Fairness in common law: a philosophical commentary

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I. Equity and justice

Fairness is equity, aequitas, namely justice in the particular case. It means considering the unique aspects of a conflict, and giving everyone an opportunity to put their side.

In Aristotle’s opinion, justice demanded both legality and equity, with equity being the superior part (Eth. Nic. 1137b11). Equity has always been a central part of the common law system. In the sense of ‘due process’ or ‘natural justice’, it is a major focus of contemporary legal theory.

Despite this, it is not immediately apparent what equity can properly add to law. Law, after all, is law; an act either corresponds to the rules or it does not. Law is uncompromisingly general; it refuses to be a respecter of persons, and so on. So if equity involves making exceptions for particular circumstances, that would seem seriously to detract from a core principle. How can acts of procedural fairness do more than muddy the clarity of legal norms?

The problem of equity besets the theory of law.¹ If justice consisted merely of applying a system of rules, or merely of the ad hoc decisions of courts, then the situation would be easier. But justice is both of those things; and accommodating the two aspects within one structure is a major theoretical and institutional challenge. The devices employed are by no means as intuitive or self-evident as one might hope, as is evident from the misgivings people have when confronted with unfamiliar institutionalisations. Under the common law, for example, fairness is implemented in the jury and adversarial procedure. Coming to a civil law country, where neither institution exists, Anglo-americans

¹ For a useful historical overview, see Sladecek 1971.
feel disorientation or even fear. Films represent civil-law procedure in nightmarish hue (for example in *Midnight Express*) while using cross-examination as the heroic centrepiece for countless domestic dramas (from *Perry Mason* to John Grisham, as one might say).

On the other side, many civil lawyers regard jury trial as a lottery, adversarial procedure as barbarous, and (for example) English rules about the admissibility of irregularly obtained evidence as deeply incompatible with fairness. Moreover, the deliberative and ‘scientific’ style of civil law proceedings appears to be more congenial to philosophers, most of whom (from whatever legal tradition) choose to disregard the phenomenon of the jury.

Philosophical ethics, however, has in recent years shifted towards ‘proceduralism’ and the view that rules cannot be seen in isolation from actions and processes. Since Macintyre’s influential *Beyond Virtue* (1982), the belief that it is misleading to start from static systems has spread even to those who oppose him on other grounds. This movement matches the rather distinct sorts of proceduralism that were already apparent in the work of Habermas, Luhmann and Alexy, who, unlike Macintyre, apply it specifically to legal procedures. Attention to procedural law seems to be on the philosophical agenda, though it is often not appreciated how sophisticated judicial practice already is.

In this essay I suggest what the load-bearing elements of fairness in the modern common law consist of. In the first part, ‘Equity as morality’, I consider and reject the view that equity invokes a set of alternative, non-legalistic rules such as morality and human rights. This is an orthodox position in modern civil law, and also underlies the viewpoint of many anglo-american thinkers. It seems, however, to be basically incoherent.

I then turn to what I take to be the central principles of fairness and comment on them philosophically. There are three of them. They concern:

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<td>! facts - the notion that moral judgements are properly reached on a particular, non-theorised basis;</td>
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<td>! confrontation - the notion that evaluative procedures are properly</td>
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2 The English position remains as set out in *R v Sang*; see *R v Khan (Sultan)*. *R v Chalkley*. Contrast the prohibitions on the use of ‘unfairly’ obtained evidence under German law; cf. Dannecker/Roberts, 1996.
resolved by conflict.

My thesis is that these elements, and the common law’s conception of fairness in general, are best accounted for from a proceduralist perspective.

II. Equity as morality

The codified law is rigid, inflexible and full of gaps, as Aristotle pointed out. One obvious task for the applied justice of the courts is, then, to compensate for the ‘over-simplification’ of the legislator. In Aristotle’s terms, equity is called upon ‘to say what the legislator himself would have said had he been present, and would have put into his law if he had known’ (Eth. Nic. 1137b23).

But what are the rules by which such subordinate legislators may work? The traditional suggestion is that they are the rules of morality. This was originally characteristic of Roman Catholic conceptions. Aquinas, for example, coupled Aristotle’s analysis of equity with the postulation of a higher level of normativity, namely divine law (Aquinas, S.T. 2a2ae 120). Thus the rules referred to for decisions on ‘contingent and particular’ issues are not strictly legal ones, but they are no less general or binding since they invoke God’s revealed morality. In medieval England, this argument supported the division of labour between the courts of law and those courts of conscience which administered equity and were staffed largely by bishops.

A structurally similar division between the municipal law on the one hand, the ‘moral government of the universe’ (Holdsworth, V 216) on the other, and the role of the courts as mediators between the two is

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3 ‘Quia propter incertitudinem humani judicii, praecipue de rebus contingentibus et particularibus, contingit de actibus humanis diversorum esse diversa judicia, ex quibus etiam diversae et contrariae leges procedunt. Ut ergo homo absque omni dubitatione scire possit quid ei sit agendum et quid vitandum, necessarium fuit ut in actibus propriis dirigeretur per legem divinitatis datum, de quia constat quod non potest errare.’ (S.T. 1a 2ae 91, 4; my italics)

4 For Holdsworth, the high point of equity as an ecclesiastical jurisdiction came with Cardinal Wolsey; the appointment of Sir Thomas More, a common lawyer, as Wolsey’s successor marks the secularisation of equity and its gradual abandonment of the ideas of the canonists (V, 216-19)
characteristic of much recent thinking. In his commentary on Art. 97 of the German Grundgesetz for example, which guarantees the independence of the judiciary, Roman Herzog distinguishes the municipal administration of the state, which is usually tainted by ideology and expediency, from the ‘general and reasonable’ norms which apply irrespective of local politics (Herzog 1977, Rn. 15). ‘General and reasonable’ legislation encompasses such enactments as the constitution itself with its enshrining of the most self-evident values. Among these, the central one is human dignity, which occupies the foundational slot in Art. 1 of the Grundgesetz. Dignity takes priority over liberty (Art. 2), serving as the core axiom for all the other values listed in the catalogue of ‘basic rights’ (Articles 1 - 19). Dignity, which is in principle a moral value, thus simultaneously anchors all legal norms.

The role of judicial independence is, in Herzog’s view, linked to this. In principle, all statute law should be impartial and not party-political. But because the boundary between legislature and executive has become historically eroded, most legislation nowadays is partisan. Herzog argues that the judicial independence guaranteed by Art. 97 is to be understood not merely as an interdict on political interference, but, beyond that, as a requirement that the judiciary actively compensate for the executive’s encroachment on the legislature. The courts have to declare the general morality which has been stifled by partisan legislation. They do this by applying fairness in the particular case: Art. 97, Herzog argues, does not guarantee the independence of the judicature collectively, but ‘of the individual judge concerned with the concrete case’ (Rn. 33). This, of course, amounts to traditional aequitas.

