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## LEGAL ECOLOGY OF ROSCOE POUND

E. V. WALTER\*

There seems to be change taking place in legal circles today in the context of which philosophy has been elevated from the level of epithet to a status of serious consideration for even the most "tough-minded" of practicing lawyers. An inevitable reaction against the neo-realism of the last decade has made respectable again the assertion that ideas about the nature of law have more than ornamental value for the law in action. It is in support of the growing tendency to look kindly upon theoretical speculation that this article will consider the legal philosophy of Roscoe Pound, ever mindful that in the person of the great Dean the talents of both theorist and practical man are combined.

If there is virgin territory in the field of jurisprudence, it certainly lies within the province of the analysis of presuppositions. Perhaps the most important information about a philosopher of law or, for that matter, about anyone who thinks about law—is information concerning his basic presuppositions. That is to say, a description of his philosophy of law, or even the comparison of his thought with other systems of thought, may not be as important as the inquiry: *What does he hold that makes it possible for him to ask the questions that he asks?* The problems of law are manifold, and the jurist is necessarily selective. He considers what appear to him to be the burning issues, but his very principle of selectivity is dependent upon basic presuppositions. These presuppositions also determine each question that is asked. For example, a basic question like: "What is the source of authority for law?" is presupposed by the implicit judgment that something called authority exists and that it is necessary for the existence of law.

Presuppositions, then, are the very core and crux of thought about law. But, one is led to ask, whence come presuppositions? That is a question that this article is not prepared to answer; its intent is merely to lay bare a fundamental problem and to hope that jurisprudence will eventually open itself to an approach that is as neglected as it is provocative, and a fresh spring for the currents of modern thought.<sup>1</sup>

There is little doubt that a man's presuppositions are intimately connected with his world-view. They are closely allied with (but not necessarily dependent upon) his basic beliefs concerning the nature of the universe and the nature and destiny of man. This statement is not as awesome and rationalistic as it sounds; a view of life need not constitute a carefully reasoned system—it is

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1. Cf. R. G. Collingwood, *An Essay on Metaphysics* (Oxford, 1940).

part of the act of living! We all possess deep-seated, unvoiced convictions about what is significant in the life of men and it is not unreasonable to assume that such convictions will manifest themselves and be reflected in our actions in court, in the classroom, and *a fortiori* in our theories about law.

Orderly and systematic thought is identified with what we call science. Scientific thinking (and there are those who maintain that jurisprudence is a science) attempts to separate and crystallize clear concepts from the amorphous mass of our primary thought. In the words of the late Professor Collingwood:

In unscientific thinking our thoughts are coagulated into knots and tangles; we fish up a thought out of our minds like an anchor foul of its own cable, hanging upside-down and draped in seaweed with shellfish sticking to it, and dump the whole thing on deck quite pleased with ourselves for having got it up at all. Thinking scientifically means disentangling all this mess, and reducing a knot of thoughts in which everything sticks together anyhow to a system of series of thoughts in which thinking the thoughts is at the same time thinking the connexions between them.<sup>2</sup>

Dean Pound's philosophy of law claims to be scientific. Among other things clear concepts have been separated from the undifferentiated primary thought, which is the matrix of his basic presuppositions. These presuppositions will be discussed in this article and the author will attempt to uncover and examine them, pointing out their implications and their relationship to Roscoe Pound's philosophy of law. It will be demonstrated that Pound's outlook is *ecological*, apparently derived from the attitudes that accompanied his early career in botany. An examination of Pound's philosophy of botany will be found consistent with, and important for an understanding of his philosophy of law.

## I. ROSCOE POUND AS A JURIST

### *His Life and Work*

Undoubtedly great jurists are influential in shaping the course of legal philosophy. Holmes called Pound a "uniquity," and perhaps more than any other living jurist, the Dean has influenced contemporary philosophy of law.<sup>3</sup>

Very significant is the recognition that Pound's approach to botany has had a profound influence upon his philosophy of law. Dean Pound has been listed as one of the leading scientists in the United States,<sup>4</sup> and his

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2. *Ibid.*, pp. 22-23.

3. G. R. Farnum, *Dean Roscoe Pound—His Significance in American Legal Thought*, 14 B.U.L. Rev. 715 (1934), a eulogistic article pointing out the significance and influence of Pound's work. The Dean has recently been acclaimed as the "foremost legal scholar in the world." N. Y. Times, July 2, 1947, p. 11. In recognition of his contribution to legal thought, the LL.D. has been conferred upon him by fourteen different universities, in addition to honorary degrees of D.C.L., J.U.D., and L.H.D.

4. *American Men of Science* 1415 (7th ed., 1944).

excellent work in phytogeography and ecology has been praised highly by botanists.

Roscoe Pound became interested in the natural sciences as a boy. Born in the frontier town of Lincoln, Nebraska, on October 27, 1870, he was recognized early as a gifted individual and was admired and respected by those who knew him.<sup>5</sup> His mother, Laura (Biddlecombe) Pound, was somewhat of a naturalist; the great Asa Gray at Harvard classified specimens for her, and in Lincoln a fountain was erected to her memory in recognition of her record in the botanical field. Mrs. Pound was an extremely talented woman. Roscoe Pound received virtually his entire education from her until he was twelve.

His father, Stephen Bosworth Pound, was a practicing attorney in Lincoln, and became a district judge of Nebraska, State senator, and member of a State constitutional convention. The atmosphere of the Pound home was, of course, colored by accounts of incidents from the senior Pound's professional life. The boy's main interest was in science, however, and he was not persuaded to pursue a legal career until later.

At the age of twelve he entered Latin School, which was the preparatory school of the University of Nebraska. Later, at the University, he majored in botany, receiving his B.A. in 1888.

Roscoe Pound's graduate work in botany at the University of Nebraska stressed ecology, plant geography and parasitic fungi. He was also in charge of the botanical laboratory and studied law, principally at his father's office.

The two most significant of Pound's attributes are his astonishing photographic memory, and his remarkable capacity to do the work of several men. At Harvard, these characteristics of the Dean are wrapped in the legends of Langdell Hall. He was well versed in Latin and German, which he has used throughout his academic career. Today he has mastered some eight or nine other languages.<sup>6</sup> His encyclopedic memory, Pound asserts, was achieved by dint of hard work, and was developed to relieve the strain on his deficient eyesight.<sup>7</sup> His massive knowledge of facts, even to the incidental ability to cite page numbers from volumes he had not seen in years, has never failed to amaze those who have come in contact with him. Furthermore, he constantly and successfully shouldered responsibilities that would be too much for an ordinary man. Thus it is possible to understand how he has done so very much in sixty years.

While he was a graduate student, Pound, with F. E. Clements and a few

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5. SAYRE, *THE LIFE OF ROSCOE POUND* (1948), is the only book-length biography of him as yet published. Sketches appear in G. R. FARNUM, *loc. cit.*; A. KOCOUREK, *Roscoe Pound as a Former Colleague Knew Him*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES*.

6. *Current Biography* 49 (May 1947).

7. C. L. CALLEN, "Your Memory is as Good as You Care to Make It," 102 *American Magazine*, Dec. 1926, p. 34.

other capable students, organized the Botanical Seminar, an *ex officio* group, which made some valuable scientific contributions.<sup>8</sup>

Pound's work was recognized abroad, particularly by the German scientists, and a fungus was named in his honor by Dr. Otto Kuntze.<sup>9</sup> Pound did not receive his Ph.D. in botany at the University of Nebraska until 1897; his minor field was in Roman Law. The interim was taken up primarily by legal studies. After getting his M.A. in botany in 1889, Pound planned to attend the Law School at Harvard.<sup>10</sup> He had considered the possibility of continuing work in botany at Harvard, but when Professor Asa Gray died in 1888, he probably felt that the quality of work under Gray's successors would not compare favorably with his excellent training at Nebraska.<sup>11</sup>

Pound entered the Law School as a regular freshman student and spent a year there, leaving without a degree. His interest was intense, and the quality and quantity of additional, nonrequired studies in comparative law, jurisprudence and legal philosophy, coupled with the encouragement and advice of members of the faculty, yielded him a knowledge of law far beyond that which was ordinarily attainable in a year's time.<sup>12</sup>

Pound left law school and was admitted to the Nebraska Bar in 1890. He practiced in Lincoln with the firm of Pound and Burr, and became a partner in the firm in 1893. From 1895 to 1901 he practiced alone.

From 1901 to 1903 Pound served as Commissioner of Appeals in the Supreme Court of Nebraska.<sup>13</sup> He was also teaching full time at the University, but without compensation, believing he ought not to draw two salaries from the State at the same time. His teaching of Roman Law and Civil Law was a forerunner of later courses in jurisprudence.

From 1903 to 1907 he continued his private practice and was Dean of Law at the University of Nebraska. He was a leading figure at the Bar, but cared little for the opportunism and vagaries of courtroom tactics. His fame,

8. Pound was the first director of the Botanical Survey of Nebraska. Research results were published in *Reports of the Botanical Survey of Nebraska*, and *Flora of Nebraska*, which he helped to edit. POUND AND CLEMENTS, *Phytogeography of Nebraska* (1898), is a pioneer work in ecology.

9. In some popular accounts, the *Roscoeopoundia* has been mistakenly reported as a lichen instead of as a fungus, *Time*, Oct. 7, 1935, pp. 64-65.

