

Comments on Roger Cotterrell's essay, 'The struggle for law: some dilemmas of cultural legality'

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First, many thanks to Carrie Menkel-Meadow, the editors of *The International Journal of Law In Context* and the sponsors of this series for facilitating this lecture, and for inviting my participation. And a special thankyou to Professor Roger Cotterrell for sharing with us such a generous, humanistic and hopeful account of law's moral possibilities, when faced with multicultural conflict within a society governed by a liberal rule of law. I very much appreciate the opportunity to reflect on this set of claims, although I feel somewhat an outsider to the task, as I'll explain below. I understand Professor Cotterrell as arguing, first, that traditional Anglo-American jurisprudence has not sufficiently theorised the role of culture and cultures, second, that multiculturalism renders inadequate, for different reasons, both Weberian and non-positivist or non-instrumental accounts of law's liberal aspirations, and third, that one possible way for law to contribute constructively to a moral and peaceful multicultural society would be to conceive of itself not just as an instrument for the fulfilment of private and conflicting individual purposes, not just as the target of passions from a more-or-less unified culture, but rather, as a means of respectful communication between cultures, albeit one that imposes individualist and liberal side-constraints on the conversation so fostered: to wit, that the law itself, and its parts, must be rigorously respectful of the autonomy and decency of all individuals, and must demand as much from citizens.

I am sympathetic to all three prongs of this project. I agree entirely that jurisprudence has not well theorised the cultural; I agree that some of the strains in the general façade of liberal legalism are a result of multicultural forces and aspirations; and I am happy to share in the call for legal doctrine that is civil and respectful. So in these comments, I will just voice some worries about the overall thrust of the project, and offer some friendly amendments. The worries are threefold: the first is jurisprudential, the second is political and the third might best be called aspirational.

The jurisprudential worry is this: it may be the case, as Professor Cotterrell reminds us, that law is importantly communicative, and as such communicates either well or poorly, ethically or not, respectfully or not. It may well be true, as J.B. White has spent his career arguing,¹ that how we use or abuse language in law says a great deal about our moral selves, that the communicative function of law has much in common with the communicative function of the literary arts, that both serve an ethical role in social life, that ethical speech in law is an ideal toward which we ought strive. I do not mean to deny any of this. Nevertheless, adjudicative law, even if it is (or can be) a form of ethical communication, is also the command of the sovereign. It is the wish of someone with power imposed on someone with less. Yes, commands communicate, and ought to do so respectfully. Commands also, though, do other things: they confiscate, they liberate, they empower

¹ White (1984, 1985, 1990, 1991, 1994, 2003, 2006). Professor Cotterrell acknowledges his debt to White at p. 380.

or dis-empower and they kill, more than occasionally. We need to heed the effects of this imperative speech.² As we praise judges for their respectful, even ethical, uses of language, we need to attend to the consequences of the commands that come sheathed in those respectful words. Is the command lawful? Is it helpful? Is it a good thing, overall? The ethical words might change the world. The command though will change the world. Is the change a just one? The virtues that we seek in our communicative lives do not exhaust the virtues we should seek in our law. In adjudication as elsewhere, the words should be respectful, and the speaker should speak ethically, be mindful of the listener and seek to strengthen the bond of community that the language facilitates. Failure on that score carries consequences. The command the words convey, though, must be just, and the new world the command creates should constitute a change for the good. The integrity of the language it employs, the ethical use of the words that constitute it and the communication thereby facilitated – none of that carries a guarantee that the force that is law's core will be put to good use.

