

ABSTRACTION AND EQUALITY

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“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”: Anthony Powell, *A Question of Upbringing* (London: Arrow 2005), p. 52.

I. TWO WAYS OF BEING JUDGED

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 it is that 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 find acceptable 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. This is because bourgeois law’s judgement is abstract. That is to say: it judges us (i) not in all our particularity but as identical *abstract beings*; (ii) by reference to *general and objective standards equally* applicable to all such beings; (iii) the application of these standards being mitigated only by a *limited range of exculpatory claims*.¹ It follows from these three components of law’s abstract judgement (hereinafter ‘the three components’ or ‘the components’) that one cannot, in absence of a

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¹ 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 U. P. 2007), pp. 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 U. P. 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.

recognised exculpatory claim, resist or deflect the law's judgement by claiming, for example, that one lacks the fortitude or capacity to adhere to its standards. It would also seem to follow that one should not be able to demand a level of legal protection tailored to one's extraordinary sensitivities rather than those of an ordinary (or reasonable or abstract) person.

Law's abstract judgement is the focus of what follows. Although that label is used hereinafter principally as a shorthand way of referring to the three components just identified, this usage does not imply that the three components are necessary and sufficient conditions of law's abstract judgement. The possibility that law's abstract judgement has other components is not therefore foreclosed.

That law's abstract judgement is obvious and commonplace to lawyers, invoked each and every day, cannot shield it from critical attention nor reduce the need for justification. The latter need arises not just because state power operates through the medium of law's abstract judgement. It also arises because this form of judgement seems *prima facie* morally problematic. Yet law's abstract judgement may also be a morally and politically significant historical development. Historically informed lawyers will see in its emphasis on generality and abstraction a distinction between feudal and bourgeois law. 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 citizens are legally formally equal. Law's abstract judgement seemingly embodies the latter idea and this could plausibly be regarded as a constitutive characteristic of bourgeois law. Being apparently both morally worrisome and morally significant ensures that law's abstract judgement is worthy of our attention.

What follows has two parts. The first sketches in a little more depth the elements of law's abstract judgement and highlights why it might be thought morally problematic. The second and longer part considers what might be said in favour of law's abstract judgement.

II. LAW'S ABSTRACT JUDGEMENT

Before sketching the three alleged components of bourgeois law's abstract judgement, two preliminary points need be noted. The first is that law's abstract judgement, insofar as a 'pure' version of it exists, is found in most current legal systems – common law, civilian or 'mixed' – and functions in both private and criminal law. While the latter two areas are indeed very different, the differences do not obviously impact upon the abstract nature of law's judgement, save perhaps to explain its possibly more limited role in criminal as compared to private law.² The second point is that the purest form of law's abstract judgement is found at the liability stage in private law and the conviction stage in criminal law. The selection, 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

² 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.

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.

A. The three components

The third component of law's abstract judgement is best examined first, since this is the least complex and (perhaps) least interesting of the three. It can be labelled the *limited avoidability* component. That the law, be it private or criminal, recognises only a limited number of exculpatory claims is not news.³ 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 through 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 such factors may be taken into account at the sentencing stage in the criminal law, they are almost completely irrelevant at the conviction stage and 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 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 law's abstract judgement thus takes us to the core of the other two. All three are functionally connected since, both alone 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 that the law regards those called before it as abstract beings. Let us name this the *presumptive identity* component. What does it entail? At the least this: 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. The law's judgement is supposedly blind to these

³ 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 pp. 99-103.

differences, treating Duke and pauper, man and woman, Christian and non-Christian, homo- and heterosexual, aesthete and philistine alike. The law most obviously treats those brought before it alike, as the same, in that it regards all its addressees as having 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 limb of law's abstract judgement; it can be dubbed the *uniformity component*. 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 marking 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 citizens 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 they can or cannot achieve these standards on particular occasions. Holding addressees of the law to the same general standards is therefore 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.⁴ There are, however, some exceptional instances in which a judgement of negligence is influenced by the specific circumstances or particularities of the defendant. Child defendants are treated somewhat differently when determining the duty of care they owe to others.⁵ There are also *dicta* in English negligence and nuisance cases to suggest that the level of a defendant's wealth will make a difference in the assessment of whether or not her conduct was reasonable.⁶ Furthermore, in some jurisdictions it

⁴ 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.

⁵ *McHale v Watson* (1966) 115 CLR 199 (HCAus); *Mullin v Richards and another* [1998] 1 All ER 920 (UKCA). 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, NY: Syracuse U. P. 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.

⁶ *Knight v Home Office* [1990] 3 All ER 237 (UKHC); *East Suffolk Rivers Catchment Board v Kent*

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.⁷

If the standard of reasonable care in negligence and the abstraction it involves set 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.⁸ 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 law's abstract judgement.

A number of defences in English criminal law also rest upon assessments of reasonableness. The most problematic defence in recent years has been the partial defence of provocation. To invoke this defence an accused must, *inter alia*, establish that the alleged provocation was such as to lead any reasonable person to lose their self-control. There are a number of problems with this defence, both in terms of its rationale and its practical consequences. But one issue has proved pre-eminently problematic: the determination of what a reasonable person is and how such a person behaves in specific contexts. Particularly fraught has been the question of which physical features, character traits or habits of the accused should be regarded as pertinent to the alleged provocation.⁹ The circumstances of the cases are usually such that endowing the reasonable person with one or other of these features makes 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 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 is 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 carries. The thrust of some recent decisions in England and elsewhere has been the virtual obliteration of the distinction between a reasonable person standard and a subjective standard tailor-made for the particular accused.¹⁰

A less prominent but equally interesting emerging issue in the criminal law is that of so-called 'cultural defences'.¹¹ While quite different in doctrinal terms, this issue has some resonance with

[1941] AC 74 (UKHL); *Goldman v Hargreave* [1967] 1 AC 645 (UKPC).

⁷ See *Kavanagh v Aktar* (1998) N.S.W.C.A. 779 (NSW, Aus.); *Mustapha v Culligan of Canada Ltd.*, [2005] 138 A.C.W.S. 3rd 767 (Ontario, Can).

⁸ *Rainieri v Miles* [1981] AC 1050, 1086 (UKHL). See also G. Treitel, *The Law of Contract* (London: Sweet and Maxwell 11th. ed., 2003), pp. 838-840 and S. Smith, *Contract Theory* (Oxford: Clarendon Press 2004), ch. 10.

⁹ Three vivid (from many) examples in a number of jurisdictions are *R. v Morhall* [1996] AC 90 (UKHL); *Stingel v R.* (1991) 171 CLR 312 (HCAus); *R v Thibert* [1996] 1 SCR 37 (SCCAn).

¹⁰ See *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. Despite its status, Smith is now apparently overruled.

¹¹ An interesting introductory discussion is A. Phillips, 'When Culture Means Gender: Issues of Cultural Defence in the English Courts' (2003) 66 *Modern Law Review* 510-531. Much more

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 either justified or excused.

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.¹² 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. While unlikely to be a goal of the remoteness rules, one of their practical effects is therefore 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 skull rule in the law of negligence.¹³ 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.¹⁴ Much the same rule holds in the criminal law.¹⁵

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. Yet, 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.¹⁶ The criminal law also rules out consent as a defence to some crimes whether or not the particular

comprehensive is A. D. Renteln, *The Cultural Defense* (New York: Oxford U. P. 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*, at p. 25.

¹² See *Ruxley Electronics and Construction Ltd., v Forsyth* [1996] AC 344 (UKHL) and *Farley v Skinner* [2002] 2 AC 732 (UKHL).

¹³ The relevant psychological features, in the American cases, usually relate to matters of belief rather than psychological fortitude: see Calabresi, *supra*, note 5, chs. 3 and 4.

¹⁴ A masterly treatment, although now slightly outdated, is H. L. A. Hart and T. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 2nd. ed., 1985), pp. 172-176.

¹⁵ See *R v Blaue* [1975] 3 All ER 446 (UKCA) and the discussion in Hart and Honoré, *ibid*, pp. 360-362.

¹⁶ See *Re F* [1990] 2 AC 1 (UKHL) at pp. 72-73 (Lord Goff).

‘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.¹⁷

B. Three points

The first point is that the preceding sketch of law’s abstract judgement shows that it is not ubiquitous. It is more deeply embedded in some areas of legal doctrine than in others and a more expansive survey would surely disclose areas in which it has little influence.¹⁸ Judged across entire legal systems, the abstract nature of law’s abstract judgement 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 – like negligence and the defence of provocation – where law’s abstract judgement is entrenched. This mixed picture might suggest that law’s abstract judgement 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 law’s abstract judgement can and must be contrasted is the second point worthy of note 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 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, holds 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”.¹⁹ 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”.²⁰ 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

¹⁷ See, for example, *R v Brown* [1994] 1 AC 212 (UKHL).

¹⁸ 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.

¹⁹ F. Schauer, *Playing by the Rules* (Oxford: Clarendon Press 1991), p. 10 (emphasis added). It will be clear to anyone familiar with this book that the conception of rules in play in the picture of law’s abstract judgement developed in this essay is much the same as Schauer’s conception of rules as entrenched generalisations: *ibid*, chs 2-5.

²⁰ *Ibid*.

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. Although conceivable, 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 law's abstract judgement 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 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%. 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 law's abstract judgement must be contrasted with less abstract (but not pure particularistic) judgement prefigures another and related warning. It is that law's abstract judgement 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 assuredly questionable.²¹ Morality's judgement is

²¹ Schauer's reading of act-utilitarianism comes close to this: *supra*, note 19.

sometimes abstract and sometimes less abstract (or particular), 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 those to whom it is owed. The duty is thus not one actually owed to ‘all human beings’ but only to ‘all human beings in mortal peril’. This does not, however, entail that the judgement which gives rise to the duty is in any but the most trivial sense particularistic.

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.²² 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 different 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.²³ 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.²⁴ The complexities here are side-stepped in what follows, the essay’s only commitment on this topic being that moral practice, like law, embodies both more and less abstract models of judgement.

The third and, for present purposes, most important point worthy of note here is raised by this question: ‘what is wrong with law’s abstract judgement?’ Even a brief survey of the many discussions of law’s abstract judgement and its cognate ideas suggests that the answer must be: a very great deal. The charge sheet includes *inter alia* the indictment that it is an historical anachronism, that it is not gender-neutral, that it suppresses the law’s ability to respect difference, that it is a morally insensitive

²² See D. Parfit, *Reasons and Persons* (Oxford: Clarendon Press 1984), p. 143 and T. Nagel, *The View from Nowhere* (New York: Oxford U. P. 1986), pp. 152-154.

²³ The eye of this current intellectual storm is the dispute between moral particularists and their opponents. For an introduction to one version of particularism see J. Dancy, ‘The Particularist’s Progress’, ch. 6 of B. Hooker and M. Little (eds), *Moral Particularism* (Oxford: Clarendon Press 2000) and his *Ethics Without Principles* (Oxford: Clarendon Press 2004).

