Frames of Reference for Legal Ideals

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I. A Historical Sketch

1. Law as the Embodiment of Common Sense.

The publication of Canada's most newly established legal journal by Canada's oldest established common law school naturally prompts reflections concerning the elements of continuity and change in legal writing, and legal thinking generally. Legal writing has so radically changed during the existence of Canada's oldest common law school, or for that matter during the existence of Australia's oldest law school to which the writer belongs, that articles written even during the earlier part of this century excite feelings of nostalgia in some people. In welcoming an article published in the Sydney Law Review in the nineteen fifties, Dean Erwin Griswold of Harvard Law School described it as an "old line" article of which he wished that more were published nowadays.¹

What were the characteristics of these "old line" museum pieces? One commonly heard suggestion, at least in Australia, is that they were absorbed in technicality, with a lack of appreciation of real issues, and that for this reason there is little occasion to be nostalgic about their passing. But this is certainly an oversimplification. There is a good deal less technicality, in the sense of attempt at comprehensive summation of the authorities, in the writings of older writers like Holmes, Pollock, Dicey or even Anson, than would be found now in many law review articles. What was rather characteristic of such writings was belief in the validity of the continuing values, enshrined in the law as they had emerged even in the remote past, accompanied by varying degrees of anxiety about threats to those values from social factors developing outside the law. In Dicey's case, this exhibited itself particularly in his deep suspicions of what he called collectivism² and, in Pollock's case, in

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¹ In a letter to the then editor.
his attempts to pin down what of the law could be pinned down in codifications of various branches of it. He worked at these assiduously, despite the belief which he expressed that a statute by the nature of it was less effective to dispose of a problem than a well considered judgment in the same sense.³

There is no sharp distinction between "old line" and "new line" writing in the centrally important respect of the interest shown in the relations between law and society. Men regarded as innovators in Harvard like Ames were legal historians as Pollock was,⁴ among other things, and as Dicey was, even if he was more concerned with the recent than the remote past.⁵ Nor were those men whose writings are the older classics from our viewpoint now mere historians of doctrine. Pollock annotated Maine's pioneering attempt to correlate the development of various more general features of the law with social conditions in a variety of civilisations⁶ and his Oxford took the legal historians Vinogradoff and Holdsworth to its bosom. Dicey attempted to correlate legal developments with social conditions in England and to explore continental comparisons.

Pollock's adverse reaction to the young Roscoe Pound of Harvard — his description of him as "ingenious" to Holmes was not in the context intended to be complimentary⁷ — is from this point of view at first sight puzzling. For there was much that Pound shared with all those already mentioned. His interest in the stages of legal development, and in Continental as well as English and American developments, was on a scale rather more comprehensive than their own. But this was no doubt part of the trouble. The Oxford tradition emphasized care and thoroughness of legal and social research in particular areas or aspects. It was inimical to generalisations on the grand scale about the springs of socio-legal development in all its aspects at a particular time. However, the nature of the

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³ Sir Frederick Pollock, Judicial Caution and Valour (1929), 45 L.Q.Rev. 293, 297.
⁵ See, e.g., A. V. Dicey, Law and Opinion in England, supra n. 2.
generalisations which were beginning to appear in Pound’s work about the springs of legal development were certainly more important in exciting suspicion than the fact that generalisations of this degree of comprehensiveness were made at all.

For the English writers dominant before the first World War legal argument on controversial matters could be carried on in terms of no more ambitious background criterion than what it was that common sense required in the circumstances.\(^8\) When, for example, Pollock and Anson disagreed about the decision in *Derry v. Peek*,\(^9\) it was to this criterion that they both appealed in support of their opposite views. Anson said that if his decision had gone the way Pollock thought it ought to have — and on this matter judicial posterity has supported Pollock — English law would not be “a monument of practical common sense”.\(^10\) Pollock did not deny that in general the common law was this, but supported on the particular matter, as opposed to Anson, what he asserted to be the common opinion of Lincoln’s Inn.\(^11\) Vinogradoff, consistently with this approach, entitled his introductory work for law students “Common Sense in Law”.\(^12\)

There were two striking and related features about this concept. In the first place, common sense was conceived as something very much embodied in the law itself, rather than as something presenting a set of demands on it in any way markedly divergent from the state of the actual law as it was conceived to be. It will be observed that Anson writes of the law as a monument of common sense and Vinogradoff of common sense in law. In the second place, little philosophical analysis was applied to the concept itself. It was used rather than analysed and this tendency persisted in Oxford to a much later stage in the writer’s experience as a student.

In both these aspects, English legal thinking might be considered as in a state of decline at the beginning of this century, perhaps attributable to the aftermath of late Victorian self-satisfaction with the state of the law and the performance of the elements in English society who were in charge of it. In earlier Victorian times, the

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8. See, e.g., Pollock in article cited *supra* n. 3, especially at 295.
9. (1889), 14 App. Cas. 337.
question whether the law measured up to standards worked out in terms of philosophical conceptions external to the law itself had been the subject of extended examination by a string of legal philosophers working to elaborate and apply the Benthamite Utilitarian conception of the greatest happiness of the greatest number.\textsuperscript{13} But while the Benthamite method of defining the law as it is by reference to the command of the sovereign continued to be dominant in English legal writing, interest in Utilitarianism as a method of determining what the law ought to be as a constant stimulus to law reform had declined, though Dicey was exceptional in this respect.\textsuperscript{14} As Dicey showed,\textsuperscript{15} this was largely because the particular applications made of it by Bentham and his disciples, while in the first instance salutary in removing obsolete legal restraints on social and economic development, had been discredited when they were availed of to support inhumanitarian excesses of the middle classes, whom they had helped to liberate, against the lower classes who became increasingly enslaved to their operations. Consequently, when in the late nineteen fifties, Oxford’s H. L. A. Hart sought to rebut the charge from Harvard’s Lon L. Fuller that the English positivist tradition was associated with a lack of interest in questions about what the law ought to be, he found himself going back a long way in order to assemble the rebutting evidence.\textsuperscript{16}

2. Law as Adjustment to Socio-Legal Evolution

Pound’s work represented a break away in the direction of emphasis upon ethical questions. His most general definition of law, however, scarcely brings this out. The notion of law as ‘the regime of ordering human activities and adjusting human relations through the systematic application of the force of a politically organized society’\textsuperscript{17} retains the conception of law as something supported by political power which was central to the positivist approach — law

\textsuperscript{14} A. V. Dicey, Law and Opinion in England (London: MacMillan, 2nd ed., 1914) \textit{passim}.
\textsuperscript{15} \textit{Id.}, Lecture VI ff.
\textsuperscript{17} See, e.g., R. Pound, 1 Jurisprudence (St. Paul: West, 1959) 13.
as something imposed — of Bentham, the approach which had survived in English legal thought up to the time when Pound began to write. But it is one of the more specialised notions of law mentioned by Pound which he himself seems to have most occasion to use. In this sense law for Pound is “the aggregate of laws, the whole body of legal precepts which obtain in a given politically organized society”. But, Pound adds, “in a wider phase of this sense it may mean the body of authoritative grounds of, or guides to, judicial and administrative action, and so of prediction of such action, established or recognized in such a society including precepts, technique, and received ideals.”

Of the three concepts with which the passage last quoted concludes that of “received ideals” is, from the point of view of Pound’s relationship with the classical English writers, the most important. For it functions in some respects to replace the notion of common sense, itself left in most of the classical writers amorphous and conceived as spread amorphously through the precepts and techniques. We are now invited instead to isolate the ideals of law for study and consider their relationship to the precepts and techniques. Moreover, the notion that they are “received” raises the question of the sources from which they are received. In this connection, as in others, Pound envisages that there is involved a process of response to developing social situations, and hence change in or accretion to, the ideals over a period. As an example, in describing the degree of reception of English law in the early formative period of American law, Pound says that in some cases “the courts determined what was applicable and what was not by reference to an idealized picture of pioneer, rural America of our formative era and this picture became a received ideal”. Pound conceives an ideal as received when it has “acquired a certain fixity in the judicial and professional tradition”. But only, of course, a “certain” fixity, a fixity in degree, not necessarily a permanent fixity.

