BOOK REVIEW

LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS. By SAMUEL I. SHUMAN. Detroit: Wayne State University Press, 1963. Pp. vi, 265. $6.95.

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This book's distinction lies in the way it relates legal positivism to recent ethical theory. Professor Shuman is obviously sensitive to the implications and nuances of positivistic legal theory. Clearly, he is at home with it and capable of evaluating it from its inner strengths and weaknesses. His interest, however, further leads him to evaluate jurisprudence from a considered and substantial ethical perspective. The consequence is a provocative and challenging volume which should prove profitable to both lawyers and laymen.

The plan of the book is complex. Initially, Professor Shuman draws a distinction between analytical jurisprudence and legal positivism. In the process he clarifies the positions of Austin, Kelsen, and H. L. A. Hart, among others, and finds himself most sympathetic with Hart's way of "doing jurisprudence." In the course of this discussion he acknowledges that the essence of Kelsen's legal positivism is that "law is law," that the theory requires the separation of law from morals, and that the theory entails, in current lingo, "a non-cognitive ethic."

Professor Shuman is well aware of the complexities involved in the term "non-cognitive ethic" and displays considerable skill in attempting to "unpack" its meaning. Actually, the course of this discussion leads him to raise the agonizing question of whether there can be in these terms significant theories of moral obligation, especially an obligation to obey the law. In addition, he raises a host of questions concerning ways in which law and morals are interwined. Some of this discussion reviews the issues debated by Professor Hart and Professor Lon Fuller; some of it raises issues of a different sort, requiring expert knowledge of present-day ethical analysis. In order to appreciate the richness of this discussion with its many aperçus, one must go to the text itself. As a layman, I wish to comment on one aspect of the argument which seems to me to be of primary philosophical importance in the debate concerning the relation of law and morals. It is whether we can justifiably use such terms as "good" or "bad" in connection with law as a functioning institution. Although this consideration may be deemed irrelevant by some students of jurisprudence, I believe it can reveal a shortcoming in the treatment of the relation of law to morals.

When, for example, Kelsen insists that "law is law," he commands respect because he makes us pay attention to the character of law which

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does prevail and which we cannot disregard merely because it is distasteful to us. Even if law is deemed by some to be bad, nevertheless punishment follows upon the delict and follows legally regardless of anyone's moral approbation or disapprobation. But does the punishment actually follow? Kelsen answers, "in the legal system the punishment follows always and invariably on the delict even when in fact, for some reason or other, it fails of execution." [1] There is something curious here. What began as a determined attempt to acknowledge law as it is, becomes a pure norm, which has consequences that may nevertheless never occur. In his words, "The compulsive act [*i.e.*, the penal consequence] has, however, a character of pure execution, just as the presupposed basic norm has a character of pure legislation." [2] Intent upon establishing the purity of the legal system, Kelsen may have unwittingly created an airy thing, which need not even function as an institution in a society. Surely he could not have meant this, for law is defined in relation to a successful order. He insists, for instance, that if a monarchy is overthrown and a new order is created, valid law too is created. Had the attempt failed, no new constitutional government would have been created but only a criminal conspiracy. This example raises the crucial question of whether law is properly defined as a pure norm or whether, on the contrary, the norm needs to be related to a functioning society. Under these circumstances even what is regarded as bad law would require sufficient support to prevent the breakdown of social life. Accordingly, it seems that the definition of law cannot be wholly conceived of as norms, quite apart from considerations of the meaning of those norms for the life of a society. Such norms may prove so inappropriate to a society that they will be nullified in practice. Then the "ought" which they imply will invariably be disregarded, and can therefore be of no practical consequence. Because of such considerations, I am impelled to take exception to Professor Hart's unkind remark that definition in such matters "can safely be left as an innocent pastime for philosophers."

The positivists may still wish to argue that such laws are nevertheless laws, for even nullified laws are laws nullified. I do not wish to get involved in the semantics of this question, including the form of linguistic analysis whose proponents insist that "law" does not include "consequences of law," on the grounds, for example, that we may "flout law," "obey law," "disobey law," but we cannot "flout the consequences of law," etc. The victory is only verbal, or else its serious intent is to regard as law, not some purely mathematical model of it, but law as it is in social life. If the latter is granted, then so also is the important point that law is not an ideal ought, but rather a social norm which actually restricts and molds social life; in the absence of restrictions and moldings, there exists nothing which is law. May not all this be granted without jeopardizing legal positivism, to-

[1] Kelsen, *The Pure Theory of Law: Its Method and Fundamental Concepts*, 50 L.Q. REV. 474, 485 (1934).

[2] Kelsen, *The Pure Theory of Law: Part II*, 51 L.Q. REV. 517, 522 (1935).

gether with its insistence upon the law as being without content and therefore separate from moral injunctions? I think not. For now it becomes evident that law cannot be regarded as independent of an operative social system. Law then is not a theoretical ideal but an indispensable part of complex social life.

