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Laws, Norms and Authority

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LAW, NORMS AND AUTHORITY. By *George C. Christie*. London: Duckworth. 1982. Pp. x, 181. $29.50.

In *Law, Norms and Authority*, Professor Christie attacks the claims of many modern legal philosophers who, in his opinion, overstate the legitimacy of the western legal systems. According to Christie, claims that law is normative and that authority is derived from law are not supportable, and by spawning criticism do more to undermine than to bolster respect for law. Christie argues that the law is better served by a frank appraisal of its true claims to legitimacy: That authority, although *de facto*, rather than flowing from, law, is nevertheless limited by the fact that those in positions of authority rely on the consent of the governed. Consequently, legal decision-makers must behave with some degree of predictability to generate and protect the social expectations on which that consent is founded.

As the author admits, much of *Law, Norms and Authority* is critical, but the criticism is not extraneous. While Christie's insights are interesting in their own right, the justification for their inclusion is the foundation his criticisms lay for his positive contributions to the philosphy of law.

Christie's argument that law is not normative, that it does not derive from a set of directives that tell people what they ought to do, can be simply stated: A theory of norms "presupposes a degree of unity, of completeness, of purposiveness and central direction to law" (p. 175) that is simply inconsistent with the development of our law. Far from being derived from any single source of norms, our law has grown "haphazardly and by accretion" (p. 175). This is not to say that law does not have normative force, or that it is incapable of guiding human behavior. Rather, the diverse and often conflicting values underlying the law as it now exists render the notion of normative consistency[1] of little use in legal decision-making.

Christie's argument for predictability follows from a model[2] for legal argumentation which he claims "permits one to make a limited claim of objectivity for judicial decision making" (p. 81). This model rests on the acceptance of cases and statutes as objective reference points. The cases and statutes themselves, not including the cases' "rules of law" or the statutes' legislative histories, serve as undisputed[3] premises for legal arguments. The statutes are put on a comparable basis by presenting, for each statute, a paradigm case — some case to which the statute certainly applies (p. 65).

Given these objective reference points, objectivity is maintained by requiring that the case in question not be decided differently from the decided and paradigm cases, unless there exists a significant difference between the instant case and each of the decided and paradigm cases (p. 67). The key to

1. Here, Christie is responding primarily to the works of Dworkin. Pp. 39-41. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

2. The model offered is actually a refinement of the model presented in Christie, *Objectivity in the Law*, 78 YALE L.J. 1311 (1969).

3. It is undisputed in almost all situations that something either is or is not a case or a statute. There need not be any agreement over any "rule of law" found in the case or on an interpretation of the statute.

maintaining objectivity in such a model is finding an objective way to define "significant difference." Christie feels that such an objective method results when the factual circumstances of the cases, rather than any supposed underlying rules or principles, are the basis for the difference. Judicial decision-making thereby gains objectivity because "disputes about the propriety of judicial decisions [are reduced] to disputes about the significant factual differences among cases" (p. 69).

Christie admits that there will be cases involving factual differences whose significance is still disputable. Although there will be leeway in decisions in such cases, there is still a requirement that there exist a "plausible significant factual difference between [differently decided cases]" (p. 72).

Christie argues that his model parallels scientific reasoning in that both rely on widely accepted standards to evaluate empirical evidence (p. 72). But analogous forms of reasoning may not guarantee the objectivity of legal argumentation. Various philosophers of science have questioned the objectivity of scientific theory,[4] and even the possibility of neutral observation has been challenged.[5] While Christie would probably be happy with whatever claim to objectivity science may have, his method does not reach even that level. Science might face problems resulting from the effect of values on seemingly neutral observations, but the problems involved in objectively selecting the significant facts from the totality of facts can only be greater.

