The Theory of Legal Science: A Review

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I

The number of contributions to a theory of legal science is so small that every essay in the field can be assured of eager attention. The present monograph of Mr. Cairns can be assured of it doubly because of the qualities of the author as well as of his work. To give an adequate account of the compact book is, however, not an easy task. There are several circumstances which baffle the reader; I shall report them first without comment, and only afterwards venture on an evaluation of the problems presented by the author.

Mr. Cairns intends to give a theory of legal science. Normally, a reader who opens a book bearing this title would expect to find in it set forth the epistemology and methodology of a science which actually exists even if its theoretical foundations should have remained hitherto unsatisfactory; one would expect the author to point to the body of knowledge of which he purports to clarify the theoretical principles. In this respect the reader will be disappointed. For Mr. Cairns is of the opinion that legal science does not exist at all, if we except a few honorable fragments, and that its creation is a task for the future. The book contains, therefore, on the whole, the theory of a non-existent science.

The science does not exist, but in the opinion of the author it should exist. In order to aid it in coming into being, he undertakes the maieutic work of outlining its aims and its basic theoretical problems; and then he invites us to get busy on it. Some readers may become irritated by the author's way of telling people what to do instead of doing it himself; but such irritation would not be quite justified. There is certainly an exhortatory tone running through the book which occasionally makes the reader feel that the author might legitimate his theoretical undertaking somewhat by carrying out a few of the things which

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apparently he knows should be done. But there is more to the work than just exhortation. The discussion has a positive value because, in the review of past approaches, it reveals theoretical fallacies and factual mistakes to be avoided in future; in addition the author suggests what he believes to be the principal problem of a legal science—and as we shall see, the problem suggested is indeed the crucial problem of any science of social order. The delimitation of a field of science through the formulation of its central problem is certainly an important theoretical achievement; but the mere formulation leaves us completely in the dark about the content of the future science. This situation makes the book difficult reading. Its style is clear (with the exception of one or two obscure passages) and the development of the problems is lucid. But throughout the book the unfortunate reader is unable to refer the ideas of the author to any fact of science, especially because the author assures him at every turn that there is none and that it will require patient work of generations of scholars to produce the science. The reader is continuously floundering and hesitating in his understanding because he is supposed not to know what the author is talking about.

This, however, is only the predicament of the lay reader who is willing to trust the author unconditionally. The expert in the field will find another reason to be baffled. Mr. Cairns gives after all some indications (very sparingly) of the scope and purpose of the future legal science. Negatively, he makes it clear that legal science is not legal history; that it cannot exhaust itself in the mere accumulation of facts (no more descriptive institutionalism) but has to formulate general rules; that it is not identical with analytical jurisprudence of the Austinian type; and that current schools of legal theory such as sociological jurists, realists, and experimentalists come under the title of "legal technology"; and that their results cannot be the basis of a science, important as their work may be in other respects. Positively, he defines legal science as the science of human behavior that has for its function the elimination of disorder and the creation of order in society.¹ Legal science in this sense does not deal with the institutions of civil and criminal law only, but includes a large part at least of the subject matter of political science.² This rather large field, which potentially might include all kinds of human behavior productive of order, is narrowed in later passages by the

¹ P. 2. ² P. 3.
enumeration of six elements of legal structure which are to constitute the principal field of inquiry. The six elements are persons, associations, property, promises, the constitution of the community and the sustaining administrative system. For the sake of abbreviating the classification the author shows a tendency to bring the six elements under three headings: the regulation of behavior (including the first four elements), the constitution, and the administrative system. The delimitation of the field to six (or three) elements is further supplemented by the definition of law as the means of social control "which, for its enforcement, embodies in itself, or has behind it, a definite agency which exerts, or through which may be exerted, the pressure of politically organized society." Mr. Cairns is aware that this definition is oriented toward the modern state and that the inclusion of other legal systems would have to take proper account of "equivalents" to the enforcement machinery evolved by the modern state. The ultimate aim of a science exploring this field will be the formulation of a system of general rules; but before rules of high generality can be formulated we have to prepare the way by the provisional construction of ideal types. "Ideal entities embodying the orders of legal relations take us to the relevant in the enormous varieties of social life and permit us to make comparisons which may possibly lead to generalization and ultimately to knowledge, universality and system."

