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JUDGING AND JUSTICE: THE SIR FRANK KITTO LECTURE, 2004

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SIR FRANK KITTO AND LEGALISM

The University of New England is the university most associated with the distinguished Australian judge, Sir Frank Kitto. He was first its Deputy Chancellor and then its Vice-Chancellor from 1968 to 1981. In fact, Kitto had a long association with academia during the course of his career. Early on, he graduated not only in Law but in Greek and Latin, he was Challis lecturer for a while at Sydney University, and he co-wrote, with J.H. Hammond, a work on Landlord and Tenant law, and provided a digest of statute law cases for New South Wales. But his career is marked by his insistence throughout of a particular approach to the judicial process and the workings of the law. He constantly referred to his own approach to the vexed and difficult question of what the best judicial reasoning should be. This is unusual. There are many good judges, as one would hope, but not all judges are able to express a clear philosophical account of what they actually do; Sir Frank could do this and he did it on several occasions.

Take the greatest English judge of the twentieth century, Alfred Denning, who throughout his long life at the Bench, significantly reworked the fundamental principles of law. Denning was not afraid of challenging many conventional understandings of what counted as good legal argument, and his contribution to English jurisprudence was that he pushed boundaries in notable areas of law. It was once thought that equity could not override a clear contract in the absence of established categories but that idea even if it was not laid to rest immediately by the famous *High Trees* case,[1] has long since been laid to rest. Denning's

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1 *Central London Property Trust, Ltd* v. *High Trees House, Ltd* [1947] K.B. 130

seemingly direct appeal to justice in *Bundy's case*,[2] where a mortgage security was rendered unenforceable because of what Denning termed 'inequality of bargaining power' was a shocking case to many lawyers at the time; it upset what was thought to be an unshakeable rule of banking law. Now *Bundy's case* is regarded uncontroversially as correct, even an application of a normal principle of equality of bargaining power. In the *Spartan Steel* case, on the question of pure economic loss, Denning characteristically remarked, in comparing the immunities to suit of certain public bodies with the vulnerability of private firms, that the question was simply one of 'policy', to the shock, again, of many lawyers.[3]

It was not that Denning managed to write a theory of law. He was not really a philosopher; not at all that way inclined. Nor is it the way of most judges who could conceivably be characterised as having philosophical pretensions. To be able to produce a coherent legal theory about what judging is, and to continue judging day in, and day out, would be a rare quality indeed, and one really only achievable in a more leisured age than ours. There have been serious examples. Sir William Blackstone in England was one, although he has never been regarded as an outstanding judge; another more recent one was Judge Oliver Wendell Holmes in America, and he was so regarded.[4] Rather, it was that Denning talked lucidly about law in a way that told all the particular set of moral values he thought it important to uphold in his role as judge. He explicitly declared that he thought that law in the end served justice, although of course that particular sort of justice known mostly to lawyers as 'legal' justice. Justice for him, in its most abstract sense, consisted in curbing whatever forces he saw ranged against the 'ordinary person', the small businessman, or the man or woman known to you and me as the 'man in the Clapham omnibus'. This special

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2 *Lloyd's Bank* v. *Bundy* [1974] 3 All E.R 757

3 Spartan Steel & Alloys Ltd v. Martin & Co. [1973] 1 Q.B. 27

4 Holmes's jurisprudential writings are, of course, well known (see *Collected Legal Papers by Oliver Wendell Holmes* (1921)) but Sir William Blackstone's are not, except perhaps through the scathing attack made on them by Jeremy Bentham. See the introduction to Blackstone's *Commentaries on the Laws of England* (first published 1765–1769, Chicago Press ed, 1979). Bentham's denunciation is in *A Comment on the Commentaries* (first published 1776, Athlone Press ed 1977, Burns & Hart (eds)).

value was what united the various cases that made Denning great.

However, the subject of this lecture is not Denning but Sir Frank Kitto, or, rather, the style of judging for which Sir Frank became well known, a style which he himself was proud of proclaiming. Kitto was famous for what is often called the 'legalistic' or 'black-letter' style of judicial reasoning, according to which judicial decisions should be concerned only with the application of the strict letter of the law. For Kitto thought very strongly that the judge must apply the law even when his sense of justice condemned what the law said. To quote from his brilliant little piece, written in 1973, entitled 'Why Write Judgements?' he said that:

> 'The Judge *usurps* the law when he superimposes upon the already-declared law a new proposition which he gets from *outside* it … No Judge is entitled to do that, *however strongly his ideas of justice may make him wish that he could*.'

Sir Frank goes further: he strongly implies 'arrogance' on the part of judges if they press their own moral convictions as to what justice requires in the case. He went on to say that a judge who 'superimposed' justice on the law would be acting as if that judge had a 'God-given understanding of justice' that told him 'infallibly' what the law ought to be.[5] This is a striking passage and its brilliance lies in its utmost clarity. Hart once faintly praised jurists such as Holmes and Austin not because what they said was true, but that the way they said it was so illuminatingly wrong: '… Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong clearly. This surely is a sovereign virtue in jurisprudence.'[6] Kitto's paragraph employs an inside/outside metaphor which presupposes that it is possible to find out what the law is independently of making any judgement about justice. Kitto therefore believes that our judgements about law can be detached from our moral convictions; the paragraph also includes the moral judgement that it is wrong when judges attempt to fuse legal judgement with personal conviction.

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5 'Why Write Judgements?' (1992) 66 *Australian Law Journal* 787, 794 (emphasis added).

6 Herbert Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593.

Sir Frank was clearly austere and serious, in manner, thought and character. Mr Justice Kirby, who has made Sir Frank an object of study, wrote rather guardedly of Sir Frank that he was not, to quote, 'devoid of a sense of humour'. I am afraid that when people say this sort of thing, they usually tend to mean something like 'this man had absolutely no sense of humour at all'. My intention is to try to explain how, while Sir Frank appears to represent a view about law that is mistaken, he actually held a view about the relationship between law and justice – a form of 'legalism', which I discuss later – that shows a subtle understanding of the judicial role, one in which judgements of justice are included in the definition of that role. So in spite of appearances, Sir Frank's views on justice meant that his career as a judge was not 'devoid of a sense of justice'. My conclusion is that Sir Frank was a man who had a very strong sense of justice. Unfortunately, the way he expressed his views had the effect of making his thesis appear much stronger than it really is. It was not that he thought that making judgements about justice was wrong – far from it – it was that he thought that judges had a particular role to play in the community, one which meant that their judgements about what justice required were constrained.

