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Shuman: Legal Positivism: Its Scope and Limitations

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RECENT BOOKS

LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS. By *Samuel I. Shuman.* Detroit: Wayne State University Press. 1963. Pp. vi, 265. $8.50.

One of the criteria that might be applied in the evaluation of a book dealing with theoretical or philosophical matters in the social science field is whether the book raises and discusses questions that are meaningful and important in their relation to, and impact upon, human social life. Judged by this criterion, Professor Shuman's book will easily pass muster before a board of critics. Anyone interested in the law as a means of social control will concede that the problems taken up by Professor Shuman, notwithstanding their theoretical and philosophical character, have a decisive bearing upon the solution of issues that every organized society has to cope with. On the other hand, the answers given by Professor Shuman to these questions, in my opinion, offer grounds for doubt and criticism.

The first chapter of the book, which lays a conceptual foundation for the subsequent discussion of more practical questions, propounds the thesis that the terms "analytical jurisprudence" and "legal positivism" are separate and distinct concepts which in past and current jurisprudential theory have been wrongly treated as synonymous. Analytical jurisprudence signifies to Professor Shuman "a method of doing jurisprudence wherein there is concern with the meanings or usages of the terms indigenous to law and their relations with one another and to the rest of language." (Pp. 12-13) Legal positivism, on the other hand, is an attitude toward law which insists on the separation of law and morals, and holds that ethical problems are not subject to cognition. In applying these criteria to John Austin and Hans Kelsen, Professor Shuman reaches the conclusion that Austin, because of his acceptance of utilitarianism as an objectively valid theory of ethics, was an analytical jurist but not a legal positivist, while Kelsen met the tests of both classifications.

The kernel of truth in Professor Shuman's thesis is that a partisan of natural-law doctrine or an adherent of historical or sociological jurisprudence may, without involving himself in contradictions, take an interest in the elucidation of legal terms and concepts in the manner of an analytical jurist. This is exemplified by the work of Savigny, who, although he was not a legal positivist, was active and proficient in the dogmatic elaboration of the conceptual framework of Roman and German law. It is, on the other hand, undeniable that in most instances legal positivism and an analytical approach to the law will go hand in hand, and that an analytic dissection of concepts and logical interrelations between propositions will usually be considered the foremost task of jurisprudence by the legal positivist.

Professor Shuman's further suggestion that only an ethical noncognitivist can be classified as a legal positivist should not be accepted. Ethical

skepticism is very prominent in the theories of the Vienna school of logical positivism, but it is not an indispensable characteristic of all varieties of positivism. In the non-legal field, Comte and Spencer are commonly described as positivists because they sought to deal with social phenomena, including ethical problems, by causal-descriptive methods borrowed from the natural sciences. Both of these authors believed in objectively valid principles of right and wrong, which they were convinced would become firmly established and universally accepted in an inexorable and irreversible process of progressive social evolution. In the legal field, Austin is classified as a positivist by the large majority of jurisprudential authors, and the classification is fully justified. It is true that Austin held the view that all actions by the legislature should be determined by the principle of utility, which he regarded as the only true and valid basis of ethics. But a belief that political activity should be controlled by certain postulates of social morality—whether these be the common good, maximum freedom, social solidarity, or others—is not incompatible with a positivistic conception of the function of jurisprudence. Professor Shuman overlooks the fact that legal positivism is primarily a theory of legal sources, dealing with the modes of applying and interpreting the law after it has come into being through the action of the political organs of the state. It is highly revealing in this respect that Austin confined the relevancy of the principle of utility to the science of legislation, which is concerned with the transformation of social, economic, and ethical postulates and claims into rules and principles of law. The science of jurisprudence, on the other hand, was in his opinion to be governed by the idea of strict and undeviating enforcement of the positive law, regardless of its ethical content. Thus the maxim that should dominate the interpretation of statutes was, according to Austin, the plain meaning rule, and not the principle of utility.[1] This is in accord with positivistic thinking, which emphasizes certainty of the law, rather than justice, as the paramount goal of legal control.

Not even in instances where the judge receives no guidance from the commands of the positive law did Austin counsel him to seek enlightenment from the principle of utility. The standard to be applied by the judge in the unprovided case, he said, may be "general utility or *any other*" (for example, custom, or a maxim of international law, or the purely subjective views of the judge).[2] The fact that Austin thus made the principle of utility binding on the legislator but not on the judge demonstrates that Austin was fully cognizant of the logical implications of his positivistic philosophy of jurisprudence. According to this philosophy, only the formalized, governmental sources of the law, such as constitutional provi-

[1] "In the case . . . of a statute, the primary index to the law which the lawgiver intended to establish, is the grammatical sense of the words in which the statute is expressed." 2 AUSTIN, LECTURES ON JURISPRUDENCE 625 (5th ed. 1885).

