

THE GERM OF JUSTICE

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I

Beginning with the ancients, people have supposed there to be some kind of connection between injustice and irregularity. Heraclitus thought that this applied even in the case of natural irregularities: “The sun will not overstep his bounds, for if he does, the Erinyes, helpers of justice, will find him out.”¹ Aristotle tells us that lawlessness is one of the modalities of injustice.² We have it in the *Digest* that “justice is the constant and perpetual will to give each his due”.³ And we have a special concern that at least certain legal norms *not* be applied to those who are not covered by their terms: *Nulla poena sine lege*. Now, it seems plausible to think that wherever there is an injustice there is some kind of inconstancy, for where there is an injustice some people are not getting their due, which they would be getting if certain norms had been correctly applied. But what about the converse? Does it follow that when norms *are* correctly applied that justice is being done? As a general matter the answer must be “no”. Better conformity to the rules for conjugating Greek verbs, composing counterpoint, or calculating the date of Easter may bring one closer to some virtue or other, but it is not going to improve anyone’s justice score. But many legal philosophers have thought that the forward

¹ *Fragments* 29

² *Nicomachean Ethics*, 1129a32-b1

³ “*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*” *Corpus Iuris Civilis* 533, *Digesta* 1.1.10

connection holds in at least one special case. Conformity to *rules of law* is often claimed to have an intimate association with justice. Indeed, H.L.A. Hart goes so far as to maintain that “though the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice.”(CL, 206)

This is surely one of the most puzzling doctrines in *The Concept of Law*. How could it be true? The formulation itself excludes the only obvious route to its truth. It admits that in applying a general rule of law, we may find ourselves giving effect to a rule that is not only unwise, unfair, or imprudent, but even to one that is morally odious. So we cannot defend what I’ll call the “germ-of-justice” thesis the ground that what is special about legal rules is that they are morally decent rules. It is taken for granted that rules of law can be appraised in terms of morality and that they can be found seriously wanting. Now, Hart is a legal positivist who thinks that the existence of a law is one thing, and its merit and demerit another. But it is important to see that this route is not only closed to positivists; it is closed to most natural lawyers too. They are not fated to defend the absurd view that there are no unjust laws.⁴ What they normally want to defend are theses more like the following: there are no legal systems that do not *try* to do justice; there are no legal systems that *utterly* fail at being just; and perhaps there are no individual laws that are *odiously* unjust. Hart rejects all of those theses, but one might accept any or all of them while affirming that the business of law-application may implicate us in the application unjust laws. But now the puzzle only deepens. For if it is beyond doubt that law-application *sometimes* does injustice; how can it in *every* case also do *at least some* justice? Moreover, if that is offered, as it appears to be, as a

⁴ J. Finnis, *Natural Law and Natural Rights*, chap.II.

necessary truth about law, doesn't it compromise any commitment to the idea that the existence of law is one thing, its merit and demerit another? We can't have a legal system *at all* without also having law-application, so it sounds like we are guaranteed to secure some justice in all possible legal systems.

My aim here is to resolve these two puzzles: how might the germ-of-justice thesis be defended, and how might it be made consistent with a general theory of law that acknowledges that there are no guarantees about the moral value of laws or legal systems? Let me take the second, and somewhat easier, problem first.

II

At one point, Hart summed up his idea of legal positivism in this way. He said that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." (*CL*, 185-6) This looks set for a head-on collision with the germ-of-justice thesis, for Hart derives the latter from another necessary truth about the nature of law: every legal system contains general rules that apply to different people on different occasions. The very presence of such rules already "connotes the principle of treating like cases alike"—though the criteria of likeness are thus far nothing more than what the rules themselves specify or presuppose. But that principle is "*one* essential element of the concept of justice," and if a legal system is to be a going concern, the application of general rules will therefore have to secure at least a minimum of justice in the *administration* of law. If like cases as picked out by the rules

themselves were not regularly treated as the rules specify, then those rules would cease to exist, and with them the legal system. “So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles”(PSLM, in EJP, 81)

Doesn't this just assert as a necessary truth what Hart's definition of positivism denies? If there are *no* moral guarantees about the law, how could there even be a necessary plane of “contact” between law and morality, let alone one that *prevents* us from treating law as a morally neutral social phenomenon? And if forced to choose between the two theses—no guarantees vs. the germ-of-justice—is a positivist not bound to opt for the first?

It may be that Hart eventually decided to take that route; he certainly developed doubts about the cogency of his argument for the germ-of-justice thesis.⁵ Be that as it may, I do not think that it is necessary to choose, for two avenues of reconciliation are open to us. First, we may adopt Hart's second formulation of the thesis in preference to his first. To say that rule-application contains the “germ” of justice is not exactly to say that rule-application is a “kind”, “form” or even “element” of justice. The germinal metaphor suggests a somewhat different idea. After all, a seed may fall on barren ground and may not germinate at all. If a *germ of justice* is to give rise to *justice*, it seems likely

⁵ In the introduction to the reprinting of *PSLM* in *EJP*, Hart writes “I see now largely as the result of Professor Lyon's essay on Formal Justice that an argument similar to mine against Fuller might be used to show that my claim made in [*PSLM*] and repeated in my *Concept of Law* that a minimal form of justice is inherent in the very notion of a general legal rule applied according to its tenor to all its instances is similarly mistaken. I am not sure that it is so, but I am clear that my claim requires considerable modification.” This is a somewhat obscure concession. Hart's chief complaint about Fuller's overvaluation of the principles of legality was that he systematically confused *internal* standards of excellence for any purposive activity with *moral* standards. Lyon's argument, as we shall see below, was somewhat different. Notice also that Hart here refers to his argument as showing that law necessarily embodies a minimal “form” of justice. He does not repeat the germinal metaphor.

