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THE SOCIOLOGICAL JURISPRUDENCE OF ROSCOE POUND†

(PART I)††

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*"A desire for an ideal relation among men which we call justice leads to thinking in terms of an achieved ideal relation rather than of means of achieving it."**

I.

INTRODUCTION.

WITH THE RISE OF MODERN SCIENCE, there came to exist among jurists an apparent unanimity of belief in the possibility of applying "the scientific method" to the study of law and legal philosophy. Under the influence of the Comtian positivist sociology, there developed a sociological jurisprudence having in view the understanding of the role of law in society and the application of the social sciences to the study of law in action and the rendering of law more effective as an instrument of social control for the ends which law is designed to accomplish in the civilization of the time and place.

As the recognized leader of the sociological school in America for more than half a century, Roscoe Pound has devoted his efforts to this work. Through his vast legal studies, excursions into legal his-

† This article is a rewritten and enlarged version of a paper prepared for Professor Harry W. Jones's Graduate Seminar in Legal Philosophy, Columbia University, 1957-1958. Because of space limitations and structural organization, this article does not consider Dean Pound's five volume treatise nor his single important volume on the Ideal Element in Law.

†† Part II, a critique of Pound's jurisprudence, will appear in Volume VII, Number 2.

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* POUND, *NEW PATHS OF THE LAW* 26 (1950).

tory, mastery and application of philosophy to law, and his research into case law for purposes of understanding how law is actually functioning, Dean Pound has made tremendous strides toward the accomplishment of this objective. In addition to these efforts, Pound has contributed a "theory of interests" which he believes to be the most effective instrument yet devised for the scientific development and application of law. A brief consideration of Pound's theory of interests in the context of sociological jurisprudence is the subject of this article.

II.

BACKGROUND OF POUND'S PHILOSOPHY.

The forerunner of sociological jurisprudence was Montesquieu, who was the first to apply the fundamental principle which sociological jurists assume. In *L'Esprit des Lois*, he expounded the thesis that a system of law is a living growth and development interrelated with the physical and societal environment.

The great impetus to the movement in modern times was furnished by Rudolph von Jhering, who revolted against the jurisprudence of conceptions of the historical-metaphysical school. Whereas juristic activity was centered around speculation as to the nature of law, Jhering emphasized consideration of the function and end of law. He stressed the social purpose of law and insisted that law should be brought into harmony with changing social conditions. His thesis was that the protection of individual rights is dictated by social considerations only. What are termed "natural rights" are nothing more than legally protected social interests. The individual's welfare is not an end in itself but is recognized only insofar as it aids in securing the welfare of society.

The basic ideas of Jhering, called social utilitarianism, stand as a link between Bentham's individual utilitarianism and two important movements of the twentieth century; the "jurisprudence of interests" in Germany and the sociological jurisprudence of Roscoe Pound. While writing his great treatise, the *Spirit of the Roman Law*, Jhering reached the position that a legal right is a legally protected interest. This led him to search for the purpose of law and to conclude that purpose is the creator of all law, that every rule of law owes its origin to some practical motive. Every act is an act done for a purpose. Thus, while he held the human will to be free from mechanical causation, he concluded that it is subjected to the law of

purpose, that is, it acts "because of" reasons (interests). Interests become the basic ingredient of his system.

Jhering treats law in the broad context of society. The purpose of law is to secure the conditions of social life, and this determines the content of law. The conditions of social life include both physical existence and ideal values, but these are relative to the social order of the time and place. He developed an inchoate scheme of interests and designated them as individual, state, and public, the last two of which he tended to treat as one. However, he did not develop a successful means of "evaluation" of the interests as against each other. Jhering thoroughly subordinates individual interests to social interests, holding that the duty to assert one's individual interest is a duty owed to society, even when in a material sense it would not pay to do so. Thus, individual rights regarded from the socialized point of view are but a means for society to realize its social ends. Unlike Bentham, Jhering recognized altruistic interests as well as egoistic interests, but he gave little consideration to the former. He recognized the beneficial interests to society which comes from an individual's acting to vindicate his personal interests, however. Jhering's scheme has been criticized for lack of a reasonably objective criterion for selection and evaluation of interests. His ideas were to have a great influence on the thought of Roscoe Pound.¹

Rudolph Stammler began his critical philosophy with an attack upon economic and historic determinism. He sought a systematic coordination of the various phenomena under a comprehensive principle, a formal method by which the changing content of empirical rules might be worked out. Stammler focused his attention on the relation of ethics to law rather than administration of justice by legal rules. Under his scheme, the jurist is confronted with a two-fold problem: the existence of a rule of right and law; and the mode of effectively executing such a law. It is the duty of the state to study social phenomena and to use its findings for the attainment of just law. This functional sociological approach is Stammler's greatest achievement. He set up the social ideal as the goal of justice through law. Whereas Kant had looked to free-willing individuals, Stammler looked to a community of free-willing men. He conceived of an ideal of social cooperation, whereby the individual is merged in the community.

1. Jhering's principle work is *DER ZWECK IM RECHT*, translated in English as *LAW AS A MEANS TO AN END* (Husik transl. 1913). Good short accounts of Jhering's philosophy are found in the following sources: FRIEDMANN, *LEGAL THEORY* 213-217 (2d ed. 1949); PATTERSON, *JURISPRUDENCE* 459-464 (1953); REUSCHLEIN, *JURISPRUDENCE* 107-112 (1951); STONE, *THE PROVINCE AND FUNCTION OF LAW* 299-316 (2d ed. 1950).

Then, putting emphasis on individual ends rather than individual wills, he arrived at a theory of justice. He sought to supplant an individualist philosophy with a social philosophy of law and to add a theory of just rule-making and just decision in concrete cases. With his aims the sociological jurist must be in thorough accord.

