Morality and the Law

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BOOK REVIEWS

MORALITY AND THE LAW

by Enoch Samuel Stumpf

Reviewed by
DR. BRENDAN F. BROWN *

This book was written by the Chairman of the Department of Philosophy at Vanderbilt University. Its purpose is to refute the claims of modern legal philosophy that "law has no moral connotations whatsoever," by demonstrating that the concept of the essence of law must include the element of morality. In the first three chapters, Dr. Stumpf shows the error of the three great historical theories which have maintained that there can be, and is, a separation between law and morality, namely, "that law is what the courts do in fact, second that law is the will of the economically dominant class, and third that law is the command of the sovereign." In the fourth chapter, the author uses world society to prove the error of these three theories by applying them to international law. In the fifth chapter, the author discusses natural law as the basis of the legal order, and in the sixth, some points of intersection between law and morals.

Professor Stumpf has convincingly shown that it is impossible for any positivist judge or jurist to construct a legal theory of positive law without moral content. The author has made a fine contribution to the literature of natural law thinking, and has effectively attacked positivism by showing, from the writings of the positivists themselves, that it is impossible to separate law from morals altogether. Both spring from the spiritual nature of man, and both are intended to provide guidelines for the direction of human behavior. The inextricable connection between law and morals is clear in the writings of some of the positivists, but hidden in the works of others. Thus, Kelsen and Holmes would appear to deny this connection, but the author has shown that they admitted it covertly or implicitly. Hobbes and Austin have clearly em-

phasized in their writings the inseparable relationship between law and morals.

Professor Stumpf has marshalled undeniable evidence that positivists have introduced morality, either idealist or utilitarian, into their legal theories in many different ways. Thus, Kelsen postulated a "basic norm," moral in nature, as his starting point. Austin bottomed law on the nature of man. Holmes referred to "fair play" and "natural justice" in some of his opinions. Hobbes admitted the existence of "natural laws," and the right of the individual to physical survival even against Leviathan. Soviet jurists have been moving in the direction of assuming an ideal standard, so that Soviet Socialist law is no longer regarded as the will of the economically dominant class, but of the will of the whole people.

With new insights, the author has conclusively proven that there is no breach between law and morals in the decisions of the Supreme Court of the United States. This is so in spite of the doctrine of separation of powers, the restrictions of federalism and the force of moral skepticism. It is true, of course, that the moral element is often handled in an elusive way. Evidence of its existence in the work of the Court is in "the simple fact that the Court consciously changes its mind on important matters and consciously seeks to implement its judgments of value into the judicial process." Further evidence is to be found in the interpretative process of the Court. Thus, the author has demonstrated that in the recent civil rights cases it is manifest that the fourteenth amendment has been interpreted as the expression of what the law "ought to be," in the light of the moral dimensions which that amendment expresses.

It is undeniable that moral judgments are operative in the reasoning of the Supreme Court, indeed of all courts and legislatures.

Dr. Stumpf does not deny, however, that all positivist writers have separated morality from the essence of law, as distinguished from its environment and content, in the construction of their legal theories, so that they consider the command of the political sovereign to be law, even though it is obviously unreasonable and unjust. The author correctly maintains that positivist legal theory supplies some of the elements of law, such as the will of the political sovereign and physical sanctions, but that it errs in making the source of positive law control and dominate all the other elements with reference to the essence of law.

The book apparently leaves unanswered the question why positivists place the source of law in the dominant position in formulating their concept of the essence or nature of law. Do positivists make the fact of political order in society the highest objective moral good, so that the highest type of moral behavior consists in obedience to the commands of the sovereign, which are regarded as the only way of insuring order? If this is so, then the author might have gone further than he did and concluded that positivists have not separated law and morality even in regard to the essence of law. Their error would then consist rather in choosing the morality of order as the highest good, instead of the dignity of the individual human being, who is more important than order, since the order in question is good only insofar as it pro-
motes that dignity. If this is so, then there is an irreconcilable difference of view between positivism and natural law theory as to the question whether the moral element of law, springing from the intrinsic value of the human person, should take precedence over the moral element of the command of the political sovereign.

