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PRAGMATISM AS A PHILOSOPHY OF LAW

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FORMERLY the case-hardened lawyer coldly rejected the suggestion that legal philosophy might aid him in the practice of the law. His younger brethren in the law schools caught his look of disdain and resisted the entry of philosophy of law as a course of study in preparation for the bar. But times are changing. It is becoming quite respectable to discuss the nature and the origin of law, its ends and functions. Law schools are adding such studies to their curricula, and the progressive lawyer is becoming aware of the fact that the courts are paying tribute to the law-teacher and the student of juristic science.[1] The excursion into this new field of legal development promises dividends in satisfaction and success amply repaying for the time spent. Judge Cardozo of the New York Court of Appeals pleads the case for philosophy of law in these stimulating words:

> You think of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. . . . You think that there is nothing practical in a theory that is concerned with *ultimate conceptions*. That is true perhaps while you are doing the journeyman's work of your profession. You may find in the end, when you pass to higher problems, that instead of being true that the study of the ultimate is profitless, there is little else that is profitable in the study of anything else.[2]

It is precisely this failure of the lawyer to search for "ultimate conceptions" and his readiness to rest content with a given rule or principle, without any analysis of its merit or demerit, that has aroused the current resentment and criticism of the law in extra-legal circles. Law is pictured as a conglomeration of dry-as-dust precedents, immersed in the mists of bygone days and unable to penetrate or solve the vital social and economic problems of the present time.[3]

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[1] Cardozo, *The Growth of the Law* (1924) 11.

[2] *op. cit.*, 23. Italics used throughout this paper are the present writer's.

[3] H. G. Wells, *Social Forces in England and America* (1914) 59.

The truth is that the criticism of the law, while often intemperate and extreme, contains a degree of validity. The law is a learned profession, but it is also a "bookish" calling. There is a tendency to treat the law as something which is apart from life. Its study embraces the absorption of precedents from the reports "in point" and "on all fours" with the problem under consideration. Victory depends upon the ability of the attorney to smother his opponent by the sheer weight and number of similar cases. This process continues to be the prevalent method of deciding cases, and properly so. The ardent social reformer in his attack upon the law frequently misses the imperative need of stability and certainty in the legal order. But the lawyer and the judge are meeting the critics half-way by the concession that the law must combine the elements of flexibility and growth with the basic ingredients of rigidity and permanency. In the old order the rule of *stare decisis* was sometimes driven too far. Judges were prone to exaggerate the finality of former decisions of their courts. A mistake once rooted in the reports was indelibly fixed in the law although the court regretfully confessed that the rule was objectionable.[4] There was often the manifest inclination to drive "a maxim or a definition with relentless disregard of consequences to a dryly logical extreme."[5]

Out of this rigid adherence to past authorities there is beginning to emerge a more conciliatory attitude on the part of the judiciary, a gradual readjustment of the controlling principles in the light of the panoramic changes of social and industrial relations. This movement, if carefully guarded and moderately exercised by the judges, may be commended. The novelty of a legal question often necessitates the departure from the lines of strict rule and principle to accomplish justice.[6] Again more mature deliberation may enable the court to admit the error of its former ruling.[7] Paralleling this recent enlargement of

[4] "If this were *res integra,* and there were no decisions on the subject, there would be a great deal of weight in the defendant's objection." Kenyon, C. J. in *Smith v. Kendall* (1794) 6 Term R. 123. *Clerke v. Martin* (1702) 2 Ld. Raym. 75; *Malardy v. McHugh* (1909) 202 Mass. 148, 152.

[5] Cardozo J., *Hynes v. N. Y. C. R. R. Co.* (1921) 231 N. Y. 229, 235; Wormser, The True Functions of Schools of Law, address before Bronx Bar Ass'n (June 8, 1923).

[6] *Hynes v. N. Y. C. R. R. Co.,* note 5; *Mitchell v. Standard Repair Co.* (1923) 275 Pa. St. 328.

