The Assumptions of Justice Abella's "Rule of Justice"

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In a number of recent interviews and extra-judicial pronouncements, former Supreme Court of Canada Justice Rosalie Abella has purported to reject the stand-alone value of the rule of law, in favour of what she has termed "the rule of justice".[1] As she put the point most recently in a *Washington Post* op-ed:

> We need to put justice back in charge, and to do that, we need to put compassion back in the service of law and law in the service of humanity. We need the rule of justice, not just the rule of law. Otherwise, what's the point of law? Or lawyers? What good is the rule of law if there's no justice? And to make justice happen, we can never forget how the world looks to those who are vulnerable. It's what I consider to be the law's majestic purpose and the legal profession's noble mandate.[2]

Although expressed in an idiosyncratic manner, the perspective Justice Abella. conveys in this statement is by no means novel. Similar ideas have bubbled beneath the surface of western liberal democracies since at least the end of the Second World

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1 See Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity, McGill Law Journal Annual Lecture" (2010) 55:4 McGill L.J. 871 at 878; "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197; Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 312; Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Sean Fine, "Doing justice to her father's dream", *The Globe & Mail* (July 29, 2016), online: https://www.theglobeandmail.com/news/national/doing-justice-to-her-fathersdream/article31207151/. Rachel Reed, "Former Canadian Supreme Court Justice Rosalie Abella on how the US approach differs — and why justice matters", Harvard Law School (November 28, 2022), online: https://hls.harvard.edu/today/former-canadian-supreme-court-justice-rosalie-abella-on-how-the-us-approach-differs-and-why-justice-matters/.

2 Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 312, 314.

War.[3] That said, Justice Abella's influence on members of the Canadian legal profession means that her statements, in particular, take on special salience for legal thought in this country. They therefore warrant direct academic engagement, over and above the few oblique critiques that have been addressed to her position to date.[4]

In this short article, I provide the beginnings of such an engagement, by unpacking and critiquing the assumptions that underlie Justice Abella's assertion of the "rule of justice" over the rule of law. As I argue, this framing assumes a sharp conceptual distinction between law and justice that treats law as devoid of intrinsic value and, perhaps more importantly, transforms justice from a distinctly legal virtue into an unbounded political ideal. To this end, I first examine the relationship between Justice Abella's position and the perspective her statements purport to reject, suggesting that they share the basic assumption that law and justice are conceptually distinct (I). I then turn to the conception of both law and justice that is supposed by this distinction (II). Finally, I offer an alternative conception of law and justice that understands them not as potential opposites, but as inextricable from one another. Rather than casting suspicion on the law as a potential instrument of oppression, or on justice as a matter of pure political preference, this perspective invites a renewed appreciation for the legal form as the necessary embodiment of justice (III).

I. THE "RULE OF JUSTICE" OR THE "RULE OF LAW"?

I begin with the relationship between the perspective exemplified by Justice Abella's professed commitment to the "rule of justice, not just the rule of law", and the viewpoint against which this statement is offered as an apparent rebuke. A particularly succinct illustration of this second view is offered by Leonid Sirota and Mark Mancini, in a widely circulated post from their blog, *Double Aspect*, from February 2021. As they put it:

> Law is the only mediator we have in a pluralistic society where there is limited agreement on foundational moral values, and still less on the best ways of giving them effect. Law records such agreement as exists for the time being, while also exposing this record to critique and providing a focus for efforts at reform. It is neither sacred nor permanent, but it is a common point of reference for the time being for people who disagree, sometimes radically, about the ways in which it should be changed. These are valuable functions regardless of whether one agrees with the substance of the law as it stands from time to time. Increasingly, however,

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[3] See most notably Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law" (1946), translated by Bonnie Litschewski Paulson & Stanley L. Paulson (2006) 26:1 Oxford J.L. Stud. 1. I note however that Justice Abella's ideas likely go further than Radbruch's relatively meek endorsement of the supremacy of justice over law.

[4] See, *e.g.*, Maxime St-Hilaire & Joanna Baron, "Introductory Essay: The Rule of Law as the Rule of Artificial Reason" (2019) 92 S.C.L.R. (2d) 1 at 43; Leonid Sirota, "The Rule of Law All the Way Up" (2019) 92 S.C.L.R. (2d) 79 at 104.

> certain schools of thought tend to deny that law has any value apart from its utility as a means to some political [*sic*] or another. We regard this as a dangerous development.[5]

There is much to say about this excerpt, especially in dialogue with Justice Abella's claims regarding the "rule of justice".[6] Perhaps the most important for present purposes is that Justice Abella's statements, on the one hand, and Sirota and Mancini's, on the other, present diametrically opposed views of the social role of law, and by extension of the basis on which law acquires value. Indeed, Justice Abella tells us that law has no value except where it is put in the service of "justice", as she conceives of it: "Otherwise, what's the point of law? Or lawyers?"[7] To "put justice back in charge",[8] then, is to supplement law, and in some cases overrule it, so as to put law "in the service of humanity".[9] This perspective contrasts markedly with Sirota and Mancini's, for whom law has value because it can serve as a "common point of reference for the time being for people who disagree, sometimes radically, about the ways in which it should be changed".[10] For Sirota and Mancini,

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[5] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/. See also Leonid Sirota and Mark Mancini, "Interpretation and the Value of Law II", *Double Aspect* (March 23, 2021), online: https://doubleaspect.blog/2021/03/23/interpretation-and-the-value-of-law-ii/; Mark Mancini, "Neutrality in Legal Interpretation", *Double Aspect* (November 20, 2020), online: https://doubleaspect.blog/2020/11/12/neutrality-in-legal-interpretation/. For a classic exposition of a view similar to that of Sirota & Mancini, see Antonin Scalia, *A Matter of Interpretation: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, 2d ed. (Princeton, NJ: Princeton University Press, 2018).

[6] For a response to Sirota & Mancini's joint blog posts focusing on their critique of "Common Good Constitutionalism", see Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum Const. 39.

[7] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can J.L. & Jur. 305 at 312.

[8] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/.

[9] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 314.

