Notre Dame Law Review

Volume 7 | Issue 2 Article 10

1-1-1932

Book Review

John M. Crimmins

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

 Part of the Law Commons

Recommended Citation

John M. Crimmins, *Book Review*, 7 Notre Dame L. Rev. 262 (1932).
Available at: http://scholarship.law.nd.edu/ndlr/vol7/iss2/10

This Book Review 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.

Another point was raised in this case and that pertained to the contributory negligence of the pedestrian struck by the cab. This question was left for the jury to decide and properly so, for it is a general principle that only where facts are such that all reasonable men must draw the same conclusions therefrom is the question of negligence one of law for the court. The jury decided that the pedestrian had been guilty of no contributory negligence.

Philip Konop.

BOOK REVIEW

AN INTRODUCTION TO THE SCIENCE OF LAW. By Albert Kocourek. Boston: Little Brown and Company. 1930.

A book review is an extremely personal affair. It is merely the reaction of one person to a particular book and through his book to a particular author. It cannot be accepted as an objective criterion either for the intrinsic worth of the book or for the real ability of the author. It is tempered both by the reviewer's ability and by his prejudices. Therefore, it must be taken for authority only in as much as the reader places faith in the ability and the learning of the reviewer, or agrees with his reasoning in the arguments he presents. I wish that the reader would keep these facts in mind as he reads the following opinion of this book.

The title of the book explains the purpose for which it was written, that is, to introduce the science of the law. That purpose if further explained in the author's preface, where he says (page v.): "The object of this book is to provide a survey of the scope of law and of some of its ideas, methods, and problems. It is the author's hope that it may be found useful to the law student for a perspective of the domain of legal science and also to the student who is not interested in the practical details of the law, but yet who wishes to acquaint himself with an outline of its subject matter and some of its leading working ideas."

It may seem that I am placing an undue stress upon the purpose of the author. But I wanted the double confirmation. When I read the book I thought that it was merely a misnomer, because it really is not an introduction at all. But when I read the preface I knew it was a failure, because it really does not introduce the law. Far from being an introduction to the law, the book presupposes an intensive training in all of its branches and a general education attained by very few students. To properly read it the reader must have the history, the principles, the maxims, and the divisions of the law at his fingers' tips, and be well versed in philosophy, science, and not a few of the languages. Above all it presupposes a comprehension of and an ability to read the most involved and the most intricate style that I have ever encountered between the boards of a book. When I read it, I thought that perhaps I was merely in the midst of one of my denser moods. So, not content with my own judgment, I read random passages to other students. Some of these were more advanced in the law than I am, some of them were not so far advanced. They were an average group of law students. And the reaction I got was unanimous. The book bewildered all to whom I submitted it. And yet it is supposed to be an introduction to the science of law.

I would further quarrel with the author on the arrangement of the matter in his book. Presumably, the first thing one does in introducing a topic is to define that topic. And yet we do not find a definition of law, although the author gives many divisions of it, until we reach page 216, when about two-thirds of the book has been already finished. Another example of the same failing is found in the author's treatment of the work "sanction." In the phraseology of the law this word has a special meaning entirely different from that which it commonly conveys to the layman. And, of course, this book is written to introduce laymen to the science of law. The author uses the word "sanction" in its highly specialized sense continuously throughout the book, and yet he waits until page 318 to give the specialized definition of the term.

But these are minor considerations. My objections to this book are based on its incomprehensibility, on the philosophy underlying it, and on the theory which seems to be the real reason for the book's existence.

The book is incomprehensible to the average person, and by this I mean the average legal reader, because of its style and its contradictions. A few examples will help me explain my attitude on these points. The author repeatedly states that there can be no such thing as a group mind. Thus on page 17 he says:". . . since there cannot be a group mind." On page 201 he says: "Legislation is a group activity and it is impossible to conceive a group mind or group cerebration." And yet on page 70 he says: " . . . to attempt to go back to the concept of Stateness for the solution of legal problems would tend to disintegrate the law, since the will of the group may conceivably, at a given moment, be contrary to the law of the State, and where the will of the group is not ascertainable . . ." So a group may not have a mind but still it is endowed with a will. But if a group may have one of these it is indeed difficult to see why the author denies it the other. I think a distinction should be drawn. Certainly a group can have neither a mind nor a will properly speaking. But in the sense that the mind and the will of each of the members of the group acts, and the adjustment and reconciliation of the result of this individual action to the others in the group gives rise to a common thought or will act, they have both. Either one of these views is consistent with right reasoning. But to adopt the first in the consideration of a group mind and the second in the consideration of a group will is contradictory.

