

# Justice under Law

## A Reply to Huemer on the Primacy of Justice

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We talked of the practice of the law. William Forbes said, he thought an honest lawyer should never undertake a cause which he was satisfied was not a just one. ‘Sir,’ said Mr Johnson, ‘a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge.’

James Boswell, *The Journal of a Tour to the Hebrides*

Law and justice are near synonyms in common speech. We expect the law to deliver justice, and we cannot imagine justice absent some system of law. This seems to be why Aristotle observes ‘that whatever is lawful is in some way just’.<sup>1</sup> Aristotle also believed that a just person will obey the law. But what if the laws are unjust, or officers of the law corrupt? The law, it might be argued, cannot truly deliver justice without the aid of moral judgments about the justice of the law itself. Yet without due respect for law, such judgments threaten to crumble the edifice of law and justice. Blind Justice presides over the court with keen-sighted Prudentia at her side. As a matter of jurisprudence, law and justice are coequal.

In his recent book, *Justice before the Law*, Michael Huemer challenges this traditional view of law and justice.<sup>2</sup> Instead, Huemer argues that we ought to affirm the *priority* of justice over the law. ‘When the rules and practices of the legal system conflict with justice’, he writes, ‘we should place justice first’ (5). The purpose of the legal system, after all, purports to aim at justice. Huemer’s case for the priority of justice is intuitively plausible, especially in light of past injustices. The book begins with a famous trial that initiated the right to a free press in America:

“In 1735, John Peter Zenger, then publisher of the *New York Weekly Journal*, was put on trial for seditious libel. Zenger had published a series of articles in his newspaper attacking the governor of New York, and the governor had directed the prosecutor to prosecute Zenger for printing these articles. During the trial, Zenger’s attorney freely admitted that Zenger had published the material in question. His defence was that the material was all *true*, and he

- 1 Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, 2<sup>nd</sup> ed. (Indianapolis, IN: Hackett Publishing, 1999), 1129b13.
- 2 Michael Huemer, *Justice before the Law* (London: Palgrave Macmillan, 2021). All references hereafter will be given via in-text page citations.

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offered to present evidence that this was so. The prosecutor, however, argued that the accuracy of Zenger's articles was irrelevant to the charges; indeed, it was *worse* to publish *accurate* criticisms of public officials than false ones, because accurate criticisms were more likely to undermine public confidence in the government. The judge agreed with the prosecutor and therefore prohibited the defence from offering any evidence of the truth of the published material. The judge instructed the jury that British law did not recognize truthfulness as a defence against a charge of libel, and he all but ordered the jury to find the defendant guilty. The jury, however, defied the judge and the law and returned a verdict of *not guilty* (4, emphasis original)."

It is difficult to argue with the jury's actions in the Zenger Trial. But whether the trial supports the priority of justice over law in the sense intended by Huemer is doubtful. Huemer is right that justice is the purpose of the legal system. But he errs in his understanding of what justice is, and the means through which it is achieved. The legal system is a form of enquiry that seeks to *discover* justice. A just outcome is one that resolves a dispute and allows for peaceful social cooperation into the future. Since what justice requires is almost always uncertain to those who come before the law (or else there would not be a dispute), the legal system must rely on procedures that assign roles to agents, the proper performance of which may sometimes appear to conflict with individual moral judgments about justice. But though the legal system cannot function without moral judgment, this is not a license to raise individual moral judgment above the law. For justice, properly understood, requires law. True justice must be justice *under* law.

My argument proceeds in three stages. In the first stage, I present Huemer's core theses: i) justice is prior to law, ii) justice is a matter of respecting people's rights, and iii) agents in the legal system should prioritise justice, not the duties assigned by their role(s) in the system. In the second stage, I critique each of these theses. I argue, first, that because the legal system aims at justice, understood as a stable social order, for which the law is necessary, justice cannot be absolutely prior to law. I argue further that Huemer's appeal to rights as the core of justice will sometimes conflict with justice understood as a stable social order. Finally, I argue that role duties, because they are premised on our imperfect knowledge of justice, are essential to justice. In the third stage, I defend the traditional view of law and justice, wherein i) neither is absolutely prior, ii) justice is a virtue of persons and institutions, and iii) just persons are law-abiding.

## 1. Justice before the Law

### 1.1 *The Primacy of Justice*

Huemer's first thesis is that the American legal system is rife with unjust laws and practices, among them drug prohibition, immigration law, the excessive cost of legal services, extorted plea deals, and unjust punishments. One may largely agree with this first thesis, even for the sake of argument, however, while disputing (as I

will later) Huemer's second thesis that justice should take precedence over law when law conflicts with justice. For if Huemer is right, his case would stand as an indictment of all existing legal systems, since none is perfectly just.<sup>3</sup> To this extent, even as it is focused solely on the United States, Huemer's book is of perennial interest.

Huemer's second thesis – the *Primacy of Justice* – contrasts with what he calls the *Primacy of Authority*. According to the *Primacy of Authority*, 'the most important value in the legal system is respect for authority ... [so that] In case of a conflict between our intuitive sense of justice and the existing laws, legal procedures, or decisions of authority figures, we should generally obey the existing laws, procedures, or authority figures' (8). Contrariwise, the *Primacy of Justice* asserts that 'the primary, guiding concern of the legal system, and of all who are involved in it, should be *justice to the individual*' (9, emphasis original). Conflicts between the demands of authority and an agent's intuitive sense of justice, Huemer argues, should be decided in favour of the latter.