[7] *Klein v. Maravella* (1916) 219 N. Y. 383; *People v. Schweinler* (1915) 214 N. Y. 395; *Epstein v. Gluckin* (1922) 233 N. Y. 490; Chief Judge Hiscock of the New York Court of Appeals, in an address before the Bar Ass'n of New York City, recently enumerated many cases which reversed or overruled earlier New York cases. See Hiscock, Progressiveness of New York Law, *New York Law Jour.,* Sept. 5-6, 1924. Cf. Cardozo, *op. cit.,* note 1, *supra,* 99-101. 41-42.

judicial discretion, and strongly supporting this endeavor of the judges to throw off or reduce the binding force of principles, we may note the arrival of "pragmatism[8] as a philosophy of law; for the adjustment of principles and doctrines to the human condition they are to govern rather than to assumed first principles."[9] Due recognition must be accorded to the accomplishments of the so-called sociological school of jurisprudence before attempting the consideration of its limitations and its weaknesses. Pragmatism with its emphasis upon the needs of mankind deserves a share of credit for its attack upon the complacency of the law in the face of cataclysmic changes in the social order of our time. With telling force the sociological jurists showed the futility of deciding twentieth-century cases by learned citations from the Yearbooks. Ours is a compact, urban, industrial community with a resultant train of novel legal questions unknown to the common law of England or even of America in colonial days.

The advent of the automobile, the aeroplane and the radio—to mention but a few modern inventions—is accompanied by numberless problems of law which defy adequate and just settlement by the simple citation of precedents. The hoary old maxim, *cujus est solum, ejus est usque ad coelum,* which purports to give me a property right to the sky, slips trippingly from the lips of the beginning student in the law. Yet tested by the attempt to recover from the "trespassing" aviator who wings his flight over my land, the rule withers and shrinks in the face of this modern engine of the air.[10] The analogies drawn from the

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[8] "Pragmatism" is a term of comparatively recent origin in philosophy. It was first used in print by William James in 1898.

"Pragmatism—a philosophical method and its corresponding doctrine which holds that the *practical* effects, or way they work, are the *sole available criteria for the truth of human, moral and religious ideals.*" Funk and Wagnall's Dict., *sub. tit.,* Pragmatism. A more particular development of "pragmatism" will be found in later parts of this article.

[9] Roscoe Pound, Mechanical Jurisprudence, 8 *Col. Law Rev.* 605.

Dean Roscoe Pound of the Harvard Law School must be given first place among American juristic writers in stressing the advantages of "pragmatism as a philosophy of law."

[10] Cf. Uniform State Aviation Act, Sect. 4: "Flight in the air over the lands and waters of this State is lawful unless at such a low altitude as to interfere with the existing use to which the land or water or the space over the land or water is put by the owner. . . ."

This section presumably attempts to codify the existing common-law rule; otherwise it would be unconstitutional since it would constitute a taking of property without compensation.

McCracken, Air Law (1923) 57 *Am. Law Rev.* 97; 4 *Am. Jour. Int. Law* (1910) 97; 71 *Un. of Pa. Law Rev.* (1922) 88.

presence of telegraph wires[11] or overhanging branches[12] or projecting eaves,[13] which occupy the space immediately above my land, fail utterly to meet the situation of the aeroplane. Is the automobile a dangerous instrumentality?[14] While courts differ in the answer,[15] it is doubtful whether the correct answer can be evolved by a comparison of the automobile with a stagecoach.[16] Certainly the intrinsic characteristics of each are readily distinguishable. In these modern controversies the pragmatic search for a rule which works in action cannot be condemned. These timely questions provide ample room for the sociological jurist to display his formula which seeks out a practical solution rather than "assumed first principles." Here, indeed, the marshalling of the facts, the balancing of interests and the weighing of values—the science of axiology, as it is called,[17] have a prominent place in the judicial process.

Thus far we may agree with the tenets of pragmatism as a philosophy of law. The real proving-ground is reached only when we realize the extent to which the advocate of pragmatism is willing to go in the reconstruction and readjustment of legal methods. Recognizing its worth-while contributions to the science of law, it remains to ask whether the sociological scholars in their enthusiasm may not be claiming too much credit for this new system. Is pragmatism self-sufficient and free from the dangers of possible misuse and abuse? Like the aptly-termed "checks and balances" of the Constitution, may we not find that pragmatism also needs a "check" and a "balance" to restrain an excessive use of this stimulating search for the facts?

