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MODERN TRENDS IN LEGAL THEORY

ROBERT LEE KOERNER*

FREQUENTLY THOSE WHO desire most earnestly to save civilization, unwittingly, but menacingly, become advocates of its ultimate destruction. We are constantly reminded that the real challenge to American education is to equip youth with the scientific accouterments necessary to ward off materialistic aggression. The highest goals in life are offered in the field of technology. Not truth, but practicality seems to be the common norm of human guidance.[1] Our fund of knowledge, as a result of the phenomenal advance of the natural sciences is now so much more real than the concept of society and of cultural relations, that we are in danger of a pseudo-interpretation of personal attributes in terms of impersonal nomenclature. Intelligence has largely become merely a higher instinct, and a prey to every shifting wind of doctrine.

The process of progressive secularization, rationalism, idealism, relativism, positivism, pragmatism and collectivism denies, all along the way, the essential nature of man, who is treated in various ways as the creature of circumstance. As a corollary, law and government, the great politico-philosophical agencies for the balancing of human relations within the social milieu, become extrinsic to the individual, and truth is reduced simply to logical consistency. Partly as a consequence of these antinomies, it is probably a correct judgment that the United States has no explicit, systematic legal philosophy or jurisprudence.

In a highly critical analysis of the caliber of the present membership of the United States Supreme Court, Dr. William Frasca recently commented:

* LL.B. (1930), M.A. (1937), Fordham University; Assistant Professor of Law, Fordham University School of Business.

1 "Those who are responsible for education have progressively removed from the curriculum of studies the Western Culture that produced the modern Democratic State; . . . the schools and colleges have, therefore, been sending out into the world men who no longer understand the creative principle of the society in which they must live." Address by Walter Lippmann, University of Pennsylvania, Dec. 29, 1940, on file in University of Pennsylvania Library.

". . . Natural Science was constituted a sort of supreme court before whose tribunal all other branches of knowledge were obliged to plead their right to recognition. . . . [T]he task that Natural Science had to fulfill was heralded as the sublimest hope and the loftiest ideal the human spirit had ever aspired to." DE HOVRE, PHILOSOPHY AND EDUCATION 4 (Jordan transl. 1931).

> ... [T]he stubbornness of the judges in continuing to close their minds to evidence and viewpoints other than those of their own choosing is compelling proof that personal "prepossessions" rather than law – *will* rather than *reason* – is the norm which they serve. . . . Since the Court may only say what the law is in isolated "cases and controversies" as these come before it for decision, the need for unitedly acknowledging and firmly adhering to a set body of principles is imperative if our entire constitutional system is to maintain its coherency. The latter-day tendency of the judges to travel each his own merry way has thoroughly confused the pattern of our law. Disdain for historical fact and the belief that "the life of the law is not logic" has completed the chain of bewilderment. If the Court is to resume its traditional place in the public's esteem a re-examination of values should be the first order of business.[2]

As against this criticism of one, but most important, segment of the American legal system, Charles McCoy has faithfully portrayed the general consequences of nearly a century of megalomania of materialistic scientism, in his article "American Political Philosophy after 1865":

> The politicial philosophy of this period is not to be found, then, in any *ex professo* treatment of the subject, but is to be found rather in a great miscellany of things – in cultural changes, and in changes in the applied sciences and mechanical arts which constitute a civilization; and in the various expressions of these changes, found in the writings of scientists and scholars, in the speeches and writings of political leaders, leaders in industry and labor and agriculture. . . .[3]

The ultimate result of this medley of contributory factors, unrelated to any abiding recognition of natural rights in the sound traditional sense of Scholastic doctrine, ushered in, at the turn of the century, the impersonal corporate organization with its concomitant arrogation of economic power over person and property.

> The natural-rights doctrine which was employed before the courts of the country in defense of property rights and individual liberty was the deeply distorted eighteenth-century version whose basic assumption was *natural* harmony of interests; and it was a doctrine suited precisely to give scope to a liberty unrestrained save by natural *force* and selection. . . . At the same time the effect of this policy was exactly to contribute to the destruction of those natural bases of society – the individual man with his intelligence and feelings, the family and voluntary associations – which the traditional medieval and classical doctrine of natural law sought to preserve through good habits and good institutions. Thus it was that we saw grow up in the United States – and in the name of natural rights and Americanism – the impersonal corporation . . . [which] had the effect not of serving the ends of human life, but large capitalistic interests.[4]

The gilded age of the gospel of wealth had its fixation in American thought as the philosophy of rugged individualism. Most philosophic writers over the last half century have, however, confused the Scholastic concept of natural law with everything from canon law[5] to Kant's postulates of practical reason.[6] Hence, during the nine-

[2] *Confusion in the Supreme Court,* 28 THOUGHT 547, 569-570 (1953).