²⁴ On which see L. Blum, ‘Against Deriving Particularity’, ch. 9 of Hooker and Little, *ibid*.

means of assessing culpability, and that it is a bearer of normal but discriminatory standards for the assessment of conduct.²⁵ Although a harrowing list for any defender of law's abstract judgement, this still does not contain the two most obvious indictments. The first is that law's abstract judgement, while a means of treating people equally, is simultaneously 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.²⁶ Law's abstract judgement functions in just this way and it seems, at least at an intuitive level, to raise a problem of fairness.

Fairness is also the crux of the second obvious indictment, which is probably closer to the surface of common sense than the first. Keeping defendants rather than claimants in mind, it appears intuitively unfair that the law holds 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 over-selfish – are almost always going to be short-comers when judged against them.²⁷ This situation would be troubling enough in our non-legal lives, but the fact that state power is brought to bear against short-comers seemingly compounds the problem.

To elucidate this intuition is not necessarily to commend it. And, indeed, with only a slight widening of focus, the intuition can appear less robust. If we keep claimants rather than short-comer defendants in mind, matters are less clear cut. Imagine a blameless claimant is damaged by the conduct of a short-comer. The question of the fairness of leaving that loss where it falls must surely arise. That the short-comer could not have achieved that standard of conduct, breach of which has given rise to the

²⁵ If western legal systems are indeed caught in a transition from autonomous to reflexive law (as sketched, albeit somewhat speculatively, in P. Nonet and P. Selznick, *Law and Society in Transition* (New Jersey: Transaction Publishers 2005 (originally published in 1978)), or in a shift from legal order to postliberal legal order (as noted in R. Unger, *Law in Modern Society* (New York: Free Press 1976)), then law's abstract judgement does indeed seem to be historically doomed. See, for a related discussion, E. Pashukanis, *Law and Marxism: A General Theory* (London: Pluto Press 1983), Introduction, chs 2-4. Chs 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; 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). D. Cornell, *Philosophy of the Limit* (New York: Routledge 1992), chs 4-6, outline some of the challenges some versions of deconstruction present to law's abstract judgement (and many other dimensions of law as well). A similar task, more critically conducted, is the burden of J. Balkin's 'Deconstruction's Legal Career' (2005) 27 *Cardozo L. R.* 719-740. A nuanced and admirably clear general treatment of the some of the problems of abstraction (and categorisation) is M. Minow, *Making All the Difference* (Ithaca, NY: Cornell U. P. 1990), Introduction and chs. 1-3. The abstraction and universality of human rights law, itself 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. On the ethical bluntness of the criminal law's means of assessing culpability see A. Norrie, *Punishment, Responsibility and Justice* (Oxford: Clarendon Press 2000), chs 1-2 and 9; for the discriminatory impact of reasonableness standards in tort see Moran, *supra*, note 5.

²⁶ 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), pp. 86-87.

²⁷ The term 'shortcomer' belongs to T. Honoré: see his *Responsibility and Fault* (Oxford: Hart Publishing 1999), p. 16.

claimant's damage, is not a compelling answer to that question. For we are still left with a baleful situation: a blameless claimant has suffered damage and that damage was undoubtedly caused by the short-comer defendant. Are the moral merits here obviously in favour of the latter? It seems not, at least in purely legal terms, since defendants feel the force of law's abstract judgement more than claimants. Generally speaking, legal doctrine is less accommodating towards the particularities and context of defendants than claimants (think again of the egg-shell skull rule). This may well represent an explicit higher valuation of claimants' interests as against those of defendants and, if so, it is not completely without moral foundation. At least, that is so if (i) we are just as – or more – troubled by the situation of the blameless claimant as that of the short-comer defendant; and (ii) there are respectable moral reasons for that.

III. ABSTRACTION AND EQUALITY

What might be said in favour of bourgeois law's abstract judgement? In answering this question, let us suppose a pure form of law's abstract judgement is in play – all three components are in play to the maximal degree. This form excludes much. It ignores character, particularity and context. Its positive aspects appear to be generality, equality of treatment and impartiality. Although a pure form of law's abstract judgement is not ubiquitous, it is still probably rightly regarded as the focal meaning, or paradigmatic instance, of bourgeois law's judgement.²⁸ 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 law's abstract judgement has over swathes of juristic thought.²⁹

The following discussion is narrowly focussed: only one broad type of argument that might support law's abstract judgement is examined. The type is arguments from equality and only two examples are considered, one of which proceeds directly from a conception of equality, the other of which moves indirectly, beginning with an account of the wrongs entailed by particular forms of inequality. Arguments of this type are an obvious and promising starting point here because law's abstract judgement undoubtedly embodies forms of equality of treatment. Law's abstract judgement might therefore be supported by broader, compelling conceptions of equality or by the considerations (not themselves necessarily egalitarian) that support such conceptions. It should be noted that the two equality-based arguments examined below are drawn from a limited intellectual palette, namely, the existing resources of contemporary liberal political and legal philosophy. Furthermore, the discussion is also completely unoriginal, offering no new argument for, or account of the nature of, equality. It can, however, claim to be original in another sense, for it seeks to test contemporary liberal political and legal philosophy by reference to its ability to support law's abstract judgement, an obvious feature

²⁸ On focal meaning, see J. Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980), pp. 9-18 and pp. 277-281.

²⁹ Evidence in support of this claim can be garnered from the critical response to cases such as *Morhall*, *Stingel* and *Thibert*, *supra*, note 9 and *Smith*, *supra*, note 10. Much the same responses are provoked by cases varying the standard of the duty in negligence.

of existing legal institutional design.³⁰ More will be said about whether or not this is an appropriate way of testing and evaluating normative theories in section IV. The discussion in section IV also considers whether or not the normative over-determination of aspects of legal institutional design is a problem.

Narrowness of focus means much is ignored. For example, non-normative arguments are left untouched, even though they are likely to do some work in supporting law's abstract judgement.³¹ Moreover, at least two other plausible sources of normative support for law's abstract judgement are set aside. One is the argument from responsibility, which is primarily a response to an alleged source of unfairness in law's abstract judgement, namely, that arising from holding agents to standards of conduct they cannot achieve. At least one conception of responsibility provides an immediate challenge to this view, although it is not discussed here.³² Another principally normative argument (or, more accurately, family of arguments) also left untouched is that from the rule of law.³³

Finally, note that the equality-based arguments considered below respond directly only to one of the already noted objections to law's abstract judgement. Responding to each of these objections in the depth required would far exceed the boundaries of even a lengthy essay. The discussion draws the sting from the indictment which holds that law's abstract judgement is simultaneously a form of equal and unequal treatment, suggesting that this charge is ultimately untroubling. Rather than rebutting each of the other specific indictments against law's abstract judgement, the aim is instead to counterbalance them by illuminating some considerations weighing in favour of law's abstract judgement.

A. Dimensions of equality

A pure form of law's abstract judgement ensures equality of treatment in a number of different ways. Its *uniformity component* usually holds all addressees of the law to the same general standards. The content of those standards is the same for all of those to whom they apply, and the standards are applied to all addressees alike, whether or not they are capable of compliance. The form of equality of treatment that this component embodies is therefore something like equality *under* the law, understood

³⁰ Features of legal institutional design are, for the purposes of this essay, aspects of legal systems broader than particular legal doctrines, rules and principles but sometimes embodied in such doctrines, rules and principles. Lon L. Fuller reminded jurists of the importance of both features and principles of general institutional design in, *inter alia*, his *The Principles of Social Order* (Durham, NC.: Duke U. P. 1981), edited by K. I. Winston.

³¹ Two apparently non-normative arguments that could well justify law's abstract judgement are therefore overlooked. These are (i) arguments from some or other conception of efficiency and (ii) arguments from convention. Standard introductions to the former are R. Posner, *Economic Analysis of Law* (New York: Aspen Publishers, 7th ed., 2007); S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Mass.: Harvard U. P. 2004). On the latter, helpful treatments are Finnis, *supra*, note 28, pp. 284-289 and E. Ullman-Margalit and S. Morgenbesser, 'Picking and Choosing' (1977) 44 *Social Research* 757-785.

³² See Honore, *supra*, note 27, ch. 2.

³³ But see my 'Abstraction and the Rule of Law', forthcoming (2009) 29 (3) *Oxford Journal of Legal Studies*. I am grateful to the editor of that journal for permission to reproduce section II of that essay here.

as requiring, at the very minimum, that all are governed by the same laws. The *presumptive identity component* is a means of ensuring equality *before* the law, since it regards all the law's addressees as the same: as abstract beings with formally equal bundles of legal rights and duties, rather than the real human beings they truly are, in all their particularity, specificity and difference. The *limited avoidability* component functions in much the same way as the other two, operating to allow excuses and defences only when reasonableness standards are satisfied, whether or not particular defendants can actually satisfy those standards. It thus regards those judged by the law as the same – as having the same capabilities and levels of fortitude – and holds them to the same standards. It is therefore a manifestation of equality before and under the law.

In a very clear sense law's abstract judgement, and the forms of equality of treatment it embodies, is a matter of exclusion. Each component illustrates what the law does not (or should not) see when judging citizens, at least not explicitly and not at the conviction or liability stage. The law does not usually see the obvious differences in wealth, status and class that exist between citizens; nor does it usually see differences in education or upbringing that often accompany these other differences. It is also rare for the law to register other equally or more obvious differences between its addressees: its judgement does not and, it is often assumed, should not differ in accordance with the gender, religion, ethnicity or sexuality of those before it, except when such tempering is unavoidable. Law's judgements, furthermore, are usually made without reference to the particular differences in aptitude, temperament, character or attitudes of those before it.

B. Some wrong turnings

Are there any arguments from broader conceptions of equality that can support the forms of equal treatment law's abstract judgement embodies? It is helpful, at the outset, to know where not to look for guidance when seeking an answer to this question. The thinnest and most formal account of equality available to us, which insists that like cases be treated alike and different cases differently, is unhelpful because its most important constituents are left unspecified. And, since the process of specifying criteria of likeness and difference usually serves to elide the distinction between this supposedly 'formal' account of equality and its more substantive competitors, there seems little point in according it separate attention.³⁴ It also seems plain, as some jurists have already realised, that some contemporary philosophical accounts of equality have little relevance to our questions or to questions about juristic equality more generally.³⁵ These accounts constitute that strand of contemporary political philosophy best labelled 'luck egalitarianism'.³⁶ This strand of thought originated as an engagement

³⁴ See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 2nd ed., 1994), pp. 159-160 and D. Lyons, *Moral Aspects of Legal Theory* (Cambridge: Cambridge U. P. 1993), ch. 2. For an optimistic treatment of the notion of formal justice and some of its constituents, see C. Perelman, *The Idea of Justice and the Problem of Argument* (London: Routledge and Kegan Paul 1963), ch. I.

³⁵ See S. Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto Law Journal* 291-326, pp. 291-294.

