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THE PRESENT POSITION OF JURISPRUDENCE IN THE UNITED STATES

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A CLEAR conception of the current situation in his discipline should facilitate a scholar’s contribution to it. And we have learned, from Savigny’s enduring discovery of the connectedness of history, to appreciate the present as an emergence from the past. Current American jurisprudence is thus an extension of the past discipline into the post-war era, modified by various influences; hence we must attend at least to recent American jurisprudence. It should also be instructive to see what is going on in jurisprudence in other countries so that we can derive some additional perspective regarding the American enterprise. In that way we may also recognize more fully the distinctiveness of the American contribution and, perhaps, discover how to contribute more effectively to the progress of international and comparative studies.

The most striking fact about current national developments is the rise of natural law philosophies almost everywhere. England, Sweden, and Denmark are among the few countries which do not participate in this world movement. The contrast is sharpest in England where, despite Maine and Pollock, Austin continues to reign. Indeed, Austin’s imperative theory has been subjected to logical positivism, and the product is a nominalist jurisprudence which reflects the view that logical analysis is the only function of jurisprudence.¹ In Sweden and Denmark


¹. One must be careful, however, not to overlook other tendencies in England. There are many scholars there who take a wide view of jurisprudence, and much of the work in the ethical aspects of law, which is carried on here in law schools, finds expression in England in departments of philosophy. Moreover, the popularity of such an essay as Isaiah Berlin’s Historical Inevitability (1954), where he discusses personal responsibility in ways that have long appealed to Anglo-American scholars of criminal law, may indicate that new philosophical perspectives are becoming accepted in England, and this is bound to influence jurisprudence there. In any case, the principal difference concerns legal sociology which seems to hold very little interest for scholars in Britain. It may be added that the dominant English preference for logical analysis is not that of legal philosophers in the Commonwealth countries, especially Australia and Canada, where jurisprudence is viewed much as in the United States.

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the dominant jurisprudence stems from the work of Axel Hagerström whose anti-metaphysical influence was not unlike that of the behaviorists in this country. His followers\(^2\) are the principal exponents of a sociological positivism which in some ways has surpassed American realist jurisprudence, especially with reference to the central problem of the normativity of law.

What must be emphasized, however, is that logical analysis and sociological positivism are marginal currents in the world picture. The salient fact, as noted, is the almost world-wide rise of natural law philosophies.\(^3\) Though this is especially noteworthy in Germany, it is also prominent in Japan and Latin-American countries, where positivism was previously dominant. In many other countries since the last war legal philosophers have been seeking to construct a jurisprudence that is grounded in rationally defensible values. Inadequate as is the above account of foreign movements, it must suffice to indicate the contours of the contemporary jurisprudential scene.

Turning now to the recent past in American jurisprudence, the obvious fact is the influence of Holmes, Pound and the Legal Realists. There have, of course, been important developments in analytics, e.g., Hohfeld and Kocourek, and scholastic jurisprudence also enjoyed a revival, especially at the University of Chicago. Holmes, however, occupied the place of unique distinction as the catalyst, while Pound, in 25 years of scholarly publication, established sociological jurisprudence as the characteristic mode of thought among legal scholars in this country.\(^4\)

The swiftness of the current and the rapidity of post-war jurisprudential change may be inferred from the recent severe criticism of Holmes as well as from the fact that in 1954, Pound abandoned the pragmatic factual basis of his theory of interests.\(^5\) Without considering the validity of the criticism of Holmes, we may infer from it and, also, from Pound's revision that there have been significant changes in the focus and temper of American jurisprudence, especially as regards problems of valuation, the "policy" of law. The impact of American

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2. The late Professor Lundstedt was a student of Hagerström's, and he, in turn, transmitted the keen Viking realism of his teacher to Olivecrona and Ross.

3. This does not refer to Russia, regarding which see Soviet Legal Philosophy (Babb trans. 1951), 5 20th Century Legal Philosophy Series.


Legal Realism upon Pound's sociological jurisprudence produced other important changes. Pound, except in his polemics with the Realists, was so intent on informing an ill-prepared Bar that it was natural for him to assume the role of the lecturer and historian of jurisprudence rather than that of inquirer and analyst. The work he did needed doing, and no other scholar could have achieved his great success. But current American jurisprudence reveals the superiority of critical and dialectical methods of discussing jurisprudential problems.