[3] 21 THOUGHT 249 (1946).

[4] *Id.* at 262, 267. The large quasi-public corporation in the United States has for better or worse channeled the American "way of life," and has assumed both social and political power over the life of almost every citizen in the country. Witness the psychological dominance of the large manufacturers in the field of advertising, particularly that of television broadcasting.

[5] WRIGHT, AMERICAN INTERPRETATIONS OF NATURAL LAW 5-6 (1931).

[6] DEWEY, MY PHILOSOPHY OF LAW 73-85 (1941). Dewey is an excellent example, however, of how

teenth century in the United States, the notion of natural law in morals fell largely into disuse, not to say discredit, outside the orthodoxy of the Catholic Church. During the intervening years, until rather recently, there has developed an increasing feeling that, in principle, all that is meant by a law of nature is a moral law to be applied to the criticism and construction of positive law, both legislative and judicial. This fallacy of thought transference has been analogously referred to in the scientific field, as the "lyricism of science":

> By the lyricism of science is meant the transfer of the conclusions of one science to which they belong, to another science to which they have no application whatever. Many and varied are the examples of such a lyricism. When Comte hit upon the science of sociology, philosophers sociologized everything; when Darwin struck on a popular theory of evolution, thinkers evolutionized everything. Now, in our own times, the quantum theory of physics has been applied to religion by Professor Whitehead; the Einstein theory of relativity has been applied to the theory of knowledge by Lord Haldane; the psycho-analytic method of psychology has been applied to mysticism; and the principles and theories of biology have been applied to God.[7]

In much the same way was the *logical* development of legal history in the United States as the judicial mind gradually slipped away from the early American position of associating secular affairs of state with religious concepts.[8] The notion of a definite and universal moral law has been progressively inconspicuous with the advancing years, attendant upon the frank admission that there is no substitute body of principles of equal generality and adaptability to be found.[9] Instead, we have witnessed the

the viewpoint of a philosopher may shift as he grows older. His earlier writings reveal a belief in God and absolute reality. In the early 1900's his philosophy adumbrated the problem of reflective experience in human life, culminating in his later works just prior to his death in the well-recognized empirical approach to methodology and fixed thought processes.

[7] Sheen, *God in Evolution,* 1 THOUGHT 575, 580 (1927).

[8] The observation of Rev. James Gillis, made a generation ago, is worth recalling in this connection: "But the difficulty is that man cannot invent a religion. He can and does invent philosophies. Religion is prehistoric, primeval. Religion is natural, instinctive, human. Philosophies are of later origin, not natural but artificial. And one of the predominating characteristics of our days, as of the days of decadence in the Roman Empire, is that religions are dying and philosophies reviving." FALSE PROPHETS 178 (1925).

[9] The foreboding remarks of Merle Curti, in his lecture on "Human Nature in American Thought," at Columbia University, epitomize the challenge of uncertainty in modern thought:

"Perhaps it is another irony of American history that the scientific methods and techniques to which we owe so much can also be used to incite hysterical emotion and to make man's destruction of humanity more efficient. Thus in the amazing atomic age the retreat from reason has led many to abandon faith in science. No substitute, no new faith, has as yet been found which seems completely to fill the gap left by the retreat from reason. . . . For the gulf between traditional American values and professions and actual individual and social behavior seems to be ominously widening. We can of course say that the ideals so generously and eloquently expressed in the American experience assumed too much and must be pared down. But let us not pare down too much! For if we do, we confess our bankruptcy." 68 POL. SCI. Q. 492, 507-09 (1953).

And the comment of Geoffrey O'Connell is hardly more sanguine:

"There seems to be a growing demand from intellectual leaders on all sides for a new declaration of the meaning and purpose of life in terms of our changing democratic society. Educational leaders like Dewey, Kilpatrick, Rugg, Bode, Counts, and a host of others, openly professing the tenets of naturalism, as well as insisting that the solution of all our problems, economic, social, and political, be arrived at by means of the methods of experimental science, are in the vanguard of those clamoring for a change in our institu-

emergence of a multiplicity of amoral doctrines, largely contradictory, and espoused either with incomplete conviction, or with an inadequate postulate of legal principle.[10]

The modern "philosophy" of American law is, therefore, basically pragmatic and deterministic,[11] branching off into what might be conveniently classified as three distinct, but not wholly unrelated, schools of legal thought: Sociological Jurisprudence, Legal and Economic Determinism, and Legal Realism; none of which fulfills the requirements of a complete doctrinal system of law resting upon a true philosophical psychology of human nature.

