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James A. Gardner

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## THE SOCIOLOGICAL JURISPRUDENCE OF ROSCOE POUND

(PART II)†

JAMES A. GARDNER††

V.

CRITIQUE.

**R**OSCOE POUND'S GREAT CONTRIBUTION to the law has been his vast and learned writings in which he has explored problems pertaining to the relationship of law to society, the way in which law functions, and how its methods and aims can be improved. Moreover, with his liberal, pragmatic approach, he has made men more conscious of what they are doing and what intelligent areas of choice are available to them. Professor Cohen has summed up Pound's positive achievements as follows. He has liberalized the law by emphasizing its place in living society and by comparison with other systems. He has emphasized the social function of law and its history, pointing out the difference between the law in books and the law in action. He has sought to break down the prejudice heretofore existing against legislation as compared with case law. He has emphasized the importance of rendering justice in a given case by appreciation of the social factors involved as opposed to mechanical manipulation of legal concepts.<sup>90</sup>

But there are justifiable criticisms of Pound's work in spite of the positive contribution which he has made on the whole and the general

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† 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 I, an outline of Pound's jurisprudence, appeared in Volume VII, Number 1, at page 1.

†† Member of the Bar of California (Fresno) and the Bar of Illinois; formerly Assistant Professor of Law, Chicago-Kent College of Law; Harlan F. Stone Fellow, Columbia University, School of Law, 1957-1958; LL.B. 1948, Harvard University; LL.M. 1958, Columbia University, School of Law.

90. Cohen, *A Critical Sketch of Legal Philosophy in America*, in 2 LAW: A CENTURY OF PROGRESS, 266, 296-97 (1937). As to this last contribution, Professor Cohen added the comment that unfortunately Pound "has not elaborated any definite ideas or methods by which such justice can be secured." *Id.* at 297.

ferment which his work has caused. The writer will endeavor to examine several points where jurists disagree with Pound. Consideration will first be given to his philosophy in general, followed by a criticism of his theory of interests.

First, it might be pointed out that Dean Pound has been much influenced by the Neo-Hegelians, both in his approach to legal problems and in his studies in legal history and philosophy.<sup>91</sup> This has been particularly true in more recent years. It renders his entire work suspect where classification and interpretation on a broad scale are involved, and this has been Pound's particular hobby for many years. In connection with his theory of interests, Pound has shown the manifestations of a system-builder, with an idealistic teleological axiology. While denying values *per se*, he has inevitably been forced to adopt values, as for example Kohler's conception of civilization (which is Neo-Hegelian), and in the formulation of the jural postulates and the scheme of social interests. He has constantly interpreted history as a continually widening process of becoming.<sup>92</sup> While he does not claim this to be inevitable, in the context of his notions of civilization, one feels that it is. Moreover, as the years have gone by, Pound has gradually shifted his emphasis from the study of what the courts do in fact to the study of jural ideals of the present and past. In religion, Pound is a skeptic, and he could well feel that by past experience and conviction he is wedded to a relativistic view of the universe — but one wonders if underneath he is not obsessed by a desire for certainty and longing for the absolutes of a universal and immutable natural law.<sup>93</sup> So much of Pound's writing seems to reflect this longing for the natural law ideal — his jural postulates belong to the ultimate ideals of the age, his conviction that the ethical ideal is the prime motivating factor in the behavior of judges, his recent tendency to ignore the factual setting in which events have taken place and to select the ideological as the motivating factor,<sup>94</sup> his conviction that "higher ideals" will prevail<sup>95</sup> — that one wonders if his ideal of

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91. *Id.* at 296, 298.

92. *NEW PATHS* 3. See: *COMMON LAW* Ch. IV, *passim*, particularly at 100, wherein he traces by a sort of Poundian dialectic the common law rights of Englishmen into a synthesis with the natural rights of man.

93. "It is a paradox, no doubt, but so it is: absolute ideas of justice have made for free government, and skeptical ideas of justice have gone with autocracy. Idealism puts something above the ruler . . . something by which to judge them and by which they are held to rule. . . . I do not intend to preach a philosophical gospel of idealism. But I do say that if the doctrines of skeptical realism are the fruits of Neo-Kantian relativism in jurisprudence and politics, in such practical subjects we must judge relativism by its fruits. The answer, however, seems to me to be that we must not take relativism absolutely . . ." *SOCIAL CONTROL* 28-29. *Cf.* *FRIEDMANN, LEGAL THEORY* 417-18 (2d ed. 1949).

94. See *COHEN, LAW AND THE SOCIAL ORDER* 329 (1933).

95. See *NEW PATHS* 68-69, *passim*.

justice and his whole theory of interests is not really anchored in natural law and more specifically in Neo-Hegelian idealism. While Pound claims to be a pragmatist and has repeatedly affirmed this position, Professor Cohen states that as a logician and especially as a legal historian, "he is decidedly Neo-Hegelian, showing markedly the influence of Kohler in emphasizing the ideological factor."<sup>96</sup> The question then becomes this: What difference does it make? The answer is that it affects Pound's objectivity. A large part of the philosophical world rejects the Hegelian viewpoint and holds that it has grave defects as a system and that "system-building" in general has repeatedly been proven to be worthless by reason of the invalidity of some major premise. Such thinkers approach the study of Pound's writings where interpretation and classification are involved with grave skepticism. When patent defects appear, they reject it. As a pragmatist, Pound would say that no system is perfect — the question is whether it will work. But even applying this test, there are simpler ways which will work as well if not better. As has been pointed out, Pound's work is of great value, but the bias of viewpoint must be considered.

Again, consider the subject of administrative law. Pound has repeatedly denounced the trend in favor of government by administrative agencies as a movement in the direction of authoritarianism. Yet a large part of the legal and juristic world have failed to see any more authoritarianism in administrative law than in law as administered by the courts, and it is certainly true that administrative agencies are in a better position to get at the facts than courts or juries. As to the broad discretion of administrators, it might be said to be no more than juries exercise and subject to less arbitrary whim. This discretion looked at from another point of view is no greater than that of the chancellor in equity during the seventeenth and eighteenth centuries, when equity courts were doing their great work of making over the law to conform with notions of ethics and morality, inducing higher standards, developing new areas, and adapting law to meet the needs of a larger society which lay ahead. Pound himself has described this course in careful and scholarly fashion on several occasions.<sup>97</sup> One wonders if Pound might not then have abhorred equity as being no longer than the chancellor's foot and preached the doctrine that the

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96. Cohen, *op. cit. supra* note 94, at 329. The late Professor Harold J. Laski characterized Pound's scheme of interests, like all Hegelian Philosophy, as "merely a beatification of the *Status quo* of any given society at any given time." Laski *The Theory of State*, in 2 *LAW: A CENTURY OF PROGRESS* 1, 11 (1937).

97. *E.g.*, *COMMON LAW* 71, 141-42.

common law courts were the only institutions which stood between the people and absolute tyranny.

Pound never tires of talking about former notions, in England and America, of the opposition of state and individual and of the law as standing between the two parties, safeguarding the latter; about the tyranny of absolute majorities, "the divine right of majorities" and the threat to our liberties from this source.<sup>98</sup> Thus, after commenting on administrative agencies as being here to stay, he continues:

What I challenge is carrying to the extreme the idea of regimented cooperation for the general welfare as the task of law; the exaltation of politically organized society to the position of absolute ruler. This presupposes superman administrators and an all-wise majority or plurality, omniscient and equal to taking over the whole domain of the general welfare and to determining in detail what it calls for in every situation.<sup>99</sup>

But the question might be asked: What about the "judicial tyranny" which existed in America during the last quarter of the nineteenth century and remained until 1937, about which Pound himself has written so brilliantly in his now classic essay on *Liberty of Contract*?<sup>100</sup> Why should the courts, unanswerable to the popular will, be the repository of popular liberty, standing between the people and themselves (as rulers)? Moreover, why should the claims (interests) of the people be taken as the highest criterion on which to erect a vast logical system of justice, the ultimate end of the law of today, when the people cannot be trusted to govern themselves through the established processes of their elected representatives?

