

CONTEMPORARY JURISPRUDENCE AND INTERNATIONAL
LAW*

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WORLD survival and progress in an atomic epoch depends on an effective international law. Yet several recent students of the subject conclude that any further attempt to improve international relations by legal means is not merely unrealistic and impractical, but also likely to result in more harm than good. Is this to be the final verdict? The purpose of this inquiry is to answer this question by analyzing the major contemporary theories of jurisprudence and their bearing on international law.

LEGAL POSITIVISM

Legal positivism delimits the subject matter of law to the cases and propositions in law books and to the legal institutions which apply those propositions. In domestic law this restriction of the law to the positive law has been found wanting. Dean Roscoe Pound's strictures against this "give-it-up" philosophy are well known.¹ Justice Holmes' and Brandeis' pragmatic conception of law as a social instrument for facing and resolving social problems rather than running away from them is now a commonplace. Increasingly important is Myres McDougal's observation that not merely British legal positivism but also American legal realism leave one with a type of law which is incapable of meeting either the opportunities or responsibilities of the contemporary world.² It has remained, however, for a legal positivist, P. E. Corbett, to give the final *reductio ad absurdum* to such a system of jurisprudence in his *Law and Society in the Relations of States*.³ Consider, for example, the theory of auto-limitation introduced by Jellinek to account for legal obligation in international law. Corbett shows the "inherent absurdity" of this position by noting that it offers "no explanation . . . for the view that while the will

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1. Pound, *Toward a New Jus Gentium* in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 7 (Northrop ed. 1949); POUND, SOCIAL CONTROL THROUGH LAW (1942).

2. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L. J. 1345 (1947).

3. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES (1951).

of the State was essential to the birth of a rule, it was not essential for the purpose of keeping it alive."⁴ He shows the same to be true of the positivistic theories of Kelsen and Lauterpacht.

The major problem confronting any legal theory is to account for social norms and legal obligation. At first the legal positivists and realists regarded their incapacity to account for the normative as an asset. Law, they said, does not involve value judgments; such judgments belong to philosophy and theology. Law is not to indulge in such supposedly speculative matters. Instead law is a science dealing with nothing but positive legal facts—hence the “realism” of the legal positivists, the early American legal realists and Corbett’s description of his own approach to international law. But they never made clear how a subject such as law, in which even the judges of the positive law are inescapably engaged in decision making, can thus separate itself in this ivory tower manner from the ethical and ideological content of the concrete problems which judicial decisions are attempting to resolve. Finally even the legal positivists themselves were forced to face the fact of norms and attempt some theory of legal obligation. Kelsen, for example, saw (a) that there are no positive rules of law ever sufficiently positive to be effective which do not presuppose a legal norm carrying with it obligations; and (b) that consent and obligation are incompatible. Thus, as Corbett writes, “Kelsen and his school rendered the service of revealing . . . the hopeless inconsistencies of the doctrine that legal obligation can result directly from the will of the entity obliged.”⁵

Strangely enough, however, this final admission by Kelsen and Corbett that law presupposes moral obligation and hence has an essential connection with ethics never caused them to question their legal philosophy. Instead they begin by drawing a distinction between legal rules and the normative ethical factor which they, following Kelsen’s terminology, call a “jural postulate” or a “*grundnorm*.”⁶ This preserves the fiction of the independence of law from ethics providing one (a) identifies law with legal rules or with merely hypothetical propositions specifying the implications of the *grundnorm* for the legal rules and the judge’s decision in applying them to a particular case and (b) assigns the *grundnorm* itself to some nonlegal subject such as ethics.

But even Kelsen could hardly be satisfied with a legal philosophy which restricted law to rules presupposing a jural postulate about which the science of law has nothing to say. No alternative remains, therefore, but to see what kind of content legal positivism can give to the primary and basic *grundnorm*. Without this, as Corbett notes, Kelsen’s theory of law is “an empty dialectic,”⁷ and law “emerges, not as a method of social control, but as a system of thought

4. *Id.* at 70.

5. *Id.* at 73; Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474 (1934).

6. KELSEN, *GENERAL THEORY OF LAW AND STATE* 115 *et seq.* (1951); CORBETT, *op. cit. supra* note 3, at 72-3.

7. CORBETT, *op. cit. supra* note 3, at 73.

which declares itself beyond criticism so long as its entire content is logically derived from one fundamental principle or postulate."⁸ Lauterpacht and Kelsen sought therefore, the type of content for the jural postulate or *grundnorm* which a positivistic philosophy of law can provide. Lauterpacht offers the proposition, "[T]he will of the international community must be obeyed."⁹ Kelsen comes forth with the *grundnorm*: "The states ought to behave as they have customarily behaved."¹⁰

To assert either of these *grundnorms* is to admit explicitly that the positivistic philosophy of international law can make no contribution to the bringing of disputes between nations under the rule of law to an extent greater than is, or has been, done. A more convincing demonstration of the impotence of legal positivism in international law can hardly be imagined. Curiously enough Corbett not only demonstrates these consequences, but also, because of his *a priori* assumption of legal positivism, acquiesces in the result.

This result is quite independent of the particular branch of law which Corbett has chosen to investigate. The demonstration that a theory of law which bases legal obligation on assent can never justify the application of law to dissenters, holds as much for criminal law in the domestic field as it does for dissenters in the international arena. Hence, were this positivistic theory of legal obligation correct, domestic law which sends murderers to the electric chair without asking them whether they assent to the court's jurisdiction should not exist. A domestic law in which the individual reserves the right to decide whether the court has jurisdiction would place the private citizen in the same position in which nations now stand with regard to international law. And were this our present situation in domestic law, Corbett would undoubtedly have published a book called *Law and Society in the Relations of Individual Persons* and described himself as "realistic." In it he would maintain that anyone who attempts to achieve an effective domestic law of murder is misguided, building false hopes and doing more harm than good.

But competent legal thinking involves more than the capacity and integrity to pursue one's philosophical premises to their consequences. A student of law can hardly call himself scientific or realistic unless he also faces the question of the validity of his premises.

Apparently, this is precisely what Austin, the founder of English legal positivism, did before he died, with results similar to those of the foregoing analysis. In her preface to the posthumous edition of his *Lectures on Jurisprudence or the Philosophy of Positive Law*, his wife, Sarah, writes that Austin had refused to publish during his lifetime a second edition of this work, notwithstanding the demand, because he had become convinced of

8. *Ibid.*

9. *Ibid.*

10. *Ibid.*

its limitations and inadequacy.¹¹ She adds the copy of an advertisement found in his notes describing his new position in part as follows:

Positive law (or *jus*), positive morality (or *mos*), together with the principles which form the text of both, are the inseparably-connected parts of a vast organic whole. To explain their several natures, and present them with their common relations, is the purpose of the essay on which the author is employed. . . . He (author) had thought of entitling the intended essay, the principles and relations of law, morals, and ethics: meaning by law, *positive* law; by morals, *positive* morals; and by ethics, the principles which are the test of both.¹²

At times Kelsen seems about to make the same admission, only to withdraw again into the premises of his positivism. For example the first sentence of the section on Nomodynamics in his *General Theory of Law and State* is: "The legal order is a system of norms."¹³ A few pages later, however, he writes: "A norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only."¹⁴ A page later one reads: "Law is always positive law, and its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. . . . The basic norm of a positive legal order is nothing but the fundamental rule according to which the various norms of the order are to be created."¹⁵ The latter statement suggests also that the solitary ethical proposition in legal science, which is its initial *grundnorm*, possesses little if any ethical content, but is instead merely a formal rule concerning how the more general and the more particular propositions of law are to be related when established in a scientific rather than a haphazard manner.

There are also suggestions that Kelsen's legal positivism is compatible with and even presupposes the living law of sociological jurisprudence.¹⁶ This would be the case if the distinction between his pure theory of law and sociological jurisprudence were a purely verbal one, drawing the line between the activity of the jurist *qua* jurist and the activity of the sociologist of law *qua* sociologist. Were such the case, the relationship might be somewhat as follows: Any legal system is a system of norms. Furthermore any system of norms derives its more particular norms from more basic general normative postulates which might appropriately be termed the *grundnorm*. This *grund-*

11. 1 AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 16-18 (Robert Campbell 4th rev. ed. 1873).

12. *Id.* at 17.

13. KELSEN, *op. cit. supra* note 6, at 110.

14. *Id.* at 113.

15. *Id.* at 114.

16. EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 81, 369, 388, 401, 419, cc. XX, XXI (1936).

norm of pure theory derives its validity and its ethical content, however, from the living law of sociological jurisprudence.

The method of validating a Kelsenian *grundnorm*, as illustrated in the location of the normative authority of his Austrian Constitution of 1920 in the earliest Constitution of 1867,¹⁷ indicates, however, that such is not the case. Kelsen confirms this conclusion: "If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically. . . . The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends."¹⁸ Clearly if law is nothing but positive law, then the assumption of an ought for some first positive law must be one's basic *grundnorm*. Thus he continues, "It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration."¹⁹ Kelsen adds that this "basic norm is not created in a legal procedure by a law-creating organ. It is not—as a positive legal norm is—valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid. . . ."²⁰ This is another way of saying that legal obligation has its basis not in any act of assent but in a primitive and hence irreducible, hypothetically *a priori* moral presupposition.²¹ Here the neo-Kantian character of Kelsen's legal positivism reveals itself.

