

# Legal Philosophy

GE Semester 6th

Based on University of Delhi

Essential/Recommended Reading:

Help students critically examine the institution of legal punishment, focusing on the coercive impact of law. Key questions to consider include:

- "Is it ever right to punish someone?"
- "What does it mean to say someone is innocent until proven guilty?"
- "What are the various theories that justify punishment?"

**Legal Philosophy GE 17**

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### **UNIT 1 Law: Concept, Meaning and Definition**

1. Traditional Natural Law Theory — Thomas Aquinas
2. Legal Positivism — Austin
3. Law as System of Rules — Hart
4. Law as Integrity — Dworkin

*Essential/Recommended Reading:*

Altman, Andrew; Arguing About Law: An Introduction to Legal Philosophy, Australia: Wadsworth, 2001, pp 32-58 (Topic 1-4)

### **UNIT 2 Scope of Legal Obligation.**

1. The Ambit of Legal Obligation
2. Freedom of Speech

*Essential/Recommended Readings:*

Fuller, Lon; The Case of the Speluncean Explorers, Harvard Law Review, Vol. 62, No. 4, February 1949, pp 616-645.

Van Mill, David; Freedom of Speech, The Stanford Encyclopaedia of Philosophy, Edward N. Zalta (ed.), Metaphysics Research Lab, Stanford University, 2021, <https://plato.stanford.edu/archives/spr2021/entries/freedom-speech/>

### **UNIT 3 Legal Issues and India (9 Hours, 3 Weeks)**

1. Basic Structure of the Constitution
2. Impact of Judicial Decisions

*Essential/Recommended Readings:*

Abridged Judgement of Kesavanand Bharati Vs. State of Kerala; AIR 1973 SC 1461.

Baxi, Upendra; Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions, Journal of the Indian Law Institute, Vol. 24, No. 4 (October-December 1982), pp. 848-862.

### **UNIT 4 Fundamentals of Law.**

1. Jury System vs. Judge System
2. Crime and Punishment

*Essential/Recommended Readings:*

Brooks, Thom; The Right to Trial by Jury, Wiley, Journal of Applied Philosophy, Vol. 21, No. 2, 2004, pp. 197-212.

Tebbit, Mark; Philosophy of Law. An Introduction, (3<sup>rd</sup> Edition), Routledge 2017, pp 242-253.



## Law and Morality

**A**mong the great evils to be found in the annals of history is the practice of slavery. If anything is unjust, then surely slavery must count as a grotesque injustice. Yet, for millennia laws supported slavery. In fact, legal rules made slavery possible by making some humans the legal property of other humans. In the United States prior to the Civil War, for example, there was an extensive system of laws regulating slavery in the southern states. And although the Constitution did not explicitly use the terms *slave* or *slavery*, the original document did not forbid states from having slavery and even required that slaves escaping to free states be returned to their owners. It is true that the Constitution authorized Congress to outlaw the importation of slaves into the United States after 1808, but that provision guaranteed that it would be legal to import slaves before that date and did nothing to eradicate the practice of slavery within the country afterward. Moreover, the Supreme Court declared in the infamous case of *Dred Scott v. Sandford* that the Constitution did not even permit Congress to outlaw slavery in any of the territories of the United States.

What, then, should American judges have done when they had to decide cases involving the laws regulating slavery? Should they have declared those laws invalid, legally null and void, as many abolitionists argued? “That which is not just is not law” was a motto of the abolitionist cause. Or should they have set aside whatever moral objections they had to slavery and enforced the laws so as to firmly uphold the practice? Or, perhaps, should they have regarded their belief in the injustice of slavery as reason to resolve any ambiguity or vagueness in the law in a way that was hostile to slavery?

These questions raise some of the deepest issues of legal philosophy. They bring to the fore questions about the nature of law itself and its relation to morality. In the Western tradition, there are two main approaches to these questions: natural law theory and legal positivism. As a first approximation, we can say that natural law theory affirms the existence of a necessary connection between law and morality, while legal positivism denies the existence of such a connection. Yet, we will see that both natural law theory and legal positivism come in very different versions, and it becomes a complicated matter to formulate the defining elements of the two approaches.

In the following sections, we will explore natural law theory and its different versions. We will then turn to the positivist criticisms of natural law theory and the positivist theories that are proposed as superior. The aim is not to resolve this long-standing debate between legal positivism and natural law theory. Rather, it is to gain a clear understanding of the debate and the arguments on each side.

## NATURAL LAW THEORY: OVERVIEW

Natural law theory combines an account of morality with a theory about the relationship of morality to the legal rules laid down by a state. Its account of morality says that there are certain universally valid principles of right and wrong and that these principles are rooted in the nature of things and knowable by human reason. One such principle entails that murder is wrong. It is wrong, not because God or anyone else has condemned it but rather because it is in the nature of murder to be wrong. And humans can come to understand the wrongness of murder using their natural ability to think, understand, and draw conclusions. Universally valid principles of right and wrong are called “natural law.” Natural law theory claims that a necessary connection exists between natural law and the legal rules laid down by a state, often called the “positive law.” This necessary connection is said to exist in virtue of the very concept of law. But what is the precise nature of that connection? There are different versions of natural law theory, each giving a different answer to that question. In this chapter, we will examine three versions.

According to the first version, rules of positive law that conflict with principles of natural law are invalid. Such rules are legally null and void and carry no legal authority. We will call this version of natural law thinking the “traditional” version. Its most prominent proponent is the medieval philosopher Thomas Aquinas and we will examine his theory shortly.

The second version of natural law theory sees a different kind of necessary connection between positive law and morality. It does not claim that the rules of positive law must be consistent with natural law principles in order to have legal validity. Rather, it claims that a moral reason always exists to obey the rules of any system of positive law. In the case of any given rule of positive law, that reason may be outweighed by weightier moral reasons for disobeying the law. But unless there are such countervailing reasons, then morality tells us to

be faithful to the positive law. The most prominent proponent of this “fidelity” version of natural law is the American legal thinker Lon Fuller, whose theory we will examine.

The third version sees a yet different form of necessary connection between positive law and morality. It does not claim that a legal rule must be consistent with natural law to be legally valid. Rather, it claims that the positive law cannot be properly interpreted and applied without the introduction of moral judgments. We will call this the “interpretive” version of natural law theory. The most prominent proponent of this theory is the American legal theorist Ronald Dworkin, and his view will be the final version of natural law theory we examine.

## TRADITIONAL NATURAL LAW THEORY: BACKGROUND

The idea that principles of right and wrong are built into the nature of things and that these principles can be discovered by human reason goes back to the days of ancient Greece. These natural law principles were seen as providing standards by which the rules of positive law could be judged. Previously, it had been accepted dogma that the laws of a state were sacred and beyond all criticism, but the ancient philosophers rejected such a dogma and claimed that the rules of positive law were subject to evaluation on the basis of the principles of natural law. These principles represented a “higher law” by which the goodness or badness of positive law could be determined.

These early ideas about natural law provided the starting points from which traditional natural law theory developed. During the Middle Ages, some natural law thinkers took the crucial step in that development and argued that the rules of positive law must be consistent with natural law in order to be legally valid. In this way, natural law was not merely a set of standards to judge the goodness or badness of the rules laid down by a state. It was a set of standards that must be met for any rule to have legal authority. Unless it met those standards, a rule was null and void. Such a rule was like counterfeit money—though it might appear on the surface to be a valid law, it really was no law at all.<sup>1</sup> The medieval philosopher St. Augustine gave a succinct statement of the traditional view: “a law that is not just is not a law.”<sup>2</sup>

It is important to recognize the difference between saying that natural law should be used to evaluate positive laws as good or bad and saying that natural law should be used to declare positive laws as legally valid or invalid. The former statement implies that even when positive laws are inconsistent with natural law, they can still be legally valid. A bad law can still be a genuine law, one that people are legally obligated to observe. In this view, being bad does not make a law null and void.

In contrast, when principles of natural law are taken as standards of legal validity, any inconsistency with those principles makes a rule legally null and

void. The rule has no more legal authority than a robber's threat to his victim "Your money or your life." This is the view of traditional natural law theory.

The medieval philosopher St. Thomas Aquinas is commonly regarded as the most important proponent of traditional natural law theory. He gives the most comprehensive and systematic presentation of the traditional version. We will shortly be examining Aquinas's views in more detail. Before we do, it is important to realize that the traditional natural law view is by no means restricted to the Middle Ages, despite the fact that Augustine and Aquinas are two of its main proponents.

The most influential English legal theorist of the eighteenth century, William Blackstone, advocated traditional natural law theory. And Blackstone's ideas about law had influence in the United States well into the nineteenth century, even though his natural law approach was never generally accepted. In addition, natural law theory was part of the movement to abolish slavery in this country. Leading abolitionists declared that the rules supporting slavery were unjust and that what was unjust could not have real legal authority and so should not be enforced by courts. An unmistakable echo is apparent in abolitionist statements of Augustine's thesis that an unjust law is no law at all.

In the twentieth century, traditional natural law theory was invoked by some to argue that the Nazi decrees leading to the persecution and extermination of millions did not have the status of law and were legally invalid due to their inconsistency with natural law. The German legal philosopher Gustav Radbruch was alluding to the Nazi laws when he wrote, "[T]here *can* be laws that are so unjust, so socially detrimental that their very character as laws, must be denied. There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles natural law."<sup>3</sup> Since the Nazi decrees were legally invalid, courts should have refused to enforce them, and anyone involved in implementing the decrees lacked the excuse that they were acting lawfully, if not morally.

The traditional version of natural law theory is also endorsed by legal thinkers who are writing today. Thus, Michael Moore has recently claimed, "For something to be a law at all it must necessarily not be unjust."<sup>4</sup> And the legal theorists Beyleveld and Brownsword have argued that there is a fundamental principle of morality that renders legally invalid any rule inconsistent with it.<sup>5</sup>

Let us now turn to one of the great natural law thinkers in the Western tradition, Thomas Aquinas. His ideas had a great influence on natural law theory for hundreds of years and continue to do so today.

## AQUINAS'S THEORY OF LAW

Aquinas's version of traditional natural law theory remains one of the most systematic and comprehensive legal philosophies ever developed. It rests on his vision of the universe as governed by a single, self-consistent, and overarching system of law. The entire system is under the direction and authority of the

supreme lawgiver and judge, God. Human law occupies the lower tier of this system. Above it are eternal law, natural law, and divine law.

Eternal law consists of those principles of action and motion that God implanted in things in order to enable each thing to perform its proper function in the overall order of the universe. The proper function of a thing determines what is good or bad for it: the good consists of performing its function; the bad consists of failing to perform it.

Natural law consists of those principles of eternal law specific to human beings. Such principles are knowable by our natural powers of reason, and they guide us toward what is good for humans. Thus, it is good for humans to live peaceably with one another in society, and so natural law principles entail the prohibition of actions such as murder and theft that harm society. In general, obedience to natural law is right for any human being because that is how we achieve the human good; disobedience is wrong because that is how we fail to achieve it.

For Aquinas humans will not reach the ultimate good simply by following natural law. The principles of natural law help us reach the good that is achievable in this world. Yet, beyond this world there is the ultimate human good: eternal salvation. A type of law exists over and above natural law and guides us to that ultimate goal. This is divine law.

Human law—Aquinas's term for positive law—consists of rules framed by the head of the political community for the common good of its members. In some cases, such rules are simply logically deduced from natural law principles. For example, the positive law against murder is logically entailed by the more general natural law that prohibits a person from wrongfully harming someone else. Once we agree that murder is a form of wrongful harm, the law against murder logically follows from the natural law principle.

In other cases, the rules of positive law make more concrete and specific the relatively vague provisions contained within natural law. For example, criminal laws specify a particular punishment (or range of punishments) for each crime, while natural law only says that criminal punishment should be proportional to the seriousness of the crime.

What happens if a rule of positive law mandates an action that is contrary to natural law? Aquinas cites Augustine's thesis that an unjust law is no law. He goes on to claim, "[E]very human law has just so much of the nature of law as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law."<sup>6</sup> Unjust rules are without legal authority, "acts of violence rather than laws."<sup>7</sup> They are the moral and legal equivalent of the robber's threat "Your money or your life."

For Aquinas, an unjust rule as such cannot create any obligation to obey its terms. It may happen that, in certain circumstances, disobedience to the rule would produce "scandal or disturbance."<sup>8</sup> Aquinas seems to have in mind here cases in which disobedience would threaten to cause social disorder, and he is saying that we are obligated to follow an unjust rule in such cases in order to avoid the disorder. But such an obligation would not be based on any authority possessed by the rule. We would be obligated to follow the rule despite the

fact that it was legally invalid. That obligation would derive directly from a natural law principle prohibiting actions that threaten scandal or disturbance.

Aquinas describes unjust rules framed by the ruler as *unjust laws*. Why does he do so, if he really believes that such rules are not real laws and have no legal authority? He seems to be using the term *unjust laws* in a way that is analogous to the way we use the term *counterfeit money*. We call what counterfeiters make “money,” even though we recognize that it is not really money but only pretends to be. In the same way, an unjust rule enacted by a ruler typically pretends to be a real law in that the ruler will claim that the rule promotes the common good. In making such a claim, the unscrupulous ruler hopes to fool people into going along with the rule without protest. But the claim does not make the rule legally valid; at best, it only makes the rule appear to be valid. Like counterfeit money, the rule is passed off as something it really is not.

Aquinas's reasons for accepting Augustine's thesis that unjust laws are no laws at all can be concisely stated as follows. The purpose of human law is to promote the common good of the members of the political community. The common good is not promoted, however, by rules that go contrary to natural law. After all, it is the natural law that guides human beings toward the good. Thus, rules that run counter to natural law are in opposition to the very purpose of human law and so are “perversions” of law. In other words, such rules represent the misuse of the power to frame rules for the political community. As such, unjust rules are without legal authority.

### Assessing Aquinas

Is Aquinas's argument for a traditional natural law approach a convincing one? There are some reasons for questioning its cogency. The most important reasons revolve around Aquinas's key claim that the purpose of human law is to promote the common good of the community. He is confident of the claim because he is confident that he knows that (1) God exists, (2) God has ordained that those in charge of political communities frame laws serving the common good, and (3) the natural reasoning powers of humans lead all reasonable persons to agree on the basic principles that determine good and bad, right and wrong.

Many twentieth-century legal and political philosophers do not have Aquinas's confidence in these matters. Many such thinkers would say (1) there is no God; (2) even if there is, God's existence is not something that we can know but only believe in; (3) even if we can know that God exists, we cannot know what, if anything, God intends those in charge of political communities to do; and (4) reasonable people can disagree over fundamental principles of human good. They would, in short, expel God from consideration in developing a legal and political philosophy and argue that basic disagreements about morality and justice cannot be definitively settled by reason.

If God is expelled, the only purposes that we can attribute to the positive law are human purposes, not divine ones. And this is where the trouble for Aquinas's traditional version of natural law theory starts to become obvious. The purposes to which humans have put positive law have not always been

especially moral or just. As the example of slavery shows, oppression and exploitation have been among such purposes.

Contemporary defenders of the traditional natural law approach might seek to mount a secular defense of Aquinas's notion that the purpose of law is to promote the common good. They may point out that what *we* understand as oppression and exploitation was understood by those who enacted slave laws as just and right. Their point is not to endorse the relativist notion that something is made right by the simple fact that people think it is right. The traditional natural law view clearly rejects any such relativism in favor of the idea that there are objective moral truths. Rather, their point is to suggest that in enacting laws people are *trying* to do what is right, however flawed their notions of right and wrong may be. If this is what people are trying to do, then we can still say that the purpose of law is to promote morality and justice. This is the human aim of law, regardless of whether it is God's aim as well. And unjust laws will run contrary to that aim.

Even if we accept that humans are always trying to promote justice when enacting laws, it does not follow that unjust rules cannot be genuine laws. If a philosopher is trying to write a book that answers all the basic questions of legal philosophy, we would not say that her writing cannot amount to a genuine book unless it actually answers all such questions. It simply would not be as good a book as she had been aiming to write. Critics of the traditional natural law approach will say something similar about an unjust rule: it still can be a genuine law even if it is not as good a law as its authors had been aiming to make it.

Moreover, it is dubious that humans are always trying to promote justice when they enact laws. Some rather cynical political leaders throughout human history were probably not even trying to do justice. They ruled for the personal advantages they could extract from political power, not to promote justice in their community. Of course, such cynical leaders *claim* publicly that their laws promote justice, but such an assertion is meant to hide, not reveal, their true purposes.

Traditional natural law theory thus seems to be on shaky grounds in claiming that unjust rules cannot have legal authority. If the claim is to be vindicated, a more persuasive approach than Aquinas's must be developed. Perhaps it can be. But even if it cannot, a necessary connection of another kind between positive law and morality is still possible. Let us explore that possibility.

## FULLER AND FIDELITY TO LAW

### The Inner Morality of Law

Lon Fuller aims to show that a moral reason to obey the law always exists, even if in some cases there might be stronger reasons for disobedience. Fidelity to the law is accordingly a genuine moral virtue.

Fuller's theory rests on the idea that any system of law necessarily abides by certain moral principles. He calls these principles the "inner morality of the law." A government can control and regulate the conduct of those in society in different ways. But a system of regulation and control is not a system of *law*, according to Fuller, unless these principles are satisfied.

What are the principles that make up the inner morality of law? Fuller derives them from the idea that law is something intended to regulate and control conduct by means of general rules that are addressed to humans as agents capable of deliberation and choice. Modes of regulation and control that do not rely on general rules or that bypass the human capacity for deliberation and choice are excluded. Accordingly, legal rules must be applied prospectively, rather than retroactively, because only prospective rules address humans as agents capable of choice. Similarly, legal rules must be relatively clear in meaning, possible to comply with, consistent with the other authoritative legal rules, and so forth. In other words, a government must abide by the traditional principles of legality if its mode of regulating society is to show respect for humans as agents capable of choosing their own conduct.

Because the principles of legality embody respect for humans as agents, they represent an inner morality that is part of any genuine legal system. On account of this inner morality, Fuller contends that there is always a moral reason for obeying the rules of any genuine system of positive law. Fidelity—or faithfulness—to the positive law thus represents a genuine moral virtue. To be sure, the inner morality of law does not guarantee that every genuine law is a just law. Nor does it guarantee that there is a moral obligation to obey any genuine law. But for Fuller that inner morality does guarantee that there is a valid moral reason to obey the rules of any system of genuine law simply in virtue of their belonging to such a system. There can, of course, be countervailing reasons that would override the reasons to obey certain rules. The law may be so unjust that the balance of moral reasons is decisively against obedience. This simply shows that fidelity to the positive law is like other moral virtues, such as telling the truth, in that sometimes the weight of moral reasons dictates that we act contrary to them.

Fuller thus believes that the basic idea behind natural law theory can be vindicated: there is a necessary connection between positive law and morality, and that connection stems from the nature of law itself. The necessary connection is not as strong as traditional natural law thinkers had postulated. For it is possible that genuine positive laws are unjust and morally ought to be disobeyed. But for Fuller those possibilities do not eliminate the fact that there is always some moral reason to be faithful to the rules of any system of positive law.

Fuller concedes that in some legal systems the inner morality of the law is not always observed. The fact that there may be some secret laws or laws retroactively applied does not by itself entail that what we are dealing with is not a legal system but some other way of regulating human behavior. Fuller sensibly points out that having a legal system is a matter of degree; it is an oversimplification to regard the existence of a system of law as an all-or-nothing affair.

Yet, Fuller also argues that at some point the violation of rule-of-law principles becomes so pervasive and serious that we are no longer dealing with a legal system but rather with some other mode of regulating behavior. He believes, for example, that Nazi Germany went past that point with its pervasive and blatant disregard of the principles of legality. Nazi Germany did not regulate behavior through a system of law but rather through a system of terror organized and implemented by the Nazi Party and the agencies it controlled. This terror operated outside and above the law. So serious was the disregard for legality that the system of social control could not be said to treat humans as responsible moral agents. Instead, it treated them as objects to be manipulated by violence rather than as subjects capable of deliberation and decision.

### Assessing Fuller

Fuller's way of distinguishing a system of law from a system of terror seems questionable. Contrary to his suggestion, Nazi terror did treat its victims as agents capable of deliberation and choice. When Jews were organized for shipment to the death camps, the Nazis presupposed that they understood the orders being given to them and would choose to comply rather than face immediate execution. The Nazis even went as far as to tell the Jews that they were being shipped to recreation camps where they would lead safe and enjoyable lives. This hideous manipulation actually presupposes intelligence and the capacity for choice on the part of those who were manipulated.

Positive law and lawless terror do not differ because the one presupposes that humans are responsible agents and the other does not. Both can and do operate on such a presupposition. The difference is that one operates according to existing authoritative rules, while the other operates free of any such restraints. But the rules of positive law can authorize acts as terrorizing as anything done by the Nazis. Indeed, the Nazi terror would have been no less dehumanizing and dreadful had every action of every Nazi been authorized by the positive law. Yet, Fuller's theory entails the implausible conclusion that, in such a case, there would have been a moral reason to follow such laws because they were part of a genuine legal system.

Fuller argues that the inner morality of the law puts significant constraints on a government bent on evildoing and injustice. Those who commit evil and injustice typically do not want others to know about it and do not want to be restricted by rules and regulations. The principles of legality, on the other hand, require that official action be authorized by rules that are made public and can be generally known. Hitler may have ordered the extermination of Jews, and many Germans no doubt were aware that exterminations were occurring on a large scale. But the extermination policy was not made public in a way that legality requires: even the Nazis were not so brazen as to advertise their atrocities to the world. And many of the Nazi atrocities simply ignored existing rules and regulations.

Fuller seems to be on solid ground in arguing that rule-of-law principles tend to constrain government injustice and evildoing. Certainly, all of those thinkers in Western history who have defended the rule of law would agree

with him on that score. But even granting the point, it does not follow that there is always a moral reason for being faithful to the rules of any system of law. Some laws may be so oppressive and unjust that there is no moral reason whatsoever to be faithful to them.

There are many examples of terribly unjust Nazi laws that were duly promulgated and met the other requirements of the inner morality of the law. The most infamous, perhaps, were the Nuremberg Laws prohibiting marriage and sexual intercourse between Jews and persons of "German blood." It would be difficult to argue that there were moral reasons for being faithful to such laws just because any system of positive law as such puts certain constraints on government wrongdoing. In certain cases, those constraints are woefully short of what morality can tolerate, and the only reason for being faithful to such laws is fear of the awful consequences of disobedience.

Fuller would claim that the example of the Nuremberg Laws does not really refute his position. He denies that Nazi Germany had a true system of law: it violated so many of the principles of legality in such an egregious way that it was a system of terror not law. Accordingly, Fuller would say that there was no moral reason to obey the Nuremberg Laws or other oppressive Nazi enactments.

Yet, granting Fuller's claim that no true system of law existed in Nazi Germany, his reply still misses the basic point: even if the Nazis had conformed to the principles of legality, they would still have been able to enact and enforce laws so draconian and unjust that the people of Germany would have had no moral reason to obey those laws. Respect for the rule of law and the values it promotes might give us moral reason to obey laws that are in some degree unjust or unfair. But we are expecting too much from the rule of law if we think it can give us a moral reason to obey any law, no matter how oppressive or unjust, so long as the law in question is part of a system that generally conforms to the principles of legality. The barbaric laws of the Nazis could not have been morally salvaged in any degree even if they had been enacted and enforced in a system that had observed the rule of law.

### Law and Social Purpose

Fuller claims that positive law and morality are connected in another way, providing additional moral reason to be faithful to the positive law. This alleged connection concerns the way in which laws should be interpreted and stems from the fact the function of positive law is to regulate the conduct of the members of society. Because of this function, there are social purposes that lie behind the rules of positive law. Fuller says that the rules should be interpreted so as to promote those social purposes. Doing so would (presumably) promote the good of society—something that morality commends us to do.

Consider a rule prohibiting vehicles from entering the park. Does that rule exclude an ambulance that is about to enter the park in order to go to the rescue of someone who has had a heart attack? If one just looked at the words of the rule and ignored any consideration of social purpose, then one would have to exclude the ambulance. A literalist application of the rule would lead to a

situation in which medical emergencies in the park could not be effectively treated. But it seems clear that the purpose of the rule is not to interfere with emergency medical treatment but rather to promote the safe enjoyment of the park. Refusing entry to ambulances in an emergency situation would not promote those purposes but rather interfere with them.

Critics of Fuller point out that interpreting laws in terms of their underlying social purposes does not necessarily promote what is morally good, simply because social purposes can be grossly immoral or unjust. Laws establishing slavery or condemning Jews to a second-class status illustrate this point. In no sense can morality be said to be promoted by interpreting such laws in terms of their underlying social purposes.

Purposive interpretation may better promote morality than a literalist application of the law, if the laws have morally acceptable purposes behind them. But nothing in the idea of law or the idea of a legal system guarantees the law's purposes will be morally acceptable. And when the purposes are immoral or unjust, purposive interpretation could actually be worse than literalist application of the law. This possibility is again illustrated by the laws of Nazi Germany.

Nazi judges often used purposive interpretation in order to impose extra hardships on Jews and others regarded as politically and morally undesirable. For example, they interpreted the law forbidding sexual intercourse between Jews and non-Jewish Germans as also applying against sexual activities other than intercourse. Their reasoning was that the purpose of the law was to discourage intimate relations between Jews and non-Jews, and that purpose would be better served by interpreting the law broadly to include any kind of sexual activity.

Fuller's efforts to establish a necessary connection between positive law and morality thus appear to fail. But his idea that there is such a connection and that it stems from the way laws should be interpreted was picked up and developed in a different direction by the legal philosopher Ronald Dworkin. Let us turn to Dworkin's interpretive version of natural law theory.

## DWORKIN'S INTERPRETIVE THEORY

### Rules and Principles: The Idea of Fit

Dworkin believes that legal interpretation, when properly carried out, requires the making of moral judgments. This does not mean that rules of positive law will be declared invalid when they are judged to be immoral or unjust. But it does mean that morality will exercise some significant influence over the way those rules are to be understood and will thereby be inextricably intertwined with the positive law.

For Dworkin, the law includes more than those rules that are explicitly adopted as authoritative by the political community. Such rules can be found in statutory codes, judicial decisions, and other official documents. But it is a mistake to stop with the explicit rules in considering what belongs to the law.

This is because those rules should be understood not as some miscellaneous collection of norms or a mere product of power politics but rather as the expression of an underlying philosophy of government.

Such a philosophy would consist of moral principles specifying the fundamental purposes of government and the proper relation between government and the individual. The law consists of the explicitly adopted rules *plus* the best moral principles that can be understood to lie behind those rules. In a country such as the United States, such principles concern the moral rights of individuals, rights that the government must respect and protect. The principles serve as legitimate bases of legal decisions, as well as help guide the interpretation of legal rules in hard cases in which the right legal answer is unclear.

How does one determine which are the best moral principles that can be seen as lying behind the rules explicitly adopted by the political community? The beginning of Dworkin's answer is that one must judge the degree of "fit" between some proposed principle and the rules. There are two aspects of fit.

First, fit is a matter of logical consistency: any viable candidate for an underlying principle must be logically consistent with most of the rules. Total consistency is not required, since it is not to be expected that any set of explicitly adopted rules will perfectly express some underlying philosophy of government. But unless there is a high degree of consistency, it will not be plausible to think that the rules of a certain legal system are an expression of the philosophy of government in question.

In addition, a proposed underlying principle must help explain why (most of) the rules explicitly adopted are good ones. This is the second aspect of fit: an underlying principle must help to justify, or provide a rationale for, the rules. Thus, the two aspects of fit are logical consistency and the power to help provide a rationale.

### Fitting the Fourth Amendment: Privacy

Dworkin's idea of fit can be illustrated by using the Fourth Amendment to the U.S. Constitution. One provision in that Amendment guarantees "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by government. Traditionally, this entailed that, as a general rule, government investigators could not search your home for evidence of a crime without a search warrant and that a warrant could be obtained only after persuading a judge that there was "probable cause" that the home contained evidence of a crime. In other words, unless a law enforcement agency could convince an independent court that there was probably evidence of a crime in person's home, the agency would not be legally permitted to invade the home in search of evidence.

Dworkin's method of interpretation asks us to determine which moral principle fits this constitutional rule against unreasonable searches and seizures. We are to look for a principle that would be logically consistent with the rule and also help explain why the rule is a good one to have. Accordingly, a principle stating that government should do whatever it regards as useful in detecting and punishing criminal activity does *not* fit the rule. This is because the

rule clearly places restrictions on what the government may do, refusing to give it a free hand in its criminal enforcement activities.

In contrast, a principle that mandates the protection of privacy does seem to fit the bill. If we understand privacy in terms of a certain physical space associated with an individual, where others may not intrude without that person's consent, then we can say that people have a moral right to privacy in their homes and that this right helps provide the rationale for the Fourth Amendment rule. Of course, the right to privacy cannot be considered absolute, or else effectively prosecuting crimes would be too difficult a task. But the Fourth Amendment rule against unreasonable searches and seizures in one's house is a good one, on this rationale, because it allows crimes to be effectively prosecuted while at the same time protecting to a significant degree the right to privacy.

We cannot assume, however, that the moral right to privacy is limited to the protection of physical spaces. It can also be said to include control over information concerning one's life, including information that could be used by others to harm the person. The right to privacy in this sense is a right to control the disclosure of such information to others. Without such a right, we are rendered much more vulnerable to others who may wish to harm us.

In addition, this informational aspect of the right to privacy helps provide a further rationale for the Fourth Amendment rule. If government were able to invade an individual's home at will, then it could collect virtually any information about her and use that information to harm her, whether she were guilty of a crime or simply a lawful critic of the government. Again, the right of informational privacy cannot be seen as absolute, and the Fourth Amendment can be interpreted as allowing effective law enforcement investigations to proceed while at the same time protecting to a significant degree this second aspect of privacy.

### **Olmstead and Beyond**

Once we see the Fourth Amendment rule as the expression of a more basic moral principle about the individual right to privacy, then it becomes clear how the Amendment should be interpreted in cases that involve new technologies, unknown to those who wrote and ratified the Amendment in the eighteenth century. The 1928 case of *Olmstead v. U.S.* illustrates the power of Dworkin's approach. That case involved wiretapping of a suspected criminal's telephone by the government without a warrant. Telephones and wiretaps were, of course, unknown in the eighteenth century. Government collected evidence from a person's home then by physically entering the property and taking what it found there. Thus, the Amendment speaks of "searches and seizures," acts of physical intrusion and confiscation. In *Olmstead* the Supreme Court decided that because wiretapping was not an act of physical intrusion and confiscation, the Fourth Amendment rule did not apply to it, and so it was not legally required for government investigators to obtain a search warrant before they could place a wiretap.

Dworkin's method of interpretation provides a very different approach to a case like *Olmstead*. It would look to a moral principle that fits the Fourth Amendment rule against unreasonable searches and seizures. Assuming that the principle is one that protects the right of privacy and that the preceding analysis of privacy is accurate, then we cannot simply say that wiretapping is not covered by the Amendment because it is not a physical intrusion. The analysis of privacy maintains that there are at least two aspects of privacy: a physical space aspect and an informational aspect. The problem with the Supreme Court's decision in *Olmstead* is that it ignores the informational aspect. Wiretaps are not physical invasions, but they are informational invasions. Using Dworkin's method, we must interpret the Amendment so as to promote both aspects of privacy. The correct legal result would then seem to be clear: wiretapping without probable cause is a violation of the Fourth Amendment.

The concept of privacy is complex, and different people are likely to understand it differently. Even people who agree that the right of privacy protects people against wiretaps without probable cause might disagree over whether it protects employees against random drug testing by their employers. Some will include that protection in the idea of privacy, but others will exclude it.

In addition, some people will understand the right of privacy as extending beyond protection for physical spaces and informational control. They will argue that it also protects from government intrusion certain kinds of intimate choices that persons make—for example, the choice to use contraceptives or have an abortion. Other will deny that the moral right of privacy protects such choices. The upshot is that even people who agree that a privacy principle fits the Fourth Amendment will disagree over what that principle protects. One person's privacy principle will be relatively narrow, and another's will be relatively broad. This will reflect the different moral and political viewpoints people have, including differences in their philosophy of government and society. And these different privacy principles can all fit the Fourth Amendment rule: they are logically consistent with it and provide a rationale for it.

This point shows that Dworkin's method of interpretation must involve more than simply deciding which moral principles fit the community's explicitly adopted legal rules. If competing privacy principles all fit the Fourth Amendment rule, then we must decide which of them is part of the law and can be a legitimate basis for legal decision making. How can we decide?

### The Role of Morality

Dworkin's solution is to look to morality: the privacy principle on which legal decisions should be made is the one, from among those that fit the explicit legal rules, that is morally best. If the best privacy principle is one that covers a person's intimate choices, such as the choice to use contraceptives or obtain an abortion, then that is the privacy principle that dictates the right legal answer in hard cases that involve the Constitutional right of privacy. A more restricted privacy principle may fit the explicit legal rules, but if the correct moral

judgment is that the restricted principle is not as good as the broader one, then the broader privacy principle is the one that is part of the law.

For Dworkin, then, the law consists of the rules explicitly adopted by the political community plus the best principles that fit those rules. "Best" here means morally best. Dworkin contends that this way of understanding the law enables us to find the right legal answers to cases in which the explicit rules do not provide a single, clear answer. By looking to the best principles that fit the explicit rules, we come up with an answer that the explicit rules by themselves fail to provide.

