EMPATHY, JUSTICE, AND JURISPRUDENCE

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ABSTRACT: This paper uses a study of the opinions in a case recently decided by the U.S. Supreme Court, Ledbetter v. Goodyear Tire & Rubber Co., to explain the role of empathy in legal interpretation. I argue for two theses: (1) that empathy is essential to an interpretation of law if that interpretation is to serve the interests of justice and (2) that no interpretation of a law is sound if it ignores whether so interpreting the law serves the interests of justice.

Piaget observes, at the very beginning of his landmark study of children’s moral thinking:

Children’s games constitute the most admirable social institutions. The game of marbles, for instance, as played by boys, contains an extremely complex system of rules, that is to say, a code of laws, a jurisprudence of its own. Only the psychologist, whose profession obliges him to become familiar with this instance of common law, and to get at the implicit morality underlying it, is in a position to estimate the extraordinary wealth of these rules by the difficulty he experiences in mastering their details.¹

My aim, in this essay, is to expand on some of the themes expressed in Piaget’s observation. I am particularly interested in the place of empathy in the jurisprudence to which Piaget refers. His reference, while somewhat oblique, is to a jurisprudence that arises with the understanding of social institutions as cooperative schemes of a particular kind. Specifically, they are cooperative schemes whose participants take themselves to be joined together as partners in an enterprise regulated by the rules of the institution

and accordingly express, through their cooperation with one another, mutual respect. My interest, then, is in how empathy is essential to such a jurisprudence. I believe that I am being faithful to Piaget in taking this understanding of social institutions to be implicit in his reference to a jurisprudence. I believe, that is, that the ideal this understanding represents is the one that Piaget takes as structuring the morality that, as he says, underlies “this instance of common law.” For my purposes, however, it is sufficient that Piaget’s work is the inspiration for my expounding, as I do, the themes he expressed.

To understand the place of empathy in this ideal requires first fixing the meaning of the word ‘empathy’ for this purpose. Doing so is especially important because the word has become something of a vogue term. As a result, loose usage is common to everyday conversation and popular writing. Social and developmental psychologists, however, have come to recognize in their work two distinct meanings. They define ‘empathy’ either as a cognitive state or as an affective state. Martin Hoffman, in his important book on empathy, remarks that psychologists define the term either as “the cognitive awareness of another person’s... thoughts, feelings, perceptions, and intentions” or as “the vicarious affective response to another person.”² A similar differentiation of meanings is recognized by philosophers as well.³

Plainly, to understand Piaget’s ideal as an ideal to which empathy is essential, we must take ‘empathy’ as having the first, and not the second, of the two meanings that Hoffman identifies. We must take it, that is, to mean a cognitive state. For Piaget’s ideal entails that those who participate in the social institutions of which it is an ideal relate to each other as cooperating partners in a joint enterprise, and they could not do so successfully if they were unable to comprehend either the views that each of their fellow partners has of his or her own situation within the enterprise or the beliefs, intentions, and motives with which their fellow partners act as participants in it. Relating to others as cooperating partners in a joint enterprise requires, in other words, being able to take up their perspectives, and such perspective taking consists in exercising a capacity for empathy in the sense corresponding to Hoffman’s first definition of the word.

In an article I wrote some years ago, “Empathy and Universalizability,” I also took the word as having this sense. Piaget’s work had influenced my thinking. Empathy so understood, I argued, has a crucial but unacknowledged role in the ethics of certain rationalist philosophers. My argument derived from an inquiry into the deficiency in moral feeling and moral motivation that characterizes the psychopathic personality. Psychopaths are commonly described as amoral agents who nonetheless know right from wrong. My idea was to use an inquiry into their deficiency to distinguish a kind of moral judgment the capacity for which they lack—thus accounting for their amoral-ity—from the kind they are generally recognized as being capable of making—thus accounting for their commonly being said to know right from wrong. The kind they lack is the kind that moral philosophers since Kant have identified as categorical imperatives. These are categorical judgments about what one ought to do that a person cannot make without being moved to act accordingly. Such judgments, I argued, cannot, pace Kant, be understood as products of purely rational processes. That is, they cannot be judgments that consist entirely of the mind’s applying a formal operation to a plan of action or what Kant called a maxim of action. If they were, then psychopathy would have to consist at least partly in the inability to apply such operations to maxims of action, yet on the assumption that a completely egocentric outlook characterizes psychopathy, one can show that nothing about psychopaths, specifically, nothing in their failure to make moral judgments of the kind Kant identified as categorical imperatives, precludes their applying such operations to maxims of action. In other words, on this assumption, one can show that such operations as Kant’s first formulation of the Categorical Imperative imply yield judgments of this kind only if the agent’s application of them to some maxim of action is informed by his regarding those with whom he is contemplating interaction from their perspectives. Such operations require, in other words, empathy with others, if they are to yield categorical imperatives.