The program is laudable and I have no criticism to offer at this stage; but, as I said, the expert reader will be baffled by it. The project of a legal science as a social science dealing with human behavior oriented towards the problem of order in general, as well as the classification of the three orders (regulation, administration, constitution), the definition of law by reference to the enforcing agent, and above all the project of proceeding through the construction of ideal types, are features familiar to the reader because they are singly and in combination closely related to the sociological principles of Max Weber. The name of Max Weber appears in the monograph of Mr. Cairns only once in a reference to his Protestant Ethic and the Spirit of Capitalism (which is translated into English). That Max Weber is the creator of a system of sociology based on the construction of ideal

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3. P. 93.
4. P. 98.
5. P. 22.
7. P. 111.
The theory of legal science, that he has expounded the theoretical principles of the science at considerable length in essays which have become classics of methodology, and that in 1922 his posthumous (fragmentary) treatise on *Wirtschaft und Gesellschaft* was published, seems to be entirely unknown to Mr. Cairns. The treatise on *Wirtschaft und Gesellschaft* is a quarto volume in small print that would run in ordinary book-size into more than 2000 pages, half of which are devoted to the execution of precisely the project which is now suggested by Mr. Cairns. We are faced by the curiosity of a treatise trying to evolve from scratch, with considerable labor, a theoretical position which was developed with great precision several decades ago in all its details and supplemented with more than a thousand pages of rich material application. It would be highly unfair, however, to assume that Mr. Cairns does not know about Max Weber; on the contrary, he quotes one of his works. Max Weber is, furthermore, known to every scholar in the field as a towering giant in the social science of the last generation; his work is available in every major library; and his fundamental concepts have been submitted to an acute analysis by Professor Talcott Parsons in his *Structure of Social Action*. The attitude of Mr. Cairns is enigmatic and cannot be explained, perhaps, by anyone but himself. Anyway, the reader who is interested in the suggestions of Mr. Cairns is referred to the work of Max Weber as the standard treatise on the "legal science" which, according to Mr. Cairns, does not exist.

Some readers may consider the case closed once this point has become clear. But again, the conclusion would be hasty. The assumptions made by the author with regard to the state of legal science are incorrect. Legal science, in his sense of the term, exists weightily (and not only in the work of Max Weber, as I may add), and its theoretical problems are elaborated far beyond any point reached by the author. We have to discount these facts in dealing with the book under review. For Mr. Cairns is a philosophical personality in his own right, and what an original philosophical mind of his quality has to say deserves attention without regard to the situation just outlined. Social science still has to operate under handicaps; and the endeavors of the author, in their successes and their failures, offer revealing insights into the theoretical situation of our time. If in the following critical evaluation of the author's positions, the shortcomings seem to outweigh the achievements, the reader should not be induced to underrate the contribution of Mr. Cairns. To see the problems at all and to be
concerned about them is the most important step in their treatment.

**II**

The first question that has to be clarified concerns the model of science underlying the theoretical analysis. The question is of particular importance in the context of the book because legal science supposedly does not exist and the creation of its model is the prelude to its future material elaboration. With regard to this problem, Mr. Cairns seems to submit in a considerable degree to the "superstition of science," that is, to the belief that the natural sciences offer the model for the social sciences. The natural sciences are the "more successful" sciences and we should do our best to reach similar prosperity. The specific ideals held up in pursuit of success are (1) the generality of laws, (2) the predictability of events on the basis of general laws, and (3) exactness.

Let us take up the last point first. The author does not define exactness, but from the context it appears that he opposes the "more exact" sciences to the "less rigorous" studies. This pair of terms may be considered of doubtful value. If "exactness" has any theoretical meaning at all, if applied to physics as the model science, it can only mean that laws of physics are formulated mathematically. The use, however, of the formal apparatus of mathematics in the couching of propositions in any science, is not a matter of choice but of ontological possibility. We operate with mathematical symbols in the formulation of propositions concerning time-space-mass relations because we can apply them to relations in this realm of being. We do not apply mathematical symbols to the "anatomy of revolutions" or the "routinization of charisma" because the structure of the subject matter does not permit their application. The attempt to apply mathematical methods to phenomena of the class just mentioned would not make the propositions exact, but would result in nonsense. As soon as we realize that the "inexactness" of the social sciences simply means that the specific structure of subject matter requires other methods than the mathematical, the idea of keeping up with the Joneses will lose its appeal; we shall realize that

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8. P. 11.
11. P. 139.
12. P. 139.
"legal science" has its own standards of precision, though their infinitely higher complexity makes it much more difficult to maintain them or to reach an opinion, in the individual case, as to whether they have been observed or not.

