SOCIAL CONTROL THROUGH LAW

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ROSCOE POUND

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THE MAHLON POWELL FOUNDATION

MAHLON POWELL—1842–1928
WABASH, INDIANA

Extract from the last Will and Testament of Mahlon Powell:

Having entertained a desire for many years to assist in the cause of a higher education for the young men and women of our state and nation, and to that end provide a fund to be held in trust for the same, and to select a proper school or university where the same would continue in perpetuity, I will, devise and bequeath all of the real and personal property that I possess and of which I die seized to the Trustees of Indiana University, Bloomington, Indiana, to be held by them and their successors in office forever, the *Income* only to be used and applied in the support and maintenance of a *Chair* in *Philosophy* in said institution, and to be dedicated and forever known as "The Mahlon Powell Professorship in Philosophy" of said University.

In accordance with the provisions of this bequest, the Trustees of Indiana University have established a Chair in Philosophy on The Mahlon Powell Foundation. Each year a Visiting Professor will be invited to fill this Chair. The sixth lecturer on The Mahlon Powell Foundation is Roscoe Pound.

HERMAN B WELLS
President, Indiana University

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I

CIVILIZATION AND SOCIAL CONTROL

WILLIAM JAMES is reported to have said that the worst enemies of any subject are the professors thereof. In saying this he had reference to practical activities such as medicine and law. In these the practitioner is in constant contact with the facts of life and of nature. He arrives at his ideas from experience and must constantly revise his ideas and recast his theories to meet the facts to which they must be applied. The professor, on the other hand, takes facts and life and nature from the relations of others and assumes them as something given him. He generalizes from them and formulates conceptions and theories from which he deduces further conceptions and theories, and upon them he builds a body of teaching which is obstinate, resistant to the facts of life and nature and very persistent, and seeks to make life and nature conform to his theoretical model. There is a warning for us who are busied

with the social sciences in this dictum. To speak only of my own special field, it is certainly true as we look back that the judges and practitioners of fifty years ago were well in advance of the jurists and teachers in what have proved to be the significant movements in law. Everywhere the science of law lagged behind the actual course of legislation and judicial decision. So far as it had practical effect it obstructed. Most of what we now complain of in the judical decisions as to social legislation in the last generation represented what was taught as the up-to-date science of jurisprudence. The pressure of unrecognized, partially recognized, unsecured, or insufficiently secured interests often put the actual law of the nineteenth century well in advance of the juristic theory of the time.

There are two elements in the body of precepts which make up a system of law, an imperative element and a traditional element. The former is the work of the lawmaker. The philosopher commonly offers him guidance. But he is likely to think of himself as invested with a power of command. The latter is the product of experi-

ence. At Rome it grew out of the experience of jurisconsults in answering questions as to actual controversies litigated in the forum. In our law it has grown out of experience in the decision of cases in the courts and the endeavor of judges to find in recorded judicial experience the principles of deciding new questions arising in concrete controversies. Thus we have law as command and law as ascertainment and formulation of the just on the basis of experience. Each seeks to establish just precepts. Each, therefore, is governed by some ideal. In the eighteenth century, and with us in the fore part of the nineteenth century, the ideal was provided both for legislature and for judge by the theory of natural law, a theory of a body of ideal precepts of universal validity for all peoples, all times, and all places, derived from ideas of what an ideal man would do and would not do, would claim and would concede as the claims of others, and arrived at by pure reason.

Philosophy was in its heyday as the guide of law in the reign of natural law both in the classical era of Roman law and in the law of Europe and America in the seventeenth and

eighteenth centuries. Every law book had a philosophical introduction, and great acts of legislation often had a philosophical preamble. But, apart from philosophical difficulties with the theory, natural law failed to maintain itself as a workable instrument of making and finding the law. While it professed to be ideal and universal, derived from universal reason, it was in fact, as I have been in the habit of putting it, a positive, not a natural, natural law. It was an idealized version of the positive law of the time and place so that in practice the law was made to provide the critique of itself. For example, when the British set up a court at Penang and had to administer justice to a community which had no law, it was held that the court was to be governed by natural law. But when Lord Westbury in the Judicial Committee of the Privy Council came to apply natural law to an appeal from such a court, it turned out that the universal natural law was the same even in details as the law of England.

In the latter part of the nineteenth century, with the breakdown of natural law, we sought, particularly in the English-

speaking world, to get on without philosophy. There was the fact that certain precepts were applied by the courts and had behind them ultimately the sheriff and his posse. They had received the guinea stamp of the state, and were backed by the force of politically organized society. Here was something we could tie to. These precepts were the pure fact of law. Nothing that did not have this guinea stamp and was not backed by force was to be considered by the scientific jurist. But we had to learn from the courts and the practitioners that this pure fact of law was an illusion. They could not ignore an ideal element in law even if the jurist had thrown it out. Whenever they were called on to choose between equally authoritative starting points for reasoning, whenever they were called on to interpret the text of a legal precept, whenever they were called on to apply a standard to conduct, the courts went outside the jurist's pure fact of law and adjusted their determination to an ideal. Thus natural law had to come back again at the beginning of the present century, though not always with that name and not this time as giving us a

universal code of ideal precepts. Its task now was not to give us an ideal body of universal legislation but to give us a critique of the ideal element in the positive law. Even if absolute ideals could not be proved, it could ascertain and formulate the social ideal of the time and place and make it a measure for choosing starting points for reasoning, of interpretation, and of applying standards. As it was put, we could have a natural law with a changing or a growing content.

