Commentary: Facts, Law, and Equity

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COMMENTARY
Facts, Law, and Equity†
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In this essay three concepts from our legal system will be discussed—Facts, Law, and Equity. Each concept will be discussed as an illustration of a goal to which the legal system and individual lawyers ought to aspire. It will then be argued that concepts analogous to Facts, Law, and Equity exist that are goals to which the humanities and humanists (i.e., the practitioners of the humanities) ought also to aspire. If the analogies presented are indeed proper analogies, then I believe it is permissible to conclude that the study of law and the legal system should be considered a branch of the humanities and that lawyers should be considered practicing humanists.

Facts and Truth

In any legal dispute, the first task of law and lawyers is to assist in the correct determination of the facts of the incident in dispute. In the American legal system these facts are determined through an adversary process. The following attributes are presumed to exist in a properly functioning adversary system:

Each party to the dispute is represented by competent legal counsel whose obligation is to assist the party to present as fully and clearly as possible the party's version of the disputed incident.

Each party has gathered all the relevant evidence that supports the party's recollection of the disputed incident.

Each party has tried to present this relevant evidence as forcefully and convincingly as possible to the judge or jury, who will make the determination of facts.

The judge or jury, the trier of fact, has listened to all the relevant evidence with an open mind. Once both parties have presented all their evidence, then and only then does it attempt to reconcile the conflicting versions of the disputed incident. After the trier of fact has reconciled the conflicting versions, it reaches a decision of fact that is its statement concerning what the facts of the incident are.

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The goal to which the legal system aspires in determining the facts of a dispute is *truth*. Our legal system assumes that truth is most likely to be reached if the adversary process is used because through that method all evidence has been gathered, all versions of the facts heard, and all versions considered before the rendition of a decision on the facts. Truth is a proper goal of the legal system, for only if truth is attained can the people subject to the legal system have confidence that the system accurately has reflected the incident tried and steadfastly has maintained contact with reality.¹

The legal system's adversarial determination of facts is analogous to the creation of a critical habit of mind through the study of the humanities. These humanistic disciplines are praised because through them the student and the scholar learns to gather all the evidence carefully, to recognize the complexity inherent in all issues, to consider all perspectives on an issue, and to suspend assertion until all evidence has been gathered and all perspectives explored. Only after the exercise of the critical habit of mind does the humanist write history, or literary criticism, or philosophy.

The goal to which the humanistic disciplines aspire with respect to the history, or the literary criticism, or the philosophy that is written also is *truth*. The humanistic disciplines assume that truth will most likely be reached through the critical habit of mind because, if properly exercised, this critical habit of mind will ensure that all evidence has been gathered and all perspectives considered before the assertion of conclusions. Truth is a proper goal of the humanities, for only if truth is sought can those who study the humanities have confidence that they are not being manipulated by propaganda.

Thus it seems that the critical habit of mind fostered by the humanities is desired for precisely the same reasons that the adversary process is desired in our legal system. Both the critical habit of mind and the adversary process are considered the best procedure or best method

¹ I do not claim that the adversary process is the only method through which truth can be ascertained. I am also aware that the adversary process itself has inherent tendencies that impede the proper determination of facts. Specifically, I am aware that the adversary process, by dividing the parties of the dispute into opposing camps, introduces a competitiveness, a partisanship, that may create great pressure to suppress evidence unfavorable to a particular party's interest, or to falsify evidence so as to present a more convincing version of the dispute incident for a particular party.

Despite these inherent tendencies, the attorney must resist pressures to suppress or falsify evidence. If the attorney succumbs to these pressures, then the trial of a particular case simply becomes a charade (complete with fulminations and drama) that cannot and ought not inspire confidence among people or be taken as reflecting the reality of the incident. Truth is then replaced by falsehood.
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by which truth is accurately ascertained. If the analogy is valid, the humanist, exercising critical habits of mind, is engaged in an adversary process with himself while engaged in humanistic research.

Although truth assuredly must be a goal of the legal system and the humanistic disciplines, and therefore must be sought by the individual attorney and humanist, the goal of truth does not distinguish the legal system or humanistic disciplines from other intellectual endeavors. Moreover, I would argue that truth cannot be the sole nor even the primary goal of the legal system or of humanistic disciplines. Let us contrast the legal system and the humanities with the sciences.

