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Jurisprudence and the Study of Cases

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Following the suggestion of our Chairman, we have apparently agreed to assume that under the theme of jurisprudence we are to include all of the abstract, nonutilitarian subjects bearing upon the subject of law. Whether we call it a historical science, a science of sciences, or a philosophy, we all believe that it is a valuable body of rapidly increasing knowledge, and our purpose now is to determine the methodological question as to how it can be made available for our undergraduate students in the law school.

It is Ferrler, I believe, who says that the philosophy of any period or any country is not what men have thought, but what men have been, compelled to think, at any time or place. Now, if we assume without attempting to prove, that jurisprudence is a philosophy of law, we may expect to find a close interrelation and reciprocal reaction between the theories of American jurists and their practical application in the courts during the past fifty years. It is the peculiar function of teachers of law to perfect this nexus of theory and practice, and it may perhaps be said, without undue egotism on the part of those present, that the law schools have not failed to properly perform their duty.

This especial advantage of position carries with it, of course, corresponding responsibilities. The exponents of pure scholarship seem to feel completely justified if their results are only true and new; that they are of no value is apparently a virtue, rather than a shortcoming. In professional scholarship, on the other hand, there is the greatest insistence on the third element in the scholarly trinity. The practical lawyer cares but little about the absolute truth of a legal conception, if only a majority of decisions can be found to favor it. That it is now is frequently a good reason for rejecting it; but it must be useful in deciding a legal controversy, or, to put it in less invidious form, in ameliorating our law. It has been the glory of American legal scholarship during the past two generations that it combines, as perhaps no other subject does, pure scholarship with professional scholarship. Whatever the theories may be as to the nature of our subject, in the hands of American teachers of law it has been a pragmatic philosophy, a philosophy of results; and if we are to keep all that we have gained by our unique advantage of position, we must be sure that it remains such.

Prior to the early '70's the subject of jurisprudence may be said to have been nonexistent in American courts and American law schools. In the courts, the cogitations that had jurisprudential color were mainly more or less clever guesses as to fundamental principles, modeled on the Blackstonian "giving of reasons," which were usually almost totally devoid of historical perspective. The philosophic lucubrations of the jurisconsults were, in the main, echoes of the English analytic jurisprudence, with some attempts to soften the vituperative criticism of Blackstone by Bentham and Austin.

English legal philosophy was at this time just beginning to outgrow the limitations of the Austrian analytical jurisprudence. The careful scientific investigations of legal history and comparative political institutions, by Maine, showed us that jurisprudence had a perspective; that here, as well as in every other field of human knowledge, we are concerned, not only with what a thing is, but much more with how it comes to be. So far as Maine's method is historical, it may be thought of as a reflex of that of Savigny on the continent, though Maine apparently nev-
er followed Savigny in developing a philosophy of "natural law" out of his historical material. As an Anglo-Saxon student of comparative law, Maine seems to be a forerunner of our internationally minded sociological jurisconsults here in America.

The founders and teachers of the case system would probably be surprised at being characterized as legal philosophers; but, if a jurisprudence of results is a philosophy, the term is not a misnomer, and if Ferrier's apothegm, quoted above, is correct, Langdell and Ames must be as much creatures of their time and environment as are any less independent thinkers. The Inception and early development of the case system of law study in America was almost contemporaneous with the beginning of historical and comparative jurisprudence in England, and may be thought of as the pragmatic converse or correlative of that movement. It apparently seemed to Langdell and his immediate followers only a new and better method of teaching law, and our pedagogical friends might find in it, if they had ever discovered its existence, a great trinity, of their favorite subject of methodology. It was the right way to do it, and in doing it in the right way these professional teachers of law, the American jurisconsults, keeping their feet on the solid earth, necessarily made great advances in legal theory, and developed a school of American historical jurisprudence. When student and teacher started together with the case, then each could fully realize that law had a history.1

The new method of approach also developed a jurisprudence of rights rather than one of rules. This was brought about by a simple change in method from one that was mainly deductive to one predominantly inductive. This slight change in emphasis has gone far toward rescuing our law schools, and then our courts, from the mechanical or epithetical jurisprudence, inherited by the courts in the nineteenth century from the deductive legal method of the eighteenth century. The great achievements of American jurists in the nineteenth century are due to the return to the original source, and to the emphasis on induction as a means of determining the rights of the parties litigant, rather than upon deduction from legal maxims, definitions, or rules.2

By the end of the last century our American jurisconsults, working with their students, have developed an American historical jurisprudence of rights; but at the beginning of the present century, either because the war of 1898 had made us think internationally rather than parochially, or because our case system as a pragmatic historical jurisprudence had reached its maturity, our jurisconsults—again mainly teachers of law—discovered Continental Europe, and, under the leadership of a Northwestern and a "Down-eastern" Dean, we seem to be in a fair way to develop an American sociological jurisprudence.

The inception and careful, scholarly elaboration of the Modern Legal Philosophy Series, the Continental Legal History Series, the Modern Criminal Science Series, and the Evolution of Law Series has given to us a great body of source material for the study of comparative law and modern jurisprudence and sociology. They perform a service for sociological jurisprudence comparable to that performed by the great series of casebooks for American historical jurisprudence. The many learned essays in our current legal literature—again mainly from professors of law—have shown us how we may hope to develop an American sociological jurisprudence.

