University of Pennsylvania
Law Review
And American Law Register
FOUNDED 1852

VOLUME 82 JANUARY, 1934 No. 3

ON PHILOSOPHY IN AMERICAN LAW*

K. N. LLEWELLYN †

"The inquiry as to a theory" remarks Pareto, "runs in terms of what it did for the man who made it—and of what it did for the men who accepted it." There is rarely a lack of the theories in the world, or even in the air—or of philosophies. Nor, for that matter, when the philosophies die do the books die with them which contain them. But life-in-action a theory can gain only when it serves men's needs. Life-in-action; I am

* As Pound has pointed out, the natural law thinking in which Mansfield was at home, and which was choked out in England by Eldon's time at least, continued to flourish here. It was Morris Cohen, I think, who made me see its recrudescence in the constitutional law cases in and after the '90's. Pound gives good reason for the first phenomenon; but I have never felt satisfied with his mere listing and description of our apparently inconsistent jurisprudential trends in the latter 19th century. It is not enough to know what they were, and whence they came. We must see why men adopted them, and above all, *how* they all fitted into the single picture. Nor is this all. Philosophers' writings and law-men's doings meet rarely on the same level of discourse, and part of the game is to find where they do, where they do not, and—if you can—the *why* of either. Finally, wherever writings are contrasted with doings, there is the question of the relative rôle of the great man and his times.

I grow impatient for some one to work these matters out. It is due our students that cases with dates ranging from 1780 to 1930 should be given some chart of the sweep, on which they can be plotted. How else are the individual cases to be grasped? Indeed there are a number of finished jobs which a second year law student is entitled to have before him. Some one should make clear to him the difference in "feel" and tendency between, say the approach in most phases of property and a few phases of commercial law from that in the flexible body of commercial law at large, the difference between the latter and the mutually diverse flexibilities of Equity and of Torts; some one should set for him the "feel" of Procedure against that of Public Law. I still feel my wattles grow red as I recall the shock with which, as a dyed-in-the-wool commercial lawyer, I met property phases of mortgage law which left me gasping. "One system of precedent" we may have, but it works in forty different ways. Some day, some one will help the second year student orient himself. Nor does any one bother to present to him the difference between logic and persuasion, nor what a man facing old courts is to do with a new vocabulary; in a word, the game, in framing an argument, of diagnosing the peculiar presuppositions of the hearers. I think the second year student is entitled to feel himself aggrieved. Meanwhile, while we wait upon the treading of the Angel, there is rushing in that calls for doing. Here is a start.

† B. A., 1915, LL. B., 1918, J. D., 1920, Yale; Betts Professor of Jurisprudence, Columbia University School of Law; Commissioner of Uniform State Laws from New York; author of numerous legal treatises and articles.

less concerned here with currency-in-words. Men may scorn philosophies, as philosophers are fond of making clear, without escaping the necessity of living in terms of some one of them—or of some inconsistent hodge-podge of a dozen. Thus what is here before the telescope is the changing array not of verbalized philosophies, but of philosophies-in-action as the history of law in these United States has gone its way. What those philosophies were, what needs they served—and whose. I am not so much concerned, I repeat, with the philosophers themselves, with whom indeed my acquaintance is but scanty. I am concerned with philosophy-in-action, with implicit philosophy, with those premises, albeit inarticulate and in fact unthought, which yet make coherence out of a multiplicity of single ways of doing. Where explicit writers happen to be mentioned, it is as persons giving fortunate expression to the living currents of their time. With an exception. The two most recent lines of premise mentioned (the sociological and the realistic) are found rather in writings than in life. I view them as *products* of their time, as attempts to adjust action to felt needs, as were the others. I view them also as probable heralds of the future. But of the *ways of the law-guild at large,* as lived, they are as yet a most inadequate expression.

It will thus be clear that I am viewing not the invention, but the *choice* of a philosophy—or better, the growing into ways of doing which comport with some one philosophy and not with another. And it will be clear that I view such fitting into a philosophy as a process dependent largely on the felt needs of the persons concerned. And it need hardly be added that I view conscious choice of a philosophy as rare, and the mere growing into one as the order of the day. But I trust to make it persuasive as well that once a philosophy has been established in the habits and attitudes of any person, it has effects; *a fortiori,* if such establishment comes to prevail among a group; and again *a fortiori* as the group in question grows larger or more solid. Finally, I shall urge that the inventor of a new philosophy, or of a creative adaptation of some ancient one to current needs, may with luck affect or deflect the current of his times. There is a certain—or better, an uncertain—leeway within which the individual contributes to the shaping of society. And there is a speeding or slowing (or turning) of the march of events, according as the needed intellectual formulations are or are not invented (or rediscovered) or are well or badly, or late or early, achieved. A lone man, by his formulations, may indeed make felt a need of which no one had been conscious before.

