



5-1-1943

American Philosophy of Law

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Recommended Citation

Clarence E. Manion, *American Philosophy of Law*, 18 Notre Dame L. Rev. 317 (1943).

Available at: <http://scholarship.law.nd.edu/ndlr/vol18/iss4/2>

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THE AMERICAN PHILOSOPHY OF LAW

Much present discussion about the Philosophy of American Law badly needs to be made more specific. Is the question "What is the Philosophy of Law in the United States?", or is it rather "What *ought* such a Philosophy to be?" The answer to the first question is largely one of fact — a fact not altogether pleasing to the modern school of realistic jurisprudence. Although the second question may or may not do so, it usually does presume that the philosophy of law in the United States is vague or non-existent. In this respect, the second question usually begs the first, in which case the answer is not anchored to anything except the force which propels it, namely, the unsupported wish of the respondent. For this reason, answers to the second question seldom, if ever, coincide. Sixteen such answers are bound up in a volume published in 1941 under the title, "My Philosophy of Law,"¹ printed for the Julius Rosenthal Foundation at Northwestern University. The distinguished authors of this symposium appear to assume that a philosophy of law is a purely personal credo about a persistent social manifestation called "law." The book contains no hint of the fact that above and beyond the authors' opinions of what it "ought" to be, a definite philosophy of law, explicit in its origin and implicit in its growth and development, has characterized our American Law from the very beginning of its history. If lawyers, judges and law teachers of the greatest influence are to write and speak of the Philosophy of Law as if it were nothing more than the commentator's "slant" at broad social aims and disciplines, then it is not surprising that the generality of our scholarship has come to regard American legal philosophy as a *tabula rasa*, waiting for the original contributions of Sociology, Economics, Political Science, Psychology and finally Mathematics.

¹ Boston Law Book Company, 1941.

I do not think that the American Catholic Philosophical Association should be misled by this popular heresy. Perhaps the Philosophy of American Law ought to be something very different from what it certainly is. Debate on this point should not be foreclosed for we are just as competent to change our legal philosophy now as we were to establish it in the first place. Nevertheless, it is gross misrepresentation for the advocates of a new legal philosophy, or no legal philosophy at all, to act as if they were debating the possibilities of a now vacant building site when, as a matter of fact, they are proposing to destroy a very solid structure put together with great pains and deliberation more than a century and a half ago.

Any perfectly honest discussion of American Legal Philosophy ought to revolve about such a question as the following: "Should the American Philosophy of Law be abandoned and, if so, what, if anything, should be substituted for it?" This question presupposes the existence of a definite Philosophy of Law in and for the United States of America. Let us first see what this philosophy is and then inquire into the reasons why its very existence is so persistently ignored by the great majority of those who write upon the subject of American jurisprudence.

In the process of this identification, no useful purpose will be served by conducting the investigation through the long and tortuous corridors of English and Continental European history. American legal philosophy is an historical development in the same narrow and strictly revolutionary sense that Communism is an historical development. In the history of Czarist Russia, for example, one may find at least some of the causes and motivations of modern Russian Communism; however, no serious student of Communist Philosophy will waste much time analyzing the "reforms" of Peter the Great. In like manner, we may explain *how* and *why* our legal philosophy came about if we study its English and American background, but we completely frustrate the legal-phil-

osophical significance of one of the most important events of all history, namely, the American Revolution, when we think and speak of American jurisprudence as a modern projection of the English Common Law. Nevertheless, during the present century there has been a constantly strengthening disposition on the part of American teachers and writers to destroy, or at least obscure, the completely revolutionary legal philosophy contained in the American Declaration of Independence. The persistence and strength of these obscurantists has finally given them command over the present generation of American legal scholarship. These commanders act, write and teach law just as if the American Declaration of Independence had never been written.