[10] Leonid Sirota and Mark Mancini, "Interpretation and the Value of Law", Double

in other words, law has value since it can serve as "the only mediator we have in a pluralistic society where there is limited agreement on foundational moral values, and still less on the best ways of giving them effect".[11]

This sharp contrast on the value of law is confirmed by the nature of the critique that proponents of each position respectively address to the other. Thus, when Justice Abella critiques the view exemplified by the Sirota and Mancini excerpt just quoted, she does so on the grounds that there is a "a critical difference between an open mind and an empty one".[12] Uncharitable language aside, the implication here is that those who would prefer to simply apply law as it is, rather than to dispense "justice", as she understands it, are engaged in little more than an empty, purposeless legalism.[13] That such a "value-neutral" application of law might be socially beneficial does not appear to factor into her consideration at all. Conversely, when critics respond to Justice Abella's assertion of the "rule of justice, not just the rule of law", they do so by accusing her of subordinating law to political whim. Sirota, for instance, decries Justice Abella's statements as amounting to a disparagement of the "Rule of Law" (a phrase he appears to intentionally capitalize).[14] And according to Maxime St-Hilaire and Joanna Baron, her position is fundamentally one that sees law as "a mere instrument of power in the hands of a 'class' of social engineers, practical economists, philosophers or activists".[15] That there may be value in a perspective that evinces concern for substantively just outcomes is likewise mostly absent from these discussions.[16]

The differences between these two perspectives on the social value of law mirror the divergent political and philosophical commitments evinced in the foregoing excerpts. On the one hand, Justice Abella's statements about the "rule of justice" are

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Aspect (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

[11] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

[12] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 310.

[13] Contrast Antonin Scalia, *A Matter of Interpretation: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, 2d ed. (Princeton, NJ: Princeton University Press, 2018) at 25.

[14] Leonid Sirota, "The Rule of Law All the Way Up" (2019) 92 S.C.L.R. (2d) 79 at para. 104.

[15] Maxime St-Hilaire & Joanna Baron, "Introductory Essay: The Rule of Law as the Rule of Artificial Reason" (2019) 92 S.C.L.R. (2d) 1 at 43.

[16] Though proponents of this view will readily recognize that "good law is better than bad law". See, *e.g.*, Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

consistent with a fairly standard (though, again, idiosyncratically-expressed) statement of what might be called a "progressive" political-legal position. According to this account, there is a set of "values" that are said to define us, or should define us, as a "democratic" society — *i.e.*, as a society that elevates the "values" that are seen as indispensable to "democracy", beyond the mere holding of elections.[17] Admittedly, Justice Abella is not entirely clear on what this emphasis on "democracy" means for her. However, her reference to "how the world looks to those who are vulnerable" in the above-quoted excerpt[18] suggests that it is closely tied in her estimation to the realization of a particular vision of equality the focus of which is "on change in the lived inequalities of the historically disadvantaged".[19] If law must be in the service of justice to have any value, and justice means achieving equality, so conceived, then the law only has value if it is in the service of this political aim.

On the other hand, Sirota and Mancini's statement is consistent with what one might call a "classical liberal" or "libertarian" political view. The fundamental assumption here is that beliefs such as those that Justice Abella claims are the imperatives that must be pursued through law are ultimately a matter of personal, subjective preference. That is, the imperatives that she associates with "justice" are either expressions of pure preference (because moral truth, or at least moral truth of this kind, does not exist), expressions of preference in light of the fundamental unknowability of moral truth (it being immaterial *in practice* whether moral truth of this kind actually exists), or illegitimate because contrary to the universal assent

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[17] See Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 312. This view is broadly consistent with what Ronald Dworkin called a "dependent" conception of democracy, which he defined as resting on "an outcome test: democracy is essentially a set of devices for producing results of the right sort": Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000) at 186.

[18] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 314.

[19] Compare Catharine A. MacKinnon, "Substantive Equality Revisited: A Reply to Sandra Fredman" (2016) 14:3 ICON 739 at 739. This view of equality originates in MacKinnon's work on legal responses to the workplace sexual harassment of women, in which she first designated it as an "inequality approach" to discrimination: Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979) at 4-5. For an argument that expressly links substantive equality (understood in terms that echo MacKinnon's formulation) to democratic values, see Nathalie Des Rosiers, "Should Conjugality Matter in Law and Social Policy?", Remarks for a Keynote Address to the North American Regional Conference of the International Society of Family Law (Ottawa: Law Commission of Canada, 2001) at 3-4, cited in *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, 2002 SCC 83, [2002] 4 S.C.R. 325 at para. 132 (S.C.C.), *per* L'Heureux-Dubé J., dissenting.

required to impose moral truth through state coercion, even if such truth might exist and potentially be known.[20] The social value that this perspective ascribes to law, as "the only mediator we have in a pluralistic society where there is limited agreement on foundational moral values",[21] is attributed because law appears to lack each of these deficiencies — *i.e.*, it exists and can be known, and is also democratically legitimate, at least where it has been adopted by a democratically-elected legislature. But to serve this role properly, the law must be applied without resort to the values of the individual judge. It is only where law is applied in a "neutral" fashion, on this view, that it can "function as a common reference and guide in a pluralistic, democratic society in which . . . disagreement about fundamental values and the policies required to implement them is pervasive and bound to remain so . . .".[22]

That said, while the perspectives respectively exemplified by Justice Abella's and Sirota and Mancini's statements do indeed present divergent views of the social value of law, their differences should not be exaggerated. In particular, it should not be assumed that these different views of the social value of law imply divergent understandings of the relationship between law and justice — or, what probably amounts to the same thing, between law and "foundational moral values".[23] To the contrary, both arguments appear to share the same fundamental assumption that law and justice are at least potentially severable and thus distinct notions in the first place.[24] On Justice Abella's view, this distinctiveness of law and justice is already

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[20] For an argument that takes up all three of these prongs, see Bruce Pardy, "The Only Legitimate Rule: A Reply to MacLean's Critique of Ecolawgic" (2017) 40:1 Dal. L.J. 323 at 325-326. Compare Richard Posner, "The Problematics of Moral and Legal Theory" (1998) 111 Harv. L. Rev. 1637 at 1642; Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974) at 48-52.

[21] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

[22] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law II", *Double Aspect* (March 23, 2021), online: https://doubleaspect.blog/2021/03/23/interpretation-and-the-value-of-law-ii/. Compare Antonin Scalia, *A Matter of Interpretation: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, 2d ed. (Princeton, NJ: Princeton University Press, 2018) at 131-134.

[23] On the general confusion of "justice" and "morality" in contemporary legal-philosophical discourse, see H.L.A. Hart, *The Concept of Law*, 3d ed. (Oxford: Oxford University Press, 2012) at 157. I will have more to say on the particular vision of justice that appears to animate Justice Abella's arguments below.

