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A CALL FOR A GENUINELY AMERICAN JURISPRUDENCE

JOHN UNDERWOOD LEWIS, PH.D.*

In spite of the fact that many practitioners of law often dismiss questions about its nature on the grounds that they are merely matters for idle speculation, it is in fact astounding how often practical legal matters are decided on the basis of jurisprudential assumptions. Two specific instances are the classic *American Banana Co. v. United Fruit Co.*¹ case and, more recently, the case that former Special Prosecutor Archibald Cox brought against the President of the United States concerning the Watergate tapes.²

In the first case, American Banana sought to recover damages from United Fruit because the latter had not only monopolized the Costa Rican banana trade but had induced the local government to take over American Banana's land, supplies and railway accesses, all in contravention (so American Banana alleged) of the Act to Protect Trade Against Monopolies.³ American Banana's action failed, and it did so not because United Fruit did not do all of these things; it did. It failed rather because it did them outside the jurisdiction of the United States. And the reason jurisdiction was important was because the Court, through Justice Holmes, defined law as a "statement of the circumstances in which the public force will be brought to bear upon men through the courts."⁴ Holmes' reasoning, then, is an example of what the late Dean Pound called the "threat theory of law."⁵ Under a "rule of conduct theory," Pound adds, the result in the *American Banana* case might have been different, for in the light of such a theory the Court could have regarded United Fruit's *conduct* as crucial and paid no attention to the fact that American Banana's claim was unenforceable for jurisdictional reasons.⁶

Essentially this same jurisprudential clash was repeated in the United States District Court of Judge John J. Sirica on August 29, 1973.⁷ Judge

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¹ 213 U.S. 347 (1909).

² *Nixon v. Cox*, 487 F.2d 700 (D.C. Cir. 1973).

³ Law of July 2, 1890, ch. 647, § 7, 26 Stat. 210, *as amended* 15 U.S.C. § 15 (1970).

⁴ 213 U.S. at 356.

⁵ 2 R. POUND, *JURISPRUDENCE* 103 (1959).

⁶ *Id.* at 104.

⁷ See N.Y. Times, August 30, 1973, at 1, col. 8.

Sirica had been asked to rule on the President's appeal of a subpoena served upon him by Mr. Cox and his grand jury. At that time Judge Sirica was told by the President's lawyers that he ought to deny the grand jury subpoena because even if he were to uphold it his court lacked the power to compel the President to obey it. The underlying (but unstated) assumption here, as in the *American Banana* case, was that law is by definition what the courts can enforce. It was precisely this assumption, however, this way of characterizing the essence of law, that, as his reply indicated, Judge Sirica disagreed with: "That the court has not the physical power to enforce its order to the President is," he said, "immaterial to a resolution of the issues. . . ."⁸

This philosophy of law expressed by Judge Sirica is clearly at odds with that put forth by Justice Holmes in the *American Banana* case, and it is the difference in these philosophies that is decisive in their differing results. This is why, as Sir Maurice Sheldon Amos said at the London School of Economics in a 1932 lecture on Roscoe Pound, "jurisprudence undoubtedly cuts ice," for law, he said, "is made by beings endowed with consciousness, and what those beings think about law affects the kind of law they make."⁹

One implication of Sir Maurice's comment about the nature of law is that it makes an important difference in the everyday lives of citizens what their society's conventional understanding is about the nature of law. That this is so can be seen by comparing the thought of William Blackstone, the great 18th century English jurist whose *Commentaries*¹⁰ have been supremely influential in the development of American jurisprudence, with the strikingly contrary ideas of James Wilson, the only American to have been a signer of both the Declaration of Independence and the Constitution as well as a Justice of the United States Supreme Court.¹¹

Blackstone defines law as "a rule of civil conduct, prescribed by the supreme power in a state commanding what is right, prohibiting what is wrong."¹² There is a question, familiar to Blackstone scholars, as to whether he meant by this that the act that is commanded *is* commanded because it is a morally right act or whether that act *becomes* right upon being commanded. The question, in other words, is whether he thinks one can talk about a course of conduct as being right before it is made legal, or whether making it legal makes it right.

Although Blackstone is ambiguous in his *Commentaries* on this point, he is purposely so. In his definition of law he deliberately embraces two notions, that of "sovereignty" and the idea of "commanding what is right, prohibiting what is wrong;"¹³ and his aim in mentioning both is to allow

⁸ *Id.* at 21, col. 1.

⁹ M.S. Amos, *Roscoe Pound*, in *MODERN THEORIES OF LAW* 86, 91 (1933).

¹⁰ W. BLACKSTONE, *COMMENTARIES* (1803).

