



Notre Dame Law Review

Volume 23 | Issue 3

Article 4

3-1-1948

Natural Law and Pragmatism

Ben W. Palmer

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

 Part of the [Law Commons](#)

Recommended Citation

Ben W. Palmer, *Natural Law and Pragmatism*, 23 Notre Dame L. Rev. 313 (1948).

Available at: <http://scholarship.law.nd.edu/ndlr/vol23/iss3/4>

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

THE NATURAL LAW AND PRAGMATISM

In a psychological movie, to agitated quivering strings rising to clamorous brassy crescendo, we see through the eyes of a distraught victim of psychosis the clear facade of a Grecian temple quiver, blur, and then with almost unendurable blast of trumpets and clash of cymbals turn into Gothic cathedral, stream-lined office building, or hovel. Suddenly we see reality.

So it is that many times in the history of civilization crowds casually, inattentively passing by the temple of a great institution or thankfully sheltered within, have been unaware of subtle changes in the institution or the erosion of slow but sure-footed time. Each intent on his own busy traffic of the streets or his personal problems at the shrine of his devotion, has failed to note any of those hairline cracks in foundation or in pillar that are individually impotent but collectively disastrous. No Samson has dramatically braced himself between the pillars and in flagrant warning bellowed forth his intention of destruction. At once the building, to casual eye imperishable, collapses into ruin. Or, more likely, as in psychotic dream or fevered vision, the beholder, as with eyes new-opened, suddenly realizes that this which he had supposed to be a temple for the unified worship of a single god had gradually become, years ago, an arena of bloody conflict.

This, of course, is but another way of referring to the familiar time lag in social institutions and ideological structures. More specifically it refers to those subtle, generally unperceived-at-the-time changes in individual thought and emotion which collectively and in retrospect visibly result in a revolutionary change in the dominant philosophy of a people or an age. It is renaissance, reformation, or enlightenment in which the leading actors play their parts more or less consciously, perhaps with some dim adumbration of the

end result. But for the supernumerary and acted-upon masses there is no pace perceived.

Ours is the task with humility but with courage, by the grace of God to help give the people the vision without which they perish. That vision must begin with a clear-eyed appraisal and a close scrutiny of the present house of the law. We must test its foundations and scan its supporting pillars. And we must consider the effect of its environment upon the stability of the structure and upon the people seeking shelter within its walls. We must consider the law in its relations to all the thought and feeling of the time.

For isolationism in thought is, of course, impossible. And whether the law be product of reason or emotion or of both in infinitely varying proportions, the pretensions of Austinian jurisprudence to be self-sufficient could not stand in the face of the development of the social sciences in the last one hundred years. And so we go back a century.

Absolute truth existing and approachable by human reason, if not always unerringly attainable, natural law as the measure of positive law, unalienable rights; these represented the philosophic teaching of American universities and colleges until well into the nineteenth century. These were the convictions of the Founding Fathers. So it was that Hamilton, with the perennial exuberant confidence of youth, wrote that "the sacred rights of mankind . . . written in the whole volume of human nature by the hand of Divinity itself . . . can never be erased or obscured by mortal power." But let us trace the obscurement if not the erasure.

Let us turn to the second administration of Andrew Jackson, the embodiment of the American frontier and see whether a change had not become apparent. For in 1835 de Tocqueville opened the second part of his *Democracy in America* with the words: "I think that in no country in the civilized world is less attention paid to philosophy than in the United States. The Americans have no philosophical school

of their own, and they care but little for all the schools into which Europe is divided, the very names of which are scarcely known to them."

Perhaps we may go beyond de Tocqueville's 1835 and take 1859 as the year of beginning. For that year saw the publication of Darwin's *Origin of Species* and saw but did not perceive the birth in far-away Vermont of John Dewey. Of Darwin we shall speak later. Of Dewey today we find such statements as these: "Dewey is the spokesman of our age." (James Harvey Robinson) "He is the most influential thinker of the past two or three generations." (Sidney Ratner) "He is the most profound and understanding thinker on education that the world has yet known." (Ernest C. Moore) "In the profoundest sense Dewey is the philosopher of America." (Herbert W. Schneider) "John Dewey is the dominant figure in American philosophy today. A host of disciples look upon him as the great intellectual liberator of our times. . . . It is largely as a result of his analysis that the greater part of traditional philosophy is finally revealed as an elaborate art of self-deception—a quest for an illusory goal."

And finally, to make an end of it, we quote Sidney Hook who begins his book in honor of Dewey: "The philosophy of John Dewey represents a distinctive contribution to the thought of the modern age. He has carried to completion a movement of ideas which marks the final break with the ancient and medieval outlook upon the world. In his doctrine the experimental temper comes to self-consciousness. A new way of life is proposed to realize the promise of our vast material culture. Organized intelligence is to take the place of myth and dogma in improving the common lot and enriching individual experience."

But before we consider the sweep of Dewey's influence and that of pragmatism let us recall the familiar story of the origin and chief points of development of that school of

thought. Then we shall attempt to sketch the reasons for its wide reception and profound influence.

The particular philosophy, taught or dominant in school or college among any people at any time, is of course of primary importance. And even the thought of a contemporaneously unknown or long-forgotten scholar, if seminally potent can be overlooked or ignored only at peril to the common good. For it may germinate and capture the minds of dominant philosophers in the schools. From thence it may sally forth in the hands of philosophers amateur and professional, enthusiastic popularizers and preachers, ecclesiastical and lay, to become the dominant philosophy of a dominant democratic majority in a vast continental democracy of 140,000,000 souls dominating or semi-dominating the modern world.

