THE SOCIOLOGICAL JURISPRUDENCE OF ROSCOE POUND.*

To attempt within the confines of a paper of this length to summarize the thought of one of the most prolific of twentieth-century writers on jurisprudence may well seem an over-bold undertaking. A bibliography of Pound's writings compiled twenty years ago contained the titles of 15 books and of 241 major articles; and Pound's activity has not declined with advancing years. Fortunately perhaps for the reviewer of his work, much of what Pound has written and said is repetitious. This is particularly true of the publications of his later years, which, like so much of his printed work, were first delivered as addresses. The result is that it is possible to find in Pound's work a keynote, and certain recurring major themes. It is proposed in the succeeding pages (1) to expound and attempt to interpret certain of these themes, (2) to consider the major criticisms of Pound's views, and (3) to attempt to assess the value of Pound's theories as practical tools by sketching the application of certain of them to current legal and social problems. Inevitably there will be much left unsaid: Equally inevitably, as will no doubt appear to the reader, much of Pound's work has been left unread.[1]

The keynote of all Pound's work is to be found in a phrase used by Sir Maurice Amos in 1932 in his lecture on Pound at the London School of Economics,[2] a phrase which later received Pound's own approval:[3] "Jurisprudence cuts ice." Given that "law" has a purpose

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1 Since the greater part of the work for this paper was done Pound's five-volume JURISPRUDENCE (St. Paul, 1959, hereafter cited simply as JURISPRUDENCE) has appeared and become available to the writer. Wherever possible reference to relevant passages of this work have been added.

2 *Roscoe Pound,* in MODERN THEORIES OF LAW (London, 1933), 87, at 90.

3 *Sociology of Law and Sociological Jurisprudence,* (1943) 5 U. OF TORONTO L.J. 1, at 20. It is true that Pound seems to have thought that the word "jurisprudence" was used by Amos as meaning only "sociological jurisprudence." Since one theme which Pound has developed is that in all ages jurisprudence has played an important part in marking out the tasks of law and in determining the content of law (*see infra,* note 5, and p. 308) it is fair to assume that he would still approve the phrase in its wider meaning.

to fulfil in society, Pound believes that human effort can be employed to make law more effective in fulfilling that purpose, and that the task of jurisprudence or legal philosophy—reflections about law—is to guide human effort in this direction.

But what is "law", and what is its purpose in society? Pound's views on these two questions must be considered first.

The definition of "law" and the ends of law.

Throughout the exposition of his legal philosophy Pound has spoken of "law" without attempting to define the term precisely. His typically pragmatic approach has been to assume that the nature of law may best be understood by what it does.

In three of his more recent series of addresses Pound sets forth[4] three apparently distinct ideas which have been described by the word "law":—

(1) "a regime of adjusting relations and ordering conduct by systematic and orderly application of the force of a politically organized society"—otherwise called the legal order.

(2) a "body of authoritative materials of or grounds of or guides to determination, whether judicial or administrative." This body of materials may be described more minutely as made up of authoritative precepts, an authoritative technique of development and application, and a background of received ideals[5] of the social and legal order.

(3) the judicial and administrative processes, the "process of determining causes and controversies according to the authoritative guides in order to uphold the legal order."

After pointing out that these are three distinct ideas, and that calling them by the one term has been a source of confusion in discussions on the nature of law, Pound says: "If the three meanings can be unified, it is by the idea of social control", and he goes on to put forward a tentative definition of law as "a highly specialized form of social control, carried on in accordance with a body of authoritative precepts,

4 SOCIAL CONTROL THROUGH LAW (New Haven, 1942), 40-41; THE TASK OF LAW (Lancaster, Pa., 1944), 43-44, 52; JUSTICE ACCORDING TO LAW (New Haven, 1951) 48-50 (hereafter cited respectively as SOCIAL CONTROL, TASK, and JUSTICE); see now 1 JURISPRUDENCE, 12-14.

5 It is as "received ideals" that the legal philosophies of the past have played their part in developing the law; and thus jurisprudence, in the larger sense, "cuts ice."

applied in a judicial and an administrative process." With a little tinkering, for example, by inserting in the first phrase a reference to the application of force, this tentative definition could be expanded into a comprehensive pragmatic and thoroughly "Poundian" (if the neologism may be pardoned) definition of law.