THE 'LETTER OF THE LAW' DOES NOT MAKE SENSE

However, what does it mean to find the law without reference to justice, and 'go by the letter of the law'? The question requires an examination of the intellectual origins of legalism. The most well-known theory proclaiming that the identification of law is a distinctly different question from what morality and justice require, is famously known as 'legal positivism'. This term derives from the idea that laws should be identified by their having been *posited* by *people* – by human institutions – alone. On the reasonable assumption that people are often unjust, 'legal positivism' stood for the doctrine that it does not follow that if something is law, it is, therefore, morally right. Indeed, positivists are keen on declaring that there is valid law even when it is so thoroughly evil that it would be morally wrong to conform to it. And in all cases, the means for identifying law is to be found in the consensus amongst a number of significant people – those people wielding power, such as judges and legislators - that particular criteria, such as 'What Parliament, or the High Court says', identify what the law is. Famously, H.L.A. Hart in his work *The Concept of Law* declared that we identify

law by referring to a uniform practice of recognition by judges as to what counts as law. And, earlier, both Jeremy Bentham in the 18th Century and John Austin in the 19th, declared that law was found by examining what the sovereign – that group of people who were, as they said, 'habitually obeyed' – had commanded. Hart continued the tradition of these early positivists, because his theory allows us to distinguish between being, in Bentham's terms, an 'expositor' and a 'censor' of law, and, in Austin's terms, to declare that 'the existence of law is one thing, but its merits and demerits are another'.

Note how differently, then, the proposed positivistic method of finding out what the law is differs from finding out what is morally right or wrong. Knifing an innocent person is not wrong *only* because a number of people, however significant, or distinguished they are, agree on criteria that make it wrong. Such a 'consensus' account of moral murder does not make sense. In fact, the very last reason we would offer to say 'knifing a person' was morally wrong is that most people thought it was wrong. You can test the truth of this by imagining telling a child that such behaviour was wrong 'because' people thought it was. This would not teach the child what was wrong. In justifying our condemnation of 'knifing' we would instead say, 'it is painful', 'it is his body', 'he has rights', or 'it is cruel'. Just saying what other people say as if that were sufficient amounts simply to parroting the views of others.

People share moral views, true, but we do not think that they hold genuine moral convictions unless they have formed their own view independently 'for themselves'. We can note a 'common understanding' that violence is wrong but this only means that there are a significant number of people who individually have the conviction that violence is wrong. It easier to appreciate this point if we detach our understanding of what it is morally right or wrong to do from any reference at all to what other people think. It clears the head. Some think that vegetarianism is morally right, for a variety of reasons, and they mean that people in general, whether or not they agree, have a duty not to eat meat. These vegetarians think, in other words, that what other people think is beside the point. People once thought that slavery was right but the weight of opinion did not make it right and those who condemned it at first, in a distinct minority, were not at all swayed by the views of the vast majority (which included in some cultures, the slaves themselves). This is not to say that we should not take into account the views of others with whom we disagree; we recognise, of course, that the views of

others might be right, and so we might learn from others that our own views are wrong. Further, sometimes the views of others that we believe to be wrong have to be, for the sake of decency, or simple politeness, factored into our judgement of what we ought, on the whole, morally do; an example would be where, believing that it is wrong to live by a religion, we nevertheless attend a church out of respect for what we know to be another's sincere belief. This 'crowd-detached' way of looking at things diverts our attention to what is particular and unique about individual moral judgement. Moral judgement requires creativity and insight, not the repeating of social conventions about how things ought to be. Naturally, therefore, we would expect moral judgements to express different insights about how things could be, if only a workable consensus could be encouraged to bring this about. Further, we learn from others; it is of course not an odd idea to suppose that someone can teach us how to behave, what to do, and so on, without reference to what other people accept or believe. In fact, it is often a revelation to many to have this pointed out to them. Simply, some people have better insights than others do. Some people have few insights, of course, but there others who have views about how to behave that lead our own views, perhaps by the force of example, or argument, often through pointing out situations, real or imaginary, that we have not thought about or confronted before, upon which we refine our own views. It is too quick a way with matters to say that this just proves that people disagree. It is much deeper than that. Moral views differ, individual to individual, and that there is disagreement between individuals is good evidence that there is something there to disagree about, and something there to learn from, and something there, our belief in the importance of which it makes sense to try to persuade or convince others of our point of view.

So not all understandings are 'plainly understood'. The important point is that it is the same for law. Lawyers routinely challenge accepted meanings. That is clear, for instance, when the anti-abortionist says abortion is murder, since most people do not accept that. It is also clear where someone campaigning on behalf of animals declares that 'meat is murder'. These sorts of comment are not false, if they are false, because they contradict what is plainly understood; we all accept that our thinking and language are flexible. This flexibility extends even to extreme cases. A person who says that justice is to be found in the patterns produced by tea-leaves is not clearly making a remark 'at odds with the facts'. True, it is a strange statement at first

although less strange if the speaker elaborates by saying that justice is a form of fairness, and random distributions (such as tea-leaves) are fair. Some arguments for the hereditary peerage use this idea. We can argue – with some reasonable success – against this view, but we cannot say that the speaker is ignoring what justice 'plainly' means. There is something significantly different going on where the speaker has clearly got the wrong end of the stick; where, for example, we find that he routinely uses 'justice' to mean his bike, and 'bike' to mean what he would expect to obtain in a court-room. To sum up: there are no plain meanings of moral terms that determine what is morally right or wrong for us to do only arguments with which we can engage.

