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IDEAS OF RELEVANCE TO LAW

By

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LECTURE I: TRUTH, DESCRIPTIVE AND PRESCRIPTIVE

A

One cannot be both a liar and a skeptic (and, of course, it is preferable to be neither). The liar understands what truth is and even believes that some statements are true and some are false. The first element in lying consists in saying in words the opposite of what you think or believe is true. The second element in lying consists in intending to deceive and willingness to injure by that deception. (The white lie has a contrary intention so far as injury is concerned.) A third aspect of lying is whether one has an obligation to tell the truth to everyone—or only to some.

The extreme skeptic cannot be a liar unless he is a liar when he declares himself to be an extreme skeptic for whom there is no truth; nothing is either true or false. If that is what the extreme skeptic really thinks, then he is at least telling us the truth when he tells us that that is what he thinks. But he cannot tell us a lie about anything other than his own state of mind or feeling.

What the extreme skeptic denies is not the possibility of truth or falsity in speech, but only the possibility of truth or falsity in thought.

The definition of truth and falsity in thought is as follows. It is the agreement or correspondence between what one thinks is the case and what is the case in reality.

Truth and falsity in thought parallel truth and falsity in speech. Truth in speech may accompany falsity in thought, and falsity in speech may accompany truth in thought. For this to be possible, it must also be possible for us to be mistaken or in error in our judgment about what is true or false. (I will return to this very important point later.)

This theory of truth and falsity rests on the following presuppositions: first, the existence of an independent reality which is what it is whether or not we know it and regardless of what we happen to be thinking about it; and second, the determinateness of that independent reality. This is made clear by the principle of contradiction as an ontological principle. Nothing can both be and not be at one and the same time. Nothing can both have a certain attribute or characteristic and not have it at one and the same time. This principle is self-evidently true; you cannot think the opposite.

The logical counterpart of the principle of contradiction tells us that to think truly, we must avoid contradicting ourselves. We cannot both affirm and deny one and the same proposition at one and the same time. It cannot be thought by us to be both true and false. We cannot answer the same question by saying both Yes and No at one and the same time.

Now let us consider the position of the extreme skeptic. To say that there is nothing either true or false, or to say there cannot be a true or false statement is tantamount to denying the presupposition of truth—denying the ontological principle of an independent and determinate reality, and flouting the logical principle of contradiction.

Here is the refutation of the extreme skeptic. Consider the statement: “No statement is either true or false.” If that is true (which the skeptic asserts), then he has contradicted himself,

because at least one statement is true. If that is false, then there may be one or more statements that are true as well as this one statement's being false. And if that statement is itself neither true nor false, why should we pay any attention to it?

There is no point in arguing with the extreme skeptic since he is willing to contradict himself at every step of the way. No one who lives in the common sense world of practical affairs can operate on the basis of extreme skepticism.

B

Two moderate forms of skepticism involve mistaken interpretations of the matter.

Consider the statement: "That's true for me, even if it isn't true for you." If the statement merely intends to call attention to the fact that individuals can differ or disagree in their judgments about what is in fact the truth of the matter, it raises no special difficulty.

To acknowledge the possibility of differences of opinion or disagreements concerning what is true or false is not to be skeptical. In fact, not to do so is to go to the opposite extreme of extreme dogmatism: only what I declare is true is true; if you disagree with me, you are wrong.

Unfortunately, people who say "That's true for me" make the mistake of adding "And that's all there is to it." When they do this, their moderate skepticism turns into an extreme subjectivism. There is no objective aspect of truth: there is only what is true for me (only the subjective aspect).

Such extreme subjectivism is just as self-refuting as extreme skepticism. What can one mean when one says "true for me" if one does not also claim that the statement I judge to be true is objectively true? "True for me" can mean no more than "I like it," "I want to think it," "I prefer it to the opposite." And if that is all there is to it, then extreme subjectivism becomes extreme skepticism.

The other mistaken form of moderate skepticism is exemplified in the statement: "That was once true relative to the circumstances that then existed, but it is no longer true."

If the statement merely intends to call attention to the fact that

what we once thought to be true (at an earlier time or place and under different circumstances), we no longer think is true, it raises no special difficulty. To acknowledge the possibility of change or alteration in our judgments about what is true or false is not to be skeptical. In fact, not to do so, to insist that our judgments about what is true are infallible, incorrigible, or unalterable is to go to the opposite extreme of dogmatism.

Unfortunately, people who say “That was true some time ago, but it is no longer true” make the mistake of adding “And that’s all there is to it.” When they do this, their moderate skepticism turns into an extreme relativism. They deny the immutability of objective truth when what they should be denying is the immutability of our subjective judgments about what is true or false.

The mutability of our judgments has no bearing on the immutability of truth in its objective aspect. If any statement is ever true, it is always true, and unchangeably so, regardless of how we change our minds about it. This holds even for changing aspects of reality itself: the addition of a precise time specification in the statement makes it possible for the statement to be immutably true.

By correcting these mistakes we reach the defensible and sound skepticism that wisdom recommends we adopt.

Most of the judgments we make about what is true or false are fallible and corrigible. They are mutable, not final. They have a future, in which they may be corrected or amended in some way, or replaced by other judgments that are truer.

The realm of judgments that have a future comprises those judgments with regard to which all relevant evidence may not yet be at hand, and the thinking we have done may not be as good as possible. Hence, when new evidence is found or when better thinking is done (or when we discover and correct errors or inadequacies in prior thinking), we change our minds and alter our judgments concerning the true and false.

The most impressive example of this is in jury trials of questions of fact. They imply two standards of proof: (1) by a preponderance of the evidence (more likely than not to be true); (2) beyond a reasonable doubt (but still not beyond all doubt, not beyond the

shadow of a doubt).

The judicial reason for re-opening a case or having a second trial may be either to allow for the introduction of new evidence, or to correct a procedural error that may have affected the deliberations of the jury. Reversal is possible even if the original verdict was beyond a reasonable doubt.