Given a definition of law as a highly specialized form of social control, what is its purpose? Pound would reply "social engineering"—a phrase he has used for nearly forty years.[6] Very broadly, one may distinguish between two classes of engineers. The job of the first is to keep existing machines running and to duplicate them where necessary. The task of the second is to design and construct new machinery for new purposes. The distinction between the two classes turns to a large extent on the availability of adequate tools and techniques. Pound's thesis of the five stages of legal development[7] is linked with an attempt to detect the end or ends of the law at each of these stages. One may apply the engineering metaphor to these by saying that as the tools and techniques of the law have developed the ends of the law have changed from those of the first class of engineer to those of the second.[8] In the "primitive stage" law was no more than a social instrument—indeed, the weakest of the three available social instruments—for keeping the peace, that is to say, ensuring that the machinery of society did not grind to a halt through excess of friction or break down through overstrain. It had neither the tools nor the techniques to do more. There followed a "stage of strict law", in which law had emerged as the prevailing agency to regulate society but operated solely through inelastic and inflexible rules: Its principal task was that of maintaining the general security by using the tools of certainty and formality to prevent and settle disputes. Next, in Pound's view, came the "stage of equity or natural law", in which the quest for certainty was modified by that for the ethical solution of controversies. One may say that the doing of justice, the satisfaction of the call for justice, appears as the

6 Its first use appears to have been in THE SPIRIT OF THE COMMON LAW (Boston, 1921), 195-196; see also INTERPRETATIONS OF LEGAL HISTORY (Cambridge, 1923; hereafter cited simply as INTERPRETATIONS), c. vii, 141-165.

7 *The End of Law as Developed in Legal Rules and Doctrines,* (1914) 27 HARV. L. REV. 195; see now 1 JURISPRUDENCE, 363-456.

8 It seems clear, however, that law is not to be excused from its original task. In SOCIAL CONTROL, 64-65, Pound suggests that the "great task of social engineering" is "such an adjustment of relations and ordering of conduct as will make the goods of existence . . . go round as far as possible *with the least friction and waste*" (emphasis added). This sounds more like the job of a maintenance engineer (perhaps a "greaser") than of a design and construction engineer: *Cf. ibid.,* at 111-112.—"There is at any rate an engineering value in what serves to eliminate or to minimize friction and waste."

most efficient lubricant of the social machine. Fourth came the stage of "the maturity of law", in which the watchwords are "equality" and "security", which insists on property and contract as fundamental ideas, and which aims at releasing as far as possible individual energies for the development of society by permitting the maximum of individual self-assertion.

One would expect maturity to be the final stage of development, followed inevitably by senility and decay. But Pound adds a fifth stage, which he describes as that of the "socialization of law." It is at this stage that the task of law appears to have been enlarged. Law has been maturing in its role of "maintenance engineer." Even in the stage of maturity of law its function, characteristically described as that of "holding the ring", has been that of providing the stable social framework, or perhaps keeping the basic machinery of society running, so that other agencies of social development could operate. But this type of engineering is not enough for Pound. For him law in modern twentieth-century society must also play its part as an agency of social development. The task of law is now twofold. It is both to maintain and to further civilization.

What then is "civilization" and how may law advance it? For answer we turn to an exposition of the second of Pound's main themes to be discussed, that of the jural postulates of civilized society.

Jural postulates of civilized society.

A number of Pound's seminal ideas were borrowed from the German jurist Kohler.[9] From him Pound took the above idea of the twofold task of law, though Kohler seems to have thought that law at all stages has had this twofold task, while Pound recognizes it only in the last stage of legal development. From his writings comes the definition of "civilization" as "the social development of human powers toward their highest possible unfolding." From him finally come the ideas, first that the jurist, who is to lay out the lines of the creative activity of law, must have a clear picture whereby to do so, and second that such a picture may be gained by ascertaining and formulating the so-called "jural postulates of the civilization of the time and place." These postulates were described by Kohler as the ideas of right and justice which that civilization presupposes. Accordingly, the

[9] For Pound's debt to Kohler in this respect see INTERPRETATIONS, 143-144; see now 3 JURISPRUDENCE, 5-8.

jural postulates which Pound himself framed in 1919[10] have been described as embodying "characteristic ideals of American civilization at the time."[11] But the description is not altogether apt.

