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LAW'S JUDGMENT AND VIRTUOUS JUDGEMENT*

EL JUICIO DEL DERECHO Y EL JUICIO VIRTUOSO

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SUMMARY: I. *Law's Abstract Judgment is Non-Virtuous Judgmen*t. II. *Law's Abstract Judgment Falls Short of Fostering a True Community*.

William Lucy's main claim in *Law's Judgment*[1] is that law's judgment is abstract (LAJ hereinafter). This claim entails that a) the law sees its addresses not in all its particularity but as identical abstract beings; b) the law judges its addresses by reference to general and objective standards equally applicable to all; and c) the application of these standards is mitigated only by a limited number and range of exculpatory claims.[2] This thesis is not meant to be merely descriptive —of the way in which current law judges us- but also normative: that the law judges us in this abstract way is a desirable feature of our legal systems in so far as it is closely connected to some values such as impartiality, dignity, equality and fairness and it is a means of realizing specific forms of community.

Lucy's book is a rare achievement in contemporary legal philosophy. Two (unfortunate, in my view) features characterize a substantial part of current work in philosophy of law: first, contemporary philosophy of law is severely disconnected from the law as such (to put it in Lucy's words, legal theory's stance is highly abstract) and,

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1 William Lucy, *Law's Judgment* (Oxford Hart Publishing 2017).

2 Ibid 4-5.

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second, it has a fairly narrow focus. Lucy's book stands out as an exception to this state of affairs in that it masterfully connects the legal and philosophical theses under discussion with a solid knowledge of doctrinal areas, showing how the claims advanced bear on the real, pressing, problems facing legal practice. The book also departs from the 'you'd better know a lot about a little' kind of approach that is characteristic of analytic philosophy of law and provides a refreshingly broad discussion of some fundamental legal values.

Despite its virtues, I find the main claim of the book highly objectionable. My critique has two strands. First, I will level an objection against the abstractedness of law's judgment defended by Lucy on the grounds that seeing and judging people on the abstract terms that the thesis recommends amounts to non-virtuous judgment. This objection is a general one that is importantly connected with several of the objections against *LAJ* considered by Lucy. The second strand of my critique is directed against the justificatory part of Lucy's project. One of the main reasons why Lucy's finds *LAJ* valuable is because it fosters a distinctive kind of community that is in significant ways egalitarian. I will argue that the kind of community envisioned by Lucy as desirable falls short of the kind of community we (I) hope to inhabit. Virtuous judgment, rather than abstract judgment, is the tool whereby the law may help us realize a deeper communitarian ideal- one that goes beyond Lucy's egalitarian one.

I. Law's Abstract Judgment is Non-Virtuous Judgment

The claim that law's judgment is abstract has two aspects: a) one aspect has to do with the way in which the law sees us, and b) the second aspect relates to how the law judges us. My claim is that on both accounts law's abstract judgment is non-virtuous. The virtuous gaze is one in which we are viewed as beings with equal moral worth and equal legal rights, but also —and here it radically departs from the mode of seeing involved in LAJ— as the unique creatures that we are. Thus, the virtuous' judge, in contrast to the judge that is committed to LAJ, would see us in all our particularity and would not be blind to the differences that make us who we are.

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How would the law judge us if it did so virtuously? The virtuous judge, in contrast to the mode of judging required by LAJ, would a) have the ability to see the whole picture, perceive all the morally and legally salient features of the case, and miss nothing of relevance; b) be emotionally attached to the parties whose case is being disposed; c) describe and re-describe the case in all its particularity; and d) specify the values at stake in ways that make them applicable to the situation at hand —she will know how to put into practice a particular value, which might even require, on occasion, that she revise the received conception of the values at stake in order to avoid unjust or absurd decisions. Hence, she will know when, in light of the circumstances, a defeating condition obtains, which may lead one to call into question the applicability of the legal rule.

Thus, virtuous judgment is markedly different from abstract judgment. It embodies a distinct form of both seeing and judging. First, it sees their addresses in their full complexity, rather than in LAJ's limited way. Secondly, it employs context-sensitive standards of judgment, which opens up the possibility that some cases might not be, given the peculiar configuration of circumstances, 'rule-cases' (as Detmold, whose work is also discussed by Lucy)[3] nicely puts it.

Let me illustrate by means of two examples (to be added to the many lucidly discussed by Lucy) the critical ways in which virtuous judgment differs from *LAJ*. One example of law's abstract judgment might be thought to be the decision of the Canadian Supreme Court in the well-known Tracy Latimer case, namely, a decision to condemn a father to life in prison (against the recommendation of the jury) for putting an end to his daughter's life, who had undergone several surgeries (and more surgeries had been planned) and lives in a vegetative state which, however, does not free her from a terrible pain.[4] Another example of law's abstract judgment would be a decision to send a man, Leroy Reed (who is cognitively deficient) to prison for life, in application of the 'three strike and you are out' law, for standing at the entrance of the courtroom armed to look for

[3] See Michael Detmold, 'Law as Practical Reason' (1989) *Cambridge Law Journal* 436-471.