Scientific disciplines can be praised because their study creates a critical habit of mind in both the scientist and the students of science. Indeed, the scientific method might be considered the premiere example of the critical habit of mind. Scientists and their students are urged to consider all variables, to perform experiments that isolate the causes of phenomena, to neutralize subjective attitudes, and to draw conclusions only upon the data thereby obtained.

The goal to which the scientific disciplines aspire with respect to the physical world is, again, truth. The scientific disciplines assume that the scientific method will most likely produce truth. Truth is a proper goal of the scientific disciplines, for only by seeking the truth can others have confidence in the predictions concerning reality issuing from the scientific disciplines.

Hence, truth is a goal common to the legal system, the humanities, and the sciences. But, if I understand the sciences correctly, truth—i.e., facts about the physical world—is all that is sought. For the sciences, no goals in addition to truth exist because only descriptive questions—questions about what is—are considered scientific questions. Normative questions—questions about what ought to be valued—are not considered scientific questions and are therefore irrelevant to the scientific endeavor.

The modern era has witnessed such great success through the scientific method that too often the lawyer or the humanist may become convinced that truth should be his only goal too. Although an admirable goal, and one difficult to achieve, truth is not the only goal of the legal system and the humanistic disciplines. Although descriptive questions are crucially important to the law and the humanities, both the legal system and the humanistic disciplines must properly consider the normative questions also. When normative questions are appreciated as relevant, it is then that goals in addition to truth are sighted for the legal system and the humanistic disciplines. Two additional goals now come into view.
In legal disputes, questions of fact are often only one aspect of the dispute between the parties. At times questions of fact are not in dispute at all because the parties to the litigation are agreed concerning the facts of the incident and have entered into a stipulation of facts for the lawsuit. Even after the facts are determined through the adversary process, the parties still dispute the meaning of the facts and the legal conclusions to be drawn from the determined set of facts. The legal system is forced, therefore, to evaluate the facts, and this forced evaluation means that the legal system must necessarily address normative questions. These normative questions about the meaning of the determined facts are characterized in our legal system as questions of law.

Questions of law, it should be stressed, are not merely questions about making judgments concerning which conflicting information or evidence should be believed as true. Questions of law are addressed only after the legal system has determined, as best it can, what the facts are. At that point, questions of law are raised concerning, first, why certain facts should be valued more than others and concerning, second, what meaning should be interpolated from these facts.

In the American legal system these questions of law are also presented through the adversary process. Each party to the dispute is represented by counsel, who argues, first, which authority—constitutional provisions, statutes, decisions, administrative regulations—is applicable to the particular case at hand. The attorneys then argue the interpretation of the authority that best supports the client’s interests. The identification and interpretation of authority is argued to a judge, who has the obligation to decide which authority will be applied and which interpretation of that authority adopted. In this process of choice by the judge, he resolves the questions of law, i.e., the normative questions about the determined facts.

It is assumed that through the adversary process, all applicable authority has been identified and all relevant interpretations of that authority argued to the judge. If the adversary process has worked properly, the judge has heard and read all the reasons for deciding for or against every party to the dispute on the questions of law. Based upon the authority and the interpretations presented, the judge then renders a decision of law that sets forth the judgment of the legal system concerning the correct evaluation of the facts.

I want to emphasize that with regard to questions of law the adversary process is not meant solely to explicate the questions. Arguments of the opposing counsel about questions of law are not meant solely to enhance the judge’s understanding of the questions. Rather, the pur-
pose of the adversary process on questions of law is to facilitate the process of choice that the judge must make on these questions. If this is done properly, the judge is then enabled to render an informed and reasoned judgment that argues and persuades for certain normative evaluations about the determined facts of the particular case.

I stress reasoned judgment because a reasoned judgment avoids two shortcomings that most often infect judgment. On one hand, the obligation to present a reasoned judgment means that the judge cannot simply render a decision on questions of law in any subjective manner that he might personally desire. On the other hand, a reasoned judgment does not exist if the judge simply applies past precedent or statutory words in an unthinking, uncritical, almost mechanical manner. Questions of law demand and deserve reasoned judgment from judges.

Through the rendition of judgments on questions of law, the judge chooses between values. Each judgment rendered is an answer to a normative question about what ought to be valued in a particular set of facts. These judgments on questions of law set forth the principles upon which people will be expected to act. These principles, when considered as a whole, constitute the Law.

The goal toward which the legal system aspires with respect to questions of law is justice. Each judgment, it is hoped, sets forth principles that are fair, right, and good.²

As the legal system has always recognized that beyond questions of fact are normative questions of law, so the humanities have also always recognized that questions about truth give rise to questions about value. Indeed, the humanities are praised and considered unique because these disciplines have always considered normative questions to be relevant questions demanding serious, sustained attention.

