

Fall 9-1-1965

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Recommended Citation

Arthur L. Goodhart, *Is Our Law Just?*, 22 Wash. & Lee L. Rev. 169 (1965),
<https://scholarlycommons.law.wlu.edu/wlulr/vol22/iss2/2>

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Washington and Lee Law Review

Member of the Southern Law Review Conference

Volume XXII

Fall 1965

Number 2

IS OUR LAW JUST?*

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The other day during a jurisprudence seminar I was asked: "Do you think that our law is just?" Fortunately the question came at the end of the hour, so that I was able to say that I would answer it when we next met. By that time I had two answers ready. The only difficulty was that they were in complete conflict with each other. Perhaps when I get to the end of this lecture you will agree with me that the real trouble lay more in the question than in the answers, as happens so often in examinations. The student may have been taught all the answers, but his quandary is to fit them to the question that he has been asked.

My first answer was a definite affirmative. Our law will not make sense unless it is just. It is possible to conceive of a system of law whose purpose it would be to achieve injustice, but that cannot be true in a political system such as ours, in which the people themselves have the final power to determine the rules that will control their actions. Thus, the Fifth Amendment of our constitution provides in part that "no one shall be deprived of life, liberty or property without due process of law," and this has been applied to the States by the Fourteenth Amendment. No other country has ever had a constitution which not only expresses this purpose of justice so clearly, but also attempts to give it life.

This idea, which is a negation of tyranny and arbitrary force, is not a novel one, for it goes back to Magna Carta, which was sealed on the field of Runnymede exactly seven hundred and fifty years ago. Chapter 39 of the Great Charter reads as follows:

*This is the John Randolph Tucker Lecture delivered at the School of Law, Washington and Lee University, on May 1, 1965.

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"No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."

Those words "law of the land" are splendid words; they mean more than the command of an arbitrary ruler who demands obedience from his subjects. They mean those general principles of law which govern the governors themselves. The same idea is expressed in the companion phrase "due process of law." If the legislature or the executive or the judges themselves act in an unreasonable and unjust manner, contrary to the constitution which gives them their authority, then their acts will have no legal validity.

This same idea was expressed by the greatest Englishman in all English history, Winston Churchill, in his characteristically vivid way. In 1900, when he was twenty-six years old, he resigned from the army and was elected a Member of Parliament; he also wrote a novel entitled *Savrola: A Tale of the Revolution in Laurania*. The hero, Savrola, who believes in democracy, persuades the people to oppose the dictator, who was originally a general. A revolution breaks out, and in the end the dictator is overthrown. Freedom is restored to Laurania.

The most interesting part of the book is an early conversation in a garden between Savrola and Lucile, the wife of the dictator, with whom Savrola is in love. She tries to persuade him to give up his campaign against her husband. It is an unusual conversation for the beginning of a love affair because they discuss the theory of evolution as applied to man and to society, the nature of God, and whether mathematical principles are of general application. It is the foundation of society that chiefly concerns Savrola. He explains it to an enraptured Lucile as follows:

"When the human race was emerging from the darkness of its origin . . . there was no idea of justice, honesty or virtue, only the motive power which we may call the 'will to live.' Then perhaps it was a minor peculiarity of some of these early ancestors of man to combine in twos and threes for their mutual protection. . . . By natural selection only the combinations survived. Thus man became a social animal. Gradually the little societies became larger ones. From families to tribes, and from tribes to nations the species advanced, always finding that the better they combined, the better they succeeded. Now on what did this system of alliance depend? It depended on the members keeping faith with each other, on the practice of honesty . . . and justice. . . ."

The qualities that enable men to co-operate are a sense of justice and a sense of duty. The rules through which this co-operation is brought about is the law. Later when leading the revolution Savrola shows respect for the laws of his country. He says:

"I discharge a duty to the human species in breaking down a military despotism. I do not like to see a government supported only by bayonets: it is an anachronism."