In the area of the judicial process and the theory of judicial decision, the Realists also made marked advances in suggestive interpretations and in alerting scholars to the significance of facts, underlying motivations, and drives. They thus expanded the bases of criticism of the judicial process, e.g., making closer contact with psychiatry. And, of course, so far as the stimulation of actual research and the discovery of segments of legal science are concerned, the Realists made important contributions. While Pound was interested in general movements of thought and in grand generalizations, the Realists advanced in pointed elucidations.

But from a world point of view both Pound and the Realists were members of the same fraternity—adherents of a sociology of law which was little concerned with the difficult problems of valuation. Pound's later work does reveal a sensitivity to what may broadly be termed "natural law," and, as stated, he even abandoned the simple Jamesian datum of the factuality of desires or demands as the basis of his theory of interests. But his penchant for didactics, rather than analysis and dialectics, could hardly provide a theory or even a defense of objective valuation in law. And the Realists, by their own preference, bypassed the "ought" of law as irrelevant to legal science.

The current post-Realist period in American jurisprudence shares the world development in that it, too, is marked by appreciation of the ethical aspect of positive law and articulation of the problems that concern a normative subject matter. But, unlike the situation in some other countries where natural law thinking has revived, that tendency in the United States is wedded to empirical interests, e.g., the sociology of law. This, however, does not comprise the simple product that might be imagined. It is not a matter of adding given ingredients in a mixture but raises, instead, the extremely difficult problem of constructing a jurisprudence which expresses knowledge of the inter-relatedness of the principal components of a defensible jurisprudence.
The legal philosopher must, at least in the final act, be a rationalist, i.e., a "rule of law" man. He must, by definition, be on the side of Plato's *Statesman* and Aristotle, as regards the "rule of law", if he is to have a raison d'être. Although he may clothe his vehicle in many a varied garb, in the last analysis reliance upon the existence or "subsistence" of ideas, the reason of law, and the evidence of its distinctive functions is the badge of his vocation. This involves much more than logic in a formal sense. It determines the legal philosopher's position vis à vis various irrationalisms. It concerns no less than the ontological foundations of a far-ranging jurisprudence and the coherence of its diverse parts. However, if the choice is between a sterile system and realistic narrow studies, the decision is an easy one. One of the principal questions actually facing American legal philosophers assumes the latter as both preference and present accomplishment and thus concerns the next step—persevering beyond significant isolated studies to the organization of a jurisprudence.

The relevance of this need to the present American situation results from the fact that the other ingredients of a major advance in jurisprudence, though far from adequate, are thoroughly appreciated, especially the importance of valuation and factual studies. If we could cultivate the aesthetic impulse of the system-builder, we would have all the interests needed to achieve a significant synthesis of jurisprudential thought. When philosophers of the stature of Whitehead, Urban, and Sheldon cultivate philosophical synthesis, it is certain that no mere eclecticism is involved; jurisprudence may also take that direction in the confidence that synthesis is the most fruitful goal to pursue.

The writer has elsewhere discussed a definite method of advancing jurisprudence in that direction as well as achieving other advantages; and the gist of it may be briefly stated. There is a substantial body of legal theory, distinguishable from jurisprudence, that has been constructed slowly and painstakingly over the centuries by specialists in contracts, torts, criminal law, and other basic branches of the law, i.e., legal theory consists of the elucidation of the fundamental principles of the various fields. But very few legal philosophers have deliberately dealt with this body of legal theory. It cannot even be said that many legal philosophers have been greatly influenced in the construction of their jurisprudence by their own expert knowledge of a particular branch of law. They ignore that knowledge and experience

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when they take flight to the ethereal heights where the muse of jurisprudence dwells. It is not surprising, therefore, that sometimes only an arid nominalism emerges and that jurisprudence has no common base of reference and operations that even remotely resembles the accumulated store of physical science upon which both scientists and philosophers of science confidently draw in easy communication with other scholars.

Jurisprudence is a higher level of abstraction than legal theory, just as the latter is more abstract than the ideas comprising positive law. What is extremely important is that the three levels of thought are closely interrelated. Legal theory, because it developed slowly and spontaneously in direct relation to expert knowledge of particular fields of positive law, is free from the artificiality that often constitutes a dismal jurisprudence. If legal philosophers would concentrate upon legal theory as the bridge between jurisprudence and law, the result, as legal theories accumulated and were resolved into their elements, would be a jurisprudence constructed upon a proven foundation—the solid foundation of well considered, frequently tested legal theory. Not the least important result of this procedure would be the easy recognition of both policy and fact in law and thus, of the ontology, scope, and functions of an adequate jurisprudence.