Thus, the explicit rules of the Constitution do not provide a clear answer to whether persons have a right to use contraceptives. The Constitution protects "liberty," but does that include the liberty to practice contraception? Dworkin's response is that we must examine the principles that fit the law's explicit rules and ask which is morally best.

Persons will, of course, disagree over what is morally best. Moral judgments are notoriously controversial. What is a judge, or anyone else, to do in the face of such disagreement? Dworkin grabs the bull by the horns: each person must decide for him- or herself what is morally best. For example, if a judge determines that a very broad privacy principle is best, then that is the one she should use in deciding the outcome of a case. She may not arrive at the correct legal outcome; after all, she may be mistaken in her moral judgment. But a judge who follows Dworkin's method of legal interpretation will make a good-faith effort to determine what is morally best. And such a judge is, in Dworkin's view, fully authorized to make her legal decision on the basis of what she regards as the correct moral judgment.

Dworkin says that, on his view, law has "integrity." He means, in part, that law is more than merely a miscellaneous collection of rules laid down by the most powerful institutions in society. For Dworkin, might does not make right, but neither does it make law. The idea that the law has integrity is the idea that the law consists of the rules the community has authoritatively decided to adopt plus the best moral principles that fit those rules. The "plus" helps raise law above the level of sheer power into the moral domain. It helps give judicial decisions in hard cases their authority. And it gives moral force to the legal obligations that members of the community have.<sup>9</sup>

### The Challenge of Skepticism

Dworkin is well aware that his method of interpretation invites significant disagreement over the best interpretation of the law and the best decision in specific legal cases. Under his method, the moral disagreements people have will reverberate in the arena of legal interpretation, producing disputes over what the law means and what the right answers are in hard cases. This might invite a deep skepticism about the law. After all, moral disagreements are notorious for being resistant to any definitive resolution. One might argue that Dworkin's appeal to morality defeats his own purpose: instead of producing right answers to legal cases, the appeal to morality ensures that there are no such answers, because there are no right answers to moral questions.

Dworkin counters this sort of skepticism by criticizing one of the premises on which it rests—namely, that the existence of disagreement about some matter means that there is no right answer to it. He argues that disagreement does not by itself entail the absence of a right answer. When people disagreed over whether the earth was stationary or moved around the sun, it did not mean that there was no correct answer to the question. People disagree on many moral issues, but that does not prove that there is no right answer.

Dworkin distinguishes two distinct types of skepticism and argues that neither provides good grounds for rejecting his theory. The first he calls “external” and the second “internal” skepticism. Let us examine each.

**External Skepticism** External skepticism holds there is nothing objective in the world to which statements asserting a right answer to a moral or legal issue could correspond. When I say, “The cat is on the mat,” there is something objective and perceivable to which it corresponds that makes it true. But consider: “The best interpretation of the Constitution gives a woman the right to an abortion,” or “The best moral principle protecting privacy includes a woman’s choice to have an abortion.” There seems to be no similarly objective and perceivable fact in the world to which these statements correspond. The external skeptic concludes that there are no right answers to moral or legal questions.

Dworkin argues that external skepticism is either irrelevant to his theory of interpretation or based on an unacceptable premise. Either way, it provides no reason for rejecting the theory. It is irrelevant if external skepticism is strictly a metaphysical view having no implications for the actual practice of legal interpretation or moral argument. The view would hold that reality contains no observable facts that can make legal interpretations or moral judgments objectively true or false. Yet, it would claim that one can still go on as before, meaningfully making moral judgments or proposing interpretations of the law and giving reasons to back up what one says. On such a view, Dworkin’s theory could remain standing as the best account of the nature of law and legal interpretation.

On the other hand, external skepticism is unacceptable if it includes the claim that the absence of observable facts making moral judgments or legal interpretations objectively true or false entails that the very practices of legal interpretation and moral argument must be repudiated. Dworkin does not think that all statements need to be like “The cat is on the mat” in having a perceivable state of affairs to which they correspond in order for them to be meaningful or subject to reasoned discussion. Surely, if I say “Torturing babies is wrong,” I have made a meaningful statement, defensible by good reasons, to which there is no objective, perceivable state of affairs analogous to the cat being on the mat. “Torturing babies damages their nervous systems” is, of course, different and is similar to “The cat is on the mat,” since the damage to the nervous systems can be perceived. The wrongness of torture cannot be literally perceived, but that does not stop us from meaningfully asserting that it is wrong to torture babies or giving reasons as to why it is wrong.

For Dworkin, then, it is mistaken to demand that moral judgments or statements about the best interpretation of the law have some perceivable facts to which they correspond or else be judged illegitimate. Such a demand misconceives the practices of moral argument and legal interpretation. As part of these practices, we make meaningful statements that can be defended and criticized on the basis of reasons, even though we are not talking about matters such as cats on mats. In the areas of morality and law, reasoned argument and discussion simply use different standards and criteria than are used when it comes to statements about perceivable states of affair.

**Internal Skepticism** Internal skepticism, the second form examined by Dworkin, does not attempt to mount any general challenge to moral argument or legal interpretation. And it can accept Dworkin's claim that law consists of the rules explicitly adopted by the community *plus* the best moral principles that fit those rules. The problem, according to internal skepticism, is that such principles may be insufficient to provide right answers to questions about the law or to give the law the integrity Dworkin claims for it.

One form of internal skepticism holds that in the American legal system, different legal rules reflect contradictory moral principles. One set of moral principles fits certain rules, but a conflicting set of principles fits other rules. The upshot is that the law is so riddled with contradiction and inconsistency that it is impossible to say that there are right answers to legal cases or a right interpretation of what the law means.

Another form of internal skepticism challenges Dworkin's claim that the law has an integrity that raises it above the realm of mere power politics. This skeptical view holds that our legal system is fundamentally unjust and oppressive: the system promotes the interests of the wealthy and privileged at the expense of the rest of society. In this view, the best moral principles that fit the explicit rules of the system are insufficient to raise the law above the realm of power politics. Such principles essentially reflect and reinforce the interests of the powerful. Thus, contrary to Dworkin, the law has no integrity: it is strictly a matter of might and not of right.

Both forms of internal skepticism are associated with the view known as "Critical Legal Studies." Dworkin does not accept Critical Legal Studies' skepticism because he believes neither that the law is riddled with contradiction nor that it is unjust and oppressive. The dispute over these points will be examined in Chapter 8.

### Assessing Dworkin

Dworkin's interpretive version of natural law theory seems to be the strongest of those considered. It posits an important and necessary connection between law and morality but avoids the problems afflicting the approaches of Aquinas and Fuller. Unlike Aquinas's traditional version of natural law theory, Dworkin's does not hold that unjust rules are invalid as laws. Unlike Fuller's version, Dworkin's does not hold that the principles of legality by themselves give us a moral reason to be faithful to the rules of any system of positive law.

Dworkin seems to agree with Fuller that legal obligations have some moral force: there is some moral reason to abide by such obligations. But Dworkin locates the source of that moral force, not merely in the principles of legality but in the integrity of law. Nonetheless, Dworkin's theory has some problems of its own.

Dworkin emphasizes that decisions in hard cases, in which the law does not have a clear answer, requires moral judgments. And on his theory, judges are authorized to rely on their own moral judgments in deciding such cases. Moreover, the correct legal answers in these cases depends on what the correct moral judgments are.

Let us grant for the sake of argument that Dworkin is right in claiming that hard cases require moral judgments. It does not follow that judges are authorized to decide a case on the basis of their own moral judgments or that the correct moral judgments determine the correct legal answers. There are alternatives to Dworkin's theory even if we acknowledge the necessity of moral judgment in legal decision making.

One alternative holds that, in our system of law, judges must not rely on their own moral judgments but rather must defer to judgments that are widely accepted in society. And it is society's moral judgments, regardless of whether they are morally correct, that determine the right legal answer in a hard case. Dworkin moves too quickly from the claim that moral judgments are needed to resolve hard cases to the conclusion that the correct moral judgments determine the correct legal answers and judges should rely on their own beliefs about which moral judgments are correct.

Dworkin might reply that true law must have integrity and that integrity is a function of the correct morality. Integrity does not guarantee the justice of law, but it does guarantee that morality determines to some degree what the law is. Thus, law necessarily has a moral dimension that raises it out of the arena of pure power politics.

Yet, Dworkin never clearly explains why law necessarily has such a dimension.<sup>10</sup> Moreover, his critics will argue that his theory rests on a fundamental mistake. They will claim that it is wrong to explain the nature of law in terms of morality at all, even the attenuated morality of Dworkinian integrity. These critics will argue that a superior approach to understanding law lies in the tradition of legal positivism. Let us now turn to the positivist understanding of law.

## LEGAL POSITIVISM: OVERVIEW

Critics of natural law theory have developed alternative approaches to understanding the nature of positive law and its relationship to morality. These approaches are examples of what is known as *legal positivism*. They reject the traditional natural law idea that genuine law is necessarily just law. But positivism goes farther and rejects the necessary links between positive law and morality posited by Fuller and Dworkin. Thus, legal positivism rejects each of the versions of natural law theory examined in this chapter.

Like natural law theory, different versions of positivism have emerged. We will begin with the version formulated in the nineteenth century by John Austin. Austin explicitly develops his theory as a superior alternative to the traditional natural law approach of such thinkers as Blackstone and Aquinas. We will then turn to the version of positivism formulated in this century by H. L. A. Hart. Hart argued that Austin's theory was flawed in important respects. The remedy was not to switch back to natural law thinking but rather to develop a new and improved version of positivism. Whether, and in what respects, Hart's theory is an advance over Austin's is an issue we will examine at some length.

## AUSTIN'S THEORY OF LAW

### Law as Command

One of the first thinkers to formulate legal positivism in a systematic way was the English theorist John Austin. For Austin, laws are rules laid down by superiors to guide the actions of those under them. Rules are a species of command. Some commands require (or prohibit) the performance of a specific action on a specific occasion. Others require (or prohibit) a general kind of action, not limited to any specific occasion. The command "Drink milk every day" is an example of the latter kind, while "Drink milk now" illustrates the former. Laws are general commands like "Drink milk every day," not limited to a specific action on a specific occasion.

Since they are commands, laws impose duties on those to whom they are addressed. Being under a duty means that a person is liable to have undesirable consequences ("sanctions") inflicted on him or her for acting contrary to the command. Since laws are general commands, they impose continuing duties to act in certain ways, not simply a duty to do a specific thing at a specific time.

For Austin, then, laws are general commands laid down by superiors to guide the actions of those under them. The general commands laid down by God for humans constitute divine law. Those who act contrary to such rules are liable to punishment at the hands of God. The general commands laid down by political rulers constitute positive law. Those who act contrary to such rules are liable to punishment at the hands of the political rulers (or their designated agents).

Some of the rules found in society are not laid down or enforced by the political rulers (or their designated agents). Certain of these rules are laid down by superiors in a private organization, for example, in a club. Others are not laid down by anyone at all and are enforced by general opinion. They consist of informal standards of behavior that society expects individuals to abide by. Even though the political rulers will not punish persons for violating these informal standards as such, people in general have a low opinion of anyone who does violate them. An example would be the rule "Give help to those in need." Neither the rule about helping those in need nor the rules of private clubs are part of the positive law. Austin places them in the category "positive morality."

Positive law consists of general commands laid down and enforced by political rulers; more exactly, it is laid down and enforced by the sovereign of an independent political society. The sovereign is the supreme power of such a society: its commands are generally obeyed by the people in the society, while it does not generally obey any other earthly power.

It is crucial to Austin's view of law that the sovereign is defined solely in terms of *power*, not in terms of justice or any other moral concept. Austin does not believe that might makes right; but he does believe that might makes sovereignty, and, since sovereignty makes positive law, might also makes positive law. The sovereign need not even claim to be ruling justly or for the common good, much less actually doing so. The power that makes some person or group sovereign has no moral qualifications whatsoever attached to it.

In Austin's view, clear thinking about law requires that one must keep in mind certain distinctions. One crucial distinction is between the question of whether a certain rule is part of the positive law and the question of whether it is a good or just rule. These two questions must not be confused. "What *is* the law?" is one question; "What *ought* the law be?" is a separate one. In a famous formulation of his view, Austin writes, "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry; whether it be or be not conformable to an assumed standard, is a different inquiry."<sup>11</sup>

It is also a consequence of Austin's theory that there is no necessary connection between legal validity and moral obligation. Whether a general command is legally valid depends only on whether the sovereign issued it. And the fact that a sovereign issues a command does not by itself mean that there is any moral obligation for anyone to obey it. For Austin, the concept of sovereignty is purely a "power concept" and not in any respect a moral one. He does claim that a person has a duty to obey the positive laws laid down by his or her sovereign. But such a duty is merely a legal, not a moral, one. To have such a duty means that one is liable to some sort of undesirable consequences at the hands of the sovereign for acting contrary to its command.

Austin proceeds to condemn the traditional natural law view as "an abuse of language" and "mischievous." It is an abuse of language because "to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk nonsense. The most pernicious laws...have been and are continually enforced as laws by judicial tribunals."<sup>12</sup> If a person thinks otherwise and acts contrary to some rule she does not regard as a positive law, then the judicial system will "demonstrate the inconclusiveness of [her] reasoning" by inflicting punishment.<sup>13</sup> Traditional natural law theory is also "mischievous" because advocating that unjust laws are void "is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny."<sup>14</sup>

Austin does not claim that there is no connection between positive law and morality. He says, for example, that positive morality is an important source of positive law: the general commands of the sovereign often reflect the rules of positive morality. In addition, everything humans do stands under divine law, the ultimate standard for judging human conduct. For Austin, no person can

legitimately claim to be exempt from God's laws, whether it is a subject deciding to obey the sovereign or a judge called on to apply one of the sovereign's general commands or even the sovereign itself deciding how to rule society.

### Assessing Austin

One of the great virtues of Austin's theory is the clarity with which it explains, distinguishes, and relates the various concepts he uses in analyzing the phenomenon of law. His positivism presents a truly clear and systematic alternative to the natural law approach. Nonetheless, the direct arguments he makes against traditional natural law theory are unpersuasive as they stand. For example, his claim that pernicious laws are enforced by courts as laws is not a claim that natural law theorists would reject. But his conclusion that, therefore, such rules are valid and genuine laws simply avoids the question that the natural law theorist would raise: Is a rule enforced as a law by the courts a valid law if it is contrary to natural law or morality? Austin thinks the answer is obviously yes, but that does not amount to a reasoned argument against someone who thinks that the answer is no.

Moreover, Austin scores no points against natural law theory in claiming that the judicial system will disabuse someone of the notion that an unjust law is not a genuine law by punishing the person for an infraction of it. A traditional natural law theorist will simply interpret such punishment as the illegal employment of brute force.

In addition, Austin's argument that traditional natural law theory invites anarchy is questionable. The argument assumes that a theory about the nature of law should be judged (in part) by the practical consequences of having it adopted in a society, and many legal theorists would reject such a practical test. But even if such theorists are wrong, Austin's argument still raises questions.

It is possible to point to a very desirable consequence that might ensue from the adoption of traditional natural law theory—namely, the moral progress achieved by the rejection of unjust laws and the refusal to enforce them. Such progress could outweigh the social disorder that might be caused. Austin's response to this point would likely be that so many different, conflicting ideas about justice and injustice prevail in modern society that the practical effect of traditional natural law theory would not be moral progress but moral and social confusion.

This response points to an important difference between the medieval society in which Aquinas developed his natural law theory and the modern society in which Austin developed his positivism. Medieval society was dominated by a single Church and a single value system. There was fundamental agreement about justice and goodness. Modern society, in contrast, is fragmented into competing creeds and conflicting ideas about justice and goodness. In the context of such fragmentation, it seems that a traditional natural law approach would generate a great deal of disagreement and confusion.

But this response neglects two important points. First, Aquinas's version of natural law theory incorporates a "scandal and disturbance clause" in order to

ensure against substantial social disruption. One should obey and enforce even unjust rules of the political community, when that is necessary to avoid scandal and disturbance. Second, Austin's own theory claims that all human actions are covered by divine law. In the context of the different religious beliefs held in modern society, there will undoubtedly be a significant amount of conflict over when divine law requires disobedience to the general commands of the sovereign. And it is not at all clear that there would be more disobedience and disturbance under Aquinas's theory than under Austin's.

Austin's version of positivism has also been criticized by other positivists. Such positivists agree with Austin in rejecting the existence of the kinds of necessary connection between law and morality posited by natural law thinkers. But they believe that Austin's account of law in terms of the general commands of the sovereign is fundamentally mistaken. In the next section, we examine the theory of one of the most prominent positivist critics of Austin, H. L. A. Hart.

## HART: LAW AS PRIMARY AND SECONDARY RULES

### Types of Legal Rules

Austin's theory provided the starting point for many positivist thinkers who came after him. But not all agreed that his version of the positivist approach was adequate. The most influential critique of Austin's theory by another positivist was developed by H. L. A. Hart. According to Hart, Austin's command theory of law fails to account for important aspects of a legal system.

Hart argues that certain types of legal rules cannot be adequately understood as commands. The rules of criminal law fit the command model fairly well, since they prohibit (or require, as in tax laws) particular kinds of conduct and provide for penalties for those who violate the prohibitions (or requirements). But Hart claims that there are legal rules very different in nature from the rules of criminal law. Thus, some legal rules do not prohibit or require but rather *empower* individuals to do things that would otherwise be impossible for them to do.

For instance, the rules of contract law empower individuals to enter into legally binding agreements. Without them, individuals would be powerless to enter such agreements, just as without the rules of baseball individuals would be powerless to hit home runs. Of course, individuals could still use sticks of wood to hit small, hard, round objects a long distance; but the point is that such actions would not count as home runs without the rules of baseball. Similarly, individuals could agree with one another to do certain things, but those agreements would not count as legally binding contracts without the rules of contract law.

Hart calls the legal rules that empower individuals "power-conferring rules." Such rules empower not only private persons but public officials as

well. Thus, power-conferring rules give judges the power to officially interpret and apply the law, legislators the power to make and alter it, and executive officials the power to enforce it.

Does the existence of power-conferring rules demonstrate the inadequacy of Austin's theory? Hart is correct to distinguish rules that empower from rules that require or prohibit. A rule that makes an action count as something (a home run, or a binding contract, or the enactment of a law) is different in kind from a rule that prohibits or requires actions of a particular type. The question is whether Austin's theory can cover rules of both types.

Defenders of Austin say it can. A legal rule that makes an action count as something still must issue from the sovereign: it must be the sovereign's "say so" that certain types of actions will count in certain ways. Moreover, failure to follow the sovereign's power-conferring rules results in undesirable consequences. A person who wants to make a legally binding agreement but who fails to follow the contract rules of the sovereign will find that the agreement cannot be enforced in court. And, of course, a person who makes a legally binding contract according to the sovereign's rules but who then violates the contract will be forced by the sovereign, on pain of legal penalty, to pay compensation or meet the terms of the contract.

Hart and other philosophers reply that the sovereign's refusal to enforce an agreement does not really amount to a punishment or sanction. But given Austin's very wide understanding of "sanction" to include any sort of undesirable consequence, it does seem that a court's refusal to enforce an agreement that one party wanted to be enforced counts as a sanction against that party. And even if Austin's initial idea of a sanction did not extend that far, his theory could easily be modified to do so, and virtually all of the basic ideas of his theory would remain intact.

### **Legal Obligation: Government and Gunman**

Hart has more fundamental criticisms of Austin's theory to make. These criticisms revolve around Austin's idea of legal obligation. Hart believes that Austin's idea is seriously defective and that correcting the defects necessarily involves major departures from the basic ideas of Austin's theory. Austin's positivist separation of morality and positive law will remain intact, but his understanding of positive law will require radical revision. Or so Hart argues.

What does it mean for a person to have a legal obligation to do (or refrain from doing) something? Austin's answer is that it means that he stands under some general command of the sovereign and risks having some sanction inflicted on him should he fail to comply. Hart argues that this analysis makes it impossible to correctly distinguish a government from a gunman.

The gunman's threat "Your money or your life" creates a situation in which a person is likely to experience undesirable consequences unless he complies with the order. Yet, nobody would say that the gunman's victim has any kind of obligation to fork over his money. The fact that the gunman's command is particular and not general is irrelevant, since there would still be no obligation

even if the gunman ordered his victim to pay over a certain percentage of his paycheck every payday. The victim may be *obliged* to hand over the money in that he has a very strong incentive to do so in light of the harsh consequences he will likely suffer should he refuse. But, Hart points out, being obliged to do something is not the same as being *obligated* to do it.

If governments can create obligations by enacting laws, Hart reasons, governments must be different from gunmen, and their laws must be different from the commands and threats of gunmen. This is because gunmen, through their threats and orders, cannot create any kind of obligation.

A natural law approach would seek the difference between the government's laws and the gunman's orders in some necessary connection of the law to morality, a connection obviously absent from the gunman's orders. But Hart rejects the natural law approach. Thus, he must find some alternative way of explaining the difference or else accept the implication of Austin's theory that there really is no essential difference and that government is simply the gunman who is habitually obeyed and who does not habitually obey any more powerful gunman. Since Hart does not believe that government can be understood as essentially the strongest gunman on the block, he develops an alternative to the natural law approach.

According to Hart, the idea of an obligation is to be explained in terms of the idea of a rule. A rule exists when people generally (1) act in a certain way and (2) regard deviations from that way of acting as something to be criticized. Condition 1 is external in that it involves outward behavior. In contrast, condition 2 is internal in that it involves the attitude people take: they think that violation of the rule is a reason for criticizing the violator. Hart insists that this internal perspective is essential to the existence of a rule: without it, the actions of people may follow certain patterns or regularities, but there is no rule that they are following.

A person has an obligation when a certain kind of rule applies to him. There must be a great deal of social pressure to conform to the rule, it must help maintain an aspect of society that is regarded as important and valuable, and it sometimes must require persons to act contrary to their individual self-interest.

All societies have rules that impose obligations. But not all societies have rules that impose *legal* obligations because not all societies have legal systems. In order to have a legal system, a society must have certain special kinds of rules over and above the rules that impose obligations.

### **Primary and Secondary Rules**

First, a society with a legal system must have a rule that singles out rules that actually do impose obligations in that society. Hart calls this the "rule of recognition" because it helps people recognize rules under which they will be held accountable. A rule of recognition serves a valuable function in helping diminish uncertainty over what the obligations of people in the society are. The rules singled out by the rule of recognition are the legally valid rules of that society.

Second, a society must have rules that specify how the legally valid rules can be changed. These rules help society adapt to changing conditions by making it possible to eliminate old rules and enact new ones.

Third, a society must have rules that empower specific individuals to enforce and apply society's legally valid rules. These rules help society ensure more effectively that the obligations it imposes on its members are met.

Hart calls these three special kinds of rules "secondary rules." They are secondary, not in the sense of being unimportant but rather in the sense that they could not exist unless there were other kinds of rules, namely, rules that impose obligations. Accordingly, he calls the rules imposing obligations "primary rules." For Hart, then, a legal system is a system that brings together both primary and secondary rules.

In any functioning legal system, the people must generally comply with the legally valid primary rules, and public officials must accept the secondary rules and the primary rules identified by the rule of recognition. This means that the officials must adopt an internal perspective on the primary and secondary rules: they must regard departures from those rules as something to be criticized. But, according to Hart, the rest of the people do not need to have an internal perspective on the primary rules that apply to them: they need to comply with those rules, but they might do so only from fear of the punishment that might be inflicted on them.

In such a case, people generally will perceive the legally valid primary rules merely as commands backed by the threat of force, and they will not regard violations as something to be criticized. Hart says that only in an extreme case would a legal system's primary rules be complied with by most people solely out of fear of the consequences, but he insists that even such an extreme case can count as a genuine legal system.

### Assessing Hart

Some critics of Hart question whether his account of obligation is essentially different from Austin's. Hart criticizes Austin on the grounds that his theory cannot distinguish the laws of a government from the coercive commands of a gunman. Unlike laws, the commands of a gunman clearly do not create any obligations. Yet, Hart's extreme case scenario—in which the people comply with the legally valid primary rules solely out of fear—does not seem essentially different from the gunman situation.

In that scenario, most people comply with the laws for the same reason a person complies with a gunman: fear of the consequences of disobedience. If a gunman's command cannot create an obligation of any kind, it seems that a government in Hart's extreme scenario cannot do so either. On the other hand, if the extreme scenario can create obligations, then so can the general commands of Austin's sovereign. It thus appears that Hart is faced with a dilemma: he must concede either that his own theory is inadequate or that his criticism of Austin's theory of legal obligation is unsound.

A natural law theorist would insist that Hart's criticism of Austin is sound and that the only way out of the dilemma is for Hart to concede that his own

theory is inadequate. The natural law thinker would then press the point that Hart's distinction between a government and a gunman can be maintained only by giving up on the positivist separation of positive law and morality. The laws of a government are essentially different from the orders of a gunman, because the former have a necessary connection to morality but the latter do not. Or so the natural law approach would have it.

However, Hart can escape the dilemma without giving up the positivist separation of positive law and morality or his desire to distinguish his version of positivism from Austin's. The key is for Hart to distinguish a government under the rule of law from an arbitrary government that uses law to control society as it pleases. Hart's theory applies to the former, Austin's to the latter. The former is unlike a gunman, who can command whatever he pleases without restriction. The latter is like a gunman.

For both Hart and Austin, positive law ultimately stems from the exercise of power by some human agency (or agencies) in society, and moral considerations do not necessarily regulate and control that agency in its exercise of power. Where Hart and Austin differ is over whether *legal* considerations regulate and control the source of positive law. Hart's answer is affirmative: the rules of positive law themselves empower specific individuals to make, enforce, and apply the law and direct those individuals as to how those tasks are to be carried out. That is the crucial function of Hart's secondary rules. Austin's answer, in contrast, is a negative one: the source of positive law is a sovereign power standing above any and all rules of positive laws.

Certainly society can have a sovereign that stands above the law and is free to act arbitrarily. But it is also possible for society to have a very different kind of government: one that generally abides by the rules and regulations of the positive law. Such a society would have a government under the rule of law, and it is the legal system of that kind of government that Hart is describing in his account of law as a system that brings together primary and secondary rules.

Hart can argue that his government of laws is unlike a gunman in that its exercise of power is regulated and controlled by secondary rules. In contrast, an Austinian sovereign that is above the law is in an important respect like a gunman: both exercise arbitrary power. But what about Hart's contention that his government of primary and secondary rules can impose legal obligations, while an Austinian sovereign and a gunman cannot impose any obligations at all?

Hart uses the idea of legal obligation to draw a line that has governments operating by secondary rules on the one side, and both gunmen and arbitrary governments on the other. But his positivist critics will question whether Hart has drawn the line in the right place. They will argue that the proper place to draw the line is between governments of any and all types on one side, and gunmen on the other. The difference lies simply in the location of sovereign power: governments have such power and gunmen do not, which is why the former can impose legal obligations and the latter cannot.

Hart's response would be that the gunman and the arbitrary government belong on the same side of the line because they both exercise arbitrary power.

But his positivist critics would dismiss the importance for an analysis of legal obligation whether power is exercised in an arbitrary or rule-governed way. For these critics, the important fact is that government—whether arbitrary or regulated by rules—has *sovereign* power, while the gunman lacks it.

According to these positivists, whether some agent or agency can impose legal obligations is not a matter of how its power is exercised—justly or unjustly, regulated by secondary rules or unregulated. Rather, it is a matter of whether the agent or agency has the sovereign power to rule society.

Hart's problem is that he never clearly explains why the existence of a legal obligation depends not simply on whose power is imposing it but on how that power is being exercised. Of course, Fuller has an answer, but it is not one that Hart, as a positivist, can accept. Fuller's answer is that genuine legal obligations must have some moral force and that obedience to the principles of legality gives moral force to the government's exercise of its power.

Hart rejects Fuller's answer but has none of his own. Lacking an answer, it might be better for Hart to relinquish his criticism of Austin's concept of obligation and concede that an Austinian sovereign, like a government that operates by secondary rules, can impose legal obligations.

## SUMMARY: NATURAL LAW VERSUS POSITIVISM

Positivism holds that natural law theory is mistaken in claiming that legal obligation amounts to something more than liability for sanctions at the hands of the government: legal obligation as such has no moral force. Natural law theory, in turn, holds that Hart's criticism of Austin's account of legal obligation is correct and points the way to some version of natural law theory: legal obligation as such has a moral force that cannot be explained on any consistent positivist account.

The dividing line between positivism and natural law theory, then, runs right through the concept of legal obligation. Do legal obligations necessarily have some moral force? Is there necessarily a moral obligation, or at least a moral reason, to fulfill any genuine legal obligation?

Positivists insist on negative answers to these questions, arguing that the ideas of law and legal obligation can and should be explained in terms of power, coercion, control, and rules but not in terms of moral right and wrong. Natural law thinkers insist on affirmative answers, arguing that the ideas of power, coercion, control, and rules cannot adequately explain the nature of legal obligation: moral right and wrong are essential ingredients as well.

This chapter has not sought to resolve the dispute. Instead, it has tried to explain and critically analyze the positions and arguments on both sides. The reader must take things from there.

The Case of the Speluncean Explorers

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## THE CASE OF THE SPELUNCEAN EXPLORERS

IN THE SUPREME COURT OF NEWGARTH, 4300

THE defendants, having been indicted for the crime of murder, were convicted and sentenced to be hanged by the Court of General Instances of the County of Stowfield. They bring a petition of error before this Court. The facts sufficiently appear in the opinion of the Chief Justice.

TRUEPENNY, C. J. The four defendants are members of the Speluncean Society, an organization of amateurs interested in the exploration of caves. Early in May of 4299 they, in the company of Roger Whetmore, then also a member of the Society, penetrated into the interior of a limestone cavern of the type found in the Central Plateau of this Commonwealth. While they were in a position remote from the entrance to the cave, a landslide occurred. Heavy boulders fell in such a manner as to block completely the only known opening to the cave. When the men discovered their predicament they settled themselves near the obstructed entrance to wait until a rescue party should remove the detritus that prevented them from leaving their underground prison. On the failure of Whetmore and the defendants to return to their homes, the Secretary of the Society was notified by their families. It appears that the explorers had left indications at the headquarters of the Society concerning the location of the cave they proposed to visit. A rescue party was promptly dispatched to the spot.

The task of rescue proved one of overwhelming difficulty. It was necessary to supplement the forces of the original party by repeated increments of men and machines, which had to be conveyed at great expense to the remote and isolated region in which the cave was located. A huge temporary camp of workmen, engineers, geologists, and other experts was established. The work of removing the obstruction was several times frustrated by fresh landslides. In one of these, ten of the workmen engaged in clearing the entrance were killed. The treasury of the Speluncean Society was soon exhausted in the rescue effort, and the sum of

eight hundred thousand frelars, raised partly by popular subscription and partly by legislative grant, was expended before the imprisoned men were rescued. Success was finally achieved on the thirty-second day after the men entered the cave.

Since it was known that the explorers had carried with them only scant provisions, and since it was also known that there was no animal or vegetable matter within the cave on which they might subsist, anxiety was early felt that they might meet death by starvation before access to them could be obtained. On the twentieth day of their imprisonment it was learned for the first time that they had taken with them into the cave a portable wireless machine capable of both sending and receiving messages. A similar machine was promptly installed in the rescue camp and oral communication established with the unfortunate men within the mountain. They asked to be informed how long a time would be required to release them. The engineers in charge of the project answered that at least ten days would be required even if no new landslides occurred. The explorers then asked if any physicians were present, and were placed in communication with a committee of medical experts. The imprisoned men described their condition and the rations they had taken with them, and asked for a medical opinion whether they would be likely to live without food for ten days longer. The chairman of the committee of physicians told them that there was little possibility of this. The wireless machine within the cave then remained silent for eight hours. When communication was re-established the men asked to speak again with the physicians. The chairman of the physicians' committee was placed before the apparatus, and Whetmore, speaking on behalf of himself and the defendants, asked whether they would be able to survive for ten days longer if they consumed the flesh of one of their number. The physicians' chairman reluctantly answered this question in the affirmative. Whetmore asked whether it would be advisable for them to cast lots to determine which of them should be eaten. None of the physicians present was willing to answer the question. Whetmore then asked if there were among the party a judge or other official of the government who would answer this question. None of those attached to the rescue camp was willing to assume the role of advisor in this matter. He then asked if any minister or priest would answer their question, and none was found who would do

so. Thereafter no further messages were received from within the cave, and it was assumed (erroneously, it later appeared) that the electric batteries of the explorers' wireless machine had become exhausted. When the imprisoned men were finally released it was learned that on the twenty-third day after their entrance into the cave Whetmore had been killed and eaten by his companions.

From the testimony of the defendants, which was accepted by the jury, it appears that it was Whetmore who first proposed that they might find the nutriment without which survival was impossible in the flesh of one of their own number. It was also Whetmore who first proposed the use of some method of casting lots, calling the attention of the defendants to a pair of dice he happened to have with him. The defendants were at first reluctant to adopt so desperate a procedure, but after the conversations by wireless related above, they finally agreed on the plan proposed by Whetmore. After much discussion of the mathematical problems involved, agreement was finally reached on a method of determining the issue by the use of the dice.

Before the dice were cast, however, Whetmore declared that he withdrew from the arrangement, as he had decided on reflection to wait for another week before embracing an expedient so frightful and odious. The others charged him with a breach of faith and proceeded to cast the dice. When it came Whetmore's turn, the dice were cast for him by one of the defendants, and he was asked to declare any objections he might have to the fairness of the throw. He stated that he had no such objections. The throw went against him, and he was then put to death and eaten by his companions.