10. In a letter to O. F. Hershey, Feb. 10, 1895, written, it is only fair to say, in a self-deprecating mood, Pound wrote, "Why am I in the law? Why—because my father wished it." Quoted in SAYRE, *op. cit.*, at 85.

11. SAYRE *supra* note 5 at 73.

12. Pound studied under Langdell, called by President Eliot, "... a curious mixture of the conservative and the radical, having the merits of both." L. C. Cassidy, *loc. cit.*, at 904. Indeed, Pound himself is compounded of this "curious mixture."

13. The cases decided by Commissioner Pound may be found in *Nebraska Reports*, vols. 61-71 (1901-1903), and *Nebraska (Unofficial) Reports*, vols. 1-4. An analysis of these cases appears in H. G. REUSCHLEIN, *Juristic Thought in the United States, With Special Reference to Roscoe Pound* (S.J.D. thesis, Cornell, 1934), a major portion of which was published as "Roscoe Pound—The Judge," 90 U. OF PA. L. REV. 292 (1942). Briefer accounts appear in H. T. Lummus, *loc. cit.*; L. C. Cassidy, *loc. cit.* See also Kocourek, "Roscoe Pound as a Former Colleague Knew Him," *loc. cit.*, at 422-23, 431.

however, was not widespread until he delivered an address at the American Bar Association meeting at St. Paul in August 1906.<sup>14</sup> Dean Wigmore, after hearing the address, called Pound to Northwestern. Pound served as professor of law at Northwestern University from 1907 to 1909, when he left to teach at the University of Chicago.

In 1910 Pound went to Harvard as Story Professor of Law. In 1913 he became Carter Professor of Jurisprudence, and held this appointment until 1937. In 1916, after the death of Dean Thayer, Pound was appointed Dean of the Law School.

Pound became Dean Emeritus in 1936, resigning, he said, to "work on the frontiers of knowledge."<sup>15</sup> In 1937 he was the first to receive one of the newly created University Professorships, a "roving professorship" which entitled him to teach in any faculty of the University. In fact he even taught a course in Lucretius, filling a gap created by wartime shortage of instructors. In June, 1947, Dean Pound retired with the title of Professor Emeritus.

More recently he has been in China, where he worked until his return in 1948 in the capacity of adviser to the Minister of Justice, reorganizing the Chinese judiciary system.

#### THE BACKGROUND OF HIS THOUGHT

From the preceding sketch of the career of Roscoe Pound, it will be apparent that his venture into botany was not a mere excursion, but an important point of departure in his academic career—so important that it is astonishing to note this departure has escaped the attention of his critics. For a while, Pound was undecided whether to remain a botanist or to make the legal profession his life's work; it was not until after he became an assistant professor of law at Nebraska in 1899 that he decided to devote his life to legal scholarship and education.

Besides his pioneering work in ecology, Pound wrote on botanical subjects. Throughout his writing he consistently maintained an attitude of treating nomenclature and classification as means toward the end of better scientific understanding, and this attitude persists in his legal writing.

At the time of his early law teaching and service on the bench, his viewpoint was analytical.<sup>16</sup> This position, as it will appear below, was not in keeping with his world-view, and it was not long until he proclaimed his adherence to the sociological school.<sup>17</sup> The period immediately after he left the bench

14. The address, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," stirred up a small revolution in the legal profession. Referred to as the "spark that kindled the white flame of progress," it resulted in a movement for reform. 20 *JOURNAL OF THE AMERICAN JUDICATURE SOCIETY* 176 (1937).

15. *Current Biography* 49 (May 1947).

16. Cf. his *Outlines of Lectures on Jurisprudence Chiefly from the Analytical Standpoint* (1903).

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

was marked by articles which show the evolution of his juristic creed and his attraction to the sociological school.<sup>18</sup> During this period he began his prolific writing on legal subjects, and he started the practice of expanding a single theme into several similar articles, having them published in several law journals. He has been writing in this manner for forty years, occasionally adding to this voluminous literature a number of lectures and addresses printed separately in book form. There is hardly a legal periodical in the United States that has not had the honor of publishing an article by Dean Pound.<sup>19</sup>

Pound's brief membership in the analytical school has been mentioned. In 1895 he wrote, in a letter to a friend:

For my part I am inclined to stick up for the analytical theory. . . . It may be my scientific dabbings have unduly prejudiced me, but I can't feel very well satisfied with any theory that refers anything to an ultimate source in divine justice. A human institution is much like an organ of the human body—I don't want any special creation for either. I believe . . . that the days of Ulpian's Law of Nature and of the modern versions of the pseudo-philosophy of the Institutes are safely past. There are two things to do in understanding an institution—to see what it is now, and to see what it has been and why it is what it is. I don't perceive the reasons for handling law in any different manner. I have read a good deal in Natural Law lately—have read quite systematically all I could get hold of on the subject, and I am not a convert to it. I think I should accept the notion of the consistency of species about as quick. They are too much on the same order.<sup>20</sup>

Pound found the analytical point of view, however, to be inadequate for his concept of law as a growing thing, mutually interrelated with its social environment.

Lewis Cassidy has observed that "To the science of law young Pound brought the training of a botanist, a careful observer of physical phenomena, even as he is now an accurate observer of social phenomena."<sup>21</sup> To the science of law Pound also brought an ecological point of view.

Judge C. S. Lobingier, a classmate of Pound's at Nebraska, writes:

His botanical and other scientific studies required an application of the analytical method, including classification. When he found that he had to abandon these as a vocation, he still had the methods and I think he felt that since he had to take up the law, he would seek the scientific side of

18. E.g., "A New School of Jurists," *University Studies* (Univ. of Nebraska, 1904), vol. 4, no. 3, p. 249; *The Decadence of Equity*, 5 *COL. L. REV.* 20 (1905); *Do We Need a Philosophy of Law?* 5 *COL. L. REV.* 339 (1905). A definitive statement of his philosophy of law did not appear until the publication of *The Scope and Purpose of Sociological Jurisprudence*, 24 *HARV. L. REV.* 591; 25 *HARV. L. REV.* 140, 489 (1911-1912).

19. The fertility of the Dean's pen may be explained in part by his zeal for reform, undoubtedly he wishes to reach as many readers as possible. F. C. Setaro, *Bibliography of the Writings of Roscoe Pound* (1942) lists 773 titles of writings credited to him as of the year 1940. The stream has continued unbroken until the present day, not greatly slackened by his recent period of over a year's work in China.

20. Letter to Mr. O. F. Hershey, Jan. 27, 1895, quoted in SAVRE, *Life of Roscoe Pound* 11 (1948).

21. L. C. Cassidy, *Dean Pound: The Scope of His Life and Work*, 7 *N.Y.U.L.Q. REV.* 903 (1930).

it, if there was one and apply those methods to it. . . He found it at first in the English analytical, and later in the Continental historical and other schools.<sup>22</sup>

Kocourek writes, "Strangely enough, in spite of his early training in the Linnaean system, he is little interested in what is called analytical jurisprudence."<sup>23</sup> Kocourek neglects Pound's training in ecology; it is hoped that the following pages will contain an explanation of why Pound left the analytical viewpoint for sociological jurisprudence.

It would be absurd to think that in transferring his energies from botany to legal study, Pound merely erased the botanical terminology from his thinking, and that he replaced it by inserting legal concepts in the appropriate gaps. But it is much more likely that the *Weltanschauung* which molded his philosophy of botany also had a formative influence on his philosophy of law. Thus it would not be surprising to find that both his botanical theory and his legal theory show a strikingly parallel development, since they are both derived from the same fundamental presuppositions and the same world-view.

The turn of the century saw the culmination of an intellectual revolt that had taken place with the acceptance of many of the implications of Darwinian theory. Pound, as did others, believed that both the natural and the normative sciences were profoundly affected by it. This is apparent in the following passage, which also demonstrates that botanical theory and legal theory were not locked in separate compartments in Pound's mind.

This revolution in science at large was achieved in the middle of the nineteenth century. In the first half of that century, scientific method in every department of learning was dominated by the classical German philosophy. Men conceived that by dialectics and deduction from controlling conceptions they could construe the whole content of knowledge. Even in the natural sciences this belief prevailed and had long dictated theories of nature and of natural phenomena. Linnaeus, for instance, lays down a proposition, *omne vivum ex ovo*, and from this fundamental conception deduces a theory of homologies between animal and vegetable organs. He deemed no study of the organisms and the organs themselves necessary to reach or sustain these conclusions. Yet, to-day, study of the organisms themselves has overthrown his fundamental proposition. The substitution of efficient for final causes as explanations of natural phenomena had been paralleled by a revolution in political thought. We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs.<sup>24</sup>

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22. Kocourek, *Roscoe Pound as a Former Colleague Knew Him*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES*, 431-32, n.33.

23. *Ibid.*, at 429.

24. *Mechanical Jurisprudence*, 8 *COL. L. REV.* 609 (1908). That Pound did much reasoning by analogy is supported by the following statement: "All interpretations go on analogies. We seek to understand one thing by comparing it with another. We construct a theory of one process by comparing it with another." *Interpretations of Legal History* 151; also *Contemporary Juristic Theory* 29.



This quotation serves also to display Pound's emphasis upon *effects*.

