Law, Justice and Ethics

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Introduction

In the first volume of this series of essays a reformational perspective on law and justice was offered. In this essay that perspective is extended to a consideration of the relationship between morality and law or between the ethical or moral dimension and the jural. First, we will briefly consider three debates that have raised important issues concerning the relationship of law and morality. Secondly, in order to address those issues, the main elements of a perspective for understanding the relationship between law and justice presented in the earlier essay will be summarised. Thirdly, and lastly, that approach will be extended to encompass the debates and issues concerning the relationship of law and morality, of the jural and ethical dimensions of human experience.

Debates over Law and Morality

Professional Ethics and Law

A persistent theme in recent literature on the conduct of lawyers in their profession concerns a perceived marked decline in ethical standards of behaviour. This has prompted calls for increasing ethical requirements both within and without the profession. It has also stimulated scholarly debate about the nature of professional ethics or responsibility and the role of ethical rules or codes of conduct. In my own country, New Zealand, the debate over professional legal ethics has been stimulated through the public attention which notable instances of ethical transgression have received. Examples are found in such events as the *Winebox Inquiry* concerning the activities of business corporations and their legal advisers seeking to minimise the corporations' tax liability, unethical conduct by lower Court judges and serious defalcations of clients' money by lawyers.

Although, in these and other such instances, breaches of the law by those participating in the impugned behaviour have not in every case been established, there has been little doubt regarding the presence of serious immoral or unethical conduct. Perhaps even more serious have been the illegal and unethical transgressions committed by public officials, who, though themselves not necessarily lawyers, have been charged with important public legal functions. The most serious of these, in my country has been the misappropriation of public money for private purposes by the Auditor-General

during the tenure of his office. The chief obligation of that public office is to ensure that state institutions, officials and bodies charged with public responsibilities are spending taxpayers funds strictly within their legal powers and purposes!

A question raised by serious ethical failures in professional practice examples of which have been given above is: What makes an ethical profession? The question requires an answer to two further questions: What is a profession? and, What is the nature of professional ethics? neither of which can be fully considered in this essay. However, the second of those questions raises yet further questions relating to the proper role of rules, both state ("legal") and internal rules of professional bodies, with regard to the prevention of unethical conduct and the promotion of ethically conforming behaviour. Answers to these latter questions presuppose a view of the nature of ethics and law and their interrelation. The issues become more complex when we are considering the regulatory dimension of professional ethics in relation to a profession (law) which itself is primarily concerned with the sphere of legal rules. A clear view of the social phenomena of law and ethics and their interrelationships becomes even more essential if light is to be shed on these issues and their complexity.

Legal Enforcement of Morality

Professional ethics is not the only area where the fundamental question of the interrelation of law and the ethical dimension has expressed itself in public debate. The question as to whether law should be used to enforce morality and, if so to what extent, has arisen in relation to issues which have been and are still debated. In England there was a celebrated debate between a judge of the House of Lords, Lord Devlin, and perhaps the leading English legal philosopher of this century, H L A Hart, over the question as to whether homosexual acts by consenting adults in private ought to be prohibited by law. In more recent times debate has raged over the morality of abortion and whether or to what extent it ought to be legally proscribed.

Immoral Law

Another debate which also involved the late Oxford philosopher of law, H L A Hart, this time against a Harvard law professor, Lon Fuller, concerned the question as to whether specific instances of formally enacted but grossly immoral (unjust) laws of the Nazi regime during the Second World War were genuine law, though deserving of condemnation (Hart), or were they in fact not valid binding law at all owing to a specific kind of *inner* moral failing (Fuller)?

This debate was itself an off-shoot from an older debate between legal

positivists and natural law theorists. Natural lawyers within the tradition of Thomas Aquinas (Thomists) adhered to the maxim, *lex injusta non est lex* (an unjust law is not law). Legal positivists such as Hart have maintained that the maxim commits a logical error in seeking to derive an "is" (invalid or non-law) from an "ought" (law that ought to be just).

It is not the purpose of this essay to explore in depth the above debates relating to ethics and the professions and those on law and morals. Rather, the aim is to provide a uniquely Christian perspective on the relationship of law and the ethical dimension from which these debates can be approached. It is hoped that this perspective can offer a sound principled basis upon which it may be possible to work towards genuine solutions to the problems they pose. With respect to the relationship of law and justice my essay in the first volume of this *Signposts* series has already furnished some of the key elements of that perspective. They will be summarised with minor elaboration before proceeding to develop them in order to address the fundamental problem of the relationship between law and the ethical or moral dimension.

Law and Justice

In the reformational perspective human law and legal institutions arise out of concrete formative responses to a universal normative requirement of God's ordering Word for the Creation. This normative requirement is but *one* of the diverse *ways* in which God's Word-governed creation exists and functions. It is described as the jural manner or "mode" of God's Creation. We should take care not to confuse this distinct jural dimension of our experience with the idea of God's Creation-governing Word as God's "law" for the creation. The jural "aspect" is only one of the diverse ways in which God's ordering Law (-Word) governs Creation.