The starting point of our analysis may begin with an excerpt from an able paper in the last number of this *Law Review*. The learned writer tells us that

What we need in the field of jurisprudence is more thinking with reference to the *facts* as they exist and less exposition of eighteenth century philosophical concepts. We need a clearer apprehension of

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[11] *Butler v. Frontier Tel. Co.* (1906) 186 N. Y. 486; *Eels v. Am. Tel. Co.* (1894) 143 N. Y. 133.

[12] *Lemmon v. Webb* (1895) A. C. 1; *Hoffman v. Armstrong* (1878) 48 N. Y. 201.

[13] *Smith v. Smith* (1872) 110 Mass. 302; *Loudenslager v. Pac. Imp. Co.* (N. J. 1921) 115 Atl. 752.

[14] Cuthbert W. Pound, Are Automobiles Inherently Dangerous? 2 *Ford. Law Rev.* 57.

[15] *MacPherson v. Buick Mfg. Co.* (1916) 217 N. Y. 382; Cadillac M. C. Co. (1915) 221 Fed. 801.

[16] *Winterbottom v. Wright* (1842) 10 M. and W. 109.

[17] Cardozo, *op. cit.*, note 1, *supra*, 94.

what is necessary to do justice under the present order and less vindication of the concept of *natural rights* under the old order.[18]

We may go along comfortably with the author in his emphasis upon the importance of weighing *facts* in the jural order, but are we ready to abandon all concepts of *natural rights* under the old order? Admittedly the concept of natural rights in any form is a barrier against the free and unlimited recognition of the facts, but so is the Constitution of the United States, and, strange to find, although the writer resists the idea of fixed rights of natural law, he warmly endorses the Constitution[19] with its specific Bill of Rights[20] and its certain restrictions upon the states, or the federal government, or both.[21] If a system of natural rights clogs and impedes the course of social reform by law, a contention to be considered later, then so does the Constitution. If the objective of the philosophy of pragmatism is the unrelenting search for the "facts," and not the weighing of these facts in terms of "rights," whether constitutional or natural, it is difficult to follow the subtle distinction between the *advantages* of the fixed rights of the Constitution and the *disadvantages* of fixed natural rights. One destroys or retards social progress just as much and no more than the other, and, to the extent that either holds back the full sweep of political changes, it is a wise and salutary restraint which should not be ruthlessly brushed aside. Human nature being what it is, we have sufficient justification for our constitutional form of government, which, it will be seen, reserves a place for natural rights.

Facts are stubborn things; they are also elusive. However restive the American people may be over the rigidity of the law, over the failure of the courts to uphold legislative reforms, over the tardiness of the

[18] Rosenberry, Law and the Changing Order (1924) 9 *Marq. Law Rev.* 38, 48. "The concept of natural rights in the old order" has been variously defined in different stages of legal history. Justice Rosenberry makes it clear that he is referring to the eighteenth century definition of natural rights which was dominantly individualistic in form. This particular form conceived of man as an abstract, isolated individual with fixed rights completely determined by natural law which the State was powerless to invade. Pound, The Spirit of the Common Law (1921) 100-102. Such a conception has been criticised even by those who argue for a theory of natural rights which antedated the Reformation. Ryan, The Supreme Court and the Minimum Wage (1923) 29-30. The overthrow of eighteenth century concept of natural rights, however, provides no sufficient reason for rejecting all forms of natural rights, a position which the pragmatic jurist must logically take. Cf. note 8, *supra;* note 25, *infra.*

[19] *op. cit.,* 43.

[20] Amendments I-X.

[21] See interesting chart in Stimson, *The American Constitution* (1923) Appendix, which enumerates the exact powers forbidden to state and federal governments.

judges to view the facts in present-day societal relations, they are more restive when faced by the danger of the removal of the "checks and balances" of the Constitution and the extension of the powers of Congress in order that these facts may be translated more readily into the living law. Dean Pound, whose opposition to the theory of natural rights is clear,[22] would have us believe that "the people think of themselves as the authors of all constitutions and limitations and the final judges of their meaning and effect."[23] The scholarly work of Dean Pound in juristic philosophy gives considerable force to his mature analysis of the popular estimate of the nature of law and constitutions, but it is submitted that the people have, on two recent occasions, proved rather convincingly that they do not believe that they are the final arbiters of the American Constitution. In 1912, when Theodore Roosevelt proposed the recall of judicial decisions, which would give effect to Dean Pound's interpretation of the people's conception of law-making, they decisively voted to preserve the Constitution from popular intermeddling. Somewhat the same issue was injected into the political arena in 1924. Again, and very emphatically, they repelled the offer to give to their chosen representatives greater freedom in the making of law. These instances show a strange dislike for the alleged belief of the citizenry that they or their immediate agents are the final judges of the meaning and effect of the Constitution.