After the rescue of the defendants, and after they had completed a stay in a hospital where they underwent a course of treatment for malnutrition and shock, they were indicted for the murder of Roger Whetmore. At the trial, after the testimony had been concluded, the foreman of the jury (a lawyer by profession) inquired of the court whether the jury might not find a special verdict, leaving it to the court to say whether on the facts as found the defendants were guilty. After some discussion, both the Prosecutor and counsel for the defendants indicated their acceptance of this procedure, and it was adopted by the court. In a lengthy special verdict the jury found the facts as I have related them above, and found further that if on these facts the

defendants were guilty of the crime charged against them, then they found the defendants guilty. On the basis of this verdict, the trial judge ruled that the defendants were guilty of murdering Roger Whetmore. The judge then sentenced them to be hanged, the law of our Commonwealth permitting him no discretion with respect to the penalty to be imposed. After the release of the jury, its members joined in a communication to the Chief Executive asking that the sentence be commuted to an imprisonment of six months. The trial judge addressed a similar communication to the Chief Executive. As yet no action with respect to these pleas has been taken, as the Chief Executive is apparently awaiting our disposition of this petition of error.

It seems to me that in dealing with this extraordinary case the jury and the trial judge followed a course that was not only fair and wise, but the only course that was open to them under the law. The language of our statute is well known: "Whoever shall willfully take the life of another shall be punished by death." N. C. S. A. (N. S.) § 12-A. This statute permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves.

In a case like this the principle of executive clemency seems admirably suited to mitigate the rigors of the law, and I propose to my colleagues that we follow the example of the jury and the trial judge by joining in the communications they have addressed to the Chief Executive. There is every reason to believe that these requests for clemency will be heeded, coming as they do from those who have studied the case and had an opportunity to become thoroughly acquainted with all its circumstances. It is highly improbable that the Chief Executive would deny these requests unless he were himself to hold hearings at least as extensive as those involved in the trial below, which lasted for three months. The holding of such hearings (which would virtually amount to a retrial of the case) would scarcely be compatible with the function of the Executive as it is usually conceived. I think we may therefore assume that some form of clemency will be extended to these defendants. If this is done, then justice will be accomplished without impairing either the letter or spirit of our statutes and without offering any encouragement for the disregard of law.

FOSTER, J. I am shocked that the Chief Justice, in an effort to escape the embarrassments of this tragic case, should have adopted, and should have proposed to his colleagues, an expedient at once so sordid and so obvious. I believe something more is on trial in this case than the fate of these unfortunate explorers; that is the law of our Commonwealth. If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error. For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.

For myself, I do not believe that our law compels the monstrous conclusion that these men are murderers. I believe, on the contrary, that it declares them to be innocent of any crime. I rest this conclusion on two independent grounds, either of which is of itself sufficient to justify the acquittal of these defendants.

The first of these grounds rests on a premise that may arouse opposition until it has been examined candidly. I take the view that the enacted or positive law of this Commonwealth, including all of its statutes and precedents, is inapplicable to this case, and that the case is governed instead by what ancient writers in Europe and America called "the law of nature."

This conclusion rests on the proposition that our positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it. We are not accustomed to applying the maxim *cessante ratione legis, cessat et ipsa lex* to the whole of our enacted law, but I believe that this is a case where the maxim should be so applied.

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give

words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.

Had the tragic events of this case taken place a mile beyond the territorial limits of our Commonwealth, no one would pretend that our law was applicable to them. We recognize that jurisdiction rests on a territorial basis. The grounds of this principle are by no means obvious and are seldom examined. I take it that this principle is supported by an assumption that it is feasible to impose a single legal order upon a group of men only if they live together within the confines of a given area of the earth's surface. The premise that men shall coexist in a group underlies, then, the territorial principle, as it does all of law. Now I contend that a case may be removed morally from the force of a legal order, as well as geographically. If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a physical sense, their underground prison was separated from our courts and writ-servers by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort.

I conclude, therefore, that at the time Roger Whetmore's life was ended by these defendants, they were, to use the quaint language of nineteenth-century writers, not in a "state of civil society" but in a "state of nature." This has the consequence that the law applicable to them is not the enacted and established law of this Commonwealth, but the law derived from those principles that were appropriate to their condition. I have no hesitancy in saying that under those principles they were guiltless of any crime.

What these men did was done in pursuance of an agreement

accepted by all of them and first proposed by Whetmore himself. Since it was apparent that their extraordinary predicament made inapplicable the usual principles that regulate men's relations with one another, it was necessary for them to draw, as it were, a new charter of government appropriate to the situation in which they found themselves.

It has from antiquity been recognized that the most basic principle of law or government is to be found in the notion of contract or agreement. Ancient thinkers, especially during the period from 1600 to 1900, used to base government itself on a supposed original social compact. Skeptics pointed out that this theory contradicted the known facts of history, and that there was no scientific evidence to support the notion that any government was ever founded in the manner supposed by the theory. Moralists replied that, if the compact was a fiction from a historical point of view, the notion of compact or agreement furnished the only ethical justification on which the powers of government, which include that of taking life, could be rested. The powers of government can only be justified morally on the ground that these are powers that reasonable men would agree upon and accept if they were faced with the necessity of constructing anew some order to make their life in common possible.

Fortunately, our Commonwealth is not bothered by the perplexities that beset the ancients. We know as a matter of historical truth that our government was founded upon a contract or free accord of men. The archeological proof is conclusive that in the first period following the Great Spiral the survivors of that holocaust voluntarily came together and drew up a charter of government. Sophistical writers have raised questions as to the power of those remote contractors to bind future generations, but the fact remains that our government traces itself back in an unbroken line to that original charter.

If, therefore, our hangmen have the power to end men's lives, if our sheriffs have the power to put delinquent tenants in the street, if our police have the power to incarcerate the inebriated reveler, these powers find their moral justification in that original compact of our forefathers. If we can find no higher source for our legal order, what higher source should we expect these starving unfortunates to find for the order they adopted for themselves?

I believe that the line of argument I have just expounded per-

mits of no rational answer. I realize that it will probably be received with a certain discomfort by many who read this opinion, who will be inclined to suspect that some hidden sophistry must underlie a demonstration that leads to so many unfamiliar conclusions. The source of this discomfort is, however, easy to identify. The usual conditions of human existence incline us to think of human life as an absolute value, not to be sacrificed under any circumstances. There is much that is fictitious about this conception even when it is applied to the ordinary relations of society. We have an illustration of this truth in the very case before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers, why then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?

Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal and ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?

This concludes the exposition of the first ground of my decision. My second ground proceeds by rejecting hypothetically all the premises on which I have so far proceeded. I concede for purposes of argument that I am wrong in saying that the situation of these men removed them from the effect of our positive law, and I assume that the Consolidated Statutes have the power to penetrate five hundred feet of rock and to impose themselves upon these starving men huddled in their underground prison.

Now it is, of course, perfectly clear that these men did an

act that violates the literal wording of the statute which declares that he who "shall willfully take the life of another" is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to expatiate on it. Illustrations of its application are numberless and are to be found in every branch of the law. In *Commonwealth v. Staymore* the defendant was convicted under a statute making it a crime to leave one's car parked in certain areas for a period longer than two hours. The defendant had attempted to remove his car, but was prevented from doing so because the streets were obstructed by a political demonstration in which he took no part and which he had no reason to anticipate. His conviction was set aside by this Court, although his case fell squarely within the wording of the statute. Again, in *Fehler v. Neegas* there was before this Court for construction a statute in which the word "not" had plainly been transposed from its intended position in the final and most crucial section of the act. This transposition was contained in all the successive drafts of the act, where it was apparently overlooked by the draftsmen and sponsors of the legislation. No one was able to prove how the error came about, yet it was apparent that, taking account of the contents of the statute as a whole, an error had been made, since a literal reading of the final clause rendered it inconsistent with everything that had gone before and with the object of the enactment as stated in its preamble. This Court refused to accept a literal interpretation of the statute, and in effect rectified its language by reading the word "not" into the place where it was evidently intended to go.

The statute before us for interpretation has never been applied literally. Centuries ago it was established that a killing in self-defense is excused. There is nothing in the wording of the statute that suggests this exception. Various attempts have been made to reconcile the legal treatment of self-defense with the words of the statute, but in my opinion these are all merely ingenious sophistries. The truth is that the exception in favor of self-defense cannot be reconciled with the *words* of the statute, but only with its *purpose*.

The true reconciliation of the excuse of self-defense with the statute making it a crime to kill another is to be found in the following line of reasoning. One of the principal objects underlying any criminal legislation is that of deterring men from crime. Now it is apparent that if it were declared to be the law that a killing in self-defense is murder such a rule could not operate in a deterrent manner. A man whose life is threatened will repel his aggressor, whatever the law may say. Looking therefore to the broad purposes of criminal legislation, we may safely declare that this statute was not intended to apply to cases of self-defense.

When the rationale of the excuse of self-defense is thus explained, it becomes apparent that precisely the same reasoning is applicable to the case at bar. If in the future any group of men ever find themselves in the tragic predicament of these defendants, we may be sure that their decision whether to live or die will not be controlled by the contents of our criminal code. Accordingly, if we read this statute intelligently it is apparent that it does not apply to this case. The withdrawal of this situation from the effect of the statute is justified by precisely the same considerations that were applied by our predecessors in office centuries ago to the case of self-defense.

There are those who raise the cry of judicial usurpation whenever a court, after analyzing the purpose of a statute, gives to its words a meaning that is not at once apparent to the casual reader who has not studied the statute closely or examined the objectives it seeks to attain. Let me say emphatically that I accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth and that it exercises its powers in subservience to the duly expressed will of the Chamber of Representatives. The line of reasoning I have applied above raises no question of fidelity to enacted law, though it may possibly raise a question of the distinction between intelligent and unintelligent fidelity. No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup and skim the potatoes" her mistress does not mean what she says. She also knows that when her master tells her to "drop everything and come running" he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence

from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.

I therefore conclude that on any aspect under which this case may be viewed these defendants are innocent of the crime of murdering Roger Whetmore, and that the conviction should be set aside.

TATTING, J. In the discharge of my duties as a justice of this Court, I am usually able to dissociate the emotional and intellectual sides of my reactions, and to decide the case before me entirely on the basis of the latter. In passing on this tragic case I find that my usual resources fail me. On the emotional side I find myself torn between sympathy for these men and a feeling of abhorrence and disgust at the monstrous act they committed. I had hoped that I would be able to put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed me.

As I analyze the opinion just rendered by my brother Foster, I find that it is shot through with contradictions and fallacies. Let us begin with his first proposition: these men were not subject to our law because they were not in a "state of civil society" but in a "state of nature." I am not clear why this is so, whether it is because of the thickness of the rock that imprisoned them, or because they were hungry, or because they had set up a "new charter of government" by which the usual rules of law were to be supplanted by a throw of the dice. Other difficulties intrude themselves. If these men passed from the jurisdiction of our law to that of "the law of nature," at what moment did this occur? Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made? These uncertainties in the doctrine proposed by my brother are capable of producing real difficulties. Suppose, for example, one of these men had had his twenty-first birthday while he was imprisoned within the mountain. On what date would we have to consider that he had attained his majority — when he reached the age of twenty-one, at which time he was, by hypothesis, removed from the effects of our law, or only when he was released

from the cave and became again subject to what my brother calls our "positive law"? These difficulties may seem fanciful, yet they only serve to reveal the fanciful nature of the doctrine that is capable of giving rise to them.

But it is not necessary to explore these niceties further to demonstrate the absurdity of my brother's position. Mr. Justice Foster and I are the appointed judges of a court of the Commonwealth of Newgarth, sworn and empowered to administer the laws of that Commonwealth. By what authority do we resolve ourselves into a Court of Nature? If these men were indeed under the law of nature, whence comes our authority to expound and apply that law? Certainly *we* are not in a state of nature.

Let us look at the contents of this code of nature that my brother proposes we adopt as our own and apply to this case. What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code, furthermore, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence — for though my brother passes over in convenient silence the effect of Whetmore's withdrawal, this is the necessary implication of his argument.

The principles my brother expounds contain other implications that cannot be tolerated. He argues that when the defendants set upon Whetmore and killed him (we know not how, perhaps by pounding him with stones) they were only exercising the rights conferred upon them by their bargain. Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.

All of these considerations make it impossible for me to accept

the first part of my brother's argument. I can neither accept his notion that these men were under a code of nature which this Court was bound to apply to them, nor can I accept the odious and perverted rules that he would read into that code. I come now to the second part of my brother's opinion, in which he seeks to show that the defendants did not violate the provisions of N. C. S. A. (n. s.) § 12-A. Here the way, instead of being clear, becomes for me misty and ambiguous, though my brother seems unaware of the difficulties that inhere in his demonstrations.

The gist of my brother's argument may be stated in the following terms: No statute, whatever its language, should be applied in a way that contradicts its purpose. One of the purposes of any criminal statute is to deter. The application of the statute making it a crime to kill another to the peculiar facts of this case would contradict this purpose, for it is impossible to believe that the contents of the criminal code could operate in a deterrent manner on men faced with the alternative of life or death. The reasoning by which this exception is read into the statute is, my brother observes, the same as that which is applied in order to provide the excuse of self-defense.

On the face of things this demonstration seems very convincing indeed. My brother's interpretation of the rationale of the excuse of self-defense is in fact supported by a decision of this court, *Commonwealth v. Parry*, a precedent I happened to encounter in my research on this case. Though *Commonwealth v. Parry* seems generally to have been overlooked in the texts and subsequent decisions, it supports unambiguously the interpretation my brother has put upon the excuse of self-defense.

Now let me outline briefly, however, the perplexities that assail me when I examine my brother's demonstration more closely. It is true that a statute should be applied in the light of its purpose, and that *one* of the purposes of criminal legislation is recognized to be deterrence. The difficulty is that other purposes are also ascribed to the law of crimes. It has been said that one of its objects is to provide an orderly outlet for the instinctive human demand for retribution. *Commonwealth v. Scape*. It has also been said that its object is the rehabilitation of the wrongdoer. *Commonwealth v. Makeover*. Other theories have been propounded. Assuming that we must interpret a statute in the light of its

purpose, what are we to do when it has many purposes or when its purposes are disputed?

A similar difficulty is presented by the fact that although there is authority for my brother's interpretation of the excuse of self-defense, there is other authority which assigns to that excuse a different rationale. Indeed, until I happened on *Commonwealth v. Parry* I had never heard of the explanation given by my brother. The taught doctrine of our law schools, memorized by generations of law students, runs in the following terms: The statute concerning murder requires a "willful" act. The man who acts to repel an aggressive threat to his own life does not act "willfully," but in response to an impulse deeply ingrained in human nature. I suspect that there is hardly a lawyer in this Commonwealth who is not familiar with this line of reasoning, especially since the point is a great favorite of the bar examiners.

Now the familiar explanation for the excuse of self-defense just expounded obviously cannot be applied by analogy to the facts of this case. These men acted not only "willfully" but with great deliberation and after hours of discussing what they should do. Again we encounter a forked path, with one line of reasoning leading us in one direction and another in a direction that is exactly the opposite. This perplexity is in this case compounded, as it were, for we have to set off one explanation, incorporated in a virtually unknown precedent of this Court, against another explanation, which forms a part of the taught legal tradition of our law schools, but which, so far as I know, has never been adopted in any judicial decision.

I recognize the relevance of the precedents cited by my brother concerning the displaced "not" and the defendant who parked overtime. But what are we to do with one of the landmarks of our jurisprudence, which again my brother passes over in silence? This is *Commonwealth v. Valjean*. Though the case is somewhat obscurely reported, it appears that the defendant was indicted for the larceny of a loaf of bread, and offered as a defense that he was in a condition approaching starvation. The court refused to accept this defense. If hunger cannot justify the theft of wholesome and natural food, how can it justify the killing and eating of a man? Again, if we look at the thing in terms of deterrence, is it likely that a man will starve to death to avoid a jail sentence for the theft of a loaf of bread? My brother's

demonstrations would compel us to overrule *Commonwealth v. Valjean*, and many other precedents that have been built on that case.

Again, I have difficulty in saying that no deterrent effect whatever could be attributed to a decision that these men were guilty of murder. The stigma of the word "murderer" is such that it is quite likely, I believe, that if these men had known that their act was deemed by the law to be murder they would have waited for a few days at least before carrying out their plan. During that time some unexpected relief might have come. I realize that this observation only reduces the distinction to a matter of degree, and does not destroy it altogether. It is certainly true that the element of deterrence would be less in this case than is normally involved in the application of the criminal law.

There is still a further difficulty in my brother Foster's proposal to read an exception into the statute to favor this case, though again a difficulty not even intimated in his opinion. What shall be the scope of this exception? Here the men cast lots and the victim was himself originally a party to the agreement. What would we have to decide if Whetmore had refused from the beginning to participate in the plan? Would a majority be permitted to overrule him? Or, suppose that no plan were adopted at all and the others simply conspired to bring about Whetmore's death, justifying their act by saying that he was in the weakest condition. Or again, that a plan of selection was followed but one based on a different justification than the one adopted here, as if the others were atheists and insisted that Whetmore should die because he was the only one who believed in an afterlife. These illustrations could be multiplied, but enough have been suggested to reveal what a quagmire of hidden difficulties my brother's reasoning contains.

Of course I realize on reflection that I may be concerning myself with a problem that will never arise, since it is unlikely that any group of men will ever again be brought to commit the dread act that was involved here. Yet, on still further reflection, even if we are certain that no similar case will arise again, do not the illustrations I have given show the lack of any coherent and rational principle in the rule my brother proposes? Should not the soundness of a principle be tested by the conclusions it entails, without reference to the accidents of later litigational

history? Still, if this is so, why is it that we of this Court so often discuss the question whether we are likely to have later occasion to apply a principle urged for the solution of the case before us? Is this a situation where a line of reasoning not originally proper has become sanctioned by precedent, so that we are permitted to apply it and may even be under an obligation to do so?

The more I examine this case and think about it, the more deeply I become involved. My mind becomes entangled in the meshes of the very nets I throw out for my own rescue. I find that almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction. My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.

I have given this case the best thought of which I am capable. I have scarcely slept since it was argued before us. When I feel myself inclined to accept the view of my brother Foster, I am repelled by a feeling that his arguments are intellectually unsound and approach mere rationalization. On the other hand, when I incline toward upholding the conviction, I am struck by the absurdity of directing that these men be put to death when their lives have been saved at the cost of the lives of ten heroic workmen. It is to me a matter of regret that the Prosecutor saw fit to ask for an indictment for murder. If we had a provision in our statutes making it a crime to eat human flesh, that would have been a more appropriate charge. If no other charge suited to the facts of this case could be brought against the defendants, it would have been wiser, I think, not to have indicted them at all. Unfortunately, however, the men have been indicted and tried, and we have therefore been drawn into this unfortunate affair.

Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this tribunal. I declare my withdrawal from the decision of this case.

**KEEN, J.** I should like to begin by setting to one side two questions which are not before this Court.

The first of these is whether executive clemency should be extended to these defendants if the conviction is affirmed. Under our system of government, that is a question for the Chief Executive, not for us. I therefore disapprove of that passage in

the opinion of the Chief Justice in which he in effect gives instructions to the Chief Executive as to what he should do in this case and suggests that some impropriety will attach if these instructions are not heeded. This is a confusion of governmental functions — a confusion of which the judiciary should be the last to be guilty. I wish to state that if I were the Chief Executive I would go farther in the direction of clemency than the pleas addressed to him propose. I would pardon these men altogether, since I believe that they have already suffered enough to pay for any offense they may have committed. I want it to be understood that this remark is made in my capacity as a private citizen who by the accident of his office happens to have acquired an intimate acquaintance with the facts of this case. In the discharge of my duties as judge, it is neither my function to address directions to the Chief Executive, nor to take into account what he may or may not do, in reaching my own decision, which must be controlled entirely by the law of this Commonwealth.

The second question that I wish to put to one side is that of deciding whether what these men did was "right" or "wrong," "wicked" or "good." That is also a question that is irrelevant to the discharge of my office as a judge sworn to apply, not my conceptions of morality, but the law of the land. In putting this question to one side I think I can also safely dismiss without comment the first and more poetic portion of my brother Foster's opinion. The element of fantasy contained in the arguments developed there has been sufficiently revealed in my brother Tatting's somewhat solemn attempt to take those arguments seriously.

The sole question before us for decision is whether these defendants did, within the meaning of N. C. S. A. (N. S.) § 12-A, willfully take the life of Roger Whetmore. The exact language of the statute is as follows: "Whoever shall willfully take the life of another shall be punished by death." Now I should suppose that any candid observer, content to extract from these words their natural meaning, would concede at once that these defendants did "willfully take the life" of Roger Whetmore.

Whence arise all the difficulties of the case, then, and the necessity for so many pages of discussion about what ought to be so obvious? The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that

is a failure to distinguish the legal from the moral aspects of this case. To put it bluntly, my brothers do not like the fact that the written law requires the conviction of these defendants. Neither do I, but unlike my brothers I respect the obligations of an office that requires me to put my personal predilections out of my mind when I come to interpret and apply the law of this Commonwealth.

Now, of course, my brother Foster does not admit that he is actuated by a personal dislike of the written law. Instead he develops a familiar line of argument according to which the court may disregard the express language of a statute when something not contained in the statute itself, called its "purpose," can be employed to justify the result the court considers proper. Because this is an old issue between myself and my colleague, I should like, before discussing his particular application of the argument to the facts of this case, to say something about the historical background of this issue and its implications for law and government generally.

There was a time in this Commonwealth when judges did in fact legislate very freely, and all of us know that during that period some of our statutes were rather thoroughly made over by the judiciary. That was a time when the accepted principles of political science did not designate with any certainty the rank and function of the various arms of the state. We all know the tragic issue of that uncertainty in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the executive and the legislature, on the other. There is no need to recount here the factors that contributed to that unseemly struggle for power, though they included the unrepresentative character of the Chamber, resulting from a division of the country into election districts that no longer accorded with the actual distribution of the population, and the forceful personality and wide popular following of the then Chief Justice. It is enough to observe that those days are behind us, and that in place of the uncertainty that then reigned we now have a clear-cut principle, which is the supremacy of the legislative branch of our government. From that principle flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice. I am not concerned with the question whether the principle that for-

bids the judicial revision of statutes is right or wrong, desirable or undesirable; I observe merely that this principle has become a tacit premise underlying the whole of the legal and governmental order I am sworn to administer.

Yet though the principle of the supremacy of the legislature has been accepted in theory for centuries, such is the tenacity of professional tradition and the force of fixed habits of thought that many of the judiciary have still not accommodated themselves to the restricted role which the new order imposes on them. My brother Foster is one of that group; his way of dealing with statutes is exactly that of a judge living in the 3900's.

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Any-one who has followed the written opinions of Mr. Justice Foster will have had an opportunity to see it at work in every branch of the law. I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute as applied to the case before him.

The process of judicial reform requires three steps. The first of these is to divine some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called "the legislator," in the pursuit of this imagined "pur-pose," overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum.*

My brother Foster's penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.

One could not wish for a better case to illustrate the specious nature of this gap-filling process than the one before us. My brother thinks he knows exactly what was sought when men made

murder a crime, and that was something he calls "deterrence." My brother Tatting has already shown how much is passed over in that interpretation. But I think the trouble goes deeper. I doubt very much whether our statute making murder a crime really has a "purpose" in any ordinary sense of the term. Primarily, such a statute reflects a deeply-felt human conviction that murder is wrong and that something should be done to the man who commits it. If we were forced to be more articulate about the matter, we would probably take refuge in the more sophisticated theories of the criminologists, which, of course, were certainly not in the minds of those who drafted our statute. We might also observe that men will do their own work more effectively and live happier lives if they are protected against the threat of violent assault. Bearing in mind that the victims of murders are often unpleasant people, we might add some suggestion that the matter of disposing of undesirables is not a function suited to private enterprise, but should be a state monopoly. All of which reminds me of the attorney who once argued before us that a statute licensing physicians was a good thing because it would lead to lower life insurance rates by lifting the level of general health. There is such a thing as overexplaining the obvious.

If we do not know the purpose of § 12-A, how can we possibly say there is a "gap" in it? How can we know what its draftsmen thought about the question of killing men in order to eat them? My brother Tatting has revealed an understandable, though perhaps slightly exaggerated revulsion to cannibalism. How do we know that his remote ancestors did not feel the same revulsion to an even higher degree? Anthropologists say that the dread felt for a forbidden act may be increased by the fact that the conditions of a tribe's life create special temptations toward it, as incest is most severely condemned among those whose village relations make it most likely to occur. Certainly the period following the Great Spiral was one that had implicit in it temptations to anthropophagy. Perhaps it was for that very reason that our ancestors expressed their prohibition in so broad and unqualified a form. All of this is conjecture, of course, but it remains abundantly clear that neither I nor my brother Foster knows what the "purpose" of § 12-A is.

Considerations similar to those I have just outlined are also

applicable to the exception in favor of self-defense, which plays so large a role in the reasoning of my brothers Foster and Tatting. It is of course true that in *Commonwealth v. Parry* an obiter dictum justified this exception on the assumption that the purpose of criminal legislation is to deter. It may well also be true that generations of law students have been taught that the true explanation of the exception lies in the fact that a man who acts in self-defense does not act "willfully," and that the same students have passed their bar examinations by repeating what their professors told them. These last observations I could dismiss, of course, as irrelevant for the simple reason that professors and bar examiners have not as yet any commission to make our laws for us. But again the real trouble lies deeper. As in dealing with the statute, so in dealing with the exception, the question is not the conjectural *purpose* of the rule, but its *scope*. Now the scope of the exception in favor of self-defense as it has been applied by this Court is plain: it applies to cases of resisting an aggressive threat to the party's own life. It is therefore too clear for argument that this case does not fall within the scope of the exception, since it is plain that Whetmore made no threat against the lives of these defendants.

The essential shabbiness of my brother Foster's attempt to cloak his remaking of the written law with an air of legitimacy comes tragically to the surface in my brother Tatting's opinion. In that opinion Justice Tatting struggles manfully to combine his colleague's loose moralisms with his own sense of fidelity to the written law. The issue of this struggle could only be that which occurred, a complete default in the discharge of the judicial function. You simply cannot apply a statute as it is written and remake it to meet your own wishes at the same time.

Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation. A hard decision is never a popular decision. Judges have been celebrated in literature for their sly prowess in devising some quibble by which a litigant could be deprived of his rights where the public thought it was wrong for him to assert those rights. But I believe that judicial dispensation does more harm in the long run than hard decisions. Hard cases may even have a certain

moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.

Indeed, I will go farther and say that not only are the principles I have been expounding those which are soundest for our present conditions, but that we would have inherited a better legal system from our forefathers if those principles had been observed from the beginning. For example, with respect to the excuse of self-defense, if our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it. Such a revision would have drawn on the assistance of natural philosophers and psychologists, and the resulting regulation of the matter would have had an understandable and rational basis, instead of the hodgepodge of verbalisms and metaphysical distinctions that have emerged from the judicial and professorial treatment.

These concluding remarks are, of course, beyond any duties that I have to discharge with relation to this case, but I include them here because I feel deeply that my colleagues are insufficiently aware of the dangers implicit in the conceptions of the judicial office advocated by my brother Foster.

I conclude that the conviction should be affirmed.

HANDY, J. I have listened with amazement to the tortured ratiocinations to which this simple case has given rise. I never cease to wonder at my colleagues' ability to throw an obscuring curtain of legalisms about every issue presented to them for decision. We have heard this afternoon learned disquisitions on the distinction between positive law and the law of nature, the language of the statute and the purpose of the statute, judicial functions and executive functions, judicial legislation and legislative legislation. My only disappointment was that someone did not raise the question of the legal nature of the bargain struck in the cave — whether it was unilateral or bilateral, and whether Whetmore could not be considered as having revoked an offer prior to action taken thereunder.

What have all these things to do with the case? The problem before us is what we, as officers of the government, ought to do with these defendants. That is a question of practical wisdom, to be exercised in a context, not of abstract theory, but of human

realities. When the case is approached in this light, it becomes, I think, one of the easiest to decide that has ever been argued before this Court.

Before stating my own conclusions about the merits of the case, I should like to discuss briefly some of the more fundamental issues involved — issues on which my colleagues and I have been divided ever since I have been on the bench.

I have never been able to make my brothers see that government is a human affair, and that men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their rulers understand the feelings and conceptions of the masses. They are ruled badly when that understanding is lacking.

Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. The reasons for this are, of course, fairly obvious. Where the masses react to a situation in terms of a few salient features, we pick into little pieces every situation presented to us. Lawyers are hired by both sides to analyze and dissect. Judges and attorneys vie with one another to see who can discover the greatest number of difficulties and distinctions in a single set of facts. Each side tries to find cases, real or imagined, that will embarrass the demonstrations of the other side. To escape this embarrassment, still further distinctions are invented and imported into the situation. When a set of facts has been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.

Now I realize that wherever you have rules and abstract principles lawyers are going to be able to make distinctions. To some extent the sort of thing I have been describing is a necessary evil attaching to any formal regulation of human affairs. But I think that the area which really stands in need of such regulation is greatly overestimated. There are, of course, a few fundamental rules of the game that must be accepted if the game is to go on at all. I would include among these the rules relating to the conduct of elections, the appointment of public officials, and the term during which an office is held. Here some restraint on discretion and dispensation, some adherence to form, some scruple for what does and what does not fall within the rule, is, I concede, essential. Perhaps the area of basic principle should be

expanded to include certain other rules, such as those designed to preserve the free civilmogn system.

But outside of these fields I believe that all government officials, including judges, will do their jobs best if they treat forms and abstract concepts as instruments. We should take as our model, I think, the good administrator, who accommodates procedures and principles to the case at hand, selecting from among the available forms those most suited to reach the proper result.

The most obvious advantage of this method of government is that it permits us to go about our daily tasks with efficiency and common sense. My adherence to this philosophy has, however, deeper roots. I believe that it is only with the insight this philosophy gives that we can preserve the flexibility essential if we are to keep our actions in reasonable accord with the sentiments of those subject to our rule. More governments have been wrecked, and more human misery caused, by the lack of this accord between ruler and ruled than by any other factor that can be discerned in history. Once drive a sufficient wedge between the mass of people and those who direct their legal, political, and economic life, and our society is ruined. Then neither Foster's law of nature nor Keen's fidelity to written law will avail us anything.

Now when these conceptions are applied to the case before us, its decision becomes, as I have said, perfectly easy. In order to demonstrate this I shall have to introduce certain realities that my brothers in their coy decorum have seen fit to pass over in silence; although they are just as acutely aware of them as I am.

The first of these is that this case has aroused an enormous public interest, both here and abroad. Almost every newspaper and magazine has carried articles about it; columnists have shared with their readers confidential information as to the next governmental move; hundreds of letters-to-the-editor have been printed. One of the great newspaper chains made a poll of public opinion on the question, "What do you think the Supreme Court should do with the Speluncean explorers?" About ninety per cent expressed a belief that the defendants should be pardoned or let off with a kind of token punishment. It is perfectly clear, then, how the public feels about the case. We could have known this without the poll, of course, on the basis of common sense, or even by ob-

serving that on this Court there are apparently four-and-a-half men, or ninety per cent, who share the common opinion.

This makes it obvious, not only what we should do, but what we must do if we are to preserve between ourselves and public opinion a reasonable and decent accord. Declaring these men innocent need not involve us in any undignified quibble or trick. No principle of statutory construction is required that is not consistent with the past practices of this Court. Certainly no layman would think that in letting these men off we had stretched the statute any more than our ancestors did when they created the excuse of self-defense. If a more detailed demonstration of the method of reconciling our decision with the statute is required, I should be content to rest on the arguments developed in the second and less visionary part of my brother Foster's opinion.

Now I know that my brothers will be horrified by my suggestion that this Court should take account of public opinion. They will tell you that public opinion is emotional and capricious, that it is based on half-truths and listens to witnesses who are not subject to cross-examination. They will tell you that the law surrounds the trial of a case like this with elaborate safeguards, designed to insure that the truth will be known and that every rational consideration bearing on the issues of the case has been taken into account. They will warn you that all of these safeguards go for naught if a mass opinion formed outside this framework is allowed to have any influence on our decision.

But let us look candidly at some of the realities of the administration of our criminal law. When a man is accused of crime, there are, speaking generally, four ways in which he may escape punishment. One of these is a determination by a judge that under the applicable law he has committed no crime. This is, of course, a determination that takes place in a rather formal and abstract atmosphere. But look at the other three ways in which he may escape punishment. These are: (1) a decision by the Prosecutor not to ask for an indictment; (2) an acquittal by the jury; (3) a pardon or commutation of sentence by the executive. Can anyone pretend that these decisions are held within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all the forms of the law will be observed?

In the case of the jury we do, to be sure, attempt to cabin

their deliberations within the area of the legally relevant, but there is no need to deceive ourselves into believing that this attempt is really successful. In the normal course of events the case now before us would have gone on all of its issues directly to the jury. Had this occurred we can be confident that there would have been an acquittal or at least a division that would have prevented a conviction. If the jury had been instructed that the men's hunger and their agreement were no defense to the charge of murder, their verdict would in all likelihood have ignored this instruction and would have involved a good deal more twisting of the letter of the law than any that is likely to tempt us. Of course the only reason that didn't occur in this case was the fortuitous circumstance that the foreman of the jury happened to be a lawyer. His learning enabled him to devise a form of words that would allow the jury to dodge its usual responsibilities.