The examination of the ideals embodied in the law at any particular time in this way raised important questions about the

frames within which the more fundamental aspects of lawyers' thinking should be carried on. If a particular writer is in general satisfied with the sets of values represented by the law as it stands, it is natural for him to idealise the concept of "law" or "the law" itself as a focus in terms of which he organizes the demands he makes, and this is particularly so if he feels that set of values threatened by rising forces in society outside of the law. This the writer takes to be the position in which the classical writers found themselves. A reformer, on the other hand, while perhaps finding some values which he supports embodied in the law will want to see these kept under examination, will therefore want to emphasize the impermanence from his point of view in at least some of the values embodied in the law, and the frame or focus of his thinking about legal ideals is likely to be some concept of society and the way it develops rather than the law itself. This the writer takes to be Pound's position.

Thus, in calling upon jurists, as perhaps their most important task, to induce a consciousness in the judges of the role ideal pictures of the social and legal order play in the development of the law, Pound places the task of picturing the social order first. He describes the task as one of inducing a consciousness of the rôle of ideal pictures of the social and legal order both in decision and in declaring the law". 23

Pound's notion of the way society and law develop in relation to one another was well adapted to a very moderate reformism. In so far as there is a single notion in Pound's work, corresponding in the function it serves to the function served by common sense in the work of the classical English writers, it is the notion of civilisation. The function of the legislator or judge is the maintaining, furthering and transmitting of civilisation, and the function of the jurist is to develop approaches aiding the judge in the "maintaining, furthering, and transmitting of civilization". 24 Pound thought of the development of society as the development of civilisation, and ideally the development of law as going through corresponding phases of development as civilisation developed, as one means of social control rendering the successive stages through which civilisation developed effective and secure. Moreover, he considered that on the whole law had performed this function properly

23. Id., 958.
24. 1 Jurisprudence 287.
and effectively, with the result that the successive stages of the development of law do in fact reflect the successive stages of the development of civilisation. Further, the development of civilisation in a society is conceived as proceeding in a more or less continuous evolutionary fashion if a sufficiently broad time span is looked at, rather than in fits and starts with periods of reaction and revolution, and it is thought to be the same with law.

On this sort of approach it will be seen that the ideals embodied in the law at any particular time — the "received" ideals — will be expected to contain much that is of value at least for the next stage of the process of adaptation of law to the development of society. They may even contain large elements of permanent value if it is supposed that evolution takes place by building upon at least some achievements of the past which retain a degree of identity and are never wholly transformed. Pound did indeed make this supposition. He thought of law in a developed society as having proceeded through a number of successive stages defined as those of primitive law, strict law, equity and natural law, maturity of law and a current less easily defined fifth stage. The permanent contribution of primitive law was the idea of a peaceable ordering of the community, that of strict law the idea of certainty and uniformity in the ordering, that of the period of equity and natural law the idea of good faith and moral conduct attained by reason, and probably that of the state of maturity of law the idea of individual legal rights, with the fifth stage adding, though not as yet permanently securing, the idea of the importance of securing social interests in the sense of satisfying as much as possible of the sum total human demand. The development of law in these respects is seen as paralleling the development of community ideals as articulated by the community's social philosophers. Thus Pound relies on the philosopher William James for the idea that philosophical thinking in this area has proceeded through stages in which it was first supposed that the end of law was keeping the peace. Then it was asked, why keep the peace, and the answer seemed to be, for the purpose of maintaining the social order. But then the question was raised why maintain the social order, and the answer given that this

25. Id., 366.
26. Id., 405-6, 421.
27. Id., 406-7, 421.
28. Id., 427.
29. Id., 432.
makes division of labour possible and sets us free for individual self-assertion. But then the question was raised of the reason for supporting freedom and the answer given, because it is a strong human demand, and the desirable objective for social controls of any kind, law or others, is the maximum satisfaction of human wants.30

The particular form of evolutionary ethical theory which Pound espoused was well designed not only for a moderate reformism generally, but to enable him to have something of both worlds on the special issue of the most satisfactory frame for consideration of ideals for law. “Law” or “the law” could continue to serve for Pound as an object of veneration, “the law” as a gathering up of the achievements of the past in the ideals which it represented in his time, and “law”, thought of more generally, as representing in addition successful techniques for adaptation of the law to the requirements of further stages of societal development. Both because of their achievement in securing for society ideals developed in the past and because of their devising of means of continuing this, Pound felt a respect for the judges which almost matched in its inducement to feelings of satisfaction Anson’s notion of the law as a monument of common sense.31 At the same time in Pound’s theory, the veneration due to law, the law and the judge did not depend on any view of law as supporting one set of social ideals against another set. Indeed, his general statement of the objectives of the law of his time would be inconsistent with any such notion, since all demands made on the law from society are treated in a sense as of equal validity for the tasks which lawyers are called on to perform. The springs of the ideals which law is called on to secure are conceived as those of society generally, and the ideals of “the law” and “law” are in the first case a record of its success and in the second case a guarantee of the continuance of its success in the service of the ideals of society. “Law” and “Society” are both concepts thought to embody ideals with which the lawyer must be concerned and any conflict which has to be resolved is thought of as a disequilibrium which may be expected to be only temporary.

3. Law as the Struggle of “Right” to Consciousness
In the course of time Pound was to be found looking askance at

30. Id., 543-544.
newer legal writers just as the classical English writers had looked askance at him. In article and counter article\textsuperscript{32} he found himself in conflict with the realists, who had proliferated in the period of the first world war, the aftermath of war, and the onset of economic depression. All of these factors were conducive to producing dissatisfactions leading to a radicalism beyond Pound’s. Yet Pound’s work had done much to provide realists with jumping-off points, and in aspects of legal thinking on which the writer is here concentrating, many of them present similarities to Pound. Like him, in ways in which they differ from one another, most of them managed to reconcile a veneration for law\textsuperscript{33} and the legal profession with an insistence on the general societal springs of legal development. Further, in the ways in which they reinterpreted the relationship between law and society, they could be considered as reinterpreting Pound in the direction of what they made of developments particularly in psychological theory outside the law. Pound’s conception of law as a handmaiden, with however vital contribution to make in this capacity, to the general forces of social development readily lent itself to reinterpretation, in the light of the notions of psychological behaviourism, in the direction that law was to be thought of as a process of official response to environmental conditions. In Pound, the \textit{process} of legal decision appeared as a third meaning of law, the first it will be recalled being law as a regime of social control — the most general — and the second — the first more specialised one — as the ideals, precepts and techniques of the law. The third meaning was clearly the least important in Pound’s scheme, both in the amount of space which Pound gives to it in his major work on \textit{Jurisprudence} and in the function which it served.\textsuperscript{34} For Pound it was the application of the ideals, precepts and techniques.\textsuperscript{35} It was otherwise, however, with the realists and here the sharp differences emerge.

The degree of difference with Pound in this respect varies with the particular realist we are considering. Jerome Frank represents an

\textsuperscript{34} Pound’s fourth volume of \textit{Jurisprudence} has 503 pages devoted to the analysis of general juristic conceptions and 32 pages to “The Judicial Process in Action” (Chapter 20).
\textsuperscript{35} See the alternative title to Chapter 20 in 4 \textit{Jurisprudence} 5.
extreme of difference, since a particular judicial response is considered to be unique to the stimulus provided by the set of environmental conditions to which the judge is responding. Thus not only do the ideals, precepts and techniques of the law fail to explain the pattern in judicial responses, but, if the idea is carried to its logical conclusion, there is no such pattern anyhow. In Frank's case, the contrast is emphasized by the disrespect for the judges involved in the theory that their failure to recognize that they necessarily bear the responsibility for their own decisions, and their attempts to refer them instead to authorities binding upon them, is a kind of infantilism which Sigmund Freud's theories provide us with the materials for explaining. Oliphant may be taken as an example of a more "middle of the road" realist approach. Oliphant, like Frank, decries the influence of law in Pound's second sense on the course of decision, but nevertheless is prepared to find a pattern in the course of decision as it emerges. He demonstrated a greater respect for the judicial fraternity than Frank did, and believed that the judges' experience led them to react in orderly fashion to the different social situations with which they found themselves faced. Hence we can expect to explain the pattern of such decision by ourselves concentrating on the study of the social sciences, and looking for the principles of judicial action there. The later history of realism since its heyday about the time of the depression seems to consist in a swing to the left by some jurimetricians and a swing to the right by perhaps realism's most influential exponent, Llewellyn.

