

Philosophy 338
Philosophy of Law
2017
Note Three

REMARKS ON CHAPTER 3

1. *Why do we have this chapter?*

The book is a philosophy book about the *law*. No, that's not quite right. The book is a book about the *philosophy* of law. This gives us two subject-matters to investigate. One, of course, is the law, and the other is philosophy. The two subject-matters come together in an interesting way. It gives us the occasion, and I think the duty, to reflect on the ways in which a philosopher might best go about saying something about the law in fulfilment of two conditions. First, it must be legally accurate, and second it must be philosophically enlightening. The question is "How is this done?" "How do we make our enquiry in a way that meets these conditions?" Part of the answer is that we arrive at a correct understanding of the law. The other part is that we achieve a good understanding of how to do philosophy when one also wants to do it in the service of the law. So part of our project is *metaphilosophical*, a philosophical study of philosophy.

2. *The pivot to the empirical*

In chapter 3, we continue the theme of theoretical postponement, not because we distrust theories, but rather because there are cases in which theoretical engagement is premature. These cases include subject-matters of philosophical interest some of whose features are empirically observable and some of whose features are open to normative assessment. Let's call these the *data* of our enquiry. These data can be considered matters of pre-theoretical *fact*. They are facts that a subsequent theory should honour. If not, the theory must show good cause for its defection from them. One of the dangers of premature theorizing is its risk of overlooking or misconceptualizing relevant pre-theoretical facts.

We shall be proceeding on the working principle that, when it comes time for us to put our own theoretical cards on the table, the theory will fail if it doesn't adequately account for the theory's pre-theoretical data. Since the data are empirically accessible to us, our adoption of the working principle is our "pivot to the empirical".

There was a time when philosophers were confident that what they do has nothing to do with empirical matters, that philosophical theories aren't in any respect answerable to empirical facts no matter what they are. There are some branches of philosophy, in which empirical facts really don't have any bearing – think here of the logic of computable functions. But in recent years, philosophers have started to show greater openness to the empirical. Here too there appears to be a distinguishing principle at work;

- THE EMPIRICAL SUSCEPTIBILITY THESIS: If a philosophical theory's subject-matter has empirically discernible features, the theory should not ignore those features without showing good cause to do so. Similarly, if the empirical features are normatively assessable, then except for weighty cause the theory's normative pronouncements should not disregard or override those data.

It's easy to see that if we adopted this principle the logic of computable functions wouldn't be bound by it, but the logic of belief would be.

3. *Due diligence*

Due diligence operationalizes our pivot to the empirical. In making an empirically sensitive philosophical investigation, an investigator does due diligence by honouring its five constituent principles.

- *The respect for data principle* simply sums up what we've been saying here. We honour it by applying the empirical susceptibility thesis.
- *The data collection principle* requires us not to overlook or suppress data of relevance to our enquiry's purposes.
- *The data analysis principle* warns us against misunderstanding or misinterpreting the data on hand, and it requires that we take pains not to data-bend.
- *The complexity recognition* is really a corollary of the prior two. It requires that in analyzing the relevant data we don't over-simplify them. All theories simplify the data, in an effort to make them engageable by the theory's analytical instruments. But if we suppress too much of the subject-matter's complexity, we run the risk of bending our data or outright ignoring some of the theory's key data.
- *The empirical sensitivity principle*, in effect, is what we get when we apply the empirical susceptibility thesis to the prior four data-related principles.

The data-collection principle tells us to be careful to collect the right data for theories whose subject-matters have empirically discernible and normatively assessable features. In a court of law, we want to know what it would take for a juror to know or believe that Spike McGirk is guilty as charged beyond a reasonable doubt. Where would we start the challenging job of collecting data of the sort required for our answer to this question? The five bulleted examples on pp. 42-43 are a small part of the answer to that.

4. *What we are like*

Criminal justice is a human enterprise. All its parties are human beings. Some have specialized training (lawyers and judges) and others have none (jurors always and witnesses often.) Some are smarter than others, but no one has to be an Einstein to give eye-witness testimony or to serve on a jury. All the parties have the same basic equipment – lungs, livers, central nervous systems and powers of reasoning. If these things aren't working properly, things can't go well for Spike. Either he'll be jailed falsely and unjustly or he will have beaten the rap on account of a corrupt, stupid, and cognitively broken justice system.

