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## "MY PHILOSOPHY OF LAW"—A SYNTHESIS

CHARLES V LAUGHLIN\*

A genuine service has been recently rendered to the world of legal thought by the Julius Rosenthal Foundation of Northwestern University in the publication<sup>1</sup> of a symposium of Contemporary American Legal Philosophies. "From the friction of minds comes the scintillation of truth."<sup>2</sup> Although truth cannot be obtained from discourse alone, one may be aided in determining and understanding crucial issues by comparing the views of those persons whose opinions are entitled to deference. If it be assumed that the quest for a philosophy of law is desirable,<sup>3</sup> no better aid can be found than a comparison and synthesis of the views of those who have given meritorious thought to the working out of such philosophy. I make no pretense of having a legal philosophy of my own. I have, however, read the symposium with great interest and believe that an attempt to extract therefrom threads of agreement and difference may not be entirely without purpose. While it is hoped that such a study may prove interesting to those who do not find time to read the entire symposium, it is primarily desired to arouse sufficient interest to induce others to read that volume itself.

Sixteen scholars, consisting of fourteen law professors and two present day philosophers, contributed views. They are as follows: Professor Joseph Walter Bingham,<sup>4</sup> Professor Morris R. Cohen,<sup>5</sup> Professor Walter Wheeler Cook,<sup>6</sup> Professor John Dewey,<sup>7</sup> Professor John Dickinson,<sup>8</sup> Professor Lon L. Fuller,<sup>9</sup> Dean Leon Green,<sup>10</sup> Professor Walter B. Kennedy,<sup>11</sup> Professor Albert Kocourek,<sup>12</sup> Professor K. N. Llewellyn,<sup>13</sup>

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<sup>1</sup>By the Boston Law Book Co., Boston, Massachusetts.

<sup>2</sup>Author unknown.

<sup>3</sup>Compare the views of Professor Thomas Reed Powell: "My Philosophy of Law" page 269. All further references, unless otherwise indicated will be to "My Philosophy of Law." Only page citations will be given.

<sup>4</sup>Law, Stanford University.

<sup>5</sup>Philosophy, The University of Chicago.

<sup>6</sup>Law, Northwestern University.

<sup>7</sup>Philosophy, Columbia University.

<sup>8</sup>Law, The University of Pennsylvania.

<sup>9</sup>Law, Harvard University.

<sup>10</sup>Law, Northwestern University.

<sup>11</sup>Law, Fordham University.

<sup>12</sup>Law, Northwestern University.

<sup>13</sup>Law, Columbia University.

Professor Underhill Moore,<sup>14</sup> Professor Edwin W. Patterson,<sup>15</sup> Dean Roscoe Pound,<sup>16</sup> Professor Thomas Reed Powell,<sup>17</sup> Professor Max Radin,<sup>18</sup> and Dean John H. Wigmore.<sup>19</sup> All contributing parties having been introduced by titles and full names, hereafter they will be referred to simply by their surnames.

An author by author summary of the views presented might prove advantageous. However, it is believed that an article organized around the subjects discussed by the various writers will be of greater utility. At the outset, it may be noted that there is little in the way of conflict of views. The variations between the articles principally relate to the subjects discussed.<sup>20</sup> It seems that the different "schools of jurisprudence" principally present an assortment of tools to be used in analyzing legal problems. This thought is brought out by Wigmore who points out that the disciplines of the analytical, historical and sociological schools of jurisprudence are not in conflict but are all useful in solving different types of legal problems.<sup>21</sup>

There is, of course, some antagonism. The principal conflict is between the proponents and opponents of the "realistic" school. Even there, the conflict seems to hinge largely upon what is meant by legal realism. One gets a considerably different idea of what the philosophy of the realist is from reading the views of one of them—such as Llewellyn—from that obtained by considering the views of a critic—notably Kennedy. For instance, the impression obtained from an opponent of the realistic school is that that system considers only judicial behavior as a fact to be observed, and has no place in its system of categories for rules of law as a guide to or check upon judicial action.<sup>22</sup> Llewellyn, however, recognizes the importance of

<sup>14</sup>Law, Yale University.

<sup>15</sup>Law, Columbia University.

<sup>16</sup>Law, Harvard University.

<sup>17</sup>Law, Harvard University.

<sup>18</sup>Law, The University of California.

<sup>19</sup>Law, Northwestern University.

<sup>20</sup>In the limited space available some authors have presented the fundamentals of their legal thoughts. Others have restricted their expositions to a more thorough consideration of particular fundamentals. To the former group belong Bingham, Dewey, Dickinson, Green, Kennedy, Llewellyn, Pound, Powell and Wigmore; to the latter belong Cook, Cohen, Fuller, Kocourek, Moore, Patterson, and Radin.

<sup>21</sup>Page 314. Is this not also true in connection with philosophy in general? Is the difference between the various philosophies to be found entirely in a conflict among the propositions affirmed and denied, or is it to be found, at least in part, in the different types of questions toward which interest is directed.

<sup>22</sup>See Dickinson, page 98.

rules as one of the parts of the law.<sup>23</sup> Is it not frequently true that the different views one gets as to the tenets of an institution depend upon whether they are taken from its friends or its enemies? Which gives the truer picture? Does not the dissenting opinion in a case often tell us more accurately than that of the majority what was held? It is suggested that the statement of doctrines of any school of thought should be taken from those who formulated it, but that its implications may be more clearly observed by its enemies.

