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Judicial Morality and the Limits of the Law

Ed Clothier

Abstract
After four years of escalation through the courts of England and Wales, on 25 June 2021 the Supreme Court upheld individuals' rights to block public highways as a means of protest. Five months later, nine people were handed down custodial sentences following a peaceful protest, which involved blocking a public highway. The determination of these cases demonstrate the extent of the law's indeterminacy and offers a paradigmatic example of how the law can represent a statement of individual judicial morality. Employing a slim-lined version of Duncan Kennedy's Judicial Phenomenology, and with reference to these cases, this paper will demonstrate how an 'environmentally activist' judge could have refused a significant number of injunction applications and decided the law, and the fate of the protestors, very differently. This article proposes that, contrary to Hart's claims that indeterminacy is solely a matter of the 'open texture' of language, there are many sources of indeterminacy which can make even seemingly 'easy cases' ambiguous.

1 Introduction

To say that the law is greatly indeterminate is to say that it is to a great degree unknowable, or, to go a step further, to say it is arbitrary. This paper does not seek to examine the nature of what the law is but rather to show, in a number of seemingly easy cases, that the law, as a social phenomenon that predominantly takes place in courts, is largely an expression of a particular court's morality, and in most instances that is the morality of a judge.

To explore this view, the paper will rely heavily on three legal scholars: Hart, Guastini, and Kennedy. First, these scholars provide a comprehensive cross section of views of indeterminacy, with Hart and Kennedy at distinct points on the spectrum, while Guastini offers a more distanced, technical and nuanced view. Second, these scholars all discuss judging in action, providing the reader with a practical understanding applicable to real world cases, allowing the reader to test their claims against real judicial reasoning.

Consequently, the paper proceeds as follows: first a summary of the National Highways and Transport for London (TFL) injunctions and how they were decided.[1] Second, Hart's claim for limited indeterminacy, resulting from the 'open texture' of language, will be investigated. Third, Kennedy and Guastini's further sources of indeterminacy will be examined. Next, the paper will take Kennedy's lead in not being 'at all convinced when people start out claiming they can tell us about judging without some grounding in a specific imagined situation',[2] and will apply Kennedy's phenomenology to the National Highways and TFL Injunctions. Finally, the pervasiveness of morality in the law will be demonstrated more generally.

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[1] *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB).
[2] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 J Legal Educ 518.

2 Summary of National Highways and Transport for London Injunctions

Between 15 September 2021 and 11 November 2021, a loose collective known as 'Insulate Britain' held multiple protests.[3] The protests involved the blocking of public highways by laying in the road. Initially, the protests focused on the M25 but later included major roads in London's Parliament Square, and other major roads in Southeast England. The collective's overarching aim was to bring about a change in Government policy, specifically, the improved insulation of all homes in Britain.[4] Both Public Highways and TFL brought multiple injunctions against the protestors.[5] Ultimately, the injunctions were granted but the collective continued their activities, resulting in nine protesters being handed down custodial sentences for contempt of court.[6]

TFL was not a party to the National Highways hearing but, to assist in demonstrating the central point of this paper, it will be assumed that they were joint claimants. Their inclusion as joint claimants is not problematic, as the injunctions granted in favour of TFL[7] are materially considered in the judgment,[8] and are particularly relevant to the application of Kennedy's phenomenology.

The presiding judge's ruling revolved around Articles 10 and 11 of the

[3] *National Highways* (n 1) [6]
[4] *National Highways* (n 1) [8].
[5] ibid [14], [16].
[6] *National Highways Ltd v Heyatawin* [2021] EWHC 3078.
[7] Andrew Fraser-Urqhuart and Charles Forrest, 'High Court Grants Urgent Interim Injunction to Transport for London Against Insulate Britain Protesters' (*Francis Taylor Building*, 8 October 2021) <https://www.ftbchambers.co.uk/news/high-court-grants-urgent-interim-injunction-transport-london-against-insulate-britain> accessed 24 May 2022.
[8] *National Highways* (n 1) [16].

