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By ROSCOE POUND *at Annual Banquet*

A PHILOSOPHER who wrote a book entitled "The Nature of Existence," felt obliged to write a preliminary chapter in answer to the question, "Does Anything Exist?" Very likely a lawyer-like thoroughness requires me to inquire at the outset whether there is such a thing as an ideal element in law.

Certainly the analytical jurists of the nineteenth century did not think so. Their first postulate was formulated thus by Bentham: "Law or the law * * * is an abstract or collective term which * * * can mean nothing more nor less than the sum total of a number of individual laws taken together." Accordingly the analytical jurist proceeds to define "a law" and, having done so, conceives he has defined "law." Moreover, since the seventeenth century, in this mode of thinking, "a law" has been taken to be a rule—a rule authoritatively prescribed by the lawmaker or authoritatively received by usage or tradition. As Blackstone puts it, a law is "a rule of civil conduct prescribed by the supreme power in a state;" as Holland puts it, "a general rule of external human action enforced by a sovereign political authority;" as Gray puts it, law is made up of "the rules in accordance with which the courts of [a] * * * society determine cases, and by which, therefore, the members of that society are to govern themselves."

What is meant by the word "rule" in these formulas? In a narrower sense it means a precept prescribing some definite detailed legal consequence for a definite detailed fact or state of facts. Such rules are the staple of primitive codes. For example:

In the Code of Hammurabi: "If a man strike a free man he shall pay ten shekels of silver."

In the Roman Twelve Tables: "If the father sell the son three times, let the son be free from the father."

In the Anglo-Saxon Laws (Laws of Ethelbert): "If there be seizing by the hair, let there be fifty scaetts for bote."

In the Salic law: "If any person shall have called another 'fox' he shall be sentenced to three shillings."

Penal codes are full of such rules. Also in modern times

they make up a large part of the law of commercial transactions and of the law of property. For example:

Uniform Negotiable Instruments Act, §124, ¶1; "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers."

New York Real Property Law, §45: "When a remainder is created on any such life estate, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder shall take effect on the death of the two persons first named, as if no other lives had been introduced."

This is the narrower meaning of the word "rule," and certainly law is much more than an aggregate of rules in that sense.

But there is a wider sense of the term "rule" in which it means a norm or pattern of conduct in general, including rules in the narrower sense, and all authoritative guides to conduct or decision having the power of the tribunals of the state behind them. In this sense it means any authoritative pattern of or guide to legal or judicial reasoning or judicial action, and hence to private conduct. By a bit of logical acrobatics law may be made out to be a body of rules in this sense. It is my thesis, however, that even so the conception of law as an aggregate of laws is inadequate.

At the outset we must make certain distinctions. For one thing, we must distinguish "law" in the sense of a body of authoritative materials of judicial and administrative action (e. g., the law of England, the Roman law) and law in the sense of the legal order—the regime of social control through politically organized society—as when we speak of respect for law or of law and order. Likewise we must distinguish law in the former sense from what it is now fashionable to call the judicial process. That phrase, too, has more than one sense. Sometimes it means only the process of reaching a decision in a particular case. At other times, and where the doctrine of judicial precedent obtains, it means the process of determining the legal precept to be established by the decision of a particular case. In that event, the process of determining the pre-

cept is a decisive element in arriving at the decision. At other times it means a generalization of the two preceding and consequent picture of how judicial decisions in general are or ought to be arrived at. Obviously law does not include everything which enters into or determines the judicial process. However we define the phrase, everything which enters into the process, or even the received ideal of the process, is not law. Many things besides law enter into the actual administration of justice. Law, in the lawyer's sense, is a highly specialized means for giving uniformity and predictability to the process and thus maintaining the general security.

There has been endless debate as to the nature and the definition of law. In a sense, as Yellowplush said of spelling— "every gentleman is entitled to his own"—so we may say of definitions of law that every jurist may have his own. My thesis today is that for the lawyer's purposes law is a body of precepts and received ideals and a received technique of using them established or recognized by a politically organized society as the authoritative basis of judicial and administrative action.

