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Law as Rule and Principle By Theodore M. Benditt

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LAW AS RULE AND PRINCIPLE. By THEODORE M. BENDITT. Stanford, California: Stanford University Press 1978, viii + 195 pp. $12.50.

One of the chief concerns in the history of philosophy of law has been the problem of the nature of law. Professor Theodore M. Benditt's work[1] attempts to analyze, among other things, the contemporary contributions to this continuing debate. In his survey of developments in the philosophy of law over the last half century he focuses primarily on the legal realists, the positivists, and the exponents of modern natural law theory.

Professor Benditt summarizes the primary traits of each of these theories. The realists assert that judicial decisions are based on sets of varying subjective criteria rather than on formal "rules of law."[2] The positivists argue that law is a system of rules applied to appropriate fact situations. Although judges may exercise minimal judicial discretion in rendering their decisions, they are bound by legal rules formulated by precedent. Natural law theorists claim that law is a fact of nature to be uncovered by reason, and cannot be created by men.[3]

Benditt is unhappy with the realist and positivist approaches. He identifies various inadequacies in each, and particularly criticizes the realists' portrayal of judicial behavior patterns. Noting that in clear cases judges have no difficulty deciding issues based

1. T. BENDITT, LAW AS RULE AND PRINCIPLE (1978).

2. I do not agree with Professor Benditt's presentation of the realist position, largely because he presents their views as being far more "anarchist" than they were. The realists did not deny that there were "rules of law" in the sense that rules were formulated by judges in deciding cases; rather, they denied that there were "rules of law" in the *transcendental* sense. That is, they did not agree there were "ideal" or "Platonic" rules that were to be discovered by judges. This formalistic view of rules, advanced by Blackstone and others, was a major target of the realist attack.

3. There are two types of natural law theory that need to be distinguished in any discussion of the position. *Transcendental* natural law is a view that has its roots in the philosophy of Plato. According to this perspective, laws are ideals that "exist" independently of nature and can never be altered. It is this view that became the object of the realists' attack.

Immanent natural law theory takes the position that there is some end or goal of conduct that should be strived for. In Aristotle's view that goal was the development of rationality in man. The goal does not exist as an *a priori* ideal but is posited as the result of rational conjecture or insight. Professor Benditt's position is of this latter type.

on a strict adherence to precedent, Benditt argues that if judges ignored formal rules, as the realists claim, the legal system would not contain any rationality or predictability. No judgment could be deemed correct or incorrect, right or wrong, proper or improper.[4]

Positivists, unlike legal realists, maintain that there are legal rules that a judge has a duty to apply in clear cases. In a hard case, where no legal rule is dispositive, the judge must exercise a degree of discretion. This use of discretion incurs the realists' criticism that the judge is simply acting on a "hunch" in deciding the hard case. Benditt considers the work of Ronald Dworkin, the most persistent modern critic of positivism, who has written extensively on the problem of judicial discretion and its relationship to legal rules. Dworkin has argued that in addition to legal rules there are principles that the judge must utilize in judicial decision-making. A principle is a "standard that is to be observed . . . because it is a requirement of justice or fairness or some other dimension of morality."[5]

Benditt's affinities lie with natural law theory, and, in the process of associating himself with contemporary natural law theory, he develops what he refers to as a "functional theory of law."[6] In addition, he attempts to show that positivism can be compatible with modern natural law theory, thus avoiding Dworkin's criticisms concerning the place of principles in law.

The functional theory of law advanced by Benditt arises in part out of an examination of the classical theories of natural law developed by philosophers such as Thomas Aquinas and Thomas Hobbes. Hobbes argued that reason could ascertain the proper directives of human conduct by considering man and his place in nature. Such a view has found its way into modern philosophical discussion through its use by moral philosophers in what has come to be known as the "good-reasons approach" in ethics.[7]

In its classical garb, natural law took a teleological posture, with the position that each thing in the world, both human and nonhuman, proceeded to a state of full development of its nature. The

4. *See* T. BENDITT, *supra* note 1, at 36.
5. *Id.* at 74.
6. *Id.* at 99–116.
7. For a development of this view, see G. HARMAN, THE NATURE OF MORALITY ch. 10 (1978).

good, or the goodness of each thing, was said to be the point at which all potentiality was fully developed. To achieve the good, human beings need to work toward the actualization of the entire spectrum of their abilities, with particular emphasis on the rational faculties.

Such a view of morality, which was first developed by Aristotle, has had to deal with some rather vexing problems. Among these is the problem of elucidating the connection between natural law and man-made law. It is plausible to suggest that survival, for example, is a proper end of human beings. Beyond this, it is difficult, if not impossible, to give a broader explication of the proper ends of human conduct. Although we may all agree that survival is an end of mankind, there will certainly be great dispute concerning how we are to proceed after reaching that general agreement.