European Convention on Human Rights.[9] Lavender J relied heavily on the recent ruling in *PPS v Ziegler,* which ruled in favour of protestors' rights.[10] Following *Ziegler*, Lavender J conceded that, although *Ziegler* was a criminal case, he agreed with counsel for the defendants that it was applicable as to whether the protestors' actions constituted a tort of trespass or nuisance.[11] In effect, this meant that he would apply the same formula from *Ziegler* to the case at hand. *Ziegler* sets out eight factors relevant to the assessment of proportionality of an interference with the Article 10 and 11 rights, specifically in cases where protestors are 'blocking traffic on the road'.[12] Lavender J favoured the protestors on five of the eight factors.

Of those factors to which Lavender J was opposed, factor (7) states a requirement for 'the absence of any complaint about the defendants' conduct' in cases where protesters block public highways.[13] To which Lavender J offered a weak, textually based, response. Factor (4) deals with whether the protests were carefully targeted and (6) with the duration of the protests.[14] Factors (4) and (6) were pivotal in his decision. However, with only minor amendments to the judge's ethical standpoint, it will be shown how this case could have been determined very differently.

3 Hart and Indeterminacy

Law's indeterminacy for all but the most provocative of legal scholars is widely accepted.[15] Guastini contends that the spectrum of indeterminacy flows between 'the noble dream', a state where the law

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[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) arts 10 and 11

[10] *DPP v Ziegler* [2021] UKSC 23, [2021] 4 ALL ER 985 [151].

[11] *National Highways* (n 1) [29].

[12] ibid [38].

[13] *National Highways* (n 1) [38].

[14] *National Highways* (n 1) [39].

[15] For example, see Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

is fully determined, and 'the nightmare', where the law is wholly indeterminate.[16] Hart is seen as the standard bearer of 'the vigil' middle ground, allowing a level of indeterminacy in hard cases while conceding that these are rare.[17]

For Hart, the single source of indeterminacy in the law is the necessity of the use of 'open language', equally attributing this to legislation and precedent.[18] Hart contends that the open texture of language to communicate rules is inevitable as it reflects the open texture of our world. The inability to forecast all future cases means that rules must be formulated generally: allowing for future interpretation to determine the correct application to the case at hand. Specifically, a part of the field of law is 'left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate'.[19] For Hart, most cases are plain cases, where 'individuals can see for themselves, in case after case' the plain meaning of the rule.[20] Judicial or official interpretation is only required in 'hard cases' to clarify or 'narrow' the language to fit a particular case, for example, in constitutional matters or parliament's ability to bind or destroy itself.[21] In these hard cases Hart is happy to concede that 'all that succeeds is success', that 'open texture' is the sole source of indeterminacy.[22] Yet Hart claims that indeterminacy does not exist, from any source, in so-called easy cases, a claim that does not withstand scrutiny.

Now let us take the weak response to factor (7) offered by Lavender J in the National Highways cases as an example, the factor relating to

[16] Riccardo Guastini, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* vol 1 (Oxford Scholarship Online 2011) 138, 150–151.
[17] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 2012) 136.
[18] ibid 126.
[19] ibid 136.
[20] ibid 136.
[21] For example see HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[22] Hart (n 17) 153.

'complaints about protestors conduct'.[23] Lavender J contends that it was 'abundantly clear from press reports that many members of the public object to the Insulate Britain protests'.[24] Inexplicably, he then references no specific press reports and instead relies on hearsay. He states only that 'at least one press report *suggested* that an ambulance was held up'.[25] Clearly, Lavender J takes a very broad reading of factor (7), particularly the words 'complaint' and 'conduct'.