So regarded law is something much more complex than the simple aggregate of rules conceived by the analytical jurists of the last century. From this standpoint we must recognize no less than three elements in a body of developed law, and must recognize that one of those elements is made up of a number of constituents.

First, we must put the precept element or elements of rules in the wider sense. This is a body of norms or patterns of decision, or prescribings as to conduct, which therefore are to serve as norms of decision, some traditional and some established by legislation. These precepts call for or imply an application of the force of politically organized society in case certain facts or states of fact are made to appear. They are the authoritative materials of judicial action, the raw materials, one might say, to which the judicial process is applied. But these materials are not all of one sort. We may profitably distinguish rules (in the narrower sense), principles, conceptions, and standards.

Rules (in the narrower sense) have been spoken of already. They are precepts prescribing some definite detailed

legal consequence for a definite detailed state of facts. A primitive body of law is made up of such precepts. Ancient codes are made up of a series of minutely detailed rules of this sort. In the tariffs of compositions in which they abound one finds not infrequently an enumeration of every member of the human body in the minutest detail, in the Anglo-Saxon law coming down to "for every nail a shilling." Because they are so detailed, there is the greatest diversity of such rules on the same subject in different jurisdictions. Also they are very short lived, seldom surviving in our law for much more than a generation.

Principles are authoritative starting points for legal reasoning. It is worth a moment's digression to note how they evolve. In primitive law there comes to be a stage in which a sacred or authoritative text or a supposedly immutable body of declared custom is the basis of administering justice. If there is a sacred or unalterable text, one way of meeting new situations of fact or new ways of looking at old situations is to correct the text. The text does not admit of change, but it may be discovered that the inscriptions or manuscripts in which the text is preserved contain errors and a corrected text may do in effect what we should do today by amendment. In this process we have a germ of legislation, on the one hand, and of legal reasoning, on the other. Another starting point may be seen in the crude interpretation of the beginnings of Roman law. Where the oak tree of one Roman was so near the adjoining land of another that acorns fell upon the latter's land, the Twelve Tables allowed the owner of the tree to go on his neighbor's land at certain times and under certain conditions to gather the acorns. This was extended to fruits of all kinds by the simple device of interpreting the word "acorn" as meaning "fruit." Again, an action was provided when one cut down his neighbor's trees. This was made to cover grapevines by a similar interpretation of the word "trees." When law ceases to be a priestly tradition, when it becomes secularized and comes into the hands of professional lawyers, legal reasoning takes the place of such crude processes.

Lawyers begin to work upon the authoritative materials by what is called in our old books "putting differences" or "taking diversities"—the first method of a science of law. They find a difference between two texts or two cases super-

ficially alike and a general proposition or principle behind that difference and formulate the principle in a maxim. By development of this process we get legal principles, that is, generalized propositions as authoritative starting points for legal reasoning.

Some examples from Roman law are: Once an heir always an heir; no one can transfer more than he has; no one should be enriched unjustly at the expense of another. Some examples from our law are: Liability flows from fault; once a mortgage always a mortgage; one who does anything on its face injurious to another must answer for the consequences. Such propositions, it will be noted, are not rules. They are premises from which to deduce rules.

Legal principles enable the law to cover much which could not be provided for by rules in the narrower sense and distinguish law in the lawyer's sense from the undifferentiated social control which obtains before law but is called law by the historical jurists.

Conceptions are generalized categories to which particular states of fact may be referred. If the facts are found to come within such a category, then certain rules, principles, and standards become applicable. Examples in Roman law are, sale, mandate transaction of strict law, transaction of good faith; in the civil law, legal transaction, the most fruitful conception in the law; in our law, trust, bailment, fiduciary relation. Here the legal precept is to apply the rules, principles and standards attaching to the conception, in case the facts come within it. Conceptions are the significant type in the maturity of law. They are chiefly the work of law teachers and law writers. In the nineteenth century judges and jurists struggled hard to put all law in terms of them.

