

## Inaugural Lecture

### THE SCENE AND THE CRIME: GOOD, EVIL AND CRIMINAL LAW

#### WHY TALK OF GOOD AND EVIL?

My title indicates what I think is a central insight in a contextual understanding of law. ‘Crime’, my area of interest, is of course a key area of ‘law’, and as a criminal lawyer, I engage with its central legal concepts. But the concepts that we use are never just *legal* concepts, they are also always something else. They rely on a broader social and moral understanding of what they are about. The law is always dependent on its context, the crime upon its scene. It is the scene that animates the legal concepts and their problems, just as, perhaps, it animates the process of detection, as in the more usual usage: the ‘scene of the crime’.

But what is the scene in relation to the crime? That question can be answered in many ways. It may be the legal process, the political, cultural and literary milieu, the social conditions, the historical context. This is an area where a thousand flowers may bloom. I don’t intend to pick them here, but to focus on where I have come from, and where I am headed. What I am going to say this evening will be tentative, and in a way risky, because I focus on something that contextual lawyers have generally avoided, perhaps for good reason. What I am going to dip my toes in is, indeed, something generally not seen as contextual at all, and that is how an understanding of ethical categories of good and evil may be required for the scene and the crime.

Why? In 2008, I published an essay on war guilt in Germany after World War II. This was about how we hold onto a notion of moral value in a world which systematically denies it. In part, it focused on Hannah Arendt’s account of the Eichmann Trial in Jerusalem, and her idea that his bureaucratic approach to murder represented the ‘banality of evil’. At that point, I focused, as many do, on the idea that evil was *banal*, but that of course left open the bigger question as to what Arendt meant by *evil*. What did the word signify? Should we, who live in secular times, especially when we see the word ‘evil’ itself banalised and turned to bad

purpose – think of the ‘axis of evil’ that we were all signed up to quite recently – avoid this idea? Did Arendt mean it rhetorically? I don’t think so, and I do think we should ask what she meant by using this term.

At the same time, I had been working on a paper on the way criminal law deals with mercy killing and assisted suicide, and I was drawn to two cases from last year involving mothers who had killed their adult, badly damaged, children: Frances Inglis and Kay Gilderdale. My focus had been on the difference between legal and moral notions of guilt, but I began to wonder what was so compelling about the case of Kay Gilderdale in particular, that a jury had refused to convict her of attempted murder despite clear evidence that she should in law be guilty. What was it about the moral quality of her action? Looking at the case, I concluded that it was because her actions could be described as in some relevant sense essentially good.

So without really meaning to go there, I found myself thinking about questions of good and evil in relation to criminal law, and wondering what on earth these terms, which previously I would have avoided, meant. Perhaps, I would have left it there but for a third piece of work I was completing in this period: my book on Roy Bhaskar’s dialectical reworking of the philosophy of critical realism. This work has many important ideas in it, but one that seemed to link in with my interest in good and evil is its argument for a *meta-ethics* grounded in the nature of human being. Now that probably seems a forbidding term, and one that no lawyer should be interested in. Nonetheless, it is the idea that there are things about the way that human being as a species or a natural kind is that enables us to reflect upon the ways we think about ethical questions. A meta-ethics is about the *grounds* of ethics, morality or normativity, and it seemed to me that one could deploy such an understanding to what it means to act in terms of good and evil.

## A META-ETHICS OF LEGAL FREEDOM

Let me explain that a little bit now before we move on. At the core of Roy’s meta-ethics is a sense of human beings as both individuated, self-acting individuals, and as beings who need the solidarity of others if they are to survive and act in the world. Infants need and demand food, but only others can provide it for them. They need shelter and protection, they are capable of learning and language, but these will only be achieved by way of others acting with and on them, and in that way being in solidarity with them. What is true of children is

just as true of adults: we cannot survive or thrive except in cooperation with others. When we are old, we require others to care for us. It is sometimes said that we come into and leave the world alone, but if this is a statement about the existential quality of being human, it is one-sided. We are born of others, and we die as social animals after a lifetime of being in relation to others.

