

Law's Judgement

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1

Law's Judgement

'It is not easy—perhaps not even desirable—to judge other people by a consistent standard. Conduct obnoxious, even unbearable, in one person may be readily tolerated in another; apparently indispensable principles of behaviour are in practice relaxed—not always with impunity—in the interests of those whose nature seems to demand an exceptional measure'.¹

'The lawyer's world is entire unto itself, the human pared away'.²

Law does many things. It can—insofar as it is published, clear, general, consistent and prospective—create and uphold a sphere of freedom since, if these conditions are satisfied, citizens will be able to predict when the law might affect them and take steps to avoid it. While not the only kind of freedom, freedom from legal liabilities and duties is undoubtedly worth having. Insofar as law embodies the formal virtues just noted, it can also allow long-term planning, and not just within the sphere of freedom from legal duties and liabilities. This is because clear, non-retrospective, general, consistent and facilitative bodies of law, like contract and trusts, allow citizens to create and project legal obligations far into the future, should they want to do so. The law can also, in many of its loftiest instantiations such as constitutional Bills and Charters of Rights and Freedoms, stand as the repository of some of a society's most important public values. But the law does something else, equally obvious and just as remarkable, and this is the focus of what follows. The law sets standards of behaviour for a whole community and even segments thereof. In doing so, it judges us.

The law judges us by assessing our conduct and its outcomes (and sometimes also our aims, intentions and cognitive status). The principal ways we stand before the law are as claimant or defendant in a contested private or public law action, or as accused or victim in a contested criminal case. As the accused in a criminal trial, prudence requires us—once the prosecution is close to proving its case—to account for our conduct, just as the victim must account for their accusation. As a claimant in either a public or private law trial we must make out our claim, while the defendant must account for their conduct as part of the process of rebutting the claimant's case. This process of giving an account of oneself before the law is

¹ A Powell, *A Question of Upbringing* (London, Arrow, 2005) 52.

² H Mantel, *Bring up the Bodies* (London, Harper Collins, 2015) 369.

clearly not a normal instance of explaining one's conduct, primarily because the explanation must be constructed within the categories of the relevant area of law. Such explanations are therefore usually tendered by lawyers on behalf of those being called to account, since if there is any skill a cadre of professional lawyers should have, it is expertise in the interpretation and disputation of the law.

The fact that, when either prudence or legal obligation demands, we must account for our conduct and that account has to take the form of, or be translatable into, legally relevant categories and standards, is both significant and obvious. These categories and standards constitute vast areas of legal doctrine (such as land and tort law, criminal and administrative law) and function as the thresholds against which our conduct is measured. That, after all, is why the word 'standard' is descriptively appropriate here. Moreover, this aspect of law's judgement pre-dates adjudication in an important sense: the law's standards are available in advance of particular judicial decisions about specific legal disputes.³ They exist not just in the form of published precedents and statutes, but also in the tidier package we now know as the legal textbook. There is an undeniable sense in which many such texts are simply guides as to how and how not to behave. They are (usually voluminous) compendia of standards for acceptable legal behaviour.

Many questions can be asked of law's judgement. Some of these questions have been staple topics of legal philosophy for as long as that discipline itself has existed. We might wonder, for example, by what right the law judges us: in what sense, if any, can the law legitimately call us to account? Why, if at all, should we take its claims seriously? What, if any, obligations do such claims create? Besides these questions, which take us to the heart of one of the foundational issues of political and legal philosophy, there is a group of related questions that has traditionally been of more interest to jurists and lawyers than philosophers. First among equals in this group of questions is this: is law a rational means of judging us? It is common for the judgements of the appellate and some lower courts of the common law world to be published. When inspected, these judgements are very discursive and provide not just an answer to the specific legal question or questions raised in the dispute before the court, but also an analysis of other related cases in which courts in this and other jurisdictions have given judgement. These other judgements can be ancient or contemporary. Examination of the published judgements of the appellate courts in the common law world also reveals a minute concern not just with the detail of any legislative provision that is in play, but also often with its alleged point and legislative history. Clearly, the judges are working hard to support the conclusions they reach. One general question that can be asked of the work they do when deciding cases is: does it rationally justify the decisions they

³ It is worth pointing out here that my spelling of 'judgement' bears no significance, save that I eschew the anachronistic lawyerly conceit of referring to law's judgement(s) as 'judgment(s)'. I thus align myself with what has been regarded as normal usage for some considerable time: see Sir E Gowers, *Fowler's Modern English Usage*, 2nd edn (Oxford, Clarendon Press, 1965).

come to? This question, in one form or another, has informed much of the best Anglo-American legal philosophy of the last four decades.⁴

In addition to questions about the legitimacy and rationality of law's judgement, we can ask a range of slightly narrower questions. These questions investigate the other properties law's judgement (or, more accurately, law's judgements) might have. So, for example, there is a great deal of interest in the degree, if any, to which judicial decisions differ from political or other normative judgements. There is also a question about the extent to which appellate court decisions are and can be predictable, given the fact that the courts often seem to develop the law in such cases. This question also serves to raise a concern about how, if at all, judicial decision-making in the common law world can abide by some of the requirements of the rule of law ideal.

Neither question about the legitimacy or the rationality of judicial decisions is of concern here. The family of slightly narrower questions about predictability and related issues is also set aside. This is certainly not to say that these questions are uninteresting. Rather, the fact that these questions are so interesting is part of the reason for ignoring them. They are ignored not because what follows aims to put tedious and dull questions centre stage, but because these very interesting questions have served to crowd out consideration of other equally interesting issues. I argue that one of these issues is the nature of law's judgement itself. This issue is often completely overlooked, the focus of much contemporary legal philosophy being instead upon the rationality or legitimacy or predictability of particular instances of law's judgement. These particular instances are a handful of judicial decisions which have been taken as exemplary and thus propelled to jurisprudential stardom: rare is the law student ignorant of *Riggs v Palmer*, or *Daniels and Daniels v R White's Lemonade and Tabard*, or *R v R*, or the *Snail Darter* case.⁵ But all these cases, and almost all the other cases lawyers in the common law jurisdictions will ever come across, have features in common which are missed by most contemporary jurisprudential discussions of law's judgement. That, at least, is one of the guiding suppositions of this book.

These features are referred to with this compendious claim: law's judgement is abstract. This claim has at least two broad aspects, each of which can be further sub-divided. One aspect relates to *how* contemporary law judges us, the other to *how* contemporary law sees those it judges. The former is tackled in the remainder

⁴ For a brief taster see N MacCormick, *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press 1978; revised edn, 1993) and *Rhetoric and the Rule of Law* (Oxford, Clarendon Press, 2005); R Dworkin, *Taking Rights Seriously* (London, Duckworths, 1978) and *Law's Empire* (London, Fontana, 1986 and Oxford, Hart Publishing, 1998). That the question is not only of interest to Anglo-American jurists is clear from, *inter alios*, A Aarnio, *The Rational as Reasonable* (Dordrecht, D Reidel, 1987); R Alexy, *A Theory of Legal Argumentation* (Oxford, Clarendon Press, 1989) and K Gunther, *The Sense of Appropriateness* (Albany, SUNY Press, 1993).

⁵ Respectively: 115 NY 506, 22 NE 188 (1889); [1938] 4 All ER 258; [1991] 4 All ER 481; and *Tennessee Valley Authority v Hill* 437 US 153 (1978).

of this chapter, which also sketches how our examination of law's judgement will proceed and why it should be thought significant. The latter aspect is the fulcrum of chapter two.

I. How Law Judges Us

When called to account by our nearest and dearest, it is normal to expect their judgement to be tempered not just with mercy but also by knowledge: not only of the conduct in question and its context, but knowledge of our character. We expect to be judged by those closest to us in all our particularity. We hope they know us and thus show a greater understanding of our deeds because of their knowledge of our characters or 'selves'. We are not strangers but intimates, with a history. Thus, those who know me best know that I am often tardy and, although they are rightly beyond excusing this inexcusable behaviour, they now plan with it in mind: I'm told, for example, to arrive for meetings earlier than they are actually scheduled to start. In addition, their judgement of this aspect of my conduct is in some sense mitigated or restrained by their knowledge of me; what they would invariably regard as inexcusable in others in most contexts, they sometimes tolerate in me in some contexts. My nearest and dearest clearly do not judge me by standards generally applicable to the rest of humankind.

The law does. Or, at least, it purports to judge me in the same way as it judges all its addressees. That is because bourgeois or liberal law's judgement is abstract.⁶ This much becomes clear once we remind ourselves of three of bourgeois law's most distinctive features. The first feature can be labelled the presumptive identity component because bourgeois law usually sees its addressees not in all their particularity, but as *identical abstract beings*. Addressees of the law are identical in two respects according to this component: they are regarded as if they were the same in terms of those capacities, cognitive and physical, which enable humans to comply with achievable and intelligible legal standards; and they are taken to be identical in the sense of having the same entitlement to the same bundle of 'formal' rights and abilities. Bourgeois law's second feature is the uniformity component, which entails that, generally speaking, the law judges its addressees by reference to *general and objective standards equally applicable to all*. The idea that the same laws should apply to all addressees of the law is so powerful that it casts suspicion upon laws which apply to particular persons or groups. This requirement, once apparently called 'isonomy', is probably identical to some versions of the generality requirement of the rule of law ideal.⁷ The limited avoidability component is the

⁶ By 'bourgeois' or 'liberal' I mean only 'not feudal'. These terms are not used pejoratively here.

⁷ On isonomy, see FA Hayek, *The Constitution of Liberty* (London, Routledge and Kegan Paul, 1960) 164–66. Neither of the two most influential accounts of the rule of law interpret its generality requirement expansively: see LL Fuller, *The Morality of Law* (New Haven, Yale University Press, revised edn, 1969) 49–51 and J Raz, *The Authority of Law* (Oxford, Clarendon Press 1979; 2nd edn, 2009) 213 and 215–16; contrast Hayek, *ibid.*, 208–10.

third feature of law's abstract judgement. It highlights the fact that the application of the standards in play in the uniformity component is often mitigated only by a *limited number and range of exculpatory claims*.⁸ Exculpatory claims are limited in range because they are subject to reasonableness standards. Thus, one can only rarely resist or deflect the law's judgement by averring, for example, that one lacks the fortitude or capacity to adhere to its standards. One is generally held to a reasonableness standard here and it usually matters not that one is unable to achieve such a standard.

In stating the three components, the qualifications used—'usually', 'generally speaking', 'often'—are deliberate. My claim is not that these three components are realised to the maximum degree across the whole of all or most current legal systems. Rather, it is that their significance in many legal systems and much legal thought is such that departures from them—which are in fact fairly numerous—are regarded as suspicious or problematic. Hence, laws which name particular addressees or which benefit particular groups are *prima facie* troublesome in most legal systems, even though many laws have the latter effect. There are also laws in most legal systems which attempt to take account of the context or character or particularity of a specific class of claimants or defendants but these, too, are often regarded as exceptional, as concessions to equity or mercy or some such allegedly non-legalistic virtue. In many legal systems the role played by the three components is that of fixed agitation points, against which departures must react and be tested. In most legal systems there is thus most likely a process of mediation between the three components, on the one hand, and their opposites or weaker versions of themselves, on the other.