It is interesting to remember that in the last war the dictators against whom Churchill himself fought were an anachronism, and, like Savrola, he defeated them.

I think that Churchill may have been over-optimistic concerning the human sense of justice and high-mindedness, but I am certain that he was right when describing the principles on which our Anglo-American polity has been based. It could not survive if law and justice were not regarded as being two parts of a single whole. It is right, therefore, to say that our law is just because it seeks to achieve justice for all those who are governed by it.

The second answer to my question is, as I have said, the exact opposite. It says: Of course our law is unjust, because however hard we may try we can never achieve complete justice. There are three reasons why there is this fundamental dichotomy between law and justice.

The first reason is that law consists of general rules of conduct and not of individual commands. Its value consists in its certainty and foreseeability. It is a guide post which enables us to direct our conduct, but a guide post that swings from north to south and from east to west would be useless. There is, therefore, something to be said for the Laws of the Medes and Persians that never changed. But, unfortunately, the circumstances to which our laws relate are continually changing so that a law which is just today may prove to be unjust tomorrow. Thomas Jefferson expressed this view, perhaps in an extreme form, when he said that, as "the earth belongs in usufruct to the living," we must not be governed by the laws of our predecessors. "Every constitution, then, and every law, naturally expires at the end of nineteen years. If it be enforced longer, it is an act of force and not of right." Professor Dumas Malone, in his classic life of Jefferson, has said that "Madison's perspicuous mind detected flaws in the logic of Jefferson's thesis," but even those who are much less perspicacious than Madison may feel that there is something wrong in this view somewhere. Perhaps the answer is that the necessary rigidity of the law and the inevitable fluidity of circumstances

are bound to lead to injustice from time to time, but it would be inconvenient and impractical always to be revising the law. This does not mean that we must placidly accept the injustice on the ground that the law is what it is; on the other hand we cannot continually be altering the law without losing all sense of direction in our lives.

The second reason for the distinction between law and justice is that law establishes a general rule while justice is concerned with the individual case. When we speak of legal justice we mean that the same rule should apply to all persons without regard to personal considerations, but this is only an aspect of justice in its general applicability. Thus, it has been said with pride that our law is the same for the rich and the poor, but this may mean that both have the same right to dine at the Ritz Hotel if they can afford to pay for it. Even if the law attempts to meet this problem by dividing persons into separate classes, based on rational grounds of distinction, there still may be a conflict between law and justice because no two persons are identical. It is for this reason that most legal systems have provided some method by which the rigidity of the legal rules may be avoided in the interest of individual justice in certain circumstances. That was the foundation of English equity; the petitioners implored the King to set aside the law "for the love of God and in the name of justice." We find this same application of equity, which is just another name for justice, in Section 2 subsection 302 of the recent Uniform Commercial Code which provides in part that: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . . ." In many of the modern civil-law codes on the Continent we find a similar equitable principle in the doctrine of "abus de droit." This has not proved to be universally popular because some critics have argued that by leaving too much to the discretion of the judge, the binding quality of the law, which is one of its essential characteristics, has been undermined. This is always a danger when the judge is overly concerned with the justice of the individual case that he is trying; he may forget the saying that "hard cases make bad law." This does not mean that the legal profession should disregard hard cases on the excuse that the law cannot be a respecter of persons, because if hard cases tend to recur too frequently, then this is strong evidence that the existing law is bad. In such circumstances, the proper course is to amend the law, and not to disregard it.

The third reason why it is impossible to identify law with justice

is that we do not know what justice is. It is not difficult to define State law as obligatory rules of conduct that are recognized and enforced by the courts, but how are we to define "justice"? I am not an enthusiastic adherent of the modern Oxford analytical school of philosophy, but there was, I thought, some sense in a course of lectures which I once attended on the subject of justice. In the first eight lectures the professor proved that we cannot define the term "justice," and in the last four he showed that, even if we could define it, the definition would be of no practical value. In spite of this pessimistic approach, I feel that I must at least suggest two synonyms for "justice": they are "what is reasonable" and "what is fair" in the circumstances of the particular case. This, of course, does not get us very far, but it does suggest that a sense of justice is not merely an expression of an emotion.