From time to time I have asked some of the more persistently voluble leaders of the obscurantists school to explain their so-called historical jurisprudence theory in the light of the revolutionary postulates of the Declaration. The answer is always the same, namely, the Declaration of Independence is, or was, a political document and, as such, it does not enter into or in any manner disturb the unbroken continuity with which English law has flowed into the channels of modern American jurisprudence.

To say the very least, this is an extremely naive predicate upon which to launch and sustain what amounts to a complete counter-revolution in American Law. If it exists at all, the line that separates legal and political documentation is exceedingly fine and, when one attempts to use that line for any practical purpose, it is found to have all the consistency of a sturdy and very much alive angleworm. Planks from political platforms often leap directly into our codes and just as a statesman is said to be a politician who has died, it may be just as truly said that a constitution is a political document implemented by sanctions and enforcement machinery.

The success of the American Revolution changed the Declaration of Independence from a pious aspiration into a definite working philosophy of law and government. By all

standards, it is the clearest and most unequivocal definition of man's relationship to God, his Government, and his fellow man that is to be found in the law of any people on earth. The Declaration was a completely revolutionary document in that it not only repudiated the governance of England, but, at the same time, affirmatively established an hitherto completely untried theory of the State. For the foundation of this new theory, it went far beyond Locke's Law of Nature to much higher ground, namely "The Laws of * * * Nature's God." It did not merely abandon all pretexts concerning the so-called "rights of Englishmen," it affirmatively postulated the God-given rights of man, as man, and formed law and government into a special agency to make these rights secure. Pursuant to this end and object, the new, free and independent states immediately set about the drafting of their several constitutions and laws. It was to be expected, of course, that the resultant political methods and legal procedures would be those with which they had become familiar as English colonies, but the objects, sanctions and philosophical principles of the new governments were the complete reverse of those of England.

In what is perhaps the earliest Federal decision (1795) declaring an act of a State legislature repugnant to the Constitution and therefore void,² the Circuit Court of the United States for the Pennsylvania District said: "In England from whence most of our legal principles and legislative notions are derived, the authority of the Parliament is transcendent and has no bounds." The decision then quotes Blackstone as follows: "The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds * * *. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal,

² Vanhorne's Lessee v. Dorrance, 2 Dallas 304 (1795).

civil, military, maritime or criminal: this being the place where that absolute, despotic power which must in all governments reside somewhere, is entrusted by the Constitution of these Kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal. It can regulate or new model the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was done in a variety of instances in the reigns of King Henry VIII and his three children. It can change and create afresh even the Constitution of the Kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True it is, that what Parliament doeth, no authority upon earth can undo." 1 Blackstone Commentaries 160. The Circuit Judge then goes on to say: "From this passage it is evident that, in England, the authority of the Parliament runs without limits and rises above control. It is difficult to say what the Constitution of England is, because, not being reduced to written certainty and precision, it lies entirely at the mercy of the Parliament; it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. Some of the judges in England have had the boldness to assert that an Act of Parliament made against natural equity is void; but this opinion contravenes the general position that the validity of an Act of Parliament cannot be drawn into question by the judicial department; it cannot be disputed and must be obeyed. The power of Parliament is absolute and transcendent; it is omnipotent in the scale of political existence. Besides, in England, there is no written constitution, *no fundamental law, nothing visible, nothing certain* by which a statute can be tested (Italics mine). In America the case is widely different: every State

in the Union has its Constitution reduced to written exactitude and precision."

