Jurisprudence: A Descriptive and Normative Analysis of Law

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JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF
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Any discussion of jurisprudence runs the risk of becoming a se-
mantic nightmare, with the labels and jargon of a particular theory
clouding the real purposes of any truly useful analysis in this area.
Any helpful examination of the "meaning of law" should be less con-
cerned with providing verbal formulae that hold true in all cases than
with the actual functioning of the law and the symbiotic relationship
between the law and the community that it serves. In *Jurisprudence:
A Descriptive and Normative Analysis of Law,* Professor Anthony
D'Amato[1] adopts this type of functional approach in examining what
is meant by "the law," placing his emphasis on, first, the way law can
and should function within society and, second, the role morality must
play as the underpinning of any legal system.
    Beyond his cogent and insightful legal mind, Professor D'Amato

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1. Professor of Law, Northwestern University School of Law; A.B. 1958, Cornell; J.D. 1961,
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brings to his work an interest in politics, international law and justice, and science and technology. *Jurisprudence: A Descriptive and Normative Analysis of Law* is a compilation of twelve essays written by Professor D'Amato and published individually in various journals from 1970 to 1982. Although each chapter stands individually, the book as a whole generally follows familiar format, beginning with a description of what the law *is* ("descriptive analysis"), and moving into an analysis of what the law *ought to be* ("normative analysis").

Professor D'Amato begins in Chapter One with a description of the contrasting approaches of legal realism and positivism. D'Amato describes American legal realism as

> a school of analysis that reached its height in the 1930s and is especially associated with the names of Oliver Wendell Holmes, Karl Llewellyn, and Jerome Frank. The realists tried to throw out all "legal reasoning" and the use of rules and principles as reasons for the decisions courts and agencies reach, claiming instead that decisionmakers decide cases according to personal predilictions [sic], deep psychological needs, friendships, calculations of personal advancement, and so forth. Accordingly, the realists claimed that students of law should study these latter motivations and not be concerned with traditional legal reasoning. [p. 5; footnote omitted]

According to legal realism, then, the process of law involves a consideration of all these various factors and makes a prediction as to the outcome of future official behavior, with this prediction affecting the present behavior of others (p. 8).

In examining positivism, on the other hand, D'Amato looks primarily at the work of H.L.A. Hart.[2] According to D'Amato, this school of thought sees "law" as emanating from the workings of an established framework: "Hart's concept of law posits the existence of a 'rule of recognition' that serves to identify officials, courts, the jurisdiction of courts, and the general system for the creation, modification, and extinction of rules of law that directly affect the conduct of the average person's life" (p. 12; footnote omitted). All other rules of law derive their validity from these rules of recognition. Thus if a statement is made by the proper person or through the proper process, it is the law; there is no reason to consider any other factors.

Arguing that "law" has to operate in the present, not retroactively, and must provide a context in which future legai results may be predicted in the present, D'Amato clearly favors the position of the legal realist over that of the positivist.[3] Nevertheless, applying the two approaches to the context of the "grudge informer" cases in Nazi Germany, D'Amato concludes that both positivism and legal realism come up short (pp. 46-50). He describes these cases as situations

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2. P. 5; *see* H.L.A. HART, THE CONCEPT OF LAW (1961).

3. P. 27. D'Amato pays particular attention to refuting the attacks made against legal realism by the positivist Hart. *See* pp. 35-46.

where people were able to procure, through entirely personal motivations, the imprisonment or execution of their "enemies" by revealing to the authorities offenses against the regime, such as listening to short wave radio broadcasts from enemy countries. After the war, these informers defended themselves on the ground that, although entirely personal in motivation, their actions were completely legal — indeed, were even patriotic — under the laws of the old regime. D'Amato declares that positivism fails to reach a proper result here, for it views the Nazi laws as valid because they emanated from the legal system then in control; although morally abhorrent, they cannot lawfully be declared invalid at a later time (p. 47).

But legal realism also has a problem with this situation, for the only way to *predict,* during the height of the Nazi regime, the eventual prosecution of a grudge informer would be to imagine a whole new set of officials, with different standards, taking over from the present rulers (p. 49). If such a leadership change can be imagined in this context, it can be imagined in any context, thus rendering the predictive element of legal realism always subject to the troubling caveat of a potential future change in standards.