This brief consideration of the internal workings of the Constitution is by no means a digression from our central purpose of considering the doctrines of pragmatism in the field of jurisprudence. It was made for the purpose of questioning the consistency of reaffirming the permanency of the Constitution and rejecting the doctrine of natural rights. Not only do we, as Americans, endorse the peculiar advantages which flow out of a static Constitution, but it also seems that we find an abiding place therein for the concept of natural rights.

The Declaration of Independence is still orthodox doctrine in the American home, and this historic corner stone of our political faith teaches us

> that all men . . . are endowed, by their Creater, with certain *unalienable rights*. . . . That to *secure* these rights, governments are instituted among men. . . .

It will be noted that, in the judgment of the forefathers, the people are endowed by the Creator, and not by the state, with certain "unalienable rights." Governments exist, not to create, but to "secure" these vested rights which antedate the formation of government and come from the

[22] *The Spirit of the Common Law* (1921) Ch. 4.
[23] *op. cit.* note 22, at 99.

Creator. These inspiring beliefs are not the special possessions of the lawyer-class; they find lodgment and support in the people and contest strongly the claim that the popular mind visualizes the Constitution as an expression of man-made rights, subject to change in all its parts by the will of the majority. Lest it be thought that the sweeping changes in the social order which have enveloped this country since the Declaration of Independence may have in some manner undermined this basic concept of natural rights, we may cite the recent utterance of President Calvin Coolidge which pledges anew our faith in this same doctrine. In his address to Congress he said:

> We do not propose to abandon the theory of the Declaration that the people have *inalienable rights* which no majority or power of government may destroy. Our country does not propose to abandon the practice of the Constitution which provides for the protection of these rights. It believes that within these limitations, *which are imposed not by the fiat of man but by the law of the Creator,* self-government is just and wise.[24]

Apparently then, in the belief of the founders and in the judgment of their present successor in office, the theory of natural rights is interwoven into the texture of the Constitution. The burden of proof, following the settled rule of procedure, would seem to be upon the pragmatist who argues that this persistent adherence to the natural-right doctrine may be carved out of the Constitution and the Declaration without destroying these fundamental documents.

But even assuming that this juristic operation may be skillfully and successfully accomplished, what assurance have we that the operation will cure the patient? It remains to ask whether the absence of the restraining influence of a system of natural rights and the unimpeded and full force of the pragmatism in legal action will make for improvement and justice in society.

Once more we turn to Dean Pound for a definition of the final objective of law, as interpreted by pragmatic jurists:

> . . . if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation, to stand in the way of its doing so.[25]

Needless to say natural rights have no place in this declaration of the end of law. Nor is there any particular indorsement of the permanency

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[24] Natural Rights and the State, *America,* Vol. XXXII, Dec. 13, 1924. Cf. Pound, *op. cit.,* note 22, *supra,* 102.

[25] Pound, An Introd. to the Phil. of Law (1922) 97-98; *op. cit., infra,* note 28, 157-158.

of any clause of the Constitution provided we can pile up enough social wants to offset the sacrifice of the claims of others. Individual "rights" which President Coolidge tells us "no power of government" and "no majority" can destroy are wholly absent in this juristic picture. The morality or immorality of a given "claim" is immaterial unless it rubs against the "disproportionate" claims of other members of the community.[26] Dean Pound accepts the keynote of pragmatic philosophy that "the essence of good is simply to satisfy demand"[27] and gives it the place of honor in his interpretation of legal history.[28] The word "right" has come to mean too much in the vocabulary of the lawyer.[29] Catalogue any, and therefore all, human claims, wants and desires; aim always at a wider circle of legally enforcible claims; stop at nothing short of a complete gratification of all these demands, for a demand is *per se* good, unless it runs counter to the adverse claims of others, and let these not interfere unless they are "disproportionate" claims.[30]