¹¹ See J. WILSON, *THE WORKS OF JAMES WILSON* (McClousky ed. 1967).

¹² 1 W. BLACKSTONE, *COMMENTARIES* 44 (1803).

¹³ *Id.*

him to shift their relationship as he moves from his consideration of positive law to his treatments of "natural" and "revealed" law. As regards the latter two, says Blackstone, what is known by men to be right determines their validity and binding force so that in the cases of "natural" and "revealed" law the ideas of right and wrong take precedence over the notion of sovereignty. This relationship is reversed, however, in matters of positive law. Here sovereignty is central: what is right is determined rather than discovered by the lawmaker.¹⁴

With Blackstone then, and for perhaps the first time since the Roman Empire, there is expressed what was to become from the 18th century on into the 20th the conventional view of the relation between moral obligation and legal validity. When he wrote that men are indeed bound by the law of nature and divine revelation, he meant us to understand that they are morally bound by them but that at the same time none of this is relevant to their legal obligations. In Blackstone's view legal obligations originate from a source different from moral ones. God's will is the source of moral obligations, whereas legal obligations are created through the will-acts of the state's sovereign lawmaker.¹⁵ The implication is that when a person finds himself confronted with a positive law that runs counter to the demands of his conscience he is legally bound to obey but morally bound to disobey it. Here Blackstone is anticipating the usually accepted 20th century view that the topic of moral obligation is unrelated to that of legal validity, and the courts, in *Blair v. Williams*¹⁶ for example, have themselves suggested this view:

. . . the obligation arising from conscience, is but an imperfect obligation. It is called an obligation . . . in an improper sense; for it rather influences than obliges . . . ; whereas the legal obligation is a perfect obligation; it is the chain of the law, which binds equally all men, and compels them, by a real necessity, to perform their duties. . . ."¹⁷

The point here is that because they are backed by the sanction of punishment, laws, unlike moral rules, really do create obligations.

What has taken place, at first in theory with the acceptance of Blackstone's doctrines and gradually into our own time in the everyday life of American law, is that the idea of legal sovereignty has been unleashed from its dependence upon the notion that the overriding purpose of the law is the promoting of the public good. Instead, legal sovereignty has been united with the idea of power. "Having legal authority" and "possessing political power" have become so synonymous that the Latin phrase *sit pro voluntate ratio* (the sovereign's will must coincide with reason) has

¹⁴ *Id.* at 44-48.

¹⁵ *Id.* at 45-46.

¹⁶ 14 Ky. (4 Litt.) 34, 41 (1823).

¹⁷ *Id.*

been replaced with *sit pro ratione voluntas* (the will of the sovereign takes the place of reason).

Gradually, therefore, beginning with Blackstone the concept of "legal validity" has in Anglo-American legal circles been turned into a purely formal concept. It has been given a purely technical sense that is completely detached from its popular, non-legal one. In the popular, man-on-the-street sense a legal rule is thought to be valid if, as one court put it,¹⁸ that rule is understood to have a "substantial rectitude," a rightness of content, as distinguished from mere formal regularity. From a technical standpoint, though, a legal rule is said to be valid if it has legal strength or force, if it is efficacious or effective regardless of the "rightness" of its content. This separation of the two senses of validity was of course the necessary logical result of defining law in terms of its maker's will and of the consequent refusal to distinguish between authority and power.

Through the neglect of this distinction, furthermore, there has arisen in American public life the assumption that there are two basically different kinds of power that people can exercise, legal and illegal, and that acts done in the name of the law are authoritative whereas illegal acts are "violent." For the first time in western culture violence has come to be identified with outlawed behavior; those with the political power to enact laws are, in other words, assumed to be by definition incapable of committing violent acts.

The most practical result of this assumption has been the systematic degradation of the idea of conscientious objection to law. James Wilson summed up the classical, traditional view of the role of conscience in public affairs by saying that "[E]veryone who is called to act, has a right to judge;"¹⁹ but the current view is that although a person might well have the right to judge the morality of the law, he does not have the power to judge whether it obligates him. And further, because it is also a part of the conventional wisdom that moral judgments have no objective correctness but are only private, biased opinions, it is also assumed that the conscientious objector's stance with respect to a given law not only can but must be overruled for the good of the state. The whole topic of amnesty for "war resisters" has been debated within this framework, and the most any conscientious objector may ever be granted by the state is that he has the choice Blackstone said he had: "Either abstain from this or submit to . . . a penalty. . . ."²⁰

As to the influence of Blackstone's thinking at the very foundations of American jurisprudence there can be little doubt. By 1776 almost twenty-five hundred copies of his *Commentaries* were being used in the colonies, over half of which were in an American edition. The acceptance

¹⁸ *Home Ins. Co. v. Gaines*, 74 Colo. 65, 66, 218 P. 907, 908 (1923).

