ANDERSON AND LEGAL THEORY*

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The door of the study giving on to the Philosophy Room opened and John Anderson stood for a moment looking for the first time at his newest batch of first year students. Then he moved to his position between the panels of philosophers and we began to hear our first discussion at the University of a legal proceeding.

The case, as Anderson presented it, was not a testimony to the effectiveness of advocacy. The successful prosecutors, especially one Anytus, appeared to be quite hopeless. On the other hand, the unsuccessful accused, Socrates, constantly made sound points. Anderson did not pretend, however, that the defence was conducted with prudence. He inferred from the fact that the accused had to appeal to his judges not to interrupt him that they considered themselves provoked.[1]

Whether nowadays judicial interruptions of counsel could be regarded as evidence of provocation is perhaps doubtful, at any rate in the case of one or two judges not a thousand miles away. But what Socrates said would certainly still be regarded as provoking. It is not thought prudent to imply that the judges have no real understanding of what they are about, especially when what is implied is not merely that they are having an off day, but that the proposition is true of the whole range of their judicial and political activities. Yet this was the result which Socrates said had emerged from his earnest inquiries of the statesmen of Athens in the hope of learning something from them. Apparently his judges were not mollified by Socrates' revelations that the same thing had emerged from his inquiries of the poets and the artisans. In any case, Socrates suggested that while the poets and artisans had no understanding of what they were doing, they could at least do something.

The modern lawyer is perhaps more often to be seen in Socrates' character of the artisan than the statesman. He is infrequently a poet. He can frequently produce specified results, and is often very good at it.

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* This Comment is published in connection with the 50th anniversary of the arrival in Sydney of John Anderson, former Professor of Philosophy in the University of Sydney.

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[1] See *Plato, The Last Days of Socrates* (Trans. H. Tredennick, 1955) "The Apology of Socrates" pp. 19, 23, 32 and 36.

But I do not believe that his understanding of what he is about would often measure up to Anderson's philosophic scrutiny much better than Socrates' sources of information measured up to his. The lawyer is in any case likely to leave the matter of philosophical explanations of what he does to legal theorists. These tend to fall into various schools of thought, such as positivists, realists, sociological jurists and natural law theorists. But in the matter of their relationships to Anderson's philosophy, there is little to choose between them. Representatives of all schools commit fundamental philosophical errors.

For Anderson, perhaps the most pervasive philosophical error is relativism. Its explanation requires brief reference to some features of Anderson's position. Facts, for him, are complex occurrences in space and time, in complex relations to other facts. There is nothing but such facts. Facts are *propositional* in structure. The term which is the subject of a proposition locates in space and time the predicate asserted of it. The predicate of a proposition characterises that location. But the terms are themselves complex. The subject is always itself a characterised place and the predicate is always itself a placed character.[2]

Characters may be either qualities or relations. Relativism, for Anderson, consists in presenting a particular relation — or relations more generally — in certain ways inconsistent with the scheme of things I have sketched. A particular relation — or relations more generally — may be treated as if it were a quality of a thing rather than a character relating that thing to other things. Or it may be treated as if it could occur independently of its function in characterising things related — as if, for example, we could have drinking existing independently of anybody drinking or anything being drunk.[3]

A prominent philosophical error in legal theory is relativism in treatment of the relations between *facts to which* responses are made, especially by officials, and those responses themselves. The most famous modern positivists purport to be centrally concerned with propositions that, when given situations occur, certain consequences *legally ought* to follow. For them, these propositions are *not* statements about what does follow. They *are* thought to be a rough *guide* to what kinds of responses people, especially officials, make in the circumstances specified. For the propositions are not taken to be generally asserted except in a context of rough correspondence between what legally ought to be done and what is.

These modern positivists are specially concerned with certain kinds of facts to which officials are called on to respond. These are claims that something is law, or that it has legal effect. And Hans Kelsen, the most famous European positivist of the last fifty years, begins his account

[2] See John Anderson, *Studies in Empirical Philosophy* (1962), Introduction by J. A. Passmore, pp. xi and xvi.