The School of Sociological Jurisprudence

The sociological jurist has the praiseworthy desire of satisfying the clamoring, but ever-changing kaleidoscope of human wants and desires, but he lacks an objective determinant for evaluating the relative merits of the interests to be adjudicated, largely because of the constant attempt to divorce sociology from social ethics. Frank H. Hankins has stated the function of the sociological method favored by this school as follows:

> The greatest need of sociology to-day as in the past is to divorce itself from a priori ethical considerations. As Comte said, "Admiration and disapprobation should be banished with equal severity from all positive science." In fact, on the basis of the rigid determinism implicit in the positivist theory, it is useless to inquire whether things might not have been different. . . . Ethical phenomena are only social phenomena of a special class; they are always relative to the social conditions of which they are a part.[12]

From this point of view, law becomes, under the persuasive advocacy of jurists like Pound and Cardozo, merely an historical instrument of legal engineering for the practical admeasurement of rules and principles according to the presently received ideals of the times. Such "philosophy of law" is thus purely subjective and uncorrelated to any objective standard of rights, and is of necessity incommunicable to any fixed frame of legal reference. Even the

tions. . . . The highly important thing to be noted, however, is that whereas yesterday material prosperity and success were offered instead of the Christian philosophy of life, today nothing positive can be or is being offered in its stead, because the economic crisis has shown the shallowness of earth-bound hopes." NATURALISM IN AMERICAN EDUCATION 241-43 (1936).

[10] Much of this pseudo-philosophy is basically naturalistic in the sense that it considers nature the whole of reality, and humanistic in the sense that it believes that man has emerged merely as a result of a continuous biological process. Whatever is transcendental of experience is rigorously excluded, whatever direction the naturalistic trend follows, whether that of Materialism, Evolutionism, or Positivism.

[11] "When studying modern American jurisprudence, it is well to remember that our legal scholars are, in the main, inclined to avoid philosophical disputes. They are not technically trained in philosophy and not equipped to deal with questions not immediately connected with every day practice. . . . By and large, American lawyers and law teachers seem to proceed in the spirit of 'positivists'. They suggest that the analysis of the legal order should not require any of 'non-legal' materials. . . . For them a Divine Plan, if it exists, need not be consulted. They believe the law can be analyzed and evaluated without requiring reference to such 'non-legal' objects or standards." LE BUFFE & HAYES, THE AMERICAN PHILOSOPHY OF LAW 161-62 (1947).

[12] Chapter on Sociology, HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES 294 (1925).

On the other hand, Dr. J. V. L. Casserley has recently insisted that "insight" based on inner human experience is a greater source of knowledge for the social scientist, and that the objective of sociology is to understand, not merely to correlate data. MORALS AND MAN IN THE SOCIAL SCIENCES (1951).

late Oliver Wendell Holmes, considered by many the outstanding jurist of the twentieth century, who professed disdain for all socialist theory, was the great exponent of the sociological juridical school in his recognition of force and feeling as the foundations of law, rather than reason and morality. Thus all thought of basing law on objective principles of justice was rigorously banned from Holmes' legal philosophy. So also the classic decisions of the eminent jurists Pound and Cardozo were mostly predicated on a voluntaristic basis, assuming, as they did, that the cardinal purpose of law is the satisfaction of the largest popular demand, as ranged against the smallest possible number of inconveniences.[13]

The natural disposition of the mind to detect and apply universally applicable principles is thus disavowed by the sociological jurist, partly no doubt because of the unprecedented *progress* of science within the last half century, with its attendant idolization of material valuation immediately realizable; partly also as a perpetuation of the doctrine of private judgment in the realm of American case adjudication. The failure here is in the appeal of many judges, whether of the professed stamp of the sociological school affiliation or not, to legal history (stare decisis), unrelated to any set of historical *principles,* which incidentally cannot be supplied or discovered by sociological processes, but only on the ground of a sound metaphysics. To arrive at the truth or falsity of any proposition, it is absurd to examine it by its apparent consequences.[14] As Znaniecki, with his characteristic insight, has put it:

> Certain schools of psychology and sociology have tried indeed to reduce cultural evolution to natural evolution; but, as a matter of fact, this reduction remains only a postulate and . . . the essential and objectively significant side of cultural life remains forever inaccessible to naturalistic science. On the other hand, certain idealistic currents appealed to history for help in determining the content and meaning of the absolute values which they exposed and defended; but they did not see that the historical and absolutistic standpoints are irreconcilable by their very logical essence. . . .[15]

The *apparent* dichotomy between reality and metaphysics is particularly well sensed by O'Connell:

[13] HOLMES-LASKI LETTERS *passim* (Howe ed. 1953) (2 vols.).

