THE MORAL END OF LAW

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Roscoe Pound argued in *An Introduction to the Philosophy of Law* that at the beginning of the twentieth century a new kind of thinking began to emerge in legal philosophy.[1] Legal scholars began conceiving the end of law as a maximum satisfaction of human wants. Pound endorsed this development, saying that when we think of the end of law as securing social interests it becomes apparent that it is possible to reach a practicable system of compromises of conflicting human wants here and now, without believing that we have a perfect solution for all times and all places (IPL, p. 44). Pound recognized that in practice the pressure of satisfying wants and desires will affect the compromises made by the legal system in varying ways. He conceded that we may not expect the compromises made and enforced by a legal system to be always and infallibly faithful to any picture we may have of the nature or ends of law, or the process of making and enforcing it. But he believed that there will be less warping of the compromises made if we have before us a clear picture of what we are seeking to do and what ends we are trying to promote through law (IPL, p. 45).

The main problem in this endeavor, according to Pound, is to determine the criteria of value by which human wants are to be measured. Although philosophers have expended enormous energy in the attempt to discover the proper method of determining the intrinsic importance of various interests, Pound remained sceptical about the possibility of discovering an absolute formula or making absolute judgments. He concluded his observations about the end of law with the following remarks:

> For the purpose of understanding the law of today, I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants—the claims and demands and expectations involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society (IPL, p. 47).

Thus, Pound has suggested that if we have before us a clear picture of what law is for and what end it seeks to promote, we will then be better able both to make and criticize law. The burden of this paper will be to develop the notions suggested by Pound and to argue that an essential function of any nonarbitrary concept of law is to promote the common

good. But just what constitutes the common good, or how this concept is to be understood, has proven difficult to specify. Pound saw that one of the problems with his theory is that we need to devise some method for determining and weighing competing wants in order to know which should be favored by the legal system. The solution to this problem is to provide a theoretical framework in terms of which the end of law is to be ascertained and elucidated. For only then will there exist the background for making practical and concrete judgments about the nature and application of law.

II

It has sometimes been thought that the common good is a name for a good that somehow acquires its value independently of the particular members of a given community. That is, it has been thought that there can be a good which is common in the sense that it preserves the peace or makes possible a certain degree of order in collective living but which may, at the same time, conflict with the individual goods that are the concern of individual members of the community. For example, the idea that peace and order are goods to be maintained at all costs and by whatever means necessary may be common in the sense that without such peace and order no other good could be achieved. But the fact that peace and order are often best achieved behind prison walls makes it clear that these goods alone could not create conditions for meaningful collective living and, hence, could not, by themselves, bring into being a good that is common.

What must be recognized at the outset is that *any* good that is a genuine moral good is a *common* good. For any moral good which can rightfully be claimed or pursued by one person is also a good that could likewise be claimed and pursued by anyone whomever, all things being equal. It is not the satisfaction of my want that creates a moral good, but when my want is a want that can be rightfully shared by anyone else in similar circumstances, then the satisfaction of such a want becomes both moral and common. Thus, Pound was correct in seeing that only in terms of human wants and interests can law have content and purpose. But not just any want or interest is entitled to legal status or protection. If law is to be intelligibly conceived as the maximum mutual accommodation of wants and interests, some procedure must exist for determining which wants are entitled to legal recognition.

Pound was correct in holding that the end of law is to give effect to as many human wants and interests as possible. If people had no wants and desires, or needs and interests, there would be nothing to be accomplished by the existence of a legal system; it could serve no useful purpose in society. And it is not merely people's desire to be secure from violence or theft, or their desire for privacy and shelter and a decent environment, that

law must make effective. For, as has been noted, even in a society of angels there would be a need for law in order that these celestial beings might perform their functions and avoid total confusion, no matter how benevolently inclined they might be. In other words, there would be no need for either law or morality if humans were entirely self-sufficient and had no wants or desires at all, for in that case there would be no goods worth pursuing or achieving.

