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## DEAN POUND AND THE IMMUTABLE NATURAL LAW

KARL KREILKAMP†

DEAN ROSCOE POUND, against much opposition from his contemporaries, upholds the power of ideals in the formation of law. When men of small experience of history attribute exclusive causality to the pressures of the strongest economic group, or to the judge's subconsciously remembered childhood fears and complexes, or at worst to judicial hunches born of judicial dinners and digestions, he confronts them with the plain facts of legal history: how abstract legal theories have both built and razed legal institutions, how taught techniques of the application and interpretation of precepts have in our own time hindered the changes in law demanded by economic changes, how religion has affected and modified both social institutions and the all-important popular attitudes toward them, how great men have dominated biological and economic forces and stamped their personalities upon the law—in short, how by deliberate effort *men* have modified nature. All this Pound means by his doctrine of the "efficacy of effort".

Not only is the efficacy of effort a truth taught by history, Pound goes on, but belief in it is the first requisite of progress in the future. Pound reminds the behaviorist that, since "men tend to do what they think they are doing,"<sup>1</sup> "it is not likely that law-making will be better than the picture of it we put before the law-maker,"<sup>2</sup> and that judges schooled into regarding judicial functioning as a product of hunch, mood, or economic background may be reasonably expected to abandon their own official deliberations to the play of these infra-rational and extraneous forces.<sup>3</sup>

This sane and welcome declaration of the importance of a belief in human freedom is followed in Pound's jurisprudence by the related doctrine of the functionality of law. Our efforts to affect the course of legal development should be directed toward the work of shaping law to fit human needs, as one adapts any tool to fit its uses. Like any means

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1. Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136 (1931).
2. POUND, INTERPRETATIONS OF LEGAL HISTORY 113 (1923).
3. ". . . 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." *Ibid.*

law is of less importance than the purpose it serves; and, like any means that are dependent upon changing conditions, law must vary with the shifting circumstances at its base, its relation to its end remaining constant throughout its concrete changes. This doctrine of the variability of man-made law evokes no protestations from the freedom-hating positivists, but Pound is old enough to remember their predecessors, the conservative jurists of the early twentieth century, and he is young enough still to fight the current worshipers of the Common Law, who identify the principles of this body of law with the natural rights of the universal man.

What's more, Pound has stated the immediate and proper end of law, the service of the social interest. Instead of the nineteenth century ideal, still widely held, of law as an instrument for the development of an asocially-conceived individual, Pound recognizes the needs generated by social life and defines law as an instrument of the group as a group. While avoiding the collectivist's blindness to the instrumentality of the group itself, and therefore placing first among the group interests to be secured by the law the good of the individual members, he nevertheless insists that in promoting this good the law must conceive of the individual as a truly social being. In discharging its immediate function of serving the group as a group, law is serving its ultimate end, the unfolding of the powers of the individual man.

To a Scholastic this is, of course, hardly a Copernican Revolution. By immemorial Scholastic definition laws are reason's ordinations for the common good, and the common good is nothing else than the good of the community as a unified order; furthermore, every precept of Scholastic social ethics is rooted in the psychological truth that sociality is a property of human nature. Nor even among the moderns, of course, was Pound the first to recognize the falsity of individualism—he himself credits the German jurist Jhering with first realizing that the end of law is the social interest. Nevertheless, Pound's contribution to American jurisprudence is great. However old the truth he taught, it was novel to the audience he had, and often unwelcome, and he deserves credit for his part in the movement to gain it a hearing and an influence.

All this, however, is far from making Pound a Scholastic. Among systems of legal philosophy that agree upon the efficacy of effort, the functionality of law, and the social end of law, all sorts of divergencies are possible. Political philosophy draws upon ethics and ethics upon psychology, and each of these as a science owes certain indispensable principles to metaphysics. Scholastic realism is not Pound's pragmatism, nor do Scholastic psychology and ethics have much common ground with Pound's indecisively materialistic view of human nature.<sup>4</sup> On the

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4. Kreilkamp, *Dean Pound and the End of Law*, 9 *FORD. L. REV.* 225, 230 (1940).

other hand, there are propositions in Scholastic jurisprudence that Pound would welcome, were his vision not obstructed by certain mistaken pre-conceptions; and the distance between us and Pound is in reality sometimes less, sometimes more, than we apprehend upon an unsystematic reading of him.

The main purpose of this paper is, therefore, to clear away some of this mist lying over the boundaries of the two positions; now and then, however, we shall leave off such reporting of *views* for a try at *things*, suggesting a criticism or two of Pound's position. In scope the paper is limited to Pound's concept of a natural law, emphasis being given, however, to a feature, its property of changeableness, by which it differs from the Scholastic concept. Wanting, above all, a rationale for a positive law that both changes and remains stable, Pound characterizes the historical natural law theories as either predominantly dynamic or conservative, and would retain for his own view the good features of each. To understand his natural law, therefore, we shall go to his discussions of these theories: I. Aristotle's Conservative Natural Law, II. Dynamic Theories of Natural Law, *i.e.*, those of the ancient Roman jurists and of the school that dominated the seventeenth and eighteenth centuries, and, III. The Conservative Natural Law of the Middle Ages.

#### I. ARISTOTLE'S CONSERVATIVE NATURAL LAW

Aristotle, the first to distinguish between a natural and positive element in law, said this:

"Political justice is partly natural and partly conventional. The part which is natural is that which has the same authority everywhere, and is independent of opinion; that which is conventional is such that it does not matter in the first instance whether it takes one form or another, it only matters when it has been laid down, e.g. that the ransom of a prisoner should be a mina, or that a goat, and not two sheep, should be offered in sacrifice, and all legislative enactments which are made in particular cases as the sacrifice in honor of Brasidas at Amphipolis, and the provisions of an Act of Parliament."<sup>5</sup>

This doctrine, a cornerstone of Aristotelian political philosophy, Pound characterizes as a mere rationalization to satisfy the needs of contemporary Greek society for order and stability, on the one hand, and modification and reform, on the other.<sup>6</sup> How these results could be expected to follow he does not make clear. He merely implies that this Aristotelian analysis of the law was a powerful force for peace and order in Athens, and that the aristocrats were thus reconciled to the people's legislative enactments and the people to the aristocratic tradition. Could he mean

5. ARISTOTLE, *ETHICS*, V, vii (1134b 18-25).

6. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 24 (1925).

that Aristotle's distinction provided the two factions with a rationale for tolerating and obeying the parts they respectively hated in the Athenian law, each faction regarding only that part of the system which favored themselves as natural law, and therefore morally obligatory, and the rest as positive law, and therefore morally indifferent? But such a pair of contradictory attitudes would hardly make for peace, which Pound acknowledges to be society's paramount need and therefore the legal theorist's controlling objective.

However unsatisfactory this pragmatic explanation for the origin of Aristotle's distinction, Pound, I think, does not understand Aristotle's meaning. He says that Aristotle puts precepts involving the positive just into the realm of the amoral, where obedience and violation are not a matter of right and wrong: since it was a legislative enactment that made sacrificing to Brasidas a part of the law, one need not feel morally obliged to obey.

"Thus when a newly reconstituted city took a living Spartan general for its eponymus, no one was bound by nature to sacrifice to Brasidas as to an ancestor, but he was bound by enactment and after all the matter was one of convention, which, in a society framed on the model of an organized kindred, required that the citizens have a common heroic ancestor, and was morally indifferent."<sup>7</sup>

And Pound goes on to suggest that this distinction between two kinds of just handed down to us by succeeding ages (especially through the channel of Thomas Aquinas), has had the deleterious effect of encouraging violation of new precepts; in our own time, *e.g.*, this is reflected in the prevalent attitude that refuses to regard current social legislation as morally obligatory, reserving this sanctity for the old individualism-inspired law.<sup>8</sup>

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7. *Id.* at 25; *cf.* Pound, *American Juristic Thinking in the Twentieth Century*, A CENTURY OF SOCIAL THOUGHT 166 (1939): "Aristotle saw the two elements in social control. . . . He saw that morals could not cover the whole ground of social control, nor could the imperative of politically organized society suffice for everything. What we have is moral precepts recognized and backed by the legal order and at the same time a large field, morally indifferent, in which morals can give us no assured solutions, in which, nevertheless, the economic order and the general security demand that men's conduct be certain and that their relations be adjusted on a uniform basis and by predictable precepts. So, he says, one part of the just is just by nature (*i.e.*, by accord with the ideal) but the other part is just by convention or enactment." As though life in a community run by a ruler, whose enactments must be obeyed if the community is to hang together, finds no place in Aristotle's "ideal" for the individual man! Recall what Aristotle himself says: "Hence it is evident that the state is a creation of nature, and that man is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity. . . ." ARISTOTLE, *POLITICS*, I, ii (1253a 2-4). Pound seems to be reading into Aristotle his own doctrine disjoining the moral from the social. See Kreilkamp, *Dean Pound and the End of Law*, *supra* note 4, at 209.

8. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 26 (1925).

Now Aristotle holds no such doctrine. When he speaks of political justice, he is speaking of a type of *justice*, and justice is one of the four cardinal virtues, than which nothing, surely, could be more moral. Aristotle does indeed distinguish between two elements of the political just, the natural just and the positive just, but he does not consider one the truly just, and therefore morally binding, and the other only nominally just, and therefore morally indifferent. What he says is that one element, arising from nature, binds always and everywhere; the other, arising from human authority, binds only when and where this authority, whether through custom or enactment, has so determined it: "that which is conventional is such that it does not matter in the first instance (that is, before the particular human decision, of custom or enactment) whether it takes one form or another, it only matters when it has been laid down." Surely this is not to say that the positive just is morally indifferent and does not matter. Aristotle recognizes the indispensability of both parts of the political just; it is as impossible for the natural just to enter into a concrete political situation apart from the positive as for the positive to stand without the natural. What else can we think when Aristotle, in establishing the connection between immutability and the natural, says that "in this world, although there is such a thing as natural justice, still all justice is variable"?<sup>9</sup> It is clear that he considers the immutability of the natural just no impediment to its union with the positive just, which is a variable form of the just. If so, Pound errs in ascribing to Aristotle the concept of a political just that is at times purely positive and therefore morally indifferent.

An alternative distinction, says Pound, one between Law and rules of law, is offered by Greek philosophy in the dialogue *Minos*—Platonic in spirit if not in authorship—and he prefers this to Aristotle's. His reasons can be easily guessed. "Nature" implies a real immutability, but history shows no such immutability in law, therefore we cannot speak of a natural law consisting of principles that we take to be ". . . eternal, unalterable realities. . ."<sup>10</sup> By the distinction between abstract Law and concrete laws, however, Pound thinks he avoids the illusion of immutability—for the concrete instances of Law can contradict each other in content—and at the same time makes it possible to retain, by accepting them as purely pragmatic and non-real postulates,<sup>11</sup> the authority of the Law and the duty of obedience, in this way helping the maintenance and promotion of the social interest in the general security.

9. ARISTOTLE, *ETHICS*, V, vii (1134b 29).

10. Pound, *American Juristic Thinking in the Twentieth Century*, *supra* note 7, at 155.

11. See text *infra*, at 202.

Partly responsible for this preference of Pound is his mistaking the Aristotelian natural just for a set of concrete regulations, determinate enough to be directly applied in the legal process, and differing from the positive precepts only as customs differ from legislative enactments. He quite rightly feels that a jurisprudence founded upon such a doctrine is committed to an extreme conservatism. What he fails to see is that Aristotle does not completely discard Plato's distinction between Law and laws, but retains it with one all-important modification. Throughout speculative philosophy, where it is a question of understanding the world in its ultimate causes, Aristotle accepts the Platonic notion of an intelligible reality, but insists that the intelligible objects (except, of course, the highest intelligible, God) have no separate existence apart from our familiar world of concrete things; whatever extra-mental existence the universal Man holds, it holds in, and only in, the many concrete, non-identical men. Hence we have Aristotle's analogous position as to law and the just, concepts occurring in the realm of practical philosophy, where it is a question of constructing norms and principles for the direction of action. The *Minos* is right in distinguishing between Law and laws; there is the one natural just and there are the many political "justs." But the one universal and immutable Law is realized as an effective norm of action only after it has been particularized in the many individual (just) legal orders. This Law is neither an empty, purely abstract form, applicable to legal orders that are wholly diverse in their constitutions, for it is based on a real if generic identity in all just legal orders (whether in customs or enactments); nor is it, on the other hand, so determinate that it can become the political just by mere declaration and promulgation and without further determination (whether through custom or enactment).<sup>12</sup> If Aristotle is at odds with Plato, it is not because he fails to see the difference between Law and laws. And if he is conservative in his jurisprudence, it is hardly because of a crude identification of the natural just with custom or tradition.

In spite of his preference for the Law-laws antithesis, Pound defers to the greater popularity of Aristotle's term "natural" and labels his own view a natural law jurisprudence.<sup>13</sup> Only he does not, of course, furnish the term with the traditional Aristotelian content. Traditional usage equates the natural with the universal and immutable, but as these

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12. See ROMMEN, *THE NATURAL LAW* 16 (1947).

13. "Natural law, as it is revived today, seeks to organize the ideal element in law, to furnish a critique of old received ideals and give a basis for formulating new ones, and to yield a reasoned canon of values and a technique of applying it. I should prefer to call it philosophical jurisprudence. But one can well sympathize with those who would salvage the good will of the old name as an asset of the science of law." POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 29 (1938).

notions are quite alien to Pound's relativism, a purifying baptism is necessary. What emerges then is a concept of natural law that applies to any practical ideal for a particular legal order.<sup>14</sup> If you have any ideal at all for your legal system, any notion of a fundamental form, spirit, or structure in it that you would like to see developed, you are a believer in natural law.

Pound is not always so unhistorical as to impute this concept to Aristotle himself. In one place he speaks of the Aristotelian division of the just into just by nature and just by enactment, and recognizes that in this context nature stands for a constant;<sup>15</sup> moreover, he knows quite well that the later Middle Ages, whose ideal of law, as we shall see,<sup>16</sup> he considers entirely too static, found their chief philosophical inspiration in "the Philosopher". However, in still another discussion, where he tries to show how the three major camps in contemporary jurisprudence stem from lines that run clear back to the Greeks, he dubs Aristotle the Father of the Sociological School!<sup>17</sup> Socrates loses out in this competition because he believes in "the reality of relations" and asserts that the "postulates" of right and justice are philosophically justifiable; his is, therefore, the dubious honor of fathering the Scholastic doctrine of an immutable natural law. And the Sophists are rejected because they lack a sense of the social importance of the nonimperative element in the law—not, be it noted, for their relativism.

14. "Ever since, [the Roman jurists, who introduced the term 'natural law'] systems of legal ideals have gone by the name of natural law." *Id.* at 15.

15. *Id.* at 13.

16. See text *infra*, at 187.

17. "It was a stock doctrine of the Sophists that the just was such only by convention and enactment. . . . Socrates, on the other hand, said that law was a discovery of the reality in relations—that is, of the ideally significant. . . . Indeed, already in Greek philosophy a master thinker sought to unify the two lines of doctrine and told us that some things were right and just by nature and other things by convention and enactment. . . . Looked at in a broad way, the three lines of thought about social control . . . have come down to us from the Greek philosophers. They are an idealist line, a realist line, and a line of unification of the other two. The idealist line may be so called because it postulates ideas of right and justice or ideals of the social order and so of the legal order, or goals philosophically justifiable. . . . The realist line, to give it the name which its followers are applying to it today, may be so called because it conceives of the items of the body of authoritative precepts as being, so far as a science of law is concerned with them, sufficiently accounted for in that they are established or recognized or enforced by the agencies of politically organized society. . . . [and thus] finds reality (in the sense of significance) in the phenomena of the legal order of themselves rather than in something they express or which men seek to realize through them. . . . We may, then, call it [the third line] the line of unification because it seeks to take account of both the ethical or rational and the imperative or enforcing element in the body of authoritative precepts and in the judicial and administrative processes. . . ." *American Juristic Thinking in the Twentieth Century*, *supra* note 7, at 143.

Pound is surely inconsistent here. Before he can ascribe to Aristotle the doctrine that “. . . one part of the just is just by nature (*i.e.*, by accord with the ideal). . . .”<sup>18</sup> and thus find Aristotle foreshadowing his own theory, he must close his eyes to what he has already reported, the immutability of the Aristotelian nature—the very doctrine for which he rejects the “Socratic-Scholastic” jurisprudence! This attempt to remove immutability from Aristotle’s concept of nature, leaving only the character of the ideal, is one of those operations where the patient dies on the table.

In Aristotle’s system, then, Pound claims to discover the conservative power of a natural law philosophy: anyone who conceives of law as divided into two parts, one made up of older, more customary precepts and the other of recent enactments, and who regards the former as the law of nature, and the latter as the purely artificial product of human invention, is certainly going to be a legal conservative. Where such a picture of law dominates men’s thinking, rulers will hesitate to make new laws, and subjects will refuse to obey them. Now Pound endorses to a certain degree the conservative tendency of such a natural law philosophy, since he considers stability, society’s paramount interest.

He also finds, however, that a natural law ideal can stimulate the creation of law. His evidence lies in the two historical periods during which doctrines of natural law wrought changes in legal systems, the age of the empire in Roman history and that of modern natural law in the seventeenth and eighteenth centuries.

