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Roscoe Pound and His Theory of Social Interests

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ROSCOE POUND AND HIS
THEORY OF SOCIAL INTERESTS

by

Joseph Clarence Verhelle, S.J.

A Thesis Submitted to the Faculty of the Graduate School
of Loyola University in Partial Fulfillment of
the Requirements for the Degree of
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LIFE

Joseph Clarence Verhelle, S.J., was born in Chicago, Illinois, January 10, 1921.

His high school years, 1934 to 1938, were spent at the University of Detroit High School. In 1942 he graduated from Georgetown University, Washington, D.C. with a Bachelor of Arts degree.

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During the school years 1953 to 1955 he taught at the University of Detroit High School.

SIGLA and PLACE OF PUBLICATION

Title	Abbreviation	Published
Alabama Law Journal	Ala. L.J.	Montgomery, Ala.
American Bar Association Journal	A.B.A.J.	Baltimore and Chicago
American Law Review	A.L.R.	St. Louis, Mo.
Boston University Law Review	Bos. U.L.R.	Boston, Mass.
Canadian Bar Review	Can. B.R.	Ottawa, Can.
Catholic University Law Review	Cath. U.L.R.	Washington, D.C.
Columbia Law Review	Col. L.R.	New York, N.Y.
Cornell Law Quarterly	Cor. L.Q.	Ithaca, N.Y.
Fordham Law Review	For. L.R.	New York, N.Y.
Georgetown Law Journal	Geo. L.J.	Washington, D.C.
George Washington Law Review	Geo. W.L.R.	Washington, D.C.
Green Bag	G.B.	Boston, Mass.
Harvard Law Review	Har. L.R.	Cambridge, Mass.
Illinois Law Review	Ill. L.R.	Chicago, Ill.
Indiana Law Journal	Ind. L.J.	Bloomington, Ind.
Iowa Law Review	Ia. L.R.	Iowa City, Ia.
Kentucky Law Journal	Ken. L.J.	Lexington, Ky.
Law Quarterly Review	L.Q.R.	London, Eng.
Louisiana Law Review	La. L.R.	Baton Rouge, La.
Marquette Law Review	Mar. L.R.	Milwaukee, Wis.
Miami Law Quarterly	Mi. L.Q.	Miami, Fla.
Michigan Law Review	Mich. L.R.	Ann Arbor, Mich.
Michigan State Bar Journal	Mich. St. B. J.	Lansing, Mich.
Minnesota Law Review	Minn. L.R.	Minneapolis, Minn.
Mississippi Law Journal	Miss. L.J.	University, Miss.
Nebraska Law Bulletin	Neb. L.B.	Lincoln, Neb.
New York University Law Quarterly Review	N.Y. U. Q. R.	New York, N.Y.
North Carolina Law Review	N. Car. L.R.	Chapel Hill, N.C.
Notre Dame Lawyer	N. D. L.	Notre Dame, Ind.
Ohio State Bar Journal	O. St. B. J.	Columbus, Ohio
Oregon Law Review	Ore. L.R.	Eugene, Ore.
Pittsburg Law Review	Pitt. L.R.	Pittsburg, Pa.
Syracuse Law Review	Syr. L.R.	Syracuse, N.Y.
Tennessee Law Review	Tenn. L.R.	Knoxville, Tenn.
Tulane Law Review	Tul. L.R.	New Orleans, La.
University of California, Los Angeles Law Review	UCLA L.R.	Los Angeles, Calif.
University of Cincinnati Law Review	Cin. L.R.	Cincinnati, Ohio
University of Chicago Law Review	Chi. L.R.	Chicago, Ill.
University of Pennsylvania Law Review	Pa. L.R.	Philadelphia, Pa.

Title	Abbreviation	<u>Published</u>
University of Toronto Law Journal	Tor.L.J.	Toronto, Can.
Vanderbilt Law Review	Van.L.R.	Nashville, Tenn.
Virginia Law Review	Va.L.R.	Charlottesville, Va.
West Virginia Law Quarterly	W.Va.L.Q.	Morgantown, W.Va.
Wisconsin Law Review	Wis.L.R.	Madison, Wis.
Yale Law Journal	Yale L.J.	New Haven, Conn.

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CHAPTER I

TWO BASIC ERRORS

You may think of philosophy as dwelling in the clouds. I hope that you may see that she is able to descend to earth. . . . You may think that there is nothing practical in the theory that is concerned with ultimate conceptions. That is true perhaps while you are doing the journeyman's work of your profession. You may find in the end, when you pass to higher problems, that instead of being true that the study of the ultimate is profitless, there is little else that is profitable in the study of anything else.¹

Dean Roscoe Pound as a teacher, scientist, historian, legal and political scholar has not only become one of the foremost authorities in bringing the philosophy of law to earth, digesting it, correlating it and criticizing it, but as a true reformer has set forth a positive constructive theory of his own. A prolific writer, his ideas have helped mold the legal instruction and legal philosophy of our times.

It is our purpose here to examine the history and legal philosophies of his day, so necessary for an intelligent understanding of precisely in what Pound's criticism as a legal reformer consisted and more especially as an aid in grasping his

¹ Benjamin W. Cardozo, The Growth of the Law, New Haven, 1924, 23.

own positive philosophy as to its evolution, method and content. It will also aid us in an evaluation of his doctrine which has taken such a marked hold on the legal thought of today that such an influential jurist as John C.H. Wu once stated that: "A definite philosophy of law is now actually in existence whose founder and exponent is none other than Professor Pound himself."²

There is pretty general agreement that the theory of law dominant in the nineteenth century and the early part of the twentieth embodies some fundamental errors of social philosophy. The views of the three schools of jurisprudence which exercised the greatest influence on the theory and to a large extent the practice of law during this period offended in two major respects. Firstly, law was unable to adapt itself to changing conditions, especially social changes, since rules of law, whether codified as advocated by the analytical school, or as derived from theories of law, as the historical and philosophical schools insisted, were presumed to be amenable to perfect application. Yet law in such a case was conceived apart from its functional role in

² John C.H. Wu, "The Juristic Philosophy of Roscoe Pound," Ill. L. Rev., Chicago, XVIII, January, 1924, 285. See also Paul Sayre, The Life of Roscoe Pound, Iowa City, 1948; F.J. Powers, "Some Reflections on Pound's Jurisprudence of Interests," Cath. U. L. Rev., Washington, D.C., III, January, 1953, 10; George R. Farnum, "Roscoe Pound--His Significance in American Legal Thought," Boston U. L. Rev., Boston XIV, November, 1934, 715-727.

society.³ Secondly, the controlling premise in all these philosophies of law was the principle of freedom. As far as possible the rules of law were molded and interpreted to express this principle: individual rights must be protected. This was the objective legislators were always to keep in mind. In point of fact, judges, often unconsciously, accepted this doctrine as their first principle, oftentimes to the detriment of the common good.

The prevailing schools which echoed the spirit of the times and which were the object of Pound's criticism were the historical school, the analytical school, and the metaphysical or philosophical school.

Mechanical Jurisprudence

The historical school placed uppermost the mass of traditional ideas and customs from which actual legal rules are derived. Law could no more be made than language; each was a growth upon the basis of a received tradition--the latter a thought to which Pound himself would subscribe.⁴ Since law is something found and not made, the legislator had no function.

³ See Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," Har. L. Rev., Cambridge, XXIV, February, 1911, 591-603, XXV, December, 1911, 141; Jerome Frank, Law and the Modern Mind, New York, 1931, ix.

⁴ See Roscoe Pound, The Spirit of the Common Law, Boston, 1926, 165.

The historical jurist conceived that a principle of human action or of social action was found by human experience and was gradually developed into and expressed in a rule. Hence they denied that the law was the product of conscious or determinate human will. They doubted the efficacy of legislation in that it sought to achieve the impossible and to make what cannot be made.⁵

To the historical jurist:

Law is something that is not and in the long run cannot be made consciously. They see chiefly social pressure behind legal rules. To them sanction is to be found in habits of obedience, public sentiment and opinion, displeasure of one's fellowmen, . . . Their type of law is custom, or those customary modes of decision whereby the life of a people makes itself felt in a gradual development by molding those rules to the conditions of the present.⁶

The historical school of jurists and all the exponents of positivist theories of jurisprudence sought a complete separation of law and morals. The ethical and moral ideas of earlier times which were translated into effective legal norms were to be replaced by customs and principles of action which emanated from the sentiments of the people of a given time and locality. The process of finding the law was through a search among such customs and conventions.

The positivist school of analytical jurisprudence,

⁵ Ibid., 155. Cf. also Ibid., 160.

⁶ Pound, "Scope and Purpose of Sociological Jurisprudence", Har. L. Rev., XXIV, 599. See also Roscoe Pound, The Formative Era of American Law, New York, 1950, 102.

which focused its attention primarily on statutes and on the interpretation of law by the courts, superseded to a large extent the historical school. For it, moral norms of the previous century were replaced by rules of action formulated by a political sovereign, which became intrinsically just by the acceptance and promulgation of the state.⁷

Where the historical jurist pursued a comparative study of the origin and development of law, legal systems, and particular doctrines and institutions, the analytical jurist pursued a "comparative study of the purposes, methods and ideas common to developed systems and of their doctrines and institutions in their matured forms."⁸ Law was something made consciously by lawgivers--either legislative or judicial. It referred to one thing, namely the body of authoritative materials in which courts found or were held bound to find the grounds of decision. Every attempt was made to exclude everything from consideration except precepts established by the authority of the state. The analytical jurist proceeded on the supposition that law in the sense of a body of authoritative grounds of or guides to judicial determination of controversies and administrative regulation of activi-

⁷ Roscoe Pound, Law and Morals, 2nd, Chapel Hill, 1926, 21-25.

⁸ Pound, "Scope and Purpose of Sociological Jurisprudence," Har. L. Rev., XXIV, 594.

ties is an aggregate of logically interdependent rules.⁹ It is not social pressure behind legal rules but the enforcement by the judicial organs of the state which constitutes sanction. Nothing that lacks an enforcing agency is law.

A universal framework of developed systems of law was to be reached through analysis of necessary legal conceptions involved in the very idea of law or of law in the developed state.¹⁰

No room under such a theory was left for changing circumstances or social conditions or different cultures. Law came tightly packed, complete in its own little legislative box with sometimes very little reference to reality and leaving no creative function for the jurist.

Meanwhile the philosophical jurist studied the philosophical and ethical bases of law, legal systems, and particular doctrines and institutions and criticized them with respect to such bases.

The philosophical jurists postulated a body of principles derivable logically from an ultimate metaphysically demonstrated fundamental. This fundamental was to serve as a starting point for juristic reasoning, and along with the principles derived from it,

⁹ See Roscoe Pound, "Future of Law," Yale L. J., New Haven, XLVII, November, 1937, 1-13.

¹⁰ See Roscoe Pound, "Fifty Years of Jurisprudence," Har. L. Rev., L, February, 1937, 551-582.

to furnish a guide to law making and critique of legal institutions, doctrines, and precepts.¹¹

In opposition to the analytical jurist, the historical jurist and the philosophical jurist agree that law is found and not made, differing only in what it is that is found. The philosophical jurist conceives that a principle of justice and right is found and expressed in a rule; the historical jurist that a principle of human action or of social action is found by human experience and is gradually developed into and expressed as a rule.¹²

Pound's primary objection to all of these theories and the objection also of other modern legal theorists is the apparent absolute universality and hence lack of flexibility of the law itself. Speaking of the aims of analytical jurists he says:

A generalized comparative anatomy of developed law was to be achieved by an analysis of "law" proceeding to analysis of conceptions necessarily presupposed by and involved in the idea of law, and passing to comparative analysis of the general conceptions common to developed systems of law. From this comparative anatomy we were to get a universal classification.

Historical jurists conceived that such a comparative anatomy could be worked out on the basis of universal conceptions discovered by historical study.