The "widely different" case of America is precisely attributable to the Declaration of Independence: the American philosophy of law and of government as distinguished from that of England. Pursuant to the postulates of the Declaration and in keeping with its philosophy, the Constitution of Pennsylvania (under consideration in the instant case), had been written and adopted. After reading the pertinent Articles of the Pennsylvania Constitution, the Circuit Judge proceeds to say: "From these passages it is evident that the right of acquiring and possessing property and having it protected is one of the natural inherent and inalienable rights of man * * *. The legislature therefore had no authority to make an act divesting one citizen of his freehold and vesting it in another without a just compensation * * * it is contrary to both the letter and spirit of the Constitution. * * * If this be the legislation of a republican government I ask wherein it differs from the mandates of an Asiatic prince? *Omnipotence in legislation is despotism.*"

Contrast this concluding sentence with Blackstone's quotation of Sir Edward Coke, cited heretofore, namely: "The power and jurisdiction of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds * * *." It was the Declaration of Independence that spelled out this revolutionary departure of American from English jurisprudence. Quite obviously, if the rights of man are inalienable and God-given, they may not be taken by *any* government whether that government be republican, democratic, or otherwise constituted. It is for this reason that American courts have consistently taken the position that the validity and binding character of governmental acts may be reviewed by the Court upon the petition of an aggrieved individual and disregarded as invalid if the act is found to be in violation of the petitioner's rights. Our system of constitutional law is unique in this respect but it is

remarkable, to say the least, that even the most ardent defenders of this "judicial review" seldom, if ever, invoke its only philosophical justification, namely, the self-evident truths of the American Declaration of Independence.

For more than 100 years following the time of *Vanhorne's Lessee v. Dorrance*, the revolutionary philosophy of American Law was frequently quoted and affirmed by our State and Federal Courts. As late as 1896, we find Justice Brewer speaking for the Supreme Court of the United States as follows: ³ "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. . . .'

"While the declaration of principle contained in the Declaration of Independence may not have the force of organic law or be made the basis of judicial decision as to the limits of right and duty and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and letter of which the former is the thought and the spirit and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." The "thought and spirit" referred to by Justice Brewer constitutes the legal philosophy of all Government, both State and Federal, in the United States. "The very highest duty of the States when they entered the Union," wrote Chief Justice Waite, in *United States v. Cruikshank*,⁴ "was to protect all persons within their boundaries in the enjoyment of these 'inalienable rights' with which they were endowed by their Creator."

³ *Gulf, C. and S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666 (1897).

⁴ 92 U. S. 542, 23 L. Ed. 588 (1876).

Our Nineteenth Century judges took the legal philosophy of the American Declaration of Independence as a "self-evident truth." So also did the framers of the forty-eight existing State Constitutions, all of which expressly recognize the existence of God or the natural inalienable rights of man, or both. At the turn of the century "lay morality" and secularized concepts of everything, including law and government, laid hold of the American intelligentia. From that point on, we began to hear less and less about the American Declaration of Independence, even on the occasion of 4th of July celebrations. Natural Law was discussed and appraised academically as a sort of way station on the evolutionary road of human progress. Such discussion is now being revived and some of those engaging in it even hazard the suggestion that the remnants of Natural Law should be salvaged and put to work.⁵

The schoolmen of the new secularism refused to dignify the Declaration of Independence by a direct refutation. They were content to dismember the Natural Law doctrines of such writers as Locke and Montesquieu on the assumption that the philosophy of the Declaration of Independence must then fall to pieces by inference. The good faith of these commentators is seriously in question. For instance, one cannot believe that these scholarly researchers could overlook the patent distinction between the Law of Nature as expounded by Locke and "The Laws of Nature's God" invoked by the Declaration of Independence. The confusion of these two radically different concepts of Natural Law must have been as deliberate as the repeated citation of disparity in individual talents, virtues, opportunities and acquisitions to refute the assertion of the Declaration of Independence that "All men are *created equal*." "We hold these truths to be self-evident; that all men are created equal." Everything we have learned about human heredity

⁵ The Revival of Natural Law, Roscoe Pound, *The Notre Dame Lawyer*, Vol. 17, p. 287, 1942.