[24] Although the point is largely immaterial to the present argument, I note that this view of the relationship between law and justice is broadly consistent with John Austin's classic statement of legal positivism, resting on the assertion that "the existence of law is one thing; its merit or demerit is another.": John Austin, *The Province of Jurisprudence Determined*, Wilfrid E. Rumble, ed. (Cambridge, U.K.: Cambridge University Press, 1995) at 157. Compare H.L.A. Hart, *The Concept of Law*, 3d ed. (Oxford: Oxford University Press, 2012)

supposed by the phrase "rule of justice, not just the rule of law".[25] That her perspective supposes a subordination of law to justice does not make them less distinct from one another; in fact it supposes such a distinction. On Sirota and Mancini's account, meanwhile, the distinctiveness of law and justice is similarly implicit in the suggestion, which Justice Abella rebukes, that adjudicators should concern themselves with the impartial and neutral application of law, to the exclusion of whatever "prior conceptions, opinions, or sensibilities" they may have about "society's values".[26]

Both perspectives thus proceed on the basis of the same fundamental distinction between law and justice. They merely disagree over which of "law" or "justice" ought to dominate within the adjudicative process.[27] On the reading offered by Justice Abella, the purpose of law is to serve justice, and so any interpretation of law that does not subordinate it to the ends of "justice", as she conceives of it, is fundamentally deficient. On Sirota and Mancini's reading, the role of judges is "not to impose some pre-determined set of values onto the law but to seek out the moral and policy choices that are embedded in the law as they find it".[28] Whereas Justice Abella's view emphasizes justice, and attributes little value to law on its own, Sirota and Mancini's emphasizes law — understood as the definite product of a legislative

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at 185-186; Joseph Raz, "Legal Positivism and the Sources of Law" in *The Authority of Law*, 2d ed. (Oxford: Oxford University Press, 2009) 37 at 39-40; John Gardner, "Legal Positivism: 5 ½ Myths" in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 19 at 21.

[25] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity, McGill Law Journal Annual Lecture" (2010) 55:4 McGill L.J. 871 at 878; "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197; Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 312.

[26] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/. See also Mark Mancini, "Neutrality in Legal Interpretation", *Double Aspect* (November 12, 2020), online: https://doubleaspect.blog/2020/11/12/neutrality-in-legal-interpretation/. Contrast Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 309-310.

[27] Compare John Gardner's contention that legal positivism does not require strict judicial application of legislatively crafted laws or mandate one single approach to legal interpretation: John Gardner, "Legal Positivism: 5 ½ Myths" in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 19 at 35-37, 42-47.

[28] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

process — at the expense of substantive commitments.

This shared assumption as to the relationship between law and justice offers a path out of the apparently irreconcilable sets of clashing values that inform these competing perspectives. Rather than being bogged down in the question of which "values" are properly admissible in the context of adjudication, it is possible to transcend the debate in which both perspectives are engaged by turning to an alternative view of the relationship between justice and law. Before turning to that alternative in earnest, however, it is first necessary to fully understand the implications of the shared assumption that law and justice are conceptually distinct.

II. LAW AND JUSTICE IN THE "RULE OF JUSTICE"

Thus far, I have suggested that Justice Abella's assertion of the "rule of justice, not just the rule of law" shares with the views she purports to rebuke the fundamental assumption that law and justice are distinct concepts. By this, I mean that both her perspective and those she criticizes rest on the idea that law and justice only *potentially*, and do not necessarily, overlap. This framing means that it is entirely possible to have law *without justice*. But it also admits of the possibility, in principle, that there might be justice *without law*. As I now argue, this framing has important consequences for the way in which both components of this relationship are understood. On the one hand, if law can exist without justice, then this understanding strips law of any intrinsic normative content and transforms it into a vehicle for other values. On the other hand, if justice can exist without law, it also serves to transform justice from a distinctly legal virtue into a potentially all-encompassing, utopian political ideal.

The consequences that arise from the first possibility, *i.e.*, from the possibility of law without justice, are likely easiest to grasp. For Sirota and Mancini, we find it expressed in the recognition that "good law is better than bad law".[29] For proponents of "progressive" legalism of the type that Justice Abella represents, this possibility is instead cast in terms informed by a peculiar but nonetheless widely held reading of legal history. On this account, law as such is entirely insufficient to guarantee or even further justice. In some cases, it may even amount to a source of profound *injustice*. Hence Justice Abella's references in many of her pronouncements to the atrocities committed before and during the Second World War,[30] in addition to her

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[29] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

[30] See Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity, McGill Law Journal Annual Lecture" (2010) 55:4 McGill L.J. 871 at 877; "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197; Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 312-313.

references to the role that law ostensibly played in upholding racial segregation in the American South and in apartheid South Africa.[31] These examples are held up as evidence of the law's insufficiency, as well as its danger. It is from these and similar cases that Justice Abella can ask: "What good is the rule of law if there's no justice?"[32]

As against these instances where law is understood as a source of injustice, Justice Abella holds out cases in which she believes that law and justice overlap, and in which law's potential is thus taken to be fulfilled. As she put it in an interview with Harvard Law School; "The law on its own is just a series of words and rules. Unless it's something that contributes to the possibility of justice, it's essentially unfulfilled."[33] While law has no value as such, it can *gain* value to the extent that it is put in the service of good rather than bad ends.[34] Indeed, law is perhaps especially just, and by extension especially valuable, where it is used with the specific aim of redressing the injustices caused by historically unjust legal orders.[35] This, then,

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They also stem in part from her own family and personal history. See Sean Fine, "Doing justice to her father's dream", *The Globe & Mail* (July 29, 2016), online: https://www.theglobeandmail.com/news/national/doing-justice-to-her-fathersdream/article31207151/.

[31] Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity, McGill Law Journal Annual Lecture" (2010) 55:4 McGill L.J. 871 at 877; "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197; Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 307, 311-312.

[32] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/.

[33] Rachel Reed, "Former Canadian Supreme Court Justice Rosalie Abella on how the US approach differs — and why justice matters", Harvard Law School (November 28, 2022), online: https://hls.harvard.edu/today/former-canadian-supreme-court-justice-rosalie-abella-on-how-the-us-approach-differs-and-why-justice-matters/. See also "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197.

[34] Compare the value that Sirota and Mancini accord to law on procedural rather than substantive grounds: Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/. As I have remarked in an earlier co-authored piece, this argument rests on a form of moral argument in its own right, and is therefore incompatible with a strictly "value-neutral" application of law. See Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini" (2021) 30:1 Const. Forum Const. 39 at 42-43. Compare John Gardner, "Legal Positivism: 5 ½ Myths" in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 19 at 30-31.