In some current jurimetical writing the judge's responses are measured in terms of the predisposing factors arising out of the judge's own personal history in relation to the categories of social situation with which the judge is faced in litigation over a period. When the results for the different judges of a court or judicial system are correlated, what is seen to emerge is not any set of general principles of judicial action but rather a profile of the particular court or judicial system. The method of procedure, moreover, discounts the possibility of arriving at a correlation

between decisions and the principles which purport to be applied in the reasons accompanying a decision. The judge continues to be treated, in the phrase used in criticism of early realism, like Pavlov's dog.

Matters took a different course in the Chicago of Karl Llewellyn, who, in the respects most important for the present topic, is more like Pound than many other realists. Whether this was true of Llewellyn throughout his writing life is a controversial matter which the writer does not presume to be able to settle. In "The Bramble Bush" he had suggested the overriding importance for investigation of what judges do in relation to what they say in support of what they do, and elsewhere he attacked the biblical statement that "In the beginning was the Word" by claiming that in the beginning was not a word but a doing. Yet Llewellyn claimed that these statements were reconcilable in their context with attaching particular importance to judicial pinning down of ideals in precepts, and particularly in the techniques by which they do it. Technique was a major object of his inquiry in his later work. He contrasted in this respect the "Grand Style", which he approved, and the "Formal Style", which he deprecated. The former was seen to involve a very free use of precedent, the latter a much narrower adherence to the reasons given in the precedents. The former was seen as characteristic of the golden age of Lord Mansfield and others, the latter as characteristic, with conspicuous exceptions among individuals, of the intervening period up to the relatively recent past. But recently the judges, in Llewellyn's view, have been recapturing the Grand Style if at first largely on the unconscious level. What he saw, therefore, as one of his own immediate missions was to restore judicial confidence by convincing them that they were doing better than they or others knew — that the facts were "joyous" — and to foster the adoption of the Grand Style among the judiciary at the conscious level.

The insistence on the actuality of a free use of precedent by the judiciary, as well as the insistence on the importance of the

41. 44 Harvard L. Rev. 1222.
43. Id., 38-40.
44. See, e.g., the quotation from T. R. Powell in *The Bramble Bush* 49.
distinction between the conscious and the unconscious, preserves in
Llewellyn's work important lessons of realist thinking. But what
rendered him able to escape from the confines of the narrow focus
of attention on judicial operations as distinct from judicial thought,
which extreme realist thinking might have suggested, was
particularly the manner in which he married the modern
psychological notion of the unconscious with his own variety of
traditional ethical intuitionism. This comes out especially in a
consideration of Llewellyn's reasons for supporting the use of the
technique of the Grand Style. For him its usefulness consisted in the
manner in which it enabled the judges to work their way towards
principles which could not in the first instance be grasped and
articulated in a general formulation, although the result which
they were ultimately found to dictate might be felt to be the right
result in a prior series of individual decisions. But to a large degree
he believed that once success was achieved in articulating at the
conscious level a principle which had been exerting its effect in
decisions at the unconscious level, it could be seen to be right by a
sort of flash of inspiration.

In this way interest not only in techniques of argument leading to
decision, and in the struggle for the realisation of ideals to be
articulated in precepts by this means, but also in the ideal content of
some precepts embodied in the law as the end product of a
successful struggle, was re-established from a realist point of view.
Llewellyn continued to think of some factors in individual judicial
decisions as unrelated to principles which might turn out to be of
lasting value — “equities of the fireside”. But the notion that
some factors in response were in terms of intuiting principles — at
first on the unconscious level but then consciously at the end of a
struggle — was the vehicle of a return to moderate reformism. On
this basis the current achievements of the legal profession were
treated with some enthusiasm, both on the level of technique and on
the level of achieved ideals. Llewellyn wrote a hymn to the common

46. “Response by the court to the need — but not as yet with understanding of its
meaning” Cases and Materials on the Law of Sales (Chicago: Callaghan, 1930)
342.
47. “[T]he certainty in question is that certainty after the event which makes
ordinary men and lawyers recognize as soon as they see the result that however
hard it has been to reach, it is the right result” (Op. cit. n. 45, 185-86).
48. Id., 270. Cf. id., 157. Also called “‘the accidental issues and needs of the
individual case” in K. N. Llewellyn and E. A. Hoebel, The Cheyenne Way
(Norman: University of Oklahoma Press 1941) 314.
law and even a poem about judicial *obiter dicta*, which might in his view come closer to the principle which would ultimately be seen to be right than the principle on which a case purported to be decided — "Words may be fragrant as they pass." In one respect, Llewellyn’s moderate reformism was more “practical” than Pound’s had been. Llewellyn is said to have been fond of saying, indeed, that his Jurisprudence was the most practical subject in the law course. In the most interesting and urgent areas of legal studies involving the adjustment of law to current social conditions, operation of Pound’s scheme of analysis on any thoroughgoing level called for the use of a complex intellectual apparatus. Any attempt to decide a case on the basis of which alternative decision would best further the sum total of human demand to the greatest extent possible is obviously a large undertaking. And while Pound was prepared to offer a group of conceptions which would enable us to work out a scheme of interests to be subserved and eliminate the necessity of approaching this problem *ad hoc* in the individual case, he was not prepared to apply that method himself to present us with the scheme of interests appropriate to the fifth stage of law through which he conceived us to be now passing. He thought this to be premature at the time he wrote. We are called on, therefore, to make a variety of comprehensive sociological and philosophical inquiries for ourselves to follow Pound’s prescriptions and to many this task, though challenging, may appear to be intractable for everyday purposes. Llewellyn’s approach is calculated to emphasize more the value to be gained by examining, though by no means exclusively, the traditional and available legal authorities and struggling to bring to our own consciousness the principles which, with the experience they provide for us and the suggestions they offer, our own intuition will tell us are right. In this way we may hope to train ourselves in arriving at predictions of future decision appropriate to the lawyer’s task — which Llewellyn contrasts with those of the more general social sciences addressed to the comfortable sweep of the decades — of directing ourselves to what

49. See *supra* n. 33.
51. Ibid.
52. Cf. "I must come up with tools of analysis which any thinking man of law can understand both in their nature and their use, and I must come out with results in words which he can not only understand but put to work" *The Common Law Tradition* 516.
will happen in a case next Thursday. In this emphasis on study of the traditional materials, Llewellyn was of course in contrast not only with Pound, but with earlier realists as well. It is said that in the first flush of realism at Yale, its exponents were rarely found in the law school at all. They were, for example, out in the New Haven highways examining the psychological responses of motorists to the legal phenomenon of traffic lights.

4. Law as the Articulation of Reason

What Llewellyn did in Chicago with the weapon of traditional ethical intuitionism, Lon L. Fuller did in Harvard with the weapon of traditional ethical rationalism. For Fuller as for the realists law is a process. But this starting point does not involve for Fuller a long process of subsequent reasoning to establish the importance in law of legal ideals. The notion of ideals as integral to law is inherent in his notion of the process itself from the beginning. In their differing notions of what is involved in a "process", twentieth century American legal thinkers reflect the division in Western intellectual tradition apparent as long ago as in the time of the early Greek philosophers. The earlier realists, though this perhaps emerges more clearly in the later writings of Lasswell and McDougal of Yale when an analysis of the notion came to be used as one method of analysing legal situations, are in the tradition stemming from Heraclitus. According to this tradition, reality is flux, and if we see in its more durable features more than patterns in the flux, we are misled. Fuller, on the other hand, belongs to the tradition of Socrates, Plato and Aristotle. According to this tradition, a process is a striving towards perfection which alone makes the process intelligible. While it has been remarked that in the case of inanimate objects this notion is to many people implausible — the notion that there are no perfect triangles, for example, but that the imperfect ones we see would be perfect, if they could, seems queer — the same author has remarked that in the field of human affairs it has very much greater plausibility. It is human affairs with which

54. The Common Law Tradition 6 and 16.
55. Fuller’s creature Foster uses this term in Problems of Jurisprudence (Brooklyn: Foundation Press, 1949) 82.
58. John Burnet, Greek Philosophy Part I — Thales to Plato (1924 ed.) 156.
Fuller is concerned and he has devoted himself to demonstrating that this approach is revealing and inspirational not only in relation to law, but in other human intellectual "enterprises" — the term he prefers to "process" — as well.

