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Jurisprudence Is Practical

Reginald Parker

MOST PRACTICING LAWYERS and even some law teachers still regard jurisprudence as a "fancy" subject that has a "mere cultural" value. Now, I for one would not belittle "cultural" subjects, such as Latin or history, and if there is anything by which the cultural level of American college graduates in general and lawyers in particular can be raised, I will support it. As to fanciness—who knows what is "fancy" and what is "practical"? Copyright law or admiralty becomes eminently practical as soon as a case touching upon those matters comes along. I, for instance, earned

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one of my largest fees because I was versed in Canon Law and thus could help a couple who had been turned down by five other lawyers whose knowledge did not include this

"fancy" subject. More power to both fanciful and cultural pursuits! It is, however, the purpose of this paper to demonstrate that jurisprudence should be studied not because of its undeniable cultural value nor because it is a bit out of the way and hence thought to be "fancy," but rather because it is eminently useful and of practical value.

Juris prudentia in Latin means what it still means in German,¹ where *Jurisprudenz* is used as the older word for *Rechtswissenschaft*: the sum total of law as a taught discipline. To study *Jurisprudenz* in those languages means simply to study law. The French usage differs. In that language *la jurisprudence* is what we might call the trend of decisions, as distinguished from *la doctrine*, which is the prevailing opinion or theory on a point of law among professors and legal writers. Some older English writers have used the word jurisprudence in the French sense, as do Louisiana decisions and writers, somewhat unnecessarily it seems. In modern common English usage, however, jurisprudence can be defined as the science of the law, the science that explains the nature and purpose of any legal order.²

¹ Admittedly, the Romans were a bit vague about the nature of the legal science. See, e.g., *Juris prudentia est divinarum atque humanarum notitia, iusti atque iniusti scientia* ("Jurisprudence is the knowledge of things divine, the science of the just and the unjust.") *Institutiones* 1, 1, 1.

² W. W. Buckland, *Some Reflections on Jurisprudence* 1-5 (1945), gives a good critique of the term jurisprudence, which contrasts with legal philosophy.

It is not easily conceivable that a physician or astronomer should be ignorant as to what their respective sciences are concerned with. Lawyers, on the other hand, are rarely able to define or even explain what their science is about. This, however, is due not to a greater degree of uneducatedness on the part of lawyers but rather to an innate difference between physical and speculative, especially normative, sciences. Physicians, astronomers and doctors deal with causal problems, that is, with the description and investigation of events as they follow, or seem to follow, from one another. A doctor may therefore quite easily refer to medicine as the science that studies the functions and propensities of the human body, of diseases and their causes and their cures, i.e., of facts and realities. And the astronomer thinks of his science as dealing with the composition, motion and other characteristics of celestial phenomena. All natural scientists deal with realities, with the world of cause and effect. If he had never heard of a definition of his science, the natural scientist could make it up at any time with no particular mental effort.

But what is law? We know that it "must" be "applied" or "enforced," but this recognition amounts to a mere vague statement and does not enlighten us as to the nature of the law. The scientist deals with causal laws—"when A is present, B will result." The sum total of such laws make up his particular discipline. Lawyers at times express themselves similarly—"when a person steals, he will be jailed"—but this is patently incorrect, for if it would causally follow that anybody who steals will be incarcerated, we would need no law forbidding theft! Yet the frequent confusion between causal "laws" and the norms that concern the lawyer have greatly contributed to the creation of the natural-law myth.³ In short, we are dealing with a legal, or normative, order whose essence can be reduced to the statement, "When there is A, there *ought* to be (or 'shall' be) B." Law does not connect facts causally but normatively. If a so-called causal law "fails to work," the law must of necessity be wrong, or inaccurately stated in some respect. Thus the law of gravity is said to affect bodies regardless of their weight. But everybody knows that under normal circumstances a stone falls with greater speed to the ground than, say, a feather. This is due to air resistance, which means that gravity produces the effects ascribed to it only in a vacuum and must be amended, as it were, if one wishes to speak of falling objects in a space that is filled with air.

A law in the lawyer's sense—a norm—on the other hand, cannot so easily be analyzed. It is valid quite regardless of its effect. A recent report in the New York Times told its readers that 85% of the thefts in

³The typical natural lawyer believes that there "exists," as a reality, a perfect, universally valid legal order that can and ought to be "found" like a corporeal object.

New York City go unpunished; yet who would deny that theft is "against the law" in New York! In other words, law is "valid" even though it may not be very efficacious, an assertion which of course would be nonsensical if made of a physical, i.e., a causal, law. This bit of mental gymnastics is quite necessary if one seeks to ascertain the nature of the legal order, a task with which every lawyer should confront himself at some stage of his career, either in law school or in practice. A good school, indeed, will not fail to offer jurisprudence, that is, a course concerning itself with the legal order itself.

