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Recommended Citation

Hall, Jerome, "The Challenge of Jurisprudence: To Build a Science and Philosophy of Law" (1951). *Articles by Maurer Faculty*. 1417.

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The Challenge of Jurisprudence:

To Build a Science and Philosophy of Law

by Jerome Hall • Professor at the Indiana University School of Law

■ Jurisprudence, says Professor Hall, is a subject that seems remote from the daily practice of most lawyers. Most members of the profession dismiss it as academic and impractical, he says, and yet ultimately the survival of our legal principles depends upon lawyers' building a rational system of law based on truth and rightness—a philosophical system that members of the Bar understand, not as an academic subject, but as a system of law that is superior to its competitors in satisfying human needs and aspirations. This article is taken from an address delivered before the Indianapolis Bar Association last autumn.

■ The challenge of jurisprudence is ultimately the challenge to live the fullest, best life of a lawyer. But some of the subjects I shall discuss will seem remote from daily practice. To that extent jurisprudence challenges accepted notions of the meaning of the lawyer's vocation. It is a challenge to re-examine and reevaluate the pattern of legal practice. Certainly it is a fact that many lawyers have discovered that their participation in various activities of a jurisprudential nature is far from being a handicap. They provide living demonstrations of the significance which jurisprudence can confer on the practice of law.

Jurisprudence is the play of the speculative mind on law and legal problems. Its history included the thinking of the greatest philosophers in all places and times until, somewhat over a century ago, jurisprudence became the dismal science of modern times, with a correspondingly narrow appeal. But jurisprudence traditionally and in its recent revival

is an uninhibited adventure in ideas, the unrecordable flash of creative mind probing the most difficult human problems. Accordingly, if, smitten by the sting of an inexhaustible love of wisdom, we rise above the inertia of technicality, we can confidently predict that men will continue to cultivate the soil of jurisprudence imaginatively in the future—though temporary blackouts are not impossible.

Challenge of Jurisprudence Is Chance To Acquire Knowledge

Recognition of the permanence of jurisprudence implies certain enduring qualities of human nature which bring reassurance in times of stress when men, sensing the limitations of finite beings, feel as impotent as sticks tossed on a wrathful ocean of passion and irrationality. Jurisprudence encourages us not only because it heightens regard for human nature; it is also evidence that our problems are not entirely new but are, instead, the perennial difficulties

of *homo sapiens*. Jurisprudence also provides a record of the ways in which the most profound men grappled with these difficulties. In doing that it comprises a body of knowledge and a methodology by use of which we can better solve our problems. Thus the challenge of jurisprudence, stated from another viewpoint, is a challenge to acquire that kind of knowledge.

The major problems of our times reveal the clash of sharply conflicting interests. They are problems whose solution depends on factual knowledge, the discovery of sound values, the use of rational methods of investigation and the threat or application of organized coercion. In a word, they are, basically, legal problems. That is why the challenge of jurisprudence addresses itself with particular emphasis to the lawyer. It amounts to a challenge to do the best possible thinking on law and legal methods and thereby raises the level and widens the range of professional skill and influence.

Just as philosophy and science were born in ancient Greece, so, too, was jurisprudence. Greek genius sought the *reason* of everything. Its searching mind fused with an incomparable sense of beauty so that what for Eastern peoples was a mass of isolated information, like geometric measurements and rules of thumb,

became in Greece organized knowledge, science. Every science has a rational as well as a factual aspect. Without the thread of reason, expressed in laws, principles and theories, men stumbled along in a crude trial-and-error method of investigation. The Greeks created the methods and the ideas which established Western science and philosophy and made them imperishable values of our culture. So, too, of the jurisprudence they left us.