As a universal dimension of human experience the jural aspect is a normative dimension of the full array of human institutions, communities and relationships, of families, marriage bonds, friendships, business corporations, churches, voluntary organisations, etc. as well as of the legal institutions of the state. For example, it expresses itself in the informal rules or norms that regulate disagreement and conflict within the family as well as in the formal public rules ("law") of statute law and judicial case decisions.

The core meaning of this normative jural dimension is captured in the concept of retribution (or "tribution") *understood as a giving of what is justly due or owing*. We might say that the whole Creation including God's human creatures prior to the invasion of sin existed in an original state of "tribution", that is, in

a jural state of harmony and peace. The conditions of human life at present, and extending back to the advent of sin into the world, has meant that the normative requirement for *re*-tribution, restoring relationships as far as humanly possible to a state of tribution, is now and until the renewing of all things a continuing and inescapable call upon God's image-bearers for an obedient response. Retribution then, in this re-formed interpretation extends well beyond a criminal or penal reference. Moreover, in a biblical understanding, even the concept of criminal retribution must be open to a broader range of considerations than mere offender directed punishment but take account of restorative considerations in respect of the victim and the wider community.

Hence this core re-tributive character of the jural dimension expresses itself in both civil (non-criminal) and criminal laws of the state. However, as a dimension of *all* societal relations and institutions, retributive justice is a divine normative calling, a calling for its implementation ("positivisation") in humanly posited norms of justice across the full range of human relationships, communities and institutions.

The different types of laws (understood in their original juridical sense) obtain their typical character from the concrete societal context in which they occur through human formation. Within the family, for example, they have a relatively informal expression appropriate to the ethical character of the bonds that constitute that intimate community. The jural dimension of this natural institution is to be normatively expressed in a manner that is in keeping with the predominant norms of love, care and nurture appropriate within that familial context. Similarly, the internal rules of an economic institution such as a business enterprise or a business contract, whilst often displaying a more formal character, are also flavoured by the specific (economic) character of those institutions.

No one needs to have pointed out that the rules contained in statutes and in the decisions of the state courts are laws. In fact it is only this type of law for which the term "law" is commonly reserved when used in its primary juridical sense. It should be clearly understood, however, that from a biblical-reformational perspective all kinds of rules formed within non-state human communities and institutions are just as much law as the rules of the state. This is because each one of those rule-spheres is a concrete expression of the jural dimension containing, in a relatively better or worse fashion, positivisations of (re)tributive norms of justice. The social-structural basis for the prominence given to state laws is to be found in the overriding normative role which that form of law plays in relation to all of those other types of law and from the

(normative) fact that it is the jural dimension which characterises the state institution in a way true of no other human community. It is the state's task to bind all non-state jural spheres – their internal laws – to common, public norms of (tributive) justice. For example, through the law of contract the state binds a jural institution (contract) *within economic* relationships (commercial transactions) to the procedural-jural requirements of fairness and equity in the "public interest".

In every state community, however, the common law, coordinating non-state (private) jural spheres, is matched by laws which apply to all members (citizens) *within* the state community itself. This internal law of the state posits norms of justice to promote the general (public) interest in a formal (public) law. Criminal law is only one kind of public law directed at behaviour that constitutes violations of human interests concerning the integrity of the person and property. Criminal offences are actions which normally possess a serious moral quality (e.g. murder, typically, the intentional killing by a person of another human being) and which call for a criminal form of re-tributive justice. But all kinds of laws directed towards the welfare of the general citizenry is law of this public type which the state alone is competent to form in the public interest.

Law, Justice and Ethics

We have seen that legal justice refers to a normative dimension or "aspect", a jural "mode" or manner which we encounter in our temporal experience within the diversity of created reality. Human law in this juridical sense is the concrete expression of this aspect functioning within families, friendships, economic organisations and other societal structures, including the state which is characterised by the leading role that the jural aspect plays in that societal institution.

It may seem strange that in referring to the jural aspect as the normative basis of legal justice no mention has been made of ethics or morality. The reason for this is grounded in a requirement for an appropriately nuanced account of God's ordering for Creation. The divine Word calls forth a rich diversity of distinct and irreducible normative responses. Although closely related to the jural, the ethical dimension is an irreducible normative mode of real experience that is distinct from the jural dimension. Whereas the jural mode is characterised as a balancing and harmonising of a plurality of interests in a (re)tributive manner, that is, a giving of what is justly due and owing, the ethical dimension of created reality calls forth a human ethical response of human love characterised in its core sense of fidelity or "troth" and often

expressed in the notion of care.

In this view then, justice, as a normative jural concept, is not to be categorised as an ethical or moral "value". This does not in any way diminish the importance of the ethical dimension (or the jural, for that matter) of human experience. On the contrary, it allows us to explain the normative significance of the ethical or moral aspect within the full range of human contexts and for creational reality as a whole. But, significantly for the subject of this essay, it allows us to explain the normative importance of the ethical aspect for the jural dimension (and vice versa).

There are at least three key features of social reality which might lead one mistakenly to think that justice as a distinctive jural idea or concept could be viewed as an ethical concept.

