

that the law is a natural growth of human society and changes to answer the varying conditions and tempers of the culture that sustains it,<sup>17</sup>

lawyers and law students who read Professor Richardson's book may expect to find their minds quickened to the realization that the law-medicine relationship is more than a courtroom experience. It is becoming an experience of societal import—of life itself.

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MORALITY AND THE LAW. By *Samuel Enoch Stumpf*.† Nashville: Vanderbilt University Press, 1966. Pp. 247. \$5.00.

This is a disappointing book. Its main theme is that although law and morality are not identical, they are nonetheless so interconnected that the law cannot be considered in isolation from morality. The author examines the relationship between law and morality in the decisions of the United States Supreme Court, in the Soviet concept of law, in the positivist theory of law, and in international law. He discusses Hobbes' notion of natural law and concludes with some general observations about the moral and legal orders. Professor Stumpf points out the obvious—that much of the law is not morally neutral and that moral considerations are relevant in legislating and in judicial decision-making—and a great portion of the book is devoted to re-establishing this rather uncontroversial conclusion. How relevant these moral considerations are, particularly in judicial decision-making, is never made quite clear, perhaps partly because Stumpf is not a lawyer by profession. Another point which the author makes and remakes is that morality invests human beings with certain rights; but he never really specifies what these rights are. The most he says in this regard is that "the law does not invest a human being with the qualities of worth and dignity and the other values which flow from these: these values are intrinsic to human nature when viewed from the standpoint of morality . . .,"<sup>1</sup>

<sup>17</sup> DEVANE, *HIGHER EDUCATION IN TWENTIETH CENTURY AMERICA* 160 (1965).

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<sup>1</sup> STUMPF, *MORALITY AND THE LAW* 238 (1966).

but this does not tell us very much, particularly when followed by phrases such as "specific rights come to light only as conditions focus on them." On the whole, then, one finds Professor Stumpf's conclusions either unexceptionable or too vague and general to permit much comment or, I would add, to be of much interest.

A disturbing feature about the book, however, is that the details are so often wrong. A common feature of these errors is that they usually arise from an attempted restatement of either a legal doctrine or the substance of a particular philosopher's writings. Two examples—one from the area of international law, the other from legal philosophy—will illustrate.

In discussing the International Court of Justice, Professor Stumpf states that

representation on this court is limited to those nations which are members of the United Nations and are duly elected by particular nations, forming a list of nominees from which the Security Council and the General Assembly each separately choose fifteen judges; any person on this list who is chosen by a majority of both bodies is elected.<sup>2</sup>

There are several things clearly wrong with this statement: first, it is individuals who sit on the court as judges, not nations represented as political entities;<sup>3</sup> second, it is not necessary that a person be a citizen or national of a country that is a party to the Statute of the International Court of Justice to be elected a judge on the International Court; third, a nation may be a party to the Statute of the International Court without being a member of the United Nations. The Charter of the United Nations expressly provides that nonmembers may become parties to the Statute of the Court,<sup>4</sup> and the Statute of the International Court expressly recognizes the right of parties to the Statute who are not members of the United Nations to participate in the election of the judges of the Court.<sup>5</sup> Switzerland

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<sup>2</sup> *Id.* at 142.

<sup>3</sup> "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." STAT. INT'L CT. JUST. art. 2.

<sup>4</sup> U.N. CHARTER art. 93, para. 2.

<sup>5</sup> The conditions under which States that are parties to the Court's Statute but not members of the United Nations may participate in electing members of the Court shall be laid down by the UN General Assembly upon recommendation of the Security Council. STAT. INT'L CT. JUST. art. 4, para. 3. The procedure under which nonmembers

is perhaps the most notable example of a nonmember of the United Nations which is a party to the Statute of the Court and whose nationals have served as judges on the Court.<sup>6</sup>

Turning to legal philosophy, Professor Stumpf makes the following assertion concerning John Austin:

Because Austin thought chiefly in terms of English monarchy and aristocracy, he made the mistake of thinking that in all governments the sovereigns are not bound by the laws they make. In America the rulers are bound by the laws they make, and even more significant is the fact that the lawmakers are also bound by the fundamental law of the Constitution.

