1-1-1939

Philosophy of Law

Charles C. Miltner

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation

Charles C. Miltner, Philosophy of Law, 14 Notre Dame L. Rev. 145 (1939).
Available at: http://scholarship.law.nd.edu/ndlr/vol14/iss2/1

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
A PHILOSOPHY OF LAW

The difference between philosophy and a philosophy-of something is the difference between one's understanding of the nature, origin and purpose of the universe, and the nature, origin and purpose of some part or attribute of it, the difference, that is, between an understanding of the whole, and of some element within or integral part of the whole. Naturally then, one would expect the philosophy of the part to be consistent with the philosophy of the whole. This is actually the case, for there are as many philosophies of society, of law, of education, and so on, as there are distinct schools and systems of philosophy itself. If there is an historical, an analytical, a sociological and a scholastic jurisprudence, or philosophy of law, it is because, and, ultimately, only because, of the fact that there has first appeared a school of philosophy or, if you wish, a philosophical viewpoint, differing from others in its basic assumptions and principles, and so in its application to the field of legal matters yielding a school of jurisprudence correspondingly different from other schools. Whether we are aware of it or not, there is a philosophy implicit in everything we do; there is theory

behind all practice, a standard of truth and of values in all our judgments. We may, in our concern for the immediately practical—which means concern over immediately utilitarian ends—be unaware that we are applying a theory, but should controversy arise over our views or procedure, it soon enough becomes apparent that our case will stand or fall depending upon the soundness of the theory or philosophy implicit in it. At such times we find that there is a utility of ultimate as well as of immediate ends, and we possibly wish that we had given more attention to the former even than to the latter. One can, I suppose, be a lawyer, in the sense of a legal practitioner, a routine counselor and a pleader in legal controversies, an advisor on business or social procedure, without any notable understanding of the philosophy of law, just as one may fulfill the routine duties of a clergyman without a profound grasp of theology or of biblical exegesis. But, in the case of the lawyer, if it is done, it is and can be done only because the practitioner simply assumes that whatever is is right, that law is the law, that whether he has ever heard of the term or not, the only philosophy worth while is Positivism, or the philosophy that no philosophy is possible. At any rate, he could not claim that he had a complete professional knowledge of his subject. To build up a philosophy of law would of course be no easy task. To examine one already built up and to acquaint oneself with its basic principles and some of its more important applications is neither difficult nor without worthwhile reward for him who takes the trouble. The volume under consideration offers such an opportunity.

"The present study," writes Dr. Obering, "seeks to give an accurate and documented synthesis of the philosophy of law or jurisprudence held and brilliantly defended by an unquestioned leader of American political thought and action in the days that witnessed the struggle for our freedom and the foundation of our national government—James Wil-
son.” 2 Though in writing of Wilson’s philosophy of law he takes occasion all along to compare it with the views of such leading Scholastic writers as Thomas Aquinas, Suarez, Vittoria and Bellarmine, it would not be true to say that this was his primary object, nor that he sought to prove that Wilson’s thought had its source in these writers. He tells us that “mindful of the warning of Dr. Adams that ‘it is often a mistake to lay too much emphasis on intellectual sonship’ because it is so difficult to establish, he has made no attempt to prove the literary dependence of Justice Wilson on the older writers.” 3 This of course is far from denying that such dependence exists, and he cites or refers to weighty students of the subject who do not hesitate to say that it does exist. But, however that may be, the reader will feel grateful that the author has taken the pains to point out the very close parallel that does obtain between the principles of jurisprudence of Wilson and the Scholastic writers. It serves the double purpose of disarming those who somehow think that there is necessarily incompatibility between Catholic social principles and the government under which we live, and of revealing the absurdity of the claim made by another group that the Founding Fathers were not actuated by any philosophy of law at all, or that if they had any, it was derived ultimately from Locke or Rousseau or the Puritans.

