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Independent Jurisprudence

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"INDEPENDENT" JURISPRUDENCE

"The great gain in its fundamental conceptions which jurisprudence made during the last century was the recognition of the truth that the law of a state . . . is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is." [1]

From the viewpoint of a jurisprudence anchored in a realistic philosophy, this statement of Professor Gray invites criticism. First, it does not show that the juristic thought of which he speaks has made any gain by going to the roots of the science, but rather that it has set that science back by tearing it up by the roots. Next, far from being a fundamental conception, it appears to be utterly superficial. It is like saying that the great gain in the fundamental conceptions of engineering during recent times is the recognition of the truth that the rules of the designer in a construction company are not those which are in accordance with mathematics or the nature of the materials of construction or the ends that the owners of the building must attain; that they are not what ought to be, but simply that which they are. It amounts to the denial of the possibility of all creative effort in the light of pure science, to the denial of any necessary presuppositions for practical science. To say that the law of a state is naught else but that which is,

[1] GRAY, THE NATURE AND SOURCES OF LAW, 94.

is simply to affirm that the law of the state is the law of the state, that it is irreducible, absolute, unconditioned. It is to assert that legislators are independent of any objective principle of control (God, nature, morals) in their law-making, that the science of jurisprudence is self-sufficient, and that whatever legislative enactment may be promulgated is *ipso facto* law, and so rightly immune from criticism on the grounds of religious truth, or natural order, or ethical obligation.

The writer has no quarrel with anyone who wishes to restrict his study to the observation and classification of mere facts, even if those facts happen to be the positive laws of a state. Doubtless, one may take notice of them, describe them, group them on the basis of some common property, and list the conceptions that seem to be most widely employed, and so deservedly qualified as fundamental. Exception is taken when this method is heralded forth as a sign of notable progress in the science of jurisprudence or the philosophy of law, when it is presented as a procedure having superior methodological value, and so one which may claim the right to supplant all other methods of approach to juristic questions.

There are, it seems to me, two distinct, but equally legitimate, lines which criticism of this theory may follow. Since it is but one of several instances of the modern revolt against the reliability of intellect in philosophical investigation, it may from that angle undertake to demonstrate its shortcomings as a philosophy of law. On the other hand, because the "facts" with which jurisprudence deals are not physical, but moral entities, not the result of predetermined causes, but the result of rational deliberation and free decision, not merely things that *are,* but things that are *brought into being,* and precisely as norms or criteria of action, one may attempt to prove that on the grounds of method it fails to conform to the canons of science. In brief, the so-called

analytical method which claims to make jurisprudence an "independent" discipline is neither a philosophy of law nor a science of law.

"The study of aesthetic phenomena," it was recently said, "is just now emerging from the metaphysical and literary stage toward the scientific, but has not reached it." [2] Here the term science is set over against the term metaphysical with the obvious suggestion that whereas science connotes certain and demonstrable knowledge of a subject, metaphysics or philosophy implies only vague and ill-defined conceptions of it, and though it may yield interesting opinions, it can never reach certainty. This is typical of the positivist attitude toward philosophy, as if philosophy were but "a collective name for questions that have not yet been answered to the satisfaction of all by whom they have been asked," as if its sphere were but the "great uncleared ground" of thought, as if, as a facetious Frenchman put it, it were but "l'art de s'égare avec methode."

As the behaviorist pretends to be able to build up a psychology on the "pure facts of behavior," so the analytical jurist pretends to construct a science of jurisprudence on the "pure fact of law." Both are curiously inconsistent, for both presuppose, and necessarily presuppose, a very definite, even if erroneous, kind of philosophy. One can no more escape a philosophy than he can flee from his own shadow. The transparent philosophical assumptions of the behaviorist in psychology, as of the pure-fact-of-law jurist, is that the positive is irreducible, that nothing exists but the actual, that nothing is knowable with certainty but the sensible and measurable, and therefore that the phenomena of the rational and moral order may be dealt with in the same way as the phenomena of the sensible and material order. Thus in both instances there are assumptions of general and ab-

2 Educ. Record (October, 1934) 452.

solute principles which with their manifold implications constitute a whole philosophy of reality, of knowledge, and of man.