The second ideal of science, the formulation of general rules, is rather obscure. Mr. Cairns expresses it as follows: the object of legal science must be "to ascertain if the complex reality of the phenomena with which it is concerned exhibits elements of orderly recurrence which may be formulated in terms of generalizations or specific laws."\footnote{P. 13.} This ideal he opposes to the unsatisfactory state of a "mere accumulation of facts."\footnote{P. 13.} In the light of the third ideal, that of the predictability of consequences of social actions,\footnote{P. 10.} the passage quoted seems to mean that general rules are rules stating that the social phenomenon A whenever it occurs will be followed regularly in time by the social phenomenon B. But the intentions of the author are not quite clear on this point. On other occasions he speaks of general laws "which unite a number of particular facts,"\footnote{P. 15.} or of "invariant relationships among the facts,"\footnote{P. 17.} without any reference to a time sequence; these formulae might apply as well to typical structural configurations. The unclarity of the formulae cannot be relieved by reference to specific instances of laws because the author, taking very seriously his assumption that legal science does not exist, does not give any. As the author leaves us groping in the dark he will not object, I hope, if we base our comments on a mere impression: We have the feeling that his predominant model of generality is the recurrence of time-sequences of social phenomena.

This postulate of general rules, if we have understood it correctly, obviously involves serious questions. It is formulated in imitation of the structure of "natural sciences";\footnote{P. 18.} the problem arises, therefore, whether the subject matter of social order has the same structure as the subject matter of inorganic nature. The problem is slurried over by Mr. Cairns through his frequent use of the term "external world" for both nature and society; but this use involves a \textit{petitio principii}: Whether there is an external world with a uniform structure of subject matter is precisely the point in question. The author himself has his qualms about the
omnipresence of general rules, but he assuages them by the sentence: "The ideal remains warranted in the absence of a demonstration—which is still to be offered—that its realization is impossible." This is a neat trick of shoving the proof to the opponent, but it does not hold water. The author, who so amply quotes methodological literature, should know that a negative proposition concerning facts cannot be proved according to the rules of verifiability which he himself sets forth so ably in his book. If he is waiting for a demonstration of the impossibility of general rules in legal science, he will have a long time to wait because it cannot be given.

The problem of the structure of social science lies elsewhere. Mr. Cairns states rightly that the ideal of science "determines in large part the subject matter to be selected for examination, the methods to be adopted, even the facts which will be chosen for study." In brief, the question of relevance and of the principle of selection is the crucial question with regard to the structure of social science. On the question of relevance the book, however, is silent, except for its enumeration of topics which has previously been noticed; and it is silent for the good reason that Mr. Cairns has no overt philosophy of man and of his place in society and the world at large that could tell him what is relevant in the world of man and society; the whole branch of knowledge that goes today under the name of philosophical anthropology is non-existent for the author. Unless we have an idea of man, we have no frame of reference for the designation of human phenomena as relevant or irrelevant. Man is engaged in the creation of social order physically, biologically, psychologically, intellectually and spiritually. Some of these engagements will offer the opportunity for the formulation of fairly general rules; for example, a societal order based on monastic ideals and on the postulate of celibacy will die out within a generation unless it can recruit itself from a surrounding society; or, no society is stable if the ruling class is not the wealthiest class through personal property or through the institutionalized chance of disposition over the wealth of the country; or, a movement under charismatic leadership will become institutionalized or disintegrate rapidly. Other propositions will apply to certain cultural areas only, as for instance, Calvinism is a contributing factor in the formation of rational working

20. P. 70.
habits. And some propositions can hardly be called general at all because there is only one case involved, as for instance, the idea of the equality of men in the Western World is partly shaped by Christianity.

