THE POLITICS of JUSTICE

A STUDY IN LAW, SOCIAL SCIENCE, AND PUBLIC POLICY

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PREFACE

This is a book about the politics of justice in America written at a time when the crises of maladministration in our courts and unethical posture in those who participate in the judicial process have deepened. Believing that the study of law and legal process is much too important to be left exclusively to lawyers, I have approached the subject from a social scientific perspective which, ultimately, I label "juriscience." After introducing the concepts of law, legal process, and social science, I advance the thesis that jurisprudence was the first of the social sciences and, as a precursory discipline, provided the newly emerging social sciences with data, methods, and tools which assisted their subsequent development and for which they became intellectually indebted. I then attempt to show how the modern social sciences have begun to pay off their debt to jurisprudence by answering questions about law and legal process which jurisprudence has left unanswered. Finally, I analyze the legal process as a tool for solving policy problems and attempt to determine whether the social scientific study of questions left unanswered by jurisprudence has as yet produced a juriscience. The study of the interface between law and society is one of the most vital and urgent tasks of the American scholar in the second half of the twentieth century. Perhaps most significantly, this book addresses that interface theme by relating law (as a social policy instrument and normative policy analysis tool) to the policy sciences.

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Finally but foremost my family: to my parents who have given me Life, Love, and Moral Guidance; to my wife, Leslie Koons Louthan, who gives me and shares with me Love, Nourishment, and Dreams; and to my children, Lauren and Mark, who give me Fits (usually but not always of Joy)–I dedicate this book.

THE POLITICS OF JUSTICE

PART ONE

JURISPRUDENCE AS THE FIRST OF THE SOCIAL SCIENCES

The purpose of part 1 is to introduce the concepts of law, legal process, and social science, and to relate law and legal process to the social scientific study of public policy.

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JURISPRUDENCE AND SOCIAL SCIENCE

THE NATURE OF JURISPRUDENCE

The term jurisprudence is used in a variety of ways. In the United States jurisprudence is sometimes used merely as an imposing, polysyllabic synonym for law in general, as when we talk about medical jurisprudence (that is, all of the existing law on medicine). In France *la jurisprudence* is used to identify the course of judicial decisions (what we in the United States would term case law as opposed to constitutional, statutory, or administrative law), and this usage also is now deeply rooted in American practice due largely to Judge Story's three-volume study, *Equity Jurisprudence* (1918), which traced the development of case law in Anglo-American courts of equity. In England jurisprudence is usually used to describe the comparative study of the essential principles of law—enforced written rules—in developed legal systems.[1] This usage too has been imported to the United States where it currently describes the teaching practice in most American law schools. In this book we will employ none of the above, but rely rather upon the original and etymological meaning of the term jurisprudence as the science of law.[2]

Jurisprudence is a particular mode of study, not of a single set of laws or of all the laws of a single state, but of the general idea of law itself. Although this book deals almost exclusively with the American judicial process, we begin with a very broad treatment of jurisprudence which could just as easily serve as an introduction to the study of the judicial process in any other western nation or of a variety of judicial processes

comparatively. We use this broad introductory approach for two reasons: (1) because the author is convinced that the student of American judicial process should have a rigorous grounding in the nature of law in general and its evolution in western civilization; and (2) because it is the argument of this book that jurisprudence is the first of the social sciences and that all modern social science subdisciplines which deal with legal process are indebted to the mother discipline which must therefore be understood. Thus, it would seem that the first order of business should be to define what we mean by law, but the matter is not that simple. We know that law possesses, at least, a dual nature: it is, on the one hand, an abstract set of rules and, on the other, a body of social machinery which functions to secure and maintain order in the community.[3] Or, as Roscoe Pound puts it, the term "law" designates both the legal order (rules) and the means by which the legal order is secured (machinery or process). When we speak of "respect for law" we mean respect for the legal order, but when we speak of "the Roman law" we mean to include as well the machinery by which the legal order is maintained and the process by which justice is administered.[4] The difficulty is that some schools of jurisprudence place an exaggerated emphasis on the first of these meanings, others on the second. In this chapter we will attempt to distinguish between the leading schools of jurisprudential thought and, arriving at an appropriate understanding of the boundaries of our subject, show how the law relates to public policy and why students and scholars in the social sciences must understand jurisprudence to be the mother discipline.

