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Why It Matters Whether There Is a Higher Law or Not

Dallas Willard*

This conference was advertised as addressing the questions: “Is there a higher law?” and “Does it matter?” I would like to use my time on this occasion to deal with the latter question: Does it matter whether there is a higher law or not? I will lay my cards on the table at the outset and say that it matters and matters hugely. Now why would that be so?

Let us begin with the language of “higher” and “lower” and tone it down a bit. It is not particularly helpful without a lot of explanation. The basic issue underlying the distinction between higher and lower law is whether there is any point *exterior* to the law as a social process from which that process and its outcomes could be evaluated as justifiable or unjustifiable, correct or incorrect, or—bluntly—right or wrong.

To say there is such a perspective is the essential meaning of claims to the effect that there is a higher law. To say there is no such perspective would, accordingly, be the meaning of the claim that there *is no* higher law—there is just the social process and its outcomes. People, individually or in groups, may or may not *like* the process or its outcomes, and may do everything they can to foil or evade them, but there is no exterior framework of general considerations from within which they can be evaluated as right or wrong or abrogated. Any “legitimate” modification of the process itself would have to come from its own internal dynamics.

In thinking about “the law” as a profession, there are two different ways (at least) of regarding the public good that lawyers and “the law” serve:

1. “Legal Help”—Working in the system (the human social process) to get what individuals and groups want. Here the aim of the persons involved is to *win* (achieve the ends at issue), or at least to get “due process.” Resolution is a public good. “Justice” is at least a matter of receiving due process.

2. “Justice” as an abstract ideal—Here the public good is seeing to it that what is right is done, insofar as that is humanly possible. This is a view

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widely assumed by citizens and by the complaints of those dissatisfied with the processes of the law. Due process does not guarantee justice.

In discussions and portrayals of law as a profession, the tensions and conflicts between the two perspectives on “the law” and between the two “public goods” related thereto are constantly in play.

When Oliver Wendell Holmes opens his famous essay on “The Path of the Law” with this sentence, “When we study law we are not studying a mystery but a well-known profession,” he is not announcing a *discovery* he or someone else made about what the law is.¹ He is announcing his *resolve* to treat “the law” as merely a human social process and expressing his wish and recommendation that others should do the same.² He wants to treat “the law as a business with well understood limits.”³ That is perhaps a perfectly legitimate decision for a practicing lawyer to make, but one that has no basis as an indication of what “the law” really is or has any bearing upon discussions of higher law. Holmes is, I think, disingenuous. His suggestion that the alternative to his decision is to engage in study of a “mystery” only reflects his commitment to the pragmatist theory of knowledge that was swirling about him in those days.⁴ The idea that anything other than the professional process and its predictable outcomes is a mystery, and therefore unfathomable, is his way of giving the dog—in this case “higher law”—a bad name before he shoots it.

There are two main reasons that convince me of the importance of there being a “higher” law, in the sense of a general framework of consideration in terms of which the judicial process and its outcomes can be evaluated and possibly set aside or reformed. One relates to the internal dynamics of the process, as a process that is “human, all too human.”⁵ The other has to do with the relationship of legislation to the legal process.

I. The Law as a Human Process

The law as a human process is one within which individual human beings, including lawyers and judges, are pursuing their own ends on the basis of their personal understandings or ideas. What else is one to do? This is, in general, unavoidable. The presence of an “appeals” system built into the process is an explicit recognition that legal proceedings do not always go as they should. Human factors such as bias, manipulation, ignorance, and

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

2. *See generally id.* at 457–78.

3. *Id.* at 459.

4. *See id.* at 457.

5. This phrase was made famous by Nietzsche but has implications beyond his meaning. *See* FRIEDRICH NIETZSCHE, MENSCHLICHES, ALLZUMENSCHLICHES (1878).

ineptitude may distort the process of the law and must be recognized and dealt with.