In England, the argument that universal, moral principles bear upon legal rights and that they should manifest themselves in the equitable decision-making of the courts has been put by T.R.S. Allan. ‘The defendant’s right to be treated with dignity and respect ... is (legally and morally) absolute’, he claims (Allan 1992, 171). In conformity with the traditional structure of equity, Allan has argued that it is ‘futile’ to attempt to ‘escape the particularity of facts’ (165). This particularity overrides mere legality: ‘In the last analysis, when the facts of the particular case seem to warrant it, all questions of law and jurisdiction must acknowledge a superior moral requirement.’ (164) This ‘moral requirement’, he says, is the ‘overriding, and ultimately irreducible, binding principle of fairness’ (ibid). Fairness, in this context, means recognition of ‘the defendant’s dignity and autonomy as a moral agent’ (154), and its medium of expression is the judge’s ‘personal moral evaluation’ and ‘passionate response to all the facts’ (167).
There seem to be two immediate problems with these approaches. As far as the common law is concerned, moralistic activism is traditionally associated with Cardinal Wolsey’s court, and is now in general resisted.\(^5\) In particular, the notion that the moral views of individual judges are a good basis for decision has been criticised. As Roskill LJ said in *R v Sang*,

Subjective judicial views of what is morally permissible or reprehensible are an unsafe guide to the administration of the criminal law and to the proper exercise of judicial discretion. ([1979] 2 AER 46 at 62)

‘Fairness’, in English courts, has consistently been confined to the process of trial itself and not extended to any substantive (or ‘absolute’) moral rights which may or may not exist beyond that.\(^6\) The function of the judge in ensuring fairness, and the ‘discretion’ needed to achieve that, is ‘confined to the forensic process. ... The judge is concerned only with the conduct of the trial.’

Second, there are conceptual difficulties in assimilating morality and legality. If we are to apply norms, then, on the basis that norms should be public, certain, indifferently applied and so on, then presumably ‘moral’ norms should be no less codified than the ‘legal’ ones they purportedly correct or amplify. But in that case, it would seem, we are back in the realm of general, public normativity - i.e. of law.

This consideration, at least in part, probably explains Kant’s impatience at the whole idea of equity (Metaphysik der Sitten, VI 234). Equity, if indeed applicable only to the particular, is a ‘dumb goddess’, because she can say nothing definite, and a ‘court of equity’ is a ‘contradiction in itself’. Particular determinations, in Kant’s argument at this point, are conceptually incoherent and unfair. And if equity is to be universal in application anyway, there is nothing to be gained by claiming that it is meaningfully distinct from law.

The alternative is that moral judgements may be particular (in some sense) and nonetheless valid. In order to understand how that might be,

\(^5\) Despite apparent lapses - see Lord Steyn in *Smith v Scrimgeour Vickers* [1996] 4 AER 769 at 790: ‘I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality.’

\(^6\) ‘What does “fair” mean in this context? It relates to the process of trial.’ per Lord Scarman in *R v Sang*, [1979] 2 AER 1222 at 1246.

\(^7\) Lord Scarman in *R v Sang* at 1245.
however, we must abandon our concern with prior rules and look more closely at the practical exercise of such judgements. The procedure surrounding the exercise of a legal judgement is, prima facie, an example of what we are looking for.

III. Facts

The problematic relationship between rules and particulars is exemplified by the distinction all legal systems make between questions of law and questions of fact.

At first glance this looks like a purely pragmatic question. It impinges most obviously on rights of appeal. Generally speaking, only first-instance courts hear evidence - the raw material of findings of fact ('what actually happened'). These findings are conclusive and not appealable; they belong to the ‘discretion’ of the courts that deal with the evidence. Appeal courts confine themselves to the law and the manner in which it has been understood and applied by the courts below.

Obviously, however, one cannot justify this simply by pointing to the economics of judicial administration. Is it right that higher courts should abandon litigants to what, from one perspective, looks like the uncertain justice of first-instance discretion? What is it about ‘facts’ that eludes the ‘law’?

There is a divergence of views between civil law and common law thinkers on this. Typically, for example, German jurists welcome the prospect of closing gaps and creating a seamless web of legal certainty. For them, the decisions of courts are a welcome adjunct to the work of the legislature; ‘judge-made’ law - i.e. precedent - supplies a want that can never be adequately dealt with at statute level. Certainty reduces litigation; hence an increase in appeals in the short term (if that is the price) will lead to a decrease in the burden of the courts in the longer term.

The English courts take an opposite view. If determinations of fact started to be treated as ‘law’ and citable, said the House of Lords in Qualcast v Haynes, ‘the precedent system will die from a surfeit of authorities’ ([1959] 2 AER 38 at 43, per Lord Somervell). It may be that judges, by training and inclination, ‘naturally’ give reasons for their decisions, even on matters of fact. But such reasons are not to be

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8 See, typically, Fikentscher 1977
understood as pronouncements about the law. They are, said Lord Denning, ‘nothing more than propositions of good sense’ (ibid. 45).9

The fact-law distinction does not merely reflect cultural divergences but is also theoretically contentious. The starting point seems to be the opposition between generalities and particular facts.10 Propositions of law are clearly declarations of general import: ‘dishonestly appropriating another’s property with the intention of permanently depriving him of it is theft’. That is a proposition to which particular sets of facts may then be matched: ‘Fred, on such-and-such a day at so-and-so, dishonestly appropriated Arthur’s property with the intention of permanently depriving him of it’. Here, the time, the place, and the actor are all particulars inserted into the proposition of law. If the general proposition forms the major premise, then the particularised statement forms the minor premise in a syllogism whose conclusion is: Fred is guilty of theft. Or, in terms of ‘subsumption’: the terms of the statute determine a ‘factual matrix’ (Tatbestand) which is ‘satisfied’ (erfüllt) by the particular facts.

That all seems reasonable enough. The difficulty is: where does the generality stop? Where is the ‘interface’, as one might say, between the general components of the law and the unique particulars of the case in hand?

It seems clear that the generality does stop; no law can engage immediately with particulars. For example: one might, as the Theft Act does, define the various elements of the offence restrictively (certain facts are not to amount to dishonesty, appropriation, and so on), thereby reducing the scope of the general terms. Or one might give definitions by means of synonyms. But reducing generality, in a negative operation, is not the same as affirming particularity. And substituting synonyms merely shifts the decision sideways, to another term.11 In

9 See also Du Parcq L.J.’s reference to ‘particular applications to special facts of propositions of ordinary good sense’ (Easson v London & North Eastern Rly Co [1944] 2 AER 425 at 430, cited by Lord Denning in Qualcast).

10 This initial supposition is found in both civil law and common law traditions. In the civil law it is usually referred to as ‘subsumption’ (the particulars of the case are ‘subsumed’ under the generality of the law). In the common law it has been propounded by, for example, Sir John Salmond (see Cross and Harris 1991, 223).