Misgivings have already been indicated as to the utility of trying to formulate a philosophy of law.<sup>24</sup> The views of Fuller, Kocourek and Powell may lend color to such doubts. Fuller feels that one's philosophy can best be stated in the negative—i.e., by the enumeration of such things in the present system as he opposes. He is especially antagonistic to two present day attitudes: (1) What he calls "the literary traditions,"<sup>25</sup> by which he means the tendency of legal teaching to emphasize only such materials as have been traditionally used—e.g., cases, statutes, etc. (2) The belief that legal problems can be solved by applying the methods evolved in the natural sciences.<sup>26</sup>

Kocourek develops a profound metaphysical dialectic to a fatalistic conclusion.<sup>27</sup> We are told that the parts we play in the great drama of time were written before time began, and that not one comma can be changed. It follows that jurists delude themselves when they purport to construct legal systems. It is suggested, however, that our illusions are to us real, the inference being that, even though our activity, including the contemplation of legal problems, has been foreordained, we get as much satisfaction from the appearance of controlling it as we would if we really did have control.

Powell disclaims having a legal philosophy, and regards his thinking and writing as a search for understanding rather than an exposition of a system.<sup>28</sup> He is inclined against generalizations concerning law, believing that since many legal systems have been advocated, and since many minds work at solving the legal problems of society, it cannot be asserted that law is simply this, or simply that. In a search

<sup>23</sup>Page 183.

<sup>24</sup>See Note 3, *supra*.

<sup>25</sup>Page 113.

<sup>26</sup>Page 118.

<sup>27</sup>Page 176.

<sup>28</sup>Page 269. Powell expresses this attitude by saying that " . . . any drive behind my legal talk and writing, is merely that of the typical Vermont Yankee whose frequent expression is 'I want to know.'"

for solutions of specific problems, help may be taken wherever found; and by appropriating such of the discipline of one group as may be helpful in solving a specific problem, Powell does not regard himself as precluded from obtaining assistance elsewhere when desired. A very excellent suggestion is made regarding the helpfulness, in studying any field of law, of emphasizing the work of some specific tribunal in that field.<sup>29</sup>

Powell also de-emphasizes the matter of definition. Several of the other contributors concern themselves with the definition of law, and of the concept of law, if for no other reason than to guard against confusion. Some are apologetic and protest that they are not primarily concerned with matters of definition, but none show—so clearly as Powell—that definition is the least concern of the legal thinker. He points out that it is not important whether law be defined as including “judicial behavior” or “observed social conformity.” Whether those things are elements of law, or not, they are important things to observe.<sup>30</sup> By way of comment it may be observed that such utility as the defining of terms may have is only as a first step. Any discipline which stops with definitions is futile.

“For all a rhetorician’s rules  
Teach him but to name his tools.”<sup>31</sup>

#### WHAT IS LAW?

A difference must be recognized between an attempt to define the word “law” and the outlining of one’s understanding of the concept of law. The letter which invited participation in the symposium states that “. . . The contents will deal with views of American thinkers on the ultimate ideas of the origin, nature or ends of the law. . . .”<sup>32</sup> This invitation clearly solicited from each contributor an expression of his views as to what law is, and on such corollary questions as why it exists and how it came into existence. The most concise statement is by Radin who declares: “I propose to discuss here the science of legal values.”<sup>33</sup> The most complete outline of the types of problems comprehended by the science of law was made by Wigmore. Omitting the

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<sup>29</sup>Page 277.

<sup>30</sup>Pages 278, 279.

<sup>31</sup>Author unknown.

<sup>32</sup>Page VII.

<sup>33</sup>Page 287.

ingenious names which that thinker coined for his categories, the outline is as follows:

Law may be regarded as:

I. A thing to be ascertained:

1. The actual law at a given moment.
2. Its history.
3. Its relationship to other sciences.

II. A thing to be questioned and debated.

1. Logic may be the standard,
2. or ethics,
3. or sociology.

III. A thing to be taught.

IV. A thing to be made and enforced. This may involve an application of:

1. The judicial process, or
2. The legislative process.

The underlying question seems to be: *What is law?* Cohen, in emphasizing the principle of polarity as an element of the legal science, points out that law cannot be regarded either as identical with justice or as completely divorced therefrom.<sup>84</sup> Some of the writers have concerned themselves with explaining various concepts of "law," while others have devoted their attention to what is comprehended by the term "Philosophy of Law."

Pound conceives of the term "law" as usable in three senses:<sup>85</sup>

1. As a regime.
2. As a body of precepts.
3. As judicial and administrative processes.

Llewellyn's outline of his conception of law hinges around five points:<sup>86</sup> (1) He regards "Law as a whole" as a "going institution." (2) This institution is composed in part of rules and principles. (3) In that connection regard must be had for the ideologies of judges—a matter rarely recognized in formal opinions. (4) Also law may be regarded as practices which give significance to rules, principles and ideologies. (5) Finally, it must be considered as a body of men trained in the above.

<sup>84</sup>Page 41.

<sup>85</sup>Page 249.

