“The Tragedy of Justice”

Charles I. Stone Professorship: Installation Lecture
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I

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Colleagues, friends, present & former students in audience.
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II

Before I begin my lecture proper, permit me one or two personal remarks that may help put what I will be saying into context.

When I arrived at this law school more than twenty-one years ago, I began, and was privileged to begin, a long and difficult journey of the mind and the heart that continues to this day and that, I hope, will continue until the day I die.

As I have experienced it, this journey has been ceaseless and often harrowing. I have tried to squeeze the universe into a ball, as T.S. Eliot puts it, and roll it towards an “overwhelming question.”

I have found no answers to my question that have been any more than just temporary expedients.

All of my writings and all of my lectures have been efforts to say the very best of what lies in me to say about the world as I see it at that point of time – albeit dimly as through a looking glass, as the saying goes.

And so it is too with today’s lecture, which I have entitled “the tragedy of justice”.

This title scandalises one of humanity’s highest aspirations – the yearning for justice – by putting it together with a more or less depressing word that the word “justice” is not used to associating with: namely, “tragedy”.

A tragedy is what happens when, despite your best intentions and all of your careful planning, something bad happens in addition to whatever good that happens.
A tragedy is when the beautiful ends you seek are polluted, in whole or in part, by the consequences of the means you use to achieve them.

I will now try to summarise the most important thing I have learned about the nature of law and justice after studying them and thinking about them for nearly 40 years.

III

A

Albert Einstein once said that we must learn to see the world anew. What is true in this case for physics is also true for law. Today I would like to take a new look at the reciprocal relations that link human suffering to law and justice, and law and justice to human suffering. My lecture concerns both the limits of the idea of just law and the potential limitlessness of our individual responsibility for the legalised suffering of others.

For the next few minutes, at least, I will accept no comfort from the conventional claim that the rule of law is ultimately progressive – that given enough time the law (if only it is leavened with a sufficient portion of ‘human rights’) will work itself pure. I also suspend, at least temporarily, all belief in the prospect of a glorious justice-to-come that would somehow redeem the long, sordid history of legalised inter-human violence.

The dead cannot be made un-dead; the hungry, the homeless and the oppressed will always have been hungry, homeless or oppressed no matter how much their condition may improve; a tear that falls once will have fallen for all eternity.

Of course, to believe in these existential truisms too much can lead to a morbid obsession with the past, which is why Holocaust survivor Elie Wiesel has conceded that for people like him there can be such a thing as ‘too many memories’. But to believe in them too little is also dangerous, for it lets us think that we can accomplish the impossible. It lets us believe that we can take flight from a present that will never depart and find refuge in a future that will never arrive.

I seek to confront the tragic aspects of law and justice without blinking or equivocating, on the ground that the human world is, or should be, a sort of fellowship of sadness. I wonder, for example, whether Solon’s laws and the golden age of Athenian democracy they enabled were worth the blood and tears of even a single Greek slave.

As I see it, intellectual honesty, not to mention a decent regard for the mutilated humanity of history’s many losers, requires me to think this sort of question down to its roots. For I have learned from experience the lesson of Ecclesiastes: “In much wisdom there is much grief, and he that increaseth knowledge increaseth sorrow”.

B

To accomplish this task, I must steadfastly maintain my autonomy from the usual ways of discussing the political and moral dimensions of law and justice. The reason is plain:
conventional discourse represses the fundamental fact that all human beings experience suffering in one form or another. It does this in order to explain or justify why legal institutions respond only to certain kinds of suffering, while at the same time ignoring, tolerating and even inflicting other kinds.

The resulting oblivion to so-called ‘necessary’ suffering runs deep.

For example, the law’s readiness to protect by force what it calls ‘mine’ can, in any given case, make the overall situation it calls ‘yours’ into a living hell, as when a loving parent loses a child in a bitter custody dispute, or a petty thief serves time in a prison where the authorities accept inmate rape as a fact of life.

The point is not that the rule of law produces no positive results in people’s lives, or even that its costs in terms of human suffering outweigh its benefits to society. The point is that thinking about law solely in terms of its benefits, or in terms of weighing its hypothetical benefits against its hypothetical costs, is an ethical evasion.

For one thing, no honest and responsible weighing of pain against gain is possible unless one understands the full measure of what is being weighed. This means that any respectable would-be balancer must first undertake a long and emotionally difficult investigation of the dark and sorrowful side of human experience, where bucketfuls of tears – including ‘the tears that a civil servant cannot see’ (Levinas) – fall every hour of every day.

