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Sociology and Sociological Jurisprudence: Admixture of Lore and Law

BY GILBERT GEIS*

The life history to date of sociological jurisprudence as a school of legal thought provides much instructive material concerning broader intellectual developments both within the law and within sociology in the United States. The jurisprudential elements in the school have remained relatively intact, though they have been considerably refined since their initial statement by Roscoe Pound in the first decade of the century,¹ and in legal circles the theory is still generally regarded as "the most popular movement in jurisprudence in the United States."² Meanwhile, the domestic sociological components of the theory, drawn largely from the contemporaneous work of Edward A. Ross and Albion W. Small, have passed through several stages, ranging from their preeminent position within the main body of sociological thought at the time of their emergence to their almost total dismissal and intellectual exile today.

Certainly some of the disparate success of the elements of sociological jurisprudence in the relevant academic disciplines

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¹ Pound, *The Need of a Sociological Jurisprudence*, 19 Green Bag 607 (1907); Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 Harv. L. Rev. 591 (1911); 25 Harv. L. Rev. 140, 489 (1911-12). "Sociological jurisprudence" will be used here to refer exclusively to the positions taken by Pound since the school is singularly his own, despite the excellent later contributions of scholars such as Stone and Simpson. Pound tacitly acknowledges this situation, writing for instance about "the task laid down in the programme of American sociological jurisprudence" and then citing his own statements on the goals of his own school. Pound, *Sociology of Law and Sociological Jurisprudence*, 5 U. Toronto L.J. 1, 5 (1943). Pound's writings can be traced through the bibliographic listings in Setaro, *A Bibliography of the Writings of Roscoe Pound (1942)*, and Strait, *A Bibliography of the Writings of Roscoe Pound, 1940-1960 (1960)*. The best secondary source is Reuschlein, *Jurisprudence—Its American Prophets* 103-154 (1951).

² Hall, *Progress of American Jurisprudence*, *The Administration of Justice in Retrospect* 24, 29 (Harding ed. 1957).

can be traced to largely fortuitous circumstances. The vigorous longevity of Dean Pound has enabled him to defend and to expand his original ideas well beyond the period when his contemporaries had passed from the scene. Pound could, for example, revise his original "theory of interests," first stated in 1914, during the twenties, again in 1943, and yet again in the recent publication of his five-volume treatise on jurisprudence.³ But productive scholarship over an unusually long period of time is hardly a total explanation of the endurance of sociological jurisprudence, for too many scholars have survived long enough to watch helplessly as their contributions passed into senescence.

A further explanation of the durability of sociological jurisprudence may be sought in the nature of the law and legal thinking in general. The law, it has often been noted, changes rather slowly compared to other segments of a society's ideational culture. This relative rigidity may partly be traced to the articulation and codification of the law—visible and written things tend to have a certain endemic inertia in contrast to more intangible items. It is a professional tradition in the law, from which sociological jurisprudence has undoubtedly benefited, to build upon existing structures where possible, refining and redefining them, rather than to discard such material and strike out along a totally novel path. Much agility is often shown and admired in legal writings which are able to break fresh ground while at the same time they incorporate at least some elements of time-honored and consecrated traditions.⁴

The chronological age of law and sociology at the time they coalesced to form sociological jurisprudence also likely contributed to the divergent intellectual fates of the elements of the theory. Legal scholarship had already preempted a not inconsiderable number of jurisprudential avenues of inquiry: analytical,

³ See Pound, *Outlines of Lectures in Jurisprudence* 56-59 (2d ed. 1914); Pound, *A Theory of Social Interests*, 15 Proc. Amer. Soc. Soc'y 16 (1921); Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1 (1943); 3 Pound, *Jurisprudence* 3-376 (1959).

⁴ Note, in this connection: "The opposition to sociological jurisprudence has always been loyal opposition." Cowan, *A Report on the Status of the Philosophy of Law in the United States*, 50 Colum. L. Rev. 1086, 1094 (1950), and: "It is some indication of the weight and influence of Pound's philosophy that there has been relatively little criticism of his approach, and such criticism has generally been directed toward complementing it rather than supplanting it." Braybrooke, *The Sociological Jurisprudence of Roscoe Pound*, 5 U. W. Austl. Ann. L. Rev. 288, 309 (1961).

historical, metaphysical, and philosophical jurisprudence in many intricate forms had all been explored for some time. Sociology, on the other hand, was barely emerging in the first decade of this century, and it was presented with boundless opportunities and few guides for the establishment of a coherent body of principles and procedures for the determination of the realms into which it would advance with its specialized viewpoint for the observation and description of human behavior.

The early sociological professors and writers, like the roster of a newly-formed major league baseball team, were gathered together from a conglomerate diversity of sources. None of them, of course, had been trained in the field in which he was working; primarily their backgrounds were in theology, economics, history, or political science.⁵ Both the sociological pioneers and the legal philosophers of their time shared an interest in and an understanding of classical and continental speculative writers, and this common background provided an important foundation onto which they could add an amalgamated and mutually comprehensible theory of jurisprudence.

Subsequently, as sociology strove to gain an identity of its own in the United States, its interests tended to become more parochial. During this period, which extends from a rather hazy beginning in the mid-1920's to, with some notable recent abatement, the present moment, sociology abandoned its reliance on European traditions and sources, with the exception of the works of theorists such as Emile Durkheim and Max Weber. Instead, it concentrated upon the establishment of a hard core of intramural consensus in regard to a disciplinary ethos. In this period, American sociology became, without question, the world leader in the arena it chose for its own and carried with it, though well behind, an emerging continental movement which now sought to divorce the social science of sociology from the social philosophical tradition that held sway. In the process of acquiring direction and definition of its meaning and methods, American sociology retreated from its involvement with the law, which at best had been only a transient and relatively passive affiliation on its part. Sociology also divorced itself to a great extent from

⁵ Cf. Bernard & Bernard, *Origins of American Sociology* 33-55 (1943); Odum, *American Sociology* (1951).

economics and political science and turned the major share of its extra-mural attention to the study of psychology and anthropology, with emergent kinship aggressions and an ensuing gain to the three disciplines at the price of more relentless inquiry into the major institutional patterns of the society. Legal scholars during this period, for their part, no longer crossed the bridge that Pound had so brilliantly constructed between their field and sociology, largely because the distance seemed too far, the toll too steep, and the grass on the other side not particularly verdant. Several continentally-trained writers (to keep the metaphor momentarily alive) tried to swim the interdisciplinary channel, but their training in an alien branch of jurisprudence was either too far afield to be attractive to American legal scholars or their sociology was too foreign to make any real impact on the American variety.

Tentative gestures by sociology in recent years toward areas of inquiry, including law, which were neglected during the period of definition and consolidation can be clearly distinguished. Explanations for this development are more difficult to come by than evidences of its appearance. It may represent partially a return to the doctrine of intellectual supremacy that was enunciated by Auguste Comte in what are considered to be the founding statements of sociology, and it may represent as well the necessity to occupy talents that without expansion of the subject matter beyond usual limits would be supernumerary in a field acquiring recruits as rapidly as sociology. The condition of our civilization today, with the apparent pressing need for formal international control and order, most certainly also needs to be included in any attempt at understanding sociology's nascent return to consideration of legal matters, for all intellectual trends have roots, be they tap or feeder, in the climate of the times.