Pound has repeatedly defended the courts in their interpretation of "due process" by infusion of ethical notions and has opposed all plans to make the legislature ultimately supreme. Rightly so — because he believes that "distrust of absolute majority or absolute plurality is as justified in experience as distrust of the absolute personal ruler. Indeed, the latter may be given pause by fear of an uprising which the entrenched majority need not fear."<sup>101</sup> Of course, the answer could be that he distrusts popular majorities while recognizing the validity of their claim to the satisfaction of wants. But does not his conception of "wants" include the right of self-government, already in effect in theory at least, and which is certainly the satisfaction of the maximum number of wants insofar as this one point is concerned?

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98. NEW PATHS 53, 56, 59, 60; cf. COMMON LAW Ch. III, *passim*.

99. NEW PATHS 53.

100. Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

101. NEW PATHS 56.

Pound speaks of the "involuntary Good Samaritan,"<sup>102</sup> but is he justified in this? Is not his only claim that the decision merely robs Peter to pay Paul? Yet that is always true when the demand exceeds the supply, which is a presupposition of Poundian ethical theory. Consider the following language:

A government which regards itself, under pretext of extending a general welfare service to the public, entitled to rob Peter to pay Paul, and is free from constitutional restraints upon legislation putting one element or group of the people for the whole, has a bad effect on the morale of the people. If government is a device for benevolent robbery, a would-be Robin Hood of today is not likely to see why his benevolently conceived activities are reprehensible.<sup>103</sup>

So long as it is according to law, has Pound any logical basis for objection, except by showing that more claims could be satisfied by the opposite result or that the ensuing friction results in greater waste? If so, has he not injected another criterion of value in using this term and this criticism? Pound would reply that he is merely applying reason tested by experience and experience developed by reason in the area where the value of change is in doubt. But if so, does not this mean that the pragmatist ethics is not to be trusted to its full implications?

When economists, political scientists, and planners have endeavored to render greater services to the people under law and through administrative agencies adapted to this purpose, Pound has seen grave objections. In attempting to render such services, Pound warns, we have become a "service state" which as it develops is a "super-state" and *par excellence* a "bureau state." Such a state calls for "a highly organized official hierarchy" with a "superman" at its head, and starts a path which may lead to a "totalitarian" state with "Marxian socialism and absolute government in its pedigree."<sup>104</sup>

Liberty — free individual self-assertion, individual initiative, and self-help — is looked on with suspicion, if not aversion by the service state, and its advocates seek a 'new concept of liberty' a freedom from want and freedom from fear, not freedom of self-assertion or self-determination. Self-help by the individual, competing with the service rendered by the state, seems an interference with the regime maintained by the government. Spontaneous individual initiative is frowned on as infringing on the

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102. *Id.* at 27, 36, 46.

103. *Id.* at 61.

104. *Id.* at 54.

domain of state action. The service state easily becomes an omniscient state, with bureaus of *ex officio* experts and propaganda activities carried on at public expense. If the step to it is gradual, the step from it to an absolute state is easy and may be made quickly.<sup>105</sup>

As a warning, this is good. Eternal vigilance is the price of liberty in all systems and departments of government. But unless wants can be satisfied through the courts, one would suspect that Dean Pound would not have them satisfied even though they meet the other pragmatist criteria. Yet most of what Pound has on many occasions termed "the socialization of the law" has taken place outside of the courts, through legislation, and by executive, bureau, and administrative agency. While there are strong objections to government's moving into new areas of social control unnecessarily, might not it be necessary to perform such functions where other agencies of social control are no longer serving the people? Pound himself would deplore a return to the nineteenth century social ideal.<sup>106</sup> Yet, while recognizing that we are now in a state of transition to a new type of society,<sup>107</sup> he criticizes the means being worked out without offering any other in place thereof. Aside from this ignoring of pragmatist ethics, might not he be guilty of the fault which he has imputed to others of attempting "to explain the institutions of the present in terms of a picture of the social order of the past"?<sup>108</sup> Pound favors the path of the future as "an ideal which allows both for competition and for cooperation"<sup>109</sup> but fails to say how these are to be achieved. He points to a trend toward "cooperation," but is not this an argument in favor of the "service state" which he so much fears?<sup>110</sup>

The Spectre which haunts Pound is the service State, which he regards as destructive of liberty and as a harbinger of a 'bureau state.' The problem of how to reconcile freedom and welfare, law and administration is indeed a serious one, but nowhere does Pound go beyond this brooding anxiety. He warns against the advent of the authoritarian State, but he does not discuss in practical and concrete terms where the line must be drawn between the 'humanitarian' path and the 'authoritarian' path. The legislator, the administrator, the jurist can only derive limited guidance from such phrases as these.<sup>111</sup>

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105. *Ibid.*

106. SOCIAL CONTROL 14.

107. *Id.* at 115; NEW PATHS *passim*.

108. SOCIAL CONTROL 119; see: *Id.* at 118-119.

109. *Id.* at 132; *cf.* 127.

110. Pound would deny that this trend is deterministic in nature.

111. FRIEDMANN, LEGAL THEORY 453-54 (3rd ed. 1953).

Pound recognizes that the improvement of the individual life is involved in the type of state action which he so strongly criticizes. "For the most part today . . . such things are urged on a general humanitarian idea. Some way must be found for relieving all distress, loss, and frustration."<sup>112</sup> The law is moving toward "more stress upon the social interest in the individual life"<sup>113</sup> and the guarantee to everyone of the minimum essential of the goods of existence. In a recent revision of one of his finest treatises, Pound has written:

It may be that administrative agencies may attain ideal humanitarian results better than the courts. But experience seems to show that attempts to attain them by methods outside the law will encounter the inflexible human antipathy and resistance to subjection of men's wills to the arbitrary wills of others. . . . one may well feel that much, at least, of the laudable humanitarian program is beyond practical attainment by law.<sup>114</sup>

This is a value judgment which by implication is based upon experience and reason, but it is directly in conflict with the pragmatist philosophical tenet that "any claim has value" or that opposing claims are intrinsically of equal value only. Moreover, it is in conflict with what Pound recognizes as the new ideals of the present age, manifested in the stage of "socialization of the law." Pound recognizes that change is inevitable, he favors the improvement of human powers over nature and the progress of man toward civilization, but he seems to oppose the only means now being conceived to accomplish this end. He favors "the humanitarian path" but does not tell us how to get there.<sup>115</sup> Yet if reason and experience have only negative value, how can we use them as reliable guides to the future? If the jurist is to rely on "positive natural law" or "a picture of the social order of the past,"<sup>116</sup> how difficult will be the effort to move beyond the present? Pound relies upon teleological ideals as to the end of law as the motivating factor in the growth of the law, but what will be the result if such ideals are not in fact looking toward the future? And does Pound subsume teleological ideals under the generic term "demand"?

Pound's theory of interests is based on the ethics of pragmatism, that whatever techniques secure a maximum of interests with a minimum of waste possess ethical value. James held that there is ethical

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112. *PHILOSOPHY* 100.

113. *Id.* at 104.