William James, the chief defender of pragmatism as a philosophy of law, divides philosophic minds into two classes, the "tender-minded" and the "tough-minded." The "tender-minded" oppose pragmatic philosophy; the "tough-minded" are inclined to accept the principles of pragmatism. The "tender-minded" philosophers, he tells us, are essentially rationalistic, intellectualistic, idealistic and religious. The "tough-minded" pragmatists are materialistic, sensationalistic, skeptical and irreligious.[31] These latter tendencies, dominant in the writings of James, Dewey and other pragmatists, may be detected in the doctrines of the pragmatic jurists. Pragmatism is a new philosophy.[32] Yet it contains much that is old. One may discover traces of Egoism or Egoistic Utilitarianism which makes the pleasure or happiness of the individual a final end, intermixed with Altruistic Utilitarianism which emphasizes the welfare of society. The "claims" of all are potentially "good" in the scales of pragmatic jurisprudence and should be gratified unless they produce undue friction by the presence of antagonistic and "disproportionate" claims of others. Even Utilitarianism, under the direction of John Stuart Mill, finally evolved a standard of values which would enable us to determine the "claim" which is entitled to recognition. He developed a standard of higher and lower values depending

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[26] Pound, Law and Morals (1923) 41. Cf. Book Review, *Law and Morals, N. Y. Law Jour.* Dec. 4, 1924.

[27] William James, The Will to Believe, 195 *et seq.*

[28] Pound, *Interpretations of Legal History* (1923) 157.

[29] *op. cit.*, note 28, 159.

[30] *op. cit., supra,* note 25, at 99.

[31] Pragmatism, 12.

[32] See note 8.

upon the "quality" of the given pleasures. So also Bentham, who emphasizes the "quantitative" aspects of happiness—the greatest happiness to the greatest number.[33]

What test or standard of value does pragmatic jurisprudence offer to enable us to weigh the clashing "claims" and "wants"? How may we detect the presence of a "disproportionate" claim which overshadows the satisfaction of a social want? Dean Pound states that he is "skeptical as to the possibility of an absolute judgment."[34] He suggests that the legal "yard-stick" may vary with the changing ages. Pragmatism has been frequently criticized because it is in a sense anarchistic and devoid of standards or principles.[35] This abandonment of principles may be permissible in philosophy, but, in any event, it cannot be tolerated in the law. As a practical science, law requires an appreciable degree of uniformity, stability and certainty. It does not suffice to shuffle the mass of wants and claims of the litigants into a confused pile and then give effect to as many as we can in so far as harmony will permit. Principles and precedents can be carried too far; and it is true that they have been frequently over-emphasized in the growth of law.[36] But this provides no reason for lifting them out of the law in their entirety or relegating them to a corner for their stubborness. The *ipse dixit* of the judge working under a formula that invites him to "secure all social interest so far as he may" is not free from grave dangers of abuse. The case for the creative jurist is not as clear as some would have us believe.[37] Haste sometimes, of necessity, mars the individual judgment of the court. Inexperience may be found on the bench as well as in the Legislature. A "short-cut" may cut short the ends of justice.[38] Bias and prejudice are human failings which sometimes find shelter beneath the judge's gown. The rule of *stare decisis* with its arrogant insistance

[33] Introduction to the *Principles of Morals and Legislation* (1891) ch. 4.

While the standards of value offered by Bentham and Mill may be theoretically precise, they present practical difficulties which have not escaped the critics of Utilitarianism. How can we give numerical values to the pleasures and emotional states of the individual? Multiply this query to embrace the "quantity" or "quality" of the pleasures of the people at large, and we are immersed in a sea of confusion. Moore, *Hist. Introd. to Ethics* (1915) ch. 3.

[34] *op. cit.*, note 25, *supra*, 95-96: "How shall we do this work of valuing (the involved interests)? . . . I do not believe the jurist has to do more than recognize the problem and perceive that it is presented to him as one of securing all social interest so far as he may, of maintaining a balance or harmony among them that is compatible with the securing of all of them."

[35] Schinz, *Anti-Pragmatism*, 76, 77.

[36] Note 4, *supra*.

[37] Cf. Cardozo, *op. cit.*, note 1, *supra*, 133-139.