This account is consistent with Sir Frank's assertion that justice and law are concerned with different questions, it needs to be said, only if the positivist view of law is correct. Why should it be, though? One of the difficulties with theorising about the relationship between law and morality is that people are predisposed, at least in Western legal societies, to think that positivism is 'self-evidently' true and that moral objectivity is false. The major predisposing arguments are that we can 'observe' what the law says, say on the permissibility of abortions, by simply reading the *Abortion Act 1967*, but there is no counterpart in the world of morality in which we can 'observe' that, for example, abortions are morally permissible. So the theory of legal positivism has widespread appeal and Sir Frank's assertion does not at least appear to be contrary to common sense.

However, Sir Frank's assertion is not a detached statement of legal theory concerning the relative status of law and morality. It is better than that. It is, instead, an individual judgement by him about the moral constraints binding judicial decision-making; his remarks bear the hallmarks of a straightforward morally evaluative judgement about the role of the judge. Take the assumption that we can read law in a straightforwardly 'observable' manner. While there is some truth in saying we can affirm that two witnesses are required for a valid will, by 'seeing' what the Wills Act says, it is not a simple truth, nor is it clear what role 'observing' plays in the argument that therefore positivism is true. It is not so difficult to argue that the statute is only a 'statute' because of a moral judgement that its authors had the moral right to make law. If we explore that question, we soon arrive at non-observable, rampantly moral judgements such as that democracy is morally right, and that is why the legislature

has the moral right to legislate and the judge has a consequent moral duty to apply the legislation.

Using the argument that right or wrong moral views cannot be 'observed', 'as a matter of fact', we can thus establish a sense in which moral obligations can be 'legislated'.[7] If someone breaks a promise to you, you can say to him, reproachfully 'you said (at such and such a time, in such a place, which fact I have recorded in my diary) "I promise".' In other words, there is a sense in which moral obligations can be created, similarly to legislation, in which the fact of the moral obligation can be 'observed'; indeed, the analogy between legislation and promising is an apt one for showing similarity rather than difference between law and morality. My point in pursuing this line of argument is to establish that the relationship between law and morality is not simply established as a matter of observable plain fact. Both law and morality impose obligations and confer powers in important and pervasive ways in our lives, and understanding what obligations or powers we have involves in many cases considering different evaluative judgements, many of which include near identical forms of argument (about murder, for example). The processes in each case are argumentative and judgemental and so, given these likenesses, there has to be some very good argument to show why the obligations imposed by law should not for that reason alone be moral obligations, and in turn why the doctrine known as legal positivism should be right.

The following seems significant in drawing connections between law and morality. There are the scales of *justice* on top of many courtrooms throughout the world, including the Old Bailey.[8] Ministries of *justice* exist in many legal systems, and it would be surprising if the Australian Minister of Justice and Customs thought that her function had little to do with *justice*. The judicial oaths in all Anglo-American legal systems require the judge to do '*justice*' in some form or another. And, of course, the phrase 'miscarriage of *justice*' is undeniably part of public criticism of what judges and other legal officers have done. A common riposte is that 'of course, law and justice are closely related'

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7 Contrary to what Hart says in Chapter 5 of *The Concept of Law* (1961).

8 Although not on the top of the Armidale Court House.

because 'law promises justice'[9] or 'the ideal law is the just law', but that does not mean that law and morality are not 'conceptually distinct.' Again, I suspect that the real appeal of this argument lies within the assumption that positivism is true and positivism itself cannot be the reason for supporting it. We have, instead, to dig beneath the surface, where we discover the connections between law and morality are closer than positivism warrants. In addition to the argument that positivism is not true by 'observation', I have added the argument that law is commonly associated with the important moral ideal of justice.

There is some support from Sir Frank. He was explicit that, although justice was no part of determining the 'plain' meanings for law, justice could nevertheless be taken into account in determining the logical extension of certain principles of the law, say, when arguing by analogy. And so Sir Frank's insistence that law and justice were independent has to be qualified. He said that in cases of 'ambiguity', justice could determine the choice between meanings. It is important to consider the implications of his view. Say one 'meaning' permits the judge to impose $1,000,000 damages, plus $40,000 costs on the defendant, and the other permits him or her to impose costs of $40,000 on the plaintiff, then to say that the correct 'meaning' of the law – what is required by law - is determined by what justice requires, is to say something quite at odds with legal positivism. For in this case, justice determines the correct legal justification. What justice requires is not external to the judgement of law.

What other reasonable construction is there that we can put on Sir Frank's words? Positivism could say that there was a 'gap' here and that the judge was filling that gap with 'morality' as opposed to law. Again we should not allow positivism the upper hand, merely because that is 'what positivism says'. What is this 'gap' that we are supposed to 'observe'? Rather, we should approach the problem by following our reasonable intuition; we would approach it as a moral as well as a legal question: we would note that there was a controversy about what the legislature had decided, and then we would take sides in that controversy. There would be no 'third position', namely that

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9 Jeremy Waldron, 'Does Law Promise Justice?' in Kagan, Krygier and Winston (eds), *Legality and Community: on the Intellectual Legacy of Philip Selznick* (2002) ch 6.

there was 'no law' on the matter, although that presumably is what positivists mean when they commonly say that there is a 'gap' there that needs to be 'filled'.

Regrettably, on this point Sir Frank is not so clear. For one of the various reasons he gave for saying that the law should be determined independently of justice was that it was arrogant to suppose that one could know what justice was. Here Sir Frank claims that it is within the remit of a judge to make judgements of justice, where this is required in an exercise in resolving ambiguity. There is a further question, too. It is that if judgements of justice are required of judges in order for them to resolve ambiguities in meanings of statutes, what sort of judgement is it that is required in declaring that a statute *unambiguously* declares what obligations, or powers, the litigants have? An 'ambiguity' requires that there exist at least two meanings for a word, or set of words, and 'resolving the ambiguity' requires working out what the legislature could have meant; it is, in other words, an exercise in 'establishing meaning'. Nevertheless, 'establishing meaning' is also what the judge does when he declares what the unambiguous meaning of a statute is. The process of establishing meaning is one that is common to both ambiguity and non-ambiguity. Convention, or 'observation' is quite inept as an explanation of what the statute 'says'. It follows that some further argument is required to establish positivism's correctness.