Philosophical jurists in much the same way sought to deduce a universal classification from

11 Ibid., 562.

12 Pound, "Scope and Purpose of Sociological Jurisprudence," Har. L. Rev., XXIV, 599. See also Roscoe Pound, The Spirit of the Common Law, 153-155; Roscoe Pound, Law and Morals, 23-25.

some fundamental datum such as free will, or liberty, or personality.¹³

It is not the purpose here to discuss the adaptability of scholastic natural law principles to Pound's objection,¹⁴ nor to question whether his interpretation of the natural law is correct. The only purpose is to point out what Pound rebelled against and what led up to his theory of social interests. Suffice it to say, his reference is to the so-called natural law of the late eighteenth and early nineteenth centuries typified by such philosophers as Kant and Hegel. He himself makes this distinction.¹⁵

For Pound law should be a means toward the peaceable ordering of society--a regulating agency in society--while the state itself is the organ of social control.¹⁶ But law has be-

13 Pound, "Fifty Years of Jurisprudence," Har. L. Rev., L, 565.

14 Cf. infra, 63-66. For the scholastic natural law Theories see Anton Hermann Chroust and Frederick A. Collins, Jr. "The Basic Ideas of the Philosophy of Law of St Thomas Aquinas as Found in the 'Summa Theologica'," Marq. L. Rev., Milwaukee, 26, 1941, 11-29; Harold R. McKinnon "Natural Law and Positive Law," Notre Dame Lawyer, Notre Dame, 23, 1948, 125. Fathers Parsons, Rueve, Millar, Noonan, Obering, "Symposium on the Natural Law," Modern Schoolmen, XVII, January, 1937. Rev. Michael Cronin, Science of Ethics, 2nd, I, New York, 1920, 633-686. Also Francis E. Lucey, S.J., "Natural Law and American Legal Realism -- Their Respective Contributions to a Theory of Law in a Democratic Society," Geo. L. Jour., Washington, D.C., XXX, 1942, 493.

15 Pound, Law and Morals, 33.

16 See Pound, The Spirit of the Common Law, Ch. 6, "The Philosophy of Law in the Nineteenth Century," 139-165, esp. 139-140.

come an end in itself, with no reference to its social function. New situations are met by deductions from old principles. Such a rigidity of rules, such an uncreative, deterministic philosophy of law, such a dichotomy between the legislative and judicial function of government results in a lack of social progress and a mechanical administration of justice which in the long run must break down.¹⁷ The philosophical approach tends to take the form of over-abstractness leading to empty generalities and ambiguities--a tendency to treat abstractions as independent entities. The cure is discussed without reference to a particular patient. Moreover, all systems are sometimes used to work out specious reasons for doctrines instead of criticizing them, thus further entrenching them in juristic thought. The legal order instead of being a combination of law and the trained reason of the judge has become arbitrary, impractical and in many cases results in injustice.¹⁸

In pursuance of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection seizes upon jurists--justice in concrete cases ceases to be their aim. Instead they aim at a thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty which shall permit judicial decision to be predicated in detail with absolute assurance.¹⁹

17 See Pound, "Scope and Purpose of Sociological Jurisprudence," Har. L. Rev., XXIV, 594-595.

18 Ibid., 596; Also see Pound, Law and Morals, 86.

19 See Roscoe Pound, "Mechanical Jurisprudence."

It is largely out of his opposition to this theory and to the nineteenth century non-creative views of law, which have outlived what usefulness they possessed, that Pound's own view takes shape. Law must be adapted to changing conditions and social progress.

Exaggerated Individualism

The second major error exemplified by the juristic philosophies of the day and seconded by the economic and political theories and practices of the early and middle nineteenth century was the exaggerated concept of individualism and individual liberty. Economic liberalism fostered by the philosophy of Adam Smith, John Stuart Mill, and the Manchester School, and encouraged in practice by leaders of the Industrial Revolution was at its zenith by the middle of the eighteenth century.

The half century following the Civil War saw both the culmination of the economic philosophy of laissez faire and the reaction against it. . . . The laissez faire doctrine of Adam Smith and his successors had been accepted as final by the great majority of Americans, . . . and a fitting capstone had been put upon the theories by the first section of the Fourteenth Amendment. . . . To the rising capitalist, and in fact to the average citizen it seemed not only unnecessary but bad economics to regulate private capital.²⁰

Col. L. Rev., New York, VIII, December, 1908, 605-623.

²⁰ Edward Frank Humphrey, An Economic History of the United States, New York, 1931, 430.

Not only should the laws of economics operate unhampered and uncontrolled by state, morality or religion, but under theegis of such men as Comte and Darwin a mechanical application of the physical laws of nature actually swayed the minds of men. Not only was this mechanical application shifted to civil law, but it also led to the notion that all law worked automatically--that any interference was to the detriment of the one interfering and of society.

In the United States, especially, during pre-civil war days--a period of growth and expansion to new frontiers--individual initiative was encouraged and fostered.²¹ And in the formation of Anglo-American law the conflicts of court and crown inspired by Stuart tyranny left its mark in the form of an attitude that regards law as primarily a bulwark protecting the individual against the government.²²

Our legislation, too, in many departments was dominated by the conception of man as a free and independent individual. Reflecting the influence of Rousseau's wild view of human nature

21 See Pound, The Spirit of the Common Law, Ch. 5, "Pioneers and the Law," 112-138; also Roscoe Pound, The Formative Era of American Law, New York, 1950, 6-8.

22 See Pound, The Spirit of the Common Law, Ch. 3, "The Courts and the Crown," 60-84; also Pound, The Formative Era of American Law, 58; Roscoe Pound, Criminal Justice in America, New York, 1930, 105.

and Kant's theory of will, the tendency was to regard man as essentially an independent individual and only secondarily a member of society. Hence jurists of the last century considered any law involving restraints on liberty justified only in so far as it aided in maintaining liberty.²³

They conceived that the legal order was to be held down to the minimum which was required to protect the individual against aggression and to secure the harmonious co-existence of the free will of each with the free will of all.²⁴

It is no wonder, then, that the lawyer of the day steeped in notions of liberty, considered it his primary task to promote and foster it.²⁵

The analytical, historical, and philosophical jurists found their theories of law giving added force to this rising individualism in "a striking example of the way in which the same

23 "Law exists for the sake of liberty. . . . It exists to protect liberty in that it limits arbitrary will. . . ." Arndts, Juristische Encyklopadie (2d ed. 1850) par 12. "Every rule of law in itself is an evil, for it can only have for its object the regulation of the exercise of rights, and to limit the exercise of a right is inevitably to limit it." Beudant, Le Droit Individuel et L'Etat (1891), 148. "Liberty . . . is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it." Carter, Law: Its Origin, Growth, and Function (1907), 337. Cited by Pound in "A Survey of Social Interests," Har. L. Rev., LVII, October, 1943, 8.

24 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 11-12.

25 Ibid., 12.

conclusion may sustain the most divergent philosophical premises."²⁶ Hence for the dominant social and legal philosophies of the nineteenth century, the immediate end of law consisted in giving expression to the free will of the individual subjects, and "the conception of justice as the securing of maximum self assertion became an axiom of juristic thought"²⁷.

Under the impetus of Kantian ethics the champions of individualism received philosophical justification. The philosophical jurists developed Kant's idea that the securing of absolute, eternal, universal, natural rights of individuals meant securing freedom of will to everyone so far as is consistent with other wills. Their basic position was that the entire legal system could be deduced from the conception of right, and a sort of ideal system set up. In general, securing freedom of will meant securing the widest possible freedom of action for individuals. "The test of right and justice with respect to any institution or doctrine was the amount of abstract liberty which it secured."²⁸

26 Pound, The Spirit of the Common Law, 151.

27 Ibid. Cf. also Pound, The Spirit of the Common Law, Ch. 6, "The Philosophy of Law in the Nineteenth Century," 139-165; Pound, Law and Morals, Ch. 3, "The Philosophical View," 84-115; Roscoe Pound, "How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought," West Va. L. Quart., Morgantown, XLII, 1936, 81-82.

28 Pound, The Spirit of the Common Law, 152.

The historical school drew the same conclusion, except that instead of deriving it through the nature of man, they attempted to discover it through history. Kant's formula of right was turned into one of law by Savigny, the founder of the historical school. He thought of law as a body of rules which determine the limits within which the freedom of individual activity would be guaranteed and protected. Experience in the administration of justice increased the scope and delimited the boundaries of this freedom. Hence the position of the historical school can best be understood in terms of the gradual historical development of Kant's theory of right, that is, as a condition in which the will of one is reconciled with the will of another according to a universal rule.

As the historical jurists adopted the idealistic interpretation of legal history it was possible to say that jurisprudence had two sides. On the one it had to do with the historical unfolding of the idea of liberty as men discover the rules by which to realize it. This was the historical jurisprudence. On the other hand it had to do with the logical unfolding of the principles involved in the abstract conception. This was philosophical jurisprudence.²⁹

Analytical jurists too fell in with the spirit of the times. It must be remembered that analytical jurisprudence completely separated the legislative power from the judicial. The latter's role was merely to insure a mechanical application of the law. The law was presumed to cover all circumstances without

29 Ibid., 154

exception as all situations were conceived of as foreseen and regulated in the intention of the legislator at the time of promulgation.³⁰ Naturally, in his uncreative capacity the judge applied the individualistic law of the times since it was the dominant characteristic not only of law, but, as has been shown, of all human activity.

As early as the third quarter of the nineteenth century opponents of this error of excessive individualism arose and exercised an influence on jurisprudence.³¹ The country itself was becoming more conscious of its social obligations. The period following the civil war had been one of uncertainty and discontent over railroads, deflation, exploitation of farmer and laborer, monopolistic practices and other abuses which seemed to contradict basic liberalistic tenants.

The years 1865 to 1910 saw a rapid growth of government interest and aid to agriculture; it saw cooperative movements to relieve both farmer and laborer, anti-monopoly legislation, interstate commerce legislation, government legislation to improve and control credit, and in general, government intervention wherever the general security was threatened. These growing state and

³⁰ See Roscoe Pound, An Introduction to the Philosophy of Law, 7th, New Haven, 1946, 53-54.

³¹ E.g. Jhering, Marx, Post, Gierke, Ward. See Pound "50 Years of Jurisprudence," Har. L. Rev. L., 557-582.

federal activities arose in part out of social changes which created new problems that called for social control. But they also arose in part out of a growing belief that the state should concern itself, at least to a greater extent than in former years, with providing goods and services to meet important social needs.³²

In the first Granger Case (1876) in an opinion written by Chief Justice Waite, it was held that property does become clothed with a public interest,

when used in a manner to make it of public consequence and affect the community at large. . . . When therefore one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good.³³

Just as Pound was influential in breaking down the deterministic concepts of law with their view of law which seemed to sever it from any relation to the social environment in which man is regulated by it, so too he was a relentless antagonist to the individualistic notions of these same jurists.

Historically, he said, individualism is false. The primary purpose of law never was to establish conditions under which individuals can enjoy the maximum of freedom. Such a theory denies the very idea of society. What history shows is that

³² Cf. Chester W. Wright, Economic History of the United States, New York, 1941, 894-895.

³³ *Munn v. Illinois* (1876), 94 U.S. 113. Italics mine.

interest in the general security is the first determinant of law. Even Kant's notion of securing the harmonious coexistence of the free will of each and the free will of all is "only another way of stating a paramount social interest in the general security in terms of individual liberty"³⁴.

Nineteenth century individualism wrote legal history as a record of a continually strengthening and increasing securing of the logical deductions from individual freedom in the form of individual rights, and hence as a product of the pressure of individual claims or wants or desires. But this is just what it is not. It is not too much to say that the social interest in the general security, in its lowest terms of an interest in peace and order, dictated the very beginnings of law.³⁵

Philosophical jurisprudence and the natural law theories of the nineteenth century are submitted to the same scathing analysis. He rejects the idea that the practical problems of law can be solved by the theory of natural rights of the last century. Such a theory was unrealistic. It held that these rights could be defined with precision as logical deductions from the basic idea of liberty. Every natural right was to be fully secured; every right had equal validity; none could conflict or overlap;

³⁴ Pound, "A Survey of Social Interests", Har. L. Rev., LVII, 9.

³⁵ Pound, The Spirit of the Common Law, 206. Cf. also Roscoe Pound, Interpretation of Legal History, New York, 1923, 60-61, 163-164; Pound, The Spirit of the Common Law, 185-189; "How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?" West Va. L. Q. XLII, 85-87.

none admit of adjustment or compromise; none could be infringed, they could only be recognized and secured.³⁶

He objects that uninhibited freedom would impair the freedom of others and lead to chaos; that there is a certain hierarchy of rights, although beyond the "social interest in the general security", he does not indicate it specifically since it is subject to change. Such an ideal order as advocated by the philosophical jurists as a practical matter just doesn't exist, as experience testifies.

The problem of law in action lay at the periphery-- in the undefined and undefinable unchartered ground between these rights. . . . But all experience shows that recognized interests must be reconciled with each other in action by some sort of compromise, that no claim can be admitted to its full logical extent.³⁷

He finds the same difficulty with the analytical school, who would have everything handled by legislation--the jurist merely applying it. Where it can be done, as in property law or commercial law, mechanical application of fixed detailed rules "is wise social engineering" but where the human element appears, such legislation is wholly inadequate.