Legal standards define certain limits of conduct and are authoritative guides to the valuation of conduct, to be applied not absolutely, as in the case of rules in the narrower sense, but in view of the circumstances of each case. Here the legal precept imposes liability if the standard is departed from or is not lived up to. One departs from or exceeds or falls short of it at his peril of answering to any one injured. Examples are: In the Roman law, the standard of the just and diligent head of a household, the standard of proper use by a usufructuary, the standard of a just man in transactions of good

faith; in our law, the standard of fair conduct of a fiduciary, the standard of the reasonably prudent man, the standard of reasonable service, reasonable facilities and reasonable incidental facilities on the part of a public utility, and the standard of fairness in competition.

These standards come into the law in what I have been wont to call the stage of equity and natural law. They have a certain moral flavor and are individualized in their application just as are moral precepts. They are a scientific way of achieving an individualization of application of law. They take the place in developed law which in primitive law is taken by the dispensing power of the king, or what in the beginnings of French law was called equity—a permissible relaxation of application of rules in particular cases. Legal standards are a great advance over these things, and over the power of popular assembly tribunals to override the law as, for example, at Athens. They fix the cases where relaxation or flexibility of application are called for consistently with the general security, and fix the limits of that relaxation and flexibility.

These four types, rules in the narrower sense, principles, conceptions and standards, make up the precept element, which analytical jurists have taken for the whole of the law. But this precept element is by no means the whole of the body of authoritative legal materials which are the basis of judicial and administrative action. It is not the whole of the authoritative apparatus by which justice is administered every day in the courts.

Second, there is the technique element—a traditional authoritative technique of finding the grounds of decision in the mass of precepts both statutory and traditional; a technique of developing the grounds of decision of particular cases out of the authoritative materials; a technique of shaping rules to meet new situations, of developing principles to meet new cases, and of working out from the whole body of legal materials the precepts appropriate to the concrete situation before the tribunal. This element is, as it were, the art of the lawyer's craft. It is this element which is decisive in characterizing the two great legal systems of the modern world, the common law and the civil law. There is no uniformity of precepts in the common-law world nor in the civil-law world. In England, the real property of an intestate passes to the per-

sonal representative. In Oklahoma, the personal property of an intestate passes to the heir. Yet English lawyer and Oklahoma lawyer understand each other as perfectly as each fails to understand the French or the Latin-American lawyer. Common law and civil law have many precepts in common and many institutions in common. Where they differ decisively is in their technique.

An example may be seen in the respective attitude of the common law and the civil law toward statutes and judicial decisions. In the technique of the common law a statute furnishes a rule for a particular situation. But it does not furnish general legal principles to be developed into rules or premises to be made the basis of legal reasoning. A common-law court reasons by analogy from judicial decisions but not from statutes. On the other hand, in the civil law single judicial decisions have no authority. A settled course of judicial decision upon some point fixes the rule for that particular point. But nothing more. The civilian finds principles in legislation. He reasons by analogy from sections of codes. His attitude toward the course of judicial decision is that of the common-law lawyer toward a statute. His attitude toward a legislative provision is that of a common-law lawyer toward judicial decisions. To put the matter concretely, we may compare judicial treatment of Lord Campbell's Act in common-law jurisdictions with a similar situation in the civil law. Lord Campbell's Act is probably as universal a bit of legislation in common-law countries as could be thought of. It prevails everywhere. Yet courts even today treat it as introducing an exceptional, one almost might say, anomalous, isolated rule into the body of the law. Thus if A hits B on the head with a club and does no more than injure him, in an action for assault and battery the burden is upon A to justify. It is enough for B to show that A hit him. If, however, A succeeds in killing B, and an action is brought by B's representative under Lord Campbell's Act, the burden is upon the plaintiff not only to show that A hit B, but that he caused the death wrongfully. In civil-law countries, as with us, the law starts out with the proposition that no price is to be put upon human life, but the edict *de dejectis et diffusis* provided a penalty in cases where someone was killed by things thrown out or poured out from a building. The penalty became a

penalty of reparation of the damage to persons interested in the life of the one killed, and by analogy all cases of wrongful killing became actionable.