Note that more or less 'pure' versions of law's abstract judgement are found in most current legal systems—common law, civilian or 'mixed'—and they function in private, public and criminal law. While these areas of law are indeed very different, the differences do not obviously impact upon the abstract nature of law's judgement, save perhaps to explain its more limited role in criminal as compared to public and private law.⁹ It is also true that the purest form of law's abstract judgement is found in only some areas of public law and plays its principal role at the liability and conviction stages of private and criminal law. The selection,

⁸ It is tempting to say these features show that law's judgement is also objective and there is at least one credible sense of 'objective' in which this is right (see M Kramer, *Objectivity and the Rule of Law* (Cambridge, Cambridge University Press, 2007) 38–45). However, the notion of objectivity when applied to law can have many other senses (all of which are dealt with in Kramer, *ibid*, and in K Greenawalt, *Law and Objectivity* (New York, Oxford University Press, 1992)) and is undoubtedly complex. Although some significant points about law's abstract judgement can be made using various senses of that term (see Greenawalt, *ibid*, Chs 6–8), this runs the risk of unnecessary complication.

⁹ Insofar as liability judgements in the criminal law are also regarded as moral judgements, it might be thought that law's abstract judgement and its components, like reasonableness standards, are inappropriate. This, however, assumes a somewhat dubious picture of moral judgement, as will be noted below, as well as assuming an exaggerated distinction between private law judgements and moral judgements.

details and quantum of the remedy in private law and the sentence in criminal law are quite often (although certainly not always) tailored to the situation of the particular claimant and defendant in the former, and the precise circumstances of the accused, his conduct and its affect upon the victim, in the latter. Why the role of law's abstract judgement is limited in this way is an interesting question, but not one tackled here.

That law's abstract judgement is found in diverse areas of contemporary law should not be overlooked. I do not claim that the three components of law's abstract judgement have marked each and every legal system known to human-kind. I claim only that law's abstract judgement is a more pronounced feature of liberal or bourgeois legal systems than it is of feudal legal systems. That its existence in the law has ebbed and flowed is plausible; so, too, might be the claim that it is now in terminal decline. The ultimate truth of these two claims is not questioned here. Moreover, the spirit of tidiness that informs these remarks demands that one other point be noted. It is a reminder, both substantive and terminological. The term 'law's abstract judgement' looms large in what follows. That it does so should not distract from the fact that it is nothing more than a shorthand way of referring to one, some or all of the three components just sketched. The substantive point follows on from this as a caution. It insists that the three components should not be taken as necessary and sufficient conditions of law's abstract judgement, for there is no intention here to foreclose the possibility of law's abstract judgement having additional components. These three components are simply the most important ones for our current purposes.

Our preliminary sketch of law's abstract judgement—hereinafter '*LAJ*'—can become less stipulative, and therefore more defensible, if it can be shown to describe something actually embedded in the law. That is the burden of the next two subsections. They elucidate the role *LAJ* plays in private law, public law and criminal law. Private law and criminal law are treated together because the three components of *LAJ* do similar work in both areas. For expository and substantive purposes, private and criminal law are therefore a good fit. As against those who insist that criminal law should be subsumed under the rubric of public law, my claim is this. There is indeed a perhaps trivial similarity in the 'public-ness' of both criminal and public law, namely, that the State is supposedly vividly present in each. But the State is assuredly not absent from private law, either as litigant, or as sponsor and guarantor of the court system and of the means of enforcing judgements. What makes public law public for our purposes is a far more banal, double-sided claim. First, the law in play in our discussion of public law is found in more or less fundamental constitutional provisions and the case-law surrounding them.¹⁰ If any area of law is assuredly public law, then it is those provisions and

¹⁰ But not all. Some 'public' law provisions in play below are found in 'ordinary' non-discrimination statutes. I have examined various ways in which public and private law might plausibly be distinguished in 'What's Private about Private Law?', Ch 3 of A Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Oxford, Hart Publishing, 2009) 47–75.

their associated case-law. Second, the public law of even the common law jurisdictions is far from uniform; complexity thus arises simply by virtue of difference and this provides another reason for treating public law separately from criminal law in what follows. Our category ‘public law’ is already a mixed-bag; it becomes too mixed to be coherent when criminal law is also added.

A. Private and Criminal Law

The third—limited avoidability—component of *LAJ* is best examined first, since this is the least complex and (perhaps) least interesting of the three. That private and criminal law recognise only a limited number of exculpatory claims is not news.¹¹ Nor is it particularly informative to highlight that these exculpatory claims are not easily available, being constrained by a variety of requirements. Almost as trite is the observation that some think the law’s ‘progress’ from barbarism is marked by greater permissiveness and flexibility in its recognition of excusing conditions. The salient point, for current purposes, is that far fewer exculpatory claims are currently legally recognised than would be if defendants were judged by reference to all the detail of their context and particular attributes. If each defendant’s conduct was judged not just against the law’s general standards, but also by a fine-grained assessment of her particular capacities on this particular occasion, in these precise circumstances, then the grounds for excusing her conduct could multiply. To know the details of this particular defendant’s character and situation at the time of, for example, a traffic accident might be to know that in some sense she could not have avoided it. And this, some assume, should generate either a complete or partial excuse. But, while factors such as these may be taken into account at the sentencing stage in the criminal law, they are almost completely irrelevant at the liability stage in private law.

That, when accepting exculpatory claims, the law rarely delves into the particularities of the defendant’s context or character is reinforced by something else: such exculpatory claims are usually valid only if reasonable. Reasonableness requirements are the principal means by which the law treats those before it as abstract beings rather than as the beings they actually are. The third component of *LAJ* thus takes us to the core of the other two. All three are functionally connected since, both separately and combined, they serve to lead law’s judgement away from particularity and toward abstraction.

The functional connection between the first two components becomes apparent as soon as we attempt to unpack them. The first, remember, is the presumptive identity component and it holds that the law regards those called before it

¹¹ In speaking of ‘exculpatory claims’ I do not intend to elide or even take a position on the plausibility of the oft-drawn distinction between justification and excuse. For some of the themes here see J Horder, *Excusing Crime* (Oxford, Clarendon Press, 2004) Ch 1 and 99–103.

as abstract beings. But what, exactly, does it entail? This, at the very least: that the law sees neither claimant nor defendant, neither accused nor victim, as the actual human beings they truly are, in all their detail and specificity. The law does not often see or even notice the specific set of abilities or experiences those being judged have, nor does it usually notice their different social, cultural, economic or ethnic backgrounds. Law's judgement is supposedly blind to these differences, treating Duke and pauper, man and woman, Christian and non-Christian, homo- and heterosexual, aesthete and philistine alike. And the law most obviously treats those brought before it alike, as the same, by assuming that all its addressees have the same bundle of formal legal rights.

Another way in which those judged by the law are treated as being both abstract and alike, is that all are usually held to the same general standards of conduct. This is the second—uniformity—component of *LAJ*. The standards are general in the sense that their content is the same and they apply to all those whom they address, applying whether or not particular addressees can actually live up to their requirements. Lack of interest in the specific capacities of particular individuals is, of course, the essence of reasonableness standards. The pass mark for examinations or driving tests is almost never set with a view of the abilities of particular candidates in mind. It is, rather, set with a view to assessing basic standards of competence anyone must achieve in order to succeed, provided it is possible for some to succeed. Whether or not specific candidates succeed, given their background, abilities and circumstances at the time of attempt, is irrelevant unless an exculpatory claim is triggered. This situation is obviously echoed in the law. Insofar as the law assumes all addressees can achieve the same standards of (usually reasonable) conduct, or embody the same standards of (usually reasonable) fortitude, it ignores obvious differences between them which actually determine whether or not they can achieve these standards on particular occasions. Holding those before the law to the same general standards is a means of treating them as abstract beings rather than as actual beings in all their particularity.

Most current legal systems contain standards for the assessment of a *defendant's* conduct or character that explicitly disregard the particularities of that individual, the context of their conduct, or both. Perhaps the most obvious private law example is the reasonable care standard in negligence and its cognates. In English and Scots law a defendant's conduct must be of the same standard as that of a reasonable person engaged in that kind of activity, a reasonable person being—by definition—reasonably competent. That the defendant cannot actually reach that standard is usually irrelevant.¹² There are, however, some exceptional instances in which a judgement of negligence is influenced by the specific circumstances or particularities of a class of defendants. Child defendants are therefore sometimes held to a slightly different standard of care compared to that applied to most

¹² See *Nettleship v Weston* [1971] 2 QB 691 (UKCA); *Wilsher v Essex Area Health Authority* [1988] AC 1074 (UKHL); *Imbree v McNeilly* [2008] HCA 40.

adults.¹³ There are also *dicta* in English negligence and nuisance cases suggesting that the level of a defendant's wealth will make a difference in the assessment of whether or not her conduct was reasonable.¹⁴ Furthermore, in some jurisdictions it has been recognised that what is reasonably foreseeable for the purposes of establishing a duty of care in negligence can differ according to the ethnic and religious context of both claimant and defendant.¹⁵

If the requirement of reasonable care in negligence and the abstraction it involves sets a demanding standard, then the default standard of performance in contract law is even more stringent. It is not enough in many contracts for a defendant to have used reasonable endeavours to perform, since the standard of compliance is strict.¹⁶ Thus, not only those unable to achieve a reasonable standard of performance are judged by a standard that is beyond them; so, too, are those capable of a reasonable level of performance. Both reasonableness and strict standards ignore the particularities and context of the individual being judged; both are therefore manifestations of *LAJ*.

A number of defences in English criminal law also rest upon assessments of reasonableness. The most problematic defence in recent years was the partial defence of provocation. To invoke this defence an accused had, *inter alia*, to establish that the alleged provocation was such as to lead any reasonable person to lose their self-control. A number of problems arose with this defence, both in terms of its rationale and its practical consequences. But one issue proved pre-eminently problematic: the determination of what a reasonable person is and how such a person behaves in specific contexts. Particularly fraught was the question of which physical features, character traits or habits of the accused should be regarded as pertinent to the alleged provocation.¹⁷ The circumstances of the cases were usually such that endowing the reasonable person with one or other of these features made the putative provocation more rather than less salient. A substance abuser whose perception of the world is addled by abuse could well regard as provocation

¹³ *McHale v Watson* (1966) 115 CLR 199 (HCAus); *Mullin v Richards and another* [1998] 1 All ER 920 (UKCA) and www.nytimes.com/2010/10/29/nyregion/29young.html (last accessed 3rd January 2017). Perhaps the first sustained analysis of the particular physical, psychological and other features of claimants and defendants regarded as salient by the American courts in determining tort liability was G Calabresi, *Ideals, Beliefs, Attitudes, and the Law* (Syracuse, Syracuse University Press, 1985) chs 2–4. Do not assume that the differential treatment of child defendants by the courts is unimpeachable: M Moran, *Rethinking the Reasonable Person* (Oxford, Clarendon Press, 2003) chs 2 and 3.

¹⁴ *Knight v Home Office* [1990] 3 All ER 237 (UKHC); *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (UKHL); *Goldman v Hargreave* [1967] 1 AC 645 (UKPC).

¹⁵ See *Kavanagh v Aktar* (1998) NSWCA 779 (NSW, Aus); *Mustapha v Culligan of Canada Ltd* [2005] 138 ACWS 3rd 767 (Ontario, Can).

¹⁶ *Rainieri v Miles* [1981] AC 1050, 1086 (UKHL). See also G Treitel and E Peel, *The Law of Contract*, 13th edn (London, Sweet and Maxwell, 2011) 834–36 and S Smith, *Contract Theory* (Oxford, Clarendon Press, 2004) Ch 10.