When the analytical jurist says that "the law of a state or other organized body is not an ideal, but something which actually exists," he evidently does not assume that anybody ever was of a mind to deny that an actually existing positive legal enactment, such as the shooting of wild ducks during the months of July and August is forbidden in the State of Indiana, could in some way simultaneously not exist. He rather wishes us to believe that such or any other legal enactment promulgated by any political sovereignty may rightly claim the status of law without reference to any general truth prior to and superior to it in the realms respectively of religion or philosophy of nature or morals, as to a norm whereby its nature as a genuine law might be determined. He not only says that the actual is real, which none will deny, but he also says that the contingent and variable real may exist and be understood independently of or without reference to an absolute and invariable, that is, an ideal, a claim that no realistic philosopher will admit. Indeed, in what he says he actually contradicts himself. For in asserting that the law of a state is simply "that which is," he asserts that the criterion or norm or ideal by which any rule of action enacted by a state may be known as a law and as claiming the obedience of subjects, is the unconditioned will of the state. So that if one were tempted to criticize such a rule he might conceivably do so on some ground, but not on the ground that it was at odds with the Divine Law or the natural order of things, or the principles of morality, or of anything conceived of as prior to or independent of the state. In brief, the state itself is put in the first place, and, so far as jurisprudence is concerned, displaces or replaces God and nature and man. As Dean Pound, discussing the question of Law and Morals in connection with the analytical school of jurisprudence, aptly remarks:

"We are back again to the state as the unchallengeable authority behind legal precepts. The state takes the place of Jehovah handing the tables of the Law to Moses. . . . Law is law by convention and enactment."[3]

All of this converges toward the anti-intellectualistic dogma that, since we cannot discover in religion or philosophy of nature or morals any universally valid and fundamental principles upon which to ground our science of jurisprudence, we must simply fall back upon the "pure fact of law," and say without further ado that that everywhere and indisputably is law which has been enacted by the state. But from our discussion thus far it is clear that this pure-fact-of-law theory, in declaring its independence of philosophy, implicitly assumes a philosophy, and one which at the same time conspicuously fails to elucidate even the fundamental conceptions of the study which presupposed it. For to say that a law is simply that which is, is merely to indicate the presence of something, not to explain or to justify it. If, as this theory does contend, law is made from precedent, or that "it stands upon its own basis as a system of precepts imposed or enforced by a sovereign," it leaves both the precedent and the enactment unexplained and unjustified. It falls back upon something which is not ultimate, and so not independent or self-sufficient. A genuine philosophy of law, as a philosophy of anything else, seeks the ultimate as its proper aim and objective.

"Science," it is said, "is just the answer to questions." But it would be more accurate to say that it is a systematic or organized body of answers to questions of a peculiar type about a definite object. For while science is indeed knowledge, it is not synonymous with all knowledge. While all of us know *that* many things are true, the scientist knows also *why* they are true, and the answer to the question, Why? inevitably involves answering the questions,

3 POUND, LAW AND MORALS, 13.

Whence? and What? All scientific knowledge is a process of mental unification of the manifold of concrete reality. The principle of this unification is also the principle of order and of system, and so also of proof and verification. Intellectual curiosity or reflective wonder about anything expresses itself in the commonplace question: What is that for? It is spontaneously assumed that once we know the end or purpose of a thing—and not till then—we can begin to understand what it is, its nature, and from this knowledge we can see what it ought to be and how it came to be at all. In other words, intellectual knowledge proceeds from a knowledge of purpose to an understanding of nature to a comprehension of origins. Science is simply a knowledge of things through their causes, and when these causes happen to be ultimate causes, science becomes philosophy or philosophical science.

It is rightly demanded then of any study which pretends to be scientific that it give some account of the whence and the what and the wherefore of things,—that it first tell us what the things are for, and then, in the light of that, in the case of moral science at least, indicate the criteria by reason of which we can determine the difference between what they are and what they ought to be, and so display their dependencies or causal relations.

