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Book Commentary

ANALYSIS OF SOURCE—A COMMENTARY ON PROFESSOR SILVING'S *SOURCES OF LAW*

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"Source" and "source material" of law is the subject-matter of this collection of some of Professor Helen Silving's papers.[1] It should be remarked at the outset that these papers should have been revised so as to take account of recent writings, without which the book wears a dated air. For instance, no mention is made of Karl N. Llewellyn's *The Common Law Tradition*,[2] which ought to find a place in any discussion of statute and precedent; instead there are references to his *Bramble Bush*,[3] published in 1930, which he himself regarded as a *tour de force* of youth. Nor, more seriously, is there any allusion to Lon L. Fuller's *The Morality of Law*[4] without which any discussion of natural law is incomplete.

The book first commences with a discussion of statute, precedent and custom, with particular emphasis on the ideologies and practices involved in them, then proceeds to a consideration of the philosophy of nature and philosophy of law as sources, rule of law, and ends with an analysis of the interrelationship between positivism and natural law. Distributed under these headings are other studies, for instance, of the English *Magna Carta*, the Spanish *Charta Magna Leonesa* and Biblical equivalents, and also, most interesting of all, of the moral and legal issues involved in the *Eichmann* affair. This commentary will begin with an analysis of the positivist-naturalist question since features of this debate, it is submitted, affect one's view of statute, precedent, custom and, indeed, of sources generally.

The precise significations of "positive" and "natural law" are not at all clear. The author begins quite properly with the well-known distinction between the content of natural law and the method of its dis-

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1. H. SILVING, SOURCES OF LAW (1968). Published by William S. Hein & Co., Buffalo, New York. Pp. viii, 404. $20.00.
2. K. LLEWELLYN, THE COMMON LAW TRADITION (1960).
3. K. LLEWELLYN, BRAMBLE BUSH (1930).
4. L. FULLER, THE MORALITY OF LAW (1964).

covery, the former being absolute and existing independently of cognition, the latter being the method of cognition. Positive law prescribes specific sources and methods which are to be appealed to in identifying "laws"; that which is extraneous to these specified sources and methods is natural.[5] There is a valuable point to be recognized here. Positive law and natural law cannot exist without the other; there can be no natural law without positive law in contrast to which it is natural, and *vice versa*.[6] The boundary shifts, but is ever-present. So far so good. But in the context of the conflict between positive and natural law the former is described as "law which is endowed with a specific machinery of enforcement and is in fact obeyed and enforced."[7] This definition can conflict with the previous one, as happens when an obsolete "law", still identifiable as such with reference to specified sources, is neither obeyed nor enforced.[8] Then again, it is stated that "the 'conflict' between natural law and the positivist doctrine first arises when the latter ceases to be positivist and assumes natural law elements."[9] Positivism is said to become a type of natural law when it is erected into an ideology and judges substitute some contemporary version of it, unknown to the original legislators, in place of natural reason.[10] Here, the meaning of "positive" is again different. Another element of confusion is introduced when logic is said to be "a type of 'natural law' which is logically [*sic*] inherent in all law."[11] What does this mean? We are told immediately that "there is nothing inherent in law which requires it to be logical, reasonable or scientific," but that a "certain amount of logic is implicit in law, and particularly in law as evolutional reality."[12] If this means that legal reasoning has endeavoured to be logical in the past and ought therefore to continue to be such, it raises the whole problem of deriving "ought to be" from what "is" or "has been"; and if this idea of "ought" is declared "natural", how should we classify the logic that actually is and has been? Is it positive?

5. H. SILVING, SOURCES OF LAW 256 (1968).
6. *Id.* at 258.
7. *Id.* at 267.
8. *E.g.*, trial by battle was still a "legal" method of proof in appeals of murder in 1818, though it had been in disuse for centuries: Ashford v. Thorton, [1818] 1 B. & Ald. 45. In Great Britain today the death penalty incredibly survives as the technical "legal" penalty for the malicious destruction of Her Majesty's ships, arsenals, dockyards, etc.: Dockyards Protection Act of 1772, 12 Geo. 3, c. 48. vol. 29. But the penalty is never pronounced, but only "recorded."
9. H. SILVING, SOURCES OF LAW 298 (1968).
10. *See, e.g.*, Erie R. Co. v. Tomkins, 304 U.S. 64 (1938).
11. H. SILVING, SOURCES OF LAW 273 (1968).
12. *Id.*

The contexts in which such statements as these appear are seeking to establish different points, but these statements do betray both a lack of coordination and a lack of clarification concerning the principles comprising positivism or natural law.

