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LEGALISM IN LAW MAKING AND LAW ENFORCEMENT

JOHN E. COONS*

Some of what I say about Dr. Shklar's book may seem critical, but you would be wrong to conclude that I have come to bury and not to praise her. It's simply a question of the limits of time; and in any event, if I seem long on criticism and short on praise, Dr. Shklar's readers will recognize it as a style with which she is familiar.

Our subject—despite its name—is not simply a book on legalism. Someone should write such a book. Dr. Shklar should write such a book. The book she has so beautifully written is a comment, rather, on the general problem of conceptualism in ethics, even though her examples have been largely limited to public law. She has adopted a meaning for legalism so broad that it could include questions ranging all the way from the destructibility of contingent remainders to the problem of the appropriate number of cocktails at the publishers' party. "What is legalism?" she asks. "It is the ethical attitude that holds moral conduct to be a matter of rule-following." This, then, is a book about an ethical attitude—an attitude holding that only specific verbal propositions have functional significance in moral and legal discourse; about an attitude that it can be a meaningful and sometimes necessary thing to construct and promulgate such formulas as "all dogs must be leashed" or "six martinis is too much." Dr. Shklar is a student of that insidious habit of human intelligence—generalization. Though her book is aimed at lawyers and speaks mostly of law, it is less a critique of lawyers and law than of all philosophies that strive to organize reality into verbal categories—in short, of practically all philosophies. Perhaps the book is not an outright rejection of conceptualism in ethics, but its author rather clearly wishes that it could be. She may suffer rules gladly for society's sake, but she does suffer. For her the center of ethical experience is not to be found in the hoary dicta of judges and moralists. It lies rather in a hope for something she describes as:

... social diversity, inspired by that barebones liberalism which, having abandoned the theory of progress and every specific scheme of economics, is committed only to the belief that tolerance is a primary virtue and that a diversity of opinions and habits is not only to be endured but to be cherished and encouraged.

This—to me—sentimental attachment to diversity for its own sake informs the entire work. It may help to explain Dr. Shklar's ambivalent attitude of hostility coupled with occasional grudging admiration for what she supposes to be the mind of the American lawyer—he of the constipated psyche, hugging his comfort blanket of true rules, suspicious of diversity, yet oddly fastidious in supplying procedural equality for dissenters. So, at least, she seems to view him. This is not merely a book about an attitude. It is an attitude about an attitude.

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Few of us would deny that conceptualism can be harmful in law as elsewhere. There is nothing like an overdose of hair splitting to render a legal or ethical system dysfunctional. American law and lawyers may in fact be guilty of such excess. Unfortunately, we would never know the answer from this book. The only legal types we meet here are such figures as Justice Jackson trotting off to Germany to try war crimes and Judge Kaufman pronouncing sentence upon the Rosenbergs. Dr. Shklar's analysis of these trials and her psychoanalysis of Justice Jackson are first rate, but the relevance of these freak cases to the care and feeding of the average lawyer is surely remote. The same may be said of the references to racial segregation, freedom of speech, euthanasia, homosexuality, and crimes against humanity. These jural sports are the examples given to assist us in penetrating and understanding the world of legalism. I find such atmosphere rather too rarified to provide much insight. We can agree that the compartmented mind is badly equipped for Law and Politics without concluding much at all about the bulk of the legal iceberg below the water line chosen by Dr. Shklar. I'd like to know what's going on in the murkier depths below the level of high policy.

I concede that one sees but poorly at this level. But there are shapes and voices, and one thing I have yet to encounter is the naive lawyer Dr. Shklar describes—the lawyer who, in her words—thinks it is "there." Now I may not understand Dr. Shklar's meaning of "there," but if she suggests that the typical American lawyer enjoys a vision of reified rules of conduct sunning themselves in a Platonic heaven, all I can say is that we've been traveling in different circles. Maybe Grotius saw them. Maybe Grotius believed in Santa Claus. Some lawyers may well believe in Santa Claus, but I have yet to meet a lawyer who believes in the reasonable man. I know some Property teachers who regularly see unicorns, but, so far as I can divine, not one of them has ever believed in peppercorns. If there is any attitude that the lawyers have learned from Langdell and from the experience of federalism it is a raw, unvarnished skepticism about the reality of the verbal boxes that we hammer in our courts and legislatures, our briefs, and our casebooks.