The task of the present paper will be to explore the relationship between sociology and law in the United States as this relationship first bore fruit in the ideas brought together by Pound as "sociological jurisprudence." Efforts will be made to trace in greater detail the three phases in the relationship described earlier: first, the period embracing the birth of sociological jurisprudence and coinciding with the infancy of sociology;

second, the period involving the refinement of sociological jurisprudence by legal scholars and the virtual abandonment of legal inquiry by sociology; and third, the period embracing the growing interaction between law and sociology. Finally, a brief attempt will be made to indicate the likely implications of historical and current developments in jurisprudence and in sociology for the theory of sociological jurisprudence and for studies grouped as part of what is known as the sociology of law.

I. ROSCOE POUND AND THE SOCIOLOGISTS

Edward A. Ross joined the faculty of the University of Nebraska in 1901 after resigning from Stanford University following a fierce battle for academic freedom and his personal right to espouse controversial political issues such as "free silver" in the face of the opposition of Leland Stanford's widow.⁶ Roscoe Pound, at thirty-one, four years younger than Ross, was appointed that same year as one of nine commissioners of the supreme court in Nebraska in a move aimed at expediting overripe judicial business. Pound, despite his court work, continued to teach law at the university each morning.⁷

Ross had many qualities that stood ready to attract Pound's attention. Besides being physically prepossessing (Ross stood six feet six inches tall and weighed more than 250 pounds), he emanated friendly self-possession and an almost evangelical fervor to communicate the vital messages he believed were contained in the newly-emergent study of sociology, a field which, as he would shortly write with typical verve, "does not meekly sidle in among the established sciences dealing with the various aspects of social life,"⁸ but ". . . aspires to nothing less than suzerainty."⁹ "Ross was always a person whom one held in awe,"¹⁰ a former student recalled, and "to have been associated with [him] was a supremely choice life experience."¹¹ As late as

⁶ Ellitt, *Stanford University: the First Twenty-Five Years* 326-368 (1937).

⁷ Sayre, *The Life of Roscoe Pound* 102 (1948). Pound deserves a better biography than this rambling, fumbling account. Cf. Simpson, *Roscoe Pound and Interpretations of Modern Legal Philosophies*, 23 N.Y.U.L.Q. Rev. 393, 404-7 (1948).

⁸ Ross, *Foundations of Sociology* 8 (1905).

⁹ *Id.* at 8-9.

¹⁰ Hertzler, *Edward Alsworth Ross*, 16 *Amer. Soc. Rev.* 598 (1951).

¹¹ *Id.* at 599. See also Gillin, *The Personality of Edward Alsworth Ross*, 42 *Amer. J. Soc.* 534 (1957).

1948, Ross could still be described as "the most dramatic and effective classroom teacher in the history of American sociology."¹²

Ross had studied philosophy in Germany after receiving his bachelor's degree in 1886, and then had attended Johns Hopkins University for his doctorate, specializing in economics and finance, philosophy and ethics, and comparative jurisprudence. After searching his mind for ideas concerning "the linch-pins which hold society together,"¹³ he had by 1894 conceived the plan of intensively delineating systems of "social control."¹⁴ In concentrating on the implications of the postulate that all groups and institutions constantly exert manifold pressures upon their units, Ross felt that he had "stumbled on to a great social secret."¹⁵

Social Control, published in 1901, became one of the classics of early American sociology. The book represents an elaborate inventory of the methods by which a society induces conformity into human behavior, written in a highly pungent style and illustrated with numerous anecdotes collected during Ross' extensive travels. Considerable attention is paid to the role of public opinion and law as the two most important means of controlling individuals. Public opinion, Ross notes, may be aligned with morality, sensitive to the moment, and flexible enough to control actions even before they occur, but its weakness lies in its fitfulness. Law, with its "blade . . . playing up and down in its groove with iron precision,"¹⁶ is considered by Ross to be "the most specialized and highly finished engine of control employed by society."¹⁷ But, like most sociologists, Ross denegated the influence of law when weighed in the balance against public

¹² Kolb, *The Sociological Theories of Edward Alsworth Ross*, Introduction to the History of Sociology 819, 820 (Barnes ed. 1948).

¹³ Ross, *Seventy Years of It* 56 (1936).

¹⁴ The idea of social control had been employed, though without any prominence, by Spencer, 2 *Principles of Sociology* 216-230 (1900 ed.), and Ross is invariably credited with introducing the term into general sociological use. Cf. Gurvitch, *Social Control*, *Twentieth Century Sociology* 267 (Gurvitch & Moore ed. 1945). Pound of course incorporated the concept into his sociological jurisprudence and employed it in the title of *Social Control Through Law* (1942).

¹⁵ Stern, *The Ward-Ross Correspondence, 1891-1896*, 3 *Amer. Soc. Rev.* 362, 392 (1938).

¹⁶ Ross, *Social Control* 94 (1901).

¹⁷ *Id.* at 106.

opinion, finding law "hardly so good a regulative instrument as the flexible lash of public censure."¹⁸

The personal relations of Ross and Pound are summarized by Ross in a brief paragraph in his autobiography; the importance of these relations for the content of sociological jurisprudence is documented throughout the writings of Pound.¹⁹ It is important to realize that Pound, for his part, had no discernible impact on the intellectual orientation or production of Ross,²⁰ indicating the early establishment of a one-way route that would continue to regulate traffic between sociology and sociological jurisprudence. Both Ross and Pound were members of a "congenial" group, known apparently merely as the "Ten," who dined together once a month. "I did not imagine that I was 'making a dent' on [Pound]," Ross wrote much later, "but quietly he began to acquaint himself with the sociological view of law and courts. . . . In 1906 he wrote me, 'I believe you have set me in the path the world is moving in.'"²¹

Part of Ross' influence was undoubtedly in the direction of forcefully advocating to Pound the views of his uncle-by-marriage, Lester F. Ward, the man to whom Ross dedicated *Social Control*. Ward was later, in 1906-1907, the first president of the American Sociological Society, and is often considered "the father of American sociology." Ward was by profession a government geologist and paleobotanist, a background compatible with Pound's pre-legal concentration in botany,²² and one which must have made Ward's works especially attractive to Pound since they quite often drew upon the earth and plant sciences for analogy and vocabulary to describe social processes.

¹⁸ *Id.* at 94.

¹⁹ Pound has clearly stated the debt: "I . . . passed . . . under the influence of Ross and Small to sociological jurisprudence." Pound, *Sociology of Law*, *Twentieth Century Sociology* 297, 336 (Gurvitch & Moore ed. 1945).

²⁰ Years later, Ross did strenuously push Pound for the presidency of the University of Wisconsin and in a footnote to the story of jurisprudence tells briefly how Felix Frankfurter spent an evening trying to talk him out of his advocacy, insisting that Pound, unable to delegate authority, was by nature a scholar rather than an administrator. Ross, *Seventy Years of It* 297-8 (1936). Ross dedicated his *Principles of Sociology* to Pound, a gesture which led newspapers to denounce Pound as the leader of the sociological (read "socialistic") movement in the nation's law schools. Ross, *Seventy Years of It* 303-4 (1936); cf. Sayre, *the Life of Roscoe Pound* 275 (1948).