[2] *Id.* at 638-39. (Emphasis added.)

sions, statutes, administrative regulations, treaties, and precedents, may be used and relied on by the judiciary in the decision of cases. If Austin had directed the judge to fill the gaps in the law by the application of the principle of utility, he would have introduced a non-legal, namely, an ethical source into the judicial process. Sociological and natural-law jurists would voice no objection to the recognition of such non-positive source materials. But it would destroy the foundations of legal positivism if the judge were commanded to use ethical principles, cultural norms, and standards of justice as legitimate sources of law-finding additional to the positive sources.[3] Austin solved the problem on the basis of his own premises by leaving the judge completely at large whenever the positive sources of the law fail him. His stubborn adherence to positivist fundamentals in this crucial area of the law shows better than anything else that Professor Shuman's attempt to expel Austin from the guild of legal positivists must be regarded as a failure.

The second doubtful thesis defended by Professor Shuman is his contention that a noncognitive view of ethics, holding that solutions to ethical problems are purely a matter of personal, emotional preference, does not necessarily lead to moral nihilism, with its attendant dangers to society. It is true that existentialist philosophy, which maintains that moral questions are not subject to cognition, nevertheless attempts to combat moral nihilism by insisting on a high standard of personal responsibility in the making of decisions. The deciding individual is admonished to weigh carefully and conscientiously all the possible consequences which his decision might have, not only for himself, but also for other persons and for society at large. He is also asked to realize that any step he takes may serve as an example which others may follow.

While this view removes the sting of moral cynicism from existentialist philosophy, it is doubtful that it can succeed in preventing moral chaos and social disintegration, which are the dangers of our epoch. Since a social order can maintain its integrity and cohesion only when at least a minimum of consensus with regard to the fundamental principles of human conduct exists among the members of the community, it would seem that some basis other than purely personal commitment is necessary to secure the moral foundations of social life. It might be argued that these foundations can be secured by the enactment of compulsory rules of law embodying some essential principles of social morality. The answer to this argument is that it is extremely difficult to maintain respect for the law if it is contended that the moral axioms underlying the law are nothing but fortuitous and arbitrary mandates imposed by those in control of

3 Kelsen states the positivist credo correctly when he emphasizes that only positive legal norms are a subject of cognition for the jurisprudential positivist. Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474, 480 (1934). Austin fully adhered to this credo in his theory of jurisprudence. See also Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612, 614 (1958).

society and lack any objective validity. In other words, it would seem that moral nihilism cannot be avoided by telling people that they must follow certain standards of social morality unless the people become convinced by rational argument and education that these standards are reasonable and necessary for a healthy social life. The existentialists are right, on the other hand, in insisting that in a large number of instances purely personal decisions on moral questions must be made in the light of the special circumstances of the situation calling for such a decision.

A related question discussed by Professor Shuman is that of the relative impact which natural-law thinking and positivistic doctrine are likely to have on the development of a sense of individual responsibility. Professor Shuman argues that natural-law thinking leads more often than not to the dulling of the sense of moral responsibility, while this accusation cannot be leveled against legal positivism. (Pp. 206-07) The charge might have some justification with regard to an authoritarian type of natural-law doctrine which imposes upon a community a whole set of detailed axioms of conduct excluding any degree of individual choice in moral matters. The historically most influential versions of natural law have not been of this character. Neither Cicero, Aquinas, Grotius, nor Locke advocated theories of natural law destructive of individual responsibility. On the contrary, these men held that under certain circumstances men should have the moral courage to resist commands of the government which were violative of fundamental requirements of justice. German positivism starting with Kant, on the other hand, taught that individuals must carry out even the most outrageous commands of the government, and that this was one of their highest moral duties. How this doctrine can serve to strengthen the sense of moral responsibility is unfathomable to me. The historical evidence seems to demonstrate clearly that it has had the opposite effect. For example, one of the chief defenses of Adolf Eichmann rested on his assertion that, as a philosophical disciple of Kant, he had no moral choice with respect to the execution of Hitler's plan for the extermination of the Jews, since this was a lawful and therefore legitimate policy of the government. Professor Shuman attacks Lon Fuller's assertion that positivism played some part in the complete submission of the German people and German officialdom (including the judiciary) to the Nazi despotism,[4] but his attack is based neither on facts nor on a thoroughgoing evaluation of German political and philosophical developments.