More specifically, Fuller sees law as a co-operative human enterprise directed at a reasoned harmony of human relations. Both because of the appeal in this concept to the idea of co-operation and because of the appeal to human reason, Fuller's thinking shares with Llewellyn's those elements which we have called, in Llewellyn's case, practical features. In the lawyer's task of predicting judicial decision, he will be guided in Fuller's view by the assumption, unless he has special grounds for the contrary assumption in a particular case, that the judge will be guided by what justice demands. And since the student or lawyer shares a common humanity, and hence a common human reason, with the judge, he has prospects of working out in advance what justice does demand. In doing so, he will certainly look for guidance to the traditional legal authorities as he would in Llewellyn's approach for, as Fuller puts it, the development of human reason demands attention to what man has made of himself at the present stage, and therefore to what the human legal enterprise has made of itself. But a relatively free use of the authorities is demanded in Fuller's approach as in Llewellyn's, for the flux of judicial decision is only seen as intelligible at all in terms of the objects of striving, which the student must discern in the light of the struggle towards reason which characterises the enterprise.

Fuller's work represents a high-water mark in a long period of moderate reformism, in its presentation of a concept of "law" which contains within itself inherently by its nature social ideals to which people wish to commit themselves and social ideals, moreover, conceived as being as broad as those of our common humanity. The evolutionary aspect of Pound's thought is preserved in the notion of law as one process of human realisation of its own true or higher nature, without the invitation implicit in Pound's thought to think of the evolution of law as a response to social demands external to the law itself, an invitation accepted by the

60. The Law in Quest of Itself (Chicago: Northwestern University Press 1940) 2-3.
61. Problems of Jurisprudence 85.
63. Id., 386-7, 392.
more extreme realists in conceiving of the environment to which legal activity responds as causally more important in legal outcomes than the criteria in terms of which lawyers were traditionally supposed to respond. In Fuller’s concept of law, the American ideal of a government of laws and not of man is protected against the notion that the government of law involves its support of the “establishment” against progress. Fuller’s concept gave a theoretical foundation for the statement one heard in Harvard that we cannot understand what the law is unless we know what the law ought to be. And in assisting understanding of what the law is by his discussion and writing, Fuller encourages the student to exercise care to distinguish his own contribution to its interpretation in the light of what it ought to be from those in official positions. The enterprise of law develops in the constant re-telling of the story of its development, with no authentic official version.  

Insofar as we can characterise “new line” legal writing as distinct from “old line”, as spoken of by Erwin Griswold, it is probably in terms of what would be suggested as an appropriate approach by the inspirational features common to the approaches of those writers we have taken as representative of a long and relatively continuous moderate reformism, with variations in style and approach represented by their differences. Most legal writing, at any rate about the domestic common law in a particular common law country, would seem to fit into such a scheme of analysis. Yet it may be that in terms of such a characterisation we will in the course of time come to be as nostalgic about “new line” writing as Griswold was about “old line” writing in his remark mentioned earlier. One detects in general community thinking at the present time, presenting itself as a demand for progress, an association of “law” with the “establishment” and an appeal to what is demanded by society or humanity in opposition to what are thought to be the demands of the law. In this kind of thinking law seems to be regarded simply as binding precepts, and as constituting therefore chains which require to be broken if the community is to break free of the trammels of the past. The “received ideals” in Pound’s second meaning of law and the techniques for their adaptation, elements in it to which we have seen other moderate reformists among jurists attached equal importance though in different formulations, are on the approach now under consideration.

64. The Law in Quest of Itself 138-140.
excluded. Hence law is left, as it were, with little to say for itself, for the features of it which were seen by the writers we have discussed were those which were thought by them to justify it—not because of their theoretically binding quality but in terms of their real value for societal development. Nowadays, community thinking tends to adopt society as a frame of reference for formulating ideals for law, which must be implemented by a rapid transformation of it, rather than expecting to find ideals in law commanding respect. This is a challenge to our fundamental frames of thinking, calling for critical re-appraisal of the type of legal thinking we have been examining through this historical sketch as well as some critical appraisal of the type of thinking which is struggling to replace it.

II. A Critical Sketch

In the foregoing the writer has purported to detect correlations between the work of particular writers, taken as representatives of leaders of legal thought especially in the present century, and particular kinds of traditional ethical theory. Thus English positivism was seen, in its origins at any rate, to be associated with Utilitarianism, Pound's sociological jurisprudence with evolutionary ethics, Llewellyn's realism with intuitionism in ethics, and Fuller's natural law approach with rationalism in ethics. This is only a matter of degree in the case of each of the writers concerned. It would not be difficult to detect in each case signs of the alternative approaches espoused by others of the writers taken, for example, to detect some reliance on the notion of the unfolding progress characteristic of evolutionary ethics in Fuller. But it is believed, nevertheless, that if one were to go beyond these writers to other examples of the schools of which they are representative, one would find that the particular kind of ethical association which we have detected in individual writers of a school persists in others of the same school to a degree enabling us to say that it is dominant. Thus, for example, evolutionary ethical theory is dominant in modern sociological jurisprudence, being more strongly apparent in Ehrlich, for example, than it is in Pound. The idea of an intuitive response to a social situation yielding a more satisfactory result for the judge than a slavish attention to doctrine is by no means

confined to Llewellyn among the realists. Bentham’s Utilitarianism communicated itself to a number of positivist legal thinkers in England, especially to those who closely followed him like John Austin, and to later ones as well. With natural law thinkers like Fuller the connection with rationalism scarcely needs to be argued, since the connection of this kind of thinking about law and ethical rationalism is explicit.

Since these thinkers were in the central direction of their interests legal theorists rather than ethical theorists, they tended to devote more attention to carrying out their legal thinking within these ethical frames, rather than to justifying the ethical frames themselves. They saw urgent problems for the development of law to which they wished in their writings to make an immediate contribution, and one does not concentrate one’s attention on the most general problems of navigation when the ship is sinking. Insofar as they sought to justify their general approaches, it was more in terms of their usefulness for achieving objectives in the improvement of the law rather than in terms of their theoretical validity. But at a time like the present, when more moderate approaches to law reform are the subject of fundamental radical questioning, any vulnerability which these approaches have to theoretical philosophical attack becomes of major importance.

1. Criticisms of Ethical Rationalism

Because the ethical frames in question are of a traditional character, and because ethical matters are traditionally the subject of philosophical division and mutual controversy, each standard type of ethical approach finds itself the subject of standard traditional criticisms. Beginning with the point of view of which we have taken Fuller as representative, we may ask: What are the standard criticisms of rationalism? As put by a philosopher influential in the writer’s University, they develop along the following lines. We examine the claims of reason to provide us with ideals commanding our allegiance by examining how and why it is we do reason. In the area with which we are here concerned, it is claimed that we reason that we should support a certain course of conduct X (whether by lawgivers or private individuals), because it has the character Y. Then why, the reasoning goes on, do we support Y? We may find ourselves answering, because activities characterised by Y have the character Z. But it is obvious, the argument goes on, that at some point the chain of reasons must stop. And at this point, it is claimed,
the reasoner is saying no more than that, if we take Z to be the point where the reasons stop, he supports Y because he is a Z sort of person, because he lives in a certain way, supports this kind of objective.66

It is little different, the argument proceeds, if we think of the reasoning as proceeding not within a single mind, but between two or more people by way of argument and persuasion. There are conceived to be limits to persuasion and discussion, which can only satisfactorily take place under conditions ‘where there are common ways of living, common demands arising from communicating activities’.67 The conclusion of the reasoning in this case is the joint assertion of such a common demand and the observation of its relationship to the proposed course of conduct about which the argument began.

In the criticism of rationalism for which the preceding account of features of the actual reasoning process is designed to provide a basis, it is claimed that rationalism in the first place attempts to obtain a dialectical advantage by ignoring the multiplicity of objectives, ways of living, or movements, which provide the sources of norms of conduct for different people and groups. When we tell a person that some action is ultimately demanded by reason, we represent it as favouring what he supports as well as what we support. Even if he remains uncertain about this, we at least confuse his mind by leading it away from the point that reasoning can justify itself only in terms of some source of norms, that source being an objective or complex of objectives, which will only appeal to him if he happens to share it.68 The argument recognizes, however, that, in its refined philosophical form as distinct from its use in popular discussion, rationalism seeks to grapple with the problem of finding a source of norms which must necessarily appeal to all, and the argument then seeks to rebut the rationalist claims in this respect.