Quite aside from doubts about the objectivity of science, Christie's efforts to objectify the law would impose serious rigidity on the social order. Unlike Dworkin,[6] Christie does not put forward a theory of mistakes to accommodate changes in values or in our understanding of the facts. He thus appears to embrace "the vice known to legal theory as formalism or conceptualism."[7] Accordingly, the desire to avoid deciding unanticipated cases has long served as the primary restraint on the desire for predictability.[8] Christie can exalt objectivity only at the expense of flexibility. True, he would focus legal arguments on the significant differences between established results and cases at bar. But the significance of differences is best predicted by the *reasons* for prior results, which Christie rejects as indeterminative. And his system of argument simply has no room for appeals to changes in values. One wonders how many additional data points would reconfirm the validity of *Winterbottom v. Wright*[9] or *Plessy v. Ferguson*[10] if

4. *See, e.g.*, T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 198 (1970) ("The superiority of one theory to another is something that cannot be proved in . . . debate").

5. *See, e.g.*, M. POLANYI, PERSONAL KNOWLEDGE 59-62 (1958).

6. *See* R. DWORKIN, *supra* note 1, at 118-23 (1977). Dworkin argues that the right answer to a hard case is one that results in the best possible justification for the totality of legal results including that of the case to be decided. An outcome consistent with the outcome of prior cases is stronger than an outcome that is inconsistent, but in certain instances the precedent inconsistent with the correct disposition of the case is so outmoded or unjust that the totality of legal results can best be justified by rejecting that precedent and accepting the inconsistency.

7. H.L.A. HART, THE CONCEPT OF LAW 126 (1961).

8. *See* H.L.A. HART, *supra* note 7, at 126-28; H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 587-97 (unpublished manuscript 1958).

9. 153 Eng. Rep. 402 (1842).

10. 163 U.S. 537 (1896).

twentieth-century judges had relied on Christie's method. In fairness, the reader should recognize that Christie may not have intended to advance a comprehensive theory of judicial decision-making, including constitutional cases and those where some precedent is directly attacked. But the cases Christie devotes the least consideration to are precisely those where objectivity would do the most to advance the legitimacy of judicial decision-making.

Christie's other, and probably greater, contribution is found in his analysis of authority. He, as is common, distinguishes *de jure* authority, *de facto* authority and "being an authority," but rejects attempts to reduce other forms of authority to *de jure* authority[11] or "being an authority."[12] Instead, he argues that "all authority is ultimately *de facto*" (p. 112).

Christie does not deny that a relation exists between law and authority. By "authority," Christie means more than the power to command action; authority also involves some claim of right that is accepted by the one to whom the command is directed (p. 99). Particularly in the modern nation-state, where authority is not based solely on the charisma of the person in authority, "[authority] is dependent upon law and law is dependent upon authority" (p. 138). Perhaps neither could exist in isolation from the other; however, "authority is the ultimate source of law rather than law being the source of authority" (p. 139).

Law depends on authority, according to Christie, because it does not exist in the abstract. This assertion is in a sense the touchstone of Christie's entire argument. Since law does not exist in the abstract, it can be binding only if promulgated by authority or backed up by sheer force (pp. 144-45). Those in authority owe their positions to the trust of others that they will act in accordance with some shared perception of the common good. They must continually justify that trust by *"consistently* . . . trying to work out the shared perception of what the public good requires" (p. 146).

Christie's conclusions that law is based on authority and that all authority is *de facto* lead to an interesting result. Christie asserts that in describing authority it is "pointless to use the terms 'legitimate' or 'illegitimate,' " since authority is more basic than law (p. 112). The factual existence of *de facto* authority in an individual may be questioned, but there is no basis on which to question the legitimacy of its existence.

Despite this conclusion, Christie is not prepared to allow unlimited discretion on the part of the individual in authority. "[C]laims of authority . . . [and] the actual exercise of authority must . . . be based upon law as much as [they] possibly can" (p. 169). Since authority rests on consent, misuse of authority would be self-defeating.

A parallel to Christie's analysis of authority may be found in noncognitive or emotive theories of ethics.[13] Those theories grew largely out of the

11. Pp. 91-93 (discussing the theories of Peters and Winch) *see, e.g.*, Peters, *Authority*, and Winch, *Authority*, both reprinted in POLITICAL PHILOSOPHY 83, 97 (A. Quinton ed. 1967).

12. Pp. 93-94 (discussing the theory of David Bell) *See, e.g.*, Bell, *Authority* 190 (Royal Institute of Philosophy Lectures, 1969-70) (1971).