²¹ Ross, *Seventy Years of It* 89 (1936).

²² See Walter, *The Legal Ecology of Roscoe Pound*, 4 *Miami L.Q.* 178 (1950).

Ward, like Ross, was a combination crusader and arm-chair analyst, maintaining a certain posture of disengagement in his work, yet insisting that its utility for improving social arrangements was one of its essential ingredients. Society, Ward believed,

should not drift aimlessly to and fro, backwards and forwards, without guidance. Rather, the group should carefully study its situations, comprehend the aims it desires to accomplish, study scientifically the best methods for the attainment of these, and then concentrate social energy to the task set before it.²³

Pound has credited Ward's influence on sociological jurisprudence as lying primarily in the turning of sociology in the United States from biology toward psychology.²⁴ The biology was essentially the mechanical view espoused by Herbert Spencer, who saw law as an instrument of little import in a process of social evolution based on Darwinian principles.²⁵ Though Ward never totally repudiated these views, he placed great emphasis on the possibility of intervening in the process of social evolution and undercutting its general inelasticity. Ward made a basic distinction, for instance, between pure sociology, a theoretical undertaking seeking to establish the principles of the science, and applied sociology, which "deals with artificial means of accelerating spontaneous processes of nature."²⁶ Like Ross and other early sociologists, Ward saw much value in his views for the legal process and for lawmen. Legislators, Ward believed, should be trained sociologists so that sociological principles could be employed in behalf of social reform. Ward conceded that legislatures would probably have to be maintained, but he thought that "more and they will become a merely formal way of putting the final sanction of society on decisions that have been worked out in the . . . sociological laboratory."²⁷ The problem of ethics for Ward revolved around means to reduce friction in social

²³ Dealey, *Lester Frank Ward*, *American Masters of Social Science* 61, 82 (Odum ed. 1927). Ross put it more bluntly for himself and his mentor: "Suckled on the practicalism of Lester F. Ward, I wouldn't give a snap of my finger for the 'pussyfooting' sociologist." Ross, *Seventy Years of It* 180 (1936).

²⁴ Pound, *supra* note 19, at 306.

²⁵ See Cairns, *Law and the Social Sciences* 136-141 (1935).

²⁶ Ward, *Pure Sociology* 3, 431 (1903).

²⁷ Ward, *Applied Sociology* 338-9 (1906). See also Fleming, *The Role of Government in a Free Society: The Conception of Lester Frank Ward*, 24 *Social Forces* 237 (1946).

action,²⁸ a view closely paralleling Pound's emphasis on the end of law as "a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of goods of existence. . . ."²⁹

The third pioneering American sociologist whose views made considerable imprint on Pound was Albion W. Small who, in the compact world of the early sociologists, was a regular correspondent of both Ward and Ross. Small's training had been in philosophy and theology, and he was highly conversant with the writings of the European scholars who formed such important sources for much of Pound's work. Small too was a firm believer in social engineering; sociology for him had its *raison d'être* in its potential service as a guide to a scientific program of social reform.

Small was also concerned, well before Pound was writing in this vein, with the classification and analysis of human interests as a step in the process of social melioration. Interests were seen as the universal human proclivity and approached with an almost biblical tone. "In the beginning," wrote Professor Small, "were interests."³⁰ An interest was defined as an unsatisfied capacity, an unrealized condition of the organism, a tendency to secure satisfaction of an unsatisfied capacity. In its subjective phase an interest was a desire, and in its objective phase a want, developed when the individual knew something, felt something, or willed something. Therefore, the entire individual or social process consisted in developing, adjusting, and satisfying interests.³¹ These interests were designated in six categories: 1) health, subsuming under it food, sex, and work; 2) wealth; 3) sociability; 4) knowledge; 5) beauty; and 6) rightness.³² Each interest for Small tended to be absolute and to seek satisfaction regardless of others, and the social process resolved itself into a continual formation of groups and institutions around interests, with social life becoming a perpetual equating and adjusting of interests.³³

Small's conception of the State is noteworthy as well in terms

²⁸ Stern, *The Ward-Ross Correspondence, 1891-1906*, 3 Amer. Soc. Rev. 362, 369 (1938).

²⁹ Pound, *An Introduction to the Philosophy of Law* 99 (1942).

³⁰ Small, *General Sociology* 196 (1905).

³¹ *Id.* at 433-4.

³² *Ibid.*

³³ *Id.* at 217.

of Pound's later enunciation of the ideas and elements of sociological jurisprudence:

Civil society organized as the State is composed of individual and group factors, each of which has in itself . . . interests seemingly distinct from the interests of others. Each has some degree of impulse to assert these interests in spite of the others. Thus the State is a union of disunions, a conciliation of conflicts, a harmony of discords. The State is an arrangement of combinations by which mutually repellent forces are brought into some measure of concurrent action.³⁴

Like Ward, Small believed that sociology was ideally suited to adjudicating amongst the varied interests impinging one upon another by bringing to bear its scientific insights, and he attempted to blend his concern with both science and social reform by the following ingenious method of choosing among social values: "The most reliable criterion of human values which science can propose," Small wrote, "would be the consensus of councils of scientists representing the largest possible variety of human interest, and co-operating to reduce their special judgments to a scale which would render their due to each of the interests of the total calculation."³⁵

II. HOLMES AND THE SOCIOLOGISTS

It is important for the historical tracing of the interaction of law and sociology to note that Ward, Small, and Ross did not appeal solely to Roscoe Pound as a lonely venturer into an adjacent and novel academic discipline. Pound distilled and adjusted these early sociological writings into his conception of sociological jurisprudence, and it is unlikely that such a wide diffusion of the ideas would have taken place without Pound's initiative. But that the times were agreeable to such an enterprise can be clearly seen from the hearing given to each of the sociologists by legal figures of the time such as Justice Holmes.

Ross's *Social Control* had been recommended to Justice Holmes in 1906 by Professor Ely of the University of Wisconsin, who was

³⁴ *Id.* at 252-3.