In 1878 Charles S. Peirce published in *Popular Science Monthly* his then generally unnoticed but now famous article entitled *How to Make Our Ideas Clear*. As a laboratory scientist his purpose was—to use his words—to apply “the fruitful methods of science” to “the barren field of metaphysics.” The a priori method for fixing belief makes a thing true when it is agreeable to reason. But this sort of truth, said Peirce, varies between persons. For what is agreeable to reason is more or less a matter of taste. Parenthetically we may note here what we shall later have occasion to suggest, namely the pragmatist distrust of metaphysics and its generally anti-intellectualist or anti-rational spirit. The method of science, said Peirce, avoids the variances of individual opinion. The heart of his doctrine is in these words: “The action of thought is excited by the irritation of a doubt and ceases when belief is attained; so that the production of belief is the sole function of thought. . . . To develop a meaning we have simply to determine what habit it produces. . . . We come down to what is tangible and practical as the root of every distinction of thought . . . and there is no distinction

so fine as to consist of anything but a possible difference in practice.”

Peirce's doctrine slumbered for twenty years. And then in 1898 came forth its great apostle and champion William James. It was he, of course, who was to elaborate the doctrine into a full-blown theory of truth and give it wide currency by an emotional drive and an ingratiatingly popular style. The drive and style were suggestive of the manner in which Justice Holmes was to win converts to the same cause in the field of law. In 1904 in the first volume of the *Journal of Philosophy, Psychology and Scientific Methods* James said: "Suppose that there are two different philosophical definitions, or propositions, or maxims, or what not, which seem to contradict each other and about which men dispute. If, by assuming the truth of the one, you can foresee no practical consequence to anybody, at any time or place, which is different from what you would foresee if you assumed the truth of the other, why then the difference between the two propositions is no real difference—it is only a specious and verbal difference, unworthy of future contention. . . . There can be no difference which does not *make* a difference—no difference in the abstract truth which does not express itself in a difference of concrete fact, and of conduct consequent upon that fact, imposed upon somebody, somehow, somewhere, and somewhen.”

In 1907 in his Lowell lectures, referring approvingly to Dewey and to Schiller, James used the now familiar words: that truth “means nothing but this, that ideas (which themselves are but parts of our experience) become true just insofar as they help us to get into satisfactory relation with other parts of our experience. . . . Any idea upon which we can ride, so to speak; any idea that will carry us prosperously from one part of our experience to another part, linking things satisfactorily, working securely, simplifying, saving labor, is true for just so much, true insofar forth, true *instru-*

mentally. This is the 'instrumental' view of truth . . . the view that truth in our ideas means their power to 'work' . . . True ideas are those that we can assimilate, validate, corroborate, and verify. False ideas are those that we can not . . . This function of agreeable leading is what we mean by an idea's verification. You can say of (a truth) either that 'it is useful because it is true', or that 'it is true because it is useful'. Both these phrases mean exactly the same thing, namely that here is an idea that gets fulfilled and can be verified. True is the name for whatever starts the verification process, useful is the name for its completed function in experience. . . . The true, to put it very briefly, is only the expedient in the way of our thinking, just as 'the right' is only the expedient in the way of our behaving. Expedient in almost any fashion; and expedient in the long run and on the whole of course."

John Dewey was the great expositor of pragmatism in America. His writings and those of others of the school are so voluminous, sometimes contradictory and ambiguous, and there are so many brands of pragmatism that it is impossible here to do more than state briefly and without qualification its main characteristics.

There is no absolute truth, no necessary truth. Truth is not transcendent or eternal but only hypothetical and ambulatory. "There is no general truth except postulated truth resulting from some motivated determination of the will." More accurately speaking, there is no truth but only successive truths, accepted tentatively and provisionally if they give promise of workability at a given time, for a given purpose and in a given environment. They are true so long as they work and no longer. They are constantly put to the test of experience and discarded as false as soon as they cease to work, that is to give satisfaction. Furthermore all truths are empirical; they are made by men and they are products of the will. As James said: "The willing department of our

nature . . . dominates both the conceiving department and the feeling department." Truths are instruments used by men to adapt themselves to their environment and to change their environment. And so too logic is identified with functional psychology. Thought is valid if it serves the needs of the organism, satisfactorily controls conduct. It is mere illusion or verbiage to say that thought apart from function may possess intrinsic or formal validity. Formal logic is a farce.

The effect of willing on knowing, the subjectivism involved in "satisfactoriness" as the test of truth, the use of logic as a flexible tool for the achievement of purpose, the succession of variable hypothetical truths, were allied to a general contempt for metaphysics, a distrust of principles in favor of concrete facts, and a marked anti-intellectualism—distrust of reason.

One of the purposes of James in proposing pragmatism was to clear the decks of metaphysical problems and though Dewey in recent years may have shown some turn towards metaphysics, he has often expressed his scorn for "general answers supposed to have a universal meaning" such as "dissertations on the Family and dissertations on the sacredness of individual personality." These, he says, "do not assist inquiry. They close it." So, pragmatists in general have ignored or scorned metaphysics. It is true that we must be on guard against being content with unscrutinized abstractions as giving finality of truth or knowledge. But we cannot overlook the fact that for pragmatists generally the phrases "sterile metaphysics", "barren abstractions", "empty verbalisms" and "pernicious abstractions" have become clichés. These are catchwords for them, as R. L. S. would say, to "rap out upon you like an oath and by way of argument." They are to knock you down with a single blow if you are so "naive"—to use their favorite word—as to refer to a generalization or principle. For them these are too often

irrelevancies or rationalizations unworthy of the intellectually sophisticated adult.