But what is the validity of the initial presupposition? Why assume the validity of the first constitution? To these questions Kelsen replies: "That a norm of the kind just mentioned is the basic norm of the national legal order does not imply that it is impossible to go beyond that norm. Certainly one may ask why one has to respect the first constitution as a binding norm. . . . The characteristic of so-called legal positivism is, however, that it dispenses with any such . . . justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator."²² Clearly then, his pure theory of law does not presuppose the living law of sociological jurisprudence as a part of itself. In fact it would be self-contradictory for the pure theory of law to derive its *grundnorm* from something outside itself. For the essence of the pure theory of law is that the *grundnorm* with its ethical "imputation" is not a mere hypothetical *a priori*, but is instead a primitive, and hence irreducible *a priori*.

At this point Kelsen's legal positivism becomes identical with the ethical jurisprudence of Morris and Felix Cohen. Nor is this an accident, for all three are neo-Kantians in their theory of ethics. They differ merely in the

17. KELSEN, *DIE VERFASSUNGSGESETZE DER REPUBLIK DEUTSCH-ÖSTERREICH*, Vols. 1-3 (1919), Vol. 4 (1920), Vol. 5 (1922).

18. KELSEN, *op. cit. supra* note 6, at 115.

19. *Ibid.*

20. *Id.* at 116.

21. Kelsen, *Causality and Imputation*, 61 *ETHICS*, No. 1 (1950).

22. KELSEN, *op. cit. supra* note 6, at 116.

relation of their ethics to law. Kelsen would keep law independent of ethics except for the solitary "ought" of his basic *grundnorm*. The Cohens regard ethics as the essence of law. But for all three the ethical within law is an *a priori* which is a primitive and hence irreducible assumption. This follows from the basic philosophical assumption of neo-Kantianism that the "good" or the "ought" cannot be derived from the "is."

NEO-KANTIAN ETHICAL JURISPRUDENCE

The jurisprudence of the Cohens²³ has two merits. It does justice to the inescapably ethical character of any legal statute, *i.e.*, its permission of certain and prohibition of other *de facto* conduct. Their ethical jurisprudence recognizes the futility of the attempt of Kelsen's pure theory of law to restrict the "ought" of legal science to a word in its first postulate referring to some present or past constitution of the positive law. In its place the Cohens introduce the richer basic ethical assumption which they term "justice" or "the good life." The remainder of law then becomes the application of this ethical ideal to the construction of the initial constitution, the legislator's creation of statutes under that constitution, and the judge's application of both to the concrete cases in his decisions.

Were Soviet Russians, 19th Century American Republicans, Spanish Roman Catholics, Arab-bloc Muslims, New Deal Democrats and British Labour Party socialists in agreement on the specific basic ethical norm which defines "justice" or "the good life," the ethical jurisprudence of the Cohens would work and the basic problem of legal science would be solved. Unfortunately this agreement does not exist.

To provide any judge with a basic postulate of legal science containing the words "the good life" is of no use to him whatever, since any case involving a moral issue results from a conflict between at least two different conceptions of what "the good life" is. To put the matter in terms of contemporary symbolic logic, the expression, "the good life," is a variable; it is not a material constant. An ethical jurisprudence is inadequate in theory or in practice until the criterion for determining the value of this variable in any instance is specified.

More explicitly this means that an ethical jurisprudence will be adequate only when its basic ethical assumptions are spelled out in detail with content, thereby giving the judge a criterion for choosing one normative principle in deciding the case rather than another. Furthermore, an adequate ethical jurisprudence must include the scientific method for designating this specific ethical content. When the Cohens take the concept of the ethical as a primitive and

23. Morris R. Cohen: *Philosophy and Legal Science*, 32 COL. L. REV. 1103 (1932); REASON AND NATURE, 333-457 (1931); LAW AND THE SOCIAL ORDER (1933); FELIX COHEN: ETHICAL SYSTEMS AND LEGAL IDEALS, AN ESSAY ON THE FOUNDATION OF LEGAL CRITICISM (1933); *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937-8). And see STAMMLER, THE THEORY OF JUSTICE (Husik's transl. 1925).

hence irreducible concept in ethics and law, this specification of the methodological criterion and the attendant specific ethical norms which result from its application becomes impossible. As with Kelsen, it would be a violation of their concept of the ethical if such a criterion were found; for then the good or the legally obligatory would not be a primitive concept but would be defined in terms of the concepts designating the criterion. Such is the inevitable consequence of any theory of law or ethics which affirms the ethical to be a basic assumption which is irreducible. It merely indicates that there must be an ethical assumption of some kind without either giving a clue as to what it is specifically, or providing a successful method for testing any specific ethical and legal norm such as *laissez faire* individualism, socialism, or communism. Notwithstanding the greater justice to the essentially ethical character of law which it promised, neo-Kantian ethical jurisprudence, then, is as barren ethically and legally as is the earlier legal positivism of Austin and of Kelsen's pure theory of law.

Law is always possessed of specific normative content. Since neither the positive law nor *a priori* ethical jurisprudence give any clue to why the content of positive law is what it is, positive law must depend, because of its specific content in any given society, on something beyond both itself and the ethically *a priori*. Here it is necessary to introduce sociological jurisprudence with its thesis that the source of the content and the obligation of the positive law is in the underlying structure or living law of the particular society to which it refers.

SOCIOLOGICAL JURISPRUDENCE

The expression "sociological jurisprudence" will be used throughout this inquiry in its most general sense to include (a) the sociology of law, and (b) sociological jurisprudence in the more restricted sense; *i.e.*, the application of the living law as determined by the sociology of law to judicial decisions.

The earlier formation of this theory of law was given by Pound²⁴ and Ehrlich. Both failed to articulate clearly the precise manner in which the living law, as specified by sociology, determined the content of the ethical norms of the positive law. The tremendous erudition of Pound's jurisprudence with its sensitivity to all schools of legal thought and its attendant eclecticism left open the question as to whether the sociologist's contribution sup-

24. POUND, *op. cit. supra*, note 1; *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1912); *Law and the Science of Law in Recent Theories*, 43 YALE L. J. 525 (1934); *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943); INTRODUCTION TO AMERICAN LAW, DUNSTER HOUSE PAPERS No. 3 (1919); INTRODUCTION TO THE PHILOSOPHY OF LAW 1-143 (1925); OUTLINES OF LECTURES ON JURISPRUDENCE cc. IV, V, VI (5th ed. 1943). See also STONE, *THE PROVINCE AND FUNCTION OF LAW; LAW AS LOGIC, JUSTICE, AND SOCIAL CONTROL* (1950).

plied the ethical norms in whole or part or was to be supplemented or even judged by ethical norms coming *a priori* from ethical jurisprudence proper. Ehrlich, particularly in his criterion of effective positive law as that which corresponds to the underlying living law of sociology, suggested that the ethical norms of the positive law might come from the sociological contribution alone. Even so he specified no sociological method for localizing and determining the factor in society which provides positive law with its specific ethical content. He merely expressed the hope, in the concluding chapters of his classic work, that such a scientific sociological jurisprudence would be constructed and suggested the form, modeled on the economic science of the Austrian School, which it might take.²⁵ Speaking of this economic science which, although deductively formulated, is based on observation, he added: "And sociology also, including the sociology of law, must be a science of observation."²⁶

But this type of scientific method raises a difficulty if sociological jurisprudence is not in the end to be as barren with respect to the specification of ethical norms as is legal positivism or the neo-Kantian ethical jurisprudence. Kelsen puts his finger on this difficulty when he notes that contemporary sociology "is not a study which seeks to determine how men ought to act, but how they actually do act and must act according to the laws of cause and effect. . . . This transformation of the science of social relationships from an ethical science into a causal sociology, explaining the reality of actual conduct and therefore indifferent to values, is largely accomplished today. It is, fundamentally, a withdrawal of social theory before an object which it has lost all hope of mastering. . . . [I]t abandons its essential problem as insoluble."²⁷ In his more recent paper, *Causality and Imputation*,²⁸ Kelsen affirms this situation to be inescapable, because the laws of any empirical science are of necessity laws of temporal cause and effect whereas legal science entails "imputation" (*i.e.*, a minimum *a priori* ethical *grundnorm*) and the freedom of the moral individual from the empirical, temporal laws of cause and effect.

But does sociological jurisprudence need to be so poverty-stricken ethically? Before turning to recent developments to answer this question, one caution is to be noted. Even if the answer should be in the affirmative, this would not establish the validity of Kelsen's pure theory or the Cohens' ethical jurisprudence. The result would be merely that sociological jurisprudence is as vacuous and inadequate ethically and legally as is legal positivism or neo-Kantian ethical jurisprudence. For let it not be forgotten that of Kelsen's *grundnorm* it can always be asked by any person confronted with such a law: "Why this particular *grundnorm* rather than one which I might suggest? Why this

25. EHRlich, *op. cit. supra* note 16, at cc. XX, XXI.

26. *Id.* at 473.

27. KELSEN, *op. cit. supra* note 6, at 391.

28. Kelsen, *supra* note 21.

particular content freely imputed by you rather than a different content which I freely will?" Similarly of the Cohens the question can be asked: "Why the specific content of 'the good life' which you read into your otherwise vacuous ethical norm rather than the different specific content which I might suggest?" To all these questions neither legal positivism nor *a priori* ethical jurisprudence has an answer. And without an answer, legal and ethical obligation is meaningless and law and ethics are not merely relative but also arbitrary.

