

# Lucky in Your Judge

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*This Article considers the role of luck in judicial outcomes, stemming from differences in the moral and legal views and reasoning of the judges who decide them. It suggests that luck is ineliminable from a system of positive law and that although it poses important moral problems of unpredictability, arbitrariness, and unfairness, it is not easily remediable. It is certainly not remediable by replacing a system of positive law with a system of adjudication addressing moral issues directly. Nor is it remediable by insisting on integrity as a feature of judicial decision-making.*

## I.

What role should *luck* play in determining the outcome of legal proceedings? We think of law as sometimes having to grapple with issues of luck — moral luck, for example, in the happenstance of a would-be killer's being charged with attempted murder rather than murder (because his shot, which could have been deadly, just happened to miss the victim's heart),<sup>1</sup> or in the happenstance of a driver whose carelessness led to near-miss rather than a collision.<sup>2</sup> We know that such cases are difficult.

Beyond this, however, is the prospect that law itself should be a matter of luck — I mean the law that is applied to one's case. One could be lucky

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1 See Sanford Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Benjamin Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97 (2008).

2 See Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387 (David Owen ed., 1996).

or unlucky in the law that one is held to; lucky or unlucky because a norm that might have been applied to one's case is not applied (even though it is applied to other cases that are relevantly similar to one's own case); lucky or unlucky because the best explanation for the resulting disparity has to do with the judge who happened to be assigned to decide the case. One might get lucky or unlucky in one's judge. That is the prospect I would like to explore in this Article.

I have a memory of a case whose source I cannot trace (it may have been a law school hypothetical), involving a judge who said to a defendant acquitted at the end of a criminal trial: "You are free to go Mr. Smith. You were lucky in your jury." Mr. Smith sued the judge for defamation, and the question was whether judicial privilege protected this gratuitous observation by the judge after the trial had ended. The judge's insinuation was that most juries would have convicted Mr. Smith; being probably guilty, he was lucky to have stumbled upon a jury willing to entertain what most would regard as fanciful doubts about the case against him. I forget how the case ended (if indeed it ever existed — I can find no trace of it in the usual databases).

The idea that one might be lucky or unlucky in one's jury is not at all unfamiliar. The jury is largely an inscrutable entity and, to a party with any sort of case (short of a cast-iron one), it must seem something of a lottery whether this closeted body of twelve or fifteen citizens, supposedly selected at random from the pool of citizens generally, will find in one's favor. On the other hand, the element of luck may be most welcome to those who do not deserve it. "If I were guilty, I would be very happy to be judged by twelve good persons and true," wrote a columnist in the *New Law Journal* in 1997. "Since the jury system is such a lottery, there is better than a 50/50 chance of being let off due to the lack of intelligence or understanding of the jury."<sup>3</sup>

Of course, lawyers try to manipulate the composition of juries: there is a whole forensic science of this. They believe they can predict how certain kinds of jurors will respond to certain types of testimony. But this practice no more eliminates the impression of luck from a jury trial than the skill of bookmakers and the confidence of professional gamblers eliminates the impression of luck from a horse race. Juries are fickle and unpredictable things. Moreover, it is not that their unpredictability to humans is valued — as it was in a sense in earlier forms of trial by ordeal ("You are free to go, Athelstan. You were lucky in your ordeal").<sup>4</sup> On the contrary, we

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<sup>3</sup> A. Bell, *Twelve Men and True! Bah Humbug*, 147 *NEW L.J.* 1857 (1997).

<sup>4</sup> The odd thing is, however, that trial by ordeal was supposed to eliminate the element of luck surrounding any human attempt to infer a conclusion from circumstantial

hope and expect that the more compelling the evidence presented to them, the more likely (and the more predictable) the jury verdict will be, one way or the other. But since the compellingness of evidence is often a matter of opinion, everyone accepts that the element of luck is pretty much ineliminable.

What Mr. Smith was lucky in was his jury's response to evidence as to matters of fact put before them. Juries may also respond in various ways to the law that is supposed to form the basis of their decision. In common law systems, there exists a phenomenon of jury nullification where a jury returns a verdict of not guilty even in cases where it is evident that the defendant has violated the law because the jury wishes to express a view on the undesirability of the law in question (or as applied to this case).<sup>5</sup> One has to be lucky to find a jury willing to do this. Two people with equally impressive cases may face quite different destinies — prison for one, freedom and celebrity for the other — based on being lucky or unlucky in regard to their respective juries' willingness to refuse to apply oppressive law to their case.

Legal systems face this element of luck with some disdain: luck may be present; we may wish it were not; we are certainly not going to take any positive action to promote it. So, for example, the United States Supreme Court has held that a defendant is not entitled to a retrial on account of some prejudice to jury selection, simply on the ground that a jury properly selected might have been more willing to acquit by "nullifying" the law under which he was charged than the jury before whom he was actually tried:

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice

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evidence, by substituting for that sort of judgment the infallible — albeit inscrutable — judgment of God. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 5-8 (1976).

<sup>5</sup> See J.C. Smith & D.J. Birch, *Case and Comment* — R. v. Ponting, 1985 CRIM. L. REV. 318 on the refusal of an English jury to convict civil servant Clive Ponting for a clear violation of the Official Secrets Act despite being ordered directly by the judge to convict him. See also Teresa Conaway, Carol Mutz & Joann Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004).

should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.<sup>6</sup>

While luck of this sort may be ineliminable (at least without changes to the jury system that might be objectionable on other grounds),<sup>7</sup> a defendant has no right that there be a lottery of this sort from which he might conceivably benefit.

## II.

In September 2006, the *New York Times* ran a series of articles on town court justices operating in the small municipalities of up-state New York. These justices are elected officials, who have jurisdiction to hear small claims and minor criminal complaints in the townships where they reside. They are rather like English "Justices of the Peace" in that they are not required to have any legal training; but unlike English Justices of the Peace (JPs), they sit alone in their courts (JPs characteristically sit in panels) and they do not work with legally qualified clerks who can advise them as to the law. The *New York Times*' articles revealed many cases of abuse that stemmed from the justices' ignorance of the laws that were applicable in and to their courtrooms.

[S]everal people in the small town of Dannemora were intimidated by their longtime justice, Thomas R. Buckley, a phone-company repairman who cursed at defendants and jailed them without bail or a trial . . . Feuding with a neighbor over her dog's running loose, he threatened to jail her and ordered the dog killed. "I just follow my own common sense," Mr. Buckley, in an interview, said of his 13 years on the bench. "And the hell with the law."<sup>8</sup>

In 20 years in office in Haverstraw, north of New York City in

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6 Strickland v. Washington, 466 U.S. 668, 694-95 (1984).

7 See the arguments in Nancy Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999) and in Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 312-24 (1996).

8 William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1.

Rockland County, Justice Ralph T. Romano drew attention for his opinions on women . . . . Arraigning a man in 1997 on charges that he had hit his wife in the face with a telephone, he laughed and asked, "What was wrong with this?"<sup>9</sup>

Gary Betters thought he understood the law as well as any average American. A school psychologist, he wanted \$1,588.60 he said the nearby village of Malone owed him for helping run a summer recreation program. When he brought a small claim in Duane Town Court, he expected that the judge would listen to both sides, then rule. . . . Although no one showed up to defend the village, Justice William J. Gori started the trial anyway. . . . [A day or two later] Mr. Betters received the news in a letter from the court: his case had been dismissed. No reason was given. "I cannot understand how a defendant can win when they don't even show up," he said. . . . Justice Gori, it seems, had gone to the village offices in Malone before the trial, interviewed the village's chief witness, then informed the village lawyer that he had decided to throw out the case. Justice Gori [said] that he had never heard of the elementary legal rule that bars a judge, except in the most extraordinary circumstances, from secret contact with one side of a case.<sup>10</sup>