¹⁹ 1 J. WILSON, *THE WORKS OF JAMES WILSON* 186 (McCloskey ed. 1967).

²⁰ 1 W. BLACKSTONE, *COMMENTARIES* 58 (1803).

and use of his work was one of the important reasons the English law was favored over French law in the formative era of the United States and, as Dean Pound wrote, the *Commentaries* “continued to be the student’s first work in the law office and in most law schools until the end of the nineteenth century. . . .”²¹ Indeed, so influential has Blackstone been in shaping American legal thought that his name is the only one mentioned in the *Corpus Juris Secundum* sections on definitions and classifications of law.²² By so naming him, this reference bible for lawyers is simply reflecting the fact that, whatever else anyone might want to say about a law, this one point is beyond dispute, namely that it is a command issued by someone whose power to enforce it is supreme.

It should hardly be surprising, then, that American lawyers—including the President’s own—feel themselves most at home with the sort of decision found in the *American Banana* case, wherein law is defined in terms of a “sovereign” maker; for as Holmes stated in that case the “very meaning of sovereignty is that the decree of the sovereign makes law.”²³ With Blackstone’s blessing the legal sovereign is thought of as the one whose coercive power is sufficient to enforce his will.

There are, though, here and there, cases to be found in American law that accept Blackstone’s definition of law only reluctantly or not at all. Judge Sirica’s proposition that it is “immaterial to a resolution of the [legal] issues” that the court in the matter of the Watergate tapes “has not the physical power to enforce its order”²⁴ is obviously incompatible with the Blackstone doctrine; and in *Devine v. State ex rel. Tucker*²⁵ assent to Blackstone is qualified this way: “Our American courts,” the bench said, “have approved that [Blackstone’s] definition [of law]; with this addition, that such [as the laws] command . . . shall not be in clear conflict with our . . . written Constitutions.”²⁶ In a Tennessee case,²⁷ Blackstone was rejected outright: “his definition,” the court said, “gives no proper definition of a law in what may . . . be termed the American sense;”²⁸ and the reason for this, as a Kentucky court put it, is that his definition “is not compatible with the genius of our forms of government, neither is it literally true as applicable to our system. We acknowledge no supreme power, except that of the people.”²⁹

More recently, in an important but mostly unpublicized decision in another United States District Court, this time in Detroit, Judge Damon

²¹ R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 25 (1938).

²² 52A C.J.S. *Law* (1968).

²³ 213 U.S. at 358.

²⁴ See note 8 *supra*.

²⁵ 105 Ohio St. 288, 136 N.E. 922 (1922).

²⁶ *Id.* at 289, 136 N.E. at 923.

²⁷ *State of Tenn. ex rel. Knight v. McCann*, 72 Tenn. (4 Lea) 1 (1879).

²⁸ *Id.* at 6.

²⁹ *Davis v. Ballard*, 24 Ky. (1 Marsh, J. J.) 563, 576 (1829).

Keith made the same point.³⁰ Over a year before the Watergate break-in and over two years before the American public even knew of the existence of the White House spy unit called the "Plumbers," Judge Keith was assigned to what in 1970 appeared to be a routine criminal case. The Ann Arbor, Michigan branch office of the C.I.A. had been dynamited in 1968 and the federal government had indicted one Robert Plamondon and two associates. Plamondon was the defense minister of the White Panther Party (since renamed the Rainbow People's Party) and William Kunstler, fresh from the Chicago Seven trial, represented him.

As the trial commenced there was no hint that anything extraordinary might happen. But then in responding to a simple, straightforward, routine defense motion, the Justice Department admitted that it had wiretapped parts of the defendant Plamondon's telephone conversations. At this point the defense asked that the wiretap logs be made available to it, but the government responded that to do so would violate national security. In support of its response, the government's attorneys presented what has since become popularly known as the "Mitchell Doctrine": the President, the then Attorney-General argued in a written brief before Judge Keith, had the inherent power of the sovereign to preserve itself and could consequently order wiretaps in matters of national security without court approval. Furthermore, he could validly refuse to reveal the resulting tapes to anyone, including any defendants in cases arising from the tapped information.³¹ This argument was presented to Judge Keith on January 14th and 16th, 1971. Nine days later, in a decision finally affirmed by the Supreme Court, Judge Keith said that the President was wrong.³²

What Judge Keith said in *United States v. Sinclair* was that, although wiretaps were not forbidden in national security cases, the established rule was that a judge had to authorize them.