THE SCHOOLS OF JURISPRUDENTIAL THOUGHT

As the science of law, jurisprudence originates with the Greeks, recognizing of course that the word "science" in this context is used in the classical Greek sense and does not include a modern social science component. Nevertheless, we must emphasize that in the works of Plato and Aristotle there is no separation of legal and social theory. In their analyses of social problems, the legal and the political coalesce within the boundaries of the "master science."[5] Their study of man (later to become anthropology), his behavior (later to become psychology and sociology), and his institutions (later to become political science) are inextricably intertwined with their study of law and, in this sense,

jurisprudence originates in Greek philosophy. However, from the vantage point of the late twentieth century, we are able to observe that the designation of a field of inquiry as either philosophy, history, science, or social science shifts and changes in a manner consistent with the broader, underlying trends in intellectual attitudes. Thus, as Pound points out, seventeenth and eighteenth-century scholars tended to think of organized knowledge as philosophy, nineteenth-century scholars as history, and twentieth-century scholars as science. It follows then that "when the philosophical method was dominant, jursiprudence was called a philosophy, when a historical method prevailed it was thought of as history, and under the reign of . . . [the] sociological method it has been considered a science."[6] And, even though the sociological or social scientific approach to the study of man and his institutions (including law) can be found, at least implicitly, in the study of philosophy as developed by the Greeks, it was not until the early nineteenth century when the German historicists and English positivists carved out a distinct sphere of intellectual concerns centered nearly exclusively in the law as a unique phenomenon that modern jurisprudence, mother discipline of the social sciences, first emerged. This is not to say that the leading schools of modern jurisprudence have no intellectual antecedents. The historical jurisprudents were Hegelians; the positivists, though stemming out of utilitarian philosophy, can be traced back further to (at least) Marsilio of Padua's fourteenth-century definition of law as coercive commands enforceable in the courts, and so on. Rather, it is to emphasize that the intellectual heritage of the contemporary student of judicial process and policy-making can be directly traced no further back than to about the year 1800. That is where we will begin.

The Historical School. Prior to the nineteenth century most legal thought took place either as a branch of theology or, at the broadest, within the relatively narrow confines of natural law philosophy. The emphasis was clearly upon individualism, rationalism, and universalism. The historical school of jurisprudence, first of the modern schools, was a vigorous reaction against this past. Founded by Friedrich Savigny (1779–1861) in 1814,[7] the historical school grew out of the surge of nationalism which swept across Western Europe at the end of the eighteenth century. Hence, rather than the individual, it emphasizes the spirit of the people or Volksgeist; rather than reason, it emphasizes the history of social experience as the unchallengeable basis for the legal order; and rather

than universalism, it emphasizes the unique nature of a people's legal system.[8] Specifically, Savigny's historical school insists that in order to understand law one must first examine its source and only then its outward manifestations. While the customs of a community and the commands of its officials may constitute evidence that law exists, they do not represent its essence. Its essence lies in its gradual, organic, unconscious development which evolves like the language of a people and, like language, it is a singular synthesis of a nation's genius. Simply put, law is that instinctive sense of right possessed by every race.

The great strength of the historical school is its insistence that law does not exist in a vacuum and must be considered in direct relationship to the social milieu in which it develops and of which it is a part. The English historical school (in distinction from Savigny's German school) founded by Sir Henry Maine (1822-1888) has kept this theme alive, and such writers as Pollock, Maitland, and Holdsworth have subsequently demonstrated the close connection between English social history and the evolution of the common law. However, the historical school has several shortcomings. First, although some laws may be the product of unconscious growth, others clearly result from conscious efforts of various kinds. Years of conscious struggle, for example, have produced the abolition of slavery, the freedom of landed property, and much of modern trade-union law. Conscious imitation plays a large role in legal evolution as evidenced by the fact that much of the Roman law was intentionally borrowed from others. And conscious refinement of legal rules is practiced by judges who extend the law far beyond any original instinctive sense of right. Second, what Savigny calls the outward manifestations of law, customs and commands, are in fact not always based on a sense of right but sometimes on the demands of dominant interests, often even minority interests (the institution of slavery, for example). Third, the historical school does not allow for an instrumental view of law—law as an instrument for social change—because social legislation can succeed according to the historical view only if it is in accord with the instinctive sense of right of the race to which it is addressed. This leads the historical school to the normative prescription that conscious law reform be discouraged and to the normative rejoinder of its critics (such as Roscoe Pound) that the school is guilty of "juristic pessimism."[9] Fourth, even if we were to set aside the shortcomings presented above in order to emphasize the historical school's strength we would find that in the twentieth century when change is rapid and values are easily

uprooted the historical school's approach is extremely difficult to apply.