The individuals who appeared, respectively, before Justices Buckley, Romano, and Gori were each of them unlucky in their judge. Mr. Betters might have gotten a judge who understood that there was a rule against secret judicial contact with a defendant; the woman who was hit with a telephone might have gotten a judge who understood that the law prohibited domestic assault; and the unfortunate dog, whose owner appeared before Justice Buckley, might have hoped for a judge who applied the law rather than his own "common-sense" to disputes between neighbors. Law in these and the many other cases referred to in the *New York Times* became a lottery, and the normal mechanisms of appeal did not seem to operate to correct this because very few local lawyers wanted to fall foul of town justice by taking their decisions to a higher court.<sup>11</sup>

One feels naturally outraged by all this. But many people say they value

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9 *Id.*

10 William Glaberson, *Delivering Small-Town Justice, With a Mix of Trial and Error*, N.Y. TIMES, Sept. 26, 2006, at A1.

11 *See id.*: "Mr. Betters decided to appeal in county court. But he could not persuade any lawyer to take the case; several, he said, told him it would not be in their interest to take on a town justice."

the informality of the "poor man's justice" meted out by these courts.<sup>12</sup> Luck plays all sorts of roles in our lives. How our marriages and jobs work out, what our children grow up to become, whether the weather ruins a crop, what happens to interest rates. It's all a matter of luck. What is wrong with luck playing an additional role, in this way, in the rules that we end up being judged by? But I think that luck in the law is something people find quite troubling. Why?

Three answers can be imagined, all of which will be important in later sections of this Article. One answer refers to the familiar Rule-of-Law value of predictability. The others refer to problems of arbitrariness and unfairness. All three refer to matters of moral concern, not just to the self-interested concerns of individuals.<sup>13</sup>

(i) *Predictability*. We value predictability in the law — knowing in advance what law will be applied to one's case, knowing where one stands so far as the law is concerned. Without such predictability, it is harder to plan. But with it, one can treat the law just like any other constraint in one's environment and design one's actions intelligently to best promote one's good under these calculable circumstances. F.A. Hayek put it this way:

In that they tell me what will happen if I do this or that, the laws of the state have the same significance for me as the laws of nature; and I can use my knowledge of the laws of the state to achieve my own aims as I use my knowledge of the laws of nature. . . . The effects of these man-made laws on [my] actions are of precisely the same kind as those of the laws of nature: [my] knowledge of either enables [me] to foresee what will be the consequences of [my] actions, and it helps [me] to make plans with confidence.<sup>14</sup>

Law as a matter of luck is like the weather in England. One never knows what will happen, so one has to take all sorts of precautions. One has no assurance that any particular interest will be protected, and one is constantly

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12 *See Id.*: "An unfamiliarity with basic legal principles is remarkably common in what are known as the justice courts, legacies of the Colonial era that survive in more than 1,000 New York towns and villages. For generations, justices have hailed them as 'poor man's courts,' where ordinary people can get simple justice with little formality or expense."

13 I am grateful to Chaim Gans, *Complaining About Being Unlucky with Your Judge* (Jan. 5, 2007) (comment prepared for the conference on Moral and Legal Luck, the Hebrew University of Jerusalem and Tel Aviv University, on file with *Theoretical Inquiries in Law*), for insisting on this point.

14 F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 142, 153 (1960).

anxious about what the effect of one's decision on one's future well-being will be. An important element of most theories of the Rule of Law is that those who make and administer state policy should do what they can to diminish its unpredictability and provide a solid and reliable basis for calculation by ordinary citizens. Law is supposed to be the means by which that is done, for when state policy is projected and administered through the medium of law, it is presented in general terms publicly in advance so that it can be used as a point of orientation by those whose affairs are likely to be impacted by it.<sup>15</sup>

(ii) *Non arbitrariness*. If it really is a matter of luck what (if any) law is applied to one's case by a court, then there is problem that can best be described under the heading of arbitrariness. The outcomes of court decisions are serious matters for the individuals concerned; they can lead to financial loss, incarceration, stigmatization and non-vindication in a dispute. Individuals should not suffer these outcomes without good reason, and the applicable law is supposed to embody a sense of what good reasons are. If the best explanation of an individual's suffering a certain adverse legal outcome is that a particular standard happened randomly to be applied to his case, then that is more or less the epitome of arbitrariness.

(iii) *Fairness*. In addition to unpredictability and arbitrariness, there is something unfair about law if it operates like a lottery. Unfairness is particularly evident in cases where justice requires a comparative assessment: if the application of the comparative standard required by law is a matter of luck, then since the same measure may not be applied to one person's case as to another's, there is no guarantee that the outcomes of these two cases will bear the relation that comparative justice requires that they bear to one another. One person may be punished more severely than another for a less heinous offense; a defendant may be held to a much higher standard of liability than he (or others like him) ever benefited from as potential plaintiffs; and so on. (There will of course be similar haphazardness in regard to non-comparative justice. If what justice requires is that a person in a given situation get X, not because this is what others get but because this is what is fitting for that situation, then it is unfair if one does not get X simply because one was unlucky enough not to have the appropriate norm applied to one's case. The element of unfairness is just more readily visible

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15 Gans, *supra* note 13, has suggested that an unpredictable outcome is a matter of moral concern only if it is unjust. I do not accept this. In a community whose members disagree about justice, the importance of my being able to predict what will happen to me as a result of the operation of the law should not vary from one perspective to another, depending on the observer's views about justice.

in the comparative case.)<sup>16</sup> The requirement that like cases be treated alike is one of the key elements of the Rule of Law. Once again, therefore, we see that legality is imperiled when law is a matter of luck.<sup>17</sup>

*Together*, these three values — predictability, non-arbitrariness, and fairness — are the values that underpin the claim that law should not be random in its application to its subjects, and that those who contend with it should not have to hope for *luck*, or fear *bad luck*, in the law that is applied to their case. I say that these three values work *together*, and that will turn out to be important — for it may be that we can sometimes secure a sort of predictability from what might otherwise be described as a judicial lottery, but that nevertheless it is not the right sort of predictability, because it is artificially divorced from non-arbitrariness or fairness or both. I will discuss these possibilities further in at the end of Part V and in Part VI.

### III.

But maybe law is *inherently* a matter of luck. For example: two individuals, P and Q, engage in the same form of conduct in exactly similar circumstances; they both do action A in circumstances C with the same effect E. If P is judged under a norm, N<sub>1</sub>, that permits doing A in circumstances C and Q is judged under a different norm, N<sub>2</sub>, that prohibits it, then P is lucky and Q is not. It is lucky for P that *his* action was not condemned by N<sub>2</sub>, which condemned the exactly similar action by Q.

If P and Q are the inhabitants of different states or countries, then perhaps we are comfortable with this. P's luck is to live in a country or a state

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16 However, JOEL FEINBERG, *Noncomparative Justice*, in *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 265, 285-86 (1980) argues that noncomparative injustice tends to be more serious than comparative injustice.

17 Gans, *supra* note 13, argues that the principle of treating like cases alike can form the basis of a moral complaint about a person's treatment only when that person's treatment is unjust. This seems plausible, but it may gain some of its plausibility from an implicit assumption that it is clear to all concerned what is just and what is unjust. As I suggested earlier, *supra* note 15, treating like cases alike may have an importance of its own in a community in which people (especially officials) are in disagreement about what justice requires. In such a community, like cases' being treated differently might be a matter of concern to us quite independently of our judgments about the justice or the injustice of the treatment of either or both of the cases. I take it that this is the implication of Ronald Dworkin's argument concerning the (relative) independence of justice and integrity as virtues of a legal system. See RONALD DWORKIN, *LAW'S EMPIRE* 166 (1986).



that has not enacted  $N_2$ . From one point of view, the different treatment of the two cases is anomalous. But we accept that different legal systems have different norms. (Sometimes we positively value this diversity in the states that constitute a federation: we value the experimentation that the differences make possible.)<sup>18</sup> And if  $N_1$  and  $N_2$  are not administered by a single over-arching entity, then we cannot complain that anyone has treated like cases in a disparate way. The cases have been treated differently, but no one or no system has violated the precept: "Treat like cases alike."