Stammler considered the universal element in every rule to be the adjustment between the individual purposes and the unitary purposes of society. Since the latter are ideal purposes, it is impossible to apply the conception of harmonizing them to any particular time and place.² Thus, he deduces them *a priori* from a harmonious synthesis, which he terms the "Social Ideal," to form "Principles of Just Law," equally void of empirical content and impossible of application to concrete problems. These ideological constructs are the ultimate basis for discriminating just law from unjust law. Stammler posits his community as an ideal abstract one, which he terms a "special community," one where this harmonizing of conflicting purposes could ideally take place according to principles drawn from pure reason. Thus the "Principles of Just Law," free of all empirical content, are in direct contrast to the jural postulates of Roscoe Pound.³

Joseph Kohler's great postulate was that law is relative to the civilization of the time and place. He denied any universal body of legal rules or institutions but insisted on the universal idea of civilization. The mission of law is the advancement of civilization through the forcible ordering of society. Law is relative to civilization. Changing with changed conditions, it is a means to and a product of civilization, which means the social development of human powers to their highest unfolding. Kohler believed that the idea of civilization pervades an aggregate of individuals as a deterministically active force for its advancement. Thus the evolution of civilization toward a higher state is inevitable. The two-fold purpose of law is to maintain the existing values of civilization and to carry forward human development; therefore law must adapt itself to the tasks of the time and place to perform its proper function of furthering this ideal. But this can only be done by the formulation of the jural ideals of the time and place. How else could lawmakers and judges be guided in their day to day work? These jural postulates are not rules but are ideas of right which are to be made effective through legal precepts and institutions.

2. The best known of his juridical ideas is his conception of "natural law with a changing content."

3. Stammler's principle work in English is *DIE LEHRE VOM RICHTIGEN RECHT*, translated as *THEORY OF JUSTICE* (Husik transl. 1925). Good short accounts of his philosophy are found in the following texts: FRIEDMANN, *op. cit. supra* note 1, at 93-100; PATTERSON, *op. cit. supra* note 1, at 389-95; REUSCHLEIN, *op. cit. supra* note 1, at 113-17; STONE, *op. cit. supra* note 1, at 317-27, 357-59.

The jurist's function is to formulate these jural postulates for the civilization of the time and place by observation of the phenomena of a given society and objective synthesis of the principles concerning human conduct which such society presupposes. Under the guidance of these jural postulates, the legislators and judges are to formulate and shape the development of the law. While Kohler recognizes the weakness of abstract logical propositions, he is never definite as to the nature of the phenomena from which the postulates are to be drawn.⁴

Dean Pound was considerably influenced by the Comtian sociologist Lester F. Ward. Ward's description of animated nature as burning with desires and desire itself as the dynamic agent in society furnished a foundation for a theory of interests. Ward's phrase "the efficacy of effort" was taken over by Pound as indicative of the endeavor which men should make to master internal and external nature.⁵ The influence of William James and pragmatism, however, is more specifically avowed. It was from James and pragmatism that Pound derived the ethical and philosophical basis for his theory of interests.⁶ Therefore, some consideration should be given to James's ethical ideas.

In seeking for an ethical philosophy, James considers three questions: the psychological question, which involves the historical origin of our moral ideas and judgments; the metaphysical question, which asks as to the meaning of such terms as "good," "ill," and "obligation"; and the casuistic question, which inquires as to the measure of the good which man recognizes.⁷

In considering the psychological question, James believes that our values cannot be said to be derived wholly from Bentham's pleasure-pain principle, though this is important. The difficulty is that it is impossible to explain all of our sentiments and preferences in this way.

The more minutely psychology studies human nature, the more clearly it finds there traces of secondary affections, relating the

4. Kohler's principle work in English is *LEHRBUCH DER RECHTS PHILOSOPHIE*, translated as *PHILOSOPHY OF LAW* (Albrecht transl. 1914). Good short accounts of his philosophy are found in the following texts: *FRIEDMANN, op. cit. supra* note 1, at 139-40; *REUSCHLEIN, op. cit. supra* note 1, at 117-20; *STONE, op. cit. supra* note 1, at 331-40. And see: *POUND, INTERPRETATIONS OF LEGAL HISTORY*, 141-151 (1923) (hereinafter cited as *INTERPRETATIONS*).

5. Ward's main theses are contained in four works: *DYNAMIC SOCIOLOGY* (1883); *PSYCHIC FORCES IN CIVILIZATION* (1901); *APPLIED SOCIOLOGY* (1906); and *PURE SOCIOLOGY* (1911). See *REUSCHLEIN, op. cit. supra* note 1, at 127; *STONE, op. cit. supra* note 1, at 403.

6. See *INTERPRETATIONS* 157.

7. James, *The Moral Philosopher and the Moral Life*, in *THE WILL TO BELIEVE AND OTHER ESSAYS* 184, 185 (1896). The following discussion is taken from the same source at 185-210.

impressions of the environment with one another and with our impulses in quite different ways from those mere associations of co-existence and succession which are practically all that pure empiricism can admit.⁸

Thus it follows that a vast number of our perceptions are of "this secondary and brain-born kind." "They deal with directly felt fitnesses between things, and often fly in the teeth of all the prepossessions of habit and presumptions of utility." These include the higher feelings, spiritual values and ideals — all the "subtleties of the moral sensibility" which go beyond the laws of associations.⁹

Considering the meaning of the terms "good," "ill," and "obligation," James reasons that these words can have no meaning in a merely material universe, where no sentient life exists.¹⁰ They take on meaning only in relation to the consciousness of sentient beings. When one sentient being comes into existence, there is a chance for good and evil to exist. "Moral relations now have their *status* in that being's consciousness. So far as he feels anything to be good, he *makes* it good." Being good for him, it is "absolutely good," "for he is the sole creator of values in that universe, and outside of his opinion things have no moral character at all."¹¹ If there are two individuals in this universe, you cannot find any ground for saying the opinion of one is more correct than that of the other or that either has the "truer moral sense." Such a world is a "moral dualism," and if there are many such persons, a "pluralism." The philosopher, therefore, to obtain a hierarchial scheme of values "must trace the ought itself to the *de facto* constitution of some existing consciousness, behind which, as one of the data of the universe, he as a purely ethical philosopher is unable to go." Such consciousness must make right and wrong such by feeling it to be so. If one thinker were divine, the others (human) would accept him as a model, but even here the question would remain as to the ground of the obligation. James concludes that:

the moment we take a steady look at the question, *we see not only that without a claim actually made by some concrete person there can be no obligation, but that there is some obligation wherever there is a claim.* Claim and obligation are, in fact, co-extensive terms; they cover each other exactly.¹²

James denies that there is some "validity" outside of a "claim's mere existence as a matter of fact" which gives to it an obligatory charac-

8. *Id.* at 186.

9. *Id.* at 187-88.

10. *Id.* at 189.