In these cases matters of property and commercial law, the social interest in the general security is the controlling element. But where

³⁶ Cf. Roscoe Pound, Contemporary Juristic Theory, 1940, 72.

³⁷ Ibid., 73.

the questions are not of interests of substance but of the weighing of human conduct and passing upon its moral aspects legislation has done little. . . . Where legislation is effective, there also mechanical application is effective and desirable. Where legislation is ineffective, the same difficulties that prevent its satisfactory operation require us to leave a wide margin of discretion in its application. . . . Every promissory note is like every other. . . . But no two cases of negligence have ever been alike or ever will be alike.³⁸

Freedom, since it deals with human conduct, cannot be adequately handled by legislation alone.

Against the background of these two basic errors in the social philosophy of his time, Pound begins to construct his own legal philosophy--sociological jurisprudence. It is based upon the needs, desires, and wants of individuals which seek protection, declaration, or interpretation of law within the framework of society, and which society and civilization itself, in order to progress, must recognize and delimit.³⁹

³⁸ Pound, Introduction to the Philosophy of Law, 139, 140, 142. Cf. also Roscoe Pound, "The Theory of Judicial Decision", Har. L. Rev., Cambridge, XXXVI, May, 1923, 825 and June 1923, 945, 951, 957.

³⁹ Cf. Roscoe Pound "Theories of Law", Yale L. Rev., New Haven, XXII, December, 1912, 145-146.

CHAPTER II

METHOD AND END OF LAW--THEORY OF INTERESTS

Roscoe Pound in his earlier days was a professor of botany and a relatively influential one for his age. He was also a student and believer in the philosophy of William James. It was natural, then, that his sociological jurisprudence have a scientific and pragmatic approach. In one of the earlier formulations of his doctrine he said:

The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to human conditions they are to govern, rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.¹

It is the scientific approach that gives to law its objectivity. At the same time such an approach tends to avoid mistakes due to ignorance and diminishes as far as possible juridical corruption. Being scientific, however, does not involve the use of nor formulation of basic tenets which will be true for all times and under all circumstances. One of the principle points of the doctrine of the sociological jurists is that it is enough

¹ Pound, "Mechanical Jurisprudence," Col. L. Rev., VIII, 609-610.

to work out such rules as may clearly govern particular facts or relations without performing the ambitious task of laying down universal propositions.

We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions. In the philosophy of today theories are 'instruments not answers to enigmas in which we can rest.'² The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also.³

The threat of the realists in jurisprudence has forced Pound to modify this radical position in his effort to find some stable element in the law.⁴ However, for all practical purposes, his method is admittedly and primarily pragmatic.

Since law both as scientific and as pragmatic must be judged "good" or "just" in so far as it attains its end,

it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.⁵

2 William James, Pragmatism, 53, cited by Pound in "Mechanical Jurisprudence," Col. L. Rev., VIII, 608.

3 Ibid., 608.

4 Cf. Pound, Law and Morals, 33, 106n; Roscoe Pound, "The Revival of Natural Law," N.D. Lawyer, Notre Dame, XVII, June, 1942, 287-372; Roscoe Pound, "A Call For a Realistic Jurisprudence," Har. L. Rev., XLIV, March 1931, 697-711.

5 Pound, "Mechanical Jurisprudence," Col. L. Rev., VIII, 605.

Pound indicates that sociological jurisprudence lies somewhere between the abstractions and individualism of the nineteenth century and its radical alternative, socialism.⁶

As seen previously, the social interest is by and large the foremost determinant of law since its beginning. Hence law must be looked upon as an instrument first of society and only secondly of the individual. Thus we find the jurisprudence of today not merely cataloguing the individual claims, wants, or desires as did the jurisprudence of the nineteenth century--as if these claims inevitably call for legal recognition in and of themselves--but we find it going on to ask

what claims, what demands are involved in the existence of the society in which these individual demands are put forward; how far may these individual demands be put in terms of those social interests or identified with them, and when so subsumed under social interests, in so far as they may be treated, what will give the fullest effect to those social interests with the least sacrifice?⁷

Since there exists in man an urge "in all the diverse conditions of life to gratify as far as may be all the different aspects of his nature,"⁸

6 Cf. Roscoe Pound, "The Problem of an Ordered Society," Tenn. L. Rev., Knoxville, XI, December, 1932, 12-13.

7 Pound, The Spirit of the Common Law, 203. Cf. also Roscoe Pound, "Justice According to Law," Col. L. Rev., New York, XIV, February, 1914, 103, 119.

8 Roscoe Pound, The Task of Law, Lancaster, 1944, 21. Cf. also Roscoe Pound, Social Control Through Law, New Haven, 1942, 64-65.

there is the task of making the goods of existence, the means of satisfying the demands and desires of men living together in a politically organized society, if they cannot satisfy all the claims that men make upon them, at least go round as far as possible with the least friction and waste.⁹

Thus the securing of social interests becomes the proximate end of law. But what are these interests to be based upon? How are they to be interpreted? Pound states that "any beginning of securing social interests must begin with the idea of civilization"¹⁰.

In the "idea of civilization", Pound not only points out what he conceives as the ultimate end of the legal order, but indicates the method by which it is to be achieved. Through the physical and biological sciences man has learned to master external nature and convert it to his use. Through the social sciences man has gathered data and organized his knowledge of internal human nature. Such knowledge has not only given man increased mastery over human nature in general, but has made possible the mastery over external nature--for example, by making possible division of labor and freeing inventive genius to push back the horizons of the unknown. The "idea of civilization" signifies the idea of raising the human powers to a point where they

9 Pound, Social Control Through Law, 64.

10 Pound, "The Problem of an Ordered Society," Tenn. L. Rev., XI, 1. Italics mine.

achieve the maximum control over nature.

In civilization; the raising of human powers to their highest possible unfolding, in the maximum control over nature, both external and internal for human purposes, we have an ideal which transcends both the individualism and the socialism of the last century.¹¹

In the summary then we see Pound attempting a reform of law with a philosophy that is pragmatic by a method which is "scientific".

We have the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have to rid ourselves of this sort of legality [deductions from assumed principles regardless of what they are based upon] and to attain a pragmatic, a sociological, legal science.¹²

Since all men have an infinite number of desires and wants, it is impossible that all be gratified. Therefore the legal order is viewed as "an adjustment of human actions and relations in order to conserve the goods of existence, prevent friction in the human use and enjoyment and eliminate waste of them".¹³ It does this by securing as many interests as it may with the least sacrifice of other interests.¹⁴ This is the primary and proximate end of law.

11 Ibid., 11.

12 Pound, "Mechanical Jurisprudence," Col. L. Rev., VIII, 609.

13 Roscoe Pound, and Theodore F. T. Plucknett, Readings On the History and System of the Common Law, comp. and ed. Pound and Plucknett, 3d, Rochester, 1927, 465.

14 See Pound, An Introduction to the Philosophy of

Since many different claims are at different times seeking legal recognition, no absolute rules or basic laws can be laid down as universally valid, but some fundamental rules derived from the civilization of the time and place can be found. This gives a certain stability to the legal order. The maintaining, furthering, and transmitting of civilization is the ultimate end of law.

While rejecting both individualism and collectivism, he finds in both extremist views some desirable parts; collectivism in its recognition of mankind's social needs, nineteenth century individualism with its devotion to freedom. Both are necessary for human progress:

free individual initiative, spontaneous self assertion of individual men, and on the other hand, cooperative, ordered, if you will regimented activity. Neither can be ignored. . .¹⁵

The previous statements indicate that while always couching his words in terms of social interests, Pound in no way intends an absolute rejection of individualism nor such a minimization of its value that man becomes so absorbed in society as to lose his identity as an individual. It is not the abstract society that becomes the recipient of his legal reforms but the

Law, 96-98.

¹⁵ Pound, "How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought?" West Va. L. Quarterly, XLII, 94.

individual as a member of society. Social interests are characterized as "claims or demands of individual human beings when thought of in terms of social life and generalized as claims of the social group."¹⁶

After all the social unit in the modern world is the individual human being. Recognition of his moral worth was the great achievement of eighteenth and nineteenth century juristic and social philosophy. Appreciation of the social interest in the individual life is the significant achievement of the social philosophy of the present generation.

It is not likely that any economic order which may supervene in such time as we can foresee will bring about a legal order which can succeed in ignoring him.¹⁷

The Theory of Interests

Pound begins his analysis with the idea that all people have a multiplicity of desires and demands which they seek to satisfy. However, the desires of each continually overlap and even conflict with those of his neighbors. It is the function of jurisprudence to see, as far as possible, that these claims and demands are fulfilled. This function Pound calls the great task of social engineering. . . . We mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the

16 Pound, Criminal Justice in America, 6. Italics mine.

17 Roscoe Pound, "Law and the State--Jurisprudence and Politics," Har. L. Rev., Cambridge, LVII, October, 1944, 1236.

means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste.¹⁸

These claims, these demands or desires which human beings either individually or through groups or associations or in relations seek to satisfy, and of which, therefore, the ordering of human relations and of human behavior must take account, are called interests.¹⁹ The chief concern of the legal system is to define the limits within which those interests shall be recognized and given effect. Both the delimitation of these interests as well as the securing of them within the defined limits are achieved through legal precepts developed and applied by judicial, and more recently, by administrative process set up to perform this function.²⁰ Hence we must "begin by ascertaining what are the claims or demands which press upon lawmakers and judges and administrative agencies for recognition and securing".²¹

Interests, according to Pound fall under three general

18 Pound, Social Control Through Law, 64, 65.

19 Cf. Ibid., 66; also Pound, Contemporary Juristic Theory, 60.

20 Cf. Pound, Social Control Through Law, 65.

21 Pound, Contemporary Juristic Theory, 61.

categories--individual, public, and social.²²

Interests are classified as individual if they are claims, demands, or desires involved immediately in the individual life, and asserted in title to that life. Basically they are three: (1) interests in personality (life, health, reputation, etc.);²³ (2) interests in domestic relations (claims of husband and wife over each other as against the world, relations of parent and child etc.);²⁴ and (3) interests of substance, that is, claims or demands asserted by individuals in title of the individual economic existence (property, contract, etc.).²⁵

Interests are classified as public if they "are claims or demands or desires involved in life in a politically organized society and asserted in title of that organization."²⁶ Basically

22 For an itemized list of the Scheme of Interests see Pound and Plucknett, Readings on the History and System of the Common Law, 465-466; For a brief explanation of these interests see Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 17-39.

23 See Roscoe Pound, "Interests of Personality," Har. L. Rev., Cambridge, XXVIII, February, 1915, 343-365 and March, 1915, 445-456; also Pound, Contemporary Juristic Theory, 62.

24 See Roscoe Pound, "Individual Interests in Domestic Relations," Mich. L. Rev., Ann Arbor, XIV, January, 1916, 177-196; also Roscoe Pound, "Individual Interests of Substance--Promised Advantages," Har. L. Rev., Cambridge, LIX, November, 1945, 1-42.

25 See Pound, Social Control Through Law, 73; also Pound, Contemporary Juristic Theory, 62-64.

26 See Pound, Social Control Through Law, 69; also Pound, Contemporary Juristic Theory, 69, and Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 2.

they include the interests of the state as a juristic person and as the guardian of social interests.²⁷

Interests are social if they are "claims or demands or desires involved in social life in civilized society and asserted in title of that life".²⁸ Historically, social interests were spoken of at common law under the name of "public policy",²⁹ and in the cataloging of social interests of today the "public policies" of common law form a solid basis. As indicated before, the primary social interest running through all legal thought is the social interest in the general security;

the claim or want or demand, asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence.³⁰

This claim takes many forms, the simplest of which is interest in the general safety. Other forms are general peace and order and more recently general health and the security of acquisitions and transactions.³¹

27 For a more complete treatment see Roscoe Pound, "A Survey of Public Interests," Har. L. Rev., Cambridge, LVIII September, 1945, 909-929.

28 See Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 2; also Pound, Social Control Through Law, 69.

29 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 4.