My brother Tatting expresses annoyance that the Prosecutor did not, in effect, decide the case for him by not asking for an indictment. Strict as he is himself in complying with the demands of legal theory, he is quite content to have the fate of these men decided out of court by the Prosecutor on the basis of common sense. The Chief Justice, on the other hand, wants the application of common sense postponed to the very end, though like Tatting, he wants no personal part in it.

This brings me to the concluding portion of my remarks, which has to do with executive clemency. Before discussing that topic directly, I want to make a related observation about the poll of public opinion. As I have said, ninety per cent of the people wanted the Supreme Court to let the men off entirely or with a more or less nominal punishment. The ten per cent constituted a very oddly assorted group, with the most curious and divergent opinions. One of our university experts has made a study of this group and has found that its members fall into certain patterns. A substantial portion of them are subscribers to "crank" newspapers of limited circulation that gave their readers a distorted version of the facts of the case. Some thought that "Speluncean" means "cannibal" and that anthropophagy is a tenet of the Society. But the point I want to make, however, is this: although almost every conceivable variety and shade of opinion was represented in this group, there was, so far as I know, not

one of them, nor a single member of the majority of ninety per cent, who said, "I think it would be a fine thing to have the courts sentence these men to be hanged, and then to have another branch of the government come along and pardon them." Yet this is a solution that has more or less dominated our discussions and which our Chief Justice proposes as a way by which we can avoid doing an injustice and at the same time preserve respect for law. He can be assured that if he is preserving anybody's morale, it is his own, and not the public's, which knows nothing of his distinctions. I mention this matter because I wish to emphasize once more the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world.

I come now to the most crucial fact in this case, a fact known to all of us on this Court, though one that my brothers have seen fit to keep under the cover of their judicial robes. This is the frightening likelihood that if the issue is left to him, the Chief Executive will refuse to pardon these men or commute their sentence. As we all know, our Chief Executive is a man now well advanced in years, of very stiff notions. Public clamor usually operates on him with the reverse of the effect intended. As I have told my brothers, it happens that my wife's niece is an intimate friend of his secretary. I have learned in this indirect, but, I think, wholly reliable way, that he is firmly determined not to commute the sentence if these men are found to have violated the law.

No one regrets more than I the necessity for relying in so important a matter on information that could be characterized as gossip. If I had my way this would not happen, for I would adopt the sensible course of sitting down with the Executive, going over the case with him, finding out what his views are, and perhaps working out with him a common program for handling the situation. But of course my brothers would never hear of such a thing.

Their scruple about acquiring accurate information directly does not prevent them from being very perturbed about what they have learned indirectly. Their acquaintance with the facts I have just related explains why the Chief Justice, ordinarily a model of decorum, saw fit in his opinion to flap his judicial robes in the face of the Executive and threaten him with excommunication if he failed to commute the sentence. It explains, I suspect,

my brother Foster's feat of levitation by which a whole library of law books was lifted from the shoulders of these defendants. It explains also why even my legalistic brother Keen emulated Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the Executive "in my capacity as a private citizen." (I may remark, incidentally, that the advice of Private Citizen Keen will appear in the reports of this court printed at taxpayers' expense.)

I must confess that as I grow older I become more and more perplexed at men's refusal to apply their common sense to problems of law and government, and this truly tragic case has deepened my sense of discouragement and dismay. I only wish that I could convince my brothers of the wisdom of the principles I have applied to the judicial office since I first assumed it. As a matter of fact, by a kind of sad rounding of the circle, I encountered issues like those involved here in the very first case I tried as Judge of the Court of General Instances in Fanleigh County.

A religious sect had unfrocked a minister who, they said, had gone over to the views and practices of a rival sect. The minister circulated a handbill making charges against the authorities who had expelled him. Certain lay members of the church announced a public meeting at which they proposed to explain the position of the church. The minister attended this meeting. Some said he slipped in unobserved in a disguise; his own testimony was that he had walked in openly as a member of the public. At any rate, when the speeches began he interrupted with certain questions about the affairs of the church and made some statements in defense of his own views. He was set upon by members of the audience and given a pretty thorough pommeling, receiving among other injuries a broken jaw. He brought a suit for damages against the association that sponsored the meeting and against ten named individuals who he alleged were his assailants.

When we came to the trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and, in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings.

As I studied the case I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense. The case at once gained a new perspective, and I saw that the only thing for me to do was to direct a verdict for the defendants for lack of evidence.

I was led to this conclusion by the following considerations. The melee in which the plaintiff was injured had been a very confused affair, with some people trying to get to the center of the disturbance, while others were trying to get away from it; some striking at the plaintiff, while others were apparently trying to protect him. It would have taken weeks to find out the truth of the matter. I decided that nobody's broken jaw was worth that much to the Commonwealth. (The minister's injuries, incidentally, had meanwhile healed without disfigurement and without any impairment of normal faculties.) Furthermore, I felt very strongly that the plaintiff had to a large extent brought the thing on himself. He knew how inflamed passions were about the affair, and could easily have found another forum for the expression of his views. My decision was widely approved by the press and public opinion, neither of which could tolerate the views and practices that the expelled minister was attempting to defend.

Now, thirty years later, thanks to an ambitious Prosecutor and a legalistic jury foreman, I am faced with a case that raises issues which are at bottom much like those involved in that case. The world does not seem to change much, except that this time it is not a question of a judgment for five or six hundred frelars, but of the life or death of four men who have already suffered more torment and humiliation than most of us would endure in a thousand years. I conclude that the defendants are innocent of the crime charged, and that the conviction and sentence should be set aside.

TATTING, J. I have been asked by the Chief Justice whether, after listening to the two opinions just rendered, I desire to re-examine the position previously taken by me. I wish to state that after hearing these opinions I am greatly strengthened in my conviction that I ought not to participate in the decision of this case.

The Supreme Court being evenly divided, the conviction and sentence of the Court of General Instances is *affirmed*. It is ordered that the execution of the sentence shall occur at 6 A.M., Friday, April 2, 4300, at which time the Public Executioner is directed to proceed with all convenient dispatch to hang each of the defendants by the neck until he is dead.

#### POSTSCRIPT

Now that the court has spoken its judgment, the reader puzzled by the choice of date may wish to be reminded that the centuries which separate us from the year 4300 are roughly equal to those that have passed since the Age of Pericles. There is probably no need to observe that the *Speluncean Case* itself is intended neither as a work of satire nor as a prediction in any ordinary sense of the term. As for the judges who make up Chief Justice Truepenny's court, they are, of course, as mythical as the facts and precedents with which they deal. The reader who refuses to accept this view, and who seeks to trace out contemporary resemblances where none is intended or contemplated, should be warned that he is engaged in a frolic of his own, which may possibly lead him to miss whatever modest truths are contained in the opinions delivered by the Supreme Court of Newgarth. The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. These philosophies presented men with live questions of choice in the days of Plato and Aristotle. Perhaps they will continue to do so when our era has had its say about them. If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problems of the human race.

*Lon L. Fuller.\**

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# Stanford Encyclopedia of Philosophy

## Archive

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# Freedom of Speech

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This entry explores the topic of free speech. It starts with a general discussion of freedom in relation to speech and then moves on to examine one of the first and best defenses of free speech, based on the harm principle. This provides a useful starting point for further digressions on the subject. The discussion moves on from the harm principle to assess the argument that speech can be limited because it causes offense rather than direct harm. I then examine arguments that suggest speech can be limited for reasons of democratic equality. I finish with an examination of paternalistic and moralistic reasons against protecting speech, and a reassessment of the harm principle.

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## 1. Introduction: Boundaries of the Debate

The topic of free speech is one of the most contentious issues in liberal societies. If liberty of expression is not highly valued, as has often been the case, there is no problem; freedom of expression is simply curtailed in favor of other values. It becomes a volatile issue when it is highly valued because only then do the limitations placed upon it become controversial. The first thing to note in any sensible discussion of freedom of speech is that it will have to be limited. Every society places some limits on the exercise of speech because it always takes place within a context of competing values. In this sense, Stanley Fish is correct when he says that there is no such thing as free speech (in the sense of unlimited speech). Free speech is simply a useful term to focus our attention on a particular form of human interaction and the phrase is not meant to suggest that speech should never be limited. One does not have to fully agree with Fish when he says, "free speech in short, is not an independent value but a political prize" (1994,102) but it is the case that no society has existed where speech has not been limited to some extent. Haworth (1998) makes a similar point when he suggests that a right to freedom of speech is not something we have, not something we own, in the same way as we possess arms and legs.

Alexander and Horton (1984) agree. They note that “speech” encapsulates many different activities: speaking, writing, singing, acting, burning flags, yelling on the street corner, advertising, threats, slander and so on. One reason for thinking that speech is not special *simpliciter* is that some of these forms of communication are more important than others and hence require different levels of protection. For example, the freedom to criticize a government is generally thought to be more important than the freedom of an artist to offend her audience. If two speech acts clash (when yelling prevents a political speech) a decision has to be made to prioritize one over the other, which means that there can be no unlimited right to free speech. For example, Alexander and Horton (1984) claim that arguments defending speech on democratic grounds have many parts. One is a claim that the public needs a great deal of information in order to make informed decisions. Another is that because government is the servant of the people, it should not be allowed to censor them. Such arguments show that one of the main reasons for justifying free speech (political speech) is important, not for its own sake but because it allows us to exercise another important value (democracy). Whatever reasons we offer to protect speech can also be used to show why some speech is not special. If speech is defended because it promotes autonomy, we no longer have grounds for protecting speech acts that undermine this value. If our defence of speech is that it is crucial to a well-functioning democracy, we have no reason to defend speech that is irrelevant to, or undermines, this goal. And if we agree with John Stuart Mill (1978) that speech should be protected because it leads to the truth, there seems no reason to protect the speech of anti-vaccers or creationists.

Speech is important because we are socially situated and it makes little sense to say that Robinson Crusoe has a right to free speech. It only becomes necessary to talk of such a right within a social setting, and appeals to an abstract and absolute right to free speech hinder rather than help the debate. At a minimum, speech will have to be limited for the sake of order. If we all speak at once, we end up with an incoherent noise. Without some rules and procedures we cannot have a conversation at all and consequently speech has to be limited by protocols of basic civility.

It is true that many human rights documents give a prominent place to the right to speech and conscience, but such documents also place limits on what can be said because of the harm and offense that unlimited speech can cause, (I will discuss this in more detail later). Outside of the United States of America speech does not tend to have a specially protected status and it has to compete with other rights claims for our allegiance. John Stuart Mill, one of the great defenders of free speech, summarized these points in *On Liberty*, where he suggests that a struggle always takes place between the competing demands of authority and liberty. He claimed that we cannot have the latter without the former:

All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things which are not fit subjects for the operation of law. (1978, 5)

The task, therefore, is not to argue for an unlimited domain of free speech; such a concept cannot be defended. Instead, we need to decide how much value we place on speech in relation to other important ideals such as privacy, security, democratic equality and the prevention of harm and there is nothing inherent to speech that suggests it must always win out in competition with these values. Speech is part of a package deal of social goods: “speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good” (Fish, 1994, 104). In this essay, I will examine some conceptions of the good that are deemed to be acceptable limitations on speech. I will start with the harm principle and then move on to other more encompassing arguments for limiting speech.

Before we do this, however, the reader might wish to disagree with the above claims and warn of the dangers of the “slippery slope.” As Frederick Schauer (1985) has demonstrated, slippery slope arguments make the claim that a current acceptable change (he calls this the instant case) to the status quo regarding speech will lead to some intolerable future state of affairs (what he calls the danger case) once the instant case prohibiting speech is introduced. The assumption is that the instant case is acceptable; otherwise it would be critiqued in its own right. The complaint is that a change from the status quo to the instant case will lead to unwanted future limitations on speech and should be avoided (even if a change to the instant case would be immediately desirable). The slippery slope argument has to make a clear distinction between the instant and the danger case. If the former was part of the latter then it is not a slippery slope argument but simply an assertion about the unwarranted breadth of the instant case. The claim being made is that a change to an acceptable instant case that is distinct from the danger case should nevertheless be prohibited because a change from the status quo to the instant case will necessarily transport us to the danger case.

As Schuer says this is not very compelling because it needs to be demonstrated, rather than merely stated, that the move from the status quo is so much more likely to lead to the danger case. Part of the problem is that slippery slope arguments are often presented in a way that suggests we can be on or off the slope. In fact, no such choice exists: we are *necessarily* on the slope whether we like it or not, and the task is always to decide how far up or down we choose to go, not whether we should step off the slope altogether. We need to keep in mind that the slippery-slope claim is not that the proposed instant case will lead to minor changes in the future, but that a small change now will have drastic and tyrannical consequences. The slippery-slope argument seems to suggest that the instant case is so flawed that any change to it from the status quo (which again, is a position already on the slope) puts us in imminent threat of sliding into the danger case. Unfortunately, the causal mechanisms for how this must *necessarily* happen are usually unspecified. Anyone making such claims should be willing to demonstrate how this unlikely event will happen before being taken seriously. Such a person is not simply advocating caution; she is claiming that there is an imminent risk of moving from an acceptable instant case to an unacceptable danger case. This is not to say that slippage cannot occur. One safeguard against this is to be as precise as possible in our use of language. If harm to others is our preferred stopping point on the slope, we need to specify in clear terms what counts as harm and what does not. Sometimes we will fail in this task, but precision puts brakes on the instant case and limits its capacity for sliding down the slope.

Those who support the slippery slope argument tend to make the claim that the inevitable consequence of limiting speech is a slide into censorship and tyranny. It is worth noting, however, that the slippery slope argument can be used to make the opposite point; one could argue that we should not allow any removal of government interventions (on speech or any other type of freedom) because once we do we are on the slippery slope to anarchy, the state of nature, and a life that Hobbes described in *Leviathan* as “solitary, poore, nasty, brutish, and short” (1968, 186).

It is possible that some limits on speech might, over time, lead to further restrictions—but they might not. And if they do, those limitations might also be justified. The main point is that once we abandon the incoherent position that there should be no limits on speech, we have to make controversial decisions about what can and cannot be expressed; this comes along with the territory of living together in communities.

Another thing to note before we engage with specific arguments for limiting speech is that we are in fact free to speak as we like. Hence, freedom of speech differs from some other types of free action. If the government wants to prevent citizens engaging in certain actions, riding motor bikes for example, it can limit their freedom to do so by making sure that such vehicles are no longer available; current bikes could be destroyed and a ban can be placed on future imports. Freedom of speech is a different case. A government can limit some forms of free expression by banning books, plays, films etc. but it cannot make it impossible to say certain things. The only thing it can do is punish people *after* they have spoken. This means that we are free to speak in a way that we are not free to ride outlawed motorbikes. This is an important point; if we insist that legal prohibitions *remove* freedom then we have to hold the incoherent position that a person was unfree at the very moment she performed a speech act. The government would have to remove our vocal cords for us to be unfree in the same way as the motorcyclist is unfree.

A more persuasive analysis suggests that the threat of a sanction makes it more difficult and potentially more costly to exercise our freedom of speech. Such sanctions take two major forms. The first, and most serious, is legal punishment by the state, which usually consists of a financial penalty, but can stretch to imprisonment (which then, of course, further restricts the person's free speech). The second threat of sanction comes from social disapprobation. People will often refrain from making public statements because they fear the ridicule and moral outrage of others. For example, one could expect to be publicly condemned if one made racist comments during a public lecture at a university. Usually it is the first type of sanction that catches our attention but, as we will see, John Stuart Mill provides a strong warning about the chilling effect of the latter form of social control.

We seem to have reached a paradoxical position. I started by claiming that there can be no such thing as a pure form of free speech: now I seem to be arguing that we are, in fact, free to say anything we like. The paradox is resolved by thinking of free speech in the following terms. I am, indeed, free to say (but not necessarily to publish) what I like, but the state and other individuals can sometimes make that freedom more or less costly to exercise. This leads to the conclusion that we can attempt to regulate speech, but we cannot prevent it if a person is undeterred by the threat of sanction. The issue, therefore, boils down to assessing how cumbersome we wish to make it for people to say certain things. I have already suggested that all societies do (correctly)

make some speech more costly than others. If the reader doubts this, it might be worth considering what life would be like with no sanctions on libelous statements, child pornography, advertising content, and releasing state secrets. The list could go on.

The conclusion to be drawn is that the problem we face is deciding where, not whether, to place limits on speech, and the next sections look at some possible solutions to this puzzle.

## 2. The Harm Principle and Free Speech

### 2.1 John Stuart Mill's Harm Principle

Given that Mill presented one of the first, and still perhaps the most famous liberal defense of free speech, I will focus on his arguments in this essay and use them as a springboard for a more general discussion of free expression. In the footnote at the beginning of Chapter II of *On Liberty*, Mill makes a very bold statement:

If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered. (1978, 15)

This is a very strong defense of free speech; Mill tells us that *any* doctrine should be allowed the light of day no matter *how* immoral it may seem to everyone else. And Mill does mean everyone:

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind. (1978, 16)

Such liberty should exist with every subject matter so that we have “absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological” (1978, 11). Mill claims that the fullest liberty of expression is required to push our arguments to their logical limits, rather than the limits of social embarrassment. Such liberty of expression is necessary, he suggests, for the dignity of persons. If liberty of expression is stifled, the price paid is “a sort of intellectual pacification” that sacrifices “the entire moral courage of the human mind” (1978, 31).

These are powerful claims for freedom of speech, but as I noted above, Mill also suggests that we need some rules of conduct to regulate the actions of members of a political community. The limitation he places on free expression is “one very simple principle” (1978, 9), now usually referred to as the harm principle, which states that

...the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. (1978, 9)

There is a great deal of debate about what Mill had in mind when he referred to harm; for the purposes of this essay he will be taken to mean that an action has to directly and in the first instance invade the rights of a person (Mill himself uses the term rights, despite basing the arguments in the book on the principle of utility). The limits on free speech will be very narrow because it is difficult to support the claim that most speech causes harm to the rights of others. This is the position staked out by Mill in the first two chapters of *On Liberty* and it is a good starting point for a discussion of free speech because it is hard to imagine a more liberal position. Liberals are usually willing to contemplate limiting speech once it can be demonstrated that it does invade the rights of others.

If we accept Mill's argument we need to ask “what types of speech, if any, cause harm?” Once we can answer this question, we have found the appropriate limits to free expression. The example Mill uses is in reference to corn dealers: he suggests that it is acceptable to claim that corn dealers starve the poor if such a view is expressed in print. It is not acceptable to make such statements to an angry mob, ready to explode, that has gathered outside the house of the corn dealer. The difference between the two is that the latter is an expression “such as to constitute...a positive instigation to some mischievous act,” (1978, 53), namely, to place the rights, and possibly the life, of the corn dealer in danger. As Daniel Jacobson (2000) notes, it is important to remember that Mill will not sanction limits to free speech simply because someone is harmed. For example, the corn

dealer may suffer severe financial hardship if he is accused of starving the poor. Mill distinguishes between legitimate and illegitimate harm, and it is only when speech causes a direct and clear violation of rights that it can be limited. The fact that Mill does not count accusations of starving the poor as causing illegitimate harm to the rights of corn dealers suggests he wished to apply the harm principle sparingly. Other examples where the harm principle may apply include libel laws, blackmail, advertising blatant untruths about commercial products, advertising dangerous products to children (e.g. cigarettes), and securing truth in contracts. In most of these cases, it is possible to show that harm can be caused and that rights can be violated.

## 2.2 Mill's Harm Principle and Pornography

There are other instances when the harm principle has been invoked but where it is more difficult to demonstrate that rights have been violated. Perhaps the most obvious example is the debate over pornography. As Feinberg notes in *Offense to Others: the Moral Limits of the Criminal Law*, most attacks on pornography up to the 1970s were from social conservatives who found such material to be immoral and obscene. This type of argument has died away in recent times and the case against pornography has been taken up by some feminists who often distinguish between erotica, which is acceptable, and pornography, which is not, because it is claimed it degrades, harms, and endangers the lives of women. The harm principle can be invoked against pornography if it can be demonstrated that it violates the rights of women.

This is an approach taken by Catherine MacKinnon (1987). She takes seriously the distinction between pornography and erotica. Erotica might be explicit and create sexual arousal, but neither is grounds for complaint. Pornography would not come under attack if it did the same thing as erotica; the complaint is that it portrays women in a manner that harms them.

When pornography involves young children, most people accept that it should be prohibited because it harms persons under the age of consent (although the principle would not necessarily rule out people over the age of consent from portraying minors). It has proved more difficult to make the same claim for consenting adults. It is difficult to know if the people who appear in books, magazines, films, videos and on the internet are being physically harmed. If they are we then need to show why this is sufficiently different from other forms of harmful employment that is not prohibited, such as hard manual labour, or very dangerous jobs. Much of the work in pornography seems to be demeaning and unpleasant but the same can be said for many forms of work and again it is unclear why the harm principle can be used to single out pornography. MacKinnon's (1987) claim that women who make a living through pornography are sexual slaves seems to exaggerate the case. If conditions in the pornography industry are particularly bad, stronger regulation rather than prohibition might be a better option, particularly as the latter will not make the industry go away.

It is also difficult to demonstrate that pornography results in harm to women as a whole. Very few people would deny that violence against women is abhorrent and an all too common feature of our society, but how much of this is caused by pornography? MacKinnon, Andrea Dworkin, (1981) and many others, have attempted to show a causal link but this has proven challenging because one needs to show that a person who would not rape, batter or otherwise violate the rights of women was caused to do so through exposure to pornography. Caroline West provides a useful overview of the literature and suggests that even though pornography might not dispose most men to rape, it might make it more likely for those men who are already so inclined. She uses the analogy of smoking. We have good grounds for saying that smoking makes cancer more likely even though smoking is neither a necessary nor sufficient condition for causing cancer. One possible problem with this analogy is that we have very powerful evidence that smoking does significantly increase the possibility of cancer; the evidence suggesting that viewing pornography leads men (already inclined) to rape women is not as robust.

If pornographers were exhorting their readers to commit violence and rape, the case for prohibition would be much stronger, but they tend not to do this, just as films that depict murder do not actively incite the audience to mimic what they see on the screen. For the sake of argument let us grant that the consumption of pornography does lead some men to commit acts of violence. Such a concession might not prove to be decisive. The harm principle might be a necessary, but it is not a sufficient reason for censorship. If pornography causes a small percentage of men to act violently we still need an argument for why the liberty of all consumers of pornography (men and women) has to be curtailed because of the violent actions of a few. We have overwhelming evidence that consuming alcohol causes a lot of violence (against women and men) but this does not mean that alcohol should be prohibited. Very few people reach this conclusion despite the clarity of the evidence. Further questions need to be answered before a ban is justified. How many people are harmed? What

is the frequency of the harm? How strong is the evidence that A is causing B? Would prohibition limit the harm and if so, by how much? Would censorship cause problems greater than the harm it is meant to negate? Can the harmful effects be prevented by measures other than prohibition?

There are other non-physical harms that also have to be taken into consideration. MacKinnon argues that pornography causes harm because it exploits, oppresses, subordinates and undermines the civil rights of women, including their right to free speech. A permissive policy on pornography has the effect of prioritizing the right to speech of pornographers over the right to speech of women. MacKinnon's claim is that pornography silences women because it presents them as inferior beings and sex objects who are not to be taken seriously. Even if pornography does not cause violence, it still leads to discrimination, domination and rights violations. She also suggests that because pornography offers a misleading and derogatory view of women, it is libelous. Along with Andrea Dworkin, MacKinnon drafted a Minneapolis Council Ordinance in 1983 that allowed women to take civil action against pornographers. They defined pornography as:

...the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context which makes these conditions sexual (1987, 176).

Such arguments have so far not led to the prohibition of pornography (which was not the intent of the Ordinance) and many liberals remain unconvinced. One reason that some doubt MacKinnon's claims is that the last twenty years have seen an explosion of pornography on the internet without a concurrent erosion of women's rights. If those arguing that pornography causes harm are right, we should expect to see a large increase in physical abuse against women and a hefty decrease in their civil rights, employment in the professions, and positions in higher education. The evidence does not seem to show this and social conditions for women today are better than 30 years ago when pornography was less prevalent. What does seem to be reasonably clear, at least in the USA, is that the increased consumption of pornography over the last 20 years has coincided with a reduction in violent crime against women, including rape. If we return to West's smoking analogy, we would have to rethink our view that smoking causes cancer if a large increase in smokers did not translate into a comparable increase in lung cancer.

The matter remains unsettled, and the lives of women might be significantly better if pornography was not around, but so far it has proven difficult to justify limiting pornography by way of the harm principle. It is important to remember that we are currently examining this issue from the perspective of Mill's formulation of the harm principle and only speech that *directly* violates rights should be banned. Finding pornography offensive, obscene or outrageous is not sufficient grounds for censorship. Nor does Mill's principle allow prohibition because pornography harms the viewer. The harm principle is there to prevent other-regarding not self-regarding harm.

Overall, no one has mounted a compelling case (at least as far as legislators and judges are concerned) for banning pornography (except in the case of minors) based on the concept of harm formulated by Mill.

## 2.3 Mill's Harm Principle and Hate Speech

Another difficult case is hate speech. Most liberal democracies have limitations on hate speech, but it is debatable whether these can be justified by the harm principle as formulated by Mill. One would have to show that such speech violated rights, directly and in the first instance. I am interested here in hate speech that does not advocate violence against a group or individual because such speech would be captured by Mill's harm principle. The Public Order Act 1986 in the U.K. does not require such a stringent barrier as the harm principle to prohibit speech. The Act states that "A person is guilty of an offence if he ...displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress."

There have been several prosecutions in the U.K. that would not have happened if the harm principle governed "absolutely the dealings of society with the individual" (Mill, 1978, 68). In 2001 evangelist Harry Hammond was prosecuted for the following statements: "Jesus Gives Peace, Jesus is Alive, Stop Immorality, Stop

Homosexuality, Stop Lesbianism, Jesus is Lord". For his sins he was fined 300 pounds and made to pay 395 pounds in costs. In 2010, Harry Taylor left anti-religious cartoons in the prayer-room of Liverpool's John Lennon Airport. The airport chaplain was "insulted, offended, and alarmed" by the cartoons and called the police. Taylor was prosecuted and received a six-month suspended sentence. Barry Thew wore a t-shirt hours after two women police officers were murdered near Manchester in 2012. The front of the shirt had the slogan "One less pig, perfect justice," and on the back was written "Kill a cop for fun". He admitted a Section 4A Public Order Offence and was sentenced to 4 months jail. Also in 2012, Liam Stacey took to twitter to mock a black professional football player who collapsed during a match. He then proceeded to racially abuse people who responded negatively to his tweet. He was sentenced to 56 days in jail. This case provoked significant commentary, most of it taking the form of slippery-slope claims that the decision would inevitably lead to Britain becoming a totalitarian state. The most recent (June 2016) case to receive public attention involves Paul Gascoigne, the former English football star, who has been charged with racially aggravated abuse after commenting, whilst on stage, that he could only make out a black man standing in a dark corner of the room when he smiled. It is doubtful that any of these examples would be captured by Mill's harm principle.

In Australia, Section 18C of the Racial Discrimination Act 1975 states that "It is unlawful for a person to do an act, otherwise than in private, If: (a) the act is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people, and (b) the act is done because of race, colour or national or ethnic origin". The most prominent person prosecuted under the Act is Andrew Bolt, a conservative political commentator, who was found guilty of racially vilifying nine aboriginal persons in newspaper articles in 2011. He suggested that the nine people had identified as aboriginal, despite having fair skin, for their own professional advantage. The case prompted the Tony Abbott led Liberal government into a failed attempt to change the legislation.

It should be noted that Section 18C is qualified by Section 18D (often ignored in the backlash against the Bolt decision). 18D says that

...section 18C does not render unlawful anything said or done reasonably and in good faith: (a) in the performance, exhibition or distribution of an artistic work; or (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (c) in the making or publishing: (i) a fair and accurate report of any event or matter of public interest; or (ii) a fair comment on any matter of public interest if the comment is an expression of a genuine belief held by the person making the comment...

It is clear that these qualifications remove some of the teeth from Section 18C. As long as the statements are made artistically and/or in good faith, for example, they are immune from prosecution. The conclusion of the judge in the Bolt case was that none of the Section 18D exemptions applied in his case. Even with these qualifications in place, however, it seems that the Racial Discrimination Act would still be ruled out by Mill's harm principle which seems to allow people to offend, insult, and humiliate (although perhaps not intimidate) regardless of the motivation of the speaker.

The United States, precisely because it fits most closely with Mill's principle, is an outlier amongst liberal democracies when it comes to hate speech. The most famous example of this is the Nazi march through Skokie, Illinois, something that would not be allowed in many other liberal democracies. The intention was not to engage in political speech at all, but simply to march through a predominantly Jewish community dressed in storm trooper uniforms and wearing swastikas (although the Illinois Supreme Court interpreted the wearing of swastikas as "symbolic political speech"). It is clear that many people, especially those who lived in Skokie, were outraged and offended by the march, but were they harmed? There was no plan to cause physical injury and the marchers did not intend to damage property.

The main argument for prohibiting the Skokie march, based on considerations of harm, was that the march would incite a riot, thus putting the marchers in danger. The problem with this argument is that the focal point is the potential harm to the speakers and not the harm done to those who are the subject of the hate. To ban speech for this reason, i.e., for the good of the speaker, tends to undermine the basic right to free speech in the first place. If we turn our attention to members of the local community, we might want to claim that they were psychologically harmed by the march. This is much more difficult to demonstrate than harm to a person's legal rights. It seems, therefore, that Mill's argument does not allow for state intervention in this case. If we base our

defense of speech on Mill's principle we will have very few prohibitions. It is only when we can show direct harm to rights, which will almost always mean when an attack is made against a specific individual or a small group of persons, that it is legitimate to impose a sanction.

One response is to suggest that the harm principle can be defined less stringently. Jeremy Waldron (2012) has made a recent attempt to do this. He draws our attention to the visual impact of hate speech through posters and signs displayed in public. Waldron argues that the harm in hate speech (the title of his book) is that it compromises the dignity of those under attack. A society where such images proliferate makes life exceedingly difficult for those targeted by hate speech. Waldron suggests that the people engaged in hate speech are saying “[t]he time for your degradation and your exclusion by the society that presently shelters you is fast approaching” (2012, 96). He claims that prohibiting such messages assures all people that they are welcome members of the community.

Waldron does not want to use hate speech legislation to punish those who hold hateful thoughts and attitudes. The goal is not to engage in thought control but to prevent harm to the social standing of certain groups in society. Liberal democratic societies are founded on ideas of equality and dignity and these are damaged by hate speech. Given this, Waldron wonders why we even need to debate the usefulness of hate speech. Mill, for example, argued that we should allow speech of this type so that our ideas do not fall into the “slumber of a decided opinion” (1978, 41). Waldron doubts that we require hate speech to prevent such an outcome.

As we have seen, Waldron is making a harm based argument but his threshold for what counts as harm is lower than Mill's. He needs to convince us that an attack on a person's dignity constitutes a significant harm. My dignity might often be bruised by colleagues, for example, but this does not necessarily show that I have been harmed. Perhaps it is only when an attack on dignity is equivalent to threats of physical abuse that it counts as a reason for limiting speech. Waldron does not offer a lot of evidence that a permissive attitude to hate speech, at least in liberal democracies, does cause significant harm. There is no specific hate speech regulation in the United States, for example, but it is not clear that more harm occurs there than in other liberal democracies.

David Boonin (2011) is not convinced that there is a need for special hate speech legislation. He claims that hate speech does not fit within the regular categories of speech that can be prohibited. Even if he can be persuaded that it does fit, he still thinks special hate speech laws are not required because existing legislation will capture the offending speech. I will examine one example he uses to make his point. Boonin argues that threatening speech already sits within the category of speech that is rightfully prohibited. He suggests, however, that hate speech does not fall within this category because a significant amount of hate speech is not directly threatening. A group of black men, for example, will not be threatened by a racially abusive elderly white woman. He argues that this example, and others like it, show why a blanket ban on all hate speech on the grounds that it is threatening cannot be justified.

Nor is it likely, he suggests, that racist attacks by frail old ladies will contribute to an atmosphere of danger. This argument might be less persuasive. Mill's use of the corn dealer example demonstrates how the use of language can incite violence regardless of who is speaking. But Mill's example also shows that a blanket ban would still be unwarranted because it allows incendiary statements to be made about corn dealers under controlled conditions.

Boonin's argument does not rest here. If it really does turn out to be the case that all hate speech is threatening in the appropriate sense, this still does not justify special hate speech laws because there is already legislation in place prohibiting threatening language. Boonin is opposed to banning hate speech because it is hateful not because it is threatening. He claims that the argument for special hate speech laws is “impaled on the horns of a dilemma: either the appeal is unconvincing because not all forms of hate speech are threatening, or it is unnecessary precisely because all forms of hate speech are threatening and are therefore already prohibited” (2011, 213). Boonin uses the same strategy with regard to other reasons, such as “fighting words”, for banning hate speech; they all find themselves impaled on the horns of the same dilemma.