[4] See *R v Latimer* [1997] 1 SCR 217 and *R v Latimer* [2001] 1 SCR 2.

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a job as a private detective (this decision was, in fact, not the one taken by the actual jury, who mercifully decided to nullify).[5] In cases such as those, rather than giving primacy to the claims of generality and abstractedness, a virtuous decision-maker (as I submit was the jury in Reed's case) would see Latimer's and Reed's cases in all their specificity and judge them accordingly.

It is worth emphasizing that to favor a virtuous approach to the law is not, however, to succumb to particularistic impulses. Lucy (rightly) warns us –and I think he is right- that we should not view particularism as the alternative to law's abstract judgment.[6] Virtuous judgment provides us, I contend, with the correct amount of abstractedness and particularity. As Aristotle said, virtue is the right mean between excess and defect. Virtuous judgment provides us with a third, middle, way in between the unyielding rigor of abstractedness —advocated by Lucy— and the open-ended flexibility of particularity that seems incompatible (as Lucy convincingly argues) with the very nature of law.

II. Law's Abstract Judgment Falls Short of Fostering a True Community

Lucy claims that law's abstract judgment enjoys significant normative support insofar as it embodies important values (such as dignity, equality and impartiality) and fosters an egalitarian kind of community, more specifically, a Dworkinian community of principle.[7] My objection to Lucy's arguments in support of the normative appeal of *LAJ* is the following: although egalitarianism is a quintessential component of our ideal of community, it does not exhaust the content of community as a legal and political ideal. Indeed, we expect members of communities to engage socially and politically

[5] The case was the subject of a TV show, Frontline, broadcast in the US in 1986: see <https://www.nytimes.com/1986/04/08/movies/inside-the-jury-room.html> and <http://articles.latimes.com/1986-04-04/entertainment/ca-24551_1_deadly-force>.

[6] Lucy (n 1) 16-19.

[7] Ibid 231.

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on an egalitarian basis. However, we also aspire to inhabit a community in which people are bounded by affective ties and in which there are relations of mutual aid and reciprocal service. In order to bring about that community, it is critical the way in which the state (through its public servants, judges being to the point here) and the law treats us. An aloof judge, who feels disconnected to those whose case in being judged, and who sees himself as someone who is to blindly apply the law, is ill-suited to establishing the kind of social relationships which, I would argue, are distinctive of fraternal communities.

Thus, to recapitulate, law's abstract judgment is not a virtuous kind of judgment. A virtuous judge would see us and judge us in a rather different way than a judge who is deeply committed to law's abstractedness. It is the former, rather than the latter, that help us to realize a thick ideal of community —and its corresponding values— to the fullest. *LAJ*'s model of belonging, with its exclusive focus on egalitarianism, is too thin. Now, Lucy's claim about law's abstract judgment, as argued, is both descriptive and normative. Nothing of what I have said thus far affects the descriptive adequacy of his claim. Lucy might be right that law's for the most part in most instances and in most legal systems sees us and judges us in abstract terms. This is not, however, all it can aspire to do and it is not the best way in which it can help us bring about social change and establish a better kind of community than the one we currently have. Thus, as a normative claim —about how the law should be— *LAJ* seems wanting.

Indeed, Lucy is probably right that doing without law's abstractedness might require 'the replacement of law as we currently know it'.[8] But I do not think that this should stop us from pursuing this project. After all, even if, as Lucy's exemplarily shows, legal theory should not be disconnected from legal practice, it should also aspire to improve and ameliorate that practice. Thinking up and visualizing a different legal order —one that sees us as the virtuous person would and that judges us virtuously— is an important step towards constructing a different (better) kind of community. That commu-

[8] Ibid 33.

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nity —to be sure— would not be the type of liberal, bourgeois or capitalist community we live in now. But neither should the turn to virtue be interpreted as requiring that we should go back to feudal legality —and throw away the important lessons that we have learnt about the importance of generality and abstractedness and the great historical conquests of due process, equal rights, and equality before and under the law.[9] It requires us, however, that we do not rest content with these important historical achievements and that we be willing to engage in a difficult, but worthy, exercise in legal and political imagination.

[9] LAJ, as Lucy says, is historically significant, in that its emphasis on generality and abstraction could be seen as generating a major distinction between feudal or medieval law, on the one hand, and bourgeois or liberal law, on the other. See Lucy (n 1) 20.