[35] See *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5, [2020] 1 S.C.R. 166 at para. 1 (S.C.C.).

would be the true purpose of law: "[t]he law's majestic purpose is to ensure that justice is done".[36] The role of judges, meanwhile, is to be "open to understanding how injustice sounds and feels to those who come before us . . . It is the compassionate application of law to life. Otherwise, what's the point?"[37]

Now, if law and justice are entirely distinct notions, then this also supposes that justice can exist *without law*.[38] This possibility does not appear to be contemplated by Sirota and Mancini. It can, however, be discerned from Justice Abella's pronouncements. In particular, it can be seen in the manner in which she conceives of justice, which once separated from law ceases to be a specifically legal virtue, and instead becomes an unbounded political ideal. To quote from the published version of her 2022 Coxford Lecture, originally delivered at the University of Western Ontario:

> You law students are the future democracy warriors — actually, the future of democracy full stop — so this lecture is dedicated to you and to the hope that you will make justice your transcendent preoccupation, no matter what you decide to do with your law degree. You are, after all, in law school where you have a window on what the law says — guided by your professors — and a window on what the law looks like outside the walls of your classrooms — guided by watching the news.[39]

Whereas the separation of law from justice tends to strip law of its normative

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[36] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 305. See also Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/.

[37] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 312. See also Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/.

[38] This possibility is closely tied to a perennial but now often overlooked debate in legal theory, regarding the strict necessity of law for human flourishing, considering the possibility of establishing alternative, non-legal forms of social control. Thomas Aquinas appears to have answered this question in the affirmative. St. Thomas Aquinas, *Summa Theologiae*, rev ed., translated by Fathers of the English Dominican Province (London: Burns, Oates & Washbourne, 1920), Part I, Q108, A1. Evgeny Pashukanis infamously answered it in the negative, suggesting that law is merely a contingent vehicle for commodity exchange destined to disappear alongside capitalism. See Evgeny B. Pashukanis, *The General Theory of Law and Marxism*, 3d ed. (1927), translated by Georgie Anne Geyer (London: Taylor & Francis, 2002) at 131-133.

[39] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 305.

content, transforming it into "just a series of words and rules",[40] the separation of justice from law thus tends to strip it of its specifically legal features. Indeed, there is nothing specifically legal about the notion of "justice" referenced in the excerpt just quoted, which Justice Abella appears to believe is interchangeable with "democracy". Certainly, "justice" is no longer the concern of the lawyer *qua* lawyer. It is a "transcendent preoccupation" that law students are to pursue "no matter what [they] decide to do with [their] law degree".[41] In other words, if "justice" becomes unbounded when it is separated from law, then for Justice Abella, its unbounded character makes it synonymous with the realization of an ideal political order — *i.e.*, of what we might without much exaggeration qualify as "a dream of absolute freedom and equality".[42]

This unbounded conception of justice has profound consequences even within the legal realm, where it tends to undermine any concern with the legal form as such, in favour of the law's use as an instrument in the pursuit of the idealized political order that justice is understood to require. Among other things, this means the promotion of what often turns out to be an *ad hoc* approach to the interpretation of rights guarantees, such that every decision affirming a "new" right or "expanding" the scope of an existing one becomes nothing more than a waystation along the path to the ever-more-complete realization of ideal justice.[43] Since the ideal political

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[40] Rachel Reed, "Former Canadian Supreme Court Justice Rosalie Abella on how the US approach differs — and why justice matters", Harvard Law School (November 28, 2022), online: https://hls.harvard.edu/today/former-canadian-supreme-court-justice-rosalie-abella-on-how-the-us-approach-differs-and-why-justice-matters/. See also "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197.

[41] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 305.

[42] Michel Villey, *Le droit et les droits de l'homme*, 2d ed. (Paris: Quadrige, 2014) at 39-40 [author's translation].

[43] See perhaps most strikingly *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4, [2015] 1 S.C.R. 245 at para. 1 (S.C.C.). This approach is broadly consistent with the dominant interpretation of the "living tree" metaphor that informs much of Canadian constitutional law. See W.J. Waluchow, "The Living Tree" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017), ch. 41; Wilfred J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press, 2007) at 11; Robert J. Sharpe & Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007) at 179-181. See also Aileen Kavanagh, "The Idea of a Living Constitution" (2003) 16:1 Can. J.L. & Jur. 55. Contrast Bradley W. Miller, "Origin Myth: The Persons Case, the Living Tree, and the New Originalism" in Grant Huscroft & Bradley W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge: Cambridge University Press, 2011) 120; Asher Honickman, "The Original Living Tree"

order cannot be known in advance, neither can the ultimate scope of the rights being guaranteed: it is an ideal precisely because it always lies somewhere over the horizon. Where law is understood as mere words in the service of a transcendent ideal of justice, the law itself becomes profoundly unstable *by design*, while the role of the judge especially is to ensure that the law remains consistent with the pursuit of this objective, by participating in the march of progress through a never-ending expansion of guaranteed rights.[44]

It is this vision of "justice" that can be seen as the proper focus of Justice Abella's critics, who allege that her perspective amounts to little more than an instrumentalization of law in the service of her own preferred political ends.[45] Interestingly, however, this charge does not appear to be one that Justice Abella seriously disputes. The very framing of her call to favour the "rule of justice", as a call to "put compassion back in the *service* of law and law in the *service* of humanity",[46] admits of a certain kind of instrumentalism. But more than this, the values that she claims ought to be pursued instrumentally through law are not to be so pursued because they are true, since "[t]ruths change over time".[47] Rather, they are to be pursued instrumentally through law because they have been posited as the "right" values to hold at a given time and place. These are "the moral core of Canada's national values, the values that make us the most successful practitioners of multiculturalism

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(2019) 28:1 Const. Forum Const. 29. See also John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in N.W. Barber, Richard Ekins & Paul Yowell, eds., *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016) 73 at 84.

[44] In this respect, Justice Abella's vision of "justice" corresponds at least in its broad outlines to what Adrian Vermeule has more negatively termed the "festival of reason": Adrian Vermeule, "Liturgy of Liberalism", *First Things* (January 2017), online: https://www.firstthings.com/article/2017/01/liturgy-of-liberalism. Compare Christopher Lasch, *The True and Only Heaven: Progress and its Critics* (New York: W.N. Norton & Co., 1991) at 47 (suggesting that the contemporary idea of "progress" is not primarily characterized by the promise of an ideal society, but by "[t]he expectation of indefinite, open-ended improvement").

[45] Maxime St-Hilaire & Joanna Baron, "Introductory Essay: The Rule of Law as the Rule of Artificial Reason" (2019) 92 S.C.L.R. (2d) 1 at 43.

[46] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 314.