Even more importantly, the usual weighing-and-balancing way of proceeding elevates the justification of abstract legal arrangements into the only problem worth thinking about in legal studies. Those who walk this path do not pause to consider the possibility that they, along with everyone else, might be personally responsible for what happens (and does not happen) in the real world each and every time they exercise a legal privilege, enforce a legal right or obey a legal duty.

In short, thinkers who obsess about law’s (or a law’s) abstract justifications fail to ask a question that is as disquieting as it is simple: What if Louis XIV was right and the law is not primarily an ‘it’, a ‘them’ or even a ‘we’, but rather in each case a ‘me’?

Take human rights. As Emmanuel Levinas observes, any attempt to fully specify or realise human rights involves reason in a persistent contradiction, since ‘the freedom of the individual is inconceivable without economic liberation, but the organisation of economic freedom is not possible without the temporary but temporarily unlimited enslavement of the individual’.

Recalling Anatole France’s famous aphorism about how the law, in all its majestic equality, forbids rich and poor alike from sleeping under the bridges, begging in the streets, and stealing bread, we might define genuine economic liberation as actually having the ability (and not just the formal legal opportunity) to satisfy one’s basic human needs and wants. This is certainly what Levinas had in mind in claiming that individual
freedom is inconceivable without economic liberation. But if this is so, what does he mean by ‘enslavement of the individual’?

Apart from the many regrettable (and regrettably persistent) instances of tyranny and injustice in the world, is not humankind as a whole freer and more prosperous today than it has ever been in recorded history?

It is certainly true that a triumphant and hypercompetitive global capitalism delivers the goods, however unevenly and however much cultural and environmental destruction it may cause along the way. But all of this is possible only because legions of politicians, lawyers, judges, government bureaucrats, police officers, and corporate property owners rigorously enforce a worldwide regime of interlocking property rights, and because the masses are conditioned to accept the existing social world, and their situation within it, as both natural and inevitable.

Marx, from whom we still have much to learn despite his many political errors, called the foregoing state of affairs ‘estrangement’ or ‘alienation’. This is the process by which the tangible and intangible creations of real individuals, acting cooperatively as social animals, come to dominate their producers as alien forces existing outside of them. Once loosed into the world by the concrete, day-to-day activities of human beings, these forces come to have origins and ends of which their producers remain ignorant, and which seem to pass through a series of phases and stages that are independent of human willing and doing.

A good example of this is when people experience ‘the law’ as a mighty thing that they must approach for justice, hat in hand – a sort of Wizard of Oz – rather than as the always-ongoing and ever-changing creation of particular human hands in particular situations.

Although every known politically realised Marxism has proven to be a disastrous failure, there is no question that Karl Marx the philosopher got it right in his analysis of how strangers, and even acquaintances, are forced to relate to one another in most of the world today. Refracted through the omnipresent lens of property, each individual appears, to himself and others, as the owner of a particular quantum of ‘human capital’: an exchange value that can be bought and sold as a commodity, a ‘human resource’, and that must be so alienated if the individual wishes to achieve social recognition.

In such an environment, the principle of ‘performance’ has come to hold complete sway over the organisation of economic liberation. The performance principle is the belief that ‘everyone has to earn a living in alienating but socially necessary performances, and one’s reward, one’s status in society will be determined by this performance’ (Marcuse). In general, this means that you are only what you can earn.

Gone or repressed is the old secular dream of achieving universal human liberation in two related but distinct spheres: freedom from natural necessity (the struggle for material subsistence) and freedom from social necessity (the domination of man by man).
Nowadays Marx’s faith in the possibility of realising a social utopia in which everyone ‘will revolve about himself as his own true sun’ appears hopelessly naïve (at best) to those who accept or acquiesce in the performance principle as if it were the first law of nature.

Making economic power relations appear not only as relationships between things but also as the very rule of rationality itself, the performance principle assures that even the citizens of prosperous Western democracies feel the need to keep on labouring for the Man, chained to their desks or their shovels, no matter how much (or little) they earn or how many (or few) goods they own.

Thus, the metaphor of economic enslavement is not just applicable to the poorest of the world’s poor, millions of whom really are held and trafficked as slaves, and all of whom know they must toil from dawn to dusk in order to live. The typical middle class consumer also shuffles along the workhouse treadmill, living in order to work, working in order to consume.