Huemer is under no illusions that his thesis is uncontroversial. Indeed, he notes that the thesis 'is very controversial in legal theory' (247). In support of the thesis, he offers two arguments. The first argument asserts 'that individuals have a general obligation to respect justice: as a general matter, it is wrong to knowingly bring about unjust outcomes' (ibid., emphasis removed). Given a sufficiently clear choice between a just and an unjust outcome, therefore, we ought to choose the just outcome, even if it conflicts with the law. Huemer's second argument reasons from the demands of instrumental rationality:

- 1 Law is justified by the goal of justice;
- 2 The means to a goal is less important than the goal that justifies that means;
- 3 Therefore, law is less important than justice (251).

If this argument is sound, then it is justified to disregard the law when it conflicts with justice. 'The law', Huemer claims, 'cannot be more important than the goal that justifies the very existence of the law to begin with' (ibid.). Taken together, these two arguments shift the burden of proof onto those who hold the *Primacy of Authority* thesis. 'Since the central function of law is to *prevent* injustice', Huemer concludes, 'one must be able to state some good reason for upholding law in a case in which doing so *causes* injustice' (252, emphasis original).

Huemer goes on to detail the moral obligations of agents in the legal system, specifically, jurors, lawyers, and judges. Juries, for instance, should only convict when a defendant has, in fact, violated a law, the law in question proscribes a moral wrong that violates someone's rights, and the punishment is proportionate to the crime. Otherwise, juries should engage in what is called 'jury nullification', which,

3 It is perhaps worth noting that, as a philosophical anarchist, who denies the moral legitimacy of political authority, Huemer likely intends this implication. See his *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey* (London: Palgrave MacMillan, 2013).

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in common law systems of justice, is '[t]he practice of voting to acquit because one finds the law or the associated punishment unjust' (232). More controversially, following the opinion of William Forbes cited above, Huemer claims that the sole moral consideration of lawyers should be 'to promote just outcomes and attempt to prevent injustices' (234). This would preclude the vigorous defence of an obviously guilty client, which lies at the core of adversarial legal systems. Finally, Huemer believes that, for judges in the legal system, 'faithful interpretation of the law has no intrinsic value. What matters is justice' (237). Hence, judges should primarily seek to secure just outcomes, even when they conflict with the plain text of a given law or statute, as, for instance, may occur in legal jurisdictions with a civil law code, like the Netherlands.

### 1.2 Justice as Respect for Rights

Huemer's thesis is premised on an assumption he calls the 'Autonomy of Ethics', according to which it is possible 'to know that a person is morally entitled to *x*, is obligated to do *y*, or has a right to *z*, independent of the existing rules of the legal system' (13). This assumption rules out *legal relativism*, according to which the existing rules of the legal system wholly determine facts about justice. But it also rules out a version of natural law theory, according to which 'morality partly determines what the law *is*, such that an unjust law is not a genuine law at all' (14, emphasis original). Despite Huemer's cavils, however, if natural law is clearly distinguished from positive law (i.e., an unjust law is merely positive law in violation of natural law), his thesis that justice should take priority over the rules of a legal system is not incompatible with natural law theory.<sup>4</sup> The only real disagreement, as we will see, has to do with whether the morality that informs the legal system can be formulated *independently* of law as such.

The central pillar of Huemer's case for the primacy of justice is an intuitive argument for moral rights, specifically rights against harmful coercion. 'Moral rights', according to Huemer, 'are agent-centered, enforceable moral constraints against harm or interference' (21, emphasis removed). These are what Robert Nozick calls 'side constraints'; they impose an obligation on others not to interfere so long as one respects likewise the rights of others.<sup>5</sup> Huemer's argument for the existence of rights draws on widely shared intuitions 'in which it seems morally wrong to harm or interfere with individuals, even though doing so in that situation would prevent a larger harm' (21) e.g., framing an innocent person to prevent a riot. Coercion, then, is only justified, according to Huemer, in order to enforce rights protections of this sort. This is the foundation of justice, and just laws in particular, which exist to protect the individual right against harmful coercion. If a law imposes harmful coercion on individuals without sufficient moral justification, then it is an unjust law and should not be obeyed.

4 Huemer appears to acknowledge this when he remarks that, for semantic reasons, 'there [is] no *interesting* disagreement between the extreme natural law theorist and myself' (17, emphasis original).

5 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 26-33.

A surprising implication of Huemer's view is that '[c]riminal laws – that is laws to which the state attaches criminal punishment for their violation – are *presumptively unjust*' (45, emphasis added). This is because all criminal laws impose harmful coercion on some individuals, and since individuals have a *prima facie* right against harmful coercion as a matter of justice, criminal laws are *presumptively unjust*. Again, the burden of proof falls on those who favour criminal punishment to give some moral justification for the use of harmful coercion that overrides the *prima facie* right. In straightforward cases of clear rights violations, e.g., theft or murder, that burden will be met and the law justified. But, Huemer argues, many laws do not meet this justificatory burden.

