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ON FORMAL JUSTICE*

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A number of legal and political theorists have suggested that public officials who fail to act within the law that they administer act unjustly. This does not mean that injustice is always likely to be done merely because it often happens to be done when officials depart from the law. Some writers have held that injustice is done whenever an official fails to act within the law, regardless of the circumstances.¹ I shall call this type of view "formal justice."

Such a view may be considered "formalistic" because it places value, in the name of justice, on adherence to existing legal rules without regard to "substantive" factors such as their contents, the consequences of obeying them, their defects or virtues, or any other circumstances of their application. The only condition imposed is that an official must by law follow the rule in his official capacity. Furthermore, those who attempt to account for this view believe that the requirements of formal justice rest directly on such notions as "proceeding by rule" or "treating like cases alike," which are thought to be at the heart of our shared concept of justice. The basic requirements of formal justice are thus supposed to be exempt from the controversy over substantive principles of justice and their possible justification. It is

* This article was begun during the author's tenure as a Guggenheim Foundation Fellow at University College, London, and completed while he was a Fellow of the Society for the Humanities at Cornell University. The author would like to thank Professor Robert S. Summers of the Cornell Law School for his help and encouragement.

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¹ See, e.g., S. BENN & R. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 128-29 (1965); H.L.A. HART, *THE CONCEPT OF LAW* 155-57 (1961); H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 14 (A. Wedberg transl. 1949); C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 1-87 (J. Petrie transl. 1963); A. ROSS, *ON LAW AND JUSTICE* 273, 280 (1959).

believed that one can embrace formal justice without committing oneself to "ideological" positions. The arguments seeking to ground formal justice on such notions also make circumstances irrelevant to its requirements, which accounts for their formalistic character.

I

THE THEORY OF FORMAL JUSTICE

Formal justice is the latest in a line of legalistic theories. One often mentioned view, ascribed to some famous writers, identifies justice with conformity to law. Hobbes, for example, is noted for stating that "no law can be unjust,"² and for suggesting that justice and injustice apply only to acts under the law, never to the laws themselves.³ This view fits nicely with his claim that the word "just" is "equivalent" to the expression "he that in his actions observes the laws of his country."⁴ Austin has said, "By the epithet *just*, we mean that a given object, to which we apply the epithet, accords with a given law to which we refer to it as a test . . . By the epithet *unjust*, we mean that the given object conforms not to the given law."⁵

These statements suggest a radical conception of justice. First, if they are correct, then we must be utterly confused when we describe laws as unjust—perhaps even when we call them just. Hobbes and Austin seem to be saying that moral appraisal of law in terms of justice exceeds the logical limits of the notion. Second, the suggested view has alarming moral implications, for an unjust act is wrong, morally wrong, unless it can be justified by overriding considerations. Other things being equal, injustice should not be done. But the idea that justice consists in conformity to law then implies, on the one hand, that deviation from the law is always wrong, unless it can be justified on other grounds, and, on the other hand, that no such justification could be based on the injustice of the law, since a law cannot be unjust. This does not mean that noncompliance must always be judged morally wrong, for one who believes that justice consists in conformity

² T. HOBBS, *LEVIATHAN: PARTS I AND II*, ch. 30, at 271 (H.W. Schneider ed. 1958). H.L.A. Hart cites this quotation as evidence that Hobbes was tempted by the view in question. See H.L.A. HART, *supra* note 1, at 251.

³ T. HOBBS, *supra* note 2, ch. 13, at 108.

⁴ *Id.* ch. 4, at 39.

⁵ J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 262 n.23 (I. Berlin, S. Hampshire & R. Wollheim eds. 1954) (emphasis in original). Edgar Bodenheimer cites this quotation as evidence that Austin holds the view in question. See E. BODENHEIMER, *TREATISE ON JUSTICE* 13-14 (1967).

to law may recognize other moral considerations that support non-compliance. But the view nevertheless does seem to stack the moral cards in favor of conformity.

Few contemporary legal theorists would accept this identification of justice with conformity to law, and it is doubtful if any legal theorist ever meant it literally. One might be tempted to mouth such slogans when "law" is understood to cover the so-called "moral law," for this includes those extralegal principles that determine when a law is just or unjust. Discussion of formal justice in these terms may cause some confusion, but if so understood the view clearly loses its distinctness and bite. If the view is not watered down, it has an obviously unacceptable implication, namely, that a law cannot be unjust—that it makes no sense to speak of an unjust law. But the appraisal of laws as just or unjust seems as intelligible and legitimate as the appraisal of official actions in administering the law, and no one denies that the latter can be just or unjust.

It is worth noting that Austin apparently never held such a view, and it is doubtful that Hobbes did. Austin argues in Hobbes's defense and thereby provides his own: Hobbes's statement that "no law can be unjust" should not be taken as the "immoral and pernicious paradox" it superficially seems to be.⁶ In context, Austin claims, it may be seen that Hobbes meant only that "no *positive* law is *legally* unjust," which Austin regards as "merely a truism put in unguarded terms."⁷ The evidence is, however, somewhat equivocal. As Austin reminds us, Hobbes also wrote that laws are not always good since they do not always serve the people's needs.⁸ It does not follow, however, that Hobbes believed that such laws should be called "unjust." He might subject laws to utilitarian appraisal while refusing to regard the appraisal as a measure of the peculiar virtue of justice. However, Hobbes also states that justice consists fundamentally in the "performance of covenants."⁹ A full explication of his theory would, I think, show that he regarded conformity to law as only a derivative requirement of justice within civil society, and even then within the limits of the social contract. The evidence is clear enough in Austin's case, for Austin was, of course, no legalistic skeptic but a utilitarian who maintained that valid moral principles have divine sanction. Ironically, his defense of Hobbes begins with the very passage that is sometimes

⁶ J. AUSTIN, *supra* note 5, at 260 n.23.

⁷ *Id.* at 261 n.23 (emphasis in original).

⁸ T. HOBBS, *supra* note 2, ch. 30, at 272; see J. AUSTIN, *supra* note 5, at 261 n.23.

⁹ T. HOBBS, *supra* note 2, ch. 15, at 119; *id.* ch. 26, at 212.

quoted to show that he identifies justice with conformity to law.¹⁰ The context of the passage makes clear that Austin defined "law" as any general rule, legal or extralegal, that is applied as a standard of appraisal, including "the ultimate measure or test: namely, the law of God," which when applied to law "is nearly equivalent to general utility."¹¹ Such a theory may not generate much enthusiasm today, but it would be closer to Austin's true sentiments than the view sometimes ascribed to him.

At any rate, the idea that justice consists in conformity to law (in the ordinary sense of the word "law," meaning what Austin calls "positive law") is not easily subdued. Something like it is implicit in various current conceptions of justice and legal ideals. It may even be found incorporated in the seemingly innocuous claim that justice in the administration of the law consists in impartial application of the law to particular cases. The result is what I call formal justice. This view identifies conformity to law not with justice overall but with justice in the administration of the law, and thus with justice in the conduct of public officials.