that a lot of other things will also have to happen along the way. On this weaker interpretation, what consistent rule-application brings is merely something like a necessary precursor to justice. One might say that this weakened version of the thesis is less interesting for the same reason that it is less threatening, since it does not actually establish what Hart says it does, namely, a necessary connection between law and justice. It does not establish this because between the necessary precursor and possible resultant lie a number of contingencies, the most obviously relevant of which are these: whether the laws being applied are in any way good or desirable, and whether the law-appliers administer them not only consistently, but also impartially and in good faith. Are we supposed to treat that precarious relationship as some kind of necessary truth? If the test of the latter is whether we can conceive of a possible world in which there exists a legal system of which it is true that there is consistent rule-application and false that there is any justice whatsoever, then this seems certain to be a contingent matter.

That is fair enough; but I doubt that this now-familiar way of thinking is actually what Hart had in mind. For all the recent discussion of “necessary connection” thesis, most legal philosophers have failed to notice that Hart himself took a pluralistic and, to contemporary ears, somewhat relaxed attitude towards necessary truths about law. (see e.g. *CL*, 156) He was interested not only in conceptual necessities about law—whatever those may be—but also in necessities contingent on facts about human nature and our physical environment, and even necessities contingent on the persistence of well-entrenched, though historically variable, attitudes and self-understandings. Indeed, he was reluctant even to use the word “necessary” outside scare-quotes, and on one occasion

referred to the germ-of-justice thesis as an “excuse” for using the language of necessity to refer to “a certain overlap between legal and moral standards.”(*PSLM*, 81)

This is not the talk of a hard-bitten possible-words semanticist. But Hart’s pluralism on this point is not laxity—he wants to explore what sense there might be in any of the different relations that have been offered up by jurists as examples of “necessary” connections between law and morals, so he is not about to rule some of them out of court on a priori grounds as not being necessary *enough*. If law-application contains the germ of justice, and if the explanation for this has to do with deep structural features characteristic of every legal system, then we can say that it is *no accident* that societies with legal systems are societies in which justice has a special place. This would be an interesting and important truth about law, whether or not it fits with some favoured philosophical doctrine about how necessity should be understood. To put it another way, if this is a contingency, it is nonetheless not a *mere* contingency. So that offers the first way to render the germ-of-justice thesis consistent with legal positivism: we can say that a germ of justice is not necessarily a kind of justice, and we can relax our understanding of what a necessary connection amounts to in these matters.

There is also a second line of reconciliation, which may run in tandem with the first. In the idea that “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality,” something rather limited may be understood by relations of *reproduction* and *satisfaction*. We could say that a legal rule L *reproduces* a moral requirement M if L requires what M requires. And we could say that L *satisfies* M if L is one morally permissible way of requiring or securing what M requires. Thus, law

reproduces the moral demand to succour the poor when it requires just that; the law satisfies this requirement when it contains a rule (or combination of rules) that determine the class of the poor, fix what is required to relieve their poverty, and provide for a reliable way of doing so. Although law may stand in a uniquely strategic position with respect to fulfilling such obligations, there will rarely be a unique strategy by which it can do this. Various rules and combinations thereof may be satisfactory determinations of general moral requirements. Nothing in Hart's argument for the germ-of-justice shows that every legal system reproduces or satisfies moral requirements in *this* sense; that is why he insists that the thesis holds even when we are applying morally odious laws.

How then do we get the "necessary contact" between law and morality? We might get it through any of the *other* relations that hold between law and morality. Philosophers have often missed this possibility because they impute to Hart a very general doctrine about law and morality. Encouraged no doubt by the title of his famous Holmes' Lecture—"Positivism and the Separation of Law and Morals"—and also by occasional turns of phrase throughout his work, many suppose that Hart's theory, or even legal positivism, somehow involves the broad idea that "there is no necessary connection between law and morality", i.e. that positivism is committed to what is now often called the *separability thesis*. It is the breadth of this idea—"no necessary connection"—that makes trouble for the germ-of-justice thesis. But the separability thesis is unacceptably broad. There are connections between law and morality that are not relations of reproduction or satisfaction. Some of these connections are fairly trivial: as Joseph Raz reminds us, it is necessarily true that a legal system cannot commit rape or murder, so it is necessarily true of every legal system that there are vices that it does not have. I have

argued that there are also a number of *non-trivial* necessary connections between law and morality, and they too are connections that no positivist need deny.⁶ But even if this is wrong, it is sufficient for present purposes that the germ-of-justice thesis is fully consistent with two ideas that mattered much *more* to Hart than did the separability thesis and which, in my view, come closer to representing the core of his theory of law.

First, the *social thesis*: law is fundamentally a matter of social fact; it is a social construction of social constructions.⁷ The germ-of-justice is a claim about what *follows from* or *inheres* in the application of law; it is not a thesis about how to *identify the law* in order to apply it. If someone thought that one could never know what the law requires without first measuring it up against morality, without figuring out whether it is virtuous, fair or just, then one would have a frontal challenge to the social thesis; but one who thinks that some connection with justice follows from or supervenes on law-application need think nothing of the kind. Indeed, he may suppose that the law is exhausted by source-based considerations while accepting that the business of *applying* these sources nonetheless always has some kind of upshot in terms of justice.