³⁵ Small, *The Meaning of Social Science* 242 (1910). See also Bogardus, *The Development of Social Thought* 305 (4th ed. 1960); Barnes, *Albion Woodbury Small*, Introduction to the History of Sociology 766 (Barnes ed. 1948); Hayes, *Albion Woodbury Small*, American Masters of Social Science 149 (Odum ed. 1927); Goodspeed, *Albion Woodbury Small*, 32 *Amer. J. Soc.* 1 (1926).

responsible for bringing Ross to Wisconsin that year. Holmes read *Social Control* and, in typical fashion, also obtained Ross' *Foundations of Sociology*, read that, and, in equally typical fashion, felt impelled to communicate his considerable enthusiasm to the author of the books,³⁶ as well as to the President of the United States. Theodore Roosevelt, in his turn, also apparently read the books and certainly conveyed his appreciation of them to Ross.³⁷ Twenty years later, Holmes was still recommending Ross' work, now to Harold Laski, who reported that he shared the Justice's "keenness" about the volumes, though he felt the "style is an insult to God,"³⁸ a view from which Holmes explicitly dissented.³⁹

The exposure of Justice Holmes to the work of Small sheds much light on the disenchantment which both he and Laski, and presumably other influential members of the scholarly element in the legal profession, came to feel with sociological work clothed in wrapping more forbidding than Ross' attractive prose. Holmes took up Small's *Meaning of Social Science* in 1919 after hearing that Small was "Pound's great man."⁴⁰ He found Small unoriginal, that "he did not pretend to be saying new things in this book and wasn't."⁴¹ Within a month, Small's book remained to Holmes "but a faint perfume in my mind."⁴² Laski used Holmes' comment on Small as a springboard for a stinging critique both of Small and of Pound himself that merits repetition as an indication of the obstacles that sociological jurisprudence faced in its home discipline:

Pound's Albion Small seems to me to represent exactly the worse side of Pound. Small belongs to that pedantocracy who

³⁶ Holmes wrote that the books were so civilized, so enlightened by side knowledge, often indicated by a single key word, so skeptical yet so appreciative even of illusion, so abundant in insight, and often so crowded with felicities, that it makes me happy to think that they come from America and not from Europe. They hit me where I live . . .

Letter from Holmes to Ross, May 6, 1906, in Ross, *Seventy Years of It* 99 (1936).

³⁷ Letter from Roosevelt to Ross, June 15, 1906, in Ross, *Seventy Years of It* 100 (1936). Perhaps the point concerning law and sociology can most effectively be made by attempting to imagine President Johnson or Chief Justice Warren reading and writing to congratulate a leader in sociological theory, such as Talcott Parsons, on the thrust and importance of his work.

³⁸ 1 Holmes-Laski Letters 62 (Howe ed. 1953).

³⁹ *Id.* at 69.

⁴⁰ *Id.* at 224.

⁴¹ *Id.* at 226.

⁴² *Id.* at 232.

doubts the value of ideas until he has fixed the boundaries of his methodology; who will give you six sentences of a dead authority which a living journalist could express in six words; whose conclusions look formidable until you realize that this vagueness doesn't conceal greatness but mist. It's the great tragedy of Pound's life that he can't see or be made to see that only some books are to be digested. His stomach must resemble an ostrich's . . .

. . . [Pound's] own ideas are almost always clearer and more fruitful than those he cites—[such as in] . . . the cumbersome Juggernaut he rolls along in his paper on sociological jurisprudence. I think he believes in the natural right of every German to be quoted.⁴³

Justice Holmes, more politic, did not respond to the strictures on Pound, but merely indicated that he felt relieved by Laski's accord on his evaluation of Small.⁴⁴

Holmes' letters are also revealing in regard to Ward, and to the general subject of reciprocal relations between law and sociology. Holmes had read Ward, and apparently found him provocative and stimulating. Acting on this feeling, he had gone forth in Washington to meet Ward—"alas, stupidly late"—on hearing that he was about to leave town.⁴⁵ Ward's response to Holmes, despite his own training in law, included a question asking which court it was that Holmes was associated with.⁴⁶ Ward, in fact, sets in clear perspective Holmes' intellectual hospitality by his own written appraisal of the profession he had prepared for but never practiced because his "conscience would not allow it."⁴⁷

There is . . . scarcely a doubt that if nine out of every ten members of the legal profession were eliminated from it and turned into some useful occupation, the ends of justice would thereby be immensely the gainer and thousands of laborers would be added to the industrial pursuits. But this is the class whom the masses intrust with the framing of their laws, and as long as the continue to do so, they must pay the penalty of their stupidity.⁴⁸

⁴³ *Id.* at 235.

⁴⁴ *Id.* at 236.

⁴⁵ Letter from Holmes to Ross, May 6, 1906, in Ross, *Seventy Years of It* 100 (1936).

⁴⁶ *Ibid.* Holmes, not to be burned twice, told Ross that he was "a judge of the U.S. Sup. Ct."

⁴⁷ Ward, *Pure Sociology* 488 (1903).

⁴⁸ Ward, *The Psychic Factors in Civilization* 167 (1893).

The reaction of Holmes and that of Pound to the sociologists and they on their part to the legal scholars who took an interest in their ideas may be summarized as follows: first, because of the congruence of learning and interest between members of the two disciplines, the jurists could be and were interested in cultivating knowledge of sociological writings; second, the sociologists, in general, were receptive to these attentions and felt that they had much to contribute to the resolution of legal problems and what they saw as a somewhat static and anachronistic legal system; third, the sociologists did not believe that there were any particular insights within the law or to be derived from legal processes or scholarship that could be germane to their work⁴⁰—their interest in law can be said to have been rather condescending; fourth, it appears evident that it remained for an individual such as Pound to capitalize on this interdisciplinary congruence by bringing back to the law and incorporating within it, with the legitimacy of his learning and status, segments of the sociological world which, with editing, could fill an important place in jurisprudential thought; and last, there was present even in cosmopolitan legal circles considerable real and latent reluctance to accept as meaningful and worthwhile the sociological position of the time.

III. POUND AND SOCIOLOGICAL JURISPRUDENCE

Pound's writings regarding sociological jurisprudence, like many speculative declarations long in the limelight, have gone through various stages, beginning with a vigorous and confident pronouncement, rather zestful and polemical in nature, then passing through a middle period of extension, formalization, and consolidation, and finally entering a stage of defensive jousting, pointed reiteration and reemphasis and, on occasion, mild impatience with criticism and with the tendency to overlook or ignore the theory's existence. Most of the elements of this final position lie well-hidden, surrounded by lulling displays of extraordinary erudition, for Pound, as a gentleman, maintains great dignity in the face of opposition or indifference, however trying

⁴⁰ An interesting item is the report that John R. Commons, when offered a professorship at Syracuse in the early 1890's, had planned a fifteen-year program in "legal aspects of sociology." Because of Commons's radical views, however, the offer was subsequently withdrawn. 3 Dorfman, *The Economic Mind in American Civilization* 285 (1949).

these may be, and regularly returns to the fray, brandishing for yet another round the tried and trusted paraphrenalia of his sociological jurisprudence.

Pound's initial statement on sociological jurisprudence, completed in Nebraska in 1907, embodied a stirring call for research into legal questions. Though there was much research in other fields, Pound noted,

no one is studying seriously or scientifically how to make our huge output of legislation effective. There are no endowments for juridical research. There are no laboratories dedicated to legal science whose bulletins shall make it possible for the scholar to obtain authoritative data and for the lay public to reach sound conclusions. No one thinks of establishing them.⁵⁰

The time was now ripe for a new approach, which Pound denominated the "sociological tendency" and found well underway in Europe with the work of Stammler, Ehrlich, Gumpłowicz, Vaccaro, and Grasserie. Pound directed his polemics primarily against law teachers, "legal monks who pass their lives in an atmosphere of pure law," teaching "traditional pseudo-science" unsuited for "a restless world of flesh and blood."⁵¹

To bring social reality and legal processes into closer harmony, Pound shortly thereafter began to add jurisprudential flesh to the bones of his initial statement, and to construct the theory of sociological jurisprudence. It was to be a vast product of a long creative lifetime, almost impossible to summarize adequately in a limited amount of space.