This idea of human beings as social animals, as actors in relation with others, is the basis for an understanding of what it means to be free, but in that freedom to be connected. The core possibility of acting for ourselves lies in each of us, but cannot be realised save through the work, example and care of others. To be free is first to have the ability to act rather than to be acted on, a certain basic spontaneity within human beings. This basic idea of freedom as spontaneity leads to the further idea that we would need space in which to exercise our choosing agency. This is the negative requirement that our active freedom be not interfered with, and it leads to the positive conception that we would need support for our agency to be enabled. Further, we are capable of grasping who we are and the context in which we act, and of acting either to maintain or to change it. So we are capable of a measure of autonomy with regard to our context. When we identify barriers to, or blocks upon, our action, we can seek to overcome (to free or emancipate ourselves from) these. Generally, note, we must do this in solidarity with others, and we can only do so if we act in accordance with principles that reflect their needs and desires as well as our own. Freedom in its various forms requires a complex dynamic of solidarity with others, and freedom within that solidarity with others, to be ourselves.

This is a way of thinking about our core human nature, and how we can understand certain ethical possibilities in it. What I have been describing is a set of freedoms that are, at a meta-ethical level, co-related. In this way we move from basic ideas of freedom such as simple human agency (the spontaneous ability to act) and negative liberty (the freedom to act without interference) to more complex kinds of freedom including positive liberty (support for action), autonomy (rational independence of our action) and emancipation (freedom from institutions and structures that block our free action). But even these more complex forms of freedom are only half the story, because we can also think of more enriched forms of freedom in which we are able to live well and to flourish according to what is unique in and best for us – according to what we may call our concrete universality. In the end, we can think of the meta-ethical possibility that the final step for humankind would be a world in which each of us flourished, and a condition of each of us flourishing would be that we all flourished .

Bhaskar calls this the ‘eudaimonistic society’, a term drawn from Aristotle, but one that also borrows from Marx, for whom the freedom of each was a condition of the freedom of all. It is, he argues, a real possibility immanent in human being, albeit one that remains sadly unactualised or under-actualised at this point in our species development.

That is a basic flavour of the idea of a critical realist meta-ethics. It raises many questions that I cannot answer here and now – how are these forms of freedom linked, or in tension, in modern society being one - but what I want to bring out is this. At the core of human being, our core human nature, lies the possibility and necessity of acting freely, and in solidarity with others, as a means of promoting the possibility that we should all flourish. My suggestion will be that people who act in something like this way act in ways that are good; and people who act fundamentally to deny these possibilities act in ways that are evil. But that is to take us ahead of ourselves: let’s go back to our examples of good and evil.

## SPEAK OF THE DEVIL

What does it mean to talk of evil? Is this just a misplaced word, so that we would be better to think in terms of acts that are bad, really bad, egregiously so? The question is implicit in Arendt’s writing on the Holocaust, where famously she coined the phrase ‘the banality of evil’. Most discussion of this phrase turns on the claim of ‘banality’, but what of the term ‘evil’? In a letter to Karl Jaspers, she wrote that

The Nazi crimes . . . explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. . . . That is, their guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. . . . We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime. . . . The Germans are burdened now *with thousands or tens of thousands or hundreds of thousands of people* who cannot be adequately punished within the legal system.

Her letter prompted a warning from Jaspers that she was close to describing “a guilt that goes beyond all criminal guilt [which] inevitably takes on a streak of ‘greatness’—of satanic greatness,” whereas it was necessary “to see these things in their total banality, in their prosaic triviality,

because that's what truly characterises them." This may have been where the idea of the banality of evil came from, though initially in her published writing, Arendt spoke of 'radical evil', a term she drew from Kant, before shifting to the idea of banality. Replying, she accepted that her words might have invited this misunderstanding, but she still wanted to make a point:

But still, there is a difference between a man who sets out to murder his old aunt and people who without considering the economic usefulness of their actions at all . . . built factories to produce corpses. . . . [I]ndividual human beings did not kill other individual human beings for human reasons, but . . . an organised attempt was made to eradicate the concept of the human being.