### 1.3 Role Playing and the Rule of Law

The next stage of Huemer's argument for the primacy of justice has to do with the role duties of agents in the legal system. Juries, judges, and lawyers, Huemer notes, have roles in the legal system that often do not directly prioritise justice. Juries are meant to evaluate the facts of a case, judges faithfully interpret and apply the law, and lawyers advocate for their client's case in a dispute. Of course, these roles may occasionally conflict with justice and lead to unjust outcomes. But if Huemer is right that it is generally wrong to bring about unjust outcomes, then agents in the legal system should ignore their putative role duties when they conflict with achieving a just outcome. To do otherwise would be to knowingly participate in systematic violations of individuals' rights against harmful coercion. Therefore, whether a legal system employs the jury trial, as the American legal system does, or does not, per the Dutch legal system, Huemer encourages agents in the system to disregard their role duties when justice is at stake.

Huemer entertains several counterarguments to this line of reasoning. According to what he calls the 'knowledge argument', because we do not know what is truly just, agents in the legal system should stick to playing their assigned role, which has the virtue of not depending on individual moral insight (273-278). Huemer interprets this claim in two ways: i) we know nothing about justice, ii) we lack perfect knowledge of justice. He then argues that the former claim is unreasonable, since we do have *some* intuitive sense of justice. The latter claim appears more reasonable, yet ignores the fact that the pursuit of justice, or any goal for that matter, does not require perfect knowledge.

A second counterargument, following this line of thought, appeals to the general reliability of the legal system, which is premised on everyone faithfully executing their role without substituting their own moral judgment. To this, Huemer replies, i) the system may still produce unjust outcomes while everyone plays their role, and ii) if such outcomes can be occasionally avoided by pursuing justice directly, it would be irrational, according to the demands of instrumental rationality, not to do so. The purpose of the legal system, after all, is to actually *achieve* justice, not just pursue it.

The final objection Huemer entertains to his thesis concerns the rule of law. Among the strongest arguments for the rule of law is that deference to the law allows

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societies to resolve normative disagreements by means of an accepted process, even if the process does not always deliver outcomes acceptable to all. This is because agreement on a process is often more important than agreement on the right outcome. 'For this reason', Huemer admits, 'the disposition to defer to accepted processes is a crucial social virtue' (330, emphasis removed). Without deference to law, peaceful social cooperation would not be possible. But while Huemer acknowledges the force of this objection to his thesis, he maintains that 'this virtue has limits' (332). One obvious limit is that process-based solutions are themselves constrained by justice, as, to take Huemer's outlandish example, when a kidnapping plot is hatched by a philosophy department to deal with a student's grade complaint (*ibid.*). Huemer then argues that social deference to a process is impermissible when i) 'the outcome of the process is seriously unjust', and ii) '[t]hat outcome is not plausibly seen as the product of a reasonable good faith effort to identify the requirements of justice in the particular case' (334). But neither of these conditions, Huemer thinks, applies when democratic processes produce unjust laws. The primacy of justice before the law, then, remains unshaken.

## 2. Law before Justice

### 2.1 *The Purpose of Law*

Huemer thinks we must choose between law and justice. Even though I will go on to argue that this choice is illusory, there is an important sense in which law precedes justice. Law is a necessary means to justice.

Huemer's argument from instrumental rationality, recall, reasons that justice must be prior to law because '[t]he legal system is ostensibly *designed* to achieve justice' (9, emphasis added). Given Huemer's view of justice discussed above, this translates into 'the legal system is ostensibly designed to respect the rights of individuals from harmful coercion.' But it is much more plausible that the legal system, inasmuch as it is *designed* at all (indeed, it is a good example of Hayekian spontaneous order), exists to maintain a stable social order, which is a necessary precondition for justice. As Bernard Williams puts it, 'the securing of order, protection, safety, trust, and the conditions of cooperation ... is "first" because solving it is the condition of solving, indeed posing, any [other questions]'.<sup>6</sup> Huemer seems to acknowledge as much when he writes, '[j]ustice to the individual, it might be argued, is not the highest value at stake in the courtroom. The most important value at stake is that of peaceful, orderly social cooperation' (331). But while he goes on to question whether this consideration tilts the scales back to law, this plausible hypothesis about the justice that the legal system exists to achieve remains unexamined.

In fact, this assumption *does* tilt the scales back to law, since without due respect for law, which creates and supports a stable social order, the very possibility of

6 Bernard Williams, *In the Beginning was the Deed* (Princeton, NJ: Princeton University Press, 2005), 3.

justice is eliminated. Justice, according to this view, is partly what emerges through a legal system, that is, the system of laws, rules, and practices that successfully maintain a stable social order. While particular laws, rules, and practices can be criticised on substantive grounds, subordinating the legal system to a substantive view of justice, untethered to the basic function of maintaining a stable social order, is a grave mistake. This is because what the just outcome would be in a given case – an outcome that preserves social order – is exactly what the legal system exists to discover, the ultimate result of which is *unknown* to the participants in the system before the case has been decided.