[3] See Anderson, *op. cit. supra* n. 2, p. 238.

of law by referring to a class of these.[4]

A man describes a document — in the document itself — as his last will and testament, or as a deed, or as a judgment. Or a body of persons votes on a document described in it as an enactment. These things are presented by Kelsen as acts of will carrying legal *self-interpretations*. But he says that these are only *subjective* meanings put on the acts. This may not correspond with the *objective* legal meaning of the act, if it has any, put upon it by the legal scientist.[5]

The legal scientist arrives at the objective meaning by confronting the act of will with a body of norms which functions as a scheme of interpretation. Thus he confronts an alleged will with the body of norms constituting the law of wills, or an alleged Act of Parliament with the constitution. If the act of will is then seen to conform with the conditions stipulated in the norms it is valid. It has an objective legal meaning.

For Kelsen, the act of will is an occurrence in time and space as is the self-interpretation which accompanies it. But the norms which give it objective meaning are not.[6] Acts of will are *is's* but norms are *oughts* and legal norms are one kind of *oughts*. The difference cannot be explained further. Kelsen says that we are immediately aware of the difference between *is* and *ought*, and nobody can deny it. It is transparent.[7]

Anderson denied that *any* proposition is transparently true. His view is that any statement that something is the case can be justified only by a statement that *something else* is the case.[8] By contrast, he regarded the kind of view Kelsen is putting as involving that some statements may be justified by the *same* statement. Representing this view to our class, Anderson moved to the blackboard and wrote upon it "p, ∴ p". Pointing to the first p, he said that, as a premise, the proposition "p" appeared in *unproved* form, in a form in which it *could* be denied, which was just what the argument was designed to show was impossible of the proposition "p".

While, however, Kelsen insists that the distinction between *is* and *ought* is transparent and does not require explanation, he does in fact attempt some explanation. It turns out in his mind to depend on a view which might be expressed by saying that the *esse* of complex states of affairs is *cognosci* — consists in the manner in which they are known by the scientist in the particular field. They are constituted by their relation to principles of cognition. This for Anderson is relativism rampant.

Kelsen postulates firstly facts in time and space. The natural sciences and some social sciences deal with these. These facts are constituted by cognition under one kind of category of thinking, the category of

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[4] E.g., H. Kelsen, *Pure Theory of Law* (transl. M. Knight, 1967) pp. 3-17.
[5] *Id.* pp. 2-3.
[6] *Id.* pp. 3-4.
[7] *Id.* pp. 5-6.
[8] See Passmore in Anderson, *op. cit. supra* n. 2, p. x.

causality. Norms, on the other hand, are the subject matter of the normative sciences. These sciences make, not causation statements, but imputation statements. Legal science is among these. Its function is to describe legal norms, but it does this by constituting them epistemologically — by constituting them through a principle produced by an act of thinking of the scientist, in order to organize the legal system to which they belong.

But *from* what are the *facts* of causal thinking, and the *norms* of legal thinking, constituted? Kelsen says that it is always a "something" which at one time *is* and the other time *ought* to be, according to the category of thinking under which it comes to be organized — the modus. Thus Kelsen says that in the two statements "the door is being closed" and "the door ought to be closed", the closing of the door in the former statement and in the latter are not identical. The "something" appears organized under the "is" or causal category in the former statement and some "ought" category in the latter. The behaviour in the "is" statement is not the behaviour referred to in the "ought" statement, but it can be examined for conformity with it.[9]

Anderson's response to this kind of thinking is that, on the account of the matter which Kelsen gives, it is out of the question to examine facts for conformity with legal provisions. There would be no way of discovering whether it is the *same* something which is being organized epistemologically in the factual "is" statement and in the normative "ought" statement. We cannot identify *a* something at all unless it is already a complex state of affairs distinguished thereby from other somethings. We cannot recognize a thing *before* it is characterized. Yet Kelsen's account of observing the same something under different *modi* proceeds on the basis that we can, contrary to his own theory of how we know things as complexes.[10]

For Anderson, Kelsen's philosophiscal difficulties are only increased by the fact that Kelsen presents the process of legal cognition as highly complex. For Kelsen, there is involved in the cognition of the norms of any single system of law, only one principle contributed by the thought of the legal scientist — which creates or constitutes the norms of the system epistemologically.[11] This is the basic norm of the system. It is what brings the other norms together in a system, for the basic norm is the one reason for the validity — or specific existence — of all the other norms in the system.[12] All the other norms in a system are for Kelsen positive norms, that is, they are created in a different sense from the epistemological one, by acts of will.

