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Dean Pound and the End of Law

Cover Page Footnote

Author of *The Metaphysical Foundations of Thomistic Jurisprudence* (1939)

DEAN POUND AND THE END OF LAW

KARL KREILKAMP†

I. *The Efficacy of Deliberate Effort*

LEARNED in the history of legal and political thought and action, Dean Pound is also—he would say, by virtue of this very fact—an ardent advocate of legal reform.

Now the minute a man promotes reform, he declares himself an opponent of positivism; for a doctrine of reform, whether its protagonist knows it or not, always supposes at least two beliefs: that what is to be changed for the better possesses in some way an ideal form that is not yet fully realized, and that men are somehow free to take a deliberate hand in that work of realization. Dean Pound is quite aware of his position. Indeed, not the least of his efforts have gone into the negative task of overthrowing the philosophies that deny to human ideals and purposes any efficacy in the molding of law.

It seems strange that jurists, of all people, should be found among the determinists. The reality of free-will ought surely to be most patent in practical life; and surely in judicial decisions, if ever in human affairs, men are seen honoring with at least public obeisance an intellectual idea—the idea of justice. Nonetheless, as we well know, jurisprudence has not escaped the determinist error, a fact amply attested by Pound's vehement and insistent attacks.

"Law is not like a natural phenomenon whose workings have to be accounted for by observation and discovery of a theory that will fit the facts. What is law depends not merely upon the facts of the past and of the present but also upon the will of those who prescribe and those who administer rules of conduct by the authority of the state; and this will is determined not a little by their theory of what they do and why they do it."¹

"The law has lived and grown through juristic activity under the influence of ideas of natural right and justice or of reasonableness, not force, as the ultimate source of authority."²

". . . the believers in eighteenth-century natural law did great things in the development of American law because that theory gave faith that they could do them."³

† Author of *THE METAPHYSICAL FOUNDATIONS OF THOMISTIC JURISPRUDENCE* (1939).

1. *The Scope and Purpose of Sociological Jurisprudence* (1911) 24 HARV. L. REV. 591, 598. [All articles and works hereinafter cited are by Dean Pound, unless otherwise noted.]

2. *A New School of Jurists* in 4 *THE UNIVERSITY STUDIES OF THE UNIVERSITY OF NEBRASKA* (1904) 17.

3. *THE FORMATIVE ERA OF AMERICAN LAW* (1938) 27; cf. *The Scope and Purpose of Sociological Jurisprudence* (1912) 25 HARV. L. REV. 489, 492, 495; *LAW AND MORALS* (1924)

Legal determinism has shown itself in a variety of forms. Race, the survival of the fittest, economic facts, class-conflict, legal tradition, various Hegelian ideas—each of these, by some school or other, has been exalted to the rôle of exclusive determinant of human law.⁴ Pound finds none adequate by itself to explain all the legal phenomena that he knows about—and his knowledge is not scant. What is more important, all such theories suffer from blindness to what Pound calls “the efficacy of effort”, that is, conscious striving after ideals. Croce characterizes historical determinism in these words:

“To conceive of history as evolution and progress implies accepting it as necessary in all its parts and therefore denying validity to judgments upon it.”⁵

This is precisely the doctrine that Pound attacks. The course of human history is not wholly comprised of necessary events. It is partly the effect of a free factor, human effort. Man is not wholly a creature of physical forces, he is partly their master.

“Living things must accept their environment. Yet life does not of necessity accept its environment in a purely passive fashion. It seeks to control the environment so as to make adjustment thereto in some sort involve mastery over it. As Ward puts it, our attitude toward nature is twofold. It is that of a student, but it is also that of a master. Man cannot prevent earthquakes or eruptions or tornadoes or floods or droughts or fires. But he can plan and build and organize so as to minimize their effects.”⁶

In human life the struggle against nature takes the form of deliberate activity, activity instigated by an ideal. The efficacy of effort is the efficacy of ideals.⁷

Nowadays there exists a special need for teaching this truth. “Economic determinism is now as definitely fashionable as historical deter-

35; INTERPRETATIONS OF LEGAL HISTORY (1923) cc. II-V; AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 15-16; *A Comparison of Ideals of Law* (1933) 47 HARV. L. REV. 1, 2; *What Is the Common Law* in HARVARD TRICENTENARY PUBLICATIONS (1937); *The Ideal Element in American Judicial Decision* (1931) 45 HARV. L. REV. 136; THE FORMATIVE ERA OF AMERICAN LAW, 93-94.

4. INTERPRETATIONS OF LEGAL HISTORY.

5. STORIA DELLA STORIOGRAFIA ITALIANA NEL SECOLO DECIMONONO, 1, 26, cited in INTERPRETATIONS OF LEGAL HISTORY at 66.

6. *The Social Order and Modern Life* in THE CREATIVE INTELLIGENCE AND MODERN LIFE (1928) 76.

7. As examples in legal history, take the influence of Puritanism on the common law [THE SPIRIT OF THE COMMON LAW (1921) 32-59] and the influence of the theories of contract on the history of that institution. (AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 236-284).

minism was fifty years ago."⁸ Years ago Pound had to oppose the "juristic pessimism" of the Historical School of jurisprudence and the Analytical School's blindness to the fact that judges help make law; now it is the Realists who deny the efficacy of effort and the influence of ideals and doubt the value of a system that permits the play of such illusions as abstract ideals.

It was through a study of legal history that Pound arrived at his perception of the efficacy of ideals. From history he drew the psychological truth that "Men tend to do what they think they are doing",⁹ and he uses it as a foundation for his division of legal history into periods that differ according to their varying ideal pictures of law. It is his contention that by becoming acquainted with a period's *idea* of the nature and end of law, you take a long step towards understanding the *actual* legal order of that period. Hence Pound defines human law as

"... the body of materials which by reason of having been prescribed or traditionally received ought to be and hence in a large view usually are the basis of decision."¹⁰

Only upon a definition of law that includes the traditionally received materials and techniques, the ideal element in law, can we understand, on the one hand, the conservatism of legal systems—how they have often, rightly or wrongly, resisted and even eventually ignored legislated innovations.¹¹ Again, only when we take into account the *ideas* about the end of law that are not yet expressed in the authoritative materials, do we, on the other hand, begin to understand much of the *change* that has occurred throughout the history of law; Pound never tires of insisting upon the dynamism inherent in the notion of a natural law (by which he means any ideal picture of the legal order¹²), its ability to stimulate jurists and legislators into the activity of abolishing or modifying existent laws and of creating new ones.¹³

8. *American Juristic Thinking in the Twentieth Century* in A CENTURY OF SOCIAL THOUGHT (1939) 160; *cf. id.* at 162-164; *What Is the Common Law*, *supra* note 3, at 5, 6; *How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?* (1936) 42 W. VA. L. Q. 81; *Hierarchy of Sources and Forms in Different Systems of Law* (1933) 7 TULANE L. REV. 475; *The Church and Legal History* in JUBILEE LAW LECTURES (1939) 91-97; *A Comparison of Ideals of Law*, *supra* note 3, at 3, 4; *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 697-700; *Public Law and Private Law* (1939) 24 CORN. L. Q. 469, 478-482.

9. *The Ideal Element in American Judicial Decision*, *loc. cit. supra* note 3.

10. *Hierarchy of Sources and Forms in Different Systems of Law*, *supra* note 8, at 479.

11. THE FORMATIVE ERA OF AMERICAN LAW, 38-80.

12. "Ever since [the time of the Roman jurists], systems of legal ideals have gone by the name of natural law." *Id.* at 15.

13. *Id.* at 16-30, 93-94; AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 33-34.

Once the lesson of history is learned, that men do what they think they are doing, then and only then is it time to talk about what we should now do with our own legal system. The Realists must be taught this lesson in psychology if they are to be diverted from their fruitless derision of judicial principles and conceptions and led to engage in the more useful task of evaluating those legal ideals.

"Faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law. One of the conspicuous actualities of the legal order is the impossibility of divorcing what they do from the question what they ought to do or what they feel they ought to do. For by and large they are trying to do what they ought to do. Their picture of what they ought to do is often decisive in determining what they do. Such pictures are actualities quite as much as the materials of legal precepts or doctrines upon which or with which they work. Critical portrayals of the ideal element in law, valuing of traditional ideals with respect to the actualities of the social and legal order, and the results to which they lead in the social and legal order of today, are as much in touch with reality (*i.e.* have to do with things of at least as much significance for the legal order) as psychological theories of the behavior of particular judges in particular cases."¹⁴

The fact that ideals influence human conduct must be learned, says Pound, by two types of men: certain theorists, who deny it explicitly (such as the waning Analyticists and the waxing Realists); and the so-called men of action, who deny it implicitly when they suppose that the reform of government presupposes a change only in the governmental system and not in the ideas of the men who conduct that system. Would we remedy the present lag between legal institutions and social needs, says Pound, we must abandon the projects for changing our judicial machinery (which is not to blame) and seek instead a conversion of judicial minds from individualism to a philosophy that gives proper recognition to social interests.

"The right course is not to tinker with our courts and with our judicial organization in the hope of bringing about particular results in particular kinds of cases at a sacrifice of all that we have learned or ought to have learned from legal and judicial history. It is rather to provide a new set of premises, a new order of ideas in such form that the courts may use them and develop them into a modern system by judicial experience of actual causes."¹⁵

A distressing witness to the practical power of ideals is at hand now in

14. *The Call for a Realist Jurisprudence*, *supra* note 8, at 700.

15. *THE SPIRIT OF THE COMMON LAW*, 190; *cf.* *What Is the Common Law*, *loc. cit.* *supra* note 3.

the insistent opposition with which the theory of individualism, as embodied in the anachronistic attitudes of the American pioneer and the nineteenth-century Liberal, harasses current movements of legal reform.

"In a long view what is likely to prove hardest and to retard and make ineffective our efforts at adjustment will be not stubborn facts but stubborn theories."¹⁶

And if the positivist interpretation of the judicial process comes to dominate our courts and our law schools, we shall have further distressing evidence of the power of ideal pictures.

