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Sociology and the Law

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SOCIOLOGY AND THE LAW

A significant recent development in the field of legal science in this country, the importance of which is not yet generally recognized by laymen, is the noteworthy awakening of interest in the philosophical literature of the continent of Europe dealing with legal institutions. Progress in this field of legal philosophy has been especially rapid since the late seventies, particularly in Germany. In English-speaking countries no phenomena of equal significance have occurred. America has never produced any notable philosophical jurists; and the work of English legal scholars of the past generation, though in some instances it has been brilliant and of far-reaching value, has been mainly historical or critical in tendency. The opportunities for American lawyers to familiarize themselves with the product of continental investigations, either through translations or through descriptive accounts, have been few and far between. Hastie's translations from the works of Puchta, Friedländer, Falck, and Ahrens, published at Edinburgh as far back as 1887, formed, until very recently, almost the only serviceable work of the kind in existence, and the doctrines incorporated in it are now regarded as old-fashioned.

It would be invidious to attempt to name all the leaders in the new movement now happily launched, but it is only proper to say that to no one is more of the credit due for the new impetus given to the study of continental legal philosophy than to Professor Roscoe Pound of the Harvard Law School and to Dean John H. Wigmore of the law school of North-Western University. The brilliant work of Professor Pound deserves more than a passing glance. His ripe scholarship and remarkable grasp of abstruse problems entitle him to rank as one of our foremost American jurists, and it is probably safe to say that this country, up to the present time, has produced no profounder thinker or keener analyst than he in the field of the law. Professor Pound during the past five years has produced a group of deeply significant essays on the new jurisprudence. He is about to publish a book on *Sociological Jurisprudence* which will contain the substance of a large number of papers published in technical

journals. The importance of this work cannot be overestimated. It will doubtless long remain the keenest critical exposition of the various schools of European legal philosophy written in the English language.

While Professor Wigmore has not written extensively on the subject, he has contributed quite as much to the movement by the momentum of his personality as he could have by producing books. He is considered, not only one of our greatest legal scholars, but also, in linguistic and scientific attainments, one of the most brilliant minds in his profession, most deeply versed in the lore of recondite European writers. Thus he has inspired others to do what he has not time, though ample equipment, to do for himself; and the legal scholarship of the future will be heavily indebted to him for his work as chairman and leading spirit of committees in charge of the publication of works of the utmost importance. There is more than one series of such publications now under way, but that which has most direct bearing on the matter in hand is the *Modern Legal Philosophy Series*. Six volumes of this series have already appeared, containing translations of important works by Gareis, Berolzheimer, Miraglia, Korkunov, Ihering, and Kohler. Seven volumes more are to appear under the auspices of the Association of American Law Schools, presenting to American readers the doctrines of French, German, and Italian jurists.

This splendid undertaking will make the writings of the leading Continental jurists common property. Already their contributions to the theory of law have begun to be discussed in the learned journals, and it will not be long before courses will be established in the curricula of our law schools which will instruct students in the newer phases of theoretical jurisprudence. The interest thus awakened, however, will not be confined to law students, but will be shared by students of political and social science, and by publicists and economists as well. Eventually the laity in general, because it must try to keep pace with the advancement of science, will find some knowledge of the theory of legal institutions essential to a sound and complete education. Long before that, the influence of the altered conception of the purpose and meaning of law may be expected to show itself in judicial decisions and in the attitude of those charged with the making and enforcement of the laws.

The movement, therefore, has significance for laymen as well

as for lawyers. As an illustration of the growing recognition of some need of an acquaintance with foreign legal literature, on the part not only of the lawyer but of the legislator, it is enough to refer to the *Guides to the Law and Legal Literature of foreign countries* issued by the Congressional Library.

The sociological theory of law is probably more easily expressible in terms which the layman may comprehend than the doctrines handed down from one generation to another of practising lawyers from the time of Blackstone. The philosophical varieties of the sociological theory are very diverse. It would be impossible to single out any one writer as typical of the whole movement, for the movement is constantly progressing and exhibiting new phases, and a standard type can be attained only at some future day, when the tributaries of current discussion have flowed into a common stream and a process of fusion has taken place. At the same time the sociological school is sharply differentiated from the schools that have preceded it. In no respect is this difference more marked than in the refusal to segregate legal science from the other social sciences and to treat it as an independent subject in no way connected with other departments of knowledge.

"The unity of the social sciences and the impossibility of a self-centred, self-sufficing science of law are now insisted upon by sociological jurists," writes Professor Pound. "It has been felt for some time that the entire separation of jurisprudence from the other social sciences, the leaving of it to itself on the one hand and the conviction of its self-sufficiency on the other hand, was not merely unfortunate for the science of law on general considerations, in that it necessitated a narrow and partial view, but was in large part to be charged with the backwardness of the law in meeting social ends, the tardiness of lawyers in admitting or even perceiving such ends, and the gulf between legal and popular thought on matters of social reform. Not a little of the world-wide discontent with our present legal order is due to modes of juristic thought and juridical method which result from want of 'team work' between jurisprudence and the other social sciences."