Societal Universality of Justice

First, justice as a normative demand on responsible human action is not confined to *legal* contexts. But then we have seen that the jural aspect as that aspect which gives to law its characteristic normative quality is not confined to what is commonly understood as "law" or "legal" contexts. So the fact that questions of justice arise in such contexts does not at all imply the absence of the jural tributive dimension from which it might be concluded that we are now in the realm of the non-jural or ethical realm. Laws and rules are but the *concrete formalisation or* "*positivisation*" of that jural normative dimension. Not every resolution of a justice issue, within the diversity of social contexts where they may arise, requires, or results in, law or rules in that *form*-al sense.

Justice (the Jural) as a Prerequisite of Love (the Ethical)

Secondly, it is also true that fulfilment of the normative demands of morality or ethics presupposes compliance with the strict retributive requirements of justice though the reverse does not necessarily apply. That is to say, fulfilment of the requirements of justice does not satisfy the full demands of ethical love or care. A parent who does not treat each of his children fairly, for example, by unduly favouring one child over other siblings in attention and in the provision of material sustenance, cannot be fulfilling the normative requirement of caring love that above all characterises the family bond. This, however, does not show that fairness or justice is an ethical norm but that the normative requirement of justice as a jural norm is a necessary *basis* for ethical behaviour. Hence fulfilling the strict requirements of (retributive) justice within a family context does not guarantee a loving or caring "atmosphere" within the family, though without satisfying those jural requirements the latter could hardly exist. A parent, then, who observes his or her "moral duties" of

justice within the family has not yet satisfied the full extent of the ethical requirements of love and nurture. It is said that the full requirements of morality are "supererogatory" or "aspirational" – they require something over and above what is our duty, what is justly owing to another.

Often, when we refer to moral *duties*, whatever may be the social context, we are still in the realm of the jural, of what is due and owing in justice to another. The opposition of "moral" duty to "legal" duty often only indicates the difference between a jural normative requirement that has been formalised in law (positive legal duty) however well or badly, and one that has not (moral duty). "Moral" here, in common usage merely has the meaning of unpositivised (jural) norm.

The Ethical Element within Justice and Law

There is a third feature of justice, a feature, perhaps more than any other, which might lead us to think that justice is merely a subset of the ethical, that it is a moral "value" or norm.

Now we have seen already in our discussion of the second feature mentioned above that the requirements of morality understood in a strict ethical sense of loving care, fidelity, etc. can only be met on a basis of justice understood in a strict (re)tributive sense of giving (dis-tributing) what is owed. Here is implied a close connection between justice and love in its ethical meaning. But there is another remarkable way in which the jural and ethical dimensions are connected which reveals the wonderful coherence of creational experience.

Up to this point in my discussion of the nature of justice, in both this and my earlier essay, I have relied on the central insight that justice refers to a distinctive normative mode of human existence (the jural) that stands along side a diversity of other aspects (both normative and non-normative). It could be said that what I have shown is that, however close the ethical and jural stand in relation to one other, the relation is an external one. Though conformity to ethical norms may assume conformity to jural norms the two are distinct from one other. Acting justly does not ensure one has also acted ethically in the sense of supererogatory demands of morality. Immoral behaviour such as lying may involve the infliction of perceptible harm in a jural sense that requires re-tributive restoration to the harm-sufferer; then again it may not. It is not all forms of dishonesty that demand a retributive response from the law, only those that involve, as well as a moral transgression, a disruption of the jural (tributive balance of interests), that is, "jural" harm.

But now we must observe that *within* the internal normative demands of

justice as a retributive manner of balancing interests, of giving what is owing, of restoring the harmony of interests where they have been disrupted, there is a potentiality for ethically or morally deepening, for enhancing, a strict retributive concept of justice. Let me provide some illustrations from both private law and public law.

Within the bonds of friendship, marriage and family, the moral norm of good faith, "troth" or "fidelity" plays a *constitutive* and a *leading* role. Fidelity is both a constituting element of such relationships and small-scale communities without which they could not exist. It also defines them as relationships of a moral ethical type in a way that is not true of business relations or organisations, or schools, churches, legal institutions, etc.

Within the law, however, we also find reference to the concept of good faith. For example, within the context of insurance contracts there is a well established obligation on both insurer and insured of utmost good faith (*uberrimae fidei*). What cannot be disputed is that "good faith" in this legal context does not have its full ethical meaning but is understood as a legal duty, the imposition of a jural norm within the common private law of the state. Its function is not to constitute a typical ethical relationship of the intimate kind displayed in friendships, marriage and family but to ethically enhance a legal relation (insurance contract) within the economic sphere of commercial relations.

This legal obligation aims, not to establish a confiding relationship of a intimate ethical type, but merely to safeguard the mutual interests of the parties to the contractual relationship which depends for its successful continuance, and for the performance of the mutual obligations and protection of mutual rights, upon a degree of good faith on both sides. It is possible in a range of different economic contexts to form contractual relations without a general requirement of good faith. But within the history of Western law it has been found that ethically reinforcing legal relations in this way enhances the legal protection of commercial interests and thereby advances the interests of commerce and the general welfare of society.

