The Task of Law. Lancaster, Pennsylvania: Franklin and Marshall College, 1941. (Full Title: *The Task of Law: The North Lectures at -anklin and Marshall College,* —arch 4, April 18,

Social 'rol through Law. New Haven, Connecticut: Yale University Prey [1]ndiana University Powell Lectures, Sixth Series, 1942. Reprinted, 58. New York: Archon Books.2

Justice Accordin, '9 Law. New Haven: Yale University Press, (Published for Vr 'minster College), 1951.3

The Ideal Element in L Tagore Law Lectures. Calcutta, India: University of Calcutta, '58.4

Roscoe Pound devoted his life to the law, inquiring into its nature, history, purpose, and practice. His influence on American legal thought and practice has been enormous. In recent years, however, the trend toward "scientific" methodology and neutrality has deflected many students of society away from Pound's writings on the central questions concerning the law. This is to be regretted, for, in an era in which legislators write more law than is needed, in which more litigation exists than is desirable, and in which power is used more than reason in attaining ends, Pound's thinking offers a refreshing balance, astuteness, and practicality to every lawyer and political scientist. An examination of the basic elements of his thinking, therefore, is in order. Although the four books of Pound's which I have selected for scrutiny do not reflect the full breadth and depth of his scholarship, they do present the key elements of his understanding of the western liberal tradition, his philosophy of law, and their interrelationship.'

1. References in the text will be to T, followed by page number.
2. References in the text will be to S, followed by page number.
3. References in the text will be to J, followed by page number.
4. References in the text will be to I, followed by page number.
5. Two fairly complete bibliographies have been printed which embrace Pound's works to 1960. Franklin C. Setaro, *A Bibliography of the Writings of Roscoe Pound,* Cambridge, Mass., Harvard University Press, 1942. George A. Strait, *A Bibliography of the Writings of Roscoe Pound: 1940-1960.* Cambridge, Mass., Harvard Law School Library, 1960.

Pound viewed the trend toward scientism with alarm, as damaging the understanding of the nature of the social sciences and the approach to the study of society:

> The conception of every branch of organized knowledge as science, where it had been thought of as a philosophy, so that natural philosophy became the science of physics, mental philosophy the science of psychology, political philosophy the science of politics, moral philosophy the science of ethics, and philosophy of law the science of jurisprudence, the urge to make everything that was called a science conform in its method to experimental physical science, did nothing less than eliminate from the social sciences their fundamental problems. For if the physical sciences have for their function to discover what is, the social sciences have for theirs to discover what ought to be and how to bring it about. If newly observed phenomena do not accord with the physicist's hypothesis, he must reject it and frame a new one. If particular facts of human conduct do not accord with some formula of justice or politics, or law, the trouble may be with those facts, not with the formula, and conduct may have to be shaped to what-ought-to-be, not formulas of what-ought-to-be shaped to facts of conduct which controvert the jural postulates of civilization. What-ought-to-be has no place in physical science. It has first place in the social sciences.'

For Pound, then, law was not a neutral, sterile record of facts but a critical element of man's development. He urged students of society not to succumb to the fashionable scientific approach and thereby "give up the central problem of what-ought-to-be in political and legal institutions, in government and law."' An uncritically scientific approach loses sight of the essential differences between the objects of the natural scientist's study and people, the proper object of the student of society. As Pound rightly observes, what is often forgotten about the nature of inquiry involved in the study of human society is that the "ought" is capable of being imposed upon the "is," that while "good and bad are irrelevant to questions of physics, they go to the root of many things in social sciences." [8] Pound recognized the difficulty of proving that certain postulates, precepts, and values of law are the only ones to be considered as right. But he held that the law is necessarily a practical undertaking. While men may not be capable of attaining—or agreeing upon—truths and the values derived therefrom, he can, Pound believed, identify values derived from the

6. Contemporary Juristic Theory. Claremont, California, Pomona College, Scripps College, Claremont Colleges, 1940, p. 36.

7. Ibid., p. 42.

8. Ibid., p. 43.

western liberal tradition which societies aspiring to be civilized could employ in fashioning and applying the law.

Pound's observations on law and society are effective guides to political scientists, jurists, lawyers, legislators, and legal philosophers, for he goes to the root of questions about the role of law in governing and guiding society, questions which are central in political and legal theory: why law is needed, what law is, and what it can achieve. The four books under consideration here contain the major points of his thinking on these three crucial questions.

THE NEED FOR LAW

Every Utopia that has even been written," observes Pound, has pictured the conditions of full security, order, and justice in that Utopia "as existing without law" (T, 12; see also, I, 177-78). Concepts of ideal states have ever been attractive, but they overlook the nature of man and his history, which clearly indicates that Utopias are not possible (T, 15). Rather, Pound feels that law, indeed all social sciences, should have civilization as a starting point of inquiry. Civilization involves

> The development of human powers to continually greater completeness, the maximum control over external or physical nature and over internal or human nature of which men are for the time being capable....(I, 28)

If men are to dominate to any degree their natural environment, cooperative social effort is needed. To achieve this cooperation, man must control those elements in his character which are destructive of society. Pound believes that man has two contradictory elements in his makeup. One is man's "aggressive or self-assertive" character by which he places his demands and desires first and seeks "to satisfy them at the expense of others" by overcoming any resistance by any means (T, 21; see also, I, 52). The other is man's desire to live in association with his fellowman (T, 23, see also, I, 52). It is unknown whether an original and ideal balance between these two drives exists, or which is more fundamental, Pound says, but man's history dominated as it is by associations and groups, suggests that "social instinct prevails over the instinct of self-assertion" (T, 24; see also, I 224).