30 Ibid., 17.

31 Ibid., 17, 18.

Pound lists and explains five other social interests;³²

(1) The security of social institutions (domestic, religious, political, economic); (2) general morals; (3) conservation of social resources; (4) general progress (economic, political, cultural); (5) the individual, moral, and social life, or in the individual human life.³³

Such in outline are the social interests which are recognized or coming to be recognized in modern law. Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromise of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.³⁴

Valuation

The greatest difficulty under this theory of social interests is how to handle these claims, demands, and wants that the individual and social groups press upon lawmakers, jurists, and administrative agencies. For as a result of his observation of facts and their interpretation, the jurist will have before him a mass of data in the form of statistics, case histories and

32 See Footnote 22 p. 28.

33 See Pound, Criminal Justice in America, 8-9.

34 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 39.

so on, showing the effect of existing law upon men in society. He can then, let it be admitted, by a technique of using statistical data derived from political science, economics, sociology, and psychology, organize these facts in some way. What will he do with them after he has organized them?³⁵ Certainly in the field in which it is agreed or settled what the law ought to achieve and what results it ought to bring about, he might conceivably do a great deal. He might show whether the law is effective for bringing about these results and suggest changes which in the light of all the facts would increase its effectiveness.

In the field, for instance, of liquor traffic, he might devise some method of control which would be effective to achieve what is agreed to be desirable, namely, a reasonable availability of alcoholic beverages, free of the abuses of drunkenness, vice and crime; he might have a certain law amended to prevent any tendency or manifestation of these abuses which everybody, except the few who would be benefitting by them, agrees is bad; or he

³⁵ This difficulty has been raised by Morris R. Cohen, in "Justice Holmes and the Nature of Law," Col. L. Rev., XXXI, New York, 1931, 352, 357; Book Review of Rueff's "From the Physical to the Social Sciences," Har. L. Rev., XLIV, Cambridge 1929, 1149; "Philosophy and Legal Science" Col. L. Rev., XXXII, New York 1932, 1103, 1117 and by Walter B. Kennedy, "Principles or Facts," For. L. Rev., IV, New York, 1935, 53.

might decide that this end cannot be achieved by law--or, to use Pound's mode of expression--he might find that liquor control was outside the scope of legal action. And so with other instances where there is an agreement that certain things are undesirable, or that a certain piece of legislation is to achieve a certain definite purpose. It is true that in such cases, the jurist might show how some agreed evil practice might be prevented, or how the agreed effect of the legislation might be attained--but only where such agreement is present.

Outside of these limits, however, facts, regardless of how scientifically they have been obtained, are of themselves of no avail; for just as they do not organize themselves, so they do not evaluate themselves. The task has only begun when all the facts about the operation of the legal system have been discovered and interpreted.

How can the gathering of facts about the incidence of industrial accidents in Detroit of itself decide whether a statute intended to shift the loss from the worker to the employer is arbitrary and unreasonable? Or how can investigation into the conditions of juvenile workers of itself decide whether a child labor amendment to the Constitution is a good thing? Admittedly the gathering and interpretation of such facts is a prerequisite for deciding such questions, but the decision is on the basis not of these facts but of an opinion of what ought to be done about them.

As Pound recognizes, some type of inventory of these interests must be made, classified, and arranged according to those recognized and those seeking recognition. A selection must then be made from this latter group to determine those which will be given recognition. Since it is Pound's view that no claim can be fully recognized in view of the limited material resources and unlimited human wants, there must be a delimitation or restriction in some way of all the recognized claims. Finally, legal institutions must be devised to give effect to these legally recognized claims.³⁶ Pound also realizes that in almost every step of this process the problem of value arises. For example, the classification of interests as individual, public, and social admittedly was one of convenience following Jhering's classification.³⁷

Before proceeding further, it is necessary to consider some of the characteristics of these claims and how they must be handled in order that Pound's process of evaluation may be better understood.

First: the legal order does not create these interests, "it finds them pressing for security".³⁸ It does, however, perform all the other functions mentioned above.

36 See Pound, Contemporary Juristic Theory, 59.

37 See Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 1.

38 Pound, Social Control Through Law, 68. Cf. also

Second; claims or demands must be weighed and valued on the same plane. "If we put one as an individual interest and the other as a social interest we may decide our question in advance in our very way of putting it."³⁹

Third; not every claim must be put permanently in the category of individual, public or social.

For some purposes and in some connections it is convenient to look at a given claim or desire or demand from one standpoint. For other purposes or in other connections it is convenient to look at the same claim or demand or the same types of claims or demands from one of the other standpoints.⁴⁰

In general, and especially if the problems are complex, it is expedient to put claims or demands in their most generalized form, that is as social interests, in order to compare them.⁴¹

Fourth; the legal order is limited in securing some types of claims or interests. For example, the redress for a stolen watch can be either recovery of the watch or the award of

Pound, The Task of Law, 26; Pound, Social Control Through Law, 63-80; Roscoe Pound, "The End of Law As Developed in Legal Rules and Doctrines," Har. L. Rev., Cambridge, XXVII, January, 1914, 233.

39 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 2. See also Pound, Contemporary Juristic Theory, 75.

40 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 2. See also Pound, Social Control Through Law, 69.

41 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 3.

money damages to purchase a new one. But generally money damages cannot buy a good reputation destroyed by malicious libel.

With these ideas in mind, Pound attempts to determine certain canons for valuing conflicting and overlapping interests. He begins by stating that we cannot demonstrate a measure of values as something everyone must accept and by which everyone must abide.⁴² Philosophical jurisprudence has failed to give us a solution.

Sometimes philosophy has moved ahead of law guiding its development. . . . But sometimes philosophy has come after legal development and done no more than organize what has been discovered in practice. . . . Now for a season, philosophy is neither leading nor organizing.

This is not to say that law is without a set of values. Lawyers and courts have found a workable scheme. Pragmatism has offered a practical method for the practical activity of law. Pound compares the values postulated or accepted in modern systems of law with the axioms and postulates of geometry. Although we live in a curved universe, we use straight lines and planes since they are near enough to the truth for our practical needs. So too, the values obtained from observation of legal and social

⁴² Pound, Social Control Through Law, 108.

⁴³ Pound, Contemporary Juristic Theory, 81. Cf. also Pound, An Introduction to the Philosophy of Law, 95-96.

phenomena are sufficiently near the truth for the practical purposes of law, even if we cannot prove them apodictically.⁴⁴

If legal phenomena are social phenomena, observation and study of them as such may well bear fruit for social science in general as well as for jurisprudence. Why should not the lawyer make a survey of legal systems in order to ascertain just what claims or demands or desires have pressed or are now pressing for recognition and satisfaction and how far they have been or are now recognized and secured?⁴⁵

Therefore the first method in evaluating and delimiting interests is the test of experience. It is the finding "by experience--by trial and error and judicial inclusion and exclusion--what will serve to adjust conflicting or overlapping interests."⁴⁶

The second method is "valuing with reference to the jural postulates of civilization in the time and place."⁴⁷ According to Pound, this is the part reason plays with experience in the determination of values.

Jurists work out the jural postulates, the pre-suppositions as to relations and conduct of civilized society in time and place, and arrive in this way at authoritative starting points for legal reasoning.

⁴⁴ Pound, Social Control Through Law, 109.

⁴⁵ Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 16.

⁴⁶ Pound, Social Control Through Law, 112. See also ibid., 109-110.

⁴⁷ Ibid., 112.

Experience is developed by reason on this basis and reason is tested by experience.⁴⁸

New claims, adjusted claims, delimitation of claims, recognition of claims are all measured by these jural postulates. These jural postulates in themselves are claims or "rights" in the sense that they are reasonable expectations based upon experience, presuppositions of civilized society, or are the moral sentiments of the community of the type of conduct expected in civilized society. These "reasonable expectations" are natural or moral rights and when backed by law become more reasonable in their expectancy hence more "natural", while at the same time they now become legal rights. Note that natural rights are merely interests which society at the specific time and place felt ought to be secured.⁴⁹ It is by this method that Pound also secures the interests which have been recognized and delimited, namely, by attributing to the one who asserts them what we call legal rights.

These postulates therefore answer all questions concerning valuation. They are the most general ideas controlling the practical thought of the members of society. They are not to be judged true or false; they are only assumptions whose terms dictate certain logical consequences. They are "presuppositions

⁴⁸ Ibid.

⁴⁹ See Pound, The Spirit of the Common Law, 92.

of life in civilized society which people take for granted in their everyday life so that the law seems to give effect to them as presuppositions of the legal order."⁵⁰

The third method of evaluating conflicting claims is found in "a received, traditionally, authoritative idea of the social order and hence of the legal order, and of what legal institutions and doctrines should be and what the results of applying them to controversies should be."⁵¹

More and more in the ordering of conduct . . . the law relies today on standards rather than on rules. . . . Application of standards and interpretation are done with reference to received ideals, authoritative pictures of the social order which are as much a part of law as rules and principles and conceptions and technique.⁵²

All three methods are similar. Actually, the "received ideals" spoken of in the third method are probably identical with the jural postulates. Possibly the notion of "received ideals" was added to give increased stability to his system in opposition to legal realism.

Despite his search for stability, however, he still maintains that since the social order is undergoing continual

32. 50 Roscoe Pound, New Paths of the Law, Lincoln, 1950,

51 Pound, Social Control Through Law, 118.

52 Pound, Contemporary Juristic Theory, 82.

change, we will never be able to formulate an ideal which all will accept; moreover, this fact of change has prevented the formulation of jural postulates the universal validity of which may be assured.

CHAPTER III

EVALUATION DIFFICULTIES

Thus far we have seen that in any given society its legal system represents an attempt to adjust the interests of individuals with each other and with the interests asserted on behalf of society and the state, with the least possible disturbance to the whole scheme of interests. Therefore an ordered scheme of interests of any society to which the law must give effect, must be possible and necessary. The first step must be the observation of the de facto claims, demands, or interests. From this comprehensive picture the jurist must draw out, by as impersonal a synthesis as possible, the fundamental principles concerning human conduct which substantially all the phenomena presuppose. Such interests in their generalized form are already part of the scheme of interests in which the particular civilization is manifest, and the conflict of interests must, therefore, be resolved by choosing that solution which will do least injury to the scheme of interests as a whole. These fundamental principles or generalized form of interests are what Pound calls the jural postulates. They are explanations of substantially all actual claims.

Being drawn not only from that small corner of the field of social phenomena which we call the legal order but from the entire field, they are not merely a rationalization of the legal status quo. They are rather a gauge of the actual achievement of the law by reference to the totality of human claims in a given society at a given time.¹

Therefore they are not so much postulates of law as postulates for law. "They are working postulates not of what law is but what men of a given society want law to do."²

The next step is a construction of a scheme of de facto claims, demands, or interests asserted in a given civilization and in harmony with the jural postulates. Since the jural postulates are merely working hypotheses, they will remain until changes in civilization show them to be no longer applicable.

Meanwhile they are to be put to the practical work of bringing the legal institutions of a particular society into a condition of harmony with the jural postulates and therefore into a condition of harmony with the actual demands made by men in that society.³

This "practical work" for Pound was the construction of the scheme of individual, public, and social interests.

The final step is an analysis of interests conflicting in a given case and reference of the conflict to the whole scheme

1 Julius Stone, The Province and Function of Law, Sydney, 1946, 360.

2 Ibid.

3 Ibid.

of interests for a solution. Since the interests conflict, solution of a particular case will give legal effect to part of the scheme at the expense of another part. The task of the jurist is to render such a solution with the least amount of friction or disturbance to the scheme as a whole. This is what Pound means by "social engineering."

It is well to note the order which it seems Pound proposes the settling of claims. First, the collection of all de facto claims. Second, the setting up of jurial postulates based upon social phenomena as a whole and not merely the legal aspect of such phenomena. Third, construction of a scheme of de facto claims to bring society in harmony with these jurial postulates. Fourth, an analysis of claims in accordance with the scheme for solution. Under this scheme the claims are catalogued but not systematized until after the formulation of the postulates. Moreover, they are drawn from society as a whole.

Whether this is Pound's thought in the matter may be debated. For example:

It is not until the second half of a century that what prove to be its characteristic modes of thought stand out definitely . . . Manifestly one cannot speak with assurance as to how we are in the end to value competing and overlapping interests in the present century. But some part of the path of the juristic thought of tomorrow is already apparent. . . . I suspect that the idea will prove to be cooperation towards civilization. But I cannot pretend that I draw this from the actual phe-

nomena of the legal order and judicial process with the same assurance with which I can draw the Ideal of free competitive individual self-assertion from the phenomena of the legal order and judicial process (as one may call it) of the nineteenth century.⁴

Are the postulates drawn from the legal order or from social phenomena as a whole? Are solutions of conflicts based upon jural postulates or are postulates drawn from solutions? It is conceivable that a series of the same type of claim could change the postulate which in turn would change recognition of claims. Yet, as Pound says, there is more to the formulation of a postulate than merely counting noses. Still, claims are an indication of the direction toward which "civilization" is tending.