It is important to separate formalistic tendencies from other tendencies among recent writers, especially from the trend toward moral skepticism, for this particular combination results in extreme positions, and a formalist need not be a moral skeptic. Extreme variations on the formalistic theme are suggested by Kelsen, Ross, and Perelman. Whereas the early "legal positivists," Bentham and Austin, regarded certain extralegal principles as rationally defensible and thus valid for appraising legal institutions, the more recent writers maintain a skeptical view of ethics that has been associated with philosophical positivism in this century ("logical positivism"). They see disagreement about extralegal principles to be used for judging law as evidence of subjectivity in such judgments because they assume that "objective" questions can be settled by "empirical" means which have no place in ethics except when questions of principle are begged. Thus, Kelsen despairs of finding any rational way of choosing among alternative resolutions of conflicting interests and declares that "[j]ustice is an irrational ideal."¹² However, he does believe that a rationally defensible element can be salvaged, although it concerns only the application of the laws, not the laws themselves. This element he identifies

¹⁰ J. AUSTIN, *supra* note 5, at 260 n.23.

¹¹ *Id.* at 263 n.23 (emphasis omitted).

¹² H. KELSEN, *supra* note 1, at 13.

with "legality," which requires adherence to the law without exception.¹³

Ross regards the idea of justice as "a demand for equality,"¹⁴ but he maintains the impossibility of finding any rational way of deciding among competing criteria of like treatment and like cases. He settles for "[t]he ideal of equality as such," or "justice in [a] formal sense," which stands for "regularity."¹⁵ He concludes that "the idea of justice resolves itself into the demand that a decision should be the result of the application of a general rule. Justice is the correct application of a law, as opposed to arbitrariness."¹⁶ Ross's reason for supposing that this conclusion requires official conformity to law is similar to Kelsen's: so far as the laws are given, decisions made by applying them can at least be based upon "observable facts."¹⁷

Perelman expressed similar views in his early writings.¹⁸ He based the requirement that officials conform to the law upon the precept "treat like cases alike," which he held to be the kernel of our shared concept of justice and thus something common to all substantive standards, however divergent or indefensible.¹⁹ This precept was understood by Perelman to require scrupulous adherence to law by public officials as the sole rationally defensible requirement of justice.²⁰ The result is a formalistic view of justice in both content and ground.

These views are comparable to the theory ascribed to Hobbes and Austin. Kelsen, Ross, and Perelman recognize that laws may be judged just or unjust only by reference to extralegal standards; the law cannot be the measure of its own morality. Thus, they acknowledge a distinction between the justice of laws and justice in their administration, which suggests the possibility of arguing against official compliance with the law when, for example, the laws to be applied are substantially unjust. But they exclude this possibility by regarding extralegal standards as arbitrary and indefensible. They recognize valid judgments about justice in the administration of the law, but none about the justice of the laws themselves. Because they are skeptical of moral principles generally (except for the requirements of formal justice, which

¹³ *Id.* at 14.

¹⁴ A. ROSS, *supra* note 1, at 269.

¹⁵ *Id.* at 273.

¹⁶ *Id.* at 280.

¹⁷ *Id.* at 284; *cf.* H. KELSEN, *supra* note 12, at 13.

¹⁸ See C. PERELMAN, *supra* note 1, at 15-16, 25-26, 36-45, 50-56.

¹⁹ *Id.* at 16, 29, 36-41.

²⁰ *Id.* at 20, 25, 41, 43, 62.

are conceived of as a special case), they must believe that no sound moral arguments could favor official deviation from the law when formal administrative justice opposes it. Thus, they seem committed to the view that official departure from the law cannot possibly be justified under any circumstances. Although emotional outbursts may be made to that effect, respectable arguments can be marshalled only for obeying the law.

This position seems extreme, but this is partly a consequence of moral skepticism, not of formal justice alone. The arguments for discounting moral appraisal of the law are unimpressive; indeed, it is difficult to identify any clear arguments at all. But this need not detain us. I shall later examine Perelman's suggestion that formal administrative justice rests on the precept that like cases be treated alike.²¹ For the present, one may simply observe that formalists could develop more moderate positions; some in fact have done so. Many seem to accept the idea that administrative justice always requires adherence to the law, while acknowledging that it might conflict with other respectable principles of justice. For example, Patterson does not reject the notion of "justice according to law" (that is, the application of "established rules and principles of law"), but only notes that it may conflict with and may be outweighed by "social expediency and justice."²² Fuller believes that

there lies in the concept of justice itself a hidden conflict or tension between opposing conceptions of the end sought by justice. On the one hand, there is what has been called *legal* justice, a justice which demands that we stick by the announced rules and not make exceptions in favour of particular individuals, a justice which conceives that men should live under the same "rule of law" and be equally bound by its terms. On the other hand, there is the justice of *dispensation*, a justice ready to make exceptions when the established rules work unexpected hardship in particular cases, a justice ready to bend the letter of the law to accomplish a fair result.²³

This sort of view is given formalistic underpinnings and developed further by Benn and Peters, who believe that "[t]o act justly . . . is to treat all men alike except where there are relevant differences between them."²⁴ They insist upon "a distinction between unjust administra-

²¹ Cf. notes 40-48 and accompanying text *infra*.

²² E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 104-06 (1953).

²³ L. FULLER, ANATOMY OF THE LAW 38 (1968) (emphasis in original). Fuller quotes Freud as holding that justice "demands that a law once made will not be broken in favour of an individual." *Id.* at 64.

²⁴ S. BENN & R. PETERS, *supra* note 1, at 128.

tion of the law and an unjust law."²⁵ But when the law speaks clearly, they maintain that justice in its administration requires adherence to it. They do not shrink from the formalistic consequences, acknowledging, for example, that

we should have to admit that a South African judge applying racial discriminatory laws was doing justice, so long as he decided according to the law and nothing else. . . .

. . . .
 . . . The judge may act justly in denying a man the vote because he has a black skin, if that is the law; but we can still question whether the criterion established by the law is itself defensible.²⁶

Perelman now falls into this camp; he remains a formalist but accepts the possibility of rational argument about substantive standards.²⁷ He thus opens the door to arguments against official compliance based on extralegal considerations. The most important development of a moderate formalistic view has been suggested by H. L. A. Hart, who does not seem skeptical of moral appraisal of laws or of moral considerations generally.²⁸

I do not claim that all these writers would insist upon the view that I call "formal justice." I wish to emphasize, however, that the view I am constructing and criticizing is not my own invention. Some of the arguments for it²⁹ have been gleaned from discussions,³⁰ but the chief ones³¹ exist more or less whole in the literature, although they need some sympathetic reconstruction. I have also refined the view under discussion to eliminate extreme implications that seem inessential. My purpose is to expose a clearly discernible tendency in legal and political theory, and I would not want formal justice rejected for inadequate reasons, only to reappear later in more presentable garb.

The task seems worth the effort, for both theoretical and practical reasons. Formalistic notions of justice misplace value by valuing mere form, thereby obscuring the essential connection between justice and

²⁵ *Id.* at 129.

²⁶ *Id.* at 128-29.

²⁷ See C. PERELMAN, *supra* note 1, at 85-86. See also C. PERELMAN, JUSTICE 53-87 (1967).

²⁸ Hart's views are discussed in notes 39-56 and accompanying text *infra*.

²⁹ See notes 33-38 and accompanying text *infra*.

³⁰ In discussions of earlier versions of this paper, which were read at several universities in England (London, Oxford, Sussex) and America (Cornell, Maryland, Virginia, Rockefeller, Wisconsin), I heard formal justice defended so often that I am persuaded the published claims are but the tip of a generally unarticulated iceberg of hunches and convictions. I am grateful to the many discussants on those occasions for their stimulating and helpful comments.