In making this argument, I had in mind Piaget’s distinction between the early and later developments in a child’s capacity for moral thought. At younger ages, on Piaget’s account, when a child is subject to the absolute authority of its parents, the child sees the rules its parents impose as fixed limits on its behavior, limits that require obedience by virtue of its parents’ authority. As children grow older and leave the shelter of their parents’

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domain, they enter into social relations with peers and engage with them in activities, such as the games Piaget studied, that are free of close adult supervision. These activities are also regulated by rules. As a result of their engaging in them, children, Piaget observed, come to a different understanding of rules. They come to see rules as variable regulations by which cooperative activities, chiefly with peers, are organized. This later development in moral thought, on Piaget’s account, consists then in a child’s abandoning an egocentric understanding of the world on which rules are fixed, structural parts, put in place by adults, principally parents, and acquiring a new understanding of the place of rules in the world.

On this new understanding, rules are the products of agreements among those who participate or once participated in the cooperative schemes that the rules define. They are not, in other words, understood as fixed, structural parts of the world. Rather, they are understood as inventions that are subject to change through new agreements by the participants in those cooperative schemes. This new understanding of rules, Piaget held, includes a change in how wrongdoing, which is to say, action that does not comply with the rules, is seen. Specifically, children, in judging an action’s morality, no longer focus on the external behavior alone as if it were a disruption in the ways of the world, a disruption the reversal of which requires punishment of the offender. They come instead to consider the agent’s intentions, motives, and powers at the time of the action and to see punishment as needed for maintaining a just distribution of the benefits and burdens of cooperation. Thus, they come to consider the action from the agent’s perspective and to use subjective conditions in judging whether he or she deserves punishment.

Piaget referred to how children who acquired this new understanding of rules related to them as “the morality of cooperation.” He referred to how children related to rules on the earlier understanding of them as “the morality of constraint.” At the same time, while he distinguished between two moralities, he made clear that he did not intend to imply that they represented distinct sets of rules. His intention, rather, was to characterize two distinct ways in which children interpret both the rules to which they are subject and the processes in which those rules’ adoption, enforcement, and adjudication consist. Accordingly, he assumed that the same set of rules could reflect, in the way children observed them, either morality. Indeed, he found evidence in the answers he elicited from the boys and girls he questioned about the games they played that the younger ones related to the rules of these games as

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7 While marbles is the game on which Piaget concentrated, its participants were, for the most part, boys. To see whether his conclusions applied to children generally, he also studied games played by girls, principally, hide-and-seek (ibid., ch. 1, sec. 7).

8 Ibid., chs. 3 and 4.
elements of a morality of constraint and the older ones related to them as elements of a morality of cooperation. The older ones, on this evidence, tended to take their peers’ perspectives in applying the rules; the younger ones tended not to. Thus, Piaget’s study suggested to me a way of distinguishing two kinds of moral judgment such that one could explain the sense in which psychopaths are capable of making moral judgments and the sense in which they are not. On the one hand, they are capable of making moral judgments in the sense of judgments that reflect an understanding of rules as elements of a morality of constraint. On the other, they are incapable of making moral judgments in the sense of judgments that reflect an understanding of rules as elements of a morality of cooperation. It remained, of course, to be shown how the latter might qualify as categorical imperatives. In the last part of “Empathy and Universalizability,” I offered a tentative answer, to which I will not be returning in this paper.

Some caution is needed here. Using Piaget’s distinction between the morality of constraint and the morality of cooperation, as I did, to make sense of the common description of psychopaths as amoral agents who nonetheless know right from wrong is potentially misleading in its suggestion of an analogy between the psychopathic mind and the mind of a young child. No such analogy should be drawn. Psychopaths lack a capacity for empathy and are, for this reason, incapable of taking the perspectives of others and so of understanding rules as elements of a morality of cooperation. Young children, by contrast, normally have this capacity before they begin to develop an understanding of rules as elements of a morality of cooperation. Nothing in Piaget’s study suggests otherwise.9 To the contrary, Piaget thought young children develop a capacity for empathy at an early age. They do not, however, owing to the influence of their understanding of rules as elements of a morality of constraint, exercise it in evaluating their own and others’ rule-following and rule-breaking actions. They come to exercise it in evaluating such actions only after they begin to take part in activities that are not closely supervised by adults and that create the