Despite Huemer's optimism about the reliability of intuitions about justice, our imperfect knowledge of justice is critical to understanding the sense in which the law is a means to justice. Huemer's argument from instrumental rationality posits that '[i]t is irrational to value a means to an end over the end itself' (11). But when the means to an end are partly *constitutive* of discovering the true nature of the end, the means must be valued equally to the end. Consider, for example, the following parallel argument to Huemer's argument from instrumental rationality:

- 1 Freedom of speech is justified by the goal of truth.
- 2 The means to a goal is less important than the goal that justifies that means.
- 3 Therefore, freedom of speech is less important than truth.

Following Huemer's reasoning, we may then conclude that freedom of speech should be restricted when the truth is directly at stake, just as the law should be disregarded when justice is directly at stake. Indeed, one may buttress the analogy by decrying the recent spread of so-called misinformation under the auspices of the freedom of speech. But this is absurd. Just as we may acknowledge freedom of speech as the best means to discovering the truth, so too law is the best means to discovering justice. Both arguments rest on the assumption that a single person's judgment is an unreliable guide to the higher goal. As John Stuart Mill famously argued, no person has direct access to the truth, especially in matters of morality and politics.<sup>7</sup> Consequently, no person has direct access to justice, especially when unbound from the law. We should no more trust a judge's personal sense of justice than we should trust a politician's notion of 'misinformation'.

Law, as I have argued, is justified by the goal of securing stable social order. This is a precondition of justice. It is not irrational, therefore, to value equally the law as a means to this end, when the nature of justice is uncertain and the law an indispensable means to our imperfect knowledge of it. For while the contours of justice are often uncertain, experience indicates that stable social order is the product of good law. Thus, Premise 2 in Huemer's argument from instrumental rationality above is false. Law is not less important than justice. Law is an indispensable means to justice.

7 John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis, IN: Hackett Publishing, 1978), Ch. II.



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Whether the foregoing criticism undermines the *Primacy of Justice* depends on how we interpret 'justice'. For the maintenance of a stable social order is, as I have argued, a kind of justice that precedes anything else we might say about justice. Curiously, Huemer acknowledges this possibility when he notes early on that those who defend the *Primacy of Authority* might argue that they are 'really driven by a more subtle, more far-sighted concern for justice ... in order to prevent a kind of social chaos which would ultimately create more injustice overall' (10). Indeed, if, as I have argued, avoiding social chaos is a precondition for justice, and the authority of law is among the necessary means of securing justice, then justice is not absolutely prior to law. '[I]t is', indeed, as Huemer speculates early in the book, 'perhaps a mistake to portray authority and justice as two separate, competing values' (10).

## 2.2 *Justice and the Limits of Rights*

Once justice is no longer decoupled from law, Huemer's view of justice as respect for individual rights begins to look tenuous. One striking consequence of his view, as we have seen, is that criminal laws are presumptively unjust because they inflict harmful coercion on those who break them. Huemer believes that coercion stands in need of moral justification. But it is not clear that this view is even coherent, much less plausible. While the coercion inflicted by specific criminal laws can be morally criticised, there is no reason to object to the fact that criminal laws *as such* inflict harmful coercion. This is because the justified use of harmful coercion is built into the very notion of criminal law. 'Law', as Aristotle writes, '... has the power that compels'.<sup>8</sup> So, it cannot be *unjust* to administer criminal penalties for breaking laws, which, after all, exist to preserve justice itself.

Huemer's rights-based view of justice has similarly perverse consequences for justice, understood as the maintenance of a stable social order. If, as I have argued, maintaining a stable social order is the foundation of justice, then a right against harmful coercion cannot be a requirement of justice in cases where the right in question would threaten or destabilise social order. Interestingly, the two most prominent examples of unjust laws Huemer proposes are potentially of exactly this sort: i) drug prohibition, and ii) immigration restrictions. Without denying the harms inflicted by, and general dysfunction surrounding these laws in the United States, it is hard to deny that drug prohibition and immigration restrictions do *not* have potentially major consequences for the stability of any society. For example, a society, in which a large number of its citizens are addicted (and have ready access) to fentanyl, and in which no distinction is made between citizen and non-citizen, may recognise Huemer's individual right against harmful coercion. But such a society may not be consistent with a stable social order, upon which the securing, and not mere proclamation of such rights depends. There is no right to destroy society in the name of justice. *Fiat justitia ruat caelum* is false.<sup>9</sup>

<sup>8</sup> Aristotle, *Nicomachean Ethics*, 1180a20.

<sup>9</sup> Cf. David Hume, 'Of Passive Obedience', in *Political Writings*, eds. Stuart D. Warner and Donald W. Livingston (Indianapolis: IN: Hackett Publishing, 1994), 182.



This is not to deny that rights belong in a discussion of law and justice. But rights are means rather than ends in themselves. Rights presuppose functioning social practices, governed by law. Huemer's right against harmful coercion is most plausible, not in the abstract, but when understood as part of the American legal tradition that has long recognised rights to life, liberty, property, and so on. Or taking an international view, we might understand human rights as a moral tradition specifying the conditions for (and ideal of) a peaceful and prosperous society. The ultimate justification for such rights, however, is not, as Huemer argues, the evil of harmful coercion, but rather the basic constituents of a well-functioning society.

