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Morality and the Law, by Samuel Enoch Stumpf

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BOOK REVIEWS

MORALITY AND THE LAW. By Samuel Enoch Stumpf. Nashville, Tennessee: Vanderbilt University Press. 1966. Pp. xiv, 247. \$5.00.

Morality and the Law is a quite thoughtful and suggestive work of some interest, although not of fundamental importance, to students of contemporary jurisprudence, especially American jurisprudence. Stumpf's title indicates his topic, which has been debated with some competence in our time most notably in the articles and books of Professors Lon Fuller¹ and H. L. A. Hart.² His study lacks the quality of Fuller's and Hart's work, however. It suffers, perhaps, from a failure to benefit from and advance their discussion. Instead, Stumpf, who is Professor of Philosophy at Vanderbilt University, strikes out on his own.

Stumpf's intent is essentially destructive: he wishes to rebut the claim of "modern legal philosophy"—in this case the positivist school of Kelsen, Gray, Holmes, Austin, and Bentham—that "law is morally neutral,"³ that "law has no moral connotations whatsoever."⁴ Generally the book is designed as a criticism of this view, although the last two of its six chapters—examining Hobbes' "natural law" jurisprudence and "some points of intersection between law and morals"—point somewhat hesitantly to a constructive alternative. One might confront positivism's claim by presenting connections between law and morality for which the positivist cannot account, or by showing that that philosophy itself admits or presupposes what it claims to deny. Stumpf does both. In chapters I, II, and III, he tries to show that three typically positivistic theories which maintain that law is "what the courts do in fact," "the will of the economically dominant class," and "the command of the sovereign," are refuted by a healthy admixture of moral views in, respectively, what the Supreme Court does in fact, Marxist legal theory and Soviet practice, and the legal philosophy of Austin. Chapter IV "tests" the "three theories" against the practice of international law.

Even this clearly critical part of Stumpf's work is fundamentally unsatisfying, if productive nevertheless of some original and valuable

1. See generally FULLER, *THE MORALITY OF LAW* (1964); FULLER, *POSITIVISM AND FIDELITY TO LAW—A REPLY TO PROFESSOR HART*, 71 *HARV. L. REV.* 630 (1958).

2. See generally HART, *THE CONCEPT OF LAW* (1961); HART, *LAW, LIBERTY, AND MORALITY* (1963); HART, *POSITIVISM AND THE SEPARATION OF LAW AND MORALS*, 71 *HARV. L. REV.* 593 (1958).

3. P. xii.

4. *Ibid.*

observations. While Chapter II, on Marxist legal thought, and Chapter III, on Austin, seem to penetrate more deeply than most contemporary scholarship, not one of the four chapters can claim to be exhaustive or definitive in its dissection of its subject. Moreover, since the three "theories" overlap in their contentions there arises both duplication and scattering of presentation and argument. Above all, there is absent that sustained criticism which inevitably reveals the necessary foundation, or at least the necessary conditions, for a truer account. Stumpf's work is not a coherent treatise, investigating step-by-step the basic doctrines of his opponents, beginning with the most basic, taking each in its best form and adducing foreign and domestic experience wherever the argument might call. He comes closest to this in Chapter III, which is thus his most valuable contribution. Considering Austin's definition of law as the sovereign's command, he argues, as did Fuller and Hart, that this fails to explain that obligatoriness which accompanies the law and which the positivists themselves acknowledge. He shows also that Bentham and Austin, not to speak of Hobbes, held that laws exist to remedy "evils," or prevent "detrimental acts" (even if only the threat of violent death) and that Austin admitted the British sovereign to exist and act only according to the (moral) expectations and principles that circumscribe the British parliament. Finally, Stumpf argues truly that the intervention of the supposed method of modern natural science into jurisprudence is unwarranted; a "science" that by its axioms permits itself only to look for "forces" is a science which does not permit itself to look at law. Law must inevitably embody a measure of, a judgment upon, the use of force by human beings. It is thus akin to human standards of all kinds.

Still, Stumpf by no means exhausts Austin or Austin's difficulties. Above all, he fails to penetrate lucidly through Austin to the root of legal positivism, not, of course, Bentham, but Hobbes. Despite Stumpf's devotion of a chapter to Hobbes, he fails to reach the difficulties in the philosopher's thought. This insufficiency in criticism is accompanied by a failure to exhibit the beginnings of reconstruction; Stumpf does not decisively show us the basic phenomena of law and morals which positivism, against its will, so to speak, was bound to admit, or for which it could not account. It is a measure of Stumpf's plan that he finds himself repeating in chapter after chapter the somewhat flat and trite conclusion, investigated with superior clarity by Fuller, that law and morality are inextricably intertwined.

