

BOOK REVIEWS

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AN ACCOUNT OF THE TWENTIETH CENTURY IN LEGAL ACADEME: OR TWO NATIONS DIVIDED BY A COMMON LANGUAGE

Pragmatism and Law: From philosophy to dispute resolution,
by MICHAL ALBERSTEIN, Ashgate, Dartmouth, 2002, viii + 359 pp,
Hardback, £60, ISBN 0 7546 2208 8

Pragmatism and Law includes a treatment of three distinct subjects. First, there is a historical account of American jurisprudence from the late 19th century to the dawn of the 21st century. Second, there is an analytical account of various species of “pragmatism” over this period. Third, there is an evaluative attempt to solve the problems identified in the historical narrative and analysis. The author identifies what she feels to be the most promising aspect of legal teaching at Harvard, and suggests a direction for gainful future development. The book is centred on Harvard, and one aspect of the treatment of all three subjects is the proposition that Harvard occupies an iconic place in American jurisprudence and education.

Despite an American earnestness in its structure and ambition, *Pragmatism and Law* is a response to the same problem as a book recently reviewed in this journal: *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century*.¹ However, the differences between the two treatments is so great that a review for a British audience demands a very cursory reminder of how fundamental is the difference in the juristic approach in these two common-law English speaking nations. In effect, the allegation of “earnestness” in the American juristic tradition needs to be justified.

Unlike the judicial committees of the House of Lords and Privy Council, institutions that developed from more powerful legislative and executive bodies, the Supreme Court of the United States of America was created with vital constitutional objectives. There were two political functions for the Supreme Court that were necessary if the overarching purpose for the adoption of the Constitution of the United States of America – the conservation and deepening of the union of the states of North America – was to be achieved. First, the Supreme Court had to mediate between the states and the federal government, acting to restrict or extend the reach of federal power. The second function of the Supreme Court was a result of the process that led to the adoption of the constitution. A concession had to be made by the supporters of the draft constitution to secure adoption by the states. It was necessary to endorse the human rights rhetoric of the revolution, as expressed by Jefferson in the *Declaration of Independence*. This Enlightenment commitment to human rights was given expression by the Bill of Rights. It fell to the Supreme Court to develop the human rights provisions of the constitution, giving substance to the rhetoric by legal enforcement of

¹ (2004) 13 (2) *Nott LJ* 67.

human rights against both state and federal action, and on occasion striking down legislation that it felt violated the constitution. There simply are no equivalent functions traditionally associated with the highest courts in the United Kingdom.

In the United Kingdom law has played an important but relatively subordinate role in political rhetoric: we remain subjects rather than citizens; it is law *and* order that is called for; it was Christianity and civilization the Empire purported to export. In the United States political rhetoric is far more likely to give centre stage to aspects of the constitutional: the union; the pioneering experiment in, and experience of, representative democracy; the language of human rights. The American rhetoric is legalistic in nature when compared with the British. The resonance of this language tends to generate a regard for, and interest in, law that is not associated with the interests involved in individual disputes resolved through litigation. Principles are at stake. Furthermore, core American values are in issue.

Thus, it is submitted that one cause for American earnestness about much juristic material is that the issues are felt to be more important. They include the future of the union, what it means to be American, and the identification of the ideal form of the United States of America. With so much at stake, errors seem more important. The historical, institutional and cultural context of public and constitutional law is powerfully different to the context of the United Kingdom.

There is a second factor – again one that derives from the federal structure of the United States – creating a demand for earnest endeavour from American jurists. There is a natural tendency for the law of the states to develop independently of each other, a centrifugal tendency in the sphere of law encouraged by differences in social, economic, geographical, political and legal factors. In each state the legislative process responds in the first instance to local political forces. This centrifugal tendency in the 19th century encouraged a legal scholarship that emphasised the need and importance of principles of universal application, a common law that was the common law of all the states rather than a multitude of common laws for each state (with apologies to Louisiana). In the 20th century, the emphasis has been less on universal principles and more on unified legal codes, which can be adopted by states as a deliberate choice for uniformity and comity over local autonomy. The United States of America does not have the institutional devices for generating uniformity of private law that the European Union has. The academic legal community has traditionally felt a duty to attempt to resist legal localism.

The final difference we need to note is the relative strengths of the academy and the profession in the two countries. To be brutal, the legal academy is stronger in influence and prestige in the United States when compared with Britain, where the legal academy is weak relative to the profession. The United States has traditionally shown a willingness to appoint academics to the highest ranks of the judiciary. Dame Brenda Hale is a rare and recent exception to the British preference for practitioners (although formerly politicians were also appointed in significant numbers). In Britain, it remains the case that the professions determine what constitutes an acceptable legal education.

