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# JURISPRUDENCE — A TEACHING PROBLEM

MIRIAM T. ROONEY\*

**H**OW TO TEACH JURISPRUDENCE is one of the most puzzling problems with which American law schools are confronted. Not only is the subject complex, but also teachers of competence are scarce because of the need for expertness in philosophy and history as well as law. The few who are looked upon as authorities are in most cases self-taught and have designed their own methods. Occasionally disciples of the more famous teachers have consciously imitated their masters in presenting the subject. There is no real agreement on an accepted course content. Furthermore, not every law school includes Jurisprudence in its curriculum, and the desirability of its inclusion or exclusion provides ground for intermittent debates among faculty curriculum committees. It is possible that a lack of a satisfactory teaching technique may be the cause rather than the result of professional uncertainties about offering the course. Whatever the reasons, the omission of systematic discussion of the origins, function, and objectives of juridical activities has a crippling effect on the all-around development of first-rate legal minds, and tends to keep law schools in the technical trade school class rather than in the forefront of university education, where they traditionally and functionally belong. Not until the teaching of Jurisprudence is again recognized as basic in the curriculum, will the faculties of law regain their rightful heritage of acknowledged leadership in the university world.

The question of how to teach Jurisprudence mirrors to some extent the nineteenth-century disputes over how to teach law in general. Between 1830 and 1870, law schools throughout the land based their instruction largely on treatises, text-books, and lectures, some relying primarily on Blackstone's *Commentaries*, others using works of original composition, like Story's or Kent's, Cooley's or Greenleaf's, for the study of

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substantive or procedural subjects. Even thirty or forty years after Langdell had introduced the case method of analysis at Harvard in 1870, many law schools still resisted the displacement of favorite texts. It seems to have been through the development of a class of crusading professional law teachers, who themselves or through their students began to take over the staffing of the more influential law schools, that the casebook method of teaching has now become almost universal in this country. Today influential professors often become recognized as such because they have formulated the pattern of the casebooks which have been most widely adopted in their special fields. In Jurisprudence, however, for the most part, casebooks are still largely unformed.

In the place of case analysis, the method of teaching Jurisprudence has veered from lectures based largely on Salmond's or Holland's treatises on the one side, to biographical manuals about well-known writers in the field on the other. Volumes by Stone and Simpson, Cohen and Cohen, Patterson, and Reuschlein are examples. The successive editions of Roscoe Pound's bibliographical guides to the literature of Jurisprudence have not featured the common-law jurists mentioned in the other law school courses as much as those who write out of a civil-law background, to which most American law students are largely strangers. Such an eclectic method tends to be confusing rather than stimulating, and it may be largely responsible for the attitude of American law students toward Jurisprudence as an impractical luxury among law school studies.

The first book prepared for law school use which included excerpts from actual

cases proposed for class analysis, seems to have been Jerome Hall's *Readings in Jurisprudence*, published in 1938. However, the bulk of the *Readings* consists less of judicial opinions calling for philosophical analysis than quotations from writers on jurisprudential subjects illustrative of the topics suggested by a carefully pre-arranged classification scheme. Without espousing any particular philosophical system, the compilation is primarily informational in a way similar to the earlier treatises, while making a definite advance by the substitution of verbatim quotations in place of paraphrases. Materials suitable for critical analysis are thereby provided, although a fully rounded out analytical technique for utilizing them in encouraging the student to reason through to his own philosophy is left for the individual professor to work out.

The next teaching tool developed was the temporary edition of *The Problems of Jurisprudence* by Lon Fuller in 1949. This gave longer excerpts from a smaller number of representative writers than Hall's book, and was designed more obviously for analytical class dissection than for survey purposes. Its most important pedagogical innovation was the inclusion of three hypothetical cases with fictitious court opinions and dissents, which afford inimitable opportunities for the analysis of the philosophical ideas implicit in the judges' statements, and at the same time suggest that theories of law, consciously or unconsciously held, may be significant in pronouncing a judgment. For a case-minded legal profession, the way had now been paved for a full-fledged casebook on Jurisprudence; the wonder is that it had taken so long to prepare the ground.

At the same time that the methods of teaching Jurisprudence were proving so

troublesome, the content itself was undergoing considerable transformation. About 1830, when law schools were beginning to supplant the apprentice training obtainable in practitioners' offices, the eighteenth-century notions of natural law, which had helped to launch the American Revolution successfully, still prevailed. Precise comprehension of natural law principles was largely lacking, however, and competence in philosophy itself was apparently rare. The decadence of the thinking done in the name of the natural law was manifest and left the door open to the cleaner cut positivism of Comte, Bentham and John Austin. The demand for codification, inaugurated with Napoleon, Bentham, and David Dudley Field, and worked over during most of the nineteenth century by the German jurists, took the ascendancy. It was not until the end of the century that the need for better criteria of human values than positivism provided, gave rise to a new school of thought which became influential under the name of sociological jurisprudence. Even as late as 1909, however, positivism was still vigorous enough to produce the lectures of John Chipman Gray on *The Nature and Sources of the Law*, although this was almost the last important publication derived directly from Austin's influence. The earlier natural law tradition had been so effectively superseded by the energetic positivists that as recently as 1931, Benjamin Fletcher Wright could say that natural law was not generally accepted in American intellectual circles any more.