This technique element is the work of lawyers, and is the most enduring element and the slowest to change in the law. In Roman law it developed from the late Republic to the third century. It was perfected by the teachers in the law schools of the late Empire in the fifth century, and it has been pretty much the same from the fifth century to the present. In the common law it developed from the thirteenth century to the seventeenth in the courts of Westminster. It was perfected in the eighteenth century and has been pretty much the same throughout the English-speaking world since the time of Blackstone.

Third, there is the ideal element; a body of received ideals of the social order, and so of the legal order; a body of received authoritative ideals of what law is and what law is for, and so of what legal precepts ought to be and how they ought to be applied in the light thereof. These ideals, not always as clearly differentiated from the personal ideals of particular judges as they should be, are the background of all judicial action, whether in finding the law—i. e., finding the applicable precept for a particular case—or in interpreting it, or in applying it. Good illustrations of the operation of the ideal element may be seen in the decisions upon the Married Women's Acts in the fore part of the nineteenth century, and the earlier decisions upon Workmen's Compensation or Employer's Liability Acts in the present century. To this day the law as to legal transactions of married women is made difficult by the attitude taken by the courts when these acts first came before them. It is significant to compare the way in which the operation of these statutes was held down, as in derogation of the common law, with the willingness of the courts to go even beyond the letter of the statutes in giving effect to laws abrogating or altering rules of the feudal property law. The ideal of an American society, in the minds of the judges, pictured a simple ownership of land, freely transferable, as the chief asset of a pioneer society, relieved of rules appropriate to a society ruled by great landowners, and devolving at death in the same way in which personal property was distributed. It also pictured women as in the home, not

about in the world entering into all manner of legal transactions. The one set of statutes conformed to the picture and was given the fullest effect. The other did not and was held down in operation. Both were in derogation of the common law. But it is significant that the doctrine of strict construction of statutes in derogation of the common law was not applied to the laws which overhauled the law of real property and purged it of archaisms. Married Women's Acts were no more radical in their departure from the common law than the statutes which made over descent of land. The difference in judicial treatment is not to be explained by the common-law canons of interpretation.

When Married Women's Acts first came before the courts, they were looked at jealously with respect to rights of husbands, just as Workmen's Compensation and Employer's Liability Acts were at first held unconstitutional for want of due process of law as infringing the liberty and taking away the property of employers. It would have been quite possible to uphold Married Women's Acts as adopting the equitable as against the common-law view with respect to the property of married women, and so not depriving husbands of substantial vested rights, but giving the substantial claims of the wife better security than could be afforded in equity. That seems to have been the theory on which the statutes were drawn. The pioneer statute was entitled "An Act for the More Effectual Protection of the Property of Married Women." In the same way, the Workmen's Compensation and Employer's Liability Acts might have been upheld, as in the event they came to be, on more than one common-law analogy, notably that of liability without fault for the torts of a servant or agent. In each case the courts were moved to choose one starting point rather than the other by an ideal of the social and legal order with which the statutes were felt to be out of accord.

It is only by a straining which is not worth while that the three elements in law, the three elements in the authoritative materials governing or guiding judicial and administrative action, may be reduced to rule even in the wider sense. Indeed, it gives a wholly wrong picture of this body of authoritative materials to put it in terms of an aggregate of rules and take rules in the narrower sense as the type. The nine-

teenth century strove for an impossible degree of absolute certainty in judicial and administrative action, and rule in the narrower sense in which a definite, detailed legal consequence is prescribed for every definite, detailed state of facts, is the simplest and most obvious case of such certainty of application. Given the exact state of facts, the exact measure of action is at hand and calls for nothing but mechanical application. A very great part of the administration of justice undoubtedly does go on in this way. Otherwise courts could not dispose of their enormous dockets consistently with the requirements of the economic order. But very significant parts of the administration of justice do not and cannot go on in this simple way.

