

Foreword

Several of the essays collected in Anthony D'Amato's *Jurisprudence: A Descriptive and Normative Analysis of Law* possess a genuine insight that has rarely been equalled by any figure in American jurisprudence. The ideas in them are so good, that I believe the publisher's decision to draw them together in a single, notable, accessible forum is absolutely correct. Articles, no matter how fine, fill a lesser place than books in the republic of letters.

D'Amato has in this collection a core of materials that ought not to be lost in the law reviews. Chapters one, two and twelve lay the foundation for a theory of jurisprudence that could be one of the most important in our generation. Chapter one, in particular, contains one of the most significant advances in American jurisprudence since the Hart and Sacks materials on legal process of the early 1950's.

D'Amato's accomplishment is to carry forward the only sensible project open to jurisprudence once God and nature stop telling us what law is and we must find it out or make it on our own. The project is to discover a method by which the law that is made can, by virtue of the place and manner of its creation, be the law that is obeyed. The moment jurisprudence exceeds the discovery of method in order to perceive and express a compelling legal content, it returns, one way or another, to nature or God. In godless, denatured society, however, a jurisprudence of content can never be more than the idealistic program of a coterie of intellectuals gathered under the banner of either morality or a "true-left" perspective. The hazard of such a jurisprudence is that it will be ineffective, or effective only by the frightful compulsion of recalcitrant social matter. Law in a godless, denatured society cannot be the perception and expression of nature or a sacred substance.

The other possibility open to jurisprudence when it exceeds the discovery of method is to perceive and express the practices and customs of the social matter. Law created under this jurisprudence demands of people only that they follow the actual norms of social behavior. This jurisprudence assumes that social order is harmonious, spontaneous and complete, and that reason has no contribution to make to it. But the actual norms of social behavior are often in conflict, and law makes a contribution to social order by using reason to resolve, ameliorate or postpone the conflict. Also, actual norms are often insufficiently articulated to rule specific instances of social behavior; and it is the role of law to specify norms, using reason grounded in ultimate values incorporated in the insufficiently articulated norms. Finally, the intentional creation of law – unlike the unguided, unconscious, molecular emergence of norms – uses reason to adjust strains between the system of norms and material consequences of behavior in conformity with the norms. The hazard of sociological jurisprudence is that law created under it loses all pretension to being rational. And law without the pretension of being rational – without the intelligent striving possessed by all true norms – makes no contribution to the ordering of society.

The instances of successful jurisprudence (and D'Amato's is one) have all involved the progressive extension and specification of method into spheres that had once been occupied by nature or a sacred substance. Law gets legitimacy not by reference to content – for who can agree on content?, and if they agree, who can guarantee that it will be rational? – but by reference to the source of law, the social method of its production. The social method of production of law bears the onus of at once defining social order in the form of law and instituting the definition of order as practice and custom. Legal institutions then assume the ancient task of curing occasional defects in an order now defined and instituted by method, as it once was by nature or God.

D'Amato's contribution to the progressive extension and specification of method is to reduce (if not eliminate) the temptation of jurisprudence to exceed method by perceiving and expressing either a compelling legal content or lobotomized norms of social behavior.

D'Amato's method is to locate the source of law in those whose job is to predict for ordinary citizens what law would be were authoritative legal institutions to create norms and apply them to

particular actions projected by those citizens. The Archimedes point of D'Amato's jurisprudence is neither the abstract creation of norms through legislation (as for Bentham) nor the concrete application of norms in adjudication (as for Dworkin or J.C. Gray), but rather the counselling (or self-counselling) of citizens as to the probable creation and application of norms by authoritative legal institutions (or other citizens) in specific instances of projected action.

The hero of D'Amato's jurisprudence is the lawyer, who succeeds in two tasks crucial to method. (The ordinary citizen also performs these tasks acting as his own lawyer.) First, by predicting what law would be were authoritative legal institutions to create norms and apply them to particular projected actions, the lawyer induces clients to obey legal norms. His inducement works for two reasons. Clients first learn of norms from a representative of the legal system friendly to their interests; and the lawyer's account of norms, which seeks to enhance those interests, is the first and arguably most important step in the process of norm creation and application that constitutes law for clients. Law appears to clients not only as the imposition of social constraints, but also as an instrument of power. Second, by providing the authoritative legal institutions with citizens prepared to obey his predictions, the lawyer encourages the institutions to conform their creation and application of norms to the predictions. Authoritative legal institutions, like commanders scrambling to lead a willful column of soldiers, are persuaded to adopt a lawyer's account of norms in order to protect the institutions' power.

Law in D'Amato's jurisprudence constitutes a conspiracy between citizens and authoritative legal institutions – each acting within their sphere to maximize their power. The broker of the conspiracy at the center of the legal system is the lawyer. American jurisprudence – from Madison to Llewellyn – has traditionally regarded power as the destroyer of law. D'Amato has found a way to turn power into law's chief creative element.

The beauty of D'Amato's construction is that it completely eliminates from jurisprudence the temptations of content, which sooner or later lead every other modern jurisprudence into chaos, duplicity, or error. The lawyer "creates" law, not according to his personal vision, but according to the needs of his client and his professional prediction of what law would be in light of those needs. Authoritative legal institutions, in turn, attempt to fulfill

the predictions of lawyers. No one in D'Amato's "Tweed ring" of jurisprudence — where every person involved in norm creation and application points to the next person for ultimate responsibility — has occasion to fill the content of law with a personal vision. Each participant in the legal system plays a role in the maintenance and evolution of law as a system. Content evolves through the participation of individuals, but does not directly incorporate their values and desires.

Law, D'Amato teaches us, is a social product realized through individuals acting as fabricators of the product. D'Amato discovers law as a system — embedded in the social system it purports to govern. D'Amato's work indeed evokes recent developments in systems theory as applied to law by writers on the Continent.

D'Amato disperses these themes throughout the essays of his collection — written as they were not systematically, but as the evolution of his thinking over at least a decade. Reading the essays through, one's thinking evolves as did D'Amato's. Like all major contributors to theory, D'Amato teaches as well as discovers.

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