The need for such ethical reinforcement within the jural sphere is often a response to a general lack of morality within commercial relations and provides a form of legal retributive justice that is ethically "opened up". But it should be understood that such moral enhancement of law is not a substitute for ethical behaviour but rather addresses the jural effects, the harms inflicted on others' interests, the injustices that result from commercial immorality. We can say that the legal requirement of good faith has an ethical meaning

analogous to its fully ethical meaning. *Good faith, as a legal duty, opens up the jural requirement of justice in a direction that points towards good faith in its original ethical sense.* Good faith has always been, within human temporal experience, from the original acts of Creation, a constitutive requirement of intimate (caring) human relations. But this has not been the case with non-intimate economic relations (e.g contracts). Thus in Common Law legal systems the legal maxim *caveat emptor*, "let the buyer beware", has often been cited as a feature of their commercial laws.

The ethical element within the criminal law is probably more widely appreciated. In a retributive regime of criminal law reaction which criminal infractions evoked in former times may have resulted in the infliction of punishment for harm caused to another without reference to the state of mind of the transgressor. Fault or guilt need play no part in a system of justice which aims to exact criminal legal retribution, albeit on the basis of a principle of punishment proportionate to the criminal harm inflicted. Yet we would consider it barbaric within the system of law shaped by the Christian heritage to disregard the elements of guilt in both the establishing of criminal liability and in the form and extent of punishment exacted. The extent of fault or *culpability* will determine the type of crime a person is adjudged to have committed where his or her actions have with some degree of responsibility caused bodily harm to another.

There is, legally speaking, a difference between an intentional act and an act performed in a careless or merely reckless manner of which the law will take account. The difference is one of *culpability or blameworthiness* which reflects the entering of a moral dimension (fault or guilt) into the legal concept of accountability or responsibility But once again note that fault or guilt within the law does not have its original moral meaning. Morally, I may be adjudged to be at fault or guilty in thinking ill of another or in having adulterous intentions, of being guilty of having *unloving* or *unfaithful* thoughts, without ever expressing those thoughts in outward, legally reproachable actions. *Legal or jural fault*, however, always carries an implication of perceptible damage to others interests requiring a retributive re-balancing or harmonising of the same.

A final example is taken from the realm of public law. Within the private law of business partnerships there is a long established duty of confidence and trust (fiduciary duty) mutually owed by each partner to every other. Within the (public) constitutional law of states and in international public law it is recognised that state authorities owe similar fiduciary duties to indigenous peoples within their territories. The increased emphasis on these duties has come about with a greater awareness of the oppressive power which colonisers

wielded over vulnerable indigenous peoples within the lands and territories which European nations were colonising in earlier centuries. The ethical enhancement of law within this context has been expressed in New Zealand law through recognition by our Court of Appeal of "principles of partnership" that are said to be implicit in the Treaty between Maori and British colonisers which established the presence of colonial power in Aotearoa (New Zealand). The concepts of fiduciary duty and trusteeship are embraced within these (jural) principles. But once more it must be clearly understood that such principles are not ethical or moral principles in their full or original ethical sense but have a specific retributive or jural sense of justice, that which is properly owing, in this case, that which the partners, the "Crown" and the Maori people, mutually owe each other in justice.

The jural element within the ethical dimension

We have discovered within the jural aspect of our experience an internal ethical element. So we find, also, that within the moral or ethical aspect there is a jural, retributive element.

The moral dimension of human life is universally present in all kinds of relationships. But it is present in specific types of intimate relationships characterised as relationships of trust and confidence, such as families, friendships and marriages. Within the moral dimension of such characteristically moral or ethical relationships and institutions there is a jural element which expresses itself in the requirement to attain a retributive balance in our *moral* obligations amongst the various personal and societal contexts in which we function. So, for example, I must balance the obligation of love and care owed to my child with the obligation of love owed to my spouse. How familiar is the complaint of spouses that they have devoted so much time and energy to children that they have neglected their own marital relationship. And yet in the course of marital and family life it is also appreciated that there are times when children require of parents more in the way of nurture and care than at other times. Getting the balance right is difficult. And amongst all the obligations of love owed to others it is all too easy to neglect one's own welfare demanded by love for self ("self-care").

Distinguishing the internal ethical element within the jural aspect from the internal jural element within the ethical aspect

We can see now that within each of the jural and ethical dimensions there is an element of the other; there is a role played by the ethical within the jural and a role played by jural within the ethical. Yet the manner in which these these internal elements function are not identical. We have seen that the ethical dimension operative within the state law (jural aspect) plays an *enhancing* or

deepening function but *not a constitutive* role. In other words, laws and regimes of law can exist without that ethical element coming to concrete realisation within a specific period of history. But it can be strongly argued that without a minimal display of the retributive balancing of ethical obligations, that is, without the internal jural element within the moral coming to concrete expression, the ethical norm of love itself cannot display itself either.

Hence the jural dimension within the ethical, unlike the ethical within the jural plays a *constitutive* and not merely a deepening or enhancing role. Difficult and imperfectly realised as the requirement of retributive balance may be the, internal jural requirement of balance within our ethical obligations – doing "justice" to all our ethical responsibilities – is nevertheless an essential element for being a loving and caring person with respect to friend, spouse, child etc.

"Moral" justice and "jural" justice

But now we must observe another critical distinction in order to avoid confusion which might arise from earlier observations made in relation to the universal jural dimensions of human relations. Doing "justice" to my multiple ethical obligations owed by me as parent to child within the family, as husband to wife in the marital bond, as loyal employee to employer, as faithful companion to friends has to be distinguished from the distinctive jural obligation of justice that arises in those very same contexts.