The second worry is political. In the 1950s, 1960s and 1970s liberal lawyers, Justices, and the litigants whose causes they represented and adjudicated, went a long way in the United States toward perfecting an individualist, liberal, formal, promise of equal justice between White and Black citizens, and between women and men. The civil rights community, and the Justices that were a part of it, did so, furthermore, through court opinions some of which were models of respect for the individuality and decency of all citizens.³ That moral accomplishment, we can now see, came with some real costs, dangers and risks for progressive politics, which are familiar enough to this audience,⁴ and I will not belabour them, but I will mention just one. By perfecting, say, the opportunities of women as well as men, of Blacks as well as Whites, to compete for jobs, or political office, or the vote, etc., we court this risk: we invite a level of comfort regarding the overall justice of our social world that may not be earned, and that may, in fact, be wildly misplaced. Bluntly: if it is no longer true that Whites can discriminate against Blacks, that women or African-Americans can be victimised by racist or sexist bigotry – then the world seems to be a much fairer place. Since our meritocracy now works – is now true to its own promise – we need not, in effect, concern ourselves with the unequal outcomes of meritocratic competition on those who are on the bottom of our social and economic pyramids. Self-congratulatory smugness of formal racial equality in some spheres, in other words, might invite an undeserved, unearned complacency regarding social justice overall, and particularly as it concerns poor people. If that is so, then the promised formal equality or formal justice in the spheres of meritocratic competition comes with a pretty nasty kick: that formal justice legitimates a huge and growing sphere of social injustice. If we think life is now fair since we do not discriminate between White and Black, or men and women, or gays and straights, well then life is

2 I do not mean to suggest that legal positivism is at odds with Cotterrell's (and White's) understanding of adjudication as communication; only that positivism highlights a feature of that communication – its imperative dimension – that non-positivist theories of law tend to downplay. For classic treatments of legal positivism, see, e.g., Austin (1861) and Bentham (1776). For a contemporary positivist conception with a more nuanced (and rule-based) conception of legal imperativism at its core than that held by these nineteenth-century theorists, see Hart (1994).

3 *Brown v. Board of Education* 347 U.S. 483 (1954) was a dramatic turnaround, not only in its holding, that *de jure* segregation on the basis of race is unconstitutional, but also for its admirable tone of respect for minority communities. More recently, the majority opinion in *Lawrence v. Texas* 539 U.S. 558 (2003), in which the Supreme Court held that states may not constitutionally criminalise consensual same-sex sexual conduct between adults, and Justice Marshall's opinion in *Goodridge v. Mass. Dep. of Pub. Health*, 440 Mass. 309, 798 N. E.2d 941 (2003), in which the Massachusetts Supreme Court held that a ban on gay marriage violates the Massachusetts Constitution, are also both civil rights victories and models of respectful communicative adjudication.

4 Progressives now worry, rightly in my view, that the overreliance on civil rights litigation to achieve gains in racial and sexual justice have come at the costs of ordinary progressive politics. We have come to view the Courts, rather than the legislative branches, as the vehicle for just laws, and as a result our law has suffered. I discuss this in detail in West (2008). See generally Rosenberg (1991), Tushnet (1999), Sager (2004).

fair, at least so far as law is concerned. The growing gap between rich and poor, haves and have-nots, economically privileged and underprivileged, is not morally problematic. It is the result of competition now made fair. It is not a problem. At least, it is not law's problem.

American progressive legal academics worry a good deal about this dilemma,⁵ so again, I won't belabour it. But let us not repeat it. The worry is just this: even if we could with a magic wand transform our courts into conduits of respectful communication between Muslims, Fundamentalist Protestants, Conservative Catholics and Orthodox Jews, that would not touch the growing divide – which is increasingly cultural, I would argue, at least on Cotterrell's four-part definition of cultural⁶ – between those who live as those of us in this room live, and those whose lives are entirely different, because severely impoverished. Professor Cotterrell made quick mention of this towards the start of his paper, when he noted that Marx was the first of the difference theorists to posit a problem with the assumption of a unified culture. But then the reference was dropped. Of course, we need not solve all the world's problems in every short paper. But we do need to worry that the gain in justice for which we argue not come at the cost of a complacency regarding greater injustice. In this United States culture, at this time, that strikes me as a very real worry. The cultural divide, here, that is proving devastating to our decency is primarily economic – not gender, race, ethnicity or religion-based. We need to worry that the bridge we build between religious and ethnic cultures not unduly consume the energies for social justice that might otherwise be free to address the elephant in the room – and the elephant, in brief, is class.