Social organization requires that the aggressive character of man be controlled, and this is the task of most social institutions. Religion, the family structure, and morality all teach the individual to restrain

his destructive and self-assertive instincts and to behave so as to promote social order (I, 52, 223, 225; see also, T, 21 182). Nevertheless, the very existence of man's unruly aggressiveness requires the presence of force that will keep it under control when necessary (T, 21; see also, I, 222). Pound observes:

> The task of social control and hence of the highly specialized form of social control which we call law, is to control this individual tendency to aggressive self-assertion to satisfy individual desires. (T, 22; see also, I, 182,222)

Social order does not emerge spontaneously nor can it exist without conscious effort. Social control, Pound maintains, is composed of the pressures brought to bear on man by his fellowman, pressures designed to "deter him from anti-social conduct, that is, conduct at variance with the social order" (T, 12).

Although Pound is aware that such control can be achieved by social arrangements that do not involve law, (J, 32-33) his concern is to discuss the role of law in meeting man's need for a civilized society by managing and resolving conflicting and overlapping claims (J, 28-30; see also, S,131-32). Because, as Pound observes, "there are very many of us but there is only one earth," men are bound to conflict with each other, in their attempt to fulfill their demands and expectations (S, 64).

According to Pound, the law does not create the interests men seek to protect, which would exist even if there were no legal order (I, 86-88; see also, S, 66-68). But the law must deal with these interests, lest man's unchecked aggressive instincts destroy civilization (T, 30). The law should recognize and classify these interests in a manner that will protect, as far as possible, the overall scheme of interests in society (S, 109). Next, the law must determine the limit to which the interests can be secured, for, Pound believes, no interest can ever receive total recognition and protection to the exclusion of all other interests. The law must also develop the means for securing the recognized and delimited interests and prescribe the canons of value for determining which interests to recognize, the limits within which the recognition will operate, the weight the interests should be accorded, and the limits of legal protection to be provided (I, 86-88; see also, S, 68).

In recognizing, delimiting, and securing interests, four critical factors—justice, force, security and balance—must be considered (T, 30; see also, I, 82-83). The justice of which Pound writes relates to "impartial authority" (T, 30). He argues that men are willing to subordinate their claims to principles and rules, which are the components

of law, when "it is known that they will be applied uniformly and systematically to all alike" (T, 16-17). Such impartial authority, equally applied, meets the normal man's expectation of external control which is "compatible with his human dignity" (T, 30).

Pound argues that law without force to compel obedience is a contradiction in terms. Men abide by law in part because of the threat of force. Yet if force is allowed to operate without restraint or limit, "we shall give up what has made law a prime agency of civilization since the days of classical Roman jurists" (S, 97). A civilized order must recognize that, although force is an "instrument of justice," it is "not something which can justify itself," for its real function is to achieve security (T,31).

Pound maintains that security reinforces man's cooperative instincts whereas a lack of security encourages his aggressive ones. Security requires that limits be placed on each individual in order to curb his aggressive urges. Historically, security has been the law's major interest—a security the chief components of which, according to Pound, are order, self-preservation, and the advancement of civilization. Without such security, chaos and disorder ensue (T, 32).

In Pound's view, then, security provides conditions favorable for an acceptable working balance between man's cooperative character and his individual self-assertiveness (T, 33). In achieving this balance, law must provide the force needed for order and security. The adjustment of the inevitable human conflicts must be made in a manner that achieves justice and security (I, 182-183).

WHAT IS LAW

Pound's definition of law focuses mainly on its functional role in society, that is, as a mechanism of social control over man's aggressive and self-assertive character (S, 41; see also, J, 49; I, 110). Law is "a highly specialized form of social control" which is composed of "a body of authoritative precepts developed and applied by an authoritative technique in the light of authoritative traditional ideals" (J, 50; see also S, 48).

As we have already seen, Pound feels that the type of law which is the object of legal and philosophical examination must be distinguished from law as examined by the physical scientist.' If not, faulty analysis and understanding will result. The law of the physical scientist is "based on the observation of what is" (T, 49). His work is to ex-

9. *Supra.,* Note 8.

amine facts carefully, deliberately, and objectively and to develop hypotheses to explain them; it "has nothing to do with what ought to be" (T, 49). Examination of law in society, on the other hand, is not focused upon what is done in a given time and place, but upon how law ought to be administered "in order to achieve the ends of social control and what those ends ought to be" (T, 50). Law, in a legal sense, is an authoritative, moral guide to behavior which necessarily deals with questions of ought and right. Without this prescriptive element, Pound argues, law would be nothing other than force (S, 32).

In Pound's view, the type of social control exerted by the law must be distinguished from the social control exerted by such other agencies as the family, morality, and religion, all of which are significant and on which, in large measure, the efficacy of law is based (S, 25). He recognizes that law may be more efficacious than other forces of social control because it has the prerogative of applying force to achieve its objects. But he also sees that, "if law as a mode of social control has all the strength of force, it has also all the weakness of dependence on force" (S, 20). For that reason law must work in cooperation with other agencies (S, 25).

A proper understanding of what law is requires consideration of its two sources—the enacted or imperative source, and the traditional or habitual source (J, 41-44; see also, I, 25). Pound identifies the imperative source as being the more modern. Historically, he maintains, there has been a symbiotic relationship between these two sources, which have adapted and blended into each other, in the process of time. The traditional element contains the usages and practices of law prevailing in a society and the customary modes used to advise persons of the law's content and operation. The basis of the authority of tradition is reason and conformity to the ideas of a civilization of a given time and place regarding what is right. The imperative element is a result of the will and act of sovereign authority, as based on the power of the state, in a given time and place. Pound observes, that historically the traditional element of the law is often adopted into imperative law, and when sufficient time elapses the imperative law becomes the traditional, as for example, the way in which Coke "incorporated old English statutes into the common law" (I, 26-27; see also J, 41-43).

A set of words describing law sheds further light on the importance and effect of these two sources of law. The words—jus, *Recht, droit, diritto,* and *derecho—all* refer to the term of what is right and just in three separate, yet related ethical senses: first, "right" referring to what is good in an ethical sense alone; second, "right" as a reasonable expectation one has as a consequence of a given time or place in a society and the means of exercising or securing the claim by use of the state's power; and third, "right" as law or as a set of precepts and principles designed to give effect to a right in the second sense in order to achieve right in the first sense (I, 26-27; see also J, 39-41).

