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RATIONAL BASIS OF LEGAL INSTITUTIONS

To say that a legal institution,—private property, the federal government of the United States, Columbia University,—exists is to say that a group of persons is doing something, is acting in some way. It is to point to a particular aspect of human behavior. If the federal constitution had not been written and ratified by somebody, the legal institution called the federal government would never have existed. A legal institution is human behavior.

But a legal institution is something more than the way men act on a single occasion. If after the constitution was adopted attempts to induce persons to act under it by accepting office had failed, it would remain the program of an unsuccessful reform movement. Or if the Supreme Court had been organized but the judges had resigned after hearing a single cause, the organization of the court and the submission of the case would be events, and the court itself a clause in the constitution. A legal institution is the happening over and over again of the same kind of behavior.

Even repetition, however, is not sufficient to make us recognize the series as an institution. The behaving over and over again in the same way must be the result of a habit to behave in that manner. The attendance of a student upon his university lectures after six weeks of regular attendance is a psychological process,—a way of behaving,—different from his attendance during the first week, or from his attendance at the same play for the sixth time during the winter. In the first case his behavior is like that of a trained dog answering his master's whistle; in the other two like that of a shy dog tempted by a choice bit in a stranger's hand. The attendance each day at their classes of the teachers and students of Columbia University is not because of a fresh act of judgment by each that his attendance is an available means to an end. So long as their mental processes remained at this high level, Columbia would be the name of a series of events, the continuance of which would be highly contingent, and not an institution. No testator would risk intestacy by naming Columbia in his residuary clause. No parent would think it worthwhile to enroll in 1923 his ten year old child in the class of 1930. In moving from bed to desk each morning, even high officers of the federal government are not motivated by an altruistic impulse to make the world safe for democracy. If they were, we should anxiously scan the newspapers each day to see if there had been a federal government yesterday. It is the habitual character of the

behavior which we call an institution upon which we rely in inferring that the behavior will continue, i. e., that the legal institution is permanent or relatively so. We may not be able to account for the fact that men's actions move along the well-cut channels or straggling ruts of habits, but that they do is the conclusion of the philosopher, the psychologist, and the common man. In consequence of its predictability, an institution becomes along with the sun, the tides, the rain, one of the constant factors among the welter of variables which are taken account of in making a judgment. One may be far from certain of what will be a neighbor's behavior when he is asked for his daughter in marriage, but at the same time confidently judge how the neighbor would feel and act if his horse were, without his consent, used for plowing another's land. But in both cases, in view of the institutions of marriage and of private property, one could count with sufficient certainty on the behavior of the community when stimulated by the courses of conduct supposed.

Perhaps in what has been said there has been implicit the assumption that the habits of the group of persons whose behavior is most conspicuous when we observe an institution,—such as the owners of property in land and chattels, the officers of the federal government, the teachers and students of Columbia,—are the only habits which are of significance. But certainly this is not the case. If every one in the United States, save those actively engaged in carrying on the federal government, should awaken some morning with only a memory of the federal government as an historical event, and freed from the habits which at once are the impulse to coöperative response to the actions of its officers and the motor mechanisms to express those impulses effectively, for a time at least the federal government would be a potentiality only and the form of the future organization of the forty-eight states would be in doubt. Indeed the most important factor in determining the form of that organization would by no means be the force at the disposal of the former government.

An inquiry, then, into the rational basis of legal institutions is nothing less than an inquiry into the rational basis of certain habits. Is it proposed to ascertain by the study of history and prehistory the actual content of the logical process which found a solution of its problem in the initiation of the modes of behavior which later became habitual and an institution? In the case of such an institution as private property does any one seriously expect such a jewel from the hands of the students of prehistory? But the case of institutions of more recent origin is different. Diaries, correspondence, pamphlets, convention proceedings, preambles, resolutions, and even charters and constitutions themselves are available. We might make an induction as to the end which some of the conspicuous founders and perpetuators of Columbia had in view in establishing the school and as to their logical process in determining that a college was a means to that end. But no diligence can be expected to unearth the logical processes of all the persons,—legislators, trustees, teachers, students, employees, parents, and surrounding community,—whose cooperation was necessary to initiate the behavior which we choose to distinguish as an institutional pattern in the fabric of human action. However,