James inveighed against what he called "perverse abstraction-worship", that absolutism which he said had a certain "sweep and dash about it", but was "remote and vacuous", possessed of "that unreality in all rationalistic systems by which your serious believer in facts is apt to be repelled." "The world to which your philosophy professor introduces you," he said, "is simple, clean, and noble. . . . Its architecture is classic. Principles of reason trace its outlines, logical necessities cement its parts. . . . In point of fact it is far less an account of this actual world than a clear addition built upon it, a classic sanctuary in which the rationalist fancy may take refuge from the intolerably confused and gothic character which mere facts present. It is no explanation of our concrete universe, it is another thing altogether, a substitute for it, a remedy, a way of escape." So typically pragmatic is the Holmesian phrase of Walton Hamilton: "To my untutored mind philosophy is an omnipresence dwelling with the absolute in the upper stratosphere, eternally occupied with frigid certainty."

Here are further familiar words of James: "A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power. . . . It means the open air and possibilities of nature, as against dogma, artificiality and pretense of finality in truth. . . . It agrees with nominalism for instance in always appealing to particulars; with utilitarianism in emphasizing practical results; with positivism in its disdain for verbal solutions, useless questions and metaphysical abstractions."

As Peirce said that what is agreeable to reason is more or less a matter of taste, so James, approaching his famous classification of men into the tender minded and the tough, said that the philosopher's "temperament really gives him a stronger bias than any of his more strictly objective premises. It loads the evidence for him one way or the other, making for a more sentimental or a more hard-hearted view of the universe, just as this fact or that principle would." In words echoed by Holmes and the legal realists he concludes "the potentist of all our premises is never mentioned." And elsewhere he declared that the history of philosophy largely bears out the saying of an eighteenth century philosopher that reason was given to men chiefly "to enable them to find reasons for what they want to think and do." On this premise Dewey goes on to refer to "that dishonesty, that insincerity characteristic of philosophic discussion." Salutary as warnings may be against concealed prejudice, unconscious bias, emotions or subconscious forces deflecting the needle of truth from its objective goal, surely here is pragmatist attack on reason, distrust of intellectual processes, skepticism of arriving at truth. And it reminds one of the old phrase of Cardinal Newman's about poisoning the wells of controversy.

Difficult as it is to classify the philosophy of a people, hazardous the generalization, one need not be an idolater of Dewey to say that pragmatism during the last half century has come to represent or express dominant American thought. If we may say with de Tocqueville that Americans have no philosophical school of their own we may also agree with him that "it is easy to perceive that almost all the inhabitants of the United States conduct their understanding in the same manner, and govern it by the same rules; that is to say, without ever having taken the trouble to define the rules, they have a philosophical method common to the whole people." Certainly a common method governs economic and political life, literature, the arts and sciences and secular education in

America today. Whether as method, point of view, theory of truth or reality, pragmatism is everywhere. The causes for its ready and wide acceptance are not far to seek. For it was advanced at an opportune time in a favoring environment. Its seeds fell on a congenial soil well plowed and fertilized for their reception.

Reformation, Enlightenment, Cartesianism, positivism, capitalism, the type of European so-called liberalism condemned in the *Syllabus of Errors*, the secularization of modern life and the dominance of the bourgeois mind with its materialism; all these were background and setting for Darwin's evolutionary hypothesis with its revolutionary ramifications in every field of thought and for the dramatic triumphs of the physical sciences during the last one hundred years.

Evolutionary theories, widely popularized, shook the faith of many in revealed truth who had accepted the book of Genesis as a scientific textbook and therefore inclined or led them to skepticism of all absolute truth. Studies of the evolution of ideas and of changes in concepts of truth led to the belief that all truth is transitory. Later the laws of nature were regarded as themselves the product of evolution and hence limited rather than absolute. Thought and therefore truth were regarded as instrumental to adaptation of the organism to its environment and product of the will as weapons in the struggle for existence. Philosophy was not a purely objective intellectual product; it was the product of changing folkways and the thinker's changing environment. So for Savigny legal principles lacked temporal stability; they changed to give expression to the changing life of the people and the silent pressure of their desires. Institutions evolved; truth evolved. That which was true yesterday might not be true tomorrow. And through it all was a growing distrust of man's reason because of his supposed kinship to the ape. And allied to this was the cult of progress.

The cult of progress appealed to the optimism and the self-confidence of Americans and to those who sought escape from a rigid fatalistic determinism that was purely materialistic. These found in evolution, especially interpreted by John Fiske as leading from the animal to the spiritual, as Henry Adams said, "a safe, conservative, practical, thoroughly common-law deity." And the struggle for existence was admirably adapted to the individualistic laissez-faire capitalism of the last half of the nineteenth century.