Another set of words related to law—/ex, *Gesetz, loi, Legge,* kg—refers primarily to that which is enacted and is imperative in

form (I, 26-27; see also J, 39-41). English, Pound points out, does not have terms which reflect this distinction between *jus* and *lex.* In English the word "right" has only an ethical connotation, while "law" refers to "the specialized social control through the force of politically organized society" (J, 40; see also I, 267). Pound notes, however, that English usage does "make a distinction between 'law' and 'a law' in which the word is used for a precept set authoritatively by the law-making organ of the state" (J, 40). Pound examines the English sense of "law," which embraces both the traditional and the enacted bases of legal precepts (J, 40).

The term "law," Pound points out has also been used in three separate senses, referring, first and most frequently, to the full body of laws in a given society at a given time; second, to the "legal order," that is, "the regime of adjusting relations and orderly conduct by systematic application of the force of politically organized society"; and third, with the modern functional view of law, to the judicial process which focuses mainly on the mechanisms used for the administration of law and not on authoritative materials used to guide judicial action (I, 2).

Believing that these three senses do not fully explain the meaning of law, but oversimplify a highly complex means of social control, Pound offers a more satisfactory definition that encompasses the protean nature of law:

> Law is a body of authoritative guides to or grounds for determination, developed and applied by an authoritative technique on a background of received ideals of the social and legal order. (T, 43)

This definition embraces the cumulative historical development that Pound feels has molded our current legal order. He sees four stages in this development. Despite the inherent difficulties and the risk of oversimplification, such division, he maintains, enables one to observe differences in the nature of the law and to understand better the evolutionary developments which underlie the current legal order (I, 110). In the first stage, he explains, when law is not differentiated from religion, ethical customs, or customs of popular action (I, 110), the major aim of "law" is to restrain private war and preserve order (I, 110-112). Second is the era of what Pound calls "strict law," a stage characterized by codified custom with primary emphasis on establishing rules which provide a definite consequence for a definite act (I, 113-115). The third stage is characterized by an infusion of morality into the law and an extension of its role to achieve security by using legal precepts to right wrongs (I, 114-116).

In the transition from the third stage to the fourth, law becomes a "taught tradition of experience developed by reason" (T, 44). At this juncture the stage which Pound calls the "maturity of law" comes into existence, and the law, as law, lends itself to the detailed and rigorous examination implied in Pound's definition. In order to com-

prehend fully the breadth of Pound's definition of law, examination must be made of its three central components—"authoritative grounds," "authoritative techniques," and "authoritative ideals" (T, 43; see also I, 2).

The "authoritative grounds" of Pound's definition encompass four basic legal precepts which he identifies as "rules, principles, precepts defining legal conceptions and precepts prescribing standards" (J, 56). The four, which are critical to Pound's understanding of the law, require detailed examination.

"A rule," Pound says, "[attaches] a definite detailed legal consequence to a definite detailed state of facts." (J, 56; see also S, 45). He observes that rules are the earliest type of legal precept and that primitive law never goes beyond them (J, 56; see also S, 45; T, 44). Rules are, of course, part of the modern body of law and are found in criminal codes, some laws of inheritance, property law, and so forth (J, 56; see also S, 45). Modern law, however, needs more than rules in order to function, for, as Pound notes "experience shows the impossibility of providing in this way for every conceivable detailed state of facts" (J, 56). As a society and its economy develop, its law must become broader and more flexible than is possible by rules alone. Law must, therefore, employ precepts which enable it to deal with conflicts which do not fit a particular and determinant state of facts (J, 56; see also S, 45-47). Thus, the second type of precept—principle—is critical to a functional legal order. "A principle" Pound says "is an authoritative starting point for legal reasoning" (J, 56) and is developed by professional lawyers. Essentially principles organize experience by "differentiating between cases and putting a principle behind the difference, and by comparing a long developed experience of decision is some field" (J, 56; see also S, 46). The constant pressure exerted on the legal order and the scope and pace of society's change preclude establishing rules to deal with each new conflict. Yet if a legal order is to survive and function, it must be able to handle each new occurance (T, 44). Consider says Pound, the principle "that one person is not to be unjustly enriched at the expense of another" (S, 46). Here, as with all principles, there is no detailed set of facts identified, nor a specific legal consequence established. Yet when two parties are involved in a transaction from which one is unjustly enriched with a correlative unjust loss to another, a legal order which seeks to serve the value embodied in the principle must choose an authoritative starting point from which reasoning may proceed. Principles, Pound maintains, provide such starting points.

Pound identifies the third legal precept—legal conception—as

> an authoritative category into which cases may be fitted so that, when placed in the proper pigeon hole, a series of rules and principles and standards becomes applicable. (S, 47; see also, T, 46)

Again, no definite state of facts or specified consequences are spelled out for legal conceptions. Yet a decision must be made as to which conception applies to a given set of facts. For example, in a transaction involving a chattel, one must decide whether to consider it in terms of a contract sale, a bailment, an abandonment of property, or a gift. The conception selected determines which rules, principles, and standards are applicable (S, 46). Pound summarizes the importance of principles and conceptions as "making it possible to get along with many fewer rules and to deal with assurance with new cases for which no rules are at hand" (S, 47).

The final precept which is critical to understanding law is that of a standard, which Pound defines as "a measure of conduct prescribed by law from which one departs at his peril for resulting damage or legal invalidity of what he does" (S, 48). All conduct which is to be approved, reproved, or regulated requires standards. For example, the standard of due care not to subject others to unreasonable risk of injury does not logically lend itself to full and thorough definition and specification and a rule cannot be employed. Yet a standard must be formed which will take into account changing circumstances and conditions and give effect to the authoritative ideal underscoring the standard adopted (S, 49).