even if at the end of our research we found a single Mark Hopkins and a single log, it is not clear what would be the value of an accurate description of his logical process. It should be some evidence of the ends and of the state of knowledge of the mechanisms of society entertained by Mark Hopkins and probably some of his contemporaries. Such evidence is material for history viewed as a catch-all for collected or recovered facts which may at some time be useful in the solution of a problem not yet formulated. It is conceivably a fact for the psychologist as a student of behavior, though obviously less valuable than human behavior under the eye of the observer. But it throws no light on any pertinent question as to what the institution has been, is or will be. Newcomen may have invented his steam engine with the end in view of keeping mine-shafts free of water. But his logical process in judging that his invention was a means to that end is quite irrelevant if we seek to determine towards what ends the invention has actually carried us, and whether it will serve our present purposes. In short, in no inquiry with respect to an institution, save only in an inquiry into its history, is the logical process of its founders a relevant fact; and the historical inquiry serves an end as well served by the history of any other institution, and better served by the study under our own eyes of the human animal.

It cannot be supposed therefore that Professors Wigmore and Kocourek in their *Rational Basis of Legal Institutions*¹ are addressing themselves to the hopeless and purposeless task of ascertaining the logical processes which were parts of the various acts of the various persons whose conduct was the beginning of legal institutions. Indeed, an examination of the excerpts which comprise the volume discloses that this was not their objective. Were they seeking a rational basis in divine revelation of the perfect society and inviting us to a critique of group habits by comparing them with logical deductions from the revelation? No; their rational basis is more naïve, if less mystical. It is human "nature." We are invited to weigh legal institutions by putting them in the balance with deductions from a supposed but unstated generalization as to man's nature. An obvious objection to this approach, which is classical in the social sciences, is that the paucity of observed facts about man's native equipment makes any wide generalization impossible. Modern anthropology and psychology do not give us any basis of fact for an induction as to what organization of society is ideal for the human animal. Instead they indicate an unexpected native adaptability to very diverse forms. Notwithstanding the varieties of culture which ethnology and prehistory disclose from neolithic man in Europe to the city dwellers of today, there is no evidence of evolution in man during the period. But this is not the most serious objection. Nor is the objection the rearing of an edifice of speculation upon opinion and opinion upon speculation. At least this flimsy structure contains

¹ *Rational Basis of Legal Institutions*. By various authors. Editorial preface by John H. Wigmore and Albert Kocourek and an Introduction by Oliver Wendell Holmes. New York: The Macmillan Co. 1923. pp. xxxii, 603.

a thousand and one nights' entertainment for the intellectual, aspirations for the liberal, comfort for the conservative, and propaganda for the radical.

The serious vice in approaching a study of legal institutions from the standpoint of a question of their rational basis is that by posing a problem that does not exist, the real problem for which the editors were groping and the most promising approach to it are so effectively obscured. Is this problem the rational ends of legal institutions? The end of a legal institution is the end towards which we judge the institution leads, towards the attainment of which the institution is a means. We may judge that the Supreme Court of the United States, a court vested with the power to declare statutes invalid, is a means to the end of preserving the institution of private property. We may think a legislature with unlimited power to tax is a means to the end of destroying the institution of private property. Is either the preservation or destruction of private property an end which is rational? One may choose either. Is one choice more rational than the other? Surely this depends upon the consequences, the ends to which the choice leads. An end, then, is rational in so far only as it is a means to another end. If one's end is increasing the stock of industrial equipment, the preservation of private property is rational if it is a means to that end. As an end to which the Supreme Court is a means, it is neither rational nor irrational. But are there no ultimate ends which are rational? Human experience discloses no ultimates. Events are related to events so that each is at once an end and a means. Ultimates are phantoms drifting upon the stream of day dreams. Nor are penultimate ends rational. A rational or logical process is directed towards an end chosen before the process is begun. The process is judging that certain means will tend to that end. It is the projection of an hypothesis as to what manipulation of facts will bring about the end. The end of the hypothesis is experiment. The test of the validity of the hypothesis is the success of the manipulation. If the facts for manipulation do not exist, the hypothesis is not rational and the end is a day dream, not a term in a logical process. It is the necessity of experiment which restricts us to proximate ends and a study of means thereto. Penultimates are not rational because the means towards their accomplishment are not at hand. In weighing an end, the relevant questions are, What are the immediate means to it? To what proximate end is it a means? The problem, then, that loomed so obscurely before the editors, was not one of rational ends, but rather, What are means to legal institutions and to what proximate ends are legal institutions means? Concretely, of what facts are group habits consequences and what are the consequences of group habits?