Rationalism is seen as claiming that, while men obviously seek conflicting objectives at times, these demands can be distinguished from those constituting man’s true, essential, or higher nature, and the existence of the contingent or lower demands may even be explained as failure to exercise properly the reasoning powers with which man is equipped to deduce an appropriate course of action.

67. *Id.*, 247.
68. *Cf. id.*, 250.
from this true nature. Hence arose Bentham's jibe against this kind of thinking that according to it, the evil man is just a man who asserts falsehoods.\(^{69}\) The purported rebuttal of rationalist claims runs that in fact the conflicts of objectives between different movements among human beings are real like any other human phenomenon and the distinction sought to be made can only be supported by the assertion of higher and lower levels of reality — on the basis of a distinction between a metaphysical and a physical world. In the Greek writing, in which rationalism as far as our knowledge goes originated, it is so justified. The striving, moving world of Fuller's "enterprises" is in Socratic theory not being, only becoming — the real world of being is the ideal world towards which the striving takes place, the world of forms with its organizing principle "the form of the Good".\(^{70}\)

In the criticism of rationalism which we are here following through, the metaphysical solution to the problem of the reconciliation of human conflict with a universal source of norms in universal human nature, is asserted to be philosophically unsound. An account could only be given of the relationship between the world of becoming and the world of being if they could be regarded as existing together in a medium which embraces both of them, but to posit such a medium would break down the distinction between the two worlds and envisage their existence in the same way, in the way that is involved in existence in that single medium. The Socratic position is therefore considered to be inherently contradictory and unintelligible. The forms themselves are likewise conceived to be on this view unintelligible, pure universals the function of which is to enable us to assert general features of things in the physical world, but about which themselves nothing can be consistently asserted since this would contradict their nature by treating them as things to be characterised. No explanation can be given of them. Thus it is claimed that Socrates never explains "the form of the Good" except by vague metaphor, and falls back upon the opinion of right thinking men in the attempt to give it content.\(^{71}\)

Colour is lent to this kind of criticism by features of Fuller's work in particular. Fuller describes the ideal towards which the law is considered to be a striving in a variety of ways. It is seen in a modest, but not complete, formulation as "the basic requirements

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69. Referred to id., 228.
70. Id., 211.
71. Ibid.
of social living’ and more ambitiously as ‘‘the fullest realisation of human powers’’. It is seen again as ‘‘a rational human existence’’ or ‘‘reasoned harmony’’ based on ‘‘human nature itself’’. The demands of human nature are articulated at the basic level in the principle of ‘‘the common need’’ which means ‘‘the common need men would perceive and feel if they knew the facts’’. But to tell us that an ideal is the ‘‘basic requirements of social living’’ tells us nothing of what the basic requirements of social living are in the sense of describing them in terms of any content of empirical fact. Nor are we enlightened by the use of the phrase ‘‘the fullest realisation of human powers’’ as to what a physical world in which this realisation occurred would be like, nor what a ‘‘rational human existence’’ would be like, or a ‘‘reasoned harmony’’ based on human nature itself, nor even how we are to recognize when we have achieved the common need. And what men would perceive and feel as the common need if they knew the facts is certainly something we could never find out on any experimental basis, and therefore whether if the experiments could be carried out a common need would be perceived at all. Fuller in fact does not seek to give any of these general ideas this kind of concrete content in any general way, and that this cannot be done is put down to the deficiencies of the current state of our understanding. Fuller does provide, in the elaborate hypothetical example of the ruler named Rex, an account of what a failure to measure up to a minimum morality of law would be like. But all that appears to emerge is the proposition that minimally laws must be universal, consistent and intelligible in statement and application, which leaves the problem of delineating the substantive content of ideal law untouched.

To these criticisms it might be expected that Fuller would make the answer that the writer has been presenting criticisms of a view which is in fact not his. He writes in one place that ‘‘[w]e know in advance that we cannot reach our goal of a social order founded solely on reason. But we know equally well that it is impossible to

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73. *Id.*, 9.
74. *The Law in Quest of Itself* 3.
77. *Id.*, 699.
set in advance a stopping place short of our goal beyond which all effort will be in vain. The illusion of natural law has at least this presumption in its favor, that it liberates the energies of men's minds and allows them to accomplish as much as they can.”  

We may answer, however, that while it is one thing to set our sights on a definite goal which is too high for complete achievement in the hope of reaching some degree of approximation to it, it is quite another to postulate a goal which must remain forever undefined because the notion of human reason being able to work it out is theoretically unsound. If Fuller thinks of natural law as an illusion in this sense, but useful in liberating energies, the restrictions which this view would impose on clear scholarly communication would have to be offset against whatever advantages might accrue in other directions. In another respect too, Fuller might be expected to claim that our criticisms are misdirected, for he treats it as a “mistake of the older natural law school”, and of some modern scholars, to reach “abstract resolutions on ends and then to trace out the implications of those resolutions for the various branches of the law”.

Fuller himself regards the ideal world of values and the world of fact as inextricably intertwined in a single moving reality. To this we may reply that it is no answer to the problem of how facts and values conceived in this way could be related to one another in a single world, merely to insist that they do exist together. The problem of rendering intelligible the notion that the moving reality involves such a relationship remains unsolved.

2. Criticisms of Ethical Intuitionism

To some moral philosophers of the past at all events, it has seemed that the intuitionism on which Llewellyn relies — the idea of a principle which may be difficult to sweat into conscious clarity, but is immediately seen to be right when expressed — is indefensible in the same way as rationalism, but more obviously so. Bentham says: “The various systems that have been formed concerning the standard of right and wrong, may all be reduced to the principle of sympathy and antipathy. One account may serve for all of them.

79. The Law in Quest of Itself 110.
81. See, e.g., The Cheyenne Way 330 and his reference to “rules which make sense on their face” (The Common Law Tradition 38).
They consist all of them in so many contrivances for avoiding the obligation of appealing to any external standard, and for prevailing upon the reader to accept the author’s sentiment or opinion as a reason for itself.\textsuperscript{82} While this criticism may apply equally to rationalism and intuitionism, at least in the case of rationalism the author’s sentiment seeks to justify itself by reference to general human nature and it is only at the end of a long dispute with the rationalist that one might come to the conclusion that reason in matters of moral argument can only function in relation to some demand or “sentiment” personal to the author of the argument or shared between himself and those with whom he is arguing. But in the case of the intuitionist the idea that some kinds of convictions of rightness are a guarantee of their own correctness tends to be put forward as dogma, and it seems to be so in Llewellyn’s case. And any attempt to break down the distinction between conviction and truth or correctness can only be obscuring philosophically.

The moral philosopher Sidgwick does indeed distinguish between dogmatic and philosophical intuitionism, but insofar as philosophical justifications of intuitionism have been attempted they have generally involved the same kind of appeal to metaphysics into which rationalism has in its classical versions been driven, with the same kind of resulting philosophical problems of establishing relationships between different worlds. Thus the intuitionist Butler\textsuperscript{83} set up a special faculty of the mind described as conscience, the decrees of which were supposed to possess a higher authority than the decrees of the ordinary passions. But since conscience was disinterested by its nature and passions interested by their nature, demonstration of how one could move to influence the other presented a seemingly insoluble problem. Butler purported to solve it by the conception of a self-love which mediated between conscience and the passions, seeking the happiness of the mind through reconciling the demands of the passions for their external objectives with the demands of duty laid down by conscience. But this merely substitutes the problem of how three quite different worlds can be related to one another for the problem of finding how two can.


\textsuperscript{83} Joseph Butler, Fifteen Sermons (1726).
It seems questionable whether Llewellyn is in any better position by positing special authority in terms of "rightness" for those decrees which have been arrived at by a process in which the assertion of a principle at the conscious level is the outcome of a process in which the principle, as it were, fights its way up from the unconscious. The fact that such a principle ultimately gets the conscious seal of approval may indicate that it reconciles for the time being various demands within the personality of the individual legal reasoner or the group where, as in the case of the development in a line of judicial authority, it is a group effort. But there seems nothing in Freud's theories which would suggest that there is here involved any more than a perhaps very temporary adjustment of conflict, which could break out again when factors of which the person or group was unaware at any level came to exert their influence, when the "right" principle might no longer seem "right" to the very same people in terms of their very same demands.