To begin with, civilization as defined by Kohler is itself an ideal; more than that, it looks very like an unchanging ideal. Has there ever been a society worthy of the name of "civilized" which did not seek to develop human powers, whether over external nature or over internal nature, to their highest possible unfolding? It is true that ideas concerning the powers to be developed and the nature of their development have varied with the time and place of the society. Some other word seems to be necessary to describe these particular variations, to avoid the ambiguity of "civilization." Though the writer lacks familiarity with and access to the major part of Kohler's writing, he feels that the translator of the *Lehrbuch der Rechtsphilosophie* has been more faithful than Pound has been to Kohler's thought in using the word "culture" instead of "civilization" in speaking of the jural postulates.[12]

Further, it is impossible to regard the postulates—or, at any rate, the 1919 ones—as expressing purely American or purely twentieth-century ideals. Each of them is prefaced by the words, "In civilized society, men must be able to assume. . . ." One feels that what Pound means is rather, "In order to attain "civilization" (as defined above) men must be able to assume . . ." One feels also that this statement is true of every society whose ultimate goal has been "civilization" in this sense, however far the society's legal system has lagged behind the ideal expressed. If so, it is misleading to describe the postulates as "ideas of right and justice" unless we also define "right" and "justice" in terms of the attainment of "civilization" as already defined.

Take for example the first postulate: "In civilized society men must be able to asume that others will commit no intentional aggressions upon them." Clearly men cannot devote themselves to the highest development of human powers if much of their time and energy is to be absorbed in protecting themselves against the aggression of others, either by defending themselves or taking measures to forestall attack.

10 In an outline of a course of lectures delivered before the Trade Union College in Boston under the title *An Introduction to American Law*, reprinted (as revised by the author) in VANDERBILT, STUDYING LAW (2nd ed., New York, 1955), 379-435; see now 3 JURISPRUDENCE, 8-10.

11 STONE, THE PROVINCE AND FUNCTION OF LAW (Sydney, 1950), 367, cites HOCKING, PRESENT STATUS OF THE PHILOSOPHY OF LAW AND OF RIGHTS (New Haven, 1926), 93 *et seq.*, for this view.

12 See the translation by ALBRECHT, in the *Modern Legal Philosophy Series*, under the title PHILOSOPHY OF LAW (New York, 1921), 4.

It is trite nowadays to assert that the tremendous material and scientific resources which are devoted to war and defence preparations would be available for constructive purposes and the development of material welfare if the members of world society were as free from the fear of aggression as are the inhabitants of the major industrial countries today within those countries. Pound himself has referred on more than one occasion[13] to the conditions of vigilance required on the Indian frontier in the United States, or in the streets of a fifteenth-century Italian city-state. He leaves to be inferred the waste involved in this diversion of human energies. A similar demand that the individual's energies be not diverted to too great an extent to looking after his own security[14] is partly to be inferred from the fourth postulate: "In civilized society men must be able to assume that others will act reasonably and prudently so as not, by want of due care under the circumstances, to impose upon them an unreasonable risk of injury" and perhaps even from the fifth postulate: "In civilized society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere, and having a natural tendency to cross the boundaries of their proper use, will restrain them or keep them within proper bounds." In addition there is perhaps to be detected the idea that "progress" may be too dearly bought if human activities are to result in a spate of accidental or negligent injuries to others.

Yet there is nothing peculiarly American or even peculiarly twentieth-century here. In the stage of primitive law the first postulate was recognized, however imperfectly the nascent legal system was able to respond to the need. Nor are there lacking in early systems of law rules responding, though equally imperfectly, to the needs expressed by the fourth and fifth of Pound's postulates. What is contemporary about the postulates is perhaps the way the formulation reflects developmental tendencies already present in the law. But to say that law in a civilized society *is* developing in a particular way, and to equate the lines of that development *ex post facto* with necessary conditions for the attainment of "civilization", appears hardly to be the heroic task which Kohler envisaged as that of the jurist. For the jurist enunciating these postulates is merely following the law: Kohler's ideal jurist was to be a trail-blazer.

13 For example, SOCIAL CONTROL, 81-82.

14 Or the security of his property; it is curious that Pound has by his use of the word "injury" seemed to confine the postulate to personal security, while the fifth postulate is not so confined.