[47] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 310. Compare Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity, McGill Law Journal Annual Lecture" (2010) 55:4 McGill L.J. 871 at 881 ("The human rights abuses occurring in some parts of the world are putting the rest of the world in danger because intolerance, in its hegemonic insularity, seeks to impose its intolerant truth on others.").

in the world, and the values whose integrity requires the legal profession's vigilant protection."[48] And they are to be developed in such a way as to move ever-more-completely towards the realization of the ideal political order supposed by the notion of "justice", whatever that ideal political order may ultimately entail.[49]

To understand law and justice as distinct notions, then, is to reduce law to "just a series of words and rules".[50] It is also to significantly expand, and thus distort, the scope of justice. Far from being a specifically legal virtue, the realization of which must take place through law, the unbounded version of "justice" at play in Justice Abella's "rule of justice" lacks any real internal or perhaps even external limit. It is far from surprising, then, that critics such as Sirota and Mancini react to the claimed primacy of the "rule of justice" by attempting to deny the role of "justice", as Justice Abella conceives of it, in adjudication. It is far from surprising that, faced with a framework that demands subordination of law to the "right" values, determined on an ever-changing and ostensibly *ad hoc* basis, some would prefer that we simply apply "law". Law at least has the virtue of being the product of processes that can be known in advance and, ideally, have received some sort of democratic assent. These are irreconcilable views, notwithstanding that they share the same basic understanding of the relationship between law and justice. So how do we resolve this impasse? The answer is that we cannot — at least until we move past the assumptions that underlie both positions.

III. LAW AND JUSTICE INTERTWINED

As against the understanding of the relationship between law and justice that is shared by both Justice Abella and her critics, I now turn to an alternative view of their relationship. This alternative sees law and justice not as conceptually distinct notions potentially at odds with each other, but as inexorably intertwined. This interconnection has important implications for the way in which both law and justice are understood. With respect to law, it means that all law — even bad law — is by its very nature a vehicle for justice — even if imperfect or even woefully deficient in achieving that end. With respect to justice, it means that justice does not and cannot involve the pursuit of an abstract, idealized political order. Rather, justice is a concrete and practical matter, concerned with the resolution of disputes and the pursuit of peaceful co-existence between members of a given community, or

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[48] Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 306.

[49] See *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28, [2020] 3 S.C.R. 113 at para. 219 (S.C.C.), Brown and Rowe JJ., dissenting.

[50] Rachel Reed, "Former Canadian Supreme Court Justice Rosalie Abella on how the US approach differs — and why justice matters", Harvard Law School (November 28, 2022), online: https://hls.harvard.edu/today/former-canadian-supreme-court-justice-rosalie-abella-on-how-the-us-approach-differs-and-why-justice-matters/. See also "Justice Rosie Abella's advice for a successful law career: 'Don't take anybody's advice'", *CBC Radio* (May 17, 2023), online: https://www.cbc.ca/radio/ideas/judge-rosalie-abella-1.6846197.

between members of the community and the community as a whole. Justice, in other words, must on this view be pursued through law.[51]

The first implication of the interconnection of law and justice — *i.e.*, the idea that law necessarily serves as a vehicle for justice — is generally misunderstood and thus requires some elaboration. Above all, it is *not* equivalent to a *subordination* of law to justice, and by extension, the view that law is at least potentially without any moral or even legal force where strictly inconsistent with what justice requires.[52] In fact, the view that law is subordinate to justice in this way is consistent with the approach embraced by Justice Abella, and more broadly with the idea that law and "justice" (in the unbounded sense discussed above) are conceptually distinct. It is only because law is distinct from justice that justice can be given primacy over law, and by extension the power to overrule law in the case of a perceived conflict between them. It is only because law and justice are distinct that the validity of any given legal enactment can be made subordinate to its compliance with the dictates of justice, conceived of as a separate requirement.[53]

Instead, the status of law as a vehicle for justice implies the possibility of an entirely internal, rather than an external and purely instrumental, critique of extant law. On this view, a bad law is not a bad law because it fails to meet an external political or moral standard consistent with the preferences of the speaker. A bad law is a bad law because it fails to meet or fully realize the requirements of justice, and is therefore defective *qua* law.[54] This critique is not external, rooted in the idea that the law amounts to a mere set of words and rules aimed at furthering external ends.

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[51] As in the motto of Osgoode Hall Law School, now part of York University, and formerly run by the Law Society of Upper Canada: "*Per Jus Ad Justitiam*". Compare Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 198.

[52] See most notably Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law" (1946), translated by Bonnie Litschewski Paulson & Stanley L. Paulson (2006) 26:1 Oxford J.L. Stud. 1. Compare Javier Hervada, *Critical Introduction to Natural Law*, translated by Mindy Emmons (Montreal: Wilson & Lafleur, 2006) at 157-158 (expressing the view that an unjust law is law but is not morally obligatory).

[53] As for instance in Radbruch's treatment of the relationship between "legal certainty" and "justice" as opposing values that must yield to one another in different circumstances. Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law" (1946), translated by Bonnie Litschewski Paulson and Stanley L. Paulson (2006) 26:1 Oxford J.L. Stud. 1 at 7. In truth, Radbruch's argument was not aimed so much at "legal positivism" as it was at a caricature of legal positivism that equates this perspective with the mechanistic application of the maxim "*dura lex sed lex*". Compare John Gardner, "Legal Positivism: 5 ½ Myths" in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 19 at 26-29.

[54] For a similar view, see John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) at 363-366. For a recent article comparing Radbruch's views with those of John Finnis (and drawing a different conclusion from my own) see Seow Hon Tan, "Radbruch's Formula Revisited: The Lex Injusta Non Est Lex Maxim in Constitutional Democracies" (2021) 34:2 Can. J.L. & Jur. 461.

It is an internal critique, proceeding from the view that law is endowed with a distinct social purpose, and thus holding normative value in its own right. The distinct social purpose of law, on this view, is precisely that it serves as the means through which justice is to be realized.[55]

To understand the full implications of the view that law serves as the embodiment of justice, however, requires that we attend to the precise meaning to be given to the other part of the law-justice relationship — *i.e.*, to the term "justice". In contrast to the unbounded concept of justice described above, justice is here understood in a much narrower sense. This sense was most famously given expression in a fragment by the Roman jurist Ulpian, included in the *Corpus Iuris Civilis* as part of Justinian's Digest: "*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*", which is to say that "Justice is the constant and perpetual will to give each his due."[56] This view of justice corresponds to something more specific than a generic reference to "foundational moral principles" referenced in the Sirota and Mancini excerpt above,[57] or the unbounded pursuit of "democracy" and "equality" suggested by Justice Abella's statements on the "rule of justice".[58] What it demands is not the perfect achievement of some utopian political vision, as the unbounded version of justice already considered might have it. Its aims are considerably narrower and more concrete, and are to be realized specifically through the medium of law.