The rights that are part of justice, then, are the rights we have in virtue of participating in functional legal systems, where 'functional' minimally means serving the primary purpose of securing order. In a sense, this makes justice relative to the legal system in question, since the laws partly determine what justice is. This is not legal relativism, however, since it is also possible to criticise the justice of the legal system as a whole. In this sense, one might make a claim about rights as a way of proposing alterations or deviations from the legal system as it exists. Huemer, for instance, may argue that the American legal system should abolish all drug related laws and remove or weaken immigration restrictions. Few legal systems (if any) have ever recognised such rights, and, as I have argued, they are not very plausible on their face. But if we view such rights as mere proposals, rather than demands of justice, they can be evaluated more carefully without rejecting the coequality of justice and law.

### *2.3 Role Duties and Procedural Justice*

Setting aside Huemer's view of justice, we turn to the implication of his thesis that agents in the legal system should ignore duties associated with their roles (e.g., judge, juror, lawyer) when those duties conflict with justice (e.g., interpreting an unjust law, choosing to convict under an unjust law, defending an obviously guilty client, etc.). By 'conflict with justice', Huemer means producing an unjust outcome. In a few straightforward cases, this thesis has some plausibility. There can be no genuine moral duty to convict a person known to be innocent. But it is significant that Huemer elides the important distinction between just outcome and just procedure. In fact, we can interpret his thesis as the claim that one should not comply with a procedure (whether just or not) when one correctly believes that it will deliver an unjust outcome.

But this is implausible. If we trusted persons to do justice in the individual case, a legal system would be largely unnecessary. The necessity of procedural justice is that we lack this trust in persons and do not believe that what justice requires is sufficiently clear. It is not that we know nothing or lack perfect knowledge of justice; we simply know *little* about justice, especially when theory meets practice. A jury trial, for example, operates according to what John Rawls calls 'imperfect

procedural justice'.<sup>10</sup> This is where 'there is an independent criterion for the correct outcome [i.e., the guilty party is convicted]', but 'there is no feasible procedure which is sure to lead to it'.<sup>11</sup> This works well enough when the laws are acceptable. But where we are unsure about the justice of the laws, there is also what Rawls calls 'pure procedural justice', which 'obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure'.<sup>12</sup> Pure procedural justice describes the operations of a legal system taken as a whole. But a legal system obviously cannot function unless agents in the system reliably play their assigned role and refrain from placing their own moral judgment above the law. This is equally the case whether legal judgments are vested in a jury, as in the American system, or in a judge, as in the Dutch system and other civil law codes.

Huemer dismisses the foregoing argument as 'faith in the system' (294-299), and his response appeals to the fact that legal systems often produce the wrong outcomes, which, he alleges, could be mitigated if agents simply aimed at just outcomes directly. One may argue further that there are better alternative legal systems that might produce more just outcomes. Given Huemer's trenchant critique of the American legal system, and the availability of worthwhile alternative models internationally, this possibility cannot be ruled out. However, it is doubtful that the moral obligation to participate faithfully in the existing system can be overridden simply on this basis. The critical question is 'compared to what is the system sub-optimal?', where the basis for the comparison is an existing or viable alternative. And even then, arguably that would justify working to gradually implement such a system, not ignoring the obligations that exist under the current system.<sup>13</sup> Huemer's criticism of the American legal system, however persuasive, cannot be sufficient to excuse agents in that system from performing their critical duties, upon which the delicate balance of law and justice depends.

Huemer later concedes that this disposition, what he calls the 'virtue of deference', is important. Yet he goes on to argue for the greater importance of what he calls the 'virtue of defiance' (338-342, emphasis added). The truth, of course, is that every society depends on both virtues, and whether one is more important is context-dependent, not subject to *a priori* stipulation. Procedural justice cannot operate unless agents in the legal system are disposed to defer to the internal norms governing their roles. But, by definition, procedural justice is imperfect and not fully reliable. Thus, individual moral judgment, which will sometimes recommend defiance, must be allowed to *occasionally* assist or correct legal procedure. This is the real insight of jury nullification, which, Huemer is quite right to note, 'is part of the normal functioning of the jury trial' (337). This exception, however, does not disprove the rule. If juries commonly became both fact-finding and regular legislative bodies, it is highly doubtful that legal systems utilising the

10 John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999 [1971]), 74.

11 Rawls, *A Theory of Justice*, 75.

12 Rawls, *A Theory of Justice*.

13 This is roughly equivalent to Socrates' 'persuade or obey' doctrine from Plato's *Crito*, 52a-c.

jury trial could continue to function properly. As I argue in the next section, when deviations from legal procedure are justified ultimately depends on good practical judgment, not philosophical principles.

### 3. Justice under Law

#### 3.1 *Justice and Law are Coequal*

On the cover of Huemer's *Justice before the Law* appears a photo of the United States Supreme Court building, featuring the motto, 'Equal Justice Under Law'. On the first page of the book, Huemer cites this motto as evidence 'the [legal] system focuses mainly, if not entirely, on justice' (3). But this is incorrect. The meaning of 'equal justice under law' does not imply that law is subordinate to justice, but that there can be no justice except justice under, i.e., in the context of, law. Huemer's title, *Justice before the Law*, has the equivalent meaning when 'before' is understood to mean 'in the presence of' or 'under the jurisdiction of' instead of 'prior to' or 'superior to' (cf. 'equality before the law'), which is the meaning he apparently intends. The motto does not, then, support Huemer's thesis at all, but rather the traditional view, whereby justice and law are coequal.