What I have just said about jury trials applies to all fields of research, historical and scientific, to everything that is in what I am going to call “the realm of doubt,” which is the realm of judgments that have a future—judgments that are subject to change, that are not final, infallible, and incorrigible.

C

Do all of our judgments fall in the realm of doubt? Are there none that belong to the realm of certitude?

The realm of certitude is the realm of judgments that are subjectively as immutable as objective truth is. These are judgments for which we dare to claim finality, infallibility, and incorrigibility—*without being dogmatic*. They are, therefore, judgments that have no future.

What judgments have this status? All self-evident truths: judgments the opposite of which it is impossible for us to think, such as the principle of contradiction; the statement about wholes and parts involving indefinables; the statement that no triangle has any diagonals involving definitions.

All empirically falsified generalizations have this status also. No empirical generalization is beyond the shadow of a doubt. One negative instance falsifies such generalizations. Once falsified, it is always false—immutably.

Finally, this status belongs to evident truth, such as my own existence, or the existence of physical objects perceptually present to me. Beyond all doubt? Beyond the shadow of a doubt? No, not quite, because of the possibility of hallucination. When I am perceiving, not hallucinating, that which I am perceiving really exists independently of my perceiving it. The only question here is whether I am in fact perceiving. That is the shadow of a doubt which I cannot remove. Nevertheless, for all practical purposes, such evident truths are certain rather than probable: what we call

practical or moral certainty, which falls just a little short of epistemological certitude.

Except for the two or three types of judgments just indicated (self-evident truths, empirically falsified generalizations, and evident truths), all other judgments fall in the sphere of doubt: all our common-sense generalizations, most of which are immoderate because they go beyond the evidence and are subject to falsification; all of the generalizations made in the empirical sciences; almost all scientific theories or hypotheses—which are subject to correction, amendment, or rejection in the light of new evidence or better thinking; a great deal of what we call “historical knowledge” including both what we regard as historical facts and also the interpretation of these facts.

An apparent paradox results. As we normally use the word “knowledge,” we speak of our common-sense knowledge of the world in which we live, of our scientific knowledge of it, or our historical knowledge of its past, and so on.

We distinguish between the realm of knowledge and the realm of opinion, as follows: knowledge consists in the possession of the truth. The phrase “false knowledge” is self-contradictory. The phrase “true knowledge” is redundant. Only opinion, not knowledge, can be either true or false.

That being our customary usage or acceptance, how can we place common-sense knowledge, scientific knowledge, and historical knowledge in the realm of doubt—the realm of judgments which, though now regarded by us as true, may turn out to be false when new evidence is forthcoming or better thinking is done?

It would *appear* that what we call knowledge is no better than opinion, if it can turn out to be false. Must we restrict our use of the word “knowledge” to judgments that clearly belong in the realm of certitude and refrain from using the word “knowledge” for any judgments that belong in the realm of doubt?

The resolution of this apparent paradox is as follows. It consists in noting a strong and weak use of the word “knowledge” and a strong and weak use of the word “opinion.”

In its strong use, the word “knowledge” refers to judgments that belong in the realm of certitude. Here it would be wrong to say “I

believe” or “I opine” or even “I think.” Here we must say “I know.” In its weak use, the word “knowledge” and in its strong use, the word “opinion” refer to a middle ground.

Here it is appropriate to say “I believe on reasonable grounds” or “I have reasonable grounds for believing, opining, or thinking,” and, as of this moment, that is equivalent to saying “I know,” *but only as of this moment*. Here we have, not final or incorrigible truth of the kind we have in the realm of certitude (knowledge in the strong sense), but only that which is *truer* than anything else at the moment.

That which is truer than alternatives may become truer still with additional evidence or better thinking (may have even more reasonable grounds). Or it may be replaced by an alternative that is truer in the light of more evidence or better thinking. Nevertheless, our claim of truth here is not an unsupported claim. On the contrary, it is the truth we *must* affirm in the light of the best evidence we now have and the best thinking we can now do.

At the opposite extreme is mere opinion—totally unsupported opinion, not knowledge in even the weaker sense of that term. When we express, espouse, or insist upon such opinions, we do so only as a matter of personal prejudice. It is an act of will on our part, not an act of thought. Here, if we use the word “truth” at all, we do so in the purely subjective sense: “true for me, and that’s all there is to it.” It may still remain the case that such opinions are either objectively true or false, since whatever is asserted about the way things are may either agree or not agree with the way that in fact things really are. But, since we can offer no reasonable grounds to support such opinions (since we have no evidence in favor of them or thinking to base them on), our assertion of them reduces to “I like to think that...”

Herein lies the radical diremption between the sphere of truth and the sphere of taste—the sphere of supported judgments and the sphere of unsupported prejudices. The sphere of taste consists of all opinions that, being unsupported, are unarguable. It may also include opinions that are not only unsupported but are intrinsically unsupportable. Hence the fundamental maxim: *de gustibus non disputandum est*. This applies to all opinions that are nothing but expressions of our likes and dislikes and cannot be anything else (the intrinsically unsupportable); and also to those opinions that are unsupported at a given time, but which may nevertheless not be

intrinsically unsupportable.

In sharp contrast, the sphere of truth consists of those opinions (in the strong sense, which is identical with knowledge in the weak sense) that are intrinsically supportable and that are also based on reasonable grounds—supported by what evidence is available and what thinking has been done. Here the judgment we make is necessitated by evidence or reasons: it is not voluntary or an entirely free choice on our part. Here the fundamental maxim is the very opposite: *de veritate disputandum est*.

Skepticism with regard to truth reared its head in antiquity. Confronted with it, the ancients came up with its refutation. Not so with regard to goodness. Skepticism about value judgments—about the validity of our attribution of goodness to objects and about the truth of any statement that contains the words “ought” or “ought not”—begins in the modern world. Without having been confronted with that brand of skepticism, the ancients nevertheless provided us with clues enabling us to separate that aspect of the good that has the objectivity of truth from that aspect that is entirely subjective and relative to the individual.