The second point is that the germ-of-justice is also consistent with the *fallibility thesis*: not only do we find the germ in a legal system whose substantive rules are unwise, foolish, imprudent or immoral, Hart insists that we find it even in one that is “hideously oppressive,” for example, in one that with “the most pedantic impartiality”

⁶ Including these: law necessarily deals with moral matters; law necessarily makes moral claims on its subjects, law is necessarily apt for appraisal by moral standards. See my “Legal Positivism” *The Stanford Encyclopedia of Philosophy* (Spring 2003 Edition), E.N. Zalta (ed.), <<http://plato.stanford.edu/archives/spr2003/entries/legal-positivism/>>. I elaborate this argument in “The Inseparability of Law and Morals”, forthcoming. See also John Gardner, “Legal Positivism: 5 ½ Myths,” 46 *American Journal of Jurisprudence* 199 (2001).

⁷ See my “The Concept of Law Revisited,” *Michigan Law Review* (1996).

denies a “vast rightless slave population the minimum benefits of protection from violence and theft”.(*PSLM*, 81) However tall the tree that might ultimately grow from it, the germ of justice itself is obviously no larger than a mustard seed. And when that is all we have, we plainly don’t have much. So nothing like a classical natural law view is going to get off the ground on the strength of the germ-of-justice alone. Even the richest story we might build on this beginning, one that incorporates some of Fuller’s requirements of legality, “is unfortunately compatible with very great iniquity.” (*CL*, 206) Admittedly, this does entail that legality is not compatible with *every sort* of iniquity to which societies are liable: there may be evils that we will not find when law is being consistently applied according to its terms. But that does not mean there are no *countervailing* iniquities, right up to the level of oppression; it also does not mean there are no *collateral* iniquities, vices that are part and parcel of the business of law-application itself. That being so, the germ-of-justice thesis is secure from any attack based on a positivist theory of law and indeed from any theory that holds that law is morally fallible.

III

I turn now to the second problem. Even if the thesis can be held consistently with a version of legal positivism, how could it be true? Whether there is any sort of connection between law and justice depends on what we mean by “justice.” Before venturing anything remotely controversial, I need to point out that one of the things that “justice” *means* in English is “the administration of law, or the forms and processes

attending it.”⁸ It is unfashionable to remark on puny linguistic points, but we can save ourselves some trouble by remembering this one. Nothing more is needed to explain why, for example, that government department charged with administering the law is called the Ministry of Justice, or why judges are called things like “Madam Justice.” Law-administration is one of the things that “justice” now means. Of course, these linguistic facts have a genealogy. Possibly the fact that people associated the administration of law with justice reflects a belief that law normally does or tries to do justice. Or possibly it reflects a more Hobbesian view that there is no such thing as justice apart from the demands of positive law. It would not be surprising if its genealogy includes an inconsistent mixture of such views, each of which had some currency in our intellectual history. But that is neither here nor there: the current linguistic association between “justice” and “law” might be a symptom of the germ-of-justice thesis, but it cannot provide a foundation for it. And our question is not whether law application is connected with “justice” understood as the administration of law; it is whether it is connected with justice in some full-blooded normative sense of the term.

One of the initial difficulties is that “justice” is sometimes used in a very capacious way. Wars, causes, measures and criticisms can all be just or unjust, since at its most general the idea of justice simply involves conformity to some standard of rectitude, such as reason, truth, fact, or morality. In practical affairs the standards we care about most are those of morality, and in this most general sense there is nothing amiss with the suggestion that legal systems or courts are or should be “justice-seeking”⁹

⁸ *OED*, 2nd edition.

⁹ Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004).

institutions inasmuch as they should orient themselves to what is right and proper. David Miller says that we are fortunate to have lost the Greeks' sense of justice as virtue in general;¹⁰ but I've a feeling that it is still alive and well, and that its persistence explains why ordinary usage is here so pliable, and why for almost any wrong you might contemplate (rape, torture, lying...) there is someone prepared to describe it as an injustice. When people are being raped or tortured something is, to put it mildly, out of kilter; why not call that kilter "justice"?

I have no ambitions to reform usage. But neither am I going to explore the relation between law and justice in this general sense, because there is no plausible argument that would connect the steadfast application of legal rules with normative kilter in general, or with the correct balance among all the virtues. Moreover, the germ-of-justice thesis is intended to be much more modest. Hart says that the general concept of justice has its primary application to matters of distribution and compensation, from which other applications, including procedural justice, derive. If we ask what all of these have in common we find that it is the maintenance of "a relative position of equality or inequality" as judged by some rule or standard. (*CL*, 159) So on this view the general concept of justice consists of a constant, acontextual, injunction — "treat like cases alike" is one way we often put it—together with a variable element that that determines in the relevant context which cases *count* as being alike. (*CL*, 160)

Although "treat like cases alike" is often touted as the *concept* of justice, or as is sometimes said "formal" justice, it is in fact too general to do even that much work.¹¹

¹⁰ David Miller, *Social Justice* (Oxford: Clarendon Press, 1976), p.17.

¹¹ See Jeremy Waldron, "The Primacy of Justice," 9 *Legal Theory* (2003), p.271.