I therefore conclude that the law will only make sense if we read it in a way that assumes that the end of a legal decision is justice. In particular, there are no plain meanings of statutes, nor plain meanings within the common law that determine the relevant litigated issues. This will mean that stating that the law has a plain meaning can only be the outcome of a legal argument, and will share all the relevant characteristics of moral argument. In other words, to say that the law has a plain meaning provides no independent argument in itself. I would add, however, perhaps rather cryptically at this point, that this is not to say that there are no plain meanings ever. Rather, that, in legal and moral argument, plain meanings themselves cannot determine the correct decision.

THE NATURE OF JUSTICE

Is it true, as Sir Frank suggests, that we cannot make judgements about what justice requires without being arrogant? I am sure he

did not mean that such judgements were impossible but instead he meant that we must be very careful in all our moral judgements just in case we are wrong; he thought that judges should not believe in their own infallibility. His point, though, is only a point about arrogance generally, and in all our judgements we must be relatively humble as to what our intellectual powers are. The injunction not to be arrogant sits perfectly well with the possibility that occasionally, and perhaps not so occasionally, our judgements might be right. Can we ever be right in our judgements of what justice requires? Well, of course. We endeavour to make right judgements only because we retain a sense of what the ideal decision would be; if we make second best, if we make a mistake, such decisions are only 'second' best to the ideal, or mistaken *because* there is the possibility of getting it right.

In fact, of course, we make judgements about what is just all the time; very abstractly, such judgements concern a particular part of morality, a public part, that which concerns human action, particularly by those occupying institutional roles, and requires proportion, balance and the right distribution of power, or wealth in our dealings with one another. Of particular importance is the public nature of the idea. Being just, more than any other dimension of morality, requires a kind of distancing, and closeness, of concern towards fellow beings. You do not judge too much, yet you also must concern yourself with the humanity of the other, and so the familiar judicial virtues of patience, impartiality, objectivity, humanity and concern, not un-surprisingly reflect our central understanding of what justice requires. A judgement of justice needs us to set a distance between ourselves and others in a kind of suspension of many of the closer judgements we make about people. Justice, for example, does not choose our friends, particularly our very close friends, for us. We are not required to associate closely with ugly, or beautiful, or talented, or Jewish, or Muslim, or aboriginal people. We are not required to be extra pleasant to people we think are horrible. But we are required to be just towards everyone. One way of putting it is to say that justice requires us to see all people as of an equal status to ourselves, and to see, as irrelevant – although not superficial - differences between people.

But the idea of equality sets many people's teeth on edge, particularly, it might be noted Jeremy Bentham's; he thought that the idea that equality meant anything in itself was ridiculous, citing the physical and mental differences that distinguish people

so minutely. Ironically, he thought that treating people as equally as possible was important, but not because equality itself had any independent virtue but because when people were treated unequally they tended to get envious, and the more envy there was in the community, the more unstable that community would become. Roughly, his idea was that the state should smooth out differences between people to the point where envy was at a minimum, and the greatest happiness of the greatest number would be enhanced through stability and, for Bentham, most importantly, the security of the community. As is so often the case with the sort of psychological utilitarian view that he propounded, further analysis of the motive of envy would have revealed why people valued equality and the type of equality they valued, and so required an exploration of reasons justifying their psychological states.

The major problem people have with equality is an initial one, easily overcome; it is Bentham's, because in denying equality you can see that the differences between people are enormous. In fact, it seems much more like an insight to say that people are, and could not be, equal. On the other hand, if we say that people are equal in 'their humanity' that does appear to mean something. Using the idea of 'equality' we can then see why certain attributes of people are 'irrelevant' in assessing what is the just way to act. It is irrelevant in cases barring positive discrimination (where a 'more equal' environment is the aim) that a person is ugly, beautiful, talented, Jewish, Muslim or aboriginal. All are equally human and so equality we can say requires us to see each person as equally a human being. I believe this idea has great power, and so do many, but it clearly has its enemies. Oddly the contemporary enemies of equality are not from ideologically driven positions, such as neo-Nazis who believe that we can 'grade' people according to their particular virtues, or to their particular genetic and historic backgrounds, but from philosophers who say that equality bears no independent meaning when it comes to talking about people. Joseph Raz at Oxford, for example, thinks that there is no moral principle of equality at all independent of a general moral requirement that we treat people as human beings. To say that we should treat people 'equally' as human beings is logically otiose, since all the work being done for morality here is done by the phrase 'human beings'. We must treat all human beings in the way that we should treat any human being, and 'equality' only reminds us of that fact of universality. To use his example,

'every human being is equally entitled to education', just implies that being human is relevant to a right to education.[10]

Raz places his point on a grand scale, eliminating at a stroke all theories that have ever placed equality of concern at their centre. He says that every moral or political theory 'claiming completeness' contains a principle of equality in this otiose sense, citing Ronald Dworkin's accounts of politics and law in terms of rights to equal concern and respect as one such: 'It is nothing but a closure principle to a political theory putting forward a right to concern and respect, and not a right to equality.' Raz says this conclusion should not strike anyone as surprising because all principles are statements of general reasons. So if people have a right not to be assaulted, they have a right, equally, not to be assaulted, or if people have a right to medical care, they have a right, equally, to medical care, or an equal right to medical care, and in each of these cases the word 'equal' adds absolutely nothing at all as an independent moral idea. Raz is quick to say that equality could have 'rhetorical' effect: it might serve well as a reminder that if A has a right to something, by virtue of 'being a human being' then so does B (subject to total resources). This is just a consequence of the logic of universals, and so already contained within the idea of 'human being'.