<sup>86</sup>Pages 183, 184.

Green believes that, although law has many phases, three elements are involved in its composition:<sup>37</sup> (1) *Wisdom*, “. . . born of the thought and experience of the ages. ” (2) *Power*—the social power that radiates through the process of formal government. (3) *Processes* by which wisdom and power are utilized.

Are not these classifications substantially similar? Pound's conception of law as a regime, is to be compared with Llewellyn's "going institution" and Green's view of it as social power. Likewise Pound, Llewellyn and Green have the same thing in mind, whether called precepts, or rules, principles or ideologies, or the wisdom of the ages.

Pound and Green both regard the legal processes (judicial and administrative) as the third sense in which the word "law" may be used, which amounts to the same as Llewellyn's fourth and fifth points.

Bingham introduces the element of *predictability*.<sup>38</sup> "What is law," he says, "in the sense of the field of our professional study? Is it not true that in this sense, the law consists of the concrete functioning of government? The lawyer's business is to forecast as accurately as he can possible governmental actions with respect to his clients affairs. . ." Bingham is an outstanding realist, and some readers might assume that the above statement presents the view of the realistic school as to the true nature of the legal concept.<sup>39</sup> No one can deny that the ability to predict what judicial or administrative action will be is the most important aptitude that a lawyer can have. Pound<sup>40</sup> and Radin<sup>41</sup> both emphasize its importance. But how can successful predictions be made, except by references to legal precepts? Does not the threefold classification of law as a regime, as a body of precepts and as legal processes still stand?

The two philosophical contributors concerned themselves less with the concept of law than with determining the type of problems with which a philosophy of law should deal. Cohen believes that a philosophy of law is an attempt to view it as a part of a larger whole<sup>42</sup>—i.e., to determine the relationship between law and the other institutions or disciplines. In that sense, he says, no fundamental distinction separ-

<sup>37</sup>Pages 133, 134.

<sup>38</sup>Page 10.

<sup>39</sup>It is to be borne in mind that Llewellyn, whose views were summarized above, is also a realist.

<sup>40</sup>Page 249.

<sup>41</sup>Page 293.

<sup>42</sup>Page 31.

ates a philosophy of law from a science of law.<sup>43</sup> Patterson similarly understands the purpose of a philosophy of law.<sup>44</sup> He regards the important relationships of law as being three in number: "Its relation with government, with society, and with justice."<sup>45</sup>

Dewey believes that the purpose of legal philosophy is to furnish "... the ground upon which existing legal affairs, including rules of law, the work of legislation, judicial decisions, and administrative practices, can be legitimately and profitably evaluated. . . ."<sup>46</sup> Dewey predicates his views upon the assumption that there should be some kind of a standard apart from the rules of law themselves for evaluating those rules; he brings out that during some periods of history these extraneous standards have been regarded as found in the law of nature, proceeding from the will of God. I do not regard Dewey's view as requiring that a philosophy of law consist of standards of evaluating legal precepts, but as providing a discipline whereby such standards can be obtained.<sup>47</sup>

These two analyses as to the purpose of a philosophy of law amount to the same thing. The only purpose in determining the relationship of law to other fields of knowledge, is to obtain standards by which legal precepts may be evaluated. From the foregoing summary of views as to the nature of the concept of law and the purpose of law, four questions appear: (1) What is law? In answer to that it was seen that law might be regarded as (a) an institution, (b) a body of precepts and (c) the judicial process. (2) Why does law exist? (3) Where does law come from, or what is its origins? (4) What is the relationship of law to other fields of knowledge, or by what standard may its precepts be judged? The bulk of the attention of most of the contributions to the symposium relate to all or part of these four questions and the

<sup>43</sup>Page 32. Cohen eliminates a supposed distinction between science and philosophy as follows: "One of the most widespread of these misimpressions is that philosophy proceeds deductively from intuitive or *a priori* first principles, while science proceeds inductively from an examination of the facts. . . (a) No science can be entirely inductive, and (b) if philosophy were purely deductive it would, like pure mathematics, be entirely hypothetical and could not assert anything about law or indeed about any specific form of existence such as mind or nature."

<sup>44</sup>Page 231.

<sup>45</sup>*Ibid.* He classifies his own legal philosophy as pluralistic, because it is not deduced from any set of self-evident truths, and eclectic because it adopts not one system of jurisprudence, but draws from many.

<sup>46</sup>Pages 74, 75.

<sup>47</sup>For example, if it be assumed that the propriety of legal rules should be tested by applying postulates from the discipline of economics, a philosophy of law would not include the entire field of economics, but would simply direct a jurist to that field.



three answers to the first. The various views relating to them will therefore be discussed.

### *Law as an Institution*

The first answer to the question, what is law, is that it is an institution, Pound says "a regime,"<sup>48</sup> Llewellyn says "a going institution." As a "going institution" Llewellyn sees five "jobs" which the law must do:<sup>49</sup> (1) Dispose of specific "trouble cases"—wrongs and disputes: (2) Prevent future trouble by advising people as to what they can reasonably expect. (3) Allocate authority within the government. (4) Organize society as a whole so as to give it integration, direction and incentive. (5) Develop a "juristic method" for performing the foregoing duties.