The second element in Pound's definition of law—"authoritative technique"—refers to "the art of the lawyer's craft," which he feels is quite as authoritative and no less important than the precepts which compose law's authoritative grounds for decision (J, 50). The element of technique distinguishes the two great legal systems of the western world—Roman and Common Law. Technique refers to the modes of looking at and handling the legal precepts previously discussed. Pound cites, for example, the difference in the Common Law tradition in which statutes furnish rules for those cases coming within the purview of the statutes. The statute, however, does not provide a basis for analogical reasoning nor a starting point for reasoning on cases to which it does not pertain, for in the Common Law these are achieved by looking at reported case decisions of the courts (J, 51). The Roman Law tradition, on the other hand, reasons by analogy from the code.

Judicial decisions are regarded as establishing only the specific point which is litigated, not as starting points for legal reasoning (J, 51). Pound distinguishes between the techniques of Common and Roman Law by showing that, in the former, specific relief is the exception while substitutional relief, in the form of monetary damages, is the rule, while the opposite is true in the latter. As Pound notes, in both traditions, the technique "is not less authoritative than the precepts" (J, 54; see also, S, 41).

According to Pound's definition of law, both the precepts and the technique of law are governed by the "authoritative ideals" of the society concerned. The significance of the ideal element in law he describes as follows:

> This element comes at bottom to the picture of the social order of the time and place, the legal tradition as to what that social order is and so as to what is the background of interpretation and application of legal precepts and is crucial in new cases in which it is necessary to choose from many equally authoritative starting points for legal reasoning. (S, 42).

For Pound, the "ideal" is as significant as the precepts: "In a developed body of law...the precept element and the ideal element are of chief importance." (I, 25).

It is necessary to understand the ideals on which law is based in order to understand "the end or purpose of social control and so of the end or purpose of the legal order..."(I, 5). Ideals perform a critical role in giving effect and meaning to the authoritative precepts (I, 5). Pound correctly notes that when men embrace certain ideals and base their actions on them, the ideals are given force. Therefore, ideals have been a decisive factor in legal development (I, 5-6). The ideals on which laws are based come down to the present from the past, but this is part of their strength and value. Pound cites with approval Justice Holmes' statement that "Continuity with the past is only a necessity and not a duty." (I, 19).

Pound traces the enduring ideals on which western law has developed from antiquity until the modern era. Perhaps the most valuable part of the tradition is natural law, which he carefully distinguishes into two types—"natural, natural law," and "positive natural law." Of the former, he says, it is

> ideal law simply as ideal. It is a body of ideal precepts derived independent of the actual positive law by some method which is regarded as guaranteeing universal moral validity and applicability. (I, 48).

He states that positive natural law

> is an idealized version of the positive law in which the jurist was brought up, in which, postulating that it is declaratory of natural law, and that it derives its force from the ideal precepts it declares, he sets out the positively established precepts, or some of them, in universal form. These idealized precepts or a positive law...are now made to appear as universal, unchallengeable [sic] and unchallengeable. (I, 49)

While seeing that law must provide answers to society's pressing and practical conflicts, which do not clearly involve a solution reflecting the standards of natural law, Pound does argue for attempts at conformity with such norms: "Indeed, it is such conformity, so far as we can bring it about, that makes social control through the force of politically organized society tolerable." (I, 50). The great task of natural law, as Pound sees it, is to function as the basis for critiquing the ideal elements in positive law. It cannot serve as a test of the validity or as a guide for the development and application of the positive law. "When we do more" he argues "we ask too much of natural law and impair its effectiveness for what it can do." (I, 50).

The ideals which guide and control law are not fixed and static; rather civilization develops, Pound notes, "relative to prior stages of human development." (I, 97). The ideals, values, and interests of a civilization should be used to meet human expectations and interests so far as possible with a minimum of friction and waste (I, 97). If there are no ideals to guide men in ordering their relations and to condition the exercise of force in society, then that exercise "becomes personal to those who wield it and arbitrary" (I, 51). Such a development, Pound feels, substitutes force for law (I, 51), a uniform, regular, and predictable system of law being the antithesis of a regime of force (I, 77). The ideals which should condition the operation of law must allow for the proper balancing of justice (the ideal relation among men), morals (the ideal development of human character), and the overall security needed for society and the individual. None of these may be fully pursued to the exclusion of the others, and the limit of law in giving effect to justice, and morals, and security must be recognized (I, 82-83).

The limit of what law can achieve and the role of other institutions which deal with social control must be considered. But this is not to suggest that law should not attend to morals and justice. Law must be directed toward giving value to certain interests and achieving the ideals of the society (I, 82-83).

Often law must also lay down guidelines to assure only uniformity and certainty. Even here, however, the law's application is to be guided by its ideals. Argument may and probably should continue over what constitutes an absolute measuje of values, but Pound reasons, "the received ideals of the purpose of the legal order and of justice as the ideal relation among men," as they exist in a given time and place, must serve in providing law with the guides to its practice (I, 106-107).

Essentially the ideals which Pound focuses upon are those prevailing in a society at a given time and place which seek to maintain and promote the values of civilization (I, 186). These values Pound sums up as the five postulates of a civilized order: men must be able to assume, first, that others will commit no intentional aggressions against them; second, that everyone will exercise care not to cast an unreasonable risk of injury upon others; third, that men will act in good faith and adhere to their promises; fourth, that men may control for beneficial purposes, what they have discovered, produced, or acquired; (I, 187) and fifth, that others using things which are harmless in their sphere of use, but harmful in their normal use elsewhere, will confine such items to where they are safe (I, 191). These postulates are not fixed and permanent, for new conditions may effect their content and scope, but they are the basic ideals which characterize western civilization. Pound feels that they should guide the use of law in order to allow men to achieve the greatest control over their internal nature, master their environment, and distribute the goods needed for existence as far as possible with a minimum of friction and waste (I, 191-194).