It could scarcely have been anticipated then, that within the next twenty years, legal positivism would have been recognized by its own advocates as inadequate, especially in not anticipating the threat of the Nazi and Communist subversions of the legal

order. By way of substitution, two false starts were made, one under the name of the new realism, and the other spoken of as the revival of natural law concepts. The new realism was an effort made by more or less disillusioned positivists to do away with outmoded forms and formulae, but without reckoning with the pervading substance of law underneath. The attempt to identify natural law with concepts or ideals was equally disappointing, because it undertook to retain the traditional terms while varying the content according to the mind of each theorist. The implied identification of natural law with the concept of due process, for example, was indicative of the shallowness of the comprehension of philosophy prevailing. Furthermore, both groups derived from positivism a subjectivist approach to law instead of recognizing the existence of an objective legal order to which the human mind must conform at its peril. Actually all things measure man, and man is not the measure of all things, as these schools of thought would have had us believe. And so the call for a truly realistic jurisprudence, which is in fact an existent, not a conceptualistic natural law, still persists. To meet it, nothing less than a reconstructed course in Jurisprudence will be satisfactory.

Possibly as a means of bridging the gap, Bobbs-Merrill, who had published Hall's pioneer *Readings in Jurisprudence* in 1938, brought out in 1954 an 882-page volume entitled *Preface to Jurisprudence* by a professor at Brooklyn Law School, Orvill Snyder. This publication, in my opinion, however, does not satisfy the recognized need. The table of contents discloses that the book is organized around such topics as the state as lawgiver, the sovereignty of the state, lawmaking, law-executing action,

sanctions, interpretation of statutes, judicial legislation, proof, things and persons, and the classification of laws. The book is divided into six parts, which are in turn subdivided into chapters. Each chapter has some introductory observations or comments by the author, followed by excerpts from judicial opinions in a number of important cases. The cases are interspersed by incisive questions designed to stimulate vigorous class discussion.

Given this framework, what does the book say? The chapter headings give the first clue for they sound less like Maitland, Coke and Bracton, than like Hobbes, Bentham, Austin and Kelsen, all of whom were more conversant with the civilian system than with the indigenous institutions of the common law. The footnote citations provide the next indication that the author places great reliance on these writers, as well as upon Gray, Hohfeld, Patterson, and, most of all, Kocourek, his own teacher. Analysis of the text itself also discloses the acknowledged predilection the compiler has for principles historically classified as positivistic: the notion that all law is made by commands of the sovereign; is to be found within the four corners of a written document; is to be applied by the judges in accordance with the specific directions of the lawgiver, without recourse to any outside or "higher" legal principles or means of interpretation; and with the inevitable application of authoritatively enforced sanctions if the command is not obeyed. Were this not evidence enough, there is the declaration of the author himself that the method adopted ". . . is that of analytical jurisprudence . . .," that is, the method characteristically utilized by followers of Austin and other exponents of the positivistic school.

Interspersed among the cases, in addi-

tion to the introductory texts, are some keen questions designed to assist the student to cut out the chaff from judicial opinions whenever they appear hazy, lazy, or actually confused. Many of them are obviously aimed at puncturing the balloons let loose by spurious notions of natural law. Other questions are designed to challenge more basic natural law premises. None, however, seems to raise any doubts about the validity of such characteristically positivistic assertions as, "the command issues from the sanction; if there is no sanction, there is no command and no law . . ." although this would appear to be putting the cart in front of the horse. The kind of questions which are generally asked and which require very serious consideration, are illustrated by the following: whether there is any relationship between a theorist's notion of the law and his theory of the state; whether it is possible to understand our system of jurisprudence apart from our concept of sovereignty; and whether the theory of natural law is inconsistent with the concept of sovereignty of the people. Another important line of questions asks whether overruling decisions constitute, in effect, *ex post facto* law, and a recurring series of questions inquires as to who is in fact doing the interpreting of our laws and upon what bases. Perhaps the question which reveals most about the author's personal attitude toward the natural law school, and toward interpretations of law by the jurists whom he calls "exponents of some authoritarian ethical system," as contrasted with those who hold law to be merely the command of a recognized sovereign supported by state force, is to be found on page 180, where he asks: "Granted the abstract validity of the natural law, is the use of natural-law theory any-

thing other than some hocus-pocus by which the interpreters of the natural law seek to become the secret actual sovereign?"