challenges this statement in our Declaration of Independence. While genetics gives no support to the concept of hereditary superior or inferior classes, neither does it support the theory of genetic equality. We have been shown beyond the shadow of doubt that individuals are ushered into the world with every type of human inequality in body and mind, and when we add to this the obvious inequalities in environment and opportunity we are forced to conclude that the statement of our Founding Fathers was a flight of poetic fancy (as indeed they may have meant it to be)."⁶

The distinction between being "born" equal and being *created* equal is the obvious difference between a litter of healthy pups and a family of children. To be "created equal" implies equality only in the sight of God, the Creator. Hundreds of writers, like the author of "You and Heredity," who persist in reading "created equal" in the sense of genetic equality are saying in effect that signers of the Declaration of Independence were either the blindest of fools or deliberate and lying propagandists. The express language of the Declaration shows that they were neither. The signers were something else, which is apparently equally incomprehensible to the "Geneticists," namely, they were men of Faith — Religious Faith if you please.

What the skeptics (who deny that there can be such a thing as "truth," and particularly "self-evident truth") and the secularists (who wish to separate government from any connection with God or Religion) unite upon is the campaign to utterly suffocate the all too obvious *theology* which thoroughly permeates the American philosophy of law and government. This well-managed plan of suffocation began to be discernible forty or fifty years ago. The definitely-accomplished separation of *Church* from State was then deliberately confused with the project to separate *Religion* from Law and Government, which is a very different kind of sep-

⁶ "You and Heredity," Amram Sheinfeld (p. 366), Frederick A. Stokes Company, N. Y. C.

aration indeed. Whatever may be said of the separation of *Church* from State, one has but to read the Declaration of Independence to see that the withdrawal of God and Religion from American Jurisprudence would not only subtract the substance from our governmental system but would likewise destroy the traditional utility of its remaining form. A man cannot be "endowed" by a Creator whose very existence is denied and without this fundamental starting point, namely, the God-given, natural inalienable right of the individual personality, our revolutionary constitutional system, conceived as a limitation upon an agency government, falls of its own weight.

Father William Obering addresses himself to this identical point in his masterful treatise on the Philosophy of Law of James Wilson.⁷ He says: "If the natural rights of man are denied, it is perfectly true to say, as Justice Wilson remarks, that he 'is not only made *for* but *by* the government.' For under such a principle, man does not differ essentially as far as his juridical position is concerned from the animals on the State Experimentnal Farm because the juridical difference between them is one established by the good pleasure of the State and may be wiped out by the same good pleasure. . . . If the citizen then has no rights which the State is bound to respect as granted by the higher natural law, he may call himself by whatever name he pleases, but he is the chattel-slave of the State of whom the State may dispose in the general interest as it disposes of any animal. For he ceases to be, in Justice Wilson's fine phrase, 'a natural person formed by the great Author of Nature' and becomes the nameless creature of the State."

Where government is unlimited, no subject of such government is truly free. Limited government is thus the re-

⁷ Philosophical Studies of the American Catholic Philosophical Society, Vol. I, p. 89.

ciprocation of human freedom. It must be observed, however, that the limitation of American Government is not comprised solely of restrictions upon the area of its activities, but it is likewise involved in the narrowly restricted objectives of American Government within those areas to which it is assigned. ". . . *To secure these rights* governments are instituted among men," says the Declaration. American Government thus becomes at all times and in all places where it may constitutionally go, a protective agency for the preservation of God's gifts. It derives its "just powers" (but *not* its ends and its objects) from the Consent of the Governed. Democracy is to spend itself in bestowing upon the State the just and necessary powers with which it is to attain its unalterable ends.