Austin emphasized that there is no *legal* limitation to the sovereign's power. This is simply a play on words, because it means that there are no laws when the sovereign *begins* being a sovereign. First there is a sovereign, then his commands become the law, so it may be theoretically correct that there are no legal limitations to the sovereign. But again, in constitutional government, the constitution is the basic law and it limits the powers of the sovereign, so that in this case not even the verbal symmetry in Austin's argument will hold.<sup>7</sup>

To my mind, this passage evidences a complete lack of comprehension of Austin's position. He did in fact consider the American experience; and his whole point was not that the sovereign is free when he "*begins* being a sovereign," but that by definition the sovereign is legally free to do whatever he wants at any time, and this legal freedom extends to changing the ground rules under which a particu-

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of the United Nations who are parties to the Statute of the Court may participate in the election of judges is set out in United Nations General Assembly Resolution 264 (III), Oct. 8, 1948.

<sup>6</sup> Liechtenstein and San Marino are also parties to the Court's Statute although they are not members of the United Nations. See [1964-1965] I.C.J.Y. 30. In addition, Japan was a party to the Statute of the Court for more than two years before it became a member of the United Nations. *Ibid.* The Statute of the Court (Article 35 (2)) also authorizes the Court to be opened to states which are neither parties to the Statute of the Court nor members of the United Nations, the latter being ipso facto parties to the Statute of the Court. Two such nonmember states which have access to the Court as a result of their having filed appropriate general declarations are the Federal Republic of Germany and the Republic of Viet-Nam. *Id.* at 30-32.

Two Swiss nationals have served as Judges *ad hoc* on the International Court of Justice. M. Paul Guggenheim was selected by Liechtenstein as its Judge *ad hoc* in the Nottebohm Case, [1954-1955] I.C.J.Y. 18, and M. Paul Carré was selected by Switzerland as a Judge *ad hoc* in the Interhandel Case, [1957-1958] I.C.J.Y. 18. In addition, during the period when Japan was not a member of the United Nations, M. Shigeru Kuriyama was nominated for election to the Court. [1955-1956] I.C.J.Y. 18. Several Swiss nationals have been similarly nominated for election to the Court.

<sup>7</sup> STUMPF, *op. cit. supra* note 1, at 106-07.

lar political society is functioning. In a constitutional society, therefore, the sovereign is that entity which can amend the constitution. In Austin's view the sovereign in the United States is a conglomerate entity consisting roughly of the electors of the Congress and state legislatures, since this conglomerate theoretically can force the initiation and ratification of amendments to the Constitution.<sup>8</sup> Because the sovereign so identified can change the Constitution for any reason whatsoever, it is not in Austin's sense bound by the Constitution. Accordingly, Stumpf's argument that the American form of government contradicts Austin's theory of sovereignty had already been anticipated and met by Austin, for what Stumpf calls "rulers" or "lawmakers" are not what Austin calls the sovereign. A more meaningful criticism of Austin's conception of sovereignty might be that, in his insistence that the sovereign be legally all powerful, Austin must of necessity, in a diversified political society such as the United States, recognize a sovereign that is so unwieldy and so large (in

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<sup>8</sup> "The supreme government of the United States of America agrees (I believe) with the foregoing general description of a supreme federal government. I believe that the common government, or the government consisting of the congress and the president of the united states, is merely a subject minister of the united states' governments. I believe that none of the latter is properly sovereign or supreme, even in the state or political society of which it is the immediate chief. *And, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body: meaning of a state's government, not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein.* If the several immediate chiefs of the several united states, were respectively single individuals, or were respectively narrow oligarchies, the sovereignty of each of the states, and also of the larger state arising from the federal union, would reside in those several individuals, or would reside in those several oligarchies, as forming a collective whole.\*

\* "The Constitution of the United States, or the constitution of their general government, was framed by deputies from the several states in 1787. *It may (I think) be inferred from the fifth article, that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body.* It is provided by that article, that 'the congress, whenever two-thirds of both houses shall deem it necessary shall propose amendments to this constitution: or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments: which amendments, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by convention in three-fourths thereof.' See also the tenth section of the first article: in which section, some of the disabilities of the several states' governments are determined expressly." AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 250-51 (The Library of Ideas ed. 1954). (Emphasis added. Austin's emphasis underscored.)