These questions are obviously searching and well-suited to classroom discussion. Rarely have some of them been stated with such directness. But to a greater degree than is perhaps realized, they may exist more or less unspoken in the minds of many jurists trained in the positivistic tradition, who are influential in directing the course of current legal activity. For that reason they must be answered, and answered as frankly as they have been asked.

It is not the asking of such questions to which objection may be made. It is rather the continued repetition of such questions, aimed almost entirely at the natural law school, while de-emphasizing comparable questions aimed at a searching re-examination of the premises of positivism, conceptualism and other schools of juridical thought, which makes these questions seem rhetorical, if not, in fact, loaded. The practice of addressing such questions to tyros in legal theory, when many mature scholars in jurisprudence have not previously been so challenged, also seems to take unfair advantage over youthful minds. The effect on a student, dependent upon this book for his introduction to Jurisprudence, of such one-sided probing, is likely to result either in a cynical prejudice against natural law theories generally, or an unshakable skepticism about the value of any legal order not based upon state force. Is this what is needed to help able young American law students understand the foundations of the common-law system which they are studying, and devote their best energies to improving it as a guarantee of justice and freedom?

Were the text in this book, which is inter-

persed throughout the chapters, to indicate impartially the several major schools of juridical thought to which many able minds have adhered throughout history, and were this done in such a way as to permit the student to select and test the validity of some of them for himself in attempting to decide how much better the judgments in the cases could be, the book might be a very valuable tool for developing a better technique in teaching Jurisprudence. The cases are important, interesting, and well selected for analysis and class discussion. The idea of offering each of them as a challenge to the thinking of each student, so that he will learn to avoid clichés and the reiteration of the obvious, is good. The use of American cases almost exclusively for jurisprudential materials is a very practical method of inculcating a consciousness of the philosophical problems which exist in almost every situation with which law has to deal.

Indeed, the book would have a great deal to recommend it if, in fact, it provided a fair presentation of the philosophical principles that traditionally lie at the foundations of the centuries-old common-law system, instead of advocating an alien philosophy characteristic of statism. By practically ignoring the natural law and by offering in its place what is in effect an apologia for positivism exclusively, the book is as out of date as it is inadequate. Furthermore it is deceptive in having the appearance of an objective study, when it is not. The book constitutes in effect an indoctrination of a very subtle kind. Instead of being a welcome addition to the needed tools for teaching Jurisprudence, it must therefore be condemned, like all half-truths, as dangerous, especially for youthful minds who have not yet attained a sufficiently

well-rounded knowledge of philosophical theories generally to meet the incisive mind of the proponent, fairly and frankly, before an impartial tribunal.

The immediate problem is the designing of a teaching tool which will open the eyes of the students to the extent and importance of the problems not yet solved, instead of offering plausible answers to questions that seldom, if ever, need to be asked. A selection of actual judicial opinions laid before the students for dissection and devaluation — an adaptation of the casebook method of critical analysis to the complex subject of Jurisprudence — would appear to provide the most effective training for those who, as the advocates and judges of the next few decades, will have to draw upon their own personally developed philosophies in coming to grips with the actual human situations that confront them. But the desired casebook will not meet the current need successfully unless it indicates somewhere along the way the substantial principles upon which a sound jurisprudence has to

be based. The call for realism and the growing interest in a revival of natural law theories would seem to imply also that the needed casebook in Jurisprudence should somehow emphasize a truly realistic natural law system instead of the outmoded positivism or the impractical conceptualism which proved inadequate in meeting the great juridical crises of the first half of the twentieth century.

In an effort to meet the double need of a new teaching tool and an exposition of an objective approach to natural law thinking, the editors of the leading law book series, West Publishing Company, had persuaded Dr. John C. H. Wu two or three years ago to undertake the compilation of a casebook in Jurisprudence for classroom use. That book is now scheduled for publication in 1958. It is anxiously awaited in the expectation that it will come much closer toward providing a solution to the insistent problem of an adequate teaching tool than any other book which has heretofore been made available to the law teaching profession.

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### *LAST MINUTE ITEM*

As we go to press, the New Jersey State Supreme Court voted 5-2 that churches and other non-profit charitable organizations in New Jersey are now liable to damage suits initiated in New Jersey civil courts. The decision upsets a legal precedent first established in England 119 years ago. Thus three suits, including one against St. Luke's Roman Catholic Church, Hohokus, were thrown back to the lower Courts for retrial. St. Luke's was sued for \$50,000 by a woman claiming she slipped on a wet church floor on a rainy day because a mat had been removed.

A complete coverage of the legal status of the injured churchgoer under the law of the various states is set forth on pages 180-182 of this issue.