3. Criticisms of Ethical Utilitarianism

If, however, we find substance in Bentham's criticisms of intuitionism, it does not necessarily follow that his own Utilitarianism, influential in positivist legal thought as we have indicated, is in any better position, despite its claims to find an external standard guaranteeing the rightness of a course of action, legal or otherwise. "What one expects to find in a principle", Bentham said, "is something that points out some external consideration as a means of warranting and guiding the internal sentiments of approbation and disapprobation." But it has seemed to some that the only way of "warranting" or "guiding" our internal sentiments is by appealing to others of our internal sentiments, even if in terms of pointing out some external situation which has an appeal to those other internal sentiments. Nor does it seem that utilitarianism, if thought of as reducible to a kind of intuitionism if the validity of this criticism of it is accepted, is any more defensible in that form than other kinds of intuitionism. As pointed out earlier, the utilitarian criterion for the rightness of actions is the contribution of a projected course of conduct, including a projected legislative act, to "the greatest happiness of

85. Anderson op. cit. 228-30.
the greatest number’’. But the objectives of a sentiment so described turn out not even to be intelligible. ‘‘Happiness’’ or ‘‘pleasure’’, as Bentham’s catalogue of pleasures shows,\(^8\) turns out to be no more than what we like or want and the mere enumeration of wanted things gives us no means of estimating the relative worth of different possible courses of action over others, of working out a total of pleasure involved in one possible course of action as compared with the total involved in another.\(^8\) Economists have found it possible indeed to plot the relative keenness of demands in particular individuals by reference to what they do in different situations, and likewise to estimate the relative keenness of demands among particular individuals where it is possible to observe their interactions in some market. But this progress in investigation was achieved only by abandoning the Benthamite notion of quantities of pleasure in the abstract with which economists began, and there is no total human market which could serve to reinstate in intelligible terms the idea of making any general estimate of the quantities of pleasure attached to particular kinds of human activity.

4. **Criticisms of Evolutionary Ethics**

This line of criticism is not only important in relation to the ethical frame of some of the thinking of legal positivism. It also sets problems for Pound’s hypothesis about the fundamental objectives of the fifth and current stage in socio-legal evolution. Pound states this to be “seeking to satisfy the maximum of the whole scheme of human desires or expectations (or wants, or demands) so far as it may be done through the legal order without too much sacrifice”.\(^8\) In another of his formulations the new object of social control is to “reconcile these desires, or wants, so far as we can, so as to secure as much of the totality of them as we can”.\(^8\) Again, he puts it that we must satisfy “as much of” human demand as we can satisfy with a minimum of friction and waste, with “the least sacrifice of the totality of interests”.\(^9\) There seem to be assumptions made in much of this language that a general calculus of human pleasures is

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86. Given by Bentham in *op. cit. chapter 5*, 56.
87. Anderson *op. cit.* 231.
88. 1 *Jurisprudence* 543.
89. *Id.*, 544.
90. 3 *Jurisprudence* 334.
an intelligible notion, in which case Pound’s approach to current problems may be vulnerable to the criticisms advanced against Bentham’s ethics on general theoretical grounds, to which added colour is lent by historical trends in economic theory. If so, Pound is chasing a chimaera.

It is no answer to this criticism to say that society is itself a market in which the respective keenness of different human demands, at any rate in that society, is demonstrated by the actual results of their interaction. If in this sense society does serve as a market in the way a market in the more ordinary sense serves the purposes of economic investigation, it is not, nevertheless, the sort of market which will serve as a criterion for the rightness either of conduct or measures of social regulation. On such a criterion, the notion of society as it ought to be would be amalgamated with that of society as it is, and this would satisfy few ethical thinkers and certainly not Pound himself. Nor is it what Pound appears to envisage. The criterion is not society as we have it, but rather the society which is coming to be — the society in which changes taking place now will issue in some degree of equilibrium. It may be plausible to suppose that we could, with sufficient information about current casual factors and the field in which they are operating, arrive at a prediction of the features of that equilibrium situation which might serve as an incentive to us to throw our weight into the cause of advancing the future social and legislative progress. For this, however, to be regarded as necessarily indicating to us what is right, it would be necessary for us to think that what will emerge in the near future will necessarily be better than what exists now. This is an assumption in fact made by evolutionary ethical theory, which we believe to be represented by Pound’s general approach, and therefore calls for examination here.

Any theory of ethics as evolutionary would appear to bear a heavy onus of proof in the light of what we seem actually to observe in the study of history generally, especially if we take broad time spans. What we seem to observe in the history of civilisations is periods of barbarism intervening between periods of culture, stages of growth and stages of decay. Pound, in explaining the stages of development of law, himself finds parallel stages of growth in laws belonging to different periods of human history in general, which we would perhaps think of as periods of civilisation as opposed to barbarism. The logical implication is that in the case of the older ones, as distinct from our present one, periods of growth were
succeeded by stages of decay or disruption, and indeed the reason why Pound is only able to speculate cautiously about the next stage of our law, is that disruption of the older ones occurred before the stage of maturity of law had been transcended. Any historical process, social or otherwise, has on any scientific approach a beginning and an end and the notion of a permanently improving social process, in which each stage is a necessary introduction to the next stage and has a subordinate goodness on that account, is unhistorical and unscientific. The very fact that the idea which Pound puts forward as his goal of law for our own era as a logical development from the previous stages, and yet that goal is substantially in the Utilitarian terms of Bentham so highly influential one hundred and fifty years ago, calls attention to the dubious account of actual cultural history by which it is sought to give the notion of evolution plausibility. Nor is Pound’s notion of the goal as achievement of a sum or average of societal demands any invention even of Bentham. The utilitarian idea appears fully fledged in writers prior to Bentham, and the general notion appears in the position taken by Glaucon in Plato’s Republic.

The unscientific character of evolutionary ethical doctrine is obscured in the minds of some by the supposition that it is connected with the views of that respected nineteenth century innovator in the field of the natural sciences, Charles Darwin. Yet ultimately the evolutionary ethical approach is opposed to Darwin’s and in line with the approaches of earlier thinkers, with antiquarian prototypes in the theories of Parmenides, the father of materialism, and Anaxagoras, but stemming more immediately in the modern period from Hegel, especially through Marx. In Darwin’s approach, the relationship between a thing and its environment is not absolutely fixed, and in any struggle it is logically just as possible that the environment will give way and not the thing environed, or vice versa. On the other hand, what is characteristic of evolutionary ethics in its own historical development is the supposition of a dualism between Man and Nature, in which overwhelming forces are supposed to be at work on one side or the other — the side which represents the true reality while that of the other is only dependent. The contest between the Hegelians and the Marxists in the general

philosophical area is about the question on which side the overwhelming forces lie.

In Hegelianism history is seen as the development of universal spirit towards the rationality which is its essential nature, through stages in each of which contradictions are solved by the dialectical process of thesis, antithesis and synthesis, at successively higher levels of rationality. Spirit, or mind, has a reconciling mission, though the reconciliations which it effects are not seen as between conflicts existing in things independent of mind, but as conflicts of its own. It is the fundamental stuff of reality, its movements are the movements of the totality. Such a view gains plausibility from the thinking of earlier modern philosophers like Berkeley, who took the view that the mind knows its own ideas and that the reality observed by the mind is therefore "thought", and Descartes, for whom the existence of the mind in turn is seen in its having thoughts. The inner identity of the subject and object of thought suggested by such approaches lends itself to the notion of the total reality as a developing stream of consciousness. Yet to such a view we may oppose the consideration that this sort of tenet really confuses the process of thinking with objects of thought by exploiting an ambiguity in popular language in this regard. If it were really true that what the mind knows is only in the mind itself, this would equally apply to these theories, which could be regarded as having no more objective truth than anything else the mind knows, and the logical outcome would be scepticism about the possibility of knowing anything at all. In practice, theorists of this kind do not draw the sceptical conclusion, but what does happen in practice is that consideration of the mind in terms of "thoughts" distracts attention from questions of what it actually is that does the thinking.93 A theory of minds as one kind of thing in the ordinary world of experience interacting with other kinds of things according to regular laws of the same kind as are exhibited in the interactions of non-mental physical things is exhibited, by contrast with Hegel, in Freud. In this respect Freud's approach is like Darwin's and not like the doctrines of evolutionary ethics.