The general tendencies and needs of the current post-Realist period in American jurisprudence have been briefly indicated above. The relatively novel element concerns the appreciation of the problems of valuation. But far from implying an indifference to sociological jurisprudence and realism, this tendency towards a modern American philosophy of natural law will build upon the enduring contributions of our recent past in ways indicated above. It is not in the least a question of "natural law" versus legal science; instead, the principal question concerns the sound coherence of the various components of an adequate jurisprudence. This requires interpretation of each major facet in the light of the others and an organization of the total product by use of a set of significant ideas.

Although jurisprudence is a theoretical enterprise, it serves practical purposes and is itself part of the cultural milieu of the times. That jurisprudence is not simply "conjured up" by escapist is evident in its history. Plato, the father of jurisprudence, lived in the most critical years of the Athenian Republic, and in the Dialogues he discussed legal problems in ways that caused thoughtful men then and thereafter to
turn to that fount of wisdom. Bentham's place in English political and legal reform and the flowering of German jurisprudence in the last third of the 19th century indicate similar practical challenges. And, to cite a proximate instance, the rise of Legal Realism in this country had intimate connections with economic dislocations and political problems, although, as is true of all major advances in jurisprudence, it was also a response to different influences, e.g., the prestige of physical science. Finally, can it be doubted that the distinctive character of current jurisprudence is closely associated with the past World War? It is only necessary to recall the barbarous ideologies of the dictatorships to appreciate the motivation of legal philosophers in many countries to bring law and value into significant interrelations. This challenge has become a vastly complicated international affair, and the horizon of the legal philosopher who deals with this perennial problem must be proportionately wider. This, as noted, is one of the principal characteristics and problems of current American jurisprudence.

A second influence and challenge concern the emergence of comparative law as a major legal discipline. If one considers even a few of the post-war developments—the inclusion of comparative study in many curricula, the travels of American legal scholars in many countries and the visits of many foreign scholars here, the increased interest in foreign legal treatises and theories, and the establishment of the American Journal of Comparative Law—the importance of the impact of so-called "comparative law" upon jurisprudence is easily perceived. The trend of practical international affairs is the correlate of this intellectual movement, and it seems evident that jurisprudence will never be the same again. In this situation, it is not the wishful thought that jurisprudence can "save the world" which primarily motivates the legal philosopher. His goal is that of all scholars—to discover and disseminate "the truth". But it happens that in our present world, jurisprudential truths have extraordinary practical importance, and American legal philosophers can hardly be insensitive to that. What is new in the present situation, so far as their work is concerned, is that, for the first time in history, it is possible for the legal scholars of many countries to meet frequently and regularly in sustained programs of cooperative research. Jurisprudence can provide the fundamental ideas and methods upon which the necessary structures of positive law can be erected.

To perform its duties to comparative study in a world-setting, juris-
prudence must first cope with the problems of communication. Here, it can only be suggested that when scholars representing different cultures wish to communicate, language becomes not a pastime or the syntax of dead letters, but a vehicle of living thought regarding common facts and values. The potentialities of American jurisprudence, especially its reality-oriented characteristic, should result in important contributions to the solution of this problem.

Of the many other problems to which American legal philosophers can and should give particular consideration, it is possible here to comment only on two or three of them. For the common lawyer the judicial process is the central area of both practical and theoretical concern, and it is here, too, in the writer's opinion, that American scholars are especially well equipped to make important contributions. The predominant emphasis in civil-law countries is upon the codes. American studies of the judicial process can illuminate the relations of that process to the codes while at the same time, with aid from the civil-law side, they critically examine the notion that pure deduction is the essence of codal adjudication.

This is a large subject, but two illustrations of the need for further study and discussion of the judicial process may be suggested. In some non-European countries which have adopted civilian codes, the case law is so scant that the power of the judges is very great; indeed by Anglo-American standards the "rule of law" is a very frail structure. Unfortunately, American scholars have done little to elucidate the case system and method in ways that are directed towards the perspective and background of civil lawyers. No doubt, our sharp departures from the pristine rigor of case-method instruction, warranted from an internal viewpoint, has dulled scholarly interest in extending knowledge of the judicial process beyond its present significant limits. But the core and vigor of the case method suggest opportunities to make lasting contributions not only to jurisprudence but also to the spread of the rule of law. To do that we need to reformulate the problems of the judicial process in order to bring within the scope of research factors that are of international significance.