What most lawyers do believe in—but not much more—is the rare but real possibility of answering practical questions with civilized solutions. Where conceptualism promotes this end, it is available as our servant. Where it does not, then so much the worse for conceptualism. In fact, of course, many legal solutions are conceptualistic—or, if you prefer—legalistic. But to suppose that lawyers think of rules in ontological terms as "there" is to mistake the shorthand of professional discourse for the deposit of truth. We do not believe in the contingent remainder because it is there. It is there because we believe in it; or, perhaps more accurately, it works, therefore it is.

I believe the lawyer's attitude to be as skeptical as Dr. Shklar could possibly wish. We swim in a sea of indeterminacy, and, if we don't love it, we at least are aware of it. Our problem is not that of being fooled by concepts but of dominating them with practical reason. Where simplistic absurdities exist—and they do—we must slay them, and we do so with regularity. Yesterday we killed the fellow servant doctrine; today we have mortally wounded Shelley's case; tomorrow other ogres will fall. No doubt the failures, too, are numerous, but success is at least frequent enough to disallow
legalism in the Shklaristic sense as the appropriate motif of the American bar. Even in, or perhaps especially in, the arena of high public policy so congenial to political scientists, legalism has been clearly the servant, not the master. In race relations, antitrust policy, civil liberties, and criminal law, the courts have been anything but conceptualistic. Perhaps the geometry of one man-one vote should be viewed as an exception; but if attitudes are here the issue, I suspect that the legalistic apportionment decisions are applauded less by lawyers than by Doctor Shklar; American lawyers have always held a curious and abiding affection for sloppy pragmatism.

All that I have said amounts to this: there is no general problem of legalism but only problems of legalism. There are merely solutions that are dysfunctional—some because they are too conceptual, others perhaps because they are not sufficiently conceptual. It is our business and Dr. Shklar's to expose and correct them. She has ably identified several problems of excessive conceptualism at high levels. I would suggest another example that has previously occupied me—indeed, a pet of mine—one of a humbler character than war crimes but nonetheless important and pervasive. For lack of a better description, I would call it the cult of winner-take-all. It is imbedded in the unspoken premise that for any given dispute submitted to adjudication, only two solutions exist: for plaintiff or for defendant; it makes litigation what the game theorists describe as a zero sum game. A judge may strive for compromise in pre-trial, but his own decision from the bench must be polarized, however neatly the issues of fact and law may be balanced.

Now for most dispute situations, this all-or-nothing approach may have many advantages in terms of judicial administration and public policy, but as a universal principle of decision it is patent nonsense. It not only falsifies reality, but is frequently unjust to the losing party and the winner as well. In many stereotyped situations rules could be devised to effect compromise solutions more nearly reflecting the real equities. One thinks immediately of comparative negligence, but an even better case is that of the defrauded owner of a chattel versus the bona fide purchaser. In many such cases the equities suggest a split, and an intelligible rule could be framed to that end. Note, however, that I speak in terms of developing workable rules for compromise, not simply in terms of judicial discretion, though discretion would surely have its role to pay. If this be legalism, make the most of it. It seems to me a functional legalism, and that, I submit, is the object of our quest.

This may appear a pedestrian concern juxtaposed to the great issues of war and peace that occupy Dr. Shklar. At bottom, however, is the identical question of the extent to which generalized solutions to ethical questions involve a sacrifice of human potential. Are rules of conduct inevitably prisons? Dr. Shklar is properly schizophrenic on this issue, but there is little doubt that rule-oriented systems cause her a good deal of uneasiness. I may be merely proving Dr. Shklar's fundamental point about lawyers' attitudes in what I'm about to say, but it is hard for me to think of rules as the enemy of freedom and diversity. It may be true, as Dr. Shklar suggests, that mystical moralists like Nietzsche or Sartre think of rules as confining and cold. But I expect that most men find mystical morality confining and cold—as confining and cold as the asylum that was eventually reserved for the original superman. Freedom is not the absence of form. Indeed, the history of human liberty is in large measure the history of form manifested in the
organization and complication of matter and psyche. In the human species the development of structure is the beginning of choice; and the essence of structure is the development of rules. Under some circumstances even the most arbitrary of rules may serve to increase freedom—the rules of the road are the classic example.