Faced by the fact of social science as it appears from these scanty examples, it seems somewhat futile to lay down the law that legal science should be a body of rules of a certain type. Our first concern is with the relevance of subject matter; if social phenomena appear to us as relevant they will become the object of scientific investigation, and we shall try to form ideal types of structures, factors, time-sequences, et cetera, as the necessity arises without bothering much about their degree of generality. The town, for instance, as a form of ordered social life, may seem relevant to us; and then we shall set about to construct the types of Hellenic, oriental, Mesopotamian, medieval and modern occidental towns, and we shall not be deterred from such undertaking because the "ideal type" of the medieval town is not a "general rule" and has no chance of leading us to further general rules. Of course, Mr. Cairns might object that he is not interested in scientific propositions which do not lead, at least, to general rules. Confronted by this argument we would have to give up: Nobody is obliged to be interested in any particular science or in science at all. If the author should not be interested in social science as it exists, that would be his private affair; he certainly would have no authority to declare the rather impressive results of social science as non-existent or unscientific because and insofar as they do not correspond to his idea of generality. A proposition may be illegitimate in a system of social science for one of two reasons: (1) because it is unverifiable, or (2) because it is irrelevant in the system of reference that is determined by philosophical anthropology; the question of generality has no bearing on the legitimacy of its status.

III

The last sentences seem to mark a limit of theoretical discussion—but the reader will have noticed the conditional. There is no disagreement between Mr. Cairns and other social scientists on the point that propositions have to be verifiable and that type-constructions have to fit the facts. The point of potential disagreement appears in the theory of relevance. Obviously, we do not all have the same idea of man and our principles of selection

22. P. 111.
of relevant subject matter may differ widely. The great systems of social thought have different rules of relevance because they have different anthropologies. The anthropology of Aristotle is not that of Plato, the Machiavellian is not the Thomistic, the Bodinian not the Hobbesian, and so forth; and the systems of these thinkers are at variance with each other less because of disagreement about facts than because of disagreement about anthropological principles. If this is the theoretical situation, do we have to accept the consequence that there never will be a social science in steady progress to ever higher perfection of the system like the natural sciences? Will social science be at the mercy of any individual position with regard to metaphysical questions about the nature of man? The answer is an emphatic Yes.

Let us reduce the first shock somewhat by the assurance that the situation is not in danger of degenerating into chaotic subjectivism; above all, the weight of the social institutions surrounding us is a corrective to aberrations, insofar as the idea of man embodied in them will influence the amplitude of the socially possible disagreement. The errors of philosophical anthropology within this established frame are, furthermore, permanently under corrective discussion; anyone who would build today a science of social order on the assumption that the creation and content of social order are not influenced by the religious consciousness of man and by his religious ideas, or on the assumption that economic problems are not a factor in political order, or that certain elements of human nature which are studied by mass psychology can be neglected, will not find much admiration for his subjective achievement; he will be told politely but firmly to get acquainted with the facts of life before he starts talking about problems of social order. Through all disagreement among philosophers, there is a convergence towards standards which makes it impossible to claim the successful construction of a system unless the anthropology underlying it gives due weight to the various elements of human nature.

While there exists a certain stock of knowledge about man which a scholar in the field of social science is not at liberty to disregard grossly without exposing himself to the reproach of incompetence, there is no hope of steady improvement by concerted efforts. For the idea of man is not a datum of the external world but a creation of the human spirit, undergoing historical changes, and it has to be recreated by every generation and by every single person. To mention the most decisive epoch of the idea: The
appearance of Christ has added to the idea of man the dimension of spiritual singularity of every human being, so that we can no longer build a science of social order, for instance on the anthropologies of Plato or Aristotle. Likewise, within the Christian Western World the idea of man is not static, but changes constantly; it has acquired, for instance, through and since the Renaissance the dimension of historic singularity. The chief determinants of the various ideas are to be found in the fundamental religious attitudes of the thinkers who created and transformed them. The physical and social sciences differ, therefore, profoundly in their epistemologies. The realm of matter is, in a sense, static, and the progress we can make in its explorations is the progress in the dissection of a corpse that holds still; the realm of man and society is relatively much more alive and the degree of understanding will be determined by the amplitude of the idea of man which is at the disposition of a scholar through environmental tradition and through the breadth of his personality. Consequently we have to be extremely cautious in attributing the deficiencies of an effort in the social sciences to plain lack of knowledge (which, of course, also occurs quite frequently); if there is any doubt we should rather attribute the selections and omissions to the fundamental attitude of a scholar with regard to the idea of man.