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9 Indeed, Piaget at one point writes: “The conduct of other people appears in its outward shape long before we can understand the intentions behind it; so that we are apt immediately to compare this outward shape with the established rule and to judge the action by this essentially objective criterion. It is only by a continuous effort of generosity and sympathy that we can resist such a tendency and try to understand other people’s reactions in terms of their intentions. It is obvious that the child is capable very early of such empathy. But it is also obvious that during this phase where respect for rules still outweighs cooperation . . . it is also obvious, we repeat, that to judge psychologically will require a greater effort in the case of other people’s actions than in that of our own” (The Moral Judgment of the Child, 183). N.B. I have replaced ‘intropathy’ with ‘empathy’ in Gabain’s translation. The word in the original French edition is ‘intropathie’; i.e., Piaget had written, “Que l’enfant soit capable très tôt de cette intropathie, cela est évident” (Le Jugement Moral chez l’Enfant, 207).
conditions necessary for their acquiring an understanding of rules as elements of a morality of cooperation. Empathy, in other words, which is essential to making moral judgments of the kind that reflect this understanding, precedes the development of that understanding. What children develop is the skill of exercising their capacity for empathy in taking the perspectives of others and judging the moral quality of their own and others’ rule-following and rule-breaking actions.

The development of this skill is integral to a child’s coming to an understanding of rules as elements of a morality of cooperation. A major component of this understanding is viewing one’s relations with those with whom one has joined in the activity the rules govern as collaborative and reciprocal. Accordingly, an attitude of mutual respect characterizes those who participate in the activity and share this understanding of its rules, and this attitude of respecting another as a partner entails taking that person’s perspective when judging the moral quality of his or her rule-following and rule-breaking actions. Piaget contrasts this attitude with the attitude of unilateral respect that children who understand rules as elements of a morality of constraint have toward those adults, chiefly their parents, and older children whom they see as the authorities from whom the rules issue. Such unilateral respect yields an interest in obedience to the rules for the sake of maintaining the order they constitute. Mutual respect, on the other hand, yields an interest in justice—in how the benefits and burdens of cooperation are shared among those who participate in the activity that the rules regulate. For joint participation in the activity brings about a common good, and when there is mutual respect among the participants, each respecting the others as partners in this activity, each is sensitive to whether the enjoyment of that good is fairly shared by all. Similarly, since the production of a common good through cooperative efforts entails that the participants share the burdens of collaboration, each is sensitive to whether these burdens too are fairly shared by all. Thus, on Piaget’s account, a sense of justice emerges in children as they come to an understanding of rules as elements of a morality of cooperation.

Piaget’s distinction between the morality of constraint and the morality of cooperation offers, then, two different models for interpreting the rules of a social institution. A legal system is such an institution, arguably our most important. Consequently, Piaget’s distinction offers two different models for interpreting the laws of a legal system. This idea is already pregnant in the observation with which Piaget began his study. No interpretation of a law, however, that ignores whether so interpreting it serves the interests of justice is sound. This is plainly true if one’s notion of law matches that found in the natural law tradition, for on that tradition laws necessarily have as their
ultimate end the advancement of the common good. But it is true as well if one’s notion of law matches that found in the tradition of legal positivism, provided that standards of justice are then understood as paramount in the evaluation of law and so in the determination of how to interpret a given law for the purpose of applying it in situations that do not neatly fall within it. So while Piaget’s distinction offers two different models for interpreting the laws of a legal system, only the model that reflects the morality of cooperation represents sound interpretation of them. Hence, to interpret a law soundly, one must be sensitive to the perspectives of the different people whose interests the law affects or is liable to affect if applied to their situation. Sound interpretation of law, in other words, requires empathy. And when a law is interpreted without empathy for those whose interests it affects, when it is instead applied on the basis of a “strict” reading, then the outcome is as likely as not to be grossly unjust.

The opinions in the recent U.S. Supreme Court case Ledbetter v. Goodyear Tire & Rubber Co. are a good illustration. The case concerned sex-based discrimination in the workplace. Lilly Ledbetter held a managerial position at a Goodyear plant, a position of a type that men normally filled. She began at the same pay as the men who held similar positions, but due to poor performance reviews, her annual raises were less than theirs. After nearly twenty years at Goodyear, she was the only woman in that type of position; her salary was significantly less than the next lowest paid employee in a position of that type, the lowest paid man; and it was about three-fifths that of the highest paid man. The performance reviews that resulted in her receiving smaller annual raises were conducted by supervisors who were biased against women and consequently gave them poorer evaluations than men. In light of this fact and the cumulative effect of these smaller raises, she sued. Goodyear, she alleged, had violated her rights under Title VII of the 1964 Civil Rights Act. She won at trial, and the jury awarded her back pay and damages.

