

LEGAL VALIDITY AND JUSTICE

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In 1979 in Basel, Switzerland, at the IVR's 9th World Congress for Philosophy of Law and Social Philosophy, I presented some of my initial thinking on the relevance of the common man's view of the law for a conception of what law is. At subsequent congresses in Mexico City and Helsinki I digressed from an exploration of this issue as I addressed some problems in legal ethics, turning first to the relevance of major moral systems for legal ethics and then to the social obligations of the attorney. Today here in Kobe, Japan, at our 13th World Congress, I wish to return to matters concerning the common man's view of the law with special reference to legal validity and justice.

While I claim to have no special purchase on the workings of the common mind, I think it is a generalization safe to make that the public frequently sees the technical workings of the legal in system as being at odds with the furthering of justice. I cite a few examples to focus our attention. Consider public reaction in the Hinckley case, where, in 1982, a jury found John W. Hinckley, Jr., who was charged with shooting and wounding President Reagan, not guilty by reason of insanity. At the trial there was no dispute about Hinckley's being the person who shot the president; he did not seem "crazy" to the public in any lay sense. Yet, technically, since the prosecution failed to prove beyond a reasonable doubt that Hinckley was sane when he fired the gun, the jury's finding was legally correct. Responding to public outrage over the injustice of the matter, lawmakers in short order drafted legislation designed to amend or abolish the insanity defense. Consider also the recent trial of Bernard Goetz. Goetz was on trial for opening fire on a group of Black youths in a New York City subway. The jury accepted his defense of self defense. Many saw the provocation of these young men as grossly insufficient to justify Goetz' extreme action and saw any legal entitlement on the part of the jury to set him free as a perversion of justice. And consider the public uproar over the recent parole of a man convicted of raping and then brutally severing the hands of a teenaged girl. While this man may technically have been eligible for parole, community after community refused to accept him as one of their number, expressing clearly the sentiment that justice requires that such a person's place is in the jail.

I gather that what is operative in views so held is some general sense of how reasoning purportedly valid in nature can lead to wrong or unjust conclusions, of how technical correctness guarantees nothing of what is true or right, or of how logic, whether pure or of some legal ilk, can deliver up answers so obviously in error. What I wish to do in this essay is explore both ways in which philosophy of law can provide us with means of conceptualizing or structuring this common sense view and ways in which philosophy of law may be informed by this view. The following analogy, which at once captures some sense of this common view and at the same time displays features of there being a philosophical structuring of the view, is thus worthy of our attention:

LOGICAL VALIDITY : TRUTH :: LEGAL VALIDITY : JUSTICE

Elementary in the study of argumentation is the notion that we can have a valid argument, an argument in which the reasoning accords perfectly with the laws of logic, and

yet end up with a false conclusion or have no guarantee of the truth of the conclusion. We know that soundness must be contrasted with validity and that our argument will be sound, that we can be guaranteed of the truth of the conclusion, only if it is valid and in addition has true premises. In other words, truth functions independently of validity, and what logic tells us about the matter in this formal fashion accords with the common view that we roughly characterized as right reasoning leading to wrong conclusions. The analogy then purports to impose this type of separability of issues on our understanding of our thinking about legal matters. We expect a counterpart to logical validity, here, legal validity, that delivers up conclusions that follow from the legal rules but yet carry with them no warranty of a just outcome. We expect that, if the outcome is unjust, that there was some injustice in one of the legal rules that was correctly applied. Or we expect that, even if the outcome were just, we have no reason to see as support for it its foregoing chain of reasoning if some link in that chain were an unjust legal rule. So, although this part of the analogy also accords with the common view that strives to separate technical correctness in legal reasoning from justice, it surely can find from legal philosophy no single voice that can speak in support of it as it could in the case of logic in the first part of the analogy. Surely we all recognize that the most fundamental of divides in the philosophy of law is over the issue of whether it makes sense to separate justice from legality.