In his outline of the history of botany, Pound traces botanical thought in much the same way that he traces the development of juristic theory in his legal articles. He generalizes about each period in the history of botany. For example, medieval botany is a botany of names, pre-Linnaean botany is a botany of classification, but in modern botany "names and classifications come to be recognized as means of expressing knowledge of plants, not as ends. . ." <sup>25</sup> Darwinian theory, he feels, placed botany on a firmer foundation. "Systematic botany, however, is very conservative, and the full effect of this has only begun to be felt. . ." <sup>26</sup>

The relationship between what Pound considers to be a pre-revolutionary type of legal thought with pre-evolutionary scientific thought is made clear in the following passage:

With all its talk of evolution, nineteenth-century jurisprudence and particularly nineteenth-century mechanical-positivist jurisprudence was comparable to the biology of special creation. In each case the fundamental assumption is that all the main lines had been laid out once for all. There could be nothing more than relatively trifling variations within the narrow lines of species created from the beginning. The herbarium belongs to the Linnaean or pre-Darwinian botany of specially created species. In the same way the nineteenth-century analytical jurisprudence, as anything more than an instrument to be used as one of many instruments, belongs to a pre-evolutionary type of legal thought. The textbook of analytical jurisprudence is a legal herbarium.<sup>27</sup>

In further comparison between a legal treatise and a herbarium, Pound says:

. . . the juristic treatise may be compared to a herbarium. In the herbarium typical forms—that is, forms chosen by the collector because they conform most nearly to a picture he has made himself—are pressed and dried and classified and an ideal vegetation is written upon that basis. It helps us to understand plants undoubtedly. But it falls to pieces as a description of nature whenever one looks attentively at the *facts of nature in the field*. Herbarium species are related to the variety of individual form in nature as the ideal legal conceptions and the ideal legal institutions of the lawyer's books are related to the unceasing variety of phenomena that goes on in the actual administration of justice. Whether or not men count in the law as set forth in the books, they count powerfully in *the law in action*. For the purpose of fixing types and ordering and classifying and endeavouring to put the phenomena of justice or some part of them in the order of reason, the jurist must ignore men. He must think of the legal conception or the

25. *A Brief Outline of the History of Botany* 8 (1909). This pamphlet was written "For the use of candidates preparing for examinations for admission to the Botanical Seminar of the University of Nebraska."

26. *Ibid.*, at 7-8.

27. *Interpretations of Legal History* 129-130. This quotation also gives another indication as to why Pound found the analytical school inadequate for his own legal philosophy.

legal precept of the legal principle as the systematic botanist thinks of the species—in terms of an idea, not as a core of consistency in a mass of phenomena shading out of a no-man's-land in every direction.<sup>28</sup>

Furthermore, Pound says that the advances in botanical classification should be emulated in the classification of law. He points out that classification in logic was influenced by what was written about biological classification in the nineteenth century, and that, obviously, principles of biological classification are not applicable to the classification of law. "Even if we think of law organically, we are not classifying law in order to express genetic relationships."<sup>29</sup> But he points out that "Biological classification has found a surer basis for itself, and there is no reason why legal classification may not do the same."<sup>30</sup> "The purpose of a scientific classification," he continues, "is practical. Classification is not an end. Legal precepts are classified in order to make the materials of the legal system effective for the ends of law."<sup>31</sup>

Thus, although he recognizes that principles for each field differ, Pound's *attitude* toward both botanical classification and legal classification is the same. Throughout his work there is also the zeal for scientific method and sticking to scientifically demonstrable facts. That this attitude appears in both botanical and legal connections is implied in the following quotation:

... and if . . . they must often take issue with courts and practitioners and books of authority as to the nature of justice and of rights and the basis of current legal conceptions and of received principles, they may say as the naturalist to his more conservative colleagues: *raisonniert so viel ihr wollt, aber fügt Euch in das wissenschaftlich unvermeidliche*.<sup>32</sup>

In explaining the many factors that influenced the development of the common law, Pound uses the following illustration:

To take an example from biology: We used to be taught that each group and species were developed from some single prior group or species, and it was the task of the systematist to identify this ancestor and trace the development, and arrange his organisms accordingly. But today the biologist has a doctrine of polyphyletic. He recognizes that if one group or species may be represented by many groups or species which have developed therefrom, it is also true that a converging development of many groups or species may have given us what is one today.<sup>33</sup>

28. *Ibid.*, at 128-39. (Italics supplied).

29. Pound, *Classification of Law*, 37 HARV. L. REV. 937 (1924).

30. *Ibid.*, at 938. It would be grossly inaccurate to leave the impression that Pound's works are replete with biological analogies. They are sparsely scattered throughout his writings, and it should be apparent that they are here in such a lethal dose only because they were unearthed by the present writer to test an hypothesis, and to help uncover Pound's "inarticulate major premise."

31. *Ibid.*, at 944.

32. "... reason as much as you will, but yield to the scientifically inevitable." KUNZE, *REVISIO GENERUM PLANTARUM*, III, *fin.*, quoted in *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 615 (1907).

33. Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 814-15 (1911).

Therefore, if Pound, reasoning by analogy, can stretch the doctrine of polyphyletic to apply to the common law, it is not unreasonable to presume that botanical analogies, whether made consciously or otherwise, played a part in other instances of this speculation about social phenomena. The same conceptual pattern that prompted Pound to oppose "law in books" with "law in action" can be found in the attitude of Pound the ecologist, who opposed the botany of the herbarium with the botany of facts of nature in the field!

At this point it would be well to consider some of the basic concepts of ecology, in order to better understand Pound's world-view.

Ecological study focuses its attention on "vegetation." In contrast with the classical botanical preoccupation with phylum, class, order, etc., ecology is concerned with plant communities. A subordinate field in ecology is "synecology," a study of the sociology of plants.

Vegetation is the sum total of plants covering an area, which is more than a mere grouping of individual plants; it is the result of the interaction of plants with their environment and with other plants.<sup>34</sup>

Ecology treats of the relation of plants to their surroundings, both physical and biological . . . regarding the habitat of a plant as an aggregate of influences or factors acting upon the plant and causing it to exhibit certain phenomena and structures more or less peculiar to the habitat and plant in question. . . In addition to . . . ecological factors which may be termed physical, there are others arising out of the interrelations of animals and plants and of associated plants which may be termed biological.<sup>35</sup>

The ecological point of view is reflected, as will be shown below, in Pound's underlying conception of law as mutually or functionally interrelated—and interacting—with its social environment.

A most important ecological conception that seems to appear in Pound's theory of law is the idea of "succession." Plant succession is a universal process in which formations of vegetation change, a development in which one group of plants or a plant community is replaced by another. The movement from the initial stage to the "climax" is usually continuous, but when each group of dominant plants reaches its maximum the change is clearly marked. The process of succession is carried on through the mutual relation of plants with each other and with the environment, and since it is a series of complex processes, there is no single cause involved. An initial cause may produce a bare area or destroy the original population in vegetated areas. Continuing causes, having to do with the interaction of habitat and vegetation, produce the character of vegetational development, and direct the successive

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34. WEAVER AND CLEMENTS, *PLANT ECOLOGY* ch. I (1929); this book is a standard source of reference in the field, and is used in this article particularly because of Pound's close association with Clements. It is significant that Pound was in substantial agreement with Clements' ideas, particularly that of biological succession.

35. POUND AND CLEMENTS, *THE PHYTOGEOGRAPHY OF NEBRASKA*, 161.

waves of plant population; and climatic causes determine the nature of the climatic climax, *i.e.*, where the succession will end.<sup>36</sup>

Pound's idea of the development of stages of law is similar to the ecological idea of succession. The first stage of law, says Pound, is that of primitive law, which fulfills the need of society to keep the peace. The second stage, that of strict law, is characterized by extreme formalism, in which law is thought of in terms of procedure and the state prevails as the regulative agency of society and the principal organ of social control, fulfilling the need for certainty. The third stage, that of equity or natural law, grows out of reaction to the strict law and infuses ideas of morality, justice, duties, and reason, into the legal system, fulfilling the need for expansion. The fourth stage, that of the maturity of law, liberalizes the strict law and formalizes equity, and is characterized by the dualism of equality and security (certainty). The fifth stage Pound finds to be one of "the socialization of law," characterized by what he considers to be the contemporary shift from individualism to the idea of "social justice," in which the claims of the individual are fulfilled by and through society.<sup>37</sup> These stages seem to evolve as a natural process; for example, Pound quotes with approval Amos' statement that

So soon as a system of law becomes reduced to completeness of outward form, it has a *natural tendency* to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. The *invariable* reaction is manifested in a progressive extension, modification, or complete suspension of the strict rule into which the once equitable principle has gradually been contracted.<sup>38</sup>

An historical illustration that Pound uses affords an opportunity to draw a parallel from ecology. He presents Roman law as having evolved through four stages, or through the stage of the maturity of law. With the cataclysmic downfall of the Roman Empire, he asserts, there was a period of anarchy causing a reversion to a *previous* stage. The primitive law of the Germanic peoples was then transferred to the second stage, or that of strict law, fulfilling the desire for organization and peace. In comparison, ecologists know that when a great portion of an advanced or a climax community of plants is destroyed by a catastrophe (*e.g.*, fire), the process of succession *begins again from a primitive stage*.<sup>39</sup>

The similarity to the idea of biological succession is further reflected in

36. WEAVER AND CLEMENTS, *op cit.*, *supra* 34, chs. IV, V.

37. *The Spirit of the Common Law*, pp. 139-43; *Liberty of Contract*, 18 YALE L.J. 454 (1909).