The decision, however, was then reversed on appeal by the Eleventh Circuit Court of Appeal on the grounds that the complaint she had filed was untimely. Title VII requires that a complaint like hers be filed with the appropriate government agency, the Equal Employment Opportunity Commission (hereafter, the EEOC), within 180 days “after the alleged unlawful

10 See, e.g., Aquinas’s definition of law: “Law is nothing else than an ordinance of reason for the common good, promulgated by him who has care of the community” (Summa Theologica I–II, q. 90, a. 4).

employment practice occurred,” and because more than 180 days had passed since the last discriminatory decision by Goodyear about an annual raise, the appellate court ruled that she had failed to meet the deadline. The Supreme Court agreed and upheld the lower court’s reversal. The issue, which Ledbetter raised in her appeal to the Supreme Court, was whether the monthly payment of her salary could also count as a discriminatory act for the purpose of determining whether she had filed her complaint within Title VII’s deadline, for if it did, then she had met the deadline. The Court held that it did not. Justice Alito, writing for the majority, reached this conclusion by relying on precedents in several cases in which the law was interpreted as defining the period in which a complaint may be filed as 180 days after a discrete, intentional act of discrimination had occurred. None of these cases, however, involved discrimination in pay. Alito, nonetheless, held that because the company’s monthly payments of Ledbetter’s salary were not themselves intentionally discriminatory, they failed to meet the condition of a discrete, intentional act of discrimination that these precedents established as the object of complaint for the purpose of triggering the filing period. So the rule he located in these precedents applied and controlled the Court’s decision. As Alito put it in his opinion’s opening sentence, “This case calls upon us to apply established precedent in a slightly different context.”

While I would not go so far as to say this is a jurisprudence for five-year-olds, it is remarkable that Alito’s opinion, though opening with an acknowledgment that the case is one of first impression, is devoid of any attempt to understand from Ledbetter’s perspective what would be a reasonable trigger of the EEOC’s 180-day filing period. Nowhere, that is, in the opinion does Alito take Ledbetter’s perspective and attempt to understand at what point someone in her situation would realize that she had been the victim of sex-based discrimination in pay and that the harm was great enough to warrant taking action. Nor does he ever take Goodyear’s perspective. In this respect, he is even-handed in his abstaining from trying to understand empathetically either party’s situation. His opinion, instead, is almost entirely devoted to locating in prior cases a fixed authoritative rule by which to determine, for the purpose of applying the EEOC’s deadline, what counts as an unlawful employment practice. It is the authority of these cases that matters to Alito and not whether extending their holdings to pay discrimination serves the central aims of the law.

13 Ledbetter, 621.
14 Alito, citing and quoting from the decision in Delaware State College v. Ricks, 449 U. S. 250 (1980), does at one point observe that a filing deadline, like the EEOC’s 180-day time period, “protect[s] employers from the burden of defending claims arising from employment decisions that are long past.” But here too (Ledbetter, 630–31) he makes the observation by citing precedents regarding the policy considerations that support statutes of limitations.
or justice. Indeed, these aims never figure in his reasoning about the case. It is no wonder, then, that Justice Ginsburg, in her dissent, criticizes the opinion for being “a cramped interpretation of Title VII.”

Ginsburg’s dissent is a model of the role of empathy in sound legal thought. Trying to understand Ledbetter’s situation, Ginsburg observes:

Comparative pay information . . . is often hidden from the employee’s view. . . . Small initial discrepancies may not be seen as meet for a federal case, particularly, when the employee, trying to succeed in a nontraditional environment, is averse to making waves. . . . It is only when the disparity becomes apparent and sizable, e.g., through future raises calculated as a percentage of current salaries, that an employee in Ledbetter’s situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.

These and similar observations make it evident, Ginsburg argues, that Ledbetter’s case is not on a par with cases in which the unlawful employment practice that triggered the filing period was a discrete act, like being terminated, one in which adverse consequences for the victim are immediately apparent. The cases from which Alito drew the rule on which he based his opinion all have this feature. In each of them, the allegedly unlawful act that triggered the filing period was a discrete act that employees who it adversely affected could easily identify. Further, its discriminatory character was not hidden from them, and its chief adverse consequence, the loss of a job due to a decision to deny tenure (Delaware State College v. Ricks), the assignment of lesser seniority (United Air Lines, Inc. v. Evans), or the imposition of disadvantages due to a change in a seniority system (Lorance v. AT&T Technologies, Inc.), was a direct result of the act. So the rule ill fits Ledbetter’s case. The injustice of applying it is palpable once one takes up her perspective, as Ginsburg did, and asks whether under this rule someone in her position would have a fair opportunity to file a complaint.

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15 Ledbetter, 661.
16 Ledbetter, 645.
17 United Air Lines, Inc. v. Evans, 431 U. S. 553 (1977); Lorance v. AT&T Technologies, Inc., 490 U. S. 900 (1989). Alito also cites dicta from a fourth case, National Railroad Passenger Corporation v. Morgan, 536 U. S. 101, 114 (2002), but their applying to Ledbetter as Alito maintains is disputed by Ginsburg. The dispute between Alito and Ginsburg over how to apply Morgan to Ledbetter is not germane to my points about the role of empathy in legal interpretation, and I have omitted discussing it in my account of the two opinions.