### *Law as a Body of Precepts*

Much attention is given to the attitude toward law which regards it as a set of rules and principles.<sup>50</sup> Cohen makes it clear that law cannot be identified with what we actually do, but must be regarded as a set of standards whereby human and governmental conduct may be judged. Such remarks may be regarded as a repudiation of what some people believe to be the realist's conception of law. Dickinson states that life would be intolerable if governmental officials acted without reference to some body of authoritative principles.<sup>51</sup> Such principles he regards as important for two reasons: (1) They furnish a basis by which the citizens may predict what governmental action will be in a specific situation and arrange his own affairs accordingly. (2) They act as a control or check upon governmental officials, particularly courts, which prevent them from acting in an arbitrary manner. He brings out that as a restraint upon government, law is to be regarded as a form of *self restraint*.<sup>52</sup>

Pound prefers the more generic term "precepts," which he regards as including rules, principles, standards and precepts defining legal concepts.<sup>53</sup> By rules, he means precepts which attach definite legal consequences to detailed situations of fact. Rules are found particularly in

<sup>48</sup>Page 249: "I think of Law as in one sense a highly specialized form of social control in a developed politically organized society—a social control through the systematic and orderly application of the force of such a society. In this sense it is a regime—the regime which we call the legal order. "

<sup>49</sup>Page 184.

<sup>50</sup>Cohen, page 35; Dewey, page 77; Patterson, pages 232, 233.

<sup>51</sup>Pages 91, 95, 97.

<sup>52</sup>Page 100.

<sup>53</sup>Pages 256, 257.

the fields of criminal, commercial and property law. Principles, Pound regards, as "... authoritative starting points for legal reasoning. They furnish a basis for reasoning when a situation not governed by a precise rule come up..." Legal standards "... are defined measures of conduct, to be applied according to the circumstances of each case..." Such examples are given as "due care," "fair conduct of fiduciaries" and the "reasonable facilities" that public utilities are required to provide. Pound regrets that attempts are frequently made to formulate rules concerning "due process of law" which he regards as a standard. Rules, principles and standards are stated in terms of legal conceptions such as "trusts," "sales," and "negligence." The remaining type of legal precepts are such as define these conceptions.

Llewellyn believes that in addition to rules, principles, etc., notice must be made of judicial ideology—i.e., "... a body of pervasive and powerful ideals which are largely unspoken, largely implicit, and which pass almost unmentioned in the books..."<sup>54</sup> Radin's remarks on page 291 may be regarded as voicing the same idea. I like the term "inarticulate premises" to describe this matter of judicial ideology. Bingham recognizes the importance of rules and principles in law, but emphasized that they must be regarded as "... tools of thought and nothing more..."<sup>55</sup> Apropos that thought he very excellently points out the importance of the facts of each case in which a precept of law may be regarded as having been developed.<sup>56</sup> At one time, he states, emphasis was placed upon generalizations, specific cases being regarded as important only for purposes of illustration, but that "... we American realists contend... that the cases in all their concreteness of causes and effects are the very substance of the law and that the causes of judicial decisions are not always stated and often are stated inaccurately in the judicial opinions..."<sup>57</sup> It may well be remarked that not only the "realists" entertain such views. They are too sound to be appropriated by any one school of jurisprudence. Dewey expresses the same thought<sup>58</sup> when he states that "... what is called application is

<sup>54</sup>Page 184.

<sup>55</sup>Page 22.

<sup>56</sup>Page 13. On page 14 excellent advice is given concerning the teaching of law by the case system. "... At present I want to emphasize that school study of a case should center on the facts of the case as presenting a problem of government and the decision, i.e., the court's disposition of the case—as an official solution of that problem. The opinion (except when it develops expert treatise proportions) is important only for the light it may throw on the problem and the solutions—not for its generalizations as such."

<sup>57</sup>Page 13.

<sup>58</sup>Page 77.

not something that happens *after* a rule or law or statute is laid down but is a necessary part of them; such a necessary part indeed that in given cases we can judge what the law is as a matter of fact only by telling how it operates. . ."

In connection with the view that legal precepts, as restraints upon governmental activity, are a form of self restraint,<sup>59</sup> it has been well pointed out that legal norms are not commands to individuals subject to the law but to the judges who apply it.<sup>60</sup> The conduct of individuals is significant because such conduct provides the operative facts by which magistrates may determine which of numerous rules of law are applicable.<sup>61</sup> In that connection Cohen repudiates the notion that law is a restraint upon individual freedom, pointing out that privileges and freedom depend upon the existence of restraints upon those inclined to interfere with another's freedom.<sup>62</sup>

#### *Law as Judicial and Administrative Process*

The concept of law is also regarded as including the judicial and administrative process through which legal precepts are put into operation.<sup>63</sup> Little attention seems to have been given the legislative process.<sup>64</sup> Of course, the entire foregoing discussion of precepts must necessarily include those which come into existence through legislation, because statutes and doctrines are the two great types of legal precepts. However, a statute is incomplete until it has been applied by administrative or judicial officers. Thus the process by which legislation is enacted can hardly be regarded as representing a meaning of the term "law."