The United States began as such with natural law the atmosphere about them. "We hold these truths to be self-evident," wrote Jefferson. And signers signed. The separation of powers, whether derived from Montesquieu or Reason, was surely written into the Document as an expres-

sion of the "essential" nature of government. The Bill of Rights, itself originally omitted because self-evident, incorporates in intent the "natural" heritage of the individual citizen.

How far this, as a philosophy, affected in that day our governmental law, is beyond my power to say. But as applied to *private law,* the rôle of the philosophy of natural law is clear. Precedents were few. Judges had neither training nor experience at their back. England was hated. Lawyers were only by accident accomplished, nor was their standing high. And yet, there were disputes. And courts. And lawyers. Meanwhile, with a rapidity no man (save one) had courage to prefigure, the country rushed westward and spawned progeny. A call for law, for changing law, for law fitted to conditions in good part theretofore unknown, was met by a lack of materials to answer the call. There was a single body of law available in English: the common law tradition. Yet that tradition (though pressed, increasingly as time went on, by advocates) was distrusted by the populace. Consider Tory-expulsion, the French Revolution, and the War of 1812. And partly the tradition was ill-adapted to our needs. If ever situation cried out for one particular philosophy, this did. Natural law! The law which urges Reason *as the law.* The judge, if his experience reaches, has but to think, to see, and to decree as seen. The English cases—merely, in tacit theory, as suggestions—proceed to suggest; and by suggesting, to relieve; and as reliefs, to become received. For one can always vary from them, when the case requires. Story and Kent, in search of variant suggestion, can range among the Continental writers. Until the growing reception of English practice as well (along with English precedents) threatens to wall in variant growth, instinct and theory of right reason continue to correct reception of the English law.

Thus up to the '50s. As the slavery controversy draws off attention, I lose the trail of growth in private law. Indeed, as I look back over my own fields of work, it is a little startling to see the incidence of the creative precedents which I happen to have met halt in the late '40s, disappear during the '50s, and set in again as the '70s approach. I speak of course from casual observation, not from careful inquiry. But, in conjunction with the towering of the slavery issue, the doubt impends whether private law, along with other lines of interest, may not have suffered stagnation as the powers of a nation were channeled toward one crucial conflict.

But whatever the doubt before the Civil War, there is none after. Grant, and the nadir of political corruption. In New York, Tweed. In the South, Reconstruction. Union Pacific Railway—why go on? The era of the business buccaneer. Natural resources. A continent to be exploited. Fortune ahead, fist in your neighbor's belly, foot in his face, immigrants, and consumers, and the earth—and law—to be exploited. In this period, as

I see it, the Business Man took hold of the ideology of America. While business began to center on industrialization, with corporate development in an ascending scale as the inevitable consequence. One thing must be remembered. "Hold of the ideology of *America,*" was what I said. "Captain of Industry", the slogan ran. *National* welfare was identified with *laissez-faire*—and with some reason. Not only were we growing, not only was—for most—the standard of living rising, but the business buccaneers (as contrasted, I suspect, with the political or the financial) were giving the country more than value received. The elder J. P. Morgan perhaps (and at times) excepted, Rockefellers, Harrimans and Hills, as doers, stood out in startling contrast to such stockjobbers as a Gould.

It is against this background that we approach the philosophy that underlay the private law between 1870 and, say, 1900. Little thereof was explicit. It was no day for too explicit philosophizing. Men's minds were on doing, which meant exploitation. Yet the trend is obvious. "Natural law" had built up, in the course of the decades, its precedents, and borrowing from England had acclimatized the precedent system in two or three of its multiform variants. And business captains needed a stable footing in the law. Stable: that means, on the one hand, reckonable. So, let us say, with reference to the law of long-term contracts or of property. Stable: that means, on the other hand, sufficiently straitjacketed in out-moded moulds not to catch up too fast with novel predatory practices. Footing to foot on, plus room to move in: these were the needs the dominant philosophy of life required. The dominant philosophy of law proceeded to supply the needs, by way of case law. By way of decisions of judges, based on decisions of the judges who had gone before them. Legislation? *Buy it off!* (Or, as with the Union Pacific, buy it on.) The nadir, I believe I mentioned, of political morality inside these boundaries.

And what philosophy may hope for acceptance and utilization, in such a situation? Positivism. Let us forget "right reason"; let us forget the bastard something known as morality; let us acknowledge merely the obvious fact, in law, that law *as is,* is law. Justice may be an ideal; in actuality it is an accident. A legal system exists to preserve the law as is, and any other thinking is a somewhat absurd idealistic tendency, divorced from facts of life.