Professor D'Amato's solution to these problems rests on an idea that recurs throughout the book. In order to be effective predictors of future legal behavior, legal theories must have a strong basis in moral philosophy (p. 51). In this way there is a sense in which the grudge informer "knows" his conduct is morally wrong, and can at least suspect that a future regime will impose retroactive sanctions against it. D'Amato claims that by ignoring this more objective and universal underlying standard, and instead viewing law only as emanating from particular "officials or . . . regimes," both legal realism and positivism share a common failing (p. 50). However, although he claims that "the terrain for a normative theory of law remains largely uncharted" (p. 54 n.89), D'Amato does disappointingly little to show the exact role morality should play in the process of law. Nowhere in the book does D'Amato tell us how or by whom the rules of morality are to be chosen or provide an adequate discussion of potential conflicts between various moral concerns.

Throughout Part One, D'Amato continues his discussion of the manner in which law can and should be able both to predict and affect future behavior. The idea that law is a prophecy of what courts do was first written by Justice Holmes,[4] but, complains D'Amato, this notion was distorted by the American realist school, which equated law with the actual decisions of officials.[5] For D'Amato, the *process* of prediction is much more important than the decisions themselves, for

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4. Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 458 (1897).

5. P. 113; *see, e.g.,* K. LLEWELLYN, THE BRAMBLE BUSH 90-91 (1951); Frank, *What Courts Do In Fact,* 26 ILL. L. REV. 645, 657 (1932).

it is this process that can affect and modify human behavior. Furthermore, this process must necessarily produce decisions in the present, while people still have the opportunity to choose the correct behavior, rather than in the future (with retroactive application). Thus, the brunt of D'Amato's criticism falls on positivism, which, with its reliance on present rules as a statement of what the law is, cannot accurately predict the outcomes of "hard cases," where present rules are subject to future modification.

In Chapter Four, "The domestic legal system: A cybernetic analysis," Professor D'Amato provides an insightful look at the interactions and relationships among the various groups within a legal system. Tracing the positivist model from its roots in Thomas Hobbes' *Leviathan,* through its development in the works of Jeremy Bentham and John Austin, to the modern contributions of Hart, D'Amato concludes that the workings of a legal system cannot be completely defined through established rules, for real-world examples provide a variety that goes well beyond the definitional abilities of language (p. 151). D'Amato instead turns to what he calls a "naturalist" model to provide a more accurate picture of the processes in a legal system. In this model, the legislature, the citizen/litigant, and the courts all share in both the input and output of each other's group (pp. 144-45). With each group within the system both affecting and affected by every other group, the system controls itself; there is no outside authority establishing rules or providing control (p. 153).

After this general overview of the legal system, the next three chapters digress into more specific areas of interest to D'Amato. Chapter Five examines the possibilities of computerizing certain aspects of the judicial process, while Chapters Six and Seven look to the international arena for a specific context in which to examine the ideas discussed earlier. While interesting, these three essays betray their origin: they are separate and distinct articles, published twelve years apart. The idea apparently was to provide specific examples of, and a context for, the discussion in the preceding chapters; instead, these three chapters do not serve to advance any particular theory or argument in the work, but rather seem to have been arbitrarily placed at the end of Part One.

Part Two of *Jurisprudence: A Descriptive and Normative Analysis of Law* centers on normative considerations, which, according to D'Amato, necessarily involve recognizing the fundamental relationship between what the law *is* and what it *ought to be* (p. 224). An examination of the *is* and the *ought,* and the relationship between the two, has been a cornerstone of jurisprudential thought since the time of David Hume. But D'Amato is not concerned with defining the *ought,* as a typical "normative analysis" might do; rather, he centers his discussion on the way the factual world and the moral world oper-

ate together in the legal process. In this way his normative analysis is consistent with his descriptive analysis, in that both view a legal system as one that must operate in the present, with the constituent parts interacting to mold the future. This shared feature in the discussion of what the law is and what it ought to be is one of the stronger aspects of the book.