These weaknesses necessarily invite reaction and criticism. For some legal scholars the historical school's principal error is its inevitable overbreadth. By emphasizing the social milieu in which law evolves, it creates a jurisprudence with such broad boundaries that the student dissipates his energies over too wide a front. This reaction gives rise to the positivist school. For others the historical school's insistence upon a theory of unconscious growth is its principal error and requires a rebuttal producing evidence that the life of the law is a process of conscious struggle and strife, a reaction giving rise to the sociological school. We will examine these two schools next and in that order.

The Positivist School. John Austin (1790–1859) is generally regarded as the founder of the positivist school.[10] Finding the boundaries of jurisprudence too broad and works on jurisprudence in a muddle, Austin adopts a method of exclusion. He confines jurisprudence to the study of law as it is, leaving the question of what law ought to be to others. Although a disciple of Jeremy Bentham and himself an enthusiastic utilitarian, Austin argues that the study of the ideal forms of law should be left to the "science of legislation," that although the context of law can be examined from a utilitarian point of view, utility is put in legal form by the "lawmaker" and this process is not a fit subject for jurisprudence. The broadest approach Austin is willing to take is to say that, simply put, law is the command of the sovereign. It is "a general rule of conduct laid down by a political superior to a political inferior."[11] In short, it is the rules in force. Austin is not unmindful of the role played by a variety of social forces in shaping the law but his intent is to make a sharp distinction between positive law (rules in force) and such other social rules as custom, ethics, and morality. This he accomplishes by emphasizing the notion of command which requires a threat of sanction by a determinate person or persons if the "law" is to be obeyed. For this reason, Austin does not regard international law as law at all because there is no determinate sovereign whom the nations of the world customarily obey. Hence, what is commonly called international law, Austin labels nothing more than positive international morality. Thus, for Austin, the boundaries of jurisprudence do not extend beyond the authoritative precept of developed legal systems; the content of jurisprudence is "the pure fact of law" excluding all reference to ideals;

the method is to analyze these rules in force and the objective is to reach a universal science of law. To define a law and analyze its logical relationship to other laws is to define law.[12]

Positivism has easily found its way to the United States. American writers have not found it difficult to replace the king of England in Austin's formulation with the concept of a "popular sovereign" and to replace the concept of command with the notion of the "public will," whereby the people elect legislators who make laws that it is the duty of judges to enforce in their decisions. The positivist lawyer's conceptualization of the law is best described by Wolfgang Friedmann as follows:

> The [positivist] lawyer . . . is not concerned with ideals; he takes law as given matter created by the state, whose authority he does not question. On this material he works, by means of a system of rules of legal logic, apparently complete and self-contained. In order to be able to work on this assumption, he must attempt to prove to his own satisfaction that thinking about the law can be excluded from the lawyer's province. Therefore, the legal system is made water-tight against all ideological intrusions, and all legal problems are couched in terms of legal logic.[13]

Although the positivist approach successfully narrows the boundaries (and thereby the tasks) of jurisprudence to more nearly manageable proportions, it tends to mistakenly magnify the inert nature of legal rules and make insufficient allowance for the creative element in the law. Law is an organic body of rules with an inherent power of growth, not a static set of precepts. It develops by taking emerging values from the community which allow it to adapt to changing popular standards of right and wrong, not by logic alone. Its content is continually derived and enunciated and must be viewed in relevant application. It does not come to us ready-made. The judge's decision is sometimes based on his "inarticulate major premise" or "social picture" of what values lie behind the law.[14] It is not based on merely analysis and deduction. Some of these problems are dealt with by the sociological school and its natural offspring, the realist school.