11 In Brutus v Cozens [1972] 2 AER 1297, the House of Lords was concerned with the meaning of ‘insult’ in s 5 of the Public Order Act 1936, and cited Dr Johnson to explain the inadequacy of synonyms:

“To explain, requires the use of terms less abstruse than that which is to be explained,
either event we still need an elementary, positive judgement; and we can only produce that by venturing beyond the schematic confines of general words.

The matching of particulars to generalities, or the technique of ‘subsumption’, thus states a problem without answering it. Conceptual operations with general terms, in the abstract, are self-explanatory and raise no problems. But we need elementary judgments as the raw material of such operations. Do these elementary judgements follow rules as well? Or are they somehow outside the rules? But, if so, does uncertainty not threaten in the very core of the structure?

This is a familiar state of affairs. It is only a problem to the extent that you are committed to viewing law as governed by rules, or, in particular, by a single set of rules. Courts that favour subsumptive models are most likely to need to tangle with the problem at a ‘logical’ level. But even in a civil law jurisdiction like Germany, which by temperament inclines towards such a viewpoint, the theorists have long foresaken strict single-perspective subsumption.12

The problem of the discontinuity between elementary ‘facts’ and the general terms affixed to them in judgements seems to have two solutions, at least insofar as we need to account for moral or valutative judgements in the context of judicial proceedings. You either put the general system first (we can call this option holism), or you put the particular facts first (particularism).

Taking holism first, we can compare general systems with languages. A language, insofar as it may be grasped lexically (in dictionaries) and syntactically (in grammars) is a general system. It depends for its functioning on the system being the same for all its users, and that means adhering to established relations and distinctions between the components: ‘tables’ are not ‘chairs’, a noun is not a verb.

What happens if we encounter something for which we have no word? The holist is committed to the view that something which cannot...
be located in a system is unintelligible. If we cannot speak about it, because we have no concept for it, and because it exceeds our systematic and linguistic capacities, then we cannot even fully become aware of it. It does not become part of our ‘world’: ‘The boundaries of language ... are the boundaries of my world’ (Wittgenstein);13 ‘No thing is there where words fail us’ (Stefan George);14 ‘Intuitions without concepts are blind’ (Kant).15

That is not the end of the matter, of course. On the contrary, it is at this point that the excitement begins. Holism does not commit us to the view that we never understand anything that is not already fixed in our existing language. It does, however, insist on a radical difference between two forms of understanding: understanding something from within a given system, and understanding which goes ‘beyond’ that given system.

Kant, for example, distinguished between two sorts of judgement. On principle, he declared, judgement is a matter of conceiving particulars as elements of generalities (Kant CJ 179). To the extent that we already possess a general rule, and we wish to assign our particular to it as an element, then our judgment is determinant. This is the case with most ‘scientific’ judgements, where we use particulars as empirical confirmation for hypotheses already sketched out in abstract systematic terms. Doubtless it could also be the case for deliberately ‘classical’ works of art (as when we evaluate Racine in terms drawn from Aristotle).

This does not exhaust the possibilities, however. A second possibility is the judgement which is applied when we do not yet possess a general principle. This Kant calls ‘reflective’. ‘... If only the particular is given and the judgment has to find the universal for it, then this power is merely reflective.’

So: despite not being assignable to any existing determinate system, a judgement may nonetheless be systematic ‘reflectively’ and in that way avoid offending against holism’s principle that ‘intuitions without concepts are blind’.


15 Kant, *Critique of Pure Reason*, B 75. Other more contemporary representatives of holism who, at least on this level, occupy comparable standpoints, would be Popper, Quine and Davidson.
How this model is applied is a matter for further choices. In direct application, it is confined to situations where the ‘judgment’ is a practical decision rather than an evaluation of existing facts. This fits quite well for aesthetic questions. Shakespeare’s originality, for example, initiated a new system which was, to start with at least, unique to himself. Previous criteria of judgment simply had no application to his work.

It is less clear how this model accords with moral judgements, which, after all, involve evaluation of past acts at least as much as they involve the origination of new ones. This is most evident in the case of judicial evaluation. To the extent that *nulla poena sine lege* is a universal maxim of justice, then ‘reflective’ judgements which only appeal to inchoate future principles cannot help us. We cannot punish people by appealing to rules which were not rules at the time the alleged wrongs were committed.

The widespread response to this problem is to say that although ‘creative’ judicial responses do not adhere to express rules, they revert to implicit rules of the community, its culture, and its traditions. This is the core of Gadamer’s ideas, which have been widely influential not only on those who have explicitly embraced ‘hermeneutics’ (which includes positivists such as Dworkin) but also on ‘communitarians’ such as Macintyre. To this corresponds a different sort of logic which is not naively subsumptive, but uses ‘dialectics’ (Gadamer) or ‘analogy’ (Kaufmann) to renew and develop the express system of rules.

From that perspective, then, particular judgements are partly the irritations which elicit change in a system, and partly the incorporation into it of rules which are not in reality ‘new’, but had merely lain dormant and unrecognised. It is basically a rather conservative position and seems at first sight to account quite well for the backward-looking development of precedent in the common law (Gadamer calls his logic ‘speculative dialectics’ - i.e. one that keeps its view on the rear mirror).

It has obvious disadvantages, however. One is the rather unattractive whisper of *Volksidentität* which seems to echo in it, as it does, more openly, in communitarianism generally. The other is that it seems to return us to the difficulty already encountered in the case of morality and human rights as guiding principles of particular judgement: reflective systems may be free of the constraints of strict law, but their justification lies in their amenability to the system and not to the particular individual case.

One solution lies in a more orthodox Kantianism, as represented by for example Onora O’Neill, who insists on the logical distinctness of ‘appraisal’ on the one hand and ‘decision’ (to do something) on the
other: reflective judgement, the argument goes, only applies to the latter. The price of this withdrawal of ‘practical judgment’ in the full sense from the evaluation of ‘actions already done’ (i.e. appraisal of others) is that it seems to leave judicial evaluation - which involves both ‘appraisal’ and a practical decision to act on that appraisal - without a clear model (O’Neill 1997, 13).

The other solution is to abandon Kantian holism altogether - or more specifically, the holistic constraint for intelligibility - and to turn to particularism. Particularism, in this context, is the notion that the basic condition for intelligibility is immediate sensation. The elements of knowledge are individual sensed certainties - that it is cold, that the sun is shining, and so on. These matters have a directness and certainty which I cannot reasonably resist. The fact that they seem to have scarcely any enduring standing of their own, but are at once categorised and absorbed into the general vocabularies and networks of consciousness, does not (for the particularist, at least), refute their initial independence. This is the Empiricism traditionally associated with Ockham or Hume and nowadays still echoed by some Oxford philosophers. As we shall now consider, it seems to account for the practice of the common law better than the various forms of holism.

In any system, determinations of law wait upon determinations of fact. I cannot, for example, punish someone until I have decided that he actually did what he is accused of. In that respect, the determination of fact is always absolutely prior to the determination of law. However, there is no logical way of drawing a precise boundary between fact and law, and any decision as to the distinction has to be justified in some other way. In the civil law, the boundaries of what counts as bare fact are more tightly drawn, and the extent of juridical assessment is correspondingly wider. Whereas under common law evaluating something as ‘negligent’, for example, is a question of fact, in Germany it is a question of law. Thus in the civil law the underlying priority of facts tends to be diminished by the notion that all the most significant evaluations have to be made by lawyers anyway.