11. *Ibid.*

12. *Id.* at 194.

ter. He does not believe there can be "such an inorganic abstract character of imperativeness" outside the "imperativeness which is in the concrete claim itself."¹³

Take any demand, however slight, which any creature, however weak, may make. Ought it not, for its own sole sake, to be satisfied? If not, prove why not. The only possible kind of proof you could adduce would be the exhibition of another creature who should make a demand that ran the other way. The only possible reason there can be why any phenomena ought to exist is that such a phenomenon actually is desired. Any desire is imperative to the extent of its amount; it makes itself valid by the fact that it exists at all.¹⁴

He therefore concludes that the words "good," "bad," and "obligation" have "no absolute natures, independent of personal support." They are objects of desire, which have no anchorage in Being, apart from the existence of living minds.¹⁵

In seeking for a measure of values, James decides that it is those types of things which contain the most essence of good in its various forms. He concludes that this is demand, that the essence of good is demand.

The best, on the whole, of those marks and measures of goodness seems to be the capacity to bring happiness. But in order not to break down fatally, this test must be taken to cover innumerable acts and impulses that never aim at happiness; so that, after all, in seeking for a universal principle we inevitably are carried onward to the most universal principle, — *that the essence of good is simply to satisfy demand*. The demand may be for anything under the sun. There is really no more ground for supposing that all our demands can be accounted for by one universal underlying kind of motive than there is ground for supposing that all physical phenomena are cases of a single law. . . .¹⁶

But all demands cannot be satisfied because "this world is vastly narrower than all that is demanded." There is competition for goods and there are alternatives to be chosen. "Every end of desire that presents itself appears exclusive of some other end of desire." Then, there must be some basis of selection. But the philosopher cannot be objective and rule out any ideal. If he is to keep his judicial position, he must never become a party to the fray. Then, what can he do? Is there any way out?¹⁷

13. *Id.* at 195.

14. *Ibid.*

15. *Id.* at 197.

16. *Id.* at 201.

17. *Id.* at 202.

Since everything which is demanded is by that fact a good, must not the guiding principle for ethical philosophy (since all demands conjointly cannot be satisfied in this poor world) be simply to satisfy at all times *as many demands as we can?* That act must be the best act, accordingly, which makes for the *best whole*, in the sense of awakening the least sum of dissatisfactions. In the casuistic scale, therefore, those ideals must be written highest which prevail at the least cost, or by whose realization the least possible number of other ideals are destroyed. . . .¹⁸

"The course of history," says James, "is nothing but the story of men's struggles from generation to generation to find the more and more inclusive order." For this reason, James finds, society has already made a better casuistic scale for the philosopher than he can ever make for himself.¹⁹

An experiment of the most searching kind has proved that the laws and usages of the law are what yield the maximum of satisfaction to the thinkers taken all together. The presumption in cases of conflict must always be in favor of the conventionally recognized good. The philosopher must be a conservative, and in the construction of his casuistic scale must put the things most in accordance with the customs of the community on top.²⁰

There can be no ultimate test as to which claims are to be preferred except through experience.²¹ One will vote always for "the richer universe," for the good which seems "most apt to be a member of the more inclusive whole." Which this is he cannot know in advance; "he only knows that if he makes a bad mistake the cries of the wounded will soon inform him of the fact." He must therefore act tentatively rather than dogmatically, and his treatises on ethics can never be final.²²

Commenting on this philosophy of James, that the essence of good is to satisfy demand, Pound has stated that this seems to him to be the problem of the legal order, to satisfy the most demands with the least friction and waste.²³ This thesis is central to Pound's theory of justice, and James's pragmatism was most influential in Pound's formative years.

18. *Id.* at 205.

19. *Id.* at 205-06.

20. *Id.* at 206.

21. *Id.* at 209-10.

22. *Id.* at 210.

23. INTERPRETATIONS 157.

III.

SOCIOLOGICAL JURISPRUDENCE.

Sociological jurisprudence is not, strictly speaking, a legal philosophy. Rather, it is a method which attempts to use the various social sciences to study the role of the law as a living force in society and seeks to control this force for the social betterment. It has experienced an evolution through a mechanical positivist stage, a biological and a psychological stage, and is now well into the stage of unification. Its attitude is essentially functional. Law is an instrument of social control, backed by the authority of the state, and the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through a consciously deliberate effort. The sanction of law lies in social ends which law is designed to serve. The sociological jurist has no preference for any particular type of precept but only for that which will do the most effective job. In philosophy he is generally a pragmatist. He is interested in the nature of law but only with reference to its use as a tool to serve society, and his examination into the law is always in connection with some specific problem of the everyday work of the legal order. Stated more succinctly:

The sociological jurists propose to study law in action on the basis of the hypothesis that the law in action bears some significant relationship to law in the books, and to proceed then to ascertain in what respects the hypothesis is or is not substantiated and requires qualification.²⁴

Dean Pound came upon the field in 1909, with a cry for reform through the study of law in action²⁵ and became the recognized leader of the American school with the systematic statement of his philosophy two years later.²⁶ He has continuously maintained this position since that time.

Pound defines jurisprudence as the science of law. But this is more than an organizing of a body of legal precepts. There are three things to consider: the administration of justice, the legal order, and law. The first is clearly enough a process, but it is not the simple mechanical process which the last century wished it to be and vainly strove to make it. Mechanical application is wise social engineering

24. Stone, *A critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531, 532-33 (1935).

25. Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

26. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911); continued in 25 HARV. L. REV. 140, 180 (1912).

only in matters of property and commercial law, the economic forms of the social interest in the general security of acquisitions and transactions where mechanical application of fixed, detailed rules or rigid deductions from fixed conceptions makes for certainty and predictability in industrial and commercial undertakings of economically organized society over long periods of time.²⁷

In types of controversies involving the moral quality or reasonableness of the individual conduct, the attempt to reduce law to strict rule and concept, susceptible of mechanical application, failed. Elaborate apparatus of individualization of justice, by at least seven agencies, were developed. Succinctly stated, these are: (1) equitable discretion; (2) legal standards, such as due care; (3) general verdicts of juries; (4) "finding the law" in adjudication of cases; (5) individualized penal sentences; (6) informal justice in petty courts; and (7) administrative tribunals.²⁸

The legal order itself is more than a state or condition conceived by the nineteenth century. It too is a process of ordering through judicial and administrative tribunals and through the means which it adopts to furnish men with legal guidance for the avoidance of conflicts.²⁹

Law itself is more than a body of rules. It is the knowledge and experience with which the juristic process is carried on. It not only includes rules, principles, concepts, and standards but also doctrines and modes of professional thought, skill, and art.³⁰

The practical objectives of sociological jurisprudence have been formulated by Pound as follows:³¹

1. A study of the social effects of legal institutions, legal precepts and legal doctrines, of the law in action as distinct from the law in books.