114. *Ibid.*

115. Actually, Pound seems to be disturbed over the trend of recent legal decisions, as shown by the fact that he has read more into some decisions than their history and logic reasonably allow. See *NEW PATHS* 38. The case which Pound discusses critically therein would appear to be *Escola v. Coca Cola Bottling Co.*, 24 Cal. App. 2d 453, 150 P. 2d 436 (1944) (concurring opinion by Traynor, J.).

116. See, *SOCIAL CONTROL* 119.



value in what gives the most effect to human demand with the least sacrifice and that this is the only criterion for preferring one value over another. But, as has been pointed out, James's ethical theory took a good deal for granted — that individuals have decent ideals and respectable habits and that society's customs are those which survive in a competition which has been on the whole rationally selective; that only what is *prima facie* good is put forward, to be determined in compromise after free discussion by reasonable men.<sup>117</sup> Pound makes this assumption also, but whereas with James it is only a tacit assumption, in Poundian theory it is the corner stone of the edifice. Thus, it makes relative values absolute within the Poundian system, thereby wedding it to the *status quo*, which is the very situation the true pragmatist has endeavored to avoid.

The two chief criticisms of Pound's theory of justice have already been made implicit in describing the theory. They might be better described as a criticism and its corollary. First, Pound goes outside the system to get the value judgments necessary to harmonize the claims if the law is to grow. Sometimes he does not seem to recognize this; at other times he does. The avowed impartiality in James's ethics is its weak point, because in its very nature the system he advocates requires some tangible guide to decision.<sup>118</sup> This is obtained by a bare presumption in favor of the existing system and experience, and is necessary to avoid anarchy. Yet once this presumption is raised, values must be introduced on another level unless each time the claim of Paul to have Peter robbed is denied, for in every case an equal amount of demand will be satisfied either way, and the mere preservation of harmony would favor the denial of the claim. The writer would therefore disagree with James that the essence of good is to satisfy demand. There must be some qualitative factor present, and no such factor attaches to mere past usage. Reason and experience should teach us this if nothing more. Hence, these tools should override abstract logical theory — as they do in Pound's case, but therein lies the conflict. As a result, Pound in fact is more liberal than Pound in theory.

Returning to James, the only point to be conceded in favor of his presumption is that change should not take place merely for the sake of change.<sup>119</sup> But Pound has difficulties that are only latent in James,

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117. PATTERSON, JURISPRUDENCE 486 (1953).

118. See discussion of James's ethics in text, *supra*.

119. Actually, James's theory has a liberal as well as a conservative aspect, and this should not be overlooked. In demonstrating the relative nature of human values, James has performed great service by showing that man is not bound to the past by inexorable rules which have been handed down to us and which must be

because Pound is dealing with the application of pragmatist theory to his theory of justice. Thus there are now two theories involved. Pound goes beyond James in the first instance and adds another element later, a different World-View. He is therefore impelled to give greater emphasis to the extant system, which shorn of its admitted imperfections, he exalts to the level of the ideal. The other criticism is that to such extent as Pound does not go outside of the pragmatist ethics as a system in order to obtain his values for deciding either in favor of Peter or Paul, he has no basis other than an arbitrary one on which to decide concrete cases. (This is a neat antinomy and true only if pragmatist ethics is considered as strictly neutral.) Thus there are two horns to the dilemma, and Pound is tossed first on one and again on the other.

James did great service by showing that man's values are relative to the time and place, but it is much more to say that in a going society claims shall be measured only by the quantity of the assertion in the first instance. James may go this far in the abstract; Pound does it in the concrete. Again, it is inconsistent to next assert that claims must be measured by an idealized version of the particular civilization. At this point Pound takes leave of James and enters the camp of Hegel. Teleology if not inevitable is nevertheless the *leitmotif*. Not only is the ideal picture shaped largely by rationalist concepts, the criterion for judging, but its projection into the future seems to be controlled by historic determinism<sup>120</sup> — for with Hegel, they merge into one another: "The real is rational, the rational is real." The term "reason and experience" might reasonably mean the scientific method applied to the new learning in the social sciences, against the background of life itself — but in context it acquires a special Poundian meaning.

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adhered to in the nature of things. Man is therefore free to chart new paths in untried fields, bound only by the equal weight to be given to the claims of his fellow men. In this sense James pointed men the way to greater freedom to achieve social progress through experimentation. This was a philosophical new departure, and pragmatist ethics is unanswerable when viewed from the abstract level of James. The law as a stabilizing factor in society would tend to fall on the conservative side of James's philosophy, and this could be a partial explanation for Pound's position. But this is not required, and care should be taken by the pragmatist philosophers to see that this does not happen.

120. The jural postulates and the stages of legal history are outstanding examples of determinism at work. They are harmonized with intelligent human direction by the process of "social engineering." On this point, Professor Patterson has commented: "Can these two (the jural postulates and the stages of legal history) be reconciled with Pound's program of action by using social engineering, as outlined above? If legal history is going to evolve because of inherent rational contradictions or even because of non-rational accidents, then why is any program of action needed to help it along? The charm of Hegelianism modified by American optimistic progressivism is that one cannot be sure whether Pound is actualizing the rational or rationalizing the actual." PATTERSON, JURISPRUDENCE 518 (1953).

It is in connection with this dichotomy of his ethical theory that Pound has probably been most misunderstood by critics, first as to his "no values," then as to his "ideals." Pound denies qualitative values to get his system going; then he jumps into the ring and paints his "ideal picture." The contract is initially confusing and sometimes not perceived. Perhaps the marriage of pragmatism to Hegelianism is eclecticism to a fault. From James's "any claim has value" to the Hegelian *absolute* is a broad jump, and it must be understood that Pound has changed horses in mid-stream.

This dichotomy of "no values" and "values" deserves further critical examination. First, why should not a claim outside of the perimeter of the postulates be acceptable — unless we are to be committed to some form of historic determinism? If we are to end up with an "ideal picture," why must we begin with a denial of its importance? But if we accept pragmatist ethics in the first instance, then why is an "ideal picture" necessary in the second? Why not take the picture as we find it and proceed from there? Why not recognize relative values in the first instance but only as tentative working hypotheses? While we are bound to history to some extent, why should not we rely on "the efficacy of effort" to cut new paths in untried fields, after the manner of the eighteenth century, in a brave new world, cut loose from the past? What is there to prevent reason, untested by experience, from being right in a specific instance, either at the outset or in the society as a going concern? Much of man's social progress has come in spurts which might be described as sharp mutations from the past. Witness the Greeks, the Renaissance, the Enlightenment, to mention only a few notable examples drawn from western history.<sup>121</sup>

The writer agrees that society cannot endure without values, at least relative values. But it must do more than endure — it must progress. Therefore, we cannot be too heavily anchored to such relative values as an "ideal picture" would represent. In fact, the relative-ness of values should make us free to proclaim new values on the basis of whatever standards we apply and carry them forward in the field by whatever methods we select consistent with our scheme of values as a whole. Moreover, we must not idealize the extant civilization or any scheme of values we might adopt. We must be free of dogma. In fact, we should be constantly alert to avoid the dangers from this source.

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121. This is even more true in the case of earlier societies. See MULLER, *THE LOOM OF HISTORY* Ch. I-IV (1958).