[38] Danger of "Common Sense" Decisions, 28 *Law Notes* (1924) 42.

upon the finality of precedent may need correction, but it still occupies the first place in the judicial process and its claim is a valid one.[39] If it be said that the Legislature must be given due recognition in the creation of law and that our legislators should not be hampered by restrictive principles in the face of a social want, we come perilously close to the proposal of Senator La Follette. To accomplish this reform is possible, but we must do so at the expense of our constitutional form of government. The majority of the people evidently believe that the price is too high. They are still concerned about "the tyrannies of political assemblies," as De Tocqueville expressed it.[40]

That this so-called "engineering interpretation" of law may be put to ill use is frankly admitted by its leading advocate, but he contends that, "for a season, the dangers are in another direction."[41] It is submitted that there are evidences that pragmatism as a philosophy of law must bear its share of blame for certain evils of the social order. Stressing as it does the virtue of "claims" and "wants" and "desires" to the exclusion of "rights" and "duties" and "obligations" in the legal order, what consequences have followed the entry of pragmatic machinery in the socialization of law?

If natural-right doctrines paid too much tribute to individual rights, there is a growing danger that pragmatism will unduly exaggerate the supremacy of "social wants." Pragmatism worships at the altar of social reform. The pages of the sociologist teem with the inequalities of our social, marital and industrial relations. Ingenious remedies are poured forth which aim to make even the path of mankind. Inevitably these proposals are directed to the state as the effective instrument to give them effect. A growing portion of the people sense the dangers of frigid paternalism as a guardian of dependent groups. If we accept the formula that law exists solely to give effect to "claims" and "wants," it is difficult to question this sudden rush to state and federal Legislatures for relief against all real or imaginary pains and aches of the body politic, but there is grave doubt whether the law is capable of absorbing the tasks of social and religious reformation.[42] The social

[39] Moschzisker, Stare Decisis in Courts of Last Resort (1924) 37 *Har. Law Rev.* 409.

[40] Kennedy, Supreme Court and Social Legislation (1923) *Cath. Char. Rev.* Vol. VII, 208.

[41] *op. cit.*, note 28, *supra*, 164.

[42] "The government of a country never gets ahead of the religion of the country. . . . There is no way by which we can substitute the authority of law for the virtue of man. . . . It is well to remember this when we are seeking for social reforms," President Coolidge, Address at the Unveiling of Statue of Bishop Francis Asbury. See favorable editorial comments, *Literary Digest*, November 8, 1924. William D. Guthrie, The Oregon Law School, *Columbia (K. of C.)*

reformer is inclined to forget that in the welter of the social and industrial evolutions the individuality of man may be altered, but it is by no means entirely lost. Liberty and freedom are not only rights but also duties which call for recognition and protection from inordinate and excessive state-control. If there is weight in this criticism of the present-day tendency to legislate society into a state of perfection, to erase the shortcomings of human relations by governmental intervention, the pragmatic jurist must bear a goodly part of the responsibility; they are the tangible results of the endeavor to infuse into statutes all the demands of the people without the stabilizing influence of Constitutional principles or the dictates of natural rights.

But this criticism should not blind the opponent to the fact that pragmatic jurisprudence has been responsible for a purposeful and direct attack upon many social and industrial evils which have been resultant products of modern societal relations. The formula of pragmatism with its deadly pursuit of the facts can claim substantial credit for the passage of laws regulating the hours of labor, providing safety appliances for the workers and placing the financial burden of industrial accidents upon industry rather than upon the employees. But, the advocate of natural rights is not obliged to accept the common belief of the sociological worker that adherence to a theory of natural rights prevents and clogs the course of just and necessary changes in the law. Proof is ample that strict observance of a theory of natural rights is perfectly compatible with a humane and enlightened interest in social welfare within appropriate and orderly limits.[43] As early as the twelfth century

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Mag., June, 1924. Nicholas M. Butler, Law and Lawlessness, address before Ohio Bar Association, January 26, 1923.

I have considered particular phases of this problem in my articles, Law and the Railroad Problem, 32 *Yale Law Jour.* 553, 558-560; Social Welfare and the Law, *Columbia (K. of C.) Mag.*, Nov., 1923.

[43] Pope Leo XIII, Encyclical, On the Condition of Labor (1891). Herein will be found a thorough consideration of economic problems of the day with reference to the doctrines of natural rights and the advocacy of substantial social reforms to cure or lessen the noted injustice of the social order.