Earlier I said that a parent who treats one child less favourably than other does injustice to the child or children not so favoured. So too where a parent administers "punishment" to a child without sufficient justification, for example, confines a child to her bedroom for an alleged wrong she did not commit (the parent did not believe her true story that the "dog" did it!). This is a case of injustice, a breach of the jural retributive norm. A parent who persistently acts unjustly to a child can never truthfully claim to love the child because the retributive norm of justice is the normative foundation for parental love. Parental duties are actions that are owed in justice by mother and father to children as members of the family bond.

Failure in these jural obligations *within* the ethical bond of the family are a necessary foundation for loving nurture. But they are to be distinguished from the jural element within the ethical dimension of that family relationship. The latter has only an analogous jural meaning in the same way that the duty of good faith in the law has a sense analogous to its original ethical meaning of good faith. Analogous, because good faith has a retributive normative

meaning within the law. Yet within the ethical dimension of normative caring love and good faith this jural analogy of retributive balance within our caring behaviour is an essential component.

But how important is it really to make these subtle and rather difficult distinctions? In the following section I will try to briefly indicate with reference to the debates surveyed at the beginning of this article how these distinctions and the perspective presented here and in my earlier excursus on law and justice may be of practical relevance. They will be considered in reverse order beginning with the debate over immoral law.

A Reformational Perspective on Law and Morality: the Debates

Immoral Law

From our examination of the function of the internal moral element within the jural dimension of experience it can be seen that "justice", as used in our everyday language, can be employed in two related but quite distinct senses. One sense refers to the concrete positivisation of the jural norm of (tributive or retributive) justice in the rules and principles of actual human institutions. The laws actually formed by *state* institutions are what most people usually mean by the phrase "legal justice". It is curious, however that this form of (positive) "justice" is often criticised for being "unjust" or "unfair". Such criticism could merely be directed at the unjust *implementation* of an otherwise just law. But as often it could be directed at the law itself as being unjust. For example, those who oppose capital punishment would regard a law that provides for death as a possible punishment for murder to be unjust. Nevertheless, it would not be considered a mistake to say that the law providing for capital punishment is part of the system of legal justice administered by the state. How do we explain these different, but closely related, applications of the term "justice"?

By referring to "the law of the land" as a system of justice we recognise that in order for law to be successfully formed there is required a positivisation of the jural norm, a giving of concrete expression to the functioning of the jural aspect in human life in a better or worse response to the universal, divinely-sourced retributive norm. A concrete law has many dimensions all of which are sourced in irreducible, universal aspects or ways in which Creation functions. A law has physical properties in the sense that it appears as an arrangement of visible signs or symbols on physical material (paper) or in physically based media such as electronic data. The distinctive language of the law reveals a lingual dimension. But it is the jural mode or aspect that "qualifies" the thing in question as a *legal* phenomenon, as a law. Without a positivising of the

jural retributive normative aspect nothing exists that can be truly called a law.

It will be recalled that this retributive aspect was described as "a balanced harmonising of a plurality of human interests according to a standard of proportionality and in a *retributive manner"*. All the elements implicit in that description are necessary internal components of successful law-formation. So, even a criminal law, which imposes death as a penalty for a crime, presupposes such a retributive manner of response to criminally harmful behaviour. A law, however, which merely deprives persons or communities of rights without any apparent justification grounded in the jural retributive norm can hardly be called law at all.

Though a law may be open to the criticism of being unjust, for a thing to be law at all requires the formation or positivisation of necessary constitutive elements both external (for example, *physical* expression in statute books, law reports, etc.) and internal (for example, a *balancing* and *harmonising*, of interests) to the jural aspect. The existence of valid law as a concrete jural norm or standard of behaviour, therefore, whether or not it measures up to some normative *ideal* of justice, is impossible without the embodiment of a normative response to the creational jural norm of retributive justice. In this sense any valid law necessarily is a form of justice however imperfect it may be.

But when we say that law ought to be just or that a law is in fact unjust, or when we say that this social problem, dispute, conflict etc. demands a just resolution, whatever the context we are appealing to some normative *ideal* of justice. And where this appeal is to an ideal shaped by Western ideas of justice we are in fact appealing to a concept of the jural norm that historically has been enriched by ethical concepts of good faith, human responsibility, mercy, conscience etc., and by the modern tradition of human rights grounded in a concept of human dignity, all of which are deeply rooted in the Christian faith.

This clarification of two fundamental senses of justice allows us now to address the central issue in the debate over the juridical status of unjust laws with specific reference to the debate between the legal positivist H L A Hart and the positivist critic Lon Fuller over the legal status of Nazi law. From our reformational perspective we can agree with the contention of Hart's legal positivism that the existence of valid law is one thing and its "morality" (justice) another. In other words legal positivism has emphasised the fact that in order to evaluate law as good or bad, as just or unjust, one must first establish that a law has been validly formed or posited. And, logically, it does not follow from the (normative) fact of a law being unjust that it is not a

valid law as the natural law legal philosophy based on the scholasticism of Thomas Aquinas is supposed to hold. In reformational terms, from the fact that an instance of genuine positivising of the retributive norm in a law fails to measure up to an *ethically enhanced ideal of justice* it does not follow that there has not been a successful formation of law.