There are two other reasons for the nineteenth century attempt to reduce law to an aggregate of rules. One is that the analytical jurists took statute for the type of law. They had inherited the command idea of law from Byzantine legal science by way of Justinian and by way of the academic study of Roman law in the twelfth century universities. Another is that the leading English and American analytical jurists were real property lawyers. John Austin was a chancery barrister at the time when the courts of equity were chiefly concerned with family settlements and the learning of future interests in land with all its intricacies had passed from the Court of Common Pleas to the Court of Chancery. John Shipman Gray was our leading American authority upon the law of real property, and in particular upon the law of future interests in land. Rules in the narrower sense are the staple of the land law because of the call for stability of titles involved in the social interest in security of acquisitions.

Analytical jurists strove hard in the last century to exclude the ideal element from the law. They deemed it destructive of certainty to admit the existence of anything but a body of positive precepts. Yet the importance of the ideal element in the work of tribunals is decisive even in the law of property. For example, in a comparatively recent case in Missouri the highest court of that state held that primogeniture in estates tail was "contrary to the theory on which this and other commonwealths were built." The statute read: "And the remainder shall pass in fee simple absolute to the person to whom the estate tail would at the death of the first grantee,

devisee, or donee in tail first pass *according to the course of the common law.*" Such a provision had been held in Massachusetts to adopt primogeniture, giving the first taker an estate for life and the common-law heir in tail a fee simple. The Missouri court did not follow these decisions nor did it follow the clear language of the statute which provided for a remainder in fee to the common-law heir in tail. Instead it fell back upon an ideal of the nature of American institutions and shaped the statutory provision to agree therewith.

But the most striking illustrations of the ideal element in action are to be found in our constitutional law. Take, for example, the interpretation of the Fourteenth Amendment. What fixed the content of the historically given phrase "due process of law"? It was not analysis. That would at most have extended the phrase to procedure. It was not history. The develpoment of the power of courts with respect to arbitrary interference with the liberty or property of the subject or citizen down to Coke's Second Institute and thence to the Constitution of the United States extended only to executive attempts to do the things committed to the legislature. The decisive factor in construing the Fourteenth Amendment was an ideal of a politically organized society in which all activities were measured by reason and every personal element was excluded or held down by general precepts or patterns of action. This ideal has shaped the whole interpretation and application of the clause as to due process of law.

Received ideals which are part of the authoritative materials of judicial action are of two kinds. First, there are ideals of the social order, of the end of law, such, for example, as the ideal of "a free government," or of "free institutions," or of "American institutions," so constantly invoked in the fore part of the nineteenth century. Thus in a well known case Mr. Justice Miller said: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere." Such ideals are frequently made into a sort of super-constitution by which legislation is judged.

Second, there are ideals of the authoritative materials of decision, that is, ideals of whence these materials are derived and what they are in substance as distinguished from form. For example, in the eighteenth century generally and in the fore part of the nineteenth century in the United States the

natural law ideal obtained. There was an ideal of a complete universal model code or body of rules, given by reason, and of a body of received or established precepts as simply declaratory thereof. Hence it followed that if a tribunal could find a better statement of a proposition of law, that is, a statement more nearly conforming to the universal model code than that contained in the positive law of the time and place, it was at liberty to, indeed it was its duty to, adopt that better formulation. Thus in a case in the highest court of New York about the middle of the last century the question was as to whether a statue and a sun dial had become fixtures. The opinion of the majority of the court goes into a long discussion of French authorities and says: "I think the French law as applicable to statuary is in accordance with reason and justice." Being in accordance with reason and justice, it was taken to be declaratory of natural law and so was taken over as the law of New York, notwithstanding the constitutional provision adopting the common law as the system in that state. The court paid no attention to the common-law authorities. The French doctrine as a sound exposition of the ideally just rule was a better formulation of something of which both English and New York law were to be merely declaratory.