Nonetheless the three postulates so far discussed (Pound's first, fourth, and fifth) provide us with an interpretation of the law in terms of a purpose—an engineering interpretation, as Pound himself called it—and the same may be said of the third postulate, which has three branches. The first two run thus: "In civilized society, men must be able to asume that those with whom they deal in the general intercourse of society will act in good faith and hence—

(a) will make good reasonable expectations which their promises or other conduct reasonably create;

(b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto."

This appears to result from a blending of the old moral maxim *pacta sunt servanda* with the objective and the "injurious reliance" theories of contractual obligation.[15] Though the notion of an enforceable contract is by no means an exclusively modern one, this particular postulate is so framed as to express a necessary condition of economic progress in a complex economy with a high degree of economic interdependence. Such familiar developments as specialization and division of labour and productive effort depend upon the keeping of contracts and the fulfilment of expectations. A contemporary and local illustration appears in the text of a General Motors-Holden's advertisement frequently appearing in musical programmes (at any rate in Western Australia) under the heading "Behind the Scenes." The relevant sentences run: "The public sees the products GMH make. But behind these products is a team twice as large as the people directly employed by GMH. This team comprises the network of independent suppliers who provide GMH with materials, parts, components and services. GMH and the supplier industries are each dependent on the other." Nor is this postulate confined in its application to twentieth-century capitalist society. In the legal system of the Soviet Union, in whose economy the fulfilment of a productive plan may depend upon the co-operative production of a number of enterprises, the contract debtor may not be absolved from the obligation to perform by payment of either penalty, fine, or damages for non-performance.[16]

15 For a brief account of these theories see PATON, JURISPRUDENCE (2nd ed., Oxford, 1951), 356-359. The "injurious reliance" theory is Pound's own: AN INTRODUCTION TO THE PHILOSOPHY OF LAW (New Haven, 1922), 269, 282.

16 Decree of 19 December 1933, on The Conclusion of Contracts for 1934, sec. 19. (HAZARD AND WEISBERG, CASES AND READINGS ON SOVIET LAW (New York, 1950), 306, 310: see also 1 GSOVSKI, SOVIET CIVIL LAW (Ann Arbor, 1948), 438-440).

The third branch of this postulate—that men must be able to assume that those with whom they deal—

"(c) will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they receive, at another's expense, what they could not reasonably have expected to receive under the actual circumstances", appears at first sight to be a purely moral or ideal postulate, responding to the "civilized" demands of good faith or honesty. But on closer examination an effort-economizing value can be detected in this also. Just as it may be argued that the ability to rely on others keeping their undertakings relieves the person to whom the undertakings are made not only of the task which he has "farmed-out" but also of the need to spend time supervising those others, so the ability to rely on others not taking advantage of one's mistakes may relieve him of some of the burden of repeated checking to assure that no disadvantageous mistakes are made. The possibility of being able to rely, even if only in part, upon the good faith of others mitigating the consequences of our mistakes may well release both energy and enterprise. For example, not only government departments but also a large number of private concerns waste a good deal of time and energy in systems of check and counter-check designed to minimize the possibility of mistake. Many otherwise excellent government servants have been partially paralysed, that is to say, rendered only half-effective, by the fear of making some mistake.

If any one postulate expresses a characteristically American ideal it is the second:

> "In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order."

But it is to a great extent an outdated ideal. It enshrines the characteristically nineteenth-century American belief that free enterprise, and the private, uncontrolled ownership of the means of production, distribution, and exchange is a necessary condition of social and economic progress. And even though, in mid-twentieth-century Australia and New Zealand there are still groups who proclaim their undying faith in these shibboleths, they (and no doubt their counterparts in the mid-twentieth-century United States) suffer a degree of governmental, and therefore, within Pound's definition of "law", legal limitation on their control of their "own" which calls for a considerable revision of

this postulate. Not only is business subjected to a large variety of controls—for example, price control, licensing of manufacturing or distributing activities, factory and other industrial legislation—but the private ownership of land also may be subject to rent control, to zoning and town-planning legislation, to building by-laws (by no means a new development), and similar restrictions. Moreover, the unqualified assertion of freedom of private property needs some modification as a result of the operation of Pound's fourth and fifth postulates, discussed above.