On page 48 the author says: "The law considered as a whole, has always put more emphasis on order, certainty, and regularity than on the elusive idea of justice." And yet on page 52 he says: "Our law rhetorically moves on a road of Natural law but in practice it moves on the wheels of expediency." But certainly the law cannot be both orderly, certain, and regular on one hand, and governed entirely by expediency, which is the exact opposite of all order, of all certainty, and of all regularity, on the other.

But a little further on he contradicts himself in connected sentences, when, on page 69, he says: "The State, in material sense, is one of these phenomena of nature; it is not an artificial thing; it is not a creation of man. The State arose out of the gregarious nature of man and is a product of his instincts and needs." The only logical meaning which can be given to the phrase "The State arose out of the gregarious nature of man," consistent with what follows, is that the gregarious nature of man is not the cause of the State, but is only the end for which the State was created. He goes on to say that the State was produced by the instincts and needs of man. If this be so, the State is both an artificial thing and a creation of man, even if an unconscious creation. Instincts are faculties of man through which he sometimes acts. And if they produce the State, then man must produce the State. The author's "needs"

can only mean certain wants, certain vacuums in man which he must find something to fill. If he does fill and satisfy these needs by the creation of the State, he creates the State. Therefore under either one of these functions, the State is a creation of man, and if it is a creation of man it must be an artificial thing.

On page 132 the author says: "The subjective element is or may be an important factor in moral judgment, while in law the present situation and tendency is to base legal judgments on objective facts to the exclusion of mental facts."

And on page 154: "An act is not culpable unless accompanied by a guilty mind." This contradiction is apparent on its face.

On page 132 he quotes with approval thus. "Buckle has observed that in a period of 2000 years of recorded history there has been little evidence of any progress whatever in morals, alongside of the tremendous advances in technical power over the forces of nature." And on the next page: "On the other hand, law has influenced morals." But if there has been no change in morals in two thousand years of recorded history how could law have affected them?

But enough of this. Suffice it to say that contradictions such as these are by no means uncommon in this book. Not so obvious but nevertheless just as serious a defect, is the author's inability to make logical distinctions. I will content myself with three examples of this. On page 205 he says: "It may here also be observed that the law is distrustful of science and that even the most distinguished scientific expert or master would be treated as an ordinary witness when giving testimony concerning scientific facts." It seems to me to be a matter of the most elemental reasoning, that the law is not in this case distrustful of science. It is the scientists the law distrusts, as it does the philosophers and the plumbers, the authors and the bookkeepers. And rightly so. For the frailties to which the flesh is heir are certainly not completely cured by even the most extensive knowledge of scientific facts and scientific principles.

Again on page 150 he says: "Such a statute (one which made an act unlawful, without providing a punishment for the commission of the act) would fail to create a new species of crime for want of a sanction." Here he fails to draw a distinction between the law and the punishment provided for the violation of the law; he makes the essence of the former exist in the latter, or at least makes the latter a condition without which the former could not exist. But logically, if a statute makes a certain act a crime, it must be a crime, even if there is no punishment provided for the commission of the act. Bootlegging would be no less of a crime if the sanction of the prohibition law were repealed.

The third example of the author's inability to draw fundamental distinctions is found on pages 283 and 284. Here he is discussing the nature of legal personality. Quite logically he explains that legal persons are not always human persons. Quite illogically he states that human persons are not always legal persons. "Even to this day, the notion prevails that human beings are legal persons." Now in the sense that human beings are not identified with legal persons, this is true. But to go further and to say that human beings are not legal persons, as the author does, is certainly not true.

All of the foregoing remarks were addressed to the incomprehensibility of the book. I shall now consider the far more important and basic matter of the philosophy underlying the book. The author seems to be a cross between an agnostic and a subjectivist, combining the most illogical features of both. His agnosticism is shown on page 45 where he says: "The law proceeds upon

the view that the will is free, although it is far from certain that this view is correct. At any rate, philosophers do not dogmatically assert the proposition and the problem probably is insoluble." We do not know whether the will is free or not, says the author, but since we have to have free will to live as we do, we will presume it, although we do not know it exists and probably never will. As an eminent cardinal says: "Oh God, if there be a God, save my soul, if I have a soul." And to this the author would in all probability add "which I will never know."

The author is also a subjectivist. Subjectivism is an absurdity, but subjectivism in a lawyer, or subjectivism in a scientist is the height of absurdity. Two professions which deal with the most material of material things, people and things, and a system of philosophy which maintains that there is no such thing as matter makes a sea which is boiling hot and pigs endowed with wings simple even for the intelligence of prattling children.