The arguments of Waldron and Boonin seem to be a long way apart and the latter suggests that anyone who argues for hate speech laws is taking an extreme position. There is, however, a lot of overlap between the two, particularly as both focus on harm, and neither wants to censor hate speech simply because it is offensive. This becomes clearer if we take a suggestion offered by Waldron. At one point in his book he ponders whether it might be advantageous to abandon the term “hate speech” altogether. Such a move goes a long way to reconciling the arguments of Waldron and Boonin. Both authors agree that prohibition is acceptable when

speech is threatening; they disagree on what counts as a harmful threat. Waldron thinks most forms of racial abuse qualify whereas Boonin is more circumspect. But the disagreement between the two is about what causes harm rather than any major philosophical difference about the appropriate limits on speech. If both agree that a threat constitutes a significant harm, then both will support censorship. This still leaves lots of room for disagreement, particularly as we are now more aware than was Mill of psychological as well as physical harm. I cannot delve into the topic here except to say that if we expand the harm principle from the physical to the mental realm, more options might become available for prohibiting hate speech and pornography.

## 2.4 Responses to the Harm Principle

There are two basic responses to the harm principle. One is that it is too narrow; the other is that it is too broad. This latter view is not often expressed because, as already noted, most people think that free speech should be limited if it causes illegitimate harm. George Kateb (1996), however, has made an interesting argument that runs as follows. If we want to limit speech because it causes harm, we will have to ban a lot of political speech. Most of it is useless, a lot of it is offensive, and some of it causes harm because it is deceitful and aimed at discrediting specific groups. It also undermines democratic citizenship and stirs up nationalism and jingoism, which results in harm to citizens of other countries. Even worse than political speech, according to Kateb, is religious speech. He claims that a lot of religious speech is hateful, useless, dishonest, and foments war, bigotry and fundamentalism. It also creates bad self-image and feelings of guilt that can haunt persons throughout their lives. Pornography and hate speech, he claims, cause nowhere near as much harm as political and religious speech. As we rightly do not want to ban political and religious speech, Kateb claims to have demonstrated that the harm principle casts the net too far. His solution is to abandon the principle in favor of almost unlimited speech.

This is a powerful argument, but there seem to be at least two problems. The first is that the harm principle would actually allow religious and political speech for the same reasons that it allows most pornography and hate speech, namely that it is not possible to demonstrate that such speech does cause direct harm to rights. I doubt that Mill would support using his arguments about harm to ban political and religious speech. The second problem for Kateb is that if he is right that such speech does cause harm by violating rights, we now have powerful reasons for limiting political and religious speech. If Kateb's argument is sound he has shown that harm is more extensive than we might have thought; he has not demonstrated that the harm principle is invalid.

## 3. The Offense Principle and Free Speech

### 3.1 Joel Feinberg's Offense Principle

The other response to the harm principle is that it does not reach far enough. One of the most impressive arguments for this position comes from Joel Feinberg who suggests that the harm principle cannot shoulder all of the work necessary for a principle of free speech. In some instances, Feinberg suggests, we also need an *offense principle* that can guide public censure. The basic idea is that the harm principle sets the bar too high and that we can legitimately prohibit some forms of expression because they are very offensive. Offending is less serious than harming so any penalties imposed should not be severe. As Feinberg notes, this has not always been the case and he cites a number of instances in the U.S. where penalties for "offensive" acts like sodomy and consensual incest have ranged from twenty years imprisonment to the death penalty. Feinberg's principle reads as follows: "it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense...to persons other than the actor, and that it is probably a necessary means to that end...The principle asserts, in effect, that the prevention of offensive conduct is properly the state's business" (1985, 1).

Such a principle is hard to apply because many people take offense as the result of an overly sensitive disposition, or worse, because of bigotry and unjustified prejudice. A further difficulty is that some people can be deeply offended by statements that others find mildly amusing. The furore over the Danish cartoons brings this starkly to the fore. Despite the difficulty of applying a standard of this kind, something like the offense principle operates widely in liberal democracies where citizens are penalized for a variety of activities, including speech, that would escape prosecution under the harm principle. Wandering around the local shopping mall naked, or engaging in sexual acts in public places are two obvious examples. Given the specific nature of this essay, I will not delve into the issue of offensive behavior in all its manifestations, and I will limit the

discussion to offensive forms of speech. Feinberg suggests that many factors need to be taken into account when deciding whether speech can be limited by the offense principle. These include the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended, the intensity of the offense, and the general interest of the community.

### 3.2 Pornography and the Offense Principle

How does the offense principle help us deal with the issue of erotica? Given the above criteria, Feinberg argues that books should never be banned because the offensive material is easy to avoid. If one is unaware of the content and should become offended in the course of reading the text, the solution is simple—close the book. A similar argument would be applied to erotic films. The French film *Baise-Moi* was in essence banned in Australia in 2002 because of its supposed offensive material (it was denied a rating which meant that it could not be shown in cinemas). It would seem, however, that the offense principle outlined by Feinberg would not permit such prohibition because it is very easy to avoid being offended by the film. It should also be legal to advertise the film, but some limits could be placed on the content of the advertisement so that sexually explicit material is not placed on billboards in public places (because these are not easily avoidable). At first glance it might seem strange to have a more stringent speech code for advertisements than for the thing being advertised; the harm principle would not provide the grounds for such a distinction, but it is a logical conclusion of the offense principle.

What of pornography i.e. material that is offensive because of its extremely violent or degrading content? In this case the offense is more profound: simply knowing that such material exists is enough to deeply offend many people. The difficulty here is that bare knowledge, i.e., being offended by knowing that something exists or is taking place, is not as serious as being offended by something that one does not like *and* that one cannot escape. If we allow that films should be banned because some people are offended, even when they do not have to view them, consistency demands that we allow the possibility of prohibiting many forms of expression. A lot of people find strong attacks on religion, or t.v. shows by religious fundamentalists deeply offensive. Feinberg argues that even though some forms of pornography are profoundly offensive to many people, they should not be prohibited on these grounds.

### 3.3 Hate Speech and the Offense Principle

Hate speech causes profound offense. The discomfort caused to the targets of such attacks cannot be shrugged off easily. As with violent pornography, the offense that is caused by the march through Skokie cannot be avoided simply by staying off the streets because offense is taken over the bare knowledge that the march is taking place. As we have seen, however, bare knowledge does not seem sufficient grounds for prohibition. But in respect to some of the other factors regarding offensive speech mentioned above, Feinberg suggests that the march through Skokie does not do very well: the social value of the speech seems to be marginal, the number of people offended will be large, and it is difficult to see how it is in the interests of the community. These reasons also hold for violent pornography which Feinberg suggests should not be prohibited for reasons of offense.

A key difference, however, is the intensity of the offense; it is particularly acute with hate speech because it is aimed at a relatively small and specific audience. The motivations of the speakers in the Skokie example seemed to be to incite fear and hatred and to directly insult members of the community through the use of Nazi symbols. Nor, according to Feinberg, was there any political content to the speech. The distinction between violent pornography and the Skokie example of hate speech is that a particular group of people were targeted and the message of hate was paraded in such a way that it could not be easily avoided. It is for these reasons that Feinberg suggests hate speech can be limited by the offense principle.

He also claims that when fighting words are used to provoke people who are prevented by law from using a fighting response, the offense is profound enough to allow for prohibition. If pornographers engaged in the same behaviour and paraded through neighborhoods where they were likely to meet great resistance and cause profound offense, they too should be prevented from doing so. It is clear, therefore, that the crucial component of the offense principle is whether the offense can be avoided. Feinberg's principle means that many forms of hate speech will still be allowed if the offense is easily avoidable. It still allows Nazis to meet in private places, or even in public ones that are easily bypassed. Advertisements for such meetings can be edited (because they are less easy to avoid) but should not be banned. It seems Feinberg thinks that hate speech does not, in and of

itself, cause direct harm to the rights of the targeted group (he is not claiming that offence equals harm) and he would be troubled by some of the prohibitions on speech in the U.K. and Australia.

## 4. Democracy and Free Speech

### 4.1 Democratic Citizenship and Pornography

Very few, if any, liberal democracies are willing to support the Millian view that only speech causing direct harm to rights should be prohibited. Most support some form of the offense principle. Some liberal philosophers are willing to extend the realm of state interference further and argue that hate speech should be banned even if it does not cause harm or unavoidable offense. The reason it should be banned is that it is inconsistent with the underlying values of liberal democracy to brand some citizens as inferior on the grounds of race, religion, gender or sexual orientation. The same applies to pornography; it should be prevented because it is incompatible with democratic citizenship to portray women as submissive sexual objects, who seem to enjoy being violently mistreated. Rae Langton, for example, starts from the liberal premise of equal concern and respect and concludes that it is justifiable to remove certain speech protections for pornographers. She avoids basing her argument on harm: "If, for example, there were conclusive evidence linking pornography to violence, one could simply justify a prohibitive strategy on the basis of the harm principle. However, the prohibitive arguments advanced in this article do not require empirical premises as strong as this...they rely instead on the notion of equality" (1990, 313).

Working within the framework of arguments supplied by Ronald Dworkin, who is opposed to prohibitive measures, she tries to demonstrate that egalitarian liberals such as Dworkin should support the prohibition of pornography. She suggests that we have "reason to be concerned about pornography, not because it is morally suspect, but because we care about equality and the rights of women" (1990, 311). Langton concludes that "women as a group have rights against the producers and consumers of pornography, and thereby have rights that are trumps against the policy of permitting pornography...the permissive policy is in conflict with the principle of equal concern and respect, and that women accordingly have rights against it" (1990, 346). Because she is not basing her argument on the harm principle, she does not have to show that women are harmed by pornography. For the argument to be persuasive, however, one has to accept that permitting pornography does mean that women are not treated with equal concern and respect. It also seems that the argument can be applied to non-pornographic material that portrays women in a demeaning way that undermines their status as equals.

### 4.2 Democratic Citizenship and Hate Speech

To argue the case above, one has to dilute one's support for freedom of expression in favor of other principles, such as equal respect for all citizens. This is a sensible approach according to Stanley Fish. He suggests that the task we face is not to arrive at hard and fast principles that prioritise all speech. Instead, we have to find a workable compromise that gives due weight to a variety of values. Supporters of this view will remind us that when we are discussing free speech, we are not dealing with it in isolation; what we are doing is comparing free speech with some other good. We have to decide whether it is better to place a higher value on speech than on the value of privacy, security, equality, or the prevention of harm.

Fish suggests we need to find a balance in which "we must consider in every case what is at stake and what are the risks and gains of alternative courses of action" (1994, 111). Is speech promoting or undermining our basic values? "If you don't ask this question, or some version of it, but just say that speech is speech and that's it, you are mystifying—presenting as an arbitrary and untheorized fiat—a policy that will seem whimsical or worse to those whose interests it harms or dismisses" (1994, 123).

The task is not to come up with principles that always favors expression, but rather, to decide what is good speech and what is bad speech. A good policy "will not assume that the only relevant sphere of action is the head and larynx of the individual speaker" (Fish, 1994, 126). Is it more in keeping with the values of a democratic society, in which every person is deemed equal, to allow or prohibit speech that singles out specific individuals and groups as less than equal? Fish's answer is that, "it depends. I am not saying that First Amendment principles are inherently bad (they are inherently nothing), only that they are not always the appropriate reference point for situations involving the production of speech" (1994, 113). But, all things considered, "I am persuaded that at the present moment, right now, the risk of not attending to hate speech is

greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope towards tyranny. This is a judgement for which I can offer reasons but no guarantees" (1994, 115).

These kinds of justification for prohibitions on hate speech suggest that the permissive approach undermines free speech properly understood. Even if hate speech or pornography does not cause harm (in Mill's sense) or offense, it has to be limited because it is incompatible with democracy itself. The argument from democracy contends that political speech is essential not only for the legitimacy of the regime, but for providing an environment where people can develop and exercise their goals, talents, and abilities. If hate speech and pornography curtail the development of such capacities in certain sections of the community, we have an argument, based on reasons used to justify free speech, for prohibition.

According to Fish, the boundaries of free speech cannot be set in stone by philosophical principles. It is the world of politics that decides what we can and cannot say guided, but not hidebound, by the world of abstract philosophy. Fish suggests that free speech is about political victories and defeats. The very guidelines for marking off protected from unprotected speech are the result of this battle rather than truths in their own right: "No such thing as free (nonideologically constrained) speech; no such thing as a public forum purged of ideological pressures of exclusion" (Fish, 1994, 116). Speech always takes place in an environment of convictions, assumptions, and perceptions i.e., within the confines of a structured world. The thing to do, according to Fish, is get out there and argue for one's position.

We should ask three questions according to Fish: "[g]iven that it is speech, what does it do, do we want it to be done, and is more to be gained or lost by moving to curtail it?" (1994, 127). He suggests that the answers we arrive at will vary according to the context. Free speech will be more limited in the military, where the underlying value is hierarchy and authority, than it will be at a university where one of the main values is the expression of ideas. Even on campus, there will be different levels of appropriate speech. Spouting off at the fountain in the centre of campus should be less regulated than what a professor can say during a lecture. It might well be acceptable for me to spend an hour of my time explaining to passers-by why Manchester United is a great football team but it would be completely inappropriate (and open to censure) to do the same thing when I am supposed to be giving a lecture on Thomas Hobbes. A campus is not simply a "free speech forum but a workplace where people have contractual obligations, assigned duties, pedagogical and administrative responsibilities" (1994, 129). Almost all places in which we interact are governed by underlying values and speech will have to fit in with these ideals: "[r]egulation of free speech is a defining feature of everyday life" (Fish, 1994, 129). Thinking of speech in this way removes a lot of its mystique. Whether we should ban hate speech is another problem, albeit more serious, similar to whether we should allow university professors to talk about football in lectures.

### 4.3 Paternalistic Justification for Limiting Speech

Although Stanley Fish takes some of the mystique away from the value of speech, he still thinks of limitations largely in terms of other- regarding consequences. There are arguments, however, that suggest speech can be limited to prevent harm being done to the speaker. The argument here is that the agent might not have a full grasp of the consequences of her actions (whether it be speech or some other form of behavior) and hence can be prevented from engaging in the act. Arguments used in the Skokie case would fit into this category and there is evidence to suggest that watching pornography can cause psychological damage to the viewer. Most liberals are wary of such arguments because they take us into the realm of paternalistic intervention where it is assumed that the state knows better than the individual what is in his or her best interests.

Mill, for example, is an opponent of paternalism generally, but he does believe there are certain instances when intervention is warranted. He suggests that if a public official is certain that a bridge will collapse, he can prevent a person crossing. If, however, there is only a danger that it will collapse the public can be warned but not coerced from crossing. The decision here seems to depend on the likelihood of personal injury; the more certain injury becomes, the more legitimate the intervention. Prohibiting freedom of speech on these grounds is very questionable for liberals in all but extreme cases (it was not persuasive in the Skokie case) because it is very rare that speech would produce such a clear danger to the individual.

We have examined some of the options regarding limitations on free speech and one cannot be classed as a liberal if one is willing to stray much further into the arena of state intervention than already discussed. Liberals

tend to be united in opposing paternalistic and moralistic justifications for limiting free expression. They hold a strong presumption in favor of individual liberty because, it is argued, this is the only way that the autonomy of the individual can be respected. Feinberg suggests that to prohibit speech for reasons other than those already mentioned means: “[i]t can be morally legitimate for the state, by means of the criminal law, to prohibit certain types of action that cause neither harm nor offense to any one, on the grounds that such actions constitute or cause evils of other kinds” (1985, 3). Acts can be “evil” if they are dangerous to a traditional way of life, because they are immoral, or because they hinder the perfectibility of the human race. Many arguments against pornography take the form that such material is wrong because of the moral harm it does to the consumer. Liberals oppose such views because they are not impressed by states trying to mold the moral character of citizens.

## 5. Back to the Harm Principle

We began this examination of free speech with the harm principle; let us end with it. The principle suggests that we need to distinguish between legal sanction and social disapprobation as means of limiting speech. As already noted, the latter does not ban speech but it makes it more uncomfortable to utter unpopular statements. Mill does not seem to support the imposition of legal penalties unless they are sanctioned by the harm principle. As one would expect, he also seems to be worried by the use of social pressure as a means of limiting speech. Chapter III of *On Liberty* is an incredible assault on social censorship, expressed through the tyranny of the majority, because he claims it produces stunted, pinched, hidebound and withered individuals: “everyone lives as under the eye of a hostile and dreaded censorship...[i]t does not occur to them to have any inclination except what is customary” (1978, 58). He continues:

the general tendency of things throughout the world is to render mediocrity the ascendant power among mankind...at present individuals are lost in the crowd...the only power deserving the name is that of masses...[i]t does seem, however, that when the opinions of masses of merely average men are everywhere become or becoming the dominant power, the counterpoise and corrective to that tendency would be the more and more pronounced individuality of those who stand on the higher eminences of thought. (1978, 63–4)

With these comments, and many others, Mill demonstrates his distaste of the apathetic, fickle, tedious, frightened and dangerous majority. It is quite a surprise, therefore, to find that he also seems to embrace a fairly encompassing offense principle when the sanction does involve social disapprobation:

Again, there are *many* acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of *offenses* against others, may rightly be prohibited. (1978, 97 author's emphasis)

Similarly, he states that “The liberty of the individual must be thus far limited; he must not make himself a nuisance” (1978, 53). In the latter parts of *On Liberty* Mill also suggests that distasteful people can be held in contempt, that we can avoid them(as long as we do not parade it), that we can warn others about them, and that we can persuade, cajole and remonstrate with those we deem offensive. These actions are legitimate as the free expression of anyone who happens to be offended as long as they are done as a spontaneous response to the person's faults and not as a form of punishment.

But those who exhibit cruelty, malice, envy, insincerity, resentment and crass egoism are open to the greater sanction of disapprobation as a form of punishment, because these faults are wicked and other-regarding. It may be true that these faults have an impact on others, but it is difficult to see how acting according to malice, envy or resentment *necessarily* violates the rights of others. The only way that Mill can make such claims is to incorporate an offense principle and hence give up on the harm principle as the *only* legitimate grounds for interference with behavior. Overall, Mill's arguments about ostracism and disapprobation seem to provide little protection for the individual who may have spoken in a non-harmful manner but who has nevertheless offended the sensibilities of the masses.

Hence we see that one of the great defenders of the harm principle seems to shy away from it at certain crucial points; even Mill was unable to mount a defense of free speech on this “one simple principle” alone. It does, however, remain a crucial part of the liberal defense of individual freedom.

## 6. Conclusion

Liberals tend to justify freedom generally, and free speech in particular, for a variety of reasons. According to Mill, free speech fosters authenticity, genius, creativity, individuality and human flourishing. He tells us that if we ban speech the silenced opinion may be true, or contain a portion of the truth, and that unchallenged opinions become mere prejudices and dead dogmas that are inherited rather than adopted. These are empirical claims that require evidence. Is it likely that we enhance the cause of truth by allowing hate speech or violent and degrading forms of pornography? It is worth pondering the relationship between speech and truth. If we had a graph where one axis is truth and the other is free speech, would we get one extra unit of truth for every extra unit of free speech? How can such a thing even be measured? It is certainly questionable whether arguments degenerate into prejudice if they are not constantly challenged. Devil's advocates are often tedious rather than useful interlocutors. Sometimes supporters of free speech, like its detractors, have a tendency to make assertions without providing compelling evidence to back them up. None of this is meant to suggest that free speech is not vitally important: this is, in fact, precisely the reason we need to find arguments in its favour. But regardless of how good these arguments are, some limits will have to be placed on speech.

We have found that the harm principle provides reasons for limiting free speech when doing so prevents direct harm to rights. This means that very few speech acts should be prohibited. It might be possible to broaden the scope of this principle, as Waldron attempts to do, to include things other than harmful rights violations. Feinberg's version of the offense principle has a wider reach than the harm principle, but it still recommends very limited intervention in the realm of free speech. All forms of speech that are found to be offensive but easily avoidable should go unpunished. This means that much pornography and hate speech will escape censure.

If these arguments are acceptable, it seems reasonable to extend them to other forms of behavior. Public nudity, for example, does not cause serious harm and if it does offend some people it is at most a bit embarrassing, and is avoided by averting one's eyes. The same goes with nudity, sex, and coarse language on television. Turning off the television provides instant relief from the offense. Neither the harm or the offense principles as outlined by Mill and Feinberg support criminalizing most drug use, nor the enforcement of seat belts, crash helmets and the like.

Some argue that speech can be limited for the sake of other liberal values, particularly the concern for democratic equality. This argument, unlike those based on harm and offense, has the potential to allow significant limits on pornography and hate speech. The claim is not that speech should always lose out when it clashes with equality, but it certainly should not be automatically privileged. To extend prohibitions on speech and other actions beyond this point requires an argument for a form of legal paternalism that suggests the state can decide what is acceptable for the safety and moral instruction of citizens, even if it means limiting actions that do not cause harm or unavoidable offense and which do not undermine democratic equality.

It has certainly been the practice of most societies, even liberal-democratic ones, to impose some paternalistic restrictions on behavior and to limit speech that causes avoidable offense. Hence the freedom of expression supported by the harm principle as outlined in Chapter One of *On Liberty* and by Feinberg's offense principle has yet to be realised. It is up to the reader to decide if such a society is an appealing possibility.

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## Other Internet Resources

[As of January 2008, typing "free speech" on Google will net millions of entries. Hence it is best to simply jump in and see what one can find. It is worth noting that almost all of them are devoted to the promotion of speech in the face of censorship. This reflects a strong bias on the internet in favor of the "slippery slope" view of free speech. There are not many entries where an argument is made for placing limitations on free expression. Wikipedia has a quite a few entries dealing with censorship, free speech, pornography, and crime statistics. Here are a few other sites to get you going.]

- [American Civil Liberties Union](#)
- [Free Speech Movement archives](#) (related to Berkeley in the 1960s)
- [Freedom Forum](#), (a forum dedicated to free speech and a free press)
- [Free Expression](#), Center for Democracy and Technology, (a website related to the issue of free speech and the internet)
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## WHO BOTHERS ABOUT THE SUPREME COURT ? THE PROBLEM OF IMPACT OF JUDICIAL DECISIONS

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## WHO BOTHERS ABOUT THE SUPREME COURT ? THE PROBLEM OF IMPACT OF JUDICIAL DECISIONS

*Upendra Baxi\**

### I

IN INDIA, the hero-worship of Justice Felix Frankfurter began rather early with the making of the Constitution when Sir B.N. Rau and others were persuaded to drop the phrase "due process" from the chapter on fundamental rights. Many interpreters of the Constitution including the justices of the Indian Supreme Court have admired Frankfurter not just for the felicity of his style; they have held his self-restraint with unabashed admiration and converted his work into a kind of judicial role-model of reticence apt for the Indian appellate judiciary.

But just no one has hitherto followed Frankfurter in his harsh self-doubt and agony concerning the impact of the decisions of the Supreme Court on American government and society at large. That he ever did raise such a question had probably more to do with the fact that he was a law professor first and a justice next (a point whose significance for judicial appointments to the Indian Supreme Court has been rather blithely ignored for about thirty long years!). Be that as it may, it was Frankfurter who first raised the question as early as 1954 in the following words :

Does anybody know, when we have a case, ... where we can go to find a light on what the practical consequences of these decisions have been? ... I don't know to what extent these things can be ascertained. I do know that, to the extent they may be relevant in deciding cases, they ought not to be left to the blind guessing of myself and others only a little less uninformed than I am.<sup>1</sup>

Frankfurter's extra-judicial and quite professorial observations have generated in the United States a fairly respectable and fruitful body of

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\*Vice-Chancellor, South Gujarat University, Surat. I have excluded in this paper a review of the literature on quantitative analysis of judicial behaviour. Jurimetric studies of the Indian Supreme Court are already available though Indian students of the court have paid virtually no attention to it (barring notable exceptions). Professor George H. Gadbois' pioneering work has been cited in the references. There is also a little read analysis by Herbert Hirsch and Gene L. Mason, "A Systems Analysis of the Indian Supreme Court", VI *E.P.W.* 2201 (1971). Rajeev Dhavan has made use of quantitative methods, though not rigorously, in his *Supreme Court of India* (1977) and the works cited in the references.

1. *Some Observations on the Supreme Court Litigation and Legal Education* 17 (1954).

literature on the impact of judicial decisions. In India, the Supreme Court has been so busy making both law and constitution that its justices have not had the leisure for self-reflection requisite even to the raising of this kind of doubt and question. And students of the court have blamed it now and praised it then for this or that decision. They have asked the question : "What does this decision mean ?" but not the question: "What is the impact of this decision or the line of these decisions?"

Of course, there have been crystal-clear examples of impact of some Supreme Court decisions. Constitutional amendments have been too frequently used to nullify judicial decisions. It is quite clear that certain decisions of the court have led to the supersession of some of its justices. Retrospective amendments and validation Acts are exercises frequently undertaken, with telling all-round political and social results. Legislative reversals of judicial decisions is a recurring experience in many democracies and has not been seen as being at odds with the principle of independence of the judiciary or of judicial review. The frequency of constitutional amendments seeking to nullify the impact of judicial decisions is somewhat distinctive to India but surely, in principle, not quite unknown to mature democracies either.

But when one talks about the impact of the decisions of the Supreme Court one means a lot more than annulment of potential impact of such decisions. One may also want to refer to compliance with the specific decision or a group of decisions; one may speak of impact on the executive agencies in this sense. One might see short or minimal term versus long-term impact (say of *Golak Nath*<sup>2</sup> and *Kesavananda*<sup>3</sup>) or optimal impact and so on. Hence the first task is to identify what could be the range of meanings associated with the notion of impact and what should be its range for the purposes of empirical analysis. The second obvious task is to identify impact-constituencies and the processes (and the effectiveness of these processes) through which impact occurs. The third task is to identify the ways in which impact analysis can be undertaken, together with an identification of its limitations as well. And last but not the least is the question as to why such research has not so far occurred in India and what can be done to promote it, assuming that it is of some relevance to judicial decision-making in India. We now turn to an examination of each of these aspects.

## II

Very broadly, impact may be said to mean effectiveness or the actual result. But this indeed is too broad. This is because in this sense the notion becomes a general one of aftermath or, in other words, of "what

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2. *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

3. *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

happened thereafter." But what happens after the judicial decision may be a very large number of events in time and space, not all of which may be relatable to whatever happened when the court held whatever it held!

Perhaps, the notion of compliance is more specific. But it might prove too specific! For example, if we operationalize the notion as mere compliance we may have to ask: How many undertrials have been released upon the recent orders by the Supreme Court? And how many affected undertrials are still rotting in Bihar prisons? Here, our question is with a specific decision or a series of specific orders or "the mandate of the Court with respect to specific named individuals."<sup>4</sup> While it is always important to think small and to find out whether a specific decision has been complied with or violated, the notion of compliance, interpreted to mean compliance to a specific mandate, is perhaps not the best indicator of impact.

Of course, if there is non-compliance interesting questions arise as to possible reasons or motives for non-compliance of court's orders. For example, it has been suggested that compliance presupposes cognition. If, for some reason, the court's ruling is not known to the government or correctly comprehended by it, or by other parties, what we have is evasion but an inadvertent one. But there may also be deliberate evasion because of the fact that "human groups find it difficult to carry out effectively acts for which they have no underlying beliefs."<sup>5</sup> Thus, the Supreme Court may well avail against the inherited incarcerated ethos of the British Raj prisons and prescribe measures for true unfolding of human spirit behind bars, inclusive of the practice of transcendental meditation. But hard-nosed prison administrators may have no underlying beliefs or even supportive ones. With non-compliance, the question moves away from behaviour of official groups to their beliefs. It has been repeatedly pointed out in current literature on impact that compliance with the law generally and judicial decisions specifically, imports a feeling of ethical or moral obligation to what is mandated.<sup>6</sup> In this sense, compliance becomes a rather broader notion, going beyond behaviour to belief and embracing what Professor Julius Stone has called "socio-ethical convictions."<sup>7</sup>

To say all this is not to say that compliance is not relevant to understanding impact. Clearly, compliance is "a subset of impact."<sup>8</sup> But impact may be regarded as something of wider and broader import. Most simply, impact means the effect or the result of a judicial decision or a set of

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4. Stephen L. Wasby, "The Supreme Court's Impact: Some Problems of Conceptualization and Measurement", 5 *Law & Soc. Rev.* 41 at 45 (1970-71).

5. Michael J. Petrick, "The Supreme Court Authority Acceptance", 21 *Western Political Quarterly* 5 at 7 (1968)

6. *Supra* note 4 at 47. See literature cited in Wasby.

7. *Social Dimensions of the Law and Justice* 546-74 (1966).

8. *Supra* note 4 at 46.

decisions. But result in what sense? In one sense, it is the expected result. Expected by whom? Here the answer is necessarily complex: It must be the result as expected in the first place by the court but its own expectations when not manifest must mean expectations imputed to it by students of judicial process. When the court, for example, elucidates in a zigzag fashion the requirements of hearing, of duty to give reasons, of conscientious exercise of discretionary powers etc., it can be said that it expects fairness to citizens in administration by the state and that the specific articulations in specific contexts are merely ingredients of that notion of fairness. The general notion of fair-play in action cannot just be developed by courts alone ; the systematization and logical clarification also require collaboration of jurists or students of the judicial process.

Thus, when one refers to impact, one refers to the intended or expected results. But unintended results also accompany the intended ones. The 1973 supersession of Supreme Court justices is a dramatic example of the unintended result, and yet it is so important a consequence that one cannot wholly ignore it in any effort to grasp the meaning of subsequent constitutional developments in India. That may be so. But there is merit in keeping the notion of impact to some manageable proportion, and the idea of intended result is a tolerably clear and useful one for the study of impact.

Even as we settle for this rather rough and ready notion of impact, we must tell the purists that underlying this notion is of course some theory or dogma concerning the nature of judicial power and process. And that is simply that the appellate courts do not merely declare the law but make it; that they also unmake the law either through interpretation or invalidation; and that they also make and unmake constitutional amendments. All this in turn presupposes the rather elementary fact (anathema to the purist) that the judiciary is an agency of national government, as much as the executive and the legislature, and that broadly judicial process is a species of political process. Political scientists find all this axiomatic;<sup>9</sup> but to lawmen all this may still have a heretical ring.<sup>10</sup> Heretical or not, no question of studying impact arises unless there is at least (with apologies to poet Coleridge) a "willing suspension of disbelief" in this regard by students of judicial process. One has at least to concede this much that the court is a politically relevant and not a politically neutral institution in order to ascribe it any impact. One reason why the study of impact of judicial decisions has so far not emerged in India may lie in the folklore about the nature of judicial power and process, negating all these truisms. It is rather hard to combine science with folklore.

### III

The effect of Supreme Court's decisions presupposes what I might call impact-constituencies (IC). These may be quite varied. In the arena of

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9. *Supra* note 4.

10. Upendra Baxi, *The Supreme Court and Indian Politics* (1980).

fundamental rights, the IC may be all agencies of the executive and all legislatures. In the field of federalism, the IC may be all federal units. Administrative law may embrace IC of a large number of groups holding public powers, regardless of the fact that they exercise quasi-judicial or other powers. In matters involving enforcement of law, many agencies besides law enforcement authorities and personnel may be the relevant or functional IC. And (without being exhaustive) all courts in India, under article 141 of the Constitution, may be the relevant IC for whatever the Supreme Court decides from time to time. In other words, impact-constituencies are human groups whose behaviour is sought to be influenced in a definite manner by the court through its explicit decisions.

Obviously, the identification of IC is essential at the threshold. Those who talk about "judicial process and social change" or the "impact of the court on the national development" are bold souls, who prefer the paradise of platitude to the earth of enquiry. Macro-generalizations about the court's role and impact are only useful as summoning or prejorative devices. They are useful ways of evoking political responses. But impact analysis, worth its name, has to be far more painstaking than demagogery.

But identification of IC is only one of the concrete steps involved. It is not to be blithely presumed that just because the court intends to address an audience, there is in fact an audience or constituency. As Professor Stephen L Wasby has pointed out, one very important component of judicial power lies in the ability of courts to communicate with groups whose conduct they seek to influence or change. What is needed is an extended social communications network, including mass media by which its decisions enter "the political milieu."<sup>11</sup> Some general awareness of what the court is doing is absolutely vital for creation or sustenance of IC. More precise knowledge of what the court has done or is doing may of course enhance the impact of its work (or resistance to it).

One would think that in India, as distinct from the United States, the communication networks, including public media, are by and large feeble. The primary agents involved in communication process are the law reporting agencies. But these serve only one organised IC, namely, the legal profession, which in turn has so far made precious little effort to transform itself into a general informational agency concerning the communication of law to the affected constituencies. Since 1977 there is some welcome sign that public media, including radio and television, are orientated to spreading greater legal information. Studies of impact of judicial decisions, unusual though it may seem, have still to begin with vaults of old newspaper files and programme content of television and radio networks rather than with law reports. And the court too, if it is responsive

11. *The Impact of the United States Supreme Court : Some Perspectives* 47 (1970).

to innovative ideas, has to take the unusual but socially worthwhile decisions concerning how best it could foster communication of its decisions to affected groups. The Indian Supreme Court in its pursuit of social relevance not merely needs catalytic justices but also a team of efficient public relations officers. Parliament has its spontaneous media coverage. The executive has at its disposal not just the government media and the free press, but also departments of publicity and information. Only the judiciary, the third major arm of the national government, has to do without specialized services of this kind. Extra-judicial utterances (speeches), which are now on the increase, do some public relations work for the court. But these are a poor substitute for specialist efforts at building the necessary communications networks. Lest all this might be regarded as merely some kind of administrative innovation, it must be immediately said that more is at stake than this. What is at stake is the potential for impact of the decisional output of the court.