However necessary it is in legal science, as Kelsen and the Cohens have correctly noted, to distinguish "the ought" and "the good life" from the "is," it is equally necessary to provide some sense in which they can be related to and thereby judged as to their truth or falsity with respect to some "is." Otherwise no reason can be given for the ethical postulates of legal science taking one specific ethical content rather than another, and both ethics and law become completely arbitrary with no meaning whatever for either ethical or legal obligation.

Underhill Moore's sociological jurisprudence²⁹ represents a tremendous advance over both the pure theory of law and ethical jurisprudence. What he sought was a legal science which could not merely demonstrate that some *grundnorm* has to be assumed, but also specify its content and verify the one that is to be assumed.

His procedure consisted in accepting not merely the fact that the basic postulates of positive law are normative but also that they are norms with a specific content which is only one of many possible specific contents. From this it follows that the ethical postulates of positive law cannot be true *a priori*, but must find their content and validation in some subject outside both the positive law and *a priori* ethics. Following Pound and Ehrlich,

29. Moore, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L. J. 703-19 (1929) (with Theodore S. Hope, Jr.); *Legal and Institutional Methods Applied to the Debiting of Direct Discounts* (with Gilbert Sussman): I. *Legal Method, Banker's Set-Off*, 40 YALE L. J. 381-400 (1931); II. *Institutional Method*, 40 YALE L. J. 555-75 (1931); III. *Connecticut Studies*, 40 YALE L. J. 752-78 (1931); IV. *South Carolina and Pennsylvania Studies*, 40 YALE L. J. 928-53 (1931); V. *The New York Study*, 40 YALE L. J. 1055-73 (1931); VI. *The Decisions, the Institutions, and the Degrees of Deviation*, 40 YALE L. J. 1219-50 (1931); and *Appendix*, 40 YALE L. J. 1251-72 (1931); *The Current Account and Set-Offs Between an Insolvent Bank and Its Customer*, 41 YALE L. J. 1109-33 (1932) (with Gilbert Sussman); *The Lawyer's Law*, 41 YALE L. J. 566-76 (1932) (with Gilbert Sussman); *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks* (with Gilbert Sussman and C. E. Brand): I. *Legal Method*, 42 YALE L. J. 817-62 (1933); II. *Institutional Method*, 42 YALE L. J. 1198-1235 (1933); *Drawing Against Uncollected Checks*, 45 YALE L. J. 1-38 (1935); 45 YALE L. J. 260-92 (1935) (with Gilbert Sussman and Emma Corstvet); *Law and Learning Theory: A Study in Legal Control*, 53 YALE L. J. 1-136 (1943) (with Charles C. Callahan); *My Philosophy of Law* in CREDOS OF SIXTEEN AMERICAN SCHOLARS 201-28 (1941); *Law and Learning Theory: A Study in Legal Control* (with Charles C. Callahan), 53 YALE L. J. (1943); Northrop, *Underhill Moore's Legal Science: Its Nature and Significance*, 59 YALE L. J. 196-213 (1950).

Underhill Moore identified this subject with the living law of sociological jurisprudence, *i.e.*, the inner order of society as determinable empirically by sociological science.

His problem then became that of providing an objectively determinable specification of the content of the living law in any given state of any given social system. He believed, quite correctly, that previous sociological jurisprudence had failed, because, although it assumed the living law to be objective for a given community, its methods of determining it were so intuitive and various that little agreement existed among different sociological jurists upon what the objective living law is. Too often the objective living law of a given sociological jurist was nothing but the image of this jurist's pet, arbitrarily chosen, positive law reform. This made sociological jurisprudence as arbitrary as Kelsen's pure theory of law or the Cohens' ethical jurisprudence.

Underhill Moore achieved this required objective specification of the content of the living law. He assumed that whatever the subjective ethical norms of the many individual people making up the living law may be, these norms, to the extent that they are socially and legally significant, will show in their overt spacio-temporal behavior. Spacio-temporal behavior is a publicly determinable objective thing quite independent of any observer's normative preference. Hence Underhill Moore solved the problem of providing an objectively determinable specification of the living law of a given society at a given time by identifying it with the high-frequency overt behavior of all the people in that society. This amounted to an identification of the living law with the common norms of the majority of its people. Thus, what Kelsen and the Cohens said sociological jurisprudence could not do, was in part at least achieved: Two meanings were provided for the distinction between the "ought" and the "is"—one of these two meanings centering in the relation of the positive law to the living law, the other centering in the living law itself.

The meaning which centers in the relation of positive law to living law is as follows: The positive legal norm which corresponds to the high-frequency behavior of the living law is the positive law norm which ought to be. The positive legal norm which does not correspond to the high-frequency behavior of the living law is the one which ought not to be. This provides the judge, confronted with a specific case and two possible norms for deciding it, with a scientifically verifiable and objective criterion of the norm to be chosen. A positive legal norm which exists but does not correspond to the high-frequency behavior of the living law is a positive ethical and legal norm which "is" but not one which "ought" to be. This makes the sociological jurist's criterion of good positive law identical with Ehrlich's criterion³⁰ of effective positive law.

The criterion for distinguishing the "ought" from the "is" within the living law alone is equally precise in Underhill Moore's sociological juris-

30. EHRlich, *op. cit. supra* note 16, at cc. III, IV.

prudence. The "ought" of the living law of a given society is its high-frequency behavior, *i.e.*, the common norms of the majority of its members. The immoral and illegal behavior of the living law is the incompatible low-frequency behavior, which if allowed to persist and accumulate, would undermine the common norms of the living law defined by the high-frequency behavior.

In his seminars, Underhill Moore often pointed out one difficulty in the application of this distinction. It arises because there is nothing in the theory to indicate at what specific point in the continuous curve of total-living-law behavior, the line between high-frequency and low-frequency behavior is to be chosen. This difficulty, however, applies only to borderline cases. It does not arise if the extreme low-frequency behavior is compared to the highest point of the high-frequency behavior.

However Underhill Moore saw that these two distinctions between the "ought" and "is" are not sufficient. The insufficiency appears when one questions, as one must, the ethical validity of the high-frequency behavior of the living law in any given society at any given time. The fact that the high-frequency behavior of a given society is what it is does not necessarily imply that it ought to be what it is. Rarely, if ever, are the high-frequency normative accomplishments of a people identical with their ideals. Also there clearly exist societies with high-frequency behavior which one must and ought to brand as evil. And in any society there is high-frequency behavior which should be reformed.

An ethical and legal science which cannot provide meaning and a criterion for designating the high-frequency behavior of the living law of a given society as bad or in need of reform is defective. Otherwise good law and conduct would always have to be the *de facto* high-frequency behavior of the present *status quo*. One can, of course, wait for the living law to change and then bring the positive law into accord with this change. This would provide a positive legal norm and also a new living law norm different from that of today's high frequency *status quo* "is." Even so, one would not be able today to say that today's society is "bad" or in need of "reform." Yet this is what every reformer and every moral man frequently does and must say.

The question, therefore, arose in Underhill Moore's mind: "Is it possible today to determine the content of tomorrow's high-frequency living law? If so, the norm specified by tomorrow's high-frequency living law could be used today as the "ought" for evaluating and reforming today's high-frequency living law.

Underhill Moore went to the physicists for an answer to this question. The reason for turning to natural science at this point was that physics is a science in which, given the state of a system today, tomorrow's state can be calculated today. Study of the scientific method of physics showed that for such a sociological jurisprudence two requirements are necessary. First, the scientific theory must be deductively formulated. When physics remained

in the purely inductive natural history stage it was unable to achieve this required predictive power. This made it quite clear to Underhill Moore that the traditional inductive descriptions of societies and the studies of social trends after the manner of the historical sociological jurists or even the policy-forming law of McDougal and Lasswell are quite inadequate. Such inductive studies merely throw arbitrarily chosen facts in one's eyes, rather than give one the over-all high-frequency ordering relations (termed by Ehrlich "the inner order of society"³¹) necessary to evaluate the facts by putting them in their true proportions. Second, the deductively formulated postulates of the theory must specify a small number of key variables correlated indirectly with inductively given operations such that, given the present empirical values of these few key variables, the inner order of the present state of the system is defined and the values for tomorrow's state can be deduced.

Sociological jurisprudence should be able to designate the normative element of the living law by determining empirically the value of the smallest possible number of variables, preferably only one. Otherwise before sociological jurisprudence can be of any use to the jurist or judge he must have the sociologist place an endless amount of inductive data on his desk. From this standpoint, the policy-forming law of Lasswell and McDougal³² with some seven secondary and three primary value variables, is most questionable, if not as ethically vacuous as legal positivism or *a priori* ethical jurisprudence. Have Lasswell and McDougal in practice done more than substitute several vacuous ethical concepts for the one vacuous ethical notion of the Cohens' *a priori* ethical jurisprudence, thereby merely multiplying the vacuity of the latter system ten-fold? Moreover, even if a non-arbitrary criterion is given of the particular inductive data selected to define operationally each of the ten value variables, the sociological jurisprudence of Lasswell and McDougal has not provided an objective determination of the living law until it also includes an invariant law or formula specifying the inner order of the ten value variables. This follows because, as Ehrlich made clear, the living law is not the observed facts of sociology but the inner order of the facts.