Justice, Pound feels, is what we seek to obtain by means of the legal ordering of society. Even if man cannot lay down unchallengeable, universal formulations of such ideals, the existing ideals provide a foundation for a workable ideal which he should seek to approximate as far as possible (I, 109).

THE LIMITS OF THE LAW

Pound feels that the examination of the role of law cannot escape the problem of values (S, 103). Legal history is marked by different periods which are distinguished from one another, in large part, on the basis of the different values which prevailed in each period (S, 104; see also, I, 55-61, 113-119). Because law is primarily a practical matter, he argues, "we are not required to hold the legal order in abeyance until philosophers have achieved" the impossible task of identifying

and defining ultimate values (I, 93). Even though there is no universally accepted legal measure of values, we must not "give up and turn society over to unchecked force" (S, 108; see also, I, 92-93). Man is the beneficiary of centuries of experience involving the adjustment of relations and ordering of conduct, an experience which provides a workable basis for making legal decisions. Although Einstein demonstrated that the universe is curved, with no straight lines, Pound reasons, we do not give up surveying; for the straight lines used in that craft are a sufficient basis for practical activity and near enough to the truth to be helpful. So it is, he says, with the values of a legal order: even though we may not prove them to be true, they are "...sufficiently near the truth for our practical purposes" (S, 109).

In using the law to order conduct, man historically has relied on three things: first, the received and traditionally authoritative ideals of the social and legal order to provide the initial guide in reconciling conflict (I, 94); second, experience to determine what will achieve the reconciliation of conflict with "the least impairment of the scheme of interests as a whole... [and]...with the least friction and waste" (I, 94; see also, J, 29; S, 110); and third, reason tested by experience and experience measured by reason for measuring and determining whether law is satisfactorily adjusting conflict and effectively accommodating new demands and developments (I, 94; see also, J, 60; S, 51, 113).

Law serves to create and maintain order in society by performing what Pound describes as the great task of "social engineering" (S, 64; see also, I, 178-179, 239-241). A major problem arises in identifying what materials the law will use in performing its task. Pound believes the law is a reactive mechanism that must respond to individuals' desires and claims for security. The law recognizes some of them and fixes the limits within which it endeavors to secure them, in view of other interests which must be secured (S, 68; see also, T, 23; I, 85-87).

The important point to remember, Pound argues, is that the law does not create these claims, but is rather a civilized means of responding to them. The law's response results in large measure from the received ideals of the community. Law must also identify the type of claim demanding recognition and be able to distinguish one type from another in order to weigh them properly in terms of importance and significance. Pound divides such claims into three types of interests—individual, social, and public (S, 69; see also, I, 85-88).

Individual interests, Pound argues, are of three major types—interests in personality, in domestic relations, and in substance, such as property, freedom of contract, and freedom of

association (S, 70). These individual interests must be identified and secured by one individual against others (S, 71). Life in society, however, does not permit men to exercise all of their freedoms fully and without restraint, lest unmanageable conflict and competition occur. The challenge for the law, therefore, Pound argues, is to decide which claim to recognize and protect, at what point in time, and at what cost to other claims. This determination law accomplishes by "social engineering," which enables just decisions to be made (S, 64). In adjudicating claims that reflect the pressure of individual interests, the law must weigh them against social interests, which Pound esteems more significant.

According to Pound, social interests are those interests which have significance for the entire society—in general security, individual life, general morals, conservation of social resources, general progress, and, finally, the social interest in protecting such other social institutions as the family and religion. Pound acknowledges that the interest in general security is the oldest and perhaps the most significant because it involves the general safety and preservation of society. In a civilized society, however, general safety involves the recognition and protection of other social interests—most particularly that of the individual life (S, 76-78). In this regard, Pound feels that attention to this vitally important social interest allows the law to foster the interdependence needed for a viable social order with the independence of the individual which is critical to a civilized society (I, 184, 194).

Public interests, in Pound's scheme, concern the interests of the state considered as a juridical person. Consequently, his major concern is with the range of social interests which exist in society, the balancing and reconciliation which are the major objectives of the law (S, 75).

Social engineering involves adjusting the conflicts of emerging and existing claims. The law must weigh and balance all the interests involved. No one interest, Pound feels, should be protected or advanced so thoroughly that others are destroyed (S, 78).

Closely related to the task of social engineering, in weighing and balancing these interests, is a proper understanding of the terms under which claims to protection and permission are advanced. According to Pound, this involves understanding of the "much vexed questions of rights" (S, 80; see also, I, 84-107). Careful distinctions must be made regarding the meaning that is attached to this concept, for, Pound notes, the term has been used in reference to natural rights, moral rights, and legal rights, in each sense conveying a different meaning

and serving a different purpose (S, 83).

The ancient Greeks used the term "right" to define what was right or just in measuring conflicting human claims, thus giving the term an ethical import. Roman jurists applied several meanings to the term and extended it beyond purely ethical significance (S, 83). Only in the later Middle Ages, Pound notes, did legal philosophy begin to speak of "right" as meaning a just claim (S, 85). In the seventeenth century the word was used to refer to "the means used in securing men in their natural rights," and this usage held the lead in legal thought for three centuries, according to Pound (S, 85). Most of the natural right theorists—the natural, natural law theorists to whom Pound refers—argue that the law should not allow the state to interfere with certain interests, leaving people free to exercise their faculties without limitation by the power of organized political society (S, 86).

Pound maintains that Rudolf von Jhering altered the entire meaning of "rights" when he defined them as only those interests which the law recognizes; that is, rights are given by organized political society and do not exist without legal creation. Accordingly, the political element dominant in Jhering's scheme and the question of the moral value of the interest are irrelevant, for all that matters is whether or not a politically organized society secures a given interest (S, 87).