The sense of justice must be based, if it is to have any value, on three things which it may be far from easy to establish. The first is a correct determination of the facts which are under consideration. It is here that the greatest difficulty usually arises because in many debates concerning what is just we find that the disputants are not in agreement in regard to the basic premises. They are not arguing about the same thing. This, not surprisingly, leads to a certain amount of confusion. That is why it has been said that the first rule for all debates is "Define your terms."

The second problem is to draw the correct conclusions from the basic facts. This is really the legal method, because all trials are concerned with the evidence presented to the court and the conclusion that it bases on them. But there is always the danger that we may assume that one thing has caused another when they have merely coincided in time or in place. The judge who orders a man to be hanged because he has been found with a bloody dagger in his hand and a corpse at his feet may have jumped too rapidly to the wrong conclusion. Fortunately, the modern detective story with its misleading clues has taught us to guard against this error, but it still remains a dangerous one. This is its special danger in the field of law. Herbert Spencer, the famous Victorian political philosopher, who believed passionately in the doctrine of *laissez-faire*, taught that poor people were poor because they were listless and had not enough ambition to get a proper education. His conclusion was that they ought to be allowed to die so that the nation as a whole would gain from "the survival of the fittest." It does not seem to have occurred to him that if the poor were sufficiently fed and had better living conditions then their listlessness might disappear.

The third thing is the most uncertain of all, because it may involve evaluation of conflicting values. This must be in large part a subjective problem because there may be no objective test that can be applied. Take the stock problem: Would it be right to sacrifice a human life so as to save the Mona Lisa? An artist might take one view, while the mother of the person to be sacrificed would almost certainly take another. Very few of the men whom we may regard as unjust think of themselves in such a way. Strange as it may seem to you and to me, they may even regard us as being unreasonable. This often irritates the young with the old.

But although pessimists may be able to prove that reason, or its synonym "justice," are but fallible guides in our approach to the law, these are better than arbitrary force. May I refer again to Winston Churchill's dislike of bayonets as a foundation for law. You may remember the saying that "you can do anything with bayonets except to sit on them." But we in the Anglo-American world would like to be able to sit down. It is a happy principle of our system of government that a man's home is his castle because he cannot be disturbed there. It is a sad commentary on our modern life that sitting down, which used to be such a pleasant avocation for most of us, has now become a gesture of defiance.

This reason, which we prefer to bayonets, may not always be a trusty guide when we are faced with novel problems in a changing world, but I believe that experience has shown that certain things are essential if we are to say that our law is just. If in what I am about to say I suggest that in some regards our legal system in the United States has fallen short in its attainment of some of these things, I hope that you will not regard this as a criticism of our system as a whole. It is said that newspapers have found bad news more dramatic than good news: the same may be true of a lecturer who has to deal with such an arid subject as the legal process; he hopes to find something that will interest his audience.

I do not think that anyone would question the view that a fair trial, both in the civil and in the criminal courts, is the most essential feature of legal justice. It is important not only in itself, but also because of its effect on the sense of law-abidingness of the people as a whole. It is held in public, and it is dramatic as no other part of the legal system is. It is for most men the symbol of justice.

It is strange, therefore, that until the last few years so little attention has been given to the fair trial, both by the bar and by the academic profession. It was first emphasized by Roscoe Pound in

his never-to-be-forgotten address entitled *The Causes of Popular Dissatisfaction with the Administration of Justice* to the American Bar Association in 1906, but nearly a generation passed before its importance was recognized. Even today the man in the street regards an unfair trial with a certain attitude of toleration as if it were an unavoidable mischance. Fortunately, this attitude is changing, and a new spirit is abroad. I believe that in another generation or two some of the court scenes which are now depicted in American films will be regarded with disbelief by our descendants.