Here, language is a source of great indeterminacy on which Lavender J, regardless of his ethical views, would have to rely heavily on his own interpretation. In *Ziegler*, factor (7) addresses not whether people disagreed with defendants protesting, a ridiculous hurdle for any political protest to have to surmount, but whether there were formal complaints. While there may have been complaints, most likely to the police, whether they related to the protestors' 'conduct' would be another matter. In any event, the claimant presented no complaints as evidence. Given the exceptionally open language of factor (7) and the lack of explicit evidence, Lavender J could, and probably should, have more comfortably concluded, as did the Divisional Court in *Ziegler*, that this could be of 'little if any relevance to the assessment of proportionality'.[26] Further, it would seem that in giving their judgment in *Ziegler*, Hamblen LJ and Stephens LJ directly anticipated such issues, instructing future interpreters that 'the factors must be open textured without being given any pre-ordained weight'.[27] Their explicit use of the Hartian term 'open textured' is striking and it is hard to think that the Lord Justices were not cognisant of future potential indeterminacy when delivering their judgment.

[23] *National Highways* (n 1) [38].
[24] *National Highways* (n 1) [39].
[25] Emphasis added, *National Highways* (n 1) [39].
[26] *Ziegler* (n 10) 85.
[27] ibid 71.

4 Beyond Open Texture

Guastini goes beyond Hart and identifies three sources of indeterminacy, outside of the '"objective" flaws of constitutional and statutory language',[28] namely: i) the plurality of interpretive methods; ii) juristic theories; and iii) the ethical and political preferences of interpreters.[29] Guastini feels that iii) 'is so manifest that there is no need to elaborate the point'.[30] That said, it is worth looking at the other two sources of indeterminacy and seeing how they differ from iii).

The 'plurality of interpretative methods' and 'juristic theories' are conceptually similar; they are distinguished from iii) by being 'cognitive' as opposed to 'acts of will'. Item i) refers to the different interpretive techniques that might be applied to any single sentence or piece of language, rather than the language itself ie the different, and importantly widely accepted, methods of interpreting set legal texts. By example, Guastini identifies three different interpretative methods adopted by Italian jurists to statutes.[31]

Item ii) is again cognitive and refers to pre-suppositions held by the jurist before they approach the legal text eg the primacy of EU Law over state law or *Marbury v Maddison* in the US.[32] These two sources of indeterminacy were roughly anticipated quite early on by the legal realist Llewellyn, who points to the 'current tradition of the court' and the 'sense of the situation as the court sees that sense'.[33] One can comfortably interchange the words court/jurist/judge where appropriate.

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[28] Guastini (n 16) 148.
[29] ibid 148.
[30] ibid.
[31] ibid 149.
[32] ibid.
[33] Karl N Llewllyn, 'Remarks on the Theory of Appellate Decision and the Rule or Canons about How Statutes Are to Be Construed' (1950) 3 Vand L Rev 395, 396.

Indeterminacy from the above sources can be one of accident, for example the jurists' preferred method of interpretation in many instances is likely to be the result of legal training. However, both sources could as easily be subsumed into iii) with an activist judge selecting the method which best suits their 'ethical' ends.

Kennedy takes a more novel approach to exploring indeterminacy, in that he plays out the judicial reasoning of a judge where the judge has an agenda as to 'how-I-want-to-come-out' which, on the face of it, is opposed, or in conflict with, how 'the law' initially seems to present itself.[34] When Kennedy talks of a judge's 'how-I-want-to-come-out', he is referring to a judge's initial feelings and sentiments on first hearing a case. – that is, the alignment of their moral and lived sensibilities with their intuitive desire for a given resolution to a case. He takes an imagined case of a bus operator seeking an injunction against strike action by unionised bus drivers laying down in the street opposite the bus depot. His judge's initial response to the case is to: a) feel 'there is no way they will be able to get away with this';[35] and b) disagree with rules which allow employers to continue operating 'the means of production' while a dispute is on-going. This view is derived from a specific worldview held by the judge who would like to see a transformation of 'American economic life.'[36]