In the opinion of the reviewer, the chief limitations of the book consist first, in its apparent attempt to minimize the difference between positivist and natural law thinking, and second, in the rejection of the Thomistic starting point of natural law doctrine and the acceptance of the natural law arguments of Hobbes. In one sense, it is commendable that the book has been written in an ecumenical style so as not to be denunciatory of positivism. It may be, however, that the book has gone somewhat too far in appeasing positivism. Thus, it is the opinion of the reviewer that it is certainly not an oversimplification of English positivist political theory to say that the British Parliament is absolutely sovereign. This theory is not mitigated, as theory, when the author writes that it is not followed in practice. The fact is that it could be followed. This theory is not undermined by the conclusion that members of a society “look for the source of law in places other than in the commands of the state.” Of course, positivists may reject their own theories in practice, but no theory may be whitewashed by showing that it is not being followed in a particular society. Of what avail is it to write that Austin “certainly did not contemplate that law had no moral characteristics,” as long as Austin was convinced that law is law, whether just or un-

just? What difference does it make functionally? Is the reader to conclude that positivist legal theory is not as sociologically dangerous as it was thought to be up to this time?

Second, the greatest limitation of the book is its presentation of natural law doctrine. This is indeed unfortunate in a work so favorable to natural law thinking, and so effective in proving that morality is not only a part of the environment and creation of law, but also of its very essence. The author seems to have little sympathy for the way in which Thomas Aquinas and the Stoics approached the doctrine of natural law. He dismisses the theory of Aquinas, in regard to eternal law, natural law, and human positive law as a “neat architectonic relationship,” which rests “in the end, upon a theological base.”

In the opinion of the reviewer, the divine revelation of theology was not the authority upon which Aquinas based his doctrine of natural law, although that was the authority upon which he grounded the supernatural law. The author does not distinguish clearly between theology, in the sense of the knowledge of God’s will through revelation (supernatural law), and theodicy, in the sense of the knowledge of God’s will through human reason alone (natural law). Aquinas based his doctrine of natural law upon a philosophical basis of reason, which proclaimed the immutable value of the dignity of the individual person. This was also the thinking of the Stoics and Augustine. But the author dismisses their theories, as well as the doctrines of such giants as Plato and Aristotle, because “in most of these cases, the theory of natural law becomes
so wrapped up with special concepts of purpose and belief that they appear presumptuous to readers whose thinking is pursued in a pluralistic setting."

Every type of natural law thinking, even that advocated by Dr. Stumpf, postulates some ideal, as he so well brings out, and in that sense will be "presumptuous" to readers who do not agree with it. The fixed value in the writings of the great historical natural law thinkers, beginning with the Stoics, was the dignity of the individual person. Certainly this is a more spiritual and more worthwhile starting point for a theory of natural law than the physical fact of animal or body survival with which Hobbes begins his doctrine. Yet, Dr. Stumpf apparently prefers this starting point.

It is regrettable and ironic that the author goes to Hobbes for a workable and contemporary theory of natural law. It is strange that the author should turn to Hobbes, who is regarded as the arch-positivist in the English speaking world, to formulate a minimum argument for natural law. Hobbes did more than any thinker in England to destroy the natural law thinking which was based on the dignity of the individual. His writings inspired Austin, who fabricated the Analytical School of Jurisprudence. According to Hobbes, natural law was what the state said it was, with the exception of the individual's right of physical survival. The state interpreted the natural law. But the natural law which Dr. Stumpf is advocating in his book is one which may be appealed to as an extrinsic authority against the state and its tyranny.

There can be no law of any kind, including the natural law, without a law-giver. This is so because law is a command which ought to be obeyed because of its reasonableness. But it is idle to speak of obedience in this context if there is no person, with will and reason, to be obeyed. A human being cannot obey a thing. This truth is included in the natural law doctrine of some of the pagan Stoics, and of such Christian writers as Augustine and Thomas Aquinas who located the source of natural law ultimately in the will of God, knowable and known by reason alone. The exclusion of this truth is one of the great defects in the theory of Hobbes as to natural law and the essence of human positive law.

In conclusion, Dr. Stumpf is to be congratulated for his publication of a scholarly, original, and comprehensive study of the perennial question of the true relation which should exist between the law and morals. It could have been written only by one with the unique and unusual educational background and experience of Dr. Stumpf, who is learned in theology, philosophy, and law. It will do much to dispel the misunderstanding concerning the attitudes of positivists toward morality and the law.