But I have yet to prove that the author is a subjectivist. I shall now attempt to do so. Or rather I shall now attempt to make the author do so. On page 288 he says: "It is common knowledge that our ideas of reality cannot be demonstrated to be true copies of reality. On the contrary it is fairly supposable that our ideas of reality are not counterparts of reality. It is, moreover, clear that words are not copies of ideas." I, being very reactionary, would maintain that the fact that our ideas of reality cannot be demonstrated to be true copies of reality is certainly not a matter of common knowledge. Being almost Medieval in my ignorance, I would maintain that it is not even a matter of common belief, much less knowledge. And being a follower of that most ridiculed and most unknown school of philosophy among the moderns, the Scholastic school, I would maintain that the opposite of this veiw is correct; that it is a matter of knowledge, although not necessarily of common knowledge, that our ideas are true copies of reality. Also, I would hold it to be far from clear that words are not copies of ideas. I, from the depths of my ignorance, maintain that words are the signs of ideas and that ideas are the signs of things, that there is a causal relation among these three, and that the chain of causation starts at the thing and ends in the word. But then perhaps I am not possessed of that very vague, very unscientific, and very reliable, particularly I fear, to bolster up extremely weak statements, possession called "common knowledge"; and it is even possible that I am absolutely unable to understand a "clear" statement. But I would prefer to think that the matter in question is not a matter of common knowledge, and that the statement is not a clear statement. Since the author gives no proof of these statements I need produce no proofs to contradict them. But if proofs were needed, the existence of this book would refute his statements. Why write a book of words if the words do not represent and convey ideas, and if the ideas do not represent things? Why quibble over terms when the terms do not mean anything?

But there is an equally strong statement of the author's subjectivism on pages 280 and 281. He says: "A relation is conceptual. Therefore the elements of a relation are also conceptual. This logical fact does not, it may be pointed out, lead to any affirmation of any sort regarding the existence or the non-existence of human beings or of things in themselves. That problem is one for the metaphysician and not for the mere lawyer." There is enough matter in this quotation to sustain many pages of dispute. But let us read a little longer first. "It follows, since human beings (if they do in fact exist) are not the domini or servi of legal relations . . ." I would like to point out that the matter contained in the parenthesis seems to deny his previous statement that the problem of the non-existence of human beings is one for the metaphysician

and not for the mere lawyer. It seems that it is already settled to the satisfaction of this lawyer, regardless of any argument to the contrary that the mere metaphysician may have to offer.

But to return to the first statement. The author is mistaken in his idea of a relation. It is not a mere concept. It is a reality, having a real foundation in both terminals of the relationship. It is no doubt true that the relation can exist formally and as a relation only in the mind of the one perceiving the relation. But it is also true that the relation has a real foundation in external things and it is this real foundation which gives rise to our concept of the relationship. This idea of relation contradicts the next statement of the author, also, because if a relation is real, the elements of that relation are also real. But supposing that these statements were true, they would certainly lead to an affirmation of the non-existence of human beings and of things in themselves. For if our ideas have no foundation in reality, it is foolish to think that there is any reality. And thinking that there is no reality is subjectivism.

Finally we come to what I consider the real purpose for which the book was written, namely the promulgation of the author's theory of the resolution of the law to component elements. This theory is embodied in Chapter IV of the book, called "Jural Analysis," beginning on page 235, and continuing to the end of the book. The theory seems in brief to be something as follows: Law as it now exists is extremely indefinite and uncertain. This uncertainty is due to the uncertainty in the means by which the law is promulgated, that is the uncertainty in words. Here the author's subjectivism enters into and colors his theory, and he substantiates his belief in the uncertainty of words by the thought that words do not represent ideas and ideas do not represent things. The way to cure this uncertainty, the author thinks, is to reduce all legal relations to a Claim-Duty, and a Power-Liability relation. How such a resolution gives any more certainty than the vaguer and more complex expressions, due to the fact that neither of the expressions represent any ideas, and even if they did, none of the ideas would represent any real things, he neglects to explain. Anyhow, he goes on to say that certainty in law can only be achieved by discarding these terms and substituting for them algebraic symbols. Here we arrive at the difficult step in the transition. How signs, even scientific signs, can give any more certainty than words, I am unable to understand. They are expressions of ideas in our mind. In his concept of things the words do not express ideas, and what the signs express God and possibly the scientist alone know. He proves the validity of his reasoning in exchanging signs for words with a statement. (Incidentally, proving things by statements seems to be a common practice with this author.) He says, further down on page 288: "We emphasize again, that the structure of jural relations in two basic forms is not a verbal device but a logical paradigm. Being a logical form, it escapes the defects already indicated. There can be no discordance between word and idea. Therefore, the phenomena of law may be indicated reliably by a system of symbols built up on the two basic forms of Duty and Power." But what is this? When he wants to show the inability of words to express ideas, they do not represent ideas; when he wants to show that symbols do, he says that there can be no discordance between the words and the ideas. But then what could one expect of a scientist who is also a subjectivist? However, let us examine the statement a little closer. He says his formula is not a verbal device but a logical paradigm, and therefore it attains more certainty than words in the expression of ideas. After a consultation with the dictionary, I found that a paradigm is an example. Therefore he makes a distinction between a verbal device and a logical paradigm or a logical example.