In Kelsen's theory we cannot, however, generally determine whether a particular norm is valid by seeing immediately whether the act of will

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[9] Kelsen, *op. cit. supra* n. 4, p. 6.

[10] *Cf.* Passmore in Anderson, *op. cit. supra* n. 2, p. xii dealing with Anderson's criticisms of the view that a thing's *esse* is *percipi.*

[11] Kelsen, *op. cit. supra* n. 4, p. 72.

[12] *Id.* p. 23.

which is alleged to have created it complies with the conditions laid down by the basic norm. It has first to be seen whether it complies with positive norms immediately superior to it in the system, and there may be several steps of this kind involved before we reach the basic norm. For example: A writ of execution may be valid because it complies with the conditions stipulated by the judgment under which it is issued; the judgment may be valid because it complies with the conditions for valid judgments stipulated in the rules of court; the rules of court may be valid because they comply with the statute providing for them to be promulgated; the statute may be valid because it complies with conditions laid down by the material constitution; the material constitution is valid because the basic norm stipulates that it shall be. Thus the establishment of a single norm as valid requires for Kelsen a whole set of examinations for conformity, *all* of which are out of the question for Anderson on Kelsen's account of what is involved.

To some the moral of the sketch I have given of the relationships between Kelsen's and Anderson's positions may be no more than that the legal profession has been ill served by its legal philosopher. It is a theme of some philosophers themselves that the ordinary man may frequently say things which can be misconstrued by philosophers so as to give rise to horrifying philosophic theories, which the ordinary man would indignantly reject.

Similarly, the ordinary lawyer makes a distinction between fact and law, he regards some legal decisions as "wrong" in terms of what legally ought to have been done, and in assessing this he purports to measure fact situations for conformity with legal principle. But he might be very much startled by the philosophy which Kelsen erects upon this, even though Kelsen himself claims that he is doing no more than work out the implications of legal talk.

Such a lawyer may prefer the explanations of H.L.A. Hart, who purports to assume the same kind of task but executes it rather differently. In recent years English positivism has centred around Hart in the way that Continental legal positivism had for decades centred around Kelsen. And at first sight some of what Hart says is compatible with Anderson's position.

In Hart's legal philosophy, what corresponds to Kelsen's basic norm of a legal system is the recognition rule of that system. But, by contrast to Kelsen, Hart insists that the existence of a recognition rule is a matter of ordinary fact — "the rule of recognition", he says, "exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria".[13] Moreover the manner in which Hart expresses the propositions of a recognition rule (and there seem for him to be more than one proposition

[13] H.L.A. Hart, *The Concept of Law* (1961) p. 107.

in a recognition rule) appears at first to represent it as asserting a fact rather than expressing a norm in the sense of what ought to be. Thus, for example, Hart presents the "supreme element" in the recognition rule of the English system as being "What the Queen in Parliament enacts *is* law".[14]

Yet, as soon as this much is said, conflicts appear between Hart's legal theory and Anderson's philosophy. For Anderson, to assert that all X are Y, to assert that it is true that all X are Y, or to assert that the state of affairs "All X are Y" exists, are one and the same assertion. But for Hart they are plainly not the same, or at least not always the same. He would clearly not contend that the proposition "All Acts passed by the Queen in Parliament are law" *describes* or *asserts* a usage by English officials, though it is this wherein its existence consists. Hart's position is here relativistic from Anderson's viewpoint. The *esse* of the rule consists in its being used.