After this digression we can now return to the preferences of Mr. Cairns. His idea of general rules is not just a private fancy; and the discussion is not at an end. We have to deal now with the ideas of man and society implied in the author's monograph. In this analysis we have to tread very cautiously, because the discussion cannot be straightforward. Mr. Cairns does not develop an idea of man explicitly and we have to infer his idea from the implications of his statements. The most important step in its understanding is done through the very recognition of the fact that it is only implied. The nature of man does not become explicitly problematical because the author does not take his stand in the realm of experiences which determine the religious and historical singularity of the person. Mr. Cairns knows that there is a problem of relevance, but he does not see that relevancies change with the idea of man, and that this idea has its roots in the sphere of self-reflective personality, in which the attitudes of man toward the world are constituted. He assumes that there is only one legitimate system of relevancies and that the problem, therefore, needs no discussion. And he can make this assumption
because man is for him a part of the external world, along with other natural phenomena, seen from the outside. Whole sections of the human person which have decisive functions in the constitution of social order do not enter, therefore, his field of observation. At this point it becomes difficult to decide whether some of the surprising statements of Mr. Cairns should be excused as being the expression of his peculiar idea of man, or whether a more critical approach would be justified. I select a passage characteristic of his attitude towards religious phenomena. For instance, we find the sentence: "In the tradition of Christianity, a knowledge of truth was a necessary element in salvation, but knowledge which was not religious was heretical." The sentence is supported, in a footnote, by the authority of Gibbon. May I suggest that the author read the Prooemium of Thomas Aquinas' *Contra Gentiles* on the problem of *duplex veritas*; he will be surprised. And may I further remark that the idea of quoting Gibbon as an authority on this problem is somewhat baroque. The reader will do well also to note the past tense in which the author speaks of Christianity. The realm of Christian experience has practically lost its function in determining the relevant selection of materials; and we shall see that it is not the only realm that has disappeared.

Man, thus, is reduced for the author to the level of an object in the external world; man may be inventive, but he is not the spiritually creative center of society and history; man has lost his singularity and has become a fungible unit. The structure of society is assimilated to that of matter. The science of a social order constituted by persons can produce general rules only with regard to phenomena which are determined by the fungible biological structure of man, or by other structural elements on the periphery of the spiritual core of the person; man has to be reduced to the fungible structures in order to make a science of general rules possible. A system of relevancies of this type will also satisfy the author's pragmatic desires. Mr. Cairns extends strictures to contemporary legal theorists, as we have seen, because they are occupied with a technology of law. But he does not condemn technology as such. He only feels that detached investigation will result in a system of rules which can be applied more successfully to the solution of social problems, than the insufficient recipes of scholars who confine their attention too narrowly to the immediate practical problems. A social science "aims to tell us in advance the perils which attend our various programs; to

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23. P. 131.
tell us which is the rational and which the irrational course.\textsuperscript{24}

The managerial or engineering interest clearly predominates, assuming blandly that we all know what we want, that we all want the same, and that the problem of social order does not lie precisely in the fact that our ideas of order differ in correspondence to our ideas of man.

Mr. Cairns does not overlook the problem entirely. He is aware that people differ in their opinions about values and that the most perfect system of technologically usable general rules will not tell us what to do. His engineering attitude makes him suggest a curious solution to the problem: If we can postulate a science of general rules which does not exist, why not postulate a science of ethical rules which does not exist? According to the author we do not have complete knowledge of legal phenomena unless we possess rules of evaluation in addition to the rules descriptive of behavior. Such a science of values “belongs altogether to the future,”\textsuperscript{25} but that we shall achieve it in due course the author has no doubt. If only we take up specific problems one by one, the specific solutions will “drop of their own accord into a system.”\textsuperscript{26}

The older method, the medieval, of ordering our problems by referring them to a fundamental attitude of the person toward life and the world as a whole is broken by the Renaissance.\textsuperscript{27} Any doubts concerning the new method of studying specific unrelated problems “were dispelled by the Industrial Revolution and the triumphs of the principle of the Division of Labor.”\textsuperscript{28}

While this argument seems to have a narcotic effect on Mr. Cairns and makes him see the future in rosy hues, it has the opposite effect on the reader. For the reader may remember having heard that an automobile engine is certainly a triumph of the Division of Labor (capitalized as it befits a divinity), but that the specific parts of the engine do not drop into place by magic, but because they were made according to the specifications of the designer of the final product. And he may be slightly disturbed by the thought that division of labor without design has sometimes resulted in unpleasantness. If, for instance, we let everybody use his abilities to his best and trust that from the division of labor will emerge somehow a satisfactory order of mankind, we may find to our dismay that the specific parts do not drop at all into