2. A sociological study as an essential preliminary step in law-making.

3. A study to ascertain the means by which legal rules can be made more effective in the existing conditions of life, including the limits of effective legal action.

4. An attempt to understand the actual growth of the law by a study of the judicial methods and modes of thought of the great judges and lawyers.

27. INTERPRETATIONS 153-54.

28. *Id.* at 154-55.

29. *Id.* at 156.

30. *Id.* at 156-57.

31. Pound, *supra* note 26, at 512-15; INTERPRETATIONS 153.

5. A sociological legal history of the common law, for studying the past relations of law to then existing social institutions.

6. Individualization of the application of legal rules so as to take account of the concrete circumstances of particular cases.

7. The establishment of a "Ministry of Justice" by the states to participate in this program.

Pound has compared the sociological jurisprudence with other schools of legal thought and notes the following characteristics of adherents to the sociological school: they pursue a comparative study of legal phenomena as social phenomena and criticize these with respect to their relation to society. In particular they (1) consider the working of the law rather than its abstract content; (2) regard law as a social institution which may be improved by human effort and endeavor to discover and effect such improvement; (3) lay stress upon the social ends of law rather than sanctions; (4) urge that legal precepts be used as guides to socially desirable results rather than inflexible molds; and (5) their philosophical views are diverse, usually positivist or some branch of the social-philosophical school.³²

Dean Pound has frequently referred to law as "experience developed by reason and reason tested by experience."³³ Therefore, he goes to history and philosophy for much of the material which he studies in order to carry out the sociological program. In this field, Pound has made one of his major contributions to the law as a means of social engineering: the classification of legal history into five stages and the discovery and specific formulation of the ends of law in each of these stages. The first stage is primitive law, in which the end of law is to keep the peace. The second stage is that of the strict law, in which the end is certainty and uniformity in the ordering of society. The means to this end are rule and form; the watchword, "certainty." The third stage is that of equity and natural law. This stage is represented in Roman law by the classical period; in English law by the rise of the Court of Chancery and the development of equity; and

32. Pound, *supra* note 26, at 516.

33. POUND, *NEW PATHS OF THE LAW* 13 (1950) (hereinafter cited as *NEW PATHS*). In POUND, *THE TASK OF LAW* 62 (1944), he states this point nicely: "Philosophical jurists in the last century conceived of a law as an expression of reason. They held it was an attempt to bring about justice, the ideal relation between men, by means of an authoritative pronouncement of reason. Thus they put the stress upon reason where the historical jurists put the emphasis on experience. There is truth in each of these ideas. It is only laws which can meet the test of reason which endure. It is only pronouncements of reason founded on or tested by experience which become permanent parts of the law. Experience is developed by reason and reason is tested by experience. Nothing else maintains itself in the legal system. Law is experience organized and developed by reason, authoritatively promulgated by the lawmaking or law-declaring organs of a politically organized society and backed by the force of that society." See also *Id* at 89.

on the Continent of Europe, by the rise of the law of nature schools of the seventeenth and eighteenth centuries. In this stage, notions of ethics and morality are brought into the law. The end of law becomes the assurance of moral conduct as derived from reason or the securing of individual rights derived from the nature of man as a rational creature. The fourth stage is that of maturity of the law. Here the watchwords are "equality" and "security." The end of law is free individual self-assertion. The working out of individual legal rights is emphasized; hence, emphasis is on equality, property and rigid adherence to fixed rules. The fifth stage, *socialization of law*, is marked by a new infusion of ethical notions into the law and emphasis on social rather than individual interests. The end of law exists for the furthering of civilization through the protection of the interests which are best designed to accomplish this purpose. A complete change of attitude has been responsible for a state of fluidity in the present stage of the law.³⁴ Thus in law and philosophical thinking, there has been a continual broadening of the sphere of recognized and secured interests, a widening of the conception of the nature and end of law, from primitive societies to the present day.

Pound understands law in three senses, as: (1) "a highly specialized form of social control in a developed politically organized society" obtained by the application of force of that society; (2) a body of authoritative guides to decision; and (3) a judicial and administrative process, in which the guides to decision are developed and applied by authoritative techniques, in the light of received authoritative ideals.³⁵ However, definitions of law change with social circumstances, and no final answer to the question about the nature of law is possible. Law is a social mechanism, a means to further the ends of society. "Law is experience organized and developed by reason, authoritatively promulgated by the lawmaking or law-declaring organs of a politically organized society and backed by the force of that society."³⁶

The end of law is justice, but what is justice? We cannot answer this question absolutely, but we must attempt an answer — we cannot neglect it.³⁷ Justice is not an "individual virtue" nor is it "the ideal relation among men"; rather, it is merely "such adjustment of relations and ordering of conduct as will make the goods of existence . . . go

34. POUND, *THE SPIRIT OF THE COMMON LAW* 139, 195 (1921) (hereinafter cited as *COMMON LAW*).

35. POUND, *MY PHILOSOPHY OF LAW* 249-62, at 249 (Sixteen American Scholars, 1941) (hereinafter cited as *MY PHILOSOPHY*). See POUND, *SOCIAL CONTROL THROUGH LAW*, 40-41 (1942) (hereinafter cited as *SOCIAL CONTROL*).

36. POUND, *THE TASK OF THE LAW* 62 (1944).

37. *MY PHILOSOPHY* 250.

round as far as possible with the least friction and waste."³⁸ In the world of today, the era of free opportunity has ended, and accordingly abstract freedom of the individual is no longer sufficient. The goods of existence are limited, while the demands on those goods are infinite. Therefore, a new type of freedom is necessary — freedom to enjoy at least a minimum of the goods necessary for life and perhaps enough to enjoy a comfortable measure of living in accordance with the means available. To order the activities of men so as to satisfy the maximum number of claims or demands with the least friction and waste is what jurists have been striving for and what philosophers say we ought to be doing.³⁹

For purposes of analytical comparison and study, Pound has further classified law (the precept element) as a body of rules, principles, conceptions, doctrines, and standards.⁴⁰

The science of law cannot be self-sufficient. Viewed functionally, as a technique of social control with a changing purpose in view, it must draw upon other disciplines for insights. Ethics, economics, political science, sociology, social psychology, history, psychology, and philosophy are the disciplines which can be used advantageously to further the purposes of law.⁴¹ In his early years, Dean Pound drew most heavily upon the first five of these and psychology, but in later years his most extensive studies have been in history and philosophy.