Again, Hart would clearly not regard the *rule* "All Acts of Parliament are law" as a proposition asserting a *fact of any kind* in the ordinary way. He never gives any account of the meaning, in the sense of what in our experience it directly refers to, of the term "law" in the predicate of a recognition rule. This is not because the possibility that some people might like to know has escaped his notice. His position is that in the case of legal propositions generally this cannot be done. Law is for him an anomalous category,[15] while for Anderson there are no anomalous categories — all fields of study are categories of spatio-temporal occurrences. For Hart, significant language has other functions than the communication of a state of affairs which is its sole function for Anderson. And in putting the structure of these communications different logics are on Hart's theory required than the traditional logic which is for Anderson the universal true presentation of the structures of facts. What a recognition rule does for Hart is not to assert what is law as a matter of ordinary fact, but to perform the special function of specifying criteria for the validity of the ordinary rules of the legal system in question.

The confrontations between Hart's legal theory and Anderson's philosophy multiply when we move from a consideration of Hart's recognition rule to a consideration of what Hart calls the "primary" rules of a legal system — those which it is the function of the recognition rule to identify. In the case of these rules Hart says that a statement that the rule exists may not be just a statement that it is accepted or used as such a statement is in the case of the recognition rule. Since, says Hart, "the status of rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition, this brings with it a new application of the word 'exist' . . . . It may now be an internal

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[14] See, e.g., *id.* p. 112.

[15] H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 *L.Q.R.* 37 at 38, 41 and 46-47.

statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity' ".[16]

Hart does not think it open to him to regard the existence of a primary rule as consisting in its being used, particularly because he is concerned to maintain that a primary rule may be valid, *even though it is not used,* if it is recognized as part of the system by the recognition rule.[17] Hence we get a different kind of relativism in Anderson's sense from that involved in Hart's treatment of recognition rules. The *esse* of primary rules is *derivari* — answering the tests specified in the recognition rule — though there is a further stipulation in Hart that the derivation should be in terms of an "internal" attitude to the system[18] — a stipulation which I believe Hart leaves somewhat obscure.

In any event, Hart's presentation is vulnerable in the result, at more than one point, to Anderson's criticisms of relativism. In some respects, the conflicts between Hart's legal theory and Anderson's philosophical theory are like the conflicts Hart has with rather ill-defined groups of legal theorists known as realists. One strain in realist thought springs from the consideration that it is highly important for lawyers to be able to perceive the subject of their study as part of a common reality with the subject matter of other social sciences and natural sciences as well. The legal theorist would like at least to be able to talk to other social scientists on the basis of some common ground, and he is jealous of the achievements of the natural scientist. He would like to be able to set out to match them by at least copying their methods. Thus some realists set out to treat the judge, as one critic has expressed it, in the way Pavlov treated his dog. They examine his responses to various kinds of stimuli.

Treating a judge like a dog means you don't ask him for explanations of his responses. You couldn't ask a dog and if one asks the judge one is to this extent departing from the scientific procedure one is seeking to copy. And if the judge tells you, you take no notice. A dog wouldn't tell you. This means that much of the contents of legal libraries is ignored. Judges are nothing if not explanatory and law libraries groan under the weight of reports of their explanations of what they do. And since much of their explanations consists in what their attitudes are to rules, the more extreme realists have no occasion to encounter rules in this prominent context.

Some realists have in any case a short way with rules. They may say, for example, that the only real rules are predictions of what the judges will do. Hart claims that this is entirely to misconceive their function. A judge does not refer to rules, he says, to find out what he will do.

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[16] Hart, *op. cit. supra* n. 13, pp. 106-107.
[17] *Id.* pp. 100 and 107.
[18] *Id.* pp. 86-88 and H.L.A. Hart, "Scandinavian Realism" [1959] *C.L.J.* 233 at 237-238.

