Institut Villey
pour la culture juridique et la philosophie du droit

École d'été de l'Institut Michel Villey
« *Law and social justice* »
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Programme

Richard BROOKS, New York University Law School

« *Justice in The Public Sphere* »

American constitutional discourse has long been saddled with a tripartite conceptual structure of entitlements subject to legal enforcement. Constitutional claims are sorted into one of three spheres, civil, political or social, each with its own liabilities and privileges among other entitlements. All debate then departs from this accepted structure. Although ordinarily implicit, there are occasions when this underlying order surfaces in conversation. Those conversations, however, are largely intramural. Arguments are exchanged about the fit and stability of particular entitlements under the banner of a given sphere, for instance, whether rights to assemble or bear arms are political or civil rights. These arguments, their subtleties notwithstanding, all take for granted the overarching tripartite conceptual structure, with debate limited to the placement of objects within that structure. It is difficult to overstate the current and historical consequences of this cabining conceptual schema on the everyday lives and activities of Americans.

In our readings and discussions we will review materials demonstrating that this accepted triad was hardly inevitable. In the wake of the American Civil War — when black servitude and subordination were being reimagined as actionable stigma and badges of slavery now legally cognizable and un- constitutional under the Thirteenth Amendment — public rights and social rights offered competing visions law's legitimacy and capacity to determine the treatment of persons in public spaces. On the one hand, public rights drew on the state's solicitude of "an underlying demand to be treated with formal respect in the public sphere." On the other hand, social rights were argued to be strictly private affairs and no concern of the state. Where public rights called on the state to upend the customs of black subordination in the South, social rights placed these practices beyond the state's reach with profound longterm, and continuing, consequences.

Daniel MARKOVITS, Yale Law School

« *The Meritocracy Trap* »

Even in the midst of runaway economic inequality and dangerous social division, it remains an axiom of modern life that meritocracy reigns supreme and promises to open opportunity to all. The idea that reward should follow ability and effort is so entrenched in our psyche that, even as society divides itself at almost every turn, all sides can be heard repeating meritocratic notions. Meritocracy cuts to the heart of who we think we are.

But what if, both up and down the social ladder, meritocracy is a sham? Today, meritocracy has become exactly what it was conceived to resist: a mechanism for the concentration and dynastic transmission of wealth and privilege across generations. Upward mobility has become a fantasy, and the embattled middle classes are now more likely to sink into the working poor than to rise into the professional elite. At the same time, meritocracy now ensnares even those who manage to claw their way to the top, requiring rich adults to work with crushing intensity, exploiting their expensive educations in order to extract a return. All this is not the result of deviations or retreats from meritocracy but rather stems directly from meritocracy's successes.

Amnon LEV, Université de Copenhague

« *Law and the Ambivalence of Justice* »

> "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread." (Anatole France, *Le Lys rouge*, 1894)

Anatole France's observation shows with admirable clarity why the social question must trouble law. It also captures how we instinctively think to address the challenge it poses to law. It is by reducing economic equality, by raising up the poor so that they do not have to beg or steal that we hope to align formal and material justice, law and society. This suggests that solving the problem of social justice is about changing the social distribution of wealth. Furthermore, it suggests that the law, while obviously an instrument of social policy, is not itself implicated in the creation of social injustice.

We shall, however, want to argue that this is a fiction, perhaps the most deeply entrenched fiction of public law. Going back to the beginnings of public law philosophy, we will show that law is itself generative of precarity; that in recognising all as equals before the law, it exposes some - always the same - to the depredation of others. As we shall see, the analysis adds to our understanding of how wealth and law intersect in society.