13. There are many theories that can be classified as noncognitive or emotive. The brief presentation that follows may not be faithful to any one such theory but is an attempt to show portions of the various theories that are analogous to the theory presented by Christie. For

work of the Vienna Circle of logical positivists in the 1930s. The positivists rejected as meaningless any statements that were not either logically true or false or empirically verifiable. Thus, any meaningful statement should be subject to logical proof of its truth or falsity or there should be some observation that would serve to verify or falsify the claim.

Much of traditional philosophy did not meet the positivists' standard. The statements of both metaphysics and ethics are not tautological; nor are there observations that bear on their truth. In particular, the statements of ethics were found to be meaningless, because goodness and wrongfulness are not properties of acts. There is then no observation of an act that will verify or falsify a claim that the act is either good or wrong.

Christie extends the positivists' approach to the philosophy of law. Observation and logic were basic to the positivists, and since ethical claims could not be based on observation or logic, they were meaningless. Christie has argued that authority, rather than any overriding system of norms, is basic in the philosophy of law. Since authority is *de facto*, it admits of observations, but legitimacy and illegitimacy in any moral sense are not observable. Nor may a claim of legitimacy or illegitimacy rest on a legal analysis, since authority is more basic than law.

The emotivists' attempt to find *some* meaning in ethical statements is analogous to the content Christie is willing to find in claims of legitimacy or illegitimacy of authority. The emotivists found content in the statements of ethics by viewing them as reports about the speaker's attitude rather than as descriptions of the acts involved. Such reports are verifiable to the same extent as any other self-reports of mental states and are meaningful. The emotivists added a second element, an exhortation to others to act in accord with the speaker's attitude, but that aspect is not necessary to a noncognitivist attempt to lend some meaning to ethical claims. Christie's view parallels this approach by allowing a claim that authority is illegitimate only if the claim is interpreted as a statement by a person that "he does not like the fact that a particular person . . . exercises authority and that, if he were one of those to whom these authoritative pronouncements were addressed he would not accept them" (p. 102).

There is, of course, criticism of noncognitive and emotive theories of ethics. Cognitive theories argue that there are bases for ethical claims, and that the noncognitivists have not captured the meaning of "good" or "wrong" in their analysis. Since it does not seem contradictory for an individual to say that he sometimes approves of what is wrong, the cognitivist concludes that "wrong" must convey more than an attitude of disapproval. Similarly, Christie's conclusions can be criticized for not capturing the meaning of "legitimate."

The criticism has not proven devastating to the noncognitivist and should be no more successful against Christie. The noncognitivist rejects each of the offered bases for ethical claims and Christie has rejected the bases offered for claims of legitmacy or illegitimacy of authority, since any

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more insight into these ethical theories see A. AYER, LANGUAGE, TRUTH AND LOGIC 102-13 (2d ed. 1946); C. STEVENSON, ETHICS AND LANGUAGE (1944); Brandt, *Emotive Theory of Ethics*, 2 ENCYCLOPEDIA OF PHILOSOPHY 493 (1967); Nielsen, *History of Ethics*, 3 ENCYCLOPEDIA OF PHILOSOPHY 81, 106-07 (1967).

greater meaning would be based on norms that would dictate what laws a legitimate authority could enact. But if such norms existed, law would be normative — a conclusion Christie finds inconsistent with the haphazard development of law.

The willingness of individuals to approve of authority that they do not agree with may be explained as the recognition that the individual's own attitude is sometimes at odds with what he takes to be the attitude of society as a whole. The choices then come down to anarchy, which Christie rejects (pp. 112-18), or accepting, in the interest of order, the authority of certain people to serve in the role of decision-makers.[14]

The reader who finds noncognitive ethical theories attractive is likely to be similarly attracted to Christie's approach to authority and legitimacy. The reader who rejects noncognitive ethical theories will probably reject Christie's reduction of authority to *de facto* authority and his dismissal of claims of legitimacy.

14. When the divergence between the individual's own choices and those of the authority becomes too great, the individual can seek to replace the authority, by revolution if necessary, or resort to civil disobedience. *See* pp. 138-46 (discussing the views on civil disobedience of Dworkin and Thomas Aquinas, among others).