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Book Review - Law, Legitimacy and Symbols: An Expanded View of Law and Society in Transition

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LAW, LEGITIMACY, AND SYMBOLS: AN EXPANDED VIEW OF LAW AND SOCIETY IN TRANSITION

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LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW. By *Philippe Nonet* and *Philip Selznick.* New York: Harper and Row. 1978. Pp. 122. $4.95.

In *Law and Society in Transition,* Philippe Nonet and Philip Selznick continue an inquiry they began in earlier works,[1] the celebration of the expansion of the rule of law. Although brief and undeveloped, this book nevertheless represents a major step forward in their thinking. Their prior works presented a continuum of legality and examined the transformation of specific institutions along a single dimension of evolving legality. *Law and Society in Transition* enriches and expands this effort by proposing a theory of the development of varying types and stages of legality.

They posit three modes of legal order, *repressive law, autonomous law,* and *responsive law.* Each is distinguished from the other by purpose, method, and source of legitimacy. Repressive law appeals to the primitive need for order and social defense and relies heavily on coercion. Autonomous law emphasizes procedural regularity and predictability. Responsive law focusses on the substantive goals of the community and views law as an instrument for achieving them.

The object of *repressive law* is order. It focusses on the most basic need of society, the preservation of social order. As such, law is subordinated to politics and relies heavily on brute force. Repressive law, as Nonet and Selznick characterize it, is a tool of political authority; it is the device by which those in political power seek to consolidate authority, command obedience, and legitimize their presence. One might be tempted to associate repressive law with amorality, the substitution of the gunman for the priest. But, as Nonet and Selznick convincingly argue, the essence of repressive law is moralism. Ultimately its appeal is derived not from fear, but from the premise that only through the

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1. *See, e.g.,* P. NONET, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY (1969); P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE (1969); Selznick, *Sociology and Natural Law,* 6 NAT. L. F. 84 (1961).

use of efficient exercise of force can the security and morality of social order be preserved.

The object of *autonomous law* is to *tame* repression. Autonomous law celebrates the "rule of law" and the development of "a government of laws and not of men." The distinguishing characteristics of autonomous laws are the separation of law and politics, the accountability of officials to the rule of law, the emphasis on procedures, and the insistence that rules be obeyed and that criticism and efforts to change be channelled through established legal institutions and procedures. Disobedience is tolerated only to the extent that its object is to challenge the validity of statutes.

Responsive law reflects a concern with substance. It acknowledges the stultifying effects of legalism and recognizes that however detailed the substantive law might be it remains an imperfect instrument for capturing and expressing the impulses and strivings of a complex community. While acknowledging the need to curb political authority and the desire for regularity, responsive law pursues accountability not solely in terms of compliance to rigid rules, but through fidelity to the substantive aims of the law. Unlike autonomous law, where rigid rules are in danger of becoming ends in themselves, responsive law focusses on *principles* within the law; they are open-textured, allowing for debate, change, and adjustment. Principles point to goals and suggest directions, but do not necessarily supply the detailed guides to decide concrete cases.

These views of legal authority correspond closely to different emphases in classical jurisprudence; repressive law is linked to the philosophical perspectives of Hobbes, John Austin, and Marx. Autonomous law is associated with Hans Kelsen. Responsive law is joined to the tradition of the sociological jurisprudence of Roscoe Pound and the philosophical perspectives of Ronald Dworkin and John Dewey. Those categorizations, the authors take pains to emphasize, are only ideal types: "Any given legal order or legal institution is likely to have a 'mixed' character, incorporating aspects of all three types of law."[2] But, they continue, "although a legal order will exhibit elements of all types, its basic posture may nevertheless approximate one type more closely than the others."[3]

Having developed these ideal types of law, the authors go on

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2. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 17 (1978).

3. *Id.*

to outline an evolutionary theory of legal development. They see in the legal order an "inner dynamic" in which certain conditions generate pressure for change, thereby producing a developmental sequence. According to Nonet and Selznick, the legal order begins with repressive law—a response to the primitive need for order and security—which then gives birth to the desire to "tame" force through autonomous law and procedure. In turn, the rigidities of autonomous law give rise to impatience with formality, and the impulse for a more socially responsive legal order.

