1941

Book Review. Fuller, L. L., The Law in Quest of Itself

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BOOK REVIEWS


Professor Fuller's book, recording three lectures at Northwestern University, is unmistakable evidence that we have definitely emerged from the doldrums in which so much of published American jurisprudence has stagnated in the recent past. For, whatever limitations may be found in this book—and I propose to suggest some—the careful reader will agree that it is thoughtful, balanced, and clear; that it represents scholarship, which, it is apparent, stems from long cultivation of philosophy in general, and much reflection.

For Professor Fuller the principal problem in contemporary jurisprudence "is that of choosing between two competing directions of legal thought which may be labelled natural law and legal positivism" (p. 4). By the latter he means "that direction of legal thought which insists on drawing a sharp distinction between the law that is and the law that ought to be." "Natural law, on the other hand, is the view which denies the possibility of a rigid separation of the is and the ought, and which tolerates a confusion of them in legal discussion" (p. 5). Professor Fuller's thesis is that "it is impossible to take a sharp distinction between the law that is and the law that ought to be" (p. 108). From this central position he subjects Legal Positivism to criticism that is sometimes brilliant, and is always stimulating and thoughtful. To illustrate his critique, he describes the process of repeating a story—the facts actually told mingle inextricably with the raconteur's conception of what the tale "ought to be"; again, he points out the over-lapping of such questions as: "is this a steam engine," and "is this a good steam engine?" So, too, of interpreting a statute or deciding a case: what is coalesces with what ought to be; and the positivists are arbitrary and unreal when they set up a rigid dichotomy. After developing the above thesis in general terms, the author concludes the first lecture with a brief historical survey of Legal Positivism (meaning the analytical schools including The Pure Theory) as represented in Hobbes, Austin, and Kelsen.

The second lecture is an analysis of American Legal Realism and of the Pure Theory of Law. His criticism of the Realists supplements his earlier well-known essay; Professor Fuller is here revealed at his best as one of the most acute legal philosophers in this country. His criticism of the Pure Theory is a valuable supplement to the scant literature in English on this influential school of thought; but his stric-

² Fuller, American Legal Realism (1934) 82 U. of Pa. L. Rev. 429.
tures on the significance of the School are debatable, and will shortly be considered. The final lecture discusses the Natural Law method, which is praised as the one "men naturally follow", and, moreover, as much closer to reality—despite the claims of positivists to the contrary. The lecture closes with stress on the emptiness of Positivism so far as a philosophy of democracy is concerned, and with an eloquent plea for faith in reason and for a richer legal scholarship, which, freed from the restraints of positivism, will be encouraged to grapple with problems vital to our legal and political order.

In as succinct a statement as is provided in this little book, it is inevitable that many issues are not as fully defined as one would wish; even though the book is obviously the product of long, painstaking thought, one cannot be certain of the writer's position on various important questions that come to mind. A reviewer is even more seriously handicapped in this regard, and I can only hope that the issues raised in the following criticism will some day find a more adequate forum. Practically all of what follows is conditioned further by uncertainty as to Professor Fuller's interpretation of "Natural Law" and "Legal Positivism."

His initial line of demarcation—that positivists sharply separate Is from Ought whereas Natural Law writers "tolerate a confusion of them", is questionable as the most significant approach available. Austin's great contribution was not the invention of the dualism between natural and positive law. That dualism he found in a tradition extending back to the Greeks, i.e., in the Natural Law writers themselves. Austin clarified the thus-established dichotomy; he analyzed the elements of morality and of positive law, and drew the long-existing lines much more clearly than any predecessor. Secondly, having made the clarification between the two domains, he developed the logic of law, the notion of system in law; in this regard he was far in advance of continental thought, and, as Professor Fuller suggests, the herald of the Pure Theory. Hence, I should argue that the major difference is not that the one drew the Is-Ought distinction sharply and the other did not, but rather that the Natural Law writers emphasized ethical appraisal of municipal laws, whereas the analytical writers were chiefly interested in the form of municipal laws. In short, whereas the former are moral philosophers, the latter are logicians.

Pursuing his original line of distinction in the manner stated above, Professor Fuller is led into a position of denying that there is any validity to distinguishing law that is from what it ought to be. This, it seems to me, leads him into error; he is on firm ground when he attacks the superficiality of various attempts by American Realists to describe empirical phenomena (the judicial process), and in that course,
omitting to consider the moral attitudes of the judges. But all of this is description of factual phenomena; Professor Fuller argues as a more sophisticated scientist of the phenomena to be explained. But moral attitudes are not ethical principles; the former are social facts that have origins, histories and effects; the latter are ideas which can be comprehended, criticized and communicated. We may ask questions about the character, intensity, etc. of existing attitudes concerning the desirability of a course of conduct or of an adjudication. Quite a different kind of inquiry asks whether certain conduct ought to be pursued, whether a statute or decision is right or good. Failure to develop this distinction leaves uncertainty and more than a suspicion that Professor Fuller is not a Natural Law philosopher, at least, in any traditional sense. It may very well be that Professor Fuller was interested only in the first sort of inquiry and that he would readily grant the propriety of the second. But his neglect to distinguish the two (in effect, sociology from ethics) brings him perilously close to denying the existence of ethics entirely. On the other hand, in a number of instances Professor Fuller himself reveals how deeply ingrained (and separable!) is the difference between Is and Ought (see, e.g., pages 13, 14, 15, 111, 112).