In any event, it was to avoid such weaknesses that Underhill Moore's sociological jurisprudence took its final direction. He turned to a causal sociological jurisprudence not, as Kelsen suggests, because of an uncritical aping of the method of natural science nor because of an admission of the incapacity of sociological jurisprudence to provide a meaning for the "ought" as distinct from the "is," but because it offered a positive way to provide meaning for such a distinction. If he were able by such a scientific method to

31. *Ibid.*

32. McDougal, *supra* note 2; *The Role of Law in World Politics*, 20 *MISS. L. J.* 253-83 (1949); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L. J.* 203-95 (1943); LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOUR* (1948).

deduce the norms constituting tomorrow's high-frequency behavior from today's high-frequency behavior, he would have today a meaning for the "ought" different from today's living law high-frequency "is" and hence an objective, empirically verifiable criterion of normative social reform.

Even though he chose the very simplest social system imaginable, where if anywhere a causal sociological jurisprudence might be possible, the result was a failure. After years of selection of every possible variable in the subject matter, Underhill Moore and Callahan³³ found that they could not obtain a formula connecting the high-frequency content of the present state of the social system to that of its future state without assuming the new norm as an independent variable. In short the future state could be deduced only if the new norm were assumed. Hence it could not be used to define the new norm. There is no greater tribute to the integrity of Underhill Moore as a legal scientist than the fact that he not only saw this negative result but accepted it. This is the sense in which his own work ended in partial disappointment.

Nonetheless he demonstrated that sociological jurisprudence can provide an objective, empirically verifiable criterion to distinguish the "is" of the positive law from its "ought" as identified with the high-frequency "is" of the living law. He showed also that it can provide within the living law for a similarly objective distinction between its "ought" as identified with its high-frequency behavior and immoral and illegal behavior as defined by that low-frequency behavior which, if not curbed, will make the norms of the high-frequency behavior impossible. The latter distinction makes clear how the "ought" of positive law operates to bring the low-frequency behavior of the minority into compatibility with the high-frequency communal behavior and inner order of society necessary for the community's existence. What he failed to achieve was a criterion equally objective for designating when the high-frequency living law is bad or in need of reform.

The simplicity of the social behavior which Underhill Moore studied (*i.e.*, the total distribution of parked cars on a street in New Haven) makes it highly probable that his negative finding with respect to the deduction of tomorrow's living law from today's is definitive for any sociological jurisprudence which identifies any society's living law with objectively determined, overt, high-frequency behavior. There is a theoretical reason, pointed out by Karl Popper³⁴ among others, for believing that such a criterion for the "ought" of today's living law would be incorrect even if it were achieved. It is that if such a causal determinism held for norms, then moral and legal reform would not only be unnecessary but also impossible. For if such determinism exists, on the one hand, man can do nothing about it; and on the other hand, the reform will come automatically without one's doing anything about it.

33. Moore & Callahan, *Law and Learning Theory*, *supra* note 29; see also Northrop, *supra* note 29.

34. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1950).

In accepting this negative result it is necessary to avoid Popper's error of concluding that the meaning of the word "ought" as applied to the living law is an ethical *a priori*. This error concerning ethical norms with respect to the living law is similar to that of Kelsen and the Cohens with respect to the positive law. An abstract, vacuous, ethical "ought" is of no more use in distinguishing the good from the bad in the living law than it is in the positive law.

If it is meaningful to say that high-frequency living law behavior is good or bad, then content must be given to the words "good" and "bad." And an objective criterion for specifying this content must be indicated. Is there any way, other than that attempted by Underhill Moore which ended in failure, for doing this? Recent developments in sociology, cultural anthropology and neurological behavioristic psychology provide part of the answer to this question.

These developments also specify the manner in which the psychological theory underlying the sociological jurisprudence of Underhill Moore and of Lasswell and McDougal must be supplemented. When this supplementation is made, a new and simpler objective method of sociological jurisprudence becomes evident. It requires the empirical determination of but one independent variable in any society in order to specify the ethical and legal content of its living law. This new method has the merit also of avoiding the weakness, noted by Underhill Moore in his own system, of not being able objectively, rather than arbitrarily, to draw the line between high-frequency or ethical living law behavior and low-frequency or non-ethical living law behavior. And this new sociological jurisprudence points the way beyond itself to another objective criterion for judging the living law in any specific instance to be "good" or "bad" or in need of specifiable reform. The last vestige of the relative, the dogmatic and the arbitrary is thereby removed from ethical and legal science. Before turning to this new method it is necessary to consider the capacity of traditional sociological jurisprudence to provide an effective international law.

TRADITIONAL SOCIOLOGICAL JURISPRUDENCE AND INTERNATIONAL LAW

The sociological jurist contends that if any positive law is to be effective it must correspond to the underlying living law. To take this thesis seriously is to realize immediately one major reason (quite apart from the fact that it is so much the creation of legal positivists) why international law is so weak, calling forth such meagre living law sanctions for itself. Existent international law is the creation of but one historical portion of one living law culture of the world. More specifically it is the product of late medieval and early modern European jurists, watered down and weakened by later 18th and 19th century European positivists. Having thus its living law roots solely in one small piece of but one local culture of the world, is it any wonder that the many diverse nations and cultures of the world refuse to grant it any

unqualified jurisdiction over even a small piece of their particular national and international affairs?

Nor is there any need to wonder why even the recent modern portion of the West, whose legal jurists have created the existent international law, should have such little confidence in it. Rooted as the recent international law is, and its recent jurists have been, in either legal positivism or *a priori* ethical jurisprudence, the norms of international law of necessity have to be left in the form of vacuous ethical *grundnorms*. Under such circumstances not even a modern Western nation can trust its fate to such an international law, even though it be its own creation. For the time must inevitably come, if such a vacuously defined international law is accepted without reservation, when its *grundnorms* will be given content by representatives of cultures such as contemporary Soviet Russia, Middle Eastern Islam or Hindu India. Such content will differ from and even in some cases be antithetical to that of the living law of our own culture.

To look at contemporary international law, therefore, from the standpoint of sociological jurisprudence is to realize why this international law is weak and devoid of living law support. Such will be the inevitable response to any international law grounded in but one culture of the world or in legal positivism, vacuous ethical jurisprudence, or the traditional sociological jurisprudence.

There is no need, however, for international law to remain in this poverty-stricken condition. Provided sociological jurisprudence can prescribe an objective method for determining the world's diverse living laws, it can point the way to an effective international law and to a world legal order to which the diverse peoples and cultures of the world can give a specified jurisdiction without reservation. The first step along this way consists in objectively determining the underlying specific living law of the world's major different cultures and then bringing the positive international law into correspondence with this specified diversity of the world's major living laws. Difficulties, which will be discussed later, will obviously arise when this is done.

An objective method for determining the living law of any people, nation or culture must be found. Clearly this is a task for which the traditional lawyer is quite incompetent. The living law of each of the many cultures and peoples of the world can be specified only by a direct scientific study of these cultures. The sciences concerned with such a study are cultural sociology and cultural anthropology. More, however, is revealed by these sciences than is necessary for, or relevant to, the jurist's purposes. The relevant items become evident when one notes that positive law is always concerned with norms. Positive law specifies certain specific *grundnorms* and particular statutes which serve as a moral and juridical measuring rod to distinguish in any culture the behavior which is legal from that which is not.

What international law needs, therefore, from the cultural sciences is the specific normative factor in the specific living law of each of the major cultures

of the world. It is because of its concern primarily with the normative factor in the living law of any society that sociological or anthropological jurisprudence distinguishes itself from sociology or anthropology proper. Thus an adequate sociological or anthropological jurisprudence must first determine the key independent variable in any culture which, when its value is determined empirically for that culture, gives its specific living law *grundnorm*. What is this independent variable? Three independent developments in contemporary sociology, anthropology and psychology specify the answer to this question. These developments are illustrated in P. A. Sorokin's concept of "logico-meaningful social causality," Clyde Kluckhohn's study of the Navaho Indian, and Warren S. McCulloch and Walter Pitts' theory of neurologically trapped universals.

NEW DEVELOPMENTS IN SOCIAL AND PSYCHOLOGICAL SCIENCE

Logico-Meaningful Causality. Sorokin's inductive study of the major cultures of the world led him to the discovery that in the cultural sciences there are two types of causality.³⁵ In the natural sciences only one of these two types occurs. The type of causality common to the natural and the cultural sciences is the one noted previously by Kelsen in his criticism of sociological jurisprudence. This type we shall call mechanical causality.³⁶ Its essence is that given the determination of certain present facts, certain future ones can be deduced.

Sorokin agrees with Kelsen that were all sociology and sociological jurisprudence of this mechanical causal type, the sociology of law and sociological jurisprudence would be of no use in providing positive law with ethical *grundnorms* possessing specific content. What distinguishes cultural science, however, from natural science is that mechanical causation in cultural science applies only to isolated factors in the system, not to the overall ordering relations of the cultural system as a whole. It was with this overall "inner order of society" that Ehrlich identified the living law in his *Fundamental Principles of the Sociology of Law*. Sorokin adds that the sociological causality which defines this overall inner order is logico-meaningful rather than mechanical.

"The nature of logico-meaningful causality begins to become evident when one pursues the analogy of Newtonian mechanics in the cultural sciences as far as it will go. Any natural system designated by Newtonian mechanics has its entities. They are the physical or scientific objects. The cultural systems also have their entities. They are the human persons and their physical environment. When, in Newtonian mechanics, the postulates and

35. SOROKIN, *SOCIAL AND CULTURAL DYNAMICS* (1937-1941); *SOCIETY, CULTURE AND PERSONALITY* (1947); *SOCIOCULTURAL CAUSALITY, SPACE, TIME* (1943); see also MAQUET, *THE SOCIOLOGY OF KNOWLEDGE OF MANNHEIM AND SOROKIN* (1951).