Ryan, *Living Wage* (1906); *Distributive Justice* (1916); *The Supreme Court and the Minimum Wage* (1923). Dr. Ryan was one of the first American economists to argue for a legal minimum wage, and yet his thesis rests upon the natural right of the worker to receive sufficient remuneration to provide the necessities of life. See also, Husslein, *The World Problem* (1918); O'Grady, *Legal Minimum Wage* (1915).

It is significant to note that the one case, more than any other in American law, that arouses the ire of the sociological jurist is *Adkins v. The Children's Hosp.* (1923) 43 Sup. Ct. Rep. 394, which nullified the Minimum Wage law of the District of Columbia. Invariably the contention is made that the theory of natural rights is responsible for this anti-pragmatic decision. Yet all the above writers argue for the passage of this very law on the grounds of natural rights.

the writers in the Canon Law gave us a definition of positive law which provides ample room for the seeds of growth and yet enunciates a system of natural rights.[44] It is safe to say that the people in those days were not in need of workmen's compensation laws, traffic regulations, minimum wage statutes and other modern devices to meet the economic inequalities of their day, but it is pertinent to note that if these stated laws were "necessary" and "useful" and "suitable to the time and place"—words which one finds frequently in current sociological arguments—their concept of law contained specific mention of these elements as proper ingredients in the fabrication of social legislation. They did, however, insist that law must be perfective and in accord with man's nature; that principles and standards derived by reason as established by the Creator must be duly regarded in the development of the law.

The issue between a natural-right philosophy of law and pragmatic jurisprudence is thus sharply drawn: The former blends the stable principles of the natural order with fluidity of the positive law. Both have a place in the application of law to current legal problems. While natural rights occupy first place, they do not pre-empt the whole area of jurisprudence. This intermixture of natural rights and human enactments and decisions, it is asserted, is the essence of our American theory of government.[45] "Novelty," it has been happily stated, "is no argument against constitutionality."[46] Nor is novelty of a given social reform any argument that it violates natural rights. Pragmatic jurisprudence starts with an open-door policy which gives free and easy entrance to any and all human and social wants and desires and makes them the first and last end of law. Gratification and satisfaction of these demands divorced from external principles, which are shadowy and abstract things, should be the aim of juristic science. The tenets of pragmatism are alluring with their "full-speed-ahead" and "give-the-people-what-they-want" theories and the gracious assumption that "the essence of good is simply to satisfy demand."[47] Booth Tarkington

[44] "Law should be *honest,* just, *possible,* according to nature, conformed to the customs of the country, *suitable to the time and place, necessary, useful,* clear. . . . Ivo of Chatres, Canon Law, cited in Ryan and Millar, Church and State (1922) 110; Le Buffe, *Pure Jurisprudence* (1924) 9.

[45] Note 24, *supra;* Stimson, *op. cit.,* note 21, *supra,* ch. 2.

[46] Cuthbert W. Pound, J., in *People ex Rel. Durham R. Co. v. La Fetra* (1921) 230 N. Y. 429, 446.

Despite Judge Pound's concession that constitutional law is adaptable to modern conditions, he expresses himself rather strongly against the "empirical, inductive, pragmatic and sociological methods of jurisprudence." These, he says, are "but wild and whirling words." See his paper, Lawyer or Philosopher, reprinted in 56 *Chi. Legal News* (1924) 215.

[47] Note 27.

humorously tells us that the all-pervading *demand* of his boyhood was to become the proprietor of a candy store.[48] But alas, this common yearning of youth had to be suppressed. Modern psychologists informed him that this *desire* to corner the confectionery market was a "sex tendency" and that it was dangerous to suppress it, but he refuses to be convinced that his own future welfare was endangered by the stern refusal of his parents. We suspect that here, at least, is a simple situation wherein the "essence of good is *not* to satisfy demand." It was not the "disproportionate" claims of society, nor even the superior wants of the fond parents, that defeated this particular venture into the commercial field, but rather the evil tendencies of the given want upon the individual himself. Demands of humankind are many and diverse, good and bad, moral and immoral, and it is difficult to perceive how the magic of pragmatism can make them all "good."