In the common law, by contrast, the priority and autonomy of determinations of fact is guaranteed institutionally by the use of lay tribunals. The tribunal of fact is, by and large, innocent of legal expertise. The decider of fact is qualified simply as ‘the ordinary sensible

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16 See the work of Michael Dummett, for example, and especially his resistance to Donald Davidson’s holism.
man', 17 who articulates ‘propositions of ordinary good sense’. 18 The fact that they do not constitute precedents ensures that decisions of fact are particularistic and remain immune to holistic requirements, such as that they be consistent with each other (i.e., one jury is not compelled to decide the same way as another, however similar the facts).

The common law does not regard ‘facts’ as bare observational preliminaries to subsumption, but as independent elementary valuations. A question of fact is anything that can and should be decided on the basis of an ordinary, untutored sensibility. Questions of fact include all the basic valuative judgements, even when these use terms from statutes or other propositions of law. This includes unreasonable behaviour, carelessness, dishonesty, insult and so on. ‘An ordinary sensible man knows an insult when he sees or hears it.’ 19

This is not sentimental populism. Jurors are not, unlike the lay participants sometimes included on the bench in civil systems, democratic representatives of ‘the people’ (as Kant, for example, thought; MdS 317). Their historical origin is different and their modern judicial role is the culmination of a lengthy process. 20

In their quality as non-lawyers, modern tribunals of fact are the successors to the Courts of Chancery, which originally administered equity. These Courts fell under the jurisdiction of the Lord Chancellor, who was, at least until 1529, usually an ecclesiastic and not a lawyer. The gradual emergence of the modern jury as an autonomous judicial tribunal coincides with the eclipse of the comparable non-legalistic qualities in the Chancery version of equity (the last ecclesiastical chancellor was Bishop Williams (1621-25); the last non-lawyer was Shaftesbury (1672-73); 21 and equity, no longer as aequitas but in a new

17 Brutus v Cozens, at 1300.

18 Qualcast v Haynes at 44.

19 Brutus v Cozens, at 1300 (per Lord Reid).

20 Originally, jurors were witnesses rather than judges - a property reflected in the fact that their verdicts could be impugned by arraigning them for perjury. By 1670 however, with the decision in Bache’s Case, the judicial role of the jury was conclusively recognised, their verdict it was said was ‘judicial, and according to the best of their judgement’. Rather than (as witnesses) producing the evidence themselves, they were to exercise their own judgement as to the ‘facts’ from the evidence produced by others. See also Holdsworth I, 345.

21 Holdsworth I, 410f.
and technical sense, became ‘legalised’ in its own body of precedent\textsuperscript{22}.

The emergence of the jury as an autonomous judicial body is the backdrop to eighteenth century debates about the nature of judgement. The traditional account of equity had rested on the supposition that courts of equity were best placed to administer ‘conscience’, understood as conformity to the divine law. Once the divine law lost its autonomous role in the legal system, the ensuing secularisation of judgement engendered two elements. One was the rejection of morality as a matter of ‘rules’ at all; \textit{aequitas} was not an appeal to laws whether ‘divine’ or otherwise. The second was the institution of deliberately non-expert tribunals of judgment.

The empiricist approach - as exemplified at this historical juncture by the Scottish enlightenment thinkers Hume, Smith and Ferguson - abandons the claim that the norm, whether fully-formed or otherwise, must precede its instance. Hume, for example, argued that moral (and legal) judgements are structurally akin to aesthetic ones. They are, that is to say, essentially non-inferential. I do not judge something to be beautiful by computation or by working out the consequences of it. Given adequate acquaintance with ‘all the circumstances’, says Hume, this kind of judgement simply resorts to ‘an active feeling or sentiment’ (Hume 1777, 290). The construction of general norms is a secondary process, derived from the first and not constitutive of it; ‘general observations with regard to these sentiments’ - i.e., laws - come after the event (289).

The theory of the ‘moral sense’ (Hutcheson, Kames, Shaftesbury\textsuperscript{23}, Hume), i.e. of an elementary capacity for moral evaluation, matches the notion of a jury as a body of people whose attributes are essentially negative: they are not beholden to any scheme of evaluation, whether legalistic or doctrinal. Not only lawyers but also priests are disqualified from jury service. The juror is a citizen - i.e. a person actively involved in the polity, whence the property qualification - but otherwise uncommitted. By the anthropology of ‘moral sense’, \textit{any} honourable person fulfilling those qualifications necessarily possesses the capacity for moral judgement. Valuation of that kind is part of the elementary capacity of human beings; moral judgement is, no less than sense cer-

\textsuperscript{22} Holdsworth VI, 547.

\textsuperscript{23} The philosophical Shaftesbury - Anthony Ashley Cooper, the 3rd Earl (1671-1713) - was grandson of the last lay Lord Chancellor, the 1st Earl. The latter, it seems, ‘scandalized’ the older members of the Chancery bar ‘by his fashionable Appearance, and by the manner in which he brushed aside technicalities in order to do speedy justice’ (Holdsworth VI, 527).
tainty, a primary given of consciousness.

Resorting to ‘moral sense’ and its application in the jury represents a distinct epistemological choice. This is illustrated by the opposing views on exemplification taken by Kant and Hume. Kant rejected any attempt to learn morality from examples. The ‘true original’ of whatever is expressed in terms of examples, said Kant, is exclusively in reason; and examples are only acceptable to the extent that they have been ‘approved’ by the general principles of morality. (‘Denn jedes Beispiel, was mir ... vorgestellt wird, muß selbst zuvor nach Principien der Moralität beurtheilt werden...’ - GMS, IV 408f.). Examples are never more than instantiations of general rules. As a result, ‘morality cannot be less well advised than to try to extract it from examples’.

For Hume, by contrast, examples (‘instances’) are the touchstone and source of moral generality. In moral questions, refusal to condescend to particulars is the mark of a specious argument. ‘It is easy for a false hypothesis to maintain some appearance of truth, while it keeps wholly in generals, makes use of undefined terms, and employs comparisons, instead of instances.’ (Enquiries, 287)

Juries, by their very constitution, dispense with generalities (i.e., in this context, familiarity with legal rules) and proceed to their valuations by confining themselves to particular instances. In that sense juries seem easier to account for in Humean than in Kantian terms. Decisions of fact are not bound to be consistent. They are not generated systematically; they are particular results of ‘moral sense’ (or of ‘ordinary good sense’, as the courts put it). That rids us of any positive systemic criterion of correctness (though there is a negative constraint which comes into operation if it can be established that ‘no tribunal ... could reasonably reach that decision’; cf Brutus v Cozens [1972] 2 AER 1297, at 1299). And neither are decisions of fact subject to pragmatic consistency restraints, as one sees from the fact that they do not constitute precedents.