We should treat like cases alike at least when the reasons for whatever decision or judgment we come to about the first case apply also to the second. So far, this has nothing to do with justice; it is a requirement of rationality. If in practicing arithmetic on Tuesday I count two apples and two apples to make four apples; then on Wednesday I had better count two oranges and two oranges to make four oranges. If I treat these like cases differently, I am not being unjust (nor am I failing to follow precedent!); I am simply being irrational, since neither the day of the week nor the type of the fruit can make any difference to the count. Similarly, if I maintain that same-sex marriages are wrong because non-procreative, while insisting that deliberately sterile different-sex marriages are licit, my erratic judgment shows me to be inconsistent, but not yet unjust, for that depends on what I do on the basis of that judgment. The inconsistency reflects badly on me: it shows me to be unprincipled; it may sometimes give rise to an inference of bigotry (which may become even stronger as I twist and turn to “distinguish” the cases). Maybe it shows me deficient in virtues that anyone needs if they are also to be just; but it does not yet show that I am unjust.

What is missing from these examples is some kind of distribution of benefits or burdens among people. We come closer to what we need with John Rawls’s suggestion that “the concept of justice applies whenever there is an allotment of something rationally regarded as advantageous or disadvantageous”¹². This is more abstract than the special problem of justice that is the concern of his book (“the way in which the major social institutions distribute fundamental rights and duties and determine the division of

¹² John Rawls, *A Theory of Justice* (Harvard University Press, 1971), p.8.

advantages from social cooperation.”¹³) But that special conception cannot delimit the general concept of justice, for we also worry about the distribution of benefits and burdens when they do not result from social cooperation, for instance when we are dividing up manna from heaven or, what amounts to the same thing, access to fossil fuels. It is only when the criteria of likeness and unlikeness specify something that we can rationally regard as an “allotment” of benefits and burdens among people that we have a norm of justice in the sense that interests us here. And this accords well with the traditional idea that justice is a matter of securing to each his or her due. If we could free ourselves from the familiar Aristotelian categories, we should say that justice is a matter of distribution; but because that idea is often used for a narrower purpose (i.e. to draw a contrast with commutative or retributive justice) it is probably safer to have another term. So let me adopt one used by John Gardner and say that the domain of justice is the domain of a certain kind of *allocative* principles.¹⁴

Why single out allocation as important? Why care so much about who has what, and on what grounds? One reason (and the one on which Gardner rests his own view) is that many allocatable resources are scarce. This is pivotal in Hume’s explanation of why there is a distinctive virtue of conforming to the requirements of justice. Hume says that if there were a general abundance, so that my use of an object or resource made no one worse off, and crowded no one out, there would be no point to rules allocating control over resources to persons or groups: “in such a happy state every other social virtue would flourish, and receive tenfold increase; but the cautious, jealous virtue of justice

¹³ *Theory of Justice*, p. 7.

¹⁴ John Gardner, “The Virtue of Justice and the Character of Law,” 53 *Current Legal Problems* (2000) 1. I am not, however, following Gardner in his claim that allocative principles regulate scarcity. See below.

would never once have been dreamed of”¹⁵ Hume does not here explicitly say what he is sometimes accused of saying: that the concept of justice is tied to scarcity. He seems to think that while the concept of justice is tied to allocation, the virtue of *conforming* to justice is necessarily tied to scarcity (and to the possibility of mutual advantage arising from such conformity). Hume acknowledges that there could conceivably be justice norms governing non-rival goods, but he thinks they would amount to an “idle ceremonial”¹⁶—like those superstitious taboos about which can wear what or look at whom. Allocation rules that have no scarcity-regulating function Hume considers “useless”. Now this seems to entail that the question whether a norm is a norm of justice can be answered separately from whether conformity to it is a virtue: some justice-norms are useless norms. And that consorts well with Hume’s methodological approach: we have a range of moral rules and practices, what might explain their emergence and stability in a way consistent with human nature?

I think Hume is wrong about the prominence he gives to scarcity in his answer. He is driven too far by the close association, perhaps it is even an identity, he sees between justice and rules regulating property. There good reasons to care about who gets what and on what grounds, reasons that have nothing to do with the scarcity of what is being allocated. Waldron offers an example that brings this out quite clearly.¹⁷ Suppose we hear on television that a judge has sentenced five members of a criminal gang to a total of two hundred years in prison. We would not (yet) be in a position to come to any view about the justice of the sentences, because although information

¹⁵ Enquiry, III.1

¹⁶ Enquiry III.1.

¹⁷ Waldron, “The Primacy of Justice,” p.275.

presented is nothing other than the aggregate of the penalties the individuals are to suffer, we are still missing the most important thing, which is how those penalties are to be distributed amongst the offenders. What matters to the justice of punishments is who is punished, how severely, and on what grounds, even when there are enough prosecutors to go round and plenty of spaces in the jails. Nor is criminal justice a secondary or marginal case as far as the law is concerned. Its concern with distribution and proportion is central to every legal system, and it has nothing to do with scarcity.

In any case, if we do restrict justice to norms about allocation under scarcity, it is going to be very unlikely that law-application has any necessary relation to justice, for many legal rules are not scarcity-regulating norms of any kind, and should not be interpreted as if they were.¹⁸ The rule prohibiting rape does not regulate scarcity; neither does the rule that the statutes of Canada must be enacted in French and English. (Probably these rules should not be understood as allocation norms of any kind). Of course, there are lots of allocation norms in legal systems: norms that determine the distribution of property, norms that provide for taxation and expenditures, norms that allocate powers among institutions and people, and so on. So perhaps we can say that every legal system contains allocation norms, and they are among the most important norms in the system. It is among these norms that we find principles of justice.