36. See NORTHROP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* 219-26 (1947).

values of the variables defining the state of any system are specified, the ordering relations of the system are made determinate. The mere specification, however, in any cultural system of the positions and momenta of the persons in that society is not sufficient to specify the ordering relations which define the culture of those persons.

“An example will suffice to make this clear. In many village communities of India, Muslims and Hindus have lived together for centuries. Most of the Muslims are converts from Hinduism; thus ethnologically the peoples are for the most part identical. Hence, the cultural differences between Muslims and Hindus which are so great as to necessitate the present division of the 19th century India into Pakistan and New Delhi’s India are not to be explained by physical, ethnological differences. The momenta and positions of the bodies of the Hindus and Muslims in any single village hardly account for the differences in their two cultures. The position of Muslims and Hindus is identical since both are located in the same village. If one watched both groups walking down the street there might be slight differences in their momenta, but hardly differences sufficient to account for the differences in culture. In fact we would suspect that where differences in momenta between Muslims and Hindus in the same village appeared, these differences would be the effect rather than the cause of the cultural differences. Clearly the cultural ordering relations are not given after the manner in which the ordering relations of natural systems exhibiting their mechanical causation are given.

“What is the unique factor, in addition to the aforementioned physical factors, which must be determined in order to make the ordering relations, which incidentally define the ethos of a culture, determinate? Sorokin’s answer is that this additional key variable, unique to cultural systems, is to be found in the meanings that the persons making up any single culture hold in common and use to conceptualize, order and integrate the raw data of their experience. It is because meanings are the key factor that Sorokin calls this unique causality of cultural science ‘logico-meaningful causality.’

“What this entails is that wherever there are two different cultures, the persons in those cultures are using different basic meanings or concepts to describe, systematize and integrate the data of their experience. The Hindus in the Indian villages are using those of Hinduism; the Muslims, those of Islam; and so we could go on beyond the Hindu villages to the rest of the world. Then we would say Soviet Russians are using those of Marx as interpreted by Lenin and Stalin. The traditional Chinese, those of Confucius; the Siamese, those of Buddhism, with a slight top layer of Hinduism; the Roman Catholics those of St. Thomas; the Americans those of Locke and Jefferson and Adam Smith and Mill and Jevons, and more recently Keynes.

“Our example of the Indian village suggests also another point noted by Sorokin. The meanings used by a given people to describe, organize and interpret the data of their experience determine the ethos of their culture. I would even go further and say that they are its ethos. The word “good” is

literally nothing more than the name for the basic meanings of the hierarchy of all meanings used by a people to conceptualize themselves and their universe. This follows from what has been said. For if the basic meanings define the ordering relations of a culture, they automatically define its living law, and the living law of a culture is its ethos. To these basic conceptual meanings the word "good" adds but one thing in addition to its designation of them, *i.e.*, their application to, and use as a measure of, conduct. In short, ethics is the conceptualization of the data of experience, applied."³⁷ And, it may be added, law is the application of ethics to society in the settling of its disputes.

But what are basic meanings or concepts which define the living law ethics of a culture? The usual term for designating the basic concepts of any subject matter is philosophy. This is why the sociological jurist determines the value of the variable which specifies objectively the living law norms of a culture when he determines the indigenous philosophy of that culture. At this point Clyde Kluckhohn's anthropological studies become important.

Philosophy of the Navaho Indians. Kluckhohn's anthropological study³⁸ is especially significant because the Navahos have no written literature. Nevertheless he found that they use positive legal norms different from those of the surrounding American culture in settling their disputes. The reason for this difference became evident only after he teased out of them the concepts which they used for describing, integrating and anticipating the facts of their experience.

When their basic concepts were made overt and verified through conversation with them, Kluckhohn found that the Navahos have a complete, integrated and articulate philosophy. Once this philosophy was made explicit, not only did their particular positive legal norms follow naturally, but also the reason for the inner ordering relations of their society became clear. Again, this time through the eyes of the science of cultural anthropology, the living law of a culture is made explicit when its philosophy is specified.

Kluckhohn's study shows also that this specification can be made in a quite objective manner without the introduction of any arbitrarily chosen normative hypothesis upon the part of the investigator. Both the philosophy and the positive law which Kluckhohn found the Navaho to possess are different from the norms or the philosophy which he brought to the study from his own culture. Both the Navaho legal norms and the Navaho philosophy came to him as a surprise.

But how can philosophy have this key significance in defining the specific content of the living law of a culture? Is not human, and hence social behavior, a mere response to the stimuli of sex or hunger, with philosophy a

37. Northrop, *Philosophical Anthropology and World Law*, 14 TRANSACTIONS OF THE NEW YORK ACADEMY OF SCIENCES 109-12 (1951).

38. Kluckhohn, *The Philosophy of the Navaho Indians* in IDEOLOGICAL DIFFERENCES AND WORLD ORDER c. XVII (Northrop ed. 1949).

mere pseudo-rationalization after the fact? At this point it is necessary to introduce the recent investigations of the neurological and behavioristic psychologists, Warren S. McCulloch and Walter Pitts.

Neurologically Trapped Equivalents of Universals. One of the great merits of Underhill Moore's sociological jurisprudence was its analytic precision. It achieved generality because it treated the living law of a culture in terms of the overt behavior of all the individuals making up the culture. It had the precision also of being deductively formulated. Both of these sources of precision were present because Underhill Moore based his final legal science upon the deductively formulated, behavioristic psychology of his Yale colleague Clark Hull.

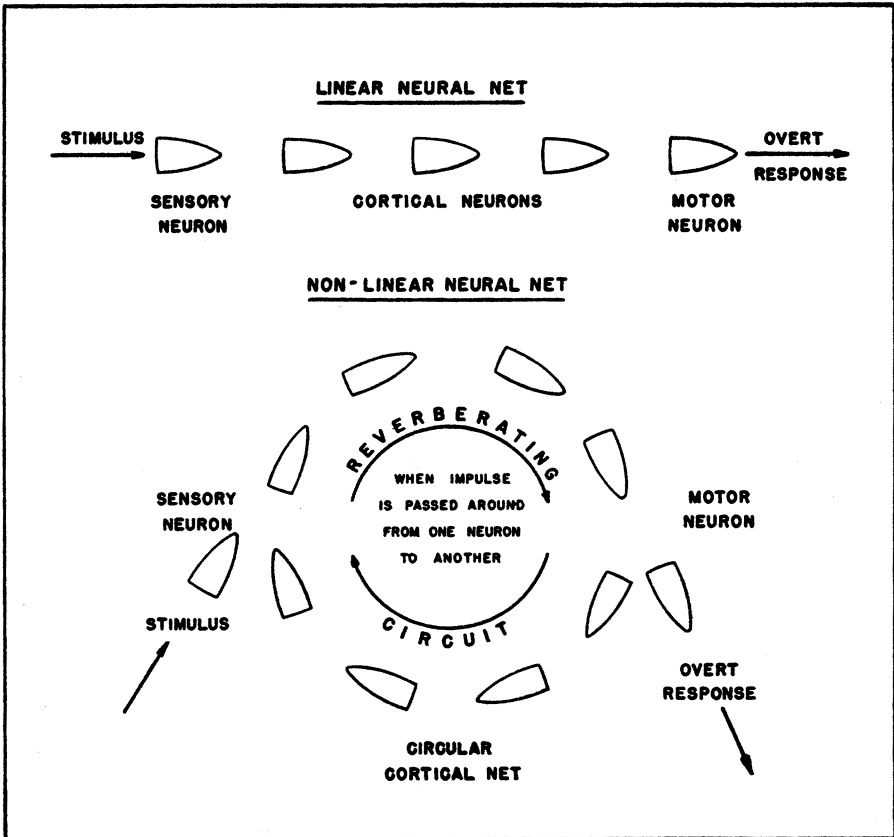
In Underhill Moore's use of this psychology, he treated all symbols merely as stimuli, ignoring their meaning. This tended to make it appear that all individual behavior and also the high-frequency group behavior which defined the living law norm is the mere effect of passing stimuli. On this basis it is difficult to understand how ideas and meanings, or, in other words, basic philosophical assumptions can have the significance in defining the living law of a culture which Sorokin's sociology and Kluckhohn's anthropology demonstrate.

McCulloch and Pitts have shown,³⁹ however, that recent neurological research and theory necessitates the reconstruction of Hull's behavioristic psychology in crucially important ways. They noted that if the nerve cells or neurons of the human nervous system were ordered linearly, then the stimulus would completely determine the response, and philosophical concepts would have the irrelevance in human behavior which many previous thinkers have supposed to be the case. In technical terms the stimulus of the sensory neuron would fire the intervening cortical neurons in the linear net which in turn would fire the motor neuron, thereby producing the overt, muscular behavioristic response. Thus the stimulus alone would determine the behavior, the intervening cortical neurons being merely carriers of the impulse from the stimulus to the motor response. (See upper part of diagram, following page).