D'Amato undertakes his normative analysis through an examination of the legal process at work in specific situations. He devotes one chapter to a look at the dilemma facing Socrates in deciding whether to escape from prison, and from his society, in order to avoid death (pp. 228-58). Another chapter reopens the famous case of the Speluncean Explorers,[6] and provides three new opinions concerning whether the convicted defendants are entitled to executive clemency (pp. 304-27). Nearly forty years ago Professor Lon Fuller provided the original five opinions in his hypothetical future case, which involved the fate of four defendants who, after being trapped in an underground cave for three weeks, elected to kill and eat the flesh of a fifth member of their party in order to survive until rescue workers could reach them. D'Amato's opinions, like Fuller's, do not claim to answer the questions presented. Instead, D'Amato focuses on the conflicting ways that law can function in a society, particularly on the differences that arise when the goals of law are centered on the group and when they are centered on the individual. D'Amato is probably most sympathetic to his third opinion, which argues that the member of the group that was killed shared in the guilt of the others because he tried, too late in the game, to withdraw from the group, thus attempting to save himself without incurring any risk. This opinion argues that the other four were not completely innocent either, but instead of dying for their wrong they should be required to perform some type of community service, thereby helping the lives of others.

D'Amato also shows his interest in the international sphere in three different chapters (two in Part One and one in Part Two), comparing the functioning of the legal process in different nations and societies. In Chapter Nine, he uses the international context to criticize the theories of Professor John Rawls,[7] concluding that any system that treats the aggregate groups (that is, the states) as equals will inevitably conflict with individual human rights (p. 273). This elevation of the claims of the state over those of the individual is the same criticism made by D'Amato of Socrates' decision to die rather than protest his sentence (p. 253). D'Amato is not, however, arguing for radical individualism; rather, in his model of the legal system the individual, like the legislature and the judiciary, has a role to play in predicting and shaping the results of the legal process. D'Amato emphasizes that the

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6. *See* Fuller, *The Case of the Speluncean Explorers,* 62 HARV. L. REV. 616 (1949).

7. *See* J. RAWLS, A THEORY OF JUSTICE (1971).

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input of the individual is crucial to this process, and must not be dwarfed by concerns of the group. One of the main reasons for this seems to be that moral philosophy must establish a foundation underlying the process of interaction among all members of the system in order to produce law (p. 279). And presumably, although D'Amato never makes this point clear, morality's objectivity should initially and fundamentally affect the actions and reactions of each *individual.*

While these examinations of legal systems at work in specific situations tend to be interesting and insightful, they also point to the major weakness of the work, a weakness that is perhaps inevitable given the genesis of the book. Originally written as twelve separate essays, the chapters come together to contribute to a theory that tends to move forward at an uneven and awkward pace. Indeed, several chapters do not seem to advance any theory at all, but rather go down the side roads of D'Amato's varied interests. Rather than clarifying the overall picture of the operation of a legal system, the discussion of the potential for computerizing part of the legal process leaves the reader wondering why an entire chapter was devoted to an area that seems to be nothing more than a sidelight. To a degree, each chapter merely provides a new context in which D'Amato can express the same basic ideas.

In a sense, of course, part of this criticism is unfair because one of the underpinnings of D'Amato's theory is that language cannot prescribe rules, or a theory, that will hold true in all cases. Rather, different circumstances and experiences give rise to the evolution of different rules and different aspects of a theory. Unfortunately, *Jurisprudence: A Descriptive and Normative Analysis of Law* is not a mosaic, with the various pieces coming together to form a comprehensive whole. Instead, in both structure and proofreading, the book seems to be the result of a hurried race to publish; little effort was made to blend the ideas presented in the individual chapters. As a result, the reader is intrigued by the various ideas and insights that flash across the pages, but is left disappointed that they lack a common thread tying them together. Perhaps there are no correct answers to the broad questions of what law is and ought to be. What a book that addresses those questions needs, however, and what Professor D'Amato fails to provide, is a more uniform and comprehensive analytic context.

— *Christopher P. Portman*