At the dawn of modern thought, Thomas Hobbes and Benedict Spinoza advanced the view that “good” was merely the name we gave to those things that in fact we happened to desire or like. Goodness is not a discoverable property of the things themselves. We simply call them good because we desire them. If we had an aversion to them instead, we would call them bad. Since desires and aversions are matters of individual temperament, nurture, and predilection, there is nothing that all human beings agree upon as deserving to be called good or bad. Just as the skeptic concerning truth says that what is true for me may not be true for you, so here the skeptic says that what is good for you may not be good for me.

A century or more later, David Hume added another arrow to the quiver of skepticism about values. He pointed out that from our knowledge of the facts about nature or reality (as complete as one might wish it to be), we cannot validate a single value judgment that ascribes to an object a goodness that makes it true to say that all men ought to desire it.

Those who, before or after Hume, identify the good with pleasure or the pleasing, do not avoid the thrust of his skeptical challenge. Rather, they reinforce it, for what pleases one individual may not

please another; and, in any case, the goodness that is identified with pleasure does not reside in the object but in the emotional experience of the individual.

Hume's challenge is further reinforced in our own century by a group of thinkers whose names are associated with a doctrine that has come to be called "noncognitive ethics." They use the word "ethics" to refer to the whole sphere of moral judgments about good and bad, or right and wrong, especially in the form of prescriptions about what ought and ought not to be sought or what ought and ought not to be done. Their dismissal of ethics as "noncognitive" is their way of saying that statements that assert an ought or an ought-not cannot be either true or false.

Not capable of being either true or false, such assertions are noncognitive. They do not belong to the sphere of knowledge, even in the weaker sense of that term, which connotes verifiable or supportable opinion. Thrown out of the sphere of truth, they are relegated to the sphere of taste. They are at best expressions of personal predilection or prejudice, entirely relative to the feelings, impulses, whims, or wishes of the individual.

If we ask why judgments about what ought to be desired or done are totally incapable of being either true or false, the answer appeals to an understanding first formulated in antiquity and one that these twentieth-century exponents of a non-cognitive ethics adopt.

Once we conceive the truth of a statement as residing in its correspondence with the facts of the matter under consideration, with the way things really are, we are led to the conclusion that only statements that assert that something is or is not the case can be either true or false—true if they assert that which is in fact the way things are, false if they assert the opposite.

All such statements can be characterized as descriptions of reality. Statements that contain the words "ought" or "ought not" are prescriptions or injunctions, not descriptions of anything. If our understanding of truth and falsity conceives them as properties that can be found only in descriptions, then we cannot avoid the skeptical conclusion that prescriptive statements cannot be either true or false.

A moment's reflection will lead us to see that the only way this

skeptical conclusion can be avoided is by expanding our understanding of truth. Can we find another mode of truth, one that is appropriate to prescriptions or injunctions, just as the more familiar mode of truth is appropriate to descriptions or statements of fact? How can oughts and ought-nots be true?

For the answer to this question, we must go back to antiquity—to the thought of Aristotle. Recognizing that the descriptive mode of truth did not apply to prescriptive statements or injunctions (which he called “practical” because they are regulative of human action), Aristotle proposed another mode of truth appropriate to practical judgments.

That mode of truth, he said, consists in the conformity of such judgments with right desire, as the other mode of truth consists in the correspondence of our descriptions of reality with the reality that they claim to describe. Unfortunately, Aristotle did not explain what he meant by right desire. We are, therefore, on our own in pushing the inquiry farther.

What is right desire? It would appear that the answer must be that right desire consists in desiring what we ought to desire, as wrong desire consists in desiring what we ought not to desire.

What ought one to desire? The answer cannot be—simply and without qualification—that we ought to desire what is good. The good is always and only the desirable and the desirable is always and only the good. As Plato’s Socrates repeatedly pointed out, we never desire anything that we do not, at the moment of desiring it, deem to be good. Hence, we must somehow find a way of distinguishing between the goods that we rightly desire and the goods that we wrongly desire.

We are helped to do this by the distinction that Socrates makes between the real and the apparent good. He repeatedly reminds us that our regarding something as good because we in fact desire it does not make it really good in fact. It may, and often does, turn out to be the very opposite. What appears to be good at the time we desire it may prove to be bad for us at some later time or in the long run. The fact that we happen to desire something may make it appear good to us at the time, but it does not make it really good for us.

If the good were always and only that which appears good to us

because we consciously desire it, it would be impossible to distinguish between right and wrong desire. Aristotle's conception of practical or prescriptive truth would then become null and void. It can be given content only if we can distinguish between the apparent good (that which we call good simply because we consciously desire it at a given moment) and the real good (that which we ought to desire whether we do in fact desire it or not).

Up to this point we seem to be running around in circles. We have identified the real good with that which we ought to desire. We have interpreted right desire as consisting in desiring what one ought to desire, which amounts to saying that it consists in desiring what is really good. To say that the truth of the prescriptive or practical judgment, which tells us what we ought to desire, consists in conformity with right desire amounts to saying that a prescription is true if it tells us that we ought to desire what we ought to desire. And that is saying nothing at all.

The only way to get out of this circle is to find some way of identifying what is really good for us that does not equate it merely with what we ought to desire. How can that be done? Aristotle provides us with the answer by calling out attention to a fundamental distinction in the realm of desire.

On the one hand, there are the desires with which we are innately endowed. Because they are inherent in human nature, as all truly specific properties are, they are present in all human beings, just as human facial characteristics, human skeletal structure, or human blood types are. Not only are they present in all human beings, as inherent properties of human nature, but they are always operative tendentially or appetitively (that is, they always tend toward or seek fulfillment), whether or not at a given moment we are conscious of such tendencies or drives.

On the other hand, there are the desires that each individual acquires in the course of his or her life, each as the result of his or her own individual temperament and by the circumstances of his or her individual life. Consequently, unlike natural desires, which are the same in all human beings, acquired desires differ from individual to individual, as individuals differ in their temperaments, experiences, and the circumstances of their lives. Also, unlike our natural desires, of which we may not be conscious at a given moment, we are always conscious of our acquired desires at the time they are motivating us in one direction or another.