Note two things here: first, that what would become 'the banality of evil' is here represented in the first place as a guilt that goes beyond all *criminal guilt*; and second that at the core of her conception of evil is the idea of 'an organised attempt ... to eradicate the concept of the human being'. On the first, in what sense does the guilt go beyond 'all criminal guilt'? Clearly, it was possible then, at Nuremberg, as it is now, to prosecute and convict the Nazis for crimes against humanity, though various questions could be asked about Nuremberg and its 'successor' trials. The nub of her point I think is that what had been done surpassed what could be registered by standard criminal law categories. The Holocaust indicated a moral failure that could not be caught by legal concepts of the guilty mind or act. Why? An inhuman system with inhuman ends had been operated by people who had fallen so far below the level of humanity that no courtroom dialogue of guilt or innocence could engage them. Certainly, the Nazis, or some – but not all - of them, could be tried, convicted and punished, but no legal process involving judgment and dialogue between citizens or human individuals could address the enormity of what had happened. It could punish, but not find guilt, because guilt involved a human relation. The law was rendered in a deep moral sense void by its context, the crime by its scene. Perhaps, we might say, the perpetrators had proved themselves 'human, all too human' (Nietzsche), but this show of humanity, where anything goes, was beyond our limits to judge. When everyman becomes a *genocidaire* (Cesarani), the legal field lacks traction to find guilt, to condemn, to punish.

The second point to note is this: that the core problem was that ‘an organised attempt [had been] made to eradicate the concept of the human being’? This is in part a meta-ethical statement, and I will return to it below.

## SPEAKING OF GOOD: TOWARDS A META-ETHICS

Let’s pause on the question of evil and take a different tack: if we have to think of evil in connection with criminal law, do we also have to think of its seeming contrary, good? I think we do, and my thoughts are prompted by two cases that came before the criminal courts in January last year. Both involved ‘mercy killings’, but they had different outcomes. In the first, Frances Inglis injected her badly brain damaged son Thomas with street heroin and killed him. It was a tragic case. Thomas had been assaulted on the street and been persuaded against his will to go to hospital in an ambulance. While in the ambulance, the door opened three times, and on the third occasion, Thomas fell out and suffered serious head injuries whence came the brain damage. While the doctors were of the view that there was some prospect of recovery, Mrs Inglis became convinced that Thomas was in an inexpressible agony. She eventually killed him, by design, and, she said, ‘with love in her heart’.

There is no defence, nor lesser offence, of ‘mercy killing’ in England and Wales, and Mrs Inglis was convicted of murder. She had the mens rea (guilty mind) exhibited by her intention to kill Thomas, and her good motive was irrelevant to law. She was sentenced to nine years imprisonment for what the judge called her ‘calculated and consistent course of criminal conduct’ (Guardian 21 January 2010); on appeal, this was reduced to five. The Court of Appeal was very clear that there was no defence of mercy killing, and that she did not fall within the provocation defence (there was no loss of control). She might have had a defence of diminished responsibility, but she had declined to plead this, it seems, because she wanted to have a trial and to highlight the fault of the medical services. To have claimed diminished responsibility would have focused the case on her own vulnerability. Nonetheless, the eventual reduction of sentence was based on the possibility of mitigation of sentence on account of her mental condition, and the fact that this was a ‘mercy killing’ – both factors that can be taken into account in sentencing (Criminal Justice Act 2003), though not in the formal adjudication of the trial.