The pragmatic, empirical complexion of the late Justice Cardozo's legal philosophy is sufficiently adumbrated in the following short quotation from his *Nature of the Judicial Process:*

". . . [W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends." *Id.* at 65 (1932).

[14] ". . . [I]ll conclusions can only flow from false propositions; to know whether any proposition be true or false, it is a preposterous method to examine it by its apparent consequences as if all happiness was not connected with the practice of virtue, which necessarily depends upon the knowledge of truth; that is, upon the knowledge of those unalterable relations which Providence has ordained that everything should bear to every other. These relations, which are truth itself, the foundation of virtue, and, consequently, the only measures of happiness, should be likewise the only measures by which we should direct our reasoning." Burke, *A Vindication of Natural Society,* 1 BOHN'S BRITISH CLASSICS 1, 6-8 (1854).

[15] ZNANIECKI, CULTURAL REALITY 7-8 (1919).

History is, however, basically a continuous process – the inner process of man, which however haltingly and awkwardly revealed, tends toward the rational unification of the human spirit. Hence the reality of social relations is not a mere mechanical or organic integration of disparate units, but is rather an historical, moral matrix within the frame of man's essential *human* nature.

> It [naturalism] is an attempt to construct a theory of life from the purely scientific standpoint. It excludes metaphysics in favor of the "view of the world which flows by inner necessity from the accomplishments of science." . . . It objects to metaphysics as an abstract, mechanical, and hair-splitting exercise of the mind. It believes that metaphysics is a futile jumble of speculations . . . resulting in no practical good. In contrast with it, it extols the physical sciences and their benefits to humanity. It fails to see that metaphysics is occupied with reality, i.e., with things as they are, with fundamental, basic notions and ideas.[16]

And there are to be found, even within the legal fraternity, those who have been quick to appreciate the necessity for delimiting scientific findings in court trials by rules of law resting on objective evidentiary determinations.[17] The conservative American Bar Association Journal commented editorially in 1949:

> The critical problems and confusions which our great transition is forcing upon us compel us again to turn to natural law for eternal values and ideas of universal application. . . . It seems high time, therefore, that we reexamine its basic concepts. . . . We should listen to the counsel of F. S. C. Northrop that "no problem in society, science or life is fully understood until its grounds in the metaphysical nature of things are discovered."[18]

There is consequently a slow but growing realization, both within and without legal circles, that a mere functional study of institutions in the light of the social sciences can never attain, as the sociological jurists pretend, to the development of an order of law as a social reality, without the coordination of principles of human values related to a common matrix of the nature and purpose of man's existence and destiny. There is, there can be, no such thing as a legalistic historical process apart from the basic consistency of human action as motivated by free will and rationality. What the law needs desperately is a philosophical psychology of the abiding nature of man in the various fields of human activity.

One of the merits of the sociological approach to law is to be found, however, in

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[16] NATURALISM IN AMERICAN EDUCATION 2 (1936).

[17] "Law enforcement should keep in stride with the advances of science and courts should receive scientific proof when presented in accordance with the established rules of evidence. . . . In the not too distant future this science may bring civilization the horrors of a push button war, *but it must not bring push button justice. . . .*" Justice Ward, in People v. Offerman, 204 Misc. 769, 774-75, 125 N.Y.S. 2d 179, 185 (Sup. Ct. 1953). (Emphasis added.)

"What is not so clearly understood about the process of reviewing the work of administrators is that resort must be had to standards which the legal profession has learned as part of its disciplined study and its pragmatic experience and which can be formulated if at all *only in the terms of a tradition*. . . . But a forecast based on an informed professional synthesis is itself a science and not only requires the dedication of intelligent experience and *objective thinking* to the task, but its practice is the most significant way in which the lawyer serves the community." Justice Bergan, in Commercial Pictures Corp. v. Board of Regents, 280 App. Div. 260, 262-63, 114 N.Y.S. 2d 561, 563 (3d Dep't 1952), *aff'd,* 305 N.Y. 336, 113 N.E. 2d 502 (1953), *rev'd,* 346 U.S. 587 (1954). (Emphasis added.)

"To apply these cases [cited] to the facts at hand is to ignore realities and to convert a verbalism into a philosophy. The law is not just a joust with word symbols, and the use of language never can excuse us from the necessity of searching for the ideas and concepts language purports to communicate." Justice Breitel, in Colgate-Palmolive-Peet Co. v. Joseph, 283 App. Div. 55, 57, 126 N.Y.S. 2d 9, 11 (1st Dep't 1953), *rev'd,* 308 N.Y. 333, 125 N.E. 2d 857 (1955).

