

## LAW'S JUDGEMENT: A SUMMARY

### UN RESUMEN DEL LIBRO LAW'S JUDGEMENT

William LUCY\*

“The... [author] told us for three quarters of an hour how... [he] came to write... [his] beastly book, when a simple apology was all that was required”  
(Wodehouse PG, *The Girl in Blue* (Arrow 2008 (1970)) 113).

Courthouse iconography around the world is dominated by the image of Justitia. She almost invariably holds scales and a sword and she is often blindfolded because, of course, justice is blind. But not quite. Or so I argue in *Law's Judgement*.<sup>1</sup> For when we —the addressees of the law— stand in the court room facing judgement, or read the copious and complex body of juristic ‘do’s and don’ts’ we find in statutes, court judgements and in our legal textbooks, one thing becomes obvious: the law is certainly not interested in every aspect of our character, conduct and context.

\* Law School, Durham University; w.n.lucy@durham.ac.uk. Thanks to the audience at the IJJ UNAM in August 2017 for their patience, comments and questions and, of course, to the symposium commentators: Amalia Amaya, Rodrigo Camarena Gonzalez and Imer Flores Mendoza. I am also grateful to Massimo LaTorre, Andrea Romeo and their colleagues and students at the Università degli Studi Magna Graecia di Catanzaro for the opportunity to discuss some of the themes of the book in April 2018 and for their unlimited kindness and hospitality. An anonymous member of my final year jurisprudence class, 2017-18, reminded me of *The Girl in Blue*, while Phil Handler and John Murphy put themselves through the mill again; I'm grateful.

<sup>1</sup> Hart Publishing 2017 (hereinafter ‘L’ in notes, with accompanying page or section numbers).

WILLIAM LUCY

So, in English tort law, the main thing that matters about my conduct as a defendant in a negligence action is whether it reached the standard of a reasonably competent performer: a reasonably competent driver, surgeon, lawyer or the like. I cannot defend myself in such an action by showing that, when I crashed into you, my driving was impaired because I was having a bad day —I was in the middle of a divorce, had flu and had slept badly. Nor can I exculpate myself by showing that I'm simply a bad driver who is only occasionally capable of reaching the standard of reasonable competence. Similarly, it is no defence to me, as an employer faced with a racial or gender discrimination action under the Equality Act 2010, to say that I'm just a racist or a misogynist: those features of my character are ignored for the purposes of exculpation, although the law does indeed register them as bases for initiating legal action. And, although there is a partial defence of loss of control (provocation) in English criminal law, the law ignores the fact that some of those accused of murder kill other people because they —the assailants— are very touchy, aggressive or bad tempered. Finally, note that the default standard of performance in English contract law is strict compliance: I simply must perform my contractual obligations and it is not good enough to try my best or make reasonable efforts. If trying my best or making reasonable efforts is insufficient to discharge my obligation, then I am —in the absence of a very few vitiating factors— in breach.

These features of English law are not unique —they are commonplace (but not absolutely ubiquitous) within the common law world and also in civil law legal systems. Nor are these features the only ones in the substantive law of these legal systems that have the effect of ignoring much, but not absolutely everything, about the character, conduct and context of the law's addressees.<sup>2</sup> Justice is therefore not blind, but it does take a very limited view of its addressees: the law sees us, but not in all our particularity and detail. In the law's gaze, we look like the people animating Nicola L's performance art piece, *Red Coat (Same Skin for Everybody)*.<sup>3</sup> Most of the differences that mark the actual people (there are eleven of them) who wear the

<sup>2</sup> See *LJ* at 4-19 for fuller discussion.

<sup>3</sup> See <<http://nicolal.com/category/performance/>>.

## LAW'S JUDGEMENT: A SUMMARY

coat are obliterated, but not all. We can see that there are different, real people in there, but in broad outline they are made to look more or less the same by the coat. It is a layer over them, subsuming them under the same guise — different but also strikingly alike.

Law's abstract judgement (LAJ) is the label I give to modern law's tendency to ignore much about its addressees while, simultaneously, treating them in the same way and as if they were alike.<sup>4</sup> In chapter 1 of *Law's Judgement* I show that LAJ has at least three components. The first is the presumptive identity component, so named because modern law usually sees its addressees not in all their particularity, but as identical abstract beings. Addressees of the law are identical in two respects according to this component: they are regarded as if they were the same in terms of those capacities, cognitive and physical, which enable humans to comply with achievable and intelligible legal standards; and they are taken to be identical in the sense of having the same entitlement to the same bundle of 'formal' rights and abilities. LAJ's second feature is the uniformity component, which entails that, generally speaking, the law judges its addressees by reference to general and objective standards equally applicable to all. The idea that the same laws should apply to all addressees of the law is so powerful that it casts suspicion upon laws which apply to particular named persons or groups. This requirement, once apparently called 'isonomy', is probably identical to some versions of the generality requirement of the rule of law ideal. The limited avoidability component is the third feature of LAJ. It highlights the fact that in modern legal systems the application of the standards in play in the uniformity component is generally mitigated only by a limited number and range of exculpatory claims.

Since LAJ is the way modern law judges us, it seems obvious to raise a closely related question: how does modern law and LAJ see us? The easy answer is: not in all our particularity and detail, but this is not overly informative. In chapter two I therefore address the legal person in more detail, examining the forms it takes and sketching the nature of its relation with LAJ. The chapter distinguishes two ways in

<sup>4</sup> By 'modern' I mean only to draw a contrast between feudal legality, on the one hand, and the legal systems characteristic of industrial, mercantile societies on the other: see *LJ* 19-21.