Once a historian has accurately depicted the period of society under study, once a literary scholar has correctly sketched the social and literary milieu of a work of literature, once a philosopher has properly defined and logically developed the ideas and concepts under discussion, these humanists must still evaluate the historical, or the literary, or the philosophical facts they have reached. These questions of evaluation are the normative questions—the questions of value—with which the humanistic disciplines are concerned.

The adversarial determination of questions of law in the legal system

² I do not claim that the Law is Justice, nor that any particular judgment is a just one. I do claim, however, that the legal system must aspire to attain justice and that judges must desire to render just judgments. For if the legal system gives up the goal of justice, it will be replaced by the goal of power; if the judge fails to strive to do justice, then the judge will be arbitrary and capricious through the imposition of judicial will. If the aspiration and desire for justice are abandoned, justice will be replaced in the legal system by injustice.
is analogous to the application of critical habits of mind to questions of value in the humanities. When critical habits of mind are turned toward normative questions, the purpose of these habits is not merely to achieve fuller explication or fuller understanding of the factual truths of the discipline. Once the humanist has settled the factual truths, he must still use critical habits of mind to pass judgment upon the historical period, or the literary work, or the philosophical arguments. Humanists must answer the normative questions about what ought to be valued in the results of their research.

It is in the passing of judgment on questions of value that the humanist has a task analogous to the task of the judge who renders judgment on questions of law. And because a judge is not permitted to decide however strikes his fancy, nor permitted to apply prior authority uncritically, so too a humanist must strive to avoid subjective moralizations and narrow parochialism that demeans and oversimplifies the questions of value addressed. These two shortcomings can be avoided if the humanist applies critical habits of mind to the standards of civilization, esthetic and moral, that have been reached through centuries of human experience. Questions of value in the humanities can be answered by reference to the humanistic disciplines themselves, which have attempted, through the centuries, to identify and to analyze the values of mankind.

Using the critical habits of mind, the humanist must explore the standards of civilization applicable to the historical, or the literary, or the philosophical facts being studied. Using the critical habits of mind, the humanist must attempt to interpret those standards so as to reveal all possible meanings that might be contained within the standards. Through this process of critical analysis, the humanist acquires all the reasons by which the questions of value can be resolved. If the critical habits of mind have been properly applied to these questions of value, the humanist is then enabled to make an informed and reasoned judgment that argues and persuades for certain normative evaluations about the determined facts of humanistic research.

In rendering judgments about historical periods, or literary works, or philosophical questions, the humanist makes choices between values. Each judgment rendered sets forth the principles by which a society, a literary work, or a philosophical argument will be subjected to praise or disdain. These principles, when considered in toto, constitute the heritage of civilizations that is denominated Culture.

The goal to which the humanistic disciplines aspire concerning questions of value is justice. Each judgment, esthetic or moral, passed by a humanist, it is hoped, reflects standards of civilization that are beautiful and good.
I realize that I have taken liberties with the word "justice" when I use the term as the goal to which the humanistic disciplines and humanists aspire. But I think the goal of justice has an attribute that makes my use of the word appropriate in both instances. This attribute is *decency*. Judgments on questions of law are meant to create a decent legal system; judgments on questions of value in the humanities are meant to create a decent civilization.

*Equity and Mercy*

Even though in any particular legal dispute the law has been properly applied and a correct judgment rendered, the legal tradition from which the American legal system is derived has historically recognized that in certain instances the law may have been too rigid or the judgment too harsh. The rigidity of the law arises when its attributes of universality and equality clash with the uniqueness of the particular situation to which the law has been applied. The harshness of a judgment arises when the principles of just judgment (fairness, rightness, goodness) conflict. Furthermore, laws are applied and judgments rendered by judges or jurors who are fallible human beings lacking absolute certainty about the correctness of their decisions. Hence, the legal system has devised means whereby the rigidity of the law and the harshness of a judgment may be alleviated. The legal system calls these means the power of equity.

Until recently, these powers of equity were lodged within the courts of equity, presided over by a chancellor, that were separate and distinct from the courts of law, presided over by a judge. Today these two courts have been merged, with the presiding officer of this single court authorized to exercise both powers of law and equity. But powers of equity have also resided and continue to reside in persons who are not functionaries of a court. The president or a governor exercises powers of equity when granting clemency and pardon. A jury also exercises powers of equity when returning a verdict of acquittal against evidence that supports conviction.