[18] 35 A.B.A.J. 42 (1949). Another of the author's articles in this connection is Koerner, *The Challenge of Legal Supremacy,* 11 REV. SOCIAL ECON. 105 (1953).

its recognition of the difference between the inert legal pronouncements in the text books and law in action.[19] But such variance goes far deeper than a mere tracery of sociological correlatives through the exercise of judicial reason. The legal process must become enabled to seek out the ultimate perfection of man's being in order to subsume reason rightfully within its function in the attainment of a sound decisional basis in justice and ethics. As Rev. Moorehouse F. X. Millar, S.J., has expressed it:

> Not only does he [man] seek by an inner necessity to preserve himself in being, which is the point at which our modern individualists and would-be Liberals all stop, but he tends further. With equal necessity he strives toward the ulterior perfection of his being, which is the precise point on which traditional Christian ethics stands out against a revived rationalistic paganism and our own modern naturalistic scientism. . . .
>
> In this way we see how, but for our intellects, our wills would not be free, and yet, owing to our intellects, our wills are not without law. Such a law is initially discerned by any intellect and becomes progressively discernible to *our* practical reason in the exercise of its function of evaluating human experience. The intellect, therefore, is a law that is constituted in our very nature as human beings. This is what is truly implied by such terms as the law of reason, the natural law, or the moral law of our being. It is by living in conformity with this law that man can gradually intellectualize his being, can make himself reasonable.[20]

What this implies in the field of jurisprudence is that a natural law, with a growing positive law content, is the proper substitute for all merely analytical or historical jural processes. Such ideals are not to be developed *outside* the present legal system, however. They are moral desiderata and, as such, subordinate jurisprudence to ethics, or, rather, supplement the moral concept with its practical application in prudence – the highest judicature.[21]

The Deterministic School of Jurisprudence

The movement of economic determinism in the law began formally with Marx in 1859, but it did not impinge upon American

[19] "Much harm has been done to our common-law technique in America by text writers in the decadence of text writing in the last quarter of the nineteenth century, and by hack writers in encyclopaedias dogmatically announcing rules in terms of the exact words of courts without attending to the results of the cases as compared with the language of decisions. . . . The most that can be done is to measure action by its conformity or want of conformity to a received authoritative ideal, *and that ideal itself must change with changes in the society of which it is a picture.*" Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 7, 11 (1941). (Emphasis added.)

[20] *The Dehumanization of Man,* 17 THOUGHT 49, 59-60 (1942).

[21] That the struggle to infuse these concepts into the present train of American legal principles will have hardy antagonists is evidenced by Cornelia Le Boutillier, in the work *American Democracy and Natural Law* (1950), in which the metaphysical concept of natural law is implicitly assailed as "semantically inept and practically useless." On the other hand, certain criticism of almost any legal system seems eternally justified.

The animadversion of St. Thomas Aquinas in this connection, as far back as the thirteenth century, is most relevant today: "The human reason cannot have a full participation of the dictate of the Divine Reason, but according to its own mode, and imperfectly. Consequently, as on the part of the speculative reason, by a natural participation of the Divine Wisdom, there is in us the knowledge of certain general principles, but not proper knowledge of each single truth, such as that contained in the Divine Wisdom; so too, on the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law. Hence the need for human reason to proceed further to sanction them by law." SUMMA THEOLOGICA, I-II, q. 91, art. 3, ad. 1.

thought until the early 1900's. Whether its present advocates belong to the idealist, or to the mechanical branch of the movement, the result is that all law is considered the product of inevitable economic causation. In government-controlled states like Russia, this simply means that law is the will of the economically dominant class; which again, in Russia means the Kremlin.[22] In the western world, deterministic jurisprudence represents the culmination of naturalism, with its concomitant extrinsic, atomistic interpretation of juridical power and relations, and its postulate of the inevitability of class conflict as a *conditio sine qua non* for social regeneration. Those assuming political power by generalizing the objectives of their purposes, conceptualize them in universal terms as principles of law or legal doctrine.[23] That such assumption is easily calculated to foster the arrogance of those seeking national, or even world domination, is sufficiently revealed through the events of modern history. It readily becomes the methodology of dictatorial leaders, which can include judges dispensing the judicial process, in justifying their approach to a closed society. Carried to extreme length, as in communistic Bolshevism, this attitude of pseudo-deliverance can reach an almost delusional intensity of spirit, and should arouse at least a proleptic, not to say prophylactic, interest in the minds of all right-thinking persons.[24]

[22] "Leninism-Stalinism ('Bolshevism') is not a scientific hypothesis but a great social ideology rationalizing the social interests of the new rulers and making them acceptable to the minds of the masses." BURNHAM, THE MANAGERIAL REVOLUTION 221 (1941).

