

THE JURISPRUDENCE OF EDWARD S. ROBINSON

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THE PAGES of a law journal are ill adapted to express the sense of bitter tragedy and irreparable personal loss which all of us at Yale feel in the loss of our friend and colleague, Edward S. Robinson. I will not try it.

I prefer as a final tribute to him to attempt to put on paper a glimpse of that brilliant, restless, pioneering mind, unusual in any generation of scholars. Professor Robinson viewed the entire world of social institutions from the angle given him by his long training in observing what most of us call the "human mind." He refused to accept the traditional learning or the traditional limitations of any subject. He avoided the sedate security of what scholars call a "field." When his observation told him that the "law" must necessarily be a very simple and somewhat primitive technique, he had the courage to act on that assumption and write down his observations on law and lawyers.

Many lawyers thought him a trespasser upon their exclusive territory, and many psychologists considered him a wanderer from the established limitations marked out by the constitutional fathers of that subject. A certain hostility of this kind was inevitable. Broad points of view are not congenial to the attitude which has departmentalized our institutions of learning. The queer country of scholarship has been mapped out in little irregular patches of domain, staked out and appropriated by different groups with names derived from Latin and Greek sources. It is all right for the neighbors to get together now and then for a housewarming or for a cooperative effort in which the resources of their respective principalities are joined for the common good. But when one man crosses to his neighbor's domain to make maps and sketches of the fortifications, as if he contemplated changing the boundaries, he is greeted with suspicion and alarm. Scholarship has its own capitalistic system and thousands of earnest and industrious men are dependent on it for both prestige and income. They do not want their separate properties taken away without due process. They have spent endless effort building books and articles on these properties. The separation of powers between lawyers, economists and psychologists is the most important concept in the federation of independent intellectual sovereignties known as a University.

Even inside these independent sovereignties, enterprise is far from communistic. The law has its own little fields, within its larger field. Deans of law schools, when a "property man" resigns, seek to replace him with another "property man," and will not hear of hiring a "con-

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flicts man" to take his place. Economics and psychology, and all the rest of the scholarly states, are divided along the same lines, and the rolling stone which rolls over these lines is permitted to gather a minimum of moss. Professor Robinson was a born trespasser and a congenital rolling stone.

Of course, these scholars knew that the tumbling stream of events was not divided this way, and so great defenses were erected to keep these events from bothering their pious meditations. Actual events were supposed to take place in a temporal world. The scholar lived in the spiritual world of principle and formula. Political scholars were advised not to mingle in politics; trial lawyers were avoided in law schools; and advertising men were looked at with suspicion in faculties devoted to the study of the psychology of men in groups. When a real scholar wanted to visit the temporal world of events, he protected himself from its vanities by a set of armor called "statistical method." This narrowed his field of vision so much that he could not see enough at any one time to be contaminated.

A psychologist could enter the field of law and cooperate with jurists, provided that he took the word of sufficiently respectable legal scholars as to what the law was. If he made his own observations, he was treated with the same scorn that an anthropologist, describing savage customs, would have received from the priests of the tribe he was observing. And so it was that Professor Robinson's observations made some people very angry indeed. Such criticism never disturbed him. He recognized too well the paradox that if lawyers did not get a little angry with what he said about the law, then what he said about the law could not be true. This is not a real paradox. It is merely another way of saying that persons engaged in a highly complicated ceremonial, filled with all sorts of symbolism in which they believe salvation is to be found, are always disturbed by practical observations about the ceremonial. If they were not so disturbed, it would mean only that they did not really believe in the ceremony.

The extent of the contribution which Professor Robinson was about to make went far beyond his book, *Law and the Lawyers*,¹ written at an early stage in his development. In the seminar which he was conducting with me, he was developing ideas which have appeared nowhere in his printed work. He was beginning a technique for the organized study of men in groups that was already giving him new insight into activities of social institutions. That technique was still unformed. Yet it gave him a platform on which to observe the habits of men both in law and in politics, to diagnose social conflicts and to predict the results. I will illustrate by giving two of his diagnoses made from that platform, selected

1. (1935).

because they relate to familiar events and thus give a hint as to his method of thinking.

Late in 1932 I attended a conference of bankers, economists and lawyers assembled by a gentleman of some prominence in the banking world, who then foresaw the impending collapse of our banking system which finally took place in March. It was conducted in an atmosphere of intense gloom because everyone was convinced of two things: that a collapse of the banking structure was imminent, and that some drastic preventive measures were needed. On the question of the particular measures needed no two men of the group agreed. Everyone saw dangers in everyone else's plans. The meeting ended in complete disagreement—as all meetings ended in those troubled times, no matter who attended them. Everyone, however, agreed with the statement of a prominent lawyer, who said: "My mind fails to function when I think of the extent of the catastrophe that will follow when the Chase National Bank closes its doors."