If the different norms of the different systems are well-known to those, respectively, who live under them, then it may be odd for either of them to say that he was "lucky" in his law. Luck has nothing to do with it. If P knew the law (that applied to him) and counted on it, then the whole proceeding is one from which luck, in the ordinary sense, is absent. (P may count himself lucky to live in a society that has  $N_1$  rather than  $N_2$ ; but that's another matter.) However, if P had done A without knowing what the law was, then we might say that P was lucky in the law: he had no reason to count on the law of his state being  $N_1$  rather than  $N_2$ ; for all P knew it could have been  $N_2$ ; P just got lucky.

Legal positivism reminds us that all law is a matter of contingency.<sup>19</sup> Even within a given system, what the law is depends on what has happened (among the legislators), and what law is applicable to one's case depends on what has happened at a particular time (usually, except in the case of retroactive law up till the time at which one performs the actions to which the law applies). So, within a state or legal system, P and Q may be treated quite differently even

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18 Sometimes, however, we worry about failures of "equal protection" as between citizens of different states in a federal system. A worry of this kind is expressed by Ronald Dworkin, contemplating the prospect that, if abortion decision-making is decentralized in the United States (made no longer a matter of federal law), fetuses might be treated as constitutional persons in some states but not in others. See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 113-14 (1993).

19 Gans, *supra* note 13, argues that a positivist need not accept that all law ought to be a matter of contingency. Gans claims that a positivist, like anyone else, will wish for good law; he will not relish the prospect of a purely happenstance relation between the demands of law and the demands of morality. This is certainly true. However, even if he values a coincidence of law and morality, the positivist will still acknowledge that whether or not a moral truth is embodied in law depends necessarily on the contingency of the enactment of a law with a given content. And he may well say that this is a good thing: we are better off with legal requirements dependent on a contingency like clear enactment than we are in a situation where the existence of a law has a necessary connection with morality, but people disagree about what morality requires or what the appropriate necessary connection is.

though their cases are admittedly alike, because Q did A at time  $t_3$  whereas P did A at time  $t_1$  and in between these two events the enactment or recognition of  $N_2$  took place. P might have been planning to do A at  $t_3$  but for quite extraneous reasons jumped the gun and did it at time  $t_1$  instead. Once again, we would say that P got lucky in the law.

Luck of this kind reflects the inevitable contingency of positive law as to time of enactment. It might also reflect the contingency of positive law in regard to the mode of enactment. Laws are enacted by a process whose outcome is contingent on events that may seem random with regard to the merits of, for example, whether A is the sort of thing that should be prohibited. Whether A should be prohibited may seem a big deal morally, and the reasons that argue in favor of its prohibition may be anything but random, anything but a matter of luck. They may be matters of moral necessity. But, on the positivist account, moral necessity is not what makes things law. As I observed in *Law and Disagreement*, the usual mode of enactment is voting in the legislature among hundreds of representatives and that involves a purely statistical determination of whether there happen to be more representatives in favor of a given measure than against it.<sup>20</sup> Representatives are not men and women of great moral discernment and there may be only a fortuitous relation between the strength of the moral reasons and the proportion of votes cast in favor of a prohibition. Bills do not reason themselves into legal authority; they are thrust into legal authority with nothing more credible than numbers on their side. In various activities, we make decisions by tossing a coin, such as, for example, to determine which side is to defend which goal at the beginning of a football game. No one would think *that* an appropriate basis for determining which propositions should be accorded authority as sources of law. But counting votes seems much more like coin-tossing than like the process required to discern and apply compelling moral reasons.

So P might be lucky that previous attempts to enact  $N_2$  in the legislature had failed. They failed, not because of any reason relating to the merits of  $N_2$ , but just because a few representatives voted one way rather than another

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20 JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). It is possible to make law-by-voting look even more arbitrary than this. Among students of "public choice," Kenneth Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950) is commonly taken to have shown that neither majority-decision nor any other method of aggregation can guarantee that a coherent group preference can be constructed rationally out of a variety of coherent individual preferences. Under certain conditions, the aggregation method may yield the result that the group "prefers" option X to option Y, Y to Z, and Z to X, leaving it completely arbitrary where in this cycle we take "the view of the majority" to rest.

(maybe in order to secure some different deal or please a friend, or because they didn't know what was at stake, or for whatever other reason). Thomas Hobbes once made the following remark about legislation by assemblies. He said that in many cases of legislative defeat, "the Votes are not so unequal, but that the conquered have hopes by the accession of some few of their own opinion at another sitting to make the stronger Party." Therefore, they can be expected to try to see "that the same business may again be brought to agitation, that so what was confirmed before by the number of their then present adversaries, the same may now in some measure become of no effect . . . ." Hobbes continued:

It follows from this that where the supreme power to make laws is lodged in such assemblies, the laws are unstable, and are not changed to follow an alteration in the state of affaires or a change of sentiment, but according to whether a larger number of men from one faction or the other has found its way into the council; so that the laws there are tossed this way and that as on the waves of the sea.<sup>21</sup>

It may be completely a matter of luck where one's action falls in regard to this more or less random process of the laws and their positive enactment floating back and forth, as it were, upon the waters. This is why some have suggested that frequent changes in the law are an affront to legality just as unknown or unpredictable laws are, or laws arbitrarily and inconsistently<sup>22</sup> applied. Lon Fuller compared the evils of inconstant law with those of retrospective law<sup>23</sup> and cited Madison's observation in *The Federalist Papers*:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences . . . become . . . snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference

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21 THOMAS HOBBS, ON THE CITIZEN 124 (Richard Tuck & Michael Silverthorne eds., Cambridge Univ. Press 1998) (1642) (ch. X, para. 13).

22 Once again, I disagree with Chaim Gans's suggestion, *supra* note 13, that these phenomena can only be a matter of moral concern to the extent that at any given time, the law in force at that time is unjust. Constancy is valued morally in a way that is independent of concerns about justice and valued particularly in a society whose members are well-known to be divided about justice.

23 LON FULLER, THE MORALITY OF LAW 80 (rev. ed. 1964).

is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.<sup>24</sup>

We may say then that all positive law involves an element of luck, connected with its essential contingency and location in time. Relative to the enactment of a certain law, one is lucky or unlucky to be on one side or other of that date. And relative to the application to one's case of the content of the law itself, one is lucky or unlucky depending on what happens to have happened in the legislature or in or at one of the other sources of law. Such elements of luck are ineliminable, though their significance can be reduced by a certain amount of legal constancy.

#### IV.

Positive law is contingent and there is an ineliminable element of luck associated with one's subjection to it. The element of luck may be vanishingly small, however, in regard to the concerns of jurisprudence: if the law is long-established and does not change too often, then there is likely to be little in the way of arbitrariness so far as its application is concerning — provided all is well with other aspects of the legal system (I will deal with this in Parts V and VI) — and few problems about predictability.

With regard to a well-established piece of law properly administered, the main element of luck — good or bad — involved in its application is the happenstance of its coinciding or not coinciding with some substantively desirable outcome. I may be lucky in that the law applies to me in a way that protects or promotes what turns out to be my self-interest; I may be unlucky in that it applies to me in a way that involves a set-back to what turns out to be my interest. Unless I have an inordinate influence on the sources of law, this correlation may well be random. I win sometimes and I lose sometimes when well-established positive law is applied to my case. It is not unreasonable to expect that good luck and bad luck in this regard may cancel each other out over time. And, on the other hand, it is not unreasonable to say that if a person is constantly suffering bad luck in this regard — bad outcomes in relation to stable laws that are not to be attributed to his own poor choices — then that may itself indicate grounds for criticism

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<sup>24</sup> THE FEDERALIST No. 10 § 44, at 232 (James Madison) (George W. Carey & James McLellan eds., Liberty Fund 2001).

of the law as substantively unjust.<sup>25</sup> This matter is enormously important, but further consideration of it is out of place in this Article.

