Schools of Jurisprudence

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Dominae Nostrae a Lacu
Omnibusque apud eam
Ventis atque Venturis
Jus Discere aut Docere
Ejus sub Aegide

Acknowledgments

Of the books I have used in writing this, three deserve special mention. *Jurisprudence: Text and Readings on the Philosophy of Law*, by George C. Christie and Patrick H. Martin (2d ed. St. Paul, West, 1995), *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism*, by Robert L. Hayman, Jr., Nancy Levit, and Richard Delgado (2d ed., St. Paul, West, 2002), and *Lloyd's Introduction to Jurisprudence* by Lord Lloyd of Hampstead and M.D.A. Freeman (6th ed., London, Sweet & Maxwell, 1994) were always within reach and much of the time open. The thought and erudition that have gone into assembling and criticizing the material deployed in these works have brought home to me with particular force the old saying about standing on the shoulders of giants.

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Introduction

My father used to tell about a course he took at Purdue before he dropped out in 1917 to join the army. The students were required to take a locomotive apart, lay out all the parts in a row, and then put the whole thing back together again. My father did not have much to do with locomotives for the rest of his life, but he retained and passed on the idea of understanding a complicated mechanism by taking out, examining, and putting back component parts one by one. That is what I propose to do here with the bodies of doctrine that make up the various schools of jurisprudence.

These schools show a good deal of variety when you look at them, but they are all made up of component parts chosen from the same array of available materials. Legislators make laws. Lawyers advise clients and argue their cases. Judges make decisions and sheriffs enforce them. The ways of doing all these things, the reasons for doing them one way rather than another, and the consequences of doing them constitute the subject-matter of jurisprudence. The intellectual resources available for the work are not unlimited, and the different ways people have used these resources cluster into schools. By separating, examining, and classifying the different elements used by the different schools, we should be able to compare and classify the schools themselves, and arrive at some idea of the strengths and weaknesses of each.

Jurisprudence is the legal profession's own account of what it is about. It is sometimes equated with the philosophy of law and, like other practical disciplines, it has a philosophical component. But it has to deal with important questions that are not philosophical. Can a corporation be liable for intentional torts? What is the role of legislative history in interpreting statutes? Should we adopt a

no-fault system of compensation for automobile accidents? Should there be a graduated income tax? An account of law that addresses such questions as these will necessarily differ from the one a philosopher would give.

Before anything else, what the legal profession is about is people intervening in other people's affairs, and being supported by the power of the state in doing so. As Justice Holmes put it in his famous essay, *The Path of the Law*:

> The reason why [law] is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.[1]

There is more to it than that, but there is at least that much to it. As an academic discipline, jurisprudence is unique in the extent of its effect outside the academy. Lawyers and judges have the state's power of intervention and coercion to deploy, and jurisprudence studies the considerations they take or ought to take into account in deploying it. We are not surprised to find presidential candidates telling us—in a rudimentary way to be sure—what school of jurisprudence they will draw on in making their judicial appointments. It is these schools, then, that I will try to present systematically here, by first laying out the component parts that are available for constructing a jurisprudential doctrine, and then showing which parts the different schools use and how they put them together.

The component parts come in three main categories. The first includes all the elements in what I will call the internal account of law—law considered in itself, what it is, what it does and how it does it. If I am practicing law, what am I practicing? If I wish to be a law-abiding citizen, what do I have to abide? If I am engaged in law enforcement, what am I enforcing? If I am a lawmaker, what

1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

do I make? If a society is under a government of laws and not of men, whom or what is it under? Then, if we set law a task, how does it go about accomplishing the task? How can we hope to prevent identity theft or provide prescription drugs to the poor by passing laws on the subject?

The second category consists of the "law and ..." components. Law is embedded in many ways in the texture of life, and life is embedded in many ways in the texture of law. It is quite natural, therefore, that people who reflect on law should look to other disciplines to fill out the texture. In my young days, the social sciences were favored. Hans Zeisel and Harry Kalven were embarked on their monumental study of the American jury.[2] David Riesman, lawyer turned sociologist, author of *The Lonely Crowd*,[3] was lecturing to law school audiences, and the Dean of the law school where I first taught laid on a series of conferences between our faculty and members of the Sociology Department, who showed us how we could use their discipline in our work. Some decades later, economics, always a contender, seemed to take first place. Major law schools added full time economists to their faculties, and other law schools adjusted their hiring to make sure the subject was covered.

A rich variety of other disciplines have also made their appearance in the legal academy, some briefly, some more permanently, some peripherally, some centrally at least in aspiration. Some of these disciplines have been brought in by their own proponents; others by legal scholars seeking to expand their horizons. Thus Stanley Fish the postmodern literary critic, Stanley Hauerwas the theologian, and Carol Gilligan the psychologist all appear in the Directory of Law Teachers, presumably imparting their respective disciplines to law students. Among academics who consider themselves primarily law people, my friend and longtime colleague, Tom Shaffer has freely drawn on psychologists, philosophers, theologians, and novelists to flesh out his vision of the law,[4] and my friend

2. Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966).