¹⁸ Gardner, "The Virtue of Justice and the Character of Law"

IV

So here is what we have: the germ-of-justice thesis is compatible with legal positivism, including Hart's version of it, and it establishes a special connection between law and justice only if it can show that applying general rules always engages norms of allocation. It is tempting to make this task seem easier than it is. One might say that the thesis must hold, because whatever else they do, legal systems contain general rules which establish, as Hart says, a certain standard of equality according to their own terms. Equality *is* an allocative principle, and the steadfast treatment of like cases alike under such a principle is therefore a kind of justice, namely, formal *justice*. Naturally, that doesn't establish anything about the relationship between law and substantive justice—it doesn't say anything about the justice of the laws themselves—but it does say something about the justice of *applying* the laws whatever they may be. As Hart puts it, "The connection between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice."(*CL*, 161).

The difficulty in this argument (and its many kin) is that it sounds like Hart is saying that whenever we do something that has the form of justice, we are also doing *formal* justice. A general reason to doubt this was identified by Hans Kelsen in 1934 in his deflationary comment on the lawyerly habit of using "justice" to refer to conformity to law:

That a general norm is applied in one case but not in a similarly situated case appears, then, as ‘unjust’; and it appears ‘unjust’ quite apart from any consideration of the value of the general norm itself. According to this usage, judging something to be just is simply to express the relative value of conformity to a norm....(IPLT, 16)

The reason Kelsen puts ‘just’ in scare-quotes here is that he denies that this is the *literal* meaning of justice, which he thinks names a value that is *non*-relative.¹⁹ Now, as far as Kelsen is concerned, that’s bad news for justice. He is a value-relativist who thinks that there aren’t any non-relative values, and that to use justice in its literal, full-blooded literal sense is therefore always to make an error (and an ideologically loaded one at that, for it conceals the ways that justice-claims simply favour some people’s interests over those of others while pretending that they are carefully calibrated by some universal, absolute standard). Literal justice, Kelsen says, is an irrational ideal. Norm-conformity, on the other hand, what lawyers sloppily and metaphorically *call* justice, is a perfectly rational and cognitive matter, for it expresses the relative value of norm-conformity. But that is because formal justice so-called really isn’t a kind of justice at all.

This is not the place to explore Kelsen’s crude and dogmatic meta-ethics. My only point is that he has correctly seen the challenge to the “formal justice” argument: how can any consideration about rule-application by itself give us

¹⁹ The translators have “In its literal meaning, however, different from this legal sense of the word, “justice” stands for an absolute value.” *Ibid*. But the German here says “*Ideal*”, not absolute.

anything other than the “relative value” of norm-conformity, which is to say, anything more than a re-description of how well conduct measures up to what that norm counts as conformity? As soon as we have a rule, we have an index of how far it is being conformed to. We can see why the norm *itself*, so to speak, might care about that: these things bear on its existence conditions. But why should we take the norm’s own point of view? If we are to get any sort of full-blooded justice conclusions from rule-application we will need to do two things, first we need somehow to ratchet-up the conclusions from norm-conformity to some non-relativized value, by which I mean some value not relativized to the very norm whose application is in issue. Second, we need to show that this is a norm of the right sort, namely, an allocative norm.

All we got from the general concept of justice was something like the form of justice principles: they are allocation norms. Principles of that generic form may be sound or unsound. Gardner puts it this way:

The just person, it goes without saying, is the person who is animated only by *sound* principles of justice. To act on unsound principles of justice—such as ‘give black people fewer benefits than white people’...is to be an *unjust* person; it is to possess, not the virtue, but the corresponding vice. But sound principles of justice and unsound principles of justice...take the same distinctive forms.²⁰

²⁰ Gardner, “The Virtue of Justice and the Character of Law.”

And that is why, as Kelsen and Gardner concur, the idea that there is a virtue called “formal justice” is simply a myth: all sound principles of justice are so in virtue of their substance. The reason to inspect the concept of justice in point of its form is to find out whether candidate principles of justice can be distinguished, as a class, from other sorts of principles. The point is obvious in other areas legal theory, for example, when we seek to distinguish liability rules from property rules in virtue of their form. But no one here thinks that, having identified the form of a liability rule we now have in hand a sound delictal principle called “formal liability”. And no one thinks that, because duty-imposing rules can be distinguished from power-conferring rules (partly) in virtue of their form, that conformity to any duty-imposing rule fulfils one’s “formal duties”.

Perhaps there are norms of formal justice that bear on L even though L itself is not thereby converted in a justice norm.²¹ The form of a formal justice norm, F, on this interpretation, is something like “For all L, apply L according to its terms.” That explains why the *form of L* (whether it be an allocation norm, a duty-imposing norm, or a power-conferring norm) does not itself generate sound norms of allocation. But what about norms of form F? *Obviously* what is wrong with the racist principle of allocation is that it is immoral in substance; the defender of formal justice is only arguing that the steadfast *application* of such a principle always has some independent value and turns up in every legal system just because and to the extent that those systems are comprised of general rules. In Kelsen’s terms, norm-application always has “some value quite apart from the

²¹ I owe the objection to Jeremy Waldron.

consideration of the general norm itself.” As I said at the outset, *some* violations of F-type norms do trouble us: *nulla poena sine lege*. Why can’t that be generalized to cover all violations, not only cases in which people are, say, punished notwithstanding the permissibility of their action under L, but also when people are *not* punished notwithstanding the clear culpability of their action under L, including when L itself is unjust? That is what the germ-of-justice thesis needs, and to establish it we need some kind of general value of conformity that is not conditional on the value of L itself.