It had happened meanwhile (thanks to the prior reception of English practice) that this philosophy (explicit or implicit) was applied to a body of *case law.* It had happened, further, that the body of American case law itself had already been developed, with a philosophical presupposition of natural law as nurse and guide. It had happened finally (as indeed was inevitable) that particular cases ran discordant ways. Whence arose, ineluctably, the problem of dealing with discordant precedents. For precedents are positive, each one of them.

The result was a confused but (to the dominant interested parties) wholly satisfactory "resolution" of incompatible decisions. To wit: decisions which we *like* are "sound", and therefore precedent. But decisions which we do *not* like are "unsound", and therefore to be disregarded. The following of *consistent* precedents is a positivistic choice. The choice among *inconsistent* precedents (say, "on principle") was, on the other hand, an echo of the already decadent philosophy of immutable "natural law". Only in later years has it tended to become mechanized in terms of "majority view", or that of *Corpus Juris;* or been frankly based on policy.

To repeat, the system was one of precedent. Into a system of precedent the urges from historical jurisprudence fit with no shock at all to the prevailing positivism. The study of history merely "reveals" the prevailing rule, or helps the natural law to make a choice among prevailing rules which happen to conflict. Indeed the going back helps positivism mightily to divorce law from the life around us.

The urge was thus for clarity and certainty, for a firm foundation. The urge was for a *solid* something on which to build, of course, with the aforesaid exception for extensions made necessary by business needs. These extensions were provided by the selected bar. Selected? Selected by fees. Throughout the period under consideration, the best brains of the bar were in the service of the business captains, as the results attest. There was no lack of growth of corporation law. The labor injunction was invented. There was, as events proceeded, the turning of the trust to the uses which have connected the word with oil and beef. The legal structure of high financeering found willing carpenters as well as able architects.

Meantime the revolt of labor breaks into the public eye in '73, in the '80s, and again and crucially in the Pullman strike of '93. The farmers, from the resumption of specie payments in 1879, suffer the pinch, and push for "easy money". The small business man in the late '80s, and loudly in the '90s, cries out against the Trusts. Popular movements capture legislatures. No longer can all legislation be bought off. In the skilled hands of corporation counsel, the front of battle shifts. A new utility is discovered for "due process", and "equal protection of the laws". For this there were no precedents. The prevailing positivism, explicit or implicit, gave no footing. Again the approach was along the lines of natural law. *Right reason* is the guide. The indefinite void marked by the phrasing of the two amendments was filled by the judges' notions of the way things should be—filled to the entire satisfaction of those persons whose ideology and action indicated the proper way to fill it. Observe the ways of *implicit* philosophy. Natural law in the constitutional field rides hand in hand with positivism on the private side. Who cares for inconsistency? Both serve the need—the need of those persons whose need, as things were organized,

was "*the* need". Observe also how an appeal to natural law which in the first half-century was a vital source of creation could at the end become in very truth the judicial "enactment of Mr. Herbert Spencer's social statics".

At this point it is time to look into the philosophy of one individual whose phrasings have had power. As one follows the growth of Holmes' thinking from his early writings in the *American Law Review,* through *The Common Law,* into his speeches, and culminating with *The Path of the Law* in 1896, one finds increasing precision in the development of a cynical realism. It might be summed up as "Look and see precisely what is there; and reckon with that, and nothing else". Or, as my friend Patterson prefers to phrase it, the judge's attitude becomes: "You have not shown enough to make me move". Even the splendid clarity of the contracts opinions cannot hide the essential conservatism of the point of view—as applied to private underlying law. The misrepresentation cases show no desire to expand. The torts cases are choked by ancient history. Even the celebrated dissent in *Vegelahn v. Guntner* [1] rests on unwillingness to *create* a precedent, where the other judges were prepared to do so in the interest of a waning point of view. The very early essay on grain elevators is a notable exception. It is striking as one works through Holmes' writings before the appointment to the Supreme Court, to find an almost total absence of discussion on public law. I can recall only one passing reference in 1896.

Mark now how the philosophy thus developed, and without change in its form, takes on a total difference in effect as the man moves into another sphere of action. "Look and see precisely what is there"—and as applied to constitutional limitations on legislation (as distinguished from the piled up precedents of common law) the answer is only a non-existent brooding omnipresence in the skies. Or, from the other angle: "You have not shown enough to make me move"—this time, not in favor of the plaintiff, but to strike down a statute. And what had been in effect a philosophy of conservatism becomes, without internal change, the "open sesame" of liberal reform. Holmes does not take the initiative. The legislature will do that. Holmes strikes down the barriers others would *by new creation* set up before the legislature. Natural law cannot maintain its substance to a cynical eye.