". . . a more anti-social theory of law-making than that implied in the economic interpretation, as grafted on analytical jurisprudence by American positivists, could not be conceived."¹⁷

"Theories of what men are doing have a controlling effect on what men do and how they do it. Thus we are likely to get a vicious circle. Taught that they cannot in the nature of things act otherwise than arbitrarily and upon prejudice and class self-interest, officials are likely to give up trying to do anything else."¹⁸

Granting that ideas, as well as physical factors, go into the formation of every legal system, the important question arises: What ideal picture of law will be chosen? What theory both explains the course of legal history and provides a norm for the present and the future? Pound rates this the Number One problem facing jurisprudence today. To those who ban it as an illegitimate and meaningless question for a science based on objective data he says:

"[If we refuse to criticize the legal order according to criteria of value] we succeed in nothing more than relegating our main problem to some other branch of learning where we shall still meet it once more in our path as the main obstacle to be overcome. . . . Nothing, then, is gained by taking refuge from this difficult problem in a doctrine of irreducible antinomies, or in skeptical realism, or in a relativist logicism, inviting every one to take his own starting point, or in an analytical jurisprudence confined to the authoritative legal materials as they are and postulating that the judicial process in action accords with them."¹⁹

16. *The Social Order and Modern Life*, *supra* note 6, at 101.

17. INTERPRETATIONS OF LEGAL HISTORY, 113.

18. *The Church and Legal History*, *supra* note 8, at 94.

19. *American Juristic Thinking in the Twentieth Century*, *supra* note 8, at 170-171; *cf. id.* at 147; AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 89-90; *How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?*, *supra* note 8, at 81; *The Call for a Realist Jurisprudence*, *supra* note 8, at 697; *The Ideal Element in American Judicial Decision*, *supra* note 3, at 147; THE FORMATIVE ERA OF AMERICAN LAW, 28-29.

In his answer to this ethical question Pound, though he does not by any means go the whole way, does take a long step towards the Scholastic natural law, long at least in comparison with the distance separating us from most modern jurists. There are parts of his view, and these not the least important, which are identical with the corresponding parts of the Scholastic view. At the same time we find crucial omissions. I deal first with the identities.

II. *The Functionality of Law*

About the time of the Civil War a number of historical factors collaborated in stopping the growth of the American legal system. The expansion of the country was beginning to slow down, and that meant that American jurists had to turn their energy from the old task of bending the strict and highly social aspects of the common law to meet the frontier conditions, towards the new task of freezing legal change as much as possible. Society's greatest need was no longer to provide the conditions most conducive to the settling of new land, but rather to stabilize the life of older communities. Corresponding to this general drift in judicial practice, says Pound, there arose in judicial thought the Analytical School of jurisprudence. It is largely out of his opposition to this theory and to the other nineteenth-century non-creative views of law, which he considers to have outlived their social usefulness, that Pound's own view takes shape.

"The philosophical jurist was too prone to find ingenious philosophical justification for rules and doctrines and institutions which had outlived the conditions for which they arose and had ceased to yield just results. The historical jurist was too prone to find a justification for an arbitrary rule in the fact that it was the culmination of a historical development. The analytical jurist banished all ethical considerations, all criticism of legal precepts with reference to morals, from the law books. If the precept could be fitted logically into a logically consistent legal system, it was enough. Such things are intelligible . . . in a stage of legal development, following a period of growth, when it was expedient for a time to assimilate and systematize the results of creative judicial and juristic activity."²⁰

It is a central dogma of the Analyticists—and their radical error, according to Pound—that the judge has no hand in creating the law.²¹ For them the judge is a mechanical mouthpiece of the legislator, his only function being to apply to individual cases the general command of the

20. LAW AND MORALS, 86; cf. *The Scope and Purpose of Sociological Jurisprudence*, *supra* note 1.

21. LAW AND MORALS, 48-53.

lawgiver, on the presumption that all future situations occasioning litigation were foreseen and regulated in the legislator's intention at the moment of lawgiving.²² It is evident that by so shutting the door to judicial creativity such a theory served the conservative requirements of the times.

Pound's reading of legal history, however, convinces him that this view of American government offends truth about the past no less than it hampers progress in the future.²³ We must recognize, he says, that the judge helps mold the legal system. He always has in the past, and he must now if the law is to be a serviceable instrument to men and not a dead weight on their backs. His argument is simply the story of the courts' creativity in history²⁴ and, more generally, the absurdity of supposing an omniscient legislator; no man can read the future in the detail necessary for deciding the locus of justice in every case of the class governed by a given precept.²⁵ The judge, moreover, is in closer touch with the detailed social facts, especially under the common-law empirical technique of working out the formulation of law.²⁶

Whether or not we approve of Pound's opposition to the separation of political powers in the case of judicial lawmaking, it shows us the origin of one of his primary tenets, the functionality of law. If the judge becomes conscious of being required frequently to turn legislator and choose between two or more possible policies of legal control, establish a precedent for future application and thereby dictate how the law's subjects shall conduct themselves in certain situations in the future, then he must ask about the law's effects upon the social situations and activities they are designed to govern, "rather than whether their abstract content is abstractly just. The moment we ask such questions, however, we are driven to inquire as to the end of law. For function means function towards some end."²⁷ The judge must learn the truth that *the law is not an end in itself*. The ordinary factory worker needs to know nothing of the reasons for the technical process he performs, but his superiors, who must fit that process to purposes that unify the operation of the factory as a whole, must know those ends and must be able to keep up with changing ends and changing conditions by the necessary

22. AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 53-54.

23. LAW AND MORALS, 43-88.

24. THE FORMATIVE ERA OF AMERICAN LAW, 81-137; LAW AND MORALS, c. 2, *The Analytical View*; INTERPRETATIONS OF LEGAL HISTORY, 130-140; AN INTRODUCTION TO THE PHILOSOPHY OF LAW, c. 3, *The Application of Law*.

25. THE SPIRIT OF THE COMMON LAW, 174.

26. *Id.* at 173 *et seq.*; *What Is the Common Law*, *supra* note 3.

27. *How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?*, *supra* note 8, at 90; *cf.* *A New School of Jurists*, *loc. cit.* *supra* note 2.

technological changes. If the existent law is imperfect and must be modified by human action, then it cannot be an absolute end, but must be the mere servant of an outside end. What is changeable is not an end in itself.

You may be surprised that such a commonplace should be dignified with the importance Pound gives it or that it should be deemed needful of much defense, but not if you know the state of jurisprudence at the time when he began writing. Pound had to teach the Analyticists that human law is something relative, something for men to take and change and use for their own purposes—within many limitations, of course.²³ And he had also to counteract the influence of the determinism of the other important nineteenth-century schools and convince men that they *could* modify human law.²⁹ The extent of the judges' respect for existent law is shown by their one-time refusal to permit any radical changes through legislation; they presumed on the part of the lawgiver an intention that every new piece of legislation should be interpreted as consonant with the common law's first principles, in spite of the fact that this presumption contradicted the legislator's power of lawmaking. Legislators could make law, yes, but they must not change the character of the common law. The principles of the common law were conceived to be perfect for all time, adequate to the function of regulating any and every set of social circumstances;³⁰ common-law rights of Englishmen and Americans were identified with the inalienable natural rights of man, and our Constitution took on the immutability of the natural law.³¹

If we grant the need of legal changes at the beginning of the present century, then we must commend Pound for attacking the defeatism and complacency of that time, and for spreading a consciousness of the elementary truth that law is essentially a changeable instrument—just as now we commend him for assailing the legal positivists, who go to the other extreme of violating the law's need of stability and continuity.

III. *The Immediate End of Law: The Social Interest*

If human law is only a means, what is its end? It is designed to serve a good outside itself, but what good? Here again Pound's teaching

28. *Fifty Years of Jurisprudence* (1937) 50 HARV. L. REV. 557.

29. INTERPRETATIONS OF LEGAL HISTORY.

30. *The Scope and Purpose of Sociological Jurisprudence* (1911) 25 HARV. L. REV. 140, 143; *Justice According to Law* (1914) 14 COL. L. REV. 103, 117n.

31. THE SPIRIT OF THE COMMON LAW, 95-98; INTERPRETATIONS OF LEGAL HISTORY, 41; THE FORMATIVE ERA OF AMERICAN LAW, 26-27. See also *The Ideal Element in American Judicial Decision*, *supra* note 3, at 142, where Pound speaks of the "common law natural law."

shows a negative and a positive side. Delimiting the true (immediate) end of law entails condemning the current misconceptions, among which we find the influential error of individualism. By different routes the dominant social and legal philosophies of the nineteenth century, both in America and abroad, arrived at the common conclusion that the immediate end of law lies in giving expression to the free-will of the individual subjects.³² Kantian and Hegelian ethics offered a philosophical justification for the Continental champions of *laissez-faire*. Kant made right the end of law and defined it as

“ . . . the whole of the conditions under which the voluntary actions of any one person may be harmonized in reality with the voluntary actions of every other person according to a universal law of freedom.”³³

For Kant any legal precept is just if it supports the equilibrium of free-wills. Individual freedom is the political goal; insofar as a social situation involves a deliberate contract, it embodies the legal idea. And Hegel says, “This is right: that existence generalized is existence of the free will. Accordingly generalized it is freedom as an idea.”³⁴ These statements boil down to an asseveration that the law exists to implement the individual subject’s free choices; and no matter what those wills want, justice obtains as long as they are in harmony one with another. Reason takes on the character of tyrant; it “is not the principle of freedom but is rather an element in human nature antagonistic to freedom.”³⁵ Since voluntary action is action flowing from the individual’s own personal choice rather than from the determination of pre-existent social relations and authority’s commands, this legal ideal is individualistic. Its objective is a maximum of individual self-assertion.

Philosophy yielded this ideological defense of individualism. Facts of modern history suggested such a political philosophy.³⁶ The great flux of economic phenomena at the beginning of the modern period dictated a change in social forms. Where new adaptations to environment were necessary on such a scale, a large increase in individually initiated

32. THE SPIRIT OF THE COMMON LAW, c. 6, *The Philosophy of Law in the Nineteenth Century*; LAW AND MORALS, c. 3, *The Philosophical View; How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?* *supra* note 8, at 82-84.

33. METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE (1797), Introduction, § B, 3, cited in LAW AND MORALS, 11, n. 24.

34. GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, 61, cited in INTERPRETATIONS OF LEGAL HISTORY, 46n.

35. PUCHTA, CURSUS DER INSTITUTIONEM, § 2, cited in INTERPRETATIONS OF LEGAL HISTORY, 47n.

36. INTRODUCTION TO THE PHILOSOPHY OF LAW, 38-54, 79-81.

activity was required—in the settling of new lands,³⁷ for example—and it was sensible then, Pound thinks, for the law to extend the boundaries of individual freedom. And in the formation of Anglo-American law the conflict of courts and crown inspired by Stuart tyranny left its mark in the form of an attitude that regards law as primarily a bulwark protecting the individual against the government.³⁸

Individualists of the Historical School of jurisprudence interpreted legal history as the unfolding of this one idea, the individual's progression from status to contract, that is, from limited legal recognition as a responsible and free-willing person to more and more such recognition and less and less liability for faults not willed, less and less treatment as a *social* unit. Pound, however, labels this reading of history false. It is "refuted by the whole course of development of the law . . . in the last generation, unless indeed we have been progressing backward."³⁹

He adduces facts drawn from judicial decision and legislation to show that

" . . . limitation of free contract and imposition of duties and liabilities as incidents of relations instead of exclusively as the consequences of manifested will, have gone forward steadily. . . ."⁴⁰

But Pound finds nothing more false than to suppose that the law's prime purpose is to establish conditions under which individuals enjoy a maximum of self-assertion. This view will neither explain the forms of legal systems in the past nor provide any help as a standard in solving our present and future legal problems. History shows us that the chronologically first concrete end of law was the general security. Primitive systems of law do not devote themselves to fostering the development of the personalities of individuals. They aim rather at setting the conditions of social life.

"Nineteenth-century individualism wrote legal history as the record of a continually strengthening and increasing securing of the logical deductions from individual freedom in the form of individual rights, and hence as a product of the pressure of individual claims or wants or desires. But this is just what it is not. It is not too much to say that the social interest in the general

37. THE SPIRIT OF THE COMMON LAW, c. 5, *The Pioneers and the Law*, 112-138; THE FORMATIVE ERA OF AMERICAN LAW, 6-8.

38. THE SPIRIT OF THE COMMON LAW, c. 3, *The Courts and the Crown*, 60-84; CRIMINAL JUSTICE IN AMERICA (1930) 105; THE FORMATIVE ERA OF AMERICAN LAW, 88.

39. INTERPRETATIONS OF LEGAL HISTORY, 60; cf. *How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?* *supra* note 8, at 85-87.

40. INTERPRETATIONS OF LEGAL HISTORY, 61; cf. THE SPIRIT OF THE COMMON LAW, 185-189.

security, in its lowest terms of an interest in peace and order, dictated the very beginnings of law."⁴¹

As an example take the truce or peace, "the most fruitful of the institutions of Germanic law".⁴² This primitive legal institution established certain suspensions of feud and private vengeance. From an individualist standpoint these exemptions were in direct contradiction of the primary end of law, which was the mothering of individual self-expression. What dictated the formation of such exemptions and suspensions was rather the human need for maintaining the social order, by supporting the activities and relations that comprised it. In Pound's language, the various types of peace or truce were "expressions or recognitions of the paramount social interest in the general security."⁴³ Primitive law is characterized by just this rudimentary conception of the general security, a conception that "puts satisfaction of the social want of general security, stated in its lowest terms, as the purpose of the legal order."⁴⁴

History shows us in general terms that the career of legal systems has always been determined largely by two opposing pulls, one towards stability and the other towards change; "Law must be stable and yet it cannot stand still."⁴⁵ The need for continual modification in the formulation and application of laws follows from the incessant change occurring in the human and physical materials those laws are supposed to organize. But without a large measure of stability in the legal system the society will disintegrate; men must be able to count on the future if they are going to live peaceably in the coöperative associations that law helps maintain and control. It is a generalization drawn from the facts of history, to say that the social interest in the general security is the first determinant of law.

"In the last century legal history was written as a record of the unfolding of individual freedom, as a record of continually increasing recognition and securing of individual interests through the pressure, as it were of the individual will. But it would be quite as easy to write it in terms of a continually wider and broader recognition and securing of social interests, that is, of the claims and demands involved in the existence of civilized society . . . the beginnings of law lend themselves much more to such an interpretation than to the orthodox interpretation of the last century."⁴⁶

41. THE SPIRIT OF THE COMMON LAW, 206.

42. *Ibid.*; cf. CRIMINAL JUSTICE IN AMERICA, 83-84.

43. THE SPIRIT OF THE COMMON LAW, 207.

44. AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 72-73.

45. INTERPRETATIONS OF LEGAL HISTORY, 1. This is a *leitmotiv* in all of Pound's writings.

46. *Id.* at 163-164.

Individualism, then, fails to explain for us the primary characteristics of the world's legal systems. (This is not to say that individual self-expression has never been an objective of law—it has always been among the subsidiary ends, and it rose to a height of much influence during the nineteenth century. Pound only removes it from the rôle of foremost end.) Nor can it lead us out of our current legal difficulties. Law must be looked upon as the instrument first of society and only secondly of the individual:

"The jurisprudence of today catalogues or inventories individual claims, individual wants, individual desires, as did the jurisprudence of the nineteenth century. Only it does not stop there and assume that these claims inevitably call for legal recognition and legal securing in and of themselves. It goes on to ask: What claims, what demands are involved in the existence of the society in which these individual demands are put forward; how far may these individual demands be put in terms of those social interests or identified with them, and when so subsumed under social interests, in so far as they may be so treated, what will give fullest effect to those social interests with the least sacrifice?"⁴⁷

The truth of this social view of law has been driven home to us by the peculiar exigencies of our times generally and of our own American society particularly.⁴⁸ The modern industrial world grew out of a world where social activities outside the family and neighborhood occupied a much smaller fraction of the individual's day. These new relations had to be taken over for regulation by the law, for it was the only large enough agency at hand. Any program of sudden change in social institutions is difficult of execution, and this one was aggravated all the more by the individualist principles governing (often unconsciously) the nineteenth-century minds holding the reins of the legal system.⁴⁹ America added to this dislocation the one afflicting a nation emerging from the frontier, where individual self-assertion is admittedly the best vehicle of society's progress, into the city, where society's claims expand at equal pace with the increase in urban complexity.

Hence the social interest, by and large the foremost determinant of law since its beginnings,⁵⁰ requires a special prominence today, when life

47. THE SPIRIT OF THE COMMON LAW, 203. See also *Justice According to Law* (1914) 14 COL. L. REV. 103, 119.

48. CRIMINAL LAW IN AMERICA. 12-26; INTERPRETATIONS OF LEGAL HISTORY, 63.

49. THE SPIRIT OF THE COMMON LAW, c. 6, *The Philosophy of Law in the Nineteenth Century*.

50. Like Pound, Scholastics infer from this factual truth a normative principle, namely, that law should be for the common good. By placing social functionality in the very definition of law—*lex est ordinatio rationis ad bonum commune*—they make the common good the first criterion for the selection of human interests to be secured by the law. See

is characterized by an increasing sociality. To spread a consciousness of the need for what Pound calls the "socializing" of law is perhaps chief among the objectives of his teaching. And, in his opinion, the foremost obstacle to be cleared away is the widespread individualist attitude, which regards law as at best a necessary evil, whose only excuse is the service it does to the self-assertion of individuals.⁵¹

His concern for the social interest also prompts Pound's current war against the Realists. However, the Realists do not commit the Individualist's error of denying that the social interest is the proper end of law; where they go wrong, according to Pound, is in flouting the social order's need of stability. The Individualist is blind to the *general* security; the Realist, to the general *security*. The fact that the Realists have lately replaced the Individualists in the jurisprudential limelight explains why Pound's major emphasis, which used to be on the need for legal change, is now on the need for stability. It is for the sake of stability, which is the paramount need of the social order, that Pound has of late been selecting for special accentuation such of his doctrines as the supremacy of law, equality before the law, the utility of the postulate of authority, and the importance of reason's part in the judicial process; just as years ago his emphasis was rather on social facts, which called for a change in law.⁵²

IV. *The Ultimate End of Law: Man*

1. *Man's Social Needs*

So much for Pound's preliminary characterization of the end of law

TAPARELLI D'AZEGLIO, *ESSAI THÉORIQUE DE DROIT NATUREL* (tr. from Italian, 4th ed. Paris, Leipzig, 1857) I, 1080; VICTOR CATHREIN, *S.J., RECHT, NATURRECHT UND POSITIVES RECHT* (2d ed. Freiburg im Breisgau, 1909) 60-61; JOSEPH RICKABY, *S.J., POLITICAL AND MORAL ESSAYS* (1902) I, 36; GEORGES RENARD, *LE DROIT, L'ORDRE ET LA RAISON* (Paris, 1927) 80-82; A. Molién, *Lois* in *DICIONNAIRE DE THÉOLOGIE CATHOLIQUE*; SIMON DEPLOIGE, *THE CONFLICT BETWEEN ETHICS AND SOCIOLOGY* (tr. by Charles C. Miltner, C.S.C. St. Louis, 1938) 345; BERNARD ROLAND-GOSSELIN, *LA DOCTRINE POLITIQUE DE SAINT THOMAS D'AQUIN* (Paris, 1928) pt. II, c. II, *The Functions of the State*; WILHELM MÜLLER, *DER STAAT IN SEINEN BEZIEHUNGEN ZUR SITTLICHEN ORDNUNG BEI THOMAS VON AQUIN* (Münster I.W. 1916) § 2, *Die Aufgaben des Staates als sittliche Zwecke*, 25-60 and, of course, ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* (I-II, Questions 90-97, especially Question 90, Article 2, and Questions 95 and 96) and *ON THE GOVERNANCE OF RULERS* (tr. by Gerald B. Phelan, St. Michael's College, Toronto, 1935).

51. THE SPIRIT OF THE COMMON LAW, c. 5, *The Pioneers and the Law*, 112-138; CRIMINAL JUSTICE IN AMERICA, 122-131.

52. See *The Church and Legal History*, *supra* note 8; *A Comparison of Ideals of Law*, *supra* note 3; *What Is the Common Law*, *supra* note 3; *Public Law and Private Law*, *supra* note 8; *Hierarchy of Sources and Forms*, *supra* note 8; *The Call for a Realist Jurisprudence*, *supra* note 8.

as the service of the social interest; for the sake of clarity we might call the social interest the *primary and proper end* of law. But the social interest is not a self-evident concept; we must go on to ask Pound what he means by it. If law's primary and proper end consists in the service of society, what is society for? In other words, what is the *ultimate* end of the legal order?