McCulloch and Pitts recalled Lorente de N6's demonstration that cortical neurons are often arranged in a circle to which a sensory neuron comes and from which a motor neuron departs, after the manner indicated in the lower part of the diagram. These three investigators present physiological evidence for believing that the firing of the sensory neuron fires one of the cortical neurons in the circle and that this cortical neuron in turn fires its succeeding

39. McCulloch & Pitts, *How We Know Universals*, 5 BULL. OF MATHEMATICAL BIOPHYSICS 115-33 (1943); McCulloch, *A Hierarchy of Values Determined by the Topology of Nervous Nets*, *id.* at 89-93. See also Rosenblueth, Wiener & Bigelow, *Behavior, Purpose and Teleology*, 10 PHILOSOPHY OF SCIENCE No. 1, 18-24 (1943). For a summary of the foregoing material see Northrop, *The Neurological and Behavioristic Psychological Basis for the Ordering of Society by Means of Ideas*, 107 SCIENCE No. 2782, 411-17 (1948) and IDEOLOGICAL DIFFERENCES AND WORLD ORDER, *op. cit. supra* note 38, at c. XIX.

neuron in the circle and so on. Suppose that the time it takes to pass this impulse representing the stimulus from one neuron to another around the circle is longer than the refractory phase required by any neuron in the circle to have its energy restored by the metabolic process of the body, after it has fired. Then the impulse will be passed continuously around the circle as long as the human being in question lives. Such a circular net, together with the impulse being permanently passed around it by the successive firings of its neurons, is a reverberating circuit.



The persisting impulse in the reverberating circuit "represents the stimulus that is gone. When something represents something else, it is a symbol. Thus McCulloch and Pitts noted that in the trapped impulses of reverberating cortical circuits one has the neurological correlate of what introspective psychology calls a meaning or a universal.

"Suppose there are several such neurally connected circuits with their different trapped representatives of diverse stimuli or environmental facts. Connected meanings give propositions and connected propositions give theories. Suppose also that some trapped impulses representing certain facts in ex-

perience (*i.e.*, stimuli) are used to define others. Then the trapped universals will be ordered hierarchically in the cortex. Thus the distinction between basic or philosophical concepts and derived, more inductively given, concepts will arise.

"Suppose also that this hierarchy of meanings can both effect the firing of one motor neuron and inhibit the firing of another, as McCulloch shows to be the case. Then we see how philosophy not only can, but must, serve as the normative judge and censor of any stimulus striking a sensory neuron, defining what passes over into overt behavior and what does not. Thus, both law and ethics, as grounded in the trapped universals placed at the top of the cortical hierarchy because of their capacity to prepare the human organism for any stimuli hitting it, become intelligible. Neurological and introspective psychology hereby combine to affirm that behavior is a response not to stimuli alone, but to ideas found to be basic in remembering, describing and integrating the stimuli, and in enabling one to anticipate tomorrow's stimuli. When many people agree on these basic meanings, one has a single culture."⁴⁰ One has also a communal, rather than merely a personal, ethics and living law.

Contemporary sociology, anthropology and neurological psychology converge, therefore, upon the conclusion that Underhill Moore's sociological jurisprudence must be amended in the following manner: Between the stimulus which fires the sensory neuron and the motor neuron which fires the muscles to produce observable overt behavior, there must be placed the reverberating circuits of the human cortex which contain the trapped equivalents of introspected ideas. It is reasonable to assume also that the correlates of these trapped impulses representing their respective sensory stimuli must appear in introspective consciousness and in linguistic communication as the directly inspected meanings and ideas of scientific and philosophical theory.

This reformulation introduces into sociological jurisprudence a much more simple, economical and effective way of objectively determining the living law of a given people or culture. One has merely to question them verbally to bring out their basic concepts and philosophy, as did Kluckhohn with the Navaho Indians, noting the consequences of this philosophy as it flows over into and is confirmed by their overt behavior, positive legal norms, and decisions. In cultures which have a written literature one need merely study their basic scientific treatises concerning nature and their basic philosophical treatises to discover the underlying concepts used to describe and integrate the raw data of human experience, watching in turn their manifestations and confirmation in overt behavior, art forms, social institutions, positive legal documents and codes.

Unlike the sociological jurisprudence of Underhill Moore or Lasswell and McDougal, this is a workable method of determining the living law in any culture. To use Underhill Moore's sociological jurisprudence in the Hindu

40. Northrop, *supra* note 37.

culture of India it would be necessary to determine objectively the spacio-temporal motions of some 350,000,000 individual Hindus. Obviously, this is impossible. Yet without it the living law is not determined since high-frequency behavior has no meaning apart from the determination of the behavior of all. When one notes, however, the connection between neurologically trapped universals in the human cortex and introspected or linguistically and publicly expressed meanings, one can use these recorded meanings rather than the overt behavior of 350,000,000 individual Hindus to determine objectively their living law.

More specifically this means that instead of undertaking the impossible task of having sociological jurists, using behavioristic psychology, report the spacio-temporal motions of 350,000,000 Hindus, one will read the Vedic hymns, the Upanishads, and the Bhagavadgītā together with the philosophical commentaries thereon by Sankara and Ramanuja. Then one must compare these philosophical treatises with an inductive inspection of the overt behavior of Hindus, their ritualism, and the positive law in the Code of Manu and the other Hindu law treatises. Obviously this is a much more economical objective way of determining the living law than would be required by the sociological jurisprudence of either an Underhill Moore or Lasswell and McDougal, with the latter's ten different value categories which would have to be determined for 350,000,000 Hindus.

This philosophical method of objectively defining the living law also avoids the weakness which Underhill Moore noted in his own sociological jurisprudence. This weakness consisted in his being unable to define, other than in an arbitrary way, the line which distinguishes high-frequency, and in his sense good living law, from low-frequency, or bad living law. In the philosophical jurisprudence based on the McCulloch and Pitts neurological behaviorism correlated with introspective psychology, the good living law is defined not quantitatively but qualitatively in terms of philosophical ideas and doctrines. Conduct within a particular living law is good if it corresponds to the philosophy of the community in question, bad if it does not. Quantity has nothing to do with the matter. What made the use of Hindu private law necessary in British India was not the fact that there are 350,000,000 Hindus, but belief in and practice of Hindu doctrines by Indian disputants in India's courts. Thus, it is not the high-frequency Gallup Poll statistics, which may express little more than a whim or hysteria of the moment, but the persisting philosophy of the community that provides the scientific basis for normative judicial decisions. The Feinberg Law passed hastily by the New York Legislature and upheld later by the United States Supreme Court⁴¹ as compared with the philosophical basis of Justice Douglas' dissent illustrates this difference

41. *Adler v. Board of Education*, 20 U.S.L. WEEK 4127 (U.S. March 3, 1952). The Feinberg Law makes membership in any organization which advocates overthrow of the government by violence prima facie evidence of disqualification for employment in the public school system.

between a quantitative mood of the moment and qualitative sociological jurisprudence.

No judge in finding the ground for his decision has to add up countless continuously changing empirically determined quantities after the manner of the sociological jurisprudence of either Underhill Moore or Lasswell and McDougal. The basis for any decision is always some determinate proposition with content defining a doctrine.

This does not mean that in determining the living law of any culture or people inductive studies may not be valuable. The more empirical the determination, the richer the content of the living law; hence the great importance of Underhill Moore's institutional studies and those of Lasswell and McDougal. Fully adequate inductive investigation must, however, supplement and simplify the latter by concentrating attention on the empirical determination of the logico-meaningful or philosophically basic doctrines held in common by large numbers of people in the particular society being studied. Otherwise, the inner order of the inductive data is not specified, without which, as Ehrlich has made clear, there is no specification of the living law.

The restriction to beliefs held in common by large numbers of people is justified because it is only common beliefs that are community beliefs and hence effective living and positive common principles. There may be countless other philosophical beliefs differing from one another held by large numbers of people in the community but, precisely because any one of them is not held in common by a large number of other people, it is the living law belief of but one person, not the living law belief of the society. It is only living law philosophical beliefs held in common by large numbers of people in the society which give the society the inner order which is its living law.

The complex culture of India just before the partition into Pakistan and the present New Delhi India will serve as an example. This total culture exhibited three diverse and in part conflicting living laws. One was the living law of the pre-Western Hindu community. This is made determinate in an objective manner when the basic philosophical conceptions of nature and man in the fundamental scientific and philosophical books and commentaries mentioned above are studied. The Hindu positive law corresponding to this underlying Hindu living law is presented in an objective manner in the law books of Manu, Gautama, Apastamba and others. The second living law of the former India is that of the Muslim community. It is made determinate in an objective manner when the conception of man in his relation to the rest of reality, as rooted in the Quran and the attendant philosophical doctrines of Arabia and Persia, is made explicit. Given this philosophical determination of Islamic living law in India, the corresponding positive laws concerning marriage, inheritance, tithes, etc., become similarly determinate and intelligible. The third major legal factor in the old India is the modern Western political and legal institutions and doctrines. This came to India first as a positive law. When the British were there it was a living law to the extent that,

because of their army and their jurisdiction, it had to be accepted. The extent to which it is a living law now that the British have left remains to be seen. The present Indian Constitution, and Prime Minister Nehru's secular state measure the extent to which modern Western positive law has become India's living law. The recent defeat of the Hindu reform bill which would have restricted Hindu living law in the light of Anglo-American secular living and positive law suggests that it is not yet very great.