WILLIAM LUCY

which the legal person operates in law and notes that these two need not always be compatible. The principal arguments of the chapter are these: first, that the two broad senses of the legal person are significantly connected to LAJ and, second, that law's persons must be understood 'legalistically'. I do not rule out the possibility that other conceptions of the person also exist in the law, but I do not think that these, if they do exist, are either central or closely connected to LAJ.

The principal question that animates the remainder of the book is this: what, if anything, might be said in favour of LAJ? I pose the question because LAJ has been indicted by many contemporary jurists and philosophers, there being at least four strands to their critique.<sup>5</sup> I do not, however, engage directly with each of those strands in the book, choosing in the main to attempt to make a positive case for LAJ regardless of those criticisms. The most the book can achieve with regard to LAJ is therefore a readjustment of the argumentative scales, adding ballast to the positive side but not thereby reducing the weight of the objections on the negative side. A full vindication of LAJ, if possible, would require a direct engagement with and rebuttal of each and every one of those objections. I engage with only a few of their sub-strands.

That engagement is the fulcrum of chapter three, which distinguishes three charges of unfairness that LAJ often generates. One of these charges relates to legal-liability responsibility, one raises the issue of impartiality, and the third invokes the idea of equity (or mercy). Each of these notions is complex and requires considerable unpacking. The argument is that, once legal-liability responsibility, impartiality and equity are properly understood, two of the charges of unfairness against LAJ that they are often taken to license are seen to be bogus. The one remaining unfairness charge, premised upon the idea of equity, retains some weight. Thus we cannot say that LAJ is fair in every sense in which we use that word. The ways in which law's judgement may be said to be fair and impartial still leave some room for certain types of moral criticism of the law. But the burden of these types of moral criticism seems ultimately to require the replacement of law as we currently know it, and as we have known

<sup>5</sup> See *LJ* 19-26.

LAW'S JUDGEMENT: A SUMMARY

it, with an altogether more ethically sensitive means of judgement. That, at least, is the implication of the argument of this chapter.

Chapters four, five and six are the core of the case in favour of LAJ. The idea of dignity and its connection to LAJ is tackled in chapter four. I examine two conceptions of dignity, my aim being to determine the degree to which they inform LAJ in particular and law in general. I argue that these two ostensibly different conceptions of dignity are not incompatible, that they overlap in an interesting way, and that that overlap constitutes one of a number of connections between dignity, on the one hand, and LAJ and the law, on the other. That both of these allegedly different conceptions of dignity inform various areas of legal doctrine as well as broader aspects of legal institutional design (such as LAJ) requires little argument; nor is it particularly newsworthy, either as a matter of legal philosophy or of common sense. The point has far greater significance from the perspective of critics of LAJ since, if dignity is one of LAJ's moral anchors, then LAJ cannot be utterly without moral value. Or, at least, it cannot be so if dignity itself is a morally significant idea. I do not show that it is, being satisfied only to note that many have regarded it as such. Dignity features first in the list of values that might inform or be embedded in LAJ because it is primarily an individualistic notion, those that follow being more closely tied to how we stand to one another as members of groups. The narrative arc of chapters four to six therefore exemplifies a move from individual to group.

The notion of equality is tackled in chapter five. There I attempt to show the senses in which LAJ is egalitarian and to demonstrate the value these senses have. Much work has to be done simply to carve out conceptual space for these senses and to distinguish them from those that are dominant in much current legal and political philosophy. The latter are like a cuckoo in a nest, squeezing out all other conceptions of equality to such a degree that the capacity to even conceive of alternatives is almost lost. I argue that two conceptions of equality can act as additional moral anchors for LAJ and that both are plausible and significant. If that is so, then this is another argument with which to commend LAJ that also makes an additional important point: it shows that LAJ is normatively over-determined from within the realm of equality. Of course, the argument

WILLIAM LUCY

that LAJ can take normative sustenance from two plausible and significant conceptions of equality does not show that LAJ is of pre-eminent moral or political value. It does, however, serve to impede the thought that it is of no moral or political value at all.

Chapter six explores possibly the most contested and troublesome notion to have recently preoccupied jurists and political philosophers, namely, community. The argument I make is that LAJ can be understood as a means of realising a particular conception (or, more accurately, family of conceptions) of community. This is certainly not to say that LAJ is the only means of realising this conception of community; rather, my point is that it is one not insignificant means of realising and maintaining this form of community. It will probably come as no surprise that this form of community is in significant ways egalitarian and thus overlaps with two of the conceptions of equality explored and recommended in chapter five. I try to show the value of this notion of community, but the argument is not one from first principles. I argue instead that this notion of community provides an amenable habitat for the realisation of many ostensibly competing values. The point is that this conception of community is compatible with, and may even be required by, numerous different arguments from first principles.

In the final instalment of the book —chapter seven— I offer this conclusion: that LAJ is nowhere near as morally and politically problematic as critics lead us to believe. That a more measured and circumspect assessment of the various arguments supporting LAJ yields insight is, for sure, a poor slogan and a pitiful rallying cry. But, while it falls short of banner-worthy inspiration, the claim is nevertheless true and important. It allows us to better judge a still crucial feature of our law and that, given law's capacity for realising both unparalleled harm and good, is significant. Robert Cover was right to maintain that legal interpretation takes place in a field of pain and death; law occupies and constructs that field and it is important we judge it scrupulously and critically.<sup>6</sup> My hope is that the argument of Law's Judgement serves to clear the ground for a scrupulous and critical assessment of one important feature of modern law's edifice: law's abstract judgement.

<sup>6</sup> Cover R, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601–30.