The starting point of sociological jurisprudence was the concept of social control, "the pressure upon each man brought to bear by his fellow men in order to constrain him to do his part in upholding civilized society and to deter him from anti-social conduct, that is, conduct at variance with the postulates of social order."⁵² Without organized social control, man's aggressive self-assertion would prevail over his cooperative social tendency and civilization would come to an end. Pound could only agree with

⁵⁰ Pound, *The Need of a Sociological Jurisprudence*, 19 Green Bag 607, 608 (1907).

⁵¹ *Id.* at 611-2.

⁵² Pound, *Social Control Through Law* 18 (1942).

Aristotle's belief that man is inherently the fiercest of beasts.⁵³ Law was seen as a highly specialized form of social control whose purpose was "social engineering," the adjusting of relationships to meet prevailing ideas of fair play. Other segments of the network of social control—such as morals, religion, and education—interact with law to regulate human behavior in varying combinations of strength, depending upon the temper of different kinds of societies in different historical epochs.

A theory of interests, labelled Pound's "most important contribution to legal philosophy" and "one of the significant ideas of the century,"⁵⁴ is central to sociological jurisprudence. For the purposes of the legal system, an interest is defined as "a claim, a want, a demand of a human being or group of human beings which the human being or group of human beings seeks to satisfy and of which social engineering in a civilized society must therefore take account."⁵⁵ To determine interests Pound does not follow the lead of the social psychologist and search out instincts, drives, or behavior tendencies, nor does he look to sociological questionnaires or other methods of attitude measurement; rather Pound relies almost exclusively on the assertions that persons make in legal proceedings and press in legislative proposals as true indicators of their interests vis-à-vis the legal system.⁵⁶

Surveying these claims and rating them according to the insistence of their demand, Pound concludes that first place must be given to the social interest in general security against those forms of action that threaten the social group;⁵⁷ second is the social interest in the security of social institutions, including domestic, religious, and political institutions; third is the general

⁵³ Pound, *supra* note 19, at 332.

⁵⁴ Patterson, *Jurisprudence* 518 (1953). Pound, of course, derived his theory of interests from the work of the German school of *Interessenjurisprudenz*, and particularly from the work of Rudolf von Jhering. Cf. *The Jurisprudence of Interests* (Schoch ed. 1948).

⁵⁵ Pound, *A Theory of Social Interests*, 15 *Proc. Amer. Soc. Soc'y* 16, 29-30 (1921). Other and later statements of the theory are indicated in note 3. See also, Pound, *A Survey of Public Interests*, 58 *Harv. L. Rev.* 909 (1945); Stone, *The Province and Function of Law* 487-649 (1950); Patterson, *Pound's Theory of Social Interests*, *Interpretations of Modern Legal Philosophies* 558 (Sayre ed. 1947).

⁵⁶ Pound, *supra* note 55, at 32-3.

⁵⁷ For the employment of this general proposition as an apparent justification of apartheid, see Pollak, *Roscoe Pound and Sociological Jurisprudence*, 47 *S.A.L.J.* 247, 374, 383 (1930).

interest in morals; fourth, the social interest in the conservation of social resources; fifth, the social interest in general progress, involving the further development of human powers and of human control over nature for the satisfaction of human wants; and sixth, "and in some ways most important of all," is the social interest in the individual life, which includes physical, mental, and economic activity, and especially the freedom of self-assertion.⁵⁸

To supplement his survey of interests, Pound advanced a number of jural postulates, adopting the viewpoint of Joseph Kohler that ". . . every culture has its definite postulates of law, and it is the duty of society from time to time, to shape the law according to these requirements."⁵⁹ Jural postulates, things which "in civilized society men must be able to assume," are values found in individual cultures and as such can influence the choice between rival interests pressing for recognition. Pound noted five jural postulates for our time, including items such as: a) that others will commit no intentional aggressions upon a person; and b) that an individual may control for beneficial purposes what he has discovered and appropriated to his own use, what he has created by his own labor, and what he has acquired under the existing social and economic order.⁶⁰

As a doctrine with its roots deeply planted in the social order, and its orientation clearly directed toward sociology, sociological jurisprudence also advanced a platform of goals. These, intermingling rather indiscriminantly a number of creeds and calls, included: a) study of the actual social effects of legal institutions, legal precepts, and legal doctrines; b) sociological study in preparation for lawmaking; c) study of means of making legal precepts effective in action; d) study of juridical methods; e) a sociological legal history; f) recognition of the importance of individualized application of legal precepts; and g) in English-speaking countries, a Ministry of Justice.⁶¹

⁵⁸ Pound, *supra* note 55, at 33-42.

⁵⁹ Kohler, *Philosophy of Law* 4 (Albrecht trans. 1914). Cf. Elison, *Kohler's Philosophy of Law*, 10 J. Pub. L. 409 (1961).

⁶⁰ For a complete list see Pound, *Introduction to American Law* 36-43 (1919); Pound, *Outlines of Lectures on Jurisprudence* 168, 179, 183-4 (5th ed. 1943).

⁶¹ Pound, *supra* note 1, at 513-5; Pound, *Interpretations of Legal History* 153 (1923); Pound, *Outlines of Lectures on Jurisprudence* 32-35 (5th ed. 1943); 1 Pound, *Jurisprudence* 351-358 (1959).

Many of the preceding elements were tied together by Pound in a much-quoted statement delivered in 1922 during the Storrs Lectures at the Yale University Law School:

For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants—the claims and demands involved in the existence of civilized society—by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognition and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of goods of existence—in short, a continually more efficacious social engineering.⁶²

The foregoing items, barely representing the encyclopedic contents of Pounds' jurisprudential thought, may be enough to indicate that the theory, consciously or unconsciously, was put together with an eye toward its intellectual immortality. Pound was acutely sensitive to the relationship between theoretical positions and the conditions and spirit of the times in which they emerged; in fact, his documentations of social and historical facts and feelings as these relate to the appearance of jurisprudential ideas probably will come to stand as his major and most enduring contribution to legal scholarship. Pound's historical research had clearly shown the lethal consequences for a jurisprudential theory of a major shift in social conditions which rendered its general rationale obsolete, and he would not, if possible, fall into the trap of being time-bound.

Very early, in fact a few months before the composition of his first statement on sociological jurisprudence, Pound has rhetorically conveyed to Justice Holmes an important insight concerning the manner in which ideas come to be catalogued in intellectual inventories and to be associated with some permanence with particular men. "Am I not right," he asked Holmes,

⁶² Pound, *An Introduction to the Philosophy of Law* 98-99 (1922).

"in thinking that this insistence on one point of view as the *unum necessarium* in legal science is what makes a school?"⁶³ The success of Pound's own efforts illustrate the value of his insight. Drawing freely on the works of others Pound was able to create the paradox of eclectic uniqueness through adroit recombination of ingredients, the use of an original label, and the insistence on acceptance of the whole package as a new school of legal thought.