Group habits are now recognized as means, something to be manipulated, something to be controlled by the process of manipulation. Inquiry at once turns in the direction of detailed observation and systematic experiment. Visions of individualistic and collectivistic utopias vanish from the observer's mind, and in their place his imagination is struggling to guide him to the formulation of an available method for the accurate determination, for example,

of the number of farm leaseholds in the United States last year, or the number of married women habitually engaged in another remunerative occupation, or the quantity and productive capacity of the industrial equipment in the United States on January 1st, 1922.

Detailed observation of such group habits as legal institutions shows each institution is a complex aggregate of many specific group habits. Private property may be a useful concept for some purposes, but it is an intellectual device which must not be allowed to obscure the duty not to commit a nuisance on one's land, the liability to the police power and to the power to tax, the disability to alienate in certain modes, the liability to be deprived of one's land or chattels by a third person's sale to a *bona fide* purchaser, which, as well as the privilege to use, the right to exclude others, and the power to alienate by deed and will, are some of the items described by the word property. Indeed, these rights, powers, privileges, immunities, duties, liabilities and disabilities are themselves simply generic names for aggregates of minute channels of conduct, all of which taken together are private property. Observation shows the material to consist of units of conceivably manageable proportions and dispels the notion that the institution of private property exists as an object for experimentation.²

Each of the specific group habits is an aggregate of the individual habits of the members of the group. Individual habits, then, are the means to be manipulated by systematic experimentation. The study of legal institutions must begin with the motivation of habit formation, stabilization, modification, and obliteration, with the "drives," whether instinctive or otherwise, which motivate one to behave habitually, and the impulses which push in another direction. Here the psychologists are ready to assist with formulations and facts.³

Next the limiting conditions of the individual's biological and social inheritance must be considered. It is not to be expected that a Japanese baby adopted and brought up in the United States by Southern foster-parents, who are by profession tumblers and in religion Methodists, will either habitually assume the posture of standing on his hands or will be other than a Christian. In college he may be taught the Russian language, and to transfer his faith to the coming of a communistic utopia, but he cannot be taught to speak the Russian language habitually, to get his living except along the grooves of the existing economic order, or really to think except about the problems of his life, and then only in terms of the existing facts of social organization. Native psycho-physical equipment and the culture into which the individual is born combine to reduce the means to experimental manipulation of legal institutions to a few uninspiring tools. These, moreover, seem to be useful only in an attack on culture. Native equipment at present at least is beyond the

² Wesley N. Hohfeld, *Fundamental Legal Conceptions* (1923).

³ John Dewey, *Human Nature and Conduct* (1922); Robert S. Woodworth, *Dynamic Psychology* (1918); William McDougall, *Psychology* (1923).

reach of any of them.⁴ In any event, if biology and eugenics offered means their use would involve a cultural change such as that we are now witnessing in the gradual adoption of the practice of sterilizing feeble-minded persons.

The non-material culture of a group, its language, aesthetic standards, religion, morality and legal institutions, changes both in consequence of inventions of new behavior models, some of which become habitual in the group, and in consequence of borrowings from other cultures.⁵ But what invented or borrowed behavior models are adopted by the group seems to depend, among other things, upon its existing material culture; that is, its stock of buildings, machines, tools, technical processes, and so forth. For instance, the legal privilege of the exclusive use of bronze objects manufactured by one's slave would not be invented if the community did not already possess processes and tools for manufacturing bronze objects. The legal device of distributing ownership of units of industrial equipment among management, stockholders and mortgagees would not be borrowed unless the state of the industrial arts made for units so costly and complicated that such a distribution was thought convenient.