I maintain that this is a distinction without a substantial difference. Whether the means employed is a verbal device or a logical example the end, that is the conveyance of ideas, is the same, and since both means are arbitrarily selected symbols (the use of the word "symbols" should be noted) it is difficult to see how one could convey the idea more effectively or more decisively that the other. And therefore, the whole reason for the system is lost, and it must fail as a useless expenditure of energy and a baseless juxtaposition of arbitrary symbols.

Besides, if we accept the author's theory, we will be conveying ideas of legal relationships by mathematical formulas, for the purpose of avoiding the uncertainties of words. But these formulas and signs are arbitrary, and themselves must be explained by words. That is, the signs are substitutes for words and must be explained by them. But how a substitute can have more certainty than the thing for which it is substituting is a mystery to me. And how you are going to avoid the uncertainty of words in explaining the symbols; how you are going to prevent the uncertainty in the words communicating itself into our ideas of the symbols when you are explaining their meanings by words, is yet more of a mystery to me. But the author's concept of substituting symbols, which seem to mean and to represent something, for words which represent no ideas, and explaining these symbols, by more words, which still do not mean anything, for the purpose of conveying ideas which do not equal either the word or the thing, to govern the relationships, which exist only in the mind, of things, which really do not exist, absolutely transcends the power of my imagination. Mystery is not a sufficiently obscure term to apply to it. Perhaps it could be called a logical paradigm.

The author brings out many theories in his book which will bear a little closer investigation. These theories are very interesting as theories. Perhaps the most interesting is his theory of the unconscious development of the law. This is expounded by the author on pages 16 and 17 of his work. By it he seems to arrive at the conclusion that all certainty and truth in the law has been attained by its unconscious development, and all that is faulty and uncertain in the law has been caused by the conscious attempts of individuals to develop it. This theory seems to have its basis in the fact that the law is a product of group thought. But according to his theories, groups cannot think. Therefore, the development is an unconscious process. I maintain that groups can think, and must think (which statement has been explained before). Therefore the development of the law is not the result of blind forces. I also maintain that this in itself is an absurdity, irrespective of any reasons given for it. The law is a product of human reason, and purely a product of human reason. And to speak of unconscious reasoning being the cause of all of the truth and certainty in the development of the law, and of conscious reasoning being the cause of all of the falsity and uncertainty in the development of the law, is such a patent absurdity as to startle even the most subjectivistic of scientists.

Another very interesting statement of the author is made on page 290 where he says: "In the creation of new legal rules, whether by the legislature or by a judge, logic is unimportant and even out of place. A certain object is sought. That object may be the general welfare, the welfare of a class, or even the welfare of a small interested group. There is no room here for logic. The pursuit of an end is not a matter of reason but of the will." Philosophy, what crimes are committed in thy name! Of course, we are not sure that the will exists, and to discuss the nature of a faculty we are not sure exists seems as futile as to ascribe a result we are sure of, that is law, to the casual operation of that

faculty, of whose existence we are not sure. But brushing these unimportant matters aside, let us see exactly what kind of a faculty the will is. It is a blind faculty. It is defined as the faculty by which we move toward a good perceived by the intellect. Therefore to speak of pursuing an end by a blind faculty is as much a contradiction as to speak of the unconscious development by unconscious reasoning. For to pursue a thing demands first of all a consideration by the pursuer as to whether the thing is worthy of pursuit or not, and secondly he must consider the means by which the thing might be pursued. And neither one of these requisites for a pursuit can be furnished by a blind faculty. It would seem that the logic of which the author so strongly disproves is as foreign as it is distasteful to him.

These are the defects I find in this book. I considered them first, because I thought that the defects far outweighed the advantages and perfections in it. The author is undoubtedly a learned man. If you must have a grasp of all of the branches of knowledge above enumerated to fully understand the book, it certainly took a much more thorough grasp of those subjects to write the book. And the development of certain topics in his book is very well done. The examples which spring most readily into my mind are the nature of the State and its distinction from the Government; the classification of the Schools of Jurisprudence; and the author's long deferred definition of law. His theory is painstakingly worked out. It will profit any student of the law to understand it because it forces him to recast his ideas of the principles of the law into another form. And the process of so re-casting these ideas will fix them more firmly in his mind. There are doubtless many other outstanding advantages in the book which I am unable to properly appreciate because of my lack of the necessary mental endowments. I regret that loss, and sincerely wish that I had had the further preparation in the sciences, law, and languages, so necessary to the full and complete understanding of this work.

John M. Crimmins.