## II. DYNAMIC THEORIES OF NATURAL LAW

Pound credits the Romans with the first theory of natural law as such (apparently because Aristotle spoke rather of the natural *just*). Like all legal theorists, they were responding to certain needs that they found in their own society:

“Natural law was a philosophical theory for a period of growth. It arose to meet the exigencies of . . . one of the greatest creative periods of legal history.”<sup>19</sup>

With the foundation and spread of the Empire came a multitude of new social complexities, rendering inadequate the old precepts and the customary judicial techniques of applying them. What was needed was a theory of the nature of law that would not only permit but demand both the retention of most of the old precepts and the ready formation of new ones. The thinkers of the time made good and constructed the theory of the natural law. The old precepts and techniques were conceived to derive their authority from convention and reason, the new

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18. *Id.* at 166.

19. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 33 (1925).

ones from reason alone. By positing a higher law, of which "legislation and the edict [*i.e.*, the type of the old established precept], so far as they had any more than a positive foundation of political authority, were but imperfect and ephemeral copies. . . ."<sup>20</sup> the Roman jurists could fill in the rapidly appearing gaps in the positive law; nature has become a dynamic concept.

"The jurisconsult had no legislative power and no *imperium*. The authority of his *responsum*, as soon as law ceased to be a class tradition, was to be found in its intrinsic reasonableness; in the appeal which it made to the reason and sense of justice of the *iudex*. In Greek phrase, if it was law, it was law by nature."<sup>21</sup>

"The conception of natural law as something of which all positive law was but declaratory, as something by which actual rules were to be measured, to which so far as possible they were to be made to conform, by which new rules were to be framed and by which old rules were to be extended or restricted in their application, was a powerful instrument in the hands of the jurists and enabled them to proceed in their task of legal construction with assured confidence."<sup>22</sup>

Note again, by the way, the concrete character that Pound gives to the Greek concept of nature. "In Greek phrase, if it [the *responsum*] was law, it was law by nature." However, since these rulings were directed toward the governing of particular situations in a particular society, they were necessarily much more determinate than Aristotle's natural just.

As to the Roman view, is it really true that the statutes and edicts were considered copies, pure declarations, of the natural law? Roman law distinguished three parts of private law: *ius naturale*, the law that animals and man, all men, share in common; *ius gentium*, the law that is the work of "natural reason" and is therefore peculiar to man and common to all human societies; and *ius civile*, the law that is proper to any particular society.<sup>23</sup> Now if each of the many bodies of *ius civile* is composed of elements not found in the others, and if on the other hand the *ius naturale* and the *ius gentium* deriving from "natural reason" were considered to consist of elements that all bodies of positive law share, then the precepts of the *ius civile* cannot, of course, have been

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20. *Id.* at 32.

21. *Id.* at 29.

22. *Id.* at 33; cf. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 608 (1911): "The appeal to reason and to the sense of mankind for the time being as to what is just and right, which the philosophical [*i.e.*, natural-law] jurist is always making, and his insistence upon what ought to be law as binding law because of its intrinsic reasonableness, have been the strongest liberalizing forces in legal history."

23. CORPUS JURIS CIVILIS, INST. BOOK I, TITLES 1 and 2.

considered "copies" of those of the *ius naturale* and the *ius gentium*. And if the proper elements introduced into positive law by way of the *responsa* were thought to be derived somehow from the common natural law, then the manner of this derivation must have been viewed as a process much more complex than that of mere declaration and promulgation.

The same misinterpretation is elaborated in another passage, where the Romans are said to have looked upon the natural law as

"... an ideal form of the social *status quo*—a form which expresses its nature, a perfect form of the social organization of a given civilization—as that which the legal order is to further and maintain. Thus judge and jurist obtain a guide which has served them well ever since. They are to measure all situations by an idealized form of the social order of the time and place and are so to shape the law as to make it maintain and further this ideal of the social *status quo*."<sup>24</sup>

Here Pound takes nature to be a given society's characteristic structure, having all the marks that distinguish this society from every other, and the natural law consequently as a code of directives for the development of this particular society with all its individually characteristic features—a far cry indeed from the law *omni humano genere commune* of the *Institutes*.

This too determinate notion of nature is also used in Pound's discussion of the seventeenth and eighteenth century natural law. He finds this later ideal strikingly close to the Roman one, because it too exploits the dynamic potentiality of a natural law ideal. Yet we cannot, he adds, regard the similarity as evidence that all men share the perception of an immutable natural law, for the two ideals are quite different in content:

"But the theory of natural law, devised for a society organized on the basis of kinship and developed for a society organized on the basis of relations, did not suffice for a society which conceived of itself as an aggregate of individuals and was reorganizing on the basis of competitive self-assertion."<sup>25</sup>

For the Romans the natural (*i.e.*, ideal) society is made of kin-groups; for the Middle Ages, it rests on relations, such as lord-vassal, master-servant, and landlord-tenant; whereas for the modern natural law thinkers, it rests on the individual and his rights.<sup>26</sup> Each of these

24. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 35 (1925).

25. *Id.* at 42; *cf.* Pound, *How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought?* 42 W. VA. L. Q. 81, 84 (1936): "Gradually but steadily the stress changes from a regime of restraint expressed in duties to a regime of liberties—of conditions of hands off—expressed in rights. By the nineteenth century the transition is complete from the idea of justice as a maintaining of the social *status quo* to an idea of justice as the securing of a maximum of individual free self-assertion."

26. I do not say that this interpretation is the wrong one to put upon the natural

theories of the natural law has inspired rulers—whether legislators or judges—to modify or expand the positive law according to the pattern of the natural society; to the Romans the natural law suggests precepts that will foster the development of the kin-groups, to the medieval rulers precepts supporting the relational organization, to the moderns precepts aiming at the protecting and promoting of individual rights.

In the history of jurisprudence the natural law, says Pound, is an ideal whose content has changed according to the changes in the idealized pictures of society.

“Hence if there is no natural law, there is still the constant factor of the relation between law and civilization, ‘a relation which takes on a different content with the infinite variety in the conditions of human cultivation.’”<sup>27</sup>

These various ideals of civilization have inspired growth in legal systems, but always within the limits of a particular social organization. So Pound would have the term natural law mean a legal ideal that, on the one hand, serves certain already established social institutions by canalizing legal change to fit their needs; and, on the other hand, transcends the present state of these institutions and inspires efforts to construct more perfect exemplifications of their forms. Both of these potentialities, the conservative and the dynamic, are found in every good and useful natural law theory.

“It is the task of the jurist to ascertain and formulate the jural postulates not of all civilization but of the civilization of the time and place—the ideas of right and justice which it presupposes—and to seek to shape the legal materials that have come down to us so that they will express or give effect to those postulates. There is no eternal law. But there is an eternal goal—the development of the powers of humanity to their highest point.”<sup>28</sup>

Stability is fostered by the refusal to let social changes exceed certain limits, by blocking attempts to overthrow or weaken the “natural” institutions; it plays a dynamic role, on the other hand, by encouraging legal changes that will bring these institutions closer to their natural, *i.e.*, ideal, form.

Now both of these operations, says Pound, can hinder rather than help the law’s deepest function of unfolding human powers. The truth is, nature does not stand still to the extent supposed by the historical

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law theories of Rome and the modern period, and even of some medieval writers, who no doubt “naturalize” certain purely historical elements of their institutions. The only point I wish to make is that Pound himself has adopted this too concrete a notion of the natural law as his own.

27. POUND, *INTERPRETATIONS OF LEGAL HISTORY* 143 (1923); the quoted words are from KOHLER, *MODERNE RECHTSPROBLEME* § 1 (2d ed. 1913).

28. *Id.* at 148.

natural law thinkers when they attach immutability to their respective ideals. "There is no eternal law." Kin-organized society gives way to a society of relations, this in turn to one of more isolated individuals, and finally society changes back (as now) into a form embodying both individualist and relational characteristics. Supposing the time to have arrived when a society is actually changing from an organization of kin-groups to one of relations, then the promulgation of rules promoting the old natural law, which is orientated toward the ideal of a kin-organized society, will obstruct the legal reform that the emergence of society's new relational nature renders desirable and ultimately inevitable. Instead, a new natural law jurisprudence must be constructed for the guidance of rulers, if they are to reshape the legal system into an instrument serviceable to the current social needs.

Thus the conservative propensity of a natural law jurisprudence, as Pound conceives it, can prove a social danger. On the other hand, so can its dynamic functioning. Anybody with a clear-cut social ideal and a lively sense of his society's imperfections always has to resist the temptation of utopianism. In the implementing of any ideal, care must be taken to respect such inherent limitations on legal control as the slowness with which the habits of the law's subjects undergo change—popular support being necessary for effective legal control—the inaccessibility of certain human acts to the eye and the arm of the law, and the fallibility of judges, upon whom, for the most part, the burden of renovating the legal system falls.<sup>29</sup> Overstepping these bounds works far more harm than good. To introduce among the laws-on-the-books precepts that cannot become laws-in-action is to lessen the subjects' respect for the authority of the law and consequently to encourage their violation of other precepts, which may be of ever greater social importance.

In constructing his own theory Pound tries to assimilate the good he finds in the historical natural law systems and leave out the bad. Their truth he conceives to consist in the connection they establish between laws and law. They recognize the fact that laws must conform to an ideal for society, and, by laying down such an ideal, they give the officials who fashion the precepts, and those who apply them, a motive for improving the law and a chart to go by.