#### WHY DOES LAW EXIST

For what ends is law a means? That problem was presented by Green as follows:<sup>65</sup> "... It is the function of philosophy to account for what takes place; to discover the essentials of life and give them synthesis. How then, can we account for a significant place for law and lawyers in our social order?" Pound recognizes that according to Kantian epistemology the end of law cannot be ascertained, but states that

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<sup>59</sup>Dickinson's view, page 100. See positions of this article appurtenant to note 52, *supra*.

<sup>60</sup>Point was made by Bingham at page 18 and Patterson at page 233.

<sup>61</sup>See Patterson, page 233.

<sup>62</sup>Pages 37, 38.

<sup>63</sup>Bingham, page 17; Green, 133; Pound, 249.

<sup>64</sup>Wigmore mentioned the legislative process as one of his categories.

<sup>65</sup>Page 131.

it can be for practical purposes.<sup>66</sup> Powell realizes that the law has many ends, many of which are generally assigned, and that ". . . Men of many minds could chant the ritual in unison and then go forth to promote contradictory policies. . . ."<sup>67</sup> Radin states that the purpose of law is to determine when the powerful machinery of courts and police will be invoked.<sup>68</sup>

Dickinson,<sup>69</sup> Green,<sup>70</sup> Patterson,<sup>71</sup> and Pound<sup>72</sup> all start with the premise that interests and drives of various human beings are in conflict. This conflict is generally said to result from the fact of scarcity—i.e., that the total of human demand exceeds available supply. Green states that it results from the fact that the first call of life is activity, from which power is developed. It is then inferred by all that the power and friction resulting from social activity demands control. Many controls exist, two of the most common being custom and religious authority. The most important of these social controls is the power of secular or political authority which exerts its control through law.

#### WHAT ARE THE SOURCES OF LAW

The explanations given as to why law exists suggest the further questions, where does it come from or what is its source. Dickinson enumerates the three usually assigned sources of law:<sup>73</sup> (1) Custom. (2) Authority, which may supplement custom or may be in derogation of it. (3) Ideal law or the law of nature. Dickinson himself regards custom and authority as being the joint sources of law, although he believes that wholesome results have come from the attempts of jurists to determine what the law of nature is. Dewey states that the use of law of nature as a standard to judge positive law is found only in philosophies of medieval origin.<sup>74</sup> Of the sixteen contributors, only Kennedy recognized the law of nature as the true and correct source of the law which we apply in the courts, or should apply.<sup>75</sup> His view is stated as follows:

". . . Legal scholasticism is a way of life and law which

<sup>66</sup>Page 250.

<sup>67</sup>Page 271.

<sup>68</sup>Pages 304, 305.

<sup>69</sup>Pages 91, 92.

<sup>70</sup>Pages 131, 132, 133.

<sup>71</sup>Page 237.

<sup>72</sup>Pages 251, 252.

<sup>73</sup>Page 101.

<sup>74</sup>Page 73.

<sup>75</sup>Page 148.

recognizes natural law and that a Divine Being is its Author. Scholasticism strongly believes in the power of Man to reason and to judge impartially in accordance with his freedom of will. Scholasticism believes in universal truths and imperishable concepts, first principles to guide man in human action. . ."

The contributors generally recognize law as a social phenomenon with custom as its source. Patterson states that the "...relation of law to society is both causal and consequential. . ." <sup>76</sup> while Radin believes that legal doctrines are derived from a process of generalizing social patterns and applying agreed social principles.<sup>77</sup> Green recognizes that of the three elements which he regarded as composing law—i.e., wisdom, power and process—only one, process, presents problems of law distinct from life and society as a whole. He concludes that a " . . . philosophy of law must therefore be found in a philosophy of the total social organism of which law is only one phase. . ." <sup>78</sup>

Dewey demonstrates the relationship between custom and social processes by an interesting figure of each. He likens social process to a stream and custom to the banks.<sup>79</sup> The banks govern the course which the stream takes and yet, over a long period of time are themselves modified by the attrition of the running water. So, social processes are governed by custom, which is, in time, itself modified by those very processes. He regards custom as the basis of law.

Dewey believes that the purpose of a philosophy of law is to provide extrinsic standards by which the precepts of law may be judged. It was for this reason that jurists formerly searched for a "law of nature." But now that is not necessary, because custom furnishes the required standards. It is a standard which is comparatively stable, and yet is susceptible to necessary modifications from time to time.

In connection with the social origin of law, there is a point which was suggested in several of the articles, but which, it seems to me, was not sufficiently discussed. That is the fact that the customs of which law grows are not necessarily beneficent. A view of history shows that law can, and frequently has, been used as an instrument of exploitation. It is not accidental that the most fundamental type of radical is the anarchist, or that the term "ruling class" has come to be synonymous with the concept of an exploiting class. Cohen may have had this thought in mind when he stated that law has often varied " . . . accord-

<sup>76</sup>Page 235.

<sup>77</sup>Page 291.

<sup>78</sup>Pages 135, 136.