First, what are the concrete social interests that the law must strive to secure? Besides the general security, which includes peace and order, general health, and security of transactions and acquisitions, Pound lists these objects of the social interest: security of social institutions (domestic, political, and religious), conservation of social resources, the general morals, general progress (economic, political, and cultural), and the individual human life.⁵³

One feature of this classification is quite objectionable. Why should the individual human life be placed on a level with these other concrete social interests, when it certainly must be considered the ultimate (though not the primary and proper) end of society itself and the social interests? Similarly, the general morals, far from being merely a concrete embodiment of the social interest, are its very end. To understand these twists in Pound's thought we must recognize the deep division and opposition that exist for him between the social and the moral. Moral refers only to the private self-regarding acts of the individual and to the acts governed by commutative justice; it does not cover activity that involves a relation and consequent obligations to society as a whole, the field that for Scholastics is governed by the norm of social justice.

"Equity imposed moral limitations. The law today is beginning to impose social limitations."⁵⁴

"Equity insisted on moral conduct on the part of creditors. . . . We insist upon protecting men against themselves so as to secure the social interest in the full moral and social life of every individual."⁵⁵

"[Civil society] demands that the individual man be able to live a moral and social life as a human being."⁵⁶

"On the other hand, the moral element plays a much more important part when we are dealing with conduct than when we have to do with property and with economic relations [i.e. where the social life is involv'd]."⁵⁷

53. THE SPIRIT OF THE COMMON LAW, 208-210; CRIMINAL JUSTICE IN AMERICA, 6-9.

54. *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 HARV. L. REV. 195, 227; cf. THE SPIRIT OF THE COMMON LAW, 186.

55. *The End of Law as Developed in Legal Rules and Doctrines*, supra note 54, at 229. See also CRIMINAL JUSTICE IN AMERICA, 8.

56. CRIMINAL JUSTICE IN AMERICA, 57-58.

57. *Id.* at 75.

"[Aristotle] saw that morals could not cover the whole ground of social control."⁵⁸

Such a use of the terms "moral" and "social" evinces a wrong conception of the individual's relation to society. Pound appears to derogate from the authority of the natural moral law by excluding from its jurisdiction an important part of the individual's existence, his life insofar as it is social. He seems to make the same mistake, in speaking of criminal justice, when he says an "antinomy", an "internal contradiction", exists between freedom and restraint, between the need of individual initiative and the need of social limitations upon that initiative.⁵⁹ Now it may be true that to adjust these two social interests is a delicate and difficult problem, and that legal systems generally err in neglecting one while exaggerating the other; but if Pound means only this by "antinomy" in the section, "The Antinomy of Criminal Justice" in *Criminal Justice in America*, why does he not rather include this section under the following one, "Inherent Difficulties in Criminal Justice"? We can only infer that he imagines he has found a fundamental and irreconcilable disunity between the social and the individual—*i.e.* moral—needs of human nature. Again, when the topic is social philosophy in general, Pound rejects individualism because for it "Civilization gets its significance as a means of educating the individual,"⁶⁰ thereby implying that in his opinion civilization has a value apart from its service of the individual's happiness, the individual's moral life.

The ultimately controlling purpose of society's operation can be found in either the individual or in society itself: if society, then you have collectivism, in which all personal values are subordinate to the existence and welfare of society; if the individual, then society is taken to exist and function for the happiness of its members. Are we then to conclude that by rejecting individualism Pound is accepting collectivism? No, the problem of interpretation is not quite so simple. For we find Pound characterizing social interests as "claims or demands of individual human beings when thought of in terms of social life and generalized as claims of the social group,"⁶¹ we find him calling "the moral and social life of the individual" "the chiefest of social interests".⁶² But if the moral and social life of the individual is the foremost social interest, why censure individualism for holding that "Civilization gets its

58. *American Juristic Thinking in the Twentieth Century*, *supra* note 8, at 166.

59. *CRIMINAL JUSTICE IN AMERICA*, 54.

60. *THE FORMATIVE ERA OF AMERICAN LAW*, 19.

61. *CRIMINAL JUSTICE IN AMERICA*, 6.

62. *THE SPIRIT OF THE COMMON LAW*, 110.

significance as a means of educating the individual"? It appears that Pound's first concern is to repudiate both collectivism and nineteenth-century individualism as they are stated by their adherents, but that he is much less certain and clear about the positive doctrine to replace them with. We are now looking for an ideal, he says, to guide our work of social construction; we do not see it completely, but we do know something of its outlines, we know that it must recognize two factors that are necessary for human progress:

"free individual initiative, spontaneous self-assertion of individual men, and on the other hand, co-operative, ordered, if you will, regimented activity. Neither can be ignored. . . ."⁶³

Thus Pound rightly recognizes that each of the extremist views contains desirable parts, collectivism its recognition of mankind's social needs, nineteenth-century individualism its devotion to freedom, but he does not know how to purify these truths of the distortions and exaggerations they have suffered during their confinement in false systems. Seeing no internal relatedness between man's social needs and his individual needs, Pound is unable to unify them in a third and alternative picture, so he contents himself with a confused and inconsistent eclecticism, whose unity is one not of intelligible order but of simple arithmetic summation.

If it were possible to separate the two, we might say that Pound's social philosophy is not to blame, but his psychology. He could easily organize his denunciations of collectivism and of nineteenth-century individualism into an ordered system of affirmative propositions, the kind of system of values which he himself says jurisprudence needs,⁶⁴ by simply positing a determinate human nature, an intelligible entity that would both explain the order and unity apparent in human phenomena and dictate a norm for man's conduct and development; and by going on to recognize from the facts of human history that, along with animality and rationality, this nature is characterized by sociality, and that therefore the derived norm forbids antisocial action, including action in violation of just human laws. Immediately it would be evident that the individual morality is both the authoritative beginning and the directive end of social control; that, on the one hand, society is for the individual, and on the other, that the individual is obligated to society. Upon such a rationale Pound could very well object to nineteenth-century individualism and at the same time, with no violence to logic, place the individual at the center of society. Where the old individualism

63. *How Far Are We Attaining a New Measure of Values?* *supra* note 3, at 94.

64. See note 19, *supra*.

erred was in leaving out of its notion of the individual human being the property of sociality: its fault lay in its psychology. There is nothing wrong with holding that civilization's only significance resides in its function of helping the individual feed, clothe, shelter, and (mentally and morally) improve himself, if by individual is understood a being possessed of a social nature, that is, of social needs generating social duties. Postulate a true psychology, and individualism is the only true social philosophy.

But Pound has no theory of human nature. Indeed, he emphatically denies even the need of one—this in spite of his awareness that rulers need a positive set of values to guide them when they are determining which out of several conflicting claims shall be secured by the law.

“. . . I submit that jurisprudence can't wait for psychologists to agree (if they are likely to), and that there is no need of waiting. We can reach a sufficient psychological basis for juristic purposes from any of the important current psychologies.”⁶⁵

But if Pound limits his psychological credo to the tenets that modern schools hold in common,⁶⁶ it is no wonder that his jurisprudence gropes along with a blindfold instead of an ethics. As though the law, the foremost agency of conscious social control, can promote the individual's moral and social life without first knowing what that individual needs!

It is evident, then, that Pound's disjunction of the moral and the social human life indicates a social philosophy essentially like neither collectivism nor nineteenth-century individualism, but that it does spring from a deficient psychology. For notwithstanding his declaration of jurisprudence's independence of psychology, Pound's own philosophy of law, being a normative science, presupposes certain psychological premises—what else is his doctrine of the efficacy of effort but an avowal of free will? His fault seems to consist in radically bifurcating the natural unity of man's being and activity, in disjoining within the individual himself the moral creature and the social. One wonders whether Pound is not harboring in his thought a relic of the old individualism's refusal to admit that the state, over and above its power of physical coercion, enjoys a *moral* claim on the individual.

65. *The Call for a Realist Jurisprudence*, *supra* note 8, at 706. Note that Pound has room for only the important current psychologies, among which he undoubtedly does not mean to include the Scholastic theory. As far as he is concerned, the doctrine of a will in man was killed and buried by nineteenth-century psychology, an event which he calls a major reason for the Sociological School's rejection of the "metaphysical will-philosophy of law". AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 90; *cf. How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 91.

66. See, for example, HEIDBREDER, *SEVEN PSYCHOLOGIES* (1933).

Then the doctrine of the social interest as the end of the legal order reduces ultimately to the doctrine of the sociality of man. Your individualist could not bear to find within the nature of gloriously free-willed man a dependence upon anything external to him, not even on his fellows, and especially not on an authority endowed with powers of compulsion: the law is not human, but since somehow it exists it must be utilized for the aggrandizement of the individual free man. But Pound sensibly takes the law's existence, and authority's existence, as fully human beings. In this case man must be social, and society can, with no oppression of mankind, function for its own good, the social interest. If man is social and society does prosecute the social interest, then individual man is the ultimate end both of society and of its instrument, the law, and the social interest is but the infravalent, though still the proper and immediate, end of law. In this respect (if we illegitimately ignore his lack of a unified psychology) Pound, as well as the Scholastics, could correct the current concept behind the term individualism—as Maritain did for the term humanism—and justifiably call himself a true individualist.

Along with his aversion to the old individualism's asocial conception of human nature, Pound feels an attraction for the medieval ideal of a relational society, a society in which the law recognizes that stable social relations are a necessary part of the individual human life. The social interest can be sufficiently secured by the law only if status is given legal sanction and accepted as an institution of at least equal utility with contract. Society is really held together by noncontractual relations, and its interests can best be promoted by a legal system that recognizes and maintains these relations. The ideal of a society of isolated individuals has been tried, and it has failed: the law-in-action, formulated by judicial lawmaking, has moved steadily and surely away from contract towards status, responding to the perceived need of the security of social institutions. It is for the sake of the social interest that Pound endorses this trend and appeals for a further return to the medieval ideal, an ideal already enshrined in the authoritative materials of our own legal system, the common law.⁶⁷

"Perhaps what is permanent in it [the medieval ideal] is its recognition of the social interest in the security of social institutions."⁶⁸

"In truth, the [medieval and common-law] idea of relation responds to what is now held to be the very nature of human society—not an aggregate of

67. THE SPIRIT OF THE COMMON LAW, c. 1, *The Feudal Element*.

68. *A Comparison of Ideals of Law*, *supra* note 3, at 5.

individuals but a complex of associations and relations whose inner order is the foundation of the law."⁶⁹

2. *The Problem of Man's Further Needs*

The individualists who rested their political philosophy on Kantian and Hegelian ethics exalted freedom as the goal of all action, and accordingly designated as the end of law the maximum of self-assertion. Pound, we have seen, will have none of this dogma and offers the rôle of end of law to the securing of the social interest. But this is only to say that in gaining his happiness man must be social, that living socially is part of his happiness. The question remains, What is man's complete happiness? By fixing the law's proper end as the securing of society's needs, Pound has committed himself to the view that man is social, that he needs to live in a social order. But mere sociality is not enough, it is not purely by being social that man progresses towards happiness. Pound recognizes that society—as well as society's instrument, the law—is not an end in itself.