The criticism that can be directed at Hartian positivism, however, concerns its notion of what is valid law. Its rejection of Fuller's contention that, irrespective of a law's substantive immorality (e.g. arbitrary deprivation of property of Jews based on racial prejudice), a purported law can fail to attain the status of valid law through failing to observe inner "moral" requirements of legal positivisation is grounded in insufficient insight into the internal normative character of the jural dimension. Fuller's inner "morality of law" points to the internal *constitutive* normative elements of the jural aspect which are required to constitute valid law as legal justice in the sense of a valid positivisation of the retributive jural norm. For example his normative requirement that the law be free of contradictions points to an inner *constitutive logical* requirement of a juristic kind *within* the jural norm of retribution. Similarly his notion that clarity is an important constituent of legality points to a normative constitutent for the effective positing of law and jural norms. Words of a statute that are so unclear as to be incapable of sensible interpretation would be ineffective to constitute a valid law notwithstanding their statutory form.

It would appear then that at least some instances of Nazi "law" failed to meet the internal constitutive normative requirements for positivising valid law, not merely because they were unjust in an ethically enhanced sense, but because the grossness of their injustice indicated a complete failure to positivise the minimal requirements of retributive justice in its strict constitutive sense. It is this insight that Fuller had grasped, if somewhat unclearly and incompletely, by referring to the internal "morality" of law.

Legal positivism, therefore, incorrectly characterises as law acts which display the mere outward form of law (statute) but which are not genuine normative responses to the jural norm and, therefore, are not themselves genuine positive jural norms of conduct requiring compliance. From our perspective, however, both Hart and Fuller can be criticised for failing to acknowledge that the source of legal normativity lies in the *universal* normative structure of the jural dimension of created reality. For lack of this insight they, and many other modern legal theorists, are preoccupied with state law as the archetypal expression of the jural dimension. They overlook the plural expression of that aspect in the various internal legal spheres of non-state institutions

communities and relations which have been identified in this article and in my earlier essay.

Legal Enforcement of Morality

Assuming fairly general agreement in a society that a particular behaviour is immoral, for instance, prostitution, the question often arises as to whether and to what extent such behaviour ought to be legally proscribed or prohibited. As between a prostitute and his or her "client" assuming the "service" provided is consensual the result of mutual agreement by adults, it might be argued there is no victim and that to legally proscribe such behaviour is merely using law to express disapproval of immoral behaviour. This argument has been used against the legal proscription of sex between consenting male adults, although in this case the gay community and gay life-style supporters would strongly argue that such behaviour is not immoral. It is not my intention here to address the issue of whether such behavior is immoral from a Christian standpoint but to indicate the proper role of law in relation to uncontroversally immoral behaviour, for example sexual abuse of children by paedophiles.

It will be recalled from my account of law and justice that in speaking of law in this context we are referring to *state* law that has the function of coordinating and integrating the inner jural dimensions of external non-state communities, institutions and relations in a *jural manner* through re-harmonising the disrupted (re-)tributive harmony *within* the various non-state spheres of life – family, marriage, business, education, etc. This is accomplished primarily through "civil" or "private" law State law, however also binds all individual citizens and institutions within its jurisdiction, internally, into a public community of law through promoting in a legal fashion their healthy flourishing according to some conception of the common good or public interest. This "public" law takes many forms. For example, the provision of public health, social welfare, educational benefits and services and/or the funding of such services can only be implemented through public legal authorisation (public law).

Both public and private law, in their formation and application, involve a retributive manner of balancing of actually or potentially conflicting and competing jural interests within both the non-state and the state communities. In other words, state law is limited by its characteristic jural aspect to the providing of legal justice. Within the reformational perspective this irreducible jural function is distinct from the characteristically *moral* function which characterises non-state communities and relationships such as families and bonds of friendship. Hence a state *cannot* act as a real substitute for members of those ethical or morally qualified communities in respect of their

characteristic ethical or moral dimensions. That is to say only parents or kin can love, care for, or nurture their children *as parents or kin*. Nor can the state or its law replace the fidelity or good faith that is a necessary moral constituent of intimate personal relationships. It can, however, *within the jural sphere* of those relations and communities address the harmful disruption of jural interests, the injustices, that occur within those communities.

As a matter of justice, in the interests of the child and of the general public, parents may rightly be compelled to fulfill their parental (moral) *duties*, that which is owed in justice to the child and the community as a whole, for example, the duty to ensure the child is provided with formal education. Not to do so is not merely to be uncaring or unloving it is to inflict harm on the child and the wider society by depriving both of the benefits of formal schooling. For that reason the state is justified in legal intervention. Similarly, the state cannot in the jural manner of its acting make up for the infidelities of human relationships, for lying dishonesty and disloyalty and lack of good faith, whether it be in arms-length commercial relations or more intimate personal relationships, but it can address the injustices, the jural harm, that results from such immorality and unethical behaviour within its private common law and, in the public interest, *promote* ethical behaviour.