Pound has devoted much time to a study of the various factors which enter into judicial lawmaking.⁴² The chief agency in our law-making has been judicial empiricism, the search for the workable legal precept, the principle which is fruitful of the good result ". . . that accord[s] with justice between the parties to concrete litigation. It is a process of trial and error with all the advantages and disadvantages of such a process."⁴³

This judicial search for law is to be governed, as in the past, by ideals of the end of law and the legal order. "Such ideals must be our [main] reliance today and tomorrow."⁴⁴ We must be conscious that these ideals are invoked and of the purpose for which they are invoked. Our theory must recognize what takes place and must rationally account for it. Our judges must be conscious that what

38. SOCIAL CONTROL 65.

39. *Id.* at 64; INTERPRETATIONS 157.

40. Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482 (1933).

41. MY PHILOSOPHY 252-54.

42. Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 802, 940 (1923).

43. *Id.* at 953.

44. *Ibid.*

they are doing is "social engineering."⁴⁵ Pound repeatedly stresses this ideal element. "Men tend to do what they think they are doing. Hence professional and judicial ideals of the social and legal order are a decisive factor in legal development."⁴⁶ Such ideals are frequently so much a part of the authoritative tradition as to be a form of law in the strictest analytical sense.⁴⁷

It is futile to reject wholly an ideal element in legislation, administration and adjudication. Men are governed consciously or unconsciously in what they do by assumptions as to what it is that they are doing and of purposes of their doing it.⁴⁸

Nor does it dispose of these ideals to show that they are not wholly realized in the course of judicial decision. They are as much a part of the "authoritative traditional legal materials" as are the legal rules and doctrines themselves, which are shaped to conform to these ideals.⁴⁹

This jurial ideal of judges and lawyers is well described by the unique Poundian phrase "positive natural law." This phrase was coined along with "natural natural law" to distinguish the two types: the latter being ideal law simply as an ideal and independent of actual law; whereas, the former is defined thus:

Positive natural law, which in practice is what usually goes by the name of natural law, is an idealized version of the positive law of the time and place, in which the jurist, postulating that it is declaratory of natural law, and that it derives its force from conformity to the ideal precepts . . . or some of them in universal form. These idealised precepts of a positive law in which the jurist was trained now appear as universal, unchallengeable and unchangeable.⁵⁰

Moreover, the idea implicit in the term "positive natural law" came to Pound as a result of his researches into legal history. It has been of great value in giving new insight into the juristic behavior of past periods and in combating "juristic pessimism" of the twentieth century.

Law as an instrument of progress toward civilization cannot stand still, yet it must be stable. A task of the law is the reconciliation of the need for stability with the need for change.⁵¹ The "give-it-up" philosophies would say that nothing can be done because of the deter-

45. *Id.* at 954.

46. Pound, *The Ideal Element in American Judicial Decision*, 45 HARV. L. REV. 136 (1931).

47. *Id.* at 136.

48. Pound, *Natural Law and Positive Natural Law*, 68 L.Q. REV. 330, 332 (1952).

49. Pound, *supra* note 46, at 147.

50. Pound, *supra* note 48, at 330.

51. INTERPRETATIONS 1.

ministic nature of history, economics, psychology, and the primitive nature of man. They would deny the "efficacy of effort" and assert that lawyers and jurists are merely shadow-boxing. But Pound denies with spirit that law is mere myth or superstition, that the great systems of the civil law and the common law are nothing more than human deceptions:

It is idle to say that the arbitrary personal subjective element in magisterial behavior, which these traditions have for centuries shown us how to subdue, is the reality and this accumulated experience a mere sham. I repeat, experience of social control by the judicial process operating according to law is as objectively valid as engineering experience.⁵²

The legal realists' distrust of traditional legal rules and concepts, insofar as they purport to describe what either courts or people are doing and Pound's insistence on the ideal element in law, with its emphasis on the ends of law as the primary motivating factor, are the basic points of divergence between Pound and realism. For this reason, Pound has been classified as a sociological idealist.⁵³

The well-taken phrase "social engineering," indicates Pound's conception of the role of the jurist and advocate in the progress of society toward civilization, through the conscious improvement of the law as an instrument of social control for the furthering of the ends in view. He has described this conception on numerous occasions, but nowhere better than in the following paragraph:

For the purpose of understanding the law today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants — the claims and demands and expectations involved in the existence of civilized society — by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence — in short, a continually more efficacious social engineering.⁵⁴

52. POUND, *CONTEMPORARY JURISTIC THEORY* 53 (1940); cf. Ch. III, *passim*. (hereinafter cited as *THEORY*.)

53. FRIEDMANN, *op. cit. supra* note 1, at 194. Realism limits itself to the observation of law in its making, working, and effect.

54. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 47 (2d ed. 1954) (hereinafter cited as *PHILOSOPHY*.)

Dean Pound considers that today we are on the threshold of a new era in law and society. The boundless opportunities of past ages, which could be utilized in order to satisfy reasonable expectations, no longer exist.

Security no longer means security of opportunity for free competitive acquisition. Men no longer claim only security of free opportunities for individual initiative. More and more they demand equality of satisfaction of wants and expectations which liberty itself cannot give them. They think of a full economic and social existence. . . .⁵⁵

This complete change of conditions and the resulting change of attitude has put twentieth century law in a state of fluidity like that of third century Rome or seventeenth century Europe.⁵⁶ Therefore, a most important task lies ahead: to rationalize the judicial process as it exists today; to substitute a larger picture of the end of law; and to idealize more critically and along broader lines than in the past. This is the task of the jurist and teacher of law, to educate the judges to a new picture with the following content: (1) a process of social engineering as a part of the whole process of social control; (2) to set off the part of the legal order appropriate to government by principle from the part involving unique situations, requiring intuition and individualized application; (3) to portray a balance between the needs of justice for the individual decision and generalized social claims; and (4) to induce a consciousness of the role of ideal pictures of the social and legal order in both judicial decision and legislation.⁵⁷

Pound asserts that a legal system attains the ends of the legal order in the following manner: (1) by the recognition of certain interests, individual, public, and social; (2) by defining the limits within which these interests shall be legally recognized and given effect through legal precepts; and (3) by endeavoring to secure the interests so recognized within the defined limits.⁵⁸ This is one way of stating that a legal system can accomplish its purposes through the theory of interests.