"In the social order . . . we have a means toward the adjustment which is involved in or presupposed by life. It is a means."⁷⁰

"Yet cooperation cannot be a wholly satisfactory measure of values for a system of law. For cooperation is a process. It must be cooperation towards some thing."⁷¹

This is the reason why Pound insists that jurists must "understand, organize and criticize . . . the ideals behind the legal order and in the background not only of the judicial process but of the legislative, the administrative and the juristic processes as well."⁷² It is not enough to recognize that only social interests are to be favored with the law's sanction; jurisprudence must also have "A theory of interests and of ends of the legal order. . . . a theory of values, for the valuing of interests,"⁷³ "a criterion for valuing the claims, demands or desires which

69. *What Is the Common Law*, *supra* note 3, at 22. Statements like these seem inconsistent with Pound's strong dislike for "subordination" as over against "coordination". He objects to Radbruch's theory that social life entails relations of subordination as well as of coordination (*Public Law and Private Law*, *supra* note 8, at 474-475). But would not a social order organized exclusively on the principle of coordination be nothing else than a mere "aggregate of individuals"? Does Pound mean to suggest that cooperative activity is possible without a leader vested with the power of command, without members obligated to obey? *Multi per se intendunt ad multa, unus vero ad unum.* (SUMMA THEOLOGICA, I, 96, 4.)

70. *The Social Order and Modern Life*, *supra* note 6, at 79.

71. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 92.

72. *Id.* at 81.

73. *The Call for a Realist Jurisprudence*, *supra* note 8, at 711.

press upon the legal order for recognition and securing".⁷⁴ Not only for Pound, but for contemporary jurists generally—except for the extreme leftists, who deny the efficacy of ideals—"the problem of values, of a criterion for valuing interests, is put in the first place as the fundamental problem of jurisprudence."⁷⁵

After such a careful setting of the stage, we are let down by Pound's own attempt at a solution. The end of the social order (*i.e.*, the ultimate end of the legal order), he says, is "the progressive development of human powers to their highest point,"⁷⁶ "the raising of human powers to their highest unfolding,"⁷⁷ in other words, "to maintain, further, and transmit civilization".⁷⁸

"Let us think of civilization, of the raising of human powers to their highest possible unfolding, of the maximum of human control over external nature and over internal nature, which has enabled mankind to inherit the earth and to maintain and increase that inheritance."⁷⁹

"An ideal of civilization, of raising human powers to their highest possible unfolding, of the maximum of human control over external nature and over internal nature for human purposes. . . ."⁸⁰

At first sight of these declarations we are moved to ask what can be the use of such generalities. For who would dispute them? Where is the law whose protagonists do not proclaim as its ultimate purpose the development of man?

Nevertheless, these expressions of Pound's half-formed social ideal are not without significance. They do reflect certain tenets that are not common to all systems of thought. We have already observed that Pound's social philosophy receives its first determinations from his aversions to individualism and collectivism. Now, when he says "civilization", he has in mind the need of avoiding these two extremisms.

"Three ideals and resulting canons of value for the recognition, delimitation, and securing of interests have obtained in juristic thought. One looks at all things from the standpoint of the individual human personality. . . . A second looks at all things from the standpoint of organized society. . . . A third re-

74. *American Juristic Thinking in the Twentieth Century*, *supra* note 3, at 163.

75. *Ibid.*; *cf. id.* at 171: "Philosophy of law must develop a positive side. Indeed, it is very likely because it is positive rather than purely negative that neo-scholasticism has been spreading so rapidly." Observe that its spread, according to Pound, comes from neo-scholasticism's being affirmative, not from its being right or true.

76. *The Social Order and Modern Life*, *supra* note 6, at 79.

77. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 95.

78. *A Comparison of Ideals of Law*, *supra* note 3, at 17.

79. *The Church and Legal History*, *supra* note 8, at 29.

80. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 94.

gards the first two as transcended in the conception of civilization and the values of civilized life. It reckons personality values and community values in terms of civilization values. Individual self-assertion, spontaneous individual initiative and free individual activity, on the one hand, and cooperation and planned collective activity, on the other hand, are thought of as means toward or agencies of civilization. Morals, law, and the state get their significance as making for civilization. The highest end is civilization."⁸¹

On the one hand, a repudiation of individualism:

"In the last century, jurists were agreed upon individual free self-assertion as the end of the legal order. Today many, at least, see effective cooperative activity as a means along with free individual activity toward an end of civilization. In the last century there was general agreement in putting the single individual as of ultimate significance. Today many, at least, see ultimate significance in the highest development of human powers."⁸²

And on the other hand, a repudiation of collectivism: civilization is not to be identified with the state. The law is a means towards the promotion of the interest of society, and society's good is something more than the state's good, civilization is a thing "distinct from and contrasted with politically organized society."⁸³ Of a piece with this rejection of totalitarianism is Pound's hankering for the medieval ideal of a universal human law;⁸⁴ the march of civilization would be greatly speeded up if only the world would shake off its narrow legal localism and seek a positive law transcendent to national legal systems, an agency of social control with a jurisdiction as universal and as growing as the world's economic interdependence. Another facet of Pound's anti-collectivism is his ideal of authority, of the supremacy of law.⁸⁵ He holds it a truth established by the whole experience of human history that the stable and predictable social control required by civilization is best realized when men—both rulers and subjects—postulate an authority behind the concrete rules of law, when the action of kings and public officials is expected to stay within bounds set by an authoritative written or customary law. Again Pound suggests that we moderns, with

81. THE FORMATIVE ERA OF AMERICAN LAW, 18-19.

82. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 88.

83. *Id.* at 94.

84. *Id.* at 88-89; *A Comparison of Ideals of Law*, *supra* note 3, at 5-7; *The Church and Legal History*, *supra* note 8, at 3-25.

85. *A Comparison of Ideals of Law*, *supra* note 3, at 8-10; *What Is the Common Law*, *supra* note 3, at 8-10; *Public Law and Private Law*, *supra* note 8; *The Church and Legal History*, *supra* note 8, c. II, *The Idea of Authority*; *A New School of Jurists*, *supra* note 2; THE SPIRIT OF THE COMMON LAW, c. 3, *The Courts and the Crown*; *American Juristic Thinking in the Twentieth Century*, *supra* note 8.

our waning sense of this truth, go to the Middle Ages for instruction.

Very well, Pound would have a society where the law, to the extent that its limitations permit, helps men expand their powers, become more civilized, increase their control over themselves and over nature. And as means to this end he conceives of a social system organized into legally supported relational institutions, but not so far organized that individual initiative and self-expression are obliterated; a system built upon the postulates of authority and of a universal law. But these ideals are still in the realm of *means*, and our concern is chiefly with the ultimate *end* of the legal order. For what end are these instruments of social control? Besides the concrete good of living with other men, what are the goods that the individual will be encouraged to enjoy once he has become a member of a relational social order maintained by an authoritarian, universalist law? Which are the human powers that the law ought to seek to unfold?

Wants Instead of Will

The end of the social order is "the highest development of human powers." Merely from the way he states this we are introduced to another of Pound's doctrines on human nature, and again we see him in the character of opponent of nineteenth-century individualism. For the latter pointed simply to one human power, the free-will, as the human faculty whose development was law's objective—as indeed it was the objective of all moral activity, individual as well as social. Pound's repugnance grew from his awareness of the injustices perpetrated by the law in the name of individual freedom.⁸⁶ He saw, for example, efforts to illegalize company stores blocked by the argument that such action would curtail the freedom of both employer and worker to engage themselves in contracts of their own free making; employer would suffer an infringement of his freedom to live his own life, and worker would suffer in addition to this the injustice of being classified with "the infant, the lunatic and the felon",⁸⁷ together with the indignity of becoming the member of a caste receiving government paternalism.⁸⁸ Pound declared such a freedom worthless and inhuman and fell to questioning its premises. The result was the simple conviction that freedom is far from the whole of human activity. Man enjoys some freedom, but there are other powers in his make-up, and when the exercise of freedom

86. *The End of Law as Developed in Legal Rules and Doctrines*, *supra* note 55, at 196-198.

87. *State v. Haun*, 61 Kan. 146, 161, 59 Pac. 340, 346 (1900), cited in *INTERPRETATIONS OF LEGAL HISTORY*, 64.

88. *E.g.*, *Frorer v. People*, 141 Ill. 171, 186, 31 N. E. 395, 399 (1892) cited in *The End of Law as Developed in Legal Rules and Doctrines*, *supra* note 55, at 197.

involves the neglect and abuse of these other powers, freedom ought to be docked.

Pound's service, then, in advocating the substitution of a jurisprudence of wants for the old jurisprudence of the will, consists in multiplying the faculties of the human person insofar as he is conceived as the end of the social order.

"At the end of the last and the beginning of the present century, a new way of thinking grew up. Jurists began to think in terms of human wants or desires rather than of human wills. They began to think that what they had to do was not simply to equalize or harmonize wills, but, if not to equalize, at least to harmonize the satisfaction of wants. They began to weigh or balance and reconcile claims or wants or desires, as formerly they had balanced or reconciled wills. They began to think of the end of law not as a maximum of self-assertion, but as a maximum satisfaction of wants."⁸⁹

The law must now take cognizance of human powers in the plural, whereas before it considered only the single power of free-will deserving of recognition.

The change is at bottom a philosophical conversion from Kantian ethics to Aristotelian, from deontology to eudaemonism. Kant forbade our acting for concrete goods, seeing in such action a subservience of our free-will to substances of inferior value; a betrayal of man's crowning glory, his ability to act for duty's sake alone. Ethics presupposes psychology, and Kant's error in psychology was Descartes', namely, regarding the material part of us as outside our essence. Pound has an inkling of these philosophical errors corrupting the old jurisprudence, and he calls the old view an unreal picture of man.