³¹ See notes 39-56 and accompanying text *infra*.

the treatment of persons. Acceptance of formal justice interferes with our attempts to understand justice and to determine whether there are, after all, any intersubjectively valid principles.³² I have also suggested what is morally at stake. At minimum, a formalist maintains that acting within the law is a necessary condition of justice in its administration, and thus that any official deviation is an injustice. Formal justice thus implies that there is always a real moral objection to official deviation from the law—however iniquitous the laws may be, whatever they require or allow, however horrendous the consequences of official obedience, and regardless of all other circumstances. Formal justice holds that this objection cannot be diminished even by full knowledge of all the relevant facts. In other words, formal justice maintains that official departure from the law is like the breach of a basic moral principle.

This point should not be exaggerated. Claims of formal justice do not absolutely condemn official disobedience under all circumstances. It may be said, however, that formal justice always argues for official compliance with existing laws under all circumstances. Therefore, if formal justice claims are unsound, they serve to mount invalid objections to official disobedience, and thus they foster excessive reverence for existing law. For example, formal justice principles make it seem easier than it really is to argue soundly for official compliance with unjust laws, and more difficult to justify official noncompliance. This result is particularly objectionable when injustice could be avoided by official departure from the law, for those who would be wronged by its application are refused relief on the basis of a spurious requirement of justice, perhaps by officials or others who, by virtue of their own social positions, are likely to be beneficiaries of the unjust arrangements.

I do not contend that officials should always *disobey* unjust or otherwise defective laws. This conclusion does not follow from a denial of formal justice. Factors exist favoring official adherence to the law,

³² This work has already received fresh impetus from the appearance of John Rawls's long-awaited book, *A Theory of Justice*, in 1971. It is interesting to note that Rawls appears at first to accept formal justice (see J. RAWLS, *A THEORY OF JUSTICE* 58-60 (1971)) but later seems to reject the concept. See *id.* at 348-49. In the former place, Rawls cites Henry Sidgwick, who comes close to endorsing formal justice himself, for Sidgwick sometimes seems to identify justice with treating like cases alike. See H. SIDGWICK, *THE METHODS OF ETHICS* 209, 267, 379-80, 496 (7th ed. 1962). But Sidgwick's view is unclear, for he does not seem to regard this kind of justice as an independent moral value—one that might conflict, for example, with other nonequivalent values. Thus, the sort of concern that Sidgwick manifests about the possible conflict of Egoism and Benevolence (see *id.* at 497-509) is not exhibited here.

even when injustice will result—factors which may outweigh those favoring noncompliance. My point is that justice, even administrative justice, depends upon the circumstances.

Formal justice is, then, the view that official deviation from the law is a kind of injustice, regardless of the circumstances. I say “a kind of injustice” because the most plausible formalist position would allow for recognition of other kinds of injustice, such as injustice in the laws themselves, in legal or other institutions, and in social systems. I am concerned here only with justice in the administration of the law, and my discussion is meant to be neutral with respect to a variety of views about the other branches of justice.

One may allow the formalist to say that official deviation from the law, while always a kind of injustice, may sometimes be justified. Such conduct need not be wrong, all things considered. As I have already mentioned, some formalists have suggested the contrary; but we should allow for the more plausible position. Thus, the formalist can acknowledge other moral factors which have a bearing upon official conduct and maintain that those favoring deviation may outweigh those favoring adherence (including formal justice) in specific cases. Moreover, since he can also recognize other kinds of justice, such as that of the laws themselves, he may hold that worse injustice may sometimes be done by following than by departing from the law, for example, when the law itself is unjust. For this reason, he may wish to balance the various factors that relate to justice in a given case, and although he regards official deviation from the law as a kind of injustice, he may sometimes decline to characterize an official deviation as “unjust” *overall*. But the formalist nevertheless does believe something like the following: justice in the administration of the law fundamentally requires official adherence in all cases. Any official departure from the law is like the breach of a basic principle—it may sometimes be justified, but it always requires justification, for there is an ineradicable moral objection to the departure.

Three further preliminary points should be made. First, as has already been mentioned, we are concerned here only with the behavior of persons acting in an official capacity. Formalists might maintain that injustice is done whenever *anyone* breaks the law. This position would be more difficult to defend, and formalists do not take it. I shall criticize the more modest and less vulnerable contention.

Second, distinctions may be made among different ways of “administering” the law (for example, enforcing, interpreting, and applying the law) and among different spheres of official conduct (for example,

the administration of substantive and procedural law). But formalists employ none of these distinctions; they are clearly irrelevant to the basic points at issue here and may therefore be ignored.

Third, I assume that laws are morally neutral in the sense that a given law can be either just or unjust. It is not that laws are immune from moral appraisal, but rather that laws are not necessarily either all just or all unjust. This may seem to beg a central question, for if one assumed that all laws were just (and also that injustice would always be done by departing from them), then the claims of formal justice would be harder to deny. I have two reasons for not making this assumption. First, it is implausible. Second, formalists do not rely upon it. They regard laws as morally neutral in the relevant sense and indeed insist upon the independence of justice in the law and justice in their administration. In omitting this unreasonable assumption, one does not deny any of the formalists' premises.

II

APPLICATION OF FORMAL JUSTICE CLAIMS

One route to formal justice proceeds as follows. If one considers any law, one can imagine some applications of it that are unjust and others that are invulnerable to such criticism. This can be done whether the law in question is just or unjust. For example, a rent administrator might be biased toward landlords and always settle disputes in their favor, without seriously considering the merits of the tenants' cases; a judge might discriminate against blacks in his sentencing and rulings; a prosecutor might be gentle with his friends and harsh with his enemies. These examples may seem to involve injustice, but they do not turn upon the justice or injustice (or more generally the morality or immorality) of the particular laws being administered. The respective injustices appear rooted not in the laws but in the way they are administered. In particular, injustice seems to arise simply because the laws have not been followed by officials. The rent administrator, for example, is supposed to base his decisions on the merits of the cases, as determined by the applicable laws or regulations, and not on whim, prejudice, or personal interest. The judge who discriminates against blacks without official sanction exceeds his lawful authority. This is not to deny that injustice could *also* be done if the judge simply followed a law which required such discrimination; but that is another point entirely. Similar considerations apply to the prosecutor in the

third example. These considerations suggest that mere failure by officials to follow the laws they administer constitutes an injustice.

Another example might run as follows. You and I commit similar unlawful acts, and there are no grounds for treating us differently. But you are accused, tried, convicted, and punished for your act, while I am left alone, even though my conduct was not secret. You might complain that injustice has been done,³³ the cause of which appears to be officials' failure to follow the law. I shall now change the example slightly to show that this difference in treatment can occur even under an unjust law. Suppose that a law is established only after we have acted, so that what had been lawful conduct when we did it is now unlawful. Other things being equal, any penalties imposed pursuant to this *ex post facto* law would be unjust. But, even here, injustice can result from the way in which the law is administered. For example, imagine that we are both tried and convicted, but while I am punished within the limits of the law, you receive exceptionally harsh treatment, not authorized by the law. We could then both complain of injustice because of prosecution under a retroactive criminal law. But you would seem to have additional ground for complaint, based on the manner in which the law was administered.