³⁶ The term was coined by Elizabeth Anderson in her 'What's the Point of Equality?' (1999) 109 *Ethics*

with John Rawls's *A Theory of Justice*, and is distinctive at least because it appears to take much more seriously than Rawls the outcomes of both natural and social lotteries.³⁷

Luck egalitarians' efforts to either cancel out or mitigate the consequences of the natural and social lotteries have led them to a vast number of proposals seemingly unlimited in their jurisdictional range. There is thus apparently no realm, or very few realms, of social life immune to the force of luck egalitarian principles. They supposedly extend not only to Rawlsian primary goods but to the distribution of temperament and marriage partners.³⁸ They do not, however, explicitly touch features of (legal) institutional design like law's abstract judgement. This might be because luck egalitarianism is not in any genuine sense a 'political' conception of equality, being unconcerned with the political structure of a society and the opportunities for power and advantage it contains.³⁹ Yet rather than excusing luck egalitarian accounts of equality, this surely serves to indict them. For, without claiming that a society's political structure is the most important determinant of the life chances of its citizens, it is surely one of a number of such determinants. It is thus not unreasonable to expect it to loom large in theories of equality.⁴⁰

The apparently paradoxical combination of lack of institutional impact and unlimited jurisdictional range in luck egalitarianism is often conjoined with the dubious assumption that equality is solely or principally a distributive and quantitative notion. On this view equality is concerned with the appropriate distribution of some divisible 'thing' or 'things' in proper amounts.⁴¹ This contrasts with the understanding in play in most juristic formulations of equality. These formulations include that class of equality provisions found in many legal systems, either in constitutional documents or in ordinary legislative provisions such as, *inter alia*, Amendment XIV of the US Constitution, sections 15 and 28 of the Canadian Charter of Rights and Freedoms, Article 14 of the European Convention of Human Rights, sections 1-4 and schedule 1 of the Human Rights Act 1998 and section 8 of the A.C.T Human Rights Act 2004. The idea of equality in these sources is principally qualitative, a matter of 'forms' of treatment – no person shall be denied equal protection of the laws – rather than a matter of

287-337, p. 289. See also S. Scheffler, 'What is Egalitarianism?' (2003) 31 *Philosophy and Public Affairs* 5-39.

³⁷ J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press, rev. ed., 1999), pp. 62-65. For discussion see Scheffler, *ibid*, pp. 8-12 and 24-31.

³⁸ Anderson, *supra*, note 36, pp. 287-288 (citing G. A. Cohen, 'On the Currency of Egalitarian Justice', (1989) 99 *Ethics* 906-944, pp. 922-23 and 930-931; P. Van Parijs, *Real Freedom for All* (Oxford: Clarendon Press 1995), p. 127).

³⁹ This is clearly not true of Dworkin whose account of equality, while in some respects rightly dubbed luck egalitarian, also engages with the political structure: see *Sovereign Virtue* (Cambridge, Mass.: Harvard U. P. 2000), chs. 3 and 4 and his 'Equality, Luck and Hierarchy' (2003) 31 *Philosophy and Public Affairs* 190-198.

⁴⁰ The near absence of an obviously political conception of equality in luck egalitarianism has been noted by Anderson, *supra*, note 36, at pp. 312-337. Scheffler, *supra*, note 36, pp. 34-39 makes a similar general point.

⁴¹ Thus it is that 'outcomes' (which usually imply a distribution some or other measurable 'thing' or set of 'things') are of primary interest to many philosophers of equality. See L. Temkin, *Inequality* (New York: Oxford U. P. 1993), pp. 11-12. Temkin notes that some notions of equality might not be illuminated by distributive-cum-quantitative (and thus outcome obsessed!) conceptions: *ibid*, p. 16.

distributing amounts of treatment (of the laws?) or other things. Being principally qualitative, the subject matter of these equality provisions is not easily ‘distributed’ in any obvious sense, which is not to say that some distributions of some things cannot provide evidence of unequal treatment under these provisions.

It might be thought that, since these provisions invoke a more limited, primarily qualitative, institutionally focussed and institutionally embedded idea of equality, they will be a more fruitful source of support for law’s abstract judgement than luck egalitarianism. These juristic statements of equality are not, however, as useful as they might seem. This is mainly because these provisions, in and of themselves, provide relatively little guidance as to the nature of equality and inequality. For, although some instances of official behaviour are now clearly invalid under these provisions (such as, for example, the enactment of a legal provision explicitly favouring Caucasians and disadvantaging non-Caucasians),⁴² there is nevertheless a large range of behaviour about which it is hard to be certain. This, at least, is so if we have reference to nothing more than the wording of these provisions themselves. Thus it is unclear from the wording of Amendment XIV of the US Constitution, for example, that the University of Michigan Law School’s admission procedures, which in some instances prioritise factors over and beyond academic merit, deny some citizens equal protection of the laws. It is similarly far from obvious whether equivalent broad equality provisions in other jurisdictions permit, for instance, differential access to public spaces, schooling, legal advice or differential levels of social security benefits.⁴³

In all but the most blatant cases, then, the courts must necessarily go beyond the literal wording of most juristic equality provisions, in part because of the distance between these general statements about equality (‘every individual is equal before and under the law’) and specific legal questions (is it discriminatory for the province of Quebec to pay the young unemployed less in benefit than their unemployed elders?). Since the words of this and similar equality provisions give relatively little guidance as to what or how they should be applied in the specific circumstances of particular cases, something more is therefore necessary than the bare text. But what is this ‘more’ and, further, what informs the search for it, gives it traction?

If the provision in question has been litigated before, then the precedents will obviously provide some guidance. So, too, might the legislative history of the provision, but there is no guarantee that it will include anything salient. Furthermore, even textual sources like precedents and legislative history will rarely rationally compel a particular interpretation of an equality provision in a specific

⁴² The key word in the first clause of this sentence is ‘now’, particularly if we have the history of the XIV amendment in mind: see W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard U. P. 1988), chs I, VII and VIII and A. Bickel, ‘The Original Understanding and the Segregation Decision’ (1955) 69 *Harvard Law Review* 1-65.

⁴³ A smattering of the vast number of cases must include: *Grutter v Bollinger* 539 US 306 (2003) (US Sup Ct) – access to law school and the XIVth Amendment; *Gosselin v Quebec (A.G.)* [2002] 4 S.C.R. 429 (SC Can) – differential welfare benefits and s. 15 of the Canadian Charter; *Baczowski and others v Poland*, App. No. 1543/06, ECtHR 2007 – Article 14 (*inter alia*) of ECHR and permission for public gathering.

case. This is because this additional textual evidence must itself usually be subject to a process of elaboration or interpretation. Consider, for example, what courts usually do with precedents cited to them as a guide to the meaning of some or other equality provision. Whether or not such precedents are factually close, they are usually examined (i) with a view to the light they cast upon the meaning of the provision; and (ii) with a view to their implications, were they to be applied in the case at bar. Particular precedents might be found satisfactory or unsatisfactory on one or both dimensions. This process is clearly anything but automatic and almost never determined solely by the precedent(s) cited. If the precedents were indeed determinative in this ‘self-interpreting’ way, then the case would assuredly not be ‘hard’ and thus unlikely ever to be litigated.⁴⁴

Moreover, when ‘the meaning of the provision’ is sought, either in precedents if there are any, or in other textual sources if there are none, what exactly is being sought? The words of the provision are there in the text, so how can its ‘meaning’ reside elsewhere? And when the implications of applying a precedent to the case at bar are determined to be either good or bad, how is that judgement arrived at? The answer is that the meaning sought, and the basis for judging implications to be good, bad or indifferent is found, as many lawyers would say, in ‘a theory’ of the provision in question, by which they mean an account of its point, purpose or value.⁴⁵ The process of elaboration in the interpretation of juridical equality provisions is thus one that involves both descent, moving from the general provision to the particular case, and ascent, moving from the general provision to an account of its point, purpose or value. Both aspects of this process are connected in that ‘the theory’ of the provision indicates the interpretative pathways along which to proceed in particular cases. Note, though, that such theories are not rightly viewed as more abstract than the provisions they theorise. Rather, they usually serve to make those provisions more specific, both in terms of their point, purpose or value and in terms of what that account of point, purpose or value requires in particular cases. Such a theory gives the provision ‘depth’ or ‘body’, showing us how to go on applying it, and is thus not best regarded as being solely abstract.⁴⁶

⁴⁴ On what makes a hard case hard, see the slightly different views in N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press 1978, rev. ed., 1994), pp. 65-72 and chs VI-VIII and R. Dworkin, *Taking Rights Seriously* (London: Duckworth 1977), p. 81. MacCormick’s original view has been supplemented in his *Rhetoric and the Rule of Law* (Oxford: Clarendon Press 2005), pp. 49-52.

⁴⁵ Although this process is described in somewhat different ways by jurists in various jurisdictions, its substance is at root the same. Interesting characterisations of the process with regard to the XIVth Amendment of the US constitution include J. Trusman and J. tenBrook, ‘The Equal Protection of the Laws’ (1949) 37 *California Law Review* 341-381; O. Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5 *Philosophy and Public Affairs* 107-177; and L. Tribe, *American Constitutional Law* (New York: Foundation Press, 2nd ed, 1988), vol II, ch. 16. For the interpretation of equality provisions in the Canadian Charter and elsewhere, see A. Brudner, *Constitutional Goods* (Oxford: Clarendon Press 2004), pp. 131-142; D. Beatty, *The Ultimate Rule of Law* (New York: Oxford U. P. 2004), ch. 3; and R. Sharpe *et. al.*, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 3rd ed., 2005), ch. 15. An interesting treatment of the interpretative pathways of the European Court of Human Rights is G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Clarendon Press 2007), chs. 3 and 5.

⁴⁶ The idea of ‘knowing how to go on’ and its many complications and ramifications (all of which are

The relative emptiness of juridical equality provisions, and the process of elaboration involved when the courts apply them in all but the simplest of cases, warrant the claim that these provisions cannot explicitly support law's abstract judgement. The distance from these provisions to law's abstract judgement is just as far, and just as contestable and problematic, as that from such provisions to, for example, a decision about the legitimacy of differential welfare payments. Furthermore, the fact that law's abstract judgement is not ubiquitous in legal systems shows it is unlikely that general equality provisions can implicitly support law's abstract judgement. If such provisions did indeed *require* law's abstract judgement, then the doctrinal instances in those legal systems in which the law's judgement is not abstract – some segments of the criminal law, for example – would surely already have come under challenge. That they have not does not entail the conclusion that these provisions cannot support law's abstract judgement; it does, however, make it unlikely that they do.

If general juridical equality provisions are unlikely to provide much support for law's abstract judgement, how should we proceed? More attention could be given to the theories said to provide an account of the point of these provisions and their constitutive value or values. For, while the actual provisions may not explicitly support law's abstract judgement, the theories said to inform such provisions might. Viewed in direct light, rather than through the prism of general equality provisions, the content of these theories should become more explicit and tractable. This way of proceeding is, however, potentially rich with distractions and our examination must, therefore, be doubly limited. First, our interest is only in those theories of general equality provisions that invoke, either directly or indirectly, an account of equality. Equality can function here either as a single and significant value in and of itself or as a bearer and protector of other interests and values. Second, our interest is in whether or not law's abstract judgement can be supported by some of these theories; we are not ultimately concerned with whether or not the accounts of equality examined below do or can provide plausible theories of the general equality provisions. General equality provisions are on our agenda, remember, only because they – or the broader theories that animate them – might be capable of supporting law's abstract judgement.