It is our proud claim that, as John Adams said, ours is a government of laws and not of men, but this is misleading because both government and the law have to be administered by men. No legal system is ever good on paper; its virtue only appears when it is put into force. Perhaps it is because we forget this that we have paid comparatively little attention to the parts played by the three major participants in the legal trial: the judge, the lawyers, and the jury. On them will depend the answer whether it is a fair trial or not. It was Aristotle who said that the judge was more important than the law.

It would be possible to fill a volume with quotations from foreign books in which the just judge is praised and his authority extolled. In the Book of Common Prayer it is said that "God is a righteous judge, strong and patient." It is as a judge that He is most often pictured. These qualities of righteousness, strength and patience are the ones that are ascribed to the ideal human judge. Edmund Burke, one of the greatest of English political philosophers, speaks with admiration of "the cold neutrality of an impartial judge." On the other hand, the judge who has failed to fulfil the trust that has been placed in him is held up for special obloquy. One of the chief villains of English history is Lord Chief Justice Jeffreys, because he was brutal and unfair in the conduct of some of the treason trials after the Monmouth Rebellion.

It is only in the United States that judges seem to have been held in less public esteem. This feeling may owe its origin to the interesting fact that the provisions of the Act of Settlement, 1701, relating to the life tenure of judicial office, did not apply to the colonies. One of the major grievances against George III in the Declaration of Independence was that "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Sixty years later, the egalitarian doctrine, introduced by President Andrew Jackson, that anyone could fill the judicial office

did not enhance the reputation of the judges, nor did the history of the courts during and after the Civil War period suggest that impartiality was an unfailing judicial virtue. It is only in recent years that we have begun to realize how important is the role that the judge must play in the life of any country.

From the judge we must turn to the jury, which is the second branch of the trial court. The famous Constitution of Virginia adopted on June 12, 1776, provided in Section 8 that in all criminal prosecutions a man has a right to demand "a speedy trial by an impartial jury of twelve men of his vicinage," and in Section 11 it states that "the ancient trial by jury is preferable to any other, and should be held sacred. If a jury is not impartial, then, as Lord Chief Justice Denman said in his judgment in *O'Connell v. The Queen*, (1844) "trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery and a snare." Jury service may therefore be regarded as a citizen's primary duty. Unfortunately, at the present time, an increasing number of responsible people succeed in evading it. I have heard a man denounce the maladministration of justice in his city at one moment, and then, a minute later, say that he would never waste his time sitting on a jury. Perhaps the growing sense of public duty which many of the younger people seem to feel today may lead to a most necessary improvement.

The relationship between the judge and the trial jury is a most interesting one. It was the judges who, beginning in the thirteenth century, gradually developed the trial jury so that it could assist them in the administration of justice, but it was not until *Bushel's case* in 1670 that the principle was established that in reaching its verdict, the jury must be completely independent, and that it could not thereafter be punished, however unreasonable or arbitrary its verdict might have been. The facts were as follows: William Penn and William Mead, who were Quakers, preached to the people in the open street. They were indicted at the Old Bailey for preaching to "an unlawful, seditious and riotous assembly." In spite of the trial judge's instructions to convict, the jury brought in a verdict of "Not guilty." The jurors were then fined and imprisoned. Thereafter they brought an action (one of the jurors being named Bushel) before the Court of Common Pleas, when all the twelve judges declared their imprisonment to be illegal.

It has, however, always been accepted in the English courts that as the jury is composed of persons who have probably had little experience in weighing evidence, it is proper for the judge, in addi-

tion to directing them concerning the law, to give them some guidance by commenting on the evidence, while reminding them that the final verdict is entirely theirs. I understand that a similar practice is valid in the Federal Courts, but that it is constitutionally forbidden in most of the State Courts. This is probably due to the distrust of the judges that was felt for so many years; it is also a reflection on the independence of mind of the jurors, which is the main justification of the jury system. There are two strong arguments in favor of a trial jury. The first is that the public still feel that the jury, having regard to the possibly divergent view of its members, is less likely to be prejudiced than a single judge might be; and the second, and more compelling, argument is that the jury can contribute that element of human justice which the strict law does not recognize. These are, I believe, strong reasons, but there is sometimes the danger that the jury may be prejudiced, or that it may not have understood the facts. In such cases, the summing up by the trial judge, in which the jury is reminded of its "sacred" duty to be impartial, may prove to be persuasive if the jury is doubtful what it should do.