Greek Jurisprudence Grappled with Major Problems

But jurisprudence was not the creation of a gifted people indulging in idle speculation. It was also a way, indeed the most important way, of grappling with the major problems of their times. By the end of the seventh century B. C., the clash of interests had already culminated in revolution. The economic structure crystalized in large land owners, peasant farmers, maritime and commercial classes. Their first efforts to resolve the social conflicts are represented in the codes of Draco and Solon (594). But the clash of interests continued. In addition, considerable information about the various Greek city-states and about foreign countries—Egypt, the Near East, Africa, indeed, about all the lands bordering on the Mediterranean—made it abundantly clear to the seafaring Athenians that laws and customs differed widely. The defeat of Persia led to the rise of Athens as a great naval power, supreme in Greece and set on its course of empire. The combination of practical power-politics, the drive for supremacy, the clash of economic and political interests, and the gift of speculation set the scene and provided the stimuli for the birth of jurisprudence.

Socrates is the father of jurisprudence and the situation he had to meet was symbolized in cynical, power attitudes expressed in the dogmas: Might is right. Law is merely conventional, differing from place to place. The natural thing to do is for the strong to bend the weak to

their desire. Socrates' efforts to refute this position paralleled the discoveries of the earlier scientists. Everything we see about us changes incessantly—you can't step into the same river twice, it was said (even once, someone added, because it is changing every split second you are putting your foot into it.) But Greek scientists had discovered that underlying the phenomena of ceaseless change are certain constants, the laws of science, not visible entities but able to be apprehended mentally. They discovered ultimate truths regarding the physical world, the constitution of matter and the processes of motion and change. And so Socrates, turning thought to human beings and the needs of a social-political community, searched for enduring principles of conduct, abiding values and methods of discovering them and proving their validity.

In the pursuit of his investigations, he made many discoveries which Plato, his student and disciple, fixed permanently in the foundations of jurisprudence. Plato nurtured the Socratic seed; and in a brilliant style, never since even approximated in philosophical writing, he added his jurisprudential ideas which have profoundly stirred thoughtful persons for more than 2000 years. In his immortal Dialogues the method of dialectics, the so-called Socratic method, is elaborated; and lawyers who have barely heard of Plato have been the beneficiaries for centuries. The nature of law and justice is explored. One of the two or three greatest trials in all history is presented. Socrates, condemned to death by a thoughtless jury, refuses to permit his powerful friends to arrange his escape. Instead, he chooses death, extolling the law of his native city and supplying the ideas which helped to establish the rule of law as the distinctive quality of Western political institutions. It was Plato, too, who wrote the first great essays on administrative law. Aristotle, Plato's student and disciple, presented a theory of equity, the classic analysis of the relations of general prescrip-

tions to the individualizing processes of government.

Plato and Aristotle were not only great theorists; they were great researchers as well. Plato's Academy drafted codes of laws for many communities and Aristotle studied 150 different constitutions. They can hardly be said to have fully explored the possibilities of constructing an empirical science of law. But, for that matter, we are still largely in the stage of discussing the prolegomena of legal science rather than of carrying on the researches necessary to construct such a discipline. Finally, it has recently become rather persuasive that the basic legal conceptions were familiar notions among the Greeks though, again, in this branch of their jurisprudence, we find nothing like the elaborate detail provided by Austin and his successors.

Greek Thinking Was Not Departmentalized

It is impossible here to discuss other Greek contributions to the founding of jurisprudence, but one additional point of particular importance must be noted. The Greeks did not departmentalize their thinking about social and political problems. What we call jurisprudence was an integral part of political science, and ethics had the dominant role in this discipline. The modern age saw the rise of specialization with concomitant increase in certain types of efficiency purchased, however, at the cost of understanding the interrelations and the whole of social-political problems.

I have said that the Greek discoveries and contributions were not the creations of idle speculation but were born of necessity. In fact we may say that Greek jurisprudence represents the solution of genius confronting the major social and political problems of their times. Plato and Aristotle studied these problems in the declining days of Athens, following the long, disastrous Peloponnesian wars. The clash between the democracy and the oligarchs was bitter to the point of

suicidal civil war. The international situation was acute and threatening. Finally, the rise of Alexander brought the promise of world federation under the aegis of Greek culture. East and west the products of Greek genius spread. The vast influence of Greek culture in the Hellenistic Age is indicated in the fact that Cicero studied under Greek teachers, later to become a major link between Greek civilization and the rising star of Imperial Rome.