¹⁷ Use of the past tense here is a result of the replacement of the provocation defence in English law by a statutory 'loss of control' defence (s 54–56 Coroners and Justice Act 2009, implemented 4 October 2010). For some vivid instances of the problems to which the defence gave rise in a number of jurisdictions, see *R v Morhall* [1996] AC 90 (UKHL); *Stingel v R* (1991) 171 CLR 312 (HCAus); *R v Thibert* [1996] 1 SCR 37 (SCCAn).

conduct that in the eyes of others would be worthy of nothing more than laughter or a raised eyebrow. Of course, the greater the degree to which the reasonable person in provocation cases was endowed with the character, traits and habits of the accused, and situated as the accused was situated at the time, the less weight the reasonable person standard carried. The thrust of some decisions in England and elsewhere had been to all but obliterate, and then reaffirm, the distinction between a reasonable person standard and a subjective standard tailor-made for the particular accused. In England and Wales, at least, this process has been arrested as a result of ss 54–56 of the Coroners and Justice Act 2009 and subsequent case-law.¹⁸

A less prominent but equally interesting emerging issue in the criminal law is that of so-called 'cultural defences'.¹⁹ While quite different in doctrinal terms, this issue has some resonance with recent developments in the provocation defence. This is found in the fact that cultural defences—whatever their particular form or detail—claim that the accused's conduct is either justified, excused or mitigated by the fact that it is right, reasonable or normal within a specific cultural group. The general claim by proponents of such defences is clear. It is that once account is taken of the accused's background and beliefs (and, perhaps, other features of their cultural context), then their conduct, which would ordinarily be contrary to the criminal law, is understandable and its culpability either reduced or eradicated.

Does private law treat *claimants* in the same way as it often treats defendants, namely, as abstract beings? Some doctrines suggest so. The law of contract, for example, only rarely awards damages for what can be called subjective losses which, on one view, are understood as those that arise from the specific non-market valuation claimants put upon performance.²⁰ Although different from one another in detail, the remoteness rules for damages in contract and tort seemingly ensure that claimants cannot claim for injury that results from their particular sensitivities. Insofar as such injury and the losses that result from it are not foreseeable by a reasonable person, they go uncompensated. Thus, while unlikely to be a goal of the remoteness rules, one of their practical effects is to treat claimants as abstract rather than actual beings. This effect is, however, almost completely negated with respect to some physical and psychological features of the claimant by the eggshell

¹⁸ A list of problematic pre-2010 cases has to include *R v Smith (Morgan)* [2000] 4 All ER 289 (UKHL); *Luc Thiet Thuan v R* [1997] AC 131 (UKPC); *Jersey v Holley* [2005] 2 AC 580 (UKPC); and *R v Van Dongen* [2005] EWCA Crim 1728. On the changes effected by the 2009 Act and the status of the pre-existing law, see *R v Clinton* [2012] EWCA Crim 2; *R v Dawes* [2013] EWCA Crim 322; and *R v Gurpinar* [2015] EWCA Crim 178. A typically sure-footed overview is provided by D Ormerod and K Laird, *Smith and Hogan's Criminal Law*, 14th edn (Oxford, Oxford University Press, 2015) 576–604.

¹⁹ An interesting introductory discussion is A Phillips, 'When Culture Means Gender: Issues of Cultural Defence in the English Courts' (2003) 66 *Modern Law Review* 510–31. Much more comprehensive is AD Renteln, *The Cultural Defense* (New York, Oxford University Press, 2004). One of the most vivid cases is *People v Kimura* No A-091133 (Sup Ct, LA County, 24th April 1985), on which see Renteln, *ibid*, 25.

²⁰ See *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (UKHL) and *Farley v Skinner* [2002] 2 AC 732 (UKHL).

skull rule in the law of negligence.²¹ If the claimant has an unusual sensitivity to a particular process or form of treatment inflicted by the defendant in breach of a duty of care, the consequence being that the claimant is affected far more seriously than others would be, then the defendant cannot escape liability for the claimant's commensurately greater losses.²² Much the same rule holds in the criminal law.²³

By insisting tortfeasors and accused take their victims as they find them, the law is recognising some particularities of the actual claimant or victim before the court. There are other areas of private law—defamation, for example—in which the courts should in principle be willing to take seriously the claimant's cultural or religious context. It is surely right that a statement which clearly does not defame a non-Muslim can be defamatory when made about a Muslim. Alongside these instances in which the law recognises some aspects of a victim's particularity, there are doctrines which suppress other such aspects. In the tort and crime of battery, for instance, victims must display reasonable fortitude in light of the touching, buffeting and other non-consensual contact of everyday life.²⁴ The criminal law also rules out consent as a defence to some crimes whether or not the particular 'victim' consented, the animating notion of this prohibition being in part the idea that reasonable people will never agree to some forms of treatment by others.²⁵

B. Public Law

My claim here is that the first two components of *LAJ* are central to some important constitutional and non-constitutional equality law provisions, while the third component is only a peripheral presence. An expansive survey of constitutional and equality provisions, along with their extensive layers of case-law, is not possible here. Rather, I concentrate upon a few very important provisions, chosen to highlight the first two components of *LAJ* at work. 'Work' here means—as it did in the discussion of private and criminal law—that the components operate as fixed agitation points against which departures must react and be tested. The claim is not that the outcomes of all (or even most) of the cases mentioned illustrate the two components being realised to the maximum degree. That would indeed be exceptional. The components are nevertheless almost always in play even when the outcomes of cases do a poor job of instantiating them; the components are still affirmed in such cases, although seemingly as obstacles around which judgements navigate. They can be honoured in the breach.

²¹ The relevant psychological features, in the American cases, usually relate to matters of belief rather than psychological fortitude: see Calabresi (n 13) Chs 3 and 4. The eggshell skull rule is not, of course, confined only to negligence.

²² A masterly treatment, although now slightly doctrinally outdated, is HLA Hart and T Honoré, *Causation in the Law*, 2nd edn (Oxford, Clarendon Press, 1985) 172–76.

²³ See *R v Blaue* [1975] 3 All ER 446 (UKCA) and the discussion in Hart and Honoré, *ibid*, 360–62.

²⁴ See *Re F* [1990] 2 AC 1 (UKHL) 72–73 (Lord Goff).

²⁵ See, for example, *R v Brown* [1994] 1 AC 212 (UKHL).

The first two components of law's abstract judgement feature in 'general', 'particularistic' and 'hybrid' equality regimes. The equal protection clause of Amendment XIV (1) of the US Constitution is a central instance of a general equality regime by virtue of its insistence that persons within states not be denied equal protection of the laws. No specific form of conduct which could constitute a denial of equal protection is mentioned, it being the job of the courts—and the Supreme Court in particular—to determine this on a case by case basis. Particularistic equality regimes, by contrast, address specific instances of unfair or discriminatory treatment one by one and usually prohibit such treatment only in specific spheres of activity or interaction. New Zealand equality law could perhaps be regarded in this way and the UK certainly used to have a particularistic equality regime. Hybrid regimes, unsurprisingly, combine elements of the other two: s 15 (1) of the Canadian Charter of Rights and Freedoms combines a non-exclusive list of types of discrimination with a general invocation of equality before and under the law, while the UK had a range of specific statutes (many of which were repealed and replaced by the Equality Act 2010)²⁶ in tandem with the general equality provisions found in EU law, the European Convention on Human Rights (ECHR) and the Human Rights Act 1998.

The uniformity component requires that the law judge its addressees by reference to general and objective standards equally applicable to all. The most obvious denial of this component consists of explicitly different laws for allegedly different groups. For most lawyers these are *prima facie* instances of direct discrimination. But the uniformity component can be denied in a less obvious yet still familiar way, by laws which, although they do not explicitly treat putatively different groups differently, affect one group far more adversely or far more beneficially than another. These are *prima facie* instances of indirect discrimination.²⁷

General equality regimes like the equal protection clause of Amendment XIV currently have little difficulty in invalidating many directly discriminatory laws, such as those setting different age limits for men and women for the consumption of alcohol, and this is so regardless of the lower level of scrutiny used by the US Supreme Court in gender cases.²⁸ The old 'separate but equal' racial segregation cases, however, show that even an ostensibly strong, general equality regime need not always be interpreted as requiring that the same legal standards must apply to all. Of course, Amendment XIV is now interpreted quite differently, the court's current approach of subjecting racial classifications to strict scrutiny being one means of attempting to ensure that the same laws govern all.²⁹ Far more problematic

²⁶ For an overview of the 2010 Act and the relevant case law, see B Hepple, *Equality: The Legal Framework*, 2nd edn (Oxford, Hart Publishing, 2014) and K Monaghan, *Monaghan on Equality Law*, 2nd edn (Oxford, Clarendon Press, 2013).

²⁷ In using the direct/indirect distinction, I do not imply that it is unproblematic; its difficulties are not, however, central to the argument here.

²⁸ See *Craig v Boren* 429 US 190 (1976).

²⁹ The supposed originator of the separate but equal doctrine, *Plessy v Ferguson* 163 US 537 (1896), was laid to rest by *Brown v Board of Education of Topeka* 347 US 483 (1954) (Brown I) and 349 US

for the court have been instances in which the disproportionate adverse impact of particular laws has been challenged under the equal protection clause. Many different laws, including zoning regulations, preferential hiring requirements and educational admission tests, have been examined by the court on numerous occasions, with very different results.³⁰

Among hybrid equality regimes, Canada has tackled the problem of apparently directly discriminatory laws in a number of important cases. A quartet of Supreme Court of Canada cases—*Andrews v Law Society of BC*; *Law v Canada*; *Nova Scotia (AG) v Walsh*; and *Gosselin v Quebec (AG)*³¹—show that, while the court takes a close look at laws treating some differently than others by, for example, setting welfare benefits at different levels for different age groups or by awarding survivor benefits only to those over a certain age, such laws will not automatically be discriminatory under s 15 (1) of the Canadian Charter of Rights and Freedoms. The test for compliance with s 15 (1) was clearly laid down in *Law* and was designed, in part, to ensure that not every instance of differential treatment will fail it. Although the court's approach to equality of impact could be characterised as a relatively cautious one, there being no presumption that all laws which treat addressees differently are suspect, there can be no suggestion that the court does not take seriously the idea of equal impact, or the uniformity component of juridical equality. In the UK, explicitly discriminatory laws, such as those prohibiting certain groups from working in particular ways or industries, have been repealed because they are incompatible with EU law.³² In both jurisdictions, laws and practices which disproportionately affect specific groups have also been subject to scrutiny, raising very similar difficulties to those faced in the US cases.³³

294 (1955) (Brown II). A fascinating account of Amendment XIV's interpretative history is provided by W Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Massachusetts, Harvard University Press, 1995).

³⁰ See *Village of Arlington Heights v Metropolitan Housing Development Corp*, 429 US 252 (1977); *Personnel Administrator of Massachusetts v Feeney* 442 US 256 (1979); and *Washington v Davis* 426 US 229 (1976). For an overview, see E Chemerinsky, *Constitutional Law*, 4th edn (New York, Wolters Kluwer, 2013) Ch 7.

³¹ Respectively: [1989] 1 SCR 143; [1999] 1 SCR 497; [2002] 4 SCR 325; and [2002] 4 SCR 429. For discussion see R Sharpe and K Roach, *The Charter of Rights and Freedom*, 4th edn (Toronto, Irwin Law, 2009) Ch 15 and PW Hogg, *Constitutional Law of Canada*, 5th edn (Scarborough, Carswell, 2007) Vol II, Ch 55.

³² See Sex Discrimination Act 1986, s 7 and Employment Act 1989, s 9 (both repealed by the Equality Act 2010, sch 27).