Such examples suggest that the justice of laws is independent of justice in their administration. Formal justice readily explains this observation by saying that laws, either just or unjust, are the basic standards of administrative justice, at least in the sense that acting within the law is a necessary condition of justice in its administration. By this view, whatever standards of justice apply to laws cannot be identical to the standards that apply to official conduct. The examples given above also suggest that a premium be placed upon official adherence to the law, since injustice seems to be done precisely when officials fail to follow the law. Formal justice accounts for this condition directly. It may appear, therefore, that formal justice has explanatory power, accounting for the data observed in such examples. One is tempted to conclude that formal justice is *needed* to account for the relevant moral phenomena.

But these conclusions would be hasty, for, upon reflection, it becomes quite clear that formal justice is not mandated by such examples. One can understand, for example, how administrative justice can be independent of the justice of laws without supposing that official de-

³³ This position may be maintained even if it is agreed that there were independent, valid, and sufficient reasons for selective prosecution. To agree, for example, that sometimes a small injustice may legitimately be done to prevent a greater evil is not to deny that the small injustice would be done.

violation from the law *per se* must be disvalued. When laws themselves are judged, we either consider how they have actually worked in practice or else assume some predictable degree of compliance by officials. But when we judge how laws are administered, we judge official behavior itself. These two branches of justice can be conceived of independently even if similar factors are relevant to the appraisal of both. For example, both branches concern certain ways in which people are affected by the law, but each concerns them differently. In the appraisal of one, we would consider the effects that can be attributed to the laws themselves, while in the other, we would consider the effects ascribable to public officials. Thus, we need not conclude that administrative justice is formalistic in order to account for the independence of these two types of moral appraisal.

The examples given do, in fact, support the conclusion that administrative injustice concerns not merely official departure from the law but also the ways in which people are treated under it, such as the relative disadvantages they suffer at the hands of administrators. In some cases, it was hypothesized also that the offending officials were moved by certain attitudes, such as bias or self-seeking. It seems clear that factors such as the treatment of individuals and the attitudes of administrators will enter into any satisfactory and complete account of justice in the administration of the law. Formal justice, however, has absolutely nothing to say about such factors, which go well beyond the mere idea of official departure from existing law. In other words, non-formal factors are available to account for the administratively inflicted injustices of our hypothetical cases. Furthermore, it is difficult to imagine a case in which injustice seems intuitively to be done by official deviation which has no adverse effect upon anyone at all. When such nonformal factors are present, it seems that they, rather than mere official departure from the law, are morally relevant.

So much for the notion that formal justice is required to account for the independence of the justice of laws from justice in their administration. What about another point suggested by the examples—a general presumption favoring official adherence to the law? The strategy of offering alternative explanations that I have just employed would seem to work here also.

The examples show that official deviations often threaten to cause injustice of the nonformal variety. These injustices are a serious matter. Any risk of them should be undertaken reluctantly. In the normal case in which individuals are likely to be affected by official action, the danger of injustice being done by departure from the law may always

be assumed present, and this danger can help to explain a kind of presumption favoring official adherence. But the relevant injustices turn upon the ways individuals suffer under administrators; their actual occurrence, even when officials fail to follow the law, always depends upon the circumstances of such deviation. Complete knowledge of a case might show that official departure would not cause a relevant injustice. In other words, one can understand the temptation to suppose that there is always a moral objection to official disobedience, but one need not agree that such an objection always exists.

This point may be reinforced in at least two ways. First, public officials are usually thought to have special obligations to uphold the law that they are charged with administering. Such obligations should not be confused with formal justice, but belief in them can illicitly lend credibility to formal justice claims, for their requirements are similar. An official deviation could, for example, seem to count both as the breach of such an obligation and as the breach of a formalistic principle of administrative justice. Nevertheless, one may acknowledge such obligations while denying formal justice claims, and belief in the former also commits one to a kind of presumption favoring official adherence to the law.⁸⁴

Second, official deviations, as is often pointed out, are very likely to have some disutility.⁸⁵ For example, if we rely upon officials to act within the law, then we are likely to suffer (or at least to be inconvenienced) when they fail to do so. Other disadvantages may attend the inability to rely on officials to follow the law. Considerations such as these apply to an enormously wide and varied range of cases and circumstances, under both just and unjust laws, and thus tend to support another kind of presumption favoring official adherence. They rest, however, upon contingent and circumstantial factors, for official deviations do not necessarily cause disutility. Thus, they do not support a presumption that is unaffected by the circumstances. Full knowledge of a case might show that no disutility would result from official deviation.

In short, the factors enumerated thus far tend to favor official ad-

⁸⁴ See section IV *infra*.

⁸⁵ Cf. B. BARRY, *POLITICAL ARGUMENT* 97-105 (1965). Analogous points about the value of excuses and limitations on punishment are made by H.L.A. Hart. See, e.g., H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 22-24, 44-49, 181-83 (1968). Hart elsewhere suggests a nonformalistic treatment of justice in the administration of the law. See Hart, *Philosophy of Law, Problems of*, in 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 274 (P. Edwards ed. 1967). But such considerations are absent from this discussion of the topic in *The Concept of Law*. See notes 39-56 and accompanying text *infra*.

herence to the law, but they are distinct from and cannot support formal justice claims. An argument for formal justice cannot rely on contingent or circumstantial factors.³⁶

These objections to the first argument for formal justice do not, of course, completely discredit the entire notion. But they do eliminate one possible reason for believing that official deviation from the law per se must be disvalued in the name of injustice, regardless of the circumstances. And if this appeal to the explanatory power of formal justice were the only argument in its favor, its attraction would undoubtedly be quite limited. Radically different sorts of arguments have also been advanced, however, which seek to ground formal justice upon the concept of justice itself.³⁷ Before examining them, I shall note the limits of an objection to formal justice that is also based upon examples.

One might try to present a real or hypothetical (but not implausible) counterexample to formal justice. Suppose that a morally indefensible law prescribes extermination for all members of a certain group. Under this law, a judge is presented with information so that he may decide a question of fact, such as whether the person in question belongs to the designated group. Let us imagine that a particular judge has remained on the bench in desperate hope of somehow doing some good, believing that he could do none elsewhere, and knowing that he would be replaced by a zealous racist if he resigned. Suppose further that he follows this law until one day a supervisor is absent from the court, and our judge has the chance to save a single person from the deadly net. To do this, he must fail to follow perfectly clear provisions of the law, for example, the rules of evidence. He does this, and the one life that he is able to save while acting in his official capacity is thereby saved.

Has this judge acted wrongly? All things considered, I would suppose that he does right in breaking the law and saving the life he is able to save.³⁸ It is not clear that any case could be made for saying

³⁶ I am prepared to admit that it may be *useful*—and may even serve the interests of justice—to inculcate in lawyers and officials a deep conviction that official deviation from the law is always unjust or otherwise wrong, for this might help dissuade some from official misconduct. But this does not make such a conviction true, nor does it clearly justify the required deliberate oversimplification of moral issues. One must also consider the disadvantages of dogmatic and conservative attitudes on the part of those who may be called upon to administer unjust and inhumane laws, policies, and directives, with their consequent failure to face the difficult moral issues squarely. Unfortunately, such issues are often regarded much too crudely, as if the choice were simply between “the rule of law” and “anarchism.” Formal justice may encourage just such blindness in officials.

³⁷ See notes 39-56 and accompanying text *infra*.