This development of sociological theory has already reacted directly upon our courts. Mr. Justice Brewer, in Mueller v. Oregon, takes "judicial cognizance" of the careful economic and social studies of Mr. Brandeis. It may perhaps be noted in passing that the later appointment of Mr. Brandeis to the Supreme Bench has some very striking analogies to the granting of the jux respondendi to skilled jurisconsults by Augustus, and the practice so common afterward of putting the most learned of these jurisconsults in charge of the teaching of law.3

1 How much difficulty the courts and litigants would have been saved in working out the law of fixtures, if they had started from the standpoint of the facts in litigation and worked inductively toward the rights of the parties, rather than beginning with a definition as a basic principle of law, and proceeding deductively to the application of the rule, by the inductive process we avoid all the pitfalls of the undistributed middle. The terrors of this logical fallacy are felt most keenly in cases involving a psychological element. In Mitchell v. Rochester Ry. Co., 151 N. Y. 107 (1896), the court decided that, as no recovery can be had for fright occasioned by the negligence of another, the defendant would not be liable for the consequences of fright. The reasoning seems to be: Fright as a cause of action is zero, but ex nihilo nihil fit (cf. Lucretius, De Rer. Nat. I, 156); ergo, the result is zero. Q. E. D. But it is wrong, because "zero" is used in the sense of "a cause of action," and not in the sense "cause" of an injury; and the plaintiff gets no redress for proved mental and physical injury, which is the proximate result of the negligence of the defendant.

2 See: "The career of the agistor's lien might have been very different if, in 1839, Baron Parke could have had before him the first volume of Gray's Cases on Property, with his simple juxtaposition of Chap- man v. Allen (1832) and Jackson v. Cummins (1839) together with the note from Ames' History of Assumpsit. We should have been saved our wanderings in the maze of crisscross decisions and cor- rective statutes of the past century which have been necessary in order to re-establish the historical truth that the agistor and all his ilk, including his ancient and modern analogues, the liveman and the garage man, have a lieu, and that the right depends upon service performed, and not upon any of the fanciful reasons imagined by the post-Blackstonians.
of the Supreme Court, as praefectus praetorio. With Justice Brandeis and Justice Holmes on the Supreme Bench, and with the precedent in Muller v. Oregon, we can hardly deny that sociological jurisprudence has found a place in our highest tribunal, and that the pure legal scholarship of both our historical and sociological periods has found a practical and valuable application in the courts.

But how are we going to get these results into the consciousness of our undergraduate students, so that we may hope through them to influence our courts and our system of law? We probably all agree, with our Chairman, that courses in juristic survey, however desirable they may seem, a priori, have not been a practical success, and most of us are somewhat doubtful as to whether they can ever be made such. Courses in legal history are already given in several schools. They have been fairly successful, and no one questions their desirability, at least for graduate students. For undergraduates they have the great pedagogical advantage that much of the source material is in the cases. Furthermore, the material outside the cases is not so voluminous as to be unmanageable, in what may be called casebook form. The type of instruction, therefore, may be the proseminarial form of professional scholarship rather than the seminarial form of the graduate courses.

When we come to the subject of courses in formal jurisprudence for undergraduates, one of the chief difficulties seems to be that we have not yet fully digested our material. If we are going to retain for these courses the unique advantage of our case study, we must reduce our material to the compass of the ordinary casebook. The difficulty of accomplishing this was very greatly increased when we passed out of our historical stage of jurisprudential study, at the beginning of this century, and began the approach from the side of comparative law and sociological interpretation. This difficulty has been solved in the graduate courses in jurisprudence by what seems to be a reversion from the case method, properly speaking, to the old method of lectures, with illustrative readings, and there is a general reluctance on the part of law teachers to return to this with undergraduate students.

When we have reduced our material to a manageable form we shall still have the question to answer as to whether it is better to put this into one casebook, or a series, for one or more synthetic courses, or to have it incorporated in each of our courses, which, as they have in the past so successfully taught the law from the standpoint of historical jurisprudence, may be reasonably expected to teach it sociologically, leaving the formal, synthetic process for our graduate courses.

The lesser philosophic categories of jurisprudence, such as possession, jura in rem and jura in personam, etc., have been taught very satisfactorily in connection with the courses in which they are naturally suggested by the cases. No better setting for elucidating the distinction between a jus in personam and a jus in rem could probably be found than the cases involving the nonassignability of the lien and the full assignability of the pledge. Savigny's elaboration of Ulpian's theory of animus and corpus in possession fits naturally into a discussion of our cases on trespass to possession, while Herberg's criticism of that theory as naturally belongs in a consideration of the cases on custody.

As soon as our casebooks are perfected, we may make jurisprudence an undergraduate subject, with the hope that students will elect it. Some of us, who have been trying the experiment in past years, have found that seniors are likely to select casebook courses to the exclusion of the more abstract subject. It is also true that some who do elect it are victims of philosophic measles, and have hopes that maybe the courses in jurisprudence will tell them what a "legal absolute" is. On the other hand, if the course is not among the required subjects, it forces in many who have an idiosyncrasy antipathetic to all abstract reasoning, and most of us shrink from lecturing to such a clientele.

Until we have overcome these practical difficulties of presentation, we shall probably have to be content with our present instrumentalities for getting the conclusions of sociological jurisprudence into the legal consciousness, by teaching our teachers of law and allowing them to pass it over to their students as occasion may arise in the study of cases. These questions of methodology can, however, be answered only in the time-honored American way of making a trial of the plan suggested, and most of us will probably be willing to follow our Chairman in making the test.

* We are told that there are two such casebooks in preparation, one by Dr. Sherman, the learned author of the Roman Law in the Modern World. The readings in Roman Law and in jurisprudence assigned in the graduate course at Harvard would seem to be quite suitable for this purpose, but those in Roman Law have been printed only in part, while those in jurisprudence exist only in typewritten form.