C. The right to equal concern and respect

The first candidate potentially well equipped to both animate general equality provisions and support law's abstract judgement is Ronald Dworkin's right to equal concern and respect.⁴⁷ The right holds that

ignored above) was, of course, a preoccupation of the later Wittgenstein: see L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell 1953; 2nd ed., 1958), I, §143-§242.

⁴⁷ By singling out this right for attention, I do not assert that it is the only possible foundation in Dworkin's work that might support law's abstract judgement. In both *Law's Empire* (Oxford: Hart Publishing 1998) and *Justice in Robes* (Cambridge, Mass.: Harvard U. P. 2006), Dworkin suggests an understanding of integrity that includes a form of equality before the law (at pp. 184-185 of the former and pp. 176-178 of the latter). There could be support here for law's abstract judgement, but this pathway is not further examined, principally because in each instance the argument is made only in passing and is somewhat inchoate. Dworkin's general statement on integrity is found in chs 6 and 7 of *Law's Empire*, *ibid.*

“[g]overnment must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s” (*TRS*, pp. 272-3).⁴⁸

Thus “individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them” (*TRS*, p. 180). They should be “treated with the same respect and concern as anyone else” (*TRS*, p. 227).

The right to equal concern and respect is far more limited than the injunctions of luck egalitarianism, applying only to the conduct of ‘government’ and, presumably, some of its outcomes or consequences. Nor is there any legitimate sense in which the right is exclusively concerned with the quantitative distribution of some ‘thing’, be that resources, welfare or some hybrid of the two.⁴⁹ For, in addition to sometimes having distributive implications, the right always entails that certain interests of all citizens must be treated in the same way (*TRS*, p. 227). The right is also clearly more specific than the general equality provisions just mentioned, principally because it sketches reasonably precisely what must be valued – citizens’ ability to formulate and pursue conceptions of the good life as well as their capacities for suffering and frustration. Furthermore, the right tells us how this ‘bundle’ of interests, which presumably all citizens have, must be treated by government, namely, with both equal concern and equal respect. It is therefore an exaggeration to claim that this right “does not have sufficient content to explain the precise nature of the wrongs that are done to people who are not treated with equal concern and respect.”⁵⁰ The wrong done by breach of this right is some combination of: (i) curtailment, partial or complete, of some citizens’ ability to pursue or formulate conceptions of a good life; (ii) the undervaluing or ignoring of some such conceptions; (iii) the undervaluing or ignoring of the suffering and frustration caused to citizens by either (i) or (ii). Although not compendious, the wrong here is sufficiently clear and substantial to show that the right to equal concern and respect is not empty. That much becomes even more obvious on switching from the negative to the positive mode for, if instead of cataloguing the wrongs done by breach of the right we think instead of the capacities it upholds, it is clear that at the very least the values of autonomy and freedom must loom large.

The right to equal concern and respect does a good deal of intellectual and practical work for Dworkin. It was invoked in his early work as a means of making sense of the principal theoretical components of Rawls’s account of justice. It played another equally important role, along with the

⁴⁸ In text and notes, ‘*TRS*’ refers to Dworkin, *supra*, note 44.

⁴⁹ In the remainder of this subsection I will speak of ‘the right to equal concern and respect’, ‘the right’ and ‘this right’ indiscriminately.

⁵⁰ Moreau, *supra*, note 35 at p. 296. Note that Moreau thinks the right to equal concern and respect is but part of a more general conception of human dignity. It may be that she regards the latter as vague but not the former, although the text suggests that she thinks both suffer the same ailment.

distinction between personal and external preferences, in Dworkin's defence of reverse discrimination, and appeared to be *the* (or one) basis of the normative power of the rights thesis, the most distinctive component of Dworkin's account of hard case adjudication.⁵¹ In his mid-period work, Dworkin argued that the right was the core of any coherent and meaningful liberal political philosophy.⁵² His more recent work on the nature and content of distributive justice also appears to rely upon a variant of this right.⁵³

But what, exactly, might this right entail or support? It is probably too demanding to expect a strict entailment between this very general right and a particular concrete feature of institutional design such as law's abstract judgement. We will therefore content ourselves with examining less rigorous forms of support, if any, that this right might provide for the latter. There is certainly no bar to the right supporting a policy or form of treatment (like law's abstract judgement) that is not itself obviously a right. For, although Dworkin regards the right to equal concern and respect as abstract and fundamental, and therefore a good basis from which to derive other rights (*TRS*, pp. xiv-xv), he also claims that the right can support collective welfare claims. Thus he holds "that particular political rights, *and* the idea of collective welfare, *and* the idea that these function as antagonists at the level of political debate, are all consequences of the fundamental ideal of a political community as a community of equals" (*TRS*, p. 368; emphasis in original). It is this kind of claim that marks Dworkin as a hedgehog in political theory rather than a fox.

Since the right *can* in principle support law's abstract judgement, it remains to determine whether it actually *does* support it. One way in which it surely does so is this: taking the right to equal concern and respect seriously ensures a form of equality before the law, namely, that citizens cannot be discriminated against or favoured because of their status, conception of a good life, or overall 'worthiness'. Interestingly, law's abstract judgement also ensures a similar kind of equality before the law by prohibiting judicial reference to many of the considerations that the right to equal concern and respect also embargoes. Like the right to equal concern and respect, law's abstract judgement is a way of not seeing many of the differences between citizens. Law's abstract judgement does not register, except when legal doctrine demands, whether a claimant's style of life is worthy or base, or whether she is patrician or plebeian, aesthete or philistine. Citizens are treated as if they were the same by law's abstract judgement and, if it is genuinely successful in doing this, it therefore functions in much the same way as the right to equal concern and respect. If we value the right to equal concern and respect, in part because of the function it fulfils, must we therefore also value law's abstract judgement because it fulfils the same function?

⁵¹ *TRS*, chs 6, 9 and 12. The right to equal concern and respect 'appeared' to support the rights thesis because there is no explicit claim to this effect in ch. 4 of *TRS* (although the right does appear in passing at p. 82). Rather, there is a medley of statements that seemingly license this conclusion: see *TRS*, p. 101 in conjunction with p. xii and xv.

⁵² *A Matter of Principle* (New York: Oxford U. P. 1985), ch. 8.

⁵³ In *Law's Empire*, *supra*, note 47, at p. 222 and ch. 8, and in *Sovereign Virtue*, *supra*, note 39, pp. 1-3, p. 128, 131 and 184 the right to equal concern and respect becomes (just) the right to equal concern or equality of concern.

There are two immediate objections to an affirmative answer. One holds that similarity of function (between law's abstract judgement and the right to equal concern and respect) cannot justify. Suppose X (the lawful interrogation of those suspected of crime) functions so as to bring about, or bring us closer to, Y (unearthing the truth). The fact that X is justified tells us nothing about Z, which also functions so as to bring us closer to Y. Unless X and Z are ultimately identical, there is simply no warrant for concluding that the justification for the former extends to the latter, even though both have the same function. This is apparent if Z in this example were torture. Torture may well have the same goal as lawful interrogation, but the considerations which justify the latter are unlikely, in most circumstances, to extend to the former. Furthermore, it might also be the case that whatever value is realised by some particular institution or institutional feature is best realised only in one context or only in a specified amount. It is then possible that the realisation of this value, or an increase in its amount, brought about by another institution or institutional feature, is a bad thing. Thus the fact that the right to equal concern and respect embodies some or other value warrants neither the conclusion that that value is always and ever valuable, nor that its realisation by other means or in ever greater amounts is always and ever valuable.

It is tempting, in the face of this objection, to try to unearth the considerations that justify or support the right to equal concern and respect. It could then be determined whether or not these considerations can also support law's abstract judgement. If they can, then there is not only unity of function here but unity of justification. This line of thought, however, serves to reinforce the first objection and in fact constitutes the second objection. The problem is that the search for deeper considerations supporting the right to equal concern and respect is virtually fruitless.⁵⁴ The right's abstract and fundamental status – the principal factor in its favour for Dworkin is its ability to support and make sense of many other principles of political morality – means that attempting to find considerations to support it is hard and, perhaps, pointless. That the main argument in favour of this right is its power to link together and illuminate other important values and concerns clearly suggests it is non-derivative. If it is, then it is assuredly silly to look for considerations supporting it.

What, then, remains to be said about the way in which the right to equal concern and respect can support law's abstract judgement? Principally that the conclusion just reached does not close off all

⁵⁴ 'Virtually fruitless' because the right could well be supported by the abstract egalitarian principle sketched in R. Dworkin, 'Comment on Narveson' (1983) 1 *Social Philosophy and Policy* 24-40, pp. 31-35 (a seemingly related version of which Dworkin invokes in *Sovereign Virtue*, *supra*, note 39, pp. 128-129)). However, Dworkin offers no positive argument in favour of this principle, thinking it "too fundamental . . . to admit of any defense in the usual form" (Comment, *ibid*, p. 31). He contents himself with showing how hard it is to reject the principle. This approach does not persuade Narveson: J. Narveson, 'Reply to Dworkin', *ibid*, pp. 41-44. The right might also gain support from the value of integrity, for discussion of which see *Law's Empire*, *supra*, note 47. Of course, a non-Dworkinian justification for the right to equal concern and respect is presumably possible (it might, for example, be derived from a conception of autonomy or public reason or from the type of consideration Narveson himself highlights (*ibid*, p. 44)), but this would simply extend further the seemingly endless search for justifications (this time, for the conception of autonomy or public reason or other considerations invoked to support the right). For an example, see Moreau's effort to root the right in a conception of human dignity: *supra*, note 35, pp. 295-296.

the available justificatory space. It could still be maintained that the values instantiated or realised by the right to equal concern and respect are, as a purely contingent matter, also realised by law's abstract judgement. It could also be added that this situation was in itself a desirable one. At least, the latter could be maintained pending a demonstration that the values realised by the right to equal concern and respect were confined to certain contexts only, or had an optimum distribution or quantity. If it is morally important that government conduct is not based upon judgements about the worth of different citizens' lives, then law's abstract judgement is presumptively just as important as the right to equal concern and respect. This claim need not hold that similarity of function always and ever justifies, but only that similarity of function justifies in this particular context (*ceteris paribus*).