Thus it is that Michal Alberstein is able to describe the intellectual (not the institutional) history of the legal academy (rarely feeling the need to step outside that community) in the United States of America (ignoring developments in Britain and Europe) and not only fill her 350 pages but struggle to contain the amount of material she needs for her narrative account. The story she relates has been told before, being a large enough subject to have attracted previous accounts. Indeed, she chooses to use the accounts of other academics to deal with the interwar period of the legal realists. The narrative, grossly abridged, is as follows.

In the late 19th century a new American philosophical approach called “pragmatism” was developed by Harvard academics Charles Pierce (a social outcast and academic failure) and William James (Henry the novelist’s brother). One of the earliest members of the group that would be associated with pragmatism was a lawyer academic, Oliver Wendell Holmes Jr (his father Oliver Wendell Holmes Snr discovered puerperal fever was contagious, and, by introducing hygienic methods into childbirth hospitals, must have saved thousands of lives). Holmes became a Justice of the Supreme Court and probably the most influential jurist of the 20th century. Holmes was the master of the enigmatic epigraph, his most famous being: “The life of the law has not been logic: it has been experience”. Holmes is one source for pragmatism in legal thought. The other major prophet of pragmatism was John Dewey, a philosopher, educational theorist, political activist, and prodigiously productive academic of the “progressive school”.

Pragmatism, either *via* Holmes or Dewey, influenced most of the leading American jurists of the 20th century. However, its most vocal juristic progeny, and soon the practitioners of a unique form of legal pragmatism, were the legal realists. This heterodox band of scholars, represented in *Pragmatism and Law* almost exclusively by Karl Llewellyn and Jerome Frank, challenged the underlying premises of the “formal” school of jurists that had dominated American academe in the late 19th and early 20th centuries. The realists denied the efficacy of doctrine alone for resolving legal problems, and placed emphasis on the effects of law, viewing law as vitally concerned with consequences rather than being pre-determined by juristic entities such as principles. In educational terms they decried the “case-law” method as practised at Harvard as impoverished in the range of materials used, impractical in its educational aims, and distorting in the manner it presented and handled cases for pedagogic purposes.

After the Second World War there was a new attempt to establish a juristic approach founded upon a consensus approach to law and legal education at Harvard, known as the “legal process” method. Legal process was developed by two scholars: Henry Hart and Albert Sacks. The method attempted to demarcate an area that was legal rather than political, and to inculcate a consensus view of law which developed through “reasoned elaboration”. Amongst the stars of this movement was Lon Fuller. However, the shock of the success of civil rights litigation, and in particular the desegregation case of *Brown v Board of Education*,² shattered the political consensus upon which the legal process method was founded. Henry Hart and Albert Sacks were faced by a series of decisions by the Warren Supreme Court that they felt were “right” but which their method could not justify. Henry Hart was, literally, unable to articulate a juristic defence of the legal process approach. He stood up to deliver a prestigious public lecture on the jurisprudence of the legal process method, announced his planned theory did not work, and sat down again.

There followed a period of juristic activity which led to a fragmentation of the juristic world. Different schools developed on the left, right, and in a rather uncertain centre. European thought known as “post-modernism” suggested that relativism was unavoidable. Efforts to separate law and politics were unconvincing. Schools of thought developed in the academy that were antagonistic and showing a tendency to develop into ever greater divergence. Meanwhile, at Harvard, the Harvard Negotiation Project was developing a body of learning and technique that seemed ever more successful as it became ever less “legal” in orientation, open to other disciplines and hostile to juristic theory. At the end of the 20th century the legal academy was divided

² 347 US 483 (1954).

into two branches, the high theorists unable to agree about anything except the errors and inadequacies of others, and the negotiation and skills people eschewing all theory and merging with non-legal disciplines.

At this point in the narrative we finally reach the point where the common thesis of this book and *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century*³ becomes apparent. Both books, although written about different systems, and with very different approaches to their subject matter, find a problem of identifying and defending the discipline known as “law”. The problem of law as a discipline is that it has a subject matter (law, legal institutions, legal processes) but no distinct methodology. Legal scholarship is distinctive in style, but utilises no method or technique that is not in use in some other discipline. This creates a fear of an immanent risk that law will dissolve into an aspect of the disciplines that provide its various methods of inquiry and analysis.

Bradney, in *Conversations, Choices, and Chances*, met this problem of definition by advancing a 19th century approach to the question of what a “liberal degree” should aspire towards, modelling legal education as a species of this genus. Alberstein inclines towards a resolution that combines the approach of the skills-based Harvard Negotiation Project with theoretical insights gleaned from post-modernism. I am in some sympathy with Alberstein on this broad question of approach, and certainly her book demonstrates that one can be both interested in an approach to legal education that is based on student experience and serious about theory at the same time. However, her account reveals a schism in the United States between high theorists and skills-based approaches similar to the one that reading Bradney suggests exists in Britain between liberal scholars and trainers.