The quickest and easiest way to become aware of the validity of this distinction between natural and acquired desires is to employ two words that are in everyone's vocabulary and are in daily use. Let us use the word "needs" for our natural desires, and the word "wants" for the desires we acquire. Translated into these familiar terms, what we have said so far boils down to this: that all human beings have the same specifically human needs, whereas individuals differ from one another with regard to the things they want.

The use of the words "need" and "want" enables us to go further. Our common understanding of needs provides us at once with the insight that there are no wrong or misguided needs. That is just another way of saying that we never need anything that is really bad for us—something we ought to avoid. We recognize that we can have wrong or misguided wants. That which we want may appear to be good to us at the time, but it may not be really good for us. Our needs are never excessive, as our wants often are. We can want too much of a good thing, but we can never need too much of whatever it is we need. We can certainly want more than we need.

One thing more, and most important of all: we cannot ever say that we ought or ought not to need something. The words "ought" and "ought not" apply only to wants, never to needs. This means that the natural desires that are our inborn needs enter into the sphere of our voluntary conduct only through the operation of our acquired desires or wants.

In other words, we may or may not in fact want what we need. Almost all of us want things that we do not need and fail to want things that we do need. In the statement just made lies the crux of the matter. We ought to want the things we need. We ought not to want the things we do not need if wanting them interferes with our wanting—and acquiring—the things we do need.

The distinction between needs and wants enables us to draw the line between real goods and apparent goods. Those things that satisfy or fulfill our needs or natural desires are things that are really good for us. Those that satisfy our wants or acquired desires are things that appear good to us when we consciously desire them. If we need them as well as want them, they are also really good for us. However, if we only want them and do not need them, they will

nevertheless appear good to us because we want them. Beyond that, they may either turn out to be harmless or innocuous (in that they do not impede or prevent our acquiring the real goods we need) or they may turn out to be the very opposite (quite harmful or really bad for us because they somehow deprive us of one or another of the real goods we need).

We cannot ever be mistaken about our wants. No one can be incorrect in saying that he wants something. But it is quite possible for individuals to be mistaken about their needs. Children are frequently given to thinking or saying that they need something when they should have said that they want it. Adults are prone to making the same mistake. If we can be mistaken about our needs, does not that weaken the underpinning of our argument so far? To avoid this, we must be able to determine with substantial accuracy the needs inherent in human nature.

Since their gratification often requires the presence of certain favorable environmental circumstances, we must also be able to determine the indispensable external conditions that function instrumentally in the satisfaction of needs (e.g., a healthy environment is instrumentally needed to safeguard the health of its members). Success in these efforts depends on the adequacy of our knowledge and understanding of human nature in itself and in its relation to the environment.

It is by reference to our common human needs that we claim to know what is really good for all human beings. Knowing this, we are also justified in claiming that we can determine the truth or falsity of prescriptions or injunctions. As Aristotle said, prescriptions are true if they conform to right desire. All our needs are right desires because those things that satisfy our natural desires are things that are really good for us. When we want what we need, our wants are also right desires.

The injunction to want knowledge, for example, is a true prescription—the true statement of an ought—because human beings all need knowledge. As Aristotle pointed out, man by nature desires to know. Since the acquired desire for knowledge is a right desire, because it consists in wanting what everyone needs, the prescription “You ought to want and seek knowledge” is universally and objectively true—true for all human beings—because it conforms to a right desire that is rooted in a natural need. No one, I think, would question man’s need for knowledge or the

truth of the prescription that everyone ought to want and seek knowledge. That truth comes to us as the conclusion of reasoning that rests on two premises.

The first is a categorical prescription or injunction: We ought to desire (seek and acquire) that which is really good for us. The second is a statement of fact about human nature: Man has a potentiality or capacity for knowing that tends toward or seeks fulfillment through the acquirement of knowledge. In other words, the facts about human nature are such that, if we are correct in our grasp of them, we can say that man needs knowledge and that knowledge is really good for man.

Now, if the foregoing categorical prescription or injunction is true and if, in addition, the foregoing statement of fact about human nature involving a need for knowledge is true, then the prescriptive conclusion, that everyone ought to want and seek knowledge, not only follows from the premises, but is also true—true by conforming to right desire as set forth in the categorical prescription that we ought to want and seek that which is really good for us (i.e., that which by nature we need).

The truth of the categorical prescription that underlies every piece of reasoning that leads to a true prescriptive conclusion is a self-evident truth. Anyone can test this for himself by trying to think the opposite and finding it impossible. We simply cannot think that we ought to desire that which is really bad for us, or that we ought not to desire that which is really good for us.

Without knowing in advance which things are in fact really good or bad for us, we do know at once that “ought to desire” is inseparable in its meaning from the meaning of “really good,” just as we know at once that the parts of a physical whole are always less than the whole. It is impossible to think that opposite just as it is impossible to think that we ought to desire that which is really bad for us. We acknowledge a truth as self-evident as soon as we acknowledge the impossibility of thinking the opposite.

What about the truth of the other premise in the reasoning? That is a factual premise. It asserts a fact about human nature. As I pointed out a little earlier, Aristotle’s observation that man by nature desires to know seems unquestionable. Man’s natural desire or need for knowledge being acknowledged, the factual premise can be asserted as true, if not with certitude, then with a very high

degree of assurance. It is beyond a reasonable doubt, if not beyond the shadow of a doubt. That suffices for present purposes.

What about other natural desires or needs, about which we must make accurate statements of fact if we are to proceed with reasoning that will yield us other true prescriptive conclusions? I have already admitted that, while we can never make a misstatement about our wants, we may be mistaken about our needs, declaring that we need something that we should have said we wanted, or failing to recognize that we need something that we do not want. Such mistakes would result in false rather than true factual assertions about human nature and the desires that are inherent in it.