\textsuperscript{24} P. 10.
\textsuperscript{25} P. 144.
\textsuperscript{26} P. 145.
\textsuperscript{27} P. 145.
\textsuperscript{28} P. 146.
their places in a smooth-running order, but that they clash in the
ghastly mess of a World War (capitalized to match the divinity of
the Division of Labor). I hope I do not have to elaborate the point
further in order to make it clear that the spiritual nihilism of Mr.
Cairns is pregnant with dangers.

If the nihilism of Mr. Cairns were simply a case of eighteenth
century mechanistic interpretation of man, we would not need to
bother about his book. But it is a distinctly modern spiritual
nihilism, reflecting the experiences of a philosophic mind. The
man of Mr. Cairns is irreligious, he is a-historic and, I have the
impression, he may be even a-political in the sense that he has no
will to establish a relationship of authority between himself and
other men. But he has a very clear ethical consciousness (though
Mr. Cairns does not disclose the content of his ethical code) and
he reveals an optimistic active desire to improve and stabilize
social conditions by “rational” social control. He is socially be-
nevolent, but he is not a benevolent despot; he is a benevolent
democrat who dreams of an Huxleyan brave new world minus
the differentiation of men into Alphas, Betas and Gammas.

The intenseness of these sentiments has enabled Mr. Cairns
to formulate the central topic of a science of social order; and his
formulation stands as that of an important theoretical principle
in spite of the curious twist which it receives in the engineering
context. We have mentioned earlier the definition of “legal
science” as the science of human behavior that reacts against dis-
order. “The order which exists in human society at any given
time is predominantly an achieved order, an invention at the cen-
ter of which is man; it is not the order of the physical universe,
which in physical theory is the product of the blind operation of
nature.” The social theorist cannot take for granted “an ultimate
social order which it is his task to discover. He must assume an
ultimate disorder, which through the agency of man’s inventive-
ness and other factors has been changed into order.”29 “Order in
social life is wrought from disorder”30 by means of “creative im-
agination.”31

Here at last we tread on classical ground. By the experience
of social disorder human mind is provoked to create order by an
act of imagination in accordance with its ordering idea of man. The
disorder of the Athenian polis provoked Socrates to stimulate

29. P. 54.
30. P. 53.
31. P. 60.
the imagination of his fellow citizens in the direction of true order. He died for his attempt and Plato created under the impression of this tragedy the great order of the Republic hoping to catch the imagination of the people or at least of a ruler who would impose it on the disordered people. His hope of creating order in Hellas failed, but the Republic stands as the first theoretical system of social order in the Western World. Here we can witness the origin of social science in the creative imagination of the philosopher who wishes to overcome disorder. The will to overcome disorder has remained the driving force of the great systems, of the Christian of St. Augustine and St. Thomas, and of the later systems originating in the sphere of the national state, until with Giambattista Vico the imaginative creative forces become themselves topical and are so to this day in the great body of science concerned with the theory of social and political myths.

Where does Mr. Cairns stand in relation to his predecessors? With regard to this question the reader will experience a great surprise, for on page 53 he can read that “this approach was first developed” in the year of our Lord 1932 in a paper in the Political Science Quarterly.

This is not an occasional remark but the considered opinion of the author. He believes that “At the basis of social thought today is the Holbachian view that man is the work of nature; he exists in nature; he is submitted to her laws; he cannot deliver himself from them. Three centuries of failure should teach us to look in new directions.” In the “new direction” we recognize the fact that order is wrought from disorder. Christianity is not the only realm of experience that has disappeared; Hellas is out, too; and the theory of the origin of order in the creative myth since Vico is swept aside. No reader could be blamed if he parted company with the author and looked “in new directions.” But the phenomenon is too overwhelming and too fascinating to be met by such action. There have always been men whose minds had the peculiar bent which we may call for its most famous instance the Cartesian. The world had to be wiped out and only when the tabula rasa could they make a new start of theorizing. The grandeur of the Critique of Pure Reason is its opening as a monologue spinning a thread of thought out of the mind of the philos-