The second case is that of Kay Gilderdale, who killed her daughter Lynn with an injection of morphine and air into the blood stream. Lynn had suffered from ME for 17 years and was at the time of her death 31. She had attempted to kill herself and had clearly expressed the wish to die. At her trial, Mrs Gilderdale pled guilty to aiding and abetting a suicide, but not guilty to attempted murder ('attempted' presumably to avoid proving questions of causation). The Crown Prosecution Service was convinced that what she had done had gone beyond assisting another to take her own life, and that there were acts and an intention to kill. As with the Inglis case, they prosecuted for the more serious offence, but the jury refused to convict on attempted murder. The judge, handing down a conditional discharge for the assisted suicide, openly questioned the CPS decision to prosecute on attempted murder. The CPS response was that they were satisfied the evidence was there to provide a realistic prospect of conviction, and that it was in the public interest to prosecute.

Why did the jury in the one case convict, but not in the other? In Mrs Inglis's case, the Court of Appeal judgement provides a sense of how the judges saw the defendant. While they had some sympathy for her, seen in the reduction of the sentence, it was also clear that they felt that she had acted in a sense out of her own concerns and interests rather than her sons. She had declined to acknowledge that part of her son's condition stemmed from her own previous botched attempt to kill him. She had suffered from stress disorder and depression for a number of years prior to the accident, so the court's judgment was that she had in part acted for herself, albeit in conditions where her responsibility should be mitigated.

In Mrs Gilderdale's case, it was different. She declined to give evidence, but the sense one gleans from the press was of a woman who acted as a 'caring and loving mother', as the judge put it, who had resisted her daughter's requests for help to die, had only acted when her daughter had herself failed in a suicide attempt, and had exposed herself to the criminal law for her daughter's sake. We can only guess at what the jury thought, but the impression of Mrs Gilderdale was of a parent who had cared for her daughter for 17 years, whose marriage had broken up in consequence, who had acted only with great reluctance and against her core feelings. She had acted, I would suggest, in what one might call loving identification with her daughter's pain, unhappiness and expressed wish to die, and against her own wishes and commitments in the matter. Her act was both self-sacrificing and other-oriented, to the daughter's wishes, needs and, hard as it is to say, well-being. It was, in its solidarity with another's self-expressed sense of what was truly best for her, regardless of the consequences to Mrs Gilderdale a fundamentally good act.

Note here, as with our discussion of Arendt and the Holocaust, that two issues come out of this discussion. The first is, law's problem in dealing with this case. By legal rights, the defendant was guilty of either murder or its attempt. She possessed an intention to kill or cause serious harm, the mens rea for the crime. There was also a guilty act. The CPS was in law perfectly entitled to prosecute. They could have declined to do so 'in the public interest', but that is a problematic route to follow because it would override the settled view of the law that mercy killing is a crime, and it would have involved deploying a discretion that would have looked quite anomalous with regard to other cases. If Mrs Inglis is to be prosecuted, so too should Mrs Gilderdale be, and let the cards fall as they will. Accordingly, the only route available was a jury acquittal in the face of what they should have done. This is known as either a perverse verdict or jury equity depending on your standpoint, but it runs against the letter of the law.

Is the problem here simply that the law has not evolved properly to deal with a hard case such as mercy killing? It could be seen in this way, but that would avoid noting a structural quality of the law, which is its systematic bias towards formalism in its concepts and to marginalise or finesse substantive moral issues in favour of seemingly neutral categories. I cannot pursue this line of argument here, but it is one that lies at the heart of the way I have analysed criminal law over the past twenty years. Intention, for example, a core legal concept, is understood in factual and psychological terms. What did the accused mean to do or foresee as virtually certain to happen is the key question. Did a purposeful thought go through her head is the question, regardless of the moral badness or goodness in the thought. Thus, as every criminal law student learns, there is no difference in law between the contract and the mercy killer. They are both in formal legal terms guilty of murder. They both mean to kill, and the moral substance or context of their action is irrelevant to the law's core concepts of act and intention.