In Marxist thought, in contrast to Hegelian, the fundamental reality is in Matter rather than in Mind, and it is in the material world that the overwhelming forces of evolution lie. "[T]he ideal

[world] is nothing else than the material world reflected by the human mind and translated into forms of thought".\textsuperscript{94} Seeing idealism and materialism as the two fundamental tendencies in philosophy, the Marxist rejects the subjectivism of the former, in which bodies can only be sensations sprung from the mind, and falls back on the objectivity of fundamental matter. But the Hegelian notion of evolution and especially societal evolution through stages, characterised by the dialectical process posited by Hegel, is retained. It is a doctrine of dialectical materialism as opposed to dialectical idealism. Therefore it shares with Hegelianism the notion of a moving totality, and attaches features to that totality which are more plausibly attached to it when the totality is thought of as fundamentally mental than when it is thought of as fundamentally material in the Marxist fashion. Reality is perceived as developing through a process of logic, proposition (thesis) and counter proposition (antithesis) followed by solution (synthesis) until the argument breaks out again at the next higher stage. Contradictions thus occur in the material world itself, leaving the inquirers into it without the tests which may ordinarily be employed to establish who is right and who is wrong in arguments in the ordinary sense between people. Ultimately this must lead, like the older established version of Hegelianism, to scepticism which, however, the Marxist does not embrace.\textsuperscript{95} But even if he does not, the effect is to subvert the scientific faith in a reality in which the regular operation of cause and effect permit the discovery of scientific principles. Moreover, the Marxist must attribute a design or purpose to reality which again would be more plausible if we supposed it to be mental after the manner of the older Hegelians. The Marxist Kautsky claims that "it was the materialist conception of history which has first completely deposed the moral ideal as the directing factor of social evolution, and has taught us to deduce our social aims solely from the knowledge of the material foundations".\textsuperscript{96} Clearly, social aims can only be "deduced" from the material foundations if the material foundations have their own aims.\textsuperscript{97} In fact in spite of Marx’s materialism man and society are in practice the subject of

\textsuperscript{94} Karl Marx, preface to the second edition of \textit{Capital}, quoted Anderson \textit{op. cit.} 302.
\textsuperscript{95} Cf. Anderson \textit{op. cit.} 306-311.
\textsuperscript{97} Anderson \textit{op. cit.} 321.
his history and the rationalising of things is identified as their "coming to consciousness".

But, whatever may be said about the consistency with which Hegel and Marx adhere to their opposing views of the fundamental nature of the moving totality, the major point of criticism of evolutionary ethics in general must be made in relation to the assumption which they explicitly share — the assumption of a totality of things moving inevitably in the direction of rationality. In ordinary language, when we distinguish change from what changes we are clearly not thinking of what changes as something eternal. It is only if we think of the substance of change, what changes, as itself a pattern of processes that we can indeed think of "it" changing. We can then think of the discontinuance of some processes which do not affect the pattern as we are envisaging it, but what we think of as in this sense the subject of change we know will also be a stage in the changes of some other pattern. We not only do not have to hypothesise some substance as the subject of all changes, but to do so would appear to involve us in insoluble problems to explain how changes could be attributed to it. In this respect, evolutionary ethics is really in the tradition stemming from Socrates, Plato and Aristotle in its attitude to change and opposed to the Heraclitean. And in this respect it appears to be subject to those philosophical criticisms which we have already put forward in criticism of the older forms of rationalism. It is a doctrine of higher level reality posing insoluble problems in regard to the manner in which the higher level of reality is to be conceived as related to what actually we observe taking place.

**III. Some Conclusions**

1. *Dangers in the Use of "Society" as a Frame of Reference for Legal Ideals*

The writer has presented the foregoing sketches in the belief that the matters canvassed have relevance to current thinking about ideals for law. At the conclusion of the first section it was suggested that current community thinking tends to adopt society as a frame of reference for formulating ideals for law, which must be implemented by a rapid transformation of it, rather than expecting to find ideals in law commanding respect. In the writer's experience, this is true of current law students, and it seems to make no difference in this respect whether they are first year students,
coming to the subject with ideas previously formed, or final year students with a general familiarity with the basic branches of the law. If a class is considering material of some judge or author who appeals for support to the law considered as an object to which veneration, or some lesser degree of respect, is due by the nature of it, the dominant reaction is scornful laughter. If, however, "society" is appealed to in the same manner and with the same object, the reaction is one of approval. Teachers have become familiar with demands that they justify the subject matter of their teaching in a course in general or in particular areas by reference to the criterion of its "social relevance".

If the object of the person making the demands is to vindicate his opinion that what is being taught has no social relevance at all — as in the writer's experience it sometimes is — and if "society" is being interpreted in accordance with the most general presuppositions of evolutionary ethical doctrine — as in the writer's view it frequently is at whatever level of consciousness — the objective of the questioner is theoretically bound to be achieved. For, if the general line of criticism in the second section of the foregoing is accepted, the answer must be that what the teacher is teaching has no social relevance at all, whatever it is in the whole field of human experience he has concerned himself with. The notion of "society" being set up is a metaphysical one and nothing in the ordinary world of experience can be demonstrated to have any logical relationship to it.

We take here as the view of "society" characteristic of evolutionary ethics that which virtually identifies it with the fundamental reality whether it is thought of in Marxist or Non-Marxist Hegelian terms. In Marx's own work society is practically identified with the fundamental material reality. In Hegel's the development of spiritual reality is thought of in terms of the development of society and Hegel's estimate of the degree of advance of spirit to his own time is recognizable as an account of the Prussian society of his own time. Society is thus conceived, as reality, as standing above the particular conflicts that go on in a particular society at a particular time, above the warring groups between whom it mediates in the course of progress, and without itself being a particular kind of political or social force. It is the Whole articulating itself through time. Social history is at any rate the central part of the history of the Absolute.

It is not of course being here suggested that those whose constant appeal is to the demands of society would work out the implications
of their view in the manner described in the previous paragraph. Most people are never called upon to develop systematically the philosophical implications of the manner in which they employ concepts in political, social and legal argument. Even general legal theorists do not necessarily find themselves called upon to do so. We cannot precisely say, for example, what Pound’s attitude would be to the sort of implications we have seen in the kind of view he takes on ethical matters. We know he condemns economic approaches such as the Marxist to history generally as being too narrow.\footnote{Jurisprudence 227-246.} We know, too, that in his whole catalogue of approaches to history which are thought to be useful in some respects but too narrow, it is the "civilization view of history", as representative of which he has considered some non-Marxist Hegelians,\footnote{While criticising as too narrow political, geographical, ethnological and economic interpretations of history, Pound refrains from criticism at the same point in his exposition of the "civilisation interpretation" of history, saying he has discussed it in connection with the neo-Hegelians (Id. 227). But when one turns to the relevant section (Id. 158-170) one finds it expository and highly approving rather than critical.} which escapes criticism on this ground. But what Pound is criticizing in Marxism is not Marxism on the level of philosophical generality as we have been considering it, but Marxism at a lower level of generality — as it appears once it has made the logical jump from treating the design in matter as the fundamental determinant of progress to seeing economic relations within society as the fundamental determinant of social progress. Pound’s general position on the philosophical issues between Marx and Hegel, and more importantly on the philosophical difficulties common to them, remains indeterminate. By contrast Ehrlich, the great twentieth century Continental sociological jurist, at least gives us a glimpse of the tail of the metaphysical cat in the bag of sociological jurisprudence. His evolutionary ethics is, in the first place, explicit and not matter of inference. He says: "The doctrine of evolution is not merely this or that scientific truth; it is the basis of all modern thinking."\footnote{Fundamental Principles of the Sociology of Law 447.} State organization "is not a match for the uninterrupted sway of elemental forces"\footnote{Id., 373.} and the study of the sources of law is the study of the "vital forces that bring about the development of legal institutions".\footnote{Id., 84.} The law should serve "the
advance of the human race in the direction of its future development”, 103 “the idea of tomorrow which is growing out of the idea of to-day”, towards “a goal which lies in the sunlit distance, which the human mind can divine but not know”. 104 Any student who requires a teacher to demonstrate the social relevance of what the teacher is doing, in the sense of its relevance to the demands of society understood in this way, can rely on receiving an unsatisfactory answer.