In this connection Pakistan has rejected a secular state for an Islamic one. This means that for the Muslim community of old India, which is now in Pakistan, the British positive law has been rejected as a criterion of the norms for Pakistan's present living and positive law. It is precisely because the philosophical beliefs which define the living law of the Muslim community are so different from and even antithetical to the philosophical beliefs specifying the living law of the Hindu community of old India that the partition into Pakistan and present India became necessary. These events and the determinate philosophical content of the diverse Hindu, Muslim and British living law doctrines are objective facts. What is true of the society which is India, is true of any society.

A sociological jurisprudence, therefore, which identifies the living law of any culture with the philosophy of that culture provides a method⁴² of specifying *grundnorms* for positive law which are not merely objective but also possessed of specific content. Unlike the pure theory of law and *a priori* ethical jurisprudence, legal science is not left with a purely vacuous ethical postulate. Moreover, it will be effective because a positive law whose *grundnorms* are specified in this manner will of necessity have the spontaneous sanctions of the living law behind it. No problem of legal obligation will arise. This new jurisprudence may be appropriately termed philosophical sociological jurisprudence.

PHILOSOPHICAL SOCIOLOGICAL JURISPRUDENCE AND INTERNATIONAL LAW

Philosophical sociological jurisprudence⁴³ makes it clear that the contemporary world does not have a single living law. Contemporary India has three major living laws and India is but one small portion of the world. Present China, apart from Formosa, has two major living laws, Taoist-Buddhist-Confucianism and Marxist Communism, both of which are in part at least different from any of the three living laws of India. Chinese Marxist

42. For an exact specification of the scientific method of this philosophical sociological jurisprudence, see Northrop, *The Importance of Deductively Formulated Theory in Ethics and Social and Legal Science* in STRUCTURE, METHOD AND MEANING, ESSAYS IN HONOR OF HENRY SHEFFER 99-114 (Henle, Kallen & Langer eds. 1951).

43. "Sociological" is used throughout in the broad sense of any social science including anthropology and social psychology as well as sociology proper. This jurisprudence might as appropriately be called "Philosophical Anthropological Jurisprudence."

Communism is in fact only a positive law used by President Mao and his colleagues in the hope of creating a new living law. Roman Catholic cultures in the West exhibit another major living law of the world. It is defined in major part by the philosophy and theology of St. Thomas Aquinas. Those modern nations of the West heavily under Protestant religious and modern scientific and philosophical influence illustrate a still different living law of which the United States is the purest case. The philosophy which specifies this living law is that of British empiricism as worked out by Hobbes, Locke, Hume, Adam Smith, Jefferson, Mill and Bentham, Jevons, Keynes and the Austrian School of Economists. The legal theory of this philosophical living law is legal positivism.

Since the underlying living laws of the world are many in number rather than one, the way to an effective international law is to base it upon the world's living law pluralism. Only if this is done will positive international law possess the underlying living law sanctions which sociological jurisprudence demonstrates that any positive law must have if it is to be effective.

What this means specifically will become clearer if the matter is first approached in a negative manner, by considering existing international law and more particularly the Charter of the United Nations. The Charter gives the impression that the world is in complete agreement upon a single set of determinate world norms. Did not each official representative of most of the nations of the world sign a document in which he dedicated his government to the building of a world order in which "freedom," "wellbeing," "economic uplift" and "the good life" would come to all men? This impression of a single world living law is however quite superficial and spurious, for the basic normative words "freedom," "wellbeing," "economic uplift" and "the good life" are left undefined. Nor is it difficult to find the reason for this lack of definition and the resultant vituperation, which has followed when subsequent foreign ministers read the definitions required by their differing and often conflicting living laws into these otherwise vacuous words.

The existing international law and the United Nations Charter are the creation of traditional Western or Westernized Asian legal minds. Such minds conceive of law in terms of legal positivism or *a priori* ethical jurisprudence. As the earlier portion of this study has shown, both of these schools leave the content of the basic ethical norms of any legal system indeterminate.

Under such circumstances, the United Nations Charter does not deserve to receive the support of any nation without the reservation of a veto. No nation or people will or should transfer one iota of sovereignty to any positive international legal institution unless the charter or constitution of that international body specifies the living law norms of the people in question. And it must guarantee those specific norms under any and all circumstances. Nor would a transfer of sovereignty without such constitutional specification and guarantee be accepted by any nation in a crucial case even if it were initially granted without the reservation of a veto. For sociological

jurisprudence makes it clear that positive law always breaks down when it goes counter to the underlying living law.

The first step, therefore, toward the achievement of a more effective world legal order is to face and honestly and explicitly accept, rather than obscure and ignore, the living law pluralism of the world. This entails the writing of a world constitution grounded in an explicitly pluralistic rather than a vacuously monistic theory of world sovereignty. The specific living law philosophies of the diverse nations and cultures of the world must be spelled out and guaranteed within their own particular respective geographical areas under any and all circumstances unless changed by the people in those areas themselves. Then and only then will any nation be justified in transferring specified sovereign power to the international legal body without the reservation of a veto.

To such a pluralistic philosophically and sociologically grounded international law each nation could commit *that specific portion of its life which is international in character* without reservation. It would have the guarantee that its own particular living law assumptions and values would be explicitly understood, honored and protected. Such an international law would have truly realistic and objective world-wide support because it would explicitly specify and have behind it not only the particular philosophical living law of one's own nation, tradition and culture, but also those of the many other living laws of the world. Let it not be forgotten that these diverse living law cultures with their different specific, basic philosophical doctrines and attendant positive legal norms are very real and objective things. An international legal world order with such factual foundations would be no will-of-the-wisp.

Legal science shows also that there is no such thing as the protection of law without corresponding duties. Under pluralistic philosophical sociological jurisprudence both the protective rights and the duties become clear. Such an international law guarantees the right of any people or nation to build their social institutions in the light of their own cultural traditions and needs, drawing upon the values of other nations only as they deem wise. This is tantamount to the outlawing of any nation which by military aggression or other means interferes with this right. In return for this protective right, a nation has the corresponding duty, without veto or reservation, to contribute its share of military and police power necessary to curtail and punish the outlawed nation wherever and whenever its illegal conduct occurs.

Pluralistic sociological jurisprudence would prescribe also more stringent admission requirements than is the case with the United Nations. When the specification of the living law philosophy of any particular nation reveals its philosophy to be regarded by it as the sole normative criterion for international judgment of other nations with a different philosophy, the explicit written repudiation without later reservation of such claims must be required before the admission of that nation to status under international law.

Otherwise the admission of such a nation would be equivalent to the acceptance of the monistic principle of sovereignty in international law. This is clearly logically incompatible with an international law grounded in the principle of living law pluralism.

A discouraging result of the United Nations police action in Korea is the failure of so many members to assume any responsibility for it. In fact even members which are not Communistic have refused to regard the United Nations' action in Korea as a police action. Instead many have interpreted it as a power politics game or ideological battle between the United States and Soviet Russia.⁴⁴

This response is in part justified because even the United States has tended to interpret the responsibility for the police action of the United Nations as entailing a choice between the American way of life and that of Marxist Russian Communism. Since no responsible non-Communist government in Asia or the Middle East wants either to be a mere pawn in a power politics game or to reject its own indigenous living law norms for those of either America or Russia, the result naturally is the refusal to choose sides with its attendant non-support and, in some cases, opposition to the U. N.'s police action. This means that the climate of opinion necessary to prevent aggression from occurring or the communal responsibility for policing aggression when it occurs does not exist in the world community today.

The reason for this situation is evident. It centers in the old habit of judging international relations in terms of one ideology alone or, in other words, in terms of a monistic theory of international legal sovereignty. So long as the support of the police action under world law is put on the basis of choosing the specific living and positive law norm of one disputant and his friends rather than of another, the failure of world law to command the community support necessary to make it effective will continue.

The moment, however, that international law acknowledges living law pluralism and grounds itself in this living law fact, the foregoing grounds for any nation's refusal to assume its share of the responsibility in policing a violation of world law are removed. Then the justification for police action is not that the living and positive law ideology of one of the disputants is right and that of the other wrong, but that the principle of living law pluralism has been violated. Upon this basis no nation in the world community is forced to choose between either ideology of the disputants. It is simply sharing the common responsibility of guaranteeing to others and to itself the right of the people of any nation to give expression to their own cultural living law norms while drawing upon those of others as they themselves choose, regardless of what the respective cultural traditions and choices may be.

44. See, e.g., Gross, *Voting in the Security Council: Abstention From Voting and Absence From Meetings*, 60 YALE L. J. 209 (1951); Kogan, *United Nations—Agent of Collective Security?*, 61 YALE L. J. 1 (1952); cf. McDougal & Gardner, *The Veto and the Charter: An Interpretation For Survival*, 60 YALE L. J. 258 (1951).

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Notwithstanding these merits and its immediate practicality for international law, philosophical sociological jurisprudence does not constitute a final and complete theory of law in general or of international law in particular. This becomes evident when one notes that the existing living law of each and every nation or culture in the world is not only being accepted but also being reformed. Reform requires passing judgment on the living law of sociological jurisprudence.

An adequate theory of law must provide meaning, therefore, for a moral and legal statement which affirms the living law of one's own culture to be in whole or in part "bad" and hence in need of reform. Moreover, however much one may and must try to live within the pluralism and relativism of the world's many living laws, this is not in the last analysis completely possible nor is it completely "good." It is necessary, therefore, to provide some meaning for the prediction of the words "good" and "bad" of the living law itself. This requires the specification of some meaning for, and the objective method of verifying, the statement that the living law conduct, for example, of Hitler's Germany was "bad" and "illegal," even if it had restricted itself to the treatment of Germans. The same is necessary for any objective moral or legal judgment of Marxist Communism, of the laissez-faire living law philosophy of the traditional pre-New Deal Supreme Court or of traditional Islam, Hinduism or Confucianism. Clearly, we cannot avoid going on beyond the many philosophies which define the many diverse living laws of sociological jurisprudence to the question of the respective merits and deficiencies of these diverse living laws including even one's own.