But the great idol of the age was modern, predominantly materialistic science. Its achievements penetrated every nook and cranny of every man's life, bringing him increased comfort and convenience and release from irksome toil, astonishing him with the corruscating successive miracles of steam, electricity, the physical and chemical sciences and the visible triumphs of modern engineering skills. He was master of his environment, lord of creation. And the secret of the genie lay in scientific methods: induction, the piling of sensible fact upon fact, the test of thought by action, practice so startling that it obscured the theory upon which its success was based, the use of successive hypotheses as instruments of scientific progress. This last was a powerful factor in leading men to look upon all truth as tentative and provisional, promptly to be scrapped and replaced by a newer model the moment its practical usefulness was doubted.

Leaders of the newer social sciences looking with envious eyes at the achievements of the physical sciences and hearing the plaudits of the multitudes decided that they would go and do likewise. They concentrated on facts, distrusted theories and abstractions and the a priori; above all they determined to be rigidly objective and therefore to exclude all ethical, moral, and supernatural considerations from their studies. The quantitative approach, in later days the statistical, was favored at the expense of the qualitative. The latter was suspected as too subjective and subject unduly to

the personal bias of the investigator. It was believed that somehow understanding and wisdom would emerge if you persevered long enough in laboriously accumulating and classifying vast quantities of carefully verified facts, though classification was sometimes suspect since it might involve those despised or feared things called categories.

So let us scan the social sciences.

Colonial colleges from the founding of Harvard to the revolution were dominated by religious and ethical influences. From the revolution to the civil war courses in moral philosophy were common and required. Paley, author of the most popular text during most of that period said "Moral philosophy, morality, Ethics, Casuistry, Natural Law, mean all the same thing: namely, that science which teaches men their duty and the reasons of it." And "political philosophy is, properly speaking, a continuation of moral philosophy; or rather, indeed, a part of it."

The purpose of courses in political theory was ethical and moral philosophy included ethics, politics and economics. Burlamaqui and Vattel were the basis of lectures on the law of nature and of nations. Just before the civil war Francis Lieber's works appeared, the first American treatises on political science. His object was to show how principles of ethics are applied to politics. By 1865, however, old-time texts in moral philosophy had been generally discarded. The newer texts struck an ethical note but it was rather from the standpoint of the individual. One writer indicated a new trend as early as 1841 when he wrote: "Questions as to the best organization and the best form of society . . . are not so much questions of duty as of art. They are the object of the two sciences of politics and political economy, which are quite distinct from ethics." Between 1865 and 1900 political science emerged as a separate discipline. The beginning of the "secular upheaval" may be assigned to 1869 when Charles W. Eliot became president of Harvard. In the lat-

ter half of the century moral philosophy became individual ethics. During that period interest in politics shifted from courses in moral philosophy and from classical courses which had not yet become narrowly linguistic to history, particularly courses in constitutional history. By the late eighties, however, interest in that subject had definitely failed. The shift was now to political, economic and social history. Men were beginning to concentrate on descriptive studies of practical politics, elections, political corruption, administration, and local government, and this was being carried on in separate departments of political science. By the beginning of the century courses in political science were being given to large numbers of college and university students because of increased enrollment and because the subject had been opened to the students down to the freshman year. There was little interest at this time in political theory; courses concentrated on "actual government". As in other social sciences aping the physical sciences the method of approach was empirical, secular, descriptive, analytical; ethics and philosophy were avoided as presumably subjective and "unscientific."

So in 1927 we find a leading political scientist insisting that "it is no more the function of the political scientist to evaluate the good or bad consequences of particular techniques than it is the function of the chemist, qua chemist, to pass ethical judgments upon the use which other men make of chemical knowledge and skill." And in the same year the president of the American Political Science Association in his presidential address said: "Political science, to become a science, should first of all obtain a divorce from the philosophers, the lawyers and the psychologists with whom it has long been in the status of a polygamous companionate marriage to the detriment of its own quest for truth. . . . Our immediate goal, therefore, should be to release political science from the old metaphysical and juristic concepts upon which

it has traditionally been based. . . . It is to the natural sciences that we may most profitably turn, in this hour of transition, for suggestions as to our postulates and methods. Political science should borrow by analogy from the new physics a determination to get rid of intellectual insincerities concerning the nature of sovereignty, the general will, natural rights, and the freedom of the individual, the consent of the governed, majority rule, home rule, the rule of public opinion, state rights, laissez faire, checks and balances, the equality of men and nations, and a government of laws not men."

And today, though not without some challenge, we find such statements as these by leading political scientists: "It is not the function of the scientist to judge between 'good' and 'evil' in his research operations. It is not up to him to say that political corruption is either good or bad." And "It is certainly not appropriate in the class-room, particularly at the college level, to discuss political ideologies in terms of 'better or worse' ". In political science as in other social sciences there are many relativists who contend that there is no scientific method of determining the superiority of one end over another. As Arnold Brecht has put it: "There is according to relativism no scientific method by which to state, in non-relative terms, whether man has a specific dignity that ought always to be respected . . . whether there is a greater value in peace or in war, in charity or selfishness, in the liberation of slaves or the enslavement of the free, in the goals of democracy or fascism. Most relativists have insisted that value judgments are statements not of what is but what ought to be, and that it is not possible logically to derive a statement of what ought to be from a statement of what is. Some have gone so far as to say that sentences dealing with what ought to be are no statements at all, but merely express emotional preferences, sentiments regarding one's own behavior, or the like."