Pound cannot in theory admit values at the outset without vitiating the pragmatist basis of his system, and this he refuses to do. In the purported selection of materials by survey and classification of claims from the "raw data" of society, one claim must be as good as another. Only when the major premises are formed, do we look at the ideal picture drawn from the *status quo*. Were Pound free to begin anew, he might admit a greater importance to relative values at the outset, might form the jural postulates from the ideal picture<sup>122</sup> — but he has been too long committed to break with so much of his past work at this stage.<sup>123</sup> Nevertheless, a gradual change of emphasis between his earlier and his later work is a discernible fact. All values were once treated as being *instrumental*, but in recent years the positive natural law has become almost fundamental.<sup>124</sup> It is interesting to note that his most valuable work occurred during the earlier period,<sup>125</sup> while he remained in the mainstream of sociological jurisprudence.

Since the balancing of interests cannot take place without some common scale, how does Pound obtain one? First, he formulates the major premises of a relative natural law, the jural postulates of the civilization of the time and place. Then, within the purview of the jural postulates, he adopts an ideal picture of society as the jurist ought to see it. To obtain this, he uses reason and experience. This is his "positive natural law," which makes an ideal out of the present, perhaps even out of the past. Thus, in practice, he makes a sort of "Kantian compromise," closing the front door to values while allowing them entry at the rear door.

One of the weaknesses of Poundian theory is the questionable neutrality in the formulation of the jural postulates, and one is never quite sure how he arrives at the result he obtains without taking into account the major premises of the given society. But once his system is established, he brings into it the *status quo*, not merely presumptively, as the edge allowed a going concern, but with all the weight of positive law, reason tested by experience, history, and

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122. This is exactly what he does in fact.

123. Furthermore he has given no indication of a tendency to do this.

124. In fairness, it should be stated that the work is not directly in conflict and is perhaps theoretically reconcilable. The writer believes that Pound would assert that while he has continued to acquire new insights into jurisprudence, his later work has been mainly a rounding out of the task which he set out to do originally.

125. Here again there is an interesting phenomena: When Pound proceeds as a law reformer, he continues much in the wake of his earlier position, and the pragmatist and practical approach continues to be strongly reflected in his work. When he writes as a social prophet and seer, he draws on the philosophical and historical studies, and a synthetic neo-Hegelian idealism prevails. It is here that he runs into strong opposition. Pound appears to see no inconsistency in his position. For practical purposes, it seems to work, but in the area of juristic theory it has reduced a once-vibrant pragmatism almost to the point of insignificance.

received ideals. Values here, though relative, he embraces *in toto*. They are absolutes within the system. He says in effect that though we do not believe in natural law (absolutes), we must behave as if we did. To put it another way, since Pound does not believe in absolute values, he postulates an "ideal picture" to guide the jurist, much after the fashion of James, who postulated "God" in order to obtain "the strenuous mood."<sup>126</sup>

Pound's choice of pragmatism as an ethical theory has been criticized from several viewpoints. The scholastic objection is that the theory denies absolute values and makes the sense of mankind, for the time being, the highest measure of the legal order.<sup>127</sup> This is a basic objection, but it attacks Pound from the position of a different philosophical value system. Different major premises being assumed, the issue is joined on a level where it can never be resolved, though for practical purposes Pound may be found in the natural law camp.<sup>128</sup> A second objection is that the theory ignores the factor of individual justice and subjects the entire society to the ephemeral caprice of public opinion. While on a purely mundane level Pound is much concerned about individual justice, in theory he denies the validity of the problem. He maintains that this involves subjective values, while the only reasonable test is that of harmonizing claims. The writer submits, however, that ethical notions in the sense of ideas of right and wrong are important in the context of society even if no absolute principles are involved, and that the individual element in justice is an important factor, that no "felicific calculus" is available which can reduce the matter to a cut and dried scheme. As Professor Patterson has pointed out, value problems exist on at least three levels.<sup>129</sup> Professor Goodman has objected to the value of any such information as might be gained by a general survey of claims.<sup>130</sup>

The realists would object that the claims men make are a consequence of law, not a cause of it. Pound denies this, giving examples of situations in which social pressures resulted in the creation of new rules of law.<sup>131</sup> But if this be true, then the law is developed by quasi-deterministic forces in our environment (as well as the teleological

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126. JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS* 195 (1896).

127. See Powers, *Some Reflections on Pound's Jurisprudence of Interests*, 3 CATH. U. L. REV. 10, 18 (1952).

128. In addition to the last paragraph, see text accompanying footnote 135-136.

129. Patterson, *Pound's Theory of Social Interests*, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558 (Sayre, 1947).

130. Goodman, *Roscoe Pound — Theory and Practice*, 23 AUSTR. L.J. 495, 497 (1950).

131. SOCIAL CONTROL 67.

"pull" derived from ideals), and this process would be accelerated by the adoption of Pound's theory. Actually, new claims are pressed in the judicial forum but only interstitially and by "molecular motion,"<sup>132</sup> and they are largely recognized only "within the narrow confines of judicial power."<sup>133</sup> The great area of substantive change is in the legislative arena, where Pound's theory, though applicable, has the least significance. Moreover, in this area many factors are more influential on the legislative process than mere quantity of claims. Effective reform movements are the result of great leadership, not quantity demand *per se*. At best the masses only provide the necessary pressures, which must be channelized and directed by great leaders.<sup>134</sup>

Professor Paton deals with the theory of interests as merely another side of the theory of natural law, which was adopted to avoid the stigma that has come to attach to that term by reason of its history and connections. He maintains that the theory of interests deals with the fundamental problems of natural law set out in new terms.<sup>135</sup> He also asks: What of the interests in a given society which are denied protection and yet are backed by a real demand?<sup>136</sup> Pound might say that these would eventually be heard if they had any claim to importance. However, the question has validity. Paton points out that a survey of interests provides no basis for preferring one claim to another save the strength of popular opinion and that law in accordance with popular opinion is not necessarily "good law." While the criticism is sound, it must be recognized that Paton is making an ethical judgment as to what constitutes "good law" by non-pragmatist standards.

Professor Patterson, who is generally sympathetic with Pound's theory of interests, cannot agree that Pound has set forth "no more than a description of how the legal order actually functions." Rather, he calls it "an imaginative 'construction' of the ends of our law."<sup>137</sup> He considers it worth while, however, in the evaluation of cases, which no jurist would deny. Specific examples will be considered later. That Pound's scheme or table of interests is not the only one which could

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132. See Holmes, J., in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218 (1917) (dissenting opinion).

133. See Frankfurter, J., in *Adamson v. California*, 322 U.S. 46, 59 (1947) (concurring opinion).

134. See WHITEHEAD, *SCIENCE AND THE MODERN WORLD* (1925). The writer can only touch on this point, however. It raises problems with many gambits, the exploration of which could well require a book.

135. PATON, *JURISPRUDENCE* 101 (2d ed. 1951). Professor Paton confesses his inability to refrain from making value judgments in formulating a scheme of interests. He would begin with "the intrinsic worth of the human personality." *Id.* at 109.

136. *Id.* at 103.

137. Patterson, *supra* note 129, at 563.

be developed is shown by the fact that Paton has presented one of his own construction, which is much simpler.<sup>138</sup> No one would dispute that both Pound's scheme and Paton's scheme bear some relation to the law in society today. How much, the writer is unable to say; but certainly other rational classifications could be constructed.

Professor Stone, one of Pound's closest disciples, has written the best criticism of the theory from the "inside," that is, from the same basic philosophical position as Dean Pound.<sup>139</sup> Stone lists seven difficulties, three of which are inherent in the nature of any attempt to consider problems arising out of the treatment of values as relative in nature, and four arising from the flow of events, incapable of partition with reference to time and space. These seven problems will be briefly summarized.