Less than ten pages later he remarks:

It (the legal profession) cannot stand still until the social order settles down for a time in a condition of stability in which its jural postulates can be recognized and formulated and the principles derived from them can be received into the authoritative guides to determination of controversies.⁵

This may seem to be merely a case of "which came first, the chicken or the egg!" This order has been taken in regard to the jural postulates, however, because it seems that two important conclusions which Pound himself intended necessarily follow.

4 Pound, Social Control Through Law, 126, 127; italics mine.

5 Ibid., 133, 134. See also Powers, "Some Reflections on Pound's Jurisprudence of Interests," Cath. U. L. Rev., III, 10-26.

First, since the postulates have been drawn from the entire field of social phenomena and not merely from the legal portion of it, changes or additions to them can come from sources other than legal. Without this possibility it would seem that changes in jural postulates would be impossible--a position which Pound is unwilling to admit. It also enables jural postulates to be kept somewhat apace (although they must always be behind) and in harmony with "civilization".

Secondly, it assumes that the postulates are prior in nature and in time to the claim since they are presuppositions upon which the claims are based. While relatively unimportant for an analysis of jural postulates as an indication of what and how society in the recent past reviewed "internal and external nature," this distinction is of importance in determining changes in postulates or the formulation of additional ones. Needless to say neither assumption solves the problem of valuation in the postulates themselves but removes several difficulties to which Pound's theory would be subjected.

By far the greater portion of any criticism which can be leveled at Pound's theory must be directed toward his theory of valuation. Three difficulties--the idea of civilization, the postulates, and the claims themselves--which of their very nature must flow from any attempt to solve problems of evaluation on any other basis than that of absolute values, immediately present

themselves.

The task of law is, according to Pound, to maintain and further civilization. The ideal of civilization is "the raising of human powers to their highest possible unfolding, of the maximum human control over external nature [things] and over internal nature [ourselves] for human purposes".⁶ The assumption here seems to be that it is impossible for civilization to do anything but progress.

The cry for bringing law into harmony with the conditions of the times assumes that the law will be better law when this has been done. That tacit assumption is justified so long as 'good law' is defined as law which is in harmony with the conditions of the times. But if there have been, and are, as few will deny, retrogressive civilizations, that is, civilizations which have moved in time from a higher level to a lower level of powers over internal and external nature, it must be obvious that the process of bringing their law into harmony with their later state is a process of degradation of the law from the level of harmony with a higher to that of a lower civilization. Though a betterment in the sense of the pragmatist definition, it is not a betterment in the sense of more effectively maintaining, furthering, and transmitting powers over internal and external nature.⁷

As Father LeBuffe so aptly remarked: "Thus a government of people steeped in the opium habit would be maintaining a sound legal order in the view of the sociological jurists, if

6 Pound, Social Control Through Law, 132.

7 Julius Stone, "A Critique of Pound's Theory of Justice," Iowa L. Rev., XX, 545, 546.

it produced enough opium to keep the people sated"⁸

This view is not far-fetched. Someone has remarked that Pound's theory was so flexible that society was permitted to do everything but commit suicide. One wonders what there is in such a scheme that would keep a suicidal-bent society alive. What curative can such a theory offer to a society whose "moral sentiments" apparently demand such legislation and solutions to social problems as easy divorce laws and sterilization laws? Such are the advance symptoms of death present in a society gasping ever more weakly that it cannot die. They indicate a society which values and determines wants in their immediate subjectivity. That Pound does not advocate this is probably true. That such laws are an indication of it is also true.

It may be questioned also whether, in any system in which one finds the source of law in human wants or demands, civilization progresses when as many of them as possible are satisfied.

Pound states that "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".⁹

⁸ Francis P. LeBuffe, S.J. and James V. Hayes, The American Philosophy of Law, 4th, New York, 1947, 153.

⁹ Pound, An Introduction to the Philosophy of Law, 98-99.

Wants do not bear an essential relationship to civilization or law.

Admitting that human wants and demands bear some relation to law, we are inclined to think that this view leads to a cul de sac. All activity springs from life's diverse demands, wishes, etc., and the law bears no unique relationship to them. . . . Wants in themselves are impulses to action not ends of action. They become ends when that which will satisfy them is subject to rational consideration.¹⁰

Moreover, where the degree of justice consists in the degree to which wants are satisfied, it seems there would be no injustice in taking care that embarrassing wants do not arise.

Nor is the theory much better if wants are interpreted to include potential or possible ones. Then the aim would be to create as many wants as possible in order to satisfy them. It is by no means obvious that a life full of many wants all of which can be satisfied is better than a well ordered life with simple and noble ends. Plato's description of the democratic man whose unlimited appetites are subject to no rules rises to disquiet us.¹¹

With no goals in view it would be difficult to guide society towards the furtherance of anything. How does one tell whether civilization is progressing? Is it automatic with time? Are we to leave civilization's advancement to the pragmatic hit and miss method, hoping that our move of two steps forward today is not merely a preparation for the slide of three steps backward

¹⁰ E. T. Mitchell, "Social Ideals and the Law," The Philosophical Review, New York, XLVI, March, 1937, 122, 123.

¹¹ Ibid., 123.

tomorrow--as happened in other cases, such as in education, when pragmatic folderol entirely replaced ultimate objectives? Someone has admirably expressed the pragmatic conception of progress as the condition of "not knowing where we are going but glad to be on our way". This may be appealing as a very temporary expedient and for a very short trip, but law is a permanent directive of society and society's journey is as long as the life of mankind.

It is not our purpose here to discuss the question of whether law should or should not be progressive. It seems that Pound would like to think of law as an aid in shaping the future of society and of "furthering civilization". The lack of universal norms, however, necessarily prevents this. Under the Poundian theory one must conclude that just as in economics wage rates always lag behind price rises, so too, of its very nature as society's handmaid, law must necessarily be the millstone about the neck of society's progress. Despite Pound's probable objection, this is the natural result of the thesis of pragmatism.

Now the 'just' becomes merely the expedient in adapting the legal order to the social and economic structure. The legal rule enunciated in a decision becomes but a 'working hypothesis' which will be demonstrated experimentally to be sound or unsound. The rule will be just or unjust as its consequences reveal.¹²

12 Fowler Vincent Harper, "Some Implications of Juris-
tic Pragmatism," The International Journal of Ethics, XXXIX.

The scientific method can tell us only what men think to be good. What is de facto objectively good or bad for society is unknowable. A decision is just if it is in accordance with a just law; and a law is just if it is in accordance with what people think is just.

As indicated before, under such a scheme we can no longer hold unalienable these rights expressed in the Declaration of Independence, nor any other rights for that matter. Pound agrees:

if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation to stand in the way of doing so.¹³

Kreilkamp, in a rather recent article, sums up Pound's position thus:

For all his talk about the philosophy of law and a natural law theory of law, what Pound is proposing is really more a technique than a philosophy. He is closer to the analytical school than he thinks. Where they confined jurisprudence to the amoral technique of applying an arbitrarily given law issuing from the ruler, Pound confines it to the quite-as-amoral technique of applying an arbitrarily given set of moral and social ideals issuing from society.¹⁴

1929, 269. Cf. also Karl Kreilkamp, "Dean Pound and the Immutable Natural Law," For. L. Rev., New York, XVIII, November, 1949, 178.

13 Pound, An Introduction to the Philosophy of Law, 97-98.

14 Kreilkamp, "Dean Pound and the Immutable Natural Law," For. L. Rev., XVIII, 179. Cf. also Walter B. Kennedy, "Pragmatism as a Philosophy of Law," Mar. L. Rev., Milwaukee, IX.

In addition to the difficulty imposed by pragmatism regarding the evaluation of the "idea of civilization", there is also the difficulty in the evaluation of the jural postulates. In order for a legal right to vest in a claimant, the claim, interest, or demand must conform or be consistent with the jural postulates then in vogue. Since the jural postulates are presuppositions derived not from all but from substantially all the "de facto" claims, their formulation

involves a judgment as to what the preponderant mass of claims presuppose, and conversely, as to what claims may be ignored because of this preponderance. This cannot be made without the intervention of a value judgment drawn from outside the whole body of de facto claims.¹⁵

Moreover, at what point do jural postulates become postulates? Are they mere expansions of other jural postulates?

It is becoming more and more evident that the civilization of the time and place presupposes some further propositions which it is by no means easy to formulate, since the conflict of interests involved has by no means been so thoroughly adjusted that one may be reasonably assured of the basis upon which the adjustment logically proceeds.¹⁶

To what must these propositions be adjusted? Not to the scheme of individual, public and social interests, since such

February, 1925, 63-77.

¹⁵ Stone, "A Critique of Pound's Theory of Justice," Iowa L. Rev., XX, 546-547.

¹⁶ Pound, Social Control Through Law, 115.

interests must first conform to the jural postulates to obtain legal recognition.¹⁷ To the advancing civilization? Toward what is civilization advancing? How is the advancement indicated? Have the claims been recognized under an interest other than social and now should be reevaluated under the heading of social interest?

The third difficulty in evaluation applies to Pound's scheme of interests as a whole, especially social interests, and the application of his criterion in a particular case. What is the norm for determining one social interest to be of greater or less value than another so that the 'social engineer' in solving a controversy may do so with a minimum of 'friction and waste'? "For some purposes and in some connections it is convenient to look at a given claim or demand or desire from one standpoint. For other purposes . . . from one of the other standpoints [individual, public, or social]."¹⁸ What determines these "standpoints"? Are there any individual or public interests of greater weight than a conflicting social interest? Is a social interest greater than any sum of individual or public interests? How is

17 "Social interests are, or are evidenced by, or are derived from--I am not quite sure what Pound means to say--public policies." Edwin W. Patterson, "Pound's Theory of Social Interests," Interpretation of Modern Legal Philosophies--Essays in Honor of Roscoe Pound ed. Paul Sayre, New York, 1947, 559.

18 Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 2.

this determined? Where the same social interest is involved, and one group demands its existence while the other demands its prohibition, is there any basis upon which a solution can be rendered? Is there anything intrinsic to the claims, wants, or desires themselves which would place one want or claim above another?

Philosophers have devoted much ingenuity to the discovery of some method of getting at the intrinsic importance of various interests, so that an absolute formula may be reached in accordance wherewith it may be assured that the weightier interests intrinsically shall prevail. But I am skeptical of an absolute judgment.¹⁹

The only check on what might be called "injustice" with regard to the selection of certain claims or interests over others seems to be society itself. When presented with the problem of recognizing and fixing limits to claims, he remarks:

Conceivably this may be done arbitrarily. But arbitrary adjustments of interests do not maintain themselves . . . Ultimately recognition of interests and delimitation of those recognized is done in accordance with an established measure of values.²⁰

The only reason seems to be, 'it works', and no one is particularly interested nor is there any way of determining why it worked or whether some other solution would have worked better or more efficiently. "Despite pronouncements of self-styled

95-96. 19 Pound, An Introduction to the Philosophy of Law,

20 Pound, Social Control Through Law, 79-80.

realists, despite the rise of absolutism in many parts of the world, we may say as Paul did to Timothy 'We know that the law is good if a man use it lawfully'."21

It might be noted that Judge Frank in interpreting Pound on this point objects to the rigid and "unreal" dichotomy between one portion of law which requires the application of abstract principles (namely, for the categorizing of a particular claim) and another portion which demands a certain individualization in the solution by a study of the facts which differentiate this conflict of interests from others.

But life does not so nicely as Pound assumes, divide itself into cases of 'individual human lives' and cases of 'interests of substances.' 'Human conduct' and the 'security of acquisitions' do not come in neat and separate bundles. The 'social interest in the security of transactions' inevitably becomes entangled with 'the social interest in the individual claim to free assertion'. Which technique then is to govern, that of individualization or that of authoritative conceptions prescribed in advance and mechanically applied?22

Frank then demands "gradations and degrees of fixity and flexibility."23

This is rather a strict interpretation of Pound--a literal reading of his words rather than viewing them in the

21 Pound, Justice According to Law, 61.

22 Jerome Frank, Law and the Modern Mind, 1930-1949, 213.

23 Ibid.

spirit of his entire thought. Pound would probably agree with Frank as to degrees of flexibility. "Law must be stable but cannot stand still."²⁴ Admittedly, too, there is a difficulty in categorizing certain claims. But Pound, in attempting to give flexibility to his system has not only been a proponent of individualization in judicial decisions,²⁵ but has indicated various ways claims, interests, and demands can be approached.²⁶

While it is true that these methods apply more to the application of the law than to valuation itself, yet valuation is concerned to the degree that the judge or lawmaker is permitted some discretion in fixing the category under which the type of interest falls. What there is in Pound's system, however, to guide the judge or lawmaker in exercising this discretion, is the more basic problem which Frank naturally ignores.