Pound was well aware of the need of jurisprudential doctrine to come to grips with the "lasting and irrefutable truth"⁶⁴ that it must deal directly with "the perennial problem of preserving stability and admitting of change."⁶⁵ The longevity of Pound's sociological jurisprudence, particularly in a period of strikingly rapid social change, testified to careful attention to object lessons concerning the historical fate of inflexible positions. Nonetheless, Pound's theory, with all its resiliency and with its great hospitality to shifts in the social fabric was to prove, almost by definition, too pliant and too general for empirical research essential to its continued growth, however effective and telling the theory became as a pedagogical weapon. Goitein's apt judgment, harsh by its very kindness, seems to make the point well: Sociological jurisprudence, he writes, "may well brave ridicule . . . indeed for its compelling plea for social enlightenment among lawyers it will outlast many a fashion."⁶⁶

IV. ESTRANGEMENT BETWEEN SOCIOLOGY AND LAW

By tying the development of sociological jurisprudence to the progress of sociology, Pound built into his theory a permanent impermanence. At the same time, however, the theory was placed beyond the ability of Pound himself and, apparently, of his followers to maintain the necessary liason with scholarship in sociology and to reckon with the disinclination of sociologists to provide the theory with intellectual nourishment.

In a revealing statement in 1927, Pound clearly indicated the interdependence of sociology and sociological jurisprudence,

⁶³ Letter from Pound to Holmes, April 15, 1907, in Sayre, *the Life of Roscoe Pound* 267 (1948).

⁶⁴ Bodenheimer, *Jurisprudence* 218 (1962).

⁶⁵ Pound, *An Introduction to the Philosophy of Law* 30 (1922); Pound, *Interpretations of Legal History* 1 (1923). Cardozo employed this principle as a basic motif in *The Growth of the Law* (1924).

⁶⁶ Goitein, *Jurisprudence*, 13 *Encyc. Brit.* 196, 198 (1963).

pointing out that "in the past fifty years the development of sociological jurisprudence has been effected profoundly by sociology,"⁶⁷ and then tracing the implications of this intertwined condition:

As [sociological jurisprudence] has followed the development of sociology, and so has gone somewhat rapidly through the changes that have marked the growth of that science, there are those who assume that they may lay hold of some tentative doctrine of a past stage and insist that sociological jurists must adhere thereto for all time. Thus, because the first type of sociologist regarded legal institutions and legal doctrines as products of an inexorable mechanism of social forces, excluding all possibility of effective creative activity, it is often assumed without warrant that such must be the position of the sociological jurist of to-day. Others assume that because at one time sociology went through a descriptive stage, sociological jurisprudence must therefore be a mere gathering of data as to the legal institutions of primitive peoples. Other critics assume that the ethnological and biological interpretations of legal history, which went along with the biological sociology, must inevitably be accepted by the sociological jurist forever after. These things are as much in the past of sociological jurisprudence as they are in sociology. The characteristic marks of the sociological jurists of the present are that they study law as a phase of social control and seek to understand its place in the whole scheme of social order; that they regard the working of law rather than its abstract content; that they think of law as a social institution which may be improved by intelligent human effort and hold it the duty of jurists to discover the means of furthering and directing that effort; and that they lay stress upon the social purposes which law subserves rather than upon theories of sanction.⁶⁸

Quite meaningfully, Pound concluded his essay with the terse observation that "while sociology has done much for jurisprudence, jurisprudence has been utilized less in sociology than its possibilities warrant."⁶⁹ This, in fact, was clear understatement for the bridge between sociological jurisprudence and sociology,

⁶⁷ Pound, *Sociology and Law*, The Social Sciences and Their Interrelations 319, 324 (Ogburn & Goldenweiser ed. 1927).

⁶⁸ *Id.* at 325.

⁶⁹ *Ibid.* Note also this comment on sociological jurisprudence: "[W]hile it is undoubtedly a school of jurisprudence it is hardly a school of sociology." Lepaulle, *The Function of Comparative Law*, 35 Harv. L. Rev. 838, 839 (1922).

never too stable, had collapsed almost totally as sociology turned from the Ward-Ross-Small type of speculative, yet rather systematic form of social analysis,⁷⁰ toward greater methodological precision, toward research stressing informal groups rather than institutional patterns, and toward ethical neutrality and the avoidance of value-laden issues.⁷¹ Evidence of this estrangement between law and sociology appears on all sides during the period between 1920 and the Second World War, and continues to be prominent today.

The early rationale of sociology, arising from "that general groping for social betterment produced by the misery that came in the wake of the industrial revolution and the factory system"⁷² came to be caricatured by later sociologists as a preoccupation with "sex, sin, and sewage."⁷³ Sociologists began to value the work of persons whom, as Riesman puts it, "with no philosophical training, consume their time affixing exact degrees of significance to insignificant correlations and never get around to discovering anything new about society."⁷⁴

By 1939, Ward's biographer could plaintively label him "A Buried Caesar"⁷⁵ and note that "most American teachers of sociology will smile tolerantly at the mention of his name as one

⁷⁰ The sociology before their time and in lesser circles has been aptly described by Ross as "a turgid mass of stale metaphysics, dark sayings, random historical allusions, and mawkish ethical raptures." Book Review, 12 *Educ. Rev.* 88, 92 (1896).

⁷¹ See Mills, *The Sociological Imagination* (1959).

⁷² Barnes, *Development of Sociology*, Contemporary Social Theory 3 (Barnes ed. 1940).

⁷³ Becker, *Anthropology and Sociology*, For a Science of Social Man 102, 145 (Gillin ed. 1954).

⁷⁴ Riesman, Thorstein Veblen 48 (1953). Cf. Lynd, Knowledge for What? 183 (1946): "Research without an actively selected point of view becomes the ditty bag of an idiot, filled with bits of pebbles, straws, feathers and other random hoardings." Note contra, Holmes, *Law in Science and Science in Law*, 12 *Harv. L. Rev.* 443, 444 (1899): "I somewhat sympathize with the Cambridge mathematician's praise of his theorem, 'The best of it all is that it can never by any possibility be made of the slightest use to anybody for anything.'"

Riesman has spoken of the misunderstanding that can result when lawyers, still presuming the social welfare motif in sociology, approach sociologists for assistance:

[W]hen a law professor comes to a sociologist because he is worried about the unequal distribution of justice, and regards legal aid work as a drop in the bucket, the latter's preoccupation with methodology and lack of reformist concern may surprise him and send him back to his own devices.

Riesman, *Law and Sociology*, Law and Society 12, 30-1 (Evan ed. 1962). Note: Lloyd, Introduction of Jurisprudence 190 (1960): "... the sociological creed is essentially an optimistic one which puts its faith in human perfectibility, especially in social relations."