Benditt wants to maintain a vestige of the natural law theory that does not fall prey to the criticisms advanced against the classical views. He divides his argument into three stages:

(A) A discussion of the logic of functional terms and an argument that the concept of a legal system is to be understood functionally;

(B) An attempt to show that the function (or purpose) of a legal system is in part moral;

(C) The assertion that once the function of a legal system has been shown to be in part moral, a connection of the appropriate sort between law and morality is established.[8]

Functional terms are understood by Benditt "in part in terms of certain features by which things referred to by that word can be identified and in part in terms of their function."[9] A concept is functional "if, and only if, criteria for evaluating the thing in question are part of the concept; and a thing has a function if, and only if, evaluative criteria are part of the concept of that thing."[10]

According to Benditt, the minimal function of law is to resolve conflicts among persons. But, he says, "there are better and worse ways of resolving or regulating conflicts."[11] It is in the resolution of these conflicts that we reach the critical difference between a "system of rules" and a "legal system." In order for a system of rules

8. T. BENDITT, *supra* note 1, at 100.
9. *Id.*
10. *Id.* at 102.
11. *Id.* at 103.

to count as a legal system "it must be such that it can be accepted by most . . . ordinary individuals."[12]

The distinction between a system of rules and a legal system is more conceptual than empirical. A system of rules qualifies as a legal system "only if it can be accepted by most of the ordinary individuals to whom it applies,"[13] yet "it is not part of the concept of a legal system that the system is actually accepted; people might refuse to accept a system and hence its rules, for poor reasons."[14] Benditt argues that it must be possible for a system of rules to be *rationally* accepted by a society to constitute a legal system. The concept of rationality employed here is one by which "a system of rules can be rationally accepted . . . only if there is some reason appropriate for doing so."[15]

Benditt admits that there will be disputes about what are rational reasons for accepting a system of rules as a legal system.[16] He suggests that the "promotion of human good"[17] would make a system of rules acceptable to most persons and would also qualify as a necessary condition for a legal system. But Benditt's analysis fails at this critical juncture because an explication of what it means to "promote human good" is lacking. He even states as much:

> The criteria that we have found implicit in the concept of a legal system are, quite evidently, moral ones, for they all come roughly under the heading of "promoting human good," which is clearly a central demand of morality. *No attempt has been made to spell this out in any way.*[18]

This failure to attempt an illumination of the relationship between rationality and the promotion of human good renders Benditt's

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12. *Id.* at 106.
13. *Id.* at 108.
14. *Id.*
15. Benditt offers several possible reasons for adopting a system of rules as a legal system:

> (1) A person might rationally go along with a legal system and profess adherence to it for purely self-interested reasons. But such a person accepts the legal system in the required sense only if he is willing to hold that there might be occasions on which either he or others ought to comply with the law even though it is against his or their overall self-interest to do so.
> (2) The promotion of justice.
> (3) The promotion of ideals.

T. BENDITT, *supra* note 1, at 109.
16. *Id.*
17. *Id.* at 110.
18. *Id.* (emphasis added).

development of natural law theory problematic. He has identified one of the central concerns of legal philosophy, but his failure to develop this insight ends his analysis where it should have begun.[19]

The relationship between law and the promotion of human good has also been treated by Roberto Unger in *Knowledge and Politics*.[20] Although Unger addresses many of the same questions as Benditt, he surpasses Benditt in attempting to delineate a theory of the good. Any supposed relationship between law and the promotion of human good requires that we first develop some definition of the good of humanity. Only in this way can we then seek to promote it. The philosophy of human nature has seen a long history of battles over the choice between reason or desire as the primary moving element in the self. Do we reason to conclusions about the proper ends of human conduct or are we simply slaves to our passions? This question has tremendous importance for a legal system that seeks to evaluate the conduct of those who fall under its purview.

The positivist theory of law attempts to deal with the issue of human nature by treating law as a matter of convention. That is, the positivists argue that law is simply a matter of conventions adopted for the regulation of conduct. There are no facts of nature that can guide men in their decisions about which laws ought to be adopted; men go about the business of formulating a legal system based on agreement among themselves.

Our beliefs about what we are as persons come to be reflected in our legal institutions, and to the positivist the laws adopted to guide conduct must be as arbitrary as the desires that move men to act. There can never be any "objective" basis on which law may be formulated if men are simply desiring beings with no concept

19. One might object that my criticisms of Benditt's ideas concerning the function of law are misdirected, for they attack a book he has not written nor chosen to write. Several arguments can be advanced in support of my criticism: First, it has already been argued that law and morality are not as separable as those such as H.L.A. Hart conceived them to be. Lon Fuller and even Ronald Dworkin have shown us this. Second, to further the morality-legality debate we need a theory of the good. This, it seems to me, is the next step in this line of argument. Benditt has simply restated step one and thus added nothing to the enterprise.