The modern theory of facts involves an abandonment of the idea that judicial decisions are primarily a matter of expertise with rules. On the contrary, the tribunal of fact is to be open to phenomena, not to concepts. It is a blank screen upon which the other participants in the process project their perspectival images. Its virtue lies not in making resourceful contributions of its own, but in being plainly blank, and in allowing the relative force of the competing images to become evident. The wisdom represented by the jury is the receptive wisdom of good sense, which may well be more difficult to achieve than the self-absorbed activism of the expert.
III. Hearings

The requirement that a hearing take place whenever there is an issue to be settled seems by common consent to belong to the modern rules of ‘natural justice’. By hearing, we mean the opportunity to make a presentation to the decider in its character as a tribunal of fact, or, to put it another way, the opportunity to make representations to its ‘moral sense’. (This is not all that is included in the technical sense of hearing - see Galligan 1996, 348f; the other elements fall for consideration in our final section.)

This is a widespread principle of law. In Germany, for example, it is reflected in the cognate principles of immediacy and orality: as far as possible, evidence is to be taken directly by the bench. In English law immediacy is even more deep-rooted, most obviously in the hearsay rules, which are far more uncompromising than their civil law counterparts.

The literature has not, however, settled why a ‘hearing’ should be required (see Galligan 1996, chapter 12). Most human choices, after all, seem to be triggered by simple sufficiency of information. If I possess a rational model together with the empirical data required by it, then my conclusions about the matter in hand should be more or less instantaneous - just as it would be if I were inputting data into a computer. From this perspective there is - given sufficiency of data - no obvious sense in which a hearing does any more than delay choices that are already implicitly pre-determined. Indeed, it is hard to conceive of a role for hearings in the course of a natural-scientific investigation. As far as judicial process is concerned, the notion that there is ‘an answer’ waiting to be ‘discovered’ is popularly mirrored in the detective story as the paradigm of forensic enquiry.

It is apparent, however, that recent work in ethics promotes the view that moral judgment is something that must be exercised, as a practical

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24 Obviously one needs to be careful in defining what constitutes an ‘issue’ for these purposes. Not every argument is a litigable issue. Protests against someone who declines to have anything to do with me, for example, may well not be issues and confer no right to a hearing. See McInnes v Onslow Fane [1978] 3 AER 211; and the cases discussed in Craig 1994, 317ff.

25 § 128 ZPO; also §250 StPO and commentary in Klenknecht/Meyer.
activity. This, in turn, reflects the view that resort to rules alone, whether or not they exist, and whether or not purely abstract considerations provide an answer, is inadequate. This position has developed against the background of the notion that moral choices are very often tragic ones. The tragic approach (for example, Larmore 1987, 38) takes inherently irreconcilable conflicts as the better paradigm for the exercise of moral judgement. In the classic cases of conflict between domestic and political obligation (we could call these Antigone cases), the ‘point’ of the conflict is precisely not that one side or the other is implicitly ‘right’ (or ‘wrong’), but that there is and can never be a ‘right answer’. Creon is, normatively speaking, no more wrong than Antigone; in those terms the confrontation is a perfect stand-off. Not, of course, that this is the end of the matter. There is indeed an ‘answer’, namely that we feel that Antigone should be forgiven. But the merit of this answer lies not in its being ‘right’, it is simply equitable. Getting to that answer is not something we can ever achieve simply by being in possession of the relevant data and applying the appropriate algorithm. Nor is it an answer which has any bearing on subsequent Antigone cases (there might well arise a legally indistinguishable situation where, however, Creon’s position seems to have the greater justice). The answer is entirely singular and entirely dependent on one thing - namely, on the fact that we have seen the play.

To the extent that we are prepared to countenance the tragic model - the possibility of Antigone cases - we introduce a different account of moral conflict from the one envisaged by the detective story. It is also one which has institutional aspects. The principle that the accused is innocent until found guilty by the jury is not simply a matter of courtesy or of adhering to human rights. The assumption from the start is that all parties to a legal battle - in this case including the accused - are in a ‘tragic’ confrontation with one another. Contrary to the detective story paradigm, the court’s working hypothesis is not that someone is at fault and just hiding it. It is that all parties possess the dignity of a coherent and honourable position, and that the primary task of the court will not be to uncover incriminating and embarrassing faults, but to adjudicate fairly between contentions which are legally sound and in that respect evenly balanced.

This, of course, is only an initial working presumption, and in many cases it will be rebutted by the development of the trial. Nevertheless the popular image of a trial as the uncovering of some specific iniquity

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by forensic intelligence is only part of the truth. Most important, it mistakes the ‘moral’ basis of adversarial procedure - namely, that all parties are (at least initially) credited with honour and legal substance. To treat someone with respect is to proceed on the basis that the reasons for their actions are sound reasons - that is to say, among other things, that they are reasons to which they are willing to commit themselves in public. Giving advance credit in this way is a more substantial form of interpersonal recognition and fairness than merely observing rules about not hitting too hard.

From this perspective, irreconcilable conflict plays a constitutive role in setting up moral judgements. Only when we concede to both sides of an argument that they are evenly matched can we get to the heart of the matter - namely to fair adjudication on the particular facts. ‘Hard cases’ are not the exception; on the contrary, they should be the rule. Fairness is a matter of getting beyond merely conceptual evaluation and penetrating to the level where the parties can be seen in balance. It is a matter of ‘seeing both sides’, even in those cases where the ultimate decision may be obvious from the start. Equity is superior to law because a legal decision is only just when preceded by a recognition of the equitable merits - i.e., that both sides are worthy of respect. A finding which is merely legally correct - for example, a finding generated by a juridical computer - cannot be just, for it has neglected the foundational factual stage of the decision.

In the iconography, Justitia holds both a sword and scales. The sword is the uncompromising sword of the law; the scales are the scales of equity. What is weighed is not what can be resolved legally - she uses the sword for that - but the particular facts of the case. And in that weighing she does indeed use compromise. All kinds of matters may be weighed against one another even though they cannot be formulated in terms of any legal algorithm. This is, as the Germans say, a matter of ‘Abwägung’, and is related to one of the central concerns of administrative law in the civil law countries, namely proportionality.

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27 See, in this connection, Galligan’s critique of the ‘dignitarian’ position: ‘In so far as the dignitarians think too much emphasis is put on procedures as means to outcomes, it may be because they fail to understand that treating a person in accordance with the standards set by law is an important aspect of treating him with respect.’ (Galligan 1996, 81)

Advocates begin work by attempting to understand the strengths of the opposing case. One can only be confident in one’s judgement about concrete legal or ethical problems once one has understood where the difficulties lie. Significant moral judgements are probably always ‘tragic’. The recognition of this is, indeed, an integral part of the philosophical tradition. Even Kant, despite his antipathy towards aporistic or indeterminate reasoning in strictly legal contexts (e.g. MS, vi 224, 411), recognises its role in the methodology of morals, where he terms it ‘casuistics’.29

Although law, according to Kant, must always supply definite answers (‘like pure mathematics’), morality needs the capacity to exercise judgement outside the system, or within its interstices (MS vi, 411). In that context, at least, it must be able to cope with genuine conundrums (‘casuistic questions’ - MS vi, 423, 426 etc.). The results of this, moreover, are not algorithms for finding pre-determined results, but practical exercises of the capacity to search for solutions (‘nicht sowohl Lehre, wie etwas gefunden, sondern Übung, wie die Wahrheit solle gesucht werden’ - 411). Casuistic questions, in other words, block easy answers in terms of existing systems, and compel a search for new solutions - perhaps within new systems.