The two main principles in Wilson’s philosophy of law are that law is a department of ethics, based on moral principles, and that the foundation of ethics is metaphysics. To the prevailing anti-intellectualism of the times this frank admission of metaphysics, or even of ethics, as having anything essential to do with law will of course be distasteful. The prejudice — for it is nothing less — against metaphysics, given a respectable status, if not initiated, by Kantian philosophy, is of such long standing that by the uncritical it has come to be identified with truth. In reply to this view

---

2 Associate Justice of the U. S. Supreme Court, 1789-1798, P. 6.
our author very aptly quotes Edmund Burke: "It is not your fond desires or mine that can alter the nature of things; by contending against which, what have we got, or shall ever get, but defeat and shame." Much more is here added to show that in taking the stand of the objective realist for his legal philosophy, Justice Wilson was linking his thought with the best of the past, and that in making it known there is provided the only likely remedy for the chaotic thinking on the subject at present, and for the ill-concealed fears for the future. Throughout his first chapter the author is at pains to show how Wilson’s thought on the science of law is contingent upon the concept of man as set forth by his realistic dualism. Briefly, he shows Wilson's view to be that from the Chair of Law should come “such a treatment of the subject (philosophy) as is necessary to give a just conception of man, in his character of author and subject of law, as accountable for his own conduct, and capable of directing both his own conduct and that of others. For laws cannot be made suitable to human nature, and such as will improve it, unless based on an accurate knowledge of human nature.”

Because of his sane realism in epistemology, Wilson could not condemn strongly enough the evil influence on legal thought, and especially on the problems of evidence, of either ancient or modern relativism and scepticism. For him, as for the Scholastic, there is both an objective order of truth and an objective order of right, an order of things that is, and of which man himself, being a part, must perforce recognize and observe certain rules of action or laws, simply because of his essential relations with the other parts. To know is mentally to grasp an object that is, and not merely to become aware of a subjective state. The key to the understanding of human activity is man's free will, and not

---

4 P. 20.
6 P. 24.
merely some vague calculation of the relative influence of heredity and environment.

Wearied as the world is today of the prevalent psychological mechanism which makes of man a plaything of the dead hand of heredity and the seductive smiles of social circumstances, a being only in degree above the level of the brute animal, it is refreshing to have set before us a jurist endowed with sufficient philosophical acumen to refute such false conceptions and to point out their harmful effects on law, morals and the institutions of social life. In view of this, one is not surprised to find that Justice Wilson was a confirmed theist. It is not by accident that those who through an erroneous knowledge-theory become sceptical of God’s existence and providence, should soon reach a perverted notion of man’s rational nature, intrinsic dignity and supernatural destiny. He that denies God as man’s first cause and final end must at once not only substitute some finite good as the supreme purpose of life, but also either profess ignorance of man’s origin or proclaim him and the universe as eternal and self-sufficient. What is taking place in the modern world, as everyone knows, is the substitution of society for God, the apotheosis of the State, and the submerging of the individual with his liberties in the immortality of the social group or the race. As the philosophy, so the legislation. Were one searching for some legal theory which could serve as an adequate antidote for the fantastic legal procedures of the totalitarian states of today, one would find all the essential principles of it in the writings of this early American jurist. Rigid in his logic and objective in his epistemology, he finds the origin and the destiny of men in God, their Creator and Supreme Good. It is in this sublime truth that he discovers the just grounds for the imposition of divine authority, the objective and universal basis for the moral order and the existence of the natural moral law, which is the fountainhead of all positive law.
These subjects are treated in chapters two and three, and they are the very heart of jurisprudence. It is here that both the Jurist and the commentator are at their best. It is here too that we find set forth in language eloquent, yet precise, and with evidence of a comprehensive knowledge of the existing literature of the time, Wilson's conception of the natural law, its distinction from the physical law, a consideration of its universality, immutability, and promulgation in the rational nature of man, the origin of moral obligation, the relation of genuine legal obligation to force, and a keen criticism of the rival views then extant.