While readers are treated to an insightful discussion of legal styles and functions, the logic and dynamic of the evolutionary model is not very convincing. The ambitions of their opening discussion dissolve in subsequent chapters, in part perhaps because the brevity of discussion is in inverse proportion to their task. This is but one weakness of the book. There are numerous additional problems that should puzzle students of law *and* society. For instance their analysis is curiously concentrated on what might be called the inner logic of the law. While not altogether ignoring the "external" social forces shaping law, they nevertheless give them short shrift. And for a book about law and authority, their book is curiously lacking in discussion of law and politics. These problems may stem from their developmental approach, a perspective that emphasizes the "inner-logic" of the law. "A developmental model," they hold, "proposes that certain states of a system will generate forces leading to specified changes."[4]

Although the authors purport to present an evolutionary model, there is little to convince the reader that the three "stages" occur in any sequence. Indeed the authors themselves are ambivalent about their developmental model. At one point they observe:

> It is helpful if it [a developmental model] successfully identifies characteristic stresses, problems, opportunities, expectations, and emergent adaptations. These may and do suggest the direction of change, but they cannot tell us what will actually happen, since that always depends on widely varying conditions and countervailing forces.[5]

Elsewhere they further indicate the problematic nature of this · scheme when they point out that autonomous law is especially

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4. *Id.* at 23.
5. *Id.*

unstable and can easily degenerate into either repressive or responsive law.

In light of this tentativeness, one wonders why they bothered to argue for a "developmental" approach at all. More simply and perhaps appropriately they may only have identified different elements of *all* legal systems, distinct features that must coexist in perpetual tension. Law is much too complex and multi-faceted an institution to have a single or even dominant goal or style; it encompasses a bewildering array of goals and orientations all of which can exist simultaneously in any legal system. At different periods, one or another of these characteristics may be more *salient* in the public's eye than the others, but temporary saliency is quite different from distinct stages.

This problem in their developmental approach is apparent once a concerted effort is made to apply it. While the authors expect it to hold for the "broad sweep of history," it is not clear whether this time span signifies time immemorial, the last one hundred years, or the past decade. Are we, for instance, expected to see this sequence unfold in the development of western civilization, or is it a pattern discernible in American law since Viet Nam? What is even more telling than the authors' failure of specification is the sympathetic reader's inability to determine.

Related to this is the question of the type of law to which they refer. One gets the impression that they have in mind judicial decisions in common-law countries (most of their examples are Anglo-American) and perhaps American constitutional law. But if their model is as general as they seem to imply, it must certainly apply to systems other than common law and the peculiarities of American constitutional law. Despite this, no reference is made to nonwestern concepts of law. Nor is legislation discussed; indeed the term is not even found in the index. For a book titled *Law and Society in Transition,* and focussing disproportionately on modern industrialized societies, this omission is surprising.

There are, however, more fundamental problems in their analysis. It is not clear at what *level* their analysis is to be applied. Let me illustrate by turning to another legal realist who also sought to attempt to elicit patterns in the development of law. In his magnum opus, *The Common Law Tradition,* Karl Llewellyn identified two "styles" of appellate court decision-making, the Formal Style and the Grand Style.[6] The Formal Style views legal reasoning as a mechanical process, where the

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6. K. LLEWELLYN, THE COMMON LAW TRADITION (1960).

task of the judge is to apply the facts to the rules in order to formulate conclusions. In contrast the Grand Style is flexible. It takes cognizance of social conditions and looks behind the legal rules to the aims of the law. Here the judge's role is seen as purposive and creative and the good judge is one who can understand the temper of the times, the substantive aims of the law, and in doing so shape both.

Llewellyn's analysis yields considerable insight into the nature of the judicial process, but as many critics have observed, his analysis fails to distinguish between two quite different things: how a judge *arrives* at a decision, and how he *writes* about it. For instance, Llewellyn labelled Supreme Court opinions handed down around the turn of the century as Formal, while he classified earlier decisions as Grand. If one looks at writing style, he is certainly correct; there is a world of difference in the opinions of John Marshall and James MacReynolds. But if one looks not at the Court's style, but its actions, his classification becomes problematic. Constitutional lawyers are quite fond of arguing that despite the mechanical style of its opinions, the decisions by the Old Court were extremely "activist," often ignoring precedent, inventing nonexistent distinctions, and generally torturing the law to arrive at conclusions compatible with the dominant conservative inclinations of the times—criticisms others have made of the Court under John Marshall and Earl Warren.