Another illustration of the importance of studies of the judicial process concerns the problem of *ignorantia juris*, which touches many fields of law and exhibits the kind of contribution jurisprudence makes to the knowledge of positive law. In discussions of *ignorantia juris* by civil lawyers, the assumption seems to prevail that "ignorance" of the
law (and thus "knowledge" of it) raises substantially the same problems as does ignorisna fincti except, perhaps, that the former is on a "higher" level, i.e., the codes, statutes, and cases state the relevant meanings and the question is—did the defendant know them? But from the perspective of common lawyers who have critically explored the judicial process, the problem is much more complicated. The vagueness of all rules at their periphery is more fully understood, and the consequent insight, in a word, is that the law is what the authorized or "competent" officials declare it to be. Consequently, "knowledge" of the law, implied in the doctrine of ignorantia juris, is not knowledge at all, in the ordinary sense. It is, instead, coincidence with what the officials say is the law in the relevant subsequent adjudication. Enough has been stated, it is hoped, to indicate that comparative studies are closely involved in jurisprudential ones and that the cooperation of American and foreign legal philosophers may have extremely fruitful practical results.

Another quite different development in post-war American jurisprudence concerns the prominent rise of psychiatry among the disciplines directly affecting law and legal thought. The studies now in progress are being devoted especially to determining the relations of psychiatry to the law of crimes and evidence, and to a broad assessment of psychiatry with a view to providing teaching materials for law school curricula. It seems a fair guess that psychiatry and other types of psychology will be receiving increasingly sustained interest in the law schools. In any event, what is already quite clear is that unless legal philosophers participate in careful studies of the interrelations of psychiatry and law, not only will progress be problematical, it is also likely that considerable damage will result. In the lack of searching inquiries, the implications of the impact of psychiatry on legal institutions are not recognized. This is not the place to report, e.g., the present situation resulting from acceptance of unsupported assertions of "irresistible impulse" or even to indicate how that view of human nature threatens by its irrationalism to infect many other fields of law. It is possible here only to suggest what presumably all scholars can agree upon—that jurisprudential, i.e., thorough deeply-probing inquiries into the relation of an empirical discipline, like psychiatry, to law are necessary if enduring contributions are to be made. This is only one

7. For a detailed discussion see Hall, Ignorance and Mistake in Criminal Law, 33 Ind. L. Rev. 1, 18-23 (1957).
instance of the general truth that the practical problems of positive law
cannot be soundly separated from the theoretical issues raised in the
science and philosophy of law.

Turning to another quite different problem which greatly concerns
the current position of jurisprudence, we confront the world impact
of Marxism. Unlike the situation regarding psychiatry, a smattering of
which has been acquired by almost everyone, the difficulty here is that
American legal scholars have almost entirely neglected the study of
Marxism in its relations to law. It seems incredible that legal scholars
here have so largely ignored this important area of contemporary juris-
prudence, and that is an unfortunate commentary upon legal education
in this country. It is true, of course, that scholars who are free to
pursue whatever subjects they choose are apt to avoid obviously politi-
cal questions. Nonetheless, Marxism raises challenging issues, and there
is a sense of relevance in "a vital school of jurisprudence" (pace
Hohfeld), no less than in political theory and economics, which ex-
presses a scholar's sensitivity to his times. "Class conflict", "economic
determinism", "legal superstructure", "ideologies", and the role of
"ideas" in adjudication and in legal institutions are among the terms
that open the jurisprudential vistas which need to be explored. If the
current interests of American jurisprudence are cultivated in the ways
indicated above, important problems concerning international and com-
parative law, the judicial process, case method, forensic psychiatry,
Marxism and others will receive careful attention. The wider, "ulti-
mate" problems of bringing natural law and legal science into significant
interrelations will receive sustained study.

There is, however, a practical matter to be noted which greatly af-
facts the prospects of current American jurisprudence and tempers
wishful optimism. In some countries, chairs in jurisprudence are oc-
cupied by scholars who devote all their time to that field and teach only
that subject. In other countries, where the legal philosopher is also
interested in and teaches a field of positive law (a better arrangement
in the writer's opinion), it is not uncommon to find two or three such
scholars in each of the larger faculties who give courses in jurispru-
dence, and the work taken by the students far exceeds that in American
law schools. Despite the valuable rigor of legal education in this coun-
try, a relatively narrow vocationalism continues to dominate, and juris-
prudence is allocated a minor role in education and scholarship. No
one in authority seems to be very anxious to alter these conditions, and
the ideal of comfortable success at the bar is not an easy obstacle to hurdle. Thus, although great problems press for solution and the potentialities of current American jurisprudence are not unimpressive, no one can be optimistic regarding their realization.