Pound's greatest drive has been to formulate a scientific theory of justice. This has resulted in his theory of interests. Pound adopted pragmatist ethics, which conceives of the highest good as the satisfaction of the maximum number of claims consistent with the least friction or waste. He adopted Kohler's conception of the end of law

55. Pound, *supra* note 48, at 334.

56. *NEW PATHS*, *passim*.

57. Pound, *supra* note 42, at 958.

58. *MY PHILOSOPHY* 259.

as making for civilization, which is the highest possible control over nature, both internal and external, for the time and place, achieved by the recognition of the social interest in the individual life. He adopted Jhering's notion that rights exist only to protect interests which the state ought to secure and the notion that the growth of law takes place because of purposes, that is, in order to protect such interests. He was influenced by the notions of Stammler that justice can be obtained only by a harmonious synthesis, but whereas Stammler posited an ideal abstract community as a device by which this result might be achieved, Pound claims that he has achieved the result *a posteriori* in the actual working community of the given society. This is questionable because of the emphasis which Pound puts on "positive natural law" as an idealized version of the legal *status quo*. He even admits the tendency of jurists to adopt an idealized version of the legal picture of an earlier time. In Pound's system there is theoretically no external standard for any claim other than the fact of the making of that claim by the individual claimant. But, of course, the legal system exists as a working agent, and the adjustment of claims must take place within the confines of the system until such time as the system has been changed in accordance with the procedures which Pound provides to meet the needs of society in flux. The satisfactory working of this system requires the knowledge, skill, and insight of the "great lawyer," who will be judge and law-giver and will perform the task by the process of sound "social engineering."

As Pound sees it, the pragmatist ethics naturally works for the development of the individual personality and, through this, of civilization. The theory of interests is a theory of justice, since there is no good without reference to some criterion, and this criterion is the satisfaction of the maximum number of claims with the least friction and waste. Thus, there is no individual justice in the old sense of personal right and wrong, since all values are relative, and the only standard is the pragmatist ethics, summarized in the last preceding sentence. The theory of interests, therefore, is an attempt to keep the law in harmony with this pragmatic ideal. This Pound endeavors to do by the survey of interest, *i.e.*, *de facto* claims of people in society, formulation of the jural postulates, generalized propositions of law (major premises) expressing the jural ideals of the civilization of the time and place, excluding all claims of interests from consideration which do not come within the purview of the jural postulates; formulation of a table or classification (scheme) of interests, which he uses as a device or measuring rod for ascertaining the elements of value

in claims subsumed under the jural postulates; and evaluation of claims competing for recognition in a given instance (law suit or legislative endeavor) by balancing or weighing them against each other with reference to harmonizing the scheme as a whole. Accepting the legal order of the time and place as presumptively the best available system, Pound relies on teleological ideals as to the end of law as the motivating factor in the growth of law and "experience developed by reason and reason tested by experience" as the best juristic method yet devised for the intelligent shaping of that growth in accordance with the desired ends or purposes. But this goes beyond pragmatist theory, which does not purport to accept values outside the system other than the bare presumption necessary to get the system going without permitting anarchy.

Change occurs when there is sufficient demand for change to shift or expand the perimeter of the mass of surveyed claims, thus requiring the revision of the jural postulates. But in the harmonizing of claims, it must ever be by the ideals of the civilization of the time and place. Thus the "balancing of interests" takes place only when the opposing claims both fall within the area of principles subsumed under the jural postulates. Recognized difficulties exist with reference to: retrogressive civilizations; "value judgments" in the formulation of jural postulates, classification of interests, and weighing of claims; homogeneity of ideals as to the time and place and society in transition; and great social engineers capable of surveying and interpreting the civilization area-period. These will be considered further in the critique of Pound's writings. The theory of justice will be considered more fully in the next section.

So long as the legal order performs this function of harmonizing interests, its authority is justified and it maintains that "habit of obedience that makes practicable the employment of force upon those who require it."⁵⁹ But there are limits to effective legal action which precludes our doing through law everything which ethical considerations and social ideals would move us to attempt. Pound describes these limitations as growing out of the following difficulties: (1) difficulties involved in the ascertainment of facts; (2) the intangibility of many duties which are morally important but defy legal enforcement; (3) the subtlety of modes of infringing important interests which the law would like to secure if it could; (4) the inapplicability of legal machinery of rule and remedy to many phases of human con-

59. SOCIAL CONTROL 53-4.

duct; (5) the necessity of appealing to individuals to set law in motion.⁶⁰

The other agencies of social control today are religion and morals and education.⁶¹

We are on the verge of a new era in law and society, Pound repeatedly points out. The path of the immediate past, which he terms "the path of liberty," is no longer the ideal of our society. We are now following "the humanitarian path," but he fears that we are headed for "the totalitarian path." He bases this possibility on his test of reason and experience, although he hopes that the last-named path can be avoided and that mankind will continue in paths which will lead to the highest value, that of civilization.⁶²

IV.

THE THEORY OF INTERESTS.

In the effort to accomplish the program of sociological jurisprudence, Pound believes that the first problem confronting society is the establishment of his theory of interests as a functioning part of the legal order. The development of this theory occurred in two steps: the formulation of the jural postulates, in 1919,⁶³ followed by the announcement of a classification or scheme of interests two years later.⁶⁴ Pound claims this to be his most valuable contribution to jurisprudence. While recognizing certain valid criticisms, he has defended it vigorously as the most workable means yet devised for sound "social engineering."

The jural postulates consist of five generalized propositions about the law which are supposed to serve as major premises under which all valid principles of positive law, both civil and criminal, may be comprehended or subsumed. They are grounded in human nature and conduct as expressed in Pound's interpretation of American judicial decisions on the appellate court level and represent his conception of the jural ideals of our society.⁶⁵ The relationship of the jural postulates to the scheme of interests will be discussed hereinafter.

60. *Id.* at 54-62.

61. *Id.* at 62.

62. See generally *NEW PATHS*.

63. *AN INTRODUCTION TO AMERICAN LAW* 36-37, 40, 43 (1919).

64. *A Theory of Social Interests*, 15 *PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY* 16-45 (May, 1921); revised and published as Pound, *A Survey of Social Interests*, 57 *HARV. L. REV.* 1-39 (1943) (hereinafter cited as *Survey*).

65. The jural postulates are set out in POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 168, 179, 183-84 (5th ed. 1943) (hereinafter cited as *OUTLINES*).