He refers to rules to find out what he ought to do. Nor will Hart go along with an alternative way that is suggested by less extreme realists for treating rules as facts by regarding them as representations of a special kind of feeling of obligation that judges and others are represented to have. There is a distinction which the ordinary man recognizes, Hart insists, between feeling an obligation and having an obligation. No account of the latter can for him be given without recognizing rules as having some special kind of philosophical status not capable of representation in the way that the subject matter of the natural sciences might be.[19]

In regarding the facts of any science at all, including law, as being events in space and time Anderson is at one with the realists. But this is about as far as the common ground goes, at least in the case of those realist views which Hart is especially concerned to attack, though Anderson's objections would be on different grounds from Hart's. It is common for realists to treat facts in the world of space and time as pure particulars. This can be seen, for example, in one kind of realist attack on the authoritative or binding character of rules. Any judicial decision, the argument runs, is a unique judicial response to a unique situation. Therefore, as soon as one seeks to make any general proposition about it, one has already departed from what is real. Our proposition is not now a representation of anything in reality — we have abstracted from reality. Consequently, even if we unreservedly accept the rule we arrive at as binding on us, it does not bind us to do anything in particular. Because it does not, *really*, apply to anything in particular.

If this argument were acceptable, it would apply not only to general legal rules, whatever they may be thought to be, but to any general proposition at all, which would always be an abstraction from reality. This is certainly not acceptable to Anderson. For him, a universal proposition "All A are B" asserts of each and every A that is a B, and this comes out in the fact that we recognize as valid the argument "All A are B, this is an A, therefore this is a B".[20]

One major divergence therefore between realist theory and Anderson's philosophy is the common treatment by realists of spatio-temporal occurrences as pure particulars. Another feature of realism which is opposed to Anderson's philosophy is realism's common treatment of judges as if what moves within the judge is inscrutable, as it is supposed to be in a dog, and the notion that therefore his responses are wholly to be accounted for by factors operating *upon* him. Thus, for example, the attempt is often made exclusively to account for the judge's reactions to a stimulus at one time by resort to what stimuli have operated upon him at other times. This, again, for Anderson is a kind of relativism. Nothing in the ordinary empirical reality which alone Anderson recognizes is a mere responder. There will be complex motions within the judge and no

[19] Hart, *op. cit. supra* n. 13, p. 86.
[20] See Passmore in Anderson, *op. cit. supra* n. 2, p. xviii.

account of his responses can be acceptable which fails to take them into account.

There is a similar conflict between Anderson's philosophy and prominent views within sociological theories of law. Again the sociological school is ill-defined but characteristic of much of it is some version or other of the proposition that legal decisions are responses to social conditions. This frequently tends to mean that there are overwhelming social forces outside the official decision-making machinery which by and large determine what happens within it, at least in the long run. For Anderson, this is not in the nature of things going on in space and time. He rejected the notion of overwhelming forces as being inconsistent with his view that social processes like any other are interactions of contending processes. There are for him no forces which guarantee the outcome of any reaction they could have with other forces.

The same kinds of Andersonian criticism apply to the last kind of theory of law which it is possible for me to mention. This is "natural law" theory. "Natural law" theory is in a degree special among schools of thought about law in *the degree of* prominence it gives to ethical theory in the determination of what is legally authoritative. This is not to say that ethical theory is not prominent in the work of schools of thought about law generally. Positivists, in England at any rate, have tended to be utilitarians in ethics. They began by following Jeremy Bentham's theory of ethics as they have followed his theory of law. But positivists make a very sharp distinction between the criteria which are supposed to determine what is just law and those which determine what is the actual law. In the case of other schools of thought the distinction between what is supposed to be just law and what is supposed to be the actual law tends to be drawn less sharply. Thus some realists are institutionists in ethics and what is *felt* to be ethically or morally right may not always be sharply distinguished from what is legally right, particularly in respect of the judicially developed common law. Again some sociologists tend to to follow evolutionary ethical theory. While what is law may, for example in Pound, be regarded as depending on criteria not greatly different from positivist criteria, at the same time what is demanded by the development of civilization may be treated as a "source" of law. The distinction between what is "law" and what is a "source" of law is nebulous.