The consequence of this is obvious. The prescriptive conclusions to which our practical reasoning would lead us would then be false rather than true, practically or prescriptively false because the errors we have made about matters of fact prevent the conclusions from conforming to right desire. Therefore, what remains for further inquiry is whether our knowledge of human nature enables us to identify—with sufficient assurance, not with certitude—the real goods that fulfill man’s natural desires or needs.

I conceded earlier that David Hume was correct in pointing out that from our knowledge of matters of fact about reality or real existence, *and from that alone*, we cannot validly reason to a true prescriptive conclusion—a judgment about what one ought or ought not to desire to do. In the foregoing statement, I have italicized the “and from that alone.” Upon that qualification, the correctness of Hume’s point rests. It follows, therefore, that practical or prescriptive reasoning can be validly carried on if it does not rely upon factual knowledge alone. The reasoning to be found earlier in this lecture relies on factual knowledge but not on that alone. Factual knowledge is represented solely in the second or minor premise—the one that asserts a certain fact about human nature, for example, that man by nature desires to know.

The prescriptive conclusion, that everyone ought to want and seek knowledge, does not rest on that premise alone. It rests on that premise combined with the first and major premise—a categorical prescription that is self-evidently true, the injunction that we ought to want and seek whatever is really good for us. Upon this one categorical prescription rest all the prescriptive truths we can validate concerning the real goods that we ought to seek, limited

only by the extent to which we can discover, with reasonable assurance, the facts about human nature and its inherent desires or needs.

LECTURE II: THE SOVEREIGNTY OF JUSTICE

A

The usual view, in the literature of the subject as well as in the popular mind, accords primacy to either liberty or equality as the highest value, the greatest good to be sought. This is not correct. Justice is the controlling idea, without which the other two become illusory and misleading ideals.

All three are goods—all are real, not apparent, goods, answering to basic human needs. But not all real goods are equally good, and not all are unlimited goods (goods without any limitation in quantity). For example, wealth and pleasure are good only to a certain extent. One can seek too much of them, more than one needs. And, in addition, wealth is good as a means, not good in itself or for its own sake. In contrast, knowledge and virtue are unlimited goods. One cannot have too much of them; and though they are indispensable means to living a good human life, they are also to be sought for their own sake.

Of these three goods—liberty, equality, and justice—only justice is an unlimited good. One cannot seek or have too much justice in society or in the relation of one individual to another. But one can ask for and have too much liberty and too much equality.

The failure to observe the limitation that should be imposed in the quest for liberty and equality leads to serious errors and, in addition, to an irreconcilable conflict between them.

The *libertarian error* consists in a demand for freedom without limit, even though trying to achieve such unlimited freedom results in an irreducible inequality of conditions that is unjust and involves serious deprivations for a majority of the population. The only equality that libertarians favor is equality of opportunity and unlimited freedom: The race goes to the strongest or the most cunning, and the devil takes the hindmost.

The *egalitarian error* consists in a demand for a complete equality of conditions, especially economic conditions, even if it infringes

on individual liberty, severely restricting equality of opportunity and freedom of enterprise. The most glaring and grievous example of the egalitarian error in recent history is the “Cultural Revolution” in China under the rule of the Gang of Four.

There is an irreconcilable conflict between liberty and equality when each is regarded as a primary good to be maximized without limit. This is not really a conflict between liberty and equality, but a conflict between two extremist misconceptions of liberty and equality.

The conflict is resolved and removed by correcting these extremist errors: Both liberty and equality can be maximized within limits that are set by criteria of justice. The resolution can be seen at once by considering the following questions, and the answers we must give to them.

Should an individual have unlimited freedom of action or enterprise, or only as much as he or she can use without injuring anyone else, without depriving them of freedom and without causing them the serious deprivations that result from an inequality of conditions? In short, should an individual have more liberty than he can exercise justly? The answer is that everyone should have only as much liberty as justice allows, and no more than that.

Should a society try to achieve an equality of conditions attended by no inequalities in the degree to which individuals enjoy that equality of conditions? Should it seek to maximize such an equality of conditions, even if it results in wrongful deprivations of individual freedom? Should it ignore the fact (that the Maoist egalitarians ignored) that human beings are unequal as well as equal, in both their endowments and attainments, and that they can make unequal contributions to the welfare of the community? The answer is that a society should seek to achieve only as much equality of conditions as justice requires, and no more than that. More than that would be unjust, even as more freedom than justice allows would be that unjust exercise of liberty which is license. Please note: In one case, we say only as much as justice *allows*; in the other, we say only as much as justice *requires*.

B

What is the freedom to which, within the limits imposed by justice, we can make a rightful claim—the liberty to which we are

entitled? When, in the Declaration of Independence, Jefferson, following John Locke, said that liberty was one of man's natural and unalienable rights, what liberty did he have in mind?

To answer that question, we must first distinguish three major forms of freedom.

One is natural freedom—the freedom of a free will, of free choice, which enables us to choose otherwise. Either we are born with this freedom, as an innate and inherent component of our nature or we do not have it. No society or set of external circumstances can confer it upon us. Hence, there is no sense in speaking of our right to it.

The second major form of liberty is acquired freedom—the freedom of the virtuous or wise individual who is able to will as he ought to will, able to conform to the requirements of the moral or civil law by overcoming the resistance of contrary passions or appetites. Hence, this being a liberty that individuals either do or do not acquire through the exercise of their natural freedom, a liberty that no society or set of circumstances can confer, there is no sense in speaking of our right to it.

The third major form of liberty is circumstantial freedom—the freedom that is conferred on individuals by external circumstances that either permit or enable them to do as they please, to act as they wish, to carry out in action the choices or decisions they freely make, wisely or unwisely. Negatively, this freedom consists in the absence of coercion, duress, constraints, impediments, or the lack of enabling means. It is a *freedom from*. Positively, this freedom consists in the possession of enabling means—a freedom to do as one wishes because one has access to the requisite means. This circumstantial freedom is possessable by bad persons as well as good. Natural freedom and acquired freedom are not indispensable antecedents of circumstantial freedom.