The Sociological and Realist Schools. Rudolf Von Jhering (1818-1892) in his *The Struggle for Law* (1879) emerges at once as the leading critic of the historical school and precursor of the sociological school. Jhering argues that law does not develop organically as does language but through the most violent struggles which often last for centuries. "All the law

in the world has been obtained by strife. Every principle of law . . . had first to be wrung by force from those who denied it. . . ."[15] In this sense, as observed earlier, Jhering is a harsh critic of Savigny's historical school. At the same time, he lays the groundwork for the sociological school by insisting that jurisprudence concentrate not on the definition of law (either as a sense of right or as an authoritative command) but on the interests which the legal system protects and on how it protects them.

> And hence it is that Justice which, in the one hand, holds the scales in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of law. The scales and the sword belong together, and the state of law is perfect only where the power with which Justice carries the sword is equalled by the skill with which she holds the scales.[16]

Jhering is the precursor of the twentieth-century sociological school because unlike the other nineteenth-century writers we have reviewed he is not nearly as concerned with the content and conceptualization of law as he is with its actual operation or functioning in society.

Indeed, the basic tenet of the sociological school is that one cannot understand what a thing is unless he understands what it does.[17] Thus, for Roscoe Pound (1870-1964),[18] generally considered the founder of the school, law is not merely a command or an abstract sense of right but "a process of balancing conflicting interests and securing the satisfaction of the maximum of wants with the minimum of friction."[19] The emphasis is clearly on process not content (customs, commands, codes) because, as Eugen Ehrlich has observed, "to attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond."[20] Not what the courts say but what they do and how they do it is the proper subject of jurisprudence. And further, argues Pound, the positivist's conception of a mechanical judicial process in which the courts operate with adding-machine accuracy is not how they do it. Courts do consider such questions as those of convenience and social interest and so must jurisprudence. It must be emphasized, however, that for the sociological school, when courts perform such functions which relate to the ends or purposes of law they do not rely on abstract ideals or divine guidance but make tentative compromises valid only for the present generation based on particular and contemporary community standards. Pound describes the program of the sociological school as follows:

Beginning with the proposition that the legal order is a phase of social control and to be understood must be taken in its setting among social phenomena, [we] urge study of the actual social effects of legal institutions and legal doctrines; sociological study in preparation for lawmaking; a sociological legal history in which the social background and social effects of legal precepts, legal doctrines and legal institutions in the past shall be investigated; and above all study of how these effects have been brought about.[21]

Pound's studies of the actual functioning and effects of law lead him to find over and over again that law in action is quite commonly different from law in the books.[22] This discovery has in turn led a group of scholars, usually called the realists, to branch off from the sociological school and to devote their energies to documenting the element of uncertainty in the law. The realists regard Pound has having come face to face with reality but as having failed to appropriately apply his discovery to the study of law. Oliver Wendell Holmes is occasionally regarded as the intellectual ancestor of the realist school because of the fundamental skepticism which weaves its way through all of his writings. "The life of the law," he writes, "has not been logic: it has been experience."[23] By this epigram he means to express his studied observation that, due to a variety of factors (most notably the personal characteristics of the judge, his intuitions and biases), there is great uncertainty and confusion in the law. Hence the law cannot be meaningfully treated through the use of the syllogism as if it were nothing more than a series of axioms in a book of mathematics. It must be treated rather as the history of judicial decisions; decisions based on "the felt necessities of the time, the prevalent moral and political theories, [and] intuitions of public policy."[24] Thus, for Holmes, when it comes to the study of the law, a page of history is worth a volume of logic. However, for Holmes, realism is not a method; it is merely a mood or spirit, specifically, the temperament of turn-of-the-century pragmatism.[25] For this reason, not Holmes but Benjamin Cardozo is properly considered to be the bridge between the sociological and realist schools. Although Cardozo's work taken as a whole, like Holmes's, fits much more neatly into Pound's sociological school than it does into the realist school, his emphasis on psychology and his use of psychological realism in the study of the judicial method (why judges in fact decide cases as they do)[26] is the most enduring theoretical contribution of the sociological/realist approach and is, without question, the forerunner of judicial behavioralism in political science. (Cardozo's theory of judicial