Self-interest is not everything, and I have already indicated that it should not be the main concern of this Article.<sup>26</sup> There is also the question of whether the law that applies to me is just. (I do not mean justly applied; I mean substantively just.) I may be lucky in the justice of the contents of the settled laws that apply to me or I may be unlucky on account of their injustice. As positivists are fond of telling us, nothing in the notion of law, nothing in the way laws are made, and precious little in regard to their formal characteristics (such as generality, prospectively, and constancy), guarantees that their demands and the demands of justice will coincide. The separability thesis (separation of law and morality) suggests that we cannot count on the justice of law.<sup>27</sup> That a given law is just is entirely fortuitous; so far as the citizen is concerned, it is a matter of luck. Since the coincidence of law and justice is a matter of luck, it seems that law is essentially arbitrary.

This is a serious matter. Justice after all is not trivial; it is the first virtue of social institutions;<sup>28</sup> nothing is more important than that justice be done. And yet, are we to say that law has an entirely fortuitous relation to justice? Or put it the other way round: legal outcomes matter to those who suffer them.<sup>29</sup> One can be killed by law, or incarcerated, ruined and stigmatized. Surely it matters that these outcomes correspond to real deserving or entitlement, or at least that it be good and right that they be borne by those who suffer them. Yet if the positivist thesis is right, all this is a matter of luck. From a moral point of view, it is good luck if you are killed, incarcerated, ruined, or stigmatized by a just law; but it might as easily turn out that one is killed, incarcerated, ruined, or stigmatized by an unjust law. And that is very bad luck indeed.

Would it not be better, then, if we were subject directly to morality and justice? Would it not be better if we were under the jurisdiction of natural law, concerning which there is not the same issue of a fortuitous relation between law and justice? If we are concerned about the arbitrariness of the

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25 See, e.g., Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); ERIC RAKOWSKI, *EQUAL JUSTICE* (1991); Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239 (2008).

26 See text accompanying *supra* note 13.

27 For the separability thesis, see H.L.A. HART, *THE CONCEPT OF LAW* 185-86 (rev. ed. 1994).

28 JOHN RAWLS, *A THEORY OF JUSTICE* 3 (rev. ed. 1999); Jeremy Waldron, *The Primacy of Justice*, 9 LEGAL THEORY 269 (2003).

29 DWORKIN, *supra* note 17, at 1.

sort of luck involved in our subjection to positive law, would things not be less arbitrary if people were subjected to natural law?

The question can be read as asking: Is there a God? If there is, and if God is prepared to apply natural law (or the objectively correct standards of justice) to us, then sure — things would be much less arbitrary. The only element of luck would be in the application of His mercy. That apart, if God were to apply natural law, we would be judged every time by the right set of standards. But so long as these wonderful hypotheses cannot be relied upon, the question at the end of the previous paragraph has to be read as asking: wouldn't things be less arbitrary if *people* — humans, down here on earth — administered natural law standards directly without the intermediation of positive law (with its problematically fortuitous relation to justice)?<sup>30</sup>

The answer in our tradition has been "No," and it is important to understand why. If we are subjected to natural law — and if God is not involved in its administration (at least for the time being!) — then we are subjected to the understanding of natural law of some human individual. And that subjection is likely to be at least as arbitrary and unpredictable — indeed as fortuitous in its connection with what justice or natural law really requires — as our subjection to positive law. This is because natural law is not easy to figure out and much of it is controversial, and there is no telling whose view of natural law one will be at the mercy of.

Going back to our earlier algebra, Two individuals, P and Q, who have engaged in the same form of conduct in exactly similar circumstances, may still be judged differently, because one of them is subjected to my calculations of natural law and one is subjected to your calculations of natural law, and it is entirely a matter of luck which is which and whether either of these calculations gets natural law right. Or even if I am the only judge, P may be judged by my best apprehension of natural law on a Monday and Q may be judged by my new and improved (but maybe still not much good) apprehension of natural law on a Tuesday. I am afraid there is no reason to think that this is a linear evolution to the direction of truth: R, who also did action A in circumstances C, may be judged on Wednesday and my third stab at getting the applicable natural law right may, for all we know, involve worse moral reasoning than either of the first two.

The argument here rests on ideas of John Locke. Locke asked: if there is natural law to govern us in the state of nature, why would we ever abandon that in favor of positive law? His answer was that in the state of nature,

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30 See also *supra* note 19.

*First*, There wants an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, and the common measure to decide all Controversies between them. For though the Law of Nature be plain and intelligible to all rational Creatures; yet Men being biassed by their Interest, as well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases.

*Secondly*, . . . there wants a known and indifferent Judge, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Mens.<sup>31</sup>

In this passage, Locke emphasizes vicissitudes of natural law application that include bias, excessive passion, ignorance and carelessness. But he might equally have emphasized what John Rawls called "the burdens of judgment" in these matters.<sup>32</sup> Natural law is difficult and complicated, and people inevitably approach it from different angles.<sup>33</sup> It is not innate; it does not disclose itself indubitably from the skies; figuring it out involves reasoning, study and application by fallible individuals in real time; and people of good faith may differ on what it requires:

It is unrealistic . . . to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain. . . . Many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason . . . will all arrive at the same conclusions.<sup>34</sup>

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31 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 350-51 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689) (II, §§ 124-25). Locke suggests that thirdly, there also exists the good or bad luck of getting someone to help enforce whatever natural law judgment is applied. *Id.* at 351 (II, § 126).

32 JOHN RAWLS, *POLITICAL LIBERALISM* 54-58 (rev. ed. 1996). For an argument that the burdens of judgment apply as much to reasoning on the matters of justice that natural law addresses as to reasoning on the issue of what makes life worth living, see WALDRON, *supra* note 20, at 151-52.

33 See also the discussion of Lockean legislation in JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 63-91 (1999).

34 RAWLS, *supra* note 32, at 58.

Given this element of randomness in the "natural law" reasoning that is applied to one's case, Locke thought everyone had good reason to prefer a move to positive legality, where there would be "an establish'd, settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong." Its coincidence with natural law or *real* right and wrong might still be fortuitous, but at least it would be stable and predictable — a "common measure to decide all Controversies between them."<sup>35</sup>

It was on this basis that Locke argued for the familiar principles of legality that I have already alluded to. Governing without "settled standing Laws" would be no improvement, he said, over the state of nature; we only leave the state of nature to secure some gains in the way of consistency and predictability. Without those gains, we might as well take our chances with the luck of individuals' natural law reasoning:

[W]hatever Form the Common-wealth is under, the Ruling Power ought to govern by *declared and received Laws*, and not by *extemporary Dictates and undetermined Resolutions*. For then Mankind will be in a far worse condition, than in the State of Nature, if they shall have armed one or a few Men with the joynt power of a Multitude, to force them to obey at pleasure the *exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills* without having any *measures set down* which may guide and justify their actions. For all the power the Government has, being only for the good of the Society, as it ought not to be Arbitrary and at Pleasure, so it ought to be exercised by *established and promulgated Laws*: that both the People may know their Duty, and be safe and secure within the limits of the Law.<sup>36</sup>

One can read this — superficially — as an attack on a certain sort of tyrant, lawless and mean, preying on the people and their property. But the argument applies equally to rulers who try conscientiously, case by case, to figure out what natural law really requires. For there too we are subject to their "extemporary Dictates and undetermined Resolutions," the "unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills." We don't want the benefit of their sudden thoughts about justice and right; we want them to apply settled standing laws. Luck is ineliminable, but some processes are more random than others. Even if the rulers are trying as hard as they can to figure out the natural law solution

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<sup>35</sup> LOCKE, *supra* note 31, at 358-60 (II, §§ 136-37).