³⁸ It should be noted that my question concerns the judge's failure to follow the

that this judge acted unjustly in failing to follow the law. Who, for example, is to be regarded as the victim of the judge's injustice? Surely the person who is saved is not the victim. Nor does it seem plausible to maintain that those he had already sent to the extermination camps are victims of an injustice done by the act in question, because a new murder has been averted. However, someone may grasp upon the obvious difference in treatment accorded those who pass before the judge. For example, one may assume that those already sent to the camps deserved no worse treatment than the one who fared better. But even if this argument seems to be a ground for saying that injustice is done by the judge's failure to follow the law in the instant case, the argument does not show that his mere failure to follow the law constitutes an injustice, which is what the formalist contends. The charge of injustice here rests on the differences in treatment dispensed by the judge. It should be emphasized that failure to follow the law does *not necessarily* result in such differences of treatment; it does not even mean that anyone will be affected.

Despite this analysis, the formalist may continue to insist that the judge has acted unjustly in departing from the law. He believes this because he thinks that there are general arguments for formal justice. He also regards this case as parallel to others in which it seems more obvious that injustice is done simply by departing from the law. To deal with formalism, therefore, one must undermine its entire rationale.

Moreover, while insisting that injustice has been done, the formalist can readily agree to our overall judgment in this case. He can, consistently, admit that for the judge to save the life is the right thing to do, because he can agree that an injustice may be justified when all factors are considered. Under the theory of formal justice I have constructed, a formalist can maintain that official deviation from the law, though in itself unjust or the breach of a basic principle, may sometimes be justified by overriding considerations. A small injustice, for example, which could help to save many innocent lives, might not be wrong, all things considered. The failure to follow an unjust law may also result in less injustice than adherence to it and might thereby be justified. The formalist can accept these points, but since he maintains that justice in the administration of the law is independent of other branches of justice and fundamentally requires adherence to the law, regardless of circumstances, he counts even these justified departures

law this once, not his following the genocidal law before. Neither am I judging his decision to remain on the bench. These questions, while important, are also separable, as the formalist must agree, and they need not be decided here.

from the law as injustices. They may be small departures, but they are regarded as injustices nevertheless. This classification is the distinctive claim of formal justice. However, although the requirements of formal justice are not supposed to depend on circumstances (including under this head the morality of the laws to be applied), other moral factors do depend on circumstances, and so the formalist can agree that what is right or wrong for a public official to do, all things considered, depends upon the circumstances. It follows that formal justice cannot be discredited merely by our conclusion that the judge's departure from the genocidal law was morally justifiable. With this the formalist could agree. Formal justice thus resists quick and easy refutation. Likewise, it is not wildly implausible. But these are not, of course, arguments for formal justice. To the chief ones I now turn.

III

ARGUMENTS FOR FORMAL JUSTICE

The arguments to be considered are recognizable as arguments for formal justice because they do not turn at all upon contingent factors. They present a noncontingent connection between administrative injustice and official deviation from the law.

H.L.A. Hart offers the most important formalist propositions in *The Concept of Law*. In fairness, one should note that Hart is at least as much concerned with refuting old-fashioned legalism as with promoting formal justice. He argues, for example, that justice cannot consist in "conformity to law," because laws themselves are judged to be just or unjust, and not simply by reference to other laws.³⁹ Although acknowledging justice, the old formula ignores such criticisms and even seems to exclude the possibility of an unjust law. However, Hart concedes too much to legalism by endorsing a formalistic account of justice in the administration of the law.

My discussion will center upon three points in Hart's brief treatment of the topic. The first bases administrative justice on the precept "treat like cases alike"; the second grounds it on a notion with which the first is often confused, namely, following a rule; the third is rooted in the idea of impartially applying the law to particular cases. These notions are worth examining closely because suggestions of formal justice are often expressed in such terms.

³⁹ H.L.A. HART, *supra* note 1, at 157.

A. *Treating Like Cases Alike*

Hart believes that "a central element in the idea of justice" is expressed by the precept "treat like cases alike and different cases differently."⁴⁰ This bare precept, however, "cannot afford any determinate guide to conduct"⁴¹ and must be supplemented. "This is so because any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblances and differences are relevant, 'Treat like cases alike' must remain an empty form."⁴² The *bare* precept requires neither more nor less than uniform treatment. Of course, there are innumerable ways of treating cases uniformly, depending upon which features of persons, acts, and circumstances one considers relevant. There are as many possible interpretations for the precept "treat like cases alike." But justice requires more than mere uniformity of treatment. Some systematic ways of dealing with cases are just and others are unjust, and the bare precept does not help us to distinguish one from another. Hart concludes that there are two parts to the idea of justice, "a uniform or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different."⁴³

I am not persuaded that this approach to analyzing the concept of justice is very promising, for the idea of treating like cases alike does not appear to have any special connection with justice. This seems true, at least, if we agree that justice does not consist simply in treating cases systematically; it requires certain kinds of treatment for certain classes of persons. But the same notion obtains for other aspects of morality, such as the requirement that one fulfill promises or that one come to the aid of those in need; these likewise require "treating like cases alike" according to specified patterns. For present purposes, however, this qualm can be suppressed. One may agree that justice requires *some* kind of uniform behavior. But what kind? Of what classes of persons? And in what circumstances?

Hart does not attempt to answer these traditionally contested questions in discussing the justice of the laws themselves. But he finds no difficulties when he turns to justice in the administration of the law:

In certain cases, indeed, the resemblances and differences be-

⁴⁰ *Id.* at 155.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 156.

tween human beings which are relevant for the criticism of legal arrangements as just or unjust are quite obvious. This is preeminently the case when we are concerned not with the justice or injustice of the *law* but of its *application* in particular cases. For here the relevant resemblances and differences between individuals, to which the person who administers the law must attend, are determined by the law itself. To say that the law against murder is justly applied is to say that it is impartially applied to all those and only those who are alike in having done what the law forbids; no prejudice or interest has deflected the administrator from treating them "equally."⁴⁴

Hart's claim seems to be that the law provides the basic standard to be followed by a public official. He implies that an official who departs from the law thereby acts unjustly, regardless of the rules, the consequences, and other circumstances.

From the parts of Hart's discussion considered so far, it may appear as if he believes that this conclusion follows from a direct application of the requirement that like cases be treated alike. Hart realizes, however, that the bare precept "treat like cases alike" is "an empty form,"⁴⁵ and as the argument for using it seems so obviously invalid, I am hesitant to impute it to him. Nevertheless, it is the main basis that Perelman, for example, suggests for his own formal justice claims,⁴⁶ and it should therefore be considered. I believe, moreover, that this is the main theoretical prop ostensibly supporting formalistic tendencies among philosophers.

From the premises that justice fundamentally requires a uniform treatment of cases and that the law prescribes *one* way of uniformly dealing with them, we are asked to conclude that justice in the administration of the law requires officials to follow the law. But this argument begs the question at issue, which is whether the pattern of treatment prescribed by law is identical (or even compatible) with the pattern required by justice. Once we realize that the justice of a law is not determined by the law, or in other words that the resemblances and differences between persons, acts, and circumstances which the law tells us to consider are not necessarily the ones that justice says we may consider, the error of the formalist becomes obvious.

A formalist might object that his claim is only supposed to account for justice in the administration of the law; it is not supposed to exhaust

⁴⁴ *Id.* (emphasis in original).