Raz's idea has an appeal in logic but no appeal of moral insight. If I say all people ought to be treated with the respect that is due to them, my statement is consistent with the grossest abuses of the Nazis. Jews are worthy of no respect, of course; Aryans of the highest respect. It alters the statement out of all recognition to say that (all) people have a right to equal respect, since we eliminate at a stroke the hideous grading of people of which non-egalitarian theories are capable. It is instructive that Raz does not refer to this point; it is as if he lacked that particular insight – an insight of *morality*, not logic. If you say that a person should be treated as an equal, it really means something about how you should treat him; in particular, it means that certain ways of treating him are ruled out as irrelevant. If I say that, because a person is particularly good-looking and talented and, indeed, particularly virtuous that, therefore, he should be given greater priority for medical treatment, I do not make a mistake of

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[10] See Joseph Raz, *The Morality of Freedom* (1986) ch 9.

logic. He can be distinguished easily from someone less good-looking in *logic*; 'human being' does not, by referring to 'one of a universal class' classify the particulars that are relevant to the way we treat each human being. As Hart pointed out once, logic does not classify particulars.

It is a failing of Raz's moral philosophy that he misses this point. It is no insight to say that reference to what is appropriate for a human being is appropriate for all human beings because 'human being' is a universal term. Grading can be understood in universal terms: 'human beings *who are Jews* should be treated (all of them) as they deserve to be treated'; Jews should be treated equally *as Jews*. Equality is violated, and by saying this we make the moral point that Jewishness is not a relevant characteristic that provides a reason for different treatment. They are equal to us.

There is a failure of moral insight displayed in Raz's argument. Imagine an art critic firmly informing you that the problem with the so-called Impressionist painters is their sloppy attention to form. She produces a host of examples, from Seurat through to Matisse, which show that landscape and human forms are rendered shapeless and inelegant through an 'obsessive' use of dots. This thesis, designed to open our eyes as to how things 'really are' in relation to the Impressionists, is supported by remarks on perspective – about how dots, which are only points, cannot show width and depth, or define curves and straight lines, as can the use of lines. Now how do we deal with this critic when we discover she is colour blind? We suddenly discover that the reason she emphasises form is that she has never been struck by the power of light and contrast – the large part of the significance of Impressionist painting – because she simply cannot, for physiological reasons, see it. I have this feeling about Raz. True, logic can use the idea of 'human being' in a way that shows that 'equality' is used as a 'universal'. But to say that human beings should be treated equally or, as I would prefer, 'as equals' does not provide a special insight is to show a lack of understanding that, in the field of moral philosophy, is very serious, as serious as the lack of the ability to see colour in the art critic. To say all this, in fact, does not take us very far – although it takes us far out of Raz's territory – because there could be good reasons that persuade us eventually to suppose that 'treating people as equals' is an unimportant insight into how we should act. But assessment of that insight requires the insight in the first place, and so Raz's treatment of moral equality is not even at the beginning of such an argument. Art critics can only say that colour is unimportant

in Impressionist painting if they can see the sense of the argument that in Impressionist painting, colour is the dominant point. The colour blind critic cannot see the force of this argument because she cannot distinguish colours. To say that people should be treated as equals means something like: that person is no different from me, he suffers, he thinks, he enjoys, he understands, he is different from others but only as far as I am different from others. It is an idea that joins with understanding what it is to be like another and is rich and complex in the way that understanding ourselves, properly, is. Maybe it is an idea that cannot be developed with a great deal of precision; maybe the practical ramifications of distributing resources, given lack of precision, militate against regarding moral equality as I have outlined it as of great importance. I doubt it, and I shall say more. Suffice it for present purposes, however, equality cannot be ruled out by a sleight of logic concluding that equality has no independent moral force.

This is all not to say, however, that the task of understanding a principle of morality based on equality is an easy one. There is a notorious difficulty with the comparative idea that something must be 'equal' to something *else.* Equality seems to require a comparison between people, in the sense that if we say someone has a right to equal concern, then it is natural to ask what it is that this right must show equal concern *with*. For equality makes us think of the 'equals' sign; it is this connection with identity with something else that connects equality with the idea of justice, which requires, in its most abstract formulation, the right proportion in dealings between people. The idea makes it natural for us to suppose that equality is fundamentally about the distribution, exchange or restoration of goods to people, 'goods' being understood in the most abstract sense. Two people are 'treated equally' if the same quantity of goods is distributed to them. So we can commend legislation, or government policy, where it in some way equalises what humanity requires to all people equally. This is a crude formulation but sufficiently abstract, too, to drive home the point.

However, there is a difficulty in 'equalising what humanity requires' since the differences between people are so great. People are not just different physically, but they have different capacities for enjoyment and hard work, different talents, which bring with them different earning capacities, and many have special needs, particularly the disabled. Briefly, the government, or the legislature, cannot make everyone the same as others, however hard it tries, however well intentioned it is.

A moral principle of equality does not rest upon any idea that people are equals in any physical or mental sense, nor on the idea that all people should be treated in a way that gives them something that is exactly equal in amount to others. Take an ill person and a healthy person. It is common sense to say that in order to treat the ill person 'as an equal', that person should have better access to medical resources – which will mean more money – than the healthy person. Why? Because ill people are disabled, or have special needs relative to healthy people. It is not that 'equality of outcomes' does not mean anything here. We could use a conception of equality that just distributes resources so that each gets equal amounts. But this makes a mockery of the idea of equality and it is clear from this example that, if we are to hold onto the idea of equality (for some abandon equality here, like Jeremy Bentham) we need to try to see if there is a better conception. I believe it lies in the idea of 'treating people as equals', meaning by this that we should treat people in a way that attends to them as equally human. If we think that because another person is black, or fat, or foreign, or of an 'inferior' religion or ethnic background, we do not in a very important sense see them as equal to ourselves. It is a problematic idea. There is a sense, bordering on the sentimental but not quite sentimental, in which we recognise in another a person like ourself and, to use an old term, we can empathise to some degree with that other person. This is a proposition which we should examine carefully. Not all people can empathise with others. Seeing others in some way as ourselves is a difficult idea since it seems to require an imaginative leap quite into 'another's shoes', yet somehow, too, to retain a sense of our own identity. To jump from this idea to a moral principle of 'treating other people as equals', and a fundamental moral principle at that, seems a big step. However, seeing others as ourselves must be the idea behind understanding what 'being equally human' means.

