

THE CASE FOR LAW—A CRITIQUE

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Roscoe Pound was the playing captain of American legal philosophy for decades. He had a surpassing sense of perspective, and a solid background of historical and social learning against which that sense could play. This sense of perspective his principal teammates shared, but Pound had a complimentary virtue much rarer among them—the instinct of the philosopher that indicates those occasions when an analytical advance is to be made or some diversionary mistake avoided, not by drawing in additional facts but by taking more care with the facts at hand. Unfortunately the very richness of Pound's learning sometimes played him false, and tempted him away from that tight control over the structure of an argument that successful philosophy demands: one occasionally finds Pound more reveling in facts than marshalling them. He was, however, no philosophical dead-end kid—he did not lay about him with disdain for what the point might be, as many did in those days now celebrated as the bright morning of Realism. But he did not have the care for organization and the taste for leanness of argument of, say, Hohfeld or that underrated philosopher, John Dickinson. If he had, his philosophical inventiveness would have been more evident and a great deal more influential.

Pound's Valparaiso address—The Case for Law—is not a strong piece; it is more a restatement of old themes than a fresh adventure. But it does illustrate the main features of his intellectual profile. His exuberant erudition sweeps us from Babylon through Rome and Plantagenet England to Colonial America, Imperial France and yesterday. His philosophical sense is deployed, cutting across dogmatism and opening up lines of analysis with logical distinctions between law and laws, rules and principles, justice and utopia. But his lack of discipline is also at work, and prevents him from carrying his insights and distinctions far enough to make them pay their way.

The argument starts by citing a contemporary demand, not further specified, for "substitutes for social control through law"; the essay's problem will be to speak to this demand, and to compose "the case for law." It closes in the posture that such a case has been supplied, but when the case is summarized it comes to this: so long as human nature holds, and man's expectations and demands rise always ahead of what is

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available, there will be a need for order and balance, and, therefore, for law.

Pound's "case for law" is disappointing because it seems responsive to a wholesale attack only an adolescent anarchist would make. Few voices are now raised, after all, in the cry that law as an institution should be extirpated root and branch (however that could be done). There are positions in the field that might be called, in some sense, challenges to law, but they are, comparatively, more limited propositions. One such position is represented by the now familiar argument that certain sorts of decisions particularly affecting individuals and heretofore made by courts—like decisions as to what course of treatment a criminal allegedly insane shall receive—are more efficiently made if the official or agency in question disregards the traditional procedures and safeguards of adjudication. Another is civil disobedience, the doctrine that disobedience to a "bad" law is a proper way to oppose that law, or, in a stronger form, that disobedience to law in general is a proper way to demonstrate one's opposition to the social and moral views of society's establishment. Civil disobedience could not, of course, exist without law, any more than a clapper could function without a bell; its challenge is not to the general need for law, but rather to the authority of law, because it asks why, and in what circumstances, law has a call upon our obedience. If we have challenges like these in mind, Pound's quick answer that human nature requires order and distribution is unsatisfying, because the proponent of "non-legal" regulation wants a different technique of order and distribution, while the proponent of civil disobedience wants a different order and a different distribution.

Had Pound paused to draw his antagonists in sufficient detail, he might have extended his arguments to meet them, because the lines he sketches have more potential than his summary exploits. He sensed, for example, how much our contemporary impatience with adjudication, and our suspicion of law's moral claim to obedience as such, each owes to the fact that legal positivism is today the inarticulate working faith of the profession. He also sensed how much this faith rests on a habit of thought, a conventional way of classifying the decisions of legal institutions which, on a second look, is a misleading way.

This is the habit of regarding as law only *rules* of law, those "definite, detailed provisions for definite, detailed states of fact"¹ that vary so over place and change so over time. These are clearly the creations and creatures of the particular men who hold legal power for a particular season. If law is merely the aggregate, at some slice across the band of

1. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 56 (1959 ed.).

time, of the rules these men have decided upon, we must adjust the quality of respect we owe the law accordingly. If we are administrators, and decide that traditional legal procedures are inefficient for some determinations, we should feel no *communal* commitment to these procedures that must be weighed in the balance. If we are citizens, distressed by social injustice, we should see in legal rules no claim upon us beyond their intrinsic merit, and the authority of the present governors who enforce them.

Pound opposes these attitudes by calling attention to the fact that the fabric of legal practices includes not only particular and shifting rules, but also principles that endure and govern what men and institutions in temporary control may lawfully do. In these principles he sees the antidote to the harm caused by "English and American analytical jurisprudence." But unfortunately it is not enough to call attention to these principles and to show how they have grown from ancient times, because the positivists, conscious and unconscious alike, are aware of our legal traditions. What the positivists dispute is that these traditional principles are law in the *sense* that particular rules are, that they in fact control and regulate officials. The philosophers of positivism take account of Pound's principles by treating them as hortatory, and as summaries of large trends of practice. They point out how much honored in the breach these principles have been at testing points, and reject as illusory the notion that they form a "higher law" or a "natural law" to which the particular rules of law are subordinate and subject.

Pound was right. The positivists' treatment of legal principles as merely hortatory will not do, and the existence of these principles does point to communal commitments which are relevant to the "case for law." But Pound stopped at the beginning, and offered no more than the bare claims John Dickinson had picked carefully to pieces in 1929.² Pound stopped there, largely, I think, because he did not put to himself the challenge of setting out clearly the views he opposed, and of studying what he had to show to oppose them. Because of this failure of discipline, he did not provide the analysis to back up his instincts.³ When this is said, however, we are left free to admire those instincts, and to join in the joy of Pound's learning and narrative as he characteristically employed them in his Valparaiso address.

2. Dickinson, *The Law Behind Law*, 29 COLUM. L. REV. 113, 285 (1929).

3. Such an analysis must start by making more precise the logical distinctions between rules and principles, and attending to their implications. See, for an effort in this direction, Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624, 631-32, and my article on the legal philosophy of H.L.A. Hart in a forthcoming number of the *University of Chicago Law Review*.