<sup>36</sup> *See id.* at 360 (II, § 137) (emphasis added).



to each individual case, they are inherently less predictable and across an array of cases probably more arbitrary and inconsistent. We want to be ruled by settled rules, not by natural law reasoning about particular cases, because we figure the element of luck and arbitrariness and unpredictability involved in the latter far exceeds the element of luck and arbitrariness and unpredictability involved in the former. That is Locke's argument, and it seems to me quite persuasive.

## V.

The attraction of the Lockean picture lies in the elements of predictability, non-arbitrariness, and consistency in the same positive norm being applied across a whole array of similar cases. Even if it is a matter of luck that this norm, rather than some other, was adopted as positive law by the community, still once it *has* been publicly adopted, then people know where they stand, they can use it as a point of reference for citing reasons for legal outcomes, and they are treated consistently under it in the sense of like cases being treated alike.

A great many legal theorists believe, however, that in reality there is likely to be little real improvement at all. Settled standing laws cannot themselves decide cases, even when they have been publicly enacted; only judges can. And the decisions of judges may continue to be something of a lottery in respect to the content of the norms that in their hands actually determine the outcome of cases. Locke's solution may fail if the adoption of a general norm in the name of the whole community is not the basis on which the law applicable to individual cases is decided. Each judge has authority to interpret the existing law of the community in its application to the parties before him, and the interpretation of one judge may differ from another. Bishop Hoadley has a famous saying: "[W]hoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver . . ."<sup>37</sup> If the law is, in effect, given anew — and maybe differently — on each occasion of judgment in each particular case, then the abrogation of randomness and unpredictability supposedly secured by "settled standing Laws" is an illusion, and we are governed by the "unlimited Decrees of [judges'] sudden thoughts, or unrestrain'd, and till that moment unknown Wills."

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<sup>37</sup> JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 102 (rev. ed. 1948) (citing Benjamin Hoadley, *Sermon Preached Before the King* (1717)).

The Legal Realists viewed adjudication in this light. Some of them followed John Chipman Gray and argued that in the light of the Bishop Hoadley maxim, there was no law apart from the decisions of judges: they were nominalists about law.<sup>38</sup> Many of those who took this view also emphasized the situational contingency and even sheer randomness of the judicial decision. Jerome Frank suggested that since law consists of the judges' decisions, we should focus our attention on what produces the hunches that underlie the judges' decisions: "Whatever produces the judges' hunches makes the law."<sup>39</sup> The factors that produce the hunches are, he argued, "multitudinous and complicated, often depending on peculiarly individual traits."<sup>40</sup> This was a common theme among the Realists.

But there were dissenting voices, at least so far as predictability was concerned. Where Frank stressed the micro-causation of the judicial decision and thus its more or less random character so far as the parties were concerned, other realists claimed that there was still a sort of predictability. Felix Cohen insisted that

[a]ctual experience does reveal a significant body of predictable uniformity in the behavior of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches. . . . A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants. . . . Behind the decision are social forces that play upon it, to give it a resultant momentum and direction.<sup>41</sup>

There has been a similar set of claims in Critical Legal Studies (CLS) concerning the more or less random character of the judicial response to the contradictions that (on the CLS account) permeate the law — the contradiction, for example, between individualism (with its particular mode of formal analysis of issues such as, for example, the bargains that parties have struck) and altruism (with *its* particular mode of substantive analysis of the bargains that parties have struck). Duncan Kennedy argues that

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38 See JEROME FRANK, *LAW AND THE MODERN MIND* 47 (1930) (defining law as "[a]ctual specific *decisions*, and guess as to actual specific future *decisions*").

39 *Id.* at 104.

40 *Id.* at 105-06.

41 Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

the acknowledgement of contradiction [in the law] makes it easier to understand judicial behavior that offends the ideal of the judge as a supremely rational being. The judge cannot . . . avoid the moment of truth in which one simply shifts modes. In place of the apparatus of rule making and rule application, with its attendant premises and attitudes, we come suddenly on a gap, a balancing test, a good faith standard, a fake or incoherent rule, or the enthusiastic adoption of a train of reasoning all know will be ignored in the next case. In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism she has found herself. The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis.<sup>42</sup>

Such a sudden switch in orientation by a judge may be rationalized sonorously under the rubric of some sort of balancing test, though, as Kennedy observes, the imagery that better characterizes "the process by which we act and act and act in one direction, but then reach the sticking point, is that of existentialist philosophy. . . . The moment of abandonment is no more rational than that of beginning, and equally a moment of terror."<sup>43</sup> A party to litigation who benefits from such a switch may count himself lucky, but it was nothing he was entitled to count on and perhaps not something that he could reliably count on, given the facts of his case and what seemed to be the state of the law at the time he came to court.

On the other hand, as Joseph Singer argues, CLS scholars don't want to be in the business of denying that law is predictable from any perspective. Any such denial would be "contradicted by the ability of experienced litigators and court watchers often to predict with surprising accuracy what judges are going to do."<sup>44</sup> Indeterminacy, says Singer, is a claim about legal doctrine — that *doctrine* cannot determine legal outcomes — and the CLS critique of determinacy is an internal critique of traditional doctrinal theory.<sup>45</sup> But indeterminacy does not mean that decisions are necessarily capricious, as they would be if the judge flipped a coin (or some psychological equivalent). Predictability can survive legal indeterminacy if the basis of predictability is determinate politics rather than determinate law:

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42 Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1776 (1976).

43 *Id.* at 1775.

44 Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10 (1984).

45 *Id.* at 11.

Politics, as well as custom, tells us that the Constitution is not going to be interpreted to prohibit wage labor. Politics, rather than legal reasoning, tells us that Justices Brennan and Marshall are far more likely than Justices Burger or Rehnquist to nullify a state statute on the basis of race or sex discrimination. There is nothing mysterious about this. We know who the liberals are on the Court and who the conservatives are by the positions those individuals generally take on key political issues.<sup>46</sup>

Assuming that Singer (or Felix Cohen) is right about this sort of predictability, how should we think about the good luck of a rich litigant who just "happens" to be up in front of (say) a conservative rather than a liberal court. In one sense, he is certainly *lucky in his judge*. Had different nominations to the court been made, or had the panel hearing his case been differently constituted, then his luck would have been different. In another sense, however, the benefit that he receives is not a matter of luck. The politics of the judiciary might be (and often is) calculable. The composition for the time being of the Supreme Court and the various appellate panels is well-known, and one can work around that knowledge in advance much as one works around the knowledge that advance promulgation of determinate law would afford.

Even in the case of trial court judges — with the indeterminacy of whose decisions Jerome Frank was mostly concerned — there exists a modicum of predictability and room for manipulation. Horace Rumpole, in John Mortimer's series of short stories about the life of a down-market barrister in London, often persuades his clerk Henry to have a word with the scheduling officer down at the Old Bailey (a friend of Henry's) to see if she can ensure that a case that Rumpole is defending is brought up before a judge of a certain stripe.<sup>47</sup> And Jerome Frank, who (as we saw) goes further than most in emphasizing judicial idiosyncrasy, cites a jurist who says (from his own experience):

The jockeying for a judge is sometimes almost humorous. Lawyers recognize the peculiarities, previous opinions, leanings, strength and weakness, and likes or dislikes of a particular judge in a particular case. Some years ago one of the bright lawyers of Chicago conferred with me as an assistant state's attorney, to agree on a judge for the

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<sup>46</sup> *Id.* at 23.

<sup>47</sup> See, e.g., JOHN MORTIMER, *Rumpole and the Judge's Elbow*, in RUMPOLE'S LAST CASE AND OTHER STORIES 23 (1987).

trial of a series of cases. We proceeded to go over the list. For the state's attorney, I objected to but one judge of all the twenty-eight Cook county judges, and as I went through the list I would ask him about one or another, "How about this one?" As to the first one I named, he said "No, he decided a case a couple of weeks ago in a way I didn't like, and I don't want him to use my client as a way to get back to a state of virtue." As to another, he said, "No, he is not very clear-headed; he is likely to read an editorial by the man who put him on the ticket, and get confused on the law." . . . To another, he objected, "If my clients were found guilty, this judge would give them the limit." . . . Again, he replied to one, "No, if the state's attorney should happen to sit in the court room I won't get a favorable ruling in the entire case." And so we went along.<sup>48</sup>

The process described here is remarkably similar in tone to jury selection and to the growth of expertise in trying to replace the element of luck in jury verdicts with an element of *ex parte* calculation.