<sup>79</sup>Pages 78, 79.

ing to the will of certain powerful individuals. . . ."<sup>80</sup> Patterson comes closer to this thought when he suggests that law may be unjust or socially ill-adapted.<sup>81</sup>

Perhaps one reason the above thought has not been more strikingly presented is that the fact is not so apparent in present-day England or in the United States. It is a point, the force of which is seen from history or from a study of the present cultures of some nations less fortunate than ourselves. Our civilization is sufficiently pluralistic that it is seldom that any one group can write its will into law,<sup>82</sup> and a compromise between conflicting interests generally results.<sup>83</sup>

Pound regards as one of the important services of the law the development of a theory of interests.<sup>84</sup> By this he means that the jurist must determine which of the numerous interests seeking legal recognition can make a sufficient showing of benefits rendered to society to be entitled to such recognition. It is then necessary for law to define the extent to which such interests will be recognized, and, as thus defined and limited, to develop techniques whereby they can be secured. To the claim that it is impossible to arrive at a standard for evaluating and comparing competing interests, Pound replies that practitioners have long been availing themselves of practical standards for that very purpose, and concludes by referring to the famous dictum of William James that ". . . the worst enemies of a subject are the professors thereof."

The importance of law as a compromise between conflicting social

<sup>80</sup>Page 36. This is not exactly the same idea, because one individual may have sufficient power to formulate law and yet use his power only for humane purposes.

<sup>81</sup>Page 232.

<sup>82</sup>This point is well stated by Cohen on page 43 as follows: ". . . most human beings see the issue of economic justice from the point of view of the class in which they were born or with which they have been long associated. Thus laborers identify their interest with that of the people, the middle classes with that of the public, and the wealthier classes with that of the country. But the very existence of class conflicts belies the theory that any class is so omnipotent that the law merely registers its will. While some classes are doubtless more powerful than others, the law generally represents a compromise very much like a peace treaty. "

It may be suggested that labor is today wielding an influence over law which is out of proportion to its economic contribution to society. But it is well known that this apparently exalted influence would not be possible except for the sympathy of some members of other groups who feel that the laboring class has not been treated with entire fairness in the past.

<sup>83</sup>This aspect of the law as an element of compromise is well brought out by Patterson on page 238.

<sup>84</sup>Pages 259 to 262. By interests he means demands or desires which human beings seek to satisfy. The law does not create interests, for they would exist even if there were no law.

interests introduces another interesting subject—i.e., the importance of form and its relationship to the concept of justice. Certainly, opposing forces are not interested in justice except insofar as each may regard it as synonymous with its own interests. Each element of society desires to obtain a state of law as favorable as possible to its interests. When a compromise occurs its form is of the greatest importance. Cohen brings out the principle of polarity by which he says that we should avoid either identifying law with justice or as regarding the two as being completely divorced.<sup>85</sup> Fuller must have that same thought in mind when he states that “. . . no society will reveal a real and lasting vitality which is not founded upon institutions which, like contract, reconcile man's need for form with his need for freedom. . .”<sup>86</sup> Possibly the best statement as to the importance of form in the law is that made by Dickinson as follows:<sup>87</sup>

“Whenever a reasonably complete and coherent system of law exists, it necessarily establishes and acts through a structure of formal jural relations, such as rights, duties, liabilities, privileges, and the like, between legally recognized entities. These formal relations are as independent of the actual content of specific legal rules as the structure of a sentence is independent of the information which the sentence conveys. They constitute what may be called the grammar of law, and due study and analysis of them are essential to a correct understanding and application of legal rules. Such formal relations follow from the existence of legal rules as inevitably as grammar follows from language.”

The formulas of law often remain the same, even though their content may change.<sup>88</sup> For example, the principle that contributory negligence on the part of a plaintiff will bar recovery in an action based upon negligence, is of long standing, although our notion as to what type of conduct constitutes contributory negligence is continuously undergoing change.<sup>89</sup> Do we put “new wine in old bottles?”

<sup>85</sup>Page 41.

<sup>86</sup>Pages 124, 125.

<sup>87</sup>Page 104.

<sup>88</sup>This point is brought out both by Bingham, page 25, and Radin, 303, 304.

<sup>89</sup>So far as the form of the law is concerned, courts will not compare the negligence of the plaintiff with that of the defendant. Yet, however such technical devices as willful and wanton conduct and last clear chance may be rationalized, their real utility is to ameliorate the doctrine of contributory negligence by allowing courts to compare negligence. It is a sophistry to say, as many courts do, that willful and wanton conduct is a different type of wrong from negligence. Certainly it is nothing more than a matter of degree—negligence which strikes the court as more reprehensible than other negligence. Furthermore, it is difficult to read many per-

It is the formal features of law which most requires the existence of a legal profession. And conversely the legal profession tends to perpetuate the technical forms of the law for various reasons, the most significant of which is that thereby they perpetuate their own craft.<sup>90</sup> Several checks upon the tendency of lawyers to insist upon technicalities have grown up, the most important being the popular demand for justice.<sup>91</sup>

Several of the contributors confessed an inability to define the concept of justice. Patterson suggests that ". . . Perhaps justice is an occult or mystic something that is left over after one has tried to communicate all one's generalizations about human conduct. . . ."<sup>92</sup> The best explanation of the meaning of justice was given by Radin,<sup>93</sup> which I regard as his best contribution. He sees the popular notion of justice as a synthesis of two antagonistic popular emotional drives, a desire for equality, and a desire for a type of inequality. On the one hand it is felt that the law should apply equally to all, but at the same time, all men should be judged according to their deserts and merits. Innumerable examples come to mind. The vicious man should be punished, the lazy man ignored and the diligent rewarded. And yet, all persons must be treated according to the same standards of evaluation. The letter of the law may say that he who has committed murder must be executed, but there may be some extenuating circumstance in the case of a particular defendant so that justice will demand that a lesser penalty be measured out to him. Justice acts as a check upon formal rules, whether doctrinal or statutory in their origin, but it must be remembered that the law cannot be identified with justice.