In short, *style* can mask content and action, and as with Llewellyn's scheme, Nonet and Selznick's discussion does not adequately clarify the level of analysis. It is not clear whether they want to focus on substance, style, or neither—since they are interested ultimately in law and legitimacy. How would they classify the Supreme Court's major constitutional decisions in the first third of this century? Were they autonomous because their style was "mechanical"? Repressive because they dampened legislative quests for change? Or responsive because they captured the impulses of American Babbitry? How would they assess the Warren Court's landmark rulings dealing with the rights of the accused—as indications of autonomous law because they focussed on procedure, or responsive because they sought to implement an ideal about how a civilized society should respond to the criminally accused?

In developing their analysis the authors should have reflected more extensively on the use and function of symbols in public life. Political legitimacy, Harold Lasswell finally convinced us, depends not only on the specific actions of governments, but also

on the successful presentation of symbols.[7] This thesis has been developed at length by numerous social scientists. Perhaps the most prominent is Murray Edelman, whose work on language, politics, and symbols has focussed on the disjunctures of political symbols and actions.[8] "For most of the public," Edelman observes, politics "is a parade of abstractions."[9] This does not mean that politics fails to engage the interest of citizens. Indeed, Edelman argues it is just the reverse: "Psychological distance from symbols that evoke perceptions and emotions heightens their potency rather than reducing it. Few principles are more centrally involved in the working of government."[10]

If Edelman is correct about politics and, one might add, the law, what are the implications for social analysis? To him they are obvious:

> Political analysis must, then, proceed on two levels simultaneously. It must examine how political actions get some groups the tangible things they want from government and at the same time it must explore what these same actions mean to the mass public and how it is aroused or placated by them.[11]

The truth Edelman asserts for political analysis also holds for socio-legal analysis. Yet it is precisely their failure to distinguish these two levels that diminishes the power of Nonet and Selznick's study. Interested as they are in the bases of legitimacy, they cannot proceed very far because they have not probed both the expressive and symbolic level on one hand and the instrumental and practical level on the other. Like many dichotomies this distinction is oversimplified, but nevertheless it does make an important point: by failing to distinguish levels of analysis, the authors fail to make problematic the central focus of their investigation, the relation of legal legitimacy to actual legal practices. The result is an insightful discussion, but one ultimately lacking analytic power.

I have dealt with this point at some length not so much to disagree with what appears to be Nonet and Selznick's optimism for the future or their pluralist politics, but to point out that they have *not* dealt adequately with the major issues inherent in their

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7. H. LASWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (1936).

8. *See, e.g.,* POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL (1977); POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE (1971); THE SYMBOLIC USES OF POLITICS (1964). *See also* T. ARNOLD, THE SYMBOLS OF GOVERMENT (1935).

9. J. M. EDELMAN, THE SYMBOLIC USES OF POLITICS 10 (1964).

10. *Id.* at 11.

11. *Id.* at 12.

topic, issues which engage a good number of students of law *and* society. To do so would have required them to dissect the anomalies of legal systems and legal realities, rather than assuming the distinction away. One need not be a Marxist or even a quiet, passive class theorist to deal seriously with the assertions that law, like politics, can provide potent symbols that mask contrary practices or that the jurist's view of law may not be shared by the mass public.

At a minimum this position simply asserts that there is a disjuncture between appearance and reality and that appearances sometimes deceive, intentionally or not. What must be made problematic in any discussion of law, legitimacy, and authority is the examination of this disjuncture.