Of the three major forms of freedom, only circumstantial freedom, the freedom to do as we please, needs to be regulated by justice. Herein lies the distinction between liberty and license.

Liberty consists in doing as we please *lawfully*, or within the limits set by justice. License consists in doing as we please *unlawfully*, or in violation of the limits set by justice. Furthermore, to ask for unlimited circumstantial freedom is to ask for anarchic freedom—

for autonomy rather than liberty. Autonomy is incompatible with living in society under law and government.

The distinction between liberty and license, and between autonomy and freedom in society, leads us to a further freedom, a variant of circumstantial freedom, which is also a liberty to which all human beings are entitled.

This is political liberty: Not a freedom to do as we please, but the freedom of an enfranchised citizen, governed with his own consent and with a voice in government, and, therefore, self-governing to the extent of his participation in government. This liberty is the freedom of which slaves and the subjects of despotic rule are completely deprived.

The citizen with political liberty is not free from regulation by law, but is free under laws that are just and justly made (with consent), as well as free in all matters where the law prescribes not. Locke's basic insight was that the rule of law in a constitutional or republican government is the very bulwark of freedom—especially freedom from unwarranted interference by others. Here Mill made an error. He thought that the sphere of freedom contracts as the sphere of law or regulated conduct expands. One further insight lies in Aristotle's observation that only criminals are coerced by just laws, not virtuous or law-abiding individuals who would voluntarily do what such laws command even if no laws commanded it. What the criminal is deprived of by law enforcement is not liberty, but license.

I come now to the most fundamental point of all. Our possession of free will—the power of free choice—is indispensable to our having a right to the circumstantial freedom to do as we please within the limits set by justice.

Our natural rights are grounded on our natural needs. Because we have freedom of choice, as a natural endowment, we have a natural need to be able to carry out in action the choices or decisions we freely make. What good would it do to make decisions that we cannot carry out? Without liberty of action, our freedom of choice would be rendered totally ineffective. We would be exercising it without being able to achieve the goods we are under a moral obligation to seek. Brute animals in cages are not deprived of a freedom to which they are entitled because, being brutes, they lack the freedom of choice or free will that human beings possess.

With regard to political liberty, the reasoning runs parallel. We have a natural right to such freedom because, being by nature political animals, we have a natural need to participate in politics, to be self-governing individuals. We are born to be citizens with suffrage.

C

With regard to equality, as with regard to liberty, it is necessary to consider its forms or dimensions.

First, we must distinguish between personal and circumstantial equality. Personal equality, or inequality, consists in the equality, or inequality, of individuals with respect to their innate endowments or acquired attainments. Circumstantial equality, or inequality, consists in an equality or inequality of conditions or of opportunity.

Next, we must observe that our statements about equality and inequality may be either declarative or prescriptive. They are declarative when they assert, as a matter of fact, that individuals are or are not equal in certain respects, either personally or circumstantially. They are prescriptive when they assert that individuals who are equal in a certain respect should be treated equally, or assert that individuals who are unequal in a certain respect should be treated unequally.

Our statements with regard to personal equality or inequality are always and only declarative, never prescriptive. It makes no sense to say that persons *should be* equal or unequal in their endowments or attainments. Prescriptive statements, demanding equality or inequality, apply only to circumstantial equality—equality of results or equality of opportunity. Hence, criteria of justice apply only to circumstantial equality, never to personal equality.

We come now to what is the most important distinction in our consideration of equality, as governed by considerations of justice. Equality in degree consists in that equality whereby one individual is neither more nor less than another in a given respect. Two individuals are unequal in degree if, in a certain respect, one is more and the other is less. In contrast, equality in kind occurs when two individuals both have a certain condition, even though one may have more of it, and the other less. Two individuals are

unequal in kind if one possesses or enjoys a condition that the other totally lacks.

Let us consider examples of this basic difference between equality in degree and equality in kind.

All citizens with suffrage are politically equal, though all do not have equal amounts of political power. Citizens in public office exercise more political power than citizens out of office. In any society in which some individuals have the status of citizenship and some are deprived of it (either as slaves or as disfranchised subjects), an inequality of political conditions exist, and this is an inequality in kind, not an inequality in degree. In a constitutional democracy, in which all mature and competent individuals enjoy the status of citizenship, an equality of political conditions exists, accompanied by inequalities in the degree of political power exercised.

An equality of economic conditions exists in a society when every one has that minimal amount of wealth, in the form of economic goods, which any human being needs to lead a decent human life. In short, when all are *haves*, and none are *have-nots*. An inequality of economic conditions exists in a society in which some portion of the population are *haves* with respect to wealth or needed economic goods, and some are *have-nots*, seriously deprived of economic goods that everyone needs. When all are economic *haves* and none are *have-nots*, some may have more and some may have less wealth.

The basic point to be observed here is that political and economic equality in kind may be accompanied by political and economic inequality in degree.

We are now prepared to consider the equalities to which all human beings are entitled.

The basis of our right to circumstantial equality in kind (either political or economic) is our natural equality in kind—our equality as persons, as human beings, having the same human nature. As members of the human species, we are all equally persons. This personal equality in kind is accompanied by many inequalities in degree. Though, as human beings, as members of the same species, we all possess the same specific attributes or traits, we do not possess them as individuals to the same degree: one individual has

more, another less, of a trait common to both. Only in their common humanity are *all* individuals equal. In all other respects, any two individuals may be either equal or unequal in the degree to which they possess this or that human trait.

The natural equality of all individuals as human beings or persons carries with it their equality with respect to all natural rights, since these are grounded on the natural needs inherent in individuals' common human nature. It makes no sense to say that some human beings have a natural right that others lack; or that some have more of a natural right and others less.

The natural equality of all human beings, together with their equal possession of natural rights, entitles all to equal liberty under law; equality of political status; economic equality, with none deprived of that minimum sufficiency of wealth that everyone needs to lead a decent human life.

The natural equality in kind of all individuals does not call for an equality in kind that is attended by no inequalities in degree. In short, it does not call for equality in degree, but only equality in kind and one that is accompanied by inequalities in degree.