Two points arise. First, Kennedy's exposition captures in its entirety Guastini's three sources of indeterminacy, as he presents us with a judge who is attempting to adapt Guastini's first two sources to the judge's ethical preferences. That is to say, he demonstrates technical indeterminacy in the process and theories of interpretation, yet they are subject to a magnetic pull from the judge's pre-ordained 'how-I-want-to-come-out'. Second, Kennedy's judge has regard to what he dramatically terms 'the devil's compact', namely the perceived

[34] Kennedy (n 2) 518.
[35] ibid 519.
[36] ibid 520.

contract between the judge and public.[37] Kennedy's judge is consciously limited by the 'the whole force field' of the particular area of the law and is not out to win-at-all-costs – they are a conformist judge who nevertheless holds quite staunch ethical views.[38]

Kennedy is not propounding 'the nightmare' view of the law, he sees his judge as greatly restricted. Nonetheless, he is clear that he sees legal reasoning as 'a kind of work with a purpose, and here the purpose is to make the case come out the way my sense of justice tells me it ought to'.[39] He may not be successful in his task, but that does not by default make that area of the law determinate, as it may simply be 'the failure of particular judges to find a way to budge it'.[40]

In Kennedy's role-play, once all legal reasoning has been exhausted, Kennedy assumes his judge has failed to generate a decisive argument that completely accords with their 'how-I-want-to-come-out', and is left with a plausible, if unstable, argument against the injunction. It then becomes a matter of risk taking on the judge's behalf, with the options ranging from deciding against the injunction on the basis of the judge's incomplete argument, to the patently devious act of deciding against the injunction on the basis 'of fact finding I know to be false'.[41]

Kennedy demonstrates that through accepted legal reasoning, a sensible judge can come to an end point where, having done the work, they are faced with a risk curve containing multiple options on how to decide the case. And it will be that judge's individual risk appetite combined with their ethical preferences that are decisive.

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[37] ibid 555.
[38] ibid 536.
[39] ibid 526.
[40] ibid 548.
[41] ibid 558–559.

5 Application to National Highways and TFL Cases

Now let us assume that Lavender J held prior moderate ethical views in favour of protestors' rights and could be considered an environmentalist. As such, it is assumed that his 'how-I-want-to-come-out' position is that he is going to work to do what he can to help Insulate Britain protestors.[42]

It has already been shown how the interpretation of factor (7) could easily be manipulated by recourse to its 'open texture'. However, the two factors pivotal in Lavender J's decision are factors (4) and (6), the factors relating to targeted protesting and duration.[43] Here, there is a simple solution that marries up our ethical judge's 'how-I-want-to-come-out' and a reading of the law, which does not rely on a different interpretation of language. Under a like-for-like reading of factors (4) and (6), that is, without recourse to a different interpretation of language, what is at issue is that the protests: i) were against government policies yet do not specifically target government; and ii) are potentially unlimited in duration. The contra-argument, as per *Ziegler*, is that if they were specifically targeted and had a set duration, then they would be permissible. Our activist judge could achieve their aims and come out in favour of the protesters by upholding the injunctions that relate to the M25 and other major roads while setting aside the injunctions that relate to Parliament Square. In so doing, he could write an opinion assisting the protestors by instructing them to limit the protest duration. While no existing precedent strictly defines a 'reasonable duration', only that such a duration exists, it would be enough to guide the protestors on this

[42] Indeed, this imagined judge became a reality on the 12 April, when District Judge Stephen Leake was inspired by protestors 'to do what I can to reduce my own impact on the planet', see 'Insulate Britain: Judge "Inspired" by Activists After M25 Protest' (BBC, 12 April 2022) <https://www.bbc.com/news/uk-england-kent-61085689> accessed 24 May 2022.
[43] *National Highways* (n 1) [39].

point, perhaps, referencing the ninety minutes deemed acceptable in *Ziegler*. In fact, the judge could go further and point to historic protests, which never ended up in court, that blocked public highways in opposition to government policy for extended periods in and around Westminster, such as the Black Cab protests.[44]

Although not a complete victory for our ethical judge, what the above brief exercise has shown is how multiple sources of indeterminacy can be used to budge the law in favour of a given ethical position. What is important is that on points (4) and (6) the judge has had to do no more than apply the same reasoning to give a completely different and much more favourable outcome to the protestors without relying on ambiguity in language.