Material culture, however, is itself being changed by the processes of invention and borrowing. And the direction and rapidity of this change is, it seems, determined by the existing material culture. The invention of the wheel and of the gas engine must precede the invention of the automobile. The invention of the moving-picture camera of today awaited the invention of the photographic film. But control of invention and borrowing in the sphere of material culture with a view to experimenting with institutions is not a promising procedure. Experimentation implies use, and however limited in space and time, its social consequences cannot be obliterated.

Changes in material culture, therefore, precede and control changes in common habits and attitudes. But changes in the non-material culture, do not follow immediately upon changes in that which is material. Indeed, they appear often to lag far behind as in the case of the delay in the adoption of the system of providing by an insurance fund for compensation to workmen injured in industrial accidents. If such a lag is in fact a common phenomenon in the process of the adjustment of legal institutions to material culture, then an opportunity does exist for the experimental manipulation of legal institutions, with a view to either lengthening or shortening the period of lag.⁶

If the editors had grasped the function of the rational process in human enterprises and had succeeded in formulating the problem they were facing as one of legal institutions as means to proximate ends; if they had seen the point of departure to be a consideration of the hypothetical limits of the field for the application of experimental methods; they would have arranged their materials from the fields of philosophy, legal analysis, modern psychology,

⁴ Thomas H. Morgan, *Physical Basis of Heredity* (1919).

⁵ Robert H. Lowie, *Primitive Society* (1920); Alexander A. Goldenweiser, *Early Civilization* (1922).

⁶ William F. Ogburn, *Social Change* (1922).

biology, social psychology, anthropology, and sociology, according to the pattern so hastily sketched in the last few paragraphs. The material would have been chosen to display the evidence and conflicting interpretations which are today the grist of these sciences.

The next step for the editors should have been an examination of the tools,—the available means to experimentation. These are familiar enough though we are more accustomed to use them after the fashion of rough and ready frontier clearings rather than that of experiment stations. Foremost is the legislative power of the government. Its exercise by statute, administrative order and judicial decision is the existing method of patenting and offering to the community behavior models which have been borrowed or invented. Its study as a means to initiating experiment, and an examination of the means to making the legislative power an effective means, should be an important part of the book. The National Monetary Commission, the Federal Trade Board, legislative reference bureaus, the Economic Research Bureau, the Bureau of Chemistry, the removal of Constitutional limitations upon legislative action, the power of the Supreme Court to block experiment, are a few of the innumerable topics that suggest themselves for organization into a comprehensive study of the existing and potential means of initiating rational manipulation of legal institutions. There would be nothing so new as to induce the pleasures of intoxication, nor anything so abstract and general as to lull to the satisfactions of contemplation. After this the agencies for observing and recording the consequences of laws should be passed in review. The elaboration of the census, a ministry of justice, the probation system, will serve to suggest the topics for integration into a study of this aspect of experimentation.

Perhaps there should be added a third part containing some account of a few of the current experiments we are blundering through without thought of direction or control. Studies of collective bargaining and the injunction, of the treatment of conscientious objectors and political prisoners during the late war, and of criminal syndicalist laws, of prohibition, of the activities of the Society for the Prevention of Vice, might be grouped under the heading of Liberty. Under Competition, there might be placed something about the Federal Trade Commission and judicial experimentation with "unfair" trade. The New York rent laws, price control during the war, public utility rate regulation, usury statutes, excess profits taxes, consumers coöperation, might be gathered into a chapter entitled Property. Inheritance Taxation could be placed profitably under the heading of Succession; and certainly the operation and consequences of our laws as to abortion and birth-control, and of our statutes and decisions relating to a minimum wage for women, could be decently covered in a chapter on the Family.