Selection and recognition of claims and interests, we are told, is to be such so as to least impair the scheme of interests as a whole; or to state it positively, so as to effectuate the scheme of interests as a whole. But what meaning is to be attached to the words "least" and "most"? Do they indicate a

²⁴ Pound, New Paths of the Law, 1.

²⁵ Cf. Roscoe Pound, "Individualization of Justice," For. L. Rev., New York, VII, May, 1938, 153-166.

²⁶ Cf. Pound, "A Survey of Social Interests," Har. L. Rev., LVII, 23. Cf. also *supra* 32-33.

counting of heads, or do they point rather to a greater intrinsic significance of some parts of the scheme of interests? Certainly something more must be involved than mere arithmetical computation; yet if some interests have a greater inherent value than others, Pound is once again faced with the problem of absolute values.²⁷

While in no place does Pound seem to subscribe to the theory of morality by the majority, nowhere does he deny this principle, and it would seem to follow necessarily and logically from his philosophy. He criticizes the realists, whom he characterizes as give-it-up philosophers, for merely collecting social and legal facts without doing anything with them:

a science of law must be more than a descriptive inventory. There must be selection and ordering of the materials so as to make them intelligible and useful. After the actualities of the legal order have been observed and recorded, it remains to do something with them.²⁸

For Pound, it would be the construction of jural postulates, but if anything more than the counting of noses is involved, he fails to indicate it. As a matter of fact Pound's theory has, somewhat unjustly, been subjected to the same criticism that he leveled

²⁷ Cf. Stone, "A Critique of Pound's Theory of Justice," Iowa L. Rev., XX, 547.

²⁸ Roscoe Pound, "A Call For a Realistic Jurisprudence," Har. L. Rev., Cambridge, XLIV, March, 1931, 697.

at the realists.²⁹

The question of valuation and instability is recognized by modern proponents of the Poundian point of view. To some there is no problem; to others, the problem is intrinsic to law itself and hence insoluble.

If it be said that Pound's theory of social interests introduces uncertainty into the law, the answer is that to a considerable extent the uncertainty is there already.³⁰

John Wu answers the question as to the certainty and definiteness that the theory of social interests can give to law in similar fashion. He places before his readers the hypothetical objection that such a theory may leave too much room for solutions based on the whims and caprices of jurists, and tends to subject individual rights to the indefinite and vague considerations of social interests. He concludes that such is probably the case but that it can't be helped. Even if all the cases could be anticipated to their minutest details and the statutes were such that every case would be unequivocally covered by them:

Who is going to guarantee that all future judges will at all follow our commands, or that they will not misapply our rules, or even that they will have enough imagination to enable them to identify the situations that we have anticipated and committed to writing with

²⁹ Cf. E. V. Walter, "The Legal Ecology of Roscoe Pound." Miami L. Q., Miami, IV, February, 1950, 178-207.

³⁰ Patterson, "Pound's Theory of Social Interests," Interpretations, 569.

those which actually arise before them?³¹

Certainly it is difficult to see how Pound's theory will alleviate these difficulties. Nay more, as Stone has pointed out, the theory of interests also assumes that there is a definite period of time and a definite area of space in which all the social aspects of life have a certain homogeneity. It also assumes the possibility of finding one set of jural postulates and the human minds for properly framing them.³²

Actually, the avowed purpose of Pound's "scientific approach to law" was so to categorize law within the framework of the "jural postulates of civilization" as to preclude the whims and caprices of judges, while at the same time leaving the law flexible enough for their discretion and individualization. Wu, however, seems to answer the question "Isn't law uncertain, subject to the whims of judges and unprotective of basic rights?" with the flat answer "Yes, but it's necessary; law is naturally that way." Either Pound has not attained his objective, or Wu, praising him for the very fault his system was designed to avoid, has misread Pound's intentions.

31 John C. H. Wu, "The juristic Philosophy of Roscoe Pound," Ill. L. Rev., XVIII, 301-302. Whether this is Dr. Wu's present position is highly questionable; he has since embraced the scholastic position of natural law.

32 Stone, The Province and Function of Law, 365-368.

According to Wu, social psychology can guarantee certainty in applying Pound's theory. While abhorring the humbug of those who identify justice and the majority, he states that public opinion will determine the content of such general notions as "police power", "public policy", "natural law", etc. This is true, he claims, because the psychological state of the people will determine the possibility of enforcement. Since the possibility of enforcement determines the validity of positive law, it follows that objectivity and certainty are achieved through public opinion.³³

In addition to a circuitous way of asserting that might makes right, Wu has failed to put any "content" into the idea of "public opinion". Moreover, if public opinion is the determining factor in putting content in these general notions by supplying specific wants, claims, and demands,

The politician can hardly be blamed if he estimates demands in terms of letters and telegrams, nor the judge, if he keeps his ear to the ground to catch the public clamor. Those who demand nothing will get nothing; those who want little will get little; those who make extravagant claims will get less than they demand but more than they deserve. A need of which the people is not conscious can hardly be counted, and one which is unexpressed will not likely be given consideration.³⁴

³³ Wu, "The Juristic Philosophy of Roscoe Pound," Ill. L. Rev., XVIII, 295-303.

³⁴ E. T. Mitchell, "Social Ideals and the Law," The Philosophical Review, XLVI, 122.

Pound, of course, would not subscribe to this pressure theory of government, yet it seems that that would be the direction towards which his system logically tends.

Paul Sayre, in his biography, not only sees no problem in this uncertainty and instability but characterizes it as an attribute of freedom.

Pound refuses to say what social interests should be preferred to others.

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 In refusing to fix ends of law in a rigid sense, Pound preserves essential freedom. . . . By refusing to give an ultimate end for the law (except for the technique of his engineering approach and his intermittent recognition and his non-rigid recognition of the jural postulates of civilization) he gives vigorous and dependable adherence to a true liberty in a dependable and objective sense by his pragmatic test of including all the social interests with the least waste.³⁵

The preference of certain interests and claims over others is for changing civilizations to determine. These determinations are based in large part upon the actual claims presented to the courts and the psychological and moral motives of those who administer the law, according to Sayre.

But it seems these motives could conceivably run the gamut from the nature of man whose ultimate destiny is heaven to getting out of the right side of the bed in the morning. Such is the freedom that can lead to intolerance, injustice and ulti-

³⁵ Paul Sayre, The Life of Roscoe Pound, Iowa City, 1948, 345, 347.

mately slavery. This is the very freedom which Pound himself recognized and vigorously condemned as characteristic of the nineteenth century.

A final point might be mentioned here regarding one of Pound's basic assumptions, namely, that law arises from the conflict of wants and interests. This assumption has merit if we identify the term law completely and exclusively with the decision in a specific case. However, beyond the bare necessities of life wants are not a natural endowment. They emerge with widening experience, as the tastes for luxuries or music; or they can be created artificially, as agitators and advertisers well know. Therefore the solution of conflicts about them must necessarily come from norms already established.

Moreover, as Timasheff, taking a more creative view of law, has pointed out, law is not necessarily but only accidentally the product of conflicts:

That conflicts are frequently conducive to the formulation of norms and to clear recognition of values is obvious; but logically values come first and conflicts around them second. Consequently norms may be formulated with direct regard to values to be promoted before any conflict situations arise. Legislation of the social reform type (e.g. New Deal) and law promulgated by revolutionary governments is clearly of that type . . . its function is not to prevent disorder or stop disorder but to create order of a specified type; not to settle conflicts but to mold conditions of human co-existence in accordance with an explicitly or implicitly recognized ideal.³⁶

Pound lightly brushes such criticism aside. Such objections may pose theoretical difficulties; but as a practical matter, the measure of values which the legal order is using and has been using successfully for the past half century has been the social engineering theory he advocates. Legal history testifies to a continually wider recognition of wants, claims, and interests, a more effective securing of social interests, a constantly more complete elimination of friction and waste in the enjoyment of the goods of existence--in short, a continually better, more effective method of social engineering. These results have been achieved regardless, or even in spite of, the fact that the philosophy behind the method may still be obscure. Hence Pound easily dismisses any discussion of valuation difficulties. For,

Jurists are perceiving what it is that the legal order has to do and has been doing, even if we have no clear theory of it. It may be that we can expect no more than an organizing legal philosophy to give us a critique of what we now see we have been doing and how we do it. Be this as it may, to the proposition that we cannot arrive at a measure of values, we may answer that we have found one, and a very workable one, whether we can prove its philosophical validity or not.³⁷

Sociology of Law," Am. Cath. Soc. Rev., II, Chicago, 1941, 245.

³⁷ Pound, Contemporary Juristic Theory, 73-74. Cf. also Ibid., 75-76, 81-82; Pound, An Introduction to the Philosophy of Law, 98-99.

CHAPTER IV

ROSCOE POUND AND THE NATURAL LAW - HIS CONTRIBUTIONS TO JURISPRUDENCE

Pound's method is essentially and admittedly pragmatic. He saw in its system freedom from the rigid adherence to past authority whether that authority be the Church or reason itself from which laws were established, or in the application of the law itself of the rule of stare decisis¹ which was often pushed to the extreme. Jurisprudence did not take into consideration the myriad changes of social and industrial relations. With the inventions of automobiles, airplanes, radio, and television new rules were needed. There was often the manifest inclination to drive a maxim or a definition to its dryly logical extreme with total disregard of the consequences. In short, law was considered something apart from life.

Being scientific as a means toward an end, it [law] must be judged by the results it achieves, not by the niceties of its internal structure; it must

1 Non-technically stare decisis means the use of former decisions involving similar facts as the basis for a present adjudication. In Pound's early career the finality of these decisions was often exaggerated, leading to many injustices.

be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.²

Pragmatism supplied this need, and in so far as it placed its emphasis on the needs of mankind by obtaining facts, balancing interests, and attempting to weigh values, jurisprudence is indebted to Pound and other pragmatists.

Law had reached a similar stultified result with its emphasis on individual liberty. The status quo of individualism with its obvious hardships and injustices was admittedly undesirable. Admittedly too, judicial decisions regarding individualism were maintained in order to give law a necessary stability. Some type of judicial discretion had to be provided for. Justice and security do not mean security of opportunity for free competitive acquisition. Man is social as well as individual. It is through cooperation together with individual effort that he can best secure those wants and desires which liberty of itself cannot give. Once again law must be adapted to the realities of life--a life ever changing whose wants are ever new. Freedom is allegedly maintained in the Poundian system by refusing to fix definite ends to law.³

² Pound, "Mechanical Jurisprudence," Col. L. Rev., VIII, 605.

³ Cf. supra, 56, n. 35.

It is not Pound's conception of law, however, that it must be continually changing. "Law must be stable but it must not stand still."⁴ In recent years with the rise of the realistic school of jurisprudence which has been flouting the need for stability in the social order, Pound has focused his attention on the first element, the stability of law. More and more too, he seems to realize the inadequacy of pragmatism to provide it. The mere accumulation of facts is not enough. In criticizing the realists he writes:

Faithful portrayal of what the courts and law-makers do is not the whole task of the science of law. One of the conspicuous actualities of the legal order is the impossibility of divorcing what they do from what they ought to do or what they feel they ought to do.⁵

Of course for Pound, consistent with his pragmatic philosophy, the ethical element is the satisfaction of a claim itself.⁶

At various times Pound has considered at some length the doctrine of natural law. In so far as he identifies it with the mechanical Kantianistic concept, he has rejected it. However, he has made some references to 16th and 17th century natural

4 Pound, New Paths of the Law, 1.

5 Pound, "A Call for a Realistic Jurisprudence," Har. L. Rev., XLIV, 700.

6 See Sayre, The Life of Roscoe Pound, 351-352.

law concepts which have led some to believe that he is turning toward the scholastic notion of this system. In speaking of the natural law of that period he writes:

The appeal to reason and to the sense of mankind for the time being as to what is just and right, which the philosophical jurist is always making, and his insistence upon what ought to be law because of its intrinsic reasonableness have been the strongest liberalizing forces in legal history.⁷

Much of the disrepute of the Natural Law at present comes from thinking of it in terms of the identification of an ideal form of familiar legal institutions with the postulated eternal immutable law of nature which obtained at the end of the 18th Century rather than in terms of the classical creative Natural Law of the 17th Century.⁸

This is the law upon which our Constitution was founded--a law that was both creative and organizing--a means of finding new precepts and reshaping old ones; of organizing what had come down from the past with what was newly found.⁹

Despite this apparent accolade to scholastic natural law, Pound is usually unsympathetic. But the question still remains as to whether his theory as it now stands is amenable to natural law application.