Now how does the analytical jurist meet these requirements? As Pound has pointed out, he regards the "science of law as wholly self-sufficient." [4] Such a science, I take it, would be one claiming independence of any presuppositions, that is, of any propositions demonstrated as true in departments of knowledge which investigate the same general subject matter, but from different and more fundamental points of view. Since all knowledge has to do with reality,—I ignore the pure subjectivist as outside the pale of possible disputants,—that science alone can in any intelligible sense be

[4] POUND, *op. cit. supra* note 3, at 41.

called self-sufficient which deals with the presuppositions of all knowledge, which investigates being and its primary implications. Such is the science of metaphysics. Beyond it, scientific study deals either with some particular being or class of beings or aspect of them, and consequently assumes as true the principles demonstrated in the more general and basic studies.

If now we apply this to the science of law, it is immediately clear that the subject matter of positive law, the exclusive object of analytical jurisprudence, is far from being the basic science having to do with human actions, and so is far from being independent or self-sufficient. If, as everyone concedes, law is a rule for human action, then it should be evident that no one can pretend to study law scientifically apart from certain definite presuppositions as to what man is and what human action is for. For if rule exists for action, action exists for end, and as the character of the action depends directly on the character of the agent, the character of the rule must also be determined by the nature of the agent. But what man is and whence he came and what ultimately is the meaning and purpose of human life are questions which, though adequately answered only by Christian Revelation, are nevertheless answered also by reason in the sacred science of theology and in philosophy of mind and ethics. The conclusions therefore of these sciences may not logically be ignored by the student of positive law. It is arbitrary in the extreme to isolate jurisprudence from the other bodies of scientific knowledge concerning man and the norms of his action, a wholly unwarranted divorcement of a particular and subordinate science from more general and fundamental sciences.

If it be objected that analytical jurisprudence is not a normative, but a descriptive science, the answer is that juristic science, whether it view its subject matter in its origin, or its factual aspects, or in its application, or in its social effects, is inextricably bound up with the normative;

it is inseparable from the questions: Has this statute the essentials of genuine law? Can men safely conform to it in their actions? Will it, if observed, secure proper human behavior, or promote the common welfare? Has a government the right to impose such a mandate upon its subjects? A forceful analogy is at hand in the science of medicine. Fancy a research worker in the field of medicine saying: "I shall examine the history of medical theory and practice; I shall then correlate different views and theories, compare one with the other and give them appropriate names, but then I shall have reached the limits of the scope of my science. I grant you that the aim of medical science is to prescribe laws of health. Well, here they are. But whether in practice they are what they ought to be, whether in practice they would require men to ignore the truths of religion or to violate the prescriptions of the natural law, or repudiate spontaneous and universal moral intuitions,— in these matters I am not interested. As a medical scientist I tell you, not what the laws of health ought to be, but only what analysis of the existing theories of medicine shows they are."

Fortunately, medical men are neither so short-sighted or so unscientific. They do indeed find out what laws of health have from time to time been drawn up, but they most assuredly also criticize them, modifying or rejecting them, and substituting new and better ones in their place. Let it be noted also that this criticism is grounded on their improved knowledge of the human organism as a whole, and of what is the natural purpose and function of each of its parts and of their relation to other facts and to other things. And it is in these facts that is found the origin of the norms or laws of health which they teach us, and which therefore enable medical men to say, not only what they are, but also what they ought to be.

The application of this to the science of law is too obvious to need extended comment. In the one case as in the other this inescapable fact emerges, that in making rules for hu-

man action, one is either placing human actions in the same category as the actions of inanimate and irrational things or he is simply playing a game of blind man's buff, unless he takes into constant consideration the origin and the nature of man, and the character of the ends which by reason of such nature he is bound to seek. This consideration will most certainly reveal a dependence of jurisprudence upon religion and philosophy of nature and ethical principle. The "pure-fact-of-law" jurisprudence is no more jurisprudence in the proper sense of that word than is the mere history of ethical theory moral science. The claim of self-sufficiency therefore is as fatuous in theory as history has shown it to be impossible in practice.

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