The central question, then, is when does a want or desire become a justifying ground for action, and hence, a candidate for legal or moral protection? Arthur Murphy sheds some light on this question in *The Theory of Practical Reason*.[2] He argues that only on the basis of an agreed or understood consensus can there be common grounds for action. His point is that unless there were goods or values agreed upon in a moral dispute there could be no significant or profitable argument (TPR, p. 193). That is, unless men find themselves in agreement on certain substantive questions of value, there could be no such thing as a moral situation, much less intelligible moral disagreement. Murphy's analysis makes it clear that the sort of practice he is concerned to examine is not just one of efficaciously applied social pressure. For social pressure *qua* social pressure cannot create either goods or obligations. We must take pains to distinguish social pressures and moral reasons, for it is only within a moral community that obligations, as opposed to social pressures, can arise. And a moral community is not just any group that influences the behavior of its members. Rather, a community "is a group whose members are related in a quite distinctive way, the way of moral understanding, and the group is a community only insofar as they are thus related" (TPR, p. 215). The importance of this can be seen in that persons are often urged to act in ways that will further the interests of the community. But this can be a reason for acting only "if the interests of the community define a good that is somehow my good, too—a common good to whose achievement I am morally committed and in which I can rightfully share . . ." (TPR, p. 215).

Thus, a "community" of persons, as opposed to an "aggregate" of persons, must be bound together by certain common bonds, including a shared morality. A group of persons confined to a particular geographical location with no common or shared views, either political or moral, could not be described as a society or a community in any meaningful sense.[3] Such a group might have an order imposed on it by some person or body of persons, but, in the absence of a common shared morality, it would not satisfy the requirement of a society unless that term is used so loosely as to become vacuous. But even when the moral claims of a community have been distinguished from mere pressures exerted by social groups, we must be careful. For it is easy to make the mistake of concluding that right ac-

tions simply *are* those actions that serve the community. This, however, would be a mistake. For our duty is not to the state or the community as such; rather, as Murphy says, "It is to other men united with me in activities whose normatively practical requirements . . . can give our common life moral meaning" (TPR, p. 219).

My position, then, is that all moral good is common. The idea of a "private" moral good in which I and I alone can share is as nonsensical as the idea of air pressure in a vacuum. Any genuine moral good is a good that any rational agent can share and is entitled to pursue. Equally important is the notion that all genuine moral goods without correlative obligations is meaningless. Thus, not only is all moral good common in the sense that it is a good every moral agent may rightfully pursue or enjoy, all moral good is inextricably bound up with obligations.

III

It is in terms of these remarks about the common good that I shall try to say something about the nature of law. Pound has reminded us that the clearer our picture of the purpose of law, the less warping there will be in the actual process of making it; i.e., the better our law will be. Now the concept or picture of law that I am urging is stated in terms of an ideal—an ideal we ought to strive for in making, changing, and enforcing law. Since the concept I urge is in the form of an ideal, any actual system of law will always, in varying degrees, fall short. Nevertheless, it is the ideal that can give purpose and direction to our efforts in the legal arena, while at the same time providing a norm in terms of which we can criticize and judge law. To conceive law as the social instrument for promoting the common good does not imply that the legal and moral realms are identical. Rather, it is to suggest that there is a moral order prior to the legal, and that the function of law is to help stabilize and unify it. For in any very large or complex society, the moral order itself cannot be maintained apart from some degree of formal control which creates the conditions necessary for social living.

In conceiving law as an artificial social instrument for promoting the common good, I am imputing a moral component to the concept of law. My thesis is that conceptual clarity is enhanced, not hindered, by distinguishing between the rule of law understood in morally loaded terms and a regime of tyranny or despotism. While I have not here attempted to refute legal positivism, I am convinced that the attempt to formulate a theory of law cannot be accomplished apart from some conception of what law is for. And I am further convinced that to conceive law as having a moral end will make departures from the rule of law easier to identify and corrective measures easier to employ.

In claiming that the end of law is to be conceived in terms of the common good, and in admitting that the common good is an ideal, I am not saying that this ideal is the end product of some absolute Reason which can, once and for all, be discerned by the human mind. In the area of morality as well as law, we must begin where we are, with our limited supply of knowledge, resources, and understanding, and from that basis conscientiously try to bring about a better, more workable, system of social goods. Only by recognizing that there are goods about which men can agree—that there are basic agreements in judgment concerning which a minimal common good can be identified—is it possible to strive for a moral or legal order not yet realized but desperately needed.