1. The objective of bringing law into harmony with the conditions of the times assumes that civilization is progressing and that such a step will result in "good law." But if civilization is retrogressing, the process will result in a degradation of law, from the level of harmony with a higher civilization to that of harmony with a lower civilization. Even this would be a betterment in the pragmatist sense but not in the sense of furthering the progress of civilization.

2. By adopting James's approach, Pound appears to have eliminated any element of value judgment in the selection of claims. A claim is valid by the fact that it is made. But the jural postulates do not take into account all claims — only the preponderant mass of claims. This cannot be done without a value judgment as to which claims should be recognized and which should be ignored. Such judgment must be drawn from outside the claims themselves.

3. In the application of the scheme of interests to particular cases, Pound tells us only that the solution must be made which will best effectuate the scheme as a whole. This again involves a value judgment from outside the system itself.

- 4 and 5. The notion of "the civilization of the time and place" assumes an area in space and a period in time when social life will be homogeneous. But there are cultural, economic, religious, political, and moral variations within one civilization area. This will make the finding of jural postulates and the construction of schemes of interests a separate process for each area or will result in disharmony. As civilization constantly changes, the scheme grows obsolete. In fact, it is never entirely in harmony. Changes must be made to bring it into

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138. PATON, *op. cit. supra* note 136, at 112.

139. Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 531, 544 (1935).

line with changed conditions. This involves difficulties as to determination of the period as well as value judgments.

6. During transition periods, there is an undermining of old demands and incoherence of new ones, making it impossible to formulate a scheme except in the form of two mutually incompatible sets of propositions. In such a situation, all solutions must be tentative.

In his later writings, Dean Pound has envisaged formulation of: a postulate entitling men to security in their jobs; a postulate imposing on enterprise the burden of human wear and tear; and a postulate that the risk of misfortune to individuals is to be borne by society as a whole.<sup>140</sup> The first would require a revision of postulate II and possibly III (a); the second, of IV and V; the third, of all except I.<sup>141</sup>

7. There must be human intellect capable of surveying and interpreting the complexities of each modern civilization area-period. It calls for mastery of the legal system and objective interpretation and for the permanent service of such minds. Men qualified to perform this service will be difficult to find. In other words, where is there another Dean Pound?

The claims having been surveyed, we are now ready to formulate the jural postulates, which is itself a question of valuation, since not all claims will be recognized. Next comes the process of formulating the scheme of interests, which is done by recognition and classification of the various interests which have been given legal recognition by society as it now exists. This again involves evaluation to some extent, both in the recognition and in the classification of the interests. These steps might reasonably be termed a kind of "fact-finding," however. This is followed by "delimitation," that is, taking account of the limits of effective legal action. Then comes the problem of weighing or balancing the interests against each other in the decision of specific legal problems.

In the classification of interests, the principle of strict neutrality must be maintained if the scheme is to work satisfactorily. As soon as interests are ranked in any specific order or given an appearance of permanence or exclusiveness, they lose character as instruments of social engineering and become a political manifesto.<sup>142</sup> This means that no interest should outweigh or outrank any other interest in the scheme or classification as such. The opposing interests must be

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140. SOCIAL CONTROL 115. Cf. NEW PATHS 32, particularly at 44-45, where Dean Pound discusses in greater detail the question of a new postulate covering loss or injury.

141. See STONE, *THE PROVINCE AND FUNCTION OF LAW* 367 (2d ed. 1950).

142. FRIEDMANN, *LEGAL THEORY* 232 (3rd ed. 1953).



balanced in concrete cases with reference to the ultimate ends or goals to be achieved. Each individual claim may be tested by each of six social interests. Summarily stated, these social interests are: the general security; the security of social institutions; the general morals; the conservation of social resources; the general progress; and the individual life. A claim may have attributes which cause it to come under more than one of these classifications. That one or two of the social interests may be most significant in most cases is due to the attributes of the claim being made.<sup>143</sup> Pound holds that for our society the ends of law can be stated in terms of "the social interest in the individual life."<sup>144</sup>

In the balancing of interests, that is, the weighing of competing policies involved in the decision of concrete cases, not only moral and ethical values but the overall political and social philosophies of the decision-makers become the important, the determining factors in the decision of cases. Thus, a conservative would emphasize individual rights and established institutions; a liberal, justice; an individual litigant, ethical values. A conservative legal order would emphasize different values from a liberal one — witness the nineteenth century, with its emphasis on free individual self-assertion, security of acquisitions and transactions and preservation of the general security.

The question therefore presents itself as to whether the law would have been any more "scientific" in the nineteenth century if Pound's theory of justice had been available. The writer submits that it would not have been. The judges might have seen other values and nevertheless remained convinced that theirs — free individual self-assertion — were preferable. We live in a society in which the individual as a person is the most important value. In a different society, some other value, for example, the state, might conceivably be the most important value. The societies of the eighteenth and nineteenth centuries would have agreed with us as to the cardinal value of the individual. But whereas the society of the eighteenth century would have endeavored to promote this value by the protection of inherent natural rights and the society of the nineteenth century by the assurance of a maximum of free individual self-assertion, we endeavor to achieve it by giving

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143. Patterson, *op. cit. supra* note 129, at 561.

144. *Survey* at 12. Three forms of this social interest have been recognized: individual self assertion; individual opportunity; and individual conditions of life.

Here again, Pound himself seems to rank the different interests when he gives first place to the individual life. The writer submits that this is necessary to some extent, and the only reason that it does not appear more clearly is that each case must ultimately be decided upon the basis of many factors, so that no standard value can be assigned to any particular interest in any particular instance. Nevertheless, the difference between mere evaluation and the dogmatism of a political manifesto is only one of degree.

greater opportunities to the individual to overcome environmental difficulties, though this may require interference with free individual self-assertion or certain eighteenth century natural rights.

This brings us to another interesting question. Property and contract were the leading instrumental values of the nineteenth century legal order. Were these values deemed most essential to maintain the end of free individual self-assertion, or was this end objective a mere rationalization of the interest in property and contract? Pound's position would seem to support the latter view.<sup>145</sup> In the nineteenth century, a stable legal order was necessary to develop the world resources, promote commercial exchange, and raise the material level of life. This could best be achieved by giving the important position to property and contract.<sup>146</sup> Now that this goal has been largely achieved, man can go on to yet higher goals of better utilization of these resources through the creation of greater individual opportunity. Yet if the society of the nineteenth century had fully understood what it was doing, it would have had a greater freedom of choice, and there would have been less resistance to change. Dean Pound was a pioneer in the demonstration of this difficulty of nineteenth century jurists, thereby making the transition to twentieth century views less difficult, because the problems were better understood. In this respect, Pound has exerted great leadership in the effort to consciously understand and actively guide the course of society. Some jurists view this as his greatest contribution to jurisprudence.<sup>147</sup>

Pound holds that "philosophies of law have been attempts to give a rational account of the law of the time and place or attempts to formulate a general theory of the legal order to meet the needs of some given period of legal development, or attempts to state the results of the two former attempts universally and to make them all-sufficient for law everywhere and for all time."<sup>148</sup> But does not this make of legal philosophy a mere rationalization of the *status quo*? Even though account be taken of the notion of law in flux and provision be made for systematic and orderly change, does not this definition

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145. See generally POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

146. A similar condition has existed in Russia during the present century, and the Soviet Union has attempted to solve it by moving along different lines, the product of another set of values.

147. Harry W. Jones, to his graduate seminar in Legal Philosophy, School of Law, Columbia University, Fall Term, 1957-1958, the writer being present.

It might be noted in passing that since the twentieth century is for practical purposes only concerned with nineteenth century theory (as it affects us today), none of the problems of realism arise out of such studies. This could well have influenced Pound's subsequent position towards the advanced realism that arose in this country after World War I.