Even though philosophical sociological jurisprudence cannot answer this question, it nevertheless points the way. Sorokin's sociology, Kluckhohn's anthropology and McCulloch and Pitts' psychology have already given the clue. What are the basic philosophical concepts or trapped universals which specify the normative inner order of any society which is its particular living law? Any specific set of these concepts is a particular way of remembering, conceiving and anticipating the stimuli or raw data of natural experience. In other words, although the philosophy of a given person or people refers for its normative prescriptions to culture, it refers to physical nature and natural man for its origin and empirical verification. In other words no philosophy is merely a specification of a living law for society; it is also at the same time an empirically originated and hence objectively verifiable theory of nature.

For example, Sorokin has shown that differences in the living and corresponding positive law norms of different societies are essentially connected with whether they use one type of scientific and philosophical concept or another in their conceptualization of nature. Kluckhohn has shown similarly that the philosophy and attendant living and positive law norms of the Navaho Indians are in considerable part at least a function of the way they

conceive of the facts of nature. Differing theories of the facts of nature can be tested as to their truth or falsity empirically. Moreover, of two theories both of which have empirical facts in their support, the one can be shown to be more true than the other if it is the only theory which can take care of all the facts leading to the two theories.

Hence, by testing the diverse philosophies of the world's many living laws against the raw data of natural experience common to all men, one has the required objective meaning for, and method⁴⁵ of, specifying the truth or falsity of, ethical and legal judgments about the world's diverse living laws of sociological jurisprudence. It is at this point, by this objective empirical method, that philosophical sociological jurisprudence passes over into a truly universal philosophy of nature or natural law jurisprudence with specific content.

The so-called universal natural law theories of jurisprudence which exist at present are not truly universal. Consider the traditional Roman Catholic natural law jurisprudence. Although its Aristotelian content insures that it is as much a theory of the empirically verifiable "is" concerning nature, as it is an "ought" for society and culture, it is clearly only one of the many such theories of the diverse cultures, peoples and nations of the world. Thus its proclaimed universality is not truly universal in the sense of a natural law jurisprudence that has first passed through the philosophical sociological jurisprudence of the world's many living laws. The latter type of sociological jurisprudence recognizes that each particular living law culture of the world regards its particular philosophy as a natural law jurisprudence which is universal. P. V. Kane has shown this to be the case for Hindu culture.⁴⁶ Others have shown it to be true for pre-westernized Chinese society.⁴⁷ Thus the traditional theories of natural law jurisprudence do not constitute a truly universal natural law jurisprudence. They are merely different provincial philosophies of nature and culture generalized dogmatically for the rest of the world.

A truly universal natural law jurisprudence with specific content will be at hand only when the following things are done: (a) One must go behind each of the philosophies of the world's many living laws to the facts of physical nature from which each arose and to which each appeals for its verification. (b) The present analysis of the experimentally verified theories of contemporary mathematical physics must be completed to determine the philosophy of nature which these theories entail. It is likely that only thus will the new philosophical norms be found for ordering a society whose technology derives

45. See further, NORTHROP, *The Criterion of the Good State and The Scientific Method for Determining the Normative Social Theory of the Ends of Human Action* in *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* cc. XVII, XXI (1947).

46. 3 KANE, *HISTORY OF DHARMASTRA* 244-5 (1946); see also Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 *YALE L. J.* 1430-50 (1950).

47. DORSEY, *Two Objective Bases for a World-Wide Legal Order* in *IDEOLOGICAL DIFFERENCES AND WORLD ORDER* (Northrop ed. 1949); NEEDHAM, *HUMAN LAW AND THE LAWS OF NATURE IN CHINA AND THE WEST* (1951).

from these theories of mathematical physics. (c) Finally the natural philosophy which combines (a) and (b) must be formulated and its new living law reforms for the world must be specified. These are tasks for the future.

Moreover only when this truly universal natural law jurisprudence is specified in detail by the aforementioned methods yet to be applied, will it be possible to rear international law on the monistic theory of sovereignty of a truly universal natural law jurisprudence rather than on the pluralistic theory of philosophical sociological jurisprudence. The natural law jurisprudence of the Roman Catholic jurist is no more acceptable to a Confucian Chinese natural law jurist than the Confucian content for natural law is acceptable to a Roman Catholic. The time therefore when international law can be based effectively upon natural law jurisprudence is in the future. For this reason international law based on the pluralistic living law of philosophical sociological jurisprudence is the only immediately effective way to bring international disputes under the rule of law.

Once such an international law is established, two ways from it toward the eventual monistic concept of international law of a truly universal natural law jurisprudence can be pursued. Moreover their pursuit will bring much quicker results than might at first be supposed. Both methods are suggested by sociological jurisprudence.

The first is well known, especially in the West, where it is called *jus gentium*. This is the way suggested by Pound in his recent article, *Toward a New Jus Gentium*.⁴⁸ It consists in examining the diverse philosophical doctrines, or as he terms them "world-pictures," defining the different living laws of the world to find the assumptions and attendant positive legal norms which they have in common. This *jus gentium* is appropriately called the sociological *jus gentium* since it is a worldwide common law which philosophical sociological jurisprudence can discover and define. The specification of the common philosophical assumptions underlying many of the diverse cultures and living laws of the East and the West has been sketched elsewhere.⁴⁹ This movement towards a truly worldwide sociological *jus gentium* has the merit of pushing the differences between the world's diverse living laws, momentarily at least, into the background and of pulling the identities of doctrine out into the foreground.

Notwithstanding these virtues, this approach to a monistic world law and philosophy by way of the sociological *jus gentium* is not as promising as might at first appear. For the issues of war or peace in the world as illustrated by Pakistan and Hindu India or by Soviet Russia and the Western democracies turn not around the more abstract philosophical premises which the disputants may have in common, but upon the assumptions which differentiate the one from the other. Important, therefore, as the sociological *jus gentium*

48. Pound, *supra* note 1.

49. NORTHROP, *THE MEETING OF EAST AND WEST* (1946); Dorsey, *supra* note 47.

is as a way from the pluralism of the world's living law to a legal monism, it is not enough.

The second way to the monism of a truly universal natural law jurisprudence is by the application of the method of the philosophy of nature and the contemporary philosophy of natural science to the reform of the traditional philosophies which define the status quo living laws of the world. By this means the weak sociological *jus gentium* becomes enriched by, strengthened, and transformed into the eventual natural law *jus gentium* or *jus naturale*.

This transformation will come about much faster than might at first be supposed because it also has support in the living law. Every nation and culture in the world today, Oriental as well as Occidental, is not merely re-vivifying its indigenous living law but also reforming it. This reform movement is as much a living law fact as is the traditional unique living law of each nation or culture which is being reformed.

Furthermore, one of the main things behind this reform is the desire of the leaders of every people and nation to introduce Western technology in order to raise the well-being of the masses of people generally. This Western technology can be operated efficiently only by grasping in considerable part at least the basic concepts of Western science. But to grasp these basic concepts is to become acquainted in part with the philosophy of Western natural science and thus to be led to look at one's own living law from the standpoint of this new philosophy of nature and the natural law jurisprudence which its application to social conduct entails.

CONCLUSION

An adequate legal science must be composed of three parts: (1) The positive law of legal positivism and *a priori* ethical jurisprudence; (2) the world's living laws as specified by philosophical sociological jurisprudence; and (3) the natural law of naturalistic jurisprudence and its naturalistic *jus gentium*.

Without the positive law neither sociological nor naturalistic jurists know the operational definitions and consequences with respect to concrete disputes and cases which their more abstract doctrines entail. Without sociological jurisprudence, positive law is either ethically vacuous or arbitrary. Without philosophy, sociological jurisprudence cannot specify in a brief practicable manner what the normative inner order of the living law in any society is. Without philosophical sociological jurisprudence and the pluralism of the world's living laws which it reveals, no immediately effective international law adequate to the needs of an atomic age is possible. And without naturalistic jurisprudence there is no criterion of good or bad living law or of the specific direction which reform of the living law should take.

Just as the specific content of the basic norms of positive law can be judged to be "good" or "bad" only by recourse to the living law, so the basic norms exhibited in the living law can be judged to be good or bad only by resorting to natural law. Even so a law based on the living law of philosophi-

cal sociological jurisprudence is the only immediately practical and effective international law, since a truly universal natural law is yet to be specified, though the method for determining it is known.

These conclusions permit a determinate answer to the question with which this inquiry began: Does contemporary jurisprudence indicate, as the advocates of legal positivism and power politics affirm, that the attempt in an atomic age to bring disputes between nations under the effective rule of law is impractical and immoral—doing in the end more harm than good? The answer is an unequivocal No! It is the “give-it-up” philosophy, not the attempt to achieve an effective international law, which must be given up. The dying legal science is legal positivism. The living fact is the pluralism of the world’s living laws which philosophical sociological jurisprudence reveals, developing, with the introduction and understanding of scientific technology, into a natural law jurisprudence with truly universal specific content. Where there are such living law facts there can be an effective international law.