18 Ginsberg also, in regard to Alito’s observation of the protection that filing deadlines provide employers, takes up Goodyear’s perspective and notes that the discrimination that triggered the complaint in this case did not occur in the distant past and that employers have various defenses available to them when the complaint alleges cumulative harm due to discriminatory acts that occurred over a long period of time (Ledbetter, 657).
The case had reached the Supreme Court because of a disagreement among lower courts in their decisions in cases of pay discrimination in which the applicability of Title VII was in question. Some of these courts, like the Eleventh Circuit, followed the same precedents on which Alito relied in his opinion. Others, however, followed a different precedent, *Bazemore v. Friday*, a case of racial discrimination in pay. The Supreme Court’s decision in this case supports allowing monthly payments of salary to count as an unlawful employment practice triggering Title VII’s filing period when the payments, though not themselves acts committed with a discriminatory intent, represent intentional discrimination by virtue of being the result of an intentionally discriminatory payment decision that occurred outside the filing period. In this case, the decision to discriminate by race in the payment of salaries occurred before Congress enacted the 1964 Civil Rights Act, when the plaintiff’s employer, the North Carolina Agricultural Service, had two branches, one whose employees were white and one whose employees were black. The black employees received lesser pay than the white employees who did similar work. After the 1964 Civil Rights Act became law, North Carolina reorganized this agency. It eliminated its division into two branches and accordingly the payment differentials between whites and blacks who did similar jobs. Nonetheless, some disparities in the pay between the white and black employees due to the earlier regime remained, and black employees brought suit against the state once Title VII was extended to cover public employees. The Court ruled that, even though more than a half-dozen years had passed since the old regime was in place, “each week’s paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.”

Ginsburg appeals to this case in support of her interpretation of the law as it applies to situations like Ledbetter’s. Alito, by contrast, finds reason to regard its holding as consistent with the three precedents on which he relies and as providing no support for Ledbetter’s claim. One could easily suppose, then, that the real question of interpretation for the Court is which of its precedents, *Bazemore* or the three cases on which Alito relies, determines what, for the purpose of deciding whether Title VII applies, counts as an unlawful employment practice that can trigger the law’s filing period. On this supposition, empathy would appear to have a less critical role in interpreting the law. The question of which precedent to follow, after all, is answered by determining whether the precedent applies to the facts of the case being decided, and to determine this, one need only consider whether the facts of

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20 *Bazemore*, 395.
that case match the facts of the precedent. Taking the perspective of the people affected or liable to be affected by the decision would be required, then, only if the facts in the precedent case included some that concerned how the people who were affected or liable to be affected by the decision in that case perceived their situations. And sometimes they do not include such facts. One does not, for instance, need to take the perspective of the black employees who were the plaintiffs in *Bazemore* (or anyone connected to the defendant, for that matter) to determine whether the relevant facts in that case match those in *Ledbetter*.21

The problem, however, with the supposition that the real question of interpretation for the Court in *Ledbetter* is which precedents it should follow is that it either derives from an unsound theory of legal interpretation or misconstrues the importance of following precedent for serving the interests of justice in this case. It doubtlessly derives from an unsound theory if it is taken flatly to mean that justice is of no concern in determining whether Ledbetter’s complaint was timely under Title VII. Jurists tend to see things this way when they believe that judicial interpretations of law are unsound unless they are backed by legal rules, a belief they hold on the grounds that the decisions following from these interpretations would not otherwise be authoritative. Hence, when a decision requires interpreting an ambiguous or vague clause in a statute, they believe its authority must come from some legal rule other than the statute itself, and the court’s precedents or the precedents of a higher court provide that rule. Judges, on this view, do not have the authority to make law. They are not legislators. They must not, then, invent legal interpretations but must base them on extant legal rules. Leaving aside the obvious problem that, on this view, it is a mystery how a precedent that stands first in a line of cases that have precedent force gets its authority,22 we can locate a further—and, for our purpose, more telling—problem in the view’s implication that an interpretation of a law that is not itself facially unjust can still be sound even though it yields unjust decisions. For on this view, an interpretation of a law is sound as long as it follows from a precedent the facts of which are more similar to the facts of the case being decided than any other precedent, even when the interpretation yields, owing to significant

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21 To be sure, that it is easier for an employee to see discriminatory harm in decisions to terminate, to assign lesser seniority, and to adopt a certain seniority system than in decisions to set annual salary are facts about the precedents on which Alito relies that arguably distinguish those cases from *Ledbetter* and that require taking the employee’s perspective to determine. So empathy would still have an important role in Ginsburg’s opinion on this view. My point, however, is only that it has a less critical role than on a view of legal interpretation that makes considerations of justice essential to sound interpretation, and not that it has no role.

dissimilarity between the facts of the two cases, an unjust decision. Such a view, because it calls for judges to be insensitive to the interests of justice when interpreting a law, is seriously flawed. Its concern with preserving the authority of judicial decisions is misplaced, reflecting perhaps a morality of constraint.