Thus the problem posed by the morally good act is a deeper problem than one of plain law reform, though that might cure it in the instant case, if we could agree as a society about the value of mercy killing – which, by the way, we can't. In my work, I have argued that this problem goes to the heart of modern law because, historically, Western societies set up law in a formalistic way in order to finesse and avoid moral, political and social contention about good and bad motives. A formalistic approach to law can be universal, i.e. it can apply to everyone, but only because the substantive moral and political issues modern societies would argue about are removed from the picture. More broadly, the formalism at the core of the law



shadows the formalism at the core of modern ethics: it is for that reason that formalistic, Kantian accounts of ethics are so persuasive in legal thought today. It would be an exaggeration, but not a wildly inaccurate one, to say that modernity gave birth to two great movements: Kantianism in ethics and the modern individualist, responsible subject in law, and that they complement each other because both have an essential formalism at their core.

The second issue is what we mean by a good act, and here, I have already indicated what I think lies at its core in the case of Mrs Gilderdale. It is an act of loving identification that was both self-sacrificing and other-oriented (to the daughter). To that, I would add that the ‘other orientation’ was to what was concretely best for the daughter, in her situation and according to her wishes. Now, at the core of the idea of what is best for any person, according to our discussion of meta-ethics, there lies a sense of how things can best go well for people in their lives, how they can flourish. And it might be said that this is a strange idea in relation to someone wishing to die: how can that be a way of flourishing? But it is not so strange really, if one thinks that what we are speaking of here is euthanasia, the good death. Death is after all a part of every life, and while, from the point of view of wishing to live, we may find it hard to think of a good death, we clearly have to accept that death will happen, and that, however reluctant we may be, our deaths can go well or badly. Part of a truly flourishing life would be to have a good death. The other element here is to act in self-sacrificing solidarity with the possibility of a good death and it is that combination that made Kay Gilderdale’s act a fundamentally good one. Recognition of freedom, flourishing, solidarity – the three elements at the core of the meta-ethics of human nature – are all present in her acts.

## THE META-ETHICS OF EVIL

If we can link the good to our meta-ethics in this way, what of Arendt’s case of evil? Here I need to say a little more, for there has already been much said in this area. Perhaps two routes in particular stand out as predominating in Western thought. One predates the Enlightenment and is based upon the Christian thought of St Augustine and Thomas Aquinas. While religious in its inspiration, it is capable of non-religious interpretation, and it is in that way that I will take it. The other is firmly located in the Enlightenment, in the philosophy of Kant, and his account of ‘radical evil’. Let’s begin with him.

Rather promisingly, Kant spoke of what he called the possibility of ‘radical evil’ in the world. A key part of Kant’s commitment was to rethink religious themes that relied upon God in terms of human reason, and the universal for Kant was based upon the idea of the categorical imperative, the claim one should act with regard to maxims that could be universally applied. To act for the good was indeed to act in terms of universal demands of reason, and to act in a manner that was radically evil was to act in ways that were inconsistent with the categorical imperative.

‘Whoever incorporates the moral law into his maxim and gives it priority is morally good; and whoever fails to do this, but gives priority to other nonmoral incentives (including sympathy) is morally evil’. (R.Bernstein, *Radical Evil*, p.18)

The problem with this approach is that its account of what is ‘radical’ in evil refers to the failure to choose *to think* in a particular way, rather than the content of what is thought or done. It is epistemic rather than ontological. Choosing not to act according to the categorical imperative is ‘radically evil’ even where one acts out of sympathy with another: it is the failure to choose rationally that is significant and this is the ‘radical’ element in the wrongdoing because it goes to the root of human being as rational. Someone who consciously acts from the heart against the law of reason is said to be acting in an evil manner: paradoxically, Kay Gilderdale on this view, would have committed an evil act. It is true that this focuses our attention on the question of human thought and choice, which is an important element in our understanding of evil, but it gives us no real sense of what an evil act is, or at least gives us so broad a notion that it is quite unhelpful.