If we contemplate the animal and botanical worlds, it strikes us clearly that we are animate and animated in a special way; indeed, we share quite significant attributes, ones that we think of as significant because they are so like our own. The criteria which we use to pick out what is significant about human beings must, I suggest, be the result of an inner comparison between and ourselves and others. So here is a start to the idea. If pain is a bad for us, then it seems reasonable to suppose that pain is a bad for those others that we pick out as significantly like us. So 'treating another as an equal' would mean something along the lines of 'treat another as you would want to be treated yourself'. It may

be that this is too quick. Sadists, psychopaths, and others either seem to have no empathetic understanding of other people, or are seemingly arbitrary in picking out those others to whom empathetic understanding extends or, perhaps worse, have sensitive empathetic understanding of those to whom they behave morally. In fact, it is a bleakly true feature of the sadist and the bully that they do have sensitivity to the senses in which the other is like them; by means of this understanding they can better torture and bully.

I think these difficulties can be met. The intuitive pull of the idea of 'seeing something from another's point of view' is too strong to give up easily, and psychopaths and bullies have, to put it bluntly, something wrong with them. Psychopaths and bullies fail to act morally because they do not appreciate *themselves* in the right way, and reasonable perception tells us – it is certainly a common enough idea – that the defects of such people arise from a lack of confidence, envy and a resulting wish to control and have power over other people. One way of putting it is to say that such people 'project' their 'problems' onto other people. So, if we are going to find significance for our moral thinking in the idea of treating others as our equals, there does not seem, in principle, to be a bar to an extended discussion into the evaluations – what is wrong with bullying type behaviour – that are built into the idea of seeing another as ourselves. My view is that it is reflections about our relationships with other people, enhanced by our experience with other people and our gaining knowledge about what other people are like – novels are good for this – that refines our moral understanding.

I should stop a moment to recap. I have given an account of justice that uses the idea of equality; in sum: each person is entitled, just by being a person, to the equality of respect that is due everyone else.

YOU HAVE TO READ THE LAW ON THE ASSUMPTION THAT IT IS JUST

I will make one obvious connection between equality and law, one that has been pointed out on many occasions before, but notably by H.L.A. Hart. No jurist has ever denied that rules were part of law; indeed, it seems such a natural part of the idea that it is barely worth drawing our attention to it, although of course Hart made great play of the fact that the command theory of

Bentham and Austin had perhaps closer affinity with non-rule-like orders. As Hart pointed out, there is a connection between rules and justice, in that rules require that 'like cases be treated alike' and that idea is consistent with the idea of proportion that is clearly part of the idea of justice. In its most general and abstract sense, justice requires proportion in distribution, whether of goods, decision-making or respect, and the idea of 'like cases being treated alike' clearly reflects some aspect of proportional treatment. But Hart is, as is well-known, quick to say that 'treating like cases alike' is consistent with a great deal of immorality. He cites the former South African system of apartheid as an example. The legal rules treated 'like cases alike' in the sense that blacks were treated alike, as the rules required, and whites were treated alike, again as the rules required. But, he said, this was a hollow sense of justice, since it brought out only what the law was 'according to the rules' and so he called it, possibly following Aristotle, 'formal justice'. Contrary to formal justice, there was 'substantive justice' – justice *of* the law, which was real, or true, justice. So we could say that, while South African apartheid law was formally just, it was substantively unjust.

Hart can be answered on this, since he draws the distinction much too sharply. It is that there is a violation, I believe, of the rule-like structure of law in the case of apartheid. Like cases are not being treated alike where there is an unjustifiable distinction drawn within the rules. It is insufficient to say that the justice of law is determined by its content and not its form since that makes us think that there was some logic of the matter that established that distinction. My suggestion is that in order, sensibly, to say that rules apply to human beings means that there is some content already in the very idea that rules are applicable in the first place, which is that people are to be treated 'alike'. The problem is that Hart assumes, as many people do, that 'treating people alike' is an idea independent of what criteria of relevance – what 'alike' means – should apply. It echoes Raz's insistence on settling the matter of moral equality by an appeal only to logic. What are the instances of 'treating people alike' in the case of apartheid? Blacks are treated one way, and whites are treated another way, where the only difference in their treatment seems to be the colour of skin, or ethnic origin. According to Hart's understanding, we condemn the content of the rules by reference to the irrelevance of skin colour or ethnic origin. What determines the application of the rule, though? Hart 'sees' the application – distinction between blacks and whites – and

assumes a principle of determination of the difference. But why assume it? Why not say that there is something 'unrule-like' about the apartheid division, thus drawing attention to a formal failure of rule application? The pattern the rule throws down is not, in other words, decisive. What makes 'like cases alike' in the law? Notice it is assumed that, if we apply rules to human beings, the precise location is in most part irrelevant: you would make a fool of yourself in court if you seriously argued that although there was the requisite negligence, there was no previous precedent in which the driver of a particular car, say a Volvo with a particular number plate, had been found liable, or that there was no previous precedent in which a plaintiff had the same surname.

Can we read cases from the standpoint of a principle of justice, as widely and abstractly as I have recounted in terms of equality? It seems to me we not only can, but we do and should. If law has the moral basis I have claimed, just pointing to disagreement amongst lawyers about what justice requires, simply does not matter. Lawyers *expect* disagreement. Legal argument is the very stuff of the law. It is what we would expect, since we can and do make legal and moral judgements demanding conformity whether or not others agree. Now say I claim that abortion is sometimes – when particular conditions are met – required by justice, as many people do. I have in mind here, the fourteen-year-old Muslim girl who has been raped by a number of Serbian soldiers. Of course, I am not making law when I form this judgement, but that is because I am not part of the relevant institution, such as the legislature or the judiciary.

So why are members of these institutions different in principle from ordinary members of the community? I think it is the result of two main determinants of legal reasoning. The first is that justice will inevitably distribute the right to decide to particular individuals, such as judges, or institutions, such as the legislature. Therefore, finding out what those individuals and institutions say, is part of the process of justice, even when they make mistakes. To give force to the just distribution of decision-making power, such decisions have to be final, at least until appealed, or overturned. The finality of the decision then becomes an ingredient of any future judgement about what justice requires. This is not an odd idea at all and is utterly familiar to all lawyers and, I would add, it is reasonable. It means that in some overall determination of what is just, mistakes have to be taken into account in order to do what is just.