To arrive at a list of the essential characteristics of the legal order, then, is one of our goals. Our statement that it is a normative or "ought" system does not exhaust the matter, for there are other systems which fit that description such as religion, morals, ethics, and even etiquette. Some of them can be distinguished from the legal order by their lack of coercive force, but that is a somewhat tenuous distinction. Actually, the compulsion inherent in the ethical or moral order is social contempt, although it might be argued that the moral order of some people (ideal Puritans, for example, if there ever were such men) exists only in their own conscience. A better distinction might be the lack of centralization in the non-legal norms; yet some religions are highly centralized. We will therefore recognize as the most valid distinction the fact that the legal order emanates from, and indeed is identical with, the state.

At this stage of the study of jurisprudence the *practical*-minded lawyer and law student have already gained an advantage over those who have only blurred notions of their own field of activity: he has a detached and logically trained view of the law. He can unmask empty phrases. He can, for instance, reduce the often-heard maxim of the "government of law and not of men" to its proper size and meaning, viz., "a government of ascertainable, detailed, pre-existing law and not of men who have authority to create new law *ad hoc*." For if law and state are one, and if the government is the representative of the state, there can be no government that is not "of law." Ours is a government of law, as was that of Hitler. He acted pursuant to the supreme German law that gave the Nazi party and especially Hitler "all power," i.e., authority to make any law. But it was not civilized, decent law that so authorized him.

The student of jurisprudence has no difficulty in perceiving the problem that existed before and was put to some test by the *Steel Seizure* case:⁴ whether the President has "inherent" emergency powers, such as would enable him to seize property for the sake of the common weal. The student knows, first, that the preferable expression for "power" (a word more appropriately used to describe the physical, causal world) is

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

"authority." He knows, further, that any authority of a state organ, such as the President, is necessarily a legal authority. And, finally, the student knows that this is another way of saying that his authority must be based on some law. There was no such written emergency law or constitutional provision. Hence, "the recognition of a presidential authority so far-reaching as to include the power to change the law would be synonymous with recognition of a second, unwritten, constitution conferring undetermined authorities upon the Chief Executive."⁵ This, fortunately, the Supreme Court refused to do.

Discussions such as these lead to the very useful recognition of the fact that law—and every legal authority—must be based on law to be valid. Any legal norm derives its validity from some other, "higher" legal norm. If a state board issues a regulation, this is valid only because some state statute so authorizes. The state statute is valid because it is authorized by the state constitution; and the state constitution is valid only if it is authorized by, i.e., does not contravene, the Federal Constitution. On what norm, then, is the Constitution based? Depending on the speaker's political conviction, he may choose one of two answers. He may say that the Constitution is based on international law in that international law has recognized the United States, and hence its Constitution, as a member of the international legal order. This answer means that all national law goes ultimately back to international law. It can be argued that our Constitution supports this view.⁶ Or he may say that the Constitution's validity stems from the norm-creating force of a successful revolution (or conquest, as in the case of, *e.g.*, England in 1066). Under this view, international law does not truly exist as a supra-national body of law but is valid only insofar as it is recognized by the national legal order. And, indeed, this argument, too, can be supported by the wording of the above cited constitutional provision!⁷ In short, one may say either that it is only through the Constitution that we recognize international law or that it is only through international law that our Constitution validly exists. Logically, there is no "correct" answer. It is a matter of choice. But the recognition and correct formulation of this and related problems would have saved many a newspaper- and magazine-reader from mountains of printed nonsense in connection with that modern revolution-created state, communist China. The legal problem is simpler than all the articles and after-dinner speeches would make it appear.

⁵ REGINALD PARKER, *ADMINISTRATIVE LAW, A TEXT* 86 (1952).

⁶ ". . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ." U.S. Const. Art. VI.

⁷ *Ibid.*

Logical clarity in general and the recognition in particular that law must be based on law sharpen the critic's eye in reading a decision. Take *Pennoyer v. Neff*.⁸ To satisfy himself for a debt for legal services a man seized another man's property in a manner quite proper under the laws, and with the help of the courts, of Oregon. The former debtor later sued him to recover the land and succeeded in the Supreme Court of the United States. But the creditor's action was perfectly lawful—the courts of Oregon said that they had jurisdiction over the seized property and upheld the procedure that was followed. (Suppose the incident had happened in Portugal, involving property situated there. Could then our Supreme Court have declared "illegal for want of jurisdiction" what was in fact legal because based on jurisdiction under the laws of Portugal?) Toward the end of its lengthy opinion, which is otherwise a good dissertation on "jurisdiction quasi in rem," the Court seemed to recognize the necessity that, however much it might frown on this or that kind of procedure, to set them aside there must be authority in law. The legal ground for its action then is presented by the Court: the fourteenth amendment, which, by decreeing that property may be taken only pursuant to due process of law, implicitly provided that a state must have jurisdiction in an objective sense—that is, actually, in the sense in which the Supreme Court will interpret "jurisdiction"—before it can proceed against a person. Oregon did not have jurisdiction, *ergo* its proceedings were invalid. So far, so good; but the complained-of proceedings took place in February 1866, *i.e.*, before the Fourteenth Amendment was enacted!⁹ The Supreme Court was silent on this point. Its decision means that the amendment has retroactive force, which in turn would mean that every ex-slave could have sued for damages, for was he not deprived, through state law now invalid, of his liberty and property prior to the amendment? The Supreme Court may of course have based later decisions on this rationale, but in fact *Pennoyer v. Neff* has not become a precedent to the effect that the fourteenth amendment has retroactive force. I have the feeling that if the defendant's lawyer in that venerable landmark had been a good jurisprudence scholar, he would have demonstrated the far-reaching, undesirable result of the plaintiff's position and would have won the case.

