

THE NEW PSYCHOLOGY AND THE FUNCTIONS OF LAW

Could it be possible that there really is no single essence of *the law* and that, consequently, there is no universal function of law? In an important sense, this is exactly the jurisprudential position that we can deduce from the new psychology that we see emerging through the genius of men like Jean Piaget, George Kelly, and many others. The impressive theoretical advances being made in empirical psychology should be examined for the important implications they may have for the persistent problems of traditional jurisprudence.

Most traditional views of the law, however they might differ, agree in defining the law as some kind of entity with recognizable characteristics. The law has always been taken to be something about which meaningful statements can be made and meaningful arguments pursued.

According to the radical nominalism of the new psychology each man constructs his own world, one element at a time. True, he acquires many of his ideas and hypotheses about this world from his social environment. However, cognitive psychologists insist that cultural concepts are accepted voluntarily for reasons of personal advantage to the individual and are not forced on the individual. Conceived as an element in each individual's world, the law may very well be a different entity for each individual. It will be a composite belief; and depending on the nature and comprehensiveness of that belief, it will serve different functions in the life of that individual.

For purposes of illustration we can take the theory of George Kelly who argues rather persuasively that human behavior generally follows the paradigm of scientists' behavior. He sees men as protoscientists trying to make sense of the world of sensory information that they encounter day by day and organizing that world in such a way that they can make it yield to their needs and desires. In other words, he is saying that each man creates his own ways of seeing the world in which he lives; the

world does not create them for him. He builds constructs, and tries them on for size.» (1).

He has provided the following explanation:

Constructs are used for predictions of things to come, and the world keeps rolling along and revealing these predictions to be either correct or misleading. This fact provides the basis for revision of constructs and, eventually, of whole construction systems. If it were a static world that we lived in our thinking about it might be static too. But new things keep happening and our predictions keep turning out in expected or unexpected ways. Each day's experience calls for the consolidation of some aspects of our outlook, revision of some, and outright abandonment of others.

What we have said about the experience of the individual man holds true also for the scientist. A scientist formulates a theory—a body of constructs with a focus and a range of convenience. If he is a good scientist, he immediately starts putting it to test. It is almost certain that, as soon as he starts testing, he will also have to start changing it in the light of the outcomes. Any theory, then, tends to be transient. And the more practical it is and the more useful it appears to be, the more vulnerable it is to new evidence (2).

At first one might object to these theories by pointing to the uniformity of outlook within a given culture. But the cognitive psychologists have met this objection openly. As has been explained by one cognitivest:

Since society surrounds the person, directing him to apply the concepts that have been worked out by his forebears and peers, and the arranging circumstances that demonstrate the predictive value of these constructs, the person will find that he can best avoid an inability to predict by adopting the concepts that are used by others around him. And furthermore, he finds that he is most comfortable when he is surrounded by others who use his constructions; for if others would apply constructions that vary from his, they will, in essence, disconfirm the validity of his own «reality.» (3).

Recognizing the radical nominalism of the view suggested above, we can next ask, what are the functions of law as it is constructed in the world views of the individuals in a society? In answering that question, we must recognize that the function of any constructs in this system is determined by their relationship to the needs and ends of the people that

(1) GEORGE A. KELLY: *A. Theory of Personality* (New York: W. W. Norton and Company, 1963), p. 12.

(2) *Ibid.*, p. 14.

(3) M. SHERIF and C. W. SHERIF: «Reference Groups» (New York: Harper and Row, 1964), as reported by James C. Mancuso, ed. *Readings for a Cognitive Theory of Personality* (New York: Holt, Rinehart, and Winston, 1970), p. 530.

hold them. The function of law as defined above would then be determined by the needs and ends of the individuals who held a particular notion about the law.

At this point a very interesting insight will begin to develop. For as jurists have argued over the centuries about the appropriate functions of law, they have always been criticized for failure to have the law serve this or that interest. The conservatives have been criticized by the radicals for using the law as an instrument for impeding change. Radicals, on the other hand, have been criticized for their notion that law should be an instrument of progress.

Notice that law does indeed serve both of these contradictory functions, depending on the individual's concern. For many an average American today, law is seen as a potential weapon for damming the tide of pornographic literature and movies. But for over a decade in America the law has been seen by others as a device for protecting their investments in the pornography industry against an irate public.

Again, in the life of the individual, the law as he constructs it can provide him with a moral guide, if he sees it as something worthy of emulation. Alternatively, in the lives of others, the law may be an object of scorn and evasion. For one the law functions as preceptor; for the other as an obstacle. For many people the law functions as a source of order in a community. But conversely, there are those who prefer less organized communities and begin to see the law as a restriction on freedom.

From this perspective the function of law is not simple, as may be suggested from these brief examples. Rather, the functions of law may well span the spectrum of human needs and ends. And in each case the law may vary as any other construct developed by the individual.

There is, of course, an alternative approach to the question of the functions of the law, and this would be more in line with traditional discussions. Given the cognitive psychologists' view of the law as a construct of the individual, we could change perspectives and ask, what function *for society* does that construct serve? In this sense, if the law is anything, it is a statistical regularity in the beliefs of the members of society about what the law is. And in *this sense*, this predominant belief does serve a number of *social* functions. First of all, it provides a regulation on judges and lawmakers by setting limits on what they can do in their society without incurring the wrath of a public whose precious ideas of reality have been violated. It also sets limits on the kind of behavior that individuals can adopt without finding themselves proscribed or restricted by some form of official community action holding the status of law. To

the extent that the individuals in society have a reasonably correct perception of what the predominant notion of law is in a society, they can discipline themselves to behave in those acceptable limits.

In jurisprudence it has always been very difficult to find philosophical solutions to the kinds of problems mentioned above. Ideal justice and social realities never quite seem to fit perfectly, leaving cause for continual philosophical reconsideration of these problems. The suggestion of these insights from cognitive psychology is that likely the problems of jurisprudence never will be solved in the realm of the ideal, that is, philosophically. But the political picture is much more encouraging, for we can now see why political solutions to these problems are very possible and how they, in fact, do occur. We can have a practical degree of justice, fairness, rationality, and even objectivity in a legal system without being able to justify any particular philosophical theory. All that would be necessary is widespread agreement in the society on some workable standard.

But there is a pessimistic side as well. That is the possibility that cultural changes within a society may be nondirectional. That is, legal and moral consensus would seriously disintegrate rather than shifting its direction or center. According to the model derived from cognitive psychology, we would expect judges in such situations to become increasingly prominent as centers of controversy. Should the disintegration continue, there would seem to be no way in which law or judges could preserve the system. It may be a paradox, but it does seem from this point of view that consensus is a prerequisite of freedom.

Cognitive psychology has never been considered a prerequisite to doing jurisprudence. Yet, if the psychologists can tell us how the social world and all its relationships is constructed in the mind of every individual, we may indeed gain some valuable insights into some of the most persistent problems of jurisprudence.

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