38. Quoted in Pound, *The Decadence of Equity*, 5 COL. L. REV. 24 (1905) (*italics mine*). Pound reasserts substantially the same statement in his treatment of the crystallization of equity in *Enforcement of Law*, 20 GREEN BAG 406 (1908).

39. *Cf. An Introduction to the Philosophy of Law*, 36-37.

the manner in which Pound treats the philosophical legal thinking of the past as an active force in the present administration of justice.

Pound finds philosophical support in the legal theory of Josef Kohler, which itself contains elements that bear a striking resemblance to the concept of succession. For example Kohler says that, in the progress of culture,

. . . its development proceeds in such a manner that the seeds of the new are already present in what exists, and as the one grows and the other decays, new values are constantly created out of the old. The law . . . must adapt itself to a constantly advancing culture and be so formed that conformably to changing cultural demands it promotes rather than hampers and oppresses it.<sup>40</sup>

But Pound is not satisfied with Kohler, although he says that Kohler's interpretation comes nearer to meeting his own requirements than any interpretation which preceded it. He is not satisfied because:

It is at bottom an idealistic interpretation and I prefer an instrumentalist point of view . . . I should fear that its Hegelian form would tend to obscure the element of human activity. The Hegelian cast of Kohler's interpretation is not necessary. But there it is. And I suspect that to many the sauce will appeal more than the fish.<sup>41</sup>

Pound, it is to be noted, persistently disclaims Hegelianism. Some critics have asserted without justification that Pound leans toward Hegelianism,<sup>42</sup> partly because of his acceptance of much of Kohler's thought, and partly because they seem to see in his depiction of the regular course of juristic development something like the unfolding of the dialectic. But one of the things that may have attracted Pound to neo-Hegelianism is perhaps a shadow of biological succession that he may have, consciously or otherwise, glimpsed in it; what he likes in Kohler's thought seems to be a neo-Hegelianism with Hegel removed. At the turn of the century, when Pound began his philosophical speculation, idealism was ranged against naturalism, and it seemed that one who would be a philosopher had to choose between them. Pound is obviously inclined toward naturalism; it underlies all his writing. There are two points, however, on which Pound may be somewhat Hegelian. The first resembles a point made by objective idealism and is the belief that the ultimate fulfillment of the individual is through the group or community or through others.<sup>43</sup> The second point is his conception of the swing between legal justice

40. KOHLER, *PHILOSOPHY OF LAW* 4. Pound, in 1911, proclaimed Kohler as the "first of living jurists." Cf. another point of view: "Kohler was a neo-Hegelian, though in his treatise on legal philosophy there is little Hegelianism and less philosophy." Translator's Introduction in STAMMLER, *THE THEORY OF JUSTICE*, p. xxxix.

41. *Interpretations of Legal History*, pp. 150-51.

42. E.g., Grossman, *The Legal Philosophy of Roscoe Pound*, 44 *YALE L.J.* 605 (1935).

43. See *The Task of Law* 17. But this conception may have come through the influence of sociology. Cohen says that Pound was influenced by the Chicago school of

and justice without law, individualism and collectivism, anarchy and absolutism, rule and discretion, and between various other opposites. This conception may be loosely analogous to the thesis-antithesis operation of the dialectic.

Just as Pound the ecologist rejected the taxonomic approach of the classical botanists, Pound the sociologist of law opposed the mechanical approach of the analytical school of jurisprudence. The contrast of the concept of "vegetation" with the logical classifications of the classical botanists (*e.g.* phylum, class, order, *etc.*) is analogous to the contrast of the concept of "society" with the mechanical structures of the analytical jurists.

Thus far only some of Pound's underlying suppositions have been presented. "There are so many facets to his thought that there is always a danger of reviewing his writing that one aspect may be emphasized at the expense of another."<sup>44</sup> An outstanding feature of his philosophy is his intense conviction of "the efficacy of human effort," a term borrowed from Lester Frank Ward.<sup>45</sup> Although Pound's interpretation of the development of law implies an organismic quality in the process (perhaps more than he realizes), he superimposes on the process the power of the human will. He asserts that:

We must think not in terms of an organism, growing because of and by means of some inherent property, but . . . in terms of a building, built by men to satisfy human desires and continually repaired, restored, rebuilt and added to in order to meet expanding or changing desires or even changing fashions.<sup>46</sup>

Furthermore:

The other and more plausible [the organismic] analogy fails in that an organism is adapting itself to environment, or at least is being acted on and shaped immediately by the pressure of the environment. Law, on the other hand, is fashioned from without to meet human needs and wants and desires. True these may arise out of the environment. But law is not adapting itself by its internal power of response to stimulus nor is it subject to immediate and direct pressure from the outward circumstances of the life in which it is to be applied.<sup>47</sup>

Much of Dean Pound's writing belies his assertion that he does not think of law as an organism. At the risk of repetition, the following instances are submitted:

. . . many interpretations of legal history developed which *both grew out of and in turn affected* nineteenth-century law.<sup>48</sup>

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sociologists, especially A. W. Small. Cohen, *loc. cit.*, at 296. Or it may have come through the influence of John Dewey.

44. Paton, *Pound and Contemporary Juristic Theory*, 22 CAN. B. REV. 489 (1944).

45. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 154 (1912).

46. *Interpretations of Legal History*, 21.

47. *Id.* at 90, 91.

48. *Id.* at 20 (*italics mine*).

. . . how the law of the past *grew out of* social, economic, and psychological conditions, how it *accorded with or accommodated itself* to them.<sup>49</sup>

Vitality and tenacity are not new qualities in our legal tradition. It has been able to receive and to absorb the most diverse bodies of doctrine and the most divergent bodies of rules, developed outside of itself, without disturbing its essential unity.<sup>50</sup>

The preponderance of both the idea of law as an organism and the idea of the power of the human will is not the result of inconsistency, but of a dualism. On one hand there exist social institutions which exhibit a pseudo-natural process of development, and on the other hand there are teleological human desires which create, shape, and change these institutions.

Pound either developed this curious dualism independently, or he owes much of it to Ward, who, incidentally, had been a botanist also. There is no doubt that Ward influenced Pound in many respects for the obligation is freely expressed by Pound. But it is conjectural, at best, to analyze the influence of one thinker upon another. Unless there had been a certain predisposition to an idea, the "influence" would never have been felt. Carl Becker has pointed out:

It has long been a favorite pastime of those who interest themselves in the history of culture to note the transfer of ideas (as if it were no more than a matter of borrowed coins) from one writer to another: to note, for example, that Mr. Jones must have got a certain idea from Mr. Smith because it can be shown that he had read, or might have read, Mr. Smith's book; all the while forgetting that if Mr. Jones hasn't already had the idea, or something like it, simmering in his own mind he wouldn't have cared to read Mr. Smith's book, or, having read it, would very likely have thrown it aside, or written a review to show what a bad and mistaken book it was. And how often it happens that books "influence" readers in ways not intended by the writers!<sup>51</sup>

According to Ward, the difference between organic and social evolution is that "the environment transforms the animal, while man transforms the environment."<sup>52</sup> The organic world is characterized by passivity, it is acted upon by the environment and adapted to it: ". . . material civilization consists in the utilization of the materials and forces of nature . . . Matter is dynamic, and every time that man has touched it with the wand of reason it has responded by satisfying a want."<sup>53</sup>

The dualism of human will and nature in Pound's thought is demonstrated by the following excerpt:

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49. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 513 (italics mine).

50. Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17 (1906).

51. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 72, 73 (1932).

52. WARD, *PURE SOCIOLOGY* 16 (2nd ed., New York, 1921). See also WARD, *APPLIED SOCIOLOGY* ch. II (Boston, 1906).

53. *Id.* at 17, 18, 20.

We who have the shaping of the law in our hands in this era of the decadence of equity have no less responsibilities than those who pleaded and judged in its founding, its development, and its crystallization.<sup>54</sup>

On one hand there appears the element of activity in "shaping" but there is also the ubiquitous and inevitable "era" which is part of a "natural" process.

Furthermore, Pound finds satisfaction in Ward's belief that not liberation of energies but satisfaction of wants is the central point of modern society.<sup>55</sup>

Pound also uncovers the philosophy of effort in Ihering's writings; he says that "Ihering has told us that we must fight for our law."<sup>56</sup> Ihering expounded the efficacy of conscious effort and made the "end of law" the fundamental problem; law, for him, is not governed by clauses but by human purpose.<sup>57</sup> He said that purpose is dictated by interests, and he gave us a concept of rights as created by society in order to give effect to interests.<sup>58</sup> Indeed Pound's classification of interests is very similar to Ihering's exposition of the "conditions of social life."<sup>59</sup> Pound maintains Ihering's dualism of individual and politico-social interests, likewise believing in the power of the collective interest over egoism.<sup>60</sup> In his exposition of the five stages of law, Pound follows Ihering closely in his description of the stage of strict law, that of formalism, and in his analysis of the fifth stage, that of the socialization of law.<sup>61</sup>

Briefly, Pound finds to be worthy the following points in Ihering's works: (1) the teleology of human interests; (2) "the ethical self-assertion of the individual," or the sense of right and justice that is in all of us; (3) to academic legal science that posed "a jurisprudence of conceptions," the opposition of a "jurisprudence of realities"; (4) the conception of law as a procuring of interests or a protecting of relations; (5) the adjustment of punishment to the nature of the criminal and not to the crime; and (6) the emphasis on the imperative element in law ["Those who feel strongly the need of thorough-going reform are likely always to take an imperative position, since their hope lies in legislation"].