The second is that there is a good reason for taking into account what people wrongly believe. This is because equality of respect requires it. It is arrogant – to echo Sir Frank – to discount the views of others, genuinely held, and the fact that another holds a genuine view is something that must be taken into account in certain sorts of decisions even if that person is wrong. I would emphasise that this is not a question of 'he might be right', in a Hobbesian calculation of self-interested hedge-betting. Quite the contrary, you have no doubts he is wrong. An example is the genuinely committed pacifist. We can think he is wrong and misguided yet still believe that it would be wrong to make him enlist. In the law, psychological fact understandings – of what people actually believe, actually want, and actually intend, in making statutes, or in deciding common law cases, will be part of 'treating them with equality of respect'. Again, though, such meanings will not be determinative of what the correct legal decision should be. So I have argued that an ideal of justice as equality of respect takes into account such facts in our identification of law. The judicial duty to be just therefore requires the judge to pay attention to statutes that are unjust because of a moral democratic requirement, and to common laws whose content is unjust, largely because of a moral requirement that people's reasonable expectations be met; loosely, we could call this the 'principle of certainty'.[11]

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[11] In the usual case in a reasonable democracy, wrong views about what is required are enforced because they are channelled through the legislature. Wrong lines of precedent are enforced because, to use Professor Ronald Dworkin's term, they are 'embedded mistakes' and have created expectations that not meeting offends equality of respect. One effect of my account is that it creates an injunction to legislators and judges that is stronger than a requirement that the law merely be consistent. To me, legislators and judges are constrained by the requirement to be just rather than the requirement to produce law that speaks consistently to all. It is not clear to me that Dworkin's idea of integrity is inconsistent with my account, but mine makes a direct appeal to justice. Since he rejects what he calls 'bare consistency' and talks of a 'coherence of moral principle' it seems to me that he is on the road to an account of law that models itself on the coherent structure that justice would require. See my 'Integrity, Equality and Justice' and Dworkin's response to this paper in (2005) 59 *Revue Internationale de Philosophie* 335. Dworkin's response is at 435. I say more about integrity in my 'Moral Equality in Legal Argument' in [2004] *Acta Juridica* 19.

A STRIKING CASE OF INJUSTICE

To give you an idea of where I think my approach can lead, I shall also look at the recent case where a married couple tried to obtain lawful permission for assisted suicide. Now I want to emphasise very strongly here that the particular view I have of the case is not relevant to the philosophical point. That is to say, I think the case was wrong, because it was wrong in justice. But I have already conceded that arguments about what constitutes the justice of the case are inherently controversial – and I have pointed out that lawyers are used to argumentative and controversial cases. And so, all I want you to do is agree with me that the correct outcome of the case was one which addressed directly the justice of the issue, whatever view of 'the justice of the issue' you in fact have. Many of you will, I dare say, disagree strongly about what I propose is the justice of the issue. However, judges appealed to the idea of *'what the law said'* which is, at least at first sight, an entirely different issue from the justice of the issue, and that is, of course, the point I want to attack.

In this case, the applicant suffered from an extremely debilitating disease. She was by all accounts an intelligent, thoughtful person, who was fortunate to have a sensitive and thoughtful husband. Both the husband and she wanted her to die, because both of them found that the suffering was too great for either of them to consider that her continued life was worthwhile. She was paralysed and could not kill herself. The husband was willing to kill her by administering the appropriate drug, but the *Suicide Act 1961* made it a criminal offence 'to assist suicide' and the prosecution office had made it clear that they would prosecute. She stated on many occasions that she wanted death, as there was no meaning left in her life. The United Kingdom's highest court held that if her husband did as his wife wanted, this would amount to the offence of assisted suicide, and so the result of the decision was that the wife died in what was by all accounts an unpleasant death. In due course the European Court of Human Rights said that the decision was not in breach of the wife's human rights. In this case, Lord Bingham made the Kitto-like statement that the court was not entitled to make a moral judgement about the matter. Simply, the court had merely 'to ascertain and apply the law of the land' even although he realised that she faced 'a humiliating and distressing death'.

To my mind, this is a reneging of the question. There is a moral effect to the decision in that it caused a great deal of pain to at

least one individual and appeal to common sense tells us that the causing of pain must be morally justified. Now, is it odd of us to suppose that in a decision like this, the House of Lords is not at all concerned with that moral effect? In making the decision that the law must be applied even where it causes a 'humiliating and distressing death' is to give the moral reason that applying 'the law' provides a moral justification in itself that overrides in this particular case the general moral principle that we should not cause pain to an individual. Law as justice requires the argument to be seen as a direct appeal to the most fundamental principle of justice that no person should be treated with disrespect, to their conscience and deeply held convictions, or with disregard to their, in Lord Bingham's words, 'humiliation and distress'. No one else was going to be affected. A court which viewed the question in this light, in which what is just and what is legal are part of the same question about how to decide, could not see the Pretty case as raising a problem of judicial conscience. I repeat, there is no 'plain meaning' of the *Suicide Act 1961* that is determinative of the question. Rather the plain meaning which led to Diane Pretty's particular form of death could only have been the result of an interpretation of the law that was certainly not made plain in court.