Professor Shuman agrees with Professor Hart's recognition of this concept in what Professor Hart refers to as minimal natural law. The vulnerability of man engenders a need for legal protection for men; the limited resources of society likewise engender a need for legal protection of property rights, etc. The human estate, it is argued, is such that this kind of legal protection is required not just in our society, but in all societies. If we grant the point, and it seems reasonable to do so, then law cannot in positivistic fashion be said to be without content. Formalities and even arbitrary positive law may very largely prevail in society, but in some respects at least minimal rights may have to be respected if a society is to survive. Professor Hart—and again Professor Shuman appears to agree—insists that we cannot go beyond a few primitive natural rights without falling into egregious error. Minimal natural law for survival, but beyond this, beware! The burning question is, why stop here?

Even minimal rights, as history has abundantly shown, need not be accorded to all members of a society. Law does exist in societies where vast numbers, often a majority, are deprived of such rights. The fact is not to be denied. There is no necessity that law and morals, defined even in the minimal sense, be in accord. Surely there is no necessity then why they should in a maximal sense. The argument has force. Yet something important has occurred in moving the argument to this level. Positivists hold that there is no connection between morals and law and that one's moral judgments do not legitimately require another to agree. Analytic jurisprudence is not, however, committed to this view of ethics and can accordingly acknowledge the possibility that laws may be, not just distasteful, but actually good or bad. Professor Hart seems to assume as a matter of course that laws are of this nature—so much so that he insists that no matter what degree of iniquity and stupidity laws contain, they still are laws. But Kelsen's positivism and analytic jurisprudence divide on this point, since Kelsen repudiates any notion that moral goodness or badness can be truly or falsely predicated of laws.

Analytic jurisprudence, then seems to regard laws as (a) operative restrictions in society, and (b) capable of being good or bad. With respect to (a), it appears that there may well be a degree of "iniquity and stupidity" that would make law impossible. Apparently the classical case for current discussion is that of Nazi Germany. It is worth noting that an observer as acute as Harold Laski regarded the Nazis as "outlaws," whose thuggery is undeserving of being elevated to the level of legal action. Or again, another acute observer, Professor Ernst Fraenkel, in *The Dual State*, insists upon distinguishing between the "prerogative state" and the "normative state." The former he characterized as "that governmental system which exercises

unlimited arbitrariness and violence unchecked by any legal guarantees." The latter is "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of administrative agencies." However the issue of "extreme iniquity" may be resolved, there is nevertheless what may be the more important question, namely (b), that of whether laws are meaningfully capable of being regarded as good or bad. I wish to comment on this question with respect to the extension of the theory of minimal natural law, and then to return specifically to Professor Shuman's discussion.

Survival value, or the continued existence of society, appears to be the mainstay of minimal natural law theory—protection of life and limb, of property relations, and the sanctioning of promises or contracts. At the other extreme are matters so controversial that their regulation by law would be so arbitrary as to make unwarranted moral judgment on the rightness or wrongness of laws. Between the extremes, however, some basis for judgment may well be present in ascertaining with some precision the utility of laws enacted for special purposes. In these instances, there is a "bridge" between the "is" and the "ought," and therefore not just reasons, but justification for law. The conclusions in the justification need not be mathematcially demonstrable. It suffices that they are based on evidence and that they are capable of being corrected. These requirements constitute the basis for reliability in science, and it is no different in principle for ethics. Ethical propositions may "goad" as well as "guide," but they are not therefore unreliable. Professor Shuman suggests that "moral purposes" differ from "efficiency purposes," and that only the latter are capable of being regarded as true or false. I think this is in error; the distinction itself precipitates a "non-cognitive ethic," and thus makes reliable knowledge in moral theory impossible. The issue is complex and is not to be resolved by obiter dicta. Nevertheless, because of its intrinsic merit I would like to quote from Professor A. I. Melden's discussion of this fascinating topic in his 1961 Presidential Address before the Pacific Division of the American Philosophical Association. Meeting head on Professor Hare's insistence that "no imperative conclusion can be validly drawn from a set of pure indicatives, that a value judgment, being an imperative, cannot be deduced from purely factual or descriptive statements," [3] he writes concerning whether he should purchase some strawberries as follows:

> Now there would be good reasons for my purchasing them if and only if there were good reasons for believing that I should purchase them. That is to say, instead of speaking about good reasons for doing x we can speak, equivalently, about good reasons for believing that x should be done. Now by any ordinary standards of good sense in the matter, the fact that these strawberries are red, juicy, large, meaty, and inexpensive is a good reason, a very good

[3] Melden, *Reasons for Action and Matters of Fact*, 35 AMERICAN PHILOSOPHICAL ASS'N PROCEEDINGS & ADDRESSES 45, 53 (1962).