In fact, where do the editors lead us when we have joined them in pursuit of their will o' the wisp, the rational basis of liberty, property, succession, family, and punishment? In the treatment of liberty, it is assumed that the balance of reason decides against a community organization in which there is

no differentiated class which functions by encouraging or discouraging the initiation and adoption of group habits, and in favor of a community organization in which there is a governing group. "Scientific anarchism [is] dangerous *per se*."⁷ The first problem posed for thought is *laissez faire* versus socialism. That both members of the antithesis are concepts describing nothing in experience, though making for an excellent debating title, effectively prevents thought. Accordingly, the discussion addresses itself to the misleading question, Should the governing class participate in attempts to prevent or to initiate changes in legal institutions in case of changes in material culture, or should it act as umpire impartially upholding the existing order? There is no suggestion that the policy of *laissez faire* is the policy of maintaining existing institutions for the moment regarded as fundamental, and that of necessity it commits the government to opposition to changes in them.⁸ Consequently there is not even a precise formulation of the real question debated, namely, Should the governing class attempt to prolong or shorten the period of cultural lag. Nevertheless, this is the question to which in all seriousness answers are offered. Since the general form of the question bars any consideration of any particular lag, of the means available in the actual situation, or of the immediate ends or aims of the particular governing class, the efforts toward solution are Gargantuan. The answers are deduced from the "doctrine of organic evolution,"⁹ "human welfare," and "natural law—law corresponding to the nature of things,"¹⁰ "the general interest,"¹¹ "Christian ethics,"¹² and "traditional morality."¹³ There is general concurrence in the answer: the governing class should as a general rule attempt to prolong the period of lag; *but* every particular instance should be dealt with as experience indicates. In short, the battle never begins because the troops are exhausted by the elaborate preliminary maneuvers. Dean Pound and Mrs. Bosanquet are the exceptions to this kind of generalship. Both address themselves to giving an account and interpretation of facts which display particular cultural lags.

The selection and arrangement of the material under the heads of property and succession are all that would be expected from a treatment of the institution of property as a single problem to be settled *a priori*. We find on the one hand, rationalization of the existing and, on the other, dreams of the future. The collection proves Professor Small right in predicting in his interesting outline that an "examination of typical opinions about property will at least furnish warnings about outstanding *futilities* of opinion . . ."¹⁴ Occasionally the worthwhile approach is suggested as when Dean Rashdall says, "the justification of property must depend not upon any *a priori* principle but upon its

⁷ *Rational Basis of Legal Institutions, op. cit.*, Carver, p. 159.

⁸ Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State* (1922), 37 Pol. Sci. Quart., 470.

⁹ *Rational Basis of Legal Institutions, op. cit.*, Spencer, p. 4.

¹⁰ *Ibid.*, Carver, pp. 154, 163.

¹¹ *Ibid.*, Ely, p. 123.

¹² *Ibid.*, Lovejoy, p. 52.

¹³ *Ibid.*, Sharp, p. 74.

¹⁴ *Ibid.*, Small, p. 194 [Italics mine].

social effects.”¹⁵ Indeed in Professor Charmont’s contribution we have a splendid example of the study of the social consequences in a particular locality of a few specific rules relating to descent of land.

The next turn in the book brings us to the family. We are led by the hand of “helpless babyhood” across “the chasm which divides animality from humanity . . .”¹⁶, only to find ourselves in the presence of “wretched motherhood and the feeble, base-born children of unbridled lust.”¹⁷ We are glad to escape to hear Dr. Cabot’s delightful little sermon “Spiritual Justification of Monogamy,” with which this part closes. The notable essay of this group is that of Elsie Clews Parsons whose careful analysis of family relations is of the sort that must precede any serious study of the family.

Upon opening the volume, we thought we sensed a spirit of weariness in Mr. Justice Holmes’ Introduction; upon closing the book, our confidence is strengthened that this impression was correct.

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¹⁵ *Ibid.*, Rashdall, p. 399.

¹⁶ *Ibid.*, pp. 470-1.

¹⁷ *Ibid.*, p. 544.