But there are distortions that no appeals system can correct. Sometimes what comes out of due process is simply wrong and unjust. Historically, the discretion of judges has been thought able to correct or ameliorate such cases; as I understand it, that is still possible in some cases, but is increasingly limited. Sometimes those who “win” in the process do so simply because they are more attractive, have a more intelligent and convincing lawyer, or have more money to spend to support their case or undermine that of their opponents. This points us to factors in “the business” of law over which due process has no control; these factors, in the end, make for a situation where “equality before the law” can only be viewed as an unapproachable ideal, and with reference to which only largely futile gestures can be made. Of course we should do what we can to favor what we know to be right in the legal process. But that must not blind us to the all too frequent failures of our efforts to achieve “justice” in any sense other than due process. The idea of a higher law makes it possible to recognize and acknowledge where “justice” did not secure “what is right” or “what should have been done.” That recognition and acknowledgement is crucial for the self-understanding and life of both the winners and losers at court. It is important for their understanding of who they are, and of exactly what they won and what they did not. It is also important for society’s understanding of what it has and does not have in the legal system, namely, that that system does not determine what is right and wrong, good and bad, but itself always stands under judgment. Justice from courts (or even legislatures) will never do justice to justice. Legislation and the rightness that is above due process are rooted in something higher still, and often it cannot be accessed *directly* into the process.

II. The Relationship of Law and Legislation

The second main reason I am convinced of the existence of a higher law that stands in judgment over what actually happens in the processes of the court system is the relation of law to legislation. It is within the powers of legislation to change the law and then to modify what is a correct or incorrect outcome of the processes of the law. I presume that legislation can also deal with what is acceptable or not in how legal proceedings themselves are conducted. But it is also the case that the legislature passes laws with respect to various kinds of situations and events in ordinary life outside the world of legal affairs. In so doing it often references what is good, right, and

fair in terms of general moral understanding. (Though one could hardly say that legislation itself cannot go wrong.)

To say that there is no external perspective, no higher law, from which the processes and outcomes of legal procedures can be evaluated and possibly overridden—or, indeed, which serves as the foundation of those processes and their outcomes—is to fail to have an adequate view of those processes and outcomes themselves. It is to fail to see them as they actually are and as they actually function in human life. For some purposes it could be that one should disregard all the broader questions and just focus on how to work the process as it is to get what you or your client wants. But to hold that that is *all* there is to law is very close to making Holmes's decision as to what the profession of law and the aim of the legal system is essentially about.⁶ That is a decision which sets one at odds with the view of law as concerned with what is right, and a decision which few could accept as adequate to the idealism that makes law an honorable undertaking. To say there is no higher law really means that there can be no issue as to what is *morally* right with regard to the conduct and outcome of legal procedures. That surely undermines the confidence in law that is essential to its use and essential to the health and stability of a society and human existence based upon law.

Thus it is extremely important that there be a higher law or laws, and that these be recognized as such by those engaged in the practice of law and by society at large. Of course there will be occasions in which appeals to such law or laws would not be appropriate and might even be detrimental. Practical wisdom has to discern those occasions and make allowance for them.

So: The law as a process is *essentially* something that stands under criticism, and therefore under a higher point of view, and if you wish, a higher law or higher order of things.

Now why does that matter? It matters because if law is to prevail in human life, it must be something that generally inspires *respect*, and where enforcement is the rare, though always possible, situation.⁷ Kant's term "Achtung," which is usually translated as "respect," conveys a vital notion: "Respect," Kant says, "is properly the representation of a worth that thwarts my self-love," where "self-love" is understood as simply fulfilling desires, doing what I or someone else wants to be done.⁸ Law is not to be simply an expression of human desire, where the stronger, better placed, cleverer, or luckier have their way. My claim is that only as subject to a higher law

6. See generally Holmes, *supra* note 1.

7. For instance, the symbolisms of the court room are tied to respect.

8. IMMANUEL KANT, *Grounding for the Metaphysics of Morals*, in ETHICAL PHILOSOPHY § 401 at n.14 (James W. Ellington trans., Hackett Publ'g Co. 2d ed. 1994) (1785).

perspective can human law and its associated processes be held in that regard which will enable them to function as law, and not as mere descriptions of how certain official personages behave, or may be expected to behave. In short, if there were no higher law, there would be *no law at all* in the form of human enactments. We would only have administrative arrangements with the power of government to back them up. That is why it matters whether or not there is a higher law.