Our earlier point regarding imputation of expected result of a judicial decision or a course of judicial decisions also becomes important in this context. And that is that commentators must serve as important agencies for amplification of the court's message. The more they shut themselves in ivory towers and the more they dedicate themselves to specialist analyses, the more also they weaken the impact potential of the court in terms of the general diffusion of awareness of its work and the role.

Professor Wasby and his colleagues do not have to make this kind of detour when talking about impact analysis, since they can more or less presume tolerable, if not adequate, media and related communication of the judicial output as well as the contribution of the academic community to this process. But it would be thoughtless to assume that what is true about America is also true about India—an attitude which too often creeps into our thinking about the judicial role.

Important in all this of course is the nature of communication or the message. It is quite commensical that "greater clarity" of judicial decisions "would bring increased compliance."<sup>12</sup> The greater the ambiguity the lesser the impact. Students of Indian Supreme Court have to carefully examine the judicial style and diction when they seek to study impact of court's decision, with the above hypothesis in view. It is clear that differential interpretation of what the court holds will minimize the potential for change for the target IC. The Indian Supreme Court justices tend towards "grandiloquence."<sup>13</sup> Profusion of American authorities in *Sunil*

12. *Id.* at 45.

13. Krishna Mohan Sharma, "Judicial Grandiloquence in India : Would Fewer Words and Short Oral Arguments Do", 4 *Lawasia* 192 (1973); R. Jethmalani, "Judicial Gobbeledygook", 2 *J.B.C.I. xx et. seq.* (1973); K.B. Nambyar, "Mr. Jethmalani and 'Judicial Gobbeledygook'", 1 *S.C.C.* (Journal Section) 68 (1974); Upendra Baxi, Introduction to K.K. Mathew's *Democracy, Equality and Freedom* (1978).

*Batra*<sup>14</sup> is apt to bewilder jail officials; the all too frequent reliance on the wisdom of the Nine Old Men in *Nandini Satpathy*<sup>15</sup> is not going to register on station house officers as many counterparts of Ramiza Bee in India since then show. Activist justices of the Supreme Court, in these and a very large number of major decisions, have to choose between self-indulgence and social impact when they write their opinions. But then much here depends on the intended IC. If the intended IC is the legal profession, legislators, higher echelons of the bureaucracy, the media looking for pungent and spectacular turns of phrase, judicial flamboyance has at least a *consciousness-raising impact*. And for all that one knows this kind of exercise may, in the stream of time, prove more valuable than crisp "dos" and "don'ts" against the exploiters of the people. Students of impact analysis should not be swayed by an ideal-type model of judicial style and diction. Their job rather is to empirically investigate the grandiose judicial style in terms of its intended (or imputed) objective of consciousnessrousing; again a phenomenon not quite relevant to American models of impact analysis.

Ambiguity in the Supreme Court's decisions might also have another social function to serve. Professor Wasby puts it thus: "The second possible result of ambiguity is that it forces people to come back to the courts to ascertain what was meant, *thus increasing the Court's control over the policy making process.*"<sup>16</sup> Or as Lowi puts it, a "strong and clear ruling ...leads to significant decentralization of caseload and a good deal of self-administration by lower courts and counsel."<sup>17</sup> In other words, the problem is between centralization and decentralization of power. Strange but true, ambiguity is an instrument of judicial power. As such, we climb altogether the wrong tree when we complain about grandiloquence! If so, a new light is also shed on the so-called problem of arrears in the Supreme Court. So-called because the court might seem to have greater potentialities of impact when its caseload is centralized rather than when it is decentralized! Available empirical studies indicate that more than half of the court's workload is special leave matters under article 136 of the Constitution.<sup>18</sup> Structurally, one better appreciates in this light the increase in separate concurring opinions and even what appears to be a higher frequency of dissenting opinions<sup>19</sup> so that in the Indian situation an

14. *Sunil Batra v. Delhi Administration*, A.I.R. 1980 S. C. 1579.

15. *Nandini Satpathy v. P.L. Dani*, A.I.R. 1978 S.C. 1025.

16. *Supra* note 11 at 46.

17. Cited in Wasby, *supra* note 11 at 46.

18. Rajeev Dhavan assisted by P. Kalpakam, *The Supreme Court under Strain : The Challenge of Arrears* (1978) (Indian Law Institute).

19. See George H. Gadbois, Jr., "Supreme Court Decision Making", 10 *Ban. L.J.* 1 (1974), and "Selection, Background Characteristics and Voting Behavior of Indian Supreme Court Judges : 1950-59", in Glenden Schubert and David Danielski (Eds.), *Comparative Judicial Behavior* 227 (1969).

analyst of impact of Supreme Court's decisions has also to examine the structural-functional aspects of ambiguity, arrears, and authority of the Supreme Court—something for which there exists no direct parallels in American studies.

Other variables in the process of impact can be stated in a more straightforward manner, following the impact analyses in the United States. These include

- (1) the case by case nature of the legal system;
- (2) the characteristics of the case itself and the variables of content and context;
- (3) the *existing political, economic and social situation*;
- (4) the geographical scope of the decision;
- (5) the follow-up of the decision by higher political authorities;
- (6) the relative power of those responding to a decision, both in terms of political action for and against the decision;
- (7) the relation of dominant interests to the content of the decision;
- (8) the belief systems or political culture;
- (9) the characteristics of the community or of the IC;
- (10) the expectations people (or IC) have of the court.<sup>20</sup>

One might in addition want to develop some sort of typology of impact. A start in this direction has made at long last in the study of American Supreme Court. Professor James P. Levine identified four major types of impact. First, there is the specific implementation or compliance with the mandate of the decision itself. Second, and quite important, is the notion of impact as a kind of hierarchical control by the Supreme Court of the judiciary in general. The third kind of impact is political impact, that is, we refer here to the responsiveness of governmental authorities and agencies to the new legal obligation entailed in the judicial decision (s).<sup>21</sup> The fourth kind of impact is plainly social. Here we have the identification of at least five types of consequences. Social impact may include (i) regulation of behaviour; (ii) allocation of costs and benefits of specific activities; (iii) symbolic effects (iv) second-order consequences (unrelated and sometimes incongruent social changes); and (v) feedback, that is "communications which enable decision-makers to constantly correct and modify their behaviour so that goals might be achieved more efficiently." (This typology is based on the degree of causal distance of an instant decision and the overall consequences). A moment's reflection on all this would show that one has to identify the types of impact one wishes to study; both the universe and the tools of enquiry may change with the type of impact under view.

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20. *Supra* note 11 at 42-56.

21. "Methodological Concerns in Studying Supreme Court Efficacy", 4 *Law & Soc. Rev.* 583 at 584-86 (1969-70).

Implicit in this notion of causal distance is the key element of time. "All impact," says Wasby,<sup>22</sup> is not immediate.<sup>22</sup> Obvious, you would say; and yet much of social science clarification at analytical levels is reiteration of the obvious. This is because we tend to overlook the obvious. Justice Holmes has well reminded lawmen that sometimes the education in the obvious may be the most important kind of education! Sometimes decision having no immediate, short-run impact may turn out to be quite crucial in the long run. *Marbury v. Madison*<sup>23</sup> is often cited to prove this point. On the other hand, some long-run important looking decisions might exhaust their impact in the short run. But time dimension is absolutely a vital notion for the study of impact. This is particularly vital in approaching decisions which are truly seminal or creative (e.g., the recent bunch of decisions on prison justice or *Moti Ram*<sup>24</sup> on bail law or *Maneka*<sup>25</sup> or *Kesavananda*<sup>26</sup>—which I termed in 1974 as the Indian Constitution of the future—or *Govind*<sup>27</sup> on the right to privacy). Judicial styles become here quite important, particularly what I have elsewhere termed "juristic activism."<sup>28</sup> Even a nodding familiarity with impact analysis should equip the traditional, blackletter law researcher with some idea of relevance of time dimension in any attempt at appreciation of judicial decisions.

Of course, there are some problems. If by impact we mean intended result (and not incongruent second-order consequences) we have to explore judicial subjectivities in order to arrive at a suitable time-span for proliferation or impact. How do we determine that span of time? Not all justices consciously speak to the future, though increasingly Indian Supreme Court justices tend to write opinions addressed to the posterity. If we were to overlook the subjective dimension, it may also be equally difficult to prescribe or to postulate an optimum time-span for the effect of judicial decision. We all know that "with all deliberate speed," in the American Supreme Court jargon, has meant twenty or so long years for worthwhile impact on educational desegregation in the states. There are surely parallel Indian examples. The short point is that cut-off periods for measuring the time necessary for generating or proliferating impact are of necessity going to involve some hard, but ultimately, arbitrary decisions. The more explicitly this kind of thing is stated in the design of impact studies the better it is for scientific understanding of the judicial process. It should also be noted that the time-dimension might vary with

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22. *Supra* note 4 at 54.

23. 5 U.S. (1 Cranch) 137 (1803).

24. *Moti Ram v. State of Madhya Pradesh*, A.I.R. 1978 S.C. 1594.

25. *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

26. *Supra* note 3.

27. *Govind v. State of Madhya Pradesh*, A.I.R. 1975 S.C. 1378.

28. Baxi, *supra* note 13.

each type of impact or each category of impact. For example, the category or type of impact (*i*) to (*iii*) identified above may take relatively lesser time than the categories (*iv*) and (*v*).

#### IV

Measurement of impact poses its own set of problems. Professor Wasby has raised some pertinent issues. What, he asks, can we "use as measures?":

Where do we begin to look? For example, do we measure the impact of the school desegregation decisions in terms of the percentage of Negro students attending classes in previously all-white schools? Or in terms of the percentage of school districts with some Negroes in integrated classes? Or in terms of the movement of whites to the suburbs from the core cities of metropolitan areas? In the area of criminal procedure, does one look at impact of decisions in terms of alleged increases in the crime rate? In terms of the number of cases which go to trial? In terms of convictions obtained? In terms of changes in police methods? In terms of the growth of interest groups, e.g., of policemen, which arise in opposition to the decisions? Or in terms of the number of cases brought to the courts to test the applicability of what the Supreme Court has declared? An easy, but unsatisfying answer for the present is that perhaps all of these, individually or in combination, might be legitimate operationalizations.<sup>29</sup>

There is then a further overriding difficulty posed by the need to isolate discrete causal relations. Or to put it less technically there is the question:

If several factors are operating in the same direction, how does one separate the impact the Court's decision has by comparison with other elements of the situation?<sup>30</sup>

This is quite an important question both for the doctrinal researcher in law as well as for an empiricist. The importance of the overall context before, during and after each event of judicial choice-making can be ignored only at the risk of both maturity and wisdom. Doctrinal scholars are accustomed to doing precisely this, for most of them in India at any rate the world begins and ends with the document called "judgment" in the pages of the All India Reports. But, as I had occasion to point out,

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29. *Supra* note 4 at 54. See also *supra* note 21, and Theodore L. Becker and Malcolm M. Feeley (Eds.), *The Impact of Supreme Court Decisions* (1st ed. 1969).

30. *Supra* note 4 at 49.

the "All India Reports consciousness" of the law is far too blinkered in its perception of the law as a social process.<sup>31</sup>

There are other problems related to design of research studies on impact and the problem of methods. There is, for example, the problem of controlling plausible rival causal hypotheses and of methods to be used. The problems of "before-after" research designs and of the technique of time series analysis pose problems of some magnitude. There are solutions to these as well, but they are not such as could be fruitfully explored in this rather generalized account of impact analysis.

## V

Is impact analysis of the Supreme Court necessary and desirable ? I think it is for reasons so far indicated. It is desirable that the court should have some feedback on the overall results of its activities in major areas of judicial law-making. It is desirable, also through this process, to develop a body of knowledge relevant to planning social change through the legal processes and institutions. It is necessary and desirable also for its incidental fallouts on the general state of legal research in India, which is, by and large, doctrinal to a fault. It is desirable and necessary not just as what Julius Stone has termed "paradigm of reduction of justices" referring to my introduction to Justice Mathew's book<sup>32</sup> but also as providing a similar paradigm for reduction of the appellate bar in India. Above all, such research will contribute to an enhanced sense of social relevance of the court as an agency of national government and may itself, after some cumulation of knowledge, become an ingredient of greater efficacy of the court's direction of national affairs.

The "costs", if these can be called such, will involve re-location of the court in the wider environment. This may mean that the court may not be seen as an epicentre of all major social developments but merely as one among the many key institutions of Indian society. This must involve some, if not considerable ego-sacrifices on the part of the court, the bar, and law scholars. Moreover, and by the same token, the broadly political role of the court will have to be conceded while tracing the multidirectional exchange of impacts and influences between the court on the one hand and institutions of the formal and informal polities on the other. The mystique of a neutral adjudication embodied in the blindfolded Dike (the Greek goddess of justice) may be slightly eroded through impact studies. This need not result in any denigration of the judicial process or salient role of the court in national affairs. If anything, I

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31. Upendra Baxi, "What Can the Convicts of Rajamundry Prison Teach Us?" (paper presented at All India Law Teachers Conference at Hyderabad, 1977, *mimeo*).

32. Baxi, *supra* note 13.

would like to think that both these will enhance by continuing impact studies.

In what major areas can we begin impact analysis for the Supreme Court? Each scholar and each institution will have its distinctive sets of priorities. But in the present opinion it is necessary in framing any order of priorities to have regard for the grassroots rights of the people rather than the superstructure rights.<sup>33</sup> If we have limited budget and scarce manpower, as is the case with empirical research in law, it is better to start off in the direction of grassroots rights. By the latter, I mean the ordinary statutory rights and privileges of the ordinary people, including the poor and vulnerable groups. These may or may not involve high constitutional controversies but nevertheless affect, for bad or worse, the concrete life situations of thousands of hapless people. We may thus accord priority to those decision areas of the Supreme Court's work which affect such groups. From this point decisions of the court relating to administration of criminal justice command priority. It is necessary to commission impact studies of decision affecting (i) bail, (ii) capital punishment, (iii) sentencing discretion, and (iv) prison justice.

There are other advantages in starting off in this direction as well. One of these is the fact that these areas will provide us also with an understanding of impact as "hierarchical control" as identified by Levine. In other words, we will be able to ascertain the extent to which courts below the Supreme Court in the judicial hierarchy interpret and apply these decisions and how much impact/ineffectivity is generated by what kind of structural factors as well as flaws in the communication process. One would thus hope to better understand the impact of the Supreme Court on the rather immediate impact constituencies of other courts in the system. If the impact is lacking or is differential over various areas, causes of these will have to be ascertained and a re-examination of the structural arrangements and working habits of the Supreme Court and other courts will emerge. Impact analysis is thus an ideal vehicle to understand (or, if you will, unmask) the structure of the judiciary in India.

Equally importantly, we will also be able to highlight the political impact/ineffectivity of the court from empirical determinations concerning the responsiveness to demands of legality and justice by the government. Impact analysis furnishes a telling model of verifying the claims to political legitimacy often urged in the title of the rule of law and justice by the governing elites. This is particularly relevant in the present post-emergency phase of the Supreme Court where the court has been increasingly preempting legislative initiatives from the government and Parliament.<sup>34</sup>

33. *Supra* note 10 at 198.

34. *Supra* note 10; Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", 7 & 8 *Del. L. Rev.* (1979-80) (to be published in a revised form in essays in honour of Justice V.R. Krishna Iyer, edited by R. Dhavan and S. Khurshid).

I am not inhibited from saying that impact analysis will have also distinctive political role in this area, by generating or reinforcing media and public interest on issue of administration of criminal justice and criminal injustice. In this sense, impact analysis will contribute vitally not just to the clarification of the legal state of affairs in the area of criminal justice but it may also contribute to the politics of human rights at the grassroots levels.

Another area of some pressing importance where it would be equally rewarding to pursue impact analysis is that of administrative law. The Supreme Court has built a magnificent edifice of principles designed to ensure fairness in pursuit of efficiency in administration. It has enunciated a large number of principles regarding the exercise of discretionary powers. It would be rewarding to find out how precisely its holdings are communicated, interpreted and applied by administrative authorities. What, for example, is the impact, if any, of *Gullapalli* cases<sup>35</sup> on executive and ministerial decision making in India? How is the duty to give reasons elaborated in *Barium Chemicals*<sup>36</sup> followed? What, if any, is the impact of the court's rulings on estoppel against administrative authorities? How is the duty to apply one's mind and avoidance of acting "mechanically and without due care" interpreted by executive and administrative authorities? There are a host of related questions. Once again this is an area which directly affects citizens in numerous aspects of day to day existence. If administrative jurisprudence is to make more than normative breakthroughs, it is essential that the court has access to the impact/ineffectivity of the edifice of decisional law so painstakingly built by it over the years.

## VI

Yet another area for impact analysis is provided by what I have called "epistolary jurisdiction", whereunder the Supreme Court justices convert letters written by social action groups on behalf of the victims of governmental lawlessness, administrative deviance and social tyranny.<sup>37</sup> Social action litigation (SAL) has vigorously flourished since 1979.

The impact of SAL in terms of compliance is as yet hard to assess simply because most of it is at interlocutory or interim order stages.<sup>38</sup> While the *Hussainara* undertrial cases have led to spectacular release of undertrials,<sup>39</sup> the impact in terms of *compliance* is still hard to measure as

35. *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*, A.I.R. 1959 S.C. 308; *Gullapalli Nageswara Rao v. State of Andhra Pradesh*, A.I.R. 1959 S.C. 1376. See also Upendra Baxi, "Introduction" to I. P. Massey, *Administrative Law* (1980).

36. *Barium Chemicals Ltd. v. A. J. Rana*, A.I.R. 1972 S.C. 591.

37. "Taking Suffering Seriously . . .", *supra* note 34.

38. *Ibid.*

39. Upendra Baxi, "The Supreme Court under Trial: Undertrials and the Supreme Court", 1 *S.C.C. (Journal Section)* 35 (1980).

cases still come up from Bihar involving undertrials languishing in prisons for as long as three decades.

If it is too early to measure impact (as compliance), it is certainly not too early to measure normative and ideological impact of SAL. Buried under a mass of interim orders in SAL lies the beginning of new constitutional interpretation which alters the nature and scope of rights radically. Identification of the new constitutional jurisprudence, thus emergent, is necessary as the Supreme Court of India is for the first time in its history becoming the Supreme Court for Indians.

Another latent or unintended impact of the growth of SAL has been accentuation of factionalism on the court, which has, like wildfire, contributed to decomposition of the court as a supreme judicial institution. This is the general impression, nurtured by public speeches by leading justices.<sup>40</sup> Students of impact analysis might wish to measure the contribution of SAL to the discohesion of the court—an undoubtedly difficult task even if in no small measure facilitated by public articulation of discord by senior justices. A study of public utterances read closely with SAL decisions and directions, aided by reconstruction of biographies of justices, could assist such impact analysis.

Yet another direction in which impact analysis could move is furnished by members of the Supreme Court bar. Not merely only a minuscule number of Supreme Court lawyers espoused SAL but also a large number of them have moved from indifference to articulate, and outspoken, criticism of the court. SAL has, as it were, drawn blood. To what extent is there a real ferment in the bar? To what extent by opposing the SAL is the legal profession reorientating itself to the performance of role-obligations which it has successfully neglected so far? What concrete alternatives to the conduct of SAL do the lawyers propose? Alternatively, what retaliatory strategies lurk beneath their public criticism, and often condemnation, of the SAL?<sup>41</sup> These are undoubtedly crucial questions which need to be carefully examined as an aspect of the impact of the SAL on a most important IC of the SAL.

Political responses to the SAL furnish another dimension of impact analysis of the SAL. A senior advocate, who is also a member of Rajya Sabha (Council of States) has, infructuously, moved motions aimed at constricting the scope of the SAL.<sup>42</sup> Do political actors have any serious grasp of the wider political significance of the SAL? Do they perceive it as an aid or as a threat to their legitimization? An understanding of their responses could indicate the actual and potential impact of the SAL. In the immediate future, judicial appointments to the apex court might be

40. Upendra Baxi, "Judicial Terrorism: Some Thoughts on Justice Tulzapurkar Pune Speech", 21 *Mainstream* 11 (1 January 1983).

41. "Taking Suffering Seriously...", *supra* note 34.

42. *Ibid.*

weighted in favour of traditional, and, therefore, anti-SAL approaches. If so, this would in a way constitute perhaps a negative and unintended result of the SAL.

Equally crucial to the impact analysis of the SAL is the perception of socio-legal activists who invoke the epistolary jurisdiction. What, clearly, are they seeking to accomplish by this? How do they plan, if they plan at all, the SAL strategies? What do they perceive as sources of strength and weakness in the SAL? How do they radiate the message of the SAL to its real beneficiaries, and with what results?

In exploring the impact of SAL, we have two choices: One, to nourish it; another, to nip it in the bud, as it were. Much depends on the value-frame or the ideology of the researcher. This is true of all impact analysis, in fact, in my opinion, of all social science research. One has to be clear from the outset concerning one's own ideological premises in setting and concretizing one's research priorities and agenda. Either you are self-conscious about your values or ideologies or they rule you from the subconscious. This is as much a fact about yourself as researcher which needs to be explored as social facts that you proceed to explore in your research.

In other words, the *impact of impact analysis* is also a part of the problematic impact analysis process. The possible and probable types and degrees of the impact of impact analysis should agonize the researcher as much as the problems of research design and method, and of grants and publication.



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The Right to Trial by Jury

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## The Right to Trial by Jury

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THOM BROOKS

**ABSTRACT** Recently, the right to trial by jury has attracted a number of vociferous critics with deep reservations about the use of juries, most of whom are in favour of greatly restricting the use of juries with a minority desiring complete abolition. This article offers a justification for the continued use of jury trials. I shall critically examine the ability of juries to render just verdicts, judicial impartiality, and judicial transparency. My contention is that the judicial system that best satisfies these values is most preferable. Of course, these three values are not the only factors relevant for consideration. Empirical evidence demonstrates that juries foster both democratic participation and public legitimization of legal decisions regarding the most serious cases. Nevertheless, juries are costly and, therefore, economically less efficient than competing modes of trial. I do not argue that all human beings possess an inalienable legal right to be tried by a jury. However, it is my hope that this analysis will make clear what we might gain or lose when we propose jury reforms.

We abhor the idea of losing the transcendent privilege of trial by jury, with the loss of which, it is remarked by [Blackstone], that in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that trial by jury and the liberty of the people went out together [1].

### Introduction

It has been said that ‘England owes more of her freedom, her grandeur, and her prosperity to [the jury trial], than to all other causes put together’ [2]. In Britain, as well as in many other countries, trial by jury has been seen traditionally as their citizens’ great bulwark of freedom: ‘the lamp that shows that freedom lives’ [3]. Yet, despite these strong demonstrations of support, the use of jury trials was nearly abolished recently in all but the most serious of criminal cases in England and Wales [4]. The right to trial by jury has attracted a number of vociferous critics who hold deep reservations about the use of juries [5]. While only a minority desire complete abolition, critics are in wide-scale agreement on the need to restrict their use. For example, they are quick to point out that the emergence of the jury trial is more of an historical accident than a conscious decision by any single legal body, evolving in ‘a piecemeal and haphazard fashion’ [6]. Indeed, there does not seem to be any clearly perceptible nor rational justification for the jury’s historical use in criminal trials [7].

Unsurprisingly, critics like Penny Darbyshire argue that the jury trial ‘seems to attract the most praise and least theoretical analysis’ [8]. She says:

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The symbolic function of the jury far outweighs its practical significance . . . this sentimental attachment to the symbol of the jury is dangerous. Adulation of the jury is based on no justification or spurious justification [9].

Indeed, some dispute that there is any ‘right’ at all to a trial by jury, arguing that most countries which use jury trials lack legal guarantees and that defendants lack a choice to opt for a trial by judge without a jury [10]. In addition, there does not appear to be any right to lay justice under the *European Convention on Human Rights* [11]. Moreover, most countries do not have jury trials, opting instead for mixed tribunals where judges sit and decide cases with jurors [12]. In countries with jury trials, this mode of trial is used infrequently, at best. For example, in England and Wales, only about two percent of all cases are tried by juries. In Australia and Scotland, the figure is less than one percent.

This article offers a theoretical justification for the continued use of jury trials. It is *not* my contention that all human beings possess an inalienable right to be tried by a jury. However, I do believe the judiciary is obliged to decide cases correctly. That is, a judicial system is best when it attributes guilt or innocence to deserving persons as well as possible. In addition, it is often thought that a judiciary should be both impartial and transparent to ensure, as well as safeguard, that the judiciary adjudicates correctly. Consequently, I shall critically examine the following three issues: our ability to decide just verdicts, judicial impartiality, and judicial transparency. My contention is that the judicial system that best satisfies these values is *most* preferable — and that juries satisfy these values, all things considered.

Of course, these three values are not the only factors relevant for consideration. Empirical evidence demonstrates that juries foster both democratic participation and public legitimization of legal decisions regarding the most serious cases, typically serious criminal cases. However, juries are costly and, therefore, economically less efficient than competing modes of trial. It is my hope that this analysis will make clear what we might gain or lose when we propose jury reforms.

## **1. Deciding just verdicts**

The most fundamental argument of the jury trial’s critics is that jurors are less capable than judges at deciding legal cases correctly: juries are more vulnerable to render mistaken verdicts. This criticism revolves around two key issues: the role of the judiciary in a modern, liberal democracy and an epistemic claim about the best manner of ascertaining just verdicts in trials.

### *1.A. The role of the judiciary*

One major problem for critics of jury trials is the fact that juries render different verdicts on occasion from those professional judges would have given. Critics argue that when this happens, juries are effectively rewriting the law, something neither juries nor judges should do [13]. For example, Judge R. J. O’Hanlon says:

it is often put forward as one of the merits of the jury system that a jury can bring about changes in the law of the land by refusing to enforce laws which

appear to them to be unjust or oppressive in some way . . . What this means in reality is that the jury, having taken an oath that they will ‘true verdicts give according to the evidence’ have broken their oath by refusing to give effect to the law of the land. They have usurped the role of parliament which is entrusted by the people with the task of making laws which are in conformity with the will of the people. However pardonable such action on the part of the jury may be in defiance of an oppressive and autocratic regime, it is indefensible in a modern democracy where fundamental rights and freedoms are protected by the country’s constitution [14].

O’Hanlon should not suggest that — *contra* juries — judges never adjudicate in a similar manner. In fact, as Derbyshire notes, lay justices and judges ‘are frequently criticised for their irrational and inconsistent sentencing patterns and gratuitous remarks’ [15]. Indeed, in jurisdictions where the judiciary offers reasoned judgements for its decisions — such as the United States’ Supreme Court — it has been observed that politics is ‘inherent in the judicial process’ [16]. As a result, this ‘problem’ of judicial decisions failing to apply relevant laws does not lie solely with activist juries.

Nevertheless, the idea that the court’s function is to apply, not create, the law is popular in both civil and common law jurisdictions [17]. In France and Germany, there is not a strict doctrine of precedent: the law can be applied with some variation in identical cases by the courts [18]. Their claim is that the creation of judicial precedent effectively creates new laws. There is something substantive to this claim. For example, abortion was not made legal in all fifty American states by legislative mandate, but by the high court decision *Roe v Wade* [19]. Thus, the use of judicial precedent may in effect ‘make new laws’, although it is important to note the fact that the decisions of juries do not hold any precedent.

What justifies the right of juries to refuse to adjudicate according to laws that might appear unjustified to them? Critics charge that both judges and juries should always apply the relevant case law without reservation. This is a gross misunderstanding of the judiciary’s role, which is to determine the *applicability* of law [20]. For example, consider the relationship between a national legislature and a local government. We might attempt to plot this relationship on a linear scale: on one side is the national legislature whose laws have universal scope; on the other side is the local government which can only legislate for a particular locality at the discretion of the national government. Both legislative bodies have the ability to legislate. The difference is that the scope of one is far wider than that of the other.

Courts might be thought of similarly. On one end of the scale might lie the constitutional courts; on the other courts of first instance with a jury. Both of these judicial bodies have the ability to adjudicate. For instance, constitutional courts do not have the power to ‘make’ new laws or even to enforce laws. On the contrary, they only have the power to declare whether or not certain legislation ought to be recognised — that is, whether or not it is constitutional. In this manner, the judiciary acts as a check on the executive and legislative branches by prescribing their scope of power [21]. Constitutional courts have the ability to nullify or uphold universally any law. Jury courts have similar powers with much less scope. As a judicial body, juries have the right to adjudicate. In a way not dissimilar to the role of local government in the legislative

branch, the jury's power extends to its particular jurisdiction only. For juries, this jurisdiction is the particular trial which confronts them.

If we were to argue that juries lack a right to determine the applicability of laws limited to their particular cases, this bottom tier of the judiciary would lack the ability to function as a part of the judiciary. Indeed, we have no similar expectations with other branches: we accept the right of local government to make laws limited in scope and local police to enforce law and order in their communities. Thus, juries in no instance can be said to usurp power from the legislature. Juries can only do what all judicial bodies are entitled to perform: determine the applicability of the law. The difference between the constitutional court and the jury is that the former determines the law's applicability in *all* cases and the jury determines applicability in the *particular* case they have been selected for [22]. It therefore makes a great deal of sense to see that the decisions of juries carry no precedent — as their powers to adjudicate are limited to a single case — whereas higher court decisions carry greater precedent — as their powers have wider scope [23].

### *1.B. Does the combined wisdom of twelve randomly selected jurors surpass the professional judge's ability to decide a case?*

It is difficult to ascertain how often a jury or judge render a 'correct' verdict, owing to the general fallibility of human knowledge in determining responsibility. Critics tend to determine how often juries decide cases correctly by comparing how often judges would have decided the same case likewise, implying that these judges, in turn, always decide cases correctly — which is not entirely justified. Nevertheless, it is striking how often juries and judges agree. In their classic study, Harry Kalven and Hans Zeisel found that judges and jurors agreed at least seventy-eight percent of the time [24]. This is not to say that juries made mistakes in twenty-two percent of cases (nor were correct in all other cases), but only that judges would have decided differently if given the chance. These findings are similar to studies of mixed tribunals in civil law jurisdictions [25]. In general, civil law mixed tribunals return unanimous decisions up to ninety-five percent in some jurisdictions [26].

All things considered, it is amazing how well juries have been able to perform their function at all. In most instances, the jury is forbidden from taking down notes during the trial. Jurors lack transcripts of the case when deciding on a verdict and, instead, rely primarily on oral evidence. Unsurprisingly, former jurors have suggested that their job would be much improved if the judge outlined the jury's role and essential laws pertaining to the case at the trial's onset and they were permitted to take notes during the trial and refer to them in jury deliberations [27]. Indeed, there is every reason to believe these amendments would further improve jury decision-making.

A further possible reason for disagreement between judges and juries on verdicts may stem from the influence of inadmissible evidence on the judge's decision. In jury trials, the judge endeavours to shield the jury from as much inadmissible evidence as possible. Thus, while the jury decides a case with  $n$  facts, a judge decides a case with  $n+1$  facts whenever he has been exposed to inadmissible evidence [28]. Perhaps in a majority of cases judges can separate acceptable versus inadmissible evidence during the course of a trial when coming to their verdicts. However, it might be rather difficult for any judge in a case involving scant circumstantial evidence to be unpersuaded

by damning, yet inadmissible, DNA evidence linking the accused with his alleged crime.

Critics argue that a judiciary administered by professionals, instead of a jury, would ensure verdicts of greater uniformity and consistency with precedent. At present, most trials in common law jurisdictions *are* juryless: about ninety percent of all cases are presided over by a judge or magistrate sitting without a jury [29]. Of course, not all judges agree with each other. For example, in *Bush v Gore* [30] judges could not agree on the relevant facts of the case nor applicable legislation and precedents. Judges and magistrates have been criticised frequently for ‘their irrational and inconsistent sentencing patterns and gratuitous remarks’ [31]. In addition, even ardent defenders of juryless trials admit ‘the quality of ratiocination by Diplock Court judges has not always been uniformly high’ [32]. Although one might *prima facie* be tempted to argue that judges would provide more uniform verdicts than juries, it would appear that this has not been the case in practice.

Even if juries performed adequately in a majority of cases, critics argue that juries are much less capable of deciding complex cases (especially fraud) than a professional judge. This claim is largely theoretical, based on the following considerations: (*i*) since well-educated persons are better at understanding complex cases than less educated persons and (*ii*) as professional judges are generally better educated than most members of a jury, then (*iii*) professional judges would better adjudicate complex cases than a jury. On these grounds, all complex cases ought to be decided by a judge sitting without a jury. There are several problems with this argument [33]. A British law reform committee found no evidence for a higher rate of acquittals in fraud cases versus other criminal cases [34]. In fact, the complexity and vagueness of fraud trials was blamed for causing problems for juries, leading the committee to argue for simplification of the legal code [35]. This committee found that lawyers deliberately appeared to confuse jurors in fraud trials [36]. A minority opinion of the committee said: ‘Most judges and lawyers who made submissions to us thought that juries mostly reached the right result, or at least an understandable result’ [37]. Indeed, past studies strongly suggest that practising judges do *not* find juries particularly gullible [38]. Thus, if there is evidence of jury confusion, then something else may well be to blame for it. As a result, arguments alleging that juries are inferior to judges at adjudicating complex fraud cases are unsubstantiated.