Pound recognizes, the importance of the historical development of the concept of rights in general and legal rights in particular. Distinctions must be made in using the term "right" for analytical purposes, he maintains (S, 91). For example, "legal right" has several important meanings. "Right" in its wider sense means a legally recognized and delimited interest plus the legal apparatus by which it is secured (S, 88). But this sense of the term needs to be distinguished from its narrower sense referring only to the capacity to constrain others to certain acts or forebearances by force (S, 89). In turn, both of these meanings must be distinguished from "right" as it refers to the capacity to create, alter, or divest legal rights in the narrower sense, such as the agent's power to sell or transfer property, or to bind his principal to a contract agreement (S, 89). It is Pound's contention that a failure to discriminate between the meanings of "right" confuses an understanding of the nature of the right itself and the method and manner by which it is to be protected and secured. Partly because of the complexity involved in such discrimination and partly because of the rise of "scientism" in legal philosophy, the skeptical view of legal thinking began to

> deny that there were such things as rights or that the claims recognized and secured by the legal order had anything more behind them than the force brought to bear by those who wield the authority of politically organized society (S, 92)

This mode of thought, which Pound calls the "threat theory," has gained widespread acceptance and legitimacy and, he argues, is symptomatic of the rise of political absolutism (S, 96). In this theory, rights are subordinate to political power, which may grant them or destroy them. The idea of the limitation of power, therefore, is denied (S, 97). Pound argues that adoption of this mode of thinking causes us to "give up what has made law a prime agency of civilization since the days of the classical Roman jurists" (S, 97). The threat theory claims to be realistic but, Pound believes, only as a boast rather than as a description. What the theory ignores is that the most important feature of social control is its task of carrying forward, on the basis of reason, what is conceived to be justice. For Pound what is most important is not the amount of force that protects legal rights but the reasonability of the claim for any such rights. On this score, he writes

> Without a recognized claim, recognized on a basis of reason, there is only an arbitrary exercise of force for its sake, something against which we rebelled at the Revolution and to prevent which we set up frames of government founded on a separation of power with a bill of rights in the forefront of them....(S, 99)

Pound believes that the function of law is to control power, not to serve it. Being human, men will seek power and self-satisfaction and in doing so will be arbitrary in their acts. The task of law is to repress this tendency. The great tradition of western law has moved in that direction since the twelfth century. To be taken in by modern realism and the threat theory it favors, he argues, is to lose that great tradition (S, 102). Law can transmit, further, and protect civilization by applying values in the process of recognizing and serving interests as they emerge in the legal system.

Pound suggests that much of the law's success at social control depends on its continuing authority. Historically, men have sought to determine the source of authority of the legal order (S, 51) and to answer the question's various corollaries—the immediate practical source of authority, the ultimate practical source, and the ultimate moral source. Pound notes that the answers have emanated mainly from either social or political philosophy. But for him, the answer is found in a more practical test. He observes that

> the legal order goes on, whatever may be the basis of whatever rightful authority it has, and I submit it has kept and holds an actual authority because it performs, and performs well, its task of reconciling and harmonizing conflicting and overlapping human demands and so maintains a social order in which we may maintain and further civilization. So long as it does this well there will be the habit of obedience that makes practicable the employment of force upon those who require it. (S, 53-54)

Although Pound believes the test of the legal order to be a practical one, a realistic assessment of that standard requires insight into and understanding of the limitations under which law operates. Through such an understanding, one can also come to understand the extent to which law can handle its task of social control.

Pound notes that there are five major limitations which impinge on the capacity of the law to control society. The first "grows out of the difficulties involved in ascertainment of the facts to which legal precepts are to be applied" (S, 55; see also, I, 72-79, 98-102). Pound notes that, although the facts of a specific case may not be given, the efficacy of the appliction of legal precepts to the case still depends upon the facts being known. But facts can be withheld, distorted, or unobtainable. Thus, the law proceeds on the fragile and frequently mistaken assumption that the facts can be known, while the reality of the legal order is that they may not. Consequently justice may and does miscarry because of this severe, but unavoidable, shortcoming. Second, Pound points to the "intangibleness of many duties which morally are of great moment but defy legal enforcement (S, 55). Some attempts to hold individuals to high standards of disinterested benevolence, therefore, fail because the very character of the standard one seeks to impose is too intangible to lend itself to legal enforcement. For example, attempts by law to force disinterested benevolence upon corporations or to create laws defining youthful incorrigibility fall short of their ends. Third, Pound cites the limitations that grow "out of the subtlety of modes of seriously infringing upon important interests which the law would be glad to secure effectively if it might" (S, 56). Such matters as protecting individuals from damage by "neighborhood gossip" or from intrusions on their privacy do not lend themselves to the controlling actions of the law because of the difficulty in pinpointing the source of the injury. Fourth, there is "the inapplicability of the legal machinery of rule and remedy to many phases of human conduct, to many important human relations, and to some serious wrongs (S, 57). In discussing this limitation, Pound notes

the incapacity of the law to handle problems of domestic relations, which most properly are controlled by morals and community sentiment, and not the law (S, 57). Fifth, law is limited by the fact that it must be set in motion by individuals (S, 60). The individual must have some personal motive in seeking the law's redress. The abstract content of the rule and its conformity to an ideal justice or an ideal of social interest are not sufficient (S, 61). Pound observes that there are those who wish to engage the law in order to protest against such wrongs as bias and prejudice. But for that purpose, he notes, "a prophet rather than a lawmaker is the proper mouthpiece..." (S, 62).

Pound's observations regarding the limitations of the law in dealing with problems are important. When too much is expected of the law, and when the limitations of the law are ignored, disappointment and disillusionment result, thus preparing the way for the use of force.

In discussing what the law can achieve, Pound finds only four remedies it can use to reconcile conflict: punishment, prevention, specific redress, and substitutional redress—"The wit of man has discovered no further possibilities of judicial action (S, 58). The first three of these remedies have serious limitations; punishment is restricted in the role of enforcing absolute duties and is effective mainly in criminal law; prevention is not always useful because many injuries are accomplished before the law is called into play, and specific redress applies only to possessory rights and certain acts which are purely economic. Because of these limitations, Pound notes, "in the great majority of cases redress by way of money damages is the only recourse and this has been the staple remedy of the law at all times." (S, 59).