Despite the existence of rules of equity that are meant to guide judgment and decision, it should be stressed that the powers of equity, no matter who possesses them, are ultimately powers of discretion. Being powers of discretion, the person in whom the powers are lodged is not, in a strict sense, obligated to use these powers to alleviate the rigidity of the law or the harshness of the judgment. In order to get the chancellor, the chief executive, or the jury to exercise these discretionary powers, the applicant must, therefore, appeal to the conscience of the distributor of equity. The applicant hopes to prick the conscience with the rigidity of the law or the harshness of the judgment and thereby
impel the person with the powers of equity into using them on the applicant's behalf.

The goal to which the legal system aspires in questions of equity is mercy. Appeals to equity are not so much appeals to justice as appeals to virtues beyond the demands of duty. The decrees of equity, it is hoped, exhibit the virtues of sympathy and compassion.

The powers of equity can be illustrated by reference to the case of Handsome Billy of Melville's *Billy Budd*. Let us assume that the law that has been applied to the circumstances of Claggart's death is the correct law. Let us assume that the judgment that has been delivered by Captain Vere is a proper judgment. Even with these assumptions, the plight of Handsome Billy seems to cry out for mercy. The powers of equity that can provide mercy are available from the Admiral of the Fleet who has the power to grant reprieves. Captain Vere, however, refuses to stay the enforcement of his judgment—refuses to stay the execution—until the *Indomitable* can rejoin the fleet. Captain Vere permits the law to run a deadly course untempered by the powers of equity, where mercy can be found.

As indicated previously, questions of equity are resolved not so much by any adherence to rules of equity as by reference to the conscience of the person who exercises the powers of equity. Thus, if any counterpart to powers of equity in the legal system is to be found in the humanities, that counterpart is the analogy between the conscience of the distributor of equity and the temperament of the individual humanist.

To be fully a humanist, certain character traits ought to be possessed by the scholar or teacher in the liberal arts disciplines. The humanist should be aware of his own fallibility and comfortable with this limitation so that he is not disturbed by the recognition that his conclusions are not the complete truth, that his judgments are not ultimate justice. Humanists should be acutely sensitive to the differences between and the uniqueness of each person, each society, and each idea so that

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3 *Billy Budd* is the story of a young man who is impressed into service on the British ship, *H.M.S. Indomitable*. While on the ship, Billy, a handsome, popular sailor, arouses the enmity of Petty Officer Claggart. Claggart informs Captain Vere that he has evidence that raises serious cause for belief that Billy is fomenting mutiny on the ship.

Captain Vere is unconvinced of Claggart's allegations and arranges a confrontation between the two. Claggart makes the accusations to Billy's face, and Captain Vere demands that Billy answer. Billy, struck dumb by the accusations, lashes out with his fist, striking Claggart on the forehead; Claggart dies.

Captain Vere summarily calls a court-martial and urges the court to give Billy the death penalty. The court-martial abides the wishes of the Captain and sentences Billy to hang without right of an appeal. Captain Vere acts quickly to carry out the sentence, and on the morning following the decree of death, Handsome Billy is hung. His final words: "God bless Captain Vere."
judgments are tolerant and constructive. The humanist should be touched by a profound sense of humility as he passes judgment on our cultural heritage—a humility that should cause the humanist to stand in awe of the power granted to him.

The goal to which the humanist aspires—while pondering the humanistic disciplines through this humanistic temperament—is mercy. Humanists hope to avoid being ethnocentric and moralistic in their scholarship; they hope to avoid being dogmatic and self-righteous in their teaching. To the contrary, though, humanists should realize the sharedness of error and the sharedness of evil among all human beings. If humanists can exhibit a humanistic temperament, then they can express the virtue of empathy.

Conclusion

In the aspirations to truth, justice, and mercy, three bonds of commonality between the legal system and the humanities and between lawyers and humanists have been identified. If the analogies here drawn are valid, the study of the legal system and the study of the humanities are complementary studies that reinforce one another in the struggle to achieve these three goals. Moreover, while lawyers and humanists may focus their attention on different endeavors, the goals to which they aspire unite them in a common search for a sense of identity with the past and a sense of responsibility for the future. The legal system and the humanities represent to a significant degree our cultural heritage, and lawyers and humanists have a duty to acculturate us to this heritage. For these reasons and in these ways, law should be considered a humanistic discipline and lawyers should be considered humanists.