In most jurisdictions, jury decisions are possible only by a unanimous decision. If the jury cannot decide with unanimity whether to acquit or convict, then the jury is ‘hung’ and the trial must be conducted a second time with a new set of jurors. Most studies demonstrate crucial differences between juries where a majority prevails and juries where only unanimity prevails [39]. Majority decision juries tend to be ‘verdict-driven’, where the goal of jurors centres on arriving at a verdict category and fashioning a story to justify the decision afterwards. On the other hand, juries requiring a unanimous verdict are ‘evidence-driven’ as dissenting jurors may hang a jury [40]. It is thought that because only one or two dissenting jurors can hang the jury, jurors engage in a more thorough analysis of the evidence in order to persuade others into unanimity. Unsurprisingly, jurisdictions are increasingly coming to favour majority verdicts as they make it easier to prosecute defendants successfully. One problem with this approach is that it discourages jurors from more thoroughly investigating the evidence in their deliberations. A second problem is that majority verdicts give greater weight

to convicting the guilty at the expense of acquitting the innocent [41]. If distributing just deserts is a judicial virtue we should promote, then we may be more justified in preferring unanimous verdicts over majority decisions.

Of course, juries, as well as judges, make mistakes [42]. For example, some research suggests that juries convict defendants on occasion due to the charisma and performance of barristers rather than on the basis of the evidence [43]. In addition, juries may not be solely to blame for their decisions, as studies have revealed that judges possess great influence on jury decision-making [44]. Nevertheless, virtually all studies have demonstrated a greater tendency for caution when choosing verdicts with juries, as they are more lenient than judges in about nineteen percent of cases: in only three percent of cases were juries less lenient than judges [45]. One consequence is that it is generally more difficult to convict a person in a jury trial than in trials by a judge sitting without a jury [46]. While juries have convicted innocent persons, they may be less likely to do so than a judge, owing to widespread agreement on most cases and a greater tendency to opt for acquittal. It is often overlooked by critics of jury trials that if juries decide incorrectly, there is a legal right of appeal to a professional appellate court in certain circumstances — although this is exceptionally rare. Thus, if critics believe that ultimately judges are better decision-makers than juries, this is not necessarily a conclusive reason to end jury trials, all things considered, as *only judges* are entitled to make final legal decisions.

## 2. Impartiality

One of the hallmarks of a just judiciary is its impartiality in adjudicating cases [47]. Judicial impartiality is thought to stem from an independence from the disputing parties, as well as from an ability to treat each side with similar consideration. Critics charge that juries are less impartial because they are more likely to acquit than judges [48]. Of course, the converse is equally true: judges may be less impartial because they are more likely to convict than juries. In fact, the acquittal rate of juries is twenty-seven percent, just barely more than magistrates' [49]. While a slightly greater tendency towards acquittal is not proof that juries are less impartial than judges or magistrates, there is a notably 'high rate of correspondence between the views of prosecutors and magistrates' decisions' [50]. Indeed, critics such as Jackson and Doran concede that judges are not independent of the environment within which they work and 'any pressure to increase quantitative output at the expense of qualitative output could work to the disadvantage of defendants' [51]. If British magistrates must 'bring qualities of impartiality and fairness' to bear on cases, we may have more reason to question their ability to adjudicate impartially rather than juries' [52].

A second more serious criticism of jury impartiality involves suggestions of jury 'nobbling' (i.e., jury intimidation) in cases involving gang-related or politically-motivated offences [53]. To counter these suggestions, some critics believe we should either abolish jury trial or curtail access to jury trial even further [54]. While the fear of jury intimidation persuaded the United Kingdom Parliament to introduce juryless trials in Northern Ireland in alleged terrorism cases, there is *no* hard evidence — nor any successful prosecution — of 'nobblers' to support these allegations [55]. Indeed, there is no suggestion that nobbling occurs in the vast majority of criminal trials. This

raises the question: why should we think that juries — which decide verdicts by super majority vote in England and Wales — are *more* likely to be affected by intimidation than a single judge or a lay magistrate? If juries are more vulnerable to intimidation, it seems reasonable to provide to them the effective police protection afforded to judges and magistrates. One solution would be to redesign court-rooms by putting the jury-box under the public gallery and out of public view in order to protect the jury [56]. Moreover, if a party wanted to influence the jury, they would have to successfully intimidate three or more jurors to acquit: there would only be a single judge to target if the trial were juryless [57].

A third criticism regards the process of choosing jurors for a trial. Ideally, jurors are chosen to reflect the views of the greater community [58]. It is thought that jurors should be randomly selected from the electoral roll, making the juries impartial. In the words of Lord Denning: 'We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole and thus represent the view of the common man' [59]. Critics are right to claim 'randomness is treated as a synonym for representativeness' as juries often fail to represent a cross-section of the population [60]. This problem is easy to fix: there should be some form of stratified sampling to ensure a better cross-section of society. Thus, the current failure of juries to be as representative as *they could be* is not a good reason to abolish trial by jury.

However, neither randomness nor representativeness should be equated with impartiality. Either method may yield jurors harbouring prejudices that unfairly influence how they weigh evidence. Jury impartiality can be better ensured by removing persons suspected to harbour prejudices. The most extensive use of jury vetting takes place in the United States through *voir dire* [61]. For example, in capital trials, approximately twenty percent of potential jurors are disqualified owing to their reservations against the death penalty. As a result, the final composition of capital juries contrasts greatly with that of the general American populace [62]. The main problem with *voir dire* is not that it produces an *unrepresentative* jury, but rather that it is not used in order to create an *impartial* jury. Instead, lawyers on both sides endeavour to select jurors that are more favourably predisposed to their particular cause. While *voir dire* may be performed for these unsatisfactory reasons, juries are selected through compromise, as both sides must come to some agreement on a jury's composition. Thus, a jury is seen to be impartial insofar as both parties are satisfied relatively equally with the jury's composition. On the other hand, in England and Wales, only the prosecution can, without cause, remove potential jurors from participating in a case thus making a jury's impartiality less likely, at least in the eyes of the accused [63].

It is often taken for granted by critics that judges are impartial. Judges are almost always appointed by politicians or popular election, either method presenting numerous difficulties. Judges who are political appointments are generally chosen owing to their prejudices for certain doctrines or ideological positions, rather than on the basis of their commitment to impartiality. The practice of direct popular election of judges has had a number of bad consequences, and it is still a common manner of selecting judges in a number of American states. In *Ring v Arizona* [64], the US Supreme Court ruled that only juries could impose a death sentence on persons convicted of a capital crime. A contributing reason for the decision is the common practice of judges' running for office to campaign on how many murderers had been sentenced to death in jurisdictions where there was popular support for the death penalty. If anything,

popular elections of judges in the United States will almost ensure a lack of judicial impartiality [65].

I would argue that juries may well be both more impartial and representative than judges. Of course, neither judges nor lay justices are representative of the community at large [66]. Yet, more importantly, *only* juries may be better predisposed to render verdicts from a standpoint of greater impartiality — as prejudiced jurors are more easily removed prior to trial, they are chosen at random instead of as a result of political activism or popular election, and shielded from inadmissible evidence — while being more representative of the larger society.

### **3. Transparency**

Crucial to judicial transparency is the law's publicity. For example, suppose the state kept its laws secret to all except government officers. Upon arrest, citizens would continue to be unaware of what law they had violated nor would they be told the reason for detention. In such instances, legal punishment is an arbitrary injustice. Judicial transparency requires publicity of the law so that most, if not all, persons have knowledge of what the legal code is. Additionally, transparency requires that anyone charged with violating a law be told which law she may have broken.

It is, of course, the state's responsibility to make its citizens familiar with its laws. But what mechanism ensures the state will do this? If all court proceedings were conducted in private, citizens might be educated to believe that the law says one thing when, in fact, the law is something quite different in actual practice. Yet, it is not inconceivable to imagine great confusion regarding the content of the law even if all proceedings were held in public. Every specialised profession — including law — develops its own terminology that may be indecipherable to those in different fields. Persons can be charged and convicted of crimes in a public hearing, but the legal arguments against them might sound as if the solicitors were speaking an unknown foreign language. It is easy to see the possibility of courtroom debate becoming the exclusive domain of legal professionals, whereby judicial transparency is not realised despite well publicised proceedings [67].

By involving citizens without a legal background in the judicial process, legal professionals must endeavour to persuade without recourse to their specialised terminology. In his *Philosophy of Right*, G. W. F. Hegel notes that professional courts without juries may adjudicate perfectly well. However, there is a danger: 'knowledge of right and of the course of court proceedings, as well as the ability to pursue one's rights, may become the *property* of a class which makes itself exclusive . . . by the terminology it uses' [68]. Indeed, the more important nonprofessionals are in deciding a verdict, the greater chance transparency has to take root. If two citizens had to decide the guilt or innocence of an accused alongside ten professional judges and only ten votes were sufficient to acquit or convict, the influence of the citizens might be entirely negligible. However, if only nonprofessionals had a say in the verdict, their influence would be central to the administration of justice. Even if nonprofessional juries adjudicated less well, they would be preferable on grounds that they would best safeguard the transparency of judicial decision-making.

Some claim that the best safeguard against unfair convictions is the deliverance of a judgement, rather than a verdict. Justice O'Hanlon of the Irish High Court argues:

The difference between the judge sitting alone and the jury is that the judge . . . has to explain how he arrived at his decision and justify it in the light of the evidence that he has heard and rules of law he is called upon to apply. The jury operates under none of these constraints [69].

Critics point to the fact that only judges are required to give an explanation for their verdict: juries can elect to acquit or convict for any reason they wish. Furthermore, all jury deliberations are conducted under a veil of secrecy. Transparency would be better facilitated if the jury gave reasoned judgements. The critics' position has been reinforced by the decision *Van De Hurk v The Netherlands* [70], where the European Court of Human Rights ruled that the courts of member countries are obliged to provide reasons for their decisions.

Jury deliberations once took place in the court-room in full view of the public. Juries were later allowed to deliberate in private because it was thought that holding their discussions in public was hampering 'frank discussion and expression of views' [71]. In a sense, the privilege granted to juries is akin to those of diplomatic negotiators. Jurors might not vote their conscience if transcripts were made public of every sentence uttered in jury-room deliberations. This is not an argument against delivering a reasoned judgement, but rather for private consultation in coming to a judgement. The decision by the European Court of Human Rights need not demand that juries create elaborate explanations for their verdicts. The Court might be satisfied with a system whereby the presiding judge draws up a list of questions the jury must provide answers to. The accused would then see the points his case rested upon and how these points affected the final verdict. One major problem we ought not to overlook is that the workload of most judiciaries would increase substantially [72]. However, this process would ensure greater transparency in jury decision-making.

We would be mistaken to think that judges offer well-reasoned judgements in every instance. For example, judges need not provide judgements in cases involving plea bargaining, a practice prevalent in all contemporary common law jurisdictions. It is well-known that the vast majority of persons accused of criminal activity plead guilty in court [73]. A guilty plea is usually enough to secure conviction. In plea bargaining, solicitors strike a deal. The defendant is charged with a crime punishable by sentence  $x$  if found guilty. If the accused is willing to plead guilty before trial, they will be punished by a lesser sentence. In *United States v Ruiz* [74], the US Supreme Court ruled that a defendant who refuses a 'fast track' plea bargain, but pleads guilty prior to trial, forfeits her chance of receiving a reduced sentence and/or reduced charges. Undoubtedly, plea bargaining punishes those who exercise their right to trial, either by judge or jury.

In addition, plea bargaining runs contrary to the judicial virtue of distributing just deserts, as it rewards people who are genuinely guilty with less severe penalties and denies defendants a presumption of innocence. When defendants simply plead guilty, guilt is *not* demonstrated beyond a reasonable doubt. Some studies have found that as many as eighteen percent of defendants who had pleaded guilty believed themselves innocent on at least one charge [75]. Perhaps worryingly, the most common reason given for pleading guilty was their own lawyer's advice while under great pressure [76].

This is not entirely due to a lawyer's laziness: British legal advisors are under a legal obligation to warn clients of the risk of losing credit by delaying a guilty plea. Contrary to *Turner* [77], judges seem to indicate the likely sentence upon a plea of guilty [78]. This may strongly influence persons accused of wrongdoing. Indeed, there are many incentives for innocent persons to enter a guilty plea. Sanders and Young argue:

These incentives include less time spent inside the system (as more time is needed to prepare a contested case than a guilty plea), less time spent in court (it takes longer to fight a case than to concede it), lower court costs, the chance to mitigate on the basis of remorse, sparing any defence witnesses (such as friends or family) the ordeal of testifying, [and] sparing oneself the ordeal of cross-examination [79].

If the problem with juries is that they do not give reasoned arguments for their decisions, this is not cause to abandon juries, since judges rarely give reasoned arguments at this judicial level. Moreover, plea bargaining often takes place behind closed doors. Indeed, some argue that the only thing wrong about the way plea bargaining is performed is 'the secrecy and Old Boys' manner in which it is conducted' [80]. Thus, the practice does not promote either transparency or distributing just deserts. There is no reason for this to be the case, as most civil law jurisdictions do not recognise formal pleas of guilt.

## Conclusion

The modern legal right to trial by jury is not rationally justified in history, its roots in the Norman compilation of the Domesday Book. Consequently, critics make the mistake of thinking the use of juries is unjustifiable. This article provides a theoretical justification for the continued legal right to trial by jury. There is widespread agreement on verdicts amongst judges and juries. When they disagree with judges, juries may be said to err on the side of caution. Juries may also be more impartial than judges, as jurors are not political appointees nor elected to office and they are more easily vetted for prejudice. In addition, only the use of jurors in judicial decision-making may ensure transparency. All things being equal, if juries are as competent as judges — if our main concern is rendering just verdicts — and juries better ensure impartiality and transparency as I claim, then a judicial system using jurors is superior to a judiciary run exclusively by professional judges [81].

This system is certainly expensive, and maximising systemic efficiency is an important consideration. For example, if we had to choose between two criminal justice systems that were equal in every regard other than cost, it might make more sense to choose the less expensive option. However, if one system better administers justice than the other and is only marginally more expensive, we may compromise justice in cutting costs. By 'compromise justice' I do not refer to an overly abstract conception, but claim instead that impartiality and transparency are compromised, as well as increasing the likelihood of guilty verdicts for innocent persons [82]. It can be argued that attacks on jury trials are attempts to sacrifice these values and that the jury has been made into a scapegoat for defects elsewhere in the criminal justice system [83]. It seems clear that cost, efficiency, and 'a more acceptable conviction rate' underlie most reforms of the

modern jury trial [84]. Indeed, the Runciman Commission endeavoured to balance convicting more persons with greater ‘value for money’ [85]. Reforms made in order to streamline the criminal process fail to take account of the fact that cases come to trial more quickly in Crown Court than in the magistrates’ court [86] and the Crown Court is not overburdened by its case load [87]. In fact, one critic even admits that if the practice of plea bargaining is banned, the Crown Court ‘will not collapse under the strain’ [88]. Rather than improve the criminal justice system, perhaps the British government’s principal aim in reforming jury trials is to save the Treasury more than £120 million [89]. The ability to secure convictions more efficiently appears to outweigh other concerns.

Finally, all concede that the jury helps legitimate trial outcomes in the eyes of the public [90]. Studies have demonstrated that jury participation increases civic awareness and participation [91]. Indeed, the legal right to jury trial is viewed by most citizens as ‘something of irreplaceable value’ [92]. Jurors and judges rate trial by jury as either a good or very good system [93]. Any attempts to restrict or abolish this legal entitlement ought to be subjected to the highest scrutiny, and they are not.

Blackstone argued: ‘let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters’ [94]. I hope we see can jury trials as an institution justifiable and worthy of retention [95].

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## NOTES

- [1] The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents in RALPH KETCHUM (ed.) (1986) *The Anti-Federalist Papers and the Constitutional Convention Debates* (Harmondsworth, Penguin), p. 250.
- [2] *Ex parte Milligan*, 71 U.S. 2 at 65 (1865) (Montesquieu). Statement of advocate, not the Court.
- [3] See LORD DEVLIN (1956) *Trial by Jury* (London, Methuen), p. 164.
- [4] See CLARE DYER (9 October 2001) Criminal Justice Review urges removal of right to trial by jury, *The Guardian*, p. 15. More recently, the current Labour government has tried (and failed) for the third time in three years to curb rights to jury trial. (See my (2003) The future of the right to trial by jury, *Philosophy Today*, 17, pp. 2–4 and MICHAEL WHITE (16 July 2003) Peers snub Blunkett on jury trials, *The Guardian*, p. 1.)
- [5] Perhaps the best representation is from JUDGE JEROME FRANK: ‘While the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour’. (*Skidmore v Baltimore and Ohio Railroad*, 167 F. 2d. 54 (1948).) See ANDREW ASHWORTH (1998, 2nd Edition) *The Criminal Process: An Evaluative Study* (Oxford, Oxford University Press); LOUIS BLOM-COOPER (2001) Article 6 and modes of criminal trial, *European Human Rights Law Review*, 1, pp. 1–14; PENNY DARBYSHIRE (1991) The lamp that shows that freedom lives — is it worth the candle? *Criminal Law Review*, pp. 740–52; and R. J. O’HANLON (1990/1992) The sacred cow of trial by jury, *Irish Jurist*, 25/27, pp. 57–68.
- [6] O’HANLON op. cit., p. 65. Regarding England and Wales, DARBYSHIRE says: ‘There is little legal logic or design . . . They have simply evolved through the last 10 centuries or more. (op. cit., p. 741.) Interestingly, Scotland developed quite differently than England, Wales, or Ireland, despite being a close cousin of their common law tradition. (See PETER DUFF (2000) The defendant’s right to trial by jury: a neighbour’s view, *Criminal Law Review*, pp. 86, 89.)
- [7] For a general history, see J. H. BAKER (1990, 3rd Edition) *An Introduction to English Legal History* (London, Butterworths), pp. 84–111; Sir WILLIAM BLACKSTONE (1825, 16th Edition), *Commentaries on*

- the Laws of England* (Vol 4) (London, Butterworths); and THOMAS GREEN (1985) *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: University of Chicago Press).
- [8] DARBYSHIRE op. cit., p. 740.
- [9] DARBYSHIRE op. cit., p. 741. Baldwin and McConville suggest that ‘the very conception of a jury might be thought absurd’ (JOHN BALDWIN and MICHAEL MC CONVILLE (1979) *Jury Trials* (Oxford, Clarendon), p. 1.)
- [10] On lack of constitutional right, see DARBYSHIRE op. cit., p. 743; JOHN JACKSON (2002) Modes of trial: shifting the balance towards the professional judge, *Criminal Law Review*, pp. 253–54; and O'HANLON op. cit., p. 58. It is argued that Britain could simply abolish jury trials by an Act of Parliament. Most states in Australia, Canada, the Republic of Ireland, and the United States, amongst other countries have constitutional rights to trial by jury. On lack of right due to a lack of choice, see DARBYSHIRE op. cit., pp. 743–44; BLOM-COOPER op. cit., p. 13; and SEAN DORAN and JOHN JACKSON (1997) The case for jury waiver, *Criminal Law Review*, pp. 155–72. Many argue that only defendants in places with right of jury waiver have a right to trial by jury as they have the option to be tried by judge without a jury.
- [11] See JACKSON op. cit., p. 254. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) states in Article 6, section 1: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.
- [12] The following countries permit trial by jury for serious criminal offences: Australia, Belgium, Canada, England, New Zealand (*Bill of Rights Act* [1990], s. 25(e); *Crimes Act* [1961], ss. 361b–c), Northern Ireland, the Republic of Ireland (*Bunreacht na hÉireann*, Art. 38 (1937)), Scotland, the United States of America (*U.S. Constitution*, Sixth Amendment (1789)), and Wales. Spain’s constitution permits trial by jury, but it has not been utilised. Sweden uses elected lay assessors. On Canada, see GRAHAM PARKER (1987) Trial by jury in Canada, *Journal of Legal History*, 8, pp. 178–89. On the Republic of Ireland, see J. M. KELLY (1967, 3rd Edition) *Fundamental Rights in the Irish Law and Constitution* (Dublin, Allen Figgis), pp. 293–94. On the United States, see WILLIAM B. LOCKHART, YALE KAMISAR, and JESSE H. CHOPPER (1970, 3rd Edition) *Cases and Materials on Constitutional Rights and Liberties* (St Paul, West Publishing), pp. 314–22 and UNITED STATES (2001, 5th Edition) *Federal Jury Practice and Instructions*, §1.01–3 (2001).
- [13] DARBYSHIRE argues: ‘What business have the jury to be rewriting the law? . . . The jury is an anti-democratic, irrational and haphazard legislator, whose erratic and secret decisions run counter to the rule of law’. (DARBYSHIRE op. cit., p. 750.)
- [14] O'HANLON op. cit., p. 68. See BLOM-COOPER op. cit., p. 6: ‘There can be no room for what the jury perceives to be an oppressive law, and to decline to apply it’.
- [15] DARBYSHIRE op. cit., p. 751.
- [16] See EDWARD LAZARUS (1999) *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (Harmondsworth, Penguin) and KAREN O'CONNOR (2001) The Supreme Court and the South, *Journal of Politics*, 63, p. 702.
- [17] German philosophers such as FICHTE and HEGEL even questioned whether the judiciary could ever be independently separate from other governmental branches of power: if the executive’s duty is to apply universal laws approved by the legislature in particular cases, then the judiciary is best seen as part of the executive. (See J. G. FICHTE (2000) *Foundations of Natural Right: According to the Principles of the Wissenschaftslehre*, F. NEUHOUSER (ed.), M. BAUER (trans.) (Cambridge, Cambridge University Press), pp. 142–43 [§16:161–62]; and G. W. F. HEGEL (1991) *Elements of the Philosophy of Right*, A. W. WOOD (ed.), H. B. NISBET (trans.) (Cambridge, Cambridge, Cambridge University Press), pp. 308 [§273], 328 [§287], and 330 [§290 Addition].)
- [18] This is not to say that the system suffers from irrationality, as lower courts do tend to follow decisions of higher courts. Nor would it be true to say that detailed judgements with full statements of statutory and judicial authority for decision are not given. (See RAYMOND YOUNGS (1998) *English, French and German Comparative Law* (London, Cavendish), pp. 51–53.)
- [19] 410 U.S. 113 (1973).
- [20] See my A defence of jury nullification, *Res Publica*, forthcoming.
- [21] One consequence is that juries serve as a popular check on the legislative and executive branches. Of course, democratic citizens have the ability to exert accountability to politicians, but the citizenry may only do so generally, either for or against a candidate. Citizens largely lack a means to have an influence on particular legislation (especially if not high profile). Juries are best suited for democratic citizens to

have a say on particular laws normally beyond their grasp. In this sense, juries expand democratic checks and balances.

- [22] It may be said a problem with my analogy is that constitutional courts appeal to a constitution, but juries may not have anything to appeal to. When constitutional courts render a verdict in a particular appeal this verdict is decided upon as the best available option in keeping with the rule of law and becomes precedent, as well as part of constitutional law. I would argue juries likewise appeal to the rule of law but their verdicts apply only to one trial alone.
- [23] For an elaborate defence of jury nullification, see my op. cit. and *United States v Moylan*, 417 F. 2d 1002 (4th Cir. 1969) at p. 1006.
- [24] HARRY KALVEN, Jr, and HANS ZEISEL (1966) *The American Jury* (Boston, Little, Brown, & Co.), p. 63.
- [25] As an example, the French use a mixed tribunal — the *Cour d'assises* — in criminal cases where the maximum punishment is six months or greater. The tribunal is composed of three judges sitting with nine jurors chosen from the electoral register. The presiding judge questions the accused prior to the introduction of witnesses. Jurors are entitled to ask questions of the accused and any witnesses at the discretion of the presiding judge. At the conclusion of the trial, the judges and jurors retire together to deliberate and choose a verdict. A majority of at least eight are required to issue a guilty verdict.
- [26] SANJA KUTNJAK IVKOVIĆ (1997) Lay participation in decision making: A Croatian perspective on mixed tribunals, *Howard Journal of Criminal Justice*, 36, p. 407.
- [27] See TREVOR GROVE (2000) *The Juryman's Tale* (London, Bloomsbury). In *R v James Edward Jeffs and Others* [unreported, 28 April 1978] decided by the New Zealand Court of Appeals, the Court said: 'As a court of three judges we have enjoyed many advantages that were not shared by members of the jury who tried the case'. (MICHAEL LEVI (1988) The role of the jury in complex cases in M. FINDLAY and P. DUFF (eds.) *The Jury Under Attack* (London, Butterworths), p. 98.) See *Mechanical and General Inventions Co. v Austin* [1935] A.C. 346, at 356.)
- [28] See KALVEN and ZEISEL op. cit., pp. 121–32.
- [29] Not all judges enjoy their isolation in decision-making, preferring a means — such as jury trial — where adjudicators have an opportunity to deliberate options before coming to a final verdict. (See JUDGE CHARLES W. JOINER (1975) From the Bench in R. SIMON (ed.) *The Jury System in America: A Critical Overview* (London, Sage), p. 146.)
- [30] 531 U.S. 98 (2000).
- [31] DARBYSHIRE op. cit., p. 751; PENNY DARBYSHIRE (2000) The mischief of plea bargaining and sentencing awards, *Criminal Law Review*, pp. 906–7; and ENRIGHT and MORTON op. cit., p. 91.
- [32] BLOM-COOPER op. cit., p. 8.
- [33] Even if we were to grant that premises (i) and (ii) are correct, we need not accept the conclusion (iii) that judges should sit without a jury. Instead, this could be grounds for greater investment in public education enabling improved citizen performance. Or one might suggest we ought to be more selective of who sits on the jury, as one British commission has done. (LORD JUSTICE AULD (2001) *Review of the Criminal Courts of England and Wales* (London, HMSO), para. 191 and CORKER op. cit., p. 291.)
- [34] ROSKILL COMMITTEE (1986) *Fraud Trials Committee Report* (London, HMSO), para. 8.35. Unfortunately, the committee appears to have accepted mistakenly the *a priori* argument against the use of juries in fraud trials: 'Nevertheless, we do not find trial by a random jury a satisfactory way of achieving justice in cases as long and complex as we have described. We believe that many jurors are out of their depth'.
- [35] There are eight separate offences of deception, but no one offence of fraud in the criminal code: 'The result is that the wrong offence may be charged, leading to unjustified acquittals. Several different offences may need to be charged in one indictment to cover all the fraudulent conduct, leading to long and confusing trials'. (CLARE DYER (30 July 2002) Fraud laws need to be simplified, says Commission, *The Guardian*, p. 9.)
- [36] ROSKILL COMMITTEE op. cit., para. 8.28. See RICHARD W. HARDING (1988) Jury performance in complex cases in M. FINDLAY and P. DUFF (eds.) *The Jury Under Attack* (London, Butterworths), pp. 74–94.
- [37] ROSKILL COMMITTEE op. cit., p. 195.
- [38] KALVEN and ZEISEL op. cit., p. 168. Nor are expert witnesses to blame for potential jury misunderstandings. As DAVID CORKER says: 'in my experience only a small minority of fraud prosecutions are mounted with the assistance of experts'. (CORKER op. cit., p. 289.) One study found that not a single expert witness is called in seventy-two percent of all jury trials (KALVEN and ZEISEL op. cit., p. 139.)
- [39] In a controversial study, it was found that the probability of convicting an innocent defendant might increase with the size of the jury where the jury must arrive at a unanimous verdict. The problem is that

- study did not look at what actual juries did: used strategic voting schemas. (See TIMOTHY FEDDERSEN and WOLFGANG PESENDORFER (1998) Convicting the innocent: the inferiority of unanimous jury verdicts under strategic voting, *American Political Science Review*, 92, p. 23.) In addition, they found that juries make fewer mistakes together than any individual juror as they aggregate information.
- [40] PENNY DARBYSHIRE (2001) What can we learn from published jury research? Findings from the Criminal Court Review, *Criminal Law Review*, p. 974.
- [41] See SANDERS and YOUNG op. cit., p. 568.
- [42] As JUDGE JEROME FRANK argues: 'You can outlaw fraud, but not mistakes — in voting or any other endeavour. Laws exist because, as James Madison reminded us, men are not angels'. (JEROME FRANK (1930) *Law and the Modern Mind* (New York, Brentano), p. 358.)
- [43] DARBYSHIRE, (1991, op. cit.), p. 749. Critics of the common law tradition question whether or not the adversarial method is the best method of legal decision-making. ZWEIGERT and KÖTZ argue that: 'It will be obvious that "adversary procedure" encourages attorneys to go to the very limits of what is morally and professionally acceptable, perhaps sometimes even to overstep them, by "preparing" their witnesses rather intensively for examination and cross-examination, and by dressing up as unalloyed truth what the attorney well knows to be a pack of lies'. (KONRAD ZWEIGERT and HEIN KÖTZ (1998, 3rd Edition) *Introduction to Comparative Law* T. WEIR (trans.) (Oxford, Clarendon), p. 275.)
- [44] See ROBERT W. SHUY (1995) How a judge's voir dire can teach a jury what to say *Discourse and Society*, 6, pp. 207–22.
- [45] KALVEN and ZEISEL op. cit., p. 59. Critics — such as Baldwin and McConville — are troubled particularly by evidence of perverse jury decisions, which they claim is as high as five percent. They do not demonstrate that a juryless system will do better. (BALDWIN and MC CONVILLE op. cit., pp. 86–7.)
- [46] ANDREW SANDERS and RICHARD YOUNG claim: 'It is no exaggeration to say that magistrates' courts are crime control courts overlaid with a thin layer of due process icing'. (ANDREW SANDERS and RICHARD YOUNG (2000, 2nd Edition) *Criminal Justice* (London, Butterworths), p. 548).
- [47] See JOHN RAWLS (1972) *A Theory of Justice* (Cambridge, Harvard University Press), p. 517.
- [48] See ASHWORTH op. cit., p. 257.
- [49] ENRIGHT and MORTON op. cit., pp. 132–35.
- [50] DORAN and JACKSON op. cit., p. 166.
- [51] JOHN JACKSON and SEAN DORAN (1995) *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford, Clarendon), p. 292.
- [52] *R v Birmingham City Justices, ex parte Chris Foreign Foods (Wholesalers) Ltd* [1970] 3 All ER 945 (Lord Parker CJ).
- [53] CORKER op. cit., p. 285. It is probably true to say most intimidation in trials affects victims and witnesses rather than jurors. (See SANDERS and YOUNG op. cit., p. 558n14.)
- [54] See O'HANLON op. cit., p. 68.
- [55] See NICHOLAS BLAKE (1988) The Case for the Jury in M. FINDLAY and P. DUFF (eds.) *The Jury Under Attack* (London, Butterworths), pp. 143–44; STEVEN GREER and ANTHONY WHITE (1988) Restoring Jury Trial to Terrorist Offences in Northern Ireland in M. FINDLAY and P. DUFF (eds.) *The Jury Under Attack* (London, Butterworths), p. 186; and STEVEN GREER and ANTHONY WHITE (1986) *Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offences in Northern Ireland* (London, The Cobden Trust), esp. p. 78.
- [56] See ENRIGHT and MORTON op. cit., p. 153.
- [57] A related worry is general tampering of the jury. In some common law jurisdictions jury tampering may be facilitated by legality of behaviour designed to influence members of the jury *after* a verdict has been rendered. The worry is that this may threaten the jury's impartiality if any juror thought it would be possible to gain a benefit from one of the parties after the trial. (See ERICA SUMMER (2001) Post-trial jury payoffs: a jury tampering loophole, *St. John's Journal of Legal Commentary*, pp. 353–72.)
- [58] 'The law is the expression of the general will. All citizens have a right to take part (*concourir*), personally or by their representatives, in its formation'. (Article VI of *The Declaration of the Rights of Man* (26 August 1789). See SHERMAN J. CLARK (1999) The courage of our convictions, *Michigan Law Review*, 97, pp. 2381–2447.) The International Criminal Court poses an interesting question about jury representativeness. While it might be best always to employ juries, the great scope of the International Criminal Court — as it also has an appellate function — may make the choosing of a representative, impartial jury of the international community practically impossible. (See WILLIAM A. SCHABAS (2001) International Criminal Court: the secret of its success, *Criminal Law Forum*, 12, pp. 415–28.)