⁷⁵ Chugerman, Lester F. Ward: the American Aristotle 64 (1939).

who lived in the dim nineties and has been left far behind."⁷⁶ "As far as American sociology was concerned," another writer noted, "Ward was dead long before he died."⁷⁷ Of Small it was said that his "permanent influence upon sociology through his writings will ultimately prove slight and ephemeral as compared with the impress of his personality and personal activities upon the development of the sociological movement."⁷⁸ It was unlikely, it was said of the third of the American sociologists who had provided focus for sociological jurisprudence, that Ross' "system as such will ever have a great deal of importance for formal social theory."⁷⁹ During the following half century, only a handful of texts supplementing Ross' original work on social control were published, and these were generally unsophisticated in their approach to law, retrogressing rather than advancing from Ross' initial position. Perhaps somewhat stronger than most, the following quotation from one such text is nonetheless not atypical:

Probably no profession in America is so much emerged [*sic*] in tradition as is the legal profession. To date, it has had no forward look, no serious research interests, and had made no serious effort to relate the practices of law to problems of human welfare and human adjustment. For the most part, the law has been punitive in its attitude and involved only with questions of interpreting statutes, not with questions of human relationships as such.⁸⁰

The only significant gestures from sociology toward law during this period appeared in two works in the field of "sociology of law."⁸¹ These treatises were products of European-trained jurists and their sociology was too speculative to gain recognition in America and their jurisprudence too remote from Pound's to make much impress there. Timasheff in 1938 had pronounced his work as part of "the new science called the sociology of law"

⁷⁶ *Id.* at 70.

⁷⁷ Burnham, Lester Frank Ward in American Thought 10 (1956).

⁷⁸ Barnes, *supra* note 35, at 788.

⁷⁹ Kolb, *supra* note 12, at 831. See also Foreword, Social Control and Foundations of Sociology (Borgatta & Meyer ed., 1959); Hollingshead, *The Concept of Social Control*, 6 Amer. Soc. Rev. 217 (1941).

⁸⁰ Landis, Social Control 444-5 (rev. ed. 1956). See also Lapiere, A Theory of Social Control 316, 318-9 (1954).

⁸¹ Timasheff, An Introduction to the Sociology of Law (1939); Gurvitch, Sociology of Law (1942). Ehrlich, Fundamental Principles of the Sociology of Law (Moll trans. 1936) does not figure in this development, having originally been published in 1913.

whose object was "the determination and the coordination of human behavior in society by the existence of legal norms" and through the use of "causal-functional investigation."⁸² But two decades after his original statement, Timasheff was willing to concede that "interaction between general sociology and the sociology of law has been superficial" and he anticipated that it would remain so until sociology of law developed "something tangible and sufficiently verified to offer for incorporation into the central core of sociological theory."⁸³

Pound took considerable pains with the appearance of these European works to spell out the relationship between sociology of law and sociological jurisprudence and to relegate the former to its own non-preemptive niche. "Sociology of law is not sociological jurisprudence," Pound stressed, and it could not "assume to dispense with jurisprudence" though it might serve as a critic, along with the philosophy of law, and might help to correct the specialized generalizations of sociological jurisprudence. But sociological jurisprudence had a field and a mission to which neither sociology nor philosophy of law was "wholly adequate, important as each is to the jurist who would be assured of a wide knowledge of his subject."⁸⁴

The views of Pound concerning the presumptions of sociology of law and the neglect by American sociology of legal matters were put forward quite succinctly in a 1943 article.⁸⁵ Pound indicates that there had been hostility among common-law lawyers toward sociology as it developed and gained recognition in America, though he supports this observation with citations to writings obviously hostile not primarily to "that science which deals with social man and is awkwardly termed 'sociology,'"⁸⁶ but rather to the importation of sociology, seen as a form of German-bred socialism, into legal matters.⁸⁷ Pound, with apparent pique, also quotes Gurvitch's bland assumption that sociologists and

⁸² Timasheff, *op. cit. supra* note 81, at 30.

⁸³ Timasheff, *Growth and Scope of Sociology of Law, Modern Sociological Theory in Continuity and Change* 424 (Becker & Boskoff ed. 1957).

⁸⁴ Pound, *Preface*, Gurvitch, *Sociology of Law* xv (1942).

⁸⁵ Pound, *Sociology of Law and Sociological Jurisprudence*, 5 U. Toronto L.J. 1 (1943).

⁸⁶ Fowler, *The New Philosophies of Law*, 27 Harv. L. Rev. 718, 727 (1914).

⁸⁷ *Ibid.* Also Fowler, *The Future of the Common Law*, 13 Colum. L. Rev. 595 (1913). Note Fowler's remark:

Most 'jurists' hate law as an art and love only its speculative side. The
(Continued on next page)

jurists, each having hollowed out his respective gallery, have finally come together in (Gurvitch's) sociology of law,⁸⁸ and then attempts to rebut the charge that sociological jurisprudence has an unscientific tendency to take up concrete problems and pronounce judgments of value. Perhaps the best answer to this, Pound retorts, barely providing an answer at all, is that made by Amos; "[Sociological jurisprudence] cuts ice."⁸⁹ Sociological jurisprudence must wrestle with things such as values, says Pound, "even if sociology of law, as a theoretical science, must not."⁹⁰

Pound also notes his continuing allegiance to the brand of sociology now in disfavor, and by his choice of verbs indicates his awareness of its status: "American sociology . . . has been devoted largely to social problems and to extensive and intensive picturing of contemporary social conditions. . . . It was in connexion with sociology of this type that American sociological jurisprudence arose."⁹¹ Finally, Pound reiterates the need, still existing, to accomplish the goals set forth forty years before as the program of sociological jurisprudence:

The task laid down in the programme of American sociological jurisprudence is always at hand to be done. If sociology on one side, and jurisprudence on the other, must be so narrowly limited as to exclude it, then, if we cannot redefine we shall have to claim the goodwill of the two names as the exponents of sociology of law are claiming the goodwill of the name "law."⁹²

(Footnote continued from preceding page)

true man of law, the plain, practicing, busy useful lawyer, has little time for philosophical tangles; he is otherwise engaged as a champion in the actual battles of legal life, avenging the wrong and injured, and defending the accused.

Id. at 603.

⁸⁸ Gurvitch, *op. cit. supra* note 81, at 3.

⁸⁹ Pound, *supra* note 85, at 20. The quote is from Amos, *Roscoe Pound, Modern Theories of Law* 86, 90 (Jennings ed. 1933). Sir Maurice, however, was not above a little needling of his own, such as when he indicates that sociological jurisprudence must be "translated into less repellent language." *Id.* at 101.

⁹⁰ Pound, *supra* note 85, at 20.

⁹¹ *Id.* at 9.

⁹² *Id.* at 5. Note also:

What we require is not a philosophy of law that seeks to force law into the bed of Procrustes of its system, nor a sociology of law that runs to methodology and seeks to justify a science of society by showing that it has its own special method by which then all the phenomena of social life are to be tried, but a sociology that knows how to use philosophy and a sociological jurisprudence that knows how to use social philosophy and a philosophical sociology.

Pound, *Social Control Through Law* 7 (1942).

