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The Unity of Law & Morality: A Refutation of Legal Positivism (Book Review)

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BOOKS REVIEWED

THE UNITY OF LAW & MORTALITY: A REFUTATION OF LEGAL POSITIVISM. By M.J. Detmold. London (1984).

M. J. Detmold, a Senior Lecturer in Law at the University of Adelaide, has written a book that is as flawed as it is ambitious, and it is mightily ambitious. Its ambitiousness is only dimly revealed by its triumphant subtitle; in addition to refuting positivism, Detmold aspires to display the ontological basis of all ethics and to link that ontology up with such capacious issues as the meaning of life, the existence of God, and the worth of self-sacrificing love. In pursuit of these objectives Detmold surveys Homer and Aeschylus, Plato and Aristotle, Hume and Kant, and a host of moderns. In particular, he examines the writings of Kelsen, Hart, Dworkin, and Raz, in each case with the purpose of exposing the errors into which they fall. It is, however, precisely at the level of exposition and critique that Detmold fails. As a consequence both his "modest" project of refuting legal positivism and his cosmic project of fitting law, properly understood, into the great scheme of things never really get off the ground.

Contemporary ethicists are inclined to pursue ethical issues as if they could, for the purposes at hand, prescind from the relation that obtains between those issues and those ultimate questions of origin, end, and meaning on which philosophers, like humankind generally, have been unable to agree. John Rawls calls this bracketing of ultimate and contested questions the method of avoidance and he has attempted both to argue for and to exemplify its utility in his works. Detmold will have none of this. He insists on setting his refutation of legal positivism in an ontological context. This, of course, is unexceptionable, even admirable, provided that the ontology invoked is itself intelligible and its nexus to ethical issues clear. But in Detmold's case neither half of that proviso is realized.

The ontology that Detmold opts for is a curious amalgam of Ludwig Wittgenstein's tractarian mysticism and Iris Murdoch's ethical aestheticism. It leads Detmold to believe that every particular in the universe is possessed of a mysteriousness that requires from us humans respect for it in its particularity. This gives him his foundation for morality, a *pou sto* from which to refute moral sceptics and to correct moral theories that focus, mistakenly in his judgment, on universals. It is hard to know what to make of this attempt to provide an ontological ground for ethical obligation. Even in antiquity brainchildren were not governed by the same rules that obtained among their ventral analogates; the firstborn of an author's ideas has no presumptive claim to superiority relative to its later-born siblings. In Wittgenstein's case whatever reasons the early pages of the *Tractatus* gave for accepting the mysticism adumbrated in its later pages were weakened, if not utterly demolished, by the criti-

que that Wittgenstein himself articulated in his later philosophy. There could, of course, still be good reasons for embracing the ontology that Detmold asserts, but this book fails to reveal what those reasons might be, and none spring readily to this reviewer's mind. For this reason the book must be judged to be seriously flawed.

Even a flawed book can be an instructive one, but this book is not of that latter sort. Detmold discusses Kelsen, Hare, Hart, Raz, *et al.* on reasons for action, the separation of law and morals, the weight of principles, *etc.*, but he does not engage the former or illuminate the latter. This failure can be attributed to at least two sources. One is Detmold's failure to present his adversaries' case for their positions carefully and sympathetically. What he does instead is quote them out of context then comment in a way that reveals his disagreement with at least one reading of the quoted passage. As a result the reader not already familiar with what Hare or Hart or Raz has to say is left unenlightened on that matter, and the reader who has worked through their difficult texts is left uncertain just how Detmold would reconstruct the entire text from which the quote is taken.

A second, and related, source of Detmold's failure to engage authors or illumine issues is his desultory style of writing, which leaves the reader wondering at every moment what *aperçu* Detmold will announce next. Whether this too can be traced to the baneful influence of Wittgenstein's *juvenilia* on Detmold's philosophical development cannot be definitively adjudicated. It does however make reading the book initially disconcerting and eventually irksome. And that's a shame because many of Detmold's insights are quite sound and his general project is surely worthy of pursuit. One is left hoping that he will return to his attempted refutation of positivism sometime soon, but this time with a sounder ontology and a more patient *modus operandi*. Till then the reader interested in a critique of positivism is referred to Philip Soper's more successful effort in his recent *A Theory of Law*.

John Robinson

TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN. By Richard A. Epstein. Harvard University Press. 1985.

There is much dissatisfaction with the state of constitutional law scholarship. This dissatisfaction is clearly not due to a lack of interest—the law reviews are filled with lengthy treatments of both particular areas of constitutional law and more general discussions of topics such as the role of judicial review in a democracy. The unease arises from the sense that the massive outpouring of commentary has established so few accepted principles.¹

1. Griswold, "Foreword: The Burger Court and American Institutions," 60 *Notre Dame L. Rev.* (1985), p. 827, 829.