Yet the establishment of even that conclusion implies a view as to the character of law, of morality, and of their articulation:

[The] Soviet system cannot be said to represent the "rule of law" in the fundamental sense of that phrase. . . . The notion of the rule of law . . . implies limitations upon the law making power of the sovereign, for the very reason for acknowledging a sovereign is to insure a reliable and predictable regime for the protection of persons and rights. The affirmation of the existence of human rights even before the existence of government, for the protection of which governments are instituted in the first place—this is the minimum meaning of the rule of law.⁵

This passage is only the most conspicuous sign of the Lockean liberalism which pervades Stumpf's discussion of the law. Similarly, he recurs to a benevolent humanitarianism, based on the equal "dignity" and "worth" of every human being, in his discussions of morality.⁶ And many of his sensible remarks in Chapter VI, as he reflects on distinctions often drawn between law and morals, reflect these older and newer variations of liberalism. If these notions are presumed, however, they are neither confidently asserted nor elaborately argued. Nothing like the sustained argument of Fuller's bold and constructive *The Morality of Law* appears. This is not attributable to an inadequately penetrating criticism alone. It seems also due to a lingering moral relativism (to be considered in connection with the chapter on Hobbes) which worries Stumpf's own theoretical views. Besides this old-fashioned positivist scepticism, there exists also in Stumpf's argument a certain presumption of historical progress: law's "flexibility," our author concludes, "is the outcome of man's ever new insights into what is morally right."⁷ If there are to be ever new, "fuller" or "dynamic" insights into the morally right, however, the future renders all present opinions open to decisive refutation; they are possibly baseless, or at least likely to be surpassed or improved. It is probably for some combination of these reasons that Stumpf finds himself explicitly denying the possibility of offering a definition of law. A definition of "law" is incapable of suggesting, by itself, the rich freight borne by the concept of law.⁸ How a definition differs from a "concept," and why, if Stumpf knows about this cargo of connotation, he cannot embody the gist of it in a definition are questions not adequately explained. True, excessively simple definitions, like those of Austin and Holmes, are misleading; it is the task of a philosopher, however, not to

5. Pp. 84-85.

6. P. 238.

7. P. 242.

8. P. 219.

deduce the impossibility of true definitions from the existence of false definitions, but to seek more satisfactory definitions or formulae. If he gives up that search he gives up the quest for the gist of the matter, be it law or morality. Most of Stumpf's troubles are implicit in his approach, which is to discuss an aspect of law or of morality by discussing various practices and theories about law and morality without at least considering the gist of law and morality. That the last is a task of grave difficulty does not make it less necessary. The price of its omission has only been partly shown. Insofar as Stumpf discusses thematically the moral basis of a legal order, it is in Chapter V where he adopts for this purpose the views of Hobbes. The rebuttal of positivism depends upon the authority of the man whom Stumpf himself acknowledges to be the founder of positivism: the moral sceptic; the fundamental originator of Bentham's and Austin's thoughts, of the endeavor to set jurisprudence on a scientific basis, of the notion of law as the command of the sovereign.

As the reader will anticipate from the previous discussion, Stumpf's recurrence to Hobbes is not whole-hearted. At the chapter's beginning Stumpf turns to Hobbes as a source of truth—to see “whether there is a necessary, rather than only an accidental or intermittent, relation between law and morality, . . . whether we find moral values embodied only occasionally in particular laws or whether the whole legal order rests upon a moral foundation.”⁹ The chapter's end, however, says the intent was only to show “that even from a positivistic version of natural law Hobbes viewed law as a moral phenomenon, insisting that the legal order cannot be separated from the moral order.”¹⁰ In the key discussion leading to his choice of Hobbes, Stumpf remarks that natural law theories (like Hobbes') are beset with “virtually insoluble problems,” being in no true sense “law” and presuming “there is some clear standard and content to morality upon which all men can agree.”¹¹ We will only note here the scepticism shared by Stumpf with his positivistic enemy, together with the crudity of the argument. Neither Aristotle, nor Plato, nor most philosophers (as opposed to theologians) have urged natural law teachings in the precise sense, the one which Stumpf's argument requires. Hobbes himself expressly denied that his counsels of expedience were laws in the sense of commands, unless treated theologically (and thus, in Hobbes' philosophy, un-naturally and probably not seriously) as edicts of the deity.¹² More important, it hardly seems a necessary condition for the existence of moral standards that all men can agree upon them. For it

9. P. 181.

10. P. 217.

11. Pp. 181-82.

12. HOBBS, *THE CITIZEN* 59 (Lamprecht ed. 1949).

might be that moral excellence, like excellence in musical composition and painting, is rare. Precisely for that reason it is largely unknown and unpursued by most men. This is not to deny that a fine and splendid character, once noted and considered in a man like Lincoln or Churchill, may be admired to some extent by many who cannot fully appreciate it. In any event the matter is debatable, and the choice of acceptability as a standard is itself a major decision with deep moral implications. In the case of Stumpf, who here echoes H. L. A. Hart, it implies the selection of Hobbes' philosophy (if only equivocally) as the model of the necessary relation between the "moral and legal orders."