Pound is careful to point out that Ihering was more a jurist than a philosopher, and that Ihering ignores the idealistic element, failing to perceive that ideals are controlling factors in all periods of growth.<sup>62</sup>

Ihering's "interests" are the starting point of Pound's legal theory. Pound says that we must start with the claims, wants, demands of the indi-

54. Pound, *The Decadence of Equity*, 5 COL. L. REV. 20, 35 (1905).

55. Pound, *Enforcement of Law*, 20 GREEN BAG 403.

56. Pound, *supra* note 54.

57. IHERING, *LAW AS A MEANS TO AN END*, ch. I.

58. Pound, *The Spirit of the Common Law*, 18 GREEN BAG 203-205 (1906).

59. Cf. IHERING, *op. cit. supra* note 57 at 337-81.

60. *Id.* at 34, 35.

61. Frankfurter, *American Contributions to Jurisprudence*, 28 HARV. L. REV. 337 (1915).

62. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 142-46 (1912).



vidual. For ethical justification he goes to the philosophy of William James.

James writes:

. . . 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*. . . 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. . . Since everything which is demanded is . . . 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?* . . . In the casuistic scale . . . 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. . . The philosopher must be a conservative, and in the construction of the casuistic scale must put the things most in accordance with the customs of the community on top.<sup>63</sup>

Pound finds this to be a statement of the problem of the legal order,<sup>64</sup> and frankly makes it the philosophy of his scheme of interests.

Pound tries to avoid the pitfall of philosophical relativism in his legal theory by fastening to Kohler's concept of civilization (*Kultur*). He says,

Everyone had begun to say that law was relative. But relative to what? Kohler answers that it is relative to civilization. Laws are relative to the civilization of the time and place. There is no universal body of legal institutions and legal rules for all civilizations. Instead there is a universal idea, namely human civilization.<sup>65</sup>

Kohler's theory of law is dynamic, fulfills Pound's requirement of emphasis on creative activity, and stresses the ideological factor. Pound's instrumentalism uses ideals as tools of development and growth. Kohler makes the province of law the philosophical study of the evolutionary processes by which law is formed. "Thus, in his view," says Pound, "historical and philosophical jurisprudence are merged in a sociological jurisprudence, and lose their identity."<sup>66</sup> Kohler, taking a remark of Hegel's that right and wrong are phenomena of culture, proceeded empirically on the basis of ethnology, comparative law, and legal history, and showed that law accepts the product of the culture of the past and attempts to adjust it to the culture of the present. Law is both a product of and one of the fashioners of culture, and must advance culture, for "law cannot stand still."<sup>67</sup> The task of the legal order is

63. WILLIAM JAMES, *THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY* 195-206 (New York, 1898).

64. Pound, *Interpretations of Legal History*, 157; Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 199 (1906); cf. *Juristic Science and Law*, 31 HARV. L. REV. 1047, 1062-1063 (1918).

65. *Id.* at 143.

66. Pound, *A New School of Jurists*, *loc. cit.*, 252.

67. Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 156-157 (1912).

both to maintain existing values of civilization and to create new ones, carrying forward the development of human powers. Pound developed more fully Kohler's idea of "jural postulates,"<sup>68</sup> which are ideas of right and justice to be fulfilled and made effective by law; the function of the jurist is to formulate the jural postulates for the time and place and to shape the inherited legal materials so as to carry them into effect. But where Kohler is vague as to the derivation of jural postulates, Pound says they are the result of *de facto* claims of human beings.<sup>69</sup>

The functional approach to law is further nourished by Stammler, who thought that just law could be achieved by variable means.<sup>70</sup> He says, and Pound agrees, that the quest of the jurist is twofold, namely, to express the rule of right and law and to discover the mode of carrying it out. Stammler's neo-Kantianism is a social theory of justice, and: "Its relation to Kant consists in bearing in mind that our community is one of free-willing men and in insisting that the individual wills of these men are not to be over-ridden arbitrarily."<sup>71</sup>

His four principles of administration of justice through law, paraphrased, are: (1) One must not be subject to the arbitrary will of another; (2) every legal demand can exist only as the person obliged can co-exist as a fellow creature; (3) no one is arbitrarily to be excluded from the common interest; and (4) the power of control conferred by law is justified only as the individual subject can yet exist as a fellow creature. These are not premises but guides to the administration of justice through law.

Pound finds Stammler significant for sociological jurisprudence because, like Ihering, his philosophy is one of the efficacy of effort, and because he lays a philosophical foundation for social justice, also adding a theory of just decision to the making of just rules.<sup>72</sup> Pound's own theory of balancing claims and weighing interests is similar to Stammler's device of the "special community," which is a model scheme of a legal system in which the principles of just law are carried out.<sup>73</sup> But Stammler differs in that his "social ideal" and "principles of just law" are *a priori*, whereas Pound and Kohler profess to work empirically.

The importance of Montesquieu to Pound's legal theory and to sociological jurisprudence can only be mentioned in passing. Pound-acclaims Montesquieu as the forerunner of sociological jurisprudence and the reviver of the

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68. Kohler used the word *Rechtspostulate*, which Julius Stone says has been badly translated as "postulates of law," but should be "postulates for law". See Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 540 n.20 (1935). But Pound always uses the term "jural postulates."

69. Stone, *op. cit. supra* note 68. (Pound goes considerably beyond Kohler in the formulation of jural postulates).

70. STAMMLER, *THE THEORY OF JUSTICE* 200.

71. Pound, *supra* note 67 at 151, 152.

72. *Id.* at 154.

73. STAMMLER, *op. cit. supra* note 70, at 215-17, 223-28

comparative method. Montesquieu's principle embraces the idea of development and regards a system of law as a living growth. Customs of a particular time and place yield laws, and as society grows customs change with the economic and cultural environment; laws change and grow with the growth of society. The judge and the legislator are merely interpreters, and law varies with the innumerable conditions of society. *L'esprit* of law is the interrelation between laws and environment.<sup>74</sup>

It is fitting at this point to summarize some of the more important sources of Pound's legal theory (bearing in mind that it was not possible to consider all of the writers that "influenced" his philosophy of law). He may have acquired, or reinforced, an ecological outlook through his botanical education. From Ihering and James he received help in setting up his system of *de facto* claims, demands, and interests, which are valid in themselves. From Kohler he received support in the idea of jural postulates with which to measure claims in a given civilization at a given time. From Ward he received help in establishing the dualism of nature (including the "natural" process of the development of law and other institutions) and the efficacy of human effort.

Based on the work of James and Stammler he makes an analysis of interests conflicting in a given case and refers to the scheme of interests as a whole for a solution.

Pound's own contribution contains the setting up of a total and unified scheme of interests and claims asserted at a given time and place, with an eye to harmony with the jural postulates. Most of all, he has coordinated diverse sources into a method of his own and has made the system into a coherent whole.

#### POUND AND REFORM

Perhaps one reason Pound believes so strongly in the efficacy of effort is that his own effort has proved so efficacious! Through his writing, his teaching, and his work in official and non-official councils and in professional societies, he has been instrumental in bringing about reform in the legal and judicial fields.

Pound got a powerful start on his crusade when his paper, "The Causes of Popular Dissatisfaction with the Administration of Justice,"<sup>75</sup> was read before the American Bar Association at a meeting on August 29, 1906. The paper is so important to Pound's career and to the legal profession in this country that it compels special mention. Pound's diagnosis started with the statement that dissatisfaction is as old as law, "discontent has an ancient and unbroken pedigree." He outlined the causes of dissatisfaction—those inherent

74. I. MONTESQUIEU, *THE SPIRIT OF THE LAWS*, Book I, ch. 1 (1st Amer. ed., 1802).

75. 40 AM. L. REV. 729 (1906); cf. POUND, *ORGANIZATION OF COURTS* 273-94 (Boston, 1940).

in any legal system, those peculiar to the Anglo-American system, and those in American judicial organization and procedure. Pound ended his paper by placing hope in a new dynamic era of law and in training through the law schools, concluding with the statement that:

We may look forward confidently to deliverance from the sporting theory of justice, we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.<sup>76</sup>

One of Pound's standard suggestions was to make provision for petty litigation because, as he said, "In discouraging litigation we encourage wrong doing."<sup>77</sup> He also criticized the ideas and ideals of practitioners, saying, "So long as the one object is to train practitioners who can make money at the Bar, and so long as schools are judged chiefly by their success in affording such training, we may expect nothing better."<sup>78</sup>

In 1933 Pound deprecated the rise of administrative rule, but was confident, at that time, that "The new institutions will presently fall into a legal mold."<sup>79</sup> In opposing administrative tribunals, Pound posited the courts as the only sure method of justice through law; but when he was annoyed at the overambition of the courts to generalize, he said, "In truth it may be that the courts also deserve to be reminded at times that they judge *sub Deo et lege*."<sup>80</sup> He was afraid that much in judicial law making is out of touch with "this throbbing, living world in which law is to be applied."<sup>81</sup>

Pound says that individual prejudices and idiosyncrasies in the administration of justice are avoided in many ways, some of which are: the rule that none may judge in his own case, the institution of a bench of judges, an authoritative technique, and professional criticism. Pound expresses the naive conviction that judges are the least likely to wield arbitrary power.<sup>82</sup>

Although Pound supported many reform measures, he never identified himself with any "movement." In recent times, he has shifted his allegiance, and to hear the accusations of his foes, the neo-realists, he is alleged to be guilty of the archest conservatism. Nevertheless, as the realists have replaced the individualists, Pound has shifted to the need for stability, in contrast to his former cry for change. Today, he says, we are overbalanced on the side of cooperativeness.<sup>83</sup> For one who was considered a radical for many years,

76. 40 AM. L. REV. 749 (1906). A similar argument was set out in *Inherent and Acquired Difficulties in the Administration of Punitive Justice*, 4 PROCEEDINGS OF THE A.P.S.A. 22-39 (1908), in which specific reforms were advocated.

77. Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 132, 134 (1906).

78. Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 611 (1907).

79. Pound, *The Future of the Common Law*, 7 U. OF CIN. L. REV. 357 (1933).

80. Pound, *Democracy and the Common Law*, 18 CASE AND COMMENT 451 (1912).

81. Pound, *Making Law and Finding Law*, 82 CENT. L.J. 358 (1916).

82. Pound, *The Law and the People*, 3 U. OF CHI. MAG. 8, 9 (1910).

83. *The Task of Law*, p. 33.

Pound takes a decidedly conservative view of administrative law today.<sup>84</sup> He recognized that an engineering interpretation might be put to ill use over a quarter of a century ago.<sup>85</sup> But now that juristic activity no longer needs stimulation, and we have quite outgrown "juristic pessimism," he thinks that contemporary juristic thought is moving too fast, and the danger is exactly in the opposite direction to that which he saw in 1923. At one time Pound said:

The individual, in short, get so much fair play, that the public gets very little. . . [The] times have changed. The individual is secure and new interests must be guarded. The common law renders no service to-day by standing full-armed before individuals, natural or artificial, that need no defence but sally forth from beneath its aegis to injure society.<sup>86</sup>

Pound, although progressive in social issues, has always been a Republican in politics—another one of his curious dualisms. Nevertheless, in 1934, he maintained that the operation of the New Deal in the courts was in accordance with a "changing ideal of justice." He said, "It is not the Constitution which is lapsing but a superconstitution erected in its name on the basis of ideals which have ceased to give an adequate picture of our social or economic order."<sup>87</sup>

Pound's dualism of human will and the pseudo-nature of society, so close to Ward's conception, enables him to maintain a theory of social engineering, in which the legal process is manipulated by a weighing and balancing, by "adjusting relations and ordering conduct," to get an end product of social justice. But where Ward said full speed ahead, assuming that "every innovation, however slight, constitutes an increment to the world's achievement"<sup>88</sup> Pound does not believe *so* implicitly in the immanence of progress. He has said, "Law must be stable and yet it cannot stand still."<sup>89</sup> These two elements, stability and change, are presented by Pound almost as physiological drives of the legal process; his legal theory allows him to shuttle from one to the other, to conform to the needs of the day.

Finally, it may be said that Pound has handed down a *system* of social engineering, which is essentially a method of the manipulation of human beings, and that the system may fall into the hands of manipulators who do not possess the integrity of a Dean Pound. Perhaps today it is more apparent that the quantity and quality of justice that is ground out by a system of social engineering depends entirely on the engineer.

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84. See below.

85. *Interpretations of Legal History*, 164-65.

86. Pound, *Do We Need a Philosophy of Law?* 5 COL. L. REV. 348, 350 (1905).

87. N.Y. Times, Sept. 9, 1934, § VIII, pp. 3, 10.

88. WARD, *PURE SOCIOLOGY*, 247.

89. *Interpretations of Legal History*, 1.

II. AN EVALUATION <sup>90</sup>

Dean Pound tells us that the question "What is law?" is as difficult as "What is truth?" Definitions of law have changed with social circumstances, and a final answer to the question about the nature of law is impossible, since the thing to be defined is living and growing, and therefore subject to change.<sup>91</sup> Pound considers law as a social mechanism, a means to further the ends of society. He offers a definitive definition of law as follows:

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.<sup>92</sup>

The end of law is justice, which Pound defines as nothing more than the satisfaction of claims, or making the goods of existence go round; it is a regime of "adjusting relations and ordering conduct," with a minimum of friction and waste.<sup>93</sup> There is nothing intrinsic in law, he says, to tie it irrevocably to any particular conception of justice.<sup>94</sup> The administration of justice is concerned with practical problems of adjusting relations and ordering conduct "where harmonizing and even compromising of conflicting and overlapping human desires and demands has to be arrived at by experience developed by reason and formulated in authoritative principles and rules."<sup>95</sup> Pound offers an elaborate system, his theory of interests, as an explanation of what is done and what should be done in the legal process. The details of his system fall into classification under personal, public, and social interests.<sup>96</sup>

When Pound began to write at the turn of the century, progressivism was in the air. The progressive movement had its roots in long needed reform, and a new awareness of the needs of society brought it to flower. Kazin's remarks concerning the progressive movement in literature are equally applicable to politics and law. He said:

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90. "A description of Pound's theory of law is not within the limits of this article. The present writer recommends *Social Control Through Law* as representative of Pound's writings. See his discussion of the nature of law, theory of interests, etc.

91. *A New School of Jurists*, loc. cit., at 265.

92. *The Task of Law*, p. 62.

93. *Social Control Through Law*, 64.

94. *Contemporary Juristic Theory*, 12.

95. *The Task of Law*, 16.

96. Pound's theory of interests cannot be duplicated here. His theory of social interests first appeared in *Legislation as a Social Function*, 18 AM. J. OF SOCIOLOGY pp. 755-768 (1913), and in *Outlines of Lectures on Jurisprudence* p. 59 (2nd ed., 1914). It received approximately its present form in *A Theory of Social Interests, Papers and Proceedings of the Amer. Sociological Society*, vol. 15, pp. 16-45 (1921), and was developed in his later writings; e.g., *The Spirit of the Common Law* (1921), pp. 31-93, 197 ff.; *Introduction to the Philosophy of Law* (1922), pp. 90 ff.; *Interpretations of Legal History* (1923), pp. 158 ff.; *Outlines of Lectures on Jurisprudence* (4th ed., 1928), pp. 65 ff., and (5th ed., 1943), pp. 103 ff.; *Contemporary Juristic Theory* (1940), lect. 3; *Social Control Through Law* (1942), pp. 63 ff., 109-12; *The Task of Law* (1944), pp. 21 ff.; *A Survey of Social Interests*, 57 HARV. L. REV. 1-39 (1943). Cf. PATTERSON, *Pound's Theory of Social Interests*, in *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound*, pp. 558-73.

The significance of the Progressive period . . . is not that it marked a revolution in itself; it simply set in motion the forces that had been crying for release into the twentieth century. . . [The new spirit was] a medium through which flowed all the borrowed and conflicting European ideas, all the amorphous tendencies toward political reform, all the hopes for a different social order, all the questioning and nostalgia, aspiration and impatience, that had been dammed up so long at the back of the American mind.<sup>97</sup>

Pound's writings reflected the hopes and tendencies of the progressive movement; his optimism and faith in effort and the immanence of progress were apparent. His later writings, however, are tempered with conservatism; especially after the bleak 1930's they no longer seem to reflect the conviction that change means progress.

Pound is very much an eclectic; his philosophy of law is a composite of the thoughts of many men, brought together in a unified system. There is very little that is original in Pound's philosophy; his merit has been in knowing how to milk other minds and to profit by the efforts of his predecessors.<sup>98</sup> Indeed, as far as his value as a philosopher is concerned, his phenomenal memory may be a bit of a curse rather than an asset. It may have been easier for him to repeat a prodigious quantity of the work of others than to attempt to strike out in the direction of originality. Grossman has suggested that in spite of his vast erudition Pound is limited as a philosopher.<sup>99</sup> Furthermore, there is a danger point, difficult even for Pound to avoid, where eclecticism becomes mere aggregation, and display of erudition becomes showmanship.

Pound has always preached, "Thou shalt not make unto thyself any graven image—of maxims or formulas to wit."<sup>100</sup> But he has committed the very sin he condemns. His penchant for classification borders on pedantry. It may be, of course, a vestigial remnant of his early training in botanical classification, but he frequently over-classifies. This criticism is supported by Morris Cohen who says that Pound has a certain tendency to taxonomy, that he classifies thinkers without regard to "promotion of understanding."<sup>101</sup> Pound's rigidity in the classification of historical periods is further recognized by Radin, who says:

His "four schools" and "five periods" are frequently mentioned. Perhaps he insists too much on them. It may well be that some of the more immature of his hearers in North Carolina came away with the impression that the

97. ALFRED KAZIN, *On Native Grounds* p. 92 (1942).

98. See J. C. H. WU, *The Juristic Philosophy of Roscoe Pound*, 18 ILL. L. REV. 288 (1924).

99. W. L. GROSSMAN, *The Legal Philosophy of Roscoe Pound*, 44 YALE L.J. 605 (1935).

100. Sir F. POLLOCK, *A Plea for Historical Interpretation*, 39 L.Q. REV. 169 (1923).

101. COHEN, *A Critical Sketch of Legal Philosophy in America in Law: A Century of Progress* pp. 318-319 (1937).

members of the "four schools" had their school insignia as prominently displayed as a football hero, and that their rise and fall were as determinable as the dates of the Stuart dynasty. But that is inevitable with such [pedagogic] devices. Dean Pound explicitly warns us of that.<sup>102</sup>

Pound's claim to strict empiricism also raises grave doubts.<sup>103</sup> The result of his investigation into the ends of law, jural postulates, social interests, etc. is really intelligent, "imaginative construction."<sup>104</sup> But his fear of indulging in a metaphysical quest forbids him to admit that he is being other than "factual." Nevertheless his dogmatic assertions (*e.g.*, that the controlling ideal in nineteenth century law was to maximize individual self-assertion; that in Greek, Roman, Medieval Law it was to preserve the *status quo*) are hardly "empirical." But his "scientific" outlook prefers the label of empiricism.