Ultimately the conclusions drawn from such an analysis may depend upon the assumptions, values, and political theory one brings to one's work. Given this, the reader should expect an author's perspective to be placed up front, not glossed over by caricature and ridicule of dissenting views. Unfortunately, Nonet and Selznick fall into this bad habit when they dismiss some "conflict theorists." Although it is easy to agree with their criticism of Howard Zinn's assertion that modern American law is a conspiracy of "congealed injustice," one wonders why they bothered to deal with this assertion, obviously made more for rhetorical than analytic purposes. Their topic is more serious than this and there are more serious opponents than Zinn. Nonet and Selznick do their own position no great service by seizing on such rhetoric while ignoring the much more interesting perspective that underlies it. For instance, had they decided to follow Edelman's advice—he is by no means a doctrinaire theorist—they would have had to clarify their levels of analysis and in the process significantly improve their work.

I do not want to suggest that all grand theories or that all developmental theories about law are impossible. Selznick and Nonet would probably even agree with me that only grand theory is worth talking about. There are also some promising efforts at constructing developmental theories of law. Richard Schwartz and James Miller have developed and tested an evolutionary model of legal institutions[12] and more recently Donald Black has offered a general theory of the expansion of the *scope* of the law.[13]

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12. Schwartz & Miller, *Legal Evolution and Societal Complexity*, 70 AM. J. Soc. 159, 159-60 (1964).

13. D. BLACK, THE BEHAVIOR OF LAW (1976).

Schwartz and Miller are interested in exploring the relationship of societal complexity and the growth of legal specialization—a particular application of Durkheim's thesis about division of labor. Black's recent book attempts to explain the expansion of the scope of the law. Given his inclusive definition of law—it is virtually synonymous with official governmental action—his study might better be characterized as an examination of the expansion of the public sector generally. Both these efforts are much more modest than Nonet and Selznick's effort, but they do have the virtue of clearly specifying the object and level of their analyses.

This is not to slight Nonet and Selznick's ambitions, only to wish they had risen to the occasion. In seeking to understand the evolutionary nature of the "spirit of the laws," they appear to be offering a theory of the moral development of society, the social equivalent of what Piaget, Kohlberg, and others have tried to do for individuals. Aside from the problems I have already raised, such an enterprise is risky, something they freely admit. It lends itself to all the problems of reification and the objections to teleological explanation. This too they recognize. But being candid about problems does not solve them, and despite their frankness, Nonet and Selznick make no serious effort to overcome the volumes of objections that modern social science has brought to bear on the subject. Nor do they frame their analysis to avoid the pitfalls.

It is this focus on the inner morality of law or the "spirit of the law" that also leads them to search for a self-contained explanation for changes in law rather than to seek them in "external" social conditions. But by being caught up in the *internal* development of the legal order, the analysis is apolitical, a curious state of affairs for a study of authority and legitimacy.

Despite these criticisms, I can appreciate the ambition of their quest; Nonet and Selznick want to understand the normative appeals of institutions of social control in modern complex societies. I think there is merit in the quest. However, I am not convinced that the effort is really one of understanding *law* in society, as the authors clearly intend it to be. Rather it seems an effort more appropriately directed at the moral appeals of *political* authority generally. But as I have argued, "The Law" is not a coherent institution; it is multifaceted and as such relies on a variety of supports. Although in the United States the Constitution—and through it law generally—does serve as an important national symbol, "The Law" is rarely perceived as a distinct and

coherent institution or symbol. Law is too diverse and amorphous, and in most cultures I doubt seriously whether there is any dominant or modal legal morality of the sort Nonet and Selznick discuss. Law insinuates itself into our lives in too many and too complex ways to allow for this. In contrast, national political authority, often personified in a single office or person, can and inevitably does offer itself as an institution symbolizing morality and legitimacy. Given their concerns, Nonet and Selznick's discussion may be directed more appropriately at different bases on which political authority, not law, rests. One might even argue that most modern governments aspire to a legitimacy based on legality, and that given this what is needed is a typology expanding the meaning of rational-legal authority. To this extent, Nonet and Selznick may have supplied a valuable point of departure. Thus, surprisingly, a presentation that lacks a developed political dimension may be most useful in guiding political, not legal, analysis.

After perusing a copy of *Law and Society in Transition,* a colleague of mine remarked, "Such a big title for such a little book." I agree. I hope, however, that Nonet and Selznick eventually will write the big book implied in their title. If they do, it will be a good one.