David Hume notably shares the traditional view. Justice, for Hume, is that 'without which there can be no peace among [human beings], nor safety, nor mutual intercourse'.<sup>14</sup> Justice is the securing of social order. Meanwhile, for Hume, law, '[has] ultimately no other object or purpose but the distribution of justice, or, in other words, the support of the twelve judges'.<sup>15</sup> As Hume's biblical reference suggests, there is no justice without law. Hume goes on to outline the tension between authority and liberty that lies at the heart of every society, a tension that mirrors the one Huemer sees between law and justice. But recognizing their mutual dependence, Hume argues, 'neither of them [authority nor liberty] can ever absolutely prevail in the contest', since while 'liberty is the perfection of civil society ... authority must be acknowledged *essential to its very existence*'.<sup>16</sup> So too, I would argue, with justice and the law. Justice, in the highest sense, is the perfection of society, but law, understood as the part of justice that maintains social order, is essential to its very existence.

Another motto, on the East side of the Supreme Court building, accompanying the likenesses of Confucius, Moses, and Solon, reads 'Justice the Guardian of Liberty'. This motto similarly supports Hume's contention: liberty is the perfection of civil society, and justice, in this higher sense, consists in the safeguarding of liberty. Apparent conflicts between law and justice, then, should be resolved in the following manner. Members of a society should have as much liberty consistent with the requirements of a stable social order, and the authority of law should carry

14 David Hume, 'Of the Origin of Government', in *Political Writings*, eds. Stuart D. Warner and Donald W. Livingston (Indianapolis: IN: Hackett Publishing, 1994), 194.

15 Hume, 'Of the Origin of Government'.

16 Hume, 'Of the Origin of Government', 196 (emphasis added).

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the weight necessary to establish and maintain social order *without thereby crushing liberty*.<sup>17</sup> The basic rationale for the prohibition of some drugs, for example, is to put restrictions on liberty for the sake of mitigating the potential social harms associated with widespread and endemic drug use. Huemer is probably correct that the wrong balance has been struck in the United States, as relatively successful efforts at legalisation in other countries has shown. But the important point remains that this is a complex matter of balancing liberty and authority, not a simple matter of protecting rights.

Now, if law and justice are coequal, it might seem that we lack an independent moral standard against which to judge existing laws and the justice of the status quo. Why, for instance, does the traditional view not collapse into legal relativism? Plato's late dialogue the *Laws* is helpful on this point.<sup>18</sup> The Athenian Stranger, with his Cretan and Spartan companions, begins by inquiring whether credit for a city's good laws is owed to their divine origins or human ingenuity.<sup>19</sup> In the course of the conversation, the Stranger observes, whether of divine origin or not, 'what the lawgiver ... any lawgiver who is good for anything at all – will always have particularly in view ... is *human goodness* of the highest order'.<sup>20</sup> Good law is law ordered to the human good.<sup>21</sup> And since the human good cannot exist without a stable social order, governed by law, the maintenance of such an order is paramount to justice. The basic rationale for immigration restrictions, for example, is that control over who is, and who is not a citizen of a country is critical to maintaining the nation-state as the basic political unit. That 'harmful coercion' is required to enforce such restrictions is neither here nor there, since there is no independent right to be a citizen of a country except by reference to its laws.<sup>22</sup>

### 3.2 *The Virtue of Justice*

Plato's deeper point is that justice is one virtue among many, and that properly understood, law should aim to inculcate all of the virtues, subject, of course, to prudential constraints inherent to law as a sometimes blunt instrument. The Cretan and the Spartan, for example, since they come from traditional martial cultures, think that their legal arrangements have been made primarily with the purpose of victory in war. To that end, the virtue of courage in battle is what their laws seek to inculcate. But with some gentle questioning from the Athenian

17 It is no objection, therefore, to protest that authoritarian states might be considered just according to the traditional view of justice. On the contrary, authoritarian states, by definition, strike *no* balance between liberty and authority. Hume, by contrast, defines a free government in terms of checks on authority, not in terms of how *much* individual liberty exists. See Hume, 'Of the Origin of Government', 196-197.

18 Plato, *Laws*, ed. Malcolm Schofield (Cambridge: Cambridge University Press, 2016).

19 Plato, *Laws*, 624a.

20 Plato, *Laws*, 630c (emphasis added).

21 Articulating, much less defending, a conception of the human good is beyond the scope of this article.

22 This is intended as a descriptive statement. Of course, we may engage in normative arguments about who should be eligible for citizenship in a given country. See e.g., Adam Hosein, *The Ethics of Migration: An Introduction* (New York: Routledge, 2019).