Nevertheless, when Pound revised or restated these postulates in 1942 and 1943[17] he not only found it unnecessary to reconcile potential conflicts between postulates or to redraft the second postulate, but he suggested the possible emergence of three further postulates which, Stone suggests,[18] would if true demand substantial modifications to all but the first postulate. These were:

> (a) that men must be able to assume that they will be secure in their jobs
>
> (b) that men must be able to assume that the enterprise which employs them or others shall bear the burden of the human wear and tear caused in its operation
>
> (c) that men must be able to assume that society as a whole will bear the risk of harm or misfortune befalling its individual members, a postulate which is an extension of the idea expressed in (b).[19]

It would be possible to interpret at least the first of these as directed towards economizing of effort. Unemployment wastes human resources; though technological unemployment may be the price of technical progress. But other values are implicit in them. Although the first five postulates look to the exclusion from a "civilized" society of the grosser aggressions on human integrity and dignity, the civilization they reflect is one whose predominant aim is material progress. These

17 SOCIAL CONTROL, 118 *et seq.*; OUTLINES OF LECTURES ON JURISPRUDENCE (5th ed., Cambridge, Mass., 1943), 168, 179, 183-184. Curiously enough, the revised postulates are not disclussed in JURISPRUDENCE. But he says (3 *id.*, at 14): "Jural postulates of an era of transition are not readily discovered and I have not tried to formulate them."

18 THE PROVINCE AND FUNCTION OF LAW (Sydney, 1950), at 367.

19 In *Philosophy of Law and Comparative Law,* (1951) 100 U. PA. L. REV. 1, at 14, Pound phrased this developing jural postulate somewhat cynically, as: "In civilized society men are entitled to assume that they will be secured by the State against all loss or injury, even though the result of their own fault or improvidence, and to that end that liability to repair all loss or injury will be cast by law on some one better able to bear it."

last three emphasize human dignity and the value of the individual human life.[20] Moreover, they appear more consonant with Kohler's original idea, as goals towards which juristic effort should strive, rather than rationalizations of positions already reached. One merely regrets their incompleteness. Others could well have been added by 1942; for example, that men must be able to assume that as workers they will share more equitably in the products of industry, or that as workers they will have a greater say in the control and management of industry.

If there is value in Kohler's original idea and in Pound's elaboration of it, there is no necessary reason why Pound's formulation of the postulates should be regarded as the last word. It may be the task of an Australian jurist to formulate the distinctive jural postulates of Australian civilization.[21] This poses the problem: How are such postulates to be formulated? Pound himself, in *Interpretations of Legal History*,[22] felt that Kohler's interpretation was too idealistic, and that it tended to give men the notion of an "idea" operating from within, bringing about legal development in its growth and unfolding. His first set of postulates, indeed, have been derived as generalizations from the course of legal development. His second set, however, reflect an attempt to detect what the community demands or expects of its "civilization", though there is still the tendency to judge the demand by what has already been conceded by the law.

Pound's Theory of Interests.

In *Interpretations of Legal History*[23] Pound went on to suggest another possible "instrumentalist" interpretation of legal history which became a third major theme of his work, the theory of interests. He sees as involved in the existence of civilized society not only the generalized postulates for law discussed immediately above, but also

20 They reflect also the failure of the legal system to fulfil the expectations expressed in the earlier postulates. See *infra*, at 304.

21 Considering the notorious disregard by the "average Australian" of minor and not-so-minor rules and regulations, one such postulate may well be "that men must be able to assume that in their day-to-day activities they will not be checked and hampered by a multitude of petty restrictions imposed by legal authority." A legal system which fulfilled such a postulate would probably release energy, enterprise, and efficiency, too. Why is it that whenever postal officials and railwaymen decide to work strictly to regulations the effect is to slow up the business of the Post Office and of the railway system involved?

22 At 150.

23 At 151 *et seq.*

a multiplicity of human claims or demands "the claim(s) or want(s) or demand(s) of the individual human being to have something or do something, or, it may be, not to be coerced into doing what he does not want to do." These, following Jhering, Pound calls "interests."

It is possible then to describe the task of law as that of recognizing and securing certain of these interests, within defined limits imposed partly by the limits of effective legal action,[24] by the precepts, processes, and techniques which belong to law.