It is only where there is a gross and fundamental abdication of responsibility within a particular social sphere such as the family, or where private business enterprise is unable to meet pressing material needs, that the state is ever justified in establishing by law a state-provided substitute for parents or state-run business as a matter of public justice (in the public interest).

Criminal law addresses itself to jurally harmful behaviour (injustice) the harmful nature of which is regarded as especially serious in both a personal and social sense owing to its (im)moral dimension. An inveterate liar may do untold (moral) damage to his and other's personal relations. But lying will not attract the attentions of the law unless it expresses itself in the form of *fraudulent* conduct that damages the interests of other persons in an unjust fashion.

Murder is unlawful and the perpetrator subject to legally sanctioned punishment, not simply because the act is immoral, but because he or she caused damage to the jural interests of another. It is, however, the moral quality of the unjust act, the presence of guilt, fault or blameworthiness accompanying the act, usually, through it having been *intentionally* carried out, that makes the injustice so serious from the point of view of both the victim and the wider society. For that reason the unjust act is labelled not

merely as a wrong committed against another but also as an act that is damaging to the interests of society as a whole. Therefore, in the public interest it is subject to criminal law and its *penal* sanctions and not merely to the law of civil wrongs and its civil forms of redress. Civil law, as we have seen in the case of contract law, also takes account of the moral character of interpersonal actions by demanding in many instances the fulfilment of the obligation of good faith understood in its jural (contractual) sense. However, it is the more seriously harmful character of the jural harm caused by human actions such as interpersonal violence that differentiates crime from civil wrong and that differentiates, for example, criminal fraud from mere civil fraud.

The difficulty with actions such as sexual intercourse between adults concerns the question as to whether and to what extent there is jural harm either to the one or both of the sexual actors, and/or to the society at large. Even non-violent sexual acts between consenting adults performed in private, if generally regarded as deviating from morally normative behaviour for *all* adult persons, may be viewed as socially harmful if widely practised and if that practice is encouraged by others. The issue then may not be whether or not the law ought to take an interest in such behaviour but concern the appropriate form of its intervention. For it has been convincingly argued that the harm done to the rights of others through the invasion of privacy may outweigh any social benefit from *enforcing* moral behaviour through the criminal law.

Perhaps the state ought to promote socially normative sexual behaviour through supporting education programmes? However, the examples of homosexual acts and abortion are controversial precisely because of the lack of social consensus on the question of the (im)morality of such practices and therefore also on the question of the harm to the jural interests of individuals and society.

Nevertheless, whatever view one takes on the morality of such behaviour (state), law can only play a part via the functioning of its jural aspect. The latter addresses itself to the primary issue of justice by means of its retributive manner of weighing and balancing the jural interests (rights) concerned – in the case of abortion, those of the mother, the foetus and the wider community (public interest). How that balance is struck, how those interests are all taken into account and harmonised will depend upon the particular *conception* of justice that comes to be expressed in the democratic political process or through more authoritarian forms of government.

Professional Ethics and the Jural Dimension

Homosexual acts, as with heterosexual acts, partake of a moral character

because they typically occur within intimate human relationships that are ethically or morally qualified. In other words it is the ethical or moral dimension which characterises that kind of human relationship though they also display many other aspects. Sexual intercourse for animals and humans is a biological act, is founded in the biotic function of animal and human life. But only for human creatures is it also a moral or ethical act, an act that cannot avoid complying with, or contravening, the ethical norms of care and love. Sex carried out for mere sexual self-gratification is immoral because it displays a lack of care and love for the other person that is a standing obligation for every intimate human relation. But sexually founded relations are not the only kind of ethically qualified relationships. Friendships also are characterised by the mutual love and concern, loyalty and good faith that is required to constitute marriages and families.

Indeed, we have seen that even for relationships and human communities that are not *typified* by their ethical quality, for example business or commercial relations, the ethical dimension still has an important role to play. Good faith, honesty, integrity etc. amongst business people fosters trust and openness in commercial dealings which can only enhance business and commerce in the types of human enterprise qualifed by the economic function. Moreover, we have seen that, in the same *retributive manner* that state law seeks in furtherance of the public interest to promote those human relations and communities displaying a typical ethical qualification discussed above, it also seeks in a retributive manner to promote relations and organisations *within the jural sphere* of contractual relations as a response to the calling to do justice within economic relationships. This positive jural function includes promoting the ethical dimension of such relationships, etc. through such legal concepts as good faith.

There are however, another kinds of relationships displaying an ethical dimension where the law and the jural aspect have a role to play. These are broadly described as “professional” relationships. These relationships involve the provision of services by those with training and competence to provide them. The examples of issues and debate within professional ethics provided at the beginning of this essay were taken from the specific field of legal ethics. Most of the following, however, applies to professional ethics in general.

The nature of the relationships between doctor and patient, accountant and client, teacher and pupil, or lawyer and client, is such that in order for them to become established as ongoing and successful relationships requires as a necessary *constituent* that there be a relationship of trust and confidence between the parties. Although the parties to such relationships may also enter

into an economic relationship – a contract whereby the professional is paid for her service – it is the *fiduciary*, *faith, trusting, or confiding* element that characterises the professional relationship itself. The professional has to be able to completely trust the client, patient, etc. to furnish accurate and truthful information about herself and the matters concerning the service which he or she is to provide. The client, patient etc. must be able implicitly, not merely to rely on the technical skills of the professional, but also be able to trust the professional to promote and safeguard the interests of the client and to maintain confidentiality in respect of all information relating to the client.