First of all, then, it may be said that sociological jurisprudence refuses to isolate the law from life in general and that it treats the law not as an inflexible formula, to be expounded only by accomplished technicians, but as a flexible social institution, to be treated, like all other institutions, with regard to the utility of the end served and the nature of the function it seeks to fulfil. The law thus comes to be dealt with as something relative and flexible, rather than fixed and absolute.

It is this recognition of the flexibility of the law and of its constant readjustments to meet new social demands, which is likely to have the most far-reaching effect in this country. The earlier schools, to be sure, have in one degree or another recognized the law to be a flexible institution. They have, however, been content merely to point out that fact without investing it with any deep practical significance. With the sociological jurist the readjustment of the law to meet new social demands is not simply an actual tendency but a moral necessity. Only through such adjustment can the law attain its highest efficiency. As the law has its roots in the needs and interests of the human race, it becomes the duty of the lawyer and legislator to serve those needs and protect those interests to the best of his ability, and he is thus brought directly face to face with life itself. Consequently, the immediate result of the new attitude will be an altered interpretation of current problems of social and economic legislation, and there must inevitably be a reaction against the time-worn precedents of the common law and a deliberate attempt to substitute new rules for old. This means that many of the highly individualistic conceptions which survive in the common law and are really anachronistic, being derived from doctrines long since abandoned, must yield to a modern ideal of social justice. As Professor Pound wrote five years ago in his article on "The Need of a Sociological Jurisprudence":

"The idea has been, so far as possible, to allow every one to do and to acquire all that he can. The individualist conception of justice as the liberty of each limited only by the like liberties of all has been the legal conception. So completely has this been true that sociologists speak of this conception as 'legal justice,' and it is sometimes assumed that law must needs aim at a different kind of justice from what is commonly understood and regarded by the community. But this cannot be. Law is a means, not an end."

Mr. Edwin M. Borchard of the State Department, formerly Law Librarian of Congress, has not claimed too much for the new sociological jurisprudence in the emphasis which he lays on the importance of a sound legal philosophy to the United States. We need, he says, a virile philosophy of law which is more efficient than the common law has been up to the present time in responding to the needs of present life. We need to apply those methods which in Germany "have helped to make law an effective handmaid in the development of social and political science." We need a philosophy, he says, which will correct the

errors of prevailing judicial doctrines regarding class legislation: the assumption of risk and contributory negligence, the right to pursue a lawful calling, and liberty of contract.

To say, however, that the new method treats the law as a social institution to be regarded as a flexible means of realizing broad human objects which fall quite as much within the province of the sociologist as of the lawyer, is to name only one of many attributes of the new jurisprudence. What has been said would be a true characterization of the earlier stage of the movement, leaving its later development unnoticed. Thus Ihering, who has exerted vast influence on the new school, expounded a clear definition of the law as a system of the protected interests of individual members of society, and constructed a utilitarian, teleological theory which duly emphasized the subordination of the law to the general subject-matter of social science. Ihering, however, is now looked upon as a precursor rather than an exponent of the present movement. He has approached the problem of law from a utilitarian standpoint and has been called "the German Bentham." But the modern quality that differentiates him from the English Utilitarianism of a century ago is found in his ripe historical spirit and his assimilation of the biological tendencies of nineteenth-century positivism. Later writers in France, Germany, and Italy have developed a profounder analysis of the sociological foundations of law and likewise of its abstract rational foundations. Theoretical jurists are now directing their attention not simply to the scientific study of the law as an instrument of social justice, but are going straight to the heart of the problem of a science of social justice itself. They are coming to discuss seriously what one writer, Charmont, calls the "renaissance of natural law," as if it were an accomplished fact and not a mere tentative proposal. This contemporary natural law speculation is entirely different from the old natural law speculation in that it has been influenced by sociological investigation and inclines to be for the most part, if not wholly, anti-metaphysical in tendency. It may be said, therefore, that the sociological method, using the term in a broad sense to apply to a varied group of impulses typical of the twentieth century, not only unifies the science of law with the science of society in general, but also seeks the solution of the problem of defining legal justice. It would take up too much space to attempt here to give an account of what sociological jurisprudence is, but under-

lying the differences of contemporary doctrine there is an essential unity of aim with respect to leading issues, whether the problem of legal justice is approached from the analytical or ideological side, as by the neo-Kantians in Germany, or from the side of concrete reality, as by the neo-Hegelians (notwithstanding the misleading connotation of their name), who lay great stress on the value of historical and economic methods of investigation.

Sociological jurisprudence, as Professor Pound says, is still formative, and "in diversity of view the sociological jurists but reflect the differences that exist among sociologists." He also indicates that just as all the methods heretofore employed by sociology are undergoing unification, no single one being any longer regarded as self-sufficient, so none of the directions which sociological jurisprudence has taken up to the present time is to be pursued exclusively and undeviatingly. It goes without saying that future progress in the science of sociology will promptly be reflected in the sociological theory of law. Americans have already accomplished so much in the field of sociology that we may confidently expect that our country will have its share in future notable contributions to this movement.

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