Turning to wider fields and more mature problems of social life we may decipher the argument of the pragmatist in action, and the results are not always decisively in favor of the palatable exaltation of human wants and demands. Without trespassing unduly upon the ecclesiastical controversies of our day, pragmatism may be discerned in the background of the so-called Modernist-Fundamentalist disputation. It is not in our province to discuss the issue, but merely to notice that the position of the Modernists is at least a diluted form of the pragmatic philosophy in which doctrines and principles are submerged in the whirlpool of current desires and demands. Adopting the language and the test of the modern philosopher, it is somewhat questionable whether the "results" and "consequences" of this liberalization have made for a greater efficiency in the churches as vital forces and uplifting agencies in our daily life. Perhaps this breakdown of religious authority may partially account for the unwise and futile effort to overload the law with the task of reforming mankind through the police powers of the state. The pragmatic theologian might do well to remember that "Christ spent no time in the antechamber of Caesar."[49]

Naturally pragmatism, nurtured and developed in our colleges and universities, has a powerful grip upon our educational systems. Under the guise of electivism of courses, which may be roughly defined as a take-the-studies-you-like program, it is possible to extract the earmarks of an educational pragmatism which invites the youth to satisfy his demands without any direct interference from the faculty. The same generosity has been visible in the dissolution of parental authority and

[48] What I Have Learned From Boys, *Am. Mag.*, Jan. 1925.

[49] A remark attributed to Tiffany Blake, Chicago, in President Coolidge's Address, note 42, *supra.*

the enlarged freedom of the rising generation. Let Nicholas Murray Butler, president of Columbia University, tell us what this species of pragmatic teaching is doing in the social order:

> If a youth be taught at home or in school that there are *no fundamental underlying principles,* but that the world is his oyster, to be consumed at such time and in such fashion as he may see fit, or that it is to be made over to his heart's desire, *one need not wonder when a spirit of lawlessness and restlessness under order and restraint find expression in his life.*[50]

This picture of pragmatism in action in the domestic and scholastic fields, producing "a spirit of lawlessness" by its emphasis upon the unlimited demands of the youth bereft of underlying principles, is not a very inviting foundation upon which to erect a pragmatic philosophy of law which stresses these same demands and wants as the ultimate end of law.[51]

Despite the alleged defects of pragmatic jurisprudence, it is reiterated that it has its place in the growth and improvement of the law, but it is also asserted that it has its limitations and its excesses which are unconsciously overlooked by its defenders. The tendency to generalize in the old order, the attempt to paint a permanent juristic masterpiece for all time—defects which the sociological scholars delight to ascribe to the theory of natural rights—may not be wholly absent in their program of practical jurisprudence. It is submitted that their generalization of the expansion of wants and claims as the end of law, fluctuating and changing from time to time, to be weighed without a weighing machine, while it may in tune with the rhythmic cadence of the present social order, does not offer convincing proof that it has given us the last word in jurisprudential development. If an overzealous use of a jurisprudence of conceptions may be attacked as "mechanical,"[52] it is possible that an "engineering interpretation" of law, with its relentless quest for claims and wants, its avoidance of friction and waste, with its automatic devices to enlarge the area of enforcible wants and its disdain of external brakes and safety-appliances in the form of legal "checks" and balances," may also fall victim to this artificial terminology which smacks of the mechanical aroma of the workshop.

Motion is necessary in the development of law, but there is a present tendency to treat change as synonymous with improvement in the legal order. It is possible to infuse too much flexibility just as it has been admitted that the old order paid too much attention to the finality of

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[50] *op. cit.,* note 42. See Delany, Radicalism or Liberalism (1923) *No. Am. Rev.* Vol. 217, p. 616, 620-621.

[51] See writer's paper, "Jazz" Jurisprudence, *America,* July 19, 1924.

[52] *op. cit.,* note 9, *supra.*

precedent. There is no particular virtue in being "on our way" unless we know where we are going.[53] The cautious traveler is not averse to a guidebook; the experienced hunter includes a compass in his outfit; even the casual pedestrian does not disdain a glance at the signboards in strange places. May we not suggest to the pragmatic jurist the importance of taking on board similiar protection against the hurricane of social wants and demands, some instrumentalities—in the shape of permanent constitutional principles and natural rights—before we engage passage with him on the maiden voyage, before we give an unconditional welcome to pragmatism as a philosophy of law?

[53] Caldwell, *Pragmatism and Idealism* (1923) 194: "'Action is the vocation of man!' Strictly speaking, this principle is false. Man is not called upon to act, but to act justly. If he cannot act without acting injustly, he had better remain inactive.