Let us assume, then, that the supposition about the real question of interpretation in \textit{Ledbetter} is consistent with the proposition that sound interpretation of law requires sensitivity to the interests of justice. Assume, that is, that the supposition is grounded in the belief that the practice of following precedent serves those interests. The practice serves the interests of justice, it is commonly argued, because it regularizes legal decisions within a system of law in that when judges decide similar cases similarly, their decisions are predictable and so those governed by law can rely on them in conducting their affairs. To leave people subject to the vagaries of a judge’s preferences, or worse, his prejudices, when they are parties in a case before him, would be unjust. For the sake of the argument, then, we may grant that following precedent in deciding cases whose facts match the facts of the precedent serves the interests of justice. Nonetheless, the supposition about the real question of interpretation in \textit{Ledbetter} is still problematic. For our granting that following precedent in deciding cases serves the interests of justice when the facts of the instant case match the facts of the precedent means only that we accept the thesis that justice requires not making decisions that overturn a precedent on grounds that the precedent was wrongly decided. \textit{Ledbetter}, however, is not a case in which the Court was faced with the question of whether to overturn a precedent. Either party could have prevailed without the Court’s overturning any of its precedents. In particular, the Court, without overturning any of its precedents, could have interpreted Title VII as it applied to this case by distinguishing the case, as Ginsburg did, from the precedents on which Alito relied. Such an interpretation would narrow those precedents’ scope by making them inapplicable to cases of discrimination in pay like \textit{Ledbetter}, and narrowing their scope in this way would not harm the interests of justice that following precedent serves. The real question of interpretation for the Court in this case was, therefore, whether the difference between the facts of the case and the facts of the precedents on which Alito relied warrants a different interpretation of Title VII.

On this understanding of the interpretive question the Court faced in \textit{Ledbetter}, the decision in \textit{Bazemore} is not by itself sufficient to warrant an interpretation of Title VII according to which Ledbetter’s complaint was timely. As Alito observed, \textit{Ledbetter} is distinguishable from \textit{Bazemore}, owing to a difference in how the discrimination in pay originated. The plaintiffs in \textit{Bazemore} were the victims of discrimination originating in a pay structure that
was racially discriminatory by design and that continued to cause them to be paid less than white employees who were doing similar jobs because the defendant had failed, when it merged the organization’s two branches and redesigned the pay structure, to eliminate all of the factors that caused the disparities in pay between black and white employees. The continuing discrimination in pay was evident and, consequently, that the defendant did nothing to fix it is reason to attribute to the defendant an ongoing intention to discriminate. Hence, it makes sense to treat each paycheck as an actionable wrong under Title VII. In *Ledbetter*, by contrast, the defendant had not adopted a discriminatory pay structure. Rather the company had made discriminatory decisions concerning the plaintiff’s pay that were not immediately evident to her and whose harmful consequences were hidden, owing to the company’s policy of keeping information about its employee’s salaries confidential and to the difficulty of discerning disparities in pay that grow large chiefly through an accumulation of small differences in raises and the compounding effect of using current salary to determine the size of a raise. What warrants, then, interpreting the law as allowing victims of discrimination in pay like Ledbetter to cite periodic payments of their salary as the unlawful employment practice that triggers the filing period is that this gives them a fair opportunity to file timely complaints, something they do not have if the unlawful practice they need to cite to trigger the filing period must be a discrete act done with discriminatory intent. And one cannot see this unfairness without taking the plaintiff’s perspective. Empathy, in other words, is essential to a sound interpretation of Title VII in this case.

My argument for taking empathy to be a requirement of sound interpretation of law rests on the thesis that no interpretation of a law is sound if it ignores whether so interpreting the law serves the interests of justice. The thesis, I believe, is largely uncontroversial when taken as a thesis about the moral quality of a legal interpretation. Surely, any judge who ignores whether her legal interpretations yield unjust decisions is open to moral criticism. But one can also take the thesis to be about the juristic quality of a legal interpretation. That is, one can take it to be the thesis that any interpretation of a law is unsound, as a matter of law, if it ignores whether so interpreting it serves the interests of justice. This thesis is certainly more controversial. Many legal theorists would dispute it. Judges, they think, whatever their moral failings may be, betray no misunderstanding of law when they ignore whether

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23 “[W]hen an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. An employer that adopts and intentionally retains such a pay structure can surely be regarded as intending to discriminate on the basis of race as long as the structure is used” (*Ledbetter*, 634).
their decisions serve the interests of justice. Nonetheless, the argument I have given for taking empathy to be a requirement of sound legal interpretation remains cogent, even if it is taken to rest on this more controversial thesis.