If, then, “society” is to function intelligibly as a source of reference from which legal ideals can be deduced, it seems essential that some meaning should be put on the conception in empirical terms, that is to say, that some description of what is meant by it should be put forward, the terms in which have reference to the kinds of things which we experience in the ordinary way. The writer has not purported to demonstrate in this brief essay that this cannot be satisfactorily achieved. He has not even purported to demonstrate that, for example, the Marxists have not done it. He has only called attention to the fact that the panoply of dialectical materialist theory neither protects Marxists from the need to perform this task nor helps them to achieve it. But metaphysical theorists commonly translate their highest level conceptions into empirical terms, even though this involves a logical jump and loses them the advantages of positing an ideal which is in its nature absolutely obligatory on all, a feature which it is believed can only exist in metaphysical conceptions. When the Marxists translate the notion of material development into the relationships between classes conceived as groups bearing different relationships to the means of production in a society, and posit the ideal of a classless society, none of the considerations to which we have called attention necessarily involves that that ideal is unintelligible in empirical terms. The question whether it can serve as a definition of a “society” from which desirable courses of action now or over a period can be deduced remains.

But once we commit ourselves to the discussion of ideals exclusively on the empirical level, the purposes which can be served by the attempt to put forward a general definition covering ideals for law must be different. Once we reject the notion that, even though we in practice struggle with one another to achieve conflicting

103. *Id.*, 204.
104. *Id.*, 211.
demands, on a higher level our demands are really in harmony, once we reject also the notion that, even though scientists assume that nothing can be neglected as being without effects, nevertheless there are some forces so powerful that nothing can prevail against them and we cannot do anything but be on their side, once we reject also the notion that, even though our convictions constantly differ, some convictions carry a guarantee of their validity with them, then any comprehensive definition of ideals, however explicit in empirical terms, will only appeal to those whom the definition satisfies in terms of their own constitutions as determined by their own characters as modified in the course of their personal history by environmental conditions.

The writer will do no more than doubt here whether such a definition could be arrived at even to satisfy the person who puts it forward. An individual human mind, especially in the light of Freudian theory, is seen to contain its own warring elements as actual societies do, and those objectives to which an individual may be prepared to commit himself in spite of this as his dominant motives, seem unlikely to have common features which would permit them to answer any single substantive description. And when the definition is thought of as intended to enable different members of a group to arrive at a common statement of their comprehensive ideal, the difficulties in the way of any general definition proving satisfactory in this context are multiplied. But, by contrast to the actual degree of success which such attempts are likely to achieve, certain motives for putting forward such definitions are very strong, and these motives are likely to achieve their objects in inverse proportion to the degree of explicitness which the purported definition actually achieves. The purpose of achieving power and influence within a group is served if a person can make it appear that he stands for a principle which is the objective of the whole group and this is most easily done if the principle is vague enough for objectives which in fact conflict to be capable of being read into it by strained interpretations. This kind of use of a definition is an attack on the independence of members of the group, who may find themselves in the end accused of disloyalty to the group if they do not accept the interpretation of the supposed common end of the group put forward by its dominant members. It is certainly a task of scholars to expose this kind of operation of definitions in the interests of intellectual freedom and as an intellectual contribution to other freedoms as well. Some conception of "society", like the
2. Specification Versus Definition

At this point of the analysis serious questions may be raised by those who value their independence about the desirability of employing single frames of reference to accommodate one's ideals for law at all. The traditional ethical frames contain elements of metaphysical delusion, the possibility of achieving a satisfactory empirical definition seems remote and the dangers of misuses of purported definitions immediate. It would be conceivable for us instead merely to carry on communication with others in terms of numbers of specific aims to discover in what areas we might find identity of aims as a basis of co-operation without attempting to represent the total of shared aims in any single fashion. Yet the latter approach will be lacking in inspirational quality, though having a certain austere appeal to those who regard clarity in discussion as an absolutely paramount consideration. And in fact the choice between these two opposite approaches does not exhaust the choices open to us. Another possibility may now be considered.

There are some kinds of objectives, which at any rate large numbers of people have, one characteristic of the operation of which is a search for sympathy, a search for "common ground" with others of the different groups to which the individual belongs from the narrowest to the broadest. Various frames of reference for legal ideals to which reference has been made in the foregoing — frames which tend to be a cross division of those thrown up by traditional ethical theories — may function as symbols for the common ground to which demands of this kind aspire. Thus a notion which we might express as "common legal values" may function as a symbol for the common ground which most lawyers may come to hope to find as bases for co-operation with one another, "common social values" as a symbol for the common ground which most members of a society may come to hope to find as a basis for co-operation within the group, and "common human values" as a symbol for the common ground which most human
beings might come to wish to find as a basis for general co-operation.

Such a symbol as is here conceived is not regarded as capable of definition in the sense of translation into any single term itself characterising any general projected state of affairs. It is designed to be given reference to various projected states of affairs not by definition but by specification. In other words, what is envisaged is the compiling of a list of common ideals to which list if it could ever be completed the symbol would refer as an envelope term. But neither is it envisaged that no item which appeared on the list at any particular time would ever be subject to revision. Nor is it envisaged that there would be any escape from this incompleteness and tentativeness even if it were possible to make a statistical survey of the whole human race with expert psychologists and discover what objectives were in fact common to the great majority of the group at a particular time. For the kind of demand we are considering may hope to induce changes in human beings to increase the area of common ground — to encourage a growth of mutual tolerance. It is as a rallying point for this kind of activity and a stimulus to system and progressive comprehensiveness in it that the writer sees the justification for the retention of this kind of frame in thought about legal ideals.

As between smaller groups than those discussed in the preceding paragraphs, the usefulness of frames for the formulation of ideals may be greater, especially where in a society with a degree of freedom of association groups can be formed along the lines of a general community of ideals among members. And this does not merely apply to ideals of mutual conduct as between members of the group, but to the formulation of the ideals of that group directed towards larger communities, and in particular towards the legal development of larger communities. As illustrative of a procedure among such a group conducing to clarity and effectiveness, the writer takes here that of the group surrounding Professors Lasswell and McDougal, long associated with Yale Law School.

Lasswell and McDougal are strongly influenced by the kinds of motives we have been discussing in searching for common ground with all — in their phrase, they make the broadest possible "identifications". ¹⁰⁵ Thus their goals for law are summed up in

¹⁰⁵ See, e.g., McDougal, Lasswell and Vlasic, Law and Public Order in Space (New Haven: Yale, 1963) 141: "In approaching the policy problems of space we
broad terms as the achievement of a public order of "human dignity". But this expression is no more than what we have called here an envelope term, serving as a general expression for a list of stated objectives. In their terms it does not have immediate semantic reference, but rather syntactic reference to the list of objectives which themselves have semantic reference. This list involves the greatest possible shaping and sharing of values in each of Lasswell and McDougal's eight value categories — power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. While this list is intended to be comprehensive, it is not pretended that complete definition is achieved of each of the items on the list by this kind of statement about them and further exercises in definition and specification are seen to be required, and are engaged upon. The group looks forward to growing acceptance of values within the scheme as common human values, common social values and common legal values without fundamental change in the scheme.

It is, however, beyond the scope of the present article to argue in support of this or any other scheme. The immediate object is to suggest the dangers of and rewards in using general frames of reference for legal ideals in various contexts. The major intellectual dangers have been suggested to be the temptation, especially by implication, to fall back on metaphysical conceptions which bemuse, but do not assist, because of their lack of relation to reality, and the immense waste of intellectual effort which may be involved in seeking by strained interpretations of general definitions to relate proposed courses of action to some single general aim. The main social dangers have been suggested to be the destruction of the independence of individuals and groups within a broader society by the sorts of procedures described in the previous sentence. But there are rewards in symbolic encouragement to be as comprehensive, clear and consistent as we can in specifying our own aims for law — or other things — and emphasizing and facilitating the operation of our interests in finding common ground with the groups to which we belong — provided always we are clear about what we are doing.

take the standpoint of citizens who are identified with the future of mankind as a whole rather than with the primacy of any particular group."

107. Ibid., and Id., 506.
108. See id., 508-509.
But, whether we resort to such frames or not, it is hoped that the critical points that I have sought to make will convince some that our values are not to be discovered by searching for the obligatory ready made, but rather within ourselves and the process of making a contribution to law therefore starts with the systematic process of self-examination.