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Book Review: Liberal Ideology and Jurisprudence - The Philosophy of Law: An Introduction to Jurisprudence, by Jeffrie G. Murphy and Jules L. Coleman

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LIBERAL IDEOLOGY AND JURISPRUDENCE

The Philosophy of Law: An Introduction to Jurisprudence. By Jeffrie G. Murphy and Jules L. Coleman. Totowa, N.J.: Rowman & Allanheld, 1984.

*Reviewed by Jerome E. Bickenbach**

This book contains mainstream Anglo-American philosophy of law at its best. It is supremely self-confident in tone. There is no waste, no hesitation, no rhetoric. Each topic or problem considered is tersely summarized and subjected to rigorous philosophical analysis. Key underlying philosophical issues are isolated, premises are established and arguments are advanced in rapid succession. The hazy but plausible insight, the ambiguous proposition or inadequate counterexample is exposed, a series of arguments is marshalled and, then, the offending untruth is set aside. Where doubt remains, the authors remind the reader that this is only an introductory text and detail the work yet to be done. The self-confidence, moreover, is augmented with a thoroughgoing optimism about progress. Hazy, ambiguous or untrue claims, though rooted out and set aside, are not discarded. Every inadequate attempt leaves behind a residue, a partial truth upon which better attempts build. We are led to believe that jurisprudential progress is a slow accretion of insight and argument, bringing us ever closer to the complete story, the whole truth.

The authors' self-confidence, optimism and unabashed gusto are infectious; and that is undoubtedly a good thing. The book is an introduction designed to grab students' attention, to turn them on to a topic that might not sell on its own. Hence, this book is intentionally a sexy sampler of what is happening at the cutting edge of philosophy of law, at least as that discipline is understood by those American analytic philosophers wedded to political liberalism.

Both authors are clear about the positions and arguments that they think are defensible and correct. They write as advocates for philosophical positions and their style is adversarial throughout. They have no interest in watering down the material. Much that appears in this volume has also appeared, or will appear, in substantially the same

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form, in professional journals. At the same time, however, the material is accessible principally because of the single most significant virtue of analytic philosophy — clarity.

Murphy and Coleman's confidence and optimism is in part a result of their analytic philosophical methodology, one that is ahistorical and purports to be value-neutral and non-ideological. However, the major cause of their self-assured tone is the authors' unquestioned assumption about the political perspective of liberalism. This reliance supplies many of the answers to fundamental moral and political questions. Thus, the authors only have to make sure that the results of their analyses accord with liberalism's central vision — an individualism supported by rights, defended by a neutral, non-paternalistic state which guarantees that most forms of interpersonal activity are modelled on the machinery of the market. The adoption of this perspective enables the authors to avoid the complications and uncertainties that would result from challenges to their political stance. In this volume, left or radical critiques of law and liberalism are more or less ignored. Such ideas do not appear to be worth the argumentative bullets it would take to blow them off the conceptual landscape.[1]

Although one may get the distinct impression that the topics covered here coincide with the research interests of the two authors, the range is impressively broad for the limited scope of the book. Moreover, a strong case is made, primarily by Coleman, for expanding the range of issues in and about law that ought to be open to philosophical treatment. This novelty adds to the excitement of the book. Philosophy of law has been a growing industry since H. L. A. Hart published *The Concept of Law* in 1961 and more or less resurrected the field, but it is exhilarating to be reminded that there is still much to explore.

The book divides naturally and perhaps intentionally into two parts — the first three chapters written by Murphy and the remaining two written by Coleman. Murphy provides jurisprudential and ethical background of the sort standardly covered by introductory courses in philosophy of law. Building on this, Coleman explores a range of more

[1] Most conspicuously absent is any reference or response to those radical and highly prolific and provocative scholars who align themselves with what has come to be called the Critical Legal Studies Movement (C.L.S.). Marxists, as a rule, tend not to turn their attention to jurisprudential issues, so it is forgivable that Murphy and Coleman ignore Marxist critique for the purposes of their introductory text. However, to ignore the mountains of material produced by the C.L.S. Movement, which for the most part challenges the very assumptions that go unchallenged in this book, is merely to insulate one's arguments from effective response. Moreover, as we shall see below, Murphy and Coleman implicitly share with the C.L.S. Movement the thesis that concrete legal systems embody a political ideology. For a recent survey of the C.L.S. Movement, see Hutchinson & Monahan, *Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought* (1984), 36 Stan. L. Rev. 199.

specific questions, more closely linked with substantive law, that are currently under professional, philosophical scrutiny.