The Romans were not original thinkers, but they were gifted legislators and administrators. Roman rule expanded until it encompassed most of the then-known world. Although brilliant generals and well-trained armies were necessary to the Roman conquest, it was sound law, reaching heights of professional competence that have never been excelled, and equal administration of that law which held many diverse peoples together for centuries. Here, too, if time allowed, some relevancies for the present American situation might be indicated.

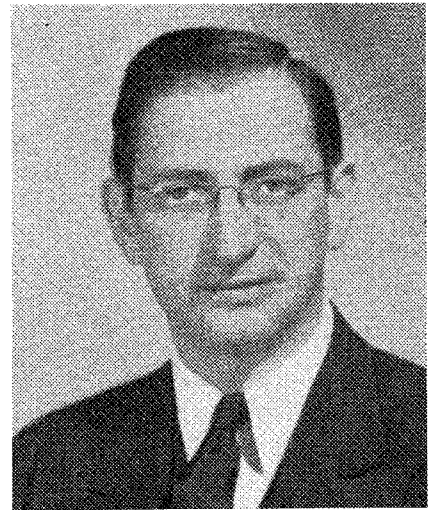
Greco-Roman Civilization Influenced Whole Western World

We are told that Greece and Rome perished and the implication is—what is the use of law and jurisprudence? But did Greece and Rome really die? The whole of Western life is permanently stamped with the seal of Greco-Roman civilization. Greek genius left its island home only to win a world to its way of scientific, philosophical and artistic thought. Rome no longer rules by force, but the greater part of the civilized world lives by Roman law and its derivatives. The question therefore is not one of biological life or death—Greeks and Romans lived on after the glory had departed. It is rather a question of sustaining the gift of creativeness, of nurturing the highest values, of providing conditions that permit the human spirit to flourish in its still untapped potentialities. In short, as Socrates put it, the question is not life, but a good life. For us, the question is how can law contribute to that end.

From what I have been saying, the challenge of jurisprudence may seem to be a challenge to participate in the building of a sound international law. World problems are obviously important, but their solution does not require every country lawyer to engage in international affairs. Still, the chances of his contributing to their solution should not be ignored. For if the American lawyer becomes a legal scientist and philosopher, the impact of the profession will be felt everywhere. Not the least important step in that direction is the role of the lawyer-philosopher as a teacher in his particular community, however small it may be or remote from world highways. The formation of a sound American opinion regarding the problems of jurisprudence, even though the average layman never hears that word, may well become the most important single factor in contemporary world history.

But beyond any world-wide influence or speculation is the daily life of the average practitioner and the increase in professional effectiveness and enjoyment which jurisprudence offers him. The challenge of jurisprudence extends to every aspect of the lawyer's vocation. It brightens his more reflective hours with the fundamental questions that have appealed to thoughtful lawyers through all the ages, though they have been minimized in the recent past by the compulsions and advantages of specialization. (May I add, parenthetically, that just as it is possible to see all of life through the window of the law, so, too, is it possible for a specialist to give his particular knowledge a very wide perspective and a deep foundation). The opportunities to expand legal horizons and make the practice of law more significant through the use of jurisprudence are unlimited.

Consider, for example, the systematization of the law. If we say that this problem lies in the field of analytical jurisprudence, many lawyers are apt to assume that we are talking about some esoteric bit of academic lore. But if it is pointed out that we



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are here concerned with the problem of finding relevant law, the practicality of the question immediately becomes evident. A great part of the lawyer's working life is spent in searching through digests and encyclopedias for cases in point. It is difficult work which becomes ever more discouraging as the courts of fifty jurisdictions pour out their massive products. The whole business would be impossible and its future utterly hopeless were it not for the fact that law is susceptible of systematic arrangement, that doctrines and principles subtend millions of rules, making the search for apt cases manageable. The familiar subjects of the substantive law and the distinctions between that and procedure indicate some of the broad lines of classification. And, within each subject, propositions of varying generality provide the instruments whereby the numerous rules and the cases can be organized and found with more or less success.