Some critics of the right to equal concern and respect are, however, sure to be dissatisfied with this argument, primarily because they think that the right itself is a fundamentally flawed idea. One objection they make should be dismissed at the outset. The objection denies that the right can entail any genuine form of equality, principally because it is alleged that the invocation of 'equal' in the right is empty. Herbert Hart claimed that what is wrong when the right to equal concern and respect is breached by, for instance, legislation denying freedom of worship is the straightforward restriction of liberty. It is "fantastic" to suppose that victims of this legislation should complain about not being treated with equal concern and respect.⁵⁵ Hart clearly does not accept that the denial of freedom of religion to one group is a form of unequal treatment, in the sense that they are denied a liberty that other groups enjoy. But the ground for his refusal is unclear. For, since it does not seem in any way unnatural to characterise this situation as one of unequal treatment, why should we refrain from such a characterisation? Hart says that 'equal' in this characterisation is playing an empty role, but he buttresses the point by changing the example. Were a tyrant to ban *all* forms of religious worship, he says, citizens could not complain that their right to equal concern and respect had been breached, since all have been treated in the same (objectionable) way.⁵⁶ In part, that is surely true. But this example simply raises a different issue from that in which some citizens are allowed freedom of worship and some are not. It should not, therefore, guide what we would say in the latter case. Furthermore, the blanket ban on religious worship could indeed be challenged, in normal circumstances, by the right to equal concern and respect. This is because it would surely be unusual for such a ban ultimately to be based upon anything other than a judgement of the unworthiness of a life informed by religious observance. While the wrong here is non-comparative (because all citizens are treated in the same way), it is still plausibly a breach of the right to equal concern and respect: the ban accords no concern and no respect to this aspect of citizens' lives.

Two related objections might still be tabled by critics. One holds that the right to equal

⁵⁵ H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), Essay 9, p. 220. A related version of this objection, which rather mysteriously insists that 'equal' in the right does not flow "from a conception of equality but from the fact that . . . [the right refers] to a group with equal claim to have the right", is offered by J. Raz, 'Professor Dworkin's Theory of Rights' XXVI *Political Studies* 123-137, p. 130

⁵⁶ Hart, *ibid*, p. 221.

concern and respect cannot reliably entail or support anything because it is internally contradictory. The contradiction arises from the conflict between the right's two key components, respect and concern. The other objection, by contrast, concedes that the right to equal concern and respect may well support law's abstract judgement in the limited, functional way just noted, but affirms that the right also supports models of judgement incompatible with law's abstract judgement.

The argument that the right to equal concern and respect is internally contradictory is at best inchoate; certainly it has never been explicitly unpacked. The point is usually made in passing and consists only of noting a possible and plausible difference between respect and concern, namely, that the latter is consistent with paternalism while the former is not.⁵⁷ This clearly falls far short of demonstrating that these two notions (and the right they constitute) cannot be combined because contradictory. This would require a demonstration that in every, most or many instances in which the right is in play, its different components pull in opposite directions. That this is not the case in a number of instances is clearly affirmed by Dworkin's own invocations of the right in such different contexts as reverse discrimination, civil disobedience and euthanasia.⁵⁸ While it must be conceded to these critics that the right to equal concern and respect is certainly complex, that does not show it to be contradictory.

For the second objection to succeed, it would have to establish that the opposite to law's abstract judgement – a form of purely particularistic judgement – fulfils the same function as the right to equal concern and respect. It seems unlikely that such a case can be made. This is principally because forms of particularistic judgement give free reign to considerations excluded from judicial and other government decisions by the right to equal concern and respect. On what grounds, for instance, would a form of particularistic judgement exclude a defendant's view of his own superiority as a good reason for risky conduct? Since for this defendant the interests of others are plainly less significant than his own, and since this belief informs his conduct, how can it be excluded as a relevant factor in determining his liability? Similarly a defendant who accepts the belief, rife in her community, that it is right to kill her children and herself in the face of marital infidelity would seem, on a particularistic model of judgement, to have grounds for a defence. If such considerations – presumably deeply held and in some sense constitutive of the defendant's identity – are excluded, then the form of judgement in play cannot be exclusively particularistic. The right to equal concern and respect is a tempting and serviceable basis upon which to exclude such considerations, although it is clearly not the only possible basis. Yet the mere fact that the right functions in this way serves to show its incompatibility with models of particularistic judgement.

⁵⁷ Raz, *supra*, note 55, p. 130. A closely related version of this objection, briefly but judiciously stated (there is "on the face of it" a conflict between these two components) is offered by R. Sartorius in his essay in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth 1983), at pp. 208-209. Dworkin's subsequent use of the bare 'equal concern' formulation, in which respect drops out of the picture (see *supra*, note 53, for references), could be explained as a recognition of the power of this objection.

⁵⁸ See *TRS*, chs. 8 and 9 and *Life's Dominion* (New York: Vintage Books 1993), ch 7.

D. The wrongs of unequal treatment

Some jurists and philosophers analyse the notion of equality indirectly, focussing not upon equality itself but rather elucidating the various wrongs unequal treatment can entail. When used to generate an account of the point, purpose or value of juridical equality provisions, this approach generates results more piecemeal or incremental than those yielded by general statements of what equality entails.⁵⁹ There are at least two reasons behind this approach: one consists of an attempt to place the value of equality in the context of our other moral and political values. Thomas Scanlon undertakes this task and concludes that, rather than being as deep or fundamental a value as is sometimes thought, the substantive notion of equality does relatively little work in explaining what is wrong with many forms of unequal treatment.⁶⁰ Values other than equality are often in play here, according to Scanlon. These values highlight a set of discrete wrongs, each one of which may be brought about by particular instances of unequal treatment. Another reason motivating this approach is found in the alleged vagueness and abstraction of general political-philosophical accounts of equality, particularly when used to illuminate the meaning of various conceptions of juridical equality. So, for example, Sophia Moreau alleges that the right to equal concern and respect is too vague to do much work with regard to juristic equality provisions, but that it can perhaps be operationalised, or its content further specified, by considering the wrongs brought about by breaches of those provisions.⁶¹

Neither reason for adopting this approach can be accepted without cavil. Scanlon's examination of the wrongs of unequal treatment seems premised upon this assumption: what he calls a non-substantive idea of equality cannot make direct good sense of all the wrongs unequal treatment entails or brings about. But there is reason to doubt this move, if the conceptual cartography of the relationship between equality and inequality is that of different sides of the same coin. We often take the notions of justice and injustice to be connected in this way, knowledge of what the former looks like being quickly translatable into knowledge of what the latter looks like by way of simple opposition. If equality and inequality are similarly connected, then a non-substantive account of the former should serve to generate an account of the latter and, additionally, its constitutive wrongs. Moreau's reason for exploring the wrongs of inequality is also questionable, for reasons already noted: it exaggerates the vagueness or abstraction of the right to equal concern and respect.

Despite these reservations, the accounts of the wrongs of unequal treatment offered by Scanlon and Moreau are certainly worth exploring. They might, for instance, serve to make even more concrete and precise the wrongs that flow from breach of the right to equal concern and respect; in

⁵⁹ Which is not a criticism. An excellent illustration of the value of this approach is Moreau, *supra*, note 35.

⁶⁰ T. Scanlon, 'The Diversity of Objections to Inequality', ch. 11 of his *The Difficulty of Tolerance* (Cambridge: Cambridge U. P. 2003), pp. 202-203. A substantive idea of equality holds "that it is morally important that people's lives or fates should be equal in some substantive way: equal in income, for example, or in overall welfare" (*ibid.* p. 202).

⁶¹ Moreau, *supra*, note 35, pp. 293-296.

addition, they could also highlight wrongs other than those that flow from breach of this right. A demonstration of the latter serves to show either that the right to equal concern and respect does not exhaust the concept of equality in play here or that that concept is not unitary and thus includes different and possibly conflicting components. A demonstration of the former serves to further illuminate the function of law's abstract judgement: if the right to equal concern and respect protects against certain wrongs then it is likely, given their functional equivalence, that law's abstract judgement does the same job. What, then, are the wrongs of unequal treatment?

For Scanlon there are five such wrongs; for Moreau, four. They agree, in broad terms, on three: (i) that unequal treatment can perpetrate suffering or severe deprivation or deny access to basic goods; (ii) that it can perpetrate stigmatising differences in status or be based upon prejudice or stereotyping; (iii) that it can perpetrate oppressive power relations.⁶² Moreau highlights another allegedly free-standing wrong, traces of which appear within Scanlon's statement of other types of wrong.⁶³ This is the wrong of diminution of individual self-worth which, for Moreau, is rarely "sufficient to render . . . treatment unfair".⁶⁴ It is thus not, after all, a free-standing wrong and is therefore set aside hereinafter. That leaves outstanding the two additional wrongs which Scanlon thinks can be brought about by unequal treatment.

One of these is the wrong of undermining equality of starting points, which, as Scanlon notes, overlaps with the wrong in (iii). Scanlon puts the issue thus: "[s]ome forms of equality are essential preconditions for the fairness of certain processes, and the aim of making or keeping those processes fair may therefore give us a reason to oppose inequalities [of power and control]".⁶⁵ One way in which some can come to exercise and maintain power over others is by denying them access to particular goods or sources of power. If in one political community citizens of group A, for example, ensure that citizens of group B are unable to vote in elections because necessary administrative procedures have not been completed, then this is a double wrong. It is wrong, first, because it excludes some from a process in which all are equally entitled to participate and, second, because it undermines the legitimacy or fairness of that process. Both wrongs can clearly serve to perpetrate oppressive power relations but this is not, as Scanlon notes, a necessary truth. Thus denial of the equality that is an essential precondition of the fairness of the election result must be baleful for reasons other than the perpetration of domination. But whatever these reasons may be – and they must not, *ex hypothesi*, be reducible to those identified in (i) to (iii) – it is hard as a practical matter to envisage a denial of equal

⁶² Moreau characterises the three wrongs as (i) based upon prejudice or stereotyping (*supra*, note 35, pp. 297-303); (ii) perpetuating oppressive power relations (*ibid*, pp. 303-307); or (iii) leaving some individuals without access to basic goods (*ibid*, pp. 307-312). For Scanlon, the three wrongs are characterised thus: (i) causing suffering or severe deprivation; or (ii) perpetuating stigmatising differences in status; and (iii) the exercise of unacceptable forms of power or domination (*supra*, note 60, p. 207). I do not affirm that these two lists are identical. Rather, I treat them as more or less the same for the purposes of this essay in the belief that the differences that exist are not sufficiently salient to effect the arguments in the text.

⁶³ Scanlon, *supra*, note 60, pp. 212-218.

⁶⁴ Moreau, *supra*, note 35, p. 313.

⁶⁵ Scanlon, *supra*, note 60, p. 205.

rights to some group of citizens being anything other than an exercise of domination by another group. Even if group A's restricting group B's access to the democratic process were based upon laudable or altruistic reasons, that would surely still be an illegitimate exercise of power. For this reason, the distinction Scanlon attempts to draw between the third and fourth wrong of unequal treatment is ignored in what follows; they are regarded as synonymous.