But it is characteristic of natural law theory to insist on the legally authoritative character of what is demanded by the ethical theory which it espouses in a high degree. And this ethical theory is rationalism. What is just in terms of reason applied to the nature of man is regarded as, at least in important classes of circumstances, obligatory upon the judge. For that reason it is also regarded as a guide to what his responses will be in given circumstances. Unless we have special reasons for knowing otherwise in the particular case, Lon L. Fuller of Harvard claims, our prediction of what a judge will do can only be based on the supposition

that he will do what is just.[21]

Since natural law theory claims to find the legally authoritative in what is pointed out as required by reason, it is vulnerable to Anderson's proposition that reason cannot point out what is required of us in given circumstances, as if what was required of us were a quality of those circumstances. Anderson began his criticisms of the view that reason can provide us with ideals demanding our allegiance by examining how and why it is we do reason. Suppose it is claimed that we should support a certain course of conduct X for the reason that it has the character Y. Then, it may be asked, why should we support Y? The answer may be, because what has the character Y, has also the character Z. But it is obvious, Anderson's argument goes on, that at some point the chain of reasons must stop. And at this point, Anderson claims, the reasoner is saying no more than that, if we take Z to be the point where the reasons stop, he supports Y because he is a Z sort of person, supports this kind of objective.[22]

At some point, then, in Anderson's view, reason exposes a relation of the situation being reasoned about to the demands of the person doing the reasoning. It cannot point out to *any* person what is demanded of him in some absolute sense unrelated to some particular set of demands of his. Anderson sees no fundamental difference in this respect whether we think of the argument going on in a single mind, or between two or more persons by way or argument or discussion. He conceives that there are limits to persuasion and discussion, which can only satisfactorily take place under conditions "where there are common ways of living, common demands arising from communicating activities".[23] The conclusion of the reasoning in such a case is the joint assertion of a common demand and the observation of its relationship to the proposed course of conduct about which the argument began.

Anderson further makes the point that there are generally no common demands over the whole of humanity. Rationalism is seen as claiming that, while men obviously seek conflicting objectives at times, these demands can be distinguished from those constituting man's true, essential, or higher nature. Anderson rejected any view which regarded any part of the nature of things as on a higher level of reality than another. He considered that no distinction could be made between different worlds of reality because to make the distinction we should have to give some account of the relations between them. But this could only be done by contradicting the assumption of the different worlds of reality. We should have to be able to see the related worlds as existing within the same medium — within the same kind of reality.

I have concentrated on aspects of current legal theories which bring

[21] Lon L. Fuller, *Reason and Fiat in Case Law* (1942) p. 29, reprinted in (1946) 59 *Harv. L.R.* 376.
[22] Anderson, *op. cit. supra* n. 2, p. 352.
[23] *Id.* p. 247.

them into conflict with Anderson's philosophy. That means that I have been talking about what is wrong with them. The relations between Anderson and legal theory are plainer in this respect than others. When dealing with a special science Anderson himself usually began in this critical fashion. But, although I have been compelled to stop at this point, it was not where Anderson stopped. Where Anderson found that a theory contained serious philosophical errors he did not for that reason write it off. Even those theories which purported to present a field as involved with entities outside space and time were often found by Anderson to say much that has a relation to the truth. For Anderson, they *had* to be referring in some way to events in space and time, however distorted that way was. They had to be inconsistent with their own philosophical position to say anything. And the same was for him true of theories, like those of some legal realists, who presented reality as consisting of pure particulars. They cannot for him say anything on that basis. Therefore in what they do say of significance they must really be proceeding on some basis inconsistent with their general position.

Thus Anderson often learned by finding what he called "empirical equivalents" for propositions put forward by those whose philosophical positions he rejected — empirical in the sense of referring to complex events in space and time. This must be the Andersonian path to an empirical theory of law. There is much reward in studying all the kinds of theories I have mentioned from this aspect. And that is true not least of those to whom I have devoted most critical attention — Kelsen and Hart.

Andersonians who are not lawyers are, perhaps, inclined to be misled by labels so as to look most benignly on realist and sociological theories of law. These approaches are popular. There is a certain heady excitement about treating a judge like a dog, or in being led away from dull legal talk to gaze wide-eyed at the great stretches of society for legal inspiration, however diffuse it means one's inquiries become. But positivists continue to be concerned with the central questions about the working of legal machinery. And it is not least by searching for empirical equivalents for their propositions that I believe we shall find stepping stones by which to arrive at an Andersonian theory of law.