Substitutional redress, therefore, is the most frequently available and practical remedy, though it, too, has drawbacks. It is employed most satisfactorily, Pound believes, in dealing with conflicts involving items of easily measured value, such as property exchanges and contractual agreements related to property. Conflicts concerning such personal matters as pride, mental comfort, and privacy, however, do not easily lend themselves to financial measurement, a fact that has given rise to the complaint that the law honors property more than the person. In response, Pound maintains that if

> the law secures property and contract more elaborately and more adequately than it secures personality, it is not because the law rates the latter less highly than the former, but because legal machinery is intrinsically well adapted to securing the one and intrinsically ill adapted to securing the other. (S, 60)

The point is well taken, for although one may bemoan the fact that redress for mental suffering is incalculable in money terms, the law can do little else than award the damages.

Pound observes that, although these mechanisms for resolving conflict are not fully satisfactory, they are the only ones which enable the law to perform its practical task. Morals or ethics alone are inadequate, because often they cannot provide a clear-cut principle on which to base a resolution. Moreover, Pound notes, some conflicts involve equally blameless parties, yet the law must resolve them. In so doing, the law restores stability and predictability, values in themselves though the substantive issue being resolved does not admit of a clearly discernable value (I, 70-82).

Finally, in addressing what the law can do, Pound points to the fact often ignored in legal theory and practice, that law not only needs support of such other institutions of social control as the church and the home, which are better equipped to handle certain areas of social control but that such support is critical (J, 29). Other institutions must provide the background against which the law operates, if it is to be effective (I, 53).

CONCLUSION

In examining the role of law in society, Pound devotes attention to the direction in which he sees the law moving in the modern era. He speaks of the influence of what he calls the "humanitarian idea" on legal development in the twentieth century. It is his belief that, as society changes in response to expanded production and widening opportunities for individual development, new and different interests emerge and press the legal order for recognition and protection (I, 245-6). In a frontier type of society, it was sufficient for the law to order men's competitive behavior so that life could proceed with minimum friction and waste. Such a legal system properly focused on liberating the individual to act with as few restraints as possible. The conditions of an industrialized and urbanized society, however, create new demands and require new solutions, Pound believes. For example, he argues that with the growth of large industries contract law is not sufficient in reconciling the divergent interests of employer and employee. Employee wants and expectations required a qualitatively different form of protection, the National Labor Relations Act, which

was designed to control the relationship of employer and employee (I, 245-6). These relationships are unique to the time and circumstances and cannot be adequately handled under the canons of contract law. All such developments, according to Pound, are a result of a changed perception of security emerging from the vast changes wrought in society by industrialization and urbanization. This new perception is reflected in what he calls the humanitarian ideal. He describes this different coloration of the concept of security as follows:

> Security, then, is security from all that keeps them [men] from an ideal relation and keeps many of them far from finding themselves in it. The ideal of a world in which all can find themselves in that relation I have been calling the humanitarian ideal. The emphasis has gradually been shifting from liberty to humanity; from leaving men free to help themselves as they can, to aiding them by the institutions of civilized society to obtain a maximum satisfaction of those claims or desires or reasonable expectations in civilized society compatible with satisfaction of the whole scheme of such expectations with the minimum of friction and waste. (I, 246)

Pound cites other such interests as "the right to privacy" and "workman's compensation" as reflecting these changes. The "service state," as he calls it, has used the law to take into account new risks to individual security which are inherent in a complex, industrial society. For example, he cites approvingly the change in tort law which generally admits the "proposition that one who intentionally does something on its face injurious to another is liable to repair the resulting damages unless he can establish a liberty or privilege under some public or social interest ..."(I, 248). Such changes are still based on a concept of general security because they touch on the issues of personal safety and security of individuals in society. According to Pound, therefore, these changes are consistent with the historical development of law in practice and theory. The "service state," which responds to changing conditions and new risks, is an acceptable, and even desirable, development for Pound because such developments are not inimical to "maintaining peace and order, upholding the general security, and assuring freedom to take advantage of opportunities for acquisition as they present themselves" (I, 256). He argues that the danger of these developments lies in the service state moving to secure men in *all* their wants, desires, and expectations. This Utopian idea, he maintains, leads to such developments as the "insurance theory of liability" which is based on the assumption that all losses and damages should be passed along to those most able to bear them.

As example, he cites the development in the law which holds manufacturers liable for injury resulting from the use of their product even though there was no proven negligence in its manufacture or sale, a development based on the assumption that the economic condition of the manufacturer enables him to bear the loss better than the injured party can (I, 253-5). Such changes, Pound warns, create involuntary Good Samaritans. He argues against such revolutionary development in legal practice and thought:

> There ought to be a better method of making the legal order effective for our humanitarian ideals than that of Robin Hood or that of the pickpocket who went to the charity sermon and was so moved by the preacher's eloquence that he picked the pockets of everyone in reach and put the contents in the plate. (I, 259)

He cites other equally revolutionary changes developing under the aegis of the service state, such as those in contract law which tend to relieve one from a burden he freely assumed "based on a proposition that so to relieve him is a service to the whole community which the state has been set up to perform" (I, 262).

Such legal developments in the service state detract from its meritorious achievements. More disturbing to Pound, however, is the increasing attraction in modern society of what he calls the "authoritarian idea." The expectations put to the service state can lead to an authoritarian notion of government in which there is "complete control of all individual activities and all productive exertion, through a regime of full service to everybody performed exclusively for us by politically organized society" (I, 266).

Many of the promoters of the service state argue for the socialization of law, socialized courts, and socialized procedure. Pound, himself, uses the term, but in the sense of "a conscious recognition of social interests where individual interests had been put as rights and social interests relegated to a subordinate category of policies" (I, 268). To advocates of the service state, however, Pound points out, this terminology has assumed a new meaning: "an extreme of unchecked power of officials and magistrates to make *ad hoc* determinations such as existed in the late totalitarian states and still obtains in Russia." (I, 268).