The United States Supreme Court has upheld the position that communism teaches the use of force to gain political control, and advocates the overthrow of the United States by force and violence. Carlson v. Landon, 342 U.S. 524 (1951).

The United States Internal Security Act of 1950 declares: "There exists a world Communist movement . . . whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means . . . to establish a . . . dictatorship in the countries throughout the world. . . . The Communist organization in the United States . . . present[s] a clear and present danger to the security of the United States and to the existence of free American institutions. . . ." 64 STAT. 987, 50 U.S.C. §781 (1952).

In 1951 the State of New York provided for the removal from public office of persons holding membership in subversive organizations. N.Y. Sess. Laws 1951, c. 233. And since 1952, membership in an organization designated as subversive by the United States Attorney General is deemed so odious that its members are denied the right to occupancy in certain public housing projects. 66 STAT. 403, 42 U.S.C. 1411c (1952).

The Supreme Court of New York, in Gurtler v. Union Parts Mfg. Co., pronounced this scathing rebuke upon the communistic "philosophy":

"However heedlessly accepted in other democracies and fearfully respected in benighted regions of the world, the term Communism has come to be recognized as opprobious throughout this nation. By every means of mass communication, Communism has been revealed in all its degenerate facets. We have taken its measure and know it for its godlessness and its menace to the free spirit and mind of man. A desperate faith in its false panaceas, clung to by some in former years, has yielded to a full awareness of its evil and its peril.

"Quite apart from the legal bar to employment in public offices, defense facilities and sensitive industries, Communists are taboo in other areas of employment. Organized labor seeks to purge them from its ranks. In offices and stores, they are undesirables. In most, if not all, of the learned professions, a Communist is a pariah." 206 Misc. 801, 805-06, 135 N.Y.S. 2d 709, 713 (1954), *rev'd*, 285 App. Div. 643, 140 N.Y.S. 2d 254 (1st Dep't 1955).

[23] Actually, they consider objective law as a figment of the imagination. For an application of the Marxist theory to the legal order, see lecture by Brooks Adams in CENTRALIZATION AND THE LAW 35 (Bigelow ed. 1906).

[24] "Society . . . cannot defraud man of his God-granted rights. . . . Nor can society systematically

The deterministic theory of law must, therefore, be opposed in the free world by the sound notion of community life, which incorporates the idea of human dignity in the individual person. The jurist, as psychologist, must continue to observe mental phenomena, *but metaphysics must furnish the rules for their interpretation,* particularly the rule of adequate cause and the rule of sufficient reason. Psychology, to become rational, must first become metaphysical, because all science, including the science of human relations and the law, demands not only that the proper nexus between facts be established, but also that the relation of the facts to their proper cause be ascertained and applied.[25]

On a broad front the refutation of deterministic proposals lies in the fact that they are not directed toward the common good from which law derives its nature and sanction.[26] The sociological refutation is posited upon the distinction between mere organizational, and institutional control. An *organization* is maintained by a few in control of others – control either from above or from without. An *institution*, on the other hand, although it is also an organization, has the further characteristic of being founded *in* the habits and customs of its members, and is supported and maintained by the adherence of such membership to the common unity. Although it exists by will or free choice, it is nevertheless built upon an ideal (the directive idea) made practical through the habits of the individual members, commonly through tradition. This latter element of tradition, as regards the social bond relating a people together, is frequently a much more potent conditioning agent of community life, emotional as well as intellectual, than the mere chronological sequence of historical events, although in a larger sense tradition itself is part of history. Geographical conditions are important directive agents, but are not deterministic of human nature. Hence institutions do not merely reflect and express social life, they also modify it profoundly, and become the means whereby man's purposes are determined depending upon the objective content of their being. Although set up by speculative reason, such institutions are sustained by practical reason.[27]

void these rights by making their use impossible." Encyclical Letter of Pius XI, *Divini Redemptoris,* para. 30 (1937). Because Communism does encroach upon human rights conferred by natural law, it must be condemned as the basis of any legal system, which "strips man of his liberty, robs human personality of all its dignity . . . [and denies] recognition of any right of the individual in his relations to the collectivity. . . ." *Id.* at para. 10.

[25] The applicable standard laid down by Saint Thomas Aquinas in his masterful work, *Summa Theologica,* is objective truth as manifesting itself to the mind. The practical adjudication of this standard is governed by certain propositions of universal character called metaphysical principles, which are, in reality, the principles according to which everybody should reason in ascertaining the ordinary facts of existence. Hence, the objective test is as imperative for the psychologist, the lawyer, or the judge in diagnosing the character of an idea as it is for the physician in diagnosing the nature of a disease.

[26] Law is "an ordinance of reason for the common good, made by him who has the care of the community and promulgated." AQUINAS, SUMMA THEOLOGICA, I-II, q. 90, art. 4, concl.