6 Easy Cases

The above case is not a 'hard case' as Hart would have it, and this paper contends that the same indeterminacy applies to a great deal of easy cases. People are often surprised when there is no 'law' or 'when the law turns out to be plain unjust'.[45] To take Hart's 'crudest example', the killing of another person, how many people truly know what constitutes murder?[46] If one walked up to someone in the street and described the circumstances around Sally Challen's case, a case where a wife with full premeditation brutally beat her husband to death with a hammer while he ate his dinner,[47] how many could say whether she was a murderer or not? How many would know anything of coercive control, diminished responsibility and provocation (now

[44] For example, see Ella Willis, 'Tottenham Court Road Black Cab Protest: Cabbies Block Road over Planned Ban on Cars, Lorries and Taxis' *Evening Standard* (London, 21 January 2019) <https://www.standard.co.uk/news/london/black-cabs-block-tottenham-court-road-in-protest-over-planned-ban-on-cars-lorries-and-taxis-a4044961.html> accessed 24 May 2022.
[45] Kennedy (n 2) 556.
[46] Hart (n 17) 133.
[47] *R v Challen* [2019] EWCA Crim 916, [2019] Crim LR 980.

'loss of control')?[48] Simply to say that most cases of killing are 'plain', is naïve. Cases of killing are 'plain' only so far as the facts that surround them, as weighed by a jury, at the time, make them plain *ex-poste*. This is not to say we live in a state of anarchy, but it is to suggest that we live in a state where people abide by rules out of a sense of morality, not out of a sense of the law. The law itself is unknowable, for it requires us to know the mind of a judge or jury.

'The law' seemed clear with regard to criminal damage, but we do not know the mind of the jury that acquitted the Colston Four, a case where four people tore down a public monument in broad daylight in front of hundreds of eyewitnesses, the national media, and thousands on social media.[49] Therefore, one's best efforts are only forecasts of what the law might be and, for the most part, this is often conflated with what the law 'ought' to be. The three cases presented cannot be considered 'hard cases', they do not deal with complex cases around the constitution or the Rule of Recognition, and they would in fact be considered plain cases by the layman and the lawyer alike. Yet such cases demonstrate the capacity for differing interpretations of the law, allowed by open texture.

7 Conclusion

This paper started by examining the injunctions and cases surrounding the recent Insulate Britain protests; from there it has proceeded to lay out how the judge in the National Highways appeal hearing came to his decision to uphold the injunctions. Using this case as a springboard, Hart, Guastini and Kennedy's theories of indeterminacy have been introduced. While Hart was right to identify 'open texture' as a source of indeterminacy, he was too hasty in considering it the sole source. Open texture was easily identified as a source of

[48] Tony Storey, 'Coercive Control: An Offence but Not a Defence' (2019) 83 JCL 513.
[49] 'Edward Colston Statue: Four Cleared of Criminal Damage' (BBC, 5 January 2022) <https://www.bbc.co.uk/news/uk-england-bristol-59727161> accessed 24 May 2022.

indeterminacy in the National Highways appeal, so much so that judges in previous hearings had forecasted and allowed for it.

The real substance of this paper has been to go beyond open texture, looking at the causes of indeterminacy that might arise out of technical or ethical differences in judges' approaches to 'the law'. Most importantly, it has examined the role moral agency has in determining the law, specifically the morality of judges. By applying Kennedy's phenomenology, a different outcome was determined in the National Highways appeal, one that did not rely solely on open texture. This goes a small way to demonstrating that there are very few, if any, easy cases. The law itself is far more indeterminate than Hart would have us believe and, in many cases, it is no more than a series of moral ordinances by men in wigs.