The need for the jural postulates is described in the following terms:

Yet important as it is not to lay down dogmatically an abstract scheme of universal law, something more definite than a conception of maintaining and furthering civilization is needed for the immediate purposes of jurisprudence and legislation. The judge must have a more detailed picture in his mind to guide him in finding legal rules, in interpreting them and in applying them to the decision of causes. The legislator must have a more detailed picture to guide him in lawmaking. The jurist also must have a clear picture whereby to lay out the lines of creative as well as of ordering and systematizing activity. It is well that the jurist, at least, should recognize that it is but a picture for use in the time and place and that his mind should be reasonably open with respect to the possibility of repainting it in whole or in part. Still he must have some such picture, and will be governed by one whether he is aware of it or not. . . . The civilization of every time and place has certain jural postulates — not rules of law but ideas of right to be made effective by legal institutions and legal precepts. It is the task of the jurist to ascertain and formulate the jural postulates not of all civilization but of the civilization of the time and place — the ideas of right and justice which it presupposes — and to seek to shape the legal materials that have come down to us so that they will express or give effect to those postulates. . . .⁶⁶

In answer to the criticism that the jural postulates give us a natural law once more, Pound replies that while this is true, it is a natural law drawn from concrete observation of the civilization of the time and place “an endeavor to ascertain the ideas of right which it presupposes” rather than a philosophical deduction from the nature of abstract man. It is also a “practical natural law,” that is “a natural law with a changing or a growing content.”⁶⁷ The revival of natural law in this century is not a revival of the rigid natural law of the metaphysical school of the nineteenth century nor the universal natural law of the eighteenth century. “It is a revival of the creative natural law of the seventeenth and eighteenth centuries, but as something relative, not something that shall stand fast forever.”⁶⁸

The advantages of Kohler's interpretation are clear. It recognizes the creative element in legal history and avoids the confident rejection of the past faith in abstract rationalization of the eighteenth century. “It takes account of the need for stability through recognizing that

66. INTERPRETATIONS 147-48.

67. *Id.* at 149, citing STAMMLER, WIRTSCHAFT UND RECHT 180-81 (2d ed. 1905).

68. INTERPRETATIONS 149-50.

we must work with the materials which the social and legal past have given us, and of the need of change by conceiving of law as relative to a constantly changing civilization."⁶⁹ Yet Pound is not satisfied because this is an idealistic interpretation, and he prefers an instrumental point of view. Kohler's interpretation gives us an idea of operating from within, of growth and unfolding — not an instrument by which men understand legal development and organize its future for their purposes. Its Hegelian form would tend to obscure the element of human activity and so would remain in the juristic stagnation, if not pessimism, of the immediate past.⁷⁰

While this interpretation is not required, it is a danger which Pound seeks to avoid by an engineering interpretation. All interpretations utilize analogies, and theories are constructed and understood in this manner. The engineering interpretation has the advantage of being put in terms of the dominant activity of the time. It is an analogy which will not postulate formal, logical or positivist determinism. Rather, while reminding us that law is conditioned by many things, it will give us an interpretation in terms of activity and of legal institutions as things that are made. It must be in terms of conditioned activity, of the capacities, characters, and prejudices of the engineers, the materials with which and the circumstances under which they work, and their goals or purposes.⁷¹

Pound's theory of social interests has been termed his most important contribution to legal philosophy, not only because it preserves continuity with the past but also because "it stands for the method of reason and compromise which is essential to the development of a democratic and free society."⁷² His table of social interests can serve, like Mendelejeff's table of chemical elements, for working purposes while looking for new interests.⁷³ It is composed of values for the construction of legal norms by legislative and judicial action. The first step, the survey of social interests (claims), was intended to end the chaotic and episodic character of discussions of public policies recognized in mature systems of law. Pound found six classes and several sub-classes.

Pound recognized that when decisions are made in new areas of the law, the courts have at all times been required to weigh interests but that usually they were not fully aware of what they were doing. The courts made vague reference to some public policy but often

69. *Id.* at 150.

70. *Id.* at 150-51.

71. *Id.* at 151-52.

72. PATTERSON, JURISPRUDENCE 518 (1953).

73. *Ibid.*

without realizing that there was a competing policy struggling for recognition, which might have an equally valid claim to consideration. Thus the conception of public policy was never clearly worked out, nor were the several policies recognized by the common law defined as were the individual interests to which the jurists gave their whole attention. To put it in Pound's own words:

"The body of the common law is made up of adjustments or compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a reasonable adjustment."⁷⁴

Moreover, in the nineteenth century, the social interest in the general security overshadowed all other interests under the conception of a public policy promoting free individual self-assertion. Social legislation was frequently struck down by reason of this policy without adequate consideration being given to the competing policies as indicated by the legislatures and the wishes of the public. Thus, courts and legislatures were constantly under pressure of new social interests struggling for recognition and being dealt with vaguely under distrusted notions of "policy." Today, they are more conscious of the new social interests and are attempting to state the ends of law in terms of "the social interest in the individual life" rather than in terms of one or more categories of social interests such as security of acquisitions or transactions. Pound believes that his classification is a good working guide for the conscious pursuit of this task.⁷⁵

Pound defines an interest as any claim or desire which human beings seek to satisfy and which must therefore be taken into account by society in its ordering of human relations.⁷⁶ He then breaks this down into individual, public, and social interests. Individual interests are "claims or demands or desires involved immediately in the individual life and asserted in title of that life." Public interests are "claims or demands or desires involved in life in a politically organized society and asserted in title of that life." Social interests are "claims or demands or desires involved immediately in the individual life and asserted in title of that life."⁷⁷ Pound's outline itself should be studied.⁷⁸

To effectuate this scheme of interests, Pound believes it is necessary to accomplish five objectives.⁷⁹ First, there must be an inventory

74. *Survey* at 4.

75. *Id.*, *passim*.

76. *MY PHILOSOPHY* 259.

77. *Survey* at 1-2.