[27] The remarks of Pope Leo XIII are pertinently recalled:

"Reason sees that whatever things that are held to be good upon earth, may exist or may not, and discerning that none of them are of necessity for us, it leaves the will free to choose what it pleases. But man can judge of this contingency . . . only because he has a soul that is simple, spiritual, and intellectual . . . which is created immediately by God. . . . When, therefore, it is established that man's soul is immortal and endowed with reason and not bound up with things material, the foun-

Philosophically considered, the theory of legal determinism is also unsound in that it regards man as *absolutely* determined by the physical and economic order. Man, however, while he is determined toward his final end – God, is not determined as to the method or manner of attaining such end, which objective lies within the province of free will. Man thus really conforms to his nature when he conforms to legally constituted authority, for the reason that society is natural to man, and the state is a natural institution. But it should be carefully noted, to avoid the subjectivism of modern thought processes, that this authority proceeds ethically *from the institution,* and not from the individual wills of its members, notwithstanding the fact that such members may be judges composing the institution of a court of law. It is this *objective* basis of obligation, implicit in the directive idea of incorporation of the members, either explicitly or implicitly; either by compact or through tradition; which gives to the institution its legal commitment. It is only on such basis that the institutional relation or relations can be legally interpreted and properly adjudicated.[28] It follows that the nature of the power to change institutional relations must be *determined* by the nature of the object which is the subject of the change proposed. In cases involving constitutional questions, such as frequently arise in the United States, the courts should attempt to ascertain the true meaning of the Constitution as an objective institution, in the light of the particular facts upon which such cases are to be decided. In the field of mutual consent or agreement, the justice of a contract is to be sought in its cause; institutionalized by the will of the contractors, but existing independently of such will as the objective basis of the contractual relation. A juridical act is thus necessarily referable to the object to be adjudicated. Subjectivism and voluntarism have no place in legal interpretation. Between the legislator and the subject stands the common good – the only objective ground or nexus for determining whether a law is sound. The situation gives the rule.[29]

The philosophical view propounded takes man for what he is; a human person, a social being. The economic deterministic view tries to socialize man. Hence the potential danger of communism lies not alone in the fact that it represents a powerful political and social movement within the progression of history, but rather more, in the fact that it represents a pseudo-philosophy of life, a falsification of human purpose, evaluation, and destiny, which philosophy is often found projected in the form of decisions of law among which are the most

dation of natural liberty is at once most firmly laid." Encyclical Letter, *Libertas Praestantissimum,* para. 3 (1888).

[28] There is here involved a moral judgment which must be objective and founded in the moral order. It is in this sense that the Constitution of the United States stands juridically *outside* its causes; that is, it has an objective reality as a legal institution apart from all subjective interpretive analysis of its provisions. The principles of the Constitution are thus immutably fixed as long as the institution exists, but the interpretative judicial decisions regarding these principles are not immutable. They are subject to erroneous construction, not the least cause of which may be the particular political philosophy of the judge in rationalization of his conceptual legalistic knowledge.

[29] "The situations in which men relatively stand produce the rules and principles of that responsibility, and afford directions to prudence in exacting it." Burke, *Letters on a Regicide Peace,* quoted in HOFFMAN & LEVACK, BURKE'S POLITICS 460 (1949).

potent agencies of control in the social order.

The modern mind apparently has not yet attained to the full recognition that there is a vast domain of reality which is purely *relational* in character; that the ideal order is just as *real* as the material order. The respective rights and duties of business associates, or husband and wife, parent and child, principal and agent, trustee and beneficiary, to cite but a few of the well-known legal relations constantly before our courts, possess legal reality apart from the will of those creating or engaged in such relations. Thus personality as applied to a corporate and social group is not a mere fictional allusion or attribution, and it is even less an illusion. It is, rather, a characterization of its existential nature in reality within the law.[30] It is a recognition of the corporation's autonomy, and of its legal capacity to play a part distinct from that played by its participant members. A proper legal evaluation of principle is especially demanded here because exactly opposing results will be reached by the courts depending upon the concept of corporate existence which is employed.