If the ideal element in the law of the time and place were as well organized, had as much definiteness, and were subjected to a critique as assured and thorough as that to which the apparatus of rules and doctrines has long been subjected, it would not be the source of confusion which we much admit it to be today. Very likely if analytical jurisprudence had gone on to treat this element as it did the precept element in the last century, analytical jurists would have no concern to cast it out of the law. Unhappily, philosophical jurisprudence has been under a cloud for a century, and this part of our authoritative legal materials has been neglected. In consequence the line between received ideals which are part of the law and subjective ideals of the particular judge or particular tribunal has not always been drawn, and indeed at times is not easy to draw carefully. An example of the extent to which an idealizing of the legal institutions of the time and place may become a universal measure may be seen in the treatment of the Enoch Arden situation by two great judges, Lord Holt and

Mr. Justice Miller. Each had occasion to speak of limitations upon legislative power. Lord Holt said that undoubtedly there were such limitations. There were things which Parliament could not do, but one thing which it could do was to enact that A, who was the wife of B, on and after a certain date should cease to be the wife of B and should be the wife of C. Mr. Justice Miller, discussing the same question, said: "There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B." When in a lecture some years ago I had occasion to mention this difference of opinion, a judge of one of our state courts wrote me an indignant letter saying that no such statute would be tolerated in any Christian civilized land. In reply I was able to remind him that a statute in almost those very words was enacted in Indiana in 1842, that such statutes are still being enacted in Canada, that they were common in England down to 1859, and that in his own state they had been enacted until after the middle of the nineteenth century. As Mark Twain said of the judgment of Solomon, the explanation lies in the way Solomon was raised. Lord Holt sat upon the bench in a land in which legislative divorce was familiar. Mr. Justice Miller was familiar with a polity in which there was a sharp distinction between judicial and legislative power and legislative divorce had long become obsolete or forbidden by constitutional provisions.

Today received ideals are in flux and the line between authoritative ideals and the personal ideals of particular judges is much more than usually hazy, and the results have put law and its application much at large in some important fields of judicial and administrative action. Hence many, who think of law in terms of the precept element, are becoming skeptical of the existence or possibility of a legal order in which judicial action is held to uniform and predictable lines.

What is needed is not destructive criticism of judicial action in a stage of transition, but a constructive theory of the neglected element of the law in which lies the mischief.

Analytical jurisprudence and historical jurisprudence, which organize and criticize and enable us to understand the precept element and the technique element must be supplemented by a philosophical jurisprudence which shall organize and criticize the ideal element and bring us to distinguish authoritative, received ideals from subjective ideals. When received ideals are universally received, there is little or no need of philosophical jurisprudence. In the reign of an idea of free competitive and acquisitive self-assertion as the ideal of the highest good in nineteenth-century America, we could get along well enough with no conscious philosophy of law. When legally received ideals cease or cease largely to reflect current ideals of the social order, or are out of touch with the actual social order, confusion of authoritative with personal ideals becomes acute and results in 5-4 decisions and the other phenomena of unpredictable legal action on which so much stress is being laid today.

When received ideals are breaking down and new ones have not yet become authoritative, we must expect for a time judicial groping, dissents, vacillation, and a blundering search for workable solutions of new problems.

PERSONAL MENTION

Noah Alter and Samuel Chutkow are now associated in practice as Chutkow & Alter at 846 Equitable Building, Denver.

Harold E. Popham, formerly Deputy District Attorney for the City and County of Denver, has tendered his resignation effective June 15th and will return to private practice.

Joseph E. Cook, Deputy District Attorney, has been assigned to handle all Juvenile Court matters for the District Attorney's office.