Stranger, both men are gradually brought to accept that courage – as one part of the human good – needs the assistance of the other virtues (e.g., temperance, wisdom, and justice), and therefore, the Cretan and Spartan lawmakers ‘did not set about legislating with an eye to just one part of human goodness ... but with an eye to goodness as a whole’.<sup>23</sup>

If the ultimate purpose of law is human goodness, as Plato thought, then justice must be understood as both a virtue of institutions *and* persons (as Plato also thought). A good society needs both. Institutional justice is what has mostly concerned political philosophers of the last fifty years. It has to do with the institutional arrangements of a society, whether they are fair, efficient, well-ordered, and so on. But as Onora O’Neill observes, a society with just institutions run by corrupt or immoral citizens is untenable: ‘For centuries both popular and philosophical writing accepted not only that good characters are vulnerable without good laws, but also that justice alone cannot guide human life, in which good laws must be buttressed by good characters.’<sup>24</sup> Again, justice and law are coequal. Alongside institutional justice, therefore, we must also include justice as a virtue of character.

For instance, when Huemer speaks of doing justice to the individual in the case at hand, he is really speaking about what it means to be a just person. In this sense, the relationship between just persons and unjust institutions is really the central issue of his book. But whereas Huemer focuses primarily on just outcomes, the virtue of justice for institutions is better understood as a virtue of a well-functioning society, just as health is the virtue of a well-functioning body. A society is good when its institutions genuinely serve the human good, while the virtues of a good citizen provide support to the maintenance and perpetuation of a society’s institutions. A stable, orderly society is analogous to a body that is alive and functioning. But a just society is one that functions well.

The rights associated with living in a just society exist in virtue of membership. As Edmund Burke puts it, ‘[i]f civil society be made for the advantage of man, all the advantages for which it is made become his *right* ... law itself is only beneficence acting by a rule’.<sup>25</sup> Rights, therefore, are inseparable from the law that exists to serve the human good. Justice, in a strict sense, requires no more than the protection of the rights that exist in virtue of the laws of one’s country. Arguments about what rights *should* be recognised in a given society – justice in a higher sense – should concern the benefits and advantages of the laws that would ultimately secure such rights. Thus, reversing Huemer’s formulation, it is not the violation of rights that gives rise to injustice, but the violation of the laws of justice that give rise to the violation of rights.

23 Ibid., 630d-e.

24 Onora O’Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 9.

25 Edmund Burke, *Reflections on the Revolution in France* (Indianapolis, IN: Liberty Fund, 1999 [1790]), 150 (emphasis added).

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### 3.3 *Justice as Lawfulness*

Once we accept the dependence of justice on law, it is natural to conclude that a just person is simply one who is law-abiding, a view I have called ‘justice as lawfulness’.<sup>26</sup> The faithful performance of role duties, such as those attaching to agents of the legal system, is not a competing consideration against which justice should be weighed, but part of the performance of the virtue of justice itself. Broadening out the sense of law, the just person should be understood to act according to the legal *and* social norms of his community. This encompasses what the ancient Greeks understood by the *nomoi*. As Richard Kraut explains:

“When [Aristotle] says that a just person, speaking in the broadest sense is *nomimos*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community.”<sup>27</sup>

But to be truly virtuous, the just person’s relationship to the laws cannot be one of unthinking obedience. For the virtues require that we act with knowledge, and with sound, regulated emotion. The just person, then, has an understanding of the laws, and obeys them willingly, without internal conflict. The unjust person, in contrast, is someone who puts his own judgment ahead of the community’s moral standards, and an unjust society is one that either lacks such standards, or is systematically unable to follow them, leading to a breakdown in social order.

In a just society, the legal and social norms will be in harmony, such that the just person faces no conflicts in remaining obedient to the laws. In an unjust society, however, it is possible that the just person faces a difficult choice. For if the legal and social norms are in conflict, there is no choice that preserves the law-abiding character of the just person. Social norms can change quickly leaving the law to catch up. Abrupt changes in the law that upset longstanding social norms are also possible. How would a just person treat these possibilities? Since the law, as I have understood it, develops as a codification of preexisting social practices, it is plausible to maintain the priority of social norms, including existing legal precedent, in cases of new or proposed legal norms. But likewise, where the existing social norms are judged deficient or in a state of flux or change, it is necessary to recognise the authority of the legal norms, which partly serve the function of coordinating a community’s standards in characteristic conditions of uncertainty.

Since justice as lawfulness may sanction occasional deviations from legal norms, it is reasonable to wonder how it essentially differs from Huemer’s view. Does this not advance the priority of justice before law? The difference, I contend, lies primarily in the status of individual moral judgments weighed against the moral standards of a community. If, for example, in some legal jurisdictions, there is a law against marijuana possession, but there is no longer a widely shared social norm that such behaviour is wrong, then it is reasonable to suppose that such a law

26 Tristan J. Rogers, ‘Justice as Lawfulness’, *Journal of the American Philosophical Association*, Vol. 4, Issue 2 (Summer 2018), 262-278.