Scanlon's fifth potential wrong is, for present purposes, irrelevant. He says "the idea of a fair procedure can . . . provide another kind of reason for insisting on equality of outcomes. (This is my fifth reason for objecting to inequalities)."⁶⁶ This claim is unpacked by reference to two others: that of a group in which all have equal claim to some benefit and that of a procedure for distributing that benefit. He holds that "[i]f a distributive procedure is supposed to be responsive to these claims, then it will be unfair if (absent some special reason) it gives some of these people a higher level of benefit than others".⁶⁷ This seems plausible, but is salient only within a more general understanding of the propriety of an equal distribution of benefits and of the appropriate means for achieving such a distribution. Societies as a whole, or particular segments thereof, might be understood in this way, but without such a prior understanding – without, that is, a full-blown political theory – this wrong is inchoate at best.⁶⁸ It is henceforth set aside.

The question which must now be answered is clear: does law's abstract judgement protect against wrongs (i) to (iii)? The wrong in (i) is a composite, made up of the perpetuation of suffering or severe deprivation and denial of access to basic goods. For Moreau, denying some access to basic goods is, unlike other forms of unequal treatment, a non-comparative wrong.⁶⁹ The wrong is the denial, plain and simple. If government denies some citizens access to basic goods there is no need, in order to see what is wrong here, to determine how other groups are or have been treated. Because he thinks it rests on a "moral idea[.] . . . that . . . [is] not fundamentally egalitarian",⁷⁰ it seems likely that Scanlon would also accept that the infliction or perpetration of suffering and severe deprivation is a non-comparative wrong. The wrong here is objectionable regardless of the treatment of others. This much is clear from that fact that an effort by the wrong-doer to point to the even greater deprivation or suffering they have inflicted on others would have no exculpatory or ameliorative effect. The wrong to one person or group stands regardless of the wrong (and its magnitude) done to another person or group.

Is law's abstract judgement complicit in perpetrating or maintaining this wrong? For those who think that law's judgement should be more ethically sensitive, a move from more to less abstract forms opens the way for the admission of factors – like, for instance, the claimant's or defendant's relative economic deprivation – that should be salient in liability judgements. But these factors are normally excluded by law's abstract judgement: it stands as a bulwark against them, thereby

⁶⁶ *Ibid*, pp. 205-6

⁶⁷ *Ibid*, p. 206.

⁶⁸ Scanlon is not ignorant of the point; he sketches two different political theories of the state, each of which has different distributive implications: *ibid*, pp. 206-7.

⁶⁹ Moreau, *supra*, note 35, p. 312.

⁷⁰ Scanlon, *supra*, note 60, p. 207.

contributing to the perpetration of deprivation and suffering and/or the denial of access to basic goods. Some attempt might be made to weaken this point. It is, obviously, true only if claimant or defendant is actually a member of a deprived group or a group denied access to basic goods. Furthermore, even in that case, the denial is perpetrated or maintained only in an incremental or piecemeal way, within the context of a decision in a particular case. Neither of these deflationary claims is, however, particularly weighty. The latter claim is misleading because decisions in particular cases are, in a system of precedent, usually generalised. The denial in a particular case can thus quite quickly become general. And the former claim is simply a statement of the obvious. Law's abstract judgement thus seems quite capable of perpetrating or maintaining this wrong. Is there any way of softening that blow?

Perhaps, since law's abstract judgement can also serve as a bulwark against this composite wrong. If law's judgment were less rather than more abstract, then space is created not only for judgements based upon the allegedly appropriate factors just noted, but for judgements based upon entirely inappropriate generalisations. Such generalisations can begin, for example, from factors such as character traits allegedly unique to a particular defendant or claimant. It must surely be the case that, on a non-abstract model of law's judgement, all facets of a particular defendant's or claimant's character are potentially relevant to determining liability. While this might be considered an ethical advance within the context of deciding liability in a particular case, this process has more troubling ethical implications once generalised. In the particular case, the defendant's fecklessness or feeble-mindedness, for example, could be regarded as conclusive to the question of liability. So far, so good. Yet, while fecklessness or feeble-mindedness might indeed be genuine facets of this particular defendant's character, their recognition in him can be inappropriately generalised so that, for instance, all members of the gender, ethnic, religious, socio-economic or national group of which he is a member are regarded as sharing this character trait. Insofar as members of such groups are already economically or otherwise deprived, or denied access to basic goods, then a more particular form of law's abstract judgement might function so as to maintain or increase that baleful situation. A more abstract form of law's judgement restricts, more or less stringently, recourse to the particular character or other traits of those being judged (either as individuals or as members of a class).

Although plausible, this argument is not unproblematic. It does not actually show that law's abstract judgement protects against the wrong in (i). Or, rather, it does so only by collapsing the distinction between that wrong and the wrong in (ii). The latter wrong has two limbs: first, the perpetuation of stigmatising differences in status and, second, the utilisation of (presumably illegitimate) prejudices and stereotypes. And, as the substance of the discussion of the previous paragraph makes clear, it is surely the latter limb of this wrong against which law's abstract judgement protects when it impedes improper generalisation. Could law's abstract judgement serve to perpetrate or maintain suffering and deprivation, or deny access to basic goods, without invoking dubious generalisations? It is not clear how it could do this directly without excluding some from the judgement of the law entirely. But agents can only be beyond the law's judgement because the law fails to confer upon them any legal status and thus any legal rights. And this lack of recognition is plainly not a

consequence of law's abstract judgement as such, but a function of the statuses and rights upheld by the legal system as a whole. Law's abstract judgement operates within, and does not itself establish, the distribution of rights and statuses recognised by the legal system as a whole.

Insofar as law's abstract judgement treats all citizens as if they were the same, the generalisations it licenses about them are limited: the generalisations must presumptively be about *all* citizens. The presumptive universality of law's abstract judgement is not, of course, always realised in each and every legal system. How could it be, if the picture offered in part II of this essay is correct, namely, that a pure form of law's abstract judgement is incompletely realised in many legal systems with which we are familiar? The inchoate realisation of law's abstract judgement allows room for false or improper generalisation – generalisation without reference to the whole class or generalisation arbitrarily limited – and that is undoubtedly troubling. Furthermore, even properly universal generalisations can still be morally troubling in other ways: the law might, for example, regard all citizens as either stupid or as having the fortitude of saints. That neither generalisation is accurate is just one aspect of the problem here. Another and more obvious problem of fairness arises from the legal consequences that flow from reliance on such unfounded generalisations. It seems bad enough that the generalisation in question is wrong, but insult is added to injury when the application of the inaccurate generalisation has legal consequences.

The moral qualms raised by the use of generalisations should, however, give us pause: what, if anything, is law's abstract judgement if not a conglomeration of generalisations? Furthermore, if there are objections to generalisations, they might be compounded if generalisations also partake of the objectionable features of stereotypes. What, then, is wrong with generalisations and stereotypes? As to the former, the problems just noted are perhaps best labelled thus: the problem of simple inaccuracy (all citizens are stupid) and the problems of over-inclusivity (generalisation without reference to the whole class) and under-inclusivity (where the generalisation is arbitrarily limited). Henceforth, generalisations that manifest these one or other of these problems (and note that the last two can be true of one and the same generalisations) are dubbed 'incomplete'. When incorporated into, or used as the basis, for rules, incomplete generalisations are often troubling. Take, for example, the generalisation 'dogs are disruptive'.⁷¹ This is clearly not universally true, since we know that some dogs are not disruptive: the generalisation is thus over-inclusive. It is also under-inclusive because it identifies only one class of disruptive agent, namely, dogs. This generalisation can quite obviously be incorporated or provide the justification for a rule such as, for example, that prohibiting dogs from restaurants. And, insofar as it is so incorporated, the generalisation's over- and under-inclusiveness infects the rule: prohibiting dogs from restaurants because they are disruptive is mildly troubling if (i) not all dogs are disruptive and (ii) not all disruption is caused by dogs.

Incomplete generalisations can clearly also inform legal rules and the problem of fairness they

⁷¹ The example and the discussion that follows draws upon Schauer's excellent treatment of the issues: *supra*, note 19, chs 2-5. Schauer has tackled closely related issues in *Profiles, Probabilities, and Stereotypes* (Cambridge, Mass.: Harvard U. P. 2003).

pose is much more troubling here. Law's abstract judgement holds citizens to the same standards of conduct. So, for example, all citizens have a duty to treat others and their interests with reasonable care, and all must react to threats and provocation with reasonable fortitude. One generalisation behind these two rules is surely that all citizens are indeed capable of achieving these standards and this is clearly over-inclusive: some citizens are certainly unable to satisfy them. What incomplete generalisations of this type and the rules that arise upon them do is this: they replace an unimpeachable probabilistic causal connection – some dogs are disruptive, some citizens can achieve these standards – with a dubious universal causal connection embracing, respectively, *all* dogs and *all* citizens.⁷² When rules based upon incomplete generalisations are applied to citizens they raise the same moral problem of fairness as does law's abstract judgement. The problem with rule- and decision-making based upon incomplete generalisation, and with law's abstract judgement itself, is that the rules and standards in play, and the decisions they inform, do not take proper account of the capacities or context of those to whom they apply. This moral qualm might be reduced if reliance upon incomplete generalisations and law's abstract judgement were otherwise morally acceptable. One potential moral advantage of law's abstract judgement is that it has egalitarian credentials, since it functions in the same way as does the right to equal concern and respect. Some have also noted that rules based upon incomplete generalisations have other, non-egalitarian pragmatic advantages.⁷³ It is, however, unclear whether either consideration is sufficiently weighty to displace the moral qualm.

What of rule- and decision-making by stereotype rather than generalisation? For Moreau, a stereotype is “simply any generalisation or classification that one group of people treats as though it captured an essential feature of certain other individuals, and which this [former] group takes to render unnecessary any individualised consideration of their characteristics or circumstances”.⁷⁴ Furthermore, stereotypes need not carry negative connotations, for Moreau, but they must be adopted by one group as a description of another group without being derived from that other group's own attempt at self-definition.⁷⁵ It is not immediately clear how stereotypes can be distinguished from generalisations on this account, since Moreau rules out a tempting version of the distinction, in which the former carry negative connotations, while the latter do not. The distinction might reside in the fact that stereotypes, for Moreau, purport to capture an essential feature of another person or group, but it is unclear why generalisations cannot do the same.

What is clear are Moreau's reasons for regarding rules or decisions based upon stereotypes as objectionable. One extends or deepens the moral qualm about incomplete generalisations already noted: when stereotypes do not fit the group or person to which they are applied, that person or group

⁷² Schauer, *supra*, note 19, pp. 31-34.

⁷³ Schauer, *supra*, note 19, ch. 7. It is perhaps unfair to Schauer to hold that the advantages he identifies (reliance, efficiency, minimisation of the risk of mistakes, stability, clear allocation of power and community) are solely pragmatic, since a case could be made that they have some moral content. The point, though, is *that a case must be made*; the advantages are thus not pre-eminently or obviously morally valuable.

⁷⁴ Moreau, *supra*, note 35, p. 298.