In focusing the discussion of radical evil on the element of free thinking and choice, Kant is in line with Christian thought in the tradition of St Augustine, but there is an important element in that thought that is not brought out. That is the ontological idea that, substantively, being is good, and that evil is to be understood as a negation or privation of being. For Augustine, all being is good, there is a hierarchy of beings, and evil is not being but its privation or lack:

‘an evil is eradicated not by the removal of some natural substance which had accrued to the original, or by the removal of any part of it, but by the healing and restoration of the original which had been corrupted and debased’. (Augustine, *City of God*)

And this can be compared with the later thought of Aquinas:

‘No being is said to be evil, considered as being, but only insofar as it lacks being’.  
(*Summa Theologica* I, 5.3)

This provides a sense of evil related to being, that is an evil that is in the thing itself, an absence of the good. Such an approach has its problems, but it seems more fruitful than Kant’s epistemological take (choosing to think wrongly). Recently Terry Eagleton has used this tradition in a modern, non-religious way to think of evil as a fundamental absence in the way in which a person might treat others, and how she might be in herself. As for others, evil is in love with the annihilation of the possibility of life:

‘there is a diabolical delight to be reaped from the notion of absolute destruction. Flaws, loose ends, and rough approximations are what evil cannot endure.... Goodness, by contrast, is in love with the dappled, unfinished nature of things.’  
(T.Eagleton, *On Evil*, p.101)

Such evil, Eagleton goes on to write, has a correlative lack in the evil-doer: to wreak havoc on being is to express the inner lack that psychoanalysis describes as the death drive. In the evil act, this is

‘turned outward so as to wreak its insatiable spitefulness on a fellow human being. Yet this furious violence involves a kind of lack – an unbearable sense of non-being, which must, so to speak be taken out on the other’. (p.127)

This nihilism with regard to being seems to me to be an important feature, and Eagleton is also right to press us to think about the motivation of the evildoer. However, his account of good and evil seems too broad, and we may question his resort to Freud. In their place, I would put our discussion of the meta-ethics of freedom, flourishing and solidarity. It seems to me that he is right, however, that there are two issues that we need to look at: the evil that is in the act and the evil that is in the motivation of the actor. Here, I turn to Hannah Arendt for further guidance. Arendt is often thought of as following in the line of Kant, for she adopted the notion of radical evil in her discussion of the Nazis and the Holocaust, and she linked it to the thought process and motivation of the evil-doers:

‘And if it is true that in the final stages of totalitarianism an absolute evil appears (absolute because it can no longer be deduced from humanly comprehensible motives), it is also true that without it we might never have known the truly radical nature of Evil’. (H.Arendt, *The Origins of Totalitarianism*, pp.viii-ix)

Later, without seeming to wish to change her analysis, Arendt dubbed this absence of ‘humanly comprehensible motives’ the ‘banality of evil’ because the Holocaust, in her view, was carried out by ordinary people in a mundane, unthinking, way. It has been pointed out, however, that there was in fact a significant difference in Arendt’s thought from Kant’s, even if they shared a term. Arendt was too much of a moral psychologist and ontologist to remain satisfied with Kant’s account. In her, issues of what was done to victims as human beings, and what the perpetrators thinking lacked both came to the fore.

For the victims, the evil of the Holocaust was seen in the denial of their humanity: both their freedom and their solidarity with others. Of their (legal) freedom, she said:

‘The aim of an arbitrary system is to destroy the civil rights of the whole population, who ultimately become just as outlawed in their own country as the stateless and homeless. The destruction of man’s rights, the killing of the juridical person in him, is a prerequisite for dominating him entirely.’ (*OT*, 451)

But what happened when a totalitarian system denied legal freedom was a prelude to the denial of what at the most basic level it meant to be human:

‘After the ... annihilation of the juridical person, the destruction of individuality is almost always successful.... For to destroy individuality is to destroy spontaneity, man’s power to begin something new out of his own resources....’ (*OT*, 455)

Spontaneity is the most basic form of human freedom, the freedom to start anew: a beginning and new agency with each new birth (and here Arendt cited Augustine, on whom she had written her doctoral thesis). The concentration camps were