The shift from ethical or moral emphasis to positivistic description and the development of political science as a separate discipline was paralleled in the field of economics. It too was originally a part of moral philosophy, but by 1825 many colleges were giving courses in "political economy". Towards the end of the century less and less attention was paid to problems of government and much more to problems of private business and later departments of economics were developing into Schools of Business Administration. Though a relation was recognized between economics and political science, psychology and history, there was little to philosophy and none to ethics. For thought was concentrated on the standardized, mythical economic man whose sole motivation was the pursuit of profit in complete isolation from obligation to others or to society at large and without regard to conscience or moral principle. And so far as national economy was concerned the sole problem was how to strengthen the state for its own selfish purposes of imperialism or of power. For the economist like the "scientific" political scientist placed no limits of morality or of natural or higher law upon the sovereign state. And the teacher of economics like the political scientist used the descriptive method; he excluded any standard but profit or material prosperity; effected by the evolutionary hypothesis and by changes in institutions and in economic practices revealed by the historian he often doubted the existence of any economic laws that were more than tentative assertions of the probable. As Harold G. Moulton of the Brookings Institute puts it: "A phrase—the relativity of economic thought—has been developed to indicate the necessity of an evolutionary body of economic thought paralleling evolutionary changes in the economic system."

Evolutionary theory, particularly the struggle for existence, dominated the thought of teachers of economics generally in the United States during the exploitive period of

business expansion that followed the civil war. It was especially congenial to the individualistic entrepreneur. John D. Rockefeller in a Sunday-school address said: "The growth of a large business is merely the survival of the fittest. . . . The American Beauty rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working out of a law of nature and a law of God." Rockefeller was merely expressing a generally-held opinion widely popularized through the immense sales of Herbert Spencer's books which reached their greatest influence about the early eighties. William Graham Sumner with a "wider following than any other teacher in Yale's history," provided his age with a "synthesis of the protestant ethic," of success as the reward of virtue, the laissez-faire doctrines of classical economics, and a combination of Ricardian principles of inevitability with evolutionary scientific determinism. Rights, according to Sumner were simply evolving folkways, not representative of absolute antecedent principles but merely currently adopted rules of the competitive game.

The close relation between Darwinism and pragmatism was paralleled among economists. It was one of their leaders, Thomas Nixon Carver, who preached the doctrine, in a book *The Religion Worth Having*, that "the naturally selected are the chosen of God," and that the best religion is that which "acts most powerfully as a spur to energy and directs that energy most productively."

It was not strange that sociology, deriving its name and the inspiration for its separate discipline from the founder of positivism should, under Spencer's leadership, consider society in evolutionary biological terms. If the life of society, progress upward and onward, did not depend upon the ruthless struggle of individuals subject only to the jungle law of nature red in tooth and claw, it was the struggle of groups:

biological, round-headed, long-headed, supposedly racial. And later, sociology like all the social sciences was profoundly influenced by the development of modern psychology, particularly crowd psychology. But before we come to that let us briefly consider history and anthropology.

In 1834 the first volume of German-trained George Bancroft's *History of the United States* with its prefatory emphasis upon indefatigable research, reliance upon primary sources alone, skeptical insistence upon authenticity, foreshadowed the era of later nineteenth century American history. In that period, under the influence of German scholarship and imported seminar methods, the panoramic literary histories of Prescott, Motley and Parkman were replaced by a constantly increasing flood of highly specialized, monographic studies where generalizations were scrupulously avoided in preference for detailed specific facts. Anything savoring of a philosophy of history was anathema, and in the interest of objective scientific truth thought and expression were carefully immunized against any contamination by ethical or moral judgments. There were no such things as laws of history, synthesis was rare and even the emotional appeal of a literary style was viewed with suspicion as indicating subjectivity or bias. Aridity proved validity. Cultural histories stressed the constant change in institutions and in concepts. Economic determinism reenforced by the spread of Marxism emphasized the non-rational, self-interest class struggle aspects of the human story. It is not without significance, as Eliot has pointed out, that Beard in his *Economic Interpretation of the Constitution of the United States* quoted Pascal: "The will, the imagination, the disorders of the body, the thousand concealed infirmities of the intelligence conspire to reduce our discovery of justice and truth to a process of haphazard in which we more often miss than hit the mark." So Bryce wrote: "As regards large parts of every public that may be said which the old statesman

said to his son in Disraeli's *Contarini Fleming*, 'Few ideas are correct ones, and what are correct no one can ascertain'."

As to anthropology, the study of man as a social being was inevitably revolutionized by the evolutionary hypothesis. The theory that man evolved from the anthropoid ape emphasized his kinship with the animal world from which he had been separated ever since the days of Aristotle as a uniquely rational being. It gave great impetus to the study of animals in both their individual and associated activities: how insects, birds, and mammals build shelters, store food; ants cultivate fungi; apes use sticks and stones as tools; division of labor, property rights asserted by individuals and by animal societies; mutual aid as a factor in evolution; primitive cultures; changes in environment as changing customs and beliefs; ethical systems and religions as products of their age and as developments of primitive myths, superstitions and customs, tribal rituals, fetishes, tabus, animism. Here were flux, interminable change, absence of eternal verities and enduring standards, individual animal instincts and desires and the will of the tribe institutionalized and rationalized. But with the mask snatched off by the "scientific" anthropologist man individually and collectively was inescapably neanderthal or piltdown, indeed brother to the ox.