The evil of Dictatorship consists not in the fact that it is "democratic" or "undemocratic," nor in the name by which it may be currently called, nor in the refinement of its ruthlessness. The evil of such Dictator Government consists in its assumption that it is the *source* of all of the rights and privileges enjoyed by those under its jurisdiction. Neither the benevolence of such a government nor the happiness of its subjects can obscure the fatal, ethical defect in its composition and nature. Such a government is a false god. Its existence profanes a sacred thing, namely, the origin, nature and eternal responsibility of the individual human soul. Philosophically, its profanity is all that is wrong with Dictatorship. Nevertheless, and strange to say, profanity is the one charge that is not seriously made against modern dictators. Why have its enemies elected not to shoot Dictatorship in the heart? For the reason that too many of the principal spokesmen of these "enemies of dictatorship" and "friends of democracy" hold with the *dictum* of the late Justice Oliver Wendell Holmes that men are not "souls" at all but merely a "complex of energies," of which a certain one "can wag its tail" and another "can make syllogisms."

These spokesmen know that if they should send a philosophical arrow into the heart of Hitlerism, for instance, the missile would not be kind enough to stop there but would fly on to the accomplishment of other important casualties. Such a shaft would scatter and confuse the highly influential school of realistic jurisprudence which holds that law is what government does. It would likewise hit and disburse the band of skeptics and secularists who have fought with marked success to obscure the deeply religious nature of American jurisprudence while they feverishly adjust the forms and procedures of our legal system to accommodate an administrative absolutism under the command of the "intellectuals."

Few, if any, of these jurisprudential realists, skeptics and secularists are tyrants at heart or by nature. Their social objectives are praiseworthy and, in most instances, unassailable, but their jurisprudence is completely alien to American legal-philosophical traditions for the short and simple reason that the government they envision is a *source* of blessings rather than a *servant* of pre-existing *individual* rights. It is precisely their peculiar philosophy of "democratic" absolutism that is responsible for the rapidly congealing stratifications of class consciousness that are now all too obvious throughout the population of our country. It is contemplated that, in the approved Marxian manner, each class must completely absorb the individual personality of its members and that in the subsequent and inevitable clash of classes, the "most numerous"⁸ class will survive. This is the established technique of all dictatorship — names and pretended distinctions to the contrary notwithstanding. Blocking the path of this "progressive liberalism" is the American philosophy of law and government. It is the theological virtue of this American jurisprudence that it first recognizes and then seeks to preserve man *qua* man. In this

⁸ This is apparently where the "democracy" comes in.

manner, it guards the safety and happiness of the *entire* group from the heart to the perimeter of society rather than *vice versa*. Without a widespread, clear and faithful acknowledgment of God's purposes in the creation of mankind and the world, no such legal philosophy can be long sustained. When religious faith is gone, such a system of jurisprudence will have automatically disappeared.

The "reformers" know that religion is the chief obstacle to the accomplishment of their political and legal objectives, hence the painstaking care that they consistently take to completely secularize their plans and promises of "heaven on earth." In order to survive this clever flank attack, the American philosophy of law must be generally and clearly understood. The man in the street must be made to know that faith and freedom are inseparable and that a secular "liberalism" is preparing to sell him into slavery. For the purpose of this immediately necessary education in the truly religious philosophy of American law and government nothing will serve our purpose better than a popularization of the self-evident truths taken *verbatim* from the language of the Declaration of Independence itself. Fortunately, there is in this language the great genius of simplification. The principles described are clear and there is a comforting dogmatic finality about them. Far from the "flight of poetic fancy" and the "glittering generalities" that the skeptics have represented them to be, the principles of the Declaration of Independence are both definite and specific. There is no reasonable and moral social objective that will not respond to their simple formula for the adjustment of human and governmental relationships in the bright light of God's creative purpose. If, as Christopher Dawson says,⁹ "we need a political philosophy that is more catholic and more humane — one which does not exclude or depreciate the non-econom-

⁹ "Religion and the Modern State," Sheed and Ward, p. 43.

ic functions and values, but which treats man as a free moral personality, the creature of God and the maker of his own destiny," the answer is that we in the United States have such a philosophy and have had it from the very beginning of our history as an independent state. Now, more than at any previous time since its establishment here, this philosophy needs to be brought out of hiding and put seriously to work.

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