The author maintains that for the most part there need be no contradiction between natural law and positivism, and with this we must surely agree. For instance, according to the author, even the most positivist of assertions, *e.g.*, law is what courts do or will do, need not militate against a statement that the courts ought to do something other than what they do now. Natural law, for its part, cannot exist without positive law in relation to which it shows itself off as "natural". Secondly, natural law depends upon positive law for its realization; and, thirdly, natural law calls for positivism in law as an important means of securing justice in the sense of certainty and equality of treatment. On the other hand, positivism cannot dispense with natural law, since the latter provides inspiration for the content of positive rules; according to Professor Fuller, a law is what its creators thought it ought to be. The reasons for keeping the two apart, however, are: (*a*) a sense of "scientific purity" and the need to judge an ethical ideal by the particular natural law that is being adumbrated; (*b*) a judge's wish to know exactly at what point law ends and discretion begins; (*c*) it comforts a judge to be able to shift responsibility when giving a harsh decision; (*d*) natural law can make law reform palatable; and (*e*) it makes for stability amidst change. Conflict between natural law and positivism can arise in either of two ways: first, in so far as positivism asserts that only that which is identifiable by means of a formal criterion of validity is "law" and nothing else is to be obeyed. Second, when positivism becomes an ideology in the sense previously explained, the courts have to choose between it and a naturalist ideology.

Such, in the briefest outline, is the author's thesis, but it is not easy to evaluate it without reference to a broader background. Accordingly, it is hoped that the following digression, which approaches the question from another angle, will not be thought out of place.[13] A rule of law, like anything else, may be considered in two frames of thought: as it stands for the purposes of this moment, or as an enduring phenomenon. The main concern of the present time-frame is to *identify* pre-

13. The writer hopes shortly to publish an expanded version of the thesis contained in the next few lines. It has been touched on previously in *Legal Politics: Norms Behind the Grundnorm*, [1968] CAMB. L.J. 233, 255, and in *The Value Study of Law*, 28 MODERN L. REV. 397, 418 (1965).

cepts as "laws" within a given legal order, and positivists assert that this is to be accomplished solely with reference to a formal criterion of validity which has been accepted by courts in that particular legal order. Thus, if a proposition is embodied in statute or precedent it can be identified as "law", and its merit or vice is irrelevant for *this* purpose. In the time-frame of endurance, however, all factors (historical, moral, social) but for which a rule would not be in existence, and continue to exist, become an *integral part* of the concept of law as enduring, and it is within this context that naturalists assert that morality, *inter alia*, is part of any concept of law, *i.e.*, of law as enduring. Thus, an immoral statute is "law" at this moment, but it will not be "law" for very long. The author glimpses this idea in her remark that "when a natural law adherent says that a certain group of phenomena 'is' law, he uses the 'is' existentially, whereas a true positivist, when making a similar statement, uses the 'is' merely descriptively."[14] The genesis of a rule may include moral or social factors and, indeed, the circumstances in which even a criterion of validity came to be accepted may reveal a built-in moral limitation on legislative power.[15] Professor Silving forwards a somewhat analogous proposition when she asserts that "modern 'positivism' is predicated upon belief in a certain basic rationality of law and of those who enact it."[16] Turning next to the continuity of a rule, its consonance with moral ideas, adaptability, effectiveness, function (*i.e.*, continued fulfillment of purpose) and functioning are all part of the concept of the *living* rule. At this point Professor Fuller's "inner morality" of law is highly significant.[17] Such a concept consists of eight requirements, namely, generality, promulgation, prospectivity, intelligibility, self-consistency, prescription of possibilities, constancy through time and congruence with official action. A moment's reflection will reveal that none of these is necessary to the validity of a law at any given point of time, but that they are all conditions without which law cannot function in regulating behaviour.

In the light of this time-frame approach there is indeed little conflict between positivists and naturalists, for the former reflect mainly in the present time-frame and the latter in a continuum. Thus, Professor Hart, a leading positivist, whose concept of law is that of a "legal sys-

14. H. SILVING, SOURCES OF LAW 295 (1968).
15. *E.g.*, in 1689 the Crown in Parliament was accepted in England as the supreme legislative authority in supersession to the prerogative in order to guard against any further immoral abuse of legislative power. See also the adoption of the American Constitution.
16. H. SILVING, SOURCES OF LAW 355 (1968).
17. L. FULLER, THE MORALITY OF LAW, chap. 2 (1964).