Paired principles, such as those mentioned above, *e.g.*, freedom and security, civilization and ethics, civilization and law, law and morals, make Pound's system of thought appear to include a series of dualisms in finely balanced tension. But there is a danger point, as it will appear below, where dualism tends to become inconsistency.

Today Pound's opinion regarding separation of powers is stable and well defined. He regards the doctrine as salutary; he says: "It gets down ultimately to one of the fundamental problems of the legal order, namely, balance between the general security and the individual life, which calls for a balance of legislative, executive, and judicial authority."<sup>105</sup>

In the past, however, his view on separation of powers showed signs of inconsistency. Lately he has said, "In the United States the separation of powers is a constitutional distribution of authority not a juristic dogma."<sup>106</sup> But in 1921 he averred, "It is true we have to combat . . . the dogma of separation of powers."<sup>107</sup> This inconsistency is not the result of a change of stand through a period of years, for at one time he held two opposite views. Citing Bluntschli, he once argued that separation of powers is not for protection but a fulfillment of an organic function. Hence if an organ fails to perform its function properly *the ground for separation of powers is no longer valid.*<sup>108</sup> A year later he executed a *volte-face* by asking for proper separation of the executive and judiciary and by defending separation of powers.<sup>109</sup> He has resolved the inconsistency today by a change in emphasis. When he quoted Bluntschli in 1907, he considered specialization of function as of prime im-

102. Max Radin, Book Review, *Law and Morals*, 23 MICH. L. REV. 553 (1925).

103. Cf. above, part I.

104. E. W. Patterson, *loc. cit.*, pp. 562, 563, 573, n.39.

105. 57 HARV. L. REV. 1227-28.

106. *Political and Social Factors in Legislative Interpretation: An Introduction*, 45 MICH. L. REV. 602 (1947).

107. *The Spirit of the Common Law*, p. 181.

108. *Executive Justice*, 46 AM. L. REG. 146 (1907); *Spurious Interpretation*, 7 COL. L. REV. 384 (1907).

109. *Enforcement of Law*, 20 GREEN BAG 409-10 (1908).



portance. Today he holds "there is much more behind the doctrine, as it stands in our polity, than specialization of functions." He considers the doctrine as a fundamental instrument of balance within the legal process.<sup>110</sup>

The idea of balance, of the swinging of a pendulum between extremes, and of the seemingly inevitable return to proper equilibrium is the *leitmotif* of Pound's thought. Another example of it is in his idea of the perpetual swing between anarchy and absolutism, between legal justice and justice without law.<sup>111</sup>

A similar inconsonance is also revealed in Pound's earlier view of the nature and function of the courts as compared to the legislative process.

On one hand he wrote as if the salvation of society rested with "the coming science of legislation."<sup>112</sup> He said, "Moreover, courts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present."<sup>113</sup> But that is exactly opposite to what he wrote in another article, in which he stated that if the backwardness of the law with respect to social problems is in the traditional element its deliverance is there too! Fundamental changes, he said, are taking place, changes in law in the spirit of recent ethics.<sup>114</sup>

On one hand he said, "We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will."<sup>115</sup> On other occasions he called legislation unoriginal and imitative,<sup>116</sup> and said that at best it could only lay down a premise or guiding principle in advance, and he stressed the limitations of legislation.<sup>117</sup> Again it will be seen that these are differences in emphasis. His opinion regarding the desirability of legislation as compared to judicial law making reflected, and shifted with, the needs of the legal order at the time he was writing. And again the inconsistency was resolved by holding a dualism (courts and legislation) in finely balanced tension. This dualism may be illustrated by the following excerpt:

As the sins of the judicial department are compelling an era of executive justice, the sins of popular and legislative law-making are threatening to compel a return to an era of judicial law-making. Both are out of place in a modern state.<sup>118</sup>

110. 57 HARV. L. REV. 1227-28.

111. *E.g.*, in the first decade of this century Pound said, "the reaction toward justice without law has long spent itself, and the powerful forces that make for law have drawn the pendulum back." Law versus equity is a permanent and not a transitory conflict. *The Decadence of Equity*, 5 COL. L. REV. 23.

112. *Common Law and Legislation*, 21 HARV. L. REV. 384 (1908).

113. *Id.* at 403.

114. *Social Problems and the Courts*, 18 AM. J. OF SOCIOLOGY 336 (1912).

115. 21 HARV. L. REV. 406.

116. *Do We Need a Philosophy of Law?* 5 COL. L. REV. 343 (1905).

117. *The Spirit of the Common Law*, pp. 179-80, xiv.

118. 7 COL. L. REV. 386.

And, as we know, Pound's prime requisites of the legal order are justice, security, and *balance*.

Similarly, Pound's critical attitude toward the over-individualism of the common law, and his conception of liberty through society,<sup>119</sup> seem inconsistent with his assertion that the doctrine of individualism is tonic and salutary, and that "this same obstinate individualism of the common law, which makes it fit so ill in many a modern niche, may yet prove a necessary bulwark against an exaggerated and enfeebling collectivism."<sup>120</sup> Again, the only possible resolution of such a seeming inconsonance is through a doctrine of a balance struck between the social interest in the "general security" and the social interest "in the individual life."

Pound's theory of the state, then, in keeping with his general philosophy of law, is sociological. The state for him is the main agency of social control. The task of the state is to sustain the balance of the legal order and to maintain the conditions of society making for a higher civilization, by a regime of justice according to law.

The most intense criticism of Pound has come from the neo-realists and, at the other extreme, from the disciples of natural law. Although the conflict has been bitter, Pound differs from the neo-realists only in approach. They say that what is officially done is not controlled by the authoritative materials that officials profess to use. Pound, on the other hand, gives great weight to the traditional element in law. It is barely possible that his phenomenal memory is a factor in this tenacious clinging to the traditional element; his comprehensive grasp of the material gives him a decided advantage in this field.

Pound says, truly enough, that those who abhor dogmatism can be as dogmatic as those who preach it. He further attacks realism as a cult of ugly and false dogma. It is, he says, a boast rather than a description to call it "realism."<sup>121</sup> But outside of emphasis on traditional materials he really has no argument with the realists. Indeed the stimulus that led to the creation of the realist creed came from Pound himself, through his extensive use of extra-legal materials.

The natural law writers have made much of the indications that Pound is in the direct line of development which has led to realism. Their attack, however, has been concentrated on Pound's treatment of values and his separation of jurisprudence and ethics. The natural law viewpoint maintains that jurisprudence is a differential science, subordinate to the inclusive, universal science of ethics.<sup>122</sup> They criticize Pound's unequivocal acceptance

119. See 5 COL. L. REV. 343-48 (1905).

120. *The Spirit of the Common Law*, 18 GREEN BAG 24-25 (1906).

121. *Social Control Through Law*, 97.

122. LEBUFFE AND HAYES, *Jurisprudence* 11 (New York, 1924). See LAURENCE STAPLETON, *Justice and World Society* (Chapel Hill, 1944), *passim*.

of the pragmatist belief that the essence of good is simply to satisfy demand. Kennedy, for example, asks if a demand is good *per se*. Pragmatism, he continues, has been frequently criticized because it is in a sense anarchistic and devoid of standards or principles. This is permissible in philosophy but not in law, which as a practical science requires an appreciable degree of uniformity, stability and certainty. As Kennedy observes:

Pragmatic jurisprudence starts with an open-door policy which gives free and easy entrance to any and all human and social wants and desires and makes them the first and last end of law. Gratification and satisfaction of these demands divorced from external principles, which are shadowy and abstract things, should be the aim of juristic science. The tenets of pragmatism are alluring with their "full-speed-ahead" and "give-the-people-what-they-want" theories and the gracious assumption that "the essence of good is simply to satisfy demand."

Demands of humankind are many and diverse, good and bad, moral and immoral, and it is difficult to perceive how the magic of pragmatism can make them all "good."<sup>123</sup>

Kreilkamp, another natural law writer, says that as an ardent advocate of legal reform, Pound assumes that what is to be changed will be better after the change. Secondly, Pound refutes determinism, assuming that men are free to take a deliberate hand in carving their own destiny. Kreilkamp, a Thomist, likes to compare Pound with the Scholastics. Like them, he says, Pound infers from factual truth the normative principle that law should be for the common good; social functionality in the definition of law makes the common good the first criterion for the selection of interests to be secured by law. He recognizes that Pound rejects collectivism, and on the other hand rejects individualism. In his words:

Of a piece with this rejection of totalitarianism is Pound's hankering for a universal human law; the march of civilization would be greatly speeded up if only the world would shake off its narrow legal localism and seek a positive law transcendent to national legal systems, an agency of social control with a jurisdiction as universal and as growing as the world's economic interdependence.

But the "hankering" for a universal system that Dr. Kreilkamp reads in Pound's philosophy is different from what he would like it to be. He delights in Pound's return to the Middle Ages for instruction but is not happy with what Pound finds there.<sup>124</sup>

Kreilkamp criticizes Pound's emphasis on the material goods of existence. As he puts it:

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123. W. B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 70-75 (1925).