148. *PHILOSOPHY* 3-4.

wed legal theory to the ideal of "positive natural law"? Conceding the necessity of some allegiance to the extant system, must we chart the future on the premise that an idealized version of the legal *status quo* is the jural ideal of today? And if this actually be the legal ideal of today, is this required? Pound not only emphasizes the jural ideal order of the present and past in his writings, but according to his theory such change as might occur could take place only within the confines of the system, as new major premises (jural postulates) might be formed and the scheme of interests broadened to include new demands. If in the nature of things the law must always be behind the times and endeavoring to catch up,<sup>149</sup> is it necessary for law to be thus additionally impeded? Law has its natural inertia to change in stable society. Must we add to this by putting it into legal forms, Kantian categories one step further removed from reality? Thus, assuming that the system could be put into effect and that great engineers would achieve impartiality, the increased difficulty of application would add to the essential "lag," and the distance between "the law in books" and "the law in action" would become even greater than that which sociological jurisprudence set out to cure. When law fails to meet the needs of society there is always difficulty; when the distance becomes too great, revolution is imminent. This would be a constant threat under Pound's system.

Moreover, writers and thinkers of today are showing that we are on the threshold of a new departure, that the break with the past is so sharp in the scientific field, that the problems of the new urban civilization are so different that experience of time can no longer be relied upon as a sound guide to the solution of unprecedented problems which crowd upon us from all directions, and that "the conventional wisdom"<sup>150</sup> is in fact a hindrance. It may well be that the break with the past is more deep and wide than any hitherto experienced and that we must find new ways and means to cope with the new and challenging environment, to chart new paths in a strange, new and untried world.<sup>151</sup>

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149. See POUND, *CRIMINAL JUSTICE IN AMERICA* 47 (1929). See also the colorful metaphor of Holmes, described in *Law and the Court*, *SPEECHES* 98-103 (1913); reprinted in MARKE, *THE HOLMES READER* 94, 96-97 (1955). In *THE TASK OF LAW* 85 (1944), Pound refers to an instance in which the law was ahead of the thought of the times (eighteenth century equity in the hands of nineteenth century judges, especially trusts and the specific enforcement of contracts). He states that when law is behind or ahead of popular thought, "the social-psychological guarantee is lacking." *Id.* at 85; and see *Id.* at 87.

150. See GALBRAITH, *THE AFFLUENT SOCIETY* (1958).

151. See generally BROWN, *THE CHALLENGE OF MAN'S FUTURE* (1956); DARWIN, *THE NEXT MILLION YEARS* (1954); LANGER, *PHILOSOPHY IN A NEW KEY* (1942); REICHENBACH, *THE RISE OF SCIENTIFIC PHILOSOPHY* (1956); SEIDENBERG, *POST-HISTORIC MAN* (1950).

Pound's survey of claims only serves to get the matter started, to obtain data to formulate the jural postulates and classify the interests. After that, the matter falls back into the common law empirical tradition, and the judges go on as before.<sup>152</sup> Here, Pound ties to reason and experience and emphasizes jural ideals as the teleological factor which is dominant in the decision. But in the "balancing of interests" to decide "rights" the courts may purport to follow precedent or some other guiding light, while actually basing their decisions on some inarticulate major premise. This may or may not be done consciously; but the more factors with which a court has to deal, the more likely it is to be led astray or at least to be unable to indicate the real basis on which its action is predicated. Professor Llewellyn would charge that the term "interest" itself is meaningless when used in Pound's special sense and only adds confusion to confusion. "Complete subjectivity has been achieved."<sup>153</sup>

Two additional risks of error have been pointed out:<sup>154</sup> (1) Characterization of the claim in its social setting so as to find or miss in its legal recognition any tendency to impair a social interest. Thus, in the case of legislation outlawing a company store contract of the last century, the court may have seen the tendency to vassalage and deemed the policy of free contract more important, or it might have overlooked the tendency to vassalage. (2) The estimate of the probable extent of the harmful consequences of a claim. Thus, courts are in disagreement as to the extent to which a suit by a minor child against its parents will disrupt family relations.

An example of a shift of emphasis in the weighing of interests would be in connection with what Dean Pound has classified as the public interest in the dignity of the state. Formerly, this was deemed so important that no suit could be brought against the state without its consent, and neither estoppel nor the statute of limitations would be held applicable where the state was concerned. Today, the state is more secure than formerly, and we are not so much concerned with its dignity. We are therefore asking whether the foregoing propositions should be maintained any longer, and the matter is in controversy.<sup>155</sup>

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152. What this means is that in deciding a concrete case, the court, after working its way through the several steps necessary to apply the theory of justice, would arrive at the same point where it began and still have the case before it, to be decided by "reason and experience" or whatever method it might use in deciding cases.

153. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 441 (1930).

154. Patterson, *op. cit. supra* note 129, at 561.

155. See SOCIAL CONTROL 75.

One other example will suffice, from what appears to be an area in which judges could be most objective. In *Russell v. Russell*,<sup>156</sup> the House of Lords held that a husband could not give evidence of non-access, as public policy protected the legitimacy of the child. But the rule was laid down too broadly in that it was not confined to cases where legitimacy was directly in issue, with the result that it upset practice in divorce and criminal cases, led to hair-splitting distinctions, and was finally repealed. Thus, the protection of social interests may be productive of individual injustice.

Pound came upon the legal scene at the beginning of the present century with a cry for reform. After more than fifty years as a leading jurist, he is leaving the scene with apprehension lest we proceed down the wrong path or travel too fast. Through the years there has been a decided shift in emphasis in Pound's studies. Whereas the realists have limited their work to scientific observation of the law in its making, working and effect in society, a field in which Pound began and achieved his early renown, Pound has come to study law more from the teleological point of view, emphasizing ideals as the all important, the motivating factor. Hence, he has shifted his scrutiny from *de facto* law in mundane society to the gloss which an idealization of that law provides when seen through the windows of history and philosophy, that is, the ideal picture. At the same time, he has criticized the realists for their refusal to be concerned with the ideal element and their skepticism in questioning its *de facto* existence. Much of Pound's later thought must be considered in this light. He refuses to admit wilful or unconscious motivation by extraneous factors as an important element in judicial behavior. He seems to believe that to do so would give judges too much leeway. Men tend to do what they think they are doing, he tells us. If this were brought into question, they would cease to take themselves seriously and would not put forth their best effort. He then proceeds to construct an engineering theory of law and reaches the conclusion that legal experience is as valid as that of engineering.

But does not this miss the main point in issue or at least simply beg the question? Is not this the main point in issue: How judges behave in fact, why they behave as they do, what can be done to make the law in books and the law in action converge into one and the same thing, and how this can best be used as an effective instrument of social control in dynamic society to accomplish our ultimate goal of improving the individual life? Then, is it not necessary to

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156. [1924] A. C. 687 *PARON, op. cit. supra* note 135, at 112.

understand the judicial process as it actually functions before we can determine the manner in which we should go about improving it? This shift of interest does not mean that what Pound has to say is of questionable value but rather that his central theme has passed beyond the realm of conventional sociological jurisprudence.

Pound believes that his theory would make law more scientific. The writer believes that Pound's theory would not and could not accomplish this objective. This is not to question the value of the jural postulates and the scheme of interests as important individual contributions to jurisprudence. The writer's criticism is directed to the theory of justice as a whole, as to the manner of its formulation and how it will work in practice. It is not the most practicable system for the decision of concrete problems. In fact, it is questionable if the formulation of a detailed scheme for the decision of cases is practicable now or ever will be. But certainly every case must be considered with reference to the greater premises of the particular area of law, the major premises of the law as a whole, and the goal or end of law in extant society.