Pound believes it unnecessary to abandon law based upon reason in its development and application and tied to the ideals of the social order in order to achieve those protections consistent with a non-revolutionary service state. Such abandonment, however, has "been following hard in the wake of the service state" (I, 268). Law, the real

foe of absolutist government, is under assault both by the practices and demands of the service state and by an intellectual climate which encourages force. Political absolutism—whether of the superman leader or the active democracy—is prospering. Forgetting the heritage of western liberal development, exponents of democratic absolutism criticize the notion of a state limited by law:

> to give those who exercise the force of the political organization's power and yet limit their exercise of the power is a contradiction of terms. In a democracy a majority must speak for the whole. In a democracy the majority must necessarily be an absolute ruler. The absolute majority takes the place of the absolute personal ruler....(I, 237)

Those who advocate extending the service state feel that oppression by government need not be feared, given its democratic basis. But, Pound counsels, the majority can be as oppressive as the absolute ruler and is less capable of being turned out of power (I, 276). This dictatorship of the majority feeds on the promises of service state advocates who label most claims and expectations as "rights." Such light and cynical use of the term—right—weakens the constitutional order, according to Pound. He also points to the basic emptiness of promises made by service state proponents to eliminate want and fear. A state that attempts to achieve Utopia ignores its incapacity to change the inherent human characteristics which produce poverty and fear: "such guarantees, which are at their best promises, can only lead to a situation in which people are deceived" (I, 277). The service state which grows in its programs and power and takes

> over all functions of public service, operating through bureaus with wide powers, and little effective limitation upon exercise of their powers, through government positions for a large and increasing proportion of the population, and through systematic official propaganda and a system of subsidies to education, science, and research, can easily be taking strides toward an absolute government, although under the forms of democracy. (I, 278)

Serving powerful and mobilized interest groups has always been an effective way to gain and to keep power. Pound warns that lavish promises and prophecies of equality and of curing men's ills through the application of power "instead of making them equal in their political and legal rights and capacities, is likely to make them more unequal than nature has made them already." (I, 279. The modern service state encourages men to make their governments more powerful:

> in the service state of today expensive service to some at the expense of others is regarded as a service to the public, as indeed it may be in some cases, and this tempts aggressive groups to obtain legislation providing service to them for which others must pay. (I, 279)

Pound sees the restoration of the individual as the object of the protection and limitation provided by the law as critical. Recognition of the moral worth of the individual was the great legal achievement of the seventeenth and eighteenth centuries, and is reflected in the present generation's appreciation of the social interest in individual life. Pound believes that this appreciation must be re-emphasized if western civilization is to continue on the path based on liberty. That liberty, working together with the good motives of the humanitarian idea, may lead to a new and great age in the law: (I, 283)

> We can hardly think of interdependence as the end of law. I prefer to think that the recognition of cooperation and the new emphasis upon it in all connections is a step toward some ideal involving organized human effort along with free spontaneous initiative, and one could conceive of such an ideal in the idea of civilization. One might think of cooperation toward bringing about and maintaining a balance between independence and inter-dependence in order to promote civilization. (I, 177)

Pound finds the crisis in law and civilization real and threatening. The amount of control exercised over individual lives by state power is increasing in tempo and scope. Less and less is left to individual determination. The contemporary service state seeks to secure a full life for everyone, but in so doing, destroys the liberty of all. By way of illustration, Pound points to the power of the state to protect some social ambitions by not allowing others to choose freely their social companions in college fraternities or private rooming houses. This is primitivism in the use of power; one most "go back to the laws of Manu for precedent for what is being urged upon fraternities in American colleges today. According to Manu, one who gave a banquet and did not invite his two nearest neighbors was subject to a penalty." (I, 268).

Thus Pound deplores the state's ordering of men's lives under the guise of law. Such developments have been made possible, he believes, largely because of our failure to understand the nature of law and its role in society and our belief that whatever the state does is law. He holds that

> Exaltation of politically organized society to the position of an absolute ruler means that those who exercise the power and authority of that organization are above the law. What they do is law because they do it, which is the very negative of law. (I, 273)

In the West, we have largely abandoned the liberal conception of law based on reason, as a civilizing standard which limits the force of the state. Pound cites the American constitutional system as an example of this previous standard. Its concept of limitation and the system of checks and balances were both designed to prevent absolutist government. It is antithetical to the modern notions that government has the inherent authority to do all things it deems necessary, and that the standard of efficiency, is the only measure of that government's acts. As Pound observes

> In the American constitutional polity we have an ideal of a government proceeding according to law, that is, by a systematic reasoned application of principles, as distinguished from a government applying the force of politically organized society by fiat in each case or by rules resting on its authority for the time or the occasion. The ideal in the authoritarian path seems to be efficiency. (I, 272)

Throughout history, men have tended to worship their rulers. Today such worship is directed to the rightness and justice of the will of the majority or the plurality. Pound, who believes that our constitutional scheme was created to prevent majorities or pluralities from running roughshod over individuals' liberties, deplores this attack on liberty. He observes that the pressures for dismantling the system of law and creating absolutist governments do not occur only from revolutionary acts, and cites Justice Frankfurter approvingly:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority. (I, 279)

Further, Pound cautions that, once an absolutist government of unlimited powers emerges, it probably cannot be overthrown by internal revolution. Those totalitarian governments which have been overthrown in this century have fallen to pressure from without, not from within (I, 275).

Although clearly alarmed by the movement toward absolutism and omnicompetent government, Pound does not consider it irreversible. It can be stopped, he believes, by a re-affirmation of the proper role of

law in society, which can come only through an understanding of the role of law—what it is, why it is needed, and the limits of its effectiveness. Students of society would well serve themselves, their disciplines, and their fellow men by considering carefully Pound's astute comments on these critical questions.

Wabash College EDWARD MCLEAN