"Hence, today jurists approach the law from psychology rather than from metaphysics [that is, Kantian metaphysics]. They think of the scope and subject matter of law from the standpoint of the concrete desires and claims of individual men in civilized society, not from the standpoint of the abstract qualities of the abstract individual, nor from the standpoint of the logical implications of the abstract individual free will."⁹⁰

". . . the apotheosis of individual free initiative in the last century caused us to lose sight of the social interest in the human life of the concrete man in our zeal for the abstract freedom of the abstract man."⁹¹

89. AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 89; *cf. How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 90-91.

90. CRIMINAL JUSTICE IN AMERICA, 4; *cf. How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 90-91.

91. INTERPRETATIONS OF LEGAL HISTORY, 147.

Here Pound implies a germ of the correct view of free-will in the nature of man, and of freedom in human morality. Man never wills for the sake of freedom alone; such a picture is unreal, what Pound signifies when he says "abstract".

"Let us say that the change consists in thinking not of an abstract harmonizing of human wills but of a concrete securing or realizing of human interests."⁹²

Man exercises his freedom in pursuit of concrete goods; Pound says that wants are the motives, not freedom, and the Scholastic says that the will acts for an object that appears good, rather than for the introverted intention merely of freely exercising itself. *Objectum voluntatis est finis*.⁹³

Interests Instead of Claim

Another aspect of this revolt against Kant is of interest. Kantian jurisprudence held that the law's job is to implement the wills of its subjects. What the subjects will is no concern of the law's. Government, and along with it the work of the judiciary, is an amoral art. Morality is the individual's field, to him and to no one else belongs the business of deciding the rightness and wrongness of claims. Starting with Jhering, however, says Pound, the emphasis veered from claims and rights to interests.⁹⁴ The pre-Jhering jurists (in the measure in which they were active in creating law) judged legal precepts according to their effectiveness in fulfilling the subjects' claim to self-determination, their fundamental right to individual freedom—a claim which the jurists imputed to the subjects. Jhering and his followers, on the other hand, posited a collection of interests behind the individual's rights and claims; the interests are what the law seeks to implement, so far as possible, and legal rights declare the dimensions of the realm of interests enforceable by law. After Jhering law becomes "something created by society through which the individual found a means of securing his interests, so far as society recognized them."⁹⁵ Obviously, as soon as

92. *THE SPIRIT OF THE COMMON LAW*, 195-196.

93. "Impossibile autem est quod ipse actus a voluntate elicitus sit ultimus finis; nam objectum voluntatis est finis, sicut objectum visus est color. Unde sicut impossibile est quod primum visibile sit ipsum videre, quia omne videre est alicujus objecti visibilis, ita impossibile est quod primum appetibile, quod est finis, sit ipsum velle. . . . Quiquid ergo homo faciat, verum est dicere quod homo agat propter finem. . . ." *SUMMA THEOLOGICA*, I-II, 1, 1 ad 2.

94. Pound himself doesn't distinguish between the terms want, desire, claim, and interest. For the sake of clarity, however, I am taking the liberty of reserving the term interest for the concept of an objective good; I use the other terms when the concept excludes the normative element and refers to actually asserted or felt claims.

95. *The Scope and Purpose of Sociological Jurisprudence*, *supra* note 30, at 143.

jurists step behind the subjects' claims into the territory of the subjects' interests, law and government are no longer purely an amoral art, they are linked to the field of ethics.⁹⁶ Legislators and jurists must needs pay attention to values; they must weigh claims against a pattern of interests, denying some claims and securing those that appeared solid with interests.

"In one form or another a tendency to subordinate philosophical jurisprudence to ethics appears in all the types of the social philosophical school. As the social utilitarians put it, the immediate end of law is to secure interests, that is, to secure human claims or demands. Accordingly, we must choose which we shall recognize. . . . In making this choice and in weighing or evaluating interests, whether in legislation or judicial decision or juristic writing, whether we do it by lawmaking or in the application of law, we must turn to ethics for principles. Morals is an evaluation of interests; law is or at least seeks to be a delimitation in accordance therewith. Thus we are brought back in substance to a conception of a jurisprudence as on one side a branch of applied ethics."⁹⁷

Pound's subscription to this dealing in interests rather than in volitional claims is part and parcel of his view that the law is functional, a means to an end. The end is the securing of as many as possible of the interests possessed by the individual.

So, when Pound says society's end—consequently, the law's ultimate and mediate end—is the progressive unfolding of human powers, at least this much new is revealed of his jurisprudence: no one human power, least of all free-will, enjoys an exclusive fostering by society and the law. The statement indicates that human nature is composed of a multiplicity of powers, and that therefore law finds many individual interests to serve by way of its implementation of the social interests. And since the single power displaced by the many powers as the ultimate end of law is the free-will, jurisprudence is handed back to the moralists, from whose territory nineteenth-century individualism had removed it.

3. *The Nature of Man's Nonsocial Needs*

So far so good. Human life must be social, and the law's primary purpose is to promote this social interest. Further, the law must recognize and foster interests that spring from life's individual character. But of Pound's picture of the nature of these individual interests we have learned only that it is not the nineteenth-century theory of a single normative interest, free self-expression. Beyond that we are still in the

96. LAW AND MORALS, 11-12.

97. *Id.* at 112-113.

dark. Pound has yet to answer the question, What is the nature of the individual human being's interests in their nonsocial aspect?

It is precisely here that Pound falters. In the first place, he does not come out clearly and state the nonsocial interests he deems needful of the law's encouragement—indeed, by describing law as he does in his engineering analogy, he ends up in dodging completely the problem of evaluation. Secondly, what treatment he does give the subject shows a decided list towards materialism. Thirdly, he denies any immutability in human nature, believing that desires and needs can vary without limit. (This third point is not dealt with in this paper.)

From his failure to present a definitive and unified picture of the human powers the law ought ultimately to seek to unfold, we can only infer that Pound just doesn't possess such a theory. He does have a few words to say in elaboration of the "individual human life" when he includes it among the social interests that the law fulfills:

"Three forms of this interest have been recognized in common law or in legislation. One might be called the social interest in individual free self-assertion, physical, mental, and economic. Another might be called the social interest in individual opportunity; the claim or demand, involved in social life, that all individuals shall have fair opportunities, political, physical, social, and economic. In a third form, the social interest in the individual life appears as a claim that each individual shall have secured to him the conditions of at least a minimum human life under the circumstances of life in the time and place."⁹⁸

But here Pound is purporting only to set forth existent law, what interests it already recognizes and what interests it appears to be coming to recognize; he is here neither approving nor condemning. In another brief treatment of the same subject, the individual human life, he allows a tinge of the normative to enter in:

". . . the social interest in the individual human life, the claim or want of civilized society that each individual therein be able to live a human life according to the standards of the society, and to be secure against those acts and courses of conduct which interfere with the possibility of each individual's living such a life."⁹⁹

Here the words "civilized" and "standards" bear a normative connotation, but again Pound does not commit himself to a definite view of human nature. The powers to be unfolded by any given legal system are those selected by the consensus of moral sentiment in the society it governs.

98. CRIMINAL JUSTICE IN AMERICA, 8-9.

99. THE SPIRIT OF THE COMMON LAW, 210.

Recall that we have already seen Pound going so far as to deny even the *need* of a theory of human nature, to say nothing of its possibility.¹⁰⁰ Here we are meeting the jurisprudential consequences of this psychological agnosticism. It is, of course, impossible to make any predictions about the essential human need of the future (your theory of which affects your assessment of all lesser human values) if your psychology recognizes no abiding essence in man. You must wait till needs show up concretely before you can know them. And if you don't know a man's needs, how can you legislate for their fulfillment, how can you tell him what he ought to do? Without a philosophical psychology, *i.e.*, without a unified picture of human nature, Pound is without the conceptual matrix necessary for an ethics. And if he still insists upon a jurisprudence, it cannot be anything but a branch of art, a kind of social engineering rather than a promulgation of "oughts".

No wonder he resorts to the current "standards of society" rather than to the doctrines of a science of ethics for a statement and an evaluation of the interests the law ought to secure. The best we can hope to do about setting an ultimate end for law, he says, is to generalize from existing currents of moral opinion, find out what society seems headed for, and then mold the law to fit society's demands, eliminating the precepts that contradict current sentiments about justice and replacing them with rules that better express the community's will. Political philosophers must not consider themselves moralists; they are only administrators of society's moral will, engineers whose work is confined to the arranging and organizing of pre-existent materials. Pound himself exemplifies this function. In treating of the ethical values that the law must subserve, he takes the attitude of an observer, not an advisor; he speaks of the uncertainty of the present ideal that society holds for itself: he guesses that the ideal is "civilization", but he says he cannot "draw" this ideal from the phenomena of the present legal order as he can draw individualism from the phenomena of the nineteenth century.¹⁰¹

With such a view Pound cannot be expected to go any farther than he has in his characterization of the basic nonsocial human interests. If a jurist has only to observe and report current legal phenomena and deduce a few cautious predictions for the immediate future, then ethical considerations are irrelevant. But if you believe in the "efficacy of effort", judges' creativity, and the functionality of law, then ought you not, as a jurist, supplement your description of deliberate legal change with a prescription of a guiding legal ideal? As we have seen, Pound does go so far as to lay down one genuine norm for present-day reform:

100. See note 67, *supra*.

101. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 92.

the law must be made more social. He is sure of at least one human power whose development must be fostered by the law, that of man's sociality; man must be governed in such a way as to teach him that his individual happiness must be one that is compatible with the welfare of the society in which he lives. As for the rest of the human powers to be unfolded by the agency of the law—the nonsocial interests of human life—society must select them for itself, without the help of any guidance from Pound.

And what does society want right now? When one considers current psychology and ethics, one does not wonder that Pound passes by the job of formulating their results for the guidance of jurisprudence. Law must conform itself to the current morality, but who's to say what the common conscience (if any) now is? Nevertheless, Pound does betray the possession of a general view of the nature of man that goes beyond the mere note of sociality, in spite of the fact that in so doing he contradicts his declared belief in a radical indeterminacy in nature.¹⁰² And on top of it all, the two notes that I find him ascribing to his image of man are themselves mutually contradictory—spirituality and exclusive materiality.

Spiritual Needs

Individual self-expression is certainly a spiritual need, and we have seen that Pound includes it among the interests that the law ought to promote.

