Philosophy 338A
Philosophy of Law
2017
Note Sixteen

SOME ODDS & ENDS

1. In the excellent discussion following Matthew's also excellent lecture on Thursday March the 14th, two important points arose about which some further clarification might be helpful.

- Matthew rightly points out an important difference between the law and science. In criminal law, the world is made to close under various conditions in which it would not close in science – in physical chemistry for example.

A legal fact is sufficient to close the world with respect to Spike's (legal) guilt, but legal fact has no closing power in science.[1] However, degrees of openness in science vary considerably. Most doors about the anatomy of human beings have been pretty much closed by Anatomy, whereas most doors about the workings of the human brain remain open. There is a rough rule of thumb about this: The more mature and methodologically self-reflective a science is, the more it closes the world. In shorter words, true laws of nature close doors.

There is all the difference here between closure by public policy and closure by true laws of nature, but the law's overriding objective is justice, whereas physical chemistry has no such encumbrance. The duty of justice interacts with the desideratum of truth in somewhat subtle ways. The closer a trial is to conviction, the greater the necessity that the conviction be true; otherwise justice has been traduced. Acquittals are different. In order to ensure the justice of a conviction, the law is willing to tolerate fairly hefty rates of false acquittals. So the key question here is, in the struggle between truth and justice, what in all intellectual conscientiousness is the appropriate balance?

- We also discussed the difficulties that attend miscarriages of justice in criminal law. We reflected on the law's reluctance (to put it mildly) to re-open completed trials, after their conclusions have made their way through the processes of appeal to courts above.

On the face of it, as Matthew rightly observed, this marks another of the differences between science and law and, in many cases, that the difference reflects badly on the law. We have here a further example of the tension between justice and truth. As before, the devil is in the details. Here are some of them. By public policy, there is no double jeopardy in criminal law for anyone who has been acquitted of the crime in question. Convictions are different. It is not

[1] Except very indirectly. It is a legal fact that human subjects cannot be subjects of stratified random samples in scientific investigations of the causal impact of regular cigarette-smoking over extended periods of life and the occurrence of lung cancer. The reason is twofold, (1) The human subjects in the smokers' segment would have to smoke 20 years' worth of a pack-a-day habitover the life of the experiment (a year say). Result: death by experiment! (2) To achieve randomization no subject would have any say about whether she's in the smokers' group or the non-smokers group. So by social policy, science does not close (*slam shut*) the world. That's why the tobacco companies insist that the causal link hasn't to the requisite degree been scientifically established. We should also add that the legal fact of Spike's innocence is embodied in the presumption of innocence. It closes the world only unless and until it is displaced by another legal fact, the fact embodied in a verdict to acquit.

uncommon for an appeals court to overturn a conviction and to order a new trial. When this happens, the Crown usually has the option of standing mute (which means, not bothering to refile), in which case the state will have withdrawn its interest.

The cases that make the front pages are, in one way or another, outliers. Consider the case of Fred who, mistakenly convicted of something rather dreadful, has completed his full sentence and is now an old man, living with his sister. He was convicted at age 48 and is now a sickly 68. On the facts on hand then, his conviction was unreversable. On the facts now, he should never have been charged in the first place. Sometimes Fred will seek compensatory and/or punitive damages from the state on account of the pain and suffering of coerced separation from family and society, loss of income, loss of professional qualification, anddiminished capacity for gainful employment. Sometimes the same remedies (in effect) can be sought from the government by petitioning the minister of justice. In other situations, a wrongfully convicted person may petition for an outright pardon, either in conjunction with a petition for compensation or not. Sometimes a wrongfully convicted person will settle for the extinction of the legal fact of guilt by the pardon that makes it true in law that he never was legally guilty of the offence of which he had been accused and tried. On those occasions, the recovery of a lost reputation would satisfy the intent of the petition.

It bears on this that, successful or otherwise consideration of and decision on these matters is entirely extra-juridical, and are not subject to the regulatory protocols of case law. The sole exception to this is a civil action brought against the government; but trial judges are reluctant to hear cases of this sort, especially if the sitting minister of justice or the chief justice strongly opposes it (often on grounds that the plaintiff's case is unlikely to succeed or that it's nothing more than a Hail Mary pass.) In each of these situations, civil or extra-juridical, contextual details are crucial, and usually highly idiosyncratic. Was there prosecutorial misconduct or was the miscarriage entirely innocent? Did the accused have an adequate defence, or was the defence just about letter perfect (on the facts of the case?) Was the accused imprisoned and, if so, where and for how long? Was he adequately fed and cared for in prison? If the accused had been given a non-custodial sentence, what were its state-imposed deprivations? Is there sound reason to suspect (or strong knowledge thereof) investigatory malfeasance or misconduct. Was ethnicity a factor here? If left unremedied, how likely is this to expose the legal system to public disrepute or political damage to the government of the day?

It also matters how well-advised the wronged person is, how much he's able to pay to assemble the requisite legal talent. How likely are the specifics of his case to attract first-rate *pro bono* support? Has the wronged person or his friends and legal team the skills to enlist favourable and enduring media attention? Was the original trial covered in any detail (or at all) by the press? If so, was the coverage balanced, accurate and impartial? Is there reason to suspect jury tampering? Or to question jurors' impartiality or ability to follow the evidence? And so on and on.

The law's basic position is that it is contrary to natural justice and security and good government to permit legally recognized reconsideration of convictions beyond the final appeal stage. It is predicated on the widely accepted belief that fairly tried accuseds are not wrongly convicted except within an acceptably narrow margin of error. When wrongful convictions are revealed in ways that disclose no pressing reason to find fault with the proceedings that led to the verdict of guilt, the law falls back on what I'll call (not they) the Stuff Happens principle. Sometimes bad things happen in human life which are the fault of no one and no institution.

(Sometimes these things are called “acts of God”.) The law’s further position is that no government no matter how benign or compassionate, has a moral *obligation* to remediate those ills, any more than a hospital has a moral obligation to attempt the cure of an incurable disease without limit. Remediation of terminal suffering is, of course, another matter entirely.