32. Well, Well! This should not cast, however, a reflection on the paper which is quite good.
33. P. 52.
34. P. 53.
opher without regard to anything that has preceded. The style has its merits in philosophy, particularly in the seventeenth and eighteenth centuries, when the thinking Ego emerged as the residue of the wreckage of medieval civilization and the new dimension of history had not yet been fully acquired. But Mr. Cairns is neither a Descartes nor a Kant, but a theorist of "legal science" with an eye on a controlled social order, and we do not live any more in the eighteenth century. The *tabula rasa* attitude is there, but it does not serve to clear a path for speculative action of the *res cogitans*; it rather leaves us face to face with an unknown future for, as we have seen, Mr. Cairns does not replace the past by his own present, but projects his idea of science into a distant future.

The implications of this new attitude, which has been in the making since the middle of the nineteenth century, can be made clearer by reflection on a sentence from a speech of Mussolini to his Blackshirts: "The past is behind us, the future is before us, we stand in the present inbetween." Some may consider this sentence an oratorical flourish; but they would be mistaken. Not at all times are the past behind us and the future before us; that happens only when we are in the throes of a violent crisis. Normally the past and the future are present; we do not stand between them, but are moving in the continuous stream of history. The past reaches into our present as the civilizational heritage that has formed us and that we have to absorb into our lives as the precondition for the formation of the future, not in some distant time ahead of us, but in the present of our daily life and work. Mr. Cairns stands on a hill-top, before and behind him stretching a desert of nothingness; the past and the future have shrunk back from his present into solid blocks of "non-existence," the category he uses most frequently. And is there any present left, if past and future have receded? For what is human present, but the creative absorption of the past for the purpose of transforming it into the future?

The question is pertinent for the theory of Mr. Cairns. For "in the ordering of human relations, as in other spheres, creative imagination is a necessary factor." The principle is valid, I think, and its elaboration would have given occasion to unfold in form of a system of wealth of materials and interpretations that we possess, ranging from Plato's theory of the origin of order in

35. P. 60.
the mythical forces of the soul to Maurice Hauriou's idée directive as the core of governmental institutions and W. Y. Elliott's theory of personal and institutional myths, et cetera. But again, this whole branch of knowledge comes under the axe; it does not exist. The topic of the creative forces is replaced by a chapter on "The Inventive Process." The choice of vocabulary is characteristic; the term "creative imagination" which correctly indicates the problem is used only occasionally, the main argument is concerned with "invention." "The order which we observe in society is an invention of man." The terminology of invention diverts the problem away from the creative forces of the soul and turns it towards purposive rational action. That "the products of social life, which may be conveniently summed up in the label 'culture,' are inventions," is not a new theory. Critias and Kallikles have expounded it at the height of Greek enlightenment when the mythical forces of Athens were dying and the city was ripe for the end. The myth was lost; its problems dissolved into the psychology of the inventive process and the psychology of the motives underlying specific cultural inventions. The heroic attempt of Plato to create a new myth had to fail in this environment.

Mr. Cairns follows the same path. He actually devotes a section to the psychology of the "happy idea" and quotes Helmholtz to the effect that his ideas came most readily "during the slow ascent of wooded hills on a sunny day." Some people get their best ideas when they are drunk, and others attain their most productive mood in even less conventional circumstances. It is a fascinating field—but I wonder whether such stories will help us much in understanding the Declaration of Independence as the basic myth of the order of the American Republic. Mr. Cairns himself does not believe it; and the chapter on invention ends with the inevitable insight that it has not got us anywhere. A great opportunity, the opportunity of outlining, at least, the problem of the origin of social order in the creative powers of the person, is wasted.

IV

Mr. Cairns' book abounds in problems on which we have not been able to touch in this review. The reader is particularly referred to the analyses of hypothesis and verification, of change,
activity, relation, causality, equilibrium and the relation between orders. These sections are, however, subordinated to the primary purpose of developing the "model" of the future science. We hope we have brought out the main trend of ideas and attitudes and may now summarize the result.