The effects of law are rights and duties. Consistently with his basic theory, Wilson holds that as not all law is man-made, so not all rights or duties descend from or may be imposed upon man by, the state. It is this doctrine, more perhaps than any other, that positivistic jurists need to reconsider, for from none have they wandered further, and none has been deserted with graver consequences to the commonweal. It has been due to their rejection of this solid and objective basis for positive legislation that chaos has entered the field of jurisprudence, the dignity of human personality become obscured and man, under favor of law, been wholly or partially deprived of those rights to property, to freedom of speech and of conscience, to education, to the possibility of marriage and normal home life which so disfigure our contemporary civilization. To what extent lawyers may be responsible for these abuses is suggested by Mr. Ferdinand Lundberg:

"Law amounts to the formal incorporation of ethical principles . . . into the political structure; but beyond the common and statutory law, beyond parable and proverb, as it were, there lies a vast juridically unsanctified realm in the violation of whose precepts there is nothing illegal. It may reasonably be doubted whether any large section of the legal profession is concerned during working hours with this domain of unofficial moral law to which the lawmen's code makes praiseworthy obeisance . . . But although no a priori social philosophy in particular is entertained by the legal profession as a whole, least of all any in-
A PHILOSOPHY OF LAW

tegetrated philosophy of law, a nihilistic philosophy is implied in its work in the sense that it denies by implication any objective or real ground of truth.”

The point is worth emphasizing. In the present positivistic fog the natural moral law is made “unofficial,” that is, legal ethics is divorced from natural ethics, a procedure may be legally right while morally wrong, ethically damnable but legally unassailable, and all because the legal profession as a whole “denies by implication any objective or real ground of truth,” and, we may add, any objective or real ground of right, any objective or real source of positive law. No better commentary on such a state of things could be found than Dr. Obering’s citation from Wilson:

“If this be a just view of things, then the consequence undeniable and unavoidable, is that, under civil government, the right of individuals to their private property, to their personal liberty, to their health, to their reputation, and to their life, flow from a human establishment, and can be traced to no higher source. The connection between man and his natural rights is intercepted by the institution of civil society. If this view be a just view of things, then under civil society, man is not only made for, but by the government: he is nothing but what the society frames: he can claim nothing but what the society provides. His natural state and his natural rights are withdrawn altogether from notice.”

This, it may be observed, is precisely the criticism that would be made by any Catholic writer on the subject. The basic principle of Catholic social philosophy is that society or the government exists for man, and not man for society or the government. This being so, it ought also to be clear that in this same philosophy, applied to practical affairs, there exists the strongest champion for genuine political freedom, for the preservation of those liberties which are inseparable from human personality.

It is in the light of this principle that Dr. Obering presents to his readers Wilson’s views on the personal and property rights of man, and on the right to and limitations of natural

---

7 Harper’s Magazine, December, 1938, pp. 6-7. (Italics mine.)
8 Pp. 88-89.
human liberty. "Without liberty," Wilson writes, "law loses its nature and its name, and becomes oppression. Without law, liberty also loses its nature and its name, and becomes licentiousness." From this he passes on to the cognate and thorny subject of equality, and succeeds, we believe, both in exposing the fallacies of the notion of equality as the "dead level of human virtues" and the anti-social notion of Hobbes and Locke, and in proving that in its true sense it means that "With regard to all, there is an equality of rights and obligations: there is that 'jus aequum' in which the Romans placed true freedom. The natural rights and duties of man belong equally to all."  

It would take us far beyond the permissible limits of this article to attempt any sort of detailed notice of the remaining chapters of this book. What the author has thus far set forth, and upon which we have briefly commented, are the basic principles of Wilson's philosophy of law. In the remaining five chapters he is at pains to show how Wilson applied these principles in his consideration of civil and criminal law, international law, the state as a natural institution, juridical defense of the revolution, and constitutional government. In the treatment of these subjects he finds occasion to discuss such subjects as: the necessity of positive law, various views on the origin of civil authority, tyranny, the basis of criminal law, conflict of laws, the slave state, people versus the government, pragmatic jurisprudence, the consent of the governed, the right to punish, the duties of the state to itself and to other states, equality of nations, the philosophy of force in international relations, war, the concept of a world court, and so on. The list is long, and it contains items in which the contemporary world is intensely interested and which it is hotly debating.

9 P. 99.
10 P. 102.
In conclusion we wish to congratulate Dr. Obering on his excellent and timely presentation of a philosophy of law which is in all its essentials that of the Founding Fathers of the Republic, and which embodies the principles of the best tradition in philosophical literature. His work deserves wide distribution and thoughtful study by all students of law as well as by anyone interested in social philosophy.

Charles C. Miltner, C.S.C.

University of Notre Dame.