124. Karl Kreilkamp, *Dean Pound and the End of Law*, 9 FORD. L. REV. 196, 207-08, 216-17 (1940).

Most of the states' problems are economic problems . . . outward acts are largely for economic goods. Nevertheless, regulation of economic processes is but a means towards the common good, which is law's true end, and the common good is larger than material prosperity. We must not let the superior quantitative weight of economic matters in the legal process distract us from recognizing that qualitative primacy belongs to spiritual interests; we must remember that the satisfaction of material needs is but a means, a precondition, to the pursuit of the higher human values.

Pound, he continues, has no theory of human nature. He refuses to see a psychological premise for valuing spirit above matter, perhaps fearing that it is unscientific. So he turns to the psychology of today, Kreilkamp says, for such premises and, of course, finds materialism. "For want of a true psychology and ethics Pound falls short of philosophy, a *sine qua non* of the science of good government."<sup>125</sup>

Pound's consideration of law and morals and of values warrants criticism. "After a careful setting of the stage, we are let down by Pound's own attempt of a solution."<sup>126</sup> His values are the "raising of human powers to their highest unfolding," and "to maintain, further and transmit civilization." In the absence of authority the "social picture" of the judge, or the "community" dictate values. But Pound says that the caprice of ephemeral public opinion has no place in the legal order. If so, how is one to know when the opinion of the community is capricious and transitory and when it is stable and establishing a permanent "value"? Pound says that law and values in law are *dependent* upon society. Can the community and society do no wrong? Furthermore, can judge and jurist according to Pound's philosophy do any more than bring the law in conformity with the values of the community? It is possible that this is just as much "juristic pessimism" as the kind Pound deprecates.

One reason for Pound's shying away from a value system may have its roots in his early training as a botanist. His reasoning by analogy from the natural sciences has been discussed above. He may be more of a positivist than is commonly supposed. He may be guilty of what Whitehead called "the fallacy of misplaced concreteness."<sup>127</sup> Values in botany—as in all the natural sciences—are limited to those near-unanimous judgments that scientists make about the nature of the world and the laws of nature, etc. Individual judgments, in most cases, are out of place. The closeness of Pound's analogical reasoning may have helped proscribe values from his legal philosophy.

Grossman points out that the philosophy behind Pound's scheme of interests makes an end in itself of the satisfaction of interests, or "desiderata." But are not these desiderata merely the means to a greater goal, that of

<sup>125.</sup> *Id.* at 212, 227-28, 232.

<sup>126.</sup> *Id.* at 215.

<sup>127.</sup> A. N. Whitehead, *Science and the Modern World* 75 ff. (New York, 1946 ed.).

human happiness? Grossman says a standard for choosing such means, in a case of conflicting interests, must be external to the interests themselves. "And so we are back where we started and have derived no criterion to help the jurist who seeks the just solution of a controversy in which he is obliged to choose between conflicting interests."<sup>128</sup> If half the community wants X and the other half not-X, which shall be chosen as more valuable to society, according to justice? "If the social and political philosopher alone can provide such a theory and such a process, jurist must turn philosopher or must leave his problem unsolved."<sup>129</sup>

But it is the judge who must make the actual decision of cases and not the community or the philosopher. Pound's assumption that the judge will be more inclined toward "lawful" action than the administrator is questionable. In the vehemence of his attack on administrative agencies he may have overstated his case. Cohen has suggested that history hardly supports the contention

that professional opinion of the bar is a sufficient check against unwise or unjust decisions. . . . Moreover, the opinion of the bar is class opinion, controlled largely by a few leaders who may have acquired prestige by defending the interests of wealthy clients.

On the one hand, we have a persistent opposition to mechanical jurisprudence of concepts or fixed rules, and a devastating criticism of our courts' uncritical reliance on such principles as the freedom of contract. On the other hand there is a naive clinging to the fiction of the division of power between the judiciary and the executive, against those who favor the fusion of judicial and administrative functions in commissions.<sup>130</sup>

Returning to the question of values, Stone has pointed out the difficulties in attempting to solve problems of evaluation on a basis other than that of absolute values. Pound's cry for bringing law into harmony with the conditions of the times assumes implicitly that the law will be better off when the operation is completed. But this is not true if civilization has regressed; although law would be closer "in touch," the change would not be for the better. At first sight, Stone continues, the pragmatic approach may appear to eliminate value judgments, and makes a claim valid in itself. Pound's jural postulates are presupposed by "substantially all" the claims made at a given time in a given society. But in judging what is presupposed by the preponderant mass of claims, a value judgment must be drawn from without. Furthermore, Stone says, the judge must make an objective weighing and balancing of conflicting interests, finding a solution which would best maintain the whole scheme of interests and result in the least friction and waste. But what do

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128. Grossman, *loc. cit.* 611.

129. *Id.*

130. M. R. Cohen, *loc. cit.*, pp. 299, 298.

"least" and "most" mean if we avoid an absolute system? Can it be a mere counting of heads, or must we admit that one part of the scheme has a greater inherent significance than another? Other difficulties, Stone says, arise from the fact that human events are conditioned by time and place. The theory of jural postulates assumes that there are clearly defined civilizations in space and in time, that at the particular time and place it is possible to find a set of postulates explaining the preponderant claims, and that at each time and place there are minds adequate and available for the task of framing the postulates. But, Stone concludes, these inherent inaccuracies in a time-place interpretation scheme do not justify a refusal to search for accuracy with the best instruments available.<sup>131</sup>

The social engineer must know what interests to stress and what to exclude. This implies that some interests may be more important than others. Perhaps the best social engineer will find himself weighing and balancing intuitively. Wu points out that in a highly cultured but morally decadent nation the emphasis on the "social interest in the general morals" and in "the security of social institutions" is the best antidote.<sup>132</sup> But, it must be shown that, in administering such an antidote, the social engineer is going beyond the "moral sense of the community." Pound leaves the impression that all would be well if only Pound were the engineer. But what if we get another engineer without the integrity of a Dean Pound? The weighing and balancing might certainly eliminate "friction and waste," but under such conditions the end product might not be justice. Stapleton has pointed out that "even the most subtle advocates of law as 'social engineering' have not left the ideals of reasonableness behind."<sup>133</sup> The fire of Pound's attack "suggests that there are certain absolutes to Pound the man if not to Pound the jurist."<sup>134</sup>

In separating law and morals and refusing to recognize the possibility of an absolute standard of values, Pound has little justification for criticizing the realists' neglect of the problem of values.<sup>135</sup> Reuschlein says:

While he tells us that morals suggest to law the ends it should pursue, apparently morals do not *control* law in the pursuit of those ends. That is dangerous doctrine, for what is not moral is, at best, unmoral. If Pound were sitting as judge today, it may be that his failure to identify completely the moral with the legal might lead to unfortunate decisions paving the way for some of the very things against which he himself protests and which he fears.<sup>136</sup>

With its absence of ethical or moral norms there is nothing in Pound's philosophy that would make it difficult for a community to run legally amuck

131. Julius Stone, *A Critique of Pound's Theory of Justice*, 20 IOWA L. REV. 545-49.

132. J. C. H. Wu, *loc. cit. supra* note 98 at 299.

133. Stapleton, *op. cit.* at 81.

134. G. W. Paton, *Pound and Contemporary Juristic Theory*, 22 CAN. B. REV. 488.

135. As he does in *The Call for a Realistic Jurisprudence*, 44 HARV. L. REV. 703.

136. H. G. Reuschlein, *Roscoe Pound—The Judge*, 90 U. OF PA. L. REV. 327.

over everything that Dean Pound and most men would consider worthy and good. A court in a totalitarian state might be satisfied with the sociological theory of law. It could go on efficiently adjusting and engineering, professing to carry out justice. And if a claim arose that might embarrass the state it could quash it easily enough with a murmur about the "general security."

One part of Pound's theory that might preclude arbitrary action against an individual, however, is Pound's acceptance of Stammler's principle of just law, that law must do nothing to violate the prescription that the individual affected by the law must yet coexist as a fellow creature. This principle sounds suspiciously like it sets forth a "right" of the individual. But Pound's theory asserts that a right is legal power granted by the state to enforce a claim, implying that if the state grants it, the state may also refuse it or take it away. Perhaps Pound implicitly recognizes "natural" rights, although he will not openly admit them to his legal theory.

It must be admitted, however, that Pound's theory of social interests does have "teeth" in it. It is based, generally, on cases actually decided. Thus anyone who will attempt to distort it must also twist the tail of the common law.

In conclusion it must be said that when sociology attempts to do more than describe, when it seeks to become social philosophy, it fails because of inappropriate method.<sup>137</sup> Law is more than a collection of social facts; it is a system of norms. Its task is not to describe how people act but to tell them how to act. This task involves ethics and morals, which obstinately require statement in universals. Pound recognizes the importance of them, but he sees such a diversity of standards of value in human life that he refuses to commit himself to *any* in his philosophy of law. That course of action is a dodge from responsibility. Perhaps the most important task of the jurist is to continually search for the best standard of values to incorporate into legal philosophy, never forgetting that it must conform to the realities of life. While he deprecates the "give-it-up-philosophies," Pound himself gives up this quest.

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137. BEROLZHEIMER, *THE WORLD'S LEGAL PHILOSOPHIES*, 313.