Where natural law philosophers, on the other hand, have erred in the past is, according to Pound, in attaching an absoluteness to their respective ideals. It is an excellent thing, and a socially necessary thing, he says, to maintain an eternal watch over the law with a view to bringing it ever closer to the moral ideals of the populace; but it is flying

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29. Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 217 (1914); POUND, *CRIMINAL JUSTICE IN AMERICA* (1930); POUND, *LAW AND MORALS* 76 (1924).

in the face of nature to seek an eternal term of office for any particular code of social morality, or a particular ideal of social organization. No theory of society enjoys a universal validity, an eternal applicability. "The essence of life is change,"<sup>30</sup> and society, comprised as it is of living beings, partakes of life's mutability. Since theories of law must follow society's varying configurations, theories of law must vary.

"Social utilitarians would say, weigh the several interests in terms of the end of law. But have we any given to us absolutely? 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."<sup>31</sup>

The rule and measure to which the law must conform itself, according to this view, does not consist in a system of objective and abiding norms. The law's ethical norm is rather the particular society's felt wants. Wants, claims, and desires, not objective interests and needs, are the rightful inspiration.<sup>32</sup> Let us keep the idealistic attentiveness and energy of the natural law thinkers, runs Pound's plea, but let us discard their absolutist delusions. Let us neither propose an eternal ideal (beyond the abstract one of fitting the law to the illimitably varying social wants) nor attempt the impossible task of making the law the enforcer of every last demand of the current morality.

Reasons why Pound is so emphatic a relativist are not hard to find. Taking contemporary philosophy's word for it that the only tenable metaphysics is relativism,<sup>33</sup> he finds much in the history of law that looks like corroboration of this. (1) *Legal rules, concepts, and principles* are forever evolving, as are the societies they serve. Starting as a

30. Pound, *The Social Order and Modern Life*, *THE CREATIVE INTELLIGENCE AND MODERN LIFE* 79 (1928).

31. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 96 (1925).

32. See Kreilkamp, *Dean Pound and the End of Law*, *supra* note 4, at 220.

33. "If recent philosophy teaches aright, there is no absolute reality." Pound, *The Call for a Realist Jurisprudence*, 44 *HARV. L. REV.* 697, 699 (1931).

"Organization and system are logical constructions of the expounder rather than in the external world expounded. They are the means whereby we make our experience of that world intelligible and available." POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 144 (1925). ". . . a final answer to the question, 'What is law?' is impossible, since the thing to be defined is living and growing, and therefore subject to change. . . ." Pound, *A New School of Jurists*, 4 *THE UNIVERSITY STUDIES OF THE UNIVERSITY OF NEBRASKA* 17 (1904).

system of compositions, of naked concrete rules ("If a free man strike a free man," says the code of Hammurabi, "he shall pay ten shekels of silver"<sup>34</sup>) law becomes, in turn, a system of rules whose significance lies only in their function of enforcing duties, which are taken to constitute the really essential part of law; then a system of rights, which are conceived as lying still farther in from the rule-surface of law, and for the preservation and promotion of which law is conceived to exist; finally a system of wants and interests. (2) The *end of law* has likewise swung from one contrary to another, in accordance with the variation in the forms of social organization; maintaining first the kin-group, then certain social relations, then the individual free-will, and finally civilization, an end that combines the individual interests with the social. (3) Similarly with the *subject-matter* of legal control; what a long road we have come since the fifth century B.C., when Hippodamus let it be known that ". . . there were but three subjects of lawsuits, namely, insult, injury and homicide."<sup>35</sup> (4) How varied, finally, have been the views as to the *source of law!* Nature, reason, custom, convention, divine authority, human authority, the class-struggle, the social compact, the Becoming of History, biological laws, psychological laws, economic laws, —all these, and more, have had their day in theories as to the source of law.

Pound was a metaphysical relativist when he entered this maze of shifting legal ideals, and he comes out of it doubly assured that there is no immutability whatsoever in law. And considering the kind of immutability he means, he is right. No such thing has existed, as a concrete legal order that does not and ought not to change; and neither, consequently, can any legal ideal, that is concrete enough to give adequate direction to a changing law, endure for good in an unchanging form. But another kind of immutability is possible and, as we have seen Aristotle insist, actually present in law throughout its history, the immutability of a generic form that realizes itself only in concrete, changing embodiments, and never in its bare generic state. Pound fails to perceive the immutability in history because he approaches his data at too concrete a level—except perhaps when, dealing with the question of the end of law, he asserts "the constant factor of the relation between law and civilization. . . ."<sup>36</sup> The natural law is not to be identified with any actually or possibly existent legal order. The particular (just) precepts and concepts of such orders are not natural law precepts and concepts, but concretizations of these.

Therefore, to change these particular rules and concepts is not neces-

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34. Pound, *The Church and Legal History*, JUBILEE LAW LECTURES 72 (1939).

35. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 241 (1925).

36. See note 27 *supra*.

sarily to depart from the natural law. If the natural law is so generic that it can simultaneously undergo realization in a variety of contrasting social organizations, then there is no contradiction in its remaining immutable at the same time that the concrete legal systems it inspires continually change shape, progress and retrogress, within the wide boundaries of legitimate variability. Variability through both space and time can be permitted (and, as we shall see St. Thomas insist, required<sup>37</sup>) in a legal system informed by the immutable natural law, just because this law is not so concretely determined as Pound supposes. By transcending the many kinds of social organization the natural law can permeate all of them, playing at once the motive and the guide of their development. Legal history looks like a confirmation of relativism only when the natural law is taken to be a complete set of concrete legal precepts.

### III. THE CONSERVATIVE NATURAL LAW OF THE MIDDLE AGES

Referring to the two ends that Kohler assigns to the legal order, Pound says that the Middle Ages were more concerned "to maintain existing values of civilization" than "to create new ones,"<sup>38</sup> and he places medieval law in a class with the static sacred law and fixed custom of primitive societies.<sup>39</sup> We may put aside as irrelevant to our purpose the question whether this historical generalization does justice to the thousand years of positive law that it covers, and consider instead the explanation Pound gives for it. If the legal order always reflects in some measure men's concepts of what law is and what it ought to be, part at least of the responsibility for the conservatism of medieval positive law must lie with medieval man's conservative thinking about law, especially his theory of the natural law. So far is this Pound's opinion that as we have seen,<sup>40</sup> he even excludes medieval natural law from the authentic tradition of the natural law, on account of its immutability. The idea of an immutable natural law is one of those concepts that, he thinks, ". . . make against conscious and deliberate creation of law by the free setting up of new premises or by the promulgation of rules which cannot be derived or made to appear derived from existing premises."<sup>41</sup>

37. See text *infra*, at 196.

38. POUND, INTERPRETATIONS OF LEGAL HISTORY 144 (1923).

39. POUND, THE SPIRIT OF THE COMMON LAW 11 (1921).

40. See text *supra*, at 180. "Although speculation as to natural law is to be found in the theological philosophical writings of the Middle Ages, it becomes significant for the law at and after the Reformation and becomes dominant in juristic thought in the seventeenth century. . . . At least in the modern world, natural law has always had two sides: a side making for change, a creative side, and a side making for stability, a systematizing, organizing side." POUND, THE FORMATIVE ERA OF AMERICAN LAW 13 (1938).

41. POUND, THE SPIRIT OF THE COMMON LAW 11 (1921).

Although he nowhere lists them as such, three properties of the medieval natural law seem to stand out in Pound's mind as factors making for conservatism in medieval positive law, besides being objectionable in their own right: (1) its "authoritarianism", (2) its theological foundation, and (3) its immutability; and he makes significant mistakes about each of these.

#### *Authoritarianism*

Dividing theories up according to the sources they assign for the binding force of law, Pound says that for the Middle Ages law rests on authority, whereas for the seventeenth century it rests on reason.<sup>42</sup> The "reason" of this disjunction is, of course, not legal reason, the organizing and systematizing faculty, which is less a competitor of authority than its instrument, but simply the faculty that observes human needs and devises laws to meet them.

"[After Grotius had emancipated jurisprudence from theology] natural law ceased to be *lex naturalis*, the enactments of a supernatural legislator, and became once more *ius naturale*, the dictates of reason in view of the exigencies of human constitution and of human society."<sup>43</sup>

The invidious implication is clear. Seventeenth century natural law brought the Western mind back to a confidence in reason, back to the open-eyed attitude of the Roman juriconsult, by which law is seen to be an instrument of justice and reason is relied upon to report whatever demands this justice is making, whereas medieval natural law had repudiated reason, and with it any deliberate concern for the "exigencies of human constitution and of human society." We are asked to put medieval natural law down as authoritarian, anti-humanist, indifferent to human needs.