³³ The British position differs according to whether domestic, EU or ECHR principles held sway. For an instance of the former, see Sex Discrimination Act 1975, s 1 (1) (b) (repealed by the Equality Act 2010, sch 27); the EU position begins with Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (Burden of Proof Directive) [1998] OJ L14 and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive) [2000] OJ L180, while the European Court of Human Rights' (ECtHR) view of indirect discrimination is still well represented by *Abdulaziz, Cabales and Balkandali v UK* Series A No 42 (1985) 7 EHRR 471. Indirect discrimination is now explicitly identified in s 19 of the Equality Act 2010.

The second limb of the presumptive identity component, which insists that the law's addressees are identical in that each is equally entitled to the same bundle of formal legal rights and abilities, is in play in many equality provisions. Bans on interracial and same-sex marriage have been held unconstitutional under Amendment XIV and so, too, has the making of child custody decisions on the basis of race; the US Supreme Court has also held that the right to procreate is one enjoyed by all to the same degree.³⁴ The Court has ruled, in addition, that all must have the same access to the courts, that the voting rights of some citizens cannot be restricted, and that all are entitled to travel between states.³⁵ Access to public education cannot, the Court has held, be based exclusively on gender or race: these factors might be used, among others, in admissions processes but a blanket refusal to admit certain groups is almost always likely to be unconstitutional under Amendment XIV.³⁶

In jurisdictions with either hybrid or particularistic equality regimes, cases of this type—which deal with civil rights—are likely to be covered by specific statutory provisions and have also, in some instances, been tackled by the courts. *AG v Quilter*,³⁷ a right to marry case decided by the New Zealand Court of Appeal, created a space for the presumptive identity component even while denying it and arriving at an outcome that few friends of equality could admire. The Court held that the Marriage Act 1955 could not be interpreted to include same-sex marriage. It concluded that this either did not make the Act incompatible with s 6 and s 10 of the New Zealand Bill of Rights Act 1990 and part II of the Human Rights Act 1993 or, if it did, that it was a form of incompatibility implicitly approved by the legislature. *Quilter* thus denied the presumptive identity component any role in this area of law, yet nevertheless implicitly affirmed that component's general importance via Tipping J's claim that New Zealand's specific anti-discrimination provisions 'gave substance to the principle of equality under the law'.³⁸ None of the other judges in the Court of Appeal disagreed with this claim and its significance, for present purposes, is this: there is almost no better way of attempting to ensure equality under the law than by taking the presumptive identity component seriously.³⁹

The courts in a number of jurisdictions have also been vigilant with regard to interferences or restrictions upon equally distributed private law rights like, for example, the right to contract. This right is not one that can be exercised in

³⁴ See *Loving v Virginia* 388 US 1 (1967); *Palmore v Sidoti* 466 US 429 (1984); *Skinner v Oklahoma ex rel Williamson* 316 US 535 (1942); and *Obergefell v Hodges* 576 US (2015).

³⁵ See, for example, *US v Guest* 383 US 745 (1966) and *Harper v Virginia Board of Elections* 383 US 663 (1966). These and the cases noted in n 34, above, can also be tackled under the due process clause of Amendment XIV, as 'fundamental rights' cases: see Chemerinsky (n 30) Ch 8.

³⁶ *US v Virginia* 518 US 515 (1996); *Gratz v Bollinger* 539 US 244 (2003); *Grutter v Bollinger* 539 US 306 (2003).

³⁷ [1998] 1 NZLR 523.

³⁸ *ibid* at 573.

³⁹ For an illustration, see my 'Equality Under and Before the Law' (2011) 61 *University of Toronto Law Journal* 411–65.

a discriminatory way, since the courts have regarded that as a practical denial of the entitlement of all to be able to enter into contractual and related arrangements.⁴⁰ Nor, for some courts, can the right be overly limited in the name of substantive equality. Thus courts in both general and hybrid equality regimes have held that contract-compliance provisions—terms inserted into contracts by one party, usually a government agency, designed to eliminate discrimination or reduce economic disadvantage—are, except for some fairly specific circumstances, incompatible with broader equality provisions.⁴¹ In the UK, differential private pension entitlements have also been set aside as a result of conflict with EU law and the ECHR. These entitlements are, of course, contractual rights and, in the UK at least, they have traditionally been different for men and women, the retirement age for the former being 65 and the latter 60. The Courts have had no hesitation in pointing out the discriminatory character of these contractual terms and that has led to a uniform normal retirement age for men and women.⁴²

Some—perhaps all—of the cases noted in this subsection can be cast in two roles simultaneously, as illustrations of *both* the uniformity and presumptive identity components. And, that being so, it might be inferred that the distinction between these two components is therefore infirm. The inference should be resisted, however, since a degree of overlap between the two components cannot show that they are identical. For the inference to be valid, each and every case subsumed under one component must also be appropriately subsumable under the other. But this seems unlikely, since one cannot convert, without remainder, the first limb of the presumptive identity component (which presumes that addressees of the law have the same physical and cognitive capacities) into the uniformity component (which holds that the same laws should apply to all). The former is about the nature of the law's addressees, while the latter is about the content of laws themselves: their reach is therefore quite different and there seems no obvious path in which a claim about the nature of law's addressees can be converted into one about the overall effect of a particular law or the law in general.

Finally, we come to the limited avoidability component. Its role in some equality provisions, although peripheral when compared with the other two components,

⁴⁰ In many jurisdictions the standard limitations on contracting included only age, intoxication and sanity. Where private law systems in the common law world did not include a non-discrimination constraint as a result of normal incremental development, such provisions were inserted as part of the process of 'constitutionalising' private law: see, for example, the Equality Act 2010 s 142 for an instance from the UK. An excellent cross-jurisdictional overview of the 'constitutionalising' process is D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Oxford, Hart Publishing, 2001).

⁴¹ For the US position see *Ararand Constructors v Pena* 515 US 200 (1995); the EU position is stated in Case 31/87 *Gebroeders Beentjes BV v the Netherlands* [1989] ECR 4365; Case C-360/89 *Commission v Italy* [1992] ECR I-3401; and Case C-513/99 *Concordia Bus Finland Oy Ab v City of Helsinki & HKL Bussilikenne* [2002] ECR I-7213.

⁴² See *Barber v Guardian Royal Exchange* [1991] QB 344 1990; *Foster Wheeler Limited v Andrew Hanley and others* [2009] EWCA 1 WLR 235 and Equality Act 2010 s 61–63. On the often complex interplay between EU equality provisions and those in the ECHR, see S Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 *Human Rights Law Review* 647–82.

is nevertheless significant. The component, remember, holds that the application of legal standards is mitigated only by a limited number and range of exculpatory claims. That the component operates within various equality regimes is plain: some such regimes allow no excuses or defences, however reasonable, for some forms of discrimination, while other forms of discrimination can be justified on tightly circumscribed and usually reasonable grounds.⁴³ None of the jurisdictions mentioned here recognise a 'I just like/can't help wrongfully discriminating' defence.

C. Two Points

The first makes explicit what was implicit in the preceding sketch of *LAJ*: it is not ubiquitous. It is more deeply embedded in some areas of legal doctrine than in others. A more expansive survey would surely disclose areas in which it has little influence.⁴⁴ Judged across entire legal systems, the abstract nature of *LAJ* is thus a matter of degree, of more or less. There is, moreover, undoubtedly a constant process of mediation between more and less abstract forms of judgement within areas of legal doctrine where *LAJ* is entrenched.

Although a pure form of *LAJ* is not ubiquitous, it is still probably rightly regarded as the focal meaning, or paradigmatic instance, of bourgeois law's judgement.⁴⁵ For, despite the many doctrinal departures from a pure and unyielding form of abstract judgement, the latter remains intact and central just because the former are usually regarded as exceptions. That they are seen as abnormal, as in need of justification, attests to the power the pure form of *LAJ* has over swathes of juristic thought.⁴⁶ This mixed picture might suggest that *LAJ* is actually in tension with a model of pure particularistic judgement, rather than being in tension with less abstract versions of itself. The question of that with which *LAJ* can and must be contrasted is the second point here. A number of considerations suggest that the tension cannot be understood as one between abstract judgement, on the one hand, and pure particularistic judgement, on the other.

First among these is that law surely is, in some significant sense, a matter of subjecting human conduct to *general* rules. And general rules are themselves unavoidably

⁴³ For the position in the UK, see S Fredman, *Discrimination Law*, 2nd edn (Oxford, Clarendon Press, 2011) 190–202 and Monaghan (n 26) Ch 13. The Equality Act 2010 broadly follows suit, containing the standard 'reasonable readjustment' provisions in relation to some forms of discrimination and to some contexts: see, for example, s 189 and schs 13 and 21.

⁴⁴ Two obvious examples are the sentencing stage in criminal law and the 'best interests of the child' principle in family law. Note that the latter ostensibly particularistic form of judgement is usually deployed not in relation to either claimant or defendant but rather to their offspring or ward.

⁴⁵ On focal meaning, see J Finniss, *Natural Law and Natural Rights*, 2nd edn (Oxford, Clarendon Press, 2011) 9–18, 277–81 and 429–31.

⁴⁶ Evidence in support of this claim can be garnered from the critical response to cases such as *Morhall*, *Stingel* and *Thibert* (n 17) and *Smith* (n 18). Much the same responses are provoked by cases varying the standard of the duty in negligence.

a matter of abstraction, a means of setting aside or ignoring particularity. The rule ‘drive on the right’ applies to all drivers whatever their context or particular capabilities: it means drive on the right *regardless* of such matters. Some might deny that law and legal judgement must invoke general rules. Frederick Schauer, for example, suggests that

disputes could ... be *resolved* largely without reference to ... rules imposing substantive constraint on the content of decisions. Having been empowered to resolve a dispute, the adjudicator would be authorised ... to come to a conclusion as open-endedly as appropriate in the circumstances.⁴⁷

While this is undoubtedly possible—an adjudicator could be empowered to resolve disputes however she likes, deciding one by flipping a coin, another by the reference to the height of the disputants, etc—it is important to see that general rules are nevertheless still in play here. First, as Schauer himself notes, ‘empowering rules create the institutions of dispute resolution and empower certain officials to resolve certain sorts of disputes’.⁴⁸ These rules must surely be general to some extent if they are to perform their task. Second, the dispute here must, if genuine, have a subject-matter, a basis, and what else could that be except some or other standard of conduct for the disputants? If the dispute is not about whether one or other disputant did or refrained from doing something required or otherwise appropriate, then what could it conceivably be about? The dispute must revolve around either a standard of conduct, in which case the standard is likely to be general, or a contested matter of fact. A standard of conduct need not be general as a matter of necessity, since it is possible that a bespoke standard be created for and applied to no one but the disputants in question. Such a limited standard would be rare in a developed legal system. Furthermore, such a standard might, by virtue of its specificity, come into tension with some components of the rule of law ideal in such a legal system.

A second consideration showing it is implausible to regard *LAJ* as being in tension with pure particularistic judgement is both banal and true. It is that the idea of pure particularistic judgement is *prima facie* senseless. If this is judgement based upon all the specificities, physical and mental, of those being judged, and responsive to the context and all the relevant circumstances of their conduct, without recourse to any general rule or standard, then it is hard to see how anything is being judged. If the reply here is: ‘the person before us’ then it invites this question: ‘against what standard?’ If we allow (as we surely must) that judgement assumes a standard against which conduct or character or both are assessed, then

⁴⁷ F Schauer, *Playing by the Rules* (Oxford, Clarendon Press, 1991) 10 (emphasis added). It will be clear to anyone that the conception of rules in play in the picture of law’s abstract judgement developed here is much the same as Schauer’s conception of rules as entrenched generalisations: *ibid*, chs 2–5. For an additional, lighter-touch discussion of the same issue, see F Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge, Massachusetts, Harvard University Press, 2003).