What I have said is relevant particularly to the jury in a criminal case. Different considerations may govern in civil cases. It may, therefore, be of interest to point out that in Great Britain juries have been abolished in almost all civil cases except in those where the character and reputation of one or other of the parties is at stake, e.g., in cases involving fraud or immorality. This has undoubtedly led to a large saving both in time and in costs, and it is also believed by many members of the bar to have resulted in more reasonable decisions.

The third branch of a trial court consists of the lawyers who, it must not be forgotten, are officers of the court. It is for this reason that the powers of discipline and control are given to the judges. Lawyers, of course, are public servants, but they are more than this,—they are members of a great and learned profession whose history and traditions reach back for more than six hundred years. Thus, it has been said that an advocate must fight with the sword of justice in his hand, but not with the dagger of the assassin. He ought to be courageous, honest and capable. He must be courageous in being prepared to defend those who need his help, even though this may be misunderstood by some members of the public. It is inconceivable that a doctor would refuse his aid to a man threatened with death, however despicable the latter's character might be; why should not the same standard be applied to the lawyer? He must also be honest both in his own statements to the court and in regard to the introduction

of evidence which he knows is false. It does not follow from this that he must vouch for the truthfulness of his clients and their witnesses; if this were a requirement, then there would be few lawyers left at the bar. It has always been exceedingly difficult to draw a clear line between what is fair practice and what is not, but perhaps it can be said that a lawyer must not deliberately assist in introducing evidence that he knows is perjured. It is of interest that in England the courts have demanded a higher standard from those who prosecute in criminal cases, because in a criminal case all those connected with the trial are, as officers of the court, under a duty to guard against the conviction of an innocent man. The prosecutor can present his evidence to the jury in its most favorable light, but he must not deliberately misrepresent it; nor, and this is most important, must he hide from the defense any evidence that might help the accused, because in doing so he might be responsible for a miscarriage of justice.

In regard to the need for capability on the part of the lawyer, all that it is necessary to say is that his is a learned profession so that he must have the standard amount of knowledge.

It is, as I have said, difficult in many cases, and impossible in some, for the courts to deal with all the problems of legal ethics. They concern professional standards and depend in the last analysis on what the profession itself requires. They may be said to be a part of "the common law" of legal ethics, and as such are more effective than are statutory rules. In recent years this common law has developed in a remarkable way, owing particularly to two causes. The first is that national, state, and city bar associations have become of growing importance and now play a leading part in the life of the legal profession. Perhaps I may suggest that their role is not unlike that of the Inns of Court and of the Law Society in England. The second cause is found in the standard that is being set by the law schools. As Mr. Justice Holmes has said, it is their function to teach law in the grand manner. This they have done by emphasizing not only the law itself, but also the standards and ideals of a great and distinguished profession.

So far, I have been talking about the men who are concerned with the law in action because I think that in achieving justice they are more important than the law itself. I, therefore, have time to say only a few words about this law, which can be divided into procedural law and substantive law.

At first sight the law of procedure would seem to have little to do with justice, but in fact it is here that it plays a leading part. In his book *In Quest of Justice*, Professor Harold Potter said:

“The fight for human justice must be on a procedural plane, since procedure may determine how far the truth can come out. . . . It is after all a procedural rule that a man must be heard in his own behalf.”

It was an absurd procedural rule, making a suitor pay for three copies of a document when one would have sufficed, which first caught the attention of Jeremy Bentham one hundred and seventy-five years ago, and started him on a career which made him the greatest law reformer that the common law has ever known. Similarly the maxim “Justice delayed is justice denied” is another illustration of the intimate relationship between procedure and justice. Here again, even more than elsewhere, we seem to be on the upgrade throughout the country. The recent Federal Procedure Rules have set an example which others will follow.