More often, however, Pound grants that medieval natural law aims at the fulfillment of at least one kind of human needs, the social interests.<sup>44</sup> Indeed, so far does medieval thought go in this direction, according to Pound, that it sacrifices the values of the individual; it sets up "an ideal of things" in place of "an ideal of men" and, far from fitting the legal order to the individual's needs, regards individual activity as something to be restrained, in order to keep the social *status quo* intact.<sup>45</sup> Against

42. "The binding force of law, which in the Middle Ages had been rested on authority and in the seventeenth century on intrinsic reasonableness, was [in America] referred to the consent of the governed." POUND, *CRIMINAL JUSTICE IN AMERICA* 132 (1930); Pound, *The Church and Legal History*, *supra* note 34, at 82.

43. Pound, *A New School of Jurists*, *supra* note 33, at 10.

44. See POUND, *THE SPIRIT OF THE COMMON LAW* 1 (1921); Pound, *A Comparison of Ideals of Law*, 47 *HARV. L. REV.* 1, 5 (1933); Pound, *What Is the Common Law?*, *HARVARD TERCENTENARY PUBLICATIONS* 22 (1937).

45. Pound, *A Comparison of Ideals of Law*, *supra* note 44, at 12; POUND, *AN INTRO-*

the background of this concept of medieval authoritarianism, Pound is able to find, accompanying the seventeenth century's substitution of reason for authority, a parallel substitution as to the end of law, of individual welfare for the social *status quo*, a development that he also describes as one by which law is brought into contact with morals. He can therefore commend Grotius, who "emancipated" jurisprudence from theology and authority, for infusing morality into the law.

"The medieval idea was that law existed to maintain those powers of control over things and those powers of action which the social system had awarded or attributed to each man. The Grotian idea was that law exists to maintain and give effect to certain inherent moral qualities in every man which reason discovers for us, by virtue of which he ought to have certain powers of control over things or certain powers of action."<sup>46</sup>

Pound thus arraigns medieval natural law as an enemy of the human person, indifferent to the individual's moral rights, authoritarian, and, for this reason (among others), inclined towards conservatism.

But Pound is, of course, wrong about this. Medieval philosophy is nothing if not personalist and moral—moral precisely in Pound's use of the word, pertaining to the needs of the individual person. It dedicates the whole social organization, together with the political agency designed to maintain and promote it, to the welfare of the individual person.<sup>47</sup> This person must of course respect the law, and by so doing

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DUCTION TO THE PHILOSOPHY OF LAW 202 (1925); Pound, *How Far Are We Attaining a New Measure of Values in Twentieth-Century Juristic Thought?*, *supra* note 25, at 83; cf. POUND, *THE SPIRIT OF THE COMMON LAW* 87 (1921): "Hence in the Middle Ages, as in Antiquity, the idea of a device to keep the peace is succeeded by the idea of a device to maintain the social *status quo*. This conception of the end of law was not questioned till the Reformation." *Id.* at 194. "In Roman law and in the Middle Ages it [the end of law] was the maintenance of the social *status quo*." POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 78 (1925): "In the Middle Ages the primitive idea of law as designed only to keep the peace came back with Germanic law. But the study of Roman law presently taught the Roman version of the Greek conception and the legal order was thought of once more as an orderly maintenance of the social *status quo*." Almost identical statements appear in POUND, *INTERPRETATIONS OF LEGAL HISTORY* 30 (1923), and POUND, *LAW AND MORALS* 7 (1924).

46. POUND, *THE SPIRIT OF THE COMMON LAW* 90 (1921); cf. Pound, *The Ideal Element in American Judicial Decision*, *supra* note 1, at 137: "One way of looking at a body of legal precepts is ethical. Put in terms of 'natural law,' it finds natural law by reasoning on the basis of the 'nature of man.' That is, it assumes an ideal body of legal precepts derived by reason from an ideal of what a perfect man would do and would not do. This is the classical natural law of the eighteenth century." Yet Pound is also on record as saying, quite inconsistently, that medieval law is characterized by the idea ". . . of law as declaratory of morals, of the moral as legal simply because it is moral, of a law as binding because of its coincidence with a binding precept of morals." Pound, *A Comparison of Ideals of Law*, *supra* note 44, at 10.

47. "The characteristic note of scholastic ethics in the widest sense, in which the social,

serve the common good, because the common good is the immediate end of law. But this is not to frustrate personal needs, for the person's good is, in a certain sense, a whole of which the common good is but a part. In St. Thomas's view, whatever answers to a genuine need in the individual agent is his good, and one of these is communal life, including membership in a state;<sup>48</sup> so the good of the state is a part of the good of the individual. The state so conceived has an ethical end, and the person, the individual human being, is the ontological spot where this end gets realized: "We must form the same judgment about the end of society as a whole as we do concerning the end of one man."<sup>49</sup>

Pound sees that the social order has two functions, the service of the individual members' needs (the "moral" interests) and its own perpetuation and growth (the social interests); where he goes wrong is in failing to discern the unity that underlies them. It is only when legal history is viewed through such bicolored spectacles that the medieval ideal for positive law appears in an unethical coloration, even if we suppose it to be as devoted to the *status quo* as Pound says it was. Since the fundamental existential subject is the individual, a social ideal is at the same time an ethical ideal if it takes the individual person to be by nature a social being, equipped with essential social desires and objective social

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political, and economic are included, is emphatically that of finality. Consequently, all the manifold social and political relationships into which the individual can enter must be regulated by this far-reaching principle. . . . The individual alone exists and is of value. He alone can merit or can sin. Consequently upon this view, the social and political order into which he enters as an integral part must exist not for itself only, but for the sake of the individuals who compose it. This is at once the metaphysical and the ethical basis of . . . the whole Thomistic social and political theory. Man—the individual—who is by nature a social animal, must find the end of his nature furthered by the society of which he necessarily forms a part. The furthering of this natural end, the completing and perfecting of his personality, is the work of the State, or indeed of any social group into which he enters. The State thereby becomes a means toward the realization of the full natural self-expression of the individual, by making possible a mutual co-operation of activities for the common good." AVELING, *St. Thomas Aquinas and the Papal Monarchy* in HEARNSHAW, *THE SOCIAL AND POLITICAL IDEAS OF SOME GREAT MEDIEVAL THINKERS* 94 (1923).

48. St. Thomas follows ARISTOTLE, *POLITICS* I, ii (1252a 1-3) and (1252b 27-30): "Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. . . . When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life."

49. ST. THOMAS AQUINAS, *ON THE GOVERNANCE OF RULERS* (tr. by Gerald B. Phelan, St. Michael's College, Toronto) (Rev. ed. 1938) I, xiv. See MÜLLER, *DER STAAT IN SEINEN BEZIEHUNGEN ZUR SITTLICHEN ORDNUNG BEI THOMAS VON AQUIN* (Münster i. W., 1916); ROLAND-GOSSELIN, *LA DOCTRINE POLITIQUE DE SAINTE THOMAS D'AQUIN* (Paris 1928); and MARITAIN, *TRUE HUMANISM* 127 (1938).

needs. Is it possible that Pound bears the taint of Kant, the feeling that in freedom alone, undetermined by a rational (and therefore social) pursuit of suitable ends, lies the innermost form of the good life, and that to live morally one must set his will on abstract duty alone and for its own sake, forgetting all about any desire for happiness? At any rate, for Pound the communal life, with its cargo of material and spiritual goods acquired from sources outside the will, appears to lie outside the boundaries of what is truly and ultimately moral for man, the social is divorced from the moral, the common good becomes an alien;<sup>50</sup> and this is why he can view the medieval respect for authority and the other social interests as a form of anti-humanism.

### *Theological Foundation*

The medieval natural law is characterized by its liaison with theology, and Pound thinks this second property, like its authoritarianism, is a factor for conservatism. When contrasting the modern concept of the end of law with the primitive and medieval, he says that, though this modern concept may substitute "a renamed god for the divine authority of the beginnings of law, at least it is a god that grows and that does not jealously deny effectiveness to human action."<sup>51</sup> If in Roman times natural law jurisprudence enjoyed full opportunity to express its dynamism, in the Middle Ages it took on theology's immutability, with the result that the positive law it inspired also lost the flexibility and adaptability that had marked the law of Rome. "The Middle Ages thought of justice and right in fixed theological terms and conceived them as above and beyond all action of sovereigns."<sup>52</sup> Human law is no longer *lex*, properly speaking, for it is no longer fashioned by the ruler; he merely recognizes and declares what has been already laid down by God, in whose hands alone the power of genuine law-making lies.<sup>53</sup> Pound considers this liaison of law with theology but one expression of the general medieval defection from reason. Immobilized by its foundation in an eternal and unchanging God, medieval law necessarily thwarted the ever-changing human needs and their advocate, reason. From this point of view, too, Grotius appears the emancipator of the

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50. See note 7 *supra*.

51. POUND, INTERPRETATIONS OF LEGAL HISTORY 144 (1923).

52. *Id.* at 102.