⁷⁵ *Ibid.*

can be denied a benefit or incur a burden on apparently arbitrary and irrelevant grounds.⁷⁶ It is also the case, according to Moreau, that in some circumstances this process undermines the autonomy of those subject to it. Rather than defining “himself and his circumstances as he understands them, he has been presented in the manner of another’s choosing . . . this will lessen his autonomy . . . it will limit his power to define and direct his life in important ways”.⁷⁷ Since law’s abstract judgement is a conglomeration of often incomplete generalisations, the latter raising much the same worries as rules and decisions based on stereotypes, it seems likely that the ills of the latter are shared by the former. Thus law’s abstract judgement may well exacerbate rather than avoid the second limb of the second wrong.

What of the first limb? The perpetuation of stigmatising differences in status does not necessarily follow from decisions and rules based upon incomplete generalisations and stereotypes, although it may often do so. Indeed, law’s abstract judgement can stand as a barrier against such stigmatising differences simply because it regards all citizens as in some respects the same. The fact that law’s abstract judgement eliminates considerations of the relative worth of claimant and defendant as possible bases for judicial decisions, except when legal doctrine explicitly requires it, makes stigmatising differences in status more difficult to uphold than they otherwise might be. That law’s abstract judgement seems unlikely to function as an explicit vehicle of stigmatising differences in status does not, of course, rule out the possibility that such differences will flow from the utilisation of stereotypes and generalisations. Indeed, if rules and decisions based upon stereotypes and (incomplete) generalisations serve to undermine the autonomy of those subject to them, it seems quite plausible in some circumstances that that reduction of autonomy could in the long term culminate in stigmatising differences. Thus, while they cannot be a primary goal of law’s abstract judgement, such differences could be one of its long term effects.

Finally, we must turn to the third wrong of unequal treatment: the perpetuation of oppressive power relations. The wrong here is that of “further entrenching or reinforcing power imbalances that are unacceptably large and that leave individuals without sufficient social or political influence”.⁷⁸ Thus described, it might be thought that this wrong is otiose, because always reducible to, or always a consequence of, the other two. Hence to the extent that law’s abstract judgement can function, however limitedly, to prevent the first and second wrongs of unequal treatment, then it can surely stand as a bulwark against the third. Making the first and second wrongs harder or perhaps even impossible to perpetrate reduces the chances of bringing about the third. That, at least, is so if oppressive power relations are always a consequence or cause of (i) the invocation of (derogatory) stereotypes, or of (ii) exclusion from basic goods and/or of (iii) the perpetration of suffering and deprivation. Similarly, to the degree that law’s abstract judgement serves to perpetrate or maintain the first and second wrongs – and, as we have seen, it can undoubtedly be complicit in the second – it can also thereby perpetrate and

⁷⁶ *Ibid*, p. 298.

⁷⁷ *Ibid*, p. 299.

⁷⁸ *Ibid*, p. 304.

maintain the third.

What, then, is the connection between the third wrong and the first and second? While accepting that there will often be a link between the three, Moreau holds that it is contingent rather than necessary.⁷⁹ She therefore holds that oppressive power relations could in some instances be maintained or created without recourse to the other two wrongs of unequal treatment. The conceptual independence of the third wrong from the others therefore requires that we consider those instances in which this wrong is unrelated to the other two: can law's abstract judgement prevent it or is it complicit in its perpetration? The example Moreau uses to show the conceptual independence of the third wrong draws upon the case of *Vriend v Alberta*.⁸⁰ The example does not, however, succeed in its aim. Mr. Vriend was unable to bring an action for discrimination on the basis of sexual orientation against his employer because this type of discrimination was not included in the Alberta Individual Rights Protection Act (*IRPA*). The Supreme Court of Canada held that the exclusion of sexual orientation as a ground for discrimination in the Alberta *IRPA* was an unjustified infringement of s 15(1) of the Charter of Rights and Freedoms.

Moreau thinks it implausible to hold that the lacuna in the Alberta *IPRA* was based upon stereotypes held by Alberta's legislators, but offers no reason for thinking this. Instead, she points to another possible explanation of the gap: "it seems more likely that they [Alberta's legislators] simply made a judgement about which decision would yield most popular support".⁸¹ Yet no grounds are adduced in support of this assessment of the reasons of Alberta's legislators and this explanation is therefore no more salient than the other more sceptical explanation. It would indeed be more encouraging if Alberta's legislators were moved solely by the reason Moreau highlights, but one need not be a great sceptic about politics to think that objectionable prejudice and stereotypes could have informed the deliberations of some. Moreover, it seems at least arguable that the lacuna in the *IPRA* could be instrumental in the perpetuation of suffering and deprivation of the kind covered by the first wrong. Although this judgement is speculative, and could be supported or denied by testimony from Mr Vriend, it is not wildly implausible to think that the suffering, pain and annoyance of being discriminated on the basis of sexual orientation drove him to pursue a legal remedy.

A variation on *Vriend* is perhaps conceivable, in which there is no recourse to stereotypes and in which the suffering is insufficient to trigger the first wrong. In *Vriend*₂, then, the claimant has no legal recourse for discrimination and this presumably perpetuates oppressive power relations (manifest in the denial of a legal remedy to all those who suffer sexual orientation discrimination). Can law's abstract judgement serve to protect against this kind of wrong? Probably only to the extent that it protects against the other two wrongs. For a *Vriend*-type legislative gap will not be made impossible by law's abstract judgement, nor even challenged by it, unless the gap turns on objectionable stereotypes. And even in that case, there is no guarantee that the said stereotype will run up against law's abstract

⁷⁹ *Ibid*, pp. 304-305.

⁸⁰ [1998] 1 S.C.R. 493 (SCC); *ibid*, pp. 305-306.

⁸¹ *Ibid*, p. 305.

judgement. Law's abstract judgement does not therefore directly prevent the third type of wrong.

IV. SOME OBJECTIONS AND A GENERALISATION

The principal question of this essay has been what, if anything, might be said in favour of law's abstract judgement? The answer offered was limited, drawn from a narrow range of raw materials found in contemporary liberal legal and political philosophy: an argument from Dworkin's early work and a more recent argument derived primarily from Scanlon. These two arguments tell us that law's abstract judgement can be supported (i) by the fact that it functions in much the same way as the right to equal concern and respect; and (ii) by virtue of its role as a bulwark against some of the wrongs of unequal treatment. While it could be claimed, somewhat portentously, that there is a 'discovery' here, namely, that law's abstract judgement is not completely without normative support, it could also be said that this discovery was hardly worth unearthing. This is because the two arguments are either too weak, when taken separately, or incoherent when combined.

The first limb of this charge could turn out to be well founded. It is not, however, an *a priori* truth that each of the arguments elucidated above is insufficiently weighty. That could only be established by a thorough evaluation of each. This task must surely be undertaken at some stage, since law's abstract judgement is undeniably both a significant feature of most contemporary legal systems and to some degree morally vexing. While part III of this essay made some effort to counter-balance the morally troubling nature of law's abstract judgement it serves, at most, as preamble to a more robust and extensive evaluation of all the arguments that might support law's abstract judgement.

That the two arguments supporting law's abstract judgement do not amount to a coherent whole is also not an *a priori* truth. It needs be shown that they are genuinely incompatible. Pending such a demonstration, it must be noted that there is textual evidence to support this alleged incompatibility. It consists of Scanlon's view that equality is not as fundamental a value as we often think and Dworkin's view that equality is a crucially important – sovereign – political virtue.⁸² Both views cannot be true and about the same idea. Nor is it plausible to suggest that, while Dworkin undoubtedly has a political notion of equality in mind, Scanlon has a purely moral conception in view. For, although this claim repeats a truth about Dworkin's view, it is false to Scanlon's arguments.⁸³ If Dworkin and Scanlon are indeed speaking about the same thing, how can their views be reconciled?

A closer look at the textual evidence yields one suggestion, while an examination of the substance of Dworkin's and Scanlon's arguments yields another. Scanlon says that "[t]he idea that equality is, in itself, a fundamental moral value turns out to play a surprisingly limited role in my reasons for thinking that many of the forms of inequality which we see around us should be eliminated".⁸⁴ In saying this, he has "in mind an idea of substantive equality – that it is morally

⁸² Scanlon, *supra*, note 60, p. 202; Dworkin, *ibid*.

⁸³ *Supra*, note 60, pp. 208-218.

⁸⁴ *Ibid*, p. 202.

important that people's lives or fates should be equal in some substantive way".⁸⁵ This he contrasts with "a merely formal notion of equal consideration, as stated in for example the principle that the comparable claims of each person deserve equal respect and should be given equal weight. This is an important principle. Its general acceptance represents an important moral advance".⁸⁶ Thus Scanlon undoubtedly thinks that substantive equality is less important than it is often thought to be, and that equality understood as equal consideration or equal respect is important, although "taken by itself . . . [the latter] is too abstract to exercise much force in the direction of substantive equality".⁸⁷

Do Dworkin and Scanlon actually disagree about the relative importance of equality? No. This is principally because Dworkin's right to equal concern and respect is not, as he takes pains to emphasise, a right to equal treatment (*TRS*, p. 227). It is not therefore a substantive conception of equality in Scanlon's terms. Since Dworkin is not necessarily committed to such a conception by virtue of his commitment to the right to equal concern and respect, there is space in which he and Scanlon can agree on the relative importance of substantive equality. Both could agree that it is less important than often thought, while still maintaining that non-substantive conceptions of equality are very important indeed. The only genuine disagreement between Dworkin and Scanlon highlighted by the textual evidence is one about the alleged depth and utility of the idea of equal respect and consideration. Scanlon thinks principles of this type morally important but also 'formal' and 'abstract'. This, remember, is the exact objection made against the right to equal concern and respect by Moreau. Some effort was made to neutralise it in the discussion above. The argument was that this charge against the right to equal concern and respect is, at best, not proven.

The reconciliation suggested by the textual evidence is backed up by that which arises from consideration of the substance of Dworkin's and Scanlon's arguments. Focussing upon the content of their non-substantive conceptions of equality shows that their positions are in many ways perfectly compatible. To see this, recall the composite wrong against which the right to equal concern and respect protects. As noted above, the wrong occasioned by breach of this right is some combination of: (i) government curtailment, partial or complete, of some citizens' ability to pursue or formulate conceptions of a good life; (ii) the undervaluing or ignoring of some such conceptions by government; and (iii) the undervaluing or ignoring, by government, of the suffering and frustration caused to citizens by either (i) or (ii). Each element of this wrong can also bring about one or more of the three wrongs of unequal treatment identified by Scanlon and Moreau. Thus, a denial or infringement of one's right to equal concern and respect can clearly: (i) perpetrate suffering, severe deprivation and/or serve to deny access to basic goods; (ii) perpetrate stigmatising differences in status or invoke objectionable prejudices or generalisations; and (iii) perpetrate oppressive power relations.