We started with the "baffling" aspects of the book, with the exhortatory cry for a science of social order which does not exist and with the rejection as non-existent of the body of science, which actually does exist. Then we tried to trace these peculiarities to their roots in the metaphysical attitude of the author. We were careful not to deal with his selections and omissions on the level of a critical discussion, which obviously would have been impossible in the face of the author's assigning the status of non-existence to the surrounding world of social science (of which the present writer is an ever so humble part). The only occasions for critical remarks were offered, therefore, in the instances in which the author went beyond his verdicts of non-existence and made factually incorrect statements about the subject matter at hand, as in the case of his remarks about the relation of Christian philosophy to the problems of knowledge and truth. For the rest, we preferred to interpret the author's judgments in the light of his system of relevancies. His metaphysical attitude determining the relevancies may be summed up as follows:

The Christian spirituality as well as the historical singularity of the person is annihilated. As no other myth of order is given as an unquestioned enveloping inheritance, man stands on a desert of nothingness without a past; and as the creative center is lost, he carries no order within himself but has to stumble blindly into the future. In the anxiety of his disorder, this man projects his desire for order into the future, hoping that by some miracle the unrelated pieces of the puzzle will fall into place and present him with the order which he himself cannot create. The need for shelter under an order and the inability to create it, find their typical expression in seeking refuge in the order of natural science, the only order that is left in our civilization once the spiritual orders are destroyed. The method of natural science will deliver by some black magic the missing order in the form of general rules which can be used in the administration of an ethical program that also will emerge by some magic out of a science of values assembled through the unfailing planless Division of Labor. And what is that whole order good for, once we have it?
Nobody knows. It is an order without meaning, an order at any cost born out of the anxieties of a lost man.

This picture of man and his order is frightening. If the men, who by character, intellect and education should be the pillars of continuity in our civilization, who should be the models of loyalty to our past in order to have a firm grip on the future that is to be shaped by their hands—if these men brush away the past and “march into the future,” what shall we expect of the common people? Mr. Cairns' book may not be the ideal scientific treatise, but it certainly is a touching personal document and it is a terrifying symptom of the disorder in which we live.

COMMENT

Professor Voegelin plainly has read my little book with care. His criticisms do not call for extended comment on my part as I believe the attentive reader will find them to be fully answered in the book.

If American jurisprudence is a social science in the sense in which sociology, economics, anthropology, political science, and geography are social sciences, then I am not aware of it. Professor Voegelin has not brought forward a single argument to negative my contention. His chief complaint on this point, aside from matters of history, is that I have delimited a field of legal science, but have not yet supplied the content. That is flattering and I can only crave Professor Voegelin’s patience. Inasmuch as Professor Voegelin indicates no reason why such a procedure is methodologically unsound, and as there are successful historical precedents for it, I must assume that in that aspect at least my undertaking is warranted. As a matter of fact, I anticipated Professor Voegelin’s criticism, where, in discussing the possibility of a social science jurisprudence I quoted, on page 3 of the book, Mr. Russell’s remark that the science of pure mathematics was baptized long before it was born. The invalidity of Professor Voegelin’s criticism is immediately apparent if for my name in one of Professor Voegelin’s passages I substitute that of the father of all jurisprudence, thus: “Plato was of the opinion that legal science did not exist at all, and that its creation was a task for the future. The Dialogues contain, therefore, on the whole, the theory of a non-existent science.” That is an accurate description of perhaps the most discussed theory of jurisprudence the world has known.
Professor Voegelin’s remarks about Weber are astonishing. From Plato to Kelsen there have been many efforts to construct a pure science of law. I attempted no description of any of them. My book was an effort at a methodology from the standpoint of the limitations of American jurisprudence conceived as a social science and was not historical; if it had been historical Professor Voegelin would find that my admiration for Weber, while considerable, is somewhat less than his, particularly on the methodological side. It is true, as Professor Voegelin says, that Weber thought about law in terms of order. But so also did Aristotle, Aquinas, Kant and Ehrlich, as I state on pages 24-25 of the book. Professor Voegelin was perhaps mislead by my brief discussion of the theory of ideal types on which Weber in German sociological circles appears to have secured a patent. It seems scarcely necessary to state that it has been a tool of scientific inquiry since the days of ancient Greece. Weber’s use of the notion is now a historical commonplace in sociology. That his formulation of the theory needs extensive revision does not have to be argued.

Any further discussion on my part would be a matter of analyzing Professor Voegelin’s ontology and stating the case against some of his other assertions from the standpoint of scientific methodology. I have no inclination to discuss the ontology which appears to me to add nothing to the validity of the methodological principles of legal science. For the rest I am fully content to permit the book to speak for itself on the constructions Professor Voegelin has placed upon the theory there proposed.

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