tem" which is a continuing phenomenon, takes refuge in the present time-frame when justifying his positivist outlook, thereby betraying a basic confusion between his concept of law and his positivism. Professor Fuller, a leading naturalist, thinks exclusively in terms of endurance and refuses to face awkward problems of validity here and now.[18] Many more examples can be quoted to show that positivists and naturalists are seldom *ad idem*, but are shadow-boxing on different planes. A real issue between them does arise when naturalists enter the present time-frame and insist that laws should be identified with reference, not just to a formal criterion, but to a formal and moral criterion; and it is on this narrow front, *i.e.*, identifying laws here and now, that the confrontation occurs. The positivists have advanced a powerful case for confining the criterion of identification to clear-cut, formal media, such as statute and precedent, so the onus lies on the naturalists to point out a workable way of adding a moral criterion. It could be done, perhaps, by international treaty embodying human and moral values on the model of the Treaty of Rome. This establishes a supra-national law for the European Community and limits the law-quality of national enactments conflicting with it.[19] It could also be accomplished through built-in constitutional limitations;[20] and moral criteria of validity might even be evolved case by case similar to equity. Such possibilities do make the naturalist position appear less starry-eyed than at first sight, but even so they all depend ultimately on the co-operation of the judges. When faced with ruthless governmental power and when "clubs are trumps", as Hobbes put it,[21] judges can do little and the naturalists would seem to labour in vain.

The problem of statute and statutory interpretation can be related to this time-frame idea, but the present book is concerned mainly with a plea that there should be a set of rules of interpretation. Legal interpretation is neither right nor wrong, for a word means what the law says it means. Thus, even the "dictionary meaning" becomes the appropriate meaning by virtue of legal fiat. Therefore, rules of interpretation are of primary importance and the meaning they yield is secondary.

18. For a brief demonstration see Dias, *The Value Study of Law*, 28 MODERN L. REV. 397, 418-20 (1965).

19. *See, e.g.*, N.V. Algemene Transport-en Expeditie Ondereming Van Gend en Loos v. Nederlandse Tariefcommissie (no. 26/62) [1963] COMMON MARKET L. REV. 105; Costa v. Ente Nazionale per l'Enegeria Elettrice (ENEL) (No. 6/64 [1964] COMMON MARKET L. REV. 425.

20. *E.g.*, I.C. Golak Nath v. State of Punjab, [1967] 2 S.C.R. 762.

21. *Dialogue between a Philosopher and a Student of the Common Law of England*, on "Punishments."

Such rules are peculiar in that they are used in conjunction with other rules whose meaning they serve to specify. The case for having such rules is (1) that they will provide an agreed type of comprehension and a method of arriving at it; (2) that they enable draftsmen to know in advance how courts will react; and (3) that they establish a criterion with reference to which there can be such a thing as "true" meaning.

In regard to all this, it should first be noted that there is a distinction between "statute" as a law-constitutive medium and the problem of interpreting particular statutes. The book is clearly concerned with the latter, though one would have expected a "jurisprudential" discussion of statute to have included both. Secondly, the plea for a "law of interpretation" is questionable. Clearly any rule of statute-law is designed to operate in a continuum, since it seeks to control the indefinite future, and this can only be achieved in terms of categories and classes. But these are man-made and hence are bound to be *casus omissi*. Therefore, viewed in the time-frame of a continuum the problem is not essentially that of "meaning," but of "application" of a given text to unforeseen situations. "Meaning" is an idea germane to the present time-frame (what words mean here and now): "application" is an idea germane to the continuum. "Meaning" should thus be oriented towards "continuous application." The process may be analogized to the building of a brick wall; one does not simply place each brick as it comes to hand next to the previous one, but along a guiding line indicating the direction. With statute this guiding line is its policy extension and is to be determined not only from the purpose behind the original enactment but also from contemporary needs. The author is correct in observing that the inclusion or exclusion of the preparatory material of statutes rests on rules, but she does not examine when the one rule or the other should be invoked. In the case of ancient statutes, evidence of the original circumstances that gave rise to its enactment is of little help if they no longer obtain.[22] Thirdly, a plea for rules of interpretation is not likely to succeed unless an indication of the type of rules that are envisaged are forwarded, for grave difficulties are encountered due to the sheer slipperiness of words. The very word "meaning" is ambiguous, for it connotes both reference ("I mean to refer to this thing") and purpose ("I mean to do so and so"). No one can fix meanings to cope with all future applications, since problems will inevitably arise

22. In R. v. Bow Road Justices, ex parte Adedigba, [1968] 2 Q.B. 572, the court adopted a contemporary interpretation.

in the fringe area of unsettled usages that surround every word. Hence, rules prescribing the means of determining meanings will be of little value. A rule which says that, *e.g.*, the "plain meaning" is to be adopted, is useless because, as Lord Blackburn pointed out, "The cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with reference to the subject-matter, is."[23] Again, a certain statute required that a taxpayer, who submitted a false tax-return, should be penalized "treble the tax which he ought to be charged under this Act." The Court of Appeal was of the opinion that the "plain meaning" of the statute required the taxpayer to pay treble the amount which he failed to declare, *i.e.*, treble £14 5s.,[24] whereas the House of Lords reasoned the statute meant treble the total tax assessment, *i.e.*, treble £139 11s. 6d.[25] What sort of rule would have avoided this divergence of opinion? It is, if anything, a problem of drafting, not of rules. Very often different meanings are attached to words according to vital policy considerations, consequently any rule which states that words shall be construed according to policy automatically deprives itself and all other rules of further value.