⁴⁸ Schauer, *Playing by the Rules*, *ibid*.

this problem of intelligibility disappears, but we face another difficulty. This is that extremely fine-grained responsiveness to the character and context of those whose conduct is being judged can undermine the power of the standard against which they are assessed.

Suppose, for example, that the pass mark for an examination is 40 per cent. If, in assessing whether a candidate has failed, we have recourse to much more than the bare figure of their examination performance, taking into account and allowing marks for all the aspects of the candidate's character and context that affected their preparation for and performance in the examination, then the pass mark itself plays a relatively minor role in judging performance. Indeed, as the range of factors taken into account to explain and mitigate a 'failed' performance expands, so the weight of the standard embodied in the pass mark declines. While its weight cannot diminish to zero, provided the standard is still in force, it can get close to that if a massive number of factors can serve to turn a mark of less than 40 into a mark of 40. The rule that the pass mark is 40 persists, but the ways of getting 40 far exceed what was once the primary way of achieving that mark, namely, by answering a sufficient number of questions at or above the pass level.

That *LAJ* must be contrasted with less abstract (but not pure particularistic) judgement prefigures another and related warning. It is that *LAJ* should not be flippantly contrasted with moral or ethical judgement. This is a mistake because there is no *a priori* reason why the models in play in one domain should not be similar or even exactly the same as those in another. Moreover, if the contrast is motivated by the thought that morality's judgement is always and ever particular, then that is surely questionable.⁴⁹ Morality's judgement is sometimes abstract and sometimes less abstract, at least as a matter of moral practice. We accept that, generally speaking, an important characteristic of some moral judgements is their generality and abstraction: we think, for instance, that some moral duties are owed by all human beings *qua* human beings to all human beings *qua* human beings. Of course, this is a euphemistic way of referring to such duties for, although agent-neutral in the sense that they are owed by all human beings regardless of their conduct or projects, they are almost never unspecific in terms of their subjects and objects. Thus, the agent-neutral duty to aid those in mortal peril is defined by the situation of both those who owe it and those to whom it is owed. The duty is not one actually owed to 'all human beings' but only to 'all human beings in mortal peril' by 'those able to do something about that'. This does not, however, entail that the judgement which gives rise to the duty is in any but the most trivial sense particularistic; rather, the judgement is simply less general than it might be.

In addition to fairly broad, agent-neutral duties, our moral lives also contain agent-relative duties rooted in our past conduct or arising from our context.⁵⁰

⁴⁹ Schauer's reading of act-utilitarianism comes close to this: *Playing by the Rules* (n 47).

⁵⁰ See D Parfit, *Reasons and Persons* (Oxford, Clarendon Press, 1984) 143 and T Nagel, *The View from Nowhere* (New York, Oxford University Press, 1986) 152–54.

The judgements that give rise to these duties—the judgement that, for example, some of my duties to my children are more demanding than some of my duties to the children of strangers—are obviously more particular or less abstract than some of those that generate agent-neutral duties. Yet it is far from clear that one kind of duty and judgement clearly dominates the other: agent-neutral and agent-relative duties, and the more and less abstract judgements that generate them, are undoubtedly both significant parts of the moral landscape. This relatively complex view of moral practice might be contested at the level of moral philosophy. Some moral philosophers might, indeed, argue that it embodies a flagrant contradiction. Arguments to that end, interestingly, can come from two completely differently directions: that ordinary moral practice is contradictory either because all moral duties, and the reasons that support them, are general and invariable, or because all moral duties and their supporting reasons are in fact variable and context-sensitive.⁵¹ Each claim resonates with a broader position about the place of general principles in moral reasoning, and each can imply a view of the role of reason and impartiality in morality and moral deliberation.⁵² The complexities here are side-stepped in what follows, the book's only commitment on this topic being that moral practice, like law, embodies both more and less abstract models of judgement.

II. Why and How?

Why is *LAJ* worthy of further study? And, if it is, how should we go about studying it? My answer to the former question is not fully unpacked until the end of this book: only by engaging with the topic can we be sure that the engagement was worthwhile. But a more concrete answer than this is necessary for those impatient with the vague prospect that something interesting might eventually be uncovered. I also provide an answer to the latter question, since it is important to appreciate the parameters and methodological assumptions that frame the discussion in the remainder of the book.

A. Why?

There are at least four considerations that make *LAJ* worthy of our attention. The first holds that *LAJ* is historically significant. Its emphasis on generality and

⁵¹ The eye of this intellectual storm was the dispute between moral particularists and their opponents. For an introduction to one version of particularism see J Dancy, 'The Particularist's Progress' in B Hooker and M Little (eds), *Moral Particularism* (Oxford, Clarendon Press, 2000) Ch 6 and his *Ethics Without Principles* (Oxford, Clarendon Press, 2004).

⁵² On which see L Blum, 'Against Deriving Particularity' in Hooker and Little, *ibid*, Ch 9.

abstraction could be seen, by historically inclined lawyers, as generating a distinction between feudal (or medieval) law, on the one hand, and bourgeois (or liberal) law, on the other. If the former was made up of different legal incidences tied to a variety of fairly rigid roles, one's rights and obligations being determined by those roles, then the latter seems distinctive in its lack of such rigidity and because all addressees of the law are legally formally equal. Law's abstract judgement in part embodies the latter idea and this could plausibly be regarded as a constitutive characteristic of bourgeois law.

For our purposes, English feudalism had two principal features. It was a system of order in which, first, economic production and the status, opportunities and life chances, along with the legal rights, duties and other incidents, of most members of the community depended upon holding and granting interests in land. It was also, second, an order marked by the fact that some holders of interests in land exercised considerable private jurisdiction over others.⁵³ A consequence of these two features was that the legal system of feudal England explicitly and systematically distinguished between different categories of addressee and, as a result, upheld a rigid system of social stratification and entrenched social immobility. There was no genuine sense in which all addressees of the law were regarded as the same before it; nor were addressees of the law always bound by the same laws. The law recognised a number of different legal statuses and these determined one's legal rights and duties, liabilities and immunities, in a fairly rigid way. The legal 'sorts and conditions of men' included, *inter alia*, that of Earl and Baron, Knight, serf, member of religious order, Clergy, Alien and Jew.⁵⁴ These legal sorts and conditions were not open to one as different choices that might be made. Rather, one's legal status was usually set for life and almost entirely a consequence of one's social rank when born. The qualifications 'usually' and 'almost entirely' are necessary because some degree of mobility existed between some (but assuredly not all) sorts and conditions. This fact does nothing to undermine the judgement that feudal society was hierarchical and rigidly stratified; nor does it make implausible the

⁵³ The utility of the term 'feudalism' and its cognates (feudal, the feudal system, etc) has been and still is vigorously contested by some historians (the *locus classicus* is E Brown, 'The Tyranny of a Concept: Feudalism and Historians of Medieval Europe' (1974) 79 *American Historical Review* 1063–88). The simplistic characterisations of feudalism and feudal legality adopted in this book do not purport to be of use to historians, but accord with what some historians and some historically informed thinkers say: K Marx, *Capital* I, Vol. 35 *Marx-Engels Collected Works* (London, Lawrence and Wishart, 1996) 706–751 and *Capital* III, Vol. 37 *Marx-Engels Collected Works* (London, Lawrence and Wishart, 1998) Ch XLVII; P Anderson, *Passages from Antiquity to Feudalism* (London, New Left Books 1974) part 2, I; C Hill, *The English Revolution 1640* (London, Lawrence and Wishart, 1955) Preface; JGA Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, Cambridge University Press, 1987 (reissue)) 68–69 and chs IV and V. A brief, clear and non-technical account of tenure and related matters in the shift from early to late middle ages is C Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, Cambridge University Press, 2008) 322–41.

⁵⁴ F Pollock and F Maitland, *History of English Law Vol. 1* (Cambridge, Cambridge University Press, 1968) 407.

claim that such ‘social immobility and hierarchy ... suggest[ed] a view of rights as inherently unequal privileges enjoyed by the established estates’.⁵⁵

One thing abundantly clear about many contemporary legal systems is that they lack the range of explicit statuses and ranks, and thus the differentiated bundles of legal rights, duties and other incidences attached to them, characteristic of feudal legal systems. While truncated echoes of the notions of due process of law, of equal standing before and under the law, and of impartial application of the law were not unknown to feudal legal systems, thanks mainly to the influence of Roman law, they are undoubtedly to the forefront of contemporary law’s self-understanding. There is probably no single point at which this transition in the nature of law and its own self-understanding occurred; it was surely a gradual process that went hand in hand with the development of mercantile, capitalist economies. Indeed, the practical and emancipatory power of ideas about due process of law, equal standing, impartiality and equality of legal rights has been regarded as one of the principal drivers of the capitalist revolution.⁵⁶ Be that as it may, the core historical claim relied upon here is a minimal one. It is that *LAJ* and its near relatives (due process, generality, equal rights and impartiality) are more explicitly in play in the legal systems of contemporary and early capitalist societies than in that of feudal England. And this difference surely merits some attention.

The second reason why *LAJ* merits attention is that it seems deeply morally counter-intuitive. The initial response of almost all first year law students, and many ordinary people, to cases like *Nettleship v Weston* and other instances of strict liability, is that they just cannot be right.⁵⁷ The fact that the law holds those it judges to standards some cannot hope to achieve provides non-lawyers and would-be lawyers with a moral jolt. Such a jolt also arises from the related realisation that the law deliberately ignores much about the character, context and knowledge of those before it, so that makers of good faith mistakes and those not wilfully ignorant can often be trapped in the law’s maw. Thus, convicting a mother for ritually scaring her sons, a relatively benign and common practice in their community, seems just as troubling as holding Mrs Weston to a standard with which she cannot comply.⁵⁸ *LAJ*’s capacity to deliver such moral jolts is part of what makes it interesting and an examination of its normative standing should throw informative light upon the grounds for these moral shocks. While *LAJ* is not the only aspect of bourgeois law with the capacity to generate moral disquiet, that

⁵⁵ NE Simmonds, *The Decline of Juridical Reason* (Manchester, Manchester University Press, 1984) 42.

⁵⁶ See M Tigar and M Levy, *Law and the Rise of Capitalism*, 2nd edn (New York, Monthly Review Press, 2000) parts IV and V and note O Gierke’s bold claim (‘[t]he intellectual force which finally dissolved the medieval view of the nature of human Groups [sic] was the law of nature’) in *Natural Law and the Theory of Society Vol. I*, translated by E Barker (Cambridge, Cambridge University Press, 1934) at 35.

⁵⁷ *Nettleship v Weston* (n 12). Lest it be thought a mistake to call this form of liability strict see: T Honoré, *Responsibility and Fault* (Oxford, Hart Publishing, 1999) Ch 2.

⁵⁸ *R v Adesanya*, *The Times*, 16 July 1974 at 3. See also [1983] *Crim LR* at 720–21.

capacity certainly triggers a number (but not all) of the critical responses to *LAJ* sketched in the following paragraphs.