Beyond all that is merely metaphorical about the economic enslavement of which I speak, consider the paradox presented by two recent criminal cases involving desperate defendants who sought to achieve not economic liberation but sheer economic survival. In the fall of 2006, a 62-year-old Ohioan by the name of Timothy Bowers found himself out of work and unable to find a steady job. Worried about how he would make it through the next few years until he became eligible for Social Security, Bowers came up with a plan: he would rob a bank, hand the money to a guard and wait for the police to arrest him. And this is exactly what he did, in the hope of being sentenced to prison: at least there his basic needs for food, shelter and medical care would be met. Bowers pled guilty and told the judge that a three-year prison sentence would suit him just fine; whereupon the judge obliged him.

Victor Lopez, a homeless man from San Diego, had a similar idea. In November of 2002, he robbed a gas station at knifepoint and then told the clerk to call the police; Lopez, who had no criminal record before his arrest, figured that a stay in jail was better than living on the streets during the winter. But the district attorney’s office refused to prosecute him, saying: ‘His intent was to get arrested, not to steal’.

Impose the lesser misery of a prison cell or impose the greater misery of poverty on the outside: this was the choice that the rule of law had constructed for itself in these cases.

Modern American law could not really punish them for what they had done, since the lesser pain of imprisonment was exactly what they wanted and sought for reasons having nothing to do with atonement. On the other hand, if the law chose to return them to the streets it would also not be responsible even if they died, since their degraded condition on the outside was not the law’s ‘fault’.
Theirs was a life that the law could choose merely to tolerate, in prison, or to exile to skid row, where it would be vulnerable to extinction by un-punishable ‘natural causes’.

But the real significance of these cases is not limited to the question of their empirical frequency in America and elsewhere. Rather, they are emblematic of a much deeper issue: they point towards a simple but profound ontological truth about the nature of law and justice as such. Although it escapes popular notice, the most basic and tangible task performed by the agents of law and justice is to divide the vast realm of universal human suffering into parts: the legal and the illegal, the just and the unjust, the inevitable and the avoidable, and so forth.

One way or another, law as such divides and imposes suffering regardless of the type of regime it serves. This is not to say that all political forms are equal, normatively speaking – only that every political arrangement in history has relied, to some degree or other, on legal operations to accomplish its goals.

*Tyranny* and *oligarchy* legally divide and impose suffering to benefit those who rule; *theocracy* legally divides and imposes suffering to enact what it takes to be God’s *commands*; *totalitarianism* legally divides and imposes suffering to achieve total *control over the minds and bodies of the masses*; *liberal democracy* legally divides and imposes suffering to let the clever and the lucky achieve social and economic *domination over the mediocre and the unlucky*.

What is more, unless they happen to find themselves bearing the brunt of law’s operations, most people overlook the large extent to which legal agents participate in what Max Weber calls ‘the tragedy with which all action, but especially political action, is truly interwoven’.

Today I challenge this indifference: I want to look the tragic effects of law and justice squarely in the face, so to speak, before the political and academic mavens of law and justice have begun to categorise and rationalise them.

Understanding is my principal goal, not ‘being useful’ to the pre-existing projects of law and justice. Lessing once asked, ‘What is the use of use?’ His question ought to be asked more often. Being of use to people, working for a just society, and living a morally decent life sound like laudable goals, at least in the abstract, but they also present a dark side: for those who pursue them most ardently, the gloriousness of the ends can, and usually does, obscure the inevitably inglorious consequences of the means.

Terrorism is an obvious case in point. But beyond demonstrating that fanaticism of any type can lead all too easily to the commission of ethical outrages, the case of terrorism is also revealing and significant at a different level.
Commenting on the moral status of terrorist acts, the philosopher Jürgen Habermas recently remarked: ‘Nothing justifies our “making allowances for” the murder or suffering of others for one’s own purposes. Each murder is one to many’. Although this sounds like a fine and noble sentiment, the truth (that is, the whole truth) reveals it to be profoundly disingenuous, just like most other finely expressed sentiments of its type.

Even granting its correctness as applied to a prototypically terrorist act such as the suicide bombing of a bus, it is almost impossible to read Habermas’s statement in a more general way, for all it’s worth, without feeling more than a little embarrassed by it. *Everyone* (and not just terrorists) makes allowances, all the time, for the ‘necessary’ deaths and suffering of other human beings.

To belabour the obvious, we do so every time we approve (or fail to stop) a **lawful execution**, every time we vote to reduce (or fail to demand) **social services for the poor**, and every time we **purchase a fancy steak dinner, a personal computer or a new SUV at prices that would feed a hundred starving strangers for a week, a month or a year**.