If democracy as we know it, and as our forefathers established it, is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of Government' . . . cannot be, in and of themselves, a crime. Such attempts become criminal only where it can be shown that the activity is carried on through unlawful means, such as the invasion of the rights of others by force or violence.³³

The government's immediate appeal of this decision was to the Sixth Circuit, where Judge Keith was upheld by a divided court.³⁴ In the majority opinion, written by Judge George C. Edwards of Detroit, the court com-

³⁰ *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971).

³¹ *Id.*

³² *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971), *aff'd sub nom. United States v. United States Dist. Ct. for the Eastern Dist. of Mich.*, 444 F.2d 651 (6th Cir.), *aff'd*, 407 U.S. 297 (1972).

³³ *Id.* at 1079.

³⁴ *United States v. United States Dist. Ct. for the Eastern Dist. of Mich.*, 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972).

mented that "it is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign."³⁵

If American lawyers have learned to characterize American law in terms of the "Mitchell Doctrine," in terms, that is, of an identification of legal validity with political power, it is because of the influence of Blackstone. "Law," Blackstone wrote, "is a rule of civil conduct, prescribed by the supreme power in a state. . . ."³⁶ But, as Judge Edwards' opinion affirming Judge Keith's wiretap decision tried to make clear, appeals to the concept of sovereignty are oddly out of place within the framework of American political and jurisprudential life. Yet, if Blackstone, with his emphasis upon sovereignty, is un-American in this sense, James Wilson is not. Read the following, taken from his decision in *Chisholm's Executors v. Georgia*:³⁷

To the Constitution of the *United States* the term sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves 'sovereign' people of the *United States*: but serenely conscious of the *fact*, they avoided the *ostentatious declaration*.³⁸

Wilson's work, though, has remained largely ignored in spite of the fact that his law lectures marked the first important law course to be established since the inception of the federal government and although his legal credentials were impeccable. Besides having built up one of the largest legal practices in America and having been a leader at the Constitutional Convention as well as a signer of both the Declaration of Independence and the federal Constitution and an architect of the Pennsylvania Constitution of 1790 and one of the original Justices of the United States Supreme Court, his established greatness actually lay in the field of jurisprudence.

One of the reasons Wilson's thought could be helpful in reshaping American jurisprudence is that much of his thinking is developed precisely in terms of his criticisms of Blackstone, whose understanding of the nature of law and legal obligation induces in Wilson an attitude of scorn mixed with anger. We have already seen him say in *Chisholm* that to the "Constitution of the *United States* the term sovereign, is totally unknown. . . ." and in the same place he adds that under the Constitution of the United States "there are citizens, but no subjects."³⁹ Finally, citing Blackstone by

³⁵ *Id.* at 665.

³⁶ See note 12 *supra*.

³⁷ 2 U.S. (2 Dall.) 419 (1793).

³⁸ *Id.* at 454 (emphasis in original).

³⁹ *Id.* at 456.

name, he writes in the same opinion that

. . . a plan of systematic despotism has lately formed in *England*. . . . Of this plan the author of the *Commentaries*, was, if not the introducer, at least the great supporter. He has been followed in it by writers . . . ; and his doctrines have, both on the other and this side of the Atlantic, been . . . received by those who neither examined their *principles* nor their *consequences*. The principle is, that all human law must be prescribed by a superior. . . .⁴⁰

How long, one wonders, will it be before those in America charged with jurisprudential responsibility begin that examination. The fact that the former Attorney-General of the United States could, with only scant popular opposition, attempt to argue the federal government's position on wire-tapping by appealing to the concept of sovereignty makes it clear that it has yet to begin. There is, perhaps, no more timely bicentennial project for the American Bar to undertake.

A start in the attempt to restate an American concept of law might begin with a look at a rhetorical question Wilson asks and that from a Blackstonian point of view makes no sense. "Because I cannot resist," he wonders, "am I obliged to obey?"⁴¹ In other words, simply because someone else possesses a power to enforce his will "am I bound to acknowledge his will as the rule of my conduct?"⁴² Judge Sirica, recall, like Wilson, thought not: "[That the court] has not the physical power to enforce its order to the President is immaterial to a resolution of the issues. . . ."⁴³ Obviously Judge Sirica and Wilson are refusing to define law in terms of the lawmaker's will or to locate in that will the source of the citizen's legal obligations. Blackstone, however, wrote that "the will of . . . one man or assemblage of men is . . . understood to be law" and the citizen's obedience "depends on the maker's will."⁴⁴

One fundamental assumption underlying Wilson's conception of law is his notion (familiar to readers of Aristotle as well) that living in society with one another is not only natural to human beings but necessary to their very existence. If people are to live genuinely human lives, Wilson argues, they need the "friendly assistance of [their]fellows in society;"⁴⁵ and it is from this fact that the institution of law gets both its importance and its dignity. Law is the chief tool for directing and guiding human social relationships in the public order, and the implication is that because of this the overriding purpose of law is to do justice. "[T]he object of all law, common or statutory," a Delaware court held in 1890, "is the establishment and enforcement of justice."⁴⁶

⁴⁰ *Id.* at 458.