In touching upon the problem of this or that interpretation of statutory or case law, the student of course realizes that many laws are ambiguous and that it is the task of the law applier to "find," as it usually is called, the "correct" construction. Yet if there is a construction that is

⁸95 U.S. 714 (1878).

⁹The amendment was proposed by Congress on June 13, 1866. Ratification was completed two years later.

correct then the law is not ambiguous, and if it is ambiguous no one interpretation is more correct than the other. What the law-applier — legislator under a constitution, judge under a statute or the common law, etc. — really does, is to make a choice under the guise of “finding” law. His choice may rightly be called a political or policy choice, and it differs quite categorically from the ordinary law-applier’s task of interpreting the law. The practical importance of this distinction lies in the fact that it enables us to recognize a great many so-called truths as mere subjective opinions, not of what is correct, but of what is desirable to the judge or lawmaker. In other words, as long as the commerce clause is as ambiguous as it is, it will be up to the law-appliers and ultimately the Supreme Court to say what may be included in federal control under this clause. But the jurisprudence student knows that, while some of these interpretations may sound more desirable to him, none is more “correct” than the other.¹⁰ I can think hardly of anything more practical.¹¹

Members of the jurisprudence guild will no doubt have identified me as a follower of Hans Kelsen.¹² I have found his clear, logical way of examining the essential propensities of the legal order and of divorcing it methodically from politics (thereby not at all belittling the lawyer’s political task and hence the necessity for his political education!¹³) as the one best suited for the purpose of instructing students as to what the law is. This, however, must not mean that a jurisprudence teacher should not pay attention to the great schools of jurisprudence and legal philosophy, notably the natural law school to which American political thinking owes so much; the historical school, which between Savigny and Spengler has reduced if not shattered man’s belief in a universally valid harmonious order; and the modern sociologists who, though constantly confusing the “is” (man’s actual behavior) with the “ought” (normative orders), have rendered inestimable contributions to the clarification of such problems as the purpose of the law and what its enforcement actually accomplishes.

¹⁰ WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953) to the contrary notwithstanding. But see Brown and Hart, book review, 67 *HARV. L. REV.* 1439 (1954).

¹¹ Nobody will deny the practical value of mathematics despite the fact that it deals with abstract figures and concepts rather than with concrete objects and commodities.

¹² Especially recommended to jurisprudence students are his *GENERAL THEORY OF LAW AND STATE* (1945); *Science and Politics*, 45 *AM. POL. SCI. REV.* 641 (1951), a masterpiece that should be read by every lawyer and political scientist; *THE LAW OF THE UNITED NATIONS* xiii-xvii (1950) (preface “On Interpretation”).

¹³ Hans Kelsen is the author of the Austrian constitution and was once a Permanent Judge in the Austrian Constitutional Court. In both these capacities, as well as an adviser to the American Government and to United Nations delegations, he has had more political experience than any American professor I can think of, now that Bruening has returned to Germany.

This returns us to what we have said about choosing (in a civilized society) one out of several possible interpretations of law. It is not done merely to satisfy one's own predilections but rather is, or should be, guided by the ethical standards of a free country. As we have said, this is not a legal question, to be sure, but it is of eternal importance to all law interpreters, statesmen and lawyers alike. The jurisprudence teacher may well find it worth while to digress from his foremost task—to analyze the law and legal order—not in order to indoctrinate his students, but to get to the core of the law-applier's most serious problem which is not so much the question whether this or that form of government warrants a freer society than any other, whether we or they are free or slaves, but rather whether man wants to be free. I can think of no better discussion than the one in Dostoyevski's *Grand Inquisitor*.¹⁴ In this unexcelled jewel of a novelette, the anti-Christ demonstrates, not inaptly I must confess, that man wants and at the same time does not want to be free. He is too weak to be allowed to be free and forge his own destiny and too freedom-loving to admit that he prefers to be a slave. To keep him happy, his leaders must keep man in bondage while telling him that he is truly free. "With us all will be happy and we will not more rebel and destroy one another we shall persuade them that they will only become free when they renounce their freedom to us and submit to us." Who can deny that Dostoyevski's modern compatriots are doing just that—telling their people that they live in a "people's democracy"? To discuss and, if possible, refute the Grand Inquisitor's political theory is indeed a task supreme for any teacher.

¹⁴ In Book V, Chapter 5 of the *Brothers Karamazov*.