Admittedly, Ulpian's definition of "justice" does not yet tell us what it means to "give each his due". This was Hans Kelsen's point, in a well-known critique. As he suggested, the command encapsulated by this formula is fundamentally tautological, at least in the absence of a specific way of determining what is in fact due to each person.[59] But dismissing the value of the formula entirely, based on this observation, is to fail to see what it teaches us about justice, and especially about its relationship

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[55] Michel Villey, *La formation de la pensée juridique moderne*, 2d ed. (Paris: Quadrige, 2013) at 95-96; Michel Villey, *Le droit et les droits de l'homme*, 2d ed. (Paris: Quadrige, 2014) at 39, 62-63; Javier Hervada, *Critical Introduction to Natural Law*, translated by Mindy Emmons (Montreal: Wilson & Lafleur, 2006) at 118-120. Compare John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) at 290.

[56] Dig 1.1.10 pr (Ulpian). Compare Aristotle, *Nicomachean Ethics* at 1130b-1131a.

[57] Leonid Sirota & Mark Mancini, "Interpretation and the Value of Law", *Double Aspect* (February 22, 2021), online: https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/.

[58] Rosalie Silberman Abella, "In this mean-spirited moral free-for-all, we need to put justice back in charge", *Washington Post* (August 14, 2023), online: https://www.washingtonpost.com/opinions/2023/08/14/justice-rule-of-law-ruth-bader-ginsburg-rosalie-abella/. See also Justice Rosalie Silberman Abella, "The Coxford Lecture, The Rule of Justice: The Compassionate Application of Law to Life" (2023) 36:2 Can. J.L. & Jur. 305 at 314.

[59] Hans Kelsen, "Aristotle's Doctrine of Justice" in *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (Berkeley: University of California Press, 1957) 110 at 128.

to law. Above all else, it minimally involves an attempt to *define* justice, which is to say that it attempts to ascribe concrete limits to what this notion entails. If the point of justice is to give what is due to each person — that is, to ensure that each receives a just distribution of resources within a political community — and if the point of law is to embody justice, then we already have a sense of the unique social purpose that law ought to fulfil. We also have some sense of which purposes are extrinsic to law, and therefore strictly immaterial to the legal function.[60] The law might allow for parties to prospectively order their affairs, most notably through the law of contract, or ensure that the person who has taken someone else's belongings return them or compensate their rightful owner.[61] Or it can impose duties owed by the community as a whole, to provide for each of its individual members. These are purposes consistent with its status as the embodiment of justice. As Kelsen's critique reminds us, Ulpian's formula does not immediately tell us who owns what, or what counts as a taking by one member of the community from another, just as it does not tell us what the community as a whole owes to each of its members. But it does tell us what *form* justice must ultimately take.[62]

That said, there is another feature of Ulpian's definition that has been elided thus far, and which provides a further answer to the purported gap identified by Kelsen's critique. Specifically, if justice is the *constant and perpetual will* to give each his due, then this supposes that justice is not simply a matter of abstract reason. Justice, on this view, is a virtue to be exercised through the will of a specific person or group of persons. It supposes law-making and adjudicating institutions charged with ensuring that each person in fact receives what is owed to him or her, by transmuting the idea of justice into concrete legal norms.[63] This is why Ulpian's definition of "justice" can be understood as concrete and functional: it is not an abstract ideal, but a matter for real, existing institutions contributing to the proper functioning of

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[60] Compare Javier Hervada, *Critical Introduction to Natural Law*, translated by Mindy Emmons (Montreal: Wilson & Lafleur, 2006) at 18-19. By extension, this view of justice also ascribes limits on what equality, or at least the legal pursuit of equality, should look like — *i.e.*, *all* persons are owed their due, and it is the purpose of law to ensure that they receive it, whatever their due may be.

[61] Compare Ernest Weinrib, *The Idea of Private Law*, 2d ed. (Oxford: Oxford University Press, 2012) at 66-68.

[62] Compare Kelsen's own view that "this tautology has the important function of legitimizing the positive law which, as a matter of fact, fulfills the task, which legal philosophy is not capable of fulfilling, to determine what is everybody's due.": Hans Kelsen, "Aristotle's Doctrine of Justice" in *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (Berkeley: University of California Press, 1957) 110 at 128.

[63] John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) at 281-290; Michel Villey, *La formation de la pensée juridique moderne* 2d ed. (Paris: Quadrige, 2013) at 91-95; Javier Hervada, *Critical Introduction to Natural Law*, translated by Mindy Emmons (Montreal: Wilson & Lafleur, 2006) at 118-120.

actual, existing human societies.[64]

On the view that law and justice are intertwined, law thus supposes justice as its primary aim, and justice also supposes a legal form through which it must ultimately be given concrete expression. In fact, it is this concrete legal form that serves to provide substance to the command to "give each his due". On this account, what justice requires cannot be understood conclusively except through concrete enactments, which give expression to what would be under-determined principles when taken in isolation from the law. Law — which is to say, decisions and enactments made by those with authority to decide for the good of the community — is necessary to authoritatively specify the precise content of justice. The command to "give each his due" may otherwise be amenable to differing reasonable interpretations at different times and in different places. Even the parties involved in a given case may have competing reasonable interpretations of what justice mandates. Concretization through law is necessary to settle these matters conclusively, and in so doing establish what is due to each on concrete, practical terms.

Two examples should serve to illustrate the operation of this relationship. The first is drawn from the domain of private law, and specifically the law of contracts. It pertains to the principle *pacta sunt servanda* (agreements must be kept) which is generally recognized as a basic principle of justice.[65] As one fairly common argument would have it, this principle is not truly recognized within the English common law tradition, owing most notably to its insistence on consideration as an essential element of a binding contract. The common law position is therefore said to contrast with the civil law systems which, as the argument goes, take the binding nature of promises seriously as a general principle of their legal order,[66] even if they

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[64] Compare Javier Hervada, *Critical Introduction to Natural Law*, translated by Mindy Emmons (Montreal: Wilson & Lafleur, 2006) at 2-3. See also John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) at 169-171.

[65] On the origins and historical antecedents of the modern maxim, see Richard Hyland, "Pacta Sunt Servanda: A Meditation" (1994) 34:2 Va. J. Int'l L. 405. On its recognition as a basic principle of justice, see John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) at 324.

