1965

Book Review (reviewing Edwin W. Patterson, Law in a Scientific Age (1963))

Edward Hirsch Levi

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
In three lectures given at the Law School of Columbia University, Professor Patterson explores three kinds of influence of science upon law: science has brought about societal changes which in turn have presented new problems for law to solve; scientific knowledge and devices have a bearing on the determination of factual issues in legal proceedings; and science represents a way of thought and possibly a measure of success suggestive for or critical of legal reasoning, systems, and institutions. Two of the essays elaborate the latter point; namely, the "ideal" influences of science upon law. Scientific method suggests for law the importance of "neutral, impersonal, reliable, evaluative determinations" — the "by-truth-possessed inquirer"; the importance of controlled experiments or statistical generalizations; the utility of laws and theories which make possible the logical structural frameworks necessary for further criticism and investigation.

Patterson classifies the uses of factual research of legal empiricism. Thus there are inquiries into the goals of law, such as Bentham's, Pound's, McDougal and Lasswell's, and Fuller's, where an appraisal of means, Patterson suggests, is required to give substance to the goals. The goals may be long range or intermediate. The inquiry may be as to the multiple purposes of a law, such as the Statute of Frauds; or as to the effect of means, which may be destructive of desirable objectives, as was the case with the national prohibition law. The inquiry may be as to the evaluative facts which will help create or explain those legal rules which will make law more orderly and understandable. Controlled experiments or statistical generalizations perhaps may be used to determine the effectiveness of such matters as capital punishment. And empirical statistical inquiries may be used to determine the results of legal procedure as was done by the Gluecks on the treatment of offenders and the prediction of juvenile delinquency, by the Chicago Jury Project to determine the effect of evidence and instructions, and by the Columbia Law School Project for Effective Justice on certain aspects of personal injury litigation and on devices that would lessen trial delays.

As must be apparent, the scope of the material covered in these three lectures is broad. The material is handled with an appealing skepticism and receptivity. The difficulties of controlled experiments are recognized. The meager fulfillment of the once cherished hope that the social sciences would provide scientific conclusions directly pertinent to legal evaluations is readily admitted. The difficulty of evaluating procedures or laws in controversial areas where "a little evidence and a big emotion are often decisive either way" (p. 65) is set forth clearly. There is an awareness of the high cost of organized scientific research and due recognition for the unscientific wisdom of judges and the unpretentious yet useful empirical investigations of law professors and students accomplished without the paraphernalia of elaborate designs. On balance the volume represents gracious encouragement for relevant empirical studies with an emphasis on the need for objective factual determinations. In this sense the thrust of the volume is to be found in the following sentences:
The strict ethical standards that surround the judge and the deep sense of responsibility that judges in our society feel are the best guarantees of ethical neutralism is the making of judicial evaluations that we have as yet found. I believe that judges in their official conduct are more unbiased than are scientists in their political pronouncements, but still not as neutral as natural scientists in their laboratories. The standards of the latter deserve to be emulated by legal-empirical scientists who will seek to find the factual bases of legal determinations. (pp. 36-37)

Patterson has not overlooked the role of public dialectic as the forum in which "the distinction between statements of fact and statements of value serves to locate the points about which further factual inquiries may be made, and may lead to a reconciliation of competing evaluations." (pp. 33-34) Apparently his conclusion is that at least in actual practice the dialectic has not been an effective substitute for the "by-truth-possessed inquirer."

Most of Patterson's first lecture is devoted to a discussion of the material influences upon law of science and the products of its technology. Passing reference is made to the problem of controlling the use of the atom bomb, although the example is used as a way of indicating how much more complicated the control of men is than the control of particles of matter. Motor vehicles, drugs, the dwindling supply of fresh water, and the artificial seeding of the clouds are mentioned as items or conditions where legal problems have some relationship to technological changes or possibilities. To illustrate the problems using scientific knowledge in the legal process reference is made (1) to a Virginia statute requiring the destruction of red cedar trees determined to be hosts of cedar rust dangerous to apple crops; (2) to the right of a child to maintain an action for prenatal injury possibly caused by deep x-ray therapy to the mother; (3) to state statutes authorizing the sterilizing of mental defectives. The cedar rust statute is used to illustrate the utility of permitting administrative discretion to reactivate a statute presently unnecessary rather than repealing the statute no longer required unless cedar rust develops a strain immune to all known fungicides. The prenatal injury case illustrates the necessity for the legal order to be revised in the face of new facts, the point that proof of scientific "conclusions in court seems to be unduly cumbersome" (pp. 17-18), and the view that "the direct proof of scientific publication by qualified experts would be preferable to the 'chancy' procedure of judicial notice." (p. 18) The statutes authorizing sterilization are used to show that the Supreme Court was ill informed in the case of *Buck v. Bell*, and the larger error of the optimistic assumption that these laws would in a few generations eliminate mental defectives. Nevertheless Patterson concludes that these laws should not be repealed, for "the world needs desperately to upgrade the mental ability of its population, and every bit helps." (p. 22) Further it is said that the effects upon inmates who have been sterilized is beneficial, and even if the offspring were normal, it would be reared by "at least one socially inadequate parent." (p. 22)

Patterson's lectures are replete with examples of the kind of subjects upon which law scientists give judgments or have views. There is a brief discussion of the "logical-metaphysical separation of fact and value." This discussion is a kind of reference to disputes about the content of systems of jurisprudence or
the appropriate mechanism or authority for changes in the law well known to the readers of the FORUM. Goal-directed legal philosophies are also mentioned with the comment that

such terms as "the public good," "freedom" are primarily rhetorical; they have emotive effects upon the participants of a legal order, to the extent that its society is a true community. They may have more specific meaning in the context of special theories of law, as in Aristotle's division of justice into rectificatory and distributive. Yet the notion that these vague terms, without such a context, will serve to harmonize and unify antagonistic groups of people has been shown more than once to be fatuous. (p. 51)

There are views on biological and sociological matters, as for example on the efficacy of sterilization. These views may be relevant to constitutional or legislative discussions. The appropriateness of administrative discretion for the enforcement or nonenforcement of a statute are of a somewhat different order since they relate more directly to the operations of the legal system. Conclusions as to the most appropriate way to bring before a tribunal the views of experts on radiation in the prenatal injury case are of this order also, although dealing with a different aspect of procedure. The propriety of changing legal concepts to permit a child to maintain an action for prenatal injuries deals in part with the arrangement and content of legal concepts, but as applied in the radiation type of case involves all kinds of considerations as to which law as a subject seems to have little to say.

Implicit in the lectures, then, is a disturbing question as to what law as a discipline is all about. The legal order, since it is made for men in society, of course must take account of the conditions of living which change, but this does not make law the discipline which from itself provides the knowledge for value judgments on all the events of living. Nor does it make law the normative or descriptive discipline of all the goals and all the mechanisms for the good society. Patterson, paraphrasing Mr. Justice Frankfurter, states that sociologists "may well be on tap, but not on top." (p. 56) Yet the range of goal-directed philosophies for law is from those which seek to describe the good society in full measure to those which seek to explain the special value of legal process. The psychological and political efficacy of vague terms is directly relevant to the special values of the legal process. But even here if facts and theories are to be found to challenge the conclusions derived at through undoubted on the job training in this realm, more than jurisprudence seems involved. This is only to suggest that along with empirical studies more work may be required if not as to what is properly law then at least as to the appropriate range of relevant disciplines for a variety of problems.

Edward H. Levi