Precedent is dealt with less extensively than statute. The comparison of statutory interpretation and precedent interpretation is unconvincing. The author states, for instance, that "the distinctive treatment of the interpretation of statutes and that of precedents is a matter of legal fiat and not merely one of inherent qualities of these forms of law."[26] Such an assertion appears to suggest that the differences are artificial and possibly of minor importance. With case law the task is that of extracting from some unique event a statement of fact at a level of sufficient generality to enable it to control similar type situations in the future. How broadly or narrowly such control can be effected depends upon the level of generality and, as the author truly remarks, facts are statable at various levels. With statute, on the other hand, the task is not one of extracting different statements of facts from a unique event, but of placing different constructions on a single given statement. This difference, it is urged, is indeed inherent in the two forms of law and is crucial. Consequently, the application of *stare decisis* to statutory interpretation is to be deplored even though the author re-

23. Leader v. Duffy, [1888] 13 A.C. 294, 301.
24. Inland Revenue Commissioners v. Hinchy, [1959] 2 Q.B. 357.
25. Inland Revenue Commissioners v. Hinchy, [1960] A.C. 748.
26. H. SILVING, SOURCES OF LAW 17-18 (1968).

gards it as a possible solution to certain problems.[27] The sole advantage of *stare decisis* in this connection is that once an interpretative decision has been given, legislators have notice of the judicial meaning. The author's general opinion is that a combination of code-cum-case-law is desirable, and the respective functions of precedent in civil and common law countries are contrasted. In the former, case law must be fitted into a scheme of comprehensive codification and is thus subsidiary and illustrative. In the latter, this is not so, and the suggestion is offered that it would be helpful to have a restatement of common law technique rather than, or perhaps in addition to, restatements of particular branches.

With regard to custom, a distinction is drawn between custom as legal continuity in the face of change and customary law which consists of particular rules referring to customs.[28] In the former sense customary law is the legal corollary of evolution.[29] Custom is said to be composed of two elements, a factual one, which is the repetition of outward acts, and a psychological one, which is the attitude of those performing such acts; but it is not clear to which of the two meanings of custom they relate. It is submitted that the preservation of continuity in a legal order is dependent on the courts. One manifestation of "justice" is that like cases should be adjudicated uniformly, thereby giving rise in time to lines of similar decisions, which thereby evolve into principles of law. The process of keeping the above abreast of social change is inseparably linked with the "custom of the courts", *i.e.*, judicial practice, which identifies custom as an element of legal continuity with precedent. But this point is not touched on by the author. Another aspect, which is largely ignored, is that of particular customs as laws. If one asks the question why customs were originally accepted as laws and why customs continue to be accepted as laws, it will be seen that, with regard to the first question, local customary practices were originally accepted by judges in the absence of any other guides because the *corpus* of law had not filled out sufficiently. A further influence was the desire to win and preserve local confidence and not to defeat settled expectations founded on local practices. The early judges were, therefore, only concerned to see whether practices exerted sufficient local pressure to conform, and it is in *this* connection that the factual repetition of outward acts and

27. *Id.* at 38. For judicial condemnation, see Wright v. Walford, [1955] 1 Q.B. 363, 374; R. v. Bow Road Justices, ex parte Adedigba, [1968] 2 Q.B. 572.
28. H. SILVING, SOURCES OF LAW 136 (1968).
29. *Id.* at 133.

the psychological urge towards conformity find their setting. By not making such distinctions, the discussion of custom loses a good deal of point.

The book proceeds to the philosophy of nature as a source of law, in connection with which the attitude of courts towards mistake, religious belief and scientific freedom is considered; and to the philosophy of law as a source of law, which deals with the influence of legal ideology. Other subsidiary matters are also dealt with, but it would exceed the province of this commentary to enter into them. Throughout the book there are many insights and thought-provoking remarks, but the overriding judgment must be that the analyses scarcely go far enough and, in any case, are couched in such abstract language that it is often difficult to distill the point.