53. "While this [*i.e.*, St. Thomas's] scheme made law a body of enactments of the supreme law-giver of the universe, and so properly to be called *lex*, it took from positive law its character of enactment and made it a mere recognition of the *lex naturalis*, which was above all human authority." Pound, *A New School of Jurists*, *supra* note 33, at 9. The same statement, with the insertion of "authoritative" before "enactment," appears in one of Pound's more recent works, Pound, *The Church and Legal History*, *supra* note 34, at 42.

natural law, who ". . . sought to put it once more squarely on the basis of reason."<sup>54</sup>

Whether or not, as regards medieval *life*, religious belief slowed up the development of men and institutions in the Middle Ages, medieval *thought* about God and the world is not quite as Pound reports it, not St. Thomas's, at any rate. Pound's central assumption seems to be that a theologically based natural law is *ipso facto* conceived to be opposed to human reason, human happiness, and human action. Whatever support such dichotomies may have found in the Middle Ages, they are utterly alien to St. Thomas. To be sure, St. Thomas defines the natural law as man's participation in the divine eternal law, but this participation he conceives as an inner, living one, not a forced and dictatorial regimentation from without; for the participation is through what is immanent to man, his power of rationally controlling his action.<sup>55</sup> Pound speaks of the medieval natural law as of a law imposed by one will upon another through the medium of a wholly surprising and unpredictable revelation of arbitrary commands, but to St. Thomas the natural law is, at bottom, a set of inclinations immanent in our being, which our own reason first apprehends as basic indispensable needs and only subsequently formulates as practical commands; it concerns ends and actions—life, the generation and care of children, knowledge, the company of others, virtue ("Be good"), and God—that are so easily apprehended to be goods, in judgments that follow so soon upon the activation of our inborn appetites and power of self-knowledge, that this apprehension of them may be justly called a *natural* knowledge, and the law a natural law.<sup>56</sup> The eternal law is source and ground of the law of our nature not as something promulgated long ago and far away, and learned only through tradition, but as something adumbrated in our very being and, basically anyhow, discerned there by our own personal knowledge. Without such adumbration and such knowledge the natural law as St. Thomas defines it would not exist.

Could, then, anyone who had read St. Thomas at all carefully say that after the classical period of Roman law it was not till the seventeenth century that the natural law was put "once more squarely on the basis of reason," and made to concern itself once more with "the exigencies of human constitution and of human society"? St. Thomas

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54. POUND, *LAW AND MORALS* 8 (1924); *cf.* POUND, *THE SPIRIT OF THE COMMON LAW* 153 (1921): "The element in law which the medieval jurists had rested on theology, the seventeenth-century jurists had derived from reason, and the law-of-nature school in the eighteenth century had deduced from the nature of man, Savigny sought to discover through history."; and POUND, *A New School of Jurists*, *supra* note 33, at 10.

55. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 91, 2.

56. *Id.* at I-II, 94, 2 and 4.

found it not at all impossible to conceive of a law that, while divine in its ultimate origin, is yet concerned with human needs and apprehended humanly through reason. He so roundly rejects the God-reason antimony that Pound alleges of the Middle Ages, that he does not shrink from the remarkable formula, ". . . we do not wrong God unless we wrong our own good. . . ." <sup>57</sup>

A reading of St. Thomas affords just as little confirmation for Pound's remaining criticism of the divine natural law of the Middle Ages, that it denies effectiveness to human action. In St. Thomas's theory the divine creativity is of such a kind that its creatures in receiving existence receive the power of action as well. All creatures are recipients, of course, receiving from fellow-creatures as well as from the Creator, but all are agents too, from the lowest to the highest. And, going upwards on the scale of observable being, St. Thomas perceives an increase in wealth, not only of being, but of activity, so that the highest existent, the rational substance man, is to be described also as the highest agent, the existent that is most the cause of its own action. He is an agent physically free to act or not to act, and to act this way or that. <sup>58</sup> St. Thomas in this doctrine of human freedom is ascribing—as, what's more, a scientifically demonstrable fact—such a power and effectiveness to the human agent as Pound hardly dares even to postulate in faith. <sup>59</sup>

Nor does St. Thomas see any incompatibility between this concept of human freedom and his concept of a divinely instituted natural law. Rightly or wrongly, consistently or not, his theory has room for both an omnipotent God, whose constant creative concurrence is required for every act of the creature, and a created human will that is free and self-determined in its choices.

"The divine will extends not only to the doing of something by the thing that He moves, but also to its being done in a manner suitable to the thing's nature. For the human will to be moved of necessity, i.e., in a manner that does not suit its nature, would be more opposed, therefore, to the divine motion than for it to be moved freely, i.e. in a manner that does suit its nature." <sup>60</sup>

57. ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* III, 122 (tr. by English Dominican Fathers 1923); cf. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 71, 2 and 4: "Whatever is contrary to the nature of a work of art is likewise contrary to the nature of the art which produced that work. Now the eternal law is compared to the order of human reason as art to a work of art. Therefore it amounts to the same that vice and sin are against the order of human reason, and that they are contrary to the eternal law. Hence Augustine says that 'every nature, as such, is from God; and is a vicious nature, in so far as it falls from the divine art whereby it was made.'"

58. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 6, 1 and 2.

59. See Kreilkamp, *Dean Pound and the End of Law*, *supra* note 4, at 228.

60. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 19, 4 and 1.

So that, even if St. Thomas limited the human ruler's office to that of declaring and enforcing the divinely instituted natural law, he would still insist that those acts of declaration and enforcement were the ruler's own, the expression of his own free choice. Even under this limited concept of the ruler's function, theism provides no grounds for inaction.

But St. Thomas goes further than this, for he does not confine the ruler's legislative function (or, for that matter, the people's custom-making function<sup>61</sup>) to that of simply declaring an already existing natural law. His is not the copy-theory of positive law, by which every precept of (just) positive law is a point-for-point copy of some precept of the natural law, differing from it not essentially, we might say, but only existentially—that is, differing not in nature and content, but only by the fact that the positive precept has its existence in the publicly promulgated legal order, whereas the natural law precept exists only in the ideal order. True, the just positive law is derived from the natural law,<sup>62</sup> and there is, therefore, some sort of similarity of essence between the two existential orders; this, however, is the similarity not of a man and his photograph, but of a universal and an individual particular, a similarity therefore that is accompanied by a difference in determinateness.

For St. Thomas conceives the natural law to be so general an ideal that before it is ready to be declared and promulgated in the form of effective positive precepts, it must undergo a process of particularization, it is an outline that needs to be filled in, and he distinguishes two types of this pre-declaratory particularization. Either the universal natural law precept necessarily implies the particular declarable precept, as "Don't harm anybody" necessarily implies "Don't kill anybody," it being impossible to kill somebody without harming him. Or the particularized declarable precept, while truly derived from the universal natural law precept, is not a necessary implication of it; any (just) particularized penal precept, for example, laying down a certain punishment for a certain crime, is derived from the universal natural law precept, "Punish the criminal," but the derivation is not by way of necessary implication, for the criminal could be (justly) punished in some other way.<sup>63</sup>

A theory like this, which defines the natural law as a set of common principles,<sup>64</sup> that need particularization before they can become living

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61. St. Thomas considers custom to have the force of positive law. See *id.* at I-II, 90, 3; and II-II, 57, 2 and 2: "The human will can by common agreement (*ex conducto populo*) make a thing to be just, provided it be not of itself contrary to natural justice, and it is in such matters that the positive just is involved."

62. *Id.* at I-II, 95, 2.

63. *Id.* at I-II, 95, 3.

64. *Id.* at 91, 3 and 1.

law, can hardly be accused of denying all effectiveness to human action. On the contrary, such action is regarded indispensable, and this precisely in that phase of social control where, one feels, Pound desires freedom of action most, the predeclaratory phase. Pound wants a theory of law in which legislation is a genuine *law-making* and ruling has some of the freedom of a creative art, and it is interesting to find St. Thomas using just these terms.

"Something may be derived from the natural law in two ways: first, as a conclusion from principles; second, as a determination of certain common notions. The first is like the method of the sciences, whereby demonstrated conclusions are drawn from principles; while the second is like the method of the arts, whereby common forms are determined to some particular. Thus the craftsman must determine the common form of house to the shape of this or that particular house."<sup>65</sup>

Nor is this demand for creative action inconsistent with St. Thomas's theism. When he defines the natural law as man's participation in the eternal law, he is making a statement about its source or foundation, the extrinsic, antecedent reality that it issues from and is seen to issue from; and when he says that the natural law requires artistic action on the part of the ruler, he is considering something that is intrinsic to the natural law, the universal character of its content. If God is seen to command the effectuation of the natural law, and if this effectuation is seen—as St. Thomas sees it—to be impossible apart from the creative action of human rulers, then God is also seen to be commanding this creative action. Far from precluding the effectiveness of human action, the doctrine of the divine origin of the natural law rather intensifies our sense of its necessity. The divine architect demands that His universals be particularized by human reason, so as then to be concretized by the human will and human actions.