I returned to New Haven much depressed and saw Professor Robinson, who unaccountably remained quite cheerful about the whole situation. I said: "But you don't seem to realize that there is a crash coming." He replied: "Did any of these experts specify in any concrete terms what human beings would do when the crash occurred?" I admitted that they had not done so. He asked: "Do you think that when the banks all close people will climb trees and throw cocoanuts at each other?" I admitted that this was a little unlikely, but that a bank crash of this magnitude certainly sounded like rioting and perhaps like revolution. Professor Robinson replied: "I will venture a prediction as to exactly what will happen. When the banks close, everyone will feel relieved. It will be a sort of national holiday. There will be general excitement and a feeling of great interest. Travel will not stop; hotels will not close; everyone will have a lot of fun, although they will not admit that it's fun at the time."

Months afterwards I happened to be in New York on the day that all the banks did close. I was amazed at the accuracy of Professor Robinson's diagnosis. I had very little cash, but was able to give checks at hotels for food and lodging without any difficulty. Everyone was excited and interested. They had something to think about and talk about. It was a great emotional release. Space does not permit me to go into the reasons Professor Robinson gave for this guess. It was, however, of all the predictions which I heard about the impending crash, the only one that was accurate.

I will give another illustration. Nearly a year before the last election Professor Robinson was commenting upon the press campaign against President Roosevelt, which was just getting under way. He said: "These

anti-Roosevelt editors are all wrong. They completely misunderstand the effect of what they are saying and doing. Newspapers are a powerful influence in this country. They will continue to be a powerful influence. However, the people who write the editorials and columns do not understand very well the nature of that influence in our peculiar intellectual atmosphere. They are now calling Roosevelt every possible name. Starting out with violent language, they will necessarily use language more and more violent. They cannot help themselves any more than the movie advertisers can help themselves when they make it impossible to describe a really good picture because the words 'colossal' and 'stupendous' have been used so frequently to describe inferior pictures that they have no meaning when applied to good ones. As the campaign goes on, attacks from newspapers will become more and more meaningless. Men caught in this type of psychology simply cannot stop. It isn't anybody's fault; it's just something that is going to happen.

"Now all this is going to make Roosevelt a popular hero. Take an illustration from dramatic techniques. The ordinary melodrama exposes the villain in the last act. The hero denounces him; the heroine points the finger of scorn at him and everyone goes away thoroughly disgusted with his conduct. But this exposure *must* take place at the *end* of the play. If it took place at the beginning of the play and kept up throughout the production, you would find that the villain was assuming heroic proportions and that the hero was becoming somewhat namby-pamby. The same thing will happen in this campaign, because editors do not realize that a political campaign is a dramatic production. Their technical propagandists think it is something like advertising tooth paste, in which a slogan becomes impressed on the public mind by constant reiteration until everyone buys the tooth paste. In fact, it is entirely different. The denunciation of Roosevelt is laying the ground for a triumphal march by him at the end of the play. This doesn't mean that the press is losing its influence. It means only that the influence of the press on public opinion is not very well understood by the people who own the newspapers. Newspaper men are beginning to learn how an advertising campaign sells soap. They do not yet understand how to bring a political drama to a climax. That is a difficult technique, like producing a play. It may fail even in skilled hands. However, it is bound to fail in the hands of people who think that dramas can be successful with high pressure salesmen on the stage instead of actors. The press campaign is going to get results, but not the results the editors expect."

The accuracy of this prediction as to the results of the newspaper campaign was verified in a most startling way and yet people still do not understand it. They are still talking today about the "waning influence of the press."

And what has the ability to make such predictions to do with law? Professor Robinson thought it had a very great relevance. Legal arguments, he thought, were the same type of propaganda as political debates, except that they were couched in more solemn and more ceremonial terms. In some primitive tribes when a dispute occurs a line is drawn on the sand and the parties hire medicine-men to help them make faces at each other. They finally get tired and the case is ended without violence. In more sophisticated primitive civilizations they use proverbs. Where outside prejudices are not aroused the best proverb always wins. In our common law system today parables are used rather than proverbs, which allow more play for the ingenious mind and make it a more complicated game, just as bridge is more complicated than matching pennies.

Professor Robinson saw all this as a fascinating study in modern anthropology. He never condemned it or thought that he saw a substitute for it. He was simply an observer.

It was this quality that made so many people misunderstand his attitude. To call law a game seems sacrilegious. In the rational atmosphere of our law schools, we instinctively suppose there is only one true approach to law. We quarrel about what that approach is and split into realist and fundamentalist schools. The difference between these two groups cannot be defined. It can be said only that the one attitude toward legal precepts is more reverent than the other. Nevertheless, an intellectual struggle goes on and everyone searches for some universal truth about what the law is.

Professor Robinson saw jurisprudence not from the point of view of an umpire deciding which jurists were right, but from the point of view of a psychologist studying a group which was undergoing spiritual conflict between ideals and practical needs, both of which had to be recognized. He noted that men in groups are bound together by slogans and habits and achieve a certain personality which has something one might call a subconscious mind. He had, however, no doctrinaire belief of the reality of what the psychologist calls the subconscious. He claimed only that it offered a pretty good platform for making observations which could not be made from a platform representing the attitude of respect and reverence which one must take before a court. He never denied the utility of legal concepts, or the necessity of using them when one appeared on the solemn judicial stage. He never denied that it was the function of the law school to teach that language. He asserted only that there was room for two sciences, one a science *of* law to be used within the little dramatic universe of the law and the other a science *about* law which was useful not on the judicial stage but in the conference room of the diagnostician of social institutions.