In the political sphere, an illegitimate equality of conditions—more than justice requires—would consist in a direct democracy in which there were no public officials and in which all citizens exercised equal amounts of political power. This involves an egalitarianism so extreme that it could not possibly exist in any modern society, and probably never existed in the past under much simpler conditions.

In the economic sphere, an illegitimate equality of conditions—more than justice requires—would consist in all individuals having and holding equal amounts of wealth. This involves an egalitarianism so extreme that it is unfeasible, except perhaps in a monastic community under the strictest view of poverty observed by all.

Whereas the equality that justice requires is an equality in kind with respect to political and economic conditions, the inequalities that justice also requires are inequalities in degree with regard to these conditions. It is necessary here to remember that two facts control our thinking: on the one hand, that all human beings are equal as persons or in their humanity; on the other hand, that

individuals are unequal, one to another, in the degree of their native endowments and their acquired attainments. They may also be unequal in what they do—in the political or economic contributions that they make.

Justice involves two principles, not one: (1) Rendering to each what is his or her due—what is his or hers by natural rights; (2) Treating equals equally and unequals unequally in proportion to their inequality.

In the political sphere, the application of the second of these two principles results in giving more political power to those who, as public officials, are constitutionally responsible for doing more. That responsibility arises from the political tasks constitutionally assigned to the offices they hold. The degree of power should be proportionate to the degree of lawful responsibility. In the economic sphere, all do not contribute equally to the production of wealth. Justice here calls for a distribution that is based on the principle: to each according to his contribution.

Are there any limits to the inequalities in degree of power or wealth that justice requires according to the second principle that recognizes inequalities of performance and contribution?

The answer is definitely yes. The operation of the second principle of justice must not conflict with the operation of the first principle, which takes precedence over the second. In short, inequalities in degree of political power or degree of wealth are allowable only if they do not preclude the political or economic equality in kind to which all are entitled as a matter of natural right. No one is entitled to more political power or more wealth than is compatible with everyone's having the political power and wealth to which there is a right.

A non-egalitarian democratic socialism prevails when each receives what everyone naturally needs, and some receive more than others in varying degrees according to the differences among them in regard to their political performance or their economic contribution. When justice is fulfilled with regard to both liberty and equality, and is not exceeded with regard to either, the result is a non-egalitarian democracy and a non-egalitarian socialism.

The domain of justice is divided into (a) the justice of the individual in relation to other individuals and to the community; and (b) the justice of the state and of government in relation to its people, the governed.

There are three modes of justice. First, justice exists in rendering to each what is his due—what is rightfully his, including the right to liberty and the right to equality and inequality of conditions. Second, justice consists in dealing fairly in exchanges and in distributions: treating equals unequally is unfair; unjustifiable discriminations are unfair: differential wages paid to men and women doing the same tasks; unfairness in exchange as with weighted scales, giving less for more is unfair. Third, justice consists in acting for the common good or general welfare: treason is unjust—not a violation of rights, not unfair, but contrary to the common good; so, too, the public official who usurps power and exceeds his legitimate authority; or the judge who accepts a bribe and corrupts due process of law.

These three modes of justice are irreducible to one another. No theory of justice is sound or adequate unless it includes all three and puts them in proper relation to one another. This explains the inadequacy of Professor Rawls's theory of justice as fairness, compared with Aristotle's and Aquinas's much more comprehensive doctrines.

Justice on the part of the state or community toward its members involves all three modes: in rendering to each what is his due and securing all natural rights for all; in treating all fairly with no unjust discriminations; and in making laws for the common good of all, not for the sake of the private interests of any faction, least of all those in power. By these criteria, constitutional democracy is the most just, the only perfectly just, form of government. And the socialism which aims at having all participate in the general economic welfare is the most just economic system.

E

Now let us consider justice in relation to law and as the ultimate ground for the authority of the law. Here the basic issue is between those who say that might makes right and those who say that the exercise of force or power without authority is illegitimate and unjust.

On the one hand, we have the position of the positivist (Thrasymachus, Ulpian, Hobbes, Austin) that man-made law is the only source and measure of what is just and unjust in the conduct of individuals.

On the other hand, we have the position of the naturalist (Plato, Aristotle, Aquinas, Locke) that man-made law has authority only to the extent that it is just. Let us remember here what Augustine said: that an unjust law is a law in name only. It has coercive force, but no authority; it is obeyed only from fear of coercion.

Man-made laws can be just in the three ways already indicated: by securing natural rights; by requiring fairness in exchanges and distributions; by being directed to the common good or general welfare; and, in addition, by emanating from those constitutionally authorized (with the consent of the governed) to legislate or make laws by due process.

Drastic consequences flow from these opposed views of justice in relation to law.

Here are the consequences of the positivist view of justice as subservient to positive law (the man-made law of the state). Positive laws, constitutions, and governments cannot be appraised as just or unjust. Being the source and measure of justice, they cannot be judged by any applicable criteria of justice. What is just or unjust in one community may be the very opposite in another. The saying of the ancient sophists was that fire burns in Greece and in Persia (natural law), but what is just in Greece and in Persia are not the same, for their conventions (their positive laws) are different.

Here are the consequences of the naturalist view of the man-made law as measured by principles of natural justice (justice considered as antecedent to such laws). States, governments, constitutions, and positive laws can be judged to be just or unjust, according as they conform or violate the principles of justice. What is just or unjust is always and everywhere the same: e.g., chattel slavery, the disfranchisement of women, the deprivations suffered by the destitute.

However, there are some positive laws concerning matters that are intrinsically neither just nor unjust, but morally indifferent; for example, traffic ordinances. Herein lies the distinction between

mala per se (murder, theft, slander, mayhem) and *mala prohibita* (driving on the wrong side of the road, wrong not in itself, but only because it violates a man-made ordinance).

We are now prepared to consider a resolution of conflicting theories of justice in relation to law. In the history of the subject, there have been three competing theories about the just and the unjust.