### *Immutability*

The immutability of the medieval natural law may be listed as Pound's third objection to the medieval theory, although he himself does not separate it from the other two. He says that "the Middle Ages thought of justice and right in fixed theological terms . . .";<sup>66</sup> that it is only in Rome and in modern times that the natural law has revealed its dynamism, and that the ideal of an immutable natural law militates against deliberate creation of law.<sup>67</sup>

But the immutability that St. Thomas attributes to the natural law

65. *Id.* at I-II, 95, 3.

66. See note 52, *supra*.

67. See text *supra*, at 180 and 187.

is one that he considers, whether rightly or wrongly, to be quite compatible with a changing positive law. Here again Pound's report of medieval theory is uncomprehending and incomplete, as it was with Aristotle's doctrine on the same point.<sup>68</sup> To St. Thomas justice and right are "fixed" no doubt, but as universals, not concrete individuals. The key concept is again that of a natural law with a universal content. To the objection, which St. Thomas himself formulates, that laws derived from the immutable natural law must be themselves immutable, he answers:

"The natural law contains certain universal precepts which are everlasting, whereas human law contains certain particular precepts according to various circumstances."<sup>69</sup>

As universal, justice can, at different times and places, get realized in contrary concretions, *i.e.*, contrary precepts of positive law, and the way is open for a just legal order to change without loss of justice, by moving from one of these contraries to the other.

Such a changing positive law is more than a logic possibility in St. Thomas's theory, it is a demand of justice itself. He quotes St. Augustine, "A temporal law, however just, may be justly changed in the course of time," and gives two grounds for such changes. First, the rulers learn more about their art and can thereupon improve the laws of their predecessors. Second, conditions change, removing the utility of an old precept; *e.g.*, (borrowing again from St. Augustine) when the people take to selling their votes and electing scoundrels, the institution of popular suffrage having lost its utility for the common good may be justly abolished.<sup>70</sup> Especially important are the changes in the subjects' capacity for law. A just ruler, bent upon the common good, is not so foolish as to try to perfect his subjects suddenly.

"These imperfect ones, being unable to bear such precepts, would break out into still greater evils. Thus it is written, 'He that violently blows his nose brings out blood,' and if 'new wine', *i.e.* precepts of the perfect life, is 'put into old bottles', *i.e.* into imperfect men, 'the bottles break, and the wine runs out,' *i.e.* the precepts are despised and those men, from contempt, break out into still worse evils."<sup>71</sup>

It is the immutable natural law itself that commands the ruler to realize the good, but this realizable good is the concrete good of a particular people for whom the realization of the whole known ideal good is not

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68. See text *supra*, at 178.

69. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 97, 1 and 1.

70. *Id.* at I-II, 97, 1.

71. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I-II, 96, 2 and 2.

a practical possibility; and the ruler is a concrete ruler, perfectible in the knowledge of this good. The positive law derives from an immutable natural law, to be sure, but its ontological residence is in this world, where change is one of the constants.

But the changes that such a natural law, with its universal contents and its imperfectly understood implications, tends to inspire in positive law are not enough for Pound. He would have a natural law without any constant content whatsoever, universal or otherwise; there must be no eternal bounds set to the changes in positive law. This relativism, underlying his chief objection to any theory of an immutable natural law, may be observed subtly at work in, strangely enough, his praise of the medieval theory.

#### *Good Features*

For Pound does have some praise for medieval law: 1) It played a large role in the construction of Western civilization, by disciplining the barbaric Teutons and teaching them the social virtues of peace and good faith.<sup>72</sup> 2) It has provided us with an exceedingly useful technique of creating law through the ". . . logical development of the content of authoritatively defined conceptions."<sup>73</sup> The ideal of an immutable law had to live with the facts of social change; law had to change, yet without appearing to change. The medieval jurists met this need by fashioning the method of legal fictions. Employing what is now called legal reason, they drew from authoritatively taken texts implications that they regarded as true, since derived logically from true premises.<sup>74</sup> This method, says Pound, is what we can take and keep as our own, for it is just the answer to society's imperative need of gradual, rather than sudden, change.

3) Besides this technical device, says Pound, our own age has also taken from the medievals an idea it presupposes, the idea of authority. But in this case we must accept the heritage only with an important reservation. As one might guess, Pound balks at the medieval belief in a truthful authority.

"Philosophically [that is, as to its truthfulness], the idea of authority had in itself the seeds of its own undoing. On the other hand, juristically, it has maintained itself. . . ."<sup>75</sup>

"It must not be forgotten that this self-sufficiency of the authoritative text is but an ideal. It is a postulate for certain practical purposes. It is not an assertion of absolute fact."<sup>76</sup>

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72. Pound, *The Church and Legal History*, *supra* note 34.

73. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 38 (1925).

74. Pound, *The Church and Legal History*, *supra* note 34, at 34.

75. Pound, *A Comparison of Ideals of Law*, *supra* note 44, at 8.

76. *Id.* at 9.

"If we concede the failure of the old natural law to come up to the more rigorous requirements of nineteenth century thought in the wake of Kant, and whatever we may feel as to its intrinsic nothingness, no one can say truthfully that it wrought nothing."<sup>77</sup>

Pound suggests that, unperturbed by their falsity, we keep these ideals, content with the dividends they offer in social unity, and not overreaching ourselves in a futile chase after truth. His own devotion to the supremacy of law<sup>78</sup> must be taken in this sense. When he insists that we should have a rule of law instead of a rule of person, he means a rule of law as such, not of this body of law rather than that. The abiding, the essential function of law is its service of society, and one law will support and further the social unity as well as another, providing only that it is adhered to.

The supremacy of law cannot, therefore, mean for Pound what it means in Scholasticism. For him the "human powers" that the law must serve to "unfold"<sup>79</sup> are not at all fixed and determinate, and he accordingly recognizes no eternal limitations on the content of laws. The individual, apart from his sociality, is completely indeterminate, his moral ideals purely conventional.

The Scholastic, on the other hand, holds that while the institution of law is absolutely necessary for the development of the social side of human nature, this nature, however, possesses in addition certain determinate needs of a higher level, for which social life is but an instrument. He finds consecrated with moral authority not just any legal rule or ideal, but only those that agree with those higher nonsocial interests of the individual. To a Scholastic the supremacy of law is inconceivable apart from two things: first and principally, the moral authority of the universal, immutable natural law, our participation in the divine eternal law; second and by derivation, the moral authority of a local, mutable legal system that, by serving the true common good—therefore violating none of the higher nonsocial needs of the individual—helps implement the natural law's precept requiring life in politically organized society.

Is there any scientifically certain reason why a rule of law should work more unity than one of person? Pound is ready with one, drawn from modern psychology, but—and this is what interests us here—he can state it only in terms of will, and not of needs, for he denies the

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77. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 30 (1938). One is inevitably reminded of Thurman Arnold's similar belief in the efficacy of empty ideals, only Mr. Arnold is more openly insistent on their falsity.

78. For example: "Not administration as law but the requiring of administration to conform to rule and form and reason is the common-law ideal." Pound, *What Is the Common Law?* *supra* note 44, at 17.

79. See notes 28 and 31, *supra*.

determinateness of these needs. The benefit the individual derives from the rule of law consists merely in an abstract freedom from the domination of his fellows.

“. . . the idea behind the doctrine of the supremacy of the law responds to a deep-seated urge in human nature not to be subject to the arbitrary will of a fellow man. It expresses experience of the ill effects of repression which is sustained abundantly by the researches of modern psychology.”<sup>80</sup>

According to this view of his psychology, the citizen is better off under a rule of law because of his satisfaction at knowing that no living person is lording it over him. This means that when he suffers under some high-handed decision of a government functionary, over whose head he finds it impracticable to appeal, what is basically wrong and painful with this decision is not its depriving him of certain material or spiritual goods, not the *injustice* of it, but purely and simply its origin in a human will. And Pound scolds the nineteenth century individualists for putting will above wants! Pound, it would seem, is forced into this unrealism by his concept of an indeterminate human nature; he wants us to keep our rule of law, but as there are no objective and abiding human wants that the rule of our particular law may be said to promote, its superiority must reside, not in its content, but in its service of the abstract will.

With what considerable reservations, then, must we take Pound's praise of the medieval concept of authority! St. Thomas conceives of man as possessing a determinate nature, and prefers law for the service it does to the needs characterizing this nature. He cites approvingly Aristotle's three reasons why written law is more likely to give men their due than the uncontrolled judgment of officials. Aristotle goes beyond men's wills to the interests they seek and to the social interests, and finds in these a certain immutable content, in the ascertainment of which successive generations of rulers can collaborate: 1) written law rests on political and psychological truths which generations of law-makers and judges have worked out collectively; 2) it is formulated from the consideration of many cases rather than just one; 3) it is dispassionate, its concern for the common good uncorrupted by any private interests of its own.<sup>81</sup> Just as what ultimately gives value to this process of collaboration by the legislators of several generations is the contact maintained with an abiding human nature, so, according to St. Thomas, what infuses its productions with the authority of morally obligatory precepts of

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80. Pound, *What Is the Common Law?*, *supra* note 44, at 22.