But what might that be? The kind of things that legal philosophers have offered as candidates—that doing so respects the norm-subjects’ expectations, that it is consonant with the role or function of a judge, that it is required by an oath of office, etc.—all fall to a number of objections carefully catalogued by David Lyons²² but first noticed by Plato. In response to the conventional suggestion that justice amounts to giving each his due, telling the truth and returning what one borrowed, Plato says that cannot be what justice *is* because those are “actions that can be sometimes right and sometimes wrong” and justice is the sort of thing that is, by its nature, right.²³ *Sometimes* we should respect the expectations inculcated by general rules; *normally* judges should fulfil their law-applying functions, and *to some considerable extent* judges should do what their (often vague) oaths require of them. But there is nothing here to generate the conclusion that these injunctions are exceptionless, and that some smidgen of injustice therefore always emerges when valid law is not applied according to its terms.

²² David Lyons, “On Formal Justice,” 58 *Cornell Law Review* (1973)

²³ *Republic*, 331 c (Desmond Lee trans, Penguin), p.65

Moreover, in deciding how far these considerations bind, we do have regard to what Kelsen called “considerations of the value of the general norm itself”. (*IPLT*, 16). What makes it tempting to suppose otherwise is that in the really horrific cases of applying unjust norms—slavery, segregation, etc.—the evil is so dominant that we are inclined to think that, even if there *were* a smidgen of injustice in failing “correctly” to segregate the black children, we might fail to notice it. It would be concealed by the overwhelming and decisive moral considerations on the other side. It seems a small step to suppose that it must therefore really *be* there, hidden under the mountain of defeating considerations. But in fact when things get this bad, there is no positive reason to think that the familiar content-independent considerations bind even *prima facie*: wholly illegitimate expectations should not be respected at all, institutional duties of role fail to bind in a tyranny, and no one is required by a promise to assist another in iniquity. It stretches all credulity to suppose that in dire circumstances, in the really oppressive legal systems that Hart acknowledges to lie within the ambit of the germ-of-justice thesis, there remains some kind of weak, shadow moral consideration in favour of rigorously applying their oppressive rules to every case.

Thus far, I have made no mention of the remark tacked on to the end of Hart’s formulation of the thesis at *CL* 161: that a kind of justice always emerges when rules are applied “without prejudice, interest or caprice”, or as he puts it in another place, to say that a law is justly applied is to say that it is impartially applied to the parties, and that “no prejudice or interest has deflected the administrator from treating them ‘equally.’” (*CL*, 160) The argument from impartiality or from a lack of prejudice is independent of the considerations just rejected. And impartiality is a venerable conception of justice, so

no one could worry about its credentials on that ground.²⁴ But it is far from clear what it has to do with rule-application. One does not need to be following any sort of rule in order to treat people impartially or to remain steadfast against the pull of self- or party-interest. A single Solomonic act of arbitration need not be not rule-governed at all, but it should and may be undertaken impartially. Is consistent rule-application sufficient to secure impartiality? It depends on what we have in mind. The rigorous application of L according to its terms may show that the *application* of L was unprejudiced, but it does not show that the *norm-applier*, J, acted without any prejudice *in applying* L. No doubt one of the reasons that racist judges in the South found it both intellectually and personally easy to apply the Jim Crow laws was that those very laws harmonized nicely their own prejudices and interests.

VI

The difficulties I reviewed in the last section are well-known. What is not often noticed, however, is that there is something odd about the whole strategy of the argument in which they are embedded. If our aim is to explain why justice has been thought to have a special relationship with *law*, then shouldn't we be invoking some of the special features of *law* in explaining how that comes to be? But the argument based on the impartial application of rules is much more general than that. Indeed, what is really striking is that *none* of the special features that make legal systems what they are do any work in the germ-of-justice thesis as we have it before us. To put it baldly, even if there

²⁴ See, e.g. Brian Barry.

were general virtues of rule-application, and even if these had something to do with justice, then they would turn up promiscuously whenever and wherever rules are being applied. As I remarked right at the outset, no one thinks that. If it were simply the ruly character of law that produces the germ of justice, then justice would have no more intimate association with law than it has with grammar or football. One might perhaps buy this as a debunking explanation. If one thought the thesis wrong, one might say that there really isn't any special connection between law and justice, and the rule application argument proves it. We are as likely to find a concern for justice in societies without legal systems as we are in societies with them, and all the talk about justice is either linguistic hangover from the sense which means "the administration of law" or it is ideological glare from "law's halo".²⁵

As far as I know, Hart was never tempted by the debunking strategy; he thought law's connection to justice, though modest, was real and was therefore to be explained rather than explained away. But when he wasn't being distracted by this problem, he saw that the sort of considerations on which his position rests have nothing to do with law at all. In arguing with Devlin about the value of conformity to conventional social morality, as such, without regard to its merits, Hart wrote:

in the practice of any social morality there are necessarily involved what may be called *formal* values as distinct from the *material* values of its particular rules or content. In moral relationships with others the individual sees questions of conduct from an impersonal point of view and applies general rules impartially to himself and to others; he is made aware