The third reason why *LAJ* is worthy of examination is that many jurists and philosophers think that there is a great deal wrong with it. Numbered among these jurists and philosophers are some of the leading thinkers of their time and their views therefore merit serious attention and interrogation. While it would be an exaggeration to say that these thinkers regard *LAJ* as the source of all bourgeois law's problems, they undoubtedly view it as deeply problematic. The charge-sheet is not, however, always drafted in such a way as to explicitly identify *LAJ* as a general target. Rather, some charges are against something ostensibly more general (bourgeois or liberal law) or much more specific (the conditions for liability responsibility in criminal law) than *LAJ*. Yet the effect of this rich and varied charge-sheet is just the same as if *LAJ* were explicitly named, for all of the complaints serve to undermine it also. We must be careful when delineating these charges to note overlaps and similarities without eliding significant distinctions. With that in mind, we can separate at least four different but sometimes related strands in the critique of *LAJ*.

The first takes us back to history, albeit in a rather different way than that already noted. This indictment holds that contemporary bourgeois law is in the grip of a significant historical transition. Although the underlying, substantive claim is the same in each case, this process has been described quite differently, three of the most interesting descriptions being that it is a shift from modern law to postmodern law, from autonomous law to responsive law, or from legal order to post-liberal legal order.⁵⁹ If these claims are true, and if our assertion that *LAJ* is a fundamental component of current law is also right, then the further inference that *LAJ* is an historical anachronism seems almost irresistibly tempting. Whereas law in the advanced capitalist countries may once have embodied *LAJ*, these societies have changed significantly since the birth of capitalism and so, too, it is claimed, have their legal systems. On this view, the legal systems of these societies are now taking a historically unique form in which *LAJ*, its cognates and many other features of bourgeois legality, are but residues soon to be completely transcended.⁶⁰ Law's abstract judgement is rather like the hovel left standing in a cityscape of gleaming new towers: it is of no value, save as a reminder of how far we have come.

⁵⁹ In the order stated, the three claims belong to B Edgeworth, *Law, Modernity and Postmodernity* (Aldershot, Ashgate, 2003); P Nonet and P Selznick, *Law and Society in Transition* (New Jersey, Transaction Publishers, 2005 (originally published in 1978)); and R Unger, *Law in Modern Society* (New York, Free Press, 1976). These writers are neither the first nor the only jurists to make this kind of claim. For a related and much earlier version, see E Pashukanis, *Law and Marxism: A General Theory* (London, Pluto Press, 1983; first published in Russian in 1924) Introduction, chs 2–4.

⁶⁰ It is therefore now appropriate 'to talk of the appearance of a discernibly new legal order, no less historically and sociologically distinctive than its predecessor': Edgeworth, *ibid.*, vi.

The second strand, at its most abstract, holds that current law suppresses particularity and difference. What this means often depends upon the specific kind of difference in view, but in general terms the objection is that law serves to ignore many of the significant features of those before it.⁶¹ We are what we are as a result of a complex web of experience, context and commitments. Our ethnic and cultural origins are manifold. We are men, women, or transgendered individuals; we are sons and daughters, mothers and fathers, employees and employers. We might share the same religious commitments, or have quite different ones, or none at all. We might be militant cyclists or campaigners for the environment; we could be active in the women's institute or have no interest at all in our communities. Some of us coach children's or adult's football teams while others are couch potatoes. We might be heterosexual or homosexual, hetero-phobe or homo-phobe, or any of the paths in between. But what we are—our distinct identities—is undoubtedly a product of what we have done and continue to do, and of where we have come from and of where we are. The critique in question holds that current law is incapable of recognising this seemingly undeniable truth. Furthermore, some aspects of current law, including *LAI*, appear specifically designed to ignore much of what makes those that stand before the law the people they are, to filter out exactly this kind of information.

A specific version of this strand appears in those areas of Alan Norrie's work concerned with the criminal law. One of the principal overarching themes of Norrie's indictment of contemporary criminal law is that it is a morally insensitive means of assessing culpability. The way in which contemporary criminal law articulates the concepts it uses to assess culpability, and the way in which it distinguishes between factors which are and are not relevant to culpability, serve to suppress morally important features of the accused, their context and the context of the conduct in question. Norrie once thought this both regrettable and avoidable.⁶² More general versions of this strand often put gender to the fore, the usual claim being that, despite its ostensible gender-neutrality, current law articulates and is informed by objectionably valorised notions of masculinity, on the

⁶¹ Within the legal academy the intellectual inspiration of this line of thought has been deconstruction: chs 4–6 of D Cornell, *Philosophy of the Limit* (New York, Routledge, 1992) outline some of the challenges some versions of deconstruction present to current law. A similar task, more critically conducted, is the burden of J Balkin's 'Deconstruction's Legal Career' (2005) 27 *Cardozo Law Review* 719–40. A nuanced and admirably clear general treatment of some of the problems of abstraction (and categorisation) in current law is M Minow, *Making All the Difference* (Ithaca, Cornell University Press, 1990) Introduction and chs 1–3. The abstraction and universality of human rights law, which itself can be seen as a manifestation of law's abstract judgement, has been impugned in Hegel's name by C Douzinas, *The End of Human Rights* (Oxford, Hart Publishing, 2000) chs 10 and 12.

⁶² See A Norrie, "Simulacra of Morality?" Beyond the Ideal/Actuality Antinomies of Criminal Law' in A Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge, Cambridge University Press, 1998) Ch 3 at 131–43 and contrast his *Punishment, Responsibility and Justice* (Oxford, Clarendon Press, 2000) 232. Chapters 1–2 and 9 of the latter are a fine statement of Norrie's view of the criminal law, that view being generalised in *Law and the Beautiful Soul* (London, The Glasshouse Press, 2005) chs 1–7 and *Justice and the Slaughter-Bench: Essays on Law's Broken Dialectic* (London, Routledge, 2016) part I.

one hand, and inappropriate images of femininity, on the other. This argument has been substantiated in numerous contexts, including criminal law and many areas of private and public law.⁶³ Mayo Moran's demonstration that tort law has recourse to normal but discriminatory standards of judgement when assessing the conduct of playing boys and girls, is one among a number of compelling examples.⁶⁴ This strand of critique can cut in two distinct directions. One is of a piece with the current point: the law should be more sensitive to those that stand before it and thus, at the very least, register the significance of gender in all its forms. The alternative takes the complaint closer to the territory of the following two strands, for the objection is not that the law fails to register all forms of gender, but that it ought not to register only one. If the law's standards of judgement are interpreted solely in light of a distinctly male world-view, then the law might work to the disadvantage of those who do not or cannot share that view. And that, of course, looks like a form of unfair or unequal treatment.

A third strand in the critique of *LAJ* holds that, although law is often a means of treating people equally, it is simultaneously and equally often a means of treating them unequally. Treating different people as if they were the same, or treating different people in exactly the same way, is in effect a form of unequal treatment.⁶⁵ *LAJ* functions in just this way and it seems, at least at an intuitive level, to raise a problem of fairness. While in no sense a uniquely contemporary critique of either law or *LAJ*, this indictment receives intermittent contemporary expression, often as part of a process of rediscovering forgotten critical discourses about law. It seems as powerful now as when first expressed. What is particularly interesting about this objection to *LAJ* is its status. We might wonder whether this complaint is indeed a genuine objection to *LAJ* which could in principle be answered, or whether it is in fact a truth about the nature of judgement based upon general rules or standards. We have already noted that the latter unavoidably entails some degree of abstraction: the application of general rules requires, seemingly by definition, ignoring some particularities of both agents and the conduct subject to those rules. This apparent truth stands alongside those that remind us that all general rules are both over- and under-inclusive. The way in which one regards this critical claim—as a general truth or as an objection that might be answered—will, of course, determine the path one takes in response to it. The substance and the correct understanding of this complaint are issues that constitute the backdrop to the discussion in almost all subsequent chapters.

⁶³ Chapters 6 and 7 of N Lacey's *Unspeakable Subjects* (Oxford, Hart Publishing, 1998) provide an overview of the ways in which contemporary feminism engages legal doctrine and theory, as does J Conaghan's *Law and Gender* (Oxford, Clarendon Press, 2013); for a discussion of the links between feminism, deconstruction and law's abstraction see her 'Violence, Ethics and Law: Feminist Reflections on a Familiar Dilemma', Ch 5 of S James and S Palmer (eds), *Visible Women* (Oxford, Hart Publishing, 2002).

⁶⁴ See Moran (n 13).

⁶⁵ The classic statement of the point is K Marx, 'Critique of the Gotha Programme' Vol. 24 *Marx-Engels Collected Works 1874–1883* (London, Lawrence and Wishart, 1989) 86–87.

Fairness is also the crux of the fourth strand in the critique of *LAJ*. This indictment is both closer to the surface of common sense than others and is also specifically directed at *LAJ*; it has, indeed, already appeared in that guise in the sketch of the second reason why *LAJ* merits attention. Its juristic form is neither complex nor technical but simply a direct analogue of the common sense intuition outlined above. It therefore takes two related forms. One holds that, keeping defendants rather than claimants in mind, it is unfair for the law to hold them to standards of behaviour which they cannot achieve. If those standards are reasonableness or strict standards, then a group of defendants—including the accident-prone and clumsy, the dim-witted, the bad-tempered, the easily distracted and the hasty, the absent-minded and the selfish—are almost always going to be short-comers when judged against them.⁶⁶ The other, related form of this intuition holds that it is unfair not to excuse good-faith wrong doing. If someone acts in good-faith but contrary to the law, their conduct being a result of ignorance, it seems unnecessarily harsh to bring the law's power to bear upon them. Yet that power is indeed often brought to bear in just these situations. It might be thought that criticising short-comers and the innocently mistaken is troubling enough; utilising the blunt instrument of state power in such circumstances surely compounds the problem, adding injury to insult. At first glance, this strand of critique appears more than capable of undermining whatever moral credit *LAJ* might have or claim. Any adequate response to this critique must look closely at the law's conception of liability-responsibility, law's supposed impartiality and the role of mercy in the administration of law.

These four strands of criticism constitute a daunting charge-sheet. The indictments on it have been arranged in order of generality, the early charges requiring some degree of extrapolation in order to affect *LAJ*, whereas the latter charges are directed specifically at it. Not every indictment is tackled in what follows, nor will those that are tackled receive equal attention. The thesis that contemporary bourgeois law is in the grip of an historical transformation is set aside, principally because the broad generality of the various claims invoked to support it require a level of historical and historiographical competence that this author lacks. No effort is made to offer a blow-by-blow rebuttal of the remaining indictments. Rather, some charges are present only as brooding shadows, the effort being to offer a positive argument in favour of some or other aspect of *LAJ* rather than a negative argument against one or other indictment. My general argumentative strategy is an attempt to find value in *LAJ* regardless of the charges against it. While not a direct engagement with those charges, this strategy nevertheless serves to counter-balance the cumulative weight of those charges by showing that something positive can be said on behalf of *LAJ*.

The final reason why *LAJ* deserves attention has been hinted at in the preceding discussion and will be attested to in subsequent chapters. It is that an examination

⁶⁶ The term 'short-comer' belongs to Honoré (n 57) 16.

of this notion brings us into contact with a range of other interesting juristic and general values. *LAJ* appears closely connected to apparent virtues such as impartiality and dignity, equality and fairness, and might also function as a means of realising specific forms of community. That, at least, is one of the more general arguments that the remainder of the book seeks to substantiate. The argument is that these virtues or values are actually embodied in *LAJ* and provide it with significant normative support.⁶⁷ That this picture of the various normative sources and props for *LAJ* is coherent, rather than incoherent, is something I hope to establish in the course of chapters four, five and six.