78. The classification is set out completely in *OUTLINES* 97-111.

79. *MY PHILOSOPHY* 261; *OUTLINES* 96.

of the interests pressing for recognition, a generalization and classification of them. This is accomplished by a general survey of legal claims being made, followed by classification and arrangement according to a logical-analytical scheme. The second step is to determine the interests which the law should recognize and secure. This is accomplished by the formulation of the jural postulates and their application to the claims (interests) as measuring devices.⁸⁰ Thirdly, we must fix the limits of securing the interests so selected. As it appears to the writer, this is a question of the "balancing of interests" against each other, which involves the problem of evaluation, though in a more relative degree than when the question is whether an interest is to be recognized at all, which is the problem considered under the fifth step.⁸¹ Fourth, we must consider the means by which the law may secure the interests when recognized and delimited (that is, take account of the limits of effective legal action). This involves an evaluation of the efficiency of legal machinery, the extent to which it can be improved, and the extent to which the law should be used to enforce some social value, as compared with some other means of social control. And finally, we must evaluate the interests. This is obviously necessary in the decision of concrete cases of conflicting interests within the comprehended scheme, and it is the problem which has caused the most trouble. Since Pound has repeatedly abjured any absolute scheme of values,⁸² this evaluation can be accomplished only, as in the past, by judicial empiricism but in the light of modern social sciences and the conscious knowledge of the effect of what is being done (the purpose of the scheme of interests itself). Dean Pound declares that this can be done and is being done "by scientific scrutiny of experience in finding how to deal effectively with concrete cases."⁸³

As the writer has endeavored to show, the most significant part of sociological jurisprudence has been its effort to render the law a more effective instrument of social control. Early in his career Dean Pound perceived that some guiding light was necessary to enable lawyers, judges and legislators to do their work more effectively — to consciously shape the growth and development of the law, to harmonize it with existing social needs and to use it as an instrument for progress toward civilization. The whole program of sociological jurisprudence

80. See OUTLINES 95; SOCIAL CONTROL 80-81, 113; *Survey* at 15; NEW PATHS 2-3; Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531, 544 (1935).

81. See SOCIAL CONTROL 78-80 (e.g., problem of secondary boycott).

82. THEORY 82; PHILOSOPHY 45-46; COMMON LAW 92-93.

83. MY PHILOSOPHY 262: cf. THEORY Ch. III, *passim*; SOCIAL CONTROL Ch. IV, *passim*.

has been an endeavor to ascertain the purposes we are seeking and to determine which of alternative choices will best further these purposes.

Pound adopted Kohler's conception of civilization. Therefore, he sees in law an attempt to maintain, further, and transmit civilization by raising human powers over nature, both internal and external, to greater completeness, yielding the maximum control of which men are capable for the time and place.⁸⁴ He believes that cooperation toward civilization will replace free individual self-assertion as the jural ideal.⁸⁵ However, he rejected natural law notions and any absolute standards of value and has repeatedly reaffirmed this position, maintaining at all times that values are relative to the given time and place (society).⁸⁶ As a sociological jurist, he has looked to society and the part played by law therein, observing and recording data, namely, the interests which human beings are pressing for recognition in this field. From this comprehensive picture, the jurist must synthesize the principles of conduct which are recognized and given effect by law, that is, the legal ideals of the particular society. Only substantially all of the claims will be considered, however, in framing this picture, as those which are inconsistent with the great mass of claims will not be a part of the social ideals which should be recognized and given effect. From this synthesis, the jurist will formulate the jural postulates of the civilization of the time and place. These postulates will serve as working hypotheses, subject to change as other *de facto* claims are pressed for recognition and as society comes to recognize such claims and thus moves forward toward civilization.

But there is obvious need for a more concrete guide to the detailed problems of the administration of justice than an abstract statement of the jural ideals of the legal order. Pound naturally realized this and as a supplementary instrument sets up his scheme of interests. This idea is derived from the pragmatic ideal of justice as the end of law, as the satisfaction of the maximum number of wants consistent with the harmonious ordering of society as a whole. As Pound states:

The task is one of satisfying human demands, of securing interests or satisfying claims or demands with the least of friction and the least of waste, whereby the means of satisfaction may be made to go as far as possible.⁸⁷

Formulation of the scheme of interests follows next, but how is this to be accomplished? The first task is to define and classify in-

84. SOCIAL CONTROL 65; INTERPRETATIONS 141.

85. SOCIAL CONTROL 127. But he points out that free initiative and cooperation work together. *Id.* at 132.

86. *Id.* Ch. IV, *passim*; INTERPRETATIONS 148, 149, 158, 159.

87. INTERPRETATIONS 157.

terests. Using the jural postulates as working hypotheses, Pound worked out a systematic inventory of the interests which may claim recognition and enforcement in the given society. Not all of the claims made are recognized in this scheme, however, but only those encompassed within the purview of the jural postulates. The scheme will thus include all the *de facto* claims which are in harmony with the working hypotheses of the legal order.

Pound adopts a convenient mode of classification of these claims into individual, public, and social interests. Each type is convertible into the other and must be converted for purposes of weighing conflicting interests. This is necessary because the interests might be considered as a sort of hierarchy. Thus if one interest is considered as a social interest and another interest in conflict therewith is considered as an individual interest, in weighing these interests against each other the social interest would inevitably win out. As Pound has put it, in this type of situation "our way of stating the question may leave nothing to decide."⁸⁸

The final phase of the theory of interests is the analysis and evaluation of conflicting interests in a specific case. Of this difficult problem, the author has already written at some length. The particular technique, however, may be indicated as follows. The first step is to ascertain what interests are in conflict and to state them in common terms. Pound generally recommends their statement as social interests. The conflicting interests in a generalized form are contained within the classification of social interests, frequently under more than one heading. This is also a factor to be considered, the number of interests under which a particular *de facto* claim may be subsumed. Since in any particular case there are obviously conflicting interests, one interest must prevail, and the solution to be preferred is that which will allow the law to give the greatest possible satisfaction to the social needs, for both stability and progress, in accordance with the end of law.

To recapitulate: The first step is the survey of claims. The next step is the formulation of jural postulates in harmony with the jural ideals as indicated by the pattern of the claims. The jural postulates once adopted are maintained only until new facts show that they are no longer applicable. The third step is the construction of a scheme of *de facto* claims in harmony with the jural postulates. The jural postulates are thus put to the practical work of bringing legal institutions of society into harmony with the actual demands of the people (as formulated in the postulates themselves). Interests outside of the

88. *Survey* at 2.

ambit of the jural postulates are cut off. The fourth step is analysis and evaluation of interests. Conflicting *de facto* claims must be first converted to a common level for purposes of comparison of the competing interests pressing for recognition. Then, the conflict must be resolved by evaluation with reference to harmonizing the scheme as a whole.⁸⁹

89. See Stone, *supra* note 80, at 544.

[TO BE CONTINUED]