"Although we think socially, we must still think of individual interests, and of that greatest of all claims which a human being may make, the claim to assert his individuality, to exercise freely the will and the reason which God has given him. We must emphasize the social interest in the moral and social life of the individual. But we must remember that it is the life of a free-willing being."¹⁰³

We have already seen how convinced Pound is of the efficacy of human effort. Surely if any aspect of our life bears the mark of a spiritual origin, it is our freedom. It is hard to see why Pound does not make the obvious inference, accept a spiritualist psychology, and then go on

102. "Is the end of law anything less than to do whatever may be achieved thereby to satisfy human desires? Are the limits any other than those imposed by the tools with which we work, whereby we may lose more than we gain, if we attempt to apply them in certain situations? . . . if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation, to stand in the way of its doing so." AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 96-93.

103. THE SPIRIT OF THE COMMON LAW, 111.

to an ethics that formulates an ideal for human life, a natural moral law, that rates spiritual values above material ones.

What's more, Pound is quite emphatic that justice to individuals, and not justice to society,¹⁰⁴ must characterize the great majority of the solutions the courts find for conflicts men get into with each other and with society.

"An active individual popular interest in justice, a fixed and constant popular determination to secure for everyone his due is a prerequisite of an effective legal system. . . . An easy-going attitude toward right and justice bodes as ill for law as any easy-going attitude toward politics bodes ill for government and administration."¹⁰⁵

"Behind the ethical interpretation is the truth that men have sought to make the administration of justice and the laws by which it is administered conform to ideas of right and that their endeavors to do so have in large measure succeeded. The legal order has been able to maintain itself, law has been able to supersede the older agencies of social control and has become the chief agency thereof, to which others are subordinated, because these efforts have been so persistent and in consequence so successful."¹⁰⁶

And Pound shows that he himself possesses the universal human sense of justice; he inveighs, for example, against the unfairness of certain legislation to employers and praises the courts of the last century because "they never deliberately and intentionally subordinated the interest of one to that of another."¹⁰⁷ Men possess the need to be treated justly; if they find injustice characterizing any of their many social relationships, they will try to cut the offensive bonds, and with sufficient multiplication of these loosening society as a whole will fall apart. If such is the truth, then certainly human nature includes among its needs the *spiritual* one of receiving justice. To perceive an ideal just settlement of any conflict is the work of the intellect. For to perceive the relation of justice implies an equating of two terms, and such an act of comparing, of seeing two objects in and through a third, is beyond the capacity of the senses, whose material constitution confines their knowledge to particulars; it belongs rather to a spiritual power, the intellect. The senses have their own peculiar goods, correlative to their own peculiar needs, but these goods are never anything but particular. The need of justice as justice—and not as embodied in a just claim for this or that concrete material good—is felt only by a being possessed of a

104. Note again the disjunction of the moral and the social.

105. *THE SPIRIT OF THE COMMON LAW*, 110.

106. *INTERPRETATIONS OF LEGAL HISTORY*, 116.

107. *Public Law and Private Law*, *supra* note 8, at 475.

spiritual faculty that can know things as related, things insofar as they are ordered one to another.

Furthermore, Pound subscribes to the profoundly democratic doctrine that men ought to receive equal treatment before the law. He may not say so, but he freights this ideal with all the authority of a natural moral law.¹⁰⁸ Human equality is one of the unquestioned pre-suppositions of his ethical view. But the metaphysics of materialism has no room for such a belief. It is only by supposing the existence of a nonmaterial principle in the human substance that you can render an intellectual justification for regarding all men equal.

Material Needs

Yet on other occasions, and when the topic is more expressly human nature in itself, Pound betrays a materialist bias, thereby avowing a view that is absolutely incompatible with the above concept of man as partly spiritual. His favorite device for picturing the legal order as a whole is his engineering analogy.¹⁰⁹ If we regard the field of law the way we do the field of engineering, we think of law as involving processes—struggle against friction and waste, organization of materials, enforcement, social control—rather than merely precepts, just as engineering is not mathematics and physics alone but mathematics and physics plus a human activity. Then the functionality of law comes to light, for the work of the engineer is not an end in itself but a means for another's use. Law is a job to be done, not a system of propositions to be deduced; a means and not an end.

This is all well and good, and no doubt many jurists have lacked a perception of these truths. But the analogy reveals also the defects of Pound's view. Engineering occupies itself with the control of matter, and our suspicion is that it is partly for this reason that Pound chooses it as the law's exemplar. Observe how he equates the "goods of existence" with material goods:

"We rely upon the physical and biological sciences and their applications to augment as well as to teach us how to conserve and to appropriate and use the materials whereby human wants may be satisfied. These materials are but too limited in comparison with human demands. As in the old-time American mining community the map of a mining district shows a maze of overlapping and conflicting claims, out of which no one would have realized anything if the working of the lodes and placers, the extent of claims and the conditions of retaining them had not been ordered and regulated, so life

108. *Id.* at 474-475.

109. THE SPIRIT OF THE COMMON LAW, 195-196; INTERPRETATIONS OF LEGAL HISTORY, 152-165; CRIMINAL JUSTICE IN AMERICA, 43.

in society shows a like condition of overlapping or conflicting claims in which the goods of human existence would be lost or wasted, or at least the satisfactions derived from them would be small, if individual application of them to individual claims and demands were not ordered. Nor may the ordering in either case maintain itself unless it effectively eliminates friction and waste in the use and enjoyment of the means at hand. Where there is not enough to go round, what there is must be made to go as far as it will."¹¹⁰

And Pound also gives his concept of "human", in the phrase "human wants", an economic content:

"Apparently he [Kohler, whom Pound does not criticize for this doctrine] means the most complete human control of nature, including human nature, for human purposes, and in this respect there seems a point of contact with the so-called economic realists in jurisprudence, who find the end of law in a maximum satisfaction of human wants."¹¹¹

Note that Pound presents the engineering analogy to explain law *as it is in itself*, law as the object of a universal science.

"All interpretations go on analogies. We seek to understand one thing by comparing it with another. We construct a theory of one process by comparing it with another. . . . Let us think of jurisprudence for a moment as a science of social engineering, having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of politically organized society."¹¹²

Pound's subject here is not this or that politically organized society, but politically organized society taken universally; he is prescribing the engineering analogy as a conceptual instrument for the ordering of not this or that historical set of human relations, but of any and every set. Then why the essentially materialistic analogy? Ought not such a capital problem be discussed in equally universal terms and solved by an analogy—if a method of such imprecision is admissible in a science—that will make intelligible *all* aspects of the legal order, and

110. INTERPRETATIONS OF LEGAL HISTORY, 157-158. See also THE SPIRIT OF THE COMMON LAW, 196; INTERPRETATIONS OF LEGAL HISTORY, 114; cf. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 91.

111. INTERPRETATIONS OF LEGAL HISTORY, 144. Pound has, it is true, objected to the economic determinists and to those of the Realists for whom the welfare of business rather than society is the end of law; business, he says, is only "a special phase of the general task of harmonizing and securing interests and upholding and furthering the social order." *The Call for a Realist Jurisprudence*, *supra* note 8, at 709. This position, however, is not necessarily inconsistent with a materialistic view of human wants. Pound may be concerned here about other material wants than those met by business.

112. INTERPRETATIONS OF LEGAL HISTORY, 151-152.

not only those economic matters that comprise the bulk of legal business, quantitatively considered, or that are at this historical moment the locus of a social lag?

For it may be true that the most urgent agenda in our own legal order are about the control of the distribution of material goods, about the problem of remaking law in order to improve our economic system. The individualist ideal of free self-expression has doubtlessly operated to the economic disadvantage of the workers, and in seeking reform of those parts of our legal system which work this injustice Pound must, of course, stress largely the need of supplying the workers with the material goods they ought in justice to be given. But ought our general philosophical picture of law to be determined by the deficiencies of the historical system under which we happen to live? It is likewise true that most of the state's problems are economic problems—a truth recognized by Thomistic jurisprudence: justice, the essentially social virtue, is the norm of "outward acts, whereby men live in communion with one another,"¹¹³ and outward acts are largely for economic goods. Nevertheless, regulation of economic processes is but a means towards the common good, which is law's true end, and the common good is larger than material prosperity.¹¹⁴ We must not let the superior quantitative weight of economic matters in the legal process distract us from recognizing that qualitative primacy belongs to spiritual interests; we must remember that the satisfaction of material needs is but a means, a precondition, to the pursuit of the higher human values.

Again we are puzzled why Pound's lively sense of human freedom would not prompt him to choose an analogy that would recognize this distinctively human need, an analogy moreover that would put the individual's need of freedom on a value-plane higher than his need of material goods or his need of living in society. Such an analogy would not deny that law must order—order justly and for the sake of the social interest—that great majority of men's social acts that are directed towards the satisfaction of material needs; it would only affirm, as a

113. "Lex enim humana ordinatur ad communitatem civilem, quae est hominum ad invicem. Homines autem ordinantur ad invicem per exteriores actus, quibus homines sibi invicem communicant. Hujusmodi autem communicatio pertinet ad rationem justitiae, quae est proprie directiva communitatis humanae." *SUMMA THEOLOGICA*, I-II, 100, 102.

114. "Essentially this common good is the proper earthly life of the assembled multitude, of a *whole* made up of human persons: that is to say, it is at once material and moral . . . the social polity is essentially directed, by reason of its own temporal end, towards such a development of social conditions as will lead the generality to a level of material, moral and intellectual life in accord with the good and peace of all, such as will positively assist each person in the progressive conquest of the fullness of personal life and spiritual liberty." JACQUES MARITAIN, *TRUE HUMANISM* (1938) 127-128.

fact and as a norm, the qualitative superiority of man's spiritual needs.