We see thus exemplified the rôle of the single man in social change, and the rôle of a philosophy once accepted, in the work of the single man. As in all but exceptional instances, with a lag. It took twenty years to win the Supreme Court to Holmes' point of view, and when it had been done there came a setback. While his philosophy in private law has waited close to sixty years to find acceptance. The acclaim that greeted *The Common Law,* here and abroad, was not for the analytical insight we prize today, but for its history.

[1] 167 Mass. 92, 44 N. E. 1077 (1896).

With the turn of the century the emotional revolt of laborers, farmers, and small business men had worked its way up into the thinking of the intellectuals. How far this is a parallel phenomenon to Roosevelt's progressivism, how far it was kindled from the political sphere, I have no means of knowing. Certain it is that vital thinking of a peculiarly high order appears in the first decade of the century. Dewey, James, Bentley, Sumner, even Ross. And Veblen. And, on the legal side, Brandeis as early as the '90s, Wigmore, the path-breaking work of Pound, Hohfeld and Cook, and in 1910 and 1911 Bingham as the forerunner of realism.

On the private law side Pound's sociological jurisprudence represents in essence a revolt against case law positivism, a re-introduction of ethics into the law, and ethics with a vigorous social flavor. The critique of the law is to proceed not from inside but from outside. Once again with a hangover of natural law thinking. For to discover social values one turns to Reason in the armchair (and, with a hangover of positivism, to the cases in the books), and to such desultory experience as he may have had about the matter. Still, on the private law side, Pound, not Holmes, is the prophet of the new dispensation. On the public law side, much more Holmes than Pound.

But it will be observed that, as indicated at the outset, we have now shifted the arena of discussion. No longer are we dealing with the implicit philosophy of the law-men at large. We have begun to speak of individual writers whose work is far from mirroring the action of their legal contemporaries in the bulk. The lag in the case of Holmes has been mentioned. The lag in the case of Pound is hardly smaller. Not until Cardozo undertook the job of re-interpretation of the fundamental point of view (beginning in 1925) may one regard sociological jurisprudence as even beginning to win general acceptance among the body of the guild.

This calls for explanation. The needs of the times were there, and felt. Sociological jurisprudence ought, it would seem, to have found an early echo. I find a number of factors to which one might appeal, yet have no great confidence in any of them being operative. The "law" under discussion was the law of the schools, and the law of the schools had for some decades been divorced from life. That may have helped to pen the tempest within the legal teapot. More important is probably that impatience called for *legislative*—or administrative—change, and so focussed attention on the constitutional field. It will be found, *e. g.*, that widespread realism in public law antedates realism among private law scholars by a good two decades. But most important of all I suspect to be the fact that leaders in legal practice had fallen hopelessly behind the times. Dominated by bourgeois, business, buccaneer ideology, serving and knowing only, as specialized office counsel, the interests of the "Ins", they had no ears for

words that betokened change in an existing order. One still meets gentlemen who still voice their profound conviction that such conservative men as Holmes, or Brandeis, or Pound, are "dangerous".

Meantime, the spear-point had advanced. In the immediate post-war years a goodly body of thinkers, stimulated especially by Dewey, Boas, Watson, and Veblen, had begun to apply Holmes' way of seeing not only to the law, but to sociological jurisprudence. To make the latter *real* required more than armchair estimates. Pound and Frankfurter had indeed begun the work in the Cleveland crime survey. A similar and more sustained approach was required no less in private law. To apply the criterion of judging law by its effects called for more exact knowledge both of what law was and of what its effects might be. Indeed it called for more accurate knowledge of the conditions of society. (Here it seems to me Brandeis was in public law the major pioneer—at least in forcing facts before the court.) Hence, "Realism". The mixture of philosophic tendencies involved in that way of work is interesting. From the positivists, the realists take the insistence on concrete data, though they largely increase the scope of data to be insisted on. From Holmes (and Watson) they take a cynicism of vision, an insistence on treating words as mere tools in attempting to deal with things more tangible. From sociological jurisprudence they accept the criterion of criticism by way of social needs. From Dewey and James they take an insistence on results as the single test of validity.

As yet their views are hopelessly unorthodox. The profession at large still shows, at times, the influence of the natural law of one hundred years ago. More vitally its work is affected by the positivism that was at home in 1880. Beginnings of the influence of sociological jurisprudence can be seen in law-men's actions. The realists find as yet little echo among judges. But what makes them seem a wedge that is opening up the future behavior of the guild is that their lines of thinking are so much closer than any others to the actual behavior of the better bar, and that their judgments of policy come backed by facts.