How should we think about this? Does this represent just the replacement of one form of determinacy and predictability with another? Some might say that the party who finds himself at the mercy of good or bad luck in the judicial process — as described — has only himself to blame for failing to get the information and for failing to do the calculations on which reliable predictions might in fact be based; he is no different from someone who, under the traditional conception of adjudication, failed to study the law adequately. Moreover, someone might say, the process is not really unfair. As long as the costs of a legal advisor who knows the local bench are not too high, every potential litigant is in the same position. They are all subject to the same calculable judicial politics and idiosyncrasies.

Others will find this far-fetched. The predictability we want from the rule of law, they will say, is not just the predictability that is associated with the rule of (predictable) men, which is all this is. Moreover, they will say that the fairness of having to calculate the same odds is not the same as the fairness law is supposed to guarantee. It is not just a matter of a "level playing field" and "everyone being on the same footing." (If it were, then probably the fairness of all being subject to an utterly unpredictable bench — the fairness of a pure judicial lottery — would be enough.) The *fairness* mentioned at the end of Part II of this Article is a matter of comparative justice — like cases being treated alike — and for this aim, it is not enough

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<sup>48</sup> FRANK, *supra* note 38, at 11-12 (citing Willard McEwen, *What is Never in the Record, But Always in the Case*, 8 ILL. L. REV. 594, 596 (1914)).

that litigants in the like cases are, as it were, handicapping the same horse race.

I find this latter view the more persuasive. If being subject to a judicial lottery is a problem for jurisprudence, I don't think the problem is solved or even mitigated when we find that it is possible for someone (or even everyone) to predict and calculate to a certain extent how the lottery wheel will spin on a particular occasion. In the end, the issue is one of arbitrariness. When we value non-arbitrariness, we value the determination of legal outcomes through the right sort of reason. On the realist and CLS accounts, legal outcomes are determined arbitrarily, relative to the right sort of reason. They are determined by factors — like the personal or political preferences of judges, or what the judge had for breakfast, or what happened to him in the lavatory when he was two years old, or whether the altruism neuron fired during an individualist process of reasoning — factors that really have nothing to do with the sort of reasons we want to operate. The fact that these other considerations may be calculable to a certain extent does not dispel that arbitrariness. Rather, given that the process is afflicted by this sort of arbitrariness, neither the predictability of the judicial lottery nor the version of fairness that it secures seems adequate or even interesting.

## VI.

Many of the theories that present adjudication as a matter of luck stress the irrational element in adjudication. But this need not be true of all such theories. Even if adjudication is nothing but the most scrupulous exercise of reason, still it may seem random from a point of view other than that of the judge who is engaged in it — namely, *from the point of view of the party who appears before him*. From that point of view, it may seem that the party was lucky to appear before a judge who reasoned (scrupulously, as it seemed to the judge) one way rather than (scrupulously, as it would seem to another judge) another way. This is an interesting possibility — because now it seems that non-arbitrariness is not sufficient to rebut a concern about judicial luck in the presence of the unfairness that involves having two similar cases decided by different judges who reason scrupulously but differently. Let me explain.

(i) Consider first a case involving very straightforward adjudication in relation to a standard. The defendant in a tort suit contends that a punitive damages award should be overturned on constitutional grounds as "grossly excessive." The federal court to which the defendant makes this argument accepts his contention, reasoning that a 500-1 ration between the

punitive damages and the compensatory damages that were also awarded cannot be justified as a fair punishment.<sup>49</sup> Though some have contended that decisions like this are inevitably capricious,<sup>50</sup> there need be no element of caprice involved. The judge may engage in exactly the sort of moral reasoning that a study of excessiveness requires him to engage in: he will consider the purpose of punitive damages, the philosophy of punishment, the appropriate relation between punishment and harm, the difference that the civil (rather than criminal) law context makes, and so on.<sup>51</sup> On the basis of scrupulous reasoning in an objective spirit along these lines, the judge overturns the award.

Even so, the relieved defendant may count himself "lucky in his judge," for he will understand that a different judge, reasoning every bit as scrupulously and in just as objective a spirit but to different moral conclusions, would have upheld the punitive damages award. The point here is exactly the Lockean point about natural law. If moral standards are to be applied to particular cases and if there is no telling who will be applying them to our case, then we are at the mercy of the moral reasoning of whomever we happen to be in front of, and we may be lucky or unlucky if that person's moral reasoning (about what the objective standards are) turns out, respectively, to favor or disfavor our interests, or to favor or disfavor what we would regard as just.

One may think that, in order to solve this problem, each judge should try to keep in mind the need for consistency as between different cases. By itself, though, this does not make the problem of luck and randomness go away. For consider the following case:

(ii) Two defendants come up for sentencing, each after having been convicted for a serious crime. Because justice-in-punishment is somewhat comparative, there is a case for saying that the man who committed the graver crime should receive the longer sentence (other things being equal). Suppose the two men come up before different judges, and each judge reasons as scrupulously as she can about the appropriate sentence. Suppose further that each judge pays particular attention to the comparative dimension. Each judge asks herself what is the appropriate scale of gravity of offenses and

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49 Cf. *BMW of North America Inc. v. Gore*, 517 U.S. 559 (1996).

50 See *id.* at 598 (Scalia, J., dissenting). For comment, see Jenny Miao Jiang, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793 (2006); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085 (2006).

51 I am assuming these are not just "crisscrossing platitudes" (to use the language of Justice Scalia in *BMW of North America Inc.*, 517 U.S. at 606).

what is the appropriate relation between the case in front of her and other cases, involving both similar and different offenders, that have or might come before her. Given a discretion between a sentence of zero years in prison and a life sentence and absent any posited "sentencing guidelines," each judge has to make a moral judgment on these matters. But even if each judge reasons competently and conscientiously, paying particular attention to the comparative issue, there is no guarantee that their moral reasoning will give them the same theory of relative-gravity-of-offenses.

Defendant P may end up being sentenced to a longer term than defendant Q, even though both judges reckon that Q's offense was graver. This is certainly unfair to P, from the point of view of comparative justice. The judge who sentenced P to fifteen years for forgery would have sentenced a defendant convicted of armed robbery to twice that amount. But the judge who sentenced Q to ten years for armed robbery would have sentenced someone convicted of forgery to half that amount.

	<b>P (forger)</b>	<b>Q (robber)</b>
1 <sup>st</sup> judge	15 years	[30 years]
2 <sup>nd</sup> judge	[5 years]	10 years

The second judge kept the armed robbery sentence to ten years, because she wanted to leave room for a meaningfully differentiated array of sentences for crimes that were even graver than that, like rape and murder, whereas the first judge believed in making fewer and narrower discriminations at the top end of the gravity scale. The point is that P and Q end up being treated unfairly, from a comparative point of view, even though each judge reasoned scrupulously and as well as she could *about comparative justice*. Q was lucky in his judge, luckier than he would have been had he come before the judge who sentenced P; P was unlucky in his judge, considering the treatment he might have received had he appeared for sentence before the judge Q.

Informed of this unhappy outcome, the judge who sentenced P might wish that her colleague on the bench had applied the correct theory of gravity of offenses — which of course she thinks is the one she applied (otherwise she would have applied a different theory). And the judge who sentenced Q might return the favor. She might say: "If only the judge who sentenced P had applied the correct theory," which the judge who sentenced Q thinks (not unreasonably) is the theory under which Q was sentenced. We might say:



"If only the two judges had both reasoned according to the one objectively correct theory of gravity-of-offenses." But that is like wishing that objective rightness could come down to earth and dwell among us, to dispose of these matters itself without interference from the burdens of human judgment. That is not going to happen. All we have on earth are people reasoning as well as they can about the objective issues that are put to them.