‘meant not only to exterminate people and degrade human beings, but also to serve the ghastly experiment of eliminating, under scientifically controlled conditions, spontaneity itself as an expression of human behaviour and transforming the human personality into a mere thing....’ (*OT*, 438)

In terms of our understanding of good as involving freedom to act in solidarity with others in the direction of human flourishing, the Holocaust’s radical evil was that it attacked the root possibility of there being human freedom as spontaneity at all. The truly good act furthers the highest forms of human freedom; the evil act attacks its most basic forms. At the same time, it removed the possibility of any sense of moral solidarity between people:

‘Who could solve the moral dilemma of the Greek mother, who was allowed by the Nazis to choose which of her three children should be killed?’ (OT, 452)

Faced with such a choice, what possible action of human solidarity was available to the mother? Not only, however, was there an annihilation of the moral bond on the side of the victims, the issue of motivelessness or banality of evil meant that there was no human bond, no solidarity between the perpetrators and their victims. There is a difference, Arendt claims, between the person who murders for humanly recognisable motives and the person who does so for no apparent human motives at all. We have already seen how Arendt wrote of the ‘difference between a man who sets out to murder his old aunt and people who without considering the economic usefulness of their actions at all . . . built factories to produce corpses. . . .’ One can talk of a form of wickedness of the person who acts for bad motives, and Arendt saw that many Nazis acted out of a ‘deep hatred and resentment against all those who were better off than themselves, and who now ... were in their power’. But such resentment, she adds, ‘which never died out entirely in the camps, strikes us as a last remnant of humanly understandable feeling’ (OT, 454).

Even if you hate someone, that is at least a humanly recognisable emotion, which indicates a moral connection, albeit a bad one, with the hated person. That person is at least worthy of hatred, and there is a kind of *negative* solidarity within it. The problem of the death camps was that even this was ultimately lacking, and this was at the nub of the idea of the banality of evil. Adolf Eichmann’s motives were so mundane as to be no real motives at all when compared with the enormity of what he was doing. They revealed in their banality a complete failure to recognise any sense of the human in his victims, to be able to think of his victims as being human. Eichmann possessed ‘an inability to think, namely to think from the standpoint of someone else’ (EJ 49). That is the core of moral solidarity, and it was entirely lacking. Some argue (eg Cesarani) that Eichmann really hated the Jews, and that Arendt’s argument somehow lets him off the hook. But her argument is in fact that he was worse than that: what made his actions truly evil on their subjective side was that they were entirely void of human solidarity. On their objective side, they were aimed at crushing the very possibility of the most basic kinds of freedom for the victims.

## CONCLUDING THOUGHTS

At this point, I wish to move into some concluding thoughts. I say that rather than ‘conclusion’ because I don’t have the neat finish to apply to what I have said thus far, to bring the loose ends together in a unified whole. What I did in the above was to follow a line of thought that was in some sense instinctual. I had been interested in Arendt, I had been struck by the moral problems of euthanasia for law, but I had not imagined I would end up thinking about good and evil, and putting these together with Roy’s meta-ethics around conceptions of freedom and solidarity. Yet, if there is an excitement in academic life, isn’t this what it is? The possibility of a discovery or a new route through the thickets of thought? Is it just the physicists or the mathematicians who can discover something new: a new way of thinking about one’s subject, or at least one’s own positions in one’s subject? I don’t think so: we academic lawyers, caught between the devil of legal practice and the deep blue sea of social theory and moral philosophy, in that intermediate position which seems to offer as much in the way of frustration as satisfaction, we too can have our rewards, can push our thought in a way that develops our understanding of legal practice in legal-theoretical terms.