To many people this conclusion of mine is astonishing because, they say, that in spite of my arguments that we should read statutes in a way that assumes that their intention is to bring a just outcome, there is simply a plain meaning in the case of the *Suicide Act 1961* since 'suicide' so clearly means 'killing oneself'. But, as is usual in the law, it is by no means clear what 'killing' means. In the United States, for example, courts have held that in a claim under a relevant insurance policy, suicide by an insane person is not a 'killing of oneself' because there is no 'will' to kill there. Once it was commonly thought that to remove the feeding tubes from an irreversibly comatose person whose brain was not functioning was to kill that person; in fact, the consensus changed, and the word 'brain-dead' followed and entered clinical practice as one way of determining death. There was no doubt that Diane Pretty had a will; nor was there a doubt whether she was brain dead. But from her own accounts her life was over; she had 'no more to live for' she declared and none of the judges disputed that she had a full understanding of her position. Moreover, any properly thought out attempt at empathising with her, in her condition, must result in a judgement that, true, her life was over; would you really not think that, we should ask ourselves, we would want exactly what

she wants for herself? Or, if we cannot do that, can we say simply that, in that case, she should be able to make the decision for herself? So when we contemplate again what the 'plain' meaning of 'life' is in the idea of 'taking one's own life', we can see it is not plain at all, for it is possible to argue without contradiction that, because Diane Pretty's life was over, there was no significant life there that could be brought to an end.

A RETURN TO SIR FRANK KITTO

Where does all this leave Sir Frank Kitto? You might think that so far I have taken a line against his remarks about law and justice. In fact that was not my intention at all. I have rather taken a strong line against what I understand to be a very common way of understanding the main force of legalism, or the 'legalistic' way of deciding cases. 'Legalism' as often understood is a matter of thinking of the role of lawyers – meant in the widest sense, to include judges and legal scholars – as a kind of scientist, whose job is relatively mechanical: to provide a description of what the law 'plainly' says. I have maintained that there is no such argument as 'this is what the plain meaning of the law is', arguing that our reading of statutes and the common law is, and should be, driven by our sense of justice. To support my view, I have offered an account of justice in terms of an equality of concern and respect due to each person.

Nevertheless, there is no suggestion in Sir Frank that he would have anything of my description of the judge as a proto-scientist. For Sir Frank had no doubts that justice was an important point and purpose of law; how could he have thought otherwise, given the extent of his concern for just outcomes in the cases in which he sat? I further venture that he was too subtle and too serious to suppose that justice had no part to play in the determination of law. Any judge worth his salt must think, too, that his role cannot have meaning unless the business of deciding the law has a purpose. And why would any judge deny it has a moral purpose? We might explore the idea of legalism by supposing that it instantiates a form of justice. We can use an analogy with the army. A soldier's duty is one of very strict obedience. For him, the order must be obeyed and not questioned. So what of that duty when the soldier has to do something that he believes to be morally wrong? If the soldier assumes that his role *qua* soldier is a good one, which is likely, then he sees good in the duty of obedience. When he listens to orders, he understands them in that

moral context. To say this is not to say that he needs to judge each order in terms of the overall moral good of its intention; obviously not, because he sees the good in the duty of strict obedience, since that duty fulfils one of the purposes of being soldier. In the best war, the one fought in order to resurrect justice, it is clear that the cause of justice is furthered by the non-questioning of orders. I see no contradiction between the ideas that the soldier has a duty of obedience to orders as well as a duty to be just since I think part of the duty to be just, given the soldier's function, consists in blind obedience.

The judge must apply the law, yet, like the soldier, his role does not have a meaning except in a moral context. Pointing to the meaning of his role does not require that the judge abandon applying the law for he must read it in a particular way, and he must realise that deference both to the legislature, and to his own institution, will require legalistic judgements. As I have characterised them, such judgements are a requirement of the overall context of justice. I suggest we understand Sir Frank Kitto as someone who placed very great weight – perhaps more weight than most – on the importance of deference to *what was already decided*. Sir Owen Dixon, a friend, mentor and intellectual partner of Sir Frank, wrote an interesting piece entitled 'Concerning Judicial Method'; in this article, Sir Owen provided some account of how he thought judgements of justice should be made. He rightly thought that we do not make judgements about justice out of the blue, for such judgements would be arbitrary or fanciful:

> The demands made in the name of justice must not be arbitrary and fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice.[12]

Very important for understanding Sir Frank, I think, is Dixon's following sentence:

> 'Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if

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[12] Sir Owen Dixon, 'Concerning Judicial Method – A Speech Delivered at Yale Law School on receiving the Henry E Howland Memorial Prize, 19 September, 1955', in Wionarski (ed), *Jesting Pilate And Other Papers and Addresses by the Right Honourable Sir Owen Dixon* (Melbourne: Law Book Company, 1965) 152, 165.

> the alternative to the judicial administration of the law according to a received technique and by the use of logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk.'[13]

There is a deeper form of legalism expressed in these lines than that commonly understood and which I have attacked. I think it is much closer to the sort of legalism Sir Frank embraced. Acting in accordance with pre-established techniques of legal reasoning produces a justice – a 'non-arbitrary' justice – of its own. Justice emerges from acting within one's roles when those roles make good moral sense even though they might not result in what justice demands independently of those roles. This makes good sense of the difference between what we could term justice 'in itself' and justice 'according to law'; for justice 'in itself' does away with all that is careful, predictable, and relatively certain. This is why justice 'according to law' seems conservative, and Sir Frank's views on the judicial role accordingly seem conservative. But it is conservative in a good sense, since it ensures justice in the achievement of the right balance between established institutions, particularly the judiciary and the legislature.

Finally, to return to the beginning of this lecture, I referred to what seemed to be a lack of humour in Kitto, at least a quality in him that urged Justice Kirby to remark that Kitto was not 'devoid of humour'. Perhaps there is something instructive here about how we are to understand Sir Frank on law and justice. It is fitting that I end by remarking that Sir Frank's understanding of law was at any rate 'not devoid of justice'. Far from it, he appreciated the complexity of the idea. Although he thought that the judge should decide in accordance with law and seemed concerned to say that as a judge he was not concerned with what justice required, his view is consistent with a more deeply worked out idea of justice in which there are constraints that justice places upon the judge's role. So Sir Frank was a judge who understood rightly and fully how complex, sophisticated and austere an idea justice is. His judgements, perhaps like his humour, often displayed themselves, in Michael Kirby's words, in an 'acidic and subdued' manner. But I have no doubt that his

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[13] Ibid.

judgements also showed that he thought, as I do, that a proper understanding of *justice* is equally as much a part of law, as the plain words in which the law is in large part composed.

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