Although it is possible to interpret law in each of the successive stages of legal development as primarily concerned with the securing of interests, Pound has asserted that jurisprudence did not begin to think in terms of human interests until men became aware that there were not enough of the goods of life to go round, that the world was crowded and its resources had been exploited.[25] Though this generalization may be rash, it underscores the fact that the central problem for a jurisprudence of interests will be the choice between conflicting demands. This will necessitate first, the delimitation of the interests which are pressing at any given time—the making of an inventory of human wants; second, the classification of those interests, and third, their evaluation. Then "the law" may choose which it shall protect or secure, and in the event of a conflict of interests, whether it shall intervene at all and in support of what interest.

How then shall the jurist compile an inventory of the interests which press for recognition in modern civilized society? Bearing in mind that it is claims and demands of others that he is seeking—not what he thinks is good for them, but what they think is good for themselves—what investigative materials and techniques of inquiry must he employ? The social psychologist might seek for basic instincts, or drives, or behaviour tendencies. But as Stone has pointed out[26] Pound has not followed this line. Some sociologists might perhaps suggest a vast questionnaire; but the task would be self-defeating in its immensity. Besides this, the question is not what people think they might like, but what they care about enough to assert some claim to in the

24 Discussed *infra,* at 301.

25 Once jurisprudence has begun to think in terms of human interests, earlier legal philosophies or theories may be re-interpreted in these terms; see, for example, Pound, *A Survey of Social Interests,* (1943) 57 HARV. L. REV. 1, at 6-12.

26 THE PROVINCE AND FUNCTION OF LAW (Sydney, 1950), 488. See also Pound, *A Survey of Social Interests,* (1943) 57 HARV. L. REV. 1, at 15-16; 3 JURISPRUDENCE, 288-289.

conditions of modern society. So Pound looks at the actual assertions of men in the particular society they live in, and especially, indeed almost exclusively, to their assertions or claims in legal proceedings (as plaintiffs, or defendants) and in legislative proposals (whether accepted or rejected).[27]

Next, how are these interests to be classified? To begin with, Pound adopts from Jhering a threefold "classification" of interests as social, public or individual. The classification depends, in Pound's own words, on the title in which they are asserted. Individual interests are those involved immediately in the individual life and are asserted in title of that life. Public interests are those involved in life in a politically organized society and are asserted in title of that organization. Social interests are those involved in social life in civilized society and asserted in title of that life.

This attempt at classification gives rise to a number of difficulties. The least of these is that of assigning a meaning to the curious phrase (curious, that is, in the context) "in title of." Perhaps an adequate paraphrase would be "because they benefit" that life, or that organization. More serious is the problem of defining the so-called "public interests." Pound's own summary of interests, in his *Outlines of Lectures on Jurisprudence*,[28] suggests that he has not devoted much time to working out a scheme of public interests. Under the general heading "Interests of the state as a juristic person" he lists a number of readings suggestive of the idea that there is or may be a public interest in governmental immunity from suit, and then two specific but hardly-documented sub-headings contemplating interests respectively of "personality" and "substance." There follows a second general heading, "Interests of the state as guardian of social interests", after which comes the classification of social interests. It is impossible not to agree with Stone[29] when he says that the category of public interests is unnecessary. This would reduce the trichotomy to a dichotomy.

27 See Pound's own articles, *Interest of Personality*, (1915) 28 HARV. L. REV. 343, 445; *Individual Interests in the Domestic Relations*, (1916) 14 MICH. L. REV. 177, in which the majority of Pound's "raw materials" are either cases or provisions of foreign codes, with some reference to legal textbooks and works of legal philosophy. See now 3 JURISPRUDENCE, c. xiv, ss. 82-99. *Cf.* also the material collected in 2 SIMPSON AND STONE, LAW AND SOCIETY (St. Paul, 1949) 743-1301, under the chapter heading "Interests Pressing and Secured." The work, by two of Pound's former pupils and colleagues, is clearly Poundian in approach. See too STONE, PROVINCE AND FUNCTION OF LAW, cc. xxi and xxii.

28 (5th ed., Cambridge, Mass., 1943), 97-112.