27 Richard Kraut, *Aristotle* (Oxford: Oxford University Press, 2002), 105-106.



would not be enforced or obeyed by a just person. Such a situation would also create a moral impetus to change the law, as has happened recently in many American states. On Huemer's view, however, the existing law should *simply* not be enforced or obeyed, solely on the basis of the putative injustice at stake, and regardless of what legal or social norms obtain in the society in question. In this sense, Huemer elevates individual moral judgments above the existing moral norms of the community. This violates a fundamental principle of justice identified by Burke:

"One of the first motives to civil society, and which becomes one of its fundamental rules, is *that no man should be judge in his own cause*. By this each person has at once divested himself of the first fundamental right of uncovenanted man, that is, to judge for himself, and to assert his own cause."<sup>28</sup>

Burke is under no delusions that acts of individual resistance against existing law are *never* justified. He is not a legal relativist. But '[t]he speculative line of demarcation, where obedience ought to end, and resistance must begin, is faint, obscure, and not easily definable'.<sup>29</sup> What makes the difference is practical judgment, which is associated with the virtue of prudence or practical wisdom (*phronesis*).<sup>30</sup> A just person may occasionally defy the legal and social norms, when i) the true interests of the community are at stake, and ii) opportunities for political and legal remedies have been exhausted. But such decisions should not be taken lightly, nor can they be put into a philosophical formula. As James Fitzjames Stephen, a judge, writer, and contemporary critic of John Stuart Mill writes:

"In nearly every department of life we are brought at last by long and laborious processes, which due care will usually enable us to perform correctly, face to face with some ultimate problem where logic, analogy, experiment, all the apparatus of thought, fail to help us, but on the value of our answer to which their value depends. The questions, Shall I or shall I not obey this man? accept this principle? submit to this pressure? and the like, are of the number. No rule can help towards their decision; but when they are decided, the answer determines the whole course and value of the life of the man who gave it."<sup>31</sup>

When the fateful decision to disobey is made well, we call such a person wise or prudent; when it is made poorly, we call them foolish and lawless. Such judgments

28 Burke, *Reflections on the Revolution in France*, 151 (emphasis original).

29 Burke, *Reflections on the Revolution in France*, 118.

30 I am neither denying that there *can* be justification for civil disobedience, nor discounting the vast philosophical literature that grapples with this issue. My point is simply that, contrary to the ambitions of legal philosophers, there is no philosophical formula for civil disobedience. For a recent review of civil disobedience, see Candice Delmas and Kimberley Brownlee, 'Civil Disobedience', in *The Stanford Encyclopedia of Philosophy* (Winter 2021 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/win2021/entries/civil-disobedience/>.

31 James Fitzjames Stephen, *Liberty, Equality, Fraternity: And Three Brief Essays* (Chicago, IL: University of Chicago Press, 1991 [1873]), 170.

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are necessarily made in hindsight. The wise person, we observe, performs a genuine service to the community; the foolish person only weakens its bonds. The truly just person, therefore, is also prudent. When higher matters of justice are at stake, the prudent person has the wisdom to see into the future, which may occasionally excuse or justify breaking the law, provided the punishments are accepted.<sup>32</sup> But though such persons have undoubtedly existed (and hopefully will continue to), it would be arrogant to assume this degree of wisdom for oneself, or to assume that one's intuitive sense of justice is obviously superior to the moral consensus of society. Yet this is precisely what Huemer supposes when he puts justice before the law.

#### 4. Conclusion

It is fitting to close by reevaluating the jury's actions in the Zenger Trial. Huemer, we have seen, regards the trial as a paradigm case of putting justice before the law. Possessed with superior moral insight, the jury could see what the judge could not, that truth is a reasonable defence against the charge of libel. With the benefit of hindsight, that is a tempting conclusion. But that would be to take for granted the hard won moral insight that the legal system, through which the jury acted, ultimately made possible. This is so because English Common Law functions to *discover* what justice requires, not assume it. The law is premised on the fact that agents of the legal system are *not* already equipped with knowledge of justice. The jury in the Zenger Trial did not put justice before the law, but acted as an instrument of law, to generate the collective moral judgment that truth is a sufficient defence against *sedition* libel. Sedition, after all, is a threat to the stability of social order. But so is a society that cannot truthfully criticise its own government.

Huemer is at his most persuasive when arguing for the legitimacy of jury nullification. While, as I have argued, he gives the practice too much weight and misapplies where it is justified, there is no doubt that jury nullification is a genuine, if infrequently used and poorly understood, part of the English Common Law tradition, from which the American legal system descends. 'This is because,' as Huemer correctly notes, 'the jury's own exercise of moral judgment, including their sense of justice, is itself a part of the relevant dispute-resolution process to which deference is due' (337). 'The man in the jury box', as Patrick Devlin calls him, 'is not just an expression; he is an active reality. It will not in the long run work to make laws about morality that are not acceptable to him.'<sup>33</sup> The law, as an instrument of justice, cannot exceed too much the existing moral character of society. Law and justice must travel together, with justice under law.

32 This follows in the tradition of nonviolent resistance pioneered by Mahatma Gandhi, and continued in the United States by Martin Luther King Jr. See his 'Letter from a Birmingham Jail', in *A Testament of Hope: The Essential Writings of Martin Luther King Jr.*, ed. James. M. Washington (New York: Harper & Row, 1986).

33 Patrick Devlin, *The Enforcement of Morals* (Indianapolis, IN: Liberty Fund, 2009 [1965]), 21.