The second major problem that needs discussion is Professor Fuller's joinder of the Analytical School (Pure Theory) and American Legal Realism as essentially alike. He refers to them as "seeming opposites" and goes on to argue that they "have much in common both in their methods and in the results they achieve" (p. 76); it is their common features which he elaborates. Now such a view is defensible, but I doubt that it leads to the most incisive analysis possible; certainly it is inadequate as concerns the so-called Legal Positivists. The American Realists spring directly from Positivism in sociology—specifically from Comte who made the term current. It is unfortunate that "positive" has also been employed to describe Analytical Jurisprudence. In that context, the term was used to distinguish municipal law from ethics; the sociological connotation, especially in its extreme mechanistic form, is at the very opposite pole. Professor Fuller recognizes this, but casually; yet the differences between American Legal Realism and the Analytical Schools are, I think, of greater significance than their similarity. Legal and sociological "positivism" clash on the most vital issues that have divided philosophers since Plato.

Accordingly, and in light, also, of the distinction drawn traditionally and validly between Existence and Value, I do not follow Professor Fuller when he argues that the major defect in American Legal Realism is the sharp dichotomy it draws between Is and Ought. As stated, I fully agree with him that since these Realists purport to describe factual phenomena (the judicial process), the above dichotomy consti-
tutes their chief deficiency in that regard. But viewing the School in the large (as the translation of Comtian and mechanical positivism to facts relevant in law), I should argue that their major defect is their anti-conceptualism (I use the term merely for brevity). Whereas Professor Fuller has stressed moral attitudes in order to establish the inseparability of Is and Ought, I should argue that of even greater significance (when set against the history of philosophy) is the American Realists' discounting, sometimes completely ignoring, the influence of rules of law.

As regards Analytical Jurisprudence, it is apparent that Professor Fuller frequently displays considerable hostility, which, I think, is unwarranted. I share his criticism as to some of the "Legal Positivists", especially as regards their views on political ethics, but this must be distinguished from Legal Positivism—the error of logicians is hardly a valid ground for dismissing logic. If the legal positivists remained consistent with their own preaching (as did Austin rather well) they would eschew disparagement (or praise) of ethics. For it is one thing to assert that the Pure Theory is utterly indifferent to ethics; it is another to assert that ethics is mere ideology. On the other hand, "the obscurity of nature" (p. 11) may make understanding difficult; it hardly condones confused analysis. The "integral reality" is different from what philosophers say about it; if legal positivists have improved our methods of analysis and have shown insight into one phase of the "integral reality", so much to the good. Particularism remains the cardinal sin, and Professor Fuller properly castigates such excessive claims by legal positivists. But what we find in this book seems, at bottom, a definite bias against logic and the role of logic in law. It is impossible here to argue the importance of so-called Legal Positivism; I can simply assert that it has provided us with a tremendous wealth of insight into the nature of law and legal ideas, and suggest that one might try to deal with such problems as rule of law, classification, codification, stare decisis, and analogy, and see how far one gets without reliance upon logical analysis. But the major point is that unless Analytical Jurisprudence (Pure Theory) is treated as logic and logical method applied to law, we do not come to grips with its essential contributions.

The final observation I should like to make concerns the use of the terms "Natural Law" and, especially, "Positivism." In such a general statement of main issues as he designed, Professor Fuller could not, of course, indulge in any detailed inquiry into the relevant semantics. Nonetheless one can learn helpful lessons from his endeavor. Clarification of the term "Positivism" seems essential, else one may slip into condemnation rather than persevere in analysis; one may even give the appearance of damning all science and of cherishing some mysticism.

1941
that the modern world has shaken off; or one may simply rest in confused and comfortable ambiguity. It is to Professor Fuller's credit that he has avoided these pitfalls as much as was humanly possible under the circumstances of his writing; he was able to do so because he confined himself to specific writers, whom he named. But read, e.g. pages 8, 9, 64, 65; compare his interpretation of Morris Cohen as a "positivist" (pp. 6-7); and decide whether Professor Fuller is a "positivist" or a "natural law" philosopher!

Professor Fuller would be the last to suggest that the subtitle "Lectures" should provide any immunity from criticism; it remains true that the limitations of space inevitably bar elaboration or qualification that full-length treatment would permit and require. Also such an occasion called for a broad and rounded statement. It is from this viewpoint that the book must be evaluated; judged thus, the book is both wise and stimulating; its thoughtful scholarship is expressed in a graceful style that represents a really fine literary achievement. Taking his stand upon the most vital spot in modern jurisprudence, Professor Fuller has provided a remarkably well-organized and sustained analysis of the principal issues. I read his book twice, with increasing profit and enjoyment, and venture to predict that it will long be read and recognized as an important contribution to the creation of an enduring American philosophy of law.

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It is fair to say that no course in the law curriculum has excited so much difference of opinion as the course in Legislation. Round Table discussions at the annual meetings of the Association of American Law Schools and articles by teachers experimenting in this area, reveal strikingly contrasting emphases. Some advocate a study of the judicial interpretation of statutes, others the relationship of legislative to judicial material, others a workshop in practical drafting, still others a comparative examination of legislative solutions of similar problems, and a few a study of what is in effect state constitutional law.¹ It was the late Professor Ernst Freund who pioneered, in an area distinct from all of these, an analysis of statutory devices calculated, as he viewed them, to produce desired results with a minimum of restraint and friction.²

¹ As illustrative, see Davis, Instruction in Statute Law (1911) 6 ILL. L. Rev. 126; Dodd, Statue Law and the Law School (1922) 1 N. C. L. Rev. 1.
² Freund, A Course in Statutes (1919) 4 Am. L. School Rev. 504. "Legislation as such also challenges attention and study where it transforms freedom which is subject to necessary law, into freedom directed by rules of law which