29 THE PROVINCE AND FUNCTION OF LAW, 491-492.

Stone's argument in support of the above assertion suggests that even the dichotomy is false: And this is the major difficulty in the attempted classification of interests. He points out that all the so-called "public" interests may be looked at from the standpoint of what Pound calls the social interest in the individual life, while the "social" interests may be interpreted as being merely the aggregate of corresponding individual interests. To pursue this criticism too far, however, is to misinterpret Pound's intention. Interests are not to be classified with the rigour of a taxonomic science. The "classifications" enunciated are convenient rather than precise generalizations under which specific individual claims or wants or demands may be subsumed for the purpose of comparison or evaluation. Thus individual claims, wants or demands may be looked at either as social interests or as purely individual interests. From the first point of view they may be classified as relating to the general security; to the security of social institutions; to the general morals; to the conservation of social resources (whether natural or human); to the general progress, economic, political, or cultural, and finally, to the social interest in the individual life—in individual self-assertion, individual opportunity, individual conditions of life. From the second point of view they may be classified as (a) individual interests of personality, relating to the physical person, to freedom of will, to honour and reputation, to privacy and sensibilities, to belief and opinion, (b) individual interests in the domestic relations, (c) individual interests of substance—in property, in succession, and testamentary disposition, in freedom of industry and contract, in promised advantages, and in advantageous relations with others, including the "right of association." Any given claim may well overlap the boundaries of several classes. The husband's claim to the *consortium* of his wife may be classified both as an individual interest in the domestic relations and as an individual interest of substance. So far as tortious injury to the wife is concerned, the tendency has been to recognize the claim only to the extent of the latter interest.[30] If the claim is encroached upon by an adulterer both interests may be recognized.[31] The claim may also be looked upon as involving the social interests in the security of social institutions—specifically, the institution of marriage—and in the general morals.

[30] Best v. Samuel Fox & Co. Ltd., [1952] A.C. 716, at 728; Toohey v. Hollier, (1954-1955) 92 Commonwealth L.R. 618, at 628, in which it was said that the aid and comfort lost must be capable of estimation in money. For evidences of a possible change see the writer's *Some Recent Developments in the Law of Torts*, (1958) 4 U. WEST. AUST. ANN. L. REV. 209, at 214, note 29.

[31] Menon v. Menon, [1936] P. 200; *cf.* Scott v. Scott and Anyan, [1957] P. 1.

But though the process of classification may help in evaluating claims or demands, the classifications themselves have little evaluative significance. Apart from the all-pervasive social interest in the general security—the earliest interest to be secured, and the chief end of primitive law—no one category of interests carries any more weight than another. As between classes the social interests are likely to outweigh individual interests; though even here almost any individual claim could be subsumed under the social interest in the individual life as well as under a specific individual interest. Pound has insisted[32] that when conflicting claims are to be weighed they must be reduced to common terms, either as individual interests or as social interests. But, he says, only in relatively simple cases is it possible to take sufficient account of all the factors involved by directly comparing individual interests as such. It may be, too, that it is a characteristic of the current stage of legal development (the so-called stage of socialization of law) that greater attention is paid to the social interests involved in individual claims than has been the case in previous stages.

The teasing question remains—by what criteria are we to measure the interests involved on either side of any particular conflict? Pound offers none, but the Jamesian injunction:[33] Satisfy as many claims or wants or desires (by which presumably he means individual claims or wants or desires) as you can, for every claim is prima facie good until another opposes it, and "the essence of good is simply to satisfy demand." It is at this point that the most telling criticism of Pound's theory has been directed, and it is on this point that Pound appears more recently to have undergone a change of thought. This will be discussed more fully below.

The limits of effective legal action.

In his *Outlines of Lectures on Jurisprudence*[34] Pound has outlined an eight-point programme of the sociological school. The third item in the programme is: "[the] study of the means of making legal precepts effective in action." In a Bar Association address bearing the title of this section of the paper[35] Pound has recorded some important insights. Behind each of the five stages of legal history Pound sees as

32 *A Survey of Social Interests*, (1943) 57 HARV. L. REV. 1, 3; 3 JURISPRUDENCE, 328.

33 JAMES, "The Moral Philosopher and the Moral Life" in THE WILL TO BELIEVE (London, 1911), 184, at 201. See the extract in Pound's OUTLINES OF LECTURES ON JURISPRUDENCE (5th ed., Cambridge, Mass., 1943), 56-57; and see 1 JURISPRUDENCE, 542-543.