[66] See G.C. Cheshire & C.H.S. Fifoot, *The Law of* Contract, 7th ed. (London: Butterworths, 1969) at 57-58; Friedrich Kessler & Grant Gilmore, *Contracts: Cases and Materials*, 2d ed. (Boston: Little, Brown, 1970) at 203-206. See also Richard Hyland, "Pacta Sunt Servanda: A Meditation" (1994) 34:2 Va. J. Int'l L. 405 at 405-406; Stephen Hall, "Pacta Sunt Servanda, the Common Law and Hong Kong" in Normann Witzleb, ed., *Contract Law in Changing Times: Asian Perspectives on Pacta Sunt Servanda* (London: Routledge, 2022) 3 at 3, 19. Compare John P. Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven, CT: Yale University Press, 1980) at 1; J.B. Baron, "Gifts, Bargains, and Form" (1989) 64 Ind. L.J. 155 at 192; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1990) at 504-507. Contrast Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA.: Belknap, 2019) at 66 (apparently finding no contradiction between his

also typically subject the enforcement of certain kinds of promises (*e.g.*, gratuitous promises to transfer property rights) to fairly rigid formalities.[67] For critics of the common law approach, this failure to give full effect to the principle *pacta sunt servanda* is understood as a serious and perhaps even fatal flaw, necessitating a reform of the positive law in order to bring it in line with what is widely perceived as the true foundation of contract.[68]

On the view of the relationship between law and justice defended here, these arguments are largely beside the point. Whether a given legal system opts to subject the formation of a valid contract to the demonstration of consideration, or instead views promises as enforceable *per se* (though subject in some cases to additional formalities) the requirements of justice are met. Both approaches can be seen to give voice to the requirements of what the Aristotelian tradition has called corrective or commutative justice — *i.e.*, to that form of justice peculiar to transactions between persons.[69] Both can also be seen to give recognition, subject to proper constraints, to the separate virtue of liberality that is traditionally associated with gift-giving.[70] That most civil law systems have chosen to adopt a presumption in favour of the existence of a valid and binding contract, while most common law systems presume the inverse, is consonant with the possibility of different concrete applications of the basic requirements of justice.[71] These are simply different ways of concretely setting the boundaries of what counts as one's due.

Indeed, both of these answers to the question of when a binding contract arises must be contrasted with the hypothetical scenario in which parties contract outside

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defence of consideration and his endorsement of the maxim *pacta sunt servanda*).

[67] See, *e.g.*, art. 1824, *Civil Code of Québec*, CCQ-1991; art. 931, *Civil Code of Lower Canada* (1866).

[68] See, *e.g.*, Charles Fried, *Contract as Promise: A Theory of Contractual* Obligation, 2d ed. (Oxford: Oxford University Press, 2015) at 38-39; Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge: Cambridge University Press, 2011) at 275. See also James Gordley, "Consideration" in J.M. Smits, ed., *Elgar Encyclopedia of Comparative* Law, 2d ed. (Northampton, MA: Edward Elgar, 2012) 216 at 219.

[69] Aristotle, *Nicomachean Ethics* at 1130b-1131a, 1133. Compare Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA: Belknap, 2019) at 30-31, 388-389; Ernest Weinrib, *The Idea of Private Law*, 2d ed. (Oxford: Oxford University Press, 2012) at 136-140. Contrast James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991) at 137-139.

[70] Aristotle, *Nicomachean Ethics* at 1120a-1120b. Compare James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford: Oxford University Press, 2006) at 352-355. Contrast Peter Benson, *Justice in Transactions: A Theory of Contract Law* (Cambridge, MA: Belknap, 2019) at 63.

[71] For an illustration of the practical implications of these differing approaches, compare *Dalhousie College v. Boutilier Estate*, [1934] S.C.R. 642 (S.C.C.) and *Martin c. Dupont*, [2016] J.Q. no 2225, 2016 QCCA 475 (Que. C.A.).

of any existing, concrete legal order. Although promises may be binding *in principle*, such a scenario provides no authoritative means by which to determine when a promise has been conclusively made, or for that matter the precise content of the promise in question. Absent a further agreement between the parties, itself subject to the possibility further reasonable *dis*agreement when that agreement comes up for interpretation, there is simply no way by which to resolve a dispute arising between them. No external arbitrator, no set of authoritative legal determinations, exist. Even an entirely honest disagreement over what constitutes a binding promise is thus potentially fatal to the possibility that the parties might prospectively order their affairs. Justice cannot be done except through law.[72]

My second illustration is likely more controversial. It pertains to rights-based judicial review, and to the institutional arrangement that characterizes the Canadian approach to this issue. On the one hand, the inclusion of a "notwithstanding clause" such as section 33 of the *Canadian Charter of Rights and Freedoms*[73] has been said to be the defining feature of a "New Commonwealth Model of Constitutionalism" in which "protected rights have some form of higher law status compared to ordinary statutes, but not one that wholly immunizes them from legislative action".[74] On the other, this provision has tended to be viewed with suspicion by many (if not most) legal scholars who have written on the topic.[75] Some have gone

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[72] Compare John Finnis, *Natural Law and Natural Rights*, 2d ed. (Oxford: Oxford University Press, 2011) at 268-269. On this perspective, contractual obligations are indeed self-imposed but can only be conclusively determined in the presence of an authoritative third-party decision-maker. Contrast Bruce Pardy, "The Only Legitimate Rule: A Reply to MacLean's Critique of Ecolawgic" (2017) 40:1 Dal. L.J. 323 at 329 ("Transactions are not created by governments but by the parties who enter into them").

[73] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[74] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013) at 35-36. This compromise reflects a more communitarian view of rights that was seen to contrast with a more American, liberal individualist outlook on rights protection. See Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 209 at 214-227.

[75] See *e.g.*, John D. Whyte, "On Not Standing for Notwithstanding" (1990) 28:2 Alta. L. Rev. 347; Lorraine Eisenstat Weinrib, "Learning to Live With The Override" (1980) 35:3 McGill L.J. 541; Barbara Billingsley, "Section 33: The *Charter*'s Sleeping Giant" (2002) 21 Windsor Y.B. Access Just. 331; Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" (2004) 23 S.C.L.R. (2d) 135. Contrast the views of political scientists, who are generally much more favourable to the Notwithstanding Clause. See, *e.g.*, Peter H. Russell, "Standing Up for Notwithstanding" (1991) 29:2 Alta. L. Rev. 293; Janet L. Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding" in James B. Kelly & Christopher P.

so far as to call the legitimacy of section 33 into question by drawing on something very much like the first view of law and justice examined above. That is, they have either claimed that section 33 is problematic because it allows for the elevation of political preferences over the rule of law,[76] or, perhaps more typically, that it involves an elevation of law over justice, conceived of as the full realization of individual rights.[77] Notably, the individual rights invoked in this second reading appear to be understood as free-standing entitlements, existing in a fully specified form *independently of* any act of concrete specification, at least on the part of legislatures.[78] The result of this arrangement, then, is that law is understood to be in potential opposition to, and invalid unless it conforms to, these abstract, free-standing entitlements. On this view, law and justice are not intertwined; they are entirely separate things.