Thus there came to be a revival of philosophy of law in the fore part of the present century. About the same time sociology, the science of society, founded by Comte a hundred years ago, had made its place among the social sciences and a sociology of law sprang up alongside of social philosophies of law. But here, too, the teachers have been going their way with too little knowledge of the problems with which the administration of justice has to wrestle and often with too little grasp of the experience developed by reason which is formulated in the traditional element of legal systems. Hence we have had to develop a philosophi-

cal science of law, a philosophical jurisprudence, and a sociological jurisprudence. We call on philosophy, ethics, politics, and sociology to help, but to help in what are regarded as problems of jurisprudence. We study law in all of its senses as a much specialized phase of what in a larger view is a science of society.

Philosophical juristic theories have been worked out as solutions of particular problems of a time and then put in universal form and made to do service for all the problems of the legal order everywhere. What we require is not a philosophy of law that seeks to force law into the bed of Procrustes of its system, nor a sociology of law that runs to methodology and seeks to justify a science of society by showing that it has its own special method by which then all the phenomena of social life are to be tried, but a sociology that knows how to use philosophy and a sociological jurisprudence that knows how to use social philosophy and a philosophical sociology.

Looking back over forty years of the present century we see that much has been accomplished. Stammler revived what the

French call juridical idealism. If he did not give us the solution he showed us the problem. He sought to make us conscious of the ideal element in the positive law and to construct a theory of it, where nineteenth-century natural law had sought a critique; just as Kant before him had sought to establish principles of lawmaking where his predecessors had sought to find a universal code. Duguit gave us a theory of an urban industrial society of the beginning of the present century as a theory of the ideal element of the law of today. His is a sociological natural law. He conceived of everything in law as deriving its validity from and to be judged by a fundamental principle of right-and-law. Following Comte he sought to arrive at it by observation and verify it by further observation. In fact, he did his observing in Durkheim's book on the division of labor in society. Duguit's vogue is not what it was. But he has had a useful influence. Gény showed us the importance of the technique element in positive law and gave us a Neo-Scholastic theory of the ideal element. His *Science et technique en droit privé positif* has by no means been appre-

ciated as it deserves. It deals with what seems to me a fundamental problem of jurisprudence, namely, the measure of valuing interests, and with two elements of law which the analytical jurisprudence of the last century ignored, and treats them in an original and suggestive way. Hauriou gave us a theory of the organizations which are significant agencies of social control in the society of today. At bottom, his theory, a Neo-Scholastic institutionalism, seems to me an attempt to understand and construct a theory of the labor organizations which are the most active groups in the society of today, and in the English-speaking world have been coming to be the dominant element both in employing extra-legal force in a time when the state was supposed to have a monopoly of force and in harnessing the force of politically organized society to their purposes. The multiplicity of what he calls institutions—things established with a continuous existence apart from any persons for the time being, certain of whose activities are organized without their personalities being included, and setting up organs of authority and procedures of their own—this

multiplicity of institutions, each carrying out its own idea, is to replace the crowd of individuals, each exerting his will in a never-ending conflict or competition, actual or potential, which Kant sought to order. It is significant that here we have a theory which finds the unit elsewhere than in the individual man, and that this theory has been very generally accepted by writers on public law at a time when that subject is crowding private law even in the English-speaking world in which the private-law view of public law has been traditional. Before this Ehrlich had shown us the significance in society of relations and groups and associations and of their inner order as the basis of the legal order. His idea of this inner order of relations and groups and associations should be compared with what the economic determinist sees as imposition of the will of the socially dominant class. His conception of a complex of social facts involved in the relations and associations which go to make up human society deserves to be compared with Duguit's observed and verified fact of social interdependence in an economic order. His idea of the reaction of living law, as he

calls it, upon generalizations and formulas, and of precepts and formulas which no longer reflect the inner order of significant relations and associations, should be compared with the view of the skeptical realists who can see nothing but individual behavior tendencies of individual judges. He made a significant beginning of a sociological comparative law or a comparative sociological jurisprudence which is palpably developing.

It is instructive to compare Ehrlich and Hauriou with ideas which obtained in antiquity as well as with the ideas of the nineteenth century. The Romans seem at one period to have thought of the individual man as a group. They could conceive of a one-individual household. One might be *paterfamilias*, patriarchal head of a household consisting of himself only. This, of course, goes back to a kin-organized society in which the kin group was the unit, from which the society of antiquity was emerging or had but lately emerged. In a society in which the individual is the unit we have been brought up to think of a group or association as an aggregate of individuals;

and in law we had thought of an association as an artificial individual. It was as hard for the last century to think of a group or association as it was for antiquity to think of a single individual. That we must think once more of relations and groups and associations, Gierke and Ehrlich and Hauriou make us realize. Indeed, Marx's theory of class struggle set thought of another type in the same direction. Durkheim's sociology and Duguit's doctrine of social interdependence through division of labor, where individual independence and the significance of the free individual will had been the central idea of the science of law in the nineteenth century, point also toward the rise of what might be called an institutional order, something with which the Italian idea of the corporative state, in which the legal unit is not the individual but the occupational group, must also be compared. All of these, from different standpoints, are theories of the urban, industrial society of today put universally.

These attempts to draw for us an accurate picture of society as it is must necessarily precede the philosophical critique of the received ideal which is part of the positive