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Justice

The usefulness of invoking "justice" as a standard for criticizing law is a matter of everyday observation. If someone claims that a given legislative enactment or judicial decision is unjust, the typical response is not "what do you mean by 'unjust'?" but rather "why do you think it is unjust?" This reflects the fact that most people seem to have a fairly developed sense of injustice, one that they are willing to use as a (presumptively) shared criterion for arguing about statutes or rulings. Although the term "unjust" is surely broad and vaguely contoured, in normal discourse it is not considered vacuous.

Let us first consider the application of "justice" to legislation and later turn to adjudication. Justice is certainly not part of the criterion of validity of legislation. Parliaments are free to enact laws of their own choice, although many states require that the statutes comport with the state's constitution. Constitutions do not contain a "justice clause" that would serve to invalidate laws that are not just; to have such a clause would be to make the judiciary into a super-legislature (for it would be the task of the judiciary to determine which laws are just). Hence the test of constitutionality of a statute is not a justice test.

To be sure, under Blackstone's conception of law, there are certain kinds of legislative enactments that are so blatantly unjust that Blackstone would deny them the status of "law," such as laws that command people to do the impossible. But Blackstone's conception with its overtones of natural law has not survived to the modern era. Today, any law enacted by the legislature is a "law," leaving the citizenry with the limited choice of either criticizing a given statute as unjust or opposing the reelection of the legislators who enacted it.

Since legislation is primarily devoted to the general allocation of valued goods in a society, "justice" is an appropriate critique of such legislation. For as David Hume pointed out, claims of justice arise because of the competition for scarce goods in a society. In evaluating particular statutes, we are operating within the general rubric of "distributive justice." But political theorists and moral philosophers through the ages have painted with a broader brush. They have attempted to consider the most general types of legislative allocations that would spell out the structure of a just society. Plato would assign people to permanent stations in life according to their natural talents as ascertained in their childhood. The immobile, stratified society of Plato's *Republic* may strike some observers as just, as Plato intended, and others as the opposite of justice--Karl Popper called it totalitarian. In the nineteenth century, Henry Sidgwick claimed that a just society would give each person what she deserved. Her just deserts might be measured by her moral virtue, her productive efforts, her capacities, and so on. In the same century, Karl Marx allocated social goods to each person "according to his needs." However, Ayn Rand, among others, effectively showed that measurements based on desert or need would have to be carried out by governing bureaucrats who would have neither the perspicacity nor the empathy for fair measurement, and hence would employ subjective criteria that would attract partisan influence if not corruption.

John Rawls in 1971 argued, contrary to Plato, that in a just society everyone should have equal opportunity to be considered for all jobs and government positions. In what he termed "the difference principle," Rawls prescribed the redistribution of society's goods by taxing the wealthiest persons just to the point where their continued productivity will remain motivated, and redistributing the taxed wealth to society's poorest persons. To some extent, Rawls' position is reflected in the "progressive income tax" policy of some states. John Stuart Mill had argued in the nineteenth century that a flat percentage rate tax was required by justice: the poor and rich man alike would be assessed, say, a 15% tax on income. A

progressive income tax, in contrast, might assess the poor man 10% and the rich man 20%. This progressivity would result in a "transfer payment" from rich to poor, much the same as Rawls' "difference principle." (There is in a sense a transfer payment under Mill's scheme as well, because the rich person pays more dollars to the govermnent than the poor person. However, Mill argued that since the govermnent protects everyone's assets--internally through the legal system and externally through the army--the rich person, having more assets to be protected, should pay more dollars to the govermnent.) In certain present-day societies where the caste system or where second-class citizenship for women operate to make it impossible for a large group of people to become wealthy by their own efforts, Rawls' redistribution system might well serve the interests of aggregate justice by compensating the permanently poor groups. But in societies where people have (relatively) equal access to economic betterment, John Stuart Mill's system might seem more just. Otherwise, those people who worked hard will be taxed in order to support those who are poor because they have chosen not to work hard. To be sure, there are some people with physical or mental disabilities who may have wanted to work hard but were unable to do so. Fairness arguably requires taxing the more fortunate persons in society in order to help the handicapped (although Nietzsche would have disagreed). But disabled persons aside, Rawls' "difference principle" has seemed to some observers to be an unjust recipe for penalizing productivity and rewarding laziness.

While questions such as whether a flat tax or a progressive tax is more just may never be finally settled, there is a certain utility in discussing such questions in terms of justice, if only because it steers the debate toward foundational issues. A similar payoff can result from critiques of judicial decisions in terms of justice. Nearly every writer agrees that justice is a goal of law, and that law should strive to attain justice. Yet when it comes to particular cases, the widespread acceptance of positivism in twentieth century jurisprudence has led to great skepticism about whether justice should be a concern of the practicing lawyer. Hans Kelsen has attacked "justice" arguments as supererogatory, because justice in the courtroom consists precisely in applying legal rules to the facts of a case. Kelsen argued that there is no such thing as justice apart from strict adherence to the rules of law. Kelsen was of course aware that a given rule of law itself could be said to be unjust, but relegated such contentions to the spheres of religion and social metaphysics. The point was made more colloquially decades ago in a first-year class at the Harvard Law School. A student asked, "But sir, is that just?" and the professor replied, "If it's justice you're looking for, you should have gone to divinity school."

However, on the issue of the place of justice in the law, positivist theory seems fatally incomplete for the reason that strict adherence to the rules of law--Kelsen's prescription for legal justice--is only possible if one is given a set of rules and instructions for applying them to a fixed set of facts. The fact is that in nearly every contested case opposing lawyers will challenge the applicability to the facts of a given set of legal rules, the uncertainty as to what the facts are, and the question of which particular rules should be chosen from among many relevant statutes and precedents. Hence the judge or other decision-maker has three tasks: what legal rules to adopt, what version of the facts to apply the rules to, and whether those rules are indeed applicable. None of these questions can be decided mechanically or by resort to the command of the legislature (which itself would have to be "interpreted"). As a result, most judges make their choices by considering what, in the circumstances, would be most fair and most just to the contesting parties. In this way, justice becomes part of nearly every case (excluding only the distinct minority of cases where the judge, for reasons of politics or personal interest, decides to ignore justice).

The argument that justice is part of the law--and not simply a commentary upon the law--is an unintended consequence of positivism. Positivists have managed to convince most legal observers and practitioners that rules of law have no necessary moral content, that rules are merely the whims of legislators or judges issued in the form of commands. In brief, rules of law are facts, not values. This does not mean that legal

rules can be ignored; they must be, and are, taken into account in every case because they form part of the topography of the case. But getting from the rules to a decision involves taking a normative step. The judge must decide which party, in light of the legal rules and facts and all the other circumstances, ought to win. Since the rules of law are themselves value-free, they cannot give rise to an "ought." Hence, the "ought" must be superimposed by the judge upon the rules of law and the facts of the case. Thus, by performing the (useful) theoretical work of stripping all value from rules of law, positivism has in effect invited justice to play a necessary role in all judicial decision-making.

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Anthony D'Amato