#### BY WHAT STANDARDS SHOULD LEGAL PRECEPTS BE EVALUATED?

By regarding custom as the source of law we have also suggested answers to the question of relationship, and have considered its re-

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sonal injury cases without believing that courts, in determining whether a plaintiff was guilty of contributory negligence, consider that question in the light of the defendant's conduct. An act will be held in case A to constitute contributory negligence, case A being one in which a defendant was regarded as negligent but not badly so, whereas, in case B, in which the defendant's negligence was of a shocking nature the same conduct on the part of the plaintiff as occurred in case A will not be called contributory negligence.

<sup>90</sup>See Radin's discussion on page 296 to 299.

<sup>91</sup>Ibid. See also Patterson, page 240. Other checks upon extreme legal technicality are legislations, the popular elections of judges, and the desire of judges for popular approval.

<sup>92</sup>Page 241.

<sup>93</sup>Pages 299 to 303.



lationship to custom, to powerful interests, to justice. Dewey foresees the objection that custom is not a sufficient standard by which to evaluate law because custom itself may be bad. In answer he shows<sup>94</sup> that custom itself is changeable, and so, both custom and law are to be judged by considering their ultimate consequences. But how can law be judged by its consequences except by reference to other disciplines, sociology (used in a broad sense to include economics, political science, etc.), logic and ethics. Thus the third, fourth and fifth problems as outlined above—i.e., the sources of law, its relationship to other institutions and fields of knowledge, and the standards by which its precepts are to be judged—merge together, and it becomes important in considering a standard by which law may be judged, to consider its relationship to these other disciplines. The most fundamental of these relationships is to the social sciences. It is generally recognized that contributions in those fields should be availed of by the jurist.<sup>95</sup> Pound states that “. . . the interpretation of legal history is no longer taken to be the key to the science of law, and economics and psychology have arisen to furnish universal solvents instead. . . .”<sup>96</sup>

If law be regarded in its relationship to the social sciences, one of the most striking problems is whether modern methods of scientific inquiry are adaptable to the solution of such problems as jurists are confronted with. Fuller thinks not.<sup>97</sup> The objections usually given to the use of such methods is that techniques of investigation found to be adequate in the fact sciences are not available in the value sciences because of an inability to eliminate an emotional element.

Unlike many of the contributors Cook limited himself to one interesting point, that of demonstrating the availability of modern scientific methods in the solutions of legal problems.<sup>98</sup> This he has done very persuasively. It is generally recognized that only such issues as relate to ultimate ends depend upon emotional differences. If a fundamental purpose can be agreed upon, the problem as to what means will best serve that end is strictly a scientific one. Cook shows that there are really very few “ends” of social conduct, and that most persons agree as to them, and that what people regard as disputes as to ends really involve only difference as to means, and thus are susceptible of scientific solutions. He also points out that we do not really know the ultimate objects for which we strive until we have considered the

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<sup>94</sup>Pages 82, 83, 84.

<sup>95</sup>See Llewellyn, pages 192, 193, 1937, Pound, 252, 253, 254.

<sup>96</sup>Page 258.

<sup>97</sup>Page 118.

<sup>98</sup>Pages 51, 58 to 63.

means for carrying them out, and that therefore problems of ends and those of means are inseparable.

Moore demonstrates<sup>99</sup> the feasibility of the use of scientific methods by outlining a legal theory based substantially upon psychological processes. He analyzes a learning process based upon pain and reward, and applies such technique to human responses made to the stimulus of a published law, such as a "no parking" sign. The effectiveness of the sign was determined by observing conduct before it was put up and afterward. The results were tabulated and cast into mathematical formulas.

It is well known that the law, as a system of precepts, is not marked by complete logical symmetry. Radin points out that the lack of complete symmetry in the law is due, in part at least, to the fact that most of the acts which the law is required to judge are not performed with their legal consequences in the minds of the actors.<sup>100</sup> Cohen, however, refutes any notion that logic forms no part of our legal system.<sup>101</sup> He criticizes Holmes' famous dictum that "the life of the law has not been logic, it has been experience" by pointing out that it is a fallacy to assume that logic and experience are mutually exclusive. We know that a knowledge of fallacies is one of the best contributions made by formal logic, and thus, Cohen points out its value as a means of checking error in legal reasoning. It would also seem that aptitude in logical deduction should be necessary to decide the many little questions with which the jurist is daily confronted. Granting Dewey's thesis that the basic legal postulates are derived from custom, it does not follow that there is a specific custom upon which to base a decision in every case. Those must be solved by logical deduction from such postulates as have been accepted.

Ethics may also be regarded as useful in furnishing standards for judging legal precepts. Cohen shows that logic is primarily a check while ethics, being the science of ultimate human ends, may furnish law with its basic postulates.<sup>102</sup> In determining the relationships between law and ethics both Pound<sup>103</sup> and Radin<sup>104</sup> point out that the term ethics involves two very different concepts. On the one hand it may be regarded as presenting an ideal system of morals, inferred either

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<sup>99</sup>Pages 203 et seq.