In discussing this problem, no attempt will be made to

⁷ Pound, "The Scope and Purpose of Sociological Jurisprudence," Har. L. Rev., XXIV, 608.

⁸ Pound, Law and Morals, 33.

⁹ Roscoe Pound, "The Revival of Natural Law," N.D. Law., Notre Dame, XVII, June, 1942, 293. See also Ibid., 329-330.

give an entire treatise on natural law doctrine nor to prove the existence of the natural law.¹⁰ However, it is necessary to understand some basic points for an intelligent comparison of his theory with that of the natural law. These points are discussed briefly below. A discussion of his conception of the natural law in general, and particular fundamental points in his doctrine which seem inconsistent with natural law theory will follow. For our definition of law we take the classical one of St. Thomas: "Law is an ordinance of reason for the common good, made by him who has care of the community, and promulgated."¹¹

Point 1. Man acting as man differs from all other materially existing things in so far as he has an intellect to know what is true and good for him, and a will so that he can embrace it. Through his reason man can understand his end and can direct all his acts towards that goal. Hence the importance of fully understanding the purpose of man's existence. Since all men have the same nature all men have the same ultimate end. The ultimate human goal which all men seek is true happiness (God).¹²

10 Cf. supra, 8, n. 14.

11 Definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata. S.T., I-II, q. 90, a. 4, Summa Theologiae S. Thomae Aquinatis, ed. Marietti, Rome, 1950, I, 413.

12 "Now the last end of man and of any intelligent substance is called happiness or beatitude, for it is this that every intellectual substance desires as its last end, and for its own sake alone. Therefore the last beatitude or happiness of any

Point 2. This ultimate human good consists not in the perfection of the body but in the perfection of the soul wherein lies man's distinctive possession, his reason. However, man attains this end by external acts which necessarily come in contact with the acts of others. Hence a sound concept of man as a social animal is needed. The function of the state is one of organizing these outward acts so that man can best attain his end. It does this through law. Hence society is impossible without human law. It also follows that both the state and the law are but means to the end. Of the totality of human goods these external acts are inferior to every other good.¹³ Therefore, in the hierarchical structure of all human goods, such acts must be subservient to every other good. Moreover, among these human goods in themselves, there is also a priority in the order of dignity and in the order of necessity. Hence the importance of fully understanding the social nature of man.

intellectual substance is to know God." C.G., III, 25, Basic Writings of St. Thomas Aquinas, ed. Anton C. Pegis, New York, 1945, II, 46. Cf. also, S.T., I-II, q. 1, a. 1 and 8.

13 "The sovereign good is man's beatitude, which is his last end; and the nearer a thing approaches to this end, the higher must it be placed as a good of man. The nearest thing to that end is virtue, and everything else that is of use to man in well-doing, whereby he attains to beatitude. After this comes the right disposition of reason, and of the powers subject thereto. And after this the well-being of the body, which is requisite for facility of action. Lastly come those things that are without, which we employ as helps to virtue." C.G., III, 141.

Point 3. Since human law treats directly only of external activity, and since man is related to society as a part of the whole as regards to the instruments to be used in attaining his end, law is concerned primarily with the common good and only secondarily with the individual good.¹⁴ Hence whatever is required for the common good is material for human legislation. Mediately, by way of the common good, human law looks to the good of the individual.

Point 4. Since the end of man, i.e. his true happiness, lies in objects directly complete of spiritual rather than bodily needs, and since the goods involved in social intercourse are not the ultimate goods of human nature but merely instruments, the state, as an instrument serving man's ultimate happiness with the function of implementing justice, can never legitimately remove spiritual goods.¹⁵ With regard to non-spiritual

¹⁴ "Legal justice does indeed sufficiently direct man in his relations towards others. As regards the common good it does so immediately, but as to the good of the individual, it does so mediately. . . . The common good of the state and the particular good of the individual differ not only in respect to the many and the few, but also under a formal aspect. For the aspect of the common good differs from the aspect of the individual good, even as the aspect of the whole differs from that of the part." S.T., II-II, q. 58, a. 7, ad 1 and 2. Cf. also Ibid., I-II, q. 96, a. 3, and q. 100, a. 8.

¹⁵ "It must be observed, however, that a medicine never removes a greater good in order to promote a lesser; . . . yet it is sometimes harmful in lesser things that it may be helpful in things of greater consequence. And . . . spiritual goods are of the greatest consequence, while temporal goods are least important." S.T., II-II, q. 108, a. 4. Cf. also Ibid., I-II, q. 21,

goods, each of which is an instrument to our final happiness, but never inextricably involved in it (e.g. property or even life), such instruments are legitimately removable by the state, when the common good requires it, in favor of some other instruments. This is why the law may work a hardship on an individual in particular cases. But the common good can overrule an individual's good only because and in so far as the individual is a part of the social whole; and the individual is part of the social whole for the material instruments of his progress.

Point 5. Through reason man can come to an understanding of his end and the end of human law. However since the end is the end as apprehended, there is nothing to prevent man from acting from a mistaken end.¹⁶ Man's intellect is fallible. This occurs if man is either mistaken about the end, has a vague notion of it, or is concerned only with the immediate effect of his actions. Moreover, since the circumstances and conditions under which men operate differ in different times and places, different

a. 4 ad 3, and q. 87, a. 7 and 8.

¹⁶ This idea should in no sense be equated with Pound's subjective notion that good is what men think is good. For in natural law an action is good only if it is in accordance with right desire. Right desire is natural desire, or better, nature in its tendency toward its good. Men may still fall short of what real good is, but there is some objective basis for distinguishing these desires. Pound, whether he realizes it or not and despite (or rather because of) his scientific method, fails to recognize any qualitative objective valuation of desire.

means in these different times and places will be better adapted to achieve the final ends both of law and man. This accounts for the various systems of law and the possibility of changes within the system itself. It also allows discretion in the application of the law on the part of the judiciary. It should be noted that the end itself never changes, since it is based upon the nature of the institution or the creature, and hence any changes in the method of achieving the end by human law must be in conformity with the common good and must never be opposed to the final end of man.

Pound's objections to this doctrine stem from his misconception of the scholastic theory itself--specifically in its immutability and its authoritarian and theological basis, which to his mind lead to an irrational conservatism and an unrealistic view of the relationship between law and life. The quotations given above give a hint of this misunderstanding. What is "right and just" is conceived of as existing "for the time being"; and while he eschews the immutability of the system, he seems to indicate that scholastic natural law was not based upon "immutable principles." The basis for this confusion is evidenced in his own notion of the natural law.

Pound conceives of the natural law as consisting of either one of two extremes.

On the one hand there is the extreme of seeing only a religious, or ethical, or rational basis for the

practical activity and of the body of authoritative precepts it makes use of.¹⁷

In this light natural law can be considered as

only Theological, or as only ethical, or as only rational, or [we] may--as men did generally from the 17th to the 19th centuries--see it as two-fold, resting partly on revelation but supplemented by reason or jointly on revelation and reason.¹⁸

On the other hand there is the opposite extreme of seeing only a basis in the power of those who exercise the force of the political organization of the particular society.¹⁹

In his opinion the ideal would be a combination of both views--a regime of force applied according to just precepts to achieve just results. But no universally valid 'just results' can be obtained in the myriad of controversies with varying circumstances and conditions which now confront the lawyer.

The end or purpose of the legal order gives us an ultimate objective of government only if we can be certain that we have a universal ideal for all men, in all times, in all places, and not merely one of some men, in some times and in some places.²⁰

Although this "ideal" element in jurisprudence should not be rejected, yet history shows that it has changed from time

17 Roscoe Pound, an "Introduction" to American Liberty and "Natural Law", by Eugene C. Gerhart, Boston, 1953, 4.

18 Ibid.

19 Ibid.

20 Ibid., 5

to time. For example, the common good of the primitive society was peace, superseded by the status quo of the Greeks. It went through several changes until the 16th to 19th century when the common good was conceived of as the promotion and maintenance of individual liberty. Today it has swung towards social control and the satisfaction of individual wants and desires. Yet a universal, unchangeable natural law has been vouched for in each instance.

What it all comes to is that we make the best practical adjustment we can by experience developed by reason, and reason tested by experience, in order to solve problems of human relations in a complex social and economic order which do not admit of satisfactory solution by simple moral maxims as universally valid. . . . We have never been able to reduce the ideal to details for every day application. . . . If they cannot be proved by revelation or by pure reason, if they cannot stand for necessary precepts for all men in all places in all times, yet they maintain themselves as practical solutions to practical questions--until the changes which are the essence of life bring new experience and new operations of reason to bear upon changed tasks of social control.²¹

In reply to Pound and his objection to the theological element of the natural law, it should be noted that the five points of the natural law enumerated and explained above were derived from reason, but founded upon man in action, that is, on experience. Certainly it was not based upon scripture or revela-

²¹ Ibid., 13-14. For a more detailed history and description of his conception of the natural law, see Pound, "Revival of Natural Law Concepts", N.D. Law., XVII, June, 1942, 287-372.

tion. Likewise it is reason and experience alone which lead us to that part of the natural law which is relevant to the guidance of society. The theological character of medieval jurisprudence, though of great concrete effect in individual lives and social forms, is not necessary to the discovery of the natural law. At best it is but a negative norm. Hence there is no justification for dismissing natural law jurisprudence on the basis of its having theological foundations or implications or as a philosophy ineligible for inspiring and guiding the positive law of our own secular civilization.

His distinction between natural natural law and positive natural law gives further indication of his confusion. In this context he seems to conceive of the natural law system as absolutely immutable, and to identify or substitute natural law for positive law. Thus positive law allows no room for change.

For the purpose of comparison Pound divides natural law into natural natural law and positive natural law.²² It is difficult to understand fully just which precepts of a scholastic natural law he would include under each heading. It seems, however, that positive natural law includes those rules which Pound refers to as the jus gentium, that is, all those precepts which embody uniform rules governing the same subject matter, which

²² Roscoe Pound, "Natural Natural Law and Positive Natural Law", L. Q. Rev., London LXVIII, July, 1952, 330-336.

were affirmed at different times and places, and which scholastics, in his opinion, consider to be universal, and immutable. This Pound objects to as leading to a body of rigid, immutable results to which every dispute must be compared. Just what the natural natural law involves in his conception of scholastic natural law is left undefined. Perhaps it is the formulation of the ultimate end together with those precepts based upon reason or analysis alone. This lack of clearness again seems to stem from Pound's inadequate knowledge of the scholastic position.

In his own system this disjunction is more clearly defined:

The immediate task of philosophical jurisprudence is to organize, systematize and criticize the element of received ideals in the positive law of the time and place. But to do this work effectively, it must work to some end, and behind its immediate task there is one of finding and formulating that end. Between that ultimate task, which, if you like, may be referred to what I have called natural natural law, and the immediate task, the neo-Hegelians put an intermediate one of discovering and formulating the jural postulates of time and place. This task might be referred to as positive natural law.²³

Even more fundamental than his misconception of the natural law system is his pragmatism. What for Pound started out merely as a method, necessarily imbibed some of its philosophy; and the road has taken him further and further from the system of

²³ Pound, "The Revival of Natural Law," N.D. Law., XVII, 354.

natural law to his logical destination -- relativism. Any conception of transcendental truth has been eliminated. Truth is merely an idea or ideas which are parts of our experience. They become true just in so far as they help us get into satisfactory relationship with other parts of our experience. Applied to Pound's theory of law, this concept of truth enables the jural postulates to be fundamentally changed or eliminated entirely. He admits that they have undergone many changes even in the past fifty years. Since the postulates of any given society are the most generalized ideas indicative of and controlling the practical thought of its members, it is evident from our analysis of them, that a change in the postulates leads to a change in the end of law itself. Just as specific desires are not good or bad in themselves, so postulates, to which judicial decisions must conform, are not to be judged true or false. Hence law is no longer the embodiment of enduring principles of justice. There is no unchanging standard of values, no fundamental norm except the whims of society. Pound seems to realize this but is not too concerned, since society itself will prevent legislators and judges from using their power in an arbitrary manner. Moreover, the problem has apparently caused no difficulty in the past.