For this mode of thought to be taken seriously, it must be shown that a theory of the good is both possible and plausible within the legal process. This theory of the good would complete the line of reasoning about the place of morality in law, and allow a full assessment of the claims advanced by those who argue that law has a moral function. In short, I am criticizing a tradition of scholarship within which Benditt has squarely placed himself.

20. R. UNGER, KNOWLEDGE AND POLITICS (1975).

of the good outside of personal desire. The laws men formulate must necessarily reflect their beliefs about themselves.

When Benditt states that the "promotion of human good" is one of the functions of law he tells us nothing, for we have no idea what he means by "good."[21] Does he mean the good of each individual (satisfying individual desires) or does he mean the collective good of society? In order to determine what sort of law is necessary or will promote human good we need to have some idea of what it is to be human and what would be good for us as humans.

The problem of goodness cannot be divorced from the perennial problem of value. If the good of each individual is all that can be valued, then there can be nothing more for a legal system to do than mediate between persons when their individual desires clash. The problem of value receives short shrift in Benditt's book, and to solve the problems of natural law theory he must do more than tell us that law has a "function." His theory needs to be supplemented with a theory of value that goes beyond the limits of his present study. In short, he needs a theory of the good.

Natural law theorists have argued that there is an objective value in nature that law must embody if it is to be law. To the classic natural law theorist any directive of human conduct that is not in accord with natural or objective law is simply not law. Maintaining this point of view requires an argument for an objective theory of value. The problem with an objective theory of value (metaphysical excesses aside) is that its prescriptions are often amorphous and fail to consider the individuality of persons. In striving for a general guide to conduct for all persons, individuality is subjugated.

There are at least two ways that a theory of value can take account of the good. In the first instance, the good is defined as the satisfaction of individual desires or interests. The second method of defining the good considers collective goals more important than the satisfaction of individual wants and needs. The most desirable theory of the good would be one that combined both the satisfaction of individual desires and collective goals as well. A theory of this nature would be far superior to the other two accounts of the good.

The place of rules in a legal system should be a direct corollary

21. Much of what Professor Benditt says about the promotion of human good has been said by Aristotle. *See* ARISTOTLE, NICHOMACHEAN ETHICS, bk. I, ch. VII & bk. II, ch. VI.

of the view of human nature on which that system is based. If persons are viewed simply as beings who can have no concept of the good beyond the satisfaction of individual interests, then apart from the enforcement of constraints of justice, there can be nothing more for a legal system to do than attempt the appeasement of individual interests as far as possible. But, if a group can come to some consensus regarding shared values—a concept of the good beyond mere individual interests—then this will become an integral aspect of the adjudicative process.

Domination plays an important role in the sharing of values.[22] There are many political considerations that might explain why different groups of people adopt certain rules as the laws of their particular society, and domination or force is an element of social reality that needs to be considered. Shared values may reflect something about human nature, and the connection between the two might be enlightening when we seek an understanding of that nature. The wielding of power by a sovereign over his people will surely have an effect on how the latter come to view their legal system. Domination corrupts the sharing of values in a society. To see whether the sharing of values is an aspect of human nature, it is necessary to remove domination so as to allow human agreement to prosper.

There are two aspects to the relationship between shared values and domination. The inequalities of power must be removed from the ethical and political values embodied within them to permit free choice as regards moral action and political vision. In addition, we must assess the continuity and resemblance of values over time. If people could choose legal rules to govern their conduct, free from the bounds of domination, we might find that they would share and adhere to the same or similar values and that those values would be expressed by their legal rules.

I have argued that the good, the problem of value, and politics are all related, and have maintained this view in the belief that we cannot assess any one of these issues in isolation. The problem of subjective value and its role in the justification of legal systems is vexing not only to the jurisprudent but to the social scientist as well. For too long jurisprudence has held itself aloof from real social and political issues by adhering to the view that its proper concern is only with analysis of legal reasoning and legal concepts.

22. *See* R. UNGER, *supra* note 20, at 242–59.

Such a view will not do; law is not a theoretical enterprise lacking any direct connection with social reality. Law and legal institutions play a role within a larger political context, and it is in that context that jurisprudence should be called on to contribute its insights.

It does not contribute to the debate over the separation of law and morals to argue once again that promotion of the good is the function of law. We seem to know this by now. What we need at this point is a theory of the good that can be given practical significance within the legal process.

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