Chapter 1 is a compact review of the major (non-Marxist, non-radical) theories of the nature of law: classical natural law, John Austin's legal positivism, H. L. A. Hart's legal positivism, American legal realism, and new versions of natural law, by which Murphy primarily means Ronald Dworkin's various jurisprudential views. The theories flow smoothly one into the other. Earlier views are held out as precursors to later ones. Refinements are shown to be the result of responses to standard objections raised against first attempts; the legal thinker who follows is always seen as building upon the work of his predecessors. Dworkin is the grand synthesizer, the current state-of-the-art jurist who has meshed together all of the "correct" insights of his predecessors.[2]

Given that Murphy views Dworkin's account of the nature of law to be founded on the insight that morality and moral reasoning are essential components of the concept of law, he moves on in Chapter 2 to consider moral theory and its application to law. Although there are a handful of pages devoted to philosophical responses to moral scepticism and to the possibility of moral objectivity, the main purpose of this chapter is to introduce two doctrines that dominate the rest of the book — the competing liberal moral theories of utilitarianism and Kantianism. Once these theories are perspicuously summarized, Murphy uses a cluster of problems in the area of freedom of speech and the press to demonstrate how utilitarian and Kantian ideas suffuse the discussion, moving us back and forth from considerations of overall utility and efficiency to considerations of rights. We are left convinced that moral philosophy's input into the law consists of countervailing intuitions about the conflict between utility and justice, efficiency and rights.

Chapter 3 deals with crime and punishment. Murphy's treatment of punishment and its competing utilitarian and Kantian justifications is standard and concise; as is his discussion of mental states, excuses and the prospect of strict liability criminal law. He also includes a previously published[3] discussion of capital punishment, viewed from the perspective of constitutional restrictions on cruel and unusual punishment. But the more interesting discussion involves the prior question of

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[2] Coleman & Murphy, *The Philosophy of Law: An Introduction to Jurisprudence* (1984) at 46-47.

[3] Murphy, "Cruel and Unusual Punishments," in Stewart, ed., *Law, Morality and Rights* (1983).

why we have criminal law at all.

Murphy argues that criminalization requires special justification because the criminal law and its supporting institutions of enforcement and prosecution cede to the state powers that are potential radical intrusions into private lives. The mere necessity of protecting individual rights from the conduct of others is not itself a justification for criminalization since private means of enforcement and protection are available.[4] Nor can it be argued that crimes are essentially injuries to the state, demanding state-enforced sanctions. The state has no rights or values that may be jeopardized by criminal activity, only individuals do.[5] What, then, justifies the state in creating and enforcing criminal law?

Murphy claims that the best approach to this question comes from the libertarian analysis of Robert Nozick. Being a devoted "liberty lover", Nozick is concerned with isolating the justifiable powers of the "minimal state". Nozick argues, in part, that these powers are restricted to those the minimal state would need in order to fulfill the job which free individuals, acting in their own self-interest, would agree to "hire" the state to perform. As it happens, the protection of rights by private means would be costly and inefficient. Given this, it is efficient for the state to engage in the job of protecting rights by means of criminalization, in order to prevent individuals from inflicting incompensable injuries or fear onto others.[6]

Thus, it is a legitimate state function, one of the few Nozick would allow, that Nozick acknowledges to protect efficiently and effectively individual rights, particularly rights to property and personal security, by means of criminalization. Murphy argues that rights to property require protection by criminal means because few structures are as important to society as mechanisms for economic exchange, "if those mechanisms become unglued, society itself would very likely become unglued."[7] Thus, we have criminal laws against theft, but not libel. Presumably the same could be said about industrial pollution, white-collar crime and racial and sexual discrimination.