Of course, if the notion of justice whose interests judges need to heed when interpreting a law were merely that of the impartial and consistent administration of rules, whatever their content, if it were merely what John Rawls calls formal justice or justice as regularity, then again the thesis would be largely uncontroversial.24 Even such ardent defenders of the separation of law and morality as H. L. A. Hart concede that the principle of formal justice, treat like cases alike, is necessary to any legal system or indeed to any practice or institution that consists in regulation of conduct by general rules.25 Even Hart could thus accept the thesis that no interpretation of a law is sound, as a matter of law, if it ignores such principles. The notion of justice contained in the more controversial thesis I mean to defend must therefore be understood to be a richer notion: one that is substantive. It is the notion at work in judgments about the fairness in the distribution of the benefits and burdens of a cooperative enterprise among those who participate in the enterprise as partners. This is the notion of justice that is distinctive of a morality of cooperation. It is the notion that informs the sense of justice that Piaget saw emerging in older children as they came to see rules as elements of such a morality.

The thesis, when understood to be about justice in this richer sense, is controversial because it implies that an interpretation of law may be unsound, as a matter of law, solely because it yields an unjust decision in a case in which a different interpretation that would yield a just decision is available. Defenders of the separation of law and morality, such as Hart, oppose any view of legal interpretation that takes substantive standards of morality to be among the standards by which the legal soundness of interpretations of law is evaluated.26 On their view, the substantive standards by which the soundness of such interpretations is evaluated are exclusively legal rules whose source is some artifact of legal procedure, such as a constitution, statute, or precedent. As Hart expounds this view, law contains a great deal of indeterminacy owing to several factors.27 First, legal rules are, of necessity, formulated in general terms, which are often vague and ambiguous. Second, legislatures commonly enact into law very general standards of conduct—for example, a requirement of due care in the handling of dangerous materials—and leave it to courts

26 Ibid., 200–01.
27 Ibid., 121–32.
or other agencies to apply them. And third, because precedents are applied analogically, their scope can be uncertain. Judges, Hart believes, are free within these areas of indeterminacy to take the law in whatever direction they think best. They are free, that is, in the sense that there is no substantive standard independent of the legal rules bearing on the case to which they must adhere to reach a correct legal decision. As long as they resolve the indeterminacy consistently with the plain meaning of the language in which the relevant legal rules are formulated and for reasons that show their decision to be neither arbitrary nor capricious, their decision is legally unassailable. Nor is the interpretation of law behind that decision open to criticism for being, as a matter of law, unsound. On Hart’s view, these areas of indeterminacy provide opportunities, so to speak, for judicial creativity.28

Hart sets this view within a broad-ranging discussion of the dispute between legal positivists and theorists of natural law that goes back to Bentham’s attack on the latter.29 This dispute has unfortunately produced more murk than light on the question of the relation of law to morality. Legal positivists, for instance, commonly object to natural law theory on the grounds that it takes laws to be something more than social artifacts. The objection, however, whatever its force against theories of natural law, does not apply to the thesis that some substantive moral standards are among the standards by which the interpretations of law are evaluated as legally sound or unsound. This thesis is wholly consistent with taking laws to be nothing more than social artifacts. Nor does the thesis entail any of the doctrines of natural law theory on which the injustice of a law annuls it as law.30 The decision in Ledbetter, though unjust, was still the law, until last year when Congress amended Title VII so as to allow periodic payments of salary to trigger the filing period for complaints to the EEOC about discrimination in pay. Its being the law until last year is due to the finality of Supreme Court decisions in the American legal system and not to the legal soundness of the interpretations that yield them. The authoritativeness of judicial decisions does not require that the legal interpretations behind them be sound, and conversely.31 Their authoritativeness is due to their finality. The soundness of the interpretations behind them, if they are sound, is due to those inter-

30 The Scholastic maxim is lex iniusta non est lex.
31 Thus the interpretation behind a lower court’s decision remains sound, if it is sound, even when the decision ceases, owing to its being reversed by a higher court, to be authoritative.
pretations’ meeting the standards by which interpretations of law are evaluated as sound or unsound. And whether or not an interpretation meets those standards is one thing, the authoritativeness of the decision it yields is another, a distinction that Hart himself has done much to clarify.32