In both morality and law, a "higher" or more perfect good can be sought only because there are proximate and conditioned goods about which men can agree, in light of their common experience. I agree with Pound that it is a mistake to think that there must be some "ultimate" or "absolute" good or end, intellectually discerned, before we can judge or compare lesser goods or interests. Rather, it is in terms of more personal wants and interests, about which men can be reasonable, that these wants and interests become worth preserving. Only on the ground that there are individual goods worth preserving could there be any point to a legal order of shared restraints and duties which make their joint achievement possible.

One of the problems Pound saw in conceiving law as maximizing human wants was that of determining criteria by which these wants are to be measured. And we have seen that goods and obligations arise in the context of important human wants. But we have also seen that these goods are not to be thought of as "ours" or "theirs" but as common goods which must be acknowledged by all who share in the life of civilized society. The commonality of common goods is not a result of their being the same, or average, or alike; they are common in the sense that they constitute the ground for dealing with differences and for pursuing ends which, though divergent, are not necessarily conflicting.

To speak of law as the artificial social instrument for promoting the common good is not to have formulated a set of philosophical blueprints for a legal order that is final and immutable. It is, rather, to acknowledge that in actual human life, including life under law, there are many different wants and interests competing for recognition. The function of law, as outlined here, is to work out an acceptable scheme of mutual accommodations whereby people can get along together with the greatest amount of harmony possible. If law is conceived as a human enterprise designed to make collective living both possible and felicitous, then the preservation of a common good is the starting point, not the sole, ultimate end, of that activity. Law cannot, by itself, make men moral. But what it can do, and if I

am right, ought to do, is help to create a working foundation so that men may go on together in the resolution of their common problems and the pursuit of their common good.

Pound's concern about the weight or importance of actual human wants or interests is not one that can be answered with precision. But Pound recognized this, and I think he would have agreed with Aristotle's dictum that we can never have more precision than the subject matter allows. And if the analysis presented here is correct, we can at least see that the relative weight of particular wants or interests can only be judged by their comparative place within a community of wants and goods in which all concerned have an active interest. For only within such a community can there be a formal structure to maintain these goods as a matter of mutual concern. When, within such a community, a plurality of interests sometimes conflict, there can be a rational adjudication of the problem only against the background of a common good; otherwise, there would be no rational way to approach the task of appraising the relative merit and importance of the competing claims.

The task of determining the relative merits of wants or interests, and the subsequent task of adjudicating the conflicts which arise when these social interests clash, are not the sole or final ends of law. Its more important function is to create conditions in which the quest for other, more specific or enriching goods can take place. After all, we are required to compare goods only when there are goods to compare. What the law can do, in addition to adjudicating disputes, is to create at least minimal conditions of mutual restraint or opportunity so that goods are never achieved through the arbitrary deprivation of others.

IV

My argument, if correct, does reveal law as having a substantive moral purpose. For the moral goods which make collective life meaningful cannot, in any very complex society, be achieved apart from the machinery of law and the element of formal control which it introduces. I am not suggesting that law is the sole basis for the existence of society; it is, rather, one of the necessary means to the establishment of order and justice. My point is simply that the purpose of formal control, expressed through law, is to insure a moral stability and cohesion creating a common good which, in the absence of law, would not be possible.

NOTES

1. Roscoe Pound, *An Introduction to the Philosophy of Law*, Rev. Ed. (New Haven: Yale University Press, 1972). Henceforth cited as IPL and by page number in the text of the paper.

2. Arthur E. Murphy, *The Theory of Practical Reason* (La Salle, Illinois: Open Court, 1965). Henceforth cited as TPR and by page number in the text of the paper.

3. For a further discussion of this point, see Lord Patrick Devlin, "Morals and the Criminal Law," in *The Enforcement of Morals* (Oxford: 1965), reprinted under the same title in *Morality and the Law*, edited by Richard A. Wasserstrom (Belmont, California: Wadsworth Publishing Co., 1971), pp. 32–37.