In support of her conclusion Alberstein relies upon the analysis that has proceeded throughout her narrative account of American juristic thought through the 20th century. The very long first chapter is foundational, as it provides the classifications for the later analysis. Unfortunately, this analysis has flaws. The analytical method is eclectic and relies upon the positing of meaning from congruity. This is a deliberate attempt to learn the lesson of post-modernist theory, that there is no one path to truth.⁴ However, along with much of “post-modern” writing there is a double tendency towards mystification.

First, the attractiveness of verbal imagery and suggestiveness of analogies tends to “persuade” by colour of language and repeated use of examples rather than attempting demonstration. To give an important example drawn from a crucial stage of Alberstein’s analysis we are presented with: “pragmatism” reified as a castrated ghost (“spirit” – also referred to as: the “spectre that haunts my paper”); non-biological sex assigned to scholars or their work (Holmes male, Dewey female); the stereotypical characteristics of the genders then applied to said scholars (Dewey is “practical”; “hysteric”; “takes care of the education of the children”; he is “the happy harmonizer”: Holmes is “obsessive”; a “responsible, insensitive, rational and sophisticated actor”; who will “encounter the outside world”); these scholars are then placed in an imagined cultural family (“traditional liberal family”) and assigned roles, all of which

³ A Bradney, (2003, Hart Publishing).

⁴ I think this is what she means when she writes at xii: “To say that I go beyond the dichotomies is to repeat the clichés. Still, I must declare that I indeed try to do so and more – not to merely go beyond, but to go right through, to endure them with passion: the internal and the external; the fantastic and the real; the progressive and the conservative; the theoretical and the practical; the philosophical and the common-sense-like; the literary and the scientific. My writing is as much about fiction as about reality – reality as a fiction, as a story, a text, which unfolds through time-and-place matrices, and where the dichotomies find their play each time in different ways.” However, I find this style sufficiently obscure to feel the need to quote in order to avoid the risk of misreading.

leads the author to ask (“of course”!) “what do the children do, and what is the horizon of their choices in the promised land?” (pages 65–70). This is not a style that allows clarity of thought.

Second, the method of analysis encourages reification. The refusal to make arbitrary decisions about definition, or preferred criteria of evaluation, leads to the setting-up of ideas or movements or the works of scholars as “things” that exist and have a life of their own. Oddly for a movement that insists upon the centrality of “the text” there is no requirement that “the text” be “any text”. The “text” becomes almost any feature of social life that is of interest to the theorist. This approach is articulated by Alberstein:

By using pragmatism as a text, which functions as a proper name, a singular identity that wears different costumes in time and place, I try to trace its operation within the theoretical legal discourse.
(page 1).

Pragmatism is not “a text”, it is not “a singular identity” or a person of any type, pragmatism does not wear clothes, it does not act. Pragmatism is not a thing at all; it is how an approach within American philosophy was described by an early exponent of the approach.

The analysis also employs the rather obscure and metaphorical language typical of the “post-modern” approach to analysis. Occasionally, I think this borders on the misuse of language, *eg* “locus” for “fulcrum” (at ix), “rapture” for “rupture” (at page 24), “pathos” for “ethos” (at pages 72, 247 *et passim*). In short, the very considerable scholarly effort displayed in chapter one is deeply mired in an analytic method that aspires to persuasion by analogy and confirmatory classification, and yet uses a form that is painfully obscure. I suspect that the first chapter is the remains of a re-worked thesis, and that this partially explains both its impressive use of the work of many authors, and its unsatisfactory form.

The later chapters of *Pragmatism and Law* are clearer in style. However, their reliance upon the classification structure developed in the first chapter leaves them unable to stand alone, and the general style and analytical method remain. As the book approaches the Harvard Negotiation Project the author seems to start to feel some irritation at the very work and method that was her focus and guide in chapter one: “For me, Schlag’s ‘nowhere to go’ metaphor seems emblematic to the academic discourse, with its proliferation of schools and economy of diversity” (page 286). It is clear that she sees the Negotiation Project – the work that has not been influenced by “post-modern” theory – as the most exciting and attractive work being undertaken at Harvard today.

In conclusion, *Pragmatism and Law* is a difficult book, somewhat overambitious and built on a method of analysis that seems destined to produce mystification and obscurity of style. However, it is a serious attempt to organise the last 100 years of American jurisprudence into some sort of overall story without distortion, using the idea of “pragmatism” and its forms as the unifying theme. It is an interesting book that displays great industry, scholarly integrity, and a considerable intelligence at work.

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