We cannot linger on psychology which became increasingly biological, experimental, materialistic, functional, non-philosophical, behavioristic, Freudian, anti-intellectualist. Just as Darwinism lent itself admirably to facile picturesque popularization, so the new psychology was widely publicised to the masses who soon glibly attributed the conduct of man whether prize-fighter or supreme court justice, not to principles or reason, but to external stimuli, visceral reactions, complexes, suppressed desires, long-forgotten infantile frustrations. Social psychology, although coming into recognition as a distinct social science in the last decade of the nineteenth century had its roots as far back as Protagoras with

his insistence upon public opinion rather than natural law as determining what men consider right. Bagehot's *Physics and Politics* anticipated Tarde, Le Bon and at the turn of the century, E. A. Ross. More and more individual thought was regarded as the product of stimuli arising from social or collective situations; from the pressure of mob emotion, of changing and irrational mass opinions. Graham Wallas's *Human Nature in Politics*, published in 1908 had wide influence with his warning: "Away with the intellectualist fallacy; politics is only in a slight degree the product of conscious reason; it is largely a matter of subconscious processes of habit and instinct, suggestion and imitation. . . . Man, like other animals, lives in an unending stream of sense impressions."

James Harvey Robinson's *The Mind in the Making* appeared in 1921 and had a wide popular appeal. Who can calculate the effects of such statements as these made with all the eclat of modern scientific truth: "Our convictions on important matters are not the result of knowledge or of critical thought. . . . They are whisperings of 'the voice of the herd' . . . No . . . mind, exempt from bodily processes, animal impulses, savage traditions, infantile impressions, conventional reactions, and traditional knowledge ever existed. . . . The progress of mankind in the scientific knowledge and regulation of human affairs has remained almost stationary for over two thousand years. . . . And how, indeed, as descendants of an extinct race of primates, with a mind still in the early stages of accumulation, should we be in the way of reaching ultimate truth at any point? . . . I am inclined to rate metaphysics, like smoking, as a highly gratifying indulgence to those who like it, and, as indulgences go, relatively innocent . . . Plato ascribed the highest form of existence to ideals and abstractions. This was a new and sophisticated republication of savage animism The modern 'principle' is too often only a new form of the ancient taboo. . . . The

reliance on authority is a fundamental primitive trait. . . . We are . . . still animals with not only an animal body, but an animal mind. The sharp distinction between the mind and the body is . . . a very ancient and spontaneous uncritical savage prepossession. . . . Language is not primarily a vehicle of ideas and information, but an emotional outlet, corresponding to various cooings, growlings, snarls, crowings, and brayings."

But perhaps the greatest breach in the wall of human faith in reason was made by the widespread promulgation by Robinson and others of the doctrine of rationalization, derived according to Dewey from the abnormal psychology of the insane. Here as in other instances a valid caution was carried to exaggeration inconsistent with truth. Said Robinson: "Most of our so-called reasoning consists in finding arguments for going on believing as we already do The 'real' reasons for our beliefs are concealed from ourselves as well as from others. . . . We unconsciously absorb them from our environment. . . . Our 'good' reasons are at bottom the result of personal preference or prejudice. Rationalizing is the self-exculpation which occurs when we feel ourselves or our group accused of misapprehension or error. And now the astonishing and perturbing suspicion emerges that perhaps almost all that has passed for social science, political economy, politics and ethics in the past may be brushed aside by future generations as mainly rationalizing. John Dewey has already reached this conclusion as to philosophy. So the social sciences have continued even to our own day to be rationalizations of uncritically accepted beliefs and customs." Falling in the backwash of cynicism that followed World War I, contributing to and coinciding with a wave of debunking biographies and an era of critical realism, often utter and gutter, in literature and the arts and on the stage, a revolt against standards and a reversion to the unintelligible, animalistic yawp of the primitive and the jungle; this too furthered the attack on reason.

The philosophy of the schools was also influenced by modern psychology, anthropology, history, particularly cultural history, comparative political science and comparative ethics. Without depreciating the hard thinking and sincerity of teachers of secular philosophy in general, I content myself with adopting the phrase that philosophy courses are often a species of kaleidoscopic entertainment leading only to confusion. Indeed in one great American university the announced purpose of a textbook in modern philosophy was to leave the reader or student in a state of profound confusion. As Father G. Stuart Hogan has said: "In modern secular education, philosophy, if taught at all, assumes the form of an exposition or history of the various systems of philosophic thought, ancient and modern, rather than a scientific attempt to determine philosophic truth, or to establish a true philosophic-religious system of thought. In most of our secular institutions of higher learning philosophy has become a rather unimportant elective subject. To many college graduates, or even college professors . . . at most . . . it is a study of man's opinions and conflicting views (most of which are not worth the paper they are written on.)"

Turning from philosophy to legal education we find that down to the end of the civil war courses in departments or schools of law generally had the Blackstonian ideal of educating the gentleman rather than giving specifically vocational training for the lawyer. But with the increasing flood of judicial decisions there was a shift from lectures on the law of nature and of nations and philosophically jurisprudential subjects to technical analytical studies of specifically American law. Ideas of specialization, of concentrating on facts with scientific objectivity as in the social sciences to the avoidance of the philosophical and the ethical came to dominate legal education in America. The great turning point was, of course, the institution of the case system by Langdell at Harvard in 1870. It was based on the assumption that

the law could be taught inductively. For a long period in American law schools it was used without any reference to philosophy, administered to students often without philosophical training or education in general ideas, dominated by the conceptions of a mechanistic Austinian jurisprudence according to which positive law was a self-sufficient science having no relation to the social sciences, utterly divorced from ethics and from natural law. The problem for many years was merely to find out what the law was; sole concern was with the "is," none, at least systematically, with the "ought". The curriculum and spirit of legal education were intensely practical; teacher and student concentrated, as James would say, on the "cash value" of ideas, not on theories or abstractions. Courses of no immediate use to the private practitioner such as legal history, comparative law, Roman or civil law and legal philosophy generally disappeared, or here and there anemically survived as electives—relegated to the cellar or the closet along with legal ethics. And that subject generally consisted merely of a hasty deferential bow to Sharswood or bar association canons of ethics that were courtesies of the trade rather than principles with any solid philosophical or reasoned ethical basis.