Professor Stumpf refers to this work a great deal in his book but has apparently overlooked or disregarded this passage.

the United States of the present day it might consist of as many as 100 million people) as to be unable as a practical matter to exercise the unlimited power which by definition it has. And perhaps this is something that might be said for the wisdom of such a form of government.

Stumpf's lack of understanding of Austin is exhibited also in his treatment of Austin's references to "positive morality," a term which Austin uses to embrace a wide variety of concepts ranging from a society's ethical values to commercial custom and even to what many people would consider elements of the law itself. For Austin, constitutions were part of positive morality—not part of the positive law in his narrow use of the word "Law"—because the sovereign could always change the constitution. Since for Austin the notion of law connoted the idea of being bound, what we call *constitutional law* was therefore not law in the strict sense, but likewise a part of positive morality. From Austin's description of constitutional law as positive morality Stumpf concludes that

Austin's analysis reveals . . . the conjunction of law and morals. Referring to these moral laws in the structure of constitutional lawmaking, he regrets that he has found them there because they upset the logical rigor of his system, but with admirable candor he, [Austin] writes,

"Though, in logical rigour, much of the so-called law which relates to the Sovereign, ought to be banished from the *Corpus Juris*, it ought to be inserted in the *Corpus Juris* for reasons of convenience which are paramount to logical symmetry. For though, in strictness, it belongs to positive morality or to ethics, a knowledge of it is absolutely necessary in order to have a knowledge of the positive law with which the *Corpus Juris* is properly concerned."<sup>9</sup>

Stumpf's conclusion is totally inaccurate and it misses the point of the very passage which he quotes to support his conclusion. When Austin speaks (and not regretfully) of including portions of positive morality in the study of law, he means constitutional law in something like its traditional meaning.<sup>10</sup> He is not referring to what

<sup>9</sup> STUMPF, *op. cit. supra* note 1, at 110. (Italics in original omitted.)

<sup>10</sup> The relationship between positive morality and constitutional law is made clear from two passages from Austin's *Lectures*, the first appearing a few paragraphs before the passage quoted by Stumpf and the second immediately following the passage quoted by Stumpf.

"Now, so far as public law relates to the Sovereign, it is clear that much of it is

Stumpf, in the passage just quoted, calls "moral laws" or to those natural rights whose protection Stumpf sees as the goal and justification of the law.

I started this review by stating that this is a disappointing book. The similarity of the title to that of Professor Fuller's fairly recent book, *The Morality of Law* (1965), cannot go unnoticed. Fuller, starting from the interconnection of law and morality, has tried to state in concrete terms how morality affects the law. Professor Fuller's book has met much criticism, but he deserves the gratitude of the profession for stating his conclusions in a way that invited comment and controversy. In contrast, Professor Stumpf, never having gotten beyond the truism that law and morality are interconnected—after all, the law deals with man and man is a moral and political animal—has left us nothing but details to quibble over.

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not law, but is merely positive morality, or ethical maxims. As against the monarch properly so called, or as against the sovereign body in its collective and sovereign capacity, the so-called laws which determine the constitution of the State, or which determine the ends or modes to and in which the sovereign powers shall be exercised, are not properly positive laws, but are laws set by general opinion, or merely ethical maxims which the Sovereign spontaneously observes.

"In strictness, therefore, much of the public law which relates to the Sovereign or State, is not matter for any portion of the *corpus juris*: understanding by the *corpus juris*, the system or collective whole of the positive laws which obtain in any society political and independent.

.....  
"The case which I am now considering is one of the numerous cases wherein law and morality are so intimately and indissolubly allied, that, though they are of distinct natures and ought to be carefully distinguished, it is necessary nevertheless to consider them in conjunction. A description, therefore, of the law which regards the constitution of the State, and which determines the ends or modes to and in which the Sovereign exercises the sovereign powers, is an essential part of a complete *corpus juris*, although, properly speaking, that so-called law is not positive law." 2 AUSTIN, LECTURES ON JURISPRUDENCE 745-46 (5th ed. 1855).

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