With Chapter 4, Coleman takes over with a treatment of philosophical problems involved in the private law areas of torts and contracts. At this point, the pace and the difficulty of the discussion in-

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[4] Indeed, the "lover of liberty" would always prefer private means for the protection of individual rights; Coleman & Murphy, *supra* note 2, at 121.

[5] *Id.* at 119.

[6] Nozick, *Anarchy, State and Utopia* (1974).

[7] *Supra* note 2, at 121.

crease because Coleman can rely on Murphy's stage-setting. Thus, Coleman can proceed without having to debate a collection of key assumptions: that analytical philosophical techniques bring to legal issues a value-neutral, ahistorical and non-ideological methodology; that this methodology can, with sufficient cleverness, actually solve philosophical issues in law; that individual rights exist prior to the state and are pivotal; that there is a conceptually clear distinction between the public and private spheres; that the market provides the best model for understanding private legal relations; and that the central moral issue within law is how best to resolve the antagonism between utilitarian and Kantian insights.

It is, therefore, with great economy that Coleman introduces in Chapter 4 a raft of issues and questions that arise in tort and contract law. Among other issues, Coleman considers how tort and contract law can be conceptually distinguished from criminal law. His answer relies on the private/public distinction: criminal law involves the public enforcement of public duties, torts the private enforcement of public duties, and contracts the private enforcement of private duties. He investigates rules of tort liability and assesses the fault system against standards of cost effectiveness, retributive justice and compensatory justice. He challenges the claims made by Calabresi and others for no-fault tort schemes, and suggests problems with tort law's response to automobile accidents. Turning to contract law, Coleman reviews Charles Fried's analysis of contracts as promises before detailing his response to Anthony Kronman's claim that contract law ought to satisfy public, rather than private, interests inasmuch as it enforces the claims of distributive justice.

While this chapter is filled with ideas, it is merely a preparation for the final chapter in which Coleman offers a masterly introduction to the machinery, models and doctrines of economic analysis of law. Coleman shows how economic analysis has been applied to nuisance and accident law, to contracts and even to criminal law. The chapter also introduces game theory, in the context of litigation/settlement strategies, which is compared and contrasted with the standard Coasian and Posnerian models of economic analysis. Coleman then surveys a collection of objections to economic analysis. With quick and lethal analytical blows, he cuts through what is to his mind the weakest objection — that economic analysis involves a pernicious ideology — before going on to more successful, but highly technical, objections that take economic analysis on its own terms. He also suggests ways in which, if implemented in law, economic analysis would fail to secure the goals it holds out as optimal.

Enough has been said to indicate the scope of this introduction to philosophy of law. Yet it is undeniable that the combination of an analytic, philosophical methodology and the political perspective of liberalism makes many of the conclusions reached by the authors totally predictable. When Murphy questions the need for criminal law, it is to be expected that he would turn to Nozick's account of the necessary evil of empowering the state to enforce individual rights. The analytic methodology precludes an attempt to see that question in historical terms, and the political perspective demands that individual rights dominate the analysis. When Coleman turns to the objection that the economic analysis of law is ideological — in that its central notion of efficiency depends on willingness to pay, which in turn depends on capacity to pay (and therefore a methodological preference for one economic class over another) — it is inevitable that the objection will fail since it challenges the unchallengeable doctrine that the market is neutral. As Coleman tellingly admits: ". . . the ideology argument is no more nor less an objection to economic analysis than it is to markets generally."[8] Given the assumptions of his treatment of legal questions, Coleman feels no obligation to consider a critique of markets.

Despite the predictable conclusions and unquestioned assumptions, it cannot be denied that this is a valuable introductory text. The book contains a wealth of philosophical analysis and the arguments are professional and tight. Hence, anyone hoping to sustain a critique of liberalism in general and mainstream American philosophy of law in particular, has the task of addressing and answering these arguments. Yet there is another level of interest in this book. Behind the dash and optimism, in the interstices of the knockdown argumentation, one can discern the hint of a substantial predicament for mainstream philosophy of law, one not without its ironic dimension.