Professor Shuman assumes further that only legal positivism is compatible with democratic freedom, while natural-law thinking tends to produce authoritarian forms of society. "If the moral or emotional foundations of those who engage in legal philosophy include the conviction that the

4 See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 659 (1958). Professor Shuman argues that "it is naive to think that legal positivism 'explained' the failure of the German judiciary during the Hitler regime." P. 212.

best protection for the continuance of a democratic form of government is the development and preservation of a free and open society rather than the cultivation of a conditioned population, then legal positivism is the better of the two alternatives." (P. 208) Was American society unfree and undemocratic at the time of Jefferson, when the doctrine of the natural rights of man was the dominating philosophy of law? Did the German practical exercise in positivism during the Nazi period bring about an open society? Has the fact that Austrian legal science after World War II turned away from legal positivism endangered the foundations of Austrian democracy? One need only raise these questions to realize that the connection between positivism and democracy existing in Professor Shuman's mind is imaginary. On the contrary, much evidence (from antiquity as well as modern times) can be adduced to show that positivism is apt to undermine the moral foundations of democratic society and thus contribute to its demise.

I have a number of other quarrels with Professor Shuman's conclusions but they relate to side issues rather than to his fundamental theses. For example, Professor Shuman asserts that "the philosophic influences on both legal education and the judiciary in America are not traceable to natural law doctrines," and that "the inalienable rights of man were derived not from the nature of man or God but from English history." (P. 6) This statement, which flies in the face of the very words of the Declaration of Independence, is supported by reference to one source which, according to Shuman's own confession, is "not overly well authenticated." (P. 233, n.10) The truth is that legal education, to the very limited extent that it was institutionalized in early America, was strongly influenced by the ideas of such natural-law jurists as Joseph Story and James Wilson, and that American judicial opinions in this early epoch were saturated with natural-law arguments.[5]

Second, Professor Shuman makes the bold assertion that St. Augustine might be classified as a legal positivist, "since he recognized that law and morals are separate phenomena." (P. 15) St. Augustine's famous statement that kingdoms without justice are nothing but robberies hardly reflects the spirit of legal positivism.[6] If there are other passages in his works in which he advocated the separation of law and morals, such passages should have been cited.

Professor Shuman asserts that there exists a sharp gulf between the natural-law ideas of St. Thomas Aquinas and Hugo Grotius, inasmuch as the latter derived natural law from the nature of man while the former did not. (P. 21) But a thorough reading of the works of St. Thomas Aquinas and his followers will clearly disclose that the source of natural law in the

[5] See HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS ch. v (1930); Bodenheimer, *Due Process of Law and Justice*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 463-68 (1962).

[6] 2 BASIC WRITINGS OF ST. AUGUSTINE 51 (Oates ed. 1948).

Thomist view is the rational nature of man.[7] Exception must also be taken to Professor Shuman's contention that, "as soon as we move away from the basic physical characteristics of man, there are very few, if any, areas of universal similarity" with respect to social practices outlawed by social orders. (P. 160) This statement disregards the evidence which modern anthropologists such as Kluckhohn, Linton, Murdock, and others have brought forth concerning the existence of many cultural uniformities in the proscription of conduct deemed incompatible with organized social life.

It would be incorrect to deduce from the preceding comments that Professor Shuman's book represents an unqualified defense of legal positivism against natural-law doctrine or sociological jurisprudence. Professor Shuman recognizes certain inherent limitations and weaknesses of legal positivism. But he neglects to discuss and come to grips with one of the most fundamental shortcomings of this approach to law, namely, its theory of legal sources referred to earlier in this review. The narrowness of this theory, as contrasted with that of natural-law doctrine and sociological jurisprudence, fails to provide the judicial process with an adequate and realistic base. No defense of legal positivism can be convincing which does not give attention to this problem. I do not assert that a vindication of legal positivism against the attacks to which it has been subjected during the past few decades in many countries is either impossible or futile. But I would say that if the arguments advanced by Professor Shuman are in fact the only ones that can be marshalled against the critics of this jurisprudential attitude, then a revival of what F. S. C. Northrop has called "the dying science" of legal positivism[8] is not likely to take place.

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[7] Probably because of his erroneous interpretation of the Thomistic natural law, Professor Shuman concludes that this version of natural law is "the polar opposite" of Professor H. L. A. Hart's "minimum natural law theory," according to which there must be some limitation on the free use of force in any legal system. P. 24. I fail to see the utter incompatibility of this view with Thomism.

[8] Northrop, *Contemporary Jurisprudence and International Law*, 61 YALE L.J. 623, 654 (1952).