> one indeed, for my purchasing them—equivalently, for believing that I should purchase them. For I should purchase them if they are good ones and inexpensive, and the fact that they are red, juicy, large, meaty is good reason, very good reason it would seem, for considering them good. But if Hare is correct, no reason for purchasing the strawberries—equivalently, no reason for thinking that they should be purchased is afforded by the mere fact that they are inexpensive, red, large, juicy, *et cetera.* And suppose that I went on to examine them and determined further that they were full of vitamins, easily digestible, and highly nutritious, indeed that there was no good reason *against* my purchasing them—for concluding that I ought *not* to purchase them—(as indeed there would be if it turned out that I was allergic to strawberries, sick and tired of their taste, had no money, or . . .) then on Hare's principles I should still have absolutely no reason to purchase them, no reason for concluding that I should purchase them. Surely this seems to verge on madness. . . . What further matter needs to be injected here in order to insure the correctness of the transition from factual considerations to action, from factual considerations to evaluative conclusion?[4]

If the case can be made for strawberries, why not for civil matters where the needs of society can be made out even more clearly?

Professors Hart and Shuman make out the case for minimal natural law in what they regard as a Hobbesian view of survival. This, however, appears to be a misreading of Hobbes, who in inveighing against the state of nature, where life is solitary, poor, nasty, brutish, and short, wants a "civil life." Civil life is survival, but it is much more, for it includes such things as navigation, agriculture, commodious building, and also such things as science and the fine and practical arts. Civil society thus connotes a whole range of civilization, which is not just long life, but communal, rich, and human. This being the essence of Hobbes' theory, he aims at a sovereignty which can make real a real life, not just one of continued existence. In Hobbes' thought, natural law is maximal, not minimal. This is why he makes sovereignty into an absolute, suggesting all the while that it had better be tempered with wisdom concerning things secular.

This discussion is meant to focalize my quarrel with Professor Shuman's analyses. By such devices as distinguishing between "efficiency purposes" and "moral purposes" he has set the stage for a non-cognitive ethic, which prevents law from being enlightened by moral judgment. His sympathies lie with David Hume and Professor Charles Stevenson, though not entirely consistently. Having separated the emotional and cognitive aspects of life, Professor Shuman is led to lose the sense of human and social integrity. The world is regarded as crassly utilitarian or unyieldingly sentimental. Neither of these provides a basis for ethical judgment.

[4] *Ibid.*

Hence, he is pursued by the analogy of playing games, especially in chapter 4, as if the analogy really shed light on questions of ethics and of law. On the other hand, he is pursued by a notion that ethical values cannot be real unless they are "ultimates," a term he generously employs, especially throughout chapter 7. He is consequently unable to entertain seriously a naturalistic theory of values, evidentially grounded and corrigible. Accordingly, when he attempts to arrive at a theory of obligation, he fails to give it any notion of moral requirement. Finally, he appears often to construe the term "relativity" in ethics as if it necessarily meant "subjectivity," and thus he loses the clues for the relation between reliability and ethical judgment.

At the end of chapter 6, Professor Shuman begins to raise questions that show genuine alternatives to the " 'sterility' of legal positivism." These pertain to the law as a going institution in society. The question is provocative. Unfortunately, he rephrases it in the two subsequent chapters such that no satisfactory solution is possible to the problem of whether there is any significant relation between law and morals. Since, in this version, morals are not derivable from man, science, or society, there cannot be any meaningful connection between them and law. Man is interpreted in a sense which makes values extrinsic to his nature; science is contrasted with values; and society is regarded in narrowly political terms which rob it of a justifiable normative function.

I may have overstated the case in expressing my chief quarrel with Professor Shuman's position. His position, however, is not easily discernible—partly, I fear, because of what is often a cumbersome style as well as an inveterate tendency to state his conclusions in negatives. The latter makes for a looseness of thought and forces the reader to interpret things possibly in a way Professor Shuman had not intended. There are too many awkward sentences such as these:

> When a theory of law describes the group legal structuring it is engaging in a philosophical task, as distinguished from, for example, the sociological, or historical tasks reductionist approaches are likely to be. (P. 35.)

> This [reference unclear] does not imply, however, that there could be a theory about the legal relations which obtain among the persons in the community, which theory was adequate while nonetheless including no account of the places where obligation is the basis for the legal conditions. (P. 63.)

Despite these obstacles and despite my disagreements with some of Professor Shuman's analyses, I personally owe him a debt for a lively discussion. His consuming interest, his flashes of insight, and his relating of jurisprudence to current ethical theory make this an important and rewarding book. The question of the relation of law and morals remains an engaging one throughout his sustained discussion.