On the first page of this book, Murphy dutifully sets out a linchpin distinction crucial to "the application of the rational techniques of the discipline of philosophy to the subject matter of law."[9] The distinction is that between analytical jurisprudence — the logical or conceptual analysis of key legal concepts like duty, responsibility, fault and negligence — and normative jurisprudence — the rational criticism and evaluation of laws and legal institutions from moral, political, economic and other points of view. Although Murphy credits the distinction to John Austin, it is basic to all versions of legal positivism.

Within analytic philosophy, a similar distinction is raised. Concep-

[8] *Id.* at 257.

[9] *Id.* at 1.

tual analysis is purportedly a value-neutral, ahistorical and non-ideological rationality, a methodology of exploring and exposing the "logic" of concepts. Given the neutrality of the methodology, moral and political judgments have always posed a problem for the analytic philosophical tradition. Bluntly, analytic philosophizing has either found nothing rational about the process of moral or political evaluation, and has embraced moral subjectivism, relativism or some other form of moral skepticism, or it has held that the objectivity of morality can proceed rationally from a foundation of basic, intuitively obvious, empirically grounded or otherwise unchallengeable moral axioms. For the most part, however, analytic philosophers have contented themselves with the clarification of moral issues, by means of conceptual analyses of core moral concepts. It has always seemed suspicious that one could generate value judgments using a value-neutral analysis of concepts and an objective determination of the facts at issue.[10]

The political philosophy of liberalism has also traded on a distinction between neutral analysis, rule following or calculation and judgments about right and wrong, good and bad. As a political philosophy, liberalism rests upon a familiar set of moral axioms: the primacy of individual liberty and individual rights, the necessity for justifying state interference with individual liberty, and the requirement that each individual be allowed to choose his or her own conception of the good life, free from state coercion or paternalism. At the same time, however, liberalism demands neutral and objective instrumentalities for the coordination of competing interests.

In the case of liberalism, moreover, this distinction has created an antagonism between the public and the private, the objective and the subjective. Liberalism's core moral axioms delineate a private sphere within which each individual is free to make, and to act upon, judgments of value he or she chooses. In the public sphere, where conflicts between individuals seeking to actualize their private conceptions of the good life arise, a neutral and objective instrumentality is required to harmonize these conflicts. For the liberal, the market has typically stood as the ideal instrument, not only for resolving conflicts, but also for doing so in a manner that does not impinge upon individual freedom. The virtues of cost-avoidance and other characterizations of efficiency have been, for the liberal, what the standards of logical coherence and consistency have been for the analytic philosopher. It is the

[10] The larger story of the modern predicament in analytic philosophy, faced with the challenge of the continental, hermeneutical tradition, is told in Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (1983).

market that neutrally and fairly determines winners and losers among those value consumers, who freely strive to realise their own personal conceptions of the good life. The state's proper role is essentially that of facilitating the pursuit of individual actors, rather than discovering and furthering a common conception of the good life.[11]

All of this suggests that the methodology of analytic philosophy and the tenets of legal positivism and liberalism are congenial partners, each complementing and underwriting the other; and so it has been. Yet Murphy and Coleman have uncovered tensions below the surface of this veneer of co-operation. They have done so by bringing both liberal ideology and analytic methodology to the discussion of fundamental legal questions. Consequently, their approach has put pressure on legal positivism, one that it may not be able to sustain.