The writer joins with Dean Pound in affirming the value of experience in a world of flux and judicial empiricism as the proven legal method of the common law world. The substantive aspect, however, is the ideal picture, the source from which it is drawn, and the direction of its orientation. If we accept an ideal as something to strive for, does this mean that we should ignore the effect of mundane forces? And cannot this ideal, even in law, be something above and beyond the area of what has been accepted in the past? Pound believes that men tend to do what they think they are doing, but are we safe in making the assumption that this will lead to justice in fact?<sup>157</sup> Are we safe in assuming that it must follow that men will actually come to do in fact what they previously only thought they were doing? Might they not, desiring an ideal relation called justice, tend to think in terms of an achieved ideal relation which would not in actuality exist; an ideal relation not capable of realization because too incongruent with existing life actualities? And if so, might not such men, by holding back "the flood of time," actually widen the gulf between such illusory ideal justice and the actual, concrete needs of society? Might not a stubborn adherence to a past ideal actually forestall the reforms necessary to bring a new ideal more nearly into conformity with the exigencies of the contemporary legal scene?

157. As an objective insight this is true, but the truth is important only in a limited sense. If the system itself is not to be tampered with, then it were better that it not be questioned. But might not a realization of its inadequacies lead to its revision — or even the institution of an entirely new system?

Does calling a pickax a caseknife, to use a Poundian example<sup>158</sup> against Pound, make it a pickax, or does it merely lead to a comfortable illusion? Apparently Pound believes that it helps to achieve the former and that to admit any less is to deny the "efficacy of effort," to let the "give-it-up" philosophies have the field, and to face defeat. But is not there room for both principles and actualities? To some extent this stubborn adherence to ideals might result in a *fait accompli*,<sup>159</sup> but it might be mere "shadow-boxing."<sup>160</sup> Men have always fallen short of ideals, even in the eighteenth century. Worse yet, witness the eighteenth century natural law in the hands of the judges in the nineteenth century. The recognition of a bad condition is the first step towards its improvement. It was this factor which finally shook the hold of the old natural law when no longer suited to the conditions of the time and place. Here, Pound played a leading part, but the setting was heroic. While attempting to understand the ideal in our striving after it, should we not also attempt to understand the *de facto* picture and make the effort to ameliorate its non-ideal aspects? Moreover, this is in the mainstream of sociological jurisprudence, the study of law's operation in living society. While Wagnerian opera may have the greatest appeal, the total picture must include the music hall and jazz.

This points to the suggestion that in relation to Pound and the sociologists, jurisprudence might be dealt with as the three parts of a trichotomy: (1) To what extent is the ideal picture a contemporary one? (2) How can we best proceed to make or keep it in conformity with the actual requirements of contemporary society? (3) Are there other factors which must be taken into account in the day to day administration of justice? To some extent these areas may overlap, yet none can lay claim to exclusive precedence. Sociological jurisprudence generally concerns itself more with (2) and (3), and realism tends to concentrate on the third category. Realism is a vital part of the sociological movement in law and has developed naturally as a healthy counterpoise to idealism. The rise of modern psychology and the social sciences, together with the development of a complex urban society, have demonstrated the need for the "realistic" evaluation of how the law operates in fact, in a time when it has not only become more impersonal and comprehensive, but also when other agencies of social control have become less active and efficacious.

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158. See COMMON LAW 166-167.

159. In Kantian language, it might make the difference between determinism and freedom.

160. More, it seems to have deterministic overtones.

What courts do in fact involves less the consideration of law as a body of rules and doctrines or a philosophical system, and more the consideration of law as a judicial and administrative process, presided over by fallible men. The realist movement has developed into "fact-oriented" and "law-oriented" groups, which have studied "the law in action," have endeavored to separate the *Is* from the *Ought* in connection with making this study effective, have shown that the courts and officials are frequently moved by the "inarticulate major premise," which is beyond the compass of the rules they purport to follow, that they cannot be relied upon to find facts in an accurate manner, and that facts are actually far more amorphous and illusive than other current and especially earlier schools of jurists have generally assumed or insisted to be the case.<sup>161</sup>

Realism has done great service in this present age of non-ideals (skepticism) by going into the sanctum sanctorium, the inner temple, and making the courts and judges answer for their conduct. Consciousness of how officials do behave makes for a healthy skepticism, which is the first step in the re-examination of major premises, the beginning of reform. It has aided in intelligent self-guidance, more intelligent legislation, conscientious attention to the problem of selection of better officials, and more conscious endeavor of great judges to be "social engineers" in the sense of rendering justice in accordance with law and shaping law in conformity with permissible articulate major premises. Realism is also rendering inestimable service to the public in enabling people to understand that the law is not and cannot ever be a body of fixed rules, can never be or even approach being reasonably certain, must always be in a state of flux but behind the flux of society, and will require constant and conscious endeavor from the most socially conscious part of the community if it is to constantly meet the needs of society.

Realism is not a school of jurisprudential thought in the regular sense but rather a special approach to the problems of "real life-law," a skeptical way of thinking about "law-stuff."<sup>162</sup> Realism is a method, a way of thinking about and dealing with a problem, an insistence upon following where the investigation leads and dealing with the situation for what it actually is, when found. Realism does not provide the answers, except in a very relative sense, but it makes people conscious

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161. See OUTLINES 24-28, for a bibliography of writings by and about the realist schools, esp. at 27, for the writings of the late Judge Frank and Professor Llewellyn, two of its outstanding figures.

162. See generally LLEWELLYN & HOBEL, *THE CHEYENNE WAY*, esp. Part III (1940); Llewellyn, *the Normative, the Legal and the Law-Jobs; the Problems of Juristic Method*, 49 YALE L.J. 1355 (1940).



of the nature of law and its imperfections. It cannot provide a perfect solution until men become as angels. Realism in law, like "eternal vigilance" in government generally, is the price which we must pay to protect and improve that which we cherish, to render action more efficacious, to make the play more real. It should remain with us as a functional part of jurisprudential thought, what epistemology is to metaphysics. There shall be work for it to do in every age. It is far more than the skepticism of the sophists in the declining period of the Greeks.<sup>163</sup>

A healthy skepticism has its value, but instead of preserving the *status quo*, it makes for change. When men question the effectiveness of what they are doing, they look for ways to improve their work. They may even re-examine their first principles if the challenge is severe enough.<sup>164</sup> The "efficacy of effort" receives new impetus, in new directions. Ideals will continue to be of great value, but they will have their greatest worth in a world of ideal values, like the seventeenth and eighteenth centuries. Moreover, the ideal values of that day were new and looking forward. The "ideal picture" of Pound is past and looking backward. Our new ideals of progress must depend upon a new *Weltanschauung*, yet to be formed, by a society now in transition.<sup>165</sup> Legal ideals can only come after, to meet the needs of such new age, when the law endeavors to "catch up." In our world of the present, the non-teleological factors, such as what courts do in fact, must also be given much consideration. We must learn more about how law operates in fact, in the first instance, in society, before we can tell where to go from here and how we best can get there. Men can and do tilt at windmills in the belief that they are tumbling giants. Let us not repeat this old mistake.