The trouble is, Pound refuses to see in his own observation of human freedom, so solidly fortified by his large knowledge of history, a reliable psychological premise for a value-judgment placing spirit above matter. Fearing perhaps that it is not scientific, he turns for such premises to the professional psychologists of the day, and of course they give him materialism. The result for his jurisprudence is a glaring and pervasive inconsistency. On the one hand, you have his conviction of man's partial mastery over nature—the gift of his own experience—together with his correct apprehension of freedom's dependence upon an intellect that, by being able to formulate an ideal, emancipates man from the tyranny, to which all other animals are subject, of absolute determination by internal and external nature; and in the same line of thought you have his insistence upon the importance of evaluating those ideals of the intellect. On the other hand, there is his contradictory bent towards determinism—the gift of modern psychology and philosophy—which obliges him to ignore his own conviction of human freedom and to overlook the fact that the usefulness of the intellect's ideals comes from their truthfulness. This second *motif*, whose development achieves a climax in the engineering analogy, with its ignoring of the spiritual human interests and of jurisprudence's radical dependence upon ethics and thence upon psychology, also controls Pound's analysis of certain ideas at the heart of his jurisprudence: *authority* has the character not of a true moral attribute of a just law, but of a postulate made necessary by the social need of certainty;¹¹⁵ *arbitrariness* is never action in violation of a need in human nature, it is reprehensible only because it is unpredictable; the *supremacy of law* is a good political method not because written or customary law is more likely to be in touch with true human needs than is personal law, but because it is more predictable

115. *The Church and Legal History*, *supra* note 8, at 43; also *A Comparison of Ideals of Law*, *supra* note 3, at 5: "Philosophically, the [medieval] idea of authority had in itself the seeds of its own undoing. On the other hand, juristically, it has maintained itself. . . ." That is, the idea of authority has lost its truthfulness, to become merely a postulate of social life.

Observe the absence of any recognition that men's acts are influenced by their conscience, their awareness of a moral law: ". . . from the standpoint of the public the quest of authority has a twofold basis. On one side it is psychological, but on another it is economic.

"A psychological basis is to be found in human repugnance to subjection to the will of another and consequent fear or suspicion of arbitrary exercise of power by those who wield the force of politically organized society. . . . On the other side, it is economic. It rests on the need of predictability of judicial and administrative action as assuring long term enterprises and investment of time and energy and money therein." *The Church and Legal History*, *supra* note 8, at 32-33.

and certain;¹¹⁶ *universality* of law is an ideal, not because the individuals and the communities that law serves possess common needs, but merely because under the postulate of such universality communities will grow in size;¹¹⁷ there should be equality under the law, not because a real equality obtains among men's natures, but because the law's subjects have the idea they are equal and will rebel against too much inequality.

Thus, despite his belief in human freedom¹¹⁸ and his consequent assertion that values are of first importance, Pound seems never to advert to these truths in developing his jurisprudence. Indeed, although he has not himself stated it as such, his belief in the efficacy of free effort seems to become, when he is influenced by his inclination towards determinism, rather a belief in the efficacy of the postulate of freedom; it is not that men are free to follow this or that ideal, it is rather that men act according to a certain ideal if they have the idea that they are free to act in that way; "the believers in eighteenth-century natural law did great things in the development of American law" not because they were free to follow that ideal, but "because that theory gave faith that they could do them."¹¹⁹ Now if Pound really thought that men do not possess the freedom of choice, but are different from their fellow animals only by the fact that they are determined by new forces, the forces behind ideals, then of course there would be no call for exalting spiritual interests above material ones; what makes spirit superior to matter is the enrichment of existence that it brings its possessor, its enabling him to "become" the realities around him through knowing them—take away man's power of knowing reality, and man truly becomes nothing but an instinct- and idea-ridden mechanism, whose only real goods are the material goods that build and comfort his body, and whose spiritual goods of truth, freedom, moral goodness, and reli-

116. *What Is the Common Law*, *supra* note 3, at 22: "The idea behind the supremacy of the law responds to a deep-seated urge in human nature not to be subject to the will of a fellowman. It expresses experience of the ill effects of repression which is sustained abundantly by the researches of modern psychology." Thus established and traditional law is better than purely voluntary law not because its suitability to man's needs has been tested by time, but only because it is more predictable and therefore saves the individual from the psychoses wrought by surprise and subjection to other men.

117. *The Church and Legal History*, *supra* note 8, c. I, *The Idea of Universality; A Comparison of Ideals of Law*, *supra* note 8, at 5-7. The unity Pound posits among men is the unity not of nature but of cooperation. But if men and communities do not have common natures and common problems, why should comparative law have the value that Pound ascribes to it?

118. "We must emphasize the social interest in the moral and social life of the individual. But we must remember that it is the life of a free-willing being." *THE SPIRIT OF THE COMMON LAW*, 111.

119. *THE FORMATIVE ERA OF AMERICAN LAW*, 27.

gious worship are but epiphenomenal fancies, coming one knows not whence.

Besides materialism Pound's engineering interpretation of law intimates another inadmissible doctrine, one that we have already discovered in Pound: the regarding of jurisprudence as a species of art rather than a department of ethics. For it excludes all consideration of value. Engineering is an amoral process; of itself it is neither good nor bad. It acquires a moral character only accidentally, in its concrete junctions with the ends for which its works are employed. But law ought to stand closer to morality than this. It is comprised of rules of conduct, forms of human behavior; by direct declaration or by less direct declaration through the determination of general precepts these rules derive from the first injunction of the natural law, Do good and avoid evil. Politics is a department of ethics.

Ultimately, then, the end of law is "the progressive unfolding of human powers", according to Pound. This is the law's "eternal goal",¹²⁰ although the powers themselves increase in number, decrease, vary in kind, without cease and without limit. Who's to earmark powers for unfolding? Not the lawmaker. His role is to tune the law to the current morality. Society is the rightful evaluator of powers; in this matter the legislator must be without initiative. In his engineering analogy Pound really abandons his claimed allegiance to Jhering by giving up interests for wants as the law's norms, and turning politics once more into an amoral art. Unless he renounces his doctrine of jurisprudence as an art and replaces it with an honest-to-goodness ethical jurisprudence, one that is based upon a view of man that is decidedly more definite than can be got from the consensus of modern psychologists, Pound has no justification for criticizing the Realists' neglect of the problem of values.¹²¹ If the only inherent and unchanging limitations on legal action are the *physical* ones set by the possibility of enforcement,¹²² why should the jurist look upon the legal order as anything else than a means for securing the popular will, no matter what that will may want; why should he bother about ends when they have nothing inherent, determinate, and predictable about them? Within the bounds of the legal order jurists' effort is efficacious, yes, but not the effort of changing society's will. Such change rises from the bottom, an expression not of the law's will but of the law's subjects' wills. Lawmaker is politician, not statesman. The philosopher does have work to do; he

120. INTERPRETATIONS OF LEGAL HISTORY, 148.

121. As he does in *The Call for a Realist Jurisprudence*, *supra* note 8, at 703.

122. INTERPRETATIONS OF LEGAL HISTORY, 40.

"must be finding out the meaning of the changes which throughout the world are going on in the body of authoritative materials of determining controversies . . . finding out upon what principles these changes may be organized, what idea of justice they postulate, what ideal they offer us in place of that yesterday."¹²³

The philosopher must seek to ascertain, not the true values of human life, the objective interests—for these are inaccessible—but the already held ultimate claims, the popular will, what the people *think* are their true needs. Law is functional, yes, and as a means it can be changed when the end requires it; but the end is outside the ruler's reach, a creature of society's will, and the changing of society's will is the business of . . . who knows?¹²⁴

Such is one man's view of the ruler's task. To lead is to follow. You rule well only if you allow society to rule you. Like many a paradox this one, when interpreted in a properly limited sense, contains a large truth, one that St. Thomas and all the Scholastics express in the requirement that the law be "possible" to the subject. Nevertheless, to mold law to the public capacity for obedience constitutes but an accidental, however, important, part of the ruler's function. The essence of ruling is leading—a thing impossible where the would-be ruler has no ultimate ideal to which to mold his people.

Pound's system of jurisprudence, at first so promising in its destructive critique of the old determinisms, collapses for lack of ethics. After successfully unseating the physical fatalisms, which give man over to the clubs of the subhuman world, Pound turns up empty-handed of philosophy, and the deliverance becomes another captivity. Law is saved from physics and biology only to be handed over to the new absolute, Society. Law has one moral measure, Society's will. To the question, What realities ought to determine that will? we receive this tiny, cautious answer, Pound's only normative certainty: the wants of society must be compatible with the existence of society. The one nega-

123. *How Far Are We Attaining a New Measure of Values?* *supra* note 8, at 82.

124. This despairing of the possibility of a genuine science of ethics and the resultant reliance upon the public's ipse dixit instead, this substitution, at the heart of political science, of a sociological science of claims for a philosophical science of interests, constitutes the grounds for Walter B. Kennedy's main criticism of Pound in 1925: "Demands of mankind are many and diverse, good and bad, moral and immoral, and it is difficult to perceive how the magic of pragmatism can make them all 'good'." *Pragmatism as a Philosophy of Law* (1925) 9 MARQ. L. REV. 75. Cf. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, 60, 5 ad 1: "just as the written law does not cause the force of the natural-just, so neither can it diminish or annul that force, because neither can man's will change nature."

tive limit on the will of society, the one crime that society must not commit, is suicide.¹²⁵

But what of the individual? All his talk about freedom notwithstanding, Pound withholds the only freedom worth having, the freedom of a man to fulfill his integral nature. This much Pound permits and requires: social living—the one constant in the natural human life. Except for the property of sociality (and, of course, animality), the nature of man is indeterminate, capable of anything and everything. Ironically, this one true insight into the property of sociality opens the door to a permissible and likely tyrannization. The citizen is free to develop his need for living with other men, but he must follow that need wherever it would lead him; Pound brands immoral any opposition to Society, no matter if social institutions and rules thwart other—likely as not, more fundamental—needs of human nature. If Society wants something, each of its members *needs* it; Society's wants are his deepest interests. To differ with your group, whatever the issue, is to jeopardize the one essential and indispensable means to your happiness and fulfillment. Governments and individuals can be wrong, Society can not.

The lack of a complete natural law is the all-vitiating deficiency in Pound's jurisprudence and disqualifies it as a guiding science for rulers. His art of legal engineering may be refined and almost frictionless. It is still not philosophy. What we need first of all is direction, purpose; a true picture of the ideal man, built upon a true picture of the actual man, an ideal neglecting human spiritual powers and needs no more than it does the powers and needs of the body; an ultimate standard for the selection of securable claims, a standard that will command us to turn down not only antisocial claims but also claims that conflict with man's nature in its nonsocial needs, a standard that will put man's spiritual interests at the top of the scale of human values—in short, what we need first of all is, not a bare technique of law, but a philosophy. Law is for the common good, which is itself part of the good of individual men; and neither the individual's good nor, consequently, the common good, can be known without a knowledge of human nature, the development of whose powers is the end of the social order and therefore the ultimate end of the legal order. For want of a true psychology and ethics Pound falls short of philosophy, a *sine qua non* of the science of good government.

125. See note 47, *supra*.