What are the consequences of this paper? First, it has been to push forward an understanding of criminal law as a would be technical and formalistic discourse of *mens rea*, *actus reus* and the defences in the light of the problems that morally substantive categories such as good and evil throw up. There is a kind of silence of the law before issues such as euthanasia or crimes against humanity, in part because these are the extremes of human conduct, and in part because law is not well equipped to deal with actions that wear their moral heart, for good or for ill, on their sleeves. In terms of my dialectic of freedom and solidarity, law is most comfortable, I think, with the lesser forms of freedom, which, important in themselves, are nonetheless limited in their scope. I have in mind in particular the kind of juridical freedom Arendt spoke of around simple notions of the ability to act (spontaneity) or of negative liberty – the freedom to act unhindered. When it comes to the broadest notions of freedom, of human flourishing in solidarity and the eudaimonistic society, this is not ground on which law is comfortable. Nor is it comfortable with forms of action which obliterate the basic assumptions of freedom – that spontaneity and solidarity are part of the human condition. When it comes to systematic attempts to deny the very possibility of legal subjectivity or solidarity, law again struggles. These are the terrains of good and evil, and I think it helps to stretch out the canvas of human freedom in order to see where on it we paint the colours and forms of the law.

At the same time, I concede my hesitancy to pursue such solid categories as good and evil if there is a risk that they themselves become a means of hijacking rather than doing rational work. Nonetheless, perhaps the best way of avoiding that happening is to be clear on the meaning, the nature and the limits of such concepts. In that way we can be clear when they are being pushed further than they should be. I am consoled that I am not alone in pursuing this kind of thinking – it is notable that thinkers of the left such as Peter Dews and Terry Eagleton have also taken the issue up in recent times. Besides, if the genocides of the past and present have lessons for us, one is surely that we should name moral phenomena accurately. I have never felt that Arendt was wrong to designate the Holocaust as evil.

To return to law: it is, as I say, most happy with simple notions of agency and negative liberty, but if we can identify such notions as a small part of the broader canvas which includes notions like autonomy, emancipation and flourishing, we can vindicate the need to provide a radical critique of the legal space at the same time as we identify the value that is in legal form. Of course, freedom as agency and negative liberty is compatible with, indeed it licences, the kind of *laissez faire* liberalism that has done so much damage to our social institutions and internationally over the years, including our universities. So to note the moral significance of such ideas is to note also the impossibility of treating them by themselves. Negative liberty left to couple with the market can produce a range of terrible effects in the name of freedom. But that to me does not mean that we should dismiss ideas of negative liberty: they have real value when the police come knocking at 5am. More generally, what we need to do is always think of such liberty alongside the deeper, more substantive forms of freedom of which it is a part, so that we can ask how the simpler forms can be married with the more complex forms to produce societies in which well-being and flourishing can occur. Of course, that is by no means a simple matter – it requires contextual, socio-legal analyses of cause and effect and of the value of agency and intervention. But if we need to embed our understanding of moral agency in contextual analyses of society, we surely equally need to have a clear understanding as contextual lawyers of the moral values that are at stake in any given social situation. Overall, however, the aim should not be to discard our notions of freedom, but to pursue and deepen them alongside a critical understanding of how they may be used and abused.

The process of thinking in this paper has gone two ways. On the one hand, it has been from the problems generated by concrete legal problems to an underlying moral ground – the meta-ethics described above. It has sought to locate those problems on a broader theoretical canvas.

On the other hand, it has anchored the meta-ethics in real life situations, and therefore revealed something of the necessity to think in such terms. The meta-ethics fill a space, and are validated in the process. When I have presented talks on meta-ethics previously, it has sometimes come across a bit like a list of forms of freedom; by linking these to a concrete analysis of legal problems, we can see, I think, their intrinsic importance. The canvas has been stretched – let's see where else it might take us. At the same time, I am aware that this paper will probably satisfy few. It says too little about the law for lawyers, it says too little about the concepts of freedom for liberal philosophers, and it says too much about these same things for social contextualists. For me, however, it identifies the terrain where I want to work: between legal problems, ethical forms and social contexts. I hope it provides one way of pushing forward an open contextual agenda for legal studies, and that it perhaps rings some bells with some of you present tonight.