81. ARISTOTLE, *RHETORIC I*, i (1354b 1-10); ST. THOMAS AQUINAS, *SUMMA THEOLOGICA I-II*, 95, 1 and 2.

positive law is their derivation from the natural law, their suitability to human nature.

To be sure, Pound says on occasion that the supremacy of law stands for the supremacy of reason and justice.

"[The Greeks argued] . . . whether men's relations with each other were adjusted, their disputes were determined, and their claims and desires were harmonized in action by arbitrary precepts, arbitrarily applied by those who wielded political power in the time and place, or rather by precepts of general application, grounded on reason and justice."<sup>82</sup>

But what is meant here by reason and justice? Reason is merely the internal coherence of the legal system, indispensable as the condition making for predictability in the legal process; and this predictability is what constitutes justice: the just settlement of a dispute is the settlement that accords with previously announced promises and threats, rather than with human needs whose satisfaction is commanded by an objective natural law. There is an interesting passage where Pound, quoting even Scripture to his purpose, reduces the Psalmist's concept of divine law to the characteristic of predictability.

"Reliance upon the uniformity and predictability of the operations of physical nature and upon the certainty and uniformity of the moral order as analogous thereto have impressed men from the beginning. In the Psalm *De Profundis* the psalmist voices this as the basis of his faith in God—*propter legem tuam sustinui te Domine*—'because of Thy law have I abided thee, O Lord!'"<sup>83</sup>

What follows in this passage makes clearer the absurdity of such a concept of law. Pound claims that this is the meaning of the term in everyday speech.

"The unprincipled man may or may not be constant in his domestic, his social, his business relations. He may or may not keep promises and engagements. On the other hand, the moral man may be trusted. We know what he will do, and what he will not do."

If, as I believe, Pound is attempting here to *define* virtue and law, then his attempt leads, of course, to absurdity, for what he says applies equally well to the vicious man, whose conduct is both predictable and bad.

Scholasticism, on the other hand, asks the question fundamental to jurisprudence, what are the human needs that law ought to serve? and answers with a picture of human nature supplied by philosophical psychology, the science in which reason reads human experience and finds behind and in it an immutable human nature. Pound's metaphysics,

82. *American Juristic Thinking in the Twentieth Century*, *supra* note 7, at 143.

83. Pound, *The Church and Legal History*, *supra* note 34, at 58.

however, precludes such a nature, and he must assign to reason an exclusively practical role, of assisting human action by creating unified plans. In jurisprudence this function becomes one of organizing legal rules into an internally coherent system, that is, of unifying the plan which law employs in controlling human action. Accordingly, Pound describes the function of the law teacher and the philosopher as one of *giving* system to the multifarious facts, which in themselves contain no order or unity.<sup>84</sup>

True, Pound levies upon legal thinkers the additional task of continually reshaping the ideal system they have created, to bring it up to date with the changes occurring in the popular moral ideal, and he accordingly, as we have seen, praises the medieval jurists for developing the technique of legal fictions. Here again, however, the role of reason is the purely practical one of implementing human action, of unifying nonrational desires and motives, the better to gratify as many of them as possible. Reason itself is allowed no need intrinsically its own, no part in ascertaining the true ends of human action. Pound concedes to reason no capacity of yielding trustworthy pictures of man's nature and of the human interests that law ought to endeavor to secure.<sup>85</sup> That some general ideal picture of man and society, whether clear and unified or vague and inconsistent, influences the formation and operation of every legal system, Pound is the first to admit, but he characterizes this picture as a compound of postulates supplied not by scientific and rational investigation but by the nonrational popular will. So when Pound says law should rest on reason and justice, he means only that it should operate according to an organized system of predictable rules, concepts, and principles, no matter what the content of these generalizations may be; conversely, "arbitrary" never means action in violation of nature, but action contrary to the traditional system of postulated ideals.

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84. "At this point teaching begins to make itself felt in the working out of broad doctrines to unify the principles, and the teacher's ideal of a body of logically interdependent precepts, *born of the exigencies of instruction*, begins to organize the received precepts in order to make them teachable, and so begins to make them more easy to find and to apply." (italics supplied). Pound, *What Is the Common Law*, *supra* note 44, at 10.

"The ideal element in law is the concern of philosophers. It is their task to formulate it and criticize it and *give* it system, as it is the task of the jurist to formulate and criticize and *give* system to the precept element. Each succeeds by putting universally what he has succeeded in doing with the legal materials of some time and place to meet the legal problems of that time and place." (italics supplied). Pound, *The Church and Legal History*, *supra* note 34, at 31.

85. "Organization and system are logical constructions of the expounder rather than in the external world expounded. They are the means whereby we make our experience of that world intelligible and available." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 144 (1925).

Accordingly, when Pound praises the Church for its part in the development of European civilization, and Neo-Scholasticism for the part it has played in twentieth century European jurisprudence, he is by no means to be understood as subscribing to Catholic and Scholastic doctrines.<sup>86</sup> The Catholic conception of marriage, for example, he commends merely for its simplicity, because by being simple it could work its way into the *mores* of many peoples, and so, further the unity of mankind; he does not consider at all the question whether the Catholic institution of marriage is the one that answers to human nature.<sup>87</sup> What Pound dislikes about modern divorce is not that it violates monogamy, but that the laws now regulating divorce are so diverse and unstable;<sup>88</sup> pressed to its logical conclusion, this position implies that the ideal of polygamy would benefit man quite as much, if adhered to, for the regularizing effect of ideals is their only function. In like manner, Neo-Scholasticism's spread in Europe between the wars he lays to its affirmative character and not to its truth;<sup>89</sup> by presenting an ideal to be followed rather than a mere criticism of other ideals, Neo-Scholasticism promises for mankind those benefits of stability and uniformity that any followed idea always brings.

The key concept in this basic department of Pound's thought is "postulate". The postulates of any given society are the most generalized ideals controlling the practical thought of its members. The term, postulate, is preferable to principle or axiom or moral precept because it brings out the irrelevance of truth. A postulate is not to be judged true or false; it is only an assumption whose terms dictate certain logical consequences; that these terms and their logical implications represent real things or relations is both untrue, since modern phenomenalism has shown us the absurdity of any belief in the truth of generalizations, and also immaterial, since the mere universal acceptance of an ideal brings in its wake the uniformity of behavior that is the principle of society's existence and progress.<sup>90</sup> The Middle Ages are to be envied for their postulates of the authority and universality of law, not because there really is a natural law, demanding obedience of all creatures sharing the human nature, but because when all men believe in such ideals they

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86. That Pound recognizes this central difference between us is evident from his classification of the various concepts of natural law: "In one sense it [the natural law] is a body of universal ideal principles serving as starting points for lawmaking, legal reasoning, and a critique of positive law. These principles are taken to be eternal, unalterable realities or *in another way of thinking* are postulated as such." (italics supplied). Pound, *American Juristic Thinking in the Twentieth Century*, *supra* note 7, at 155.

87. Pound, *The Church and Legal History*, *supra* note 34, at 11.

88. *Id.* at 14.

89. Pound, *American Juristic Thinking in the Twentieth Century*, *supra* note 7, at 171.

90. Pound, *A Comparison of Ideals of Law*, *supra* note 44, at 9.

are drawn together into a society that is wider, more unified, and consequently more productive of human good.

In this concept of postulate, playing the role of first principle in Pound's theory, we have a doctrine that epitomizes his moral skepticism and relativism and serves, perhaps more than any other, to mark the deep difference between his jurisprudence and the Scholastic. What is truly good for man, and what bad, is for Pound unknowable; all that can be surely and scientifically known is what men *think* to be good. Ethics in this view becomes a knowledge concerning ideas, not things, and jurisprudence too, so far as it depends upon ethics for certain of its principles, is just so far confined to ideas and shut off from things. When we declare a certain decision to be just, Pound permits us to mean that it accords with a just law; but for this implied assertion that the law is just, we must limit our meaning to, "The law accords with what people *think* to be just." Beyond this point we may wonder and inquire, but not know. As litigant, lawyer, judge, jurist, or public we may guess what postulate is coming next, and presumably even wish and work for one rather than another; what we may not do, without absurdity, is reason about it.

For all his talk about the philosophy of law, and a natural law theory of law, what Pound is proposing is really more a technique than a philosophy. He is closer to the Analytical School than he thinks. Where they confined jurisprudence to the amoral technique of applying an arbitrarily given positive law, issuing from the ruler, Pound confines it to the quite as amoral technique of applying an arbitrarily given set of moral and social ideals, issuing from society. Nothing in his theory removes him farther from Scholastic jurisprudence, which derives its starting-point from an objective philosophy of the human good and, more ultimately, from a necessary, therefore scientifically knowable, human nature and natural law.