More generally, it is clear to anyone willing to *look* that the war zones, prisons, shantytowns, sweatshops, orphanages, bordellos, nursing homes and emergency rooms of the world are filled to overflowing with tattered and damaged people for whom such allowances have been made. Considered from their point of view, every conventional theory of law and justice – however wise, good and globally useful it may appear to those who are less unfortunate – is little more than an elaborate prolegomena to the infliction of pain.

Please do not misunderstand me! The previous remarks are not meant to lay the foundation for what would be a self-righteous (and in my case hypocritical) argument that buying fancy dinners, personal computers and new cars is detestable or immoral behaviour. If everyone stopped buying fancy dinners, computers and cars, unemployment would explode, the suicide rate would increase, and a lot more children would have to cry themselves to sleep from hearing their parents bitterly argue with one another about how to pay the bills.

In short, experience teaches that the legal and political arrangements which human beings adopt always wind up hurting *someone*, no matter how ‘just’ they appear to those who benefit from them or accept them as the least bad alternative.

Is this not the very definition of tragedy: knowing that you’re damned if you do and damned if you don’t?

F

The ancient Stoics defined happiness as the absence of pain and freedom from strong emotion (*apatheia*) rather than the presence of satisfaction, for they knew that human desire, being insatiable, can never be fully satisfied. From this they drew the politically conservative conclusion that people ought to accept things as they are, however degraded
their condition may be, so as to achieve tranquillity of mind (*euthymia*) as their highest good.

Although I feel compelled to reject its shameful tendency to blame the victims of injustice for their own suffering, stoicism does contain at least one mighty truth that is pertinent to our theme. To put this truth in a nutshell: if human beings never felt aggrieved or disappointed by anything they would not need law and justice, for in that case everything would feel fine to them just the way it is, *whatever* it is.

Human beings seem to be habitually unhappy with the way things are, regardless of how they are. We act as if the whole point of existence is to keep on trying to fix a broken world that refuses to stay fixed. In short: whatever the relative merits of their various complaints may be, it is clear that human beings in general are constitutionally inclined to suffer from wanting the world to be different than it is.

In their endless quest for the will-o’-the-wisp of a happiness that abides forever, sufferers frequently appeal to the existing legal order for comfort and assistance, and sometimes they even get a measure of temporary relief from it. This is law’s chief virtue: operating on the ancient premise that man is wolf to man (‘*Homo homini lupus est*’), law’s arrangements socialise individual wolfishness and offers sufferers the opportunity to channel their predations and counter-predations into legally (if not socially) acceptable forms.

Nothing lasts forever, though, and history teaches that people can also come to suffer from existing law itself. Experiencing it as an oppressive burden, they are inclined to call the law unjust and to turn to reality-transcending ideals of justice for comfort. Since the popular virtue associated with suffering is endurance, this is usually all that happens: the oppressed merely cultivate their martyrdom and get on with their unhappy lives, perhaps nurturing a vague hope for redemption at the end of days.

Every now and then, though, reality-transcending ideals of justice manage to find their way into popular movements (whether reformist or revolutionary) to throw off existing law. Indeed, some of these movements actually succeed, at least until the inevitable countermovement sets in.

But universal experience teaches that time’s passage never halts at the bright, shining moment when justice prevails over unjust law. Nor do deep-seated social problems ever magically resolve themselves. A justice that rises triumphant over unjust law no longer can claim to be reality-transcending, for it has succeeded, against all odds, in remaking reality itself. Now it must descend from heaven to earth, where its human champions feel the need to redeem its promises. Justice triumphant over law finds out very quickly that it
must replace revolutionary chaos with a new *nomos*, and anomic freedom with the security of authoritative standards of behaviour.

In a cruel parody of the usual order of things, the brightly coloured butterfly of justice metamorphoses into a drab legal caterpillar: a new legal regime emerges in browns and greys from the chrysalis of radical or revolutionary change.

The inherent insatiability of human desire being what it is, however, it is not long before this new regime begins to evoke the same kinds of feelings and reactions as the old. That is, sometimes people accept the revolutionary gift of new law and appeal to it for comfort and assistance, and other times they feel oppressed by it and resent it; whereupon the process of a butterfly striving to become a caterpillar starts all over again.

The net historical result is what Hegel would call the bad infinity of an endless dialectical loop:

1. Suffering in conditions of anarchy leads to a demand for justice within the law,
2. Justice defined *only* by law leads to suffering,
3. Suffering *from* law leads to the demand for a justice *beyond* the law,
4. This new demand for justice leads to the establishment of new law, and
5. The new law leads to new suffering, thereby starting the process all over again.