The problem is simply that the more that liberals insist upon the existence of individual rights, the less they will be able to understand the foundations of a concrete legal system,
without finding embodied in it legal guarantees and protections of these rights. In particular, for the liberal, the logic of constitutional rights is fundamentally, not merely coincidentally or analogically, the logic of natural rights. As Dworkin has argued, legal positivists have great difficulty in accounting for the nature of legal reasoning, as it exists in concrete cases, since they reject the notion that there is an essential moral and political content to law. In effect, Dworkin is saying that law, as it is known in liberal states, only makes sense if it is morally situated and essentially embodies the tenets of liberalism.[12]

Over and over again, the authors of this volume reinforce this view, without expressly aligning themselves with Dworkin. When Murphy discusses the constitutional questions of journalistic freedom of speech and cruel and unusual punishment, he relies explicitly on the doctrine of individual rights. Moreover, it would be implausible to insist that his analyses are aimed at external moral criticism of the law; rather, the point of his arguments is to disclose what freedom of speech and cruel and unusual are legally. Coleman's discussions reflect a similar perspective. His concern throughout is to explore what is legally demanded by underlying liberal doctrines.

The various assumptions about individual rights, the limited role of the state and the priority of the market model of interaction are not

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[11] The major, recent exposition of the nature and inner tensions of liberalism is found in Unger, *Knowledge and Politics* (1975). For a sustained critique of liberalism from the perspective of liberalism's conception of the self, see Sandel, *Liberalism and the Limits of Justice* (1982).

[12] See *Taking Rights Seriously* (1977) Ch. 3, and *"Natural" Law Revisited* (1982), 34 U. of Fla. L. Rev. 165.

alien to the character of American law. Quite the opposite, these elements of the liberal ideology are inextricably a part of American law and politics. They often determine the results of legal reasoning in constitutional law as well as in torts and contracts. In an important sense, Murphy and Coleman are attempting to do what Dworkin's mythical super-judge Hercules tries to do when he or she reasons towards the solution of a particular legal question, by searching for those moral principles that underlie legal rules and finding the best justification, in terms of principles and political morality, for the legal structure as a whole.[13]

This suggests that Murphy and Coleman, as liberals, should be committed to a version of natural law and, indeed, should strongly dissociate themselves from most versions of legal positivism. Yet, such a commitment is at odds with the presumed ideological and moral neutrality of the analytic methodology they employ, for the kind of natural law that seems to emanate from the book is one in which it is impossible to separate the analysis of centrally important legal concepts from the ideological demands of liberalism. Indeed, it is a natural law jurisprudence for which analysis is simply a disclosure and delineation of the requirements imposed on the law by liberal ideology. Gone is the philosophical distinction between neutral analysis and moral evaluation. Gone, too, is the legal positivist distinction between analytical and normative jurisprudence. As Murphy and Coleman amply demonstrate, a philosophical understanding of American law reveals that it is ideological in essence. Law, as some have said, is politics.[14]

The irony is that this very insight is the basis of radical critiques of the law, which have been so studiously ignored in this book, be they Marxist critiques arguing that law is purely superstructural, neo-Marxist critiques arguing that law is a legitimating device for liberal ideology or any of the variety of left and radical critiques offered by the Critical Legal Studies Movement. Naturally, Murphy and Coleman would strenuously reject the suggestion that their arguments and analyses presuppose a natural law jurisprudence, or that their conclusions about jurisprudential and substantive legal issues intentionally embody the ideological claims of liberalism. However, the authors seem to be faced with a dilemma. Assumptions about individual rights, the proper role of the state, the separation of the private from the public and the pivotal role of the market are either external to the law or constitute

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[13] For Dworkin's characterization of the role and methodology of Hercules, see "Hard Cases," *supra* note 12, at ch. 4.

[14] See the C.L.S. Movement's sampler: Kairys, ed., *The Politics of Law* (1982).

aspects of law that make law intelligible as such. If the latter, Murphy and Coleman are presupposing a natural law jurisprudence; if the former, it is appropriate to ask by what warrant do these authors purport to find extra-legal moral and political doctrines embodied in substantive law.

Liberalism most likely requires a natural law jurisprudence and the tensions this may generate are unavoidable. Murphy and Coleman have unintentionally produced an introduction to the philosophy of law that may reveal some of the internal tensions of liberalism itself by its methodology, its unstated assumptions and its conclusions. Hence, for those concerned with understanding the power and the persuasiveness of liberalism and mainstream American legal philosophy, as well as for those who are concerned with critiquing these institutions, *The Philosophy of Law* awaits.