System-building in the past has repeatedly failed. A system can prove no sounder than the first principles upon which it is founded, and Poundian abstract claims and tables, with interests balanced by an ideal picture drawn out of and slanted toward the past will prove no

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163. See Pound, *American Juristic Thinking in the Twentieth Century*, in *A CENTURY OF SOCIAL THOUGHT* 143-72, 156-57, *passim* (1939). At times Pound seems to recognize the importance of realism, however: "If psychological realist jurisprudence could divorce itself from dogmatic Freudian psychology it might do for the coming generation what historical jurisprudence did for the nineteenth century." *Id.* at 166.

164. It is only when the situation is deemed to be hopeless by mass society that the challenge will be so severe as to cause decline to set in. *E.g.*, see generally TOYNBEE, *A STUDY OF HISTORY*.

165. See generally LANGER, *PHILOSOPHY IN A NEW KEY* (1942). Fortunately for jurisprudence, however, Pound goes blithely on, digging steadily with his "case knife" (pick), just as effectively as Tom Sawyer dug Huck Finn and himself out of the cellar.

exception.<sup>166</sup> It is under serious attack from many quarters. It is unfortunate that Pound's formative years occurred when Hegelianism was at its peak of influence, but even without Hegel there are the centuries of continental rationalism and man's innate desire for certainty.<sup>167</sup> Pound's pragmatism without idealism produced the great studies of law and society in his best years. But sociological idealism is vulnerable at several points, particularly in its failure to give adequate recognition to the importance of realism, in its emphasis on the *status quo*, and in its insistence upon the validity of legal experience to a high degree of certainty.<sup>168</sup> The result is a theory of justice and an "ideal picture" which do not do justice to Pound's great stature as a jurist and law reformer. The following quotation from an eminent pragmatist is in point:

Experience shows that the relative fixity of concepts affords men with a specious sense of protection, of assurance against the troublesome flux of events.<sup>169</sup>

## VI.

### CONCLUSION.

In a sense the writer believes that Dean Pound has become too disturbed about the uncertainties of the law in action and has sought consolation in the security of a quasi-natural law system. While still adhering to his earlier ethical values (pragmatism), he has adopted neo-Hegelian idealism to a considerable extent and has devoted much of his prodigious energy to the defense of his system. This fusion of pragmatism with Hegelianism has not been an altogether happy union. It has created certain problems as to where Pound stands as a philosopher and how consistent he remains. Yet Pound has steadfastly maintained his position against all criticisms. While Pound's philosophy admits of a viewpoint that does not assert immutability, nevertheless for practical purposes it must be treated as if it did. This puts Pound in a class closely allied to fundamentalism, yet without the advantages of consistency which the true fundamentalists maintain.<sup>170</sup>

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166. See generally REICHENBACH, *THE RISE OF SCIENTIFIC PHILOSOPHY*, Part I, *passim* (1956).

167. *Id.* esp. at Chs. II, III, and VI.

168. For one to say that legal experience is as valid as that of engineering would seem to illustrate this. See quotation in text at note 52.

169. Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 20 (1924).

170. The question might be raised: Would not the simple assertion of a relative set of values have been sufficient? The answer is that it would have resulted in something different from the theory of justice which has developed. Certainly the ideal picture would have been missing, and sociological idealism without that would be (to Pound) like the ship's navigator without a mariner's compass.

As a result, he receives more than his fair share of criticism, some of it the result of a failure to understand what his position actually is. Nevertheless, his great legal studies keep him at the head of our generation of law reformers. If he had continued in the wake of his early studies of law in society, his position would be less controversial and perhaps his contribution to jurisprudence would have been even greater than it now is.

The theory of justice has failed to establish any clear criterion of empirical truth, and this is the only result which could be expected, for the solution of legal problems involves value judgments, the testing of which at this time is not subject to objective or scientific technique. As Cardozo has elegantly stated:

Antithesis permeates the structure. Here is the mystery of the legal process, and here also is its lure. These unending paradoxes tease us with the challenge of a riddle, the incitement of the chase. The law, like science generally, if it could be followed to its roots, would take us down beneath the veins and ridges to the unplumbed depths of being, the reality behind the veil.<sup>171</sup>

Nor will we ever know the answers in any ultimate sense, though we may approach general agreement on the current basic needs of the community. It is only in crucial cases, however, that difficulties arise. The judges go along together with their various philosophies until they reach a certain point. Then, they begin to diverge, and a choice must be made. "History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go."<sup>172</sup>

Pound did great service in showing that the eighteenth and nineteenth century ideals were being unduly emphasized in the early twentieth century and should be given a lesser place or even relegated to legal history. He did equally great service in reforming whole areas of the substantive law and procedure. But it was not necessary to develop a scheme of interests to make judges realize that certain policies at common law had been over-emphasized. His *Liberty of Contract* went a long way toward achieving that result. Moreover, the theory of justice is too complicated to be of great help to the judge and the legislator, in the hurry and bustle of everyday life. Thus, after going through the initial steps in the balancing process, when we reach the last step in system, we are back where we began, with the trouble-

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171. CARDOZO, PARADOXES OF LEGAL SCIENCE 134 (1928).

172. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1922).

some problem of evaluation. Perhaps Cardozo's little book on *The Nature of the Judicial Process* is more helpful to judges in understanding the proper approach to their work and what they should do in doubtful cases. Thus, Cardozo goes straight to the heart of the problem and sums it up as follows:

If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection, in brief, from life itself.<sup>173</sup>

The theory of justice was not necessary to sociological jurisprudence. Holmes and Cardozo proved that magnificently. Pound's work would have had greater influence without that rampart, but once established, he has made it the keystone of the arch. Development of the theory has made it necessary for him to paint the ideal picture and finally to become an avowed idealist. The theory itself might be called a sort of "Poundian dialectic," and idealism a kind of "Kantian category" through which "reality" can be viewed. This results in an idealistic interpretation of history and philosophy, with strong implications of determinism. Thus, sociological jurisprudence, normally positivistic and unsystematic, has become something very different. It was this anomalous development which brought on Pound's controversy with the realists, a subject beyond the scope of this paper.<sup>174</sup> Pound believes that he is right, and his theory might effectuate an idealized version of the legal *status quo* with room for change, in the hands of great engineers. Einsteinian science itself has come to think of reality as only a series of tentative conceptions to be used as working hypotheses.<sup>175</sup> Pound might analogize his theory to this and call it *instrumental*, but where is the criteria for objective testing? However, if Pound has erred, it only proves the validity of another Poundian insight, which by analogy might serve as a partial characterization:

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.<sup>176</sup>

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173. *Id.* at 112. This is not gainsay the fact that on the jurisprudential level of interests is a highly valuable contribution — though even here there would be sharp dissent from the unqualified proposition that the jural postulates are the result of claims arising out of popular demand.

174. See particularly: Pound, *The Call for a Realistic Jurisprudence*, 44 HARV. L. REV. 697 (1931); Llewellyn, *Some Realism about Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

175. See generally POLANYI, *THE LOGIC OF LIBERTY* (1951).

176. NEW PATHS 26.

In conclusion, we must emphasize that to point out weaknesses of abstract Poundian theory is neither to deny the immense contribution of sociological jurisprudence to modern legal studies nor Pound's leading part therein. This article has concentrated on the theory of justice, but it cannot be gainsaid that sociological jurisprudence in general has been the mainspring of twentieth century legal theory nor that Dean Pound's insistence upon treating law in the context of society as a living organism and his great writings in this context have been among the outstanding contributions of the century. In any subsequent examination of the jurisprudence of our age, Pound's name must be writ large. Thus, in spite of certain criticisms of his theory of justice, Pound may be said to be the founder and leading representative of a school of thought which will remain a permanent part of jurisprudential theory and will continue to exert a powerful and ameliorating influence upon the law in action.