He found that in our present thinking the science *about* law was discussed only *in camera*. It was the property of unscrupulous people, because when used by respectable persons it created spiritual conflicts between their ideals and practical necessities. Professor Robinson noted that this attitude had the effect of removing from the field of practical effectiveness in government many tolerant and respectable people. He noted that it compelled them to drop the reins of power and turn the real techniques of government over to a *sub rosa* class called politicians. He had faith in a future science *about* law which actually concerned the techniques of human organizations. He thought that it could be studied better if we could only get a respectable place for it in our institutions of learning. But he did not claim that all law subjects should be taught from that platform. There is room in the law for romance and oratory and logic, as well as for objective diagnosis, and he merely sought a place for that diagnosis among these other techniques.

Professor Robinson realized the truth of Alvin Johnson's remark that heretofore the union of the legal and social sciences had been a beautiful example of cross-sterilization. He put his finger on the difficulty. From an objective point of view law and economics are parts of the folklore of the people. He therefore wanted to observe them as an anthropologist observes folklore. To observe them in this way he had to take the point of view that neither law nor economics had any separate field of its own and that he was a student of the operation of human institutions which used on different occasions the language of each of these sciences. He did not think that there were separate "legal aspects" and "economic aspects" to a problem. He thought that they were only different attitudes which men took toward the same set of events on different occasions.

Nor was Professor Robinson caught in that set of rigid classifications which makes up so much of the literature of psychology and psychiatry. Indeed, when he first began to read about the "causes of action" of common law pleading, he said that the similarity between these "causes of action" and the classifications of psychiatry was most startling. He told me that much psychiatric diagnosis consists in determining whether schizophrenia "lies" in the same way that lawyers determine whether "trespass on the case lies." The psychologist observing legal institutions, he thought, had no right to assume that his training through observing individuals in clinics gave him any special skill in observing legal institutions. Skill in observation of one sort of phenomenon does not mean skill in the observation of another sort. Therefore, the observer of legal institutions should be one who had experience with their activities. All the psychologist could contribute to the observation of legal institutions was a point of view. And the greatest light which that point of view

could give would be to remove that feeling of moral indignation or devotion to unattainable ideals which prevents legal scholars from seeing what is under their noses. For the purposes of practical clarity he considered that the slogan "Be an adult and abandon your infantilisms" was a good substitute for the older slogan "Be good and do not sin," because it enabled us in observing human activity to break the shackles of many of the preconceptions of the past. He knew, however, that no principle or slogan could be ridden too far. He agreed thoroughly with that brilliant epigram of Harry Stack Sullivan of Chicago: "And now when you have ceased to care for adventure, when you have forgotten romance, when the only things worth while to you are prestige and income, then you have grown up, then you have become an adult."

Professor Robinson never expected the human race to grow up, any more than the realistic priests of the middle ages ever thought that the human race was going to cease to sin. As an observer he was studying the effect of the psychological compulsions which form institutions on the conduct of those institutions. He saw in the law an unexplored mine of such psychological material. He insisted that the lawyers themselves, because of their great familiarity with the legal organization, would make the best legal psychologists if only they could be won over to a new point of view. That new point of view did not involve abandoning the proverbs, parables and precepts of the law. It meant only that the lawyer should think differently about the law when he was on the solemn judicial stage than when he was off it.

One very competent legal scholar, Professor Mechem of Iowa, called his point of view "the jurisprudence of despair."² It made many scholars like Professor Mechem unhappy to think that it was necessary to be practical about such sacred things as legal ideals and logic, and to regard them as symptoms rather than as truths. It was a natural reaction which may be compared to the reaction of the ethical philosophers at the beginning of the century toward psychoanalytical descriptions of "love" and "honesty." They felt their ethical world crumbling, just as Professor Mechem felt his jurisprudential world crumbling under the impact of an objective analysis. And yet Professor Robinson often observed that the legal scholars had nothing to fear. People fall in love as readily after Freud as before. In the same way, they can continue to reverence judicial institutions in spite of the fact that they understand them. The dramatist and the diagnostician have roles which are separate and apart. Once diagnosis becomes a recognized technique, the orator and the dramatist will find that their place in the law is still undisturbed. Professor Robinson believed that power over human activities could be acquired by objective understanding, just as power in the diagnosis and

2. Mechem, *The Jurisprudence of Despair* (1936) 21 IOWA L. REV. 669.

cure of maladjusted personality had been acquired with that point of view.

No one will ever know what Professor Robinson might have accomplished had he lived. I can give only my own appraisal: Professor Robinson was one of the really great minds of his generation, and the contribution which he was about to make would have placed his name in the very forefront of modern jurisprudence.