- [59] *Crown Court at Sheffield, ex p Brownlow* [1980] QB 530 at 541.
- [60] DARBYSHIRE op. cit., pp. 744–45. Of course, once potential jurors are selected randomly, lawyers on both sides may remove persons under certain conditions. I will defend briefly the use of *voir dire* below as an acceptable alternative.
- [61] See R. MAY (1998) Jury selection in the United States: are there lessons to be learned? *Criminal Law Review*, p. 270.
- [62] See WILLIAM E. CONNOLLY (1999) The Will, capital punishment, and cultural war, in A. SARAT (ed.) *The Killing State: Capital Punishment in Law, Politics, and Culture* (Oxford, Oxford University Press), p. 196; V. P. HANS (1995) Death by jury in N. FINKEL (ed.) *Commonsense Justice: Juror's Notions of the Law* (Cambridge, Harvard University Press), p. 184; BARRY LATZER (1998) *Death Penalty Cases: Leading U.S. Supreme Court Cases on Capital Punishment* (London, Butterworths–Heinemann), p. 155; and *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d. 27 (1986). *Ham v. South Carolina* established the right to question prospective jurors about potential biases they might harbour when the facts of the case suggested that bias might be a problem (409 U.S. 524 (1973)).
- [63] The defence can only remove potential jurors for cause.
- [64] 122 S. Ct. 2428, 2002 WL 1357257 (2002). See my *A Matter of Life and Death: The Use of Judge or Jury in Capital Sentencing*, unpub. TS.
- [65] Problems with judge selection are not specific to the United States alone. Indeed, a recent commission led by Sir Colin Campbell found ‘no clear “audit trail” in the Queen’s Counsel selection system to show the reasoning and judgement when candidates are chosen or rejected’. (DYER op. cit., p. 9.)
- [66] In Britain, the vast majority of judges are white males from a more affluent background. (See CLARE DYER (8 October 2002) Judge selection found to lack transparency: system ‘helps perpetuate a white, male judiciary’, *The Guardian*, p. 9.)
- [67] Indeed, transparency is particularly lacking in the vast majority of court cases which do not employ jury verdicts. It is also worth noting that one good example of professional manipulation of the legal system to the detriment of the general public might be Ireland under British rule. (See DAVID JOHNSON (1996) Trial by jury in Ireland 1860–1914, *Journal of Legal History*, 17, pp. 270–93.) In addition, JACKSON and DORAN argue ‘[t]he gradual waning of the jury’s influence has led in many common law jurisdictions including England and Wales to substantial numbers of cases being concluded on the basis of professional advice and negotiation which is not subject to any open scrutiny’. (JACKSON and DORAN op. cit., p. 298.)
- [68] HEGEL op. cit., p. 258 [§228 Remark]. Emphasis is given. See G. W. F. HEGEL (1995) *Lectures on Natural Right and Political Science: The First Philosophy of Right, Heidelberg 1817–1818 with Additions from the Lectures of 1818–1819* J. STEWART and P. HODGSON (trans.) (Berkeley, University of California Press), pp. 203–5 [§116].
- [69] O’HANLON op. cit., p. 66.
- [70] [1994] 18 E.H.R.R. 481. In *Condron v United Kingdom* [(2000) *Criminal Law Review* 679] the European Court of Human Rights indicated that trial by jury was not necessarily incompatible with Article 6 of the *European Convention on Human Rights*.
- [71] Suggestion of the Discussion Paper of the New South Wales Law Reform Commission on ‘The Jury in a Criminal Trial’ (1985). Cited in The Hon Mr Justice MCHUGH (1988) *Jurors’ deliberations, jury secrecy, public policy, and the law of contempt* in M. FINDLAY and P. DUFF (eds.) op. cit., p. 62.
- [72] CORKER op. cit., p. 293.
- [73] In the United States, ninety-two percent plead guilty, ninety-three percent in British magistrates’ courts, and seventy-three percent in the Britain’s Crown Court. (DARBYSHIRE, (2000, op. cit.), p. 898).
- [74] 122 S.Ct. 2450, 2002 WL 1357244.
- [75] DARBYSHIRE (2000), op. cit., p. 903n69.
- [76] DARBYSHIRE (2000), op. cit., p. 903.
- [77] *R v Turner* [1970] 2 Q.B. 321.
- [78] DARBYSHIRE (2000), pp. 899–900.
- [79] SANDERS and YOUNG op. cit., p. 478.
- [80] MORTON op. cit., p. 1843. In addition, defence counsels are under an obligation to inform the judge of an accused’s admission of guilt. There is no obligation to profess admissions of innocence, even when entering a guilty plea. Thus, the system ‘appears to be prepared to tolerate some frauds more than others’. (SANDERS and YOUNG op. cit., p. 475.)
- [81] In essence, my argument defends the use of lay participation in judicial decision-making and, thus, there are implications for the mixed tribunal system in civil law jurisdictions. Interestingly, lay judges tend to

- agree with professional judges on verdicts as much as 95 percent of the time. (Ivković op. cit., p. 407.) My claim that impartiality and transparency is best facilitated by lay participation in judicial decision-making would apply to common law juries as well as civil law mixed tribunals: mixed tribunals would sacrifice these judicial values in limiting the use of lay judges. However, I accept many of Sanders and Young's criticisms of the inquisitorial method. (See SANDERS and YOUNG op. cit., pp. 13–7.)
- [82] JOHN BRAITHWAITE and PHILIP PETTIT argue that the jury trial's high cost is a good thing as it would justify 'fewer prosecutions, fewer trials', commensurate with their Republican theory of parsimony where less intervention is favoured to more. (J. BRAITHWAITE and P. PETTIT (1990) *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford, Clarendon), pp. 120, 203.) There are several difficulties with their analysis, including the fact they simply assume all criminal trials should be tried by a jury without giving any indication of how exactly *justice* is compromised without jury trials.
- [83] JAMES GOBERT says: 'the jury has become a convenient scapegoat which allows more permanent participants in the criminal justice system — police, lawyers, and judges — to deflect criticism from themselves. The jury not only relieves the judge of the burden of having to make the difficult decision, but also provides the judge with a convenient skirt behind which to hide when a verdict which may have been virtually dictated by the jury's directions fails to meet with public approval'. (J. GOBERT (1997) *Justice, Democracy and the Jury* (Aldershot, Ashgate), p. 62.)
- [84] See ENRIGHT and MORTON op. cit., p. 155.
- [85] See ROYAL COMMISSION ON CRIMINAL JUSTICE (1993) Report (Cm 2263) (London, HMSO), pp. 4–5 and SANDERS and YOUNG op. cit., p. 481.
- [86] DAVID WOLCHOVER and ANTHONY HEATON-ARMSTRONG (2000) The Right to Trial by Jury, *New Law Journal*, p. 158.
- [87] DARBYSHIRE (2000, op. cit.), p. 908.
- [88] DARBYSHIRE (2000, op. cit.), p. 908. Cf. ASHWORTH op. cit., p. 262.
- [89] *The Economist* op. cit., p. 22.
- [90] For example, see DARBYSHIRE, (1991, op. cit.), pp. 740, 744–6.
- [91] See JOHN GASTIL, E. PIERRE DEESS, and PHIL WEISER (2002) Civic awakening in the jury room: a test of the connection between jury deliberation and political participation, *Journal of Politics*, 64, pp. 585–95.
- [92] BRUCE HOULDER (1997) The importance of preserving the jury system and the right of election for trial, *Criminal Law Review*, p. 881.
- [93] See SANDERS and YOUNG op. cit. pp. 598–9.
- [94] BLACKSTONE op. cit., pp. 349–50.
- [95] Earlier versions of this paper were presented at the Association for Legal and Social Philosophy at the University of Newcastle; at the European Ethics Summit at the European Parliament, Brussels; at the Ockham Society at the University of Oxford; and at both the Philosophy Society and the Senior Postgraduate Seminar at the University of Sheffield. I am most grateful to Brenda Almond, Reza Banakar, Chris Bennett, Stephan Blatti, Meagan Brooks, Roger Cotterrell, Matt Matravers, Joe Morrison, James Penner, Jenny Szende, and, especially, Penny Darbyshire, Antony Duff, Fabian Freyenhagen, Peter Jones, Suzanne Uniacke, and an anonymous referee for their very helpful comments on earlier drafts.

# 15 Theories of punishment

The institution of state punishment is so widespread in the contemporary world that the question of justifying its very existence does not often arise. This is partly because the answer seems so obvious. Without any structure of positive sanctions in place, it is assumed, normal social transactions could not be governed by law. Without any mechanism for coercion or enforcement of legal norms, we could hardly speak of a legal system at all. Close analysis of the justification of punishment, however, reveals serious tensions, not only between competing theoretical perspectives but also between conflicting practical attitudes on questions about what kinds of punishment are morally acceptable. Various defences of the existing systems offer inconsistent accounts of the principles underlying punishment. They also collide with proposals for penal reform and even with frankly abolitionist arguments. What philosophical analysis over the last few centuries has aimed at is a clear examination of the principles in conflict here.

## **The problem of justification**

We need first to remember why state punishment requires justification. Like many other common practices, punishment is at least *prima facie* problematic because it involves the kind of treatment that in any other context would be morally indefensible. As is well known, the history of the practice of punishment has spanned the full range, from the mildest of penalties to the most cruel and inhumane treatment imaginable. Even in an age when we like to think that most state punishment is relatively humane, policies such as the death penalty or imprisonment, involving the deprivation of life or liberty, clearly stand in need of justification.

It has often been found instructive to compare this question about justifying punishment with other, non-punitive instances of state coercion, which are also in their very nature morally problematic. Any state action or policy that involves the apparent violation of individual rights requires a special justification. Emergency measures in times of national crisis, the introduction of military conscription or national service, the Prevention of Terrorism Act (2005) and other suspensions of specific civil liberties are generally agreed to

be subject to special justification. Non-punitive coercion also includes practices such as the rationing of scarce resources, the requisitioning of property or internment of enemy citizens in wartime, compulsory purchase and the enforced quarantine of blameless victims of contagious diseases. None of these examples normally involve punishment or penalisation; nevertheless all of them are, to say the least, morally questionable and need to be justified.

Apart from the obvious consideration that the question of whether such measures can be justified will depend on the specific circumstances in each case, it at first seems that there is only one type of justification available, that of reference to ends and the invocation of 'necessary evil'. The greater the danger to be averted or the greater the good to come out of the action – in terms of public safety, public health or national security – implies that the ends are desirable enough to outweigh the distress or inconvenience involved in the means. The assumption, then, is that the only justification available for such 'harsh measures' is based on an instrumental, means–ends type of reasoning.

Does it follow that the practice of state punishment is of the same order as these other questionable practices and that justification must follow the same instrumental route? Some philosophers have certainly thought so. Surely, it might be argued, the victims of such policies are blameless and, if such treatment can be justified, then the punishment of the guilty can *a fortiori* be justified along the same lines.

To show that this argument is too peremptory, we need to look more closely at the claim that all morally questionable acts can only be justified by instrumental reason. Is it possible to justify such an act without any reference at all to the good that will come out of it? One way to argue this would be to deny that the act was in fact morally questionable, or 'an evil' in itself. To argue that an activity is 'perfectly justified' is often to claim that there is nothing wrong with it, that those who disapprove are entirely mistaken. In a wider context, this is frequently said in defence of 'victimless' crimes, where no harm has been done. Another way, however, is to accept that in normal circumstances the act would be indefensible, but that in these unusual circumstances it is justified in itself as a response to another act. Thus, one might argue that 'a justified outburst' or 'justified anger' at an unwarranted attack on oneself or another is a morally appropriate response to provocation and contemplated without any view to the future. This could, of course, be represented as covertly instrumental, in that the justification is derived from the intention to defend one's interests, character or reputation. The ends again justify the means. This tendency, however, to reduce all justifications to forward-looking ones, with reference only to goals or objectives, obscures an important normative distinction.

### **Punishment justified by its effects**

Given that state punishment can involve extremely harsh treatment, which in normal circumstances (which is to say, without good cause) would be

regarded with horror, philosophers who adopt the instrumentalist outlook insist that the only justification for such drastic measures must lie in the compensating benefits that will come out of it. The standard practice of imposing long periods of imprisonment for serious crime, for example, can only be justified if this practice as a whole is at least partly instrumental in the reduction or control of crime. If it cannot be justified with reference to these or some other social goals, then punishment inflicted for its own sake would be seen as nothing more than pointless cruelty, and hence manifestly unjustified. The basic requirement of justification is that the punishment has some definite purpose. What this purpose might be varies enormously. To define it as the reduction of crime is the most general statement of the purpose of punishment, thus understood. For this reason, this perspective is often referred to as 'reductivism' (Walker 1991). This objective is in turn justified in terms of more general moral aims, such as the need for personal security and the opportunity to fulfil human potential. This in turn is justified until we reach a goal – such as the utilitarian standard of the general happiness – that does not need to be justified in any other terms. That is to say, we reach a goal that has non-instrumental value.

The reductivist aim is itself broken down into many specific penal strategies, with widely varying moral implications. The most obvious preventive strategy is the use of temporary or permanent confinement – either in prison or psychiatric hospital – to neutralise or incapacitate dangerous offenders. Consequently, the most basic justification of punishment is the need to remove offenders from society. Taken in isolation, this justification is morally equivalent to the enforced quarantine of carriers of deadly diseases. Another of the central reductivist strategies is the threat or the implementation of punitive sanctions in order to discourage or pre-empt the need for punishment. What this involves is the use of punishment as a deterrent, in a specific form to deter its recipient from reoffending, and in a general form to discourage others from committing the same kind of offence.

In addition to the goals of prevention and deterrence, reductivist strategies have included various attempts to adjust the behaviour of persistent offenders. The ideal aim here is to achieve the rehabilitation or reintegration of the offender into society. This rehabilitative ideal takes us beyond the scope of the standard consequentialist theories of punishment, primarily based on prevention and deterrence, because it ranges from the kind of moral education and reform strategies that see punishment itself as the agent of such effects, to approaches that regard the adjustment of the offender's behaviour as a preferable alternative to punishment. The latter includes the belief that offenders can be 'cured' of their criminal tendencies by various kinds of aversion therapy. Overall, though, this general goal of rehabilitation still exemplifies a broadly instrumental approach to the problem of justification, in that it rests on the assumption that this is the only way to justify either openly punitive practices or compulsory reformative alternatives.

The instrumental justification of punishment requires that at least one of these strategies lies behind its practice. The condition of its justification is that

the evil of punishing is outweighed by one or more of these compensating benefits.

### **Justifying punishment retrospectively**

For those who look exclusively to the present and the past for justification, the good that may come out of the practice of state punishment is contingent or incidental to the justification. Whether or not there exists a right to punish depends on what has already happened. The various social and individual benefits of the practice – the prevention and reduction of crime, the creation of greater peace and security, the effects on the offenders and their victims – are recognised as important considerations in themselves, but also as outcomes to be encouraged quite independently of the legitimacy of punishing. The right, in other words, precedes the good. The right to punish is derived from the offender's breaking of the law, or from his or her violation of the rights of others. How exactly the right to punish is derived from these past events rather than from projections into the future is, for the retrospectivist, the crux of the justification problem.

The main issue for retrospectivists, then, is how far they succeed in fixing a strictly non-consequentialist horizon. In its purest versions, the committing of a crime is both necessary and sufficient for the justification of punishment. The crime in some sense calls for or demands a punitive response. The classic statement of this claim was made by Hegel (1770–1831), who represented both crime and punishment in terms of the negation or annulment of its opposite. Punishment is justified because it nullifies or makes nothing of the crime; it negates it both legally and morally. This is why, morally speaking, it can be done, and why it has to be done; the state has both the right and the duty to punish.

This was one version of what is known as retributivism. Although the literal meaning of 'retribution' concerns the idea of the duty of repayment or reparation for wrongs committed, the connotations attaching to this ancient term are much wider. The core concept of the traditional theories of retribution is that of desert, indicating the principle that punishment should be given to people according to what they justly deserve, rather than to what we may feel is necessary for purposes of deterrence or rehabilitation.

Most of the other key retributive concepts revolve around this one. The right to retaliate with equivalent force against intentional violations of the moral code as enforced by the law is intrinsically linked with the idea that wrongdoing deserves punishment of the same level of seriousness as the offence. The general idea that retributive justice is the proper goal of punishment, rather than consequentialist calculations of outcomes, is also based on the idea of just deserts. Desert lies behind the retributive belief that the suffering inflicted by the punishment on the guilty is not an intrinsic evil to be regretted, but on the contrary a desirable state of affairs. This can only be so if those who have inflicted suffering on others can be said to deserve to suffer

themselves. Each of these elements of the retributive justification is essentially backward-looking; the repayment, the retaliation, the deserved sufferings for past wrongs, all seem to be purely retrospective in their frame of reference.

Several other elements combine to produce the standard retributive justification. One of the more prominent is the Kantian insistence that the precondition of just punishment is that it treats offenders with respect for their dignity and capacity for free choice. Treating offenders as ends in themselves is the positive requirement here, but what is perhaps more important is what this prescription rules out, the use of others ‘merely as a means’ for greater social objectives.

### **Criticisms of the traditional theories**

The most general and fundamental criticism of the forward-looking, instrumental approach is the claim that it is unjustifiably lenient in its implications for penal policy, that it releases the state from its obligation to punish crime in accordance with desert. Retributivists argue that, if desert is removed from the justification, nothing is left to prevent inappropriately light sentencing for serious crime. The role played by desert in this respect cannot be taken over by deterrence, because it is precisely the restriction of the goal of punishment to this unpredictable factor that destabilises the entire institution of state punishment.

It may at first seem paradoxical that the other main type of criticism focuses on the personal dignity and rights of those who are liable to be punished by consequentialists. The first aspect of this line of criticism is the belief that we – or the state – owe it to the offenders themselves to punish them as if they were free reasoning agents. If offenders are punished in accordance with factors extraneous to the fact and nature of their crime, or their degree of culpability, the implication is that they are being treated – contrary to the Kantian dictum – merely as a means to an end, rather than as responsible human agents. This idea that it is morally repugnant to regard people merely as objects for manipulation is applied generally to the practice of punishment, but it is thought especially relevant to the forcible re-educative and ‘curative’ rehabilitation programmes favoured by some consequentialists. A typically retributive view is that even the most severe punishment is less dehumanising than this kind of ‘treatment’.

The second aspect of this line of criticism is that there is an irresistible logic whereby the unrestricted pursuit of utility leads to outright injustice. This is a criticism applied much more broadly to utilitarianism as a moral theory, but it becomes particularly focused in the philosophy of punishment. The danger in this respect is quite clear. If the administration of punishment, especially in sentencing, were to be guided solely by considerations of social policy and expediency, calculating the best probable consequences for society as a whole, there would be no limit to the potential injustice suffered by individuals or minority groups for the sake of the general good. There would be no restraint on favouritism or victimisation, or on the nature of the punishment. Even the

complete absence of guilt would provide no good reason for not punishing, if the occasional scapegoating of the innocent could be shown to be in the public interest. This, it is often said, is the logical conclusion of making the justification of punishment purely forward-looking. The overall criticism is that, when the core requirements of guilt and desert are removed, there remains no steadiness of purpose or stability in the philosophy of punishment. Every policy is subject to variation and experimentation.

It is in their attack on this inherent lack of control or limitation on the instrumentalist approach that retributivists score most heavily. Their insistence that prospective benefits – even the prospect of the complete elimination of a particularly threatening crime – do not give the state the right to punish, that this can only be derived from the prior fact and nature of the crime and what the criminal thereby deserves, puts them in a position to make the retributivist case persuasive by virtue of its focus on the injustice of punishing the innocent, which makes an almost universal appeal to moral intuition.

### ***Weaknesses of retributivism***

The weaknesses found in traditional retributivism fall under three headings: (1) doubts about its status as a moral justification; (2) problems with intelligibility; and (3) problems of rationality. Overall, it has been argued by critics that retributivism is morally dubious, that its key concepts are incorrigibly vague or ambiguous, and that it is based on feeling rather than reason. It will become clear that these sets of problems are interconnected, but it is important first to isolate them as distinct weaknesses.

### ***The moral-status problem***

This is seen by many consequentialist critics as the basic and decisive one. Retributivism, it is said, does not really qualify as a moral theory of justification at all, because it is based on the premoral instincts to retaliate and take revenge. What this sanctions is the taking of sadistic pleasure in the self-righteous infliction of suffering. The point of constructing a modern moral theory is to civilise our instincts, not to give them free rein by institutionalising them.

Traditional retributivists hold that the state draws not only the right but also the duty to punish exclusively from the fact and nature of the crime, rather than from any benefits the punishment might produce. The duty as well as the right to punish is strictly backward-looking. This is the source of the most damaging criticisms of the retributive case. If the duty arises solely from what cannot be undone, it is argued, the state has no moral alternative but to exact retribution, regardless of the good or evil that may come out of it, even if a non-punitive response would be manifestly preferable. In this respect, it is argued, they are saddled with an outdated superstition, that every crime must be paid for, regardless of exonerating circumstances. On this line of reasoning,

the logical conclusion of retributivism is a completely irrational and vindictive insistence on punishment for its own sake.

The retaliatory character of the retributivist justification is central to Kant's philosophy of punishment and is rooted in the ancient biblical doctrine of *lex talionis*. A standard line of defence against the criticism that retributivism is rooted in an Old Testament morality of vengeance, from which we should long since have distanced ourselves, is that even in the original sources these maxims were intended to civilise rather than to urge vengeance. The idea is that the 'eye for an eye' maxim was a judicial rule aimed at limiting revenge to inflicting equivalent harm – that is, to take no more than an eye – rather than insisting that justice demands the taking of revenge. It has to be said that there is little support for this interpretation in the relevant passages, which do seem to insist upon responding punitively, rather than urging restraint in the response. It is quite possible, of course, that both meanings can be intended simultaneously. Even on the softer interpretation, however, the question of whether the returning of 'like for like' is really a moral response remains unresolved.

Although appeals to intuition are frequent in this debate, they do not seem to take us much further, because there is a deep intuitive conflict on this matter. While some find it self-evident that a serious offence intrinsically merits an equally serious punishment, others find it intuitively obvious that punishment for the sole purpose of retribution is pointless, that it serves no useful or civilised purpose. The retributive reply that the point of punishment is that it serves the purpose of criminal justice is met by the response that this is a particular, outdated and severe conception of justice that is inappropriate to a modern humane society.

### *Problems with intelligibility*

In addition to the claim that the retributive attitude is morally reactionary, the second major weakness identified by critics is that all attempts to develop a systematic elucidation of its key concepts have led only to deeper mystification. What does it really mean, for example, to say that a criminal 'deserves' to suffer or be penalised for the crime? Does it mean any more than that we believe they ought to suffer for it? If so, how does this 'ought' mysteriously arise from the fact or nature of the crime? Why should it not be derived from, for example, the need to prevent and deter other such crimes?

The retributivist reply to this is complex. On the face of it, one might imagine, it is easy to argue that desert, like acknowledgement or gratitude, is an essentially retrospective concept and is intuitively intelligible as such. The difficulty that remains, however, is that of showing that it makes sense to say that either a moral right or an obligation to punish can be generated by the simple reflection that we commonly use this retrospective concept.

More specifically, what is the reasoning behind the retributive claim that the punishment should 'fit' or 'match' the crime? In the context of the death

sentence for murder – ‘a life for a life’ – it is conceded by critics that this is at least intelligible; however, what would the matching sentence be for fraud, for treason, for rape? The idea of even a rough correspondence in this sense between a crime and its punishment is said to be of little practical value. Ultimately, it is argued, the retributive language of desert is mere rhetoric to mask the absence of an intelligible justification.

The standard retributivist reply to this criticism as a whole is that the intelligibility of desert as a justification is exhibited in the principle of proportionality, the violation of which – handing out disproportionate punishment – is a clear injustice. To punish a minor theft, for example, more severely than an armed robbery is manifestly unjust. Starting from such examples, it is easy to construct parallel scales of seriousness in criminal offences, on the one hand, and penalties or sentences, on the other. That one should match the other is a requirement of desert, not of any consequentialist calculation.

There are basically two problems with this. The first is that any ranking of criminal offences according to desert is controversial. Which is the more serious, meriting more serious punishment: robbery with violence, or a non-violent crime such as fraud, the illicit proceeds of which are much greater? Second, even if a scale of desert is settled, this only solves the problem of the relative severity of the punishment. It does not fix the level of the mean, which in practice is relative to the standards of a particular society. Nor does it fix the range (minimum and maximum) or the spread (ratio of one offence to another) of the scale. A retributivist might well reply that the very recognition of these problems amounts to a tacit admission that desert is the appropriate basis for justification. The consequentialist can in turn reply that the principle of proportionality gives us at most a justification for treating some offences as more serious than others; the scale might as easily be applied to the appropriate degree of disapproval or reprimand, as to the institution of punishment. What this demonstrates, however, is that the justification is difficult, not that the idea of desert as justification is unintelligible.

The most notoriously vague aspect of the retributivist account originates in Hegel’s theory that the punishment constitutes an annulment of the crime. The idea at the heart of this theory is that the act of punishment constitutes a denial of the legitimacy of the criminal act, in Hegel’s dialectical terms, a rightful negation of the criminal negation, leading to a moral reaffirmation of the legitimacy of the rightful order. Although this perhaps comes the closest to a purely retributive justification, problems of intelligibility have frequently been voiced. How can punitive action nullify or ‘make nothing of’ an offence in which death or permanent injury has been caused? How can the situation prior to the crime be restored? These objections, however, rest upon a misinterpretation of the sense of negation intended by Hegel. It is not the offence itself that is annulled or ‘cancelled out’, it is the implicit claim to a morally and legally invalid legitimacy that is ‘made nothing of’. For Hegel, the dialectical process of crime and punishment is a struggle for the recognition of the validity of the moral order that has been challenged. The justification of punishment is

purely retrospective because it is drawn solely from the challenge to the moral and legal authority of the state.

### *Problems of rationality*

In addition to doubts about moral soundness and intelligibility, the third type of weakness commonly attributed to the retributive approaches is the absence of a rational basis for the justification of punishment. The problem here is that, even if we can make it clear what is required for a retributive justification and give an intelligible account of the state's right and duty to punish without reference to consequences, we cannot give any good reasons for preferring this justification, without such reference. The best that can be done is to clarify by example the intuition that the guilty deserve 'to be brought to justice'. The problem here is that most phrases that seem to capture the elusive meaning of the retributive justification are highly emotive ones. The general charge in terms of rationality is that retributivism is entirely dependent on intuition and the negative emotions of anger, resentment and hatred. An important accompanying criticism is that attempts at elucidation depend too much on symbol and metaphor, not enough on reasoned argument.

There are essentially two ways in which retributivists can reply to this. They can either accept that retributivism is not rational, but argue that it is nevertheless morally defensible, or they can reject the instrumentalist model of rationality and argue that a rational account of retributivism can be given. With the first approach, it can be argued that the retributive emotions, properly controlled and channelled by law, express a wholly legitimate response to crime and that this in itself constitutes a justification. The reason for preferring the retributive justification is that it is held to be psychologically and morally realistic, in that it conforms with the sentiments of disapproval or abhorrence that most people feel in response to serious crime. This approach questions the assumption that justification as such has to be rational (Mackie 1985: ch. 15).

The second way is more difficult. It is insufficient – though quite correct – to point out that retributivists do not lack reasoned arguments; the question is about the basis of these arguments. What has to be shown here is that a strictly non-consequential justification can sensibly be called a rational one. If 'rationality' simply means 'thinking in terms of consequences', any non-consequential thinking becomes irrational by definition. If, on the other hand, its meaning is wider than this, including retrospectivist thinking in terms of pre-existent rights and the duty to respect them for their own sake, then the constraints on the application of the narrower rationality will themselves be seen as an integral part of rationality, rather than as emotive constraints.

### **Modifications and compromises**

It should be clear from the discussion to this point why, unless one side gives way on an important point of principle, the two positions cannot be simply

combined into a unified theory of punishment. There have nevertheless been numerous attempts, especially in the second half of the twentieth century, to modify the theories in such a way that they might complement one another. The idea behind the 'mixed theory' is to search for a common ground on which some of the opposing elements can be synthesised into a coherent theory that will either reflect the reality of existing legal practices or provide the basis for realistic proposals to reform the current system. From this standpoint, neither the instrumental justification nor the retributive one in their pure and intransigent versions are seen as realistic in either sense.

There are three important possible structures for the mixed theory to adopt. It can be (1) retributive in its basic justification, making concessions to the demands of social policy; (2) instrumentalist in its basic justification, making concessions to one or more of the retributive principles; or (3) more radically innovative in that the basis of justification is extended across both areas, so that both retributive justice and social value are necessary conditions, but neither alone is sufficient.

### ***Strong and weak retributivism***

The first option has been a very popular one. What the moderation of retributivism involves is the distinction between a maximum version, insisting on both the right and the duty of the state to punish, and a minimum version that relinquishes the duty, insisting only on the prior right to punish and the forfeiture by the criminal of the right not to be punished. The main advantage of this is that it avoids the range of criticisms relating to its moral status. On the minimum interpretation, the state only exercises its right when there actually is a non-retributive point, which is to say that it takes a flexible approach to prosecution and sentencing, allowing that consequential considerations can override the *prima facie* duty to punish.

The maximum interpretation is clearly indicated by the traditional versions of retributivism. Kant's insistence on the solemn duty to execute every last murderer (Kant 1887: 194–201) is the paradigm case of strong retributivism. Hegel's theory of annulment also implies the inseparability of the duty and the right to punish; the theory is an explanation of why the state is morally obliged as well as entitled to invalidate the crime. It cannot let the offence stand. The case for minimalism, however, has been defended by modern retributivists such as W.D. Ross (1930), Armstrong (1961) and Mundle (1954).

There is certainly some plausibility in arguing that the minimal thesis is more in line with actual practices; the commuting of sentences and reprieves, the royal prerogative of mercy, the powers of the Home Secretary, judicial discretion and mitigation of severity of sentence have played a prominent role in the history of the English legal system, and also many prosecutions are not held to be in the public interest. In short, the right to punish is not always exercised. Against this, however, some sentences have been mandatory and many offences are not regarded as subject to discretion.

The relevant question here, however, is about the kind of principles in operation. Flexibility and mitigation of sentence tend to be desert-based – focusing on degrees of responsibility – rather than consequentialist. To the extent that this is true, the mixed theory is not a concession to consequentialism at all. If, on the other hand, the theory were to accept the principle that consequentialist considerations should govern sentencing as a proposal for systematic reform, it would be making so many radical concessions that it would be difficult to see it as retaining any more than a formal commitment to retributivism. Either way, the minimal version, abandoning the duty to punish, does not seem to provide a basis for a real compromise. The dilemma we are left with is that, while the Kantian strong version is too strong, the weak version either makes no real concessions or virtually dissolves as a retributive theory.

### ***Lex talionis and unfair advantage***

A different kind of attempt to modify the retaliatory character of retributivism is represented by theories that shift the justification from the doctrine of *lex talionis* to the idea that desert is based, not on the right of the state to retaliate against offenders, but on the right and duty to remove the advantage unfairly gained by the offender's refusal to play by the rules. The duty is towards those who have not taken similar advantage, those on behalf of whom the state acts, and the focus is on the injustice towards the law-abiding. Offenders deserve to suffer in a measure equivalent to their offence, not by virtue of an ancient moral law commanding such equivalence, but because the failure to cancel the advantage is an injustice.

This line of thought is aimed at defusing the criticism that retributivism is based solely on the vengeful emotions. The idea that the suppression of unfair advantage is morally mandatory is aimed, not at changing the substance of the theory, but at providing it with rational rather than emotional backing and thereby making it more intelligible.

### ***Consequentialist compromises***

There are a number of important theories that are explicitly instrumentalist in their basic assumptions, but that are designed specifically for the purpose of reconciling this kind of justification with retributivism. The two most influential were developed by Rawls (1955) and H.L.A. Hart in 1959 (Hart 1968).

The essential feature common to each of these theories was the claim that the problem of justification in punishment theory cannot be expressed by one question – such as ‘How is punishment justified?’ – but must address a more discriminating set of questions, the answers to which are different in kind. It is the difference between these answers that is supposed to create the ground for a compromise, or for a combined theory of punishment.

Rawls's opening distinction is between (1) any practice or system of rules, such as a game, a governing assembly or the institution of punishment, and

(2) a particular action falling under these rules, such as a move in a game, a parliamentary enactment or a judicial decision, any one of which is governed by the relevant system of rules. Justifying a practice, Rawls argued, is quite different from justifying any of its instances. With the practice of punishment, what we are determining is the initial purpose of setting up the institution and punishing anybody at all. This, he claimed, can only be justified in utilitarian terms, as furthering in some way the interests of society. Nobody, he believed, would want to argue that the very *purpose* of punishment was to match wrongdoing with suffering. With a particular instance of punishment, by contrast, the conviction and sentencing of an individual lawbreaker can only be justified in terms of that individual's guilt, or the fact that he has broken the rules of the practice.

What Rawls was arguing was that it would be inappropriate to try to justify any such punitive action in forward-looking, consequentialist terms. While the legislator laying down the law looks to the future, the judge applying the law looks to the past. In this way, Rawls argued that utilitarians and retributivists both have a legitimate point, and that the two perspectives can be combined by recognising this distinction.

Hart's starting point is similar to that of Rawls, in that he distinguishes between a 'general justifying aim' behind punishment as a whole, and the specific principles of justice guiding and restricting the application of punishment. He then rejects retribution as the general aim and argues that it is legitimately to be found in the principles constraining the operation of utility. This he describes as 'retribution in distribution', which he finds morally defensible. The main feature of this distributive justice is the requirement that guilt is a necessary condition of punishment. Punishment as a whole is justified in the first place – as it had been in Rawls's version – by the general justifying aim of its beneficial consequences, primarily crime reduction. What Hart was seeking, in his own words, was 'the middle way between a purely forward-looking scheme of social hygiene and theories which treat retribution as a general justifying aim' (Hart 1968: 233). One of Hart's central themes was the need to untangle the conceptual confusion caused by utilitarians and retributivists alike in failing to see the distinction between the general justifying aim and the principled constraints upon it.

Both Rawls and Hart worked on the assumption that, if the implications of these distinctions could be made clear, only the most intransigent of old-fashioned retributivists could fail to see that the justifying aim must be consequentialist, especially given the recognition of the real place of the retributivist principles in the practice of punishment. The implication that they both attached great importance to, that the problem of punishing the innocent could be avoided by combining the utilitarian general aim with 'retribution in distribution', was thought to be decisive. That these assumptions were unduly optimistic was to be clearly demonstrated by the retributivist revival in the 1970s. The main practical concern in this revival was to reinstate the priority of desert over deterrence as the fundamental justification.