Even if philosophy of law cannot inform us about the analogy in the unequivocal fashion that logic does, we can still inquire into what particular doctrines of legal philosophy would allow us to make sense of the claim in the analogy about legal validity and justice. And, with those ways of understanding the relationship, we can evaluate whether the analogy, all in all, is a good one. To begin with, legal positivism and its popular variant, legal realism, give credence to this attempt to polarize legal validity and justice. Austin's positivism, of course, and for example, admonishes us to recognize that "the existence of law is one thing; its merit or demerit is another."¹ By extension, we can reasonably expect that Austin would endorse the proposition that the outcome of applying some existing law to the facts in some case is one thing; its merit or demerit is another. If so, we have a way of casting the point of the analogy within a philosophical framework. And I call it that because Austin does not merely assert his view but does argue for the cogency of his position that draws the distinction in question: "Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity."² He goes on to demonstrate how it is that thinking, like Blackstone's, that conflates the distinction between the validity of human laws and divine justice, is an "abuse of language" that "is not merely puerile, it is mischievous."³

Llewellyn brings out how Legal Realism American style has as one of its general tenets the temporary separation of the is and the ought of the law⁴ thus alligning realism with the positivists and thus also being a position for structuring the insight of the analogy. Jerome Frank's realism, in particular, provides a good illustration. Frank is critical of the traditional view of law and the judicial decision that shows law as fixed and unchanging and the judge

1 *John Austin, The Province of Jurisprudence Determined*, in: *Readings in Philosophy of Law*, edited by John Arthur and William Shaw, Englewood Cliffs, 1984, p. 18.

2 *Ibid.*, p. 19.

3 *Ibid.*

4 *Karl N. Llewellyn, Some Realism About Realism*, in: *Law and Philosophy*, edited by Edward Allen Kent, 1970, p. 62.

as formally and mechanistically applying law to fact situations; judges on that view have no discretionary powers given the fashion in which outcomes of cases are so strictly a function of the ways in which logic orders rules and facts. Frank replaces this with a view where law is the decision of the court, arguing that we have deceived ourselves in thinking that the judge had so little discretion. And we find that, on his view, even if we have a pronouncement of a court that is law, it does not guarantee us of a just outcome. For Frank beseeches his fellow judges to move more to a model of equity where justice is done for the particular case at hand.⁵ The closer we come to this model, the closer we come to a just outcome, but, again, there is no question about the fact that any judge's decision is law regardless of whether he toes the line of the model set out by Frank. So Frank's thinking too can be seen as providing a philosophical basis for the common view regarding justice.

In that Plato would speak of Justice as being a real essence on a plane of reality transcending the world of our sensory experience, in that our understanding of the forms is always incomplete in our corporeal existence, and in that Plato makes no pronouncements about the laws of men not being laws at all if they fall short of Justice, it seems that there will always be a gap between the administration of human laws, or their valid application, and Justice in this ideal sense. Staying with Plato's thinking for the moment, and looking at its relevance for the entire analogy, we see the form or real essence of Truth occupying the same position in its relation to logical validity as Justice does to legal validity. In each case some human pursuit, whether reasoning in the area of logic or of law, falls short of some transcendent ideal. If so, it is doubtful that placing a construction on the analogy of this sort can be seen as rendering any plausible, philosophical foundation for the common view we were considering. For the common view seems to keep it completely within the realm of human judgment to know fully what truth and justice entails and to be able to say when our reasoning has failed us. In contrast the common view presumes a far greater understanding of truth and justice than Plato's account would allow.

Suppose now that we try to read the entire analogy with the philosophical understanding of the relationship between truth and logical validity mentioned earlier and a positivist's understanding of the relationship between legal validity and justice. This does not run into the difficulty with the Platonic reading in that there seems to be no withholding from the human mind a full understanding of truth and justice. Austin, at least, would be quite unable to insist on a separation of human and divine law were he unable to claim to know what divine law is. Nonetheless, we do get a striking discontinuity on this reading of the analogy in that truth bears no connection to matters divine whereas justice does. This is significant in assessing the adequacy of this construction for serving as a foundation for the common view, since, on the one hand, the common view makes no reference to teachings not of this world and, on the other, suggests no such discontinuity in speaking of truth and justice.

What of putting the philosophical view of truth and logical validity together with Frank's position on legal validity and justice. Here I think we have something workable. While Frank makes no precise reference to the fashion in which the philosopher speaks of the relationship between truth and validity, he seems implicitly to invoke this as he rejects the use of the formal or mechanistic model in the domain of law. That model makes truth no more or less accessible to the human mind than does Frank's rendering of justice. So this juxtaposition of philosophical positions, at least to this point in our analysis, appears to be a compatible one and suffers from none of the major disanalogies we saw above that seemed to keep the other readings distant from the common view. Furthermore, employing these two positions supports favorably an important point of comparison on each side of the analogy. Truth and justice represent what we are striving for, and the two types of validity

5 Jerome Frank, *Law and the Modern Mind*, in: *Readings in Philosophy of Law*, pp. 21—29, *passim*.

represent possible but not necessary ways of achieving this. And the relationship on each side is strikingly similar to the common view in that in each case some form of reasoning, valid in nature, may preclude us from attaining what is so important — truth and justice.