3. David A. Riesman, The Lonely Crowd (1950).

4. *See, e.g.*, Thomas L. Shaffer, American Legal Ethics: Text, Readings, and Discussion Topics (1985).

John Noonan, in his long career as both scholar and judge, has put law and history together in numerous ways, including a chapter on "The Alliance between Law and History" in one of his books.[5] The list of disciplines that interact on occasion with the law is a long one.

Values constitute the third category of components. These include everything people have hoped to accomplish by making and enforcing laws. Law is a tool, or a set of tools if you like. What you think of it will have to depend in part on what you want to do with it. Obviously, different people will have different values. But the differences are not so all-embracing as to preclude discussion of which values are suitable for legal implementation in a community where people live together on terms of mutual respect. Many of us believe there is a common human nature underlying all the values that people seek to implement. But even without such a belief, there will be practical, historical, or emotional ties holding a community together. Once a few wildly utopian or clearly evil values have been ruled out, the ones that remain can be organized, classified, talked about, and assigned their places in the community's law.

I will devote the first three chapters to these three categories of components. Then I will begin examining how the different schools put the components together.

5. John T. Noonan, Jr., Persons and Masks of the Law 152–67 (1976).

I

The Internal Account

By the "internal account," I mean the account of what law is considered by itself, independent of anything introduced into the enterprise from without—the subject of the next chapter—or of anything one might hope to accomplish with it—the subject of the following chapter. I will try to do this in terms of Aristotle's "four causes," which have been used for a good many descriptive purposes since he set them forth in the fourth century BC.[1] The causes in question are:

> The efficient cause—what brings a thing about,
> The material cause—what it is made of,
> The formal cause—what makes it what it is, and
> The final cause—what it is for.

When we put these together, we have a fairly complete account of whatever it is we are considering.

Let us see how this works with a fairly simple object, say a ceramic pot. Its efficient cause is the potter who makes it. Its material cause is the clay that he uses, and the glaze he puts on it. Its formal cause is its design: I suppose it would have to be an impermeable object with a central cavity, or it would not be a pot. Its final cause is to hold liquids. Note that in this application of the causes, what I am calling an internal account, we do not consider the different disciplines that contribute to the potter's knowledge of his trade—the physics of firing, the chemistry of the glaze, the mechanics of the wheel. Nor do we consider what liquids one might want to put in his pot and why. These questions are analogous to

1. Aristotle, Metaphysics, bk. 5 pt. 2.

questions of the use of other disciplines in law and questions of the values to be served by law—questions I am leaving to other chapters.

The four causes of law, as I see them,[2] are these:

1. The efficient cause is society. Law comes about as people who live together develop and articulate the terms on which they are to do so.
2. The material cause is the means of social control—anything from the electric chair to the raised eyebrow that can be deployed or threatened to get people to behave in socially acceptable ways.
3. The formal cause is institutions and processes, courts, legislatures, administrative agencies, and whatever else makes for the orderly application of social controls and insures that like cases will be treated alike.
4. The final cause is people. Those who work with the law always have something they want other people to do or refrain from doing, or something they want other people to get, to keep, or to give up.

A. Society, the Efficient Cause

Law, like language, seems to make its appearance whenever people live together in some kind of community. It seems to be a necessary component of any culture. Anthropologists have regarded some cultures as "pre-legal," but one way or another, they all have an understanding of the terms on which they are to live together, and a way of drawing on that understanding for application to questions that arise. Only by an artificial limitation of the term can we say of any such understanding that it is not law. On the other hand, it is natural for more developed cultures to subject such understandings to reflection and refinement. They come to be articulated in statutes and precedents, which are studied in their turn

2. *See* Robert E. Rodes, Jr., The Legal Enterprise 3 (1976).

by people specialized to studying them. It seems to be natural also for the articulation and to some extent the study to be entrusted to particular persons with authority to bind everyone involved to a particular version of the common understanding. In short, where there is law, there is a community held together by a common culture, a common understanding of the terms under which they are to live together, and there is a government, a set of people with authority to articulate that understanding, clarify it if need be, revise it to meet new situations, and put it into effect.

I believe that both elements, community and government, are necessary to a developed legal system. It is all very well to say that law is an emanation of the spirit of the people, the so-called *Volksgeist*,[3] but there has to be a government to articulate it and put it into effect. And it is all very well to say that law is a set of pronouncements from some person or persons in authority, but for such pronouncements to have the force of law, there must be a pretty general consensus in the community for giving them that force.

I suppose there is some question whether people living together in peace are necessarily a community. It often seems that without a common tradition, a common experience of history, the living together will be nothing more than an armed truce. In recent decades, we have seen examples all over the world of ethnic and religious groups flying at each other's throats as soon as the restraint of a powerful government is removed. In such cases, how can we assign any part in the formation of law to a *Volksgeist*? There would seem to be no *Volk*.

Certainly some communities are more homogeneous than others, and some pluralistic communities are more profoundly committed to their pluralism than others are. But even the most fragmented society cannot have a legal system unless there is at least a passive acquiescence in its being in force. A culture of fear, mistrust, and surly acceptance is not much of a culture, but it is still a culture. The community constituted by such a culture will

3. See the discussion of the Historical School, *infra* pp. 117–21.