⁴⁵ *Id.* at 155.

⁴⁶ See C. PERELMAN, *supra* note 1, at 16, 29, 36-41.

all of justice, including that of the laws themselves. But this really makes no difference. Why should we suppose that the pattern of treatment prescribed by the law is the same as (or even compatible with) that prescribed by *any* principle of justice? An argument based on the idea of treating like cases alike gives us no reason at all.

The argument could be valid if certain assumptions were true. One might imagine, for example, that the only *possible* way for officials to deal with cases uniformly would be by following the law, as if failing to follow the law somehow guaranteed that cases would not be dealt with in a uniform manner.⁴⁷ But such an assumption would clearly be false. An official *can* deal with cases uniformly without following the law; that is, his conduct may fit another pattern, which does not perfectly follow the law, but requires some unauthorized actions. Corrupt officials who take bribes or who for some other reason act systematically in a partial or prejudiced manner, although breaking legal rules, can sometimes act with permanent legal effect. Such actions are a kind of uniform behavior, implemented according to a uniform pattern. Thus, appeal to the bare precept "treat like cases alike" is not sufficient to show that justice requires following the law.

At this point, formalists may say that they are not invoking merely the bare precept "treat like cases alike"; appeal is also being made to something special about the law. But what is this unique characteristic? I have mentioned that the possibility of construing legal rules as prescribing a way of "treating like cases alike" is of no help, for such rules prescribe only one of many possible patterns.

I have also given some reasons why injustice can be linked with official deviation from the law.⁴⁸ But these connections are contingent; they depend upon the circumstances of each case. Arguments appealing to them cannot possibly give aid or comfort to the formalist. It should also be obvious that arguments for such connections make appeal to the precept "treat like cases alike" entirely unnecessary.

B. *Following a Rule*

Hart suggests a second argument for formal justice when he observes:

The connexion between this aspect of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be

⁴⁷ This is not the same as saying that the only *just* way for officials to deal with cases uniformly is by following the law, for this would again simply beg the question.

⁴⁸ See pp. 838-42 *supra*.

said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.⁴⁹

This is a new argument, for the notion of applying a rule is clearly not equivalent to that of treating like cases alike. The precept "treat like cases alike" makes no reference to rules at all. It can be followed by devising a uniform treatment of cases even when no relevant rules exist, for example, by comparing current cases among themselves. When a judge does this, he cannot be construed to be *following* an existing legal rule, even though he may create a new one. It is also possible to apply an existing rule *without* treating like cases alike, for example, by applying a rule for the first time to the case at bar.

Hart's suggestion may be elaborated into an argument along the following lines. From the premise that an official should apply a given rule, it follows that his behavior is subject to adverse criticism if he fails to do what the rule prescribes. The mere notion of applying a rule to particular cases might therefore be said to generate a principle by which behavior can be judged. This principle takes no account of what the rules require or allow, of what their effects are likely to be, or of particular circumstances. When there are rules for officials to apply, this principle is necessarily operative, and they are bound by it. It requires that the rules be applied exactly, without deviation in any respect.⁵⁰

Such an argument does not necessitate an extreme legalistic position, nor does it mean that public officials must always follow the law. It can be taken as an account of one principle of justice, which can conceivably be overridden.

But is the outcome really a principle of *justice*? The argument turns entirely on the notion of applying a rule to particular cases; it contains no further restrictions. If the result were a principle of justice, then any deviation from any rule that one is supposed to apply would be, in itself, an unjust act. Nothing restricts this mode of argument to the conduct of public officials, or even to the law. For that reason, it seems clear that the argument must fail, for either it works

⁴⁹ H.L.A. HART, *supra* note 1, at 156-57. See also C. PERELMAN, *supra* note 1, at 36-45.

⁵⁰ If this argument were sound it would be of special interest for supporting a traditional natural law contention, namely, that there is a significant, necessary connection between law and morals because the principle requiring adherence to legal rules would seem to be implicit in the law by virtue of the fact that every legal system contains some rules. For another attempt to show such a connection, see L. FULLER, *THE MORALITY OF LAW* (1964). I have discussed Fuller's suggestions elsewhere. See Lyons, *The Internal Morality of Law*, 71 *PROC. ARISTOTELIAN Soc'y* 105, 105-19 (1970-71).

for all kinds of rules, regardless of the circumstances, or it works for none. And it clearly does not work for some. To see this, one need only select a rule the breach of which has no necessary moral significance, regardless of the circumstances. The charge of injustice carries moral weight, and if the breach of some rule does not automatically carry such weight, then it cannot be an unjust act. Suppose, then, that when I speak ungrammatically I can be said to break a rule of language. The argument would have it that I thereby commit an unjust act. But this is implausible. Of course, I can do wrong by misusing language, but whether what I do is not only grammatically incorrect but also morally wrong, some kind of injustice, or the violation of a basic moral principle, would seem to depend on contingent circumstances.

A formalist might agree that departures from some rules are not always unjust, but insist that departure from existing law, at least by officials responsible for administering it, is always a kind of injustice—that there is something *special* about that kind of rule breaking. This is an intelligible contention, but one has been given no reason to accept it. Another argument is needed.

The problem is as follows. Insofar as official nonconformity to law is regarded merely as the failure to follow rules, it is implausible to regard it as a kind of injustice. Is there anything else essential to official noncompliance that would provide the required link? It must be something *essential* to this kind of rule breaking, that is, something independent of all circumstances. Otherwise, a formal justice claim cannot be supported, for formal justice maintains that official disobedience is always morally objectionable, regardless of the circumstances. If one invokes considerations linking deviation with injustice in a contingent manner, that is, dependent on the circumstances, one has no argument for formal justice.

I cannot think of anything to fulfill the formalistic requirements, but it is worth emphasizing what will *not* work. It can be argued, as I have shown, that official deviation from the law is likely to cause injustice involving, *e.g.*, mistreatment of individuals. But these are risks; actual injustices depend upon the concrete circumstances. Sometimes it can be certain that injustice will result from misadministration of the law, but this sort of argument also suggests that sometimes no injustice will be done at all. When such cases arise, there can be *no* objection, based on injustice, to official deviation from the law.

C. *Impartially Applying the Law to Particular Cases*

Each of the direct arguments for formal justice that I have con-

sidered can be criticized in yet another way, namely, that they lead to the conclusion that following the law is *sufficient* as well as necessary for administrative justice. This conclusion, however, seems much too simple a conception. Even if one agrees that justice in the administration of the law cannot be done unless the law is followed, one may still wish to say that justice requires more than merely acting within the limits laid down by the law.

In his remarks on justice, Hart suggests a much more plausible view, namely, that administrative justice consists in applying the law *impartially* to particular cases. For example, while invoking the idea of treating like cases alike, Hart maintains:

To say that the law against murder is justly applied is to say that it is *impartially* applied to all those and only those who are alike in having done what the law forbids; *no prejudice or interest has deflected* the administrator from treating them "equally."⁵¹

A similar qualification seems indicated when Hart appeals to the notion of proceeding by rule:

Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied to different cases is the same general rule, *without prejudice, interest, or caprice.*⁵²

Although the standard of impartiality is invoked by Hart when he suggests the first two arguments for formal justice, it plays no apparent role in either of them. Moreover, appeal to impartiality goes beyond the ideas of proceeding by rule and treating like cases alike. This point should be emphasized. Impartiality is not implicit in the ideas of treating like cases alike or proceeding by rule. Although impartiality may require *some* kind of uniform behavior, *merely* to deal with cases in a uniform manner is not to be impartial. An official might systematically favor one group over others as a consequence of personal prejudice or interest, and get uniform results. Likewise, impartiality is not implicit in proceeding by rule, because rules leave areas of discretion.