If we have some way of understanding the analogy that puts in philosophical perspective some of the thinking of the common man, what can we say at this point in evaluating the analogy so understood. Is it a good one? Do the similarities outweigh the dissimilarities? I think that our discussion in the preceding paragraph can be seen as the case for this being a good analogy. The problems it encounters are these. First, while it makes sense to speak of the goal of legal validity as being justice, it is incorrect to speak of truth as the goal of logical validity; consistency is the goal of logical validity; truth the result of the sound argument. Looked at differently, we can, in a neutral fashion say that the goal of logical validity is quite different from truth but can do likewise regarding legal validity and justice only by revealing our perverseness. Surely, even the strict positivist who wants to keep analytically separable the issue of whether something is a law from whether it is a good law, will always at the same time endorse the notion that, in the end, the goal of any of our efforts in striving for legal validity is justice. To my knowledge, Thrasymachus is the only character in Western thinking who so distorted the meaning of justice that it came to mean what we call injustice and called that his goal. Or put differently in even a slightly different fashion, we would think it grossly wicked for one claiming to be interested in legal validity to declare that we arrived at a legally valid although unjust conclusion and remark. "But what of it?" Whereas, no such stigma seems to attach to the person claiming to be interested in logical validity who remarks in such a fashion when presented with the logically valid but untrue conclusion. We at least suspect that this latter person may well have a regard for the truth but knows that logical validity does not necessarily get us there. That cannot be said for the first fellow regarding justice, given the entailments of something's being legally valid but unjust. Injustices *will ensue* as the community gives effect to the legally valid reasoning. Freedoms, property, lives may unjustly be dealt with. This fellow is committed, then, to endorsing injustice, unlike the second fellow, who is not so committed regarding falsehood.

Another apparent dissimilarity, and this is related to the first, is that legal norms are created with justice in mind, with the goal of securing justice for the community. Again, it seems virtually inconceivable for anyone to assert that we are creating these norms to secure injustice or to say that, if justice comes our way, all fine and good, but that we cannot worry about such matters. Things seem quite different regarding the norms of logic and truth. We do not devise laws of logic; their existence does not reflect any intentional, purposive human activity to secure truth as with the case of the laws of society being framed to secure justice.

Furthermore, suppose that we liken the ways in which logical validity may be unsuccessful in securing truth to the fashion in which legal validity may be unsuccessful to arriving at justice. We know that, if we have a false conclusion in a valid argument, we can trace this to one or more false premises and to nothing else. Regarding legal validity and the unjust outcome, we can arguably and analogously trace the unjust outcome to one or more unjust legal norms that were employed in arriving at a conclusion. But it is not the case that this is the only fashion in which we may end up with an unjust outcome. Injustice may be the result of a determination of fact based on evidence too thin or fabricated or the result of a mistaken identity. It may be the result of a judge's bending to political pressures or his or her own biases. It may be the result of the shortcomings of counsel. Again, in that the sources of injustice are many but of falsehood in an argument's conclusion one, we can identify another disanalogy.

The foregoing line of reasoning suggests that the difficulties with a philosophical rendering of the analogy rest more heavily on the scales than do its strengths. Put differently,

a common view rendered in terms of the philosophical positions most compatible with it does not, all in all, make a great deal of sense. My own diagnosis of the problem is not that the common view is fundamentally wrong concerning the relationship between legal validity and justice but that it is muddled and draws too few distinctions when characterizing reasoning, right reasoning, justice, and truth; our attempt to subject the common view to philosophical analysis bore this out. Nonetheless, it is noteworthy that philosophy of law has become enriched as the result of this investigation into these common views. We have had an opportunity to investigate the validity of an analogy which I venture at first blush looked quite plausible to many of us. In the course of the discussion, we were afforded a fresh opportunity to consider, in a context where both truth and justice are brought into focus, some of the claims of the constantly opposing forces of the legal positivists and of the natural law theorists.