The success is less frequent and

complete than it should be. Indeed, what assurance have you after long painstaking research that very important cases have not completely eluded your investigation? The lawyer must rely on the staffs of publishers. He must rely on an old, makeshift, classification of the law. One need not be unappreciative of the publishers' efforts to be skeptical of the professional literature they have provided. Nor are the publishers to be blamed. The plain fact is that the Bar has not interested itself in the development of a legal system nor has it cultivated the aptitudes necessary for sound organization of the law.

In this regard the Anglo-American lawyer has lagged behind the Continental lawyer who inherited the systematic treatises of the modern Roman law. On the Continent this is manifested in codification which, joined to a looser grip of precedent, makes the practice of law less arduous.

My purpose is not to insinuate that code systems are superior to case law, nor do I think a revival of the Field-Carter debates on that subject is called for. That issue has been clouded by the myth pervading academic circles, at least, that the basic methods of legal thinking are quite different, that the Continental lawyer reasons deductively from the broad propositions of his code while the common lawyer reasons inductively from case to case until he constructs the required principle. It is impossible here to set forth the reasons for believing that this account is mythology. And it is more pertinent to point out that the common law abounds in doctrines and principles no less than do the civilian systems. This suggests that the difference lies in the articulation and organization of these generalizations rather than in basic methods of analyzing legal problems or deciding cases. It also implies that, quite apart from official enactment of codes, the effort to systematize the case law would make the authoritative materials more usable. There is, in

addition, the aesthetic pleasure to be derived from an appreciation of the architecture of the legal order as well as the increased efficiency in making one's way through the labyrinthian byways of a great legal system. These are joys and utilities which any lawyer can experience.

There are serious international consequences of the common lawyer's disinclination to organize his law. His contacts with foreign lawyers are rendered difficult, and his participation in international efforts to unify law are limited. Beyond that extends the curtailment of American influence on other cultures. The Romans, by contrast, left their law in the convenient form of the Justinian Code; and its successors, the Swiss and German civil codes and the French and Italian penal codes, have been adopted throughout the world from Turkey to China and Peru. This nation, despite its strategic position, is unable to exercise a similar influence on world culture because its law in foreign eyes is a formless mass of countless rules piled helter-skelter in terrifying Gargantuan dimensions. I do not mean to suggest that the imitation of American law by foreign countries should be pressed. Our influence, if any, may be better extended in assisting others to develop free institutions in ways congenial to their own culture. To do that, however, we must improve our competence to communicate the character and significance of American legal experience.

"Legal Sociology" Implies a Factual Science

I turn now to the challenge of jurisprudence with regard to a factual science of law, a sociology of law, which is not concerned with systematization of legal precepts but with the functioning and effects of law, the interrelations of legal and non-legal institutions, and the like. In short, legal sociology carries the connotation of science in its ordinary meaning; it is or, rather, will be, if it is ever brought into existence, a distinctive factual science.

It is widely recognized that the

better state legislatures and the national Congress have increasingly relied on factual information in the study and drafting of legislation—though even here, that is sporadic and superficial. It will probably be granted also that some judges, especially in constitutional cases, lean heavily on the findings of factual research. Many lawyers have heard of the pioneering Brandeis brief, which emphasized facts rather than the cases. Yet all that seems remote from the daily work of most lawyers. I grant that, but nonetheless submit that factual research relevant to law and legal problems should be a serious concern of the thoughtful practitioner.

In order to indicate a perspective on the question quickly, I point to our brethren in the medical profession. I do so without intent to draw invidious comparisons or to imply that there are no major differences or to suggest that anyone is to blame because lawyers are not held in the same high esteem which the doctors enjoy. I can only mention one aspect of a large problem, namely, that medicine rests on science and is itself, to a substantial degree, a science, whereas the practice of the law does not even pretend to rest on organized empirical knowledge. For three centuries science has received the supreme accolade of Western culture, and medicine participates in that prestige. Nor is it merely a matter of public esteem. The reputation is deserved because the doctors are contributing to our knowledge of health in many important ways. The conquest of disease by scientific methods is universally appreciated as are preventive medicine and the efforts of doctors to educate the public. The clinic and the laboratory and the scientific medical publications are established and highly regarded.

Granted that law is fundamentally different in important regards, it is nonetheless pertinent to consider the possible significance of research and legal science for the practice of law. This is not an easy problem because

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