But I would go even further in praise of rules: they are not merely a precondition of freedom. They are the guardians of the enthusiastic society, for they provide the limiting conditions under which romance is possible. Romance is not the offspring of formlessness; rather, it is the child of order. It depends in a fundamental way upon letting man know the risks he runs and then leaving him free to run them. Or—which is about the same thing—it depends upon perceiving the importance of the rules of any game in order to get any fun out of the playing. Bridge is really not much fun if trump keeps changing in the middle of the hand.

I'd like to illustrate this relation between rules and romance by returning for a moment to the nursery to examine what Chesterton called “the ethics of elfland.” Let's take the case of Beauty and the Beast. Suppose we had reason to think that the witch who had hexed the handsome prince was really a pretty wishy-washy, discretion-oriented sort of witch who often relented when the chips were down. Even if Beauty lost her nerve and couldn't bring herself to kiss the poor ugly fellow, there still was a good chance the witch would give him his complexion back and he and Beauty would get married and live happily. I nearly said “ever after,” but that would be up to the witch again, wouldn't it? If she changed her mind once, why not twice? And, for that matter, suppose Beauty and Prince didn't get along after all. Maybe the witch would let her off the hook and find another prince for her, and then another. . . . Romantic? Exciting?

Or suppose, on the other hand, the warmhearted heroine in her great charity summons her courage, kisses the beast, and he turns into . . . a giraffe. Exciting? Romantic?

What was it about Beauty and the Beast, or even Cinderella, that made our childish hearts leap? Precisely this: we had confidence that the plan would be observed, the promise kept, the rule enforced. We were excited by the knowledge that what the girl did or failed to do really mattered. It was of no great importance that the rule itself be sensible but only that it be enforceable. We might hear the tale a hundred times, but there was always the chance that next time Beauty would not kiss the Beast, and we knew what the awful consequences would be—indeed, we insisted on them as the center and spice of the story.

On a larger scale, the same principle operates in Genesis. What a catastrophe for romance if God had said, “Well, Adam, you rascal, you've eaten the apple. I hope you won't do that again. Do try to be better.” Adam's infidelity was in any event a disaster, but from the wreckage of Eden at least this was preserved by God's judgment: that what man does matters a very great deal. If God had merely shrugged, even this would have been lost, and our warm and comfortable Eden would be about as exciting as a cow pasture. If God could not be trusted to punish, He could not be trusted.

The application of this same line of thought to the institution of marriage is obvious, and brings the world of the fairy tale and of scripture across the
borders of pure morality and into the world of the lawyer. The fascination
and excitement of marriage has nothing to do with the physical. That aspect
of the relation is quite imaginable even without the institution. The romance
of marriage is in the commitment, in a man's willingness to cast his lot for
life on a judgment that is both difficult and dangerous. Like accepting the
challenge to a duel, it may be unwise, it may be regretted, it may be a disaster.
But all this is simply to say that there is risk, and without risk there is no
romance.

This line of thought can be carried too far, as perhaps I've unwittingly
demonstrated. The content of the rules does make a difference. And, as
Dr. Shklar demonstrates, a limited tyranny is conceivable, even under the
rule of law. But at least insofar as legalism, like Mother Goose, preserves
fidelity to human principle and institutions, it protects the essence of a zestful
life. In preserving the rules of the game, the law keeps the game worth play-
ing and continues to inspire the revolutionary notion that men can lead civil-
ized lives, that society can provide freedom in order, and that the joy of
responsible action is the primary spice of life.