<sup>100</sup>Pages 298, 299.

<sup>101</sup>Page 39.

<sup>102</sup>Pages 40, 41.

<sup>103</sup>Pages 258, 259.

<sup>104</sup>Page 289.

from theology or from the social sciences. This is the ethics that people talk about. On the other hand, the ethics of any particular group may be inferred from the actual conduct of its members. This view of morals may give a very different picture from the first. It follows, therefore, that when it is considered that law is used in three senses—i.e., as a regime, as a body of precepts, and as judicial processes—and ethics or morals in two, that there are six possible relationships. The discussions in the symposium, however, involved principally such principles of ethics as are accepted by any particular group, and law as a body of precepts. The other possible relationships should, however, be kept in mind.

Radin points out<sup>105</sup> that law and ethics are alike in that they both involve judgments regarding conduct. In both cases such judgments are derived from accepted social patterns of conduct. They differ in two important particulars. Legal judgments are announced by a definite body of persons, whereas those of a moral nature must be inferred from what members of a group, and particularly its *ad hoc* leaders, say and do. Also, there is the important difference as to sanctions. Only legal judgments may be enforced by the powerful processes of the law. The two are bound to be interrelated. This is well stated by Radin as follows:<sup>106</sup>

“When legal and ethical judgments differ, when what is legally permissible is morally reprehensible or what is legally wrong is morally allowed or even commanded, we may be sure that the judges—the chief makers of legal judgments—are aware of it for all their pretense at being indifferent, and any too pronounced or too long continued a divergence between ethical and legal judgments will not be tolerated.”

The most fundamental of the relations of law is to government. Patterson conceives of government as an “. . . organized group of individuals to which the bulk of the population are in a habit of obedience. . . ”<sup>107</sup> As has been seen, law furnishes the principles which underlie such governmental action as adversely affects the government's subjects, which are principles of self restraint, voluntarily assumed. Dickinson points out that there is a public law no less than a private law.<sup>108</sup> The above conception of law, as principles governing official conduct, is especially applicable to public law.

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<sup>105</sup>Pages 288, 289.

<sup>106</sup>Page 288.

<sup>107</sup>Page 235.

<sup>108</sup>Page 96.

The current controversy concerning the realistic school especially relates to the relationship between law and government. Those who do not regard themselves as members of that group accuse the realists of holding that law is simply what governmental officials do in fact. I do not so interpret the essays in this symposium written by those who are classified as realists.<sup>109</sup> My understanding of their views is that they differ from those of orthodox jurists only in degree. I do not believe that they deny that principles and precepts are an important factor in determining judicial action, and if we are to understand truly that action we must determine what principles are currently accepted by the judicial profession. They do make it clear that comprehension of principles is not the only way by which judicial action may be understood.

Many persons are concerned with law, and so, some notice must be given to those individuals who deal with it in practice. Of the numerous professions<sup>110</sup> concerned with making, interpreting and applying of law, the skilled jurist, whether he be judge, practitioner or teacher, is the most important. The necessity for specially trained practitioners is especially important when the significance of the formal side of law is considered. The necessity of a legal profession is well stated by Green as follows:<sup>111</sup>

"If such analysis and synthesis are valid, then (1) in order to understand, preserve, and utilize the accumulated wisdom and experience of the ages, (2) in order to serve society through the control of its enormous social power, and (3) in order to operate successfully the processes which have been developed for that control so as to bring them to bear upon the activities of every-day life, as well as to fashion new processes, the social organization requires a large body of highly trained citizens who are devoted to those ends. Here, it is believed, are found the functions which give adequate justification for men who profess the law."

In considering the work of the lawyer, the importance of his functions of predicting future legal actions must again be mentioned and emphasized. Radin points out that the attorney predicts the course of judicial action, but that he has a hand in shaping the very action, the course of which he must forecast.<sup>112</sup>

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<sup>109</sup>Notably Bingham and Llewellyn.

<sup>110</sup>The best list of these is made by Llewellyn, page 188.

<sup>111</sup>Page 136.

<sup>112</sup>Page 293.

Llewellyn sees a cleavage between the work of the attorney and that of the judge. The magistrate is not concerned with prediction, but with arriving at a just result.<sup>118</sup> It might seem, Llewellyn admits, that by allowing a judge to be governed by other factors than those precedents and precepts to be found in law books, however it might promote justice, would entail the vice of rendering law uncertain. He believes, however, that the existence of an established technique for arriving at a result will make the law more certain, rather than less so. In supporting that view he starts with the premise that if a particular rule is clear, wise and applicable to the case to be decided, there is no antagonism between the judge's task of reaching a just result and the practitioner's burden of forecasting what decision will be made. It is just for a court to apply such a rule, and is feasible for an attorney accurately to predict that the court will do so. Thus, by striving to keep the law ever synonymous with justice, all the uncertainties resulting from the varying personal equations of particular judges will tend to disappear and we will have a legal system which is just, stable, certain and sufficiently flexible to satisfy the changing needs of society.

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<sup>118</sup>Pages 190, 191.

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