The third worry is closely related. Professor Cotterrell alluded to it indirectly in his paper, and directly in responses to questions after his presentation. In the paper, Cotterrell suggests that our liberal rule of law for the most part serves and recognises individuals and corporations. This leaves human beings who are mightily constructed by, attached to, defined by and parts of culture, just a bit, in the cold. Individuals and corporations, our jurisprudence sees. Encultured human beings – not so much so. But, Professor Cotterrell suggests, we could address this. Without abandoning the promise of individualism, we can, and should, recognise encultured human beings – they are individuals, too. What we must do, then, is broaden, perhaps greatly, at least somewhat, our understanding of the 'individualism' that the liberal rule of law countenances. We might have to acknowledge that for some cultures, 'individual' means something distinctive – and we as a multitude need be respectful of those differences.

Well, perhaps, and perhaps the broadening he suggests is a good one. But let me go back to square one – the observation that the liberal rule of law posits individuals and corporations as the object of law's solicitude – and proffer a rather different worry, not addressed by the embrace of the encultured human being as also being an individual worthy of law's protection. The observation that the liberal rule of law embraces individuals and corporations is extremely astute. It is also worrisome. Here in the United States, the way it is often put is that the law respects 'persons' – and then defines persons so as to include both corporate and natural individuals. The implication of this sleight of hand is clearly that corporations and natural individuals have some shared essence, or at least some shared set of traits in common, that law can recognise. Whatever individuals and corporations both have in common, then, becomes our definitional account of the 'person' that law recognises, protects, serves. What might those traits be?

5 Much of the Critical Legal Studies movement from the 1970s on concerned these risks of 'legitimation' – that apparent gains in adjudicative justice would legitimate even greater economic or social injustices, and in effect, be not worth the price. See Kairys (1998) and particularly the essays by Alan Freeman on race discrimination law, and Robert Gordon on private law and contract law.

6 Culture, Cotterrell argues (this issue, p. 377), 'in one aspect . . . relates to shared beliefs or ultimate values; in another, to matters of tradition, including common language, environment or historical experience. In a third sense it refers to shared allegiances and emotions. In a fourth, it reflects levels of technological and productive development (material culture) and instrumental (especially economic) social relationships.'

Well, corporations maximise profit pretty much all the time, and individuals maximise utility at least a good bit of the time. So, as the sun rises in the morning, the 'person' law protects, is, increasingly, the utility maximiser. Again, however we define the individual law protects must be by reference to traits shared by corporations, since corporations are also persons. Utility-maximiser seems to be the shared ground, then, that law can readily identify. Utility-maximiser, then, is the essence of personhood.

This is a problem for our law, for social justice and for the human beings that inhabit planet earth. It is not solved by throwing cultures in the mix. Cultures also might well maximise profit, or utility, who knows? Whether they are included, because they do so, or excluded because they don't, though, the larger problem, to my mind, is the continued lack of recognition of the fully embodied, biological, animalistic human being – that is borne in total dependency, lives for some period of time, breathes, sickens, declines and dies. Corporations, and therefore the persons that individuals are, do none of that. Persons, remember, must include corporations as well as individuals, so the aspect of the individual protected by law, again, is not the born, breathing, sickened, declining and dying animal. It may be the utility-maximising individual. It may be the utility-maximising encultured individual. It is not the animal within us, much less the child within of pop psychology. We need a jurisprudence for animals – including the human animal. A jurisprudence that embraces the culture, I worry, is not such a jurisprudence. It might well thicken the person the law might imagine, see, recognise or valorize. But, with all due respect, a jurisprudence of culture will not thicken it all the way to the ground. It will not deliver us a jurisprudence that respects our biological, physical, animalistic needs, our dependencies or our sicknesses unto death. We need such a jurisprudence, I suspect, if we are to enliven, and lighten, either our finite lives or the law that survives us.

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