(1) The ancient view first advanced by Socrates in the *Republic*: the naturalist view that what is just and unjust can be determined without reference to man-made laws, and by reference to natural rights or to what is fair.

(2) The equally ancient, opposing view advanced by Thrasymachus against Socrates: the positivist view that might makes right, that what the enforceable law of those in power prescribes is just and what it prohibits is unjust.

(3) The 19th century view advanced by utilitarians and pragmatists that what is just and unjust can be determined by reference to what is for or against the common good or general welfare.

Though I favor the naturalist view as the soundest of these three, it goes too far if it claims to answer all questions about justice by reference to natural right's or by reference to criteria of fairness in exchanges and distributions. Some questions of justice remain that can be answered only by reference to the utilitarian criterion of what is expedient for the common good or general welfare.

In addition, it must be conceded that about matters otherwise indifferent (neither intrinsically just nor unjust, neither more nor less expedient for the general welfare), those with legislative responsibility must make a choice between alternative prescriptions or regulations. Driving on the left side of the road is not more just and not more expedient than driving on the right side. But for the peace, order, and safety of the community, one or the other rule of the road must be prescribed and enforced. And when it is, conformity with that regulation is just conduct; violation of it, unjust.

We are now in a position to see a resolution of the conflict among theories of justice in relation to law. It involves three steps.

1. Everything that is naturally just by reference to natural rights or by reference to principles of fairness is also expedient for the common good or general welfare. Herein lies the truth of the naturalist view that justice is, by these criteria, antecedent to positive law and also the source of authority in man-made laws.

2. Everything that is determined to be expedient for the common good or general welfare is just even if that involves no reference to natural rights or criteria of fairness. Herein lies the truth in the utilitarian or pragmatic view, which also claims that justice by this criterion is antecedent to positive law and the source of authority in man-made laws.

3. Some things are indifferent to all of the foregoing criteria, as the example of alternative traffic regulations so plainly shows. In the public interest, a choice between the indifferent alternatives must be made. Hence, when the determination is made by the enactment of a positive law (a particular traffic ordinance), the law becomes the standard for judging behavior as just or unjust because the determination was made for the general welfare. Herein lies the truth in the positivist view, but it should be added that it presupposes the truth in the utilitarian or pragmatic view, since making a choice between otherwise indifferent alternatives is dictated by considerations of what is expedient for the general welfare.

F

Finally, we come to two soul-searching questions about justice, questions we are indebted to Plato for raising and trying to answer.

Why should anyone be just? How does the individual profit by being just to others? How does his being just contribute to his own happiness or his leading a good life?

Such virtues as temperance and fortitude clearly serve the interests of the individual. The intemperate and the cowardly person clearly injures himself by making the wrong choices—by overindulging his appetites for sensual pleasures, by not enduring the pains or hardships involved in seeking what is really good for himself. Not so in the case of justice: the just man is one who does good to others or at least abstains from injuring others. Justice does not seem to be concerned with the good of the individual who acts

justly. Why, then, Plato asks, should a man not be unjust to others if it is expedient to do so in his own interest? Why should he be just unless it is expedient to act justly in order to avoid adverse consequences, such as punishment or social disapproval?

To this extremely difficult question, Plato answers in terms of an internal harmony of all the moral virtues. This answer is more fully developed by Aristotle's theory that moral virtue, indispensable for the pursuit of happiness, has three inseparable aspects, of which justice is one. Temperance, courage, and justice are not three separate virtues, of which we can have one or two without having all three. They are three inseparable aspects of moral virtue as an indivisible whole. Since moral virtue as a whole is an indispensable means to making a good human life, being just toward others profits the individual by facilitating his own pursuit of happiness.

We come, finally, to the other difficult question that Plato raised. What should one prefer or choose—to do injustice to others or to suffer injustice at their hands? This is not an academic question. It occurs often in our lives. We are often faced with the choice between doing injustice or suffering injury for not doing it.

Plato's answer was, in my judgment, too simple and was based on an inadequate theory of the good. That inadequate theory consists in maintaining that moral virtue is the only good. Socrates in the *Apology* said that no harm can come to a good man in this life or the next. The Stoics and Immanuel Kant reiterated this view: the only thing that is really good is a good will—a virtuous will. Accordingly, it follows that in being unjust to others one abandons one's own ultimate good; whereas, in contrast, suffering injustice done by others does not diminish one's virtue or good will in the least.

A sounder answer to this difficult question is based on Aristotle's more adequate theory of the good. Moral virtue is only one of the real goods. Wealth, pleasure, health, liberty, knowledge, friendship, and so on, are also real goods. The loss of moral virtue is a serious obstacle to the achievement of happiness; but so also is the loss of liberty, the deprivation of wealth, the impairment of one's health. Hence the choice between doing and suffering injustice must be based upon the following considerations.

On the one hand, to what extent will the threatened injustice to be

suffered injure me in a way that will seriously impede my pursuit of happiness? On the other hand, faced with the choice between committing injustice in this one instance or suffering serious injury by refusing to act unjustly, can I commit this one act of injustice without losing my moral virtue? The answer to this latter question is yes. Moral virtue is an habitual disposition to act in morally correct ways, and that habit of right choice and right conduct is neither formed by a single right choice and action, nor destroyed by a single wrong one.

It follows, therefore, that it may be clearly preferable, in certain instances, to do injustice, if doing it, in the particular instance, is the only way one can avoid serious injury as a consequence of suffering injustice at the hands of others.

G

One final remark, even if it must be brief and, therefore, not fully explained.

I said at the beginning that liberty, equality, and justice constitute one triad of great ideas. The other, and even more basic, triad is truth, goodness, and beauty.

I hope it has become apparent from the foregoing treatment of liberty, equality, and justice that an adequate account of these three important ideas ultimately rests on an adequate theory of the good. And an adequate theory of the good, I would like to add, rests on an adequate account of truth—an account that explains the truth of prescriptive statements about what ought or ought not to be done and sought, as well as the truth of descriptive statements about what does or does not exist. 

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