To accept the view that law and justice are intertwined, by contrast, means that there is nothing intrinsically unacceptable about a provision like section 33, or for that matter about an alternative arrangement that does not countenance rights-based judicial review of any kind. Indeed, it requires accepting that a given legal system is not unjust simply because it makes rights-based judicial review unavailable. Such an arrangement merely reflects a different view of the allocation of institutional powers, and a different view of who ultimately gets the final say on the general rules that establish each person's due within the community. On the allocation contemplated by section 33, the Canadian Parliament and the various provincial legislatures get to make this determination, subject in the ordinary course of affairs to the courts being entitled to substitute their own readings of the rights enumerated in the *Charter* for the choices made by these legislative bodies. Where section 33 is

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Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: University of British Columbia Press, 2010) 107; Janet L. Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 20; F. L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" (1987) 20:1 Can. J. Poli. Sci. 31.

[76] See Leonid Sirota, "The Rule of Law All the Way Up" (2019) 92 S.C.L.R. (2d) 79 at 93-97. See also Leonid Sirota, "Not as Advertised", *Double Aspect* (January 3, 2022), online: https://doubleaspect.blog/2020/11/12/neutrality-in-legal-interpretation/.

[77] See most notably Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 U.T.L.J. 189 at 190.

[78] The assumption, then, appears to be that these rights are either entirely free-standing, or are the sole province of judicial rather than legislative specification. As between these two views, Leckey and Mendelsohn appear to favour the latter. See Robert Leckey & Eric Mendelsohn, "The Notwithstanding Clause: Legislatures, Courts, and the Electorate" (2022) 72:2 U.T.L.J. 189 at 206-209, 215. This perspective is consistent with Dworkin's understanding of rights as "trumps" to be wielded against majoritarian legislatures: Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 20, 90-94; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) at 221-223, 310-312.

invoked, these same legislative bodies instead retain the final say on the way in which justice will be specified into concrete legal rules, at least with respect to those Charter provisions captured by the effect of a section 33 declaration.[79] There is no particular problem with this arrangement, from the standpoint that views law and justice as intertwined.

That said, to accept the view that section 33 raises no particular problems of justice does not mean that justice becomes irrelevant once section 33 is invoked. Although the legislatures have in such cases assumed the final say on the manner in which the requirements of justice will be specified into concrete legal rules, these rules must still be applied on the facts of each case.[80] The fundamental legal imperative of like treatment — in effect, simply a restatement of the imperative to give each person his or her due — means that judges must still strive for coherence in doing so.[81] In that spirit, the various interpretive presumptions recognized by the Canadian legal system, including perhaps most notably the presumption of conformity with the constitution and with common law rights, continue to apply to legal interpretation notwithstanding the invocation of section 33.[82] Justice must be done through law, which means that the law must be applied consistently and coherently. Only in so doing can each person be given his or her due.

IV. CONCLUSION

Although expressed in idiosyncratic language, Justice Abella's suggestion that

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[79] For a more developed version of this argument, see Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "Notwithstanding Judicial Specification: The Notwithstanding Clause Within a Juridical Order" (2023) 110 S.C.L.R. (2d) 135. Compare Richard Ekins, "Legislation as Reasoned Action" in Grégoire Webber *et al., Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018), 86 at 100.

[80] Compare Richard Ekins, "Legislation as Reasoned Action" in Grégoire Webber *et al*., *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press, 2018), 86 at 101.

[81] On the imperative of like treatment, see Aristotle, *Nicomachean Ethics* at 1131a10-b15.

[82] See also Stéphane Sérafin, Kerry Sun & Xavier Foccroulle Ménard, "Notwithstanding Judicial Specification: The Notwithstanding Clause Within a Juridical Order" (2023) 110 S.C.L.R. (2d) 135 at 162, 166. On the presumption of conformity with the constitution, see *e.g. McKay v. The Queen*, [1965] S.C.R. 798 at 803-804 (S.C.C.); *R. v. Rube*, [1992] S.C.J. No. 82, [1992] 3 S.C.R. 159 (S.C.C.); *R. v. Ahmad*, [2011] S.C.J. No. 6, 2011 SCC 6 at para. 24 (S.C.C.). Compare *La Presse inc. v. Quebec*, [2023] S.C.J. No. 22, 2023 SCC 22 at para. 24 (S.C.C.). On the presumption of conformity with common law rights, see *e.g*., *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 at 542 (H.L.); *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] S.C.J. No. 42, 2003 SCC 4 at paras. 38-40 (S.C.C.); *Heritage Capital Corp. v. Equitable Trust Co.*, [2016] S.C.J. No. 19, 2016 SCC 19 at para. 29 (S.C.C.); *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, [2020] S.C.J. No. 29, 2020 SCC 29 at paras. 39, 44 (S.C.C.).

"we need the rule of justice, not just the rule of law" can be seen as one expression of the much more widely held view that law and justice are conceptually distinct. This assumption as to the relationship between law and justice carries with it implications for both notions. Law is reduced to a mere set of words and rules, stripped of its intrinsic normative value. Justice is transformed from a specifically legal virtue into the unbounded, instrumental pursuit of an ideal political order. However, this is not the only possible way of conceiving the relationship between law and justice. On the alternative view discussed above, law and justice are not distinct notions potentially at odds with one another, such that one is inevitably forced to choose between them based on extrinsic moral and political considerations. Instead, law and justice are intertwined, so that there can be no law without justice and — perhaps more importantly — no justice without law.

Both this narrower view of justice and the correspondingly narrower role it ascribes to law will undoubtedly be seen by many as unattractive, or at least to be less attractive than the image of the ideal society conjured by "the rule of justice". One last comment is therefore in order. Although the scope accorded to justice and the purpose ascribed to law are indeed narrower on this account, this perspective offers an important counterweight to the hubris that has so often tended to claim contemporary jurists. Their instrumentalist view of law would see it swallow up every aspect of human life and put it in the service of any and every conceivable political project. But if law has value because it embodies justice, and justice is conceived narrowly, as the concrete practice of rendering to each his due, then it is because this function is essential to the proper ordering of any human community. And it is also because there is more to life in any human community than can or should be expressed in terms of justice, and certainly more to life in such a community than can ever be reduced to the form of law.