What difference can considerations of impartiality make to the formalist's position? In answering this question, it is useful to contrast formalists who have different conceptions of a legal system. Suppose, first, that a formalist conceives of the law as a set of rules that officials can apply "mechanically" to cases as they arise, in the sense that officials can actually follow the law only in one way. If they do one thing,

⁵¹ H.L.A. HART, *supra* note 1, at 156 (emphasis added).

⁵² *Id.* at 156-57 (emphasis added).

they follow the law; if they do anything else, they fail to follow it. This means that there is only one way for officials to administer the law justly, for formalists maintain, at the least, that official departure from the law is an injustice. Such a "mechanical" formalist is therefore obliged to embrace the overly simple formal justice claim that justice in the administration of the law consists in following it; deviation from the law would then be seen as both a necessary and a sufficient condition of administrative injustice.

How would this kind of formalist conceive of and value impartiality? He could not regard it as an essential element of administrative justice; it could not enter into his basic position. He could value it, however, in at least two other ways. On the one hand, its absence could be seen as one possible, contingent cause of deviation from the law and thus of injustice. On the other hand, he could value it as a cast of mind that is intrinsically fitting for a public official. But, either way, impartiality would add nothing of relevance to the formalist's position. It would not repair the defects of the views that we have already considered.

The appeal to impartiality can make a substantial difference to the formalist's position—a difference relevant to our concerns—only if he does not accept a "mechanical" conception of the law but believes instead that officials sometimes face alternative lines of lawful behavior and must often make significant choices in administering the law. If the formalist also believes that the choice of lawful alternatives is subject to criticism in the name of justice, then he must qualify his formal justice claim accordingly, because the simple requirement that officials act within the law does not enable the formalist to differentiate between the lawful alternatives. To evaluate them, the formalist must supplement that requirement with some other extralegal standard. For when officials have such "discretion," strictly speaking, the binding guidance of the law has been exhausted. Impartiality may then be invoked as a supplementary standard, to be applied when officials must exercise discretion. The resultant view would be that, given the understanding that the law itself does not fully determine what constitutes its own impartial application, administrative justice consists in applying the laws impartially to particular cases. Although incorporating extralegal standards, such a view would still be formalistic in the original sense because it holds that adherence to existing law is a necessary condition of administrative justice.

Hart himself argues that officials have discretion.⁵³ No legal rule

⁵³ *Id.* at 121-50.

or set of rules completely determines in all relevant respects how an official is to deal with cases that arise. Legal rules cannot be applied "mechanically"; there is always room for the exercise of official judgment. Lawmakers often deliberately allow for discretion in particular cases, as when judges are authorized to fix punishments. But occasions for exercising discretion also result from conflicts between laws, problems left untouched by laws, and vague or ambiguous laws, which cannot entirely be eliminated.

An official's choice among lawful alternatives is subject to criticism in the name of justice. Thus, the discretion that judges have in sentencing convicted offenders may be exercised impartially or partially; police and prosecutors may ration their time and attention in a partial or impartial manner. If these officials fail to act impartially, they may be charged with injustice.

The claim that administrative justice requires impartial application of the law to particular cases is not inherently formalistic. One might agree, for example, that the just way of applying the law is the impartial way, while believing that justice may sometimes require that officials *not* apply the law. The formalistic version of the claim maintains that impartial application of the existing rules of law *fully embodies* administrative justice, with the understanding that this claim fundamentally requires officials to act within the limits laid down by law. I wish to discredit the latter version.⁵⁴

This formula clearly may be thought to exhaust the topic of administrative justice because what an official essentially does is administer the law. If one goes beyond this formula, beyond the requirement of impartial application of existing rules of law, it will be argued, one is necessarily changing the topic, since one is no longer confining oneself to justice in the administration of the law.

I believe this to be a mistaken notion. I have already observed that it is possible for an official to overstep the legal boundaries while acting in his official capacity. The question remains whether such conduct must always be unjust, or the breach of a basic principle. In giving this reply, however, I am assuming that the question of justice in the administration of the law is identical to or at least co-extensive with the question of justice in official conduct. The formalist might deny this for some reason. I see no way of arguing this particular point directly, so I shall take a different tack.

⁵⁴ The formalistic version can be ascribed to Hart because he offers the formula within unquestionably formalistic arguments. For him, impartiality is required by administrative justice, but only within the limits laid down by the law. See text accompanying notes 51-52 *supra*.

Let us assume that officials should, to do justice, be impartial; this does not imply adherence to any particular set of rules, such as the rules of law. Again, suppose that the only just way of applying the law is the impartial way; it does not follow that an official who fails to follow the law acts unjustly. Let us agree that an *application* of the law which is *not* impartial is *unjust*; it does not follow that all *deviations* by officials from the law are unjust. For not every such departure could be described as an application of the law that fails to be impartial. An official might deliberately refuse to follow the law; this is not the same as applying it in, for example, a biased or prejudiced manner. This distinction is important, for the official may refuse to follow the law on principled grounds, precisely in order to prevent an injustice of which he would be the instrument.

Is it possible for this to happen—for an official to prevent an injustice by refusing to follow the law, while avoiding other injustices? If so, then mere deviation from the law by a public official does not by itself constitute a kind of injustice. If one can give an affirmative answer to this question, it will imply that the formula, “administrative justice requires the impartial application of the law to particular cases,” has only conditional force. It does not exhaust the topic of administrative justice, for if it did, and if the law were broken, then injustice would be done.

An affirmative answer may be suggested by an example. Suppose that Jones is an official responsible for administering a law that is unjust because it discriminates against blacks by depriving them of certain benefits conferred upon whites. Jones realizes that he is in a position to distribute benefits more equitably by using his office but without following the law. Let us imagine that Jones so acts, thus exceeding his official discretion. *Must* an injustice have been done? If one examines the situation and finds no one wronged, then one should look for some other sign, mark, or symptom of injustice. If none is found, one is left with no ground for confirming the claim that official deviation from the law is inherently unjust.

None of those directly affected by the distribution made by Jones, acting in defiance of the law, would seem to be wronged as a necessary consequence. Some, indeed, are treated justly only because Jones refuses to follow the law; they are surely not wronged on that account. Nor are those in whose favor the law discriminates necessarily wronged, for one can suppose that they receive the same benefits they would have enjoyed had the law been followed; the class formerly discriminated against is simply not given less. Can any other basis be found for say-

ing that Jones's behavior is unjust? It would seem that *all* potential arguments similarly turn upon contingent circumstances. For example, Jones might expose others, such as official subordinates, to risks without their knowledge and consent. This may seem to be a kind of injustice, or at least some kind of moral wrong, but this complication is not inevitable; he might protect others or he might act alone, assuming all the risk himself. Again, he might find it necessary to deceive others in order to carry off his plan successfully. But this fact—which has uncertain ties to the charge of injustice—also turns upon contingencies, for deception might not be necessary.⁵⁵

There are many possible grounds for the charge of injustice or some other kind of wrong when officials fail to follow the law. Benefits or burdens may be distributed unjustly as a consequence, or someone may fail to receive something that he deserves. But formal justice cannot rely upon any such "substantive" considerations since it maintains that an official can act unjustly by simply failing to follow the law. Injustice seems, however, to depend upon the surrounding circumstances.⁵⁶ At least, one has no reason at all to think otherwise.