Law is a practical matter and the lawyer can find comfort in his having employed a practical means of adjusting competing, conflicting, and overlapping interests. . . . If its postulates are ultimately mistaken, they approximate to the truth sufficiently for practical purposes. . . .

We may concede, if the sceptic insists, that value is relative to something. Perhaps value in jurisprudence is relative to civilization. Proximately it is relative to the task of enabling men to live together in civilized society with a minimum of friction and a minimum of waste of the goods of existence. What accords with the jural postulates of the time and place has juristic value. If it will work in adjusting relations and ordering conduct so as to eliminate or minimize friction and waste, it is a valuable measure for a practical activity. Until philosophers enable men to do better, lawyers may do much with this practical measure developed by reason from experience.²⁴

Where there is no necessary, absolute, eternal truth, there can be no real and objective relationships between law and justice. Where there is no framework of reference, there can be no stability; there can be no absolute or ultimate goal. Hence Pound can logically pen the following but it is devoid of much meaning: "There is no eternal law. But there is an eternal goal--the development of the powers of humanity to their highest point."²⁵

It is true that the application of statistics to law has a definite value. Since a universal law cannot be fully applicable in particular cases (and human conduct is always particular), it is necessary that the law be such as to govern common needs and common problems, while it is at the same time impossible that a law be instituted which will not fail in some case.

24 Ibid., 371-372.

25 Pound, Interpretations of Legal History, 148

Every law is directed to the common welfare of men, and derives the force and nature of law accordingly; . . . Now it often happens that the observance of some point of law conduces to the common welfare in the majority of instances, and yet, in some cases, is very injurious. Since, then, the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good.²⁶

No man is so wise as to be able to consider every single case; and therefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view. And even if a lawgiver were able to take all the cases into consideration, he ought not to mention them all, in order to avoid confusion; but he should frame the law according to that which is of most common occurrence.²⁷

Thus while civil law as implementing natural law may not be absolutely applicable to human activity, it is amenable to statistical application. The point is, however, that the facts can't weigh themselves; they must be related to some norm. What are the facts and what is the norm in Pound's case?

The facts in Pound's theory consist of all the claims, wants, and desires of individuals. The norm or the function of law is to acknowledge as many of these claims, wants, and desires as possible with the minimum friction and waste. The difficulty of evaluating such claims has already been pointed out.²⁸ It is

26 S. T., I-II, q. 96, a. 6, Basic Writings of St. Thomas Aquinas, ed. Anton C. Pegis, New York, 1945, II, 798.

27 Ibid., ad 3. Cf. also Ibid., II-II, q 47, a. 3 ad 2.

28 Cf. supra, 44-53.

sufficient here to remark that for St. Thomas and scholastics a definite end is envisaged and statistical information is helpful in determining the best means to attain it. For Pound however, the end is determined by the claims and desires themselves. As they change the end changes. It is true that as regards material things, the common good may vary with time, place, and circumstances. However, none of these vitiates man's ultimate good. Nor does the fact that the common good in the concrete may vary change the notion of the common good itself. Neither is the common good to be determined by the desires and wishes of the greatest number. Desires, wishes, and claims of themselves with no objective consideration of their inherent qualities do not necessarily tend to the common good. This is especially true in a materialistic, secularistic age. Yet Pound has no standard by which he can measure the inherent quality of any desire or claim. As Professor Kenedy aptly points out:

Demands of mankind 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'.²⁹

Since law is composed exclusively of society's felt wants and not of objective norms, Pound feels justified in stating:

²⁹ Kenedy, "Pragmatism as a Philosophy of Law," Mar. L. Rev., IX, 75. *Lex scripta, sicut non dat robur juri naturali, Ita nec potest eius robut minuere vel auferre; quia nec voluntas hominis potest immutare naturam.* S.T., II-II, q. 60, a. 5, ad 1.

If in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation, to stand in the way of its doing so.³⁰

This refusal to consider the inherent qualities of desires does not coincide with the notion of man as a rational being. Law is an ordination of reason. Though man's distinctive faculties are his intellect and will, yet it is reason that enjoys a primacy over the will,³¹ otherwise there would be no foundation for a jurisprudence that insisted on the precedence of reason over will in social law-giving. Just as all natures impel their possessors towards an end, so does man's nature impel him towards an end which is defined by his intellect. Since reason points out the end as good and the will thereby seeks it, it is essential that the desires, claims, and wants be in accordance with reason and man's ultimate good. Where desires and claims are made with no reference to the ultimate good, it can hardly be said that man is acting in accordance with his nature, that is, reasonably.

30 Pound, An Introduction to the Philosophy of Law, 97-98.

31 Si ergo intellectus et voluntas considerentur secundum se, sic intellectus eminentior invenitur. . . . Quando vero res in qua est bonum, est infra animam; tunc etiam per comparisonem ad talem rem, intellectus est altior voluntate. S.T. I, q. 82, a. 3.

The natural law doctrine starts from a study of man's nature. This knowledge is not wholly apriori but is acquired gradually by experience over a long period of time. It has revealed that basically man is not a detached reason, but a rational, social, proprietary animal created by God. These characteristics have been found in all men at all times. Men share a common nature in virtue of which they can all be classified as men. They share a common dignity, not only by reason of their creation by God, but also because of their distinctive characteristics of intellect and will which places them above all other material things. All men have a goal in common in that all men in some way seek happiness.

Pound would agree with many of these ideas, at least theoretically. For example he states:

Although we think socially, we must still think of individual interests, and of that greatest of all claims which a human being may make, the claim to assert his individuality, to exercise freely the will and reason which God has given him. We must emphasize the social interest in the moral and social life of the individual. But we must remember that it is the life of a free-willing being.³²

He has admitted a common goal but only in an abstract fashion. The "development of the powers of humanity to their highest point" is a noble ideal but largely subjective. How is it accomplished; how is it measured; how is it determined? His

32 Pound, The Spirit of the Common Law, 111.

solution is acceptable as far as it goes, but it falls far short of the complete answer.

Since all men possess a common and unchangeable nature, dignity, and goal, there are some universal and unchangeable principles of action drawn from them and demanded by reason of them. For example, even Pound would admit that all men are under the obligation of rendering justice towards all. But just what does justice demand? For the advocate of natural law there are specific principles, based upon the nature and goal of man, to which all just law must conform. For Pound society itself is the ultimate norm, in that society will rebel if the limits of "justice" are exceeded.

A few years ago Pound undertook the task of organizing the legal system of China. Suppose he had been called upon to organize the legal system of Nazi Germany. He would have found competing claims of Aryan pagans, Jews, and Catholics. How would he have formulated the jural postulates? Would he have recognized that the demands of Aryan claims in an Aryan country required and justified denial of humanity to Jews and Catholics? Would there be no way of evaluating the rival claims; of pronouncing some spurious and evil?

How would Pound apply his pragmatic test to perjury? Would he recognize it as always evil, morally and civilly? Upon such recognition depends not only the efficacy of the legal order

but it forms one of the basic ties binding men together in organized society. How then can it be explained? The admission that men always have the duty of benevolence, of justice, of cooperation--the recognition of perjury, slander, adultery as always evil, postulates universal principles universally valid. To assert that society is the ultimate judge of when justice has been achieved is not only to permit society to be a judge in her own case, legitimately opening the door to such "isms" as nazism, facism and communism, but also to confuse the embodiment of the principles of justice with the principle itself.

However, the natural law doctrine does not require that all principles be universally valid. As was indicated above,³³ the elements comprising the common good in the concrete may change, requiring a change in the application of the principles themselves. Yet what has been said of Pound's concept of mechanical jurisprudence in addition to the examples he cites indicate a misunderstanding on this point. The following case is typical.

Suppose a farm on one tract and an oil refinery on an adjacent tract. The refinery is constructed and operated with all due care. In spite of everything that can be done to prevent it, waste products of the refinery get into the soil and rains wash them into and poison the water of a well on the farm and a brook that runs through it. Either the farm can no longer be used as such or the other tract cannot be used for a refinery. The courts have differed on this case. In an industrial state it is

33 Cf. supra 69, point 5.

held--on the basis of an absolute doctrine attaching liability to fault--that as the refinery is not at fault it is not liable. In an agricultural state it is held on the same facts that--upon a principle forbidding pollution of the water of a running stream--the refinery will be enjoined even though it must then be closed up. One can see the practical basis in the respective value of the competing activities in time and place here. But what is the universally applicable precept good for each apart from time and place?³⁴

The "universally applicable precept good" is that justice should be done to the parties concerned even though what was demanded by justice might differ according to the circumstances. Natural law of itself will not offer a complete solution; it is not a substitute for positive law. But it is not on that account to be discarded. On the contrary, it requires and is the basis for positive law which complements it, and gives it its particular determination according to the various conditions of man in time and place. It affords the foundation, framework, and norm for positive civil law. At times the principles may be difficult to apply and even admit of several different applications; but the principles themselves can never be denied or violated regardless of the direction in which society may drift. Under this aspect law becomes a constructive guide and not merely a slave to society. It forms the basis for the answer to the question posed above regarding the organization of a legal system

³⁴ Pound, an "Introduction" to American Liberty and "Natural Law", 6.

in Nazi Germany. Is it then vacuous or useless?

It is Pound who is unrealistic in believing that the natural law theory allows no change or that it is explicitly defined down to the minutest detail so that universally valid "just results" can be obtained in every case. The application of the natural law, or any other theory of law for that matter, never promised this. Even positive civil law based upon the natural law cannot prevent, and prudently should not try to rule out, all evil, lest greater evil follow. It may have to tolerate evil, although it may never enjoin it.³⁵ Moreover, from what has been said (point 4), to expect from the natural law a solution which in every case will leave both parties unhurt is chimerical. Aside from rendering each man his due, the law may work a hardship on a particular individual. This is the point where the judge must exercise wisdom and discretion; not an arbitrary discretion but one held in check by the nature and end of both law and man. While there is always equity to alleviate it as much as possible, the hardship in a particular case is a small price to pay for the benefits of social living.

Pragmatism with its scientific method concerns itself with facts alone. It believes wisdom will emerge if you persevere long enough in laboriously accumulating and classifying

35 Cf. S.T., I-II, q. 96, a. 2, and q. 97, a. 2

facts. Although not avowedly materialistic, pragmatism, when applied to a materialistic, secularistic society must partake of its spirit. Pound's engineering analysis of friction and waste, the material nature of all wants, claims, and desires, the cataloging of the "individual life" as merely one of the equal subdivisions of social interests, the constant emphasis on facts and not principles, the attempt to use exclusively the method of the physical sciences as the basis of jurisprudence, all betray this materialistic bias. Yet he somehow seems to realize that pragmatism of itself can furnish only part of the answer. While providing a certain degree of objectivity, the stability so necessary for a thorough, well grounded, progressive legal system is wholly lacking.

But his attitude toward natural law as a solution is both ambiguous and ambivalent. It stems from an honest misconception of the scholastic theory itself. Pound never fully distinguishes genuine and traditional natural law from its rationalistic caricature. He believes that in its scholastic form it rests on theological (i.e. supernatural) foundations. Nor has he wholly escaped a moral relativism which rejects any universal ideal or principles valid for all men at all times. In confusing the unvarying principles with the myriad particular but varying applications of these principles, in his conception natural law becomes for all practical purposes a substitute for positive law

itself. That it was never conceived as such is apparent to every student of the natural law system. That Pound views it in this light helps to explain his rejection of the system as leading to an irrational conservatism and an unrealistic view of the relationship between law and life.

Nevertheless, Pound's contribution to law, not only to such specific branches as administrative, criminal, and constitutional law, but also to its history and theory, can hardly be overestimated. In his persistent effort to adapt law to fit human needs and his emphasis upon the proper recognition of man's social nature as well as his individual nature, Pound became the forerunner of modern jurisprudence, and one of its greatest constructive contributors. Even his development of the use of the pragmatic and statistical method in the science of law was a notable contribution. For man's nature is not known wholly apriori. Only gradually and by experience do we learn to know ourselves. There is, therefore, a large sphere for a methodological pragmatism; but it never does and never can stand alone. It is here that his system fails. While he continually and rightly seeks a stable element in law accompanied by an ever changing content suited to the needs of the times, his basic philosophy has prevented him from ever finding it. For underlying every successful and complete system of law there must always be found, implicit or acknowledged, the true philosophy of man.

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APPROVAL SHEET

The thesis submitted by **Joseph Clarence Verhelle, S.J.** has been read and approved by three members of the Department of **Philosophy.**

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

Feb-16, 1958
Date

Paul V. Kennedy S.J.
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