The Realist Theory of Legal Interpretation

The contest being waged in America between the conceptualists and the realists, between those who espouse an ideal legal order and those who are content with law as it is, is dividing jurisprudential scholars, and courts, into two legalistic groups: conservative, and radical. The conflict may be variously phrased as Transcendentalism versus Functionalism, or Conceptualism versus Positivism. The Realist program in jurisprudence is a furtherance of the sociological, empiricist approach to legal problems, particularly through psychological rather than philosophical analysis. Law, it holds, is ascertained by experience rather than by logic. One of the better known realists has intimated that the judge decides the cause according to his prejudice or pleasure, and then introduces a legal argument to support his conclusion.[31] Natural law principles are deemed irrelevant in realist appraisals of legal relations, as also is the ideal factor in shaping law to a better standard of conformance with the common welfare.[32]

The engineering process of the pragmatic jurist has not been uncritically accepted in modern American case law, however.[33] Nor has the attempt of the realists to divorce their empirical method from the institution of the English and American common law system, in lieu of a system of

[30] Hallis, in his scholarly book, *Corporate Personality* (1930), reaches the conclusion that corporate personality is a legal, but not a social reality (p. 240). And Wormser, in his *Disregard of the Corporate Entity* (1927), while conceding that a corporation is a reality, denies that it is a personality except by assumption of law. It seems that both writers fall short of the full realization that, whenever the law concedes legal personality either to a group or to a human being, it is merely recognizing the legal significance of something which nevertheless exists *in fact*.

[31] FRANK, LAW AND THE MODERN MIND 103 (1930).

[32] Further reference on this point may be made to AQUINAS, *Of the Power of Human Law*, SUMMA THEOLOGICA, I-II, q. 96.

[33] "The horizons of our concepts in many fields of the law are constantly widening. In torts, and especially negligence, the changes by statute and decisional doctrine have encompassed broader areas. We impose liability now where none existed a few short years ago. . . . Particularly marked is the trend 'that the ethical quality of the defendant's act is the measure of liability, not just the final act done.' " D'Onofrio v. City of New York, 206 Misc. 644, 646, 124 N.Y.S. 2d 850, 852 (Sup. Ct. 1953), *rev'd*, 284 App. Div. 688, 134 N.Y.S. 2d 569 (1st Dep't 1954).

free judicial decision, met with ready acceptance in present-day American legal circles.[34] Notwithstanding this divergence, however, there is still an apparent attempt by some American courts to refer the objective content of legal interpretation to mere common sense, with the consequent subjective indeterminism which this entails, rather than to sound metaphysics.[35]

The objective *due* order is not being used, to a large extent, by modern jurists in the process of adjudication of vital legal issues. In its place are substituted either an "ideal" of time and space, in the Spinozian sense of projected reality, or a process of quasi-scientific testing and re-testing of evidential data in the hope that, through sublimation and refinement of factual issues, a more nearly perfect *approximation* of legal principle will be reached. What is lacking in this pragmatic approach to justiciable problems is the philosophical mandate that principles must be ascertained before they can be applied. The law is not a mere prophecy of court action, either as a profession of radical individualism or of radical socialism. It is, on the contrary, an instrument of authority, intrinsic to the social nature of man, just as human nature is both immanent within and transcendent to the individual. Law in this sense truly becomes a rule of reason for the ascertainment of principles of human conduct; principles eternal, natural, customary, and conventional, in the perspective of the common good and the true unity of order demanded by sovereign people under law.

Sound legal reform thus envisions a dual unification: one immanent in the rationality of the judge; the other transcendent in the objective order of reality. Actually, society demands more than one kind of law to coordinate its multifarious relations and activities. The Eternal Law, incarnate in the Absolute Mind of God, also enters rightfully into the human process of adjudication, and becomes part of jurisprudence. We are slowly beginning to realize that an historically expanding human reality is just as much evidentiary material for legal contemplation as is an astronomically expanding universe. The mind can never be satisfied with a dry logical coherence because all objective reality is potentialized in the individual, and finds in him its epitome, which mere speculation however veiled will not reveal.

And it is only through the traditions and institutions of communal (not communistic) life that a vital assimilation of reality is possible. Reality is thus interiorized in the individual, and the individual in turn becomes a part of history. Hence there can be no such thing as judicial auto-realization, since a creative legal process cannot be self-explanatory. It is in this light, and within this perspective, that Scholastic jurisprudence holds that positive law is a facet of natural law which derives its sanction from the eternal law. Only within such interpretation can the dignity of the individual be maintained. Only on such construction can a system of sound legal interpretation survive.

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[34] "The genius of the common law lay in its flexibility and its adaptability to the changing nature of human affairs. . . . Its flexibility consisted not in the change of its essential principles, but in the application of old principles to new cases and in the modification of the rules flowing from them. . . . Since its rules were founded in reason, one of the oldest maxims of the common law was that where the reason for the rule ceased, the rule also ceased." Justice Nolan, in People v. Morton, 284 App. Div. 413, 419, 132 N.Y.S. 2d 302, 309 (2d Dep't), *aff'd,* 308 N.Y. 96, 123 N.E. 2d 790 (1954).

[35] GILLIS, FALSE PROPHETS 192-93 (1925).