IV

OFFICIAL OBLIGATIONS

Considerable illicit support for formal justice may derive from the widespread conviction that officials have special obligations to uphold the law. This conviction, properly qualified, is not implausible. But the support it affords formal justice, even were it not illicit, would in any case be insufficient.

Official obligations of allegiance to the law may readily appear to bolster formal justice claims. Officials have a special relation to the law,

⁵⁵ Once again, one may wish to note an official's special obligation of allegiance to the law, which Jones has presumably incurred by accepting and retaining his position. I shall discuss this point shortly.

⁵⁶ One might construct less serious examples. Suppose a law prescribes a useless ritual, for example, that a county clerk is required to spit twice out of the left side of his mouth when certifying that a will has been witnessed in the required way. An official might well be tempted to rebel, save for the fact that wills are regarded as invalid unless this ritual has been performed. But suppose the official is *certain* that no one will know if he performed the ritual, and he merely pretends to have done it. He thus fails to follow perfectly clear provisions of the law. Has an injustice been done? Would the answer be any different if the ritual were required *of the clerk* but not required for the validation of the will? Suppose the clerk refused to do it under those circumstances. Would he be acting unjustly? Or perhaps only imprudently, assuming there were penalties for official noncompliance?

unlike ordinary citizens, for they are responsible for administering it. This relation is part of what it is to be a public official. If those in public office undertake and reaffirm obligations of fidelity to law, they thereby provide a basis for criticism of their deviations from the law, for any such deviation would seem to amount to the breach of such an obligation. The case for formalistic requirements is strengthened because it may appear that any official *must be* under such obligation by virtue of his acceptance of and continuation in a position of public trust. If so, the obligations always require official conformity to the law, regardless of the circumstances.

The first difficulty with this line of reasoning arises from the fact that formal justice pretends to give an account of what constitutes *justice* in the administration of the law. The argument demonstrating that there are special obligations incumbent on officials has nothing to say about such matters. The vice of an official who strays from the law is not depicted as an injustice but rather as an infidelity or breach of faith. What justice requires of him is something else.

Second, it is doubtful whether such obligations always give a reason for official conformity, regardless of the circumstances. Consider, for example, the suggestion that a public official must always be under such an obligation. This cannot be correct, for there may be circumstances in which no such obligations can be incurred or sustained.⁵⁷ One should not confuse the obligation in question with institutional requirements; the question is whether a basis for *moral* criticism of officials who deviate from existing law is always present. It would seem that the requisite conditions may be lacking. Suppose, for the moment, that such an obligation arises when a person voluntarily accepts and retains official responsibility; it does not follow that all officials have such obligations, for one might be coerced into accepting or retaining this position. It would then be highly questionable whether such an obligation had been incurred. The very existence of such obligations therefore depends upon the circumstances, and another argument for formalistic conclusions dissolves.

Even if voluntary acceptance and retention of official responsibility are necessary to give rise to such an obligation, they may not be sufficient. One recognizes similar limits when arguing, for example, that certain contracts are void *ab initio* because of their nature or subject matter. Similarly, there may be circumstances in which no morally

⁵⁷ Even if a person *willingly* accepts responsibility for implementing his government's genocidal policies, it is doubtful that he thereby incurs a *morally* binding obligation to discharge his official duties.

binding commitment can be made, even if made of one's own free will, or in which certain conduct could not be required. One might argue, for example, that the judge in our earlier example⁵⁸ was under no moral obligation to follow the genocidal law he was charged with administering—and mean it *strictly*. This argument can be understood in one of two ways, depending on the circumstances: either any obligation of fidelity to his nation's laws that he had incurred was entirely extinguished, or such matters fall outside the scope of that obligation, in which case he would still be obligated to follow other, innocuous laws.

A formalist who wishes to salvage as much as is possible from a sinking ship may be tempted to object that the official obligation argument is unaffected even in such cases, for he can admit that such obligations can be overridden, and he may say that this has happened. The obligation persists, even in the extreme case, but is simply outweighed. If so, a formalist objection to official deviation from the law in such cases remains.

However, this response will not save formal justice or even the weaker claim that there is always *some* kind of moral objection to official deviation from the law, regardless of the circumstances, for, as I have mentioned, officials are not always under such obligations, as, for example, when they are coerced into serving.⁵⁹ The reasoning behind that point can be applied to my last. To say that voluntarily undertaking and retaining responsibility is a necessary condition of an obligation to uphold the law is not to draw a conclusion from conventional rules; it is to make a moral judgment. The very idea that a person who voluntarily accepts and retains a position of public trust incurs an "obligation" rests upon a moral conception of what constitutes a valid and binding agreement, for the institutional rules do not necessarily recognize such limitations. Moral considerations are relied upon in claiming that there is such an obligation, and the substance of such obligations—what they are obligations to do or to refrain from doing—can likewise be the subject of a moral judgment. Furthermore, by saying that someone who undertakes to administer the law incurs an obligation to uphold it, one is surely not bound to say that he is to be regarded as under an obligation to do whatever the law requires of him, regardless of the particular requirement, the effects of following it, and all other circumstances. A moral judgment is required here. Some acts, perhaps,

⁵⁸ See text preceding note 38 *supra*.

⁵⁹ One might be coerced into serving or remaining in office by threats to oneself or one's family. A government might wish to do this to exploit the skills or prestige of certain individuals. It should be noted that, although examples of such coercion may be found in recent history, the mere *possibility* of such cases is sufficient for the present point.

are beyond an official's special obligation of allegiance to the law. In other words, it is doubtful that a sound moral reason for a public official to abide by the law that he administers always exists, even when he has voluntarily undertaken to uphold the law.

CONCLUSION

I have been appraising the notion that injustice is done whenever an official fails to follow the law that he is charged with administering, regardless of the circumstances. This notion, which I call "formal justice," appears to have several sources, but no firm foundations.

It is sometimes suggested that formal justice is required to account for the distinction between justice in the administration of the law and the justice of the laws themselves, as well as for the moral premium placed on official adherence to the law. But I have shown that other explanations are readily available. It has also been suggested that formal justice derives from the precept, at the heart of justice, that like cases be treated alike, or from the notion of following a rule, which is central to the law. But I have shown that these slender reeds cannot support the weight of formal justice. I have considered the idea that justice in the administration of the law involves the impartial application of the law to particular cases. This idea seems unobjectionable, when understood to mean that the law should be impartially applied, if and when one is justified in following it. But an appeal to the notion of impartiality cannot show that deliberate refusal to follow the law is unjust. Finally, I have taken account of the conviction that officials are under obligations of allegiance to the law, deriving from their positions of public trust. These convictions are distinct from formal justice claims. Moreover, the arguments for such obligations would not show that there is always a moral objection to official deviation from the law, regardless of the circumstances.

Formal justice therefore seems theoretically unfounded. It appears to be an exaggerated expression of otherwise legitimate concern for justice in the administration of the law. But since it exaggerates the case to be made for compliance with unjust and inequitable laws, it is morally objectionable.