Clearly the consequences of a denial or infringement of the right to equal concern and respect are not necessarily limited to these three possibilities, since it is conceivable that in some (albeit

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

unlikely) circumstances the right may be breached without causing any of these three wrongs. As a practical matter, however, most breaches of the right will bring about at least one of these wrongs. Consider again some of the most commonplace types of exclusion familiar from the relatively recent history of the West. Think, for example, of the denial of some group's right to religious worship: what plausible basis could this limitation have, if not some or other objectionable prejudices or generalisations? Furthermore, what would have to be true for this prohibition *not* to perpetrate stigmatising differences in status? Suppose also that some ethnic, gender or sexual-orientation group is forbidden access to law schools at public universities. How, in practical terms, could such a prohibition scrupulously avoid perpetrating oppressive power relations and/or stigmatising differences in status and/or objectionable prejudices or generalisations? And, even if it did, could it also avoid the perpetration of suffering and/or deprivation, not to mention serving to deny access to some basic goods?

While not perhaps substantively incompatible, it might nevertheless be maintained that the two arguments are structurally unstable. Since they are not hierarchically ordered, the two cannot be combined in a stable way: if neither argument is ranked as more important than the other, each can in some instances serve to cancel out the other. So, for instance, what prevents, in the possibly rare but conceivable case of a breach of the right to equal concern and respect not bringing about one or other wrong of unequal treatment, the inference that there is 'therefore' no wrong here? What, in other words, stops the argument from the wrongs of unequal treatment 'trumping' the argument from equal concern and respect?

If the right to equal concern and respect does indeed identify wrongs over and above those said by Scanlon and Moreau to flow from unequal treatment, then it is clearly broader than the argument from the wrongs of unequal treatment. While not of itself sufficient to establish the priority of the former over the latter, this is a step toward that goal. If it can additionally be shown that the composite wrong protected by the right to equal concern and respect is a genuine wrong even when unnoticed by the argument from the wrongs of inequality, then there is greater progress towards that goal. Since the argument from the wrongs of inequality would not identify all the wrongs against which we expect a conception of equality to protect, it is reasonable to supplement it. The right to equal concern and respect can play exactly that role and this provides a basis upon which to rank these two arguments. The argument from the right to equal concern and respect dominates the argument from the wrongs of inequality because it identifies more of what we regard as vexing about unequal treatment.

This riposte is unlikely to be effective against an objection slightly broader than the charge of instability. This objection holds that it is simply misconceived to even attempt to marry the two different accounts (and the two different approaches) to equality found in the work of Dworkin and Scanlon. This is because both general moral and political theories, on the one hand, and the more specific moral and political analyses of particular concepts derived from them, on the other, are intended to have unlimited logical range. They are intended, even if pluralistic, to exhaust all the available logical space and therefore cannot be combined because they divide or classify that space in

plainly incompatible ways. Think, for example, of Rawls's account of distributive justice and that of Robert Nozick.⁸⁸ Each account provides an answer to the question about the nature of distributive justice strictly incompatible with the other: Rawls's two principles of justice simply cannot be coherently combined with the three principles of Nozick's historical entitlement theory. Now, if all moral and political theories and the more specific analyses derived from them are, so to speak, incompatible *ab initio* in this sense, then it is indeed foolish to seek to combine them with one another. But even if (as seems unlikely) this were generally true, the point is surely irrelevant to one of this essay's central concerns, namely, that of determining what, if anything, might be said in favour of law's abstract judgement.

The way in which that concern has been addressed is clear: through the medium (albeit a very small segment) of recent political and moral philosophy. This concern is certainly not accurately described as that of determining the general compatibility of two different views of and approaches to equality. Rather, the task was the lower level one of seeking normative support for an obvious feature of legal institutional design. That these sources of normative support might ultimately be incompatible with one another need not undermine either the interest or the validity of elucidating them and that for which they provide support. Indeed, the fact that some or other aspect of institutional design might be supported by a range of broader and possibly incompatible moral or political theories, or analyses derived therefrom, is suggestive of a deeper possible truth. It is a truth about both those broader theories and the analyses derived from them, on the one hand, and aspects of (legal) institutional design, on the other.

Imagine a spectrum. At one end we have general moral and political theories and the analyses of specific moral and political concepts, at the other various features or perhaps just one feature of institutional design. One obvious way in which the two points on the spectrum can be brought into contact is by asking whether or not one can throw light upon the other. The light we have searched for is normative light and, although we have focussed only upon one feature of legal institutional design, we have examined two moral-cum-political accounts of equality (many other accounts could have been considered instead).⁸⁹ That law's abstract judgement draws support from arguments as different as that from the right to equal concern and respect, and that from the wrongs of inequality, is interesting whether or not those broader analyses of equality are incompatible one with another. Indeed, if they are actually incompatible that might serve to make the fact of law's abstract judgement drawing support from them even more interesting. Why?

Because it suggests that this aspect of legal institutional design is normatively over-determined as well as being theoretically 'blunt' and that this might also be true of many other aspects of legal institutional design. Some such features – certainly particular doctrinal rules such as, for example, the rule about past consideration in English contract law – appear neither explicable by a

⁸⁸ See Rawls, *supra*, note 37 and compare *Anarchy, State and Utopia* (Oxford: Blackwell 1974).

⁸⁹ One of the most interesting being A. Ripstein, *Equality, Responsibility, and the Law* (Cambridge: C. U. P. 1999).

single general normative-cum-explanatory theory, nor do they entail only one such theory.⁹⁰ Rather, some doctrinal rules and related features of legal institutional design seem compatible with – and thus capable of being supported by – more than one such theory and are in this sense normatively over-determined. That some such rules and institutional features rarely seem to entail any single normative-cum-explanatory theory is the flip-side of this coin and illustrates their theoretical bluntness.⁹¹ Some legal doctrines and institutional features simply do not make one explanatory or normative theory any more salient than another; they are compatible with many such theories. The discussion so far provides limited grounds for thinking that law's abstract judgement is normatively over-determined and therefore theoretically blunt. Is this a problem? It seems less of a problem provided the supporting considerations are ultimately consistent or hierarchically ordered. But even if they are not, the *prima facie* paradoxical situation in which incompatible normative theories or analyses support some institutional feature or aspect of doctrine still illuminates something significant about some of our normative theories and some features of the social world.

It is eminently possible for there to be different views about the exact significance of what is illuminated here. One view is that widespread normative over-determination of legal doctrine, on the one hand, and aspects of legal institutional design, on the other, prefigures a different approach to understanding law than is common in much current legal-theoretical work. This alternative approach is one which works out from some or other feature of law towards broader normative or other theoretical accounts. Taken as an approach to legal philosophy, this would have as its rallying call something as mundane as 'law first, then theory' (if it were true that law itself is in no meaningful sense already theorised). Moving the other way, from some or other theory to an understanding of law or some of its features, risks distorting the phenomenon in order to fit the selected normative or explanatory theory; it can become something of a Procrustean procedure. Law's normative over-determination also implies that law's normative landscape is both diverse and plural. This need not imply anything at all about the ultimate status of values, but it certainly supports a more theoretically modest approach to understanding law than is currently common. By 'theoretical modesty' I have in mind the obviously rebuttable assumption that no single normative theory, be it a particular account of moral right and wrong or an account of economic efficiency, has the explanatory power to reach all aspects of law.

This view of what the normative over-determination of aspects of law might imply for the way in which we should go about understanding law, and doing legal philosophy, has no appeal for jurists enamoured of intellectual generality and tidiness. A penchant for generality and tidiness is often the symptom of a deeper commitment, holding that law's many doctrinal segments and related institutional

⁹⁰ It does not follow that such features and doctrines are therefore necessarily conventional, having the same rational and normative status as rules about which side of the road to drive on, although they might sometimes have that status.

⁹¹ On bluntness see N. E. Simmonds, 'Bluntness and Bricolage' ch. 1 of H. Gross and R. Harrision, (eds.), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press 1992) and my 'Method and Fit: Two Problems for Contemporary Philosophies of Tort Law' (2007) 52 *McGill L. J.* 605-656, pp. 643-647.

features simply must be explained by a single, unified general theory. Faced with the putative fact of normative over-determination, such committed generalists would presumably insist upon an intellectual war of attrition between the competing normative (or other) theories which support some or other feature of legal institutional design or doctrine. The position arrived at in this essay would thus be regarded as only the end of the beginning of the jurisprudential task. While there is no obviously compelling ground upon which to reject this approach, it can be noted that the candidates suggested by jurists for the role of unified general theory of law (or some segment thereof) have not been conspicuously successful. The candidates include, *inter multos alia*, economic analysis of law, some examples of critical legal studies, and some instances of 'orthodox' legal philosophy.⁹² A crucial difficulty for many such theories is that of combining explanatory generality and unity with an accurate and reasonably fine-grained understanding of features of the law, be they aspects of doctrine or institutional design. Thus most versions of economic analysis of tort law struggle to explain the bilateral nature of private law adjudication in terms which show this feature to be anything more than a second-best historical accident, while some non-economic theories are forced to disregard or 'reinterpret' significant swathes of settled doctrine.⁹³ The point is that theories which aim at the broadest level of explanatory and normative generality should not be assumed to be *ipso facto* virtuous. Theoretical generality is sometimes a virtue, sometimes not.

Finally, a generalisation. There might be a broader notion of equality of which law's abstract judgement is part. This broader notion could be labelled 'juridical equality', its referent being the various instantiations of equality within the law. These instantiations include not just the ideas of equality before and under the law, but also legal equality provisions with a broader scope, law's abstract judgement, and the various procedural manifestations of equality (such as equality of standing before the court, equal access to legal knowledge and advice, and the judges' obligation of actual and apparent impartiality). While the propriety of subsuming all these instances under one rubric may be questioned, it is surely permissible to search for links between these instances and to examine in what ways, if any, such links (if found) are significant and informative. That research programme cannot be ruled out without argument, but nor can it be claimed that great progress has been made upon it here. Yet one tentative point, pending the results of a more complete study of the alleged instances of juridical equality, can be made. It is that the recognition of a broad notion of juridical equality, combining the many instances of equality in the law, suggests this notion is both complex and capable of being supported by a range of diverse arguments and considerations. Complexity does not entail a diversity of justificatory considerations in all cases; these two features can, indeed, be quite separate. But in this instance they surely go side by side, the various aspects of the complex notion of juridical equality quite possibly requiring different types of normative and other support.

⁹² See Posner and Shavell, *supra*, note 31; R. M. Unger, *What Should Legal Analysis Become?* (London: Verso 1996) and *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard U. P. 1986); E. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard U. P. 1995).

⁹³ See S. Shavell, *Economic Analysis of Accident Law* (Cambridge, Mass.: Harvard U. P. 1987), pp. 265-270; and Weinrib, *supra*, ch. 7.

To conclude, it is worth reminding ourselves again that law's abstract judgement is currently subject to a degree of both doctrinal and theoretical contestation. The specific charges against it might, in the end, be compelling. Law's abstract judgement in its current form could thence rightly be discarded on the rubbish heap of history. The suggestion here is that we pause before doing this and consider if there is a positive case for law's abstract judgement. Only when such a case has been considered shall we know if anything of significance will be lost by excising this familiar feature of familiar legal systems.