The "grand theories" of Aristotle, Plato, Augustine, and others have "become so wrapped up with special concepts of purpose and belief that they appear presumptuous to readers whose thinking is pursued in a pluralistic setting."¹³ No doubt these thinkers appear foreign to most of us in a modern "setting." That is hardly a theoretical reason for crudely lumping together philosophers and theologians, however, or for dismissing as presumptuous the unfamiliar. Especially is that the case when the familiar, modern "pluralism," is linked inextricably with precisely the positivism whose difficulties Stumpf exposes. Pluralism and its antecedent, "toleration," do not rest merely on the advocacy of moderation in regulating opinion and custom; they also reflect the deep endeavor of Hobbes and especially Locke to separate from political life not only concern with religious salvation but also concern with moral excellence. Hence followed the original endeavor to separate morality and law, to find a political solution—"civil peace"—which would be free of the disputes over opinions which theology had decisively exacerbated. Stumpf does not quite penetrate to the point where the relation between law and morals can be seen to depend upon fundamental discussions in political philosophy. Yet the thread of his argument for Hobbes' views as the model relation between the legal and moral orders follows the essence of Hobbes' own reasoning:

The real difficulty with natural law theories is, however, that in presenting their 'arguments,' the more 'maximal' their premises and assumptions are, the more 'minimal' their acceptability seems to be. There is reason to believe that from a more minimal set of premises it would be possible to formulate an argument for natural law which would be more maximally acceptable. One who has formulated such a minimum argument for natural law is, surprisingly enough, Thomas Hobbes.¹⁴

13. Pp. 188-89.

14. P. 189.

Hobbes' formulation is not "surprising." It accords with his intention. To repeat, Hobbes sought to overcome the philosophic, theological, and civil disputes attending the religious version of classical moral philosophy. He sought a starting point beyond men's disputable opinions and found it in the body, in the necessary motions or passions of the body and especially in the most necessary and strongest passion, that for self-preservation or, more precisely, for the avoidance of violent death. Stumpf, like Hart, feels some need to rise above the blind and narrow positivism of Bentham and his successors. Oriented by fundamentally liberal opinions about the central importance of life, liberty, and property—which Bentham's notion of "utility" implicitly continued to presuppose—these contemporary legal thinkers return more or less unerringly to the font of the classically modern legal philosophy: Hobbes. But the Hobbes who was the progenitor, if not the great developer, of the legal philosophy of natural rights, is also the originator of moral scepticism and the rest of positivism. Eventually the "critical acid" came to eat its maker. For if the starting point of moral philosophy is a passion, the movement of bodies, what reason can justify that point as moral or right? How move from "is" to "ought," as this difficulty intrinsic to modern but not classical moral philosophy came to be stated? How argue by reason and without circularity for acceptability—for a workable politics attuned to the necessary passions that all can feel—if reason's moral notions are understood as no more than vagaries, unless rigorously disciplined as the tool of passion? What Hobbes perhaps ironically called his "true moral philosophy" capitulates to the critique of reason and ethics which he directed at the classics.

In view of what has been said here, we need not deeply appraise Stumpf's quite detailed and sensible treatment of Hobbes. Suffice it to say that he inclines to deprecate difficulties arising from the positivistic tendencies in his eagerness to show how Hobbes, starting even from the most crude necessities of human existence, evolved a system of moral rules or duties and then a comprehensive political teaching. In this process Stumpf so stretches the term "moral," never clearly investigated in the book, as to slight the significance of Hobbes' reduction of ethics to those expediential duties and dispositions that serve the security, the peaceableness, and the comfort of civil society.

On one level, indeed, Anglo-American jurisprudence needs to turn back to its philosophic forbears. We live in settled liberal societies, whose continuance and improvement require due attention to their laws and guiding principles at their best. Stumpf, and Hart as well, are moved not unwisely by that solid good sense which is served by our laws. Pru-

dence, then, demands that we understand our own kind of jurisprudence. It should be realized, however, that this means a return not to Hobbes, but to the most ingenious and now widely misunderstood Locke. It should mean, moreover, fundamentally a return to our more practical, specifically national statesmen, interpreters and even correctors of the liberal teaching, to the *Federalist* which Fuller recommends, to the practical jurisprudence of Chief Justice Marshall, to the peculiar combination of Lockean liberalism and a nobler humanitarianism which Harry V. Jaffa has beautifully portrayed in Lincoln.¹⁵ To a great extent we must guide the American law in accord with the American lights which applied the new political and legal science to our conditions. Whether this solution is as sufficient in guiding legal philosophy as it may be in guiding American legal practice is, however, a question too large to exhaust here.

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