Finally, I must say a few words about the substantive law, but that subject is so vast that I cannot even touch its fringes. It is here that the American law schools have made a great contribution, for there seems to be no point of law that they have not analyzed, characterized, and written an article about. Fortunately, the American Law Institute, one of the most valuable institutions in all legal history, has succeeded in canalizing much of this learning, so that many of the legal rules, which had developed hardening of the arteries, have now been rejuvenated. Here again the relationship between law and justice has in recent years become a close and fruitful one. Two references may illustrate this.

The first illustration comes from the law of contract. During most of the nineteenth century a contract was regarded as a bargain between two parties which must be strictly construed. Each party must have given consideration, because otherwise there would be no bargain. Each party must also see that the terms which he thought were a necessary part of the contract were stated clearly in the contract itself. The morals were those of the market place; If the purchaser had not taken sufficient care to guard his own interests, then “caveat emptor.” Today we have a law which places far more emphasis on justice. We now think in terms of a promise and what it reasonably meant to the promisee. We are approaching the ideal standard that a man’s word must be as good as his bond, although we realize that in a practical world this must not be taken as an absolute standard.

The second illustration comes from the law of tort. In the nineteenth century, the doctrine was that a man need take care not to

injure another only if there were a relationship between them establishing such a duty. If there were no such relationship, then a man could injure another, either intentionally or negligently, without any legal liability. I once received an article for the Law Quarterly Review entitled *Thirty Ways of injuring Another without being held legally liable*, but I did not publish it on the grounds of public policy. Today, as all of us know, this special relationship has become of so little importance that it has become, in Professor Buckland's words, a fifth wheel in the law of tort. We are approaching what has been called the "good neighbor" principle, i.e., we must take reasonable care not to injure others. Here again, the principle is not an absolute one, for the law may consider that in certain circumstances there should be no legal liability.

This same emphasis on justice can be found in our approach to every branch of the law, because we no longer think of it as an esoteric science divorced from the needs of ordinary human life. On the other hand, we do recognize that it is a science and as such has principles of its own. In 1608 King James I told Sir Edward Coke, probably the greatest of all Chief Justices in English history, and the other judges that he wished to judge a case himself. The Chief Justice replied with remarkable courage that "the King cannot take any Cause out of any Courts and give Judgment upon it himself . . . Causes which concern the Life, or Inheritance, or Goods, or Fortunes of his Subjects are not to be decided by natural Reason, but by artificial Reason and Judgment of Law, which requires long Study and Experience before that a Man can attain to the Cognizance of it; and that the Law was the golden Metwand and Measure to try Causes of the Subjects, which protected His Majesty in Safety and Peace." Coke's independence finally brought about his dismissal, but in the long run the law triumphed, as it usually does.

To deal, even inadequately, with such vast subjects as law and justice in a brief hour is obviously an impossible task, but I have some excuse today because I am speaking at the University of Washington and Lee. To all of us George Washington is the symbol of truth and Robert E. Lee is the symbol of honor. Cannot we say that the function of the administration of law is to establish the truth, while the function of justice is to see that that truth is used in an honorable way? The simplest illustration of that is our law of equity: the law says that Whiteacre belongs to A., but justice says that as an honorable man he must use it for the benefit of B. An over-rigid law will lead to injustice, while an uncontrolled justice will lead to chaos. Throughout

this lecture I have suggested that there are no absolute standards that can be applied to the administration of the law and to its substantive rules. The best we can do is to seek to make them as just as possible without destroying that degree of uniformity which is an essential element in the nature of law. It follows that there can be no absolute answer to the question: *Is our law just?* because it posits an impossible ideal. A more reasonable question would have been: *Is our law becoming more just?* To that I can reply with a clear and optimistic "Yes."