In this respect, Kant was taking up an old tradition. Compendia of baffling oppositions were integral to Roman rhetorical training, as one sees most notably in the Elder Seneca’s Controversiae. Such exercises were themselves embedded in the theory and practice of topical reasoning - i.e. reasoning which took place in concrete argument between real opponents, rather than within abstract deductive schemes. This tradition extended from the Sophists to Aristotle, Cicero, and Quintilian.

In the twentieth century this tradition has attracted interest from various quarters. Macintyre, in his attempt to revitalise Aristotelian virtue ethics, has emphasised the ‘agonistic’ basis of moral and legal discourse (Macintyre 1982, 129). It has, moreover, in a very systematic way influenced intuitionist and proceduralist approaches to theoretical reasoning. This theme, which extends from mathematics (Brouwer) to ethics (Habermas), emphasises the practical nature of reasoning. Mathematics, according to the intuitionists, is a human activity

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29 For an interesting discussion of Kant on casuistics, see O’Neill 1997. O’Neill herself takes the view that practical reasoning in the proper sense inherently demands the negotiation of conflicting claims. ‘Practical judgement is always a matter of finding a way of achieving a range of aims and objectives while conforming to a plurality of principles of duty, and of doing so while taking account of the realities and vulnerabilities of human life.’ (17)
and not (as the classic position believes) the discovery of fundamental relations in the real world. By extension, all talk of ‘truth’, for example, ultimately concerns the rules to which human activities (such as debating) implicitly adhere, and the sentences which acquire a certain kind of status (acceptance) in the course of those practices. Truth is re-interpreted as ‘provability’, in the sense of ‘achievable in a sequence of regular transitions’. And the crucial point, against the classical position, is that validity (truth, goodness, etc.) only accrues to actions, not to states. So the concrete fact of debate is a precondition of validity, not merely some transcendent notion of correspondence or consistency.30

‘Discourse ethics’, most famously implemented by Apel and Habermas, and applied within legal theory by Alexy, draws on this tradition. In discourse ethics, procedure is constitutive of moral value; or, to put it another way, moral values are merely the rules implicit in certain sorts of universal human activities - most notably, for that theory, discourse (‘communication’) itself.

The importance of ‘casuistics’, then, is its emphasis on the inescapability of real-time process. Casuistic questions are intended to force the inquirer to engage in the to and fro of deliberation, to understand that it is only in the practical ‘exercise’ (Kant) of her faculties that judgement can take place at all. They are not intended to induce terminal perplexity, but to initiate an enquiry that happens, like the judicial debate itself, over a period of time.

IV. Confrontation

Hearing means a decision-making process that occupies some period of time. Decisions are not pre-ordained, ‘in the air’, waiting to be discovered. They must be generated. In that sense a hearing is constitutive for the validity of a factual decision. No hearing - no decision.

Given that much, however, we still have to consider what sort of process makes a hearing. Mere lapse of time, even assuming the physical presence of the participants, presumably does not. They must do something which amounts recognisably to a decision-generating pro-

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30 See Roberts 1992, chap. 5.
cess. The question is: what must they do?

This question has, as one would expect, been explored by ‘proceduralists’, in particular by Habermas and Alexy under the banner of ‘discourse ethics’. Here, the basic notion is that human beings realise themselves intersubjectively. No man is an island: only someone who interacts with others and is *recognised* by others can truly be called a human being. Such recognition is intrinsically good because realisation, entelechy, coming to be what you truly are, is intrinsically good.

The interaction which leads to recognition is, in this account, a communicative process. In this regard, *verbal* communication is particularly apt to the generation of complex personal identities. We thus have a dual structure. On the assumption that it is universally good for human beings to realise themselves, then any function that assists in this process will also be ‘good’. The functional rules of communication can be shown to express the value of self-realisation. That way we avoid having to derive our commandments from religious revelation, ethical intuition and so on, and keep our moral values correspondingly ‘thin’ and plausible. At the same time we still adhere to the core principle that a genuine ethical value must be transcendent, i.e. not merely functional or instrumental.

Habermas attempts to demonstrate that communicative practice integrates functional and moral elements. In communicating, I realise myself and others. To communicate effectively, I find myself observing maxims that have a direct moral content as well. The default condition of conversation, in his view, is that I presuppose my interlocutors to be telling the truth. Because I am interested in finding out the truth, I tolerate my interlocutors, I encourage them, I give them every opportunity to project themselves before me and whoever else is participating. I have a direct functional interest, in other words, in creating an environment of trust and solidarity. But these, clearly, are ‘moral’ values in a direct and traditional sense. Hence communication is instrumental in satisfying values that are themselves more than instrumental - namely those of personal realisation in a context of interpersonal recognition. More than that: communication depends on those values for its own functioning: and since communication is the most powerful instrument of human rationality, this confirms the legitimacy of those norms that it implies.

The problem with Habermas’ account, at least in our terms, is that its rules of communicative process are not easy to reconcile with judicial practice. Habermas demands of communicative processes that they be ‘unforced’ (zwanglos), sincere, tolerant and so on. But such virtues, and the loving encouragement of self-realisation in others, are
See Habermas 1992, 290f, where he (a) summarizes practical procedure almost entirely in terms of judgements on appeal (‘Rechtsmittel’), before (b) concluding with the remark that in other respects the ‘juridical discourse of the court’ takes place in a ‘procedural vacuum’ - i.e. with the concession that he, at least, has no account for it. Alexy also appears to regard forensic procedures, at least as far as they involve negotiation between the parties and their lawyers, as distinct from the reasonings of the bench and basically out of tune with the high scientific aspirations of ‘discourse’ (Alexy 1991, 270). Since, in most legal systems, only appeal courts have more than one professional judge, this hardly suggests any great faith in the ability of first-instance courts to provide justice.

Moreover, these bellicose metaphors have long antecedents. The aggressive examination of witnesses was integral to Roman procedure (Quintilian, V, 7); cross-examination is commended by Blackstone (III, 373f); and even the ‘frightful’ Judge Jeffreys was commended by contemporaries for his masterly cross-examination (Holdsworth VI, 527). The right to confront adverse witnesses is constitutionally recognised in the US Bill of Rights (Amendment VI; Blackstone also uses this term, loc. cit.); and the same guarantee, even though arguably watered down a little, is contained in Art. 6 (3) (d) of the European Convention on Human Rights.