I am not imagining that the reasoning of the judge who sentenced P differs from the reasoning of the judge who sentenced Q, because the first judge ate something for breakfast that the second judge didn't or because some random neuron fired in the first judge's brain that didn't fire in the brain of the second judge or because the two judges belong to different political parties. There is no element of the irrational here. There are just two people in robes — each in her own way a competent moral reasoner — each reasoning as best she can about the issue that the law (and morality) requires her to address. But as long as they reason separately, there is likely to be something of a lottery involved for the defendants. The only way to eliminate the unfairness associated with this lottery is to somehow yoke the two judges to the same standards of gravity-of-offenses, either by requiring a single judge or panel of judges to pass on all sentences, or by binding them with determinate sentencing guidelines furnished as a matter of positive law.

Ronald Dworkin's theory of law and adjudication<sup>52</sup> is incomparably more complicated than either of the pictures I have painted of judges wrestling with the "grossly excessive" standard for constitutional review of punitive damages awards or with the problem of comparatively just and unjust penalties for different offences. But it has some elements in common with them, particularly with the second case.

(iii) On Dworkin's account, each judge wrestling with a case has to consider not just the issue of justice that the case poses, but also its relation to the way similar cases (locally similar and sometimes more remotely analogous) have been decided. Figuring out how a particular outcome for the case at hand stands to the earlier decisions is itself a matter of interpretation involving nuanced moral judgment. And bringing that into relation with what justice, left to its own devices, would require in the case at hand, is also a difficult and delicate matter. The judge — call him Hercules — is required to approach all this as though it were an objective matter, though of course since he has to answer the questions generated by this theory of adjudication in his own voice, his own moral and political conceptions will be directly engaged. They are not engaged in a willful or subjectivist spirit,

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52 DWORKIN, *supra* note 17 (especially at 238-75).

as a matter of caprice or personal privilege, but as Hercules's direct answer to the direct moral and political questions that this theory of adjudication requires him to address.<sup>53</sup> Hercules will not think of himself as capricious or as indulging his subjective preferences. And quite rightly. His experience may well be — as Dworkin insists — that these various requirements constrain him: he will not feel "free" to decide anything he likes.<sup>54</sup> But he is likely to be aware, nevertheless, of various points where his own reasoning and his own convictions made a difference to the outcome. (He need not be put off by that awareness: he may be convinced that his convictions made the difference they made just because they represented the objective truth about justice, etc.)

Suppose Hercules is a liberal (i.e., suppose he is convinced that certain liberal positions are the objectively right answers to exactly the questions that his role requires him to address). He will be aware that some defendants will think themselves lucky to have *his* Dworkinian reasoning deciding their case rather than the Dworkinian reasoning of another well-known judge (called Heraclea), who articulates and argues — in the same objective spirit — for different (more conservative) postulates of justice and different (more conservative) interpretations of the relation between one precedent and another. And Hercules may be aware that parties may sometimes complain that they have been unfairly treated because they did not get the benefit of his liberal reasoning as other people did, in cases similar to theirs.

Moreover, these complaints may be well-founded, in relation to at least some of the grounds of complaint about legal luck that I discussed earlier in the Article.<sup>55</sup> Admittedly, the complaints may be easier to sustain under some headings than others.

One party, P, who suffered under Heraclea, may complain that he had no idea in advance how his case would be treated. There was nothing he could count on, P might complain; he might have been subject to Hercules's scrupulous reasoning on objective matters of justice and interpretation, or he might have been subject to the scrupulous reasoning of Heraclea. It is just bad luck that P came up before Heraclea; but his complaint is that that circumstance was unpredictable. Professor Dworkin tells me he thinks this sort of predictability complaint is overblown: people suffer unpredictably at the hands of the government all the time (e.g., whenever it closes a naval base), and that in itself is not a ground of legitimate complaint about the

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53 *Id.* at 238-58.

54 *Id.* at 235.

55 At the end of *supra* Part II.

decisions of officials.<sup>56</sup> I am not sure whether we should accept this rebuttal; but let us note it and move on.<sup>57</sup>

The party who suffered under Heraclea may also complain that the decision was arbitrary. But this critique cannot really be sustained. Heraclea's judgment is the opposite of arbitrary: it is closely reasoned, with due attention to all the important questions legal and moral that the party's case generated. Certainly that's how it appears to Heraclea. It is the exact opposite of a whimsical or capricious decision. P may acknowledge this, but say that what was arbitrary was the difference in outcome to his case made by the arbitrary fact that he happened to be subject to Heraclea's non-arbitrary reasoning rather than Hercules' non-arbitrary reasoning. In the end, this is really a complaint about unfairness, not about arbitrariness. P observes that another party, R, whose case was exactly similar to his, was treated differently by the law, by virtue of the fact that R appeared before Hercules whereas P appeared before Heraclea. R was lucky in his judge; P was not. Yet they were like cases and they ought to have been treated alike. Surely this is a problem.

The point I am making shares many similarities with, and indeed it is indebted to, the case that Gerald Postema makes about Dworkin's general view of interpretation.<sup>58</sup> Postema invites us to consider different kinds of interpretive practice, involving different relations between a plurality of interpreters (or between one interpreter and an interpretive community). Consider two possibilities:

(1) Even when we are aware that others are interpreting the same text or the same practice, our interpretive activities are sometimes undertaken just on our own account. Interpretation in Departments of English Literature is like that. Though there are many Shakespeare scholars, each aware of the others' work, a given scholar is not speaking or interpreting in anyone's name but her own. She may — as Kant suggested in another context — try to see things as from a generalized point of view.<sup>59</sup> But still, there is no point in her striving to reconcile or coordinate her interpretation of *Hamlet* with anyone else's interpretation.<sup>60</sup>

(2) Sometimes, however, one interprets a practice or a text, not just in

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<sup>56</sup> Conversation with Ronald Dworkin, in New York (Fall 2006).

<sup>57</sup> I think one's response to this point will be connected to one's response to Chaim Gans's point about predictability and injustice, discussed briefly in *supra* note 15.

<sup>58</sup> Gerald Postema, "Protestant Interpretation" and Social Practices, 6 *LAW & PHIL.* 283 (1987).

<sup>59</sup> IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 135-38 (J.H. Bernard trans., Hafner Press 1951) (1790).

<sup>60</sup> Even what I have called the literary model might be inappropriate in some cases.

one's own name but in the name of a community of interpretation, and there, I would think, the problem of the relation between one interpreter's account and another's surely *does* have to be faced. On Dworkin's general account, one would have thought legal reasoning is like this. Law-as-integrity is supposed to help sustain us as a community, as a single association of principle speaking with one voice on the various issues and disputes that we have to resolve.<sup>61</sup> Curiously, however, what Dworkin says about adjudication does not seem to be affected by this. He writes as though some form of model (1) were appropriate. Here's how Postema characterizes Dworkin's position:

A participant's [e.g., a judge's] working theory . . . need not as a general matter, be responsive to the views of other participants in the practice. The interpretive activities of other participants, according to Dworkin, are sometimes relevant for tactical reasons; or because, in the judgment of the interpreter, fairness<sup>62</sup> requires that their opinions be taken into account (but only to the extent permitted by other competing background considerations like justice, as judged by the interpreter's theory of these considerations); or because of factors specific to a particular practice. There is nothing in Dworkin's meta-theory of interpretation of social practices that requires attention to the interpretive activities of fellow participants. Herein lies the strong "protestantism" of Dworkin's theory . . . While Dworkin seems to recognize that the practice is common, he counsels participants to live as if each had a private understanding of his own.<sup>63</sup>

The problem here, Postema reminds us, is not arbitrariness, but simply that this approach makes interpretation in the name of the whole society "insufficiently intersubjective, and thus (at least in the case of law) insufficiently political."<sup>64</sup>

Now, here is an important point: Dworkin's much-vaunted value of *integrity* makes no difference whatever to this problem. Think back to our pair of judges, Hercules and Heraclea. Integrity is what commands that Heraclea consider the relation between cases already decided and the case of P, just as integrity is what commands Hercules to consider the relation between cases already decided and the case of R. That is

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Postema cites Dworkin's own example of a chain-novel. Postema, *supra* note 58, at 311.