⁴¹ J. WILSON, *THE WORKS OF JAMES WILSON*.

⁴² *Id.*

⁴³ See note 8 *supra*.

⁴⁴ 1 W. BLACKSTONE, *COMMENTARIES* 44 (1803).

⁴⁵ J. WILSON, *THE WORKS OF JAMES WILSON*.

⁴⁶ *State v. Williams*, 14 Del. 508, 509, 18 A. 949, 950 (1890).

It is not surprising, then, that the central notion in Wilson's theory of law is what he calls the "publick interest" or the "common good," rather than the idea of "sovereignty."⁴⁷ He insisted on this point both as a professor of law and as a Supreme Court Justice and in doing so he thought he was laying the cornerstone of a uniquely American jurisprudence. Indeed, he thought he had found the key to jurisprudence itself as a science, for, given his understanding of the human person as a social being, he thought it logical to insist that the main function of law lay in directing people to their proper ends as citizens rather than in coercing them into doing the sovereign's will.

The chief value Wilson's theory of law has to the American situation, then, lies not so much in the fact that it accords with the understanding of law that the courts have from time to time acknowledged, but rather in the fact that by utilizing his definition of law one can make a distinction that cannot, Wilson thinks, be made within a Blackstonian framework. This is the distinction, alluded to above, between "power" and "authority"—one that is, more than any other, crucial to the viability of American legal and political life. We have seen how for Blackstone the edges between the two concepts blur because of his idea that the authority of law flows from the "supreme power" in the state, but in Wilson's model of a legal system the authority to legislate originates in the consent of the governed; without this consent the legislator would have at most only the power to enforce his will. He would not, however, have the authority to create legal obligations amongst the citizenry.

What Wilson is saying here becomes clearer when his notion of "consent" is examined, for there are, he says, two acts of consent necessary for the existence of the American legal system. One is that by which the people decided to bestow an authoritative power upon some person or persons so that he or they might then make valid legal rules; the other is the act through which the people willingly agree to act in terms of those legal rules. Thus, Wilson insists, "compulsion will not be received as a substitute for consent. The common law is a law of liberty."⁴⁸

In sum Wilson holds that a person's obligation to do what a law directs him to do, even assuming that law to have been made and promulgated in perfect accord with the technical constitutional requirements, is not created by the fact that the law has an effective sanction attached to it—that is, because the lawmaker has the power to enforce his will; it is created, rather (again assuming the technical constitutional requirements to have been met) by the law's content—that is, by the fact that what the law is directing the citizen to do or refrain from doing is in some sense necessary if the citizen's desired welfare is to be attained. Laws, it was held in *People v. Brown*,⁴⁹ are to be formulated according to the social needs of

⁴⁷ J. WILSON, THE WORKS OF JAMES WILSON.

⁴⁸ *Id.*

⁴⁹ 175 Misc. 989, 27 N.Y.S.2d 241 (Suffolk County Ct. 1941).

the people and are, consequently, as was recalled in *City of Bangor v. Etna*,⁵⁰ more than some "mere will exerted as an act of power."⁵¹

In light of James Wilson's radically American jurisprudence, it is not remarkable that he opposed Blackstone at every turn. The sad thing, perhaps, is that he has not had more influence on the fellow members of his bar down even into the 1970's. "I cannot," he said, "[consider Blackstone] a zealous friend of republicanism. . . ."⁵² That is why he tried, in his writings, in his lecturing and on the bench of his country's highest court, to articulate and defend what he called the "revolution principle"—the notion that because the sovereign power in America resides in the people they may change their constitution and government whenever they please. For this very principle, he adds, is not one of "discord, rancour, or war; [but]of melioration, contentment and peace."⁵³ Because in our time it is being ignored in the law school classroom and subverted in high government offices, it has had to look for its preservation in the streets.

⁵⁰ 140 Me. 85, 89, 34 A.2d 205, 208 (1943).

⁵¹ *Id.*

⁵² J. WILSON, *THE WORKS OF JAMES WILSON*.

⁵³ *Id.*