Most people today, as always, remain completely oblivious to this dialectical rising and falling of lawmaking and law-preserving violence in history. As Walter Benjamin puts it, each generation sees itself as standing at the high noon of history. Each generation FORGETS TO REMEMBER.

Indeed, for those whose subjectivity is completely absorbed in the normalcy of the existing legal order, the tale of law’s task is one of epic grandeur: a dignified and heroic quest for justice. As storytellers, these people partake in the same reality as the story they tell, and thus have a strong inclination to parrot the law’s official hagiologies. Given the opportunity, they would gladly celebrate ‘Law Day’ every day.

They think that the linguistic signs which express the norms of law and justice generally mean in advance exactly what they receive or interpret them to mean. And if they hear enough legal sheep bleating back the opinion that legal rule X clearly means ‘Y’, these storytellers inevitably follow their herd instincts and go along.

When the time comes to apply their understandings – when they actually lay on the lash in the name of the law – those who love the law usually manage to convince themselves that the ink stains contained in law books are doing all the work, bearing all the responsibility.
One way or another, the quintessential agents of legal violence under the rule of law inwardly celebrate the performance of their legal and moral duties with a lavation symbolising their personal innocence, just as Pontius Pilate is said to have done outwardly when he symbolically washed his hands of Jesus’ blood.

I

In contrast, only those whose subjective sense of life does not correspond to the norm – let’s call them disillusioned outsiders or poorly adjusted insiders – can tell a truly tragic tale about the law’s operations.

Such people are not necessarily gloomy pessimists. Their willingness to confront honestly the tragic aspects of the rule of law stems not from hopelessness but from an inner sense of struggle between what Herbert Marcuse calls ‘the delight of beauty and the horror of politics’.

Politics, in the largest sense of the word, has produced many different kinds of horror over the past hundred years, from brutal wars to terrible famines, from US-sponsored assassinations of democratically elected leaders in Iran and Chile to state-sponsored murders of journalists who dare to report too many facts, from the Armenian genocide to Auschwitz and from Auschwitz to the genocides in Cambodia, Rwanda and Darfur, from the camps of the Gulag to the camps at Guantánamo and Abu Ghraib, from the Tuskegee syphilis experiment to death by lethal injection.

Bertolt Brecht’s poem, A Bad Time for Poetry, somehow manages to capture perfectly the inner struggle between the beauty and the horror of life as lived under the conditions established by modern national and international politics. Making due allowance for the specific historical context in which it was written, the poem distils the essence of this struggle into five enduring lines. In translation they read:

Within me there is a struggle between
The delight about an apple tree in blossom
And the horror about a Hitler speech.
But only the latter
Drives me to my desk.

Although I, too, relish the delight of seeing an apple tree in bloom, I cannot bring myself to talk to you today about that delight or any other. Zakhor (Hebrew for ‘remember’) is the motto (or the curse) that drives me to my desk and brings me to this podium.

The disillusioned outsiders and poorly adjusted insiders of whom I speak realise, at a level deeper than mere knowledge, that a billion tears fall and a million dreams are shattered in the matchless uniqueness of each and every moment. They also fear that ‘so long as the sufferings of a single human being are forgotten there can be no deliverance’ (Löwy).
They suspect that the faithful performance of their legal and moral duties never completely washes the blood off their hands, no matter how much praise they receive for it from the chorus of legal sheep that surround them. In truth, such individuals feel more like Lady Macbeth after Duncan’s murder: for them the smell of blood lingers still.

Today I have tried to speak on behalf of discomfited souls such as these: people who have experienced (or are open to experiencing) a certain degree of ethical rupture between the rule of law as it is officially advertised in liberal societies and life as it is actually lived by our fellow human beings around the globe.

To be sure, these malcontents have learned the most basic lesson of history – that eggs must be broken to make the omelette of any plausible human society. But they also know that broken eggs are capable of speaking up, as Hannah Arendt puts it, in voices they cannot refuse to hear.

On behalf of individuals such as these I have tried this afternoon to offer a perspective that is meant to be insurrectionary without being utopian.

As for what, precisely, this troubled and troubling perspective sees, and whether it can or should demonstrate its ‘usefulness’, for the time being I can only throw myself on your mercy by pleading my favourite two lines from The Love Song of J. Alfred Prufrock: ‘Oh, do not ask, “What is it?” / Let us go and make our visit’.

THANK YOU for listening so patiently to what I have to say.