²⁵ I owe the term to Don Regan.

of and takes account of the wants, expectations, and reactions of others; he exerts self-discipline and control in adapting his conduct to reciprocal aims. These are universal virtues and indeed constitute the specifically moral attitude to conduct. (LLM, 71)

There is a lot more going on here than consistent and impartial rule-application, so we might quibble about whether the virtues identified remain “formal” in any significant sense, and we might have doubts about whether they really are universal. But they are values independent of the particular rules in the application of which they are displayed. Notice, however, that they are not characterized as having anything to do with *justice*, and that Hart does not say that conformity to the rules of social morality contains the germ of justice (not even where this conformity exists alongside a sensitivity to the wants, expectations and reactions of others). This should be a clue that something has gone wrong in the argument about the application of legal rules. Where the rules of social morality are at issue, there is no temptation to reach for the language of justice to explain the “formal” virtues in conformity as such; what makes legal rules any different?

To advance, I think we need to take more seriously than does Hart himself the terms in which he actually sets out the germ-of-justice thesis. They are, to repeat, that “we have, in the bare notion of applying a general rule of law, the germ at least of justice.” What’s odd about his actual argument to that conclusion is that it seems to place no weight on *any* of the three features that are front and centre in its formulation. First, the thesis seems to bear on some property of *general rules of law*, not just on any old rules whatever. Second, the kind of justice at issue has something do with *applying* those

rules to others, not simply in there being such rules, nor even in individuals following them for their own part. Third—a point we’ve already encountered—the thesis is supposed to show that this gives rise to *the germ* of justice, not simply to an activity that shares the form of justice. Moreover, these three points are not just a happenstance of formulation: when people talk about the special connection between law and justice they are usually thinking about a thesis that is framed along these lines. Let me take the points in turn.

Law is not just any old bunch of social rules. Hart followed Kelsen in maintaining that law is a set of social rules that can appropriately be thought of as a *system*, unified by special relationships among the rules and special institutions charged with their administration. In particular, he said it is a union of primary rules guiding conduct, and secondary rules that determine how the primary rules are to be identified, how they are to be applied, and how they may be changed. But even that is incomplete as an explanation of what law is: legal rules also have a characteristic content. They are rules *about* something in particular. The rules of the National Hockey League, though systematized with panoply of secondary rules, are either not a legal system or are a borderline case of one. Anyone discovering the records of an ancient civilization could not be sure that they had found its legal code, as opposed to some sporting rules, until he knew they regulated certain things, for example, violence, property, and kinship. Legal systems orient themselves to the most important things in the societies in which they exist, and they do so comprehensively, for law is an open-ended and high-stakes matter. Hart himself explained those stakes in terms of social survival, the character and requisites of which he thought of in a broadly Humean way. I’m not sure we should follow him on

that: many societies, especially theocratic ones, take their most important interests to be something other than survival.²⁶ But law is a normative system with high ambitions for itself, and in any society in which it exists, it is the locus of the highest-stakes regulations.

Perhaps there is something justice-relevant to be learned something from the fact that every legal system has law-applying institutions that handle rules like that. However laws are produced—whether by the slow emergence of general or official custom or by legislative promulgation—the existence of a legal system crucially depends on institutions that can identify and authenticate the rules of the system, and that can render binding determinations in any disputes about them. It would be too simple to express this by saying that legislatures are optional and courts necessary—a Parliament can exercise judicial functions—and it would be quite wrong to take this to mean that courts are in any way better than legislatures. But the crucial aspect of the division of normative labour that gives rise to law is the coalescence of norm-*application* in some institutions or other.

How does this bear on the germ-of-justice? It does not, I hasten to add, do anything to show that adjudicative institutions are likely to be *just*. But it does exhibit a connection to justice that Ronald Dworkin once proposed. Dworkin used to say that courts characteristically do, and in any case should, decide cases on the rights of the parties before them, and not on broader issues of social policy such as what would serve the common good, or maximize wealth, or promote public virtue. There is a sophomoric

²⁶ For a persuasive case that Hobbes cannot even be understood as having oriented his theory around survival, see S.A. Lloyd, *Ideals as Interests*.

objection to that claim, one that begins on the footing that many of the laws that judges have to administer have as their unarguable foundations just such considerations of policy. Who would be tempted to thin, for example, that the justification for a tax code allowing one to deduct donations to charity from one's income is a matter of rights? Charitable donations serve the virtue of charity, not justice. (What's more, allowing charitable deductions comes at a price in justice, for these deductions have to be paid for in tax expenditures, which allows private interests to direct the public purse and is regressive with respect to income.) The answer to the sophomoric objection is that even if all that is so, when a *dispute* about charitable donations comes to court it now *becomes* a matter of rights, if only in the sense that the question is now who has the right to a decision. When Bob Jones University turns up in court and demands that its little racist enterprise be counted a charity²⁷ so that it can avoid paying social security and unemployment taxes, the question is all about rights, constitutional and other. Authoritative adjudication is in its essence an allocative enterprise, for its core function is to settle who is to get what, and on what grounds.²⁸ And authoritative adjudication, as we've just seen, is crucial to the existence of law.