Laws are not only social artifacts, as legal positivists assert, they also are artifacts with a characteristic function. They are, in this respect, like watches and soap. The characteristic function of a watch is to tell time and that of soap is to remove embedded dirt. Accordingly, the primary standard by which we evaluate a watch or a bar of soap is how well it serves its characteristic function, and this standard is implicit in the kind of functional artifact a watch or a bar of soap is. A good watch keeps accurate time. A good bar of soap removes most, if not all, of the dirt embedded in the things to which it is applied. Correlatively, good watchmakers and good soap-makers are people who make good watches and good soap. The same is true of laws. For laws are instruments of a community’s government, and their function is to promote the common good of the members of the community they govern. Accordingly, the primary standard by which we evaluate laws is how well they serve this function. A good law materially promotes the common good of the people it governs, and a good lawmaker is someone who makes good laws. This standard is a moral standard. At the same time, it is inseparable from law.

To suppose otherwise is to be blind to the functional character of law. Legal positivists, of course, eager to defeat natural law theory, have advanced notions of law that exclude its characteristic function. The classical positivist notion is that of a general command issued to the members of a population by someone or some assembly of people whom the bulk of the population is in the habit of obeying.33 Contemporary positivists, following Hart, have replaced this notion with that of a rule belonging to a system of rules that includes two distinct types and has a certain structure.34 On either of these notions, one can separate laws from the standards by which we evaluate them and then insist, as positivists have done, that there is no necessary connection between them. But doing so betrays an incomplete understanding of the nature of law. It is like defining soap as a certain chemical compound, an alkali combined with a fatty acid, and then declaring that what soap is has no necessary connection to any of the standards by which we evaluate it. The makers of soap and we users who benefit from their productive labor know better.

32 Hart, The Concept of Law, 138–44.
This argument against positivist notions of law is among the oldest in philosophy. It is essentially the argument Socrates makes, in the first book of the *Republic*, when he bests Thrasymachus in their exchange about the nature of justice. Thrasymachus, you may recall, puts forward the thesis that justice is what is in the interest of the stronger. By the stronger he means the rulers in a community. Being the community’s lawmakers, they determine the standards of justice for the members of the community. Or so Thrasymachus assumes. But he also, when cross-examined by Socrates, concedes that ruling is a skill or craft like healing and piloting. This concession then proves to be his undoing, for healers and pilots, Socrates observes, if they are good at their craft, exercise it to benefit those whom they heal and those whom they lead. Hence, by analogy, rulers, if they are good at their craft, make laws that benefit those whom they rule. Laws are among the instruments by which rulers govern their community, and thus good laws are laws that promote the common good in that community. Similarly, doing justice, which the ancient Greeks also saw as being part of ruling, promotes the common good.

Of course, the ancient Greek notion of justice, at least as Plato interprets it in the *Republic*, is different from the notion that concerns us. It is different, that is, from the notion distinctive of a morality of cooperation. The standard by which we evaluate laws in virtue of their characteristic function is that of how well a law serves that function, which is to say, how well it promotes the common good. But this is not to say that how well it serves the interests of justice, in the sense of fairness in the distribution of the burdens and benefits of cooperation, is a standard by which laws are evaluated in virtue of their characteristic function. Nor then is it to say that this is a standard by which legal interpretations are evaluated by virtue of the characteristic function of laws. Indeed, in the abstract, one can distinguish interest in promoting the common good from interest in the fairness of the distribution of the burdens and benefits of participation in the cooperative enterprise that promotes that good. The common good is a good in which all who participate in the enterprise share, and in the abstract one could aim at the common good, while being indifferent to whether the enjoyment of that good or the burdens of participation in the enterprise were fairly shared.

Concretely, however, it would be a very strange turn of mind to be concerned with the one and not the other. The common good is not an aggregate of all the benefits the participants individually receive from the enterprise. It is not an aggregate good like the classical utilitarians’ greatest

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happiness for the greatest number. Rather, it comprises only the benefits of
the enterprise in which all the participants share. And it is hard to imagine
concretely how someone could come to be concerned with promoting a good
that is essentially shared and not be concerned with how it is shared. The idea
of a shared good would lose its evaluative significance if abstracted from the
idea of its being fairly shared. Hence, the standard of fairness in the distrib-
ution of benefits and burdens of participation in a cooperative enterprise is
an immediate corollary of the standard of promoting materially the common
good that results from such an enterprise. Both standards, therefore, are
standards by which laws and judicial interpretations of them are, as a matter
of law, evaluated. And I can think of no better evidence of this relation
between the two standards than Piaget’s remarkable study of how the syn-
thesis of these ideas arises in the minds of children as they come to understand
the rules that regulate their lives as elements of a morality of cooperation.37

37 I am grateful to Peter Cane for comments on an earlier draft of this essay.