It would be foolish to maintain that *LAJ* is the only feature of bourgeois legal systems significantly connected to such virtues as dignity, equality and community. But this putative web of connections does become particularly interesting when we recall the relative opprobrium in which law's judgement is held by many jurists and philosophers. The idea seems to be in bad odour, yet it keeps what appears to be morally respectable company. That is puzzling and it is one driver of the discussion that follows. It aims not only to examine the doubts about *LAJ*, but also to excavate and perhaps renovate some of the values it embodies.

B. How?

There are many ways in which law's judgement could be studied. The whole panoply of the human sciences could be mined for disciplinary frameworks, the utilisation of which might throw light upon the topic. The approach adopted here is jurisprudential or legal-philosophical, but that is to say little more than that some effort is made to clarify and interrogate law's judgement in a general way, not completely free from engagement with the legal doctrines in which it is found, but not primarily concerned with the elucidation and analysis of those doctrines.

There is an important constraint upon the jurisprudential approach taken here and it arises from a substantive claim. The claim, I hope, is uncontroversial and holds that law's judgement is an aspect of legal institutional design. By that term I refer both to procedural and substantive doctrines, on the one hand, and more general features of a legal system, on the other. The law of contract in England and Wales is a substantive doctrine of that legal system and an aspect of that jurisdiction's legal institutional design; so, too, are its system of precedent and the standard patterns of justification used by its appellate court judges when deciding hard cases. The way in which trials are organised and the nature of the court structure, along with procedural rules and rules controlling access to the courts, are also aspects of a jurisdiction's legal institutional design. Little weight should be placed upon the 'design' element of this phrase, particularly if it suggests the deliberate implementation of a detailed prior plan. In common law (and perhaps other) legal

⁶⁷ I draw no significant distinction in what follows between 'values' and 'virtues': I use the two terms as synonyms.

systems, features of institutional design are just as likely to have evolved piecemeal as to be the products of advanced planning.

Why should legal institutional design be thought interesting and what, if anything, is distinctive about this focus? Comparative legal institutional design can be interesting in a simple and obvious sense. Those who know the law of one jurisdiction are often intrigued and interested to know whether other jurisdictions face similar specific doctrinal problems as their own and how, if at all, they are resolved. Thus, the Law Commission for England and Wales was interested to know how other jurisdictions dealt with third party rights under contracts before recommending a change in domestic law.⁶⁸ This type of comparative interest is obvious because an interest in difference and diversity—in how others do, think and organise—is one that all but the dullest of sentient human beings display. That lawyers in one jurisdiction are interested in what lawyers in other jurisdictions say, think and do is no more surprising than wine-makers (or footballers) in one country being interested in the wine and oenology (or football) of other countries. The history of human beings suggests they have a reasonably high level of curiosity.

Legal institutional design is interesting in another way that is neither first and foremost comparative, nor so obvious. Here the question raised about some or other aspect of legal institutional design is this: what is its point, purpose or value? Answers to that question can often lead to a reinterpretation or reappraisal of the aspect of institutional design in question. The temptation among many contemporary jurists and legal philosophers is to assume that answers to this question must entail the construction of arguments from first principles. Such arguments have this shape: the jurist first establishes or, more usually, simply assumes the pre-eminence of one or other supposedly fundamental value. Having done that, the jurist then proceeds to show that the selected value either makes whatever aspect of legal institutional design is in question uniquely salient or, more rarely, shows it to be of little value at all.⁶⁹ Argumentation from first principles is unhelpful (i) if

⁶⁸ The Law Commission, Consultation Paper No 121, *Privity of Contract: Contracts for the Benefit of Third Parties* (London, HMSO, 1991) 139–67.

⁶⁹ There are many examples and the values invoked often vary according to the area of law or aspect of legal institutional design focussed upon. Even a brief list must include: efficiency (see W Landes and R Posner, *The Economic Structure of Tort Law* (Cambridge, Massachusetts, Harvard University Press, 1987) and R Posner, *Economic Analysis of Law*, 1st edn (Boston, Little Brown, 1972)); corrective justice (E Weinrib, *The Idea of Private Law* (Cambridge, Massachusetts, Harvard University Press, 1995) and J Coleman, *The Practice of Principle* (Oxford, Clarendon Press, 2001)); retributive justice (M Moore, *Placing Blame* (Oxford, Clarendon Press, 1997)); dignity (S Moreau, ‘The Wrongs of Unequal Treatment’ (2004) 54 *University of Toronto Law Journal* 291–326 and P Capps, *Human Dignity and the Foundations of International Law* (Oxford, Hart Publishing, 2009)); combinations of consent, autonomy and liberty (C Fried, *Contract as Promise*, 2nd edn (New York, Oxford University Press, 2015); R Barnett, ‘A Consent Theory of Contract’ (1986) 86 *Columbia Law Review* 269–321); and liberty and justice (TRS Allan, *Law, Liberty and Justice* (Oxford, Clarendon Press, 1993)). The recalcitrance of one well entrenched aspect of legal institutional design to complete normative explanation and justification is illuminatingly explored by N Duxbury, *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008).

no single fundamental value makes a particular aspect of legal institutional design uniquely salient; and (ii) when aspects of legal institutional design are compatible with, or derivable from, more than one first principle. Argumentation from first principles can also become a distraction for jurists and legal philosophers insofar as their focus is indeed some or other aspect of legal institutional design. For such arguments often become a competition between rival first principles, the discussion mutating into a meta-level contest between allegedly fundamental values and the various ways in which their power over us might be established. At this point, matters of legal institutional design tend to fall from view.

What follows avoids immediate recourse to first principles. Our examination of *LAJ* aims to illuminate the values, if any, immanent within this aspect of legal institutional design or, at the very least, closely related to it. The values I examine are normative—part of our ethical, moral and legal fabric—but the candidates considered do not constitute an exhaustive list. This is in part because I have examined some additional candidates elsewhere and in part a result of the usual constraints of space and time.⁷⁰ Furthermore, my focus might be thought unforgivably narrow for another reason: I ignore non-normative sources of support for *LAJ*.⁷¹ That is true, although the omission is excusable if one embraces a wide conception of ‘the normative’, as I do. That domain or, rather, family of domains, has this in common: each contains considerations pertinent to what we should do or think or how we should be. Conceived in this way, normative considerations are many and various, while ostensible non-normative considerations are relatively few.

My discussion of the values immanent within and supportive of *LAJ* is not in any sense foundational. It is not therefore concerned, as much moral philosophy is, with the epistemological or rational basis of those values. Rather, the principal burden is to elucidate those values and their relationship not just with this aspect of legal institutional design but also with one another. This is best understood as a matter of value cartography. It might be objected that elucidating these values, some of their *inter se* connections, and their relationship with *LAJ*, does not provide an argument in support of *LAJ* or those values. In one sense this is certainly true—there is no argument to show the rational necessity of those values. But there certainly is an argument in favour of *LAJ* here, if it is accepted that the values that inform it or support it are indeed valuable. If they are, and if they do indeed support *LAJ*, then that must provide some insight into *LAJ*'s normative standing.

⁷⁰ See my ‘Abstraction and the Rule of Law’ (2009) 29 *Oxford Journal of Legal Studies* 481–509.

⁷¹ Arguments from efficiency and from convention might well support law's abstract judgement yet neither is considered here. The former are often mistakenly regarded as non-normative, even by their proponents, who also usually cleave to an implausibly robust distinction between ‘positive’ and ‘normative’ modes of argument (for standard discussions see the works by Posner and by Landes and Posner (n 69) and S Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Massachusetts, Harvard University Press, 2004)). Arguments of the latter type might also seem to be non-normative, but this is a mistake on my view: for a brief and helpful treatment, see Finnis (n 45) 284–89. Both types of argument are ignored not because they are non-normative but because I lack space and time to examine them thoroughly.

That insight does not demonstrate the rational necessity of *LAI* nor does it show *LAI* to be normatively unimpeachable.

The effort to unearth the values immanent within and supportive of *LAI* ensures that the approach in what follows is, so far as possible, made-to-measure rather than off-the-peg. By that I mean that the account of the normative bases of this aspect of legal institutional design should fit it in such a way as to take all its aspects and contours equally seriously, relegating none to the background. Thus we are likely to generate a sensitive and nuanced account of *LAI* and its value(s). While this observation does not imply that some jurists and philosophers aim to offer blunt and clumsy accounts of an aspect of legal institutional design, it does suggest that some such accounts are indeed blunt and clumsy. One reason for this is that some accounts of some aspects of legal institutional design proceed thus: they move from first principles to the domain they seek to understand and study, reading the latter in light of the former. First principles here are assigned explanatory and normative priority and, if some aspects of the domain in question do not fit with those principles, then they are either overlooked or lopped-off in Procrustean manner. This, at least, is one plausible explanation of the wildly implausible or plain old counter-intuitive claims made by jurists seemingly immersed in the details of a particular aspect of legal institutional design.⁷² Such accounts are akin to off-the-peg clothing—just as the latter are occasionally a poor fit for a particular human body, these accounts are sometimes a poor fit with the object domain they purport to explain and justify.

One way in which we can try to ensure a close fit between our normative and explanatory accounts of an aspect of legal institutional design, on the one hand, and that aspect of legal institutional design, on the other, is by embracing the participants' point of view as our principal methodological injunction. This claim invites two obvious questions: what on earth is it and why, if at all, is a methodological injunction that includes it necessary? The participants' point of view is the understanding of the point, meaning and value of a practice held by those whose conduct and beliefs constitute that practice. As a methodological injunction, attending to the participants' point of view requires that any account of any aspect of the social world must first and foremost attempt to accommodate the views of those whose conduct and beliefs constitute that aspect of the social world.⁷³ Thus an account of *LAI* that seeks to follow this injunction must (i) access the views about the point and value of that aspect of legal institutional design of those whose conduct and beliefs constitute that aspect of legal institutional design; and (ii),

⁷² See, for example, Weinrib's thoughts on strict liability (n 69) at 177, 185 and 190.

⁷³ For an account of this methodological approach in legal philosophy, see my *Understanding and Explaining Adjudication* (Oxford, Clarendon Press, 1999) Chs 2–3; for its role in philosophy of private law, see my *Philosophy of Private Law* (Oxford, Clarendon Press, 2007) 26–44; 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill Law Journal* 605–56; and 'The Crises of Private Law' in T Wilhelmsson and S Hurri (eds), *From Dissonance to Sense: Welfare State-expectations, Privatization and Private Law* (London, Dartmouth, 1998) Ch 7, 177–218.

in the first instance, attempt to accommodate and make sense of those views within its own theoretical account of that aspect of legal institutional design.⁷⁴ Whether or not it is possible to accommodate and make sense of participants' views and beliefs, and how far a theoretical account can depart from those views and beliefs, are not issues that can be settled in advance. Nor can the issue of what should be done when faced with a plurality of different views about the meaning and value of a practice among participants in that practice. These issues can only be plausibly addressed during the study of whatever aspect of the social world is in play.⁷⁵

The content of this methodological injunction might seem so obvious as to require no explication, but it is certainly not the only approach to understanding and explaining the social world that has been developed in the practice and philosophy of the social sciences. Nor is it the only such approach to have been adopted within legal scholarship.⁷⁶ It is, however, dominant in what can be called legal doctrinal scholarship, in which an attempt is made, primarily for the benefit of lawyers, to chronicle and make consistent some chunk of legal doctrine. Thus legal treatises and textbooks are written by lawyers for lawyers from the perspective of lawyers. This in part explains why they seem so arcane to non-lawyers. But the law can be studied, catalogued and examined *regardless* of the perspective of lawyers, of those whose beliefs and conduct constitute the practice. We (lawyers) should neither assume this type of work out of existence, nor demean its value just because it departs from the participants' point of view.