<sup>61</sup> See DWORKIN, *supra* note 17, at 206-15.

<sup>62</sup> "Fairness" in the political sense defined in *id.* at 164-65.

<sup>63</sup> Postema, *supra* note 58, at 296-97 (citations omitted).

<sup>64</sup> *Id.*

why the decision-problem faced by a Dworkinian judge is so difficult: each judge ought ideally to consider the full range of possible analogies (local and remote) between the case in front of him or her and other cases that have been decided by the courts. The requirements of integrity define an almost impossibly difficult array of questions for each judge to consider in Dworkinian jurisprudence. (This is why the judges are named for demigods.) It is to be expected that different judges reasoning their way to their utmost ability through these questions — reasoning competently and in a scrupulously objective spirit — will come up with different answers. In case (ii) above — the case of the judges sentencing the robber and the forger — we said it was quite possible that two judges may responsibly come up with different comparative theories of the gravity of offenses. Here, where the questions are more complex and the burdens of judgment greater,<sup>65</sup> disagreement is almost inevitable. And the questions that are more complex are exactly the questions raised in the service of integrity; a judge who was unconcerned about integrity would have a much simpler task, and different judges might disagree less if none of them considered integrity important. I do not want to say that integrity makes this problem of like cases not being treated alike actually *worse*, but it certainly does not make the situation any better.

I am not complaining that Dworkin has failed to think of this problem. He has, and he says that integrity is not supposed to guarantee uniformity and should not be regarded as vulnerable to the criticism that similar cases end up being treated differently. Law as integrity, he says, consists in questions rather than answers.<sup>66</sup>

We want our officials to treat us as tied together in an association of principle, and we want this for reasons that do not depend on any identity of conviction among these officials, either about fit or about the more substantive principles an interpretation engages. Our reasons endure when judges disagree, at least in detail, about the best interpretation of the community's political order, because each judge still confirms and

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<sup>65</sup> For "the burdens of judgment," see *supra* note 32 and accompanying text.

<sup>66</sup> DWORKIN, *supra* note 17, at 239. See also *id.* at 412: "I have not devised an algorithm for the courtroom. No electronic magician could design from my arguments a computer program that would supply a verdict everyone would accept once the facts of the case and the text of all past statutes and judicial decisions were put at the computer's disposal."

reinforces the principled character of our association by striving in spite of the disagreement, to reach his own opinion . . . .<sup>67</sup>

But there may be a difference of perspective here that makes all the difference in how we regard the variability. Our society may be more principled in a sense, because each judge takes integrity and objectivity seriously. But from the point of view of the individual party, hauled up before one of the judges in question, this response to his complaint of unfairness — that integrity consists in questions not answers — will be unsatisfactory. For consider our friends, P and R, hauled up before Heraclea and Hercules respectively. P *really is* being treated in a way that differs from the treatment of other exactly similar cases (like R's). And this means that we cannot appeal to the way other cases are treated in calling on P to be a good member of the community and submit to the requirements that others are suffering under or submit to the general requirements on others that he himself benefits from in other contexts.<sup>68</sup> He is just unlucky in his judge. And, when we focus steadily on that bad luck as seen from his point of view — rather than from the point of view of Heraclea, congratulating herself on the attention she paid to objectivity and integrity — we glimpse the danger of its being destructive to the operation of the very reasons (about legitimacy and political obligation) that made integrity important for Dworkin in the first place.

## VII.

Rather than simply saying, "Who cares whether the outcomes are the same, provided Hercules and Heraclea reason in the same spirit of attentiveness to integrity?" a better response for Dworkin would be to say that his account does the most to eliminate elements of luck and unfairness from adjudication that can reasonably be done, without making matters much worse on other fronts. I want to end by arguing briefly that this may well be the case.

It is tempting to see the musings of this Article as prelude to an argument

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<sup>67</sup> *Id.* at 264.

<sup>68</sup> To make the case tight (though fantastic), P has two cases at law: one case (as plaintiff) against S, before Heraclea, and one case (as defendant) against R, before Hercules. The problem is that in the case before Heraclea, P as defendant is being required to bear the burden of a standard that differs from the standard whose benefit he enjoys as plaintiff in the case bearing the same exact characteristics before Hercules.

for something like Exclusive Legal Positivism.<sup>69</sup> The argument would go as follows: So long as there are prominent elements of moral reasoning in law, the outcomes of law-suits are bound to depend on the happenstance of a given case's being argued before one judge rather than another. So let us eliminate that element altogether, and replace the sort of jurisprudence that calls for moral reasoning with a body of easily applicable law that does not.

One thought may be that we should replace all standards — like the "gross excessiveness" standard for punitive damages that we considered in the previous Part — with rules. We could have a rule that says: "No punitive damages greater than ten times the amount of compensatory damages." And then we apply that rule to everyone, and no defendant would be lucky or unlucky in his judge, because every judge can do the arithmetic of division-by-ten, and the results would be uniform all along the bench. But that rule might be unbearably crude, compared to the distinctions that anyone thought worth making. And any less crude version of it would be subject to interpretation and we would be back where we started: with the differing interpretations that, with the best will in the world, the reasoning of separate scrupulous interpreters gives rise to.

So we try to head that danger off, by requiring judges to work more collegially in their interpretations, in the spirit recommended, though unfortunately not described, by Postema. "She [e.g., Heraclea] must construct an interpretation, cognizant of the interpretive activity of other contributors, past and future."<sup>70</sup> A judge who seeks to decide what the law is by interpreting the practice of other judges, must orient herself "not only [to] their decisions and actions, but also their interpretive activity."<sup>71</sup> The judicial capacity should be seen as not just a capacity to reason in one's own voice, but as "a capacity to judge what one has confidence that others in the community would also regard as reasonable or fitting."<sup>72</sup>

But I am not sure this would improve the situation any more than integrity does. This is simply more integrity projected forward or sideways, rather than just backwards, and thus more opportunity for the burdens of judgment to kick in and for the reasoning of different judges to follow different trajectories.

Maybe Postema's judge would be a little more self-conscious about pursuing novel or unusual lines of reasoning, a little more collegially

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<sup>69</sup> See JOSEPH RAZ, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 210, 215-20 (1994).

<sup>70</sup> Postema, *supra* note 58, at 312.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 314.

convergent with what she took her brother and sister judges to be doing. But then there's the opposite danger again: Postema's judge, following this line of reasoning, would have to suppress some sense of an important distinction between cases — what she regarded as an important but hitherto unnoticed dissimilarity between cases otherwise regarded as relevantly similar — and operate with a cruder standard than she was convinced the cases called for.

The back-and-forth between these moves defines the intractability of the problem. And it may well be that integrity does all that can be done for fairness and consistency, and the elimination of invidious luck, without sacrificing other important values.

As long as facts are complex and juries are human, there will be opportunities for judges to say "You were lucky in your jury," as they discharge an acquitted defendant. And as long as law and justice are complicated and judges are reasoning as humans reason — as even the most scrupulous and Herculean human reasoners reason — there will always be occasion for a disappointed litigant to say: "I was unlucky in my judge." I have not said anything in this Article to indicate that the complaint is unimportant. However, I do think that on the whole it is better for us not to dismiss it, but to say — in full awareness of the difficulty of the judicial function even at its best — "Yes, you were unlucky, I suppose. But what is one to do?"