BOOK REVIEWS

My Philosophy of Law, Credos of Sixteen American Scholars

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My Philosophy of Law states the credos of fourteen teachers of law and two of philosophy. The purpose of its publication is "to present a fair picture of contemporary, American views on legal philosophy." It should be noted that the "picture" is painted by writers selected from academic life. Whether or not such a group or any group of individuals could paint a "fair picture" of American legal philosophy, may be questioned; but that aside, the result of their combined effort portrays the conflict which wages today within the field of American academic legal philosophy.

Significant to one interested in changing emphases in legal philosophy is the absence of older dogmas. Only Walter B. Kennedy writes in the socratic vein. And one wonders whether his vivid scholasticism should be classed as a survival of an ancient faith, or, perhaps even more significant, as a rising, moral protest to a legal creed of materialistic behaviorism.

Absent, too, is the thesis of historical jurisprudence. Never dominant in America, as an adjunct to analytical theory it once exercised considerable influence among both practitioners and teachers. John Dickinson's essay is partially reminiscent of this mode.

And so with analytical jurisprudence. Edwin W. Patterson's essay is in the tradition. But he eschews adherence to "party line" and to absolutism, for electicism and pluralism. Albert Kocourek, once with Hohfeld in the vanguard of analytical jurists, writes in metaphysical and scientific terms about "the world of reality and the world of appearance." John H. Wigmore, whose work on evidence is analytical classic, refuses to be so classified, although his essay is in the accepted vein.

Thus have general social climates of opinion contributed to the

rise and decline of schools of law. Rationalism and the theological, separately or together, fathered the natural law. Organic evolution and romanticism sponsored the evolution of custom and of culture as law. Empiricism and the positivism of Comte are reflected in analytical jurisprudence. And if pragmatism has urged jurisprudence on to newer schools, that does not mean the influence of older ones is entirely spent.

Indeed the pragmatism of Roscoe Pound's sociological jurisprudence is itself an application of empiricism as well as of relativism, to "social engineering." Pound's essay is among the best. But the startling thing is that as a presentation of technical sociological doctrine, it stands alone. Is this significant? Among law-trained writers is sociological jurisprudence moribund? Certainly all American jurisprudence today is sociological in one way or another. However, the literary tradition with which Pound's doctrine is primarily associated—a study of law in books rather than of law in action—is perhaps more typical of legal theory of the nineteen twenties than of the thirties and forties, when emphasis shifted to gathering facts and to scientific description of behavior. Sociological positivism still has its adherents. Books are still written in its name. But in the list of contributors to this collection of essays, it would be hazardous to class more than Pound, its founder, as an enthusiastic advocate of its technical philosophy.

Rather it seems, by accident, by design or by course of events, the predominant credo of this group is neo-realism. This form of positivism applies empiricism in the nature of behaviorism, as a basic creed for law. As a phase of pragmatism its values are relative. It urges factual research and a study of what men do. It rejects the binding force of words as the essence of law, and turns to a science of law as official action. Law becomes "the concrete functioning of government." The science of law becomes a descriptive sociology of how governmental officials act. The business of lawyers becomes the forecasting for clients of how judges and administrative officials will behave in a given legal situation.

The foundation for this approach is Holmes' famous statement: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." It is not without significance that a teacher of philosophy recently gave as his opinion, that

the pragmatism of James and Peirce was only a generalization of Holmes' prediction theory.[1]

In this collection of essays the extreme credos of realism are those of Joseph W. Bingham, long its champion, and Underhill Moore, leading advocate of behaviorism. With reservations, Thomas Reed Powell assumes a seat in the periphery of the movement. And on the basis of his theory of law stated here, Leon Green, at times classed as a member, is not one of its extremists. In addition are Walter Wheeler Cook, Karl N. Llewellyn and Max Radin, whose allegiance to realism has been both strongly avowed and productive. But if I read their essays aright, there may be hope that the challenge which this school must face and overcome lest it experiences as rapid decline in popular favor as it did rise, will be belatedly accepted.

The difficulty with realists' basis for a science of law is not that it lacks merit. Despite the charge that realists seem "to flog a dead horse", the demands of the day are that legal rules conform to factual social needs. Law in books can justify its existence only if it correlates properly with law in action. So realists assert that they separate the law that "Is" from that which "Ought" to be only temporarily, and in order better to study that which Is. What Ought to be can then be better ascertained. But unfortunately realists are stressing what Is at a time when what Ought to be is becoming more and more important.

We are passing through a period of positivism in governmental theory. Natural rights as a basis for man's position under government are rejected. A grant of positive legal rights embodied in constitutions is assumed. Yet once we posit the State as the source of man's constitutional rights, then theoretically at least, rights in a democracy are as dependent on the State for their creation and recognition, as they are under fascism or communism. The State may be differently defined in each, but the source of rights is the same. What the State grants, it may take away. It is simply a matter of legislation, constitutional or statutory. Majorities in power may be as tyrannical as minorities.

Such a theory is not that of our founders. It is not the theory to which our governments were dedicated. The Ninth Federal Amendment and the twentieth section of the Ohio bill of rights recognize that man's rights do not derive from constitutions. They are in the

[1] Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism*, (1942) 39 The Journal of Philosophy 85.

people. For their protection governments are created. And it is just this difference in source—rights in society as such, not from the State or its government—that has made American democracy a fighting faith.

The difficulty with realists, then, is that at a time when there is need to consider the law that Ought to be, they seek a descriptive sociology of the law that Is. But even if they succeed in their quest for a descriptive legal science, their efforts momentarily contribute little to democracy's objectives today and tomorrow.

This myopia of realism, always criticized by Morris Cohen, is challenged by Lon Fuller. The question is not whether social, economic and political problems will be dealt with in the law. Of course they will, but how? What are democracy's essential values? Are they absolute or relative? Should an approach to them be empirical or *a priori?* Will rationalism lead to a solution? Governmental trends are clearly toward increased federal control. The legal issues concern Liberty as well as Property. They still involve the relation of man to man, and of man to the State. What will be his position in the democracy which is now emerging? No credo of law which even temporarily disregards these questions in order to devote itself to a scientific study of official behavior, can hope to survive.

This fact is recognized by Kennedy, whose solution is through neo-scholasticism. Pound offers a theory of interests. Cook and Llewellyn see the need. Pragmatism does not ignore it. Quite the contrary as John Dewey's essay shows. It is a problem of source and of function. These may involve metaphysical conceptions or a theory of law as a social phenomenon. For a democracy, either hypothesis seems eminently preferable to one which attributes source and function to the caprice of a state.

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