The rules of adversarial examination reached their modern form in the nineteenth century (Allen 1997). Today, probably no common law practitioner could conceive that a trial could be fully just without the cross-examination of witnesses. In certain respects, one of the fundamental maxims of natural justice propounded by administrative lawyers, namely audi alteram partem, is an affirmation of the partisan process behind all just decision-making.

Civil law procedure looks initially more promising for discourse ethics because of its greater informality. Nonetheless both Habermas and Alexy effectively restrict ‘discourse’, in the desired sense, to the exchanges that take place between the members of the bench.31 As far as the advocates themselves are concerned, however, discursive rationality would seem to be an illusion or a sham.

The most widespread response to this difficulty is to be found in those varieties of positivism which give up trying to link legality with transcendent moral principles, and thus to accept combative adversarialism. From this perspective, the contribution that adversarialism makes

31 See Habermas 1992, 290f, where he (a) summarizes practical procedure almost entirely in terms of judgements on appeal (‘Rechtsmittel’), before (b) concluding with the remark that in other respects the ‘juridical discourse of the court’ takes place in a ‘procedural vacuum’ - i.e. with the concession that he, at least, has no account for it. Alexy also appears to regard forensic procedures, at least as far as they involve negotiation between the parties and their lawyers, as distinct from the reasonings of the bench and basically out of tune with the high scientific aspirations of ‘discourse’ (Alexy 1991, 270). Since, in most legal systems, only appeal courts have more than one professional judge, this hardly suggests any great faith in the ability of first-instance courts to provide justice.
to the intelligibility of complex decisions is clear (see Luhmann 1983, in particular). The binary, partisan nature of courtroom procedure (you either win or you lose) promotes order and intelligibility by ‘reducing complexity’ (as Luhmann puts it). This is particularly characteristic of the common law, which arranges even criminal and administrative trials as a *lis* between parties. In such cases, we are only dealing with the two positions condensed into or personalised by the combatants. The ‘bottom line’ reduces to the question of which party wins; all substantive legal issues are only ancillary to that one end.

In this context, abstract ‘scientific’ discourse (as in non-partisan civil law procedure) does indeed represent a burden of unreduced complexity. Arranging the trial as an adversarial contest - like a cricket match, as Maitland said - clearly satisfies widespread intuitions. The difficulty of positivism is its strongly external perspective. For participants in legal processes, with all the very direct consequences that flow for them, it is scarcely tolerable to be told that they are actors in a grand role-playing exercise designed to resolve upsets within the social system. Neither does this correspond to the self-conception of the professionals involved. Mere cynicism, or what looks like it, cannot be an effective ‘reduction of complexity’ even in Luhmann’s terms. It is probably more effective to assume that values are, somehow, genuinely at issue in legal proceedings.

The better alternative is to take account of Habermas’s reconstruction of procedure from a non-instrumental moral core. The difficulty with discourse ethics generally is not its rejection of instrumentalism, but the kind of moral core it purports to revert to. This is the same ‘hostility to and denial of conflict’ which Macintyre sees in Platonism (Macintyre 1982, 147). Its predominant modern variant is the contractarianism associated with Rousseau, Kant and Rawls. Contractarians tend to insist that conflict characterises the ’state of nature’, namely the fallen condition from which human rationality is supposed to rescue us. Surmounting conflict is the essential step beyond it. We achieve this, above all, by concluding with our fellow human beings a contract establishing the general order of rights and claims. Conflict is

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32 See Luhmann’s comments on conflict and order at 1983, 100ff.

33 Pollock & Maitland II, 670.

34 See, for example, Luhmann’s image of court process as a role-playing exercise in which the participants play out, and gradually come to terms with, the roles allotted to them. (Luhmann 1983, 87, 92).
thus rendered unnecessary, and continuing to engage in it even so is to relapse into the state of nature. Rationality enjoins us to agree amongst ourselves and to observe the terms of our agreement, and any refusal amounts to irrationality and to an offence against our own essential nature.

Part of the subliminal appeal of contractianism is its reconstruction of Christian love and solidarity. The contract becomes the symbol of a new, secularised community of believers. Hence its vehement rejection of those who persist in conflict: as Rousseau and Kant passionately proclaim, the criminal has wilfully excluded himself from the fellowship of the community. 35 Conflict is sinful, the mark of Cain, the sign of the creature that has spurned reason’s path to perfection. Conflict has no legitimate role within the community; the state retains an absolute ‘monopoly of force’. From a contractarian point of view, the United States citizen’s ‘right to bear arms’ is not only an anachronism, but a shocking one.

Rousseauistic and Kantian contractarianism, and discourse ethics, are strongly committed to the ‘platonistic’ or Christian idea that love and harmony are the base conditions of moral behaviour. This is, however, no more than a presupposition; and if judicial practice is hard to account for in discourse ethics, then that may represent a difficulty in the presupposition rather than any inadequacy in the structure of proceduralism itself. Moreover, the alternative solution - namely, abandoning any free-standing prior commitment to love and harmony, and directly theorising conflict - has entirely respectable philosophical antecedents, even if it initially sounds unattractive. We can look at this with a view to justifying the phenomenon of the courtroom.

In the modern era, the notion that human beings are not in the first instance characterised by love for one another is most obviously represented by Nietzsche and by Hobbes, both of whom identify the will to power as the defining attribute of the human psyche. ‘In the first place, I put for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death,’ declares Hobbes (Leviathan, chapter 11). The struggle for power is elementary; it is not the product of some other aspiration such as survival. This argument, which in Hobbes sometimes gets submerged in the contractarian notion that self-preservation is prior, is more explicit in Nietzsche:

35 Rousseau 1762, II 5; Kant, MDS 331. This can lead to fairly frightening theories of punishment, as Hegel, interestingly, was one of the first to see.
The struggle for existence is the exception, a temporary restriction of the will to life. The greater and lesser struggle always revolves around domination, growth and enlargement, around power, in accordance with the will to power, which is life’s will. (The Gay Science, § 349).

This anthropology is intensely secular, in that the notion of a divinely ordained ‘status’ is abandoned. Human beings do not possess some pre-given identity. Nor do they occupy a slot in the great chain of being, or in a general scheme of ‘human rights’. On the contrary, the underlying principle is that human beings constitute themselves, by their own intersubjective practice. ‘The struggle for power is the medium in which human beings realize themselves in a universe with no divine order and no fixed values, not even their own continued existence. My reality articulates itself at the point of contact with my neighbours; and that point of contact is not love or solidarity, but opposition and conflict.

This is not anarchic violence, however; the struggle for power has its own teleology. In the first place, the struggle for power leads properly to the self-constitution of human identity. This is evident in both Adam Ferguson and in Adam Smith. In Ferguson, self-constitution takes place most strongly in a hazardous environment; life is a ‘game’, where chance, uncertainty and desire form the basis for human exertions. This is not to celebrate risk and play for its own sake. Hazard is the matrix of creativity; and its ‘logic’ is evident in the emerging structures of collective endeavour. Adam Smith, famously, called this the ‘invisible hand’ which promoted the interests of society even as its individual members concentrated on the atomistic encounters of ‘truck, barter and exchange’ (Smith 1776, I 477, I 20).