V. SOCIOLOGY AND LAW: GROWING RAPPROCHEMENT

The tendency of sociology to return to matters of immediate social concern seemed to take form soon after the conclusion of the Second World War. Louis Wirth, surveying sociological developments from 1895 to 1947, indicated the shift:

In recent years sociology seems to have begun to move into a phase closely resembling the period of initial enthusiasm for sociology in America. This phase is marked by a return to the original interest of sociologists in the actual problems of man in society. The presently emerging orientation of sociology differs from that of a generation ago, however, in several important respects; in Small's day the passion for solving the practical problems of society was supported and sustained by little more than faith that sociology could discover a scientific foundation for ethics and social policies and was guided in its investigations largely by unproved but intuitively plausible broad philosophical notions concerning human nature, the social order and social dynamics.

The contemporary return of sociology to the original interest of its intellectual progenitors in contrast is distinguished by more tempered expectations. . . . Rather than aspiring to the role of value-setter, the contemporary sociologist is increasingly sensitive to the fact that science, or at least science alone, cannot set values.⁹³

Only a few of the indications of the rapprochement between law and sociology can be noted in the remaining space; perhaps the most obvious have been two recent volumes, fostered primarily by sociologists, and dealing with areas of mutual concern to their discipline and the law.⁹⁴ Articles in both books, as well as in other recent publications, take up a number of basic issues of cooperative research and spell out with some precision unresolved questions, allowing for their further examination by scholars in either discipline. Selznick, for instance, maintains that sociology will best help legal research by meticulously "tending its own garden,"⁹⁵ while Strodtbeck takes an opposing posi-

⁹³ Quoted in Bramson, *The Political Content of Sociology* 93-4 (1961).

⁹⁴ *Law and Sociology* (Evan ed. 1962); F. J. Davis, *Society & the Law* (1962).

⁹⁵ Selznick, *The Sociology of Law*, *Sociology Today* 115, 117 (Merton ed. 1959).

tion: By concentrating on real legal issues, he insists, sociologists will be forced to sharpen their analytical tools to a finer edge.⁹⁶

Joint research efforts by sociologists and lawyers remain sparse enough to be catalogued briefly by writers seeking to indicate such endeavors;⁹⁷ their existence alone, however, betokens an obvious trend, even though, as it has been aptly expressed, the relationship between law and sociology "is still limited to the self-chosen initiates, and has not become part of the routine kit of working tools of either profession."⁹⁸ Perhaps the most significant development appears in the growing demand that the social sciences concentrate greater attention on questions of values. It is being urged that the stress on cultural relativism, long fashionable in sociology, is itself the outcome of a value commitment, probably based on humanistic and pedagogical considerations, that "normative systems" represent vital and ascertainable units of sociological investigation, and that "a vigorous research program, devoted to the formulation and testing of natural law principles" [*i.e.*, items showing "unity in diversity"] "might do much to advance both the cause of justice and sociological truth."⁹⁹

Abandonment of the harbor of methodological security comes hard, however, and the anticipated loss of "pure" scientific objectivity raises certain yearnings in research sociologists setting out on the journey into a value-laden world. These doubts, expressed with particular sensitivity and awareness by a younger sociologist, indicate both the direction in which sociological thinking and the resistance it must overcome before traveling comfortably along that path:

. . . The relation of scholarship to political involvement is very complex. In the end they don't mix well . . . but I believe

⁹⁶ Strodbeck, *Social Process, the Law and Jury Functioning*, Law and Sociology, *op. cit. supra* note 94, at 144, 163. Strodbeck receives support from Riesman who suggests that an examination of research done in response to "the track of the discipline" shows no more seminal character than research done in "quest of an answer to an extra-academic problem." Riesman, *supra* note 74, at 41.

⁹⁷ See Geis, *Sociology and Crime*, Sociology of Crime 7, 25 (Roucek ed. 1961); Univ. of Cal., Berkeley, Ann. Rpt., Center for the Study of Law & Society (1962).

⁹⁸ Blumrosen, *Legal Process and Labor Law*, Law & Sociology, *op. cit. supra* note 94, at 185-6.

⁹⁹ Selznick, *Sociology & Natural Law*, 6 Natural L. Forum 84, 108 (1961).

in mixing them anyway. Personally, I prefer the half-successful scholar-politician to the serenely and completely successful half-man. That is why I have a stubborn, ineradicable admiration for [C. Wright] Mills, despite his shortcomings [as a scientist]. . . .¹⁰⁰

The meaning of the reconsideration by sociologists of legal matters for the future of sociological jurisprudence is far from clear. Sociologists to date have paid virtually no attention to Pound's doctrine, either in terms of rejecting it, refining it for their purposes, or supplementing it with sociological material of more recent vintage. Pound himself did not keep the theory abreast of sociological developments, perhaps, as indicated, because such work was not relevant to his position.¹⁰¹

If sociology were to devote attention to sociological jurisprudence as a doctrine from which to derive empirical leads, then it might attempt to operationalize segments of Pound's theory; for instance, by employing content analysis techniques to determine the interplay of interests as these appear in appellate briefs or appellate decisions. Jural postulates might be measured against the expressed preferences of samples of persons, in terms of real or simulated legal conflicts. While such work could be profitable, it seems likely that sociological jurisprudence will continue to be found wanting as a springboard for sociological investigations into the legal system. For scholars approaching sociological jurisprudence from a legal base, it appears that it can be taken only so far without carrying into the realm of sociology or other branches of the social sciences. Riesman's judgment seems pertinent here:

The early advocates of sociological jurisprudence were unduly sanguine . . . Many of them hoped to storm the fortress of law without extensive empirical work but with what now appear as semantic and epistemological slogans. The effect of these slogans was at first stimulating, especially when they were felt to be part of a general movement toward realism and debunking vis-à-vis American institutions. Now that the

¹⁰⁰ Berger, Letter, N.Y. Times Book Rev., June 2, 1963, p. 25, col. 3. See also Berger, *Adolescence and Beyond*, 10 Social Problems 394 (1963).

¹⁰¹ It is interesting that Pound has also been accused of being inattentive to later legal writers, "many of whom were writing while Pound was still in powerful spate." Llewellyn, *Jurisprudence* 496 (1962).

tasks loom in their true magnitude, I hope that scholars will nonetheless persevere.¹⁰²

If scholars do persevere—both legal and sociological scholars—as it seems likely they will, then the prediction of Ziesel also appears to be accurate, that “the main thrust of sociological inquiry into the law, in this country at least, will follow the narrower if safer road of empirical research, rather than broad speculative tradition, although ultimately the two should link up.”¹⁰³ If this is true, and it is suggested that it is likely, then it seems equally reasonable to suppose that sociological jurisprudence itself will disappear as a distinguishable entity, except for historical purposes, and that a new amalgamation of sociology and related sciences with law, perhaps labelled functional jurisprudence in law,¹⁰⁴ and the sociology of law in sociology, will bring together anew the insights and research findings achieved and to be achieved by work in the two disciplines.

¹⁰² Riesman, *supra* note 74, at 15.

¹⁰³ Ziesel, *Social Research on the Law, Law & Sociology, op. cit. supra* note 94, at 124, 126.

¹⁰⁴ The term is suggested in Paton, *A Text-Book of Jurisprudence* 17 (2d ed. 1951), and Paton, *Pound and Contemporary Juristic Thought*, 22 *Can. B. Rev.* 479, 483 (1944).