Here is an empirical fact about Canadians. Canadians at large – the neurotypical ones – believe that within an acceptably narrow margin of error we don't convict the wrong people in our criminal courts. Of course the belief that we don't might be mistaken. If so, how would we find out? How would we find our way to the sweeping generalization that across the board we

convict or acquit the wrong people in Canada? Or that the margin of error for conviction is a great deal wider than is believed?

Some people think that the way to answer this is to consult with the experts, and seek the wise counsel of belief-theoretic logicians and rational decision theorists.

Other people think that here is a better thing to do first. It is to try to explain why Canadians are simply unable to see that Canada is so thoroughly a wrecked place? What would we have to be like to be unable to see what a lousy job the neurotypical Canadian has done here, there and everywhere, every day of the week, in determining the guilt and innocence of accused persons.

At the heart of this question lies another. Decisions of guilt and innocence are required to be made by ordinary men and women reasoning about the matters before them in the ways in which they ordinarily reason about the ordinary things of human life, including the most existential. If, in so doing, we go so systematically awry in court, how could we resist the accusation that our reasoning abilities are no good as a *matter of course*?

Where is the evidence that we are, all of us, as cognitively screwed-up as that, indeed that we are, all of us, wall to wall cognitive misfits? It is in answer to *this* question that the tug of the natural section, pp. 35-38 was written, and also the fallibilism section included at pp. 44-46. What they help us see is the following:

- If we follow our due diligence principle in regard to the empirically discernible features of human cognitive life, it quickly becomes apparent that if we really do screw up in the court and jury room, it is *not* because we screw up systematically. So either we don't screw up there, or we do; but if we do, it can't be because we are using our reasoning powers in those circumstances in the way that has served us so well overall. Well enough to survive, prosper and occasionally build a great civilization.

5. Normativity

It is striking how many philosophers prefer the call-the-experts option. To find out whether human beings are any good at reasoning, decision-making, and forming reasonable beliefs, whether in court or in life in general, it is best to go to our "best theories" of these things, the theories we find in establishment epistemology or EE. Naturally our EE advisors will urge us to conform our cognitive behaviour to the theoretical principles of EE itself, to regulate our beliefs and decisions in the ways set down in EE's constituent disciplines.

The fly in the ointment is that it is humanly impossible to follow that advice, or even to approximate to compliance with it. The key problem is computational complexity. It is vastly beyond the computational reach of even the humanly most perfect human agent to do the calculations mandated by EEs normative rules. For example, it is not possible for us to believe each and every logical truth or each and every logical implication of anything else we may believe. In those cases, the mandated beliefs are too numerous, in fact infinitely so. There are infinitely many truths of logic, and infinitely many propositions that logically follow from our each and every belief. This poses the computational problem. No human being has the wherewithal to put these infinitely large assemblages of propositions in the structured shape required for productive engagement by his or her belief-forming mechanisms. The mechanisms are too computationally feeble for efficacious assortment. Moreover, it has been known for a long time that there is no space in the conscious belief-forming mind for plenitudes of such size.

The EE rules mandate the norms of correct cognitive practice. The norms are massively underperformed by beings like us. One of two things appears to follow from this. Either the norms are the wrong ones or we are at fault for so massively failing them – correct norms for a cognitively decrepit humanity, or false norms for a cognitively competent one. The first alternative implies big-box scepticism, of which we’ll say a bit more in chapter 4. I’ll only say here that that’s a pretty heavy cost.

Those who adopt the cognitive incompetent thesis freely concede that their normative theories are empirically untrue. But they offer in reparation the defence that, even so, their EE rules are *normatively authoritative* for us poor mortals on the ground. The plainly expressed answer to this proposition is “Just who made you EE guys the king of the normative legitimacy castle?” Wouldn’t they do well to reflect on the Raiffa-Nagel chat?

Very well, then. If the norms that call the shots for the goods and bads of human cognitive performance aren’t to be found in the idealized models of abstractly rational theoretical agents, then where? The NN-convergence thesis on p. 37 is offered not as a definitive answer, but rather as a tentative suggestion as to how the norms might be sussed out. Think here of French. What is the right way of speaking French? The answer is to speak it in the way that French is normally spoken. This is certainly so. If we wanted to learn to speak it properly, what should we do? By whatever means that might be available to us, we should learn to speak in the way that French is normally spoken. In which case, the normative would converge on the normal.

What the NN-convergence thesis proposes is that we approach the normativity of neurotypical human reasoning in this same way. It proposes that we do this tentatively, that we adopt the NN-thesis as a working hypothesis until such time as we have reason to abandon it for something better.