Thus the whole sweep of thought in political science, economics, sociology, anthropology, history, psychology, philosophy, and in legal education during the last one hundred years was in the direction of relativism, positivism, empiricism, concentration on concrete measurable facts and the analysis of narrowly circumscribed situations by specialists using their own highly specialized techniques. The emphasis was on change rather than stability, on the temporal and immediate rather than the eternal, on the natural to the exclusion of the supernatural. There was distrust of synthesis and of metaphysics, disregard of ontology, suspicion of philosophy.

To the relativity of the social sciences was added a confusion resulting from profound changes in the physical sciences during the latter part of the last one hundred years. These changes were particularly disturbing to those who had turned from religion to dogmatic materialistic science as their god or had hoped that an integrated philosophy would emerge from facts produced by the inductive sciences as soon as there were facts enough. It was seen that the physical sciences had their own basic assumptions, previously unchallenged. The solid matter of Newtonian physics was replaced by something wavelike. "Fixed measures, constant rules became ambiguous. Bodies could be two sizes at the same time, straight lines contemporaneously crooked." It was discovered that "the assumptions of classical physics were not universal necessities of nature, but only somewhat parochial principles of analysis suitable for handling a limited type of material." Causality was doubted. Whitehead said: "The stable foundations of physics have broken up. . . . The old foundations of scientific thought are becoming unintelligible. Time, space, matter, material, ether, function, electricity, mechanism, organism, configuration, structure, pattern, all require reinterpretation." There was reason for Dewey saying: "If reality itself be in transition . . . this doctrine originated not with the objectionable pragmatist, but with the physicist and naturalist and moral historian."

Thus it is certain that the whole climate of opinion, both educational and popular, was favorable to the seeds of pragmatism.

We recognize, of course, that the roots of pragmatism go back to the Sophists. We recognize the fact that the temper of thought in the United States was akin to that which dominated European thought during the last century and that pragmatism is not an exclusively American invention flowering only on American soil. Nevertheless pragmatism made a particularly strong appeal to the American mind. As de

Tocqueville said: "To evade the bondage of system and habit, of family-maxims, class opinions, and, in some degree, of national prejudices; to accept tradition only as a means of information, and existing facts only as a lesson to be used in doing otherwise and doing better; to seek the reason of things for one's self, and in one's self alone; to tend to results without being bound to means, and to aim at the substance through the form;—such are the principal characteristics of what I shall call the philosophical methods of the Americans."

Pragmatism was practical. So was the American. Like the frontiersman and the man of business it tended to scorn theory; there was condemnation in the word "theoretical". Both glorified action at the expense of reflection; efficiency was their god. Both emphasized short-term visible, tangible results rather than long-term eventualities, distrusted the abstract, preferred concrete and definite facts that could be weighed, measured, counted, and banked; looked to the future rather than the past. As de Tocqueville noted in his diary: "There is no country in the world where man more confidently seizes the future." Or as Bliss Perry put it: "Here in America everything was to do; we were forced to conjugate our verbs in the future tense." So too the logic of both looked to consequences rather than to premises. They were of the "restless temper" that the Frenchman also noted. "The American," he said, "has no time to tie himself to anything, he grows accustomed only to change, and ends by regarding it as the natural state of man. He feels the need of it, more, he loves it; for the instability, instead of meaning disaster to him seems to give birth only to miracles about him." Both pragmatism and the American were *ex tempore*, particularly valued the expedient, were generally inclined to regard differences of principle as merely verbal and of no great consequence unless something momentous was visibly at stake, distrustful of what they called dogma.

Both pragmatism and the American were individualistic; anti-authoritarian, proud of the right of private judgment, equalitarian in that one man's opinion was as good as another's. Both were materialistic, prided themselves on what they called their tough, hard realism but nevertheless were sentimental and often idealistic—provided that the ideals were sufficiently vague.

Rousseau and romanticism are seen in both. The ineradicable moral sentiments of man, vestigial remnants of transcendentalism, secularized protestantism and humanitarian impulses derived from the Christian ethic and impelling even those avowedly agnostic, skeptic or materialist, were capitalized and canalized into the support of secular education. By concentrating on pedagogical methods and on material equipment, on means and organization, the divisive effect of any conscious or unconscious disagreement as to the essential nature of man and the ultimate end of the educational process was avoided. As religious faith weakened and dogmatic science of the late nineteenth century was seen to be a false god, more and more earnest men and women made public education their non-sectarian, non-credal, intensely practical and tangible religion. As a leading pragmatist said, the teacher's desk became an altar. And John Dewey was the prophet of the new religion which was fused into a worship of democracy that rapidly won adherents. Ethics and truth were man-made, instruments of an anthropological humanism, expressions of the general will in which each man mystically participated. As Kallen says: "For Dewey growth is intelligence, intelligence is freedom, freedom is education, education is growth." Education plus government of a socialistic type would enable men to work together with a sense of unity and to achieve their ideals. The ideals, however, were not stated any more than the objective of the "growth" which was education. The big thing was shared experience and "this active relation between the ideal and the actual"

to which Dewey gave the name "God". God, he said, is simply "the unity of all ideal ends arousing us to desire and actions."