The second point is that conflict possesses not merely functional utility, but also the elements of what is recognisably a morality. This morality does not consist in adherence to substantive norms, but in the right exercise of human faculties. The general goal is the enlargement of power - initially at the expense of others. Power, however, is dynamic, not static. I do not have power as a possession in myself: I have it only in that exercise which causes my fellow human beings to acknowledge it. Power, as Hobbes indicates, is ‘not absolute, but a thing

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36 ‘Is it hope alone that supports the mind in the midst of precarious and uncertain prospects? And would assurance of success fill the intervals of expectation with more pleasing emotions? Give the huntsman his prey, give the gamster the gold which is staked on the game, that the one may not need to fatigae his person, nor the other to perplex his mind, and both will probably laugh at our folly... Withdraw the occupations of men, terminate their desires, existence is a burden, and the iteration of memory a torment.’ (Civil Society, 45)
dependant on the need and judgement of another’ (Leviathan, ch. 10).

For this reason the simple use of compulsion or force is counter-productive. Power is not violence. Power is control; and most of all, it is self-control. The highest power is the demonstration that force is unnecessary and that loss and diminution of power are sustainable. This is the grammar of what Hobbes calls honour. Honour is not exploiting evident superiority and not taking advantage; it is the willingness to endure loss and things adverse to immediate self-interest. Honour expresses itself in Magnanimity:

Actions proceeding from Equity, joyned with loose, are Honourable; as signs of Magnanimity: for Magnanimity is a signe of Power. On the contrary, Craft, Shifting, neglect of Equity, is Dishonourable. (Leviathan, chapter 10)

The same model, despite its very different ultimate implementation, is at the heart also of Kant’s notion of morality. Human beings are moral because they are free agents; and this freedom shows itself in the ability of human beings willingly to act against their own interests.37

Honour clearly has legal implications as well. Hume defines honour as ‘fidelity, the observing of promises, and telling truth’ (Hume 1741/2, 294). In that sense it is the foundation of fiduciary relations and trust in general. Not to fulfil my promises, and not to keep fidelity, is ‘craft, shifting and neglect of equity’, and hence a loss of power far more significant than if I had demonstrated open disregard of my interests in the first place.

The substantive values affirmed in honourable actions are particular and self-imposed. The strongest requirement is formal, namely consistency. ‘Power’ only accrues to some constant identity, and craftiness and opportunism do not supply that. Power is a matter of being able to ‘deliver the goods’. A commitment to deliver goods I cannot deliver is clearly counterproductive; but the choice of which goods I declare myself able to deliver is a matter for me alone - not forgetting, of course, that these ‘goods’ have to be valuable to others.38 Given an identity honourably maintained, the actor’s positive values are, in a wide sense, a matter of particular choice. ‘Observing promises’ is the essential virtue under this moral scheme; and that is clearly formal

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37 See Roberts 1988, chapter 1.

38 ‘As in other things, so in men, not the seller, but the buyer determines the Price.’ Hobbes, Leviathan, chap. 10.
Conflict is both the medium of self-realisation and the test of honour and consistency. In this respect - if one accepts the argument, at all events - it constitutes an alternative to the ‘platonistic’ telos of love. I do not form my identity by loving; and truth is not a matter of consensus. Solidarity and mutual recognition derive, if at all, from their apparent opposite, namely conflict, and not from some primal harmony. Certainly they are values; but they arise only at the end of human intercourse, not in its origin. In this respect, courtroom procedure is not a rather hopeless struggle to restore harmony in the face of the perversities of human nature. On the contrary, it is an enactment of the elementary processes of human identity.

From this perspective, the connections between cross-examination, disclosure and fairness become clearer. Under English law, the accused is not protected by a right to privacy or anything analogous because the overriding question is directed towards his honourable consistency. All aspects of a party’s behaviour are in principle subject to scrutiny by his opponent or by the prosecution, subject only to the limitation that utterances made in the context of proceedings may only be used in evidence if they were voluntarily tendered (privilege; nemo debet prodere seipsum). Cross-examination and disclosure are those elements which, more than anything, distinguish common law from civil law procedure. For the civil law, whose ‘dignitarian’ approach accords substantive rights, being gentle to the accused is a free-standing value. There is no such value in the common law, because the common law proceeds from the basic principle that every person of full capacity freely chooses his own identity, and that the test of that identity is consistency. No-one may be heard to justify themselves by declarations inconsistent with their former behaviour. Consistency is the fundamental requirement for ‘honour’. Cross-examination and disclosure are the procedural devices by which it is tested; and they guarantee

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39 This is where Kant’s formalism breaks down. His basic notion is that freedom has its highest manifestation in our ability to dispose against our interests, i.e. to exercise self-control. This however is perverted by the calculus of universal, identifiable, substantive (and hence more than just formal) rights.

40 In this respect, the fundamental grammar of obligations owes more to the individualistic self-commitment of contract than to the universalism of tort. Compare Atiyah 1979 and Atiyah 1997.

41 R v Sang, R v Khan (Sultan), R v Chakley.
fairness because of the particularism to which they are directed.

V. Conclusion

My argument amounts to this: common law is in its essentials a pure proceduralism. In pure proceduralism the validity of the outcome is primarily determined by the validity of the procedure. To the extent that this validity is referrable to or assessible in terms of prior norms, these norms are procedural ('fairness'), rather than substantive ('human rights', traditional morality, or even legal codes).

So where, in proceduralism, do we look for substantive moral content in a valid decision? There are two possibilities. Either (1) arguments as to moral justification simply stop, or else (2) the procedure must be intrinsically moral in some way. Functionalism (in our argument, above, Luhmann) takes the first solution. Discourse ethics (Habermas) takes the second solution. We have tried to follow Habermas.

For discourse ethics, procedures are justified to the extent that they enact intuitively valid moral norms such as solidarity, tolerance and so on. The problem is that real-world argument allows only limited space (if any) for moral intuitions of this sort. In our context: courtroom procedure generally, and common law procedure in particular, seems to articulate quite different emotions and practices.

I have tried to show that courtroom procedure does articulate moral values and that in this respect discourse ethics is correct. The point is, however, that these moral values have a character different from the 'platonistic' ones of love and harmony. The underlying value is consistency ('honour'), and the medium in which it is articulated is conflict. Fairness is right action within conflict.

The common law conception of fairness as conflictive process is, conceptually, a long way from civil law conceptions of fairness as the implementation of basic rights. At a fundamental level the two may even be incompatible with one another. Which system one favours is, in the end, a matter for informed strategic decision.

\[42\] For this concept, see Rawls 1972, 85. Rawls himself, it must be said, regards courtroom trials as examples of imperfect procedural justice (86).
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