The principal virtue of this methodological injunction is that it ensures that theoretical attempts to understand and explain an aspect of the social world begin close-in to that aspect of the social world. Or, more accurately, begin close-in to the views of the participants whose conduct and beliefs constitute that aspect of the social world. This is one means of trying to ensure that the aspect of the social world under study is taken seriously, at least if it is assumed that participants' views about the meaning and point of that aspect of the social world are *prima facie* reliable. That is not to say participants' views must be incorrigible guides to the nature, meaning and value of the aspect of the social world in question. It is, rather, simply a matter of assigning some presumptive weight to those views at the outset of the effort to provide a theoretical account of that aspect of the social world. Of course, if it can be shown that human beings are generally subject to false consciousness or are otherwise blind to the nature of the social reality that their conduct in part creates, then the participants' point of view becomes a means

⁷⁴ As compared to most participants' accounts of some aspect of social reality, a theoretical account (for current purposes) is simply a more general, more abstract and sometimes more technical attempt to understand and explain that aspect.

⁷⁵ Some general guidance as to how to proceed in the face of the latter issue is provided by Finnis (n 45) Ch 1 and 426–35.

⁷⁶ For a sketch of alternative approaches as they have appeared in some relatively recent legal philosophy, see my *Understanding and Explaining Adjudication* (n 73) part II.

of mystifying social reality rather than understanding it.⁷⁷ This book proceeds on the basis that participants' views have some presumptive weight in the attempt to understand and explain aspects of the social world. The justification for so proceeding is two-fold: first, this assumption is the default position of much legal scholarship and, second, alternative approaches which reject this assumption are in many ways more problematic.⁷⁸

This book's emphasis upon one aspect of legal institutional design ensures that, although the approach adopted is broadly jurisprudential, it runs contrary to much contemporary legal philosophy and must strive to avoid the pitfalls of an older jurisprudential approach. Contemporary legal philosophy has been accused of being boring.⁷⁹ One ground for this complaint is that the self-consciously 'analytical' wing of contemporary jurisprudence appears obsessed with the finest minutiae of the alleged dispute between legion varieties of legal positivism, on the one hand, and increasingly scarce versions of legal idealism, on the other.⁸⁰ This is a jurisprudential battlefield upon which an ever more differentiated and finely drawn army is lined up to face a near non-existent opponent, the supposed 'dispute' being one in which things have not appreciably advanced for more than 30 years.⁸¹ This obsession illustrates what sceptics about legal philosophy claim to have known all along: that the subject has little connection with law and our—citizens', lawyers', students'—actual experience of it. It also seems that some of the most interesting jurisprudential scholarship of the last three decades is not 'purely' jurisprudential, since it has taken as its subject various chunks of legal doctrine (which are but aspects of legal institutional design).⁸² True, such scholarship has often brought to bear the frameworks and insights of contemporary and classical moral and political philosophy upon these chunks of doctrine, but sceptics about jurisprudence might hold that this is not what makes such scholarship interesting in the first place. What makes such work so interesting and so resonant throughout the legal academy is its actual engagement with the law.

If much contemporary legal philosophy has indeed lost sight of the law in all but the most abstract sense—that which presumably animates the question 'What is law?'—what ought jurisprudentially inclined scholars to do? Carrying on

⁷⁷ See Marx, 'Capital I' (n 53) 81–94; 185–86; and 537–42; and 'Capital III', *ibid.*, 209 for a critical account of ideology that would warrant this conclusion in some circumstances.

⁷⁸ For some arguments to this end, see n 73 above.

⁷⁹ Or, more accurately, at least one distinguished jurist thinks it should strive to be interesting: R Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1–37, 37.

⁸⁰ For one suggestion as to the point when most observers lost interest in this debate, see the book review by D Priel, (2006) 69 *Modern Law Review* 114–19, 114.

⁸¹ R Dworkin, 'Thirty Years On' (2001–2002) 115 *Harvard Law Review* 1655–87.

⁸² Just four (North American) examples will do: see the work of Weinrib, Coleman and Fried, above n 69, in conjunction with G Fletcher, *Rethinking the Criminal Law* (Boston, Little Brown, 1978). To these few many more books and essays, all of them more recent, could be added, some of them belonging to authors who also produce work that sceptics might place in the (allegedly uninteresting) 'contemporary analytical jurisprudence' category.

regardless is one option, at least until the sceptics' charge is satisfactorily proven. Another option is adopted here: we cast our troth in with proponents of the allegedly interesting jurisprudential project and focus upon illuminating some area of legal institutional design. The questions in this enterprise do not revolve around the existence conditions for law in general or for any conceivable legal system, but instead centre upon particular legal concepts and features of existing legal systems.

Now, questions about the nature of some legal concepts were, of course, the fulcrum of an older tradition of jurisprudence textbooks, few of which were captivatingly interesting.⁸³ Yet the fact that these texts often made some legal concepts—possession, title, property, promises, rights and duties, etc—appear quite dull does not mean that those topics are, after all, actually dull. They are not only the everyday currency of lawyers but also, in some senses at least, part and parcel of many accounts of how our collective life together should be lived. It should not be too hard to bring such notions to life. Nor should we accept that the study of these concepts sets the limit of jurisprudential enquiry: that must, at the very least, range across the whole territory of legal institutional design. That these early analytical jurists gave life to a dreary tradition of the study of legal concepts,⁸⁴ and that contemporary analytical jurists appear trapped in a relatively fruitless discussion of a grand conflict, are claims hard to deny. They provide the Scylla and Charybdis between which this book attempts to sail.

III. Prospect

Given what has already been said, the structure of the book is not in the least bit surprising. The remaining chapters tackle the following issues. Chapter two addresses the legal person, examining the forms it takes and sketching the nature of its relation with *LAJ*. The chapter distinguishes two ways in which the legal person operates in law and notes that these two need not always be compatible. The principal arguments the chapter makes are these: first, that the two broad senses of the legal person are significantly connected to *LAJ* and, second, that law's persons must be understood 'legalistically'. I do not rule out the possibility that other conceptions of the person also exist in the law, but I do not think that these, if they do exist, are either central or closely connected to *LAJ*.

Chapter three distinguishes three charges of unfairness that *LAJ* often generates. One of these charges relates to legal-liability responsibility, one raises the issue

⁸³ Two instances: J Salmond, *On Jurisprudence* (London, Sweet and Maxwell, 1st edn, 1902; 12th edn, by PJ Fitzgerald, 1966) and F Pollock, *A First Book on Jurisprudence* (London, Macmillan, 1st edn, 1896; 6th edn, 1929).

⁸⁴ Excellent overviews of this type of jurisprudential scholarship and its wider intellectual context are N Duxbury, 'Why English Jurisprudence is Analytical' (2004) 57 *Current Legal Problems* 1–51 and his 'English Jurisprudence between Austin and Hart' (2005) 91 *Virginia Law Review* 1–91.

of impartiality and the third invokes the idea of equity (or mercy). Each of these notions is complex and they demand scrupulous unpacking. The argument of this chapter is that, once these three notions are properly understood, two of the charges of unfairness against *LAJ* that they are often taken to license are seen to be bogus. The one remaining unfairness charge, premised upon the idea of equity, retains some weight. Thus we cannot say that *LAJ* is fair in every sense in which we use that word. The ways in which law's judgement may be said to be fair and impartial still leave some room for certain types of moral criticism of the law. But the burden of these types of moral criticism seems ultimately to require the replacement of law as we currently know it, and as we have known it, with an altogether more ethically sensitive means of judging our conduct and characters. That, at least, is the implication of the argument of chapter three.

The idea of dignity and its connection with *LAJ* is the fulcrum of chapter four. Two conceptions of dignity are examined, the aim being to determine the degree to which they inform *LAJ* in particular and law in general. It is argued that these two ostensibly different conceptions of dignity are not ultimately incompatible, that they overlap in an interesting way, and that that overlap constitutes one of a number of connections between dignity, on the one hand, and *LAJ* and the law, on the other. That both of these allegedly different conceptions of dignity inform various areas of legal doctrine as well as broader aspects of legal institutional design requires relatively little argument and is not particularly newsworthy, either as a matter of legal philosophy or of common sense. The point has significance only from the perspective of critics of *LAJ* since, if dignity is one of *LAJ*'s moral anchors, then *LAJ* cannot be utterly without moral value. Or, at least, it cannot be so if dignity itself is a morally significant idea. I do not show that it is, being satisfied only to note that many have regarded it as such. Dignity features first in the list of values that might inform or be embedded in *LAJ* because it is first and foremost an individualistic notion, those that follow being more closely tied to how we stand to one another as members of groups. The narrative arc informing chapters four to six is that of a move from individual to group.

Equality—another complex notion—informs chapter five. This chapter attempts to show the senses in which *LAJ* is egalitarian and to demonstrate the value these senses have. Much work has to be done simply to carve out conceptual space for these senses and to distinguish them from those that are dominant in much current legal and political philosophy. The latter are like a cuckoo in a nest, squeezing out all other conceptions of equality to such a degree that the capacity to even conceive of alternatives is almost lost. The chapter argues that two conceptions of equality can act as *LAJ*'s moral anchors and that both are plausible and significant. If that is so, then we have another argument with which to commend *LAJ* that also makes another important point: it shows that *LAJ* is normatively over-determined from within the realm of equality. Of course, the argument that *LAJ* can take normative sustenance from plausible and significant conceptions of equality does not show that *LAJ* is of pre-eminent moral or political value. It does, however, serve to impede the thought that it is of no moral or political value at all.

Chapter six explores possibly the most contested and troublesome notion to have recently preoccupied jurists and philosophers, namely, community. The argument I make is that *LAJ* can be understood as a means of realising a particular conception (or, more accurately, family of conceptions) of community. This is certainly not to say that *LAJ* is the only means of realising this notion of community; rather, the point is that it is one not insignificant means of realising and maintaining this form of community. Unsurprisingly, perhaps, that form of community is in significant ways egalitarian and thus overlaps with two of the conceptions of equality explored and recommended in chapter five. Some effort is made to show the value of this notion of community but the argument is not one from first principles. I argue instead that this notion of community provides a convivial habitat for the realisation of many ostensibly competing values. The point is that this conception of community is compatible with, and may even be required by, numerous different arguments from first principles.

In the course of attempting to make out the various arguments just sketched, all the chapters also aim to redress the balance of argument in favour of *LAJ*. The cloud of suspicion that hangs over *LAJ*, and some of the specific charges that inform it, serve as the negative background against which any positive argument in favour of *LAJ* has to be made out. The final chapter—chapter seven—recaps the arguments of previous chapters and reiterates the claim that *LAJ* is nowhere near as morally and politically problematic as critics lead us to believe. That a more measured and circumspect assessment of the various arguments supporting *LAJ* yields insight is assuredly a pitiful rallying cry. But, while it falls far short of inspiration, this claim is nevertheless true and important. It allows us to better judge a still crucial feature of our law and that, given law's capacity for realising both unparalleled harm and good, is significant. Robert Cover was right to maintain that legal interpretation takes place in a field of pain and death; law occupies and constructs that field and it is important we judge it scrupulously and critically.⁸⁵ The argument of this book serves to clear the ground for a scrupulous and critical judgement of law's abstract judgement.

⁸⁵ R Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601–30.