In 1888 Dewey had written: "Democracy and the one, the ultimate ethical ideal of humanity are to my mind synonymous. The idea of democracy, the ideas of liberty, equality, and fraternity, represent a society in which the distinction between the spiritual and the secular has ceased . . . the church and the state, the divine and the human organization of society are one." Forty-six years later he defined religious faith, not as belief in a supernatural deity nor in values transcending human life, but as "the unification of self through allegiance to inclusive ideal ends, which imagination presents to us and to which the human will responds as worthy of controlling our desires and choices." Evidently the "inclusive ideal ends" whatever they might from time to time turn out transiently to be, were to be determined or sought for in a democratic educational system whose only philosophy—if it be a philosophy—was to be pragmatism. And the pragmatism was to be democratic in a democracy in which, according to Dewey, "the governed and the governors are not two classes, but two aspects of the same fact—the fact of the possession by society of a unified and articulate will."

Here once again is the sovereign general will of Rousseau, sentimental, anti-intellectual, making its own standards to suit the desires of the transient hour, taking expediency as its guide, restrained by no objective standards or by recognition of any higher law than force and the will to power. Certainly to the pragmatist there was to be no restraint of natural law.

And here at the last I mention natural law. But I have done this purposely. For I need not point out how difficult it would be for natural law with its basis in absolutes, in reason, in eternal unchanging verities, to withstand the ero-

sion of this philosophical and cultural environment. What interest could there be in scholastic natural law, in true natural law, among a generation of materialists as Carleton Hayes called the men of 1870 to 1900, men of a sensate culture as Sorokin described those of this age, among men contemptuous of tradition whose scorn of the medieval was matched only by their ignorance of the accomplishments of the medieval mind? They were repelled also from what they thought was natural law by two brands of pseudo-natural law. First, that represented by the excessively theoretical and abstract creations of the French revolutionary mind with its succession of paper constitutions echoed by the closet-spun codes of Bentham. Second, the Spencerian identification of natural law with the brute struggle for existence and individualistic, atomistic *laissez-faire*. Indeed it was the humanitarian revulsion at abuses of the capitalistic system run riot and proletarian protest that brought into being the progressive movement of the first part of this century. Pragmatism was a powerful weapon against the status quo and it is not without significance that so many leaders of the movement were pragmatists. More and more they called upon the state for aid; for control of economic processes, often without too much thought as to the dangers of a totalitarian trend. This was the paradox of liberalism.

Liberalism in the law had certain salutary effects which no one of sense would deny any more than he would assert that all of pragmatism was evil. But the evil effects of pragmatism and its offspring legal realism were clear: the introduction of what to many was regarded as an unwise and unnecessary disregard of *stare decisi* and too wide a degree of judicial discretion, indeed the conversion of the judge too often into a legislator in constitutional cases. But most dangerous of all was the unsettling of the philosophical bases of the law. These evil effects I know you know because of the clear and trenchant criticisms of legal pragmatism by such

scholastics as Francis Lucey, S.J., John C. Ford, S.J., William H. Kenealy, S.J., R. W. Mulligan, S.J., Msgr. William Dillon, Clarence Manion, Brendan F. Brown, the late Walter B. Kennedy, and Miriam Theresa Rooney. Nor shall I here discuss the profound influence of Mr. Justice Holmes because of his skillful use of his long-occupied key position on the Supreme Court, because of his intellectual power, the prestige of his name, and the felicities of a style sufficient to deceive even the elect. So also I shall not pause here to refer to some return of philosophy to the law schools, the growing discontent with pragmatic secular education, with a science that has created a Frankenstein monster which threatens to destroy us and which gives us neither assurance, nor hope, nor wisdom. But if anything is becoming clear to this confused revolutionary generation when the foundations of civilization are shaken to the depths, it is that the law like life needs an integrating philosophy that will give some objective standards, some sure footing amidst the shifting sands of crumbling secular institutions.

You and I know that the answer lies in the further invigoration and wider acceptance of scholastic natural law; that natural law which represents the experienced reason of men of many races, tongues and cultures since far before the birth of Christ; that natural law whose achievements for fifteen centuries the Carlyles have traced, to which Coke and our revolutionary forefathers appealed, and which for the Founding Fathers was the one sure basis of constitutional liberty in America, indeed in any land at any time.

One hundred and forty million men and women, each unique and infinitely precious in the eyes of God, seek refuge in the temple of American law. They look for protection against the abuses of arbitrary power whether by individuals, ruthless minority groups, or by the clamorous majority in a vast continental democracy. If they find that the foundations of that structure have been subtly undermined

so that it no longer gives them assurance of protection; if they see with newly-opened eyes that the law administered therein is merely the embodiment of arbitrary force, of command and not of reason or enduring principles of justice, they will shatter it to bits and revert to primeval chaos or insurrection organized. And that catastrophe will occur if a pragmatic philosophy dominates the law, particularly American constitutional law. For, the basic philosophy of the Constitution gone, only an empty shell of verbiage remains. That discovered, the public opinion which supports the law, the Constitution and the courts, will turn against them for their mockery of justice and seek other gods—perhaps the gods of force.

Ben W. Palmer