It is the client, patient, etc. who is especially vulnerable in this mutually trusting relationship. This is so because of the harm which he or she may suffer if the professional abuses his or her position of knowledge and expertise by using information and/or economic resources of the vulnerable party acquired in the course of the relationship in order to serve the professional party's own interests or the interests of others. Trust and confidence is what typifies such professional relationships. For that mutual trusting state of affairs to come into being requires qualities of good faith, trustworthiness, honesty and loyalty as a necessary *ethical foundation*.

Now a client or a patient who tells a lie about himself or his affairs to the lawyer or doctor may very well damage the relationship but will rarely damage the interests of the professional in any substantial way. In fact such untruthfulness probably only affects the ability of the professional to further the best interests of the client. However, a client or patient is much more vulnerable to harm in a jural sense. A solicitor who misappropriates the funds of his client not only acts unethically – in an untrustworthy and dishonest manner – but has at the same time inflicted economic and other harm in a manner that constitutes a substantial injustice to the client.

Whatever may be their motivations, professional organisations have realised how critical for the existence and continuance of professional relationships are the *ethical* obligations that their members owe those whom they serve. Such bodies therefore have their own codes or rules of conduct which contain both ethical ideals and aspirations for their member to aspire to and also rules or duties which, if transgressed by members, entail liability to being subjected to the profession's internal disciplinary processes. Sanctions such as expulsion from the professional body and the removal of the right to practise in that professional capacity may be imposed.

Governments, recognising that the maintenance of healthy professional relationships is important not only for the professions themselves but for

particular victims of unethical professional dealings and for the wider society at large, give legal support to the establishment of professional internal codes of conduct, but also impose additional public legal requirements. First, they may mandate that certain professions formulate their own code of conduct if they do not already possess one. Secondly, they may require in the public interest that those codes observe minimum public legal standards in the norms of behaviour they impose on members and in the processes of discipline and sanctioning which they administer. This public law protection is matched by state private law that provides state legal redress for victims of professional misconduct within the professional private relationship over and above any redress that may be available via the internal rule-governed processes of the profession. State provided legal redress is found in the law of fiduciaries which is specifically addressed to such professional and other trust-based relations as well as in the general law of civil obligations (contract, tort, restitution, etc).

Applying our perspective developed here and in the earlier essay we see state law fulfilling its public legal role of binding the internal jural spheres of non-state relationships, in this case, relationships qualified by the dimension of trust or faith, to public legal norms of justice in a retributive manner. As in the case of contractual relations the state requires the exercise of good faith within these fiduciary relationships as a matter of justice ("legal morality"), both in the private sense that requires addressing the injustice as between the parties to the relationship (*inter partes*), and also in the communal sense that refers to the general interests of the public community (the "common good").

Finally, the state legal regulation of *legal* ethics within the *legal* profession is of especial public importance. This is because the service which that profession provides is itself concerned with facilitating access to the benefits in the form of powers, rights and duties which the state provides in carrying out its jural calling of effecting public justice through its private and public law.

Conclusion

From the biblical truth that God has created a richly diverse world which functions in different *ways* and contains different *kinds* of things communities and relationships, Christian thought has arrived at an insight into the diverse irreducible universal dimensions or aspects of human experience. The normative quality of this diversity is found in the distinctive normative aspects, such as the jural and the ethical, with which we have been primarily concerned. But we have seen that normative diversity within Creation also displays itself within each of these dimensions. Thus, within the jural

dimension and its expression in concrete law there is contained an ethical (and an economic, aesthetic, social, historical, etc.) element which always retains its jural sense of retributive justice. So also in the ethical there is jural element that never loses its ethical sense of caring love or faithfulness. Only from these key biblically grounded insights is it possible to explain the complexities of the relationships between law and morality, between the jural and ethical aspects and the problems and debates which arise in respect of those interconnections.

The perennial debates over the issues of immoral law, the legal enforcement of morality and more recently over the place of ethics within the professions will continue to perplex and confuse without a contribution from a Christian perspective that takes account of these reformational insights. It does not mean that such problems will be easily resolved because they involve complex and profound considerations that require persevering effort and deep practical wisdom as well as theoretical insight for their practical resolution.

More importantly, the radical imperfection of humanity that continues to religiously direct its faith towards idols of its own making will ensure that these problems of justice and ethics will persist in the human condition, prevent clear insight into their nature and impede their removal from human experience. Ultimately, it is only the transcending spiritual power of the One True God, redemptively revealed in Jesus Christ, and working through the obedient faith of those who choose to follow Christ that will finally overcome injustice and immorality in human life. Human temporal law is a limited means for achieving that end in a fallen world, but its effectiveness is dependent upon the Spirit which gives it life.

This observation is not the mere statement of a utopian aspiration but in the case of Western legal traditions, is justified by historical fact. The undoubted benefits which Western law has contributed to peace and justice in international relations and to the internal peace, justice and good order of individual states could not have been realised without the establishment of the Christian faith and its outworking in the concepts and institutions of the law.