So the sophomoric objection is wrong. But it has truth in it. Adjudication is a special part of law-application, but it is not all there is to the law. For law exists outside court, and it is both intended and used to guide people aside from any litigation, actual or possible. When we evaluate law-application in, say, *Bob Jones University v. United States*, it is natural to inspect that decision in the light of justice—was the final allocation

²⁷ *Bob Jones University v. United States* 461 U.S. 573 (1983)

²⁸ Gardner very effectively emphasizes this, but he mistakenly connects it to the idea of scarcity. For reasons I give above, I do not think that justice norms always regulate scarce resources. For reasons given below, the decisions of courts generally do.

the one that should have been made?—and in doing so natural to say, as Dworkin does, that it is in that sense a decision about the rights of the parties. But this is not a feature that depends on either the content of the rules or on what it takes to apply them, it is one that depends on the nature of adjudication, and because these are rules regulating high-stakes domains, that business is going to have all the marks of justice. So it is not the presence of general rules that explains why law contains the germ of justice; it is rule-application by institutions of a certain sort. And this idea is satisfying, both because it accords with a familiar view of how the work of courts is to be assessed and because, unlike Hart's explanation, it does make use of the distinctive features of legal systems.

So we see how norms of justice come to have a special place in law. To see why this yields no more than a *germ* of justice, let us turn to the necessary content of law and to Kelsen's challenge. We might now try to argue that all this being so, and law being what it is, we can ratchet-up the value of norm-application from purely relative to non-relative value. For legal systems by their nature contain morally important norms, and when courts are applying them they are either applying important norms, or doing their part in a system that applies such norms, and so these do after all have a kind of value that we can explain independently of the value constituted by norm-conformity itself. It is the value contributed by what Hart called the minimum content of natural law.

Now, as just formulated, the argument is far too crude to carry conviction: to test it fully, we would want to add all sorts of nuances explaining the distinctive contribution of positive law in crystallizing moral norms and making them more determinate, in coordinating activity for the common good, in making authoritative determinations that

resolve disagreements, and so forth. This will carry us some way forward, but not to the end of the road. To say that a legal system must of its nature settle disputes *about* certain kinds of concerns, and that these are moral concerns, is not to say that it must do so well or even tolerably. And as Hart insisted time and again, to say that every legal system must deliver the goods to some people does not show that it must deliver the goods to everyone, and that one of the characteristic ways that law can fail, consistently with satisfying the minimum content, is by not delivering them justly. But if we have law-producing and law-applying organs, then we do at least have social machinery by which justice could be made effective, and perhaps in certain social contexts, nothing but such organs stands any chance of doing so, or of doing so overall and amongst everyone. And if that is right, why not express it by saying that we have, in the idea of a society subject to institutions that apply law, the germ at least of justice?

This will sound disappointing, for though it gives us Hart's literal conclusion, it doesn't make use of his own argument for it, and is not clear to me how far it satisfies the itch to say that there is a special relationship between law and justice. But I'm afraid things get even worse. For it is also a feature of societies with law that the legal system in a certain way *dominates* that society: it is the most important normative system going. This does not contradict the view, sometimes called "pluralism," according to which legal systems never travel solo, nor does it show that a legal system can be effective without considerable buy-in and support from the companion normative systems that are also in force. And while it is importantly and necessarily true that law has a life outside court, its life inside court is dramatic, visible, and profitable. When people study or teach law, a lot of what they study is cases—and some people study nothing else. Steeped as they are

in the allocative moment of adjudication, it is not surprising that they may come to overemphasize it and sometimes even *identify* adjudication with law itself. The rot sets in when people move from the correct observation that the Court in *Bob Jones University* had an allocative job to do, a job that will therefore be appraised in terms of justice, to the conclusion that the decision must only be made on grounds of justice, to the illusion that every legal system is only or pre-eminently serving justice, and then by way of reform to set out to make the law of charitable status just as just as it can be.²⁹ Now the germ of justice has not only sprouted, but become an invasive weed. This is, I think, what people worry about when they criticize something they call “rights discourse”. These complaints are rarely made from the basis of any plausible analysis of what it is to have a right, what that idea commits us to, or how it might play out in the law. Their frustration, sometimes justified, has another source. It is a reaction to the spread of adjudicative habits of mind beyond the crucial, but special, moment of the legal system to which they are native. There is a necessary connection between law and justice that runs through the activities of courts, which must orient themselves towards allocative considerations because they need to decide not only whether plaintiff should get X, but whether he should get it *in the face of* defendant’s claim to the contrary. A society with an effective legal system supervised by courts is therefore a society that is set up to do that job. Whether it is done well is another matter. But the importance and dominance of these institutions can make it sometimes seem that with the law, every germ of normative concern is bound grow into what Hume called the “cautious, jealous virtue of justice.”

²⁹ Cf Gardner.

A final point. Nothing in this argument presupposes or entails that justice is “the first virtue of social institutions”, as Rawls puts it, nor even that it is, as Hart thinks, “a virtue specially appropriate to law”. (*CL*, 7) Maybe the allocative character of justice shows that it takes primacy over certain kinds of aggregative considerations³⁰ but justice norms are not the only non-aggregative principles in the law. And even if there is some special connection between law and justice, there may also be special connections between law and some of these other virtues, and they may conflict with justice. (*CL*, 166) All of this remains open. But we have, I think, done the best we can for the germ-of-justice thesis.

³⁰ So argues Waldron, “The Primacy of Justice.”