The Province of Jurisprudence Determined

Author : Mortimer Sellers

Date : November 18, 2011

Robin West, *Normative Jurisprudence: An Introduction* (2011).

Robin West's new book on "normative jurisprudence" should have an immense and lasting effect on American discourse about the law. This volume should be important for two reasons and in two senses of the word *should*: first, because Professor West has great authority in the American legal academy as an early and much-admired proponent of feminist jurisprudence, law and literature, and critical legal studies; and second, because she is in this volume on almost every point and in almost every way correct about the purpose, value, and nature of jurisprudence and the law.

I distinguish two senses of the word "should" in this way because the central argument West makes is that although both the "is" (predictions about existing power and authority) and the "ought" (justice) matter in understanding the path of American jurisprudence, the latter is more important, and much overlooked. West calls for a renewed "normative jurisprudence", by which she means a jurisprudence dedicated to studying not primarily what the law *is*, but what it *ought* to be — how to make the law more just.

For the most part West's advocacy restricts itself to mapping the province of jurisprudence — what "jurisprudents" (as she calls them) ought to be talking about — which is justice. She doesn't say as much about what justice is or could be in practice. But simply to speak of "justice" or "normative" jurisprudence at all commits West to what she recognizes must amount to a revival of the secular natural law tradition. And she goes further: Robin West embraces the ancient doctrine that laws are and only can be just to the extent that they advance the "common, human good". Brava!

When West insists that the study of jurisprudence (properly so-called) requires the pursuit of just laws through a better understanding of justice, the human good, and human nature, she repeats simple truths well stated and restated by Aristotle, Marcus Tullius Cicero, Thomas Aquinas, Thomas Paine, John Adams, and most students of the law in most cultures for most of human history — but oddly absent in the discourse of contemporary American lawyers and legal academics. The bulk of this volume is dedicated to gently and sympathetically explaining how and why American jurisprudence went off the rails — and eloquently, persuasively urging her colleagues back onto the right track.

This book will be influential in large part because West takes such trouble to address the fashions and obsessions of her errant contemporaries. The three main chapters engage (seriatim) proponents of what West identifies as the three currently dominant jurisprudential traditions of (1) natural law, (2) positivism and (3) critical legal theory, represented in American legal discourse by (1) Ronald Dworkin and Lon Fuller, (2) Oliver Wendell Holmes, Jr., and (3) Janet Halley — all indulgently chided for slipping away from the earlier and more ambitious jurisprudence of (1) Thomas Aquinas, (2) Jeremy Bentham, and (3) Peter Gabel and Roberto Unger. What Aquinas, Bentham, Gabel and Unger have in common — West also mentions John Finnis — is their commitment to advancing a "moral brief": their attempt to explain how laws and the world could be made to be more just and therefore less oppressive to real human beings.

This is indeed what lawyers, legislators, and law professors ought to be doing, but I cannot help feeling

that in her effort to persuade by offering an "internal" critique of contemporary jurisprudence, flattering each theory's intentions, West is too kind to legal positivism and the critical legal studies movement, and unfair to "liberals" such as Ronald Dworkin, who try to make American law live up to its declared ideals. Briefly, the father of legal positivism wasn't Bentham, but Hobbes, and the essence of positivism has always been the promotion of stability and legal certainty at the expense of justice. Similarly, the essence of CLS was always the denial of (moral) truth and (legal) constraint, in order to empower ones allies and friends. (And the refusal to accept that any idea or concept has an "essence", which is why I so delight in saying so.)

These last three sentences lost me half the readers who made it this far, which is why perhaps West's approach is best — to show that in fact we all in the end agree (or would agree if we thought about it) that the only good purpose of law is justice.

This makes it doubly surprising when she turns on Dworkin for taking a similarly "internal" view of the United States Constitution and the common law, interpreting them in the interest of justice, and therefore legitimating (as she sees it) a profoundly unjust system. This criticism of constitutionalism needs to be argued for, not asserted, and leads to my one criticism of this book, which is that it too easily attributes the injustices of the United States to the American legal system, and not primarily to the judges, lawyers and above all law professors whose pernicious doctrines deny justice as the proper purpose of law and the state.

But in the end these differences are matters of tone and law school generation. West studied under liberals and saw the dangers of complacent constitutionalism. I studied under crits and saw the damage of self-indulgent antinomianism. What we both saw and what anyone must know who can see or hear or feel or live in America today is that injustice is everywhere and often supported and advanced by the very laws and legal system of which we are the priests and expositors in our law schools, courts and classrooms. To serve without question makes us complicit in oppression.

Robin West has done a tremendous service by reminding American lawyers that jurisprudence and the law must be normative to have any value at all — and that it matters which norms these are. "To willfully fail to act … is shameful" she tells us. I agree.

Cite as: Mortimer Sellers, *The Province of Jurisprudence Determined*, JOTWELL (November 18, 2011) (reviewing Robin West, *Normative Jurisprudence: An Introduction* (2011)), https://juris.jotwell.com/the-province-of-jurisprudence-determined/.