34 *Ibid.*, at 32-35; 1 JURISPRUDENCE, 350-358.

35 *The Limits of Effective Legal Action*, (1916) 27 INT. J. ETHICS 150; see now 3 JURISPRUDENCE, 353 *et seq.*

a limitation on the ends of law the problem of adequate enforcement of the law. In the earliest stage of law keeping the peace was all that the primitive legal system could manage. The stage of strict law reflects a fear of the arbitrariness which any attempt to individualize justice might bring; so the law is confined to strict application of rigid and formal rules, and to a limited area of human activity, and the problem of enforcement is sidestepped. It is with the stage of moralization of law, the period of equity and natural law, when the law attempts to deal with the whole field of human conduct, to turn moral duties into legal duties, and thus to be "ethical at the expense of what is practicable" that the problem becomes acute. Its insolubility leads to the stage of "maturity" of law in which as in the stage of strict law, the field of operation of law is confined and no attention is given to the problem of enforcement. But the present stage of "socialization of law" when the ideas of the social sciences are coming into law, and once again ambitious programmes are afoot—in many cases in response to public demand—to cover the whole range of human relations by law, the non-enforcement of law is again apparent as a problem. Writing in 1916, Pound referred specifically to the frequent complaints of non-enforcement of "blue" laws and of the already voluminous social legislation. The complaints could be matched anywhere in Australia and New Zealand today. For example, non-enforcement of the licensing laws on the west coast of New Zealand was notorious until a high-level police decision in 1957 that there could not be one "law" for the west coast and another (however imperfectly enforced) for the rest of New Zealand provoked a storm of controversy. When the writer was living in Wellington, New Zealand, there were frequent complaints in the newspapers of the failure of various local authorities to enforce their probably unnecessary by-laws prohibiting the lighting of fires in the open without a permit. Inadequate or non-existent enforcement of parking by-laws has, it seems, been a major cause of traffic congestion in many cities and has limited the usefulness of the motor car to the person who wishes to visit the business area of the city for only a short period during the day; yet the by-laws are directed to protecting his interests against the "all-day" parker. Instances could be multiplied indefinitely.

It is possible that the root of the problem of non-enforcement of law lies outside the legal system itself. It may be that the social interest in the individual life includes a social interest in the inefficiency of law.[36] But some of the difficulties undoubtedly result from defects in

[36] There are some penetrating insights in Seagle's provocative book, LAW—THE

the "tools" of law. Of the five sources of limitations on the effectiveness of legal action which Pound enumerates, three or four can be related to such defects. For example, Pound speaks of difficulties involved in the ascertainment of the facts to which legal rules are to be applied. The existence of these has been heavily underscored by the sustained attacks of Jerome Frank on the inadequacy of courts of law as fact-finding instruments.[37] Yet the defects are only in part those of the courts; in part they stem from the human failings of witnesses, in part from the inability of modern science to devise a completely acceptable method of determining whether a witness is or is not telling the truth. In 1916 Pound ascribed the reluctance of the law to give damages for purely mental suffering to the difficulty of ascertaining the facts.[38] This reflects on the stage of medical knowledge rather than on judicial competence.[39]

When, however, Pound gives as another source of such limitations "the intangible nature of moral duties which defy enforcement as legal duties" it is clear that the difficulty is external to the law. Pound used to give point to the difficulty in his addresses by telling the story of the schoolmaster's injunction to his pupils, "Boys, be pure in heart or I'll flog you."[40] No conceivable legal system could compel purity of heart, though it could punish the external *indicia* of impurity if they could be defined. Thus Pound is on less secure ground when he speaks of the unsuccessful attempt of Roman law to secure that manumitted slaves displayed "gratitude" towards their former masters. The display of gratitude, *e.g.,* by *obsequium,* or of ingratitude, *e.g.,* by *contumelia* or *convicium,* is an external standard of conduct which the law can reach and enforce or restrain.[41]

It is not clear, moreover, that the third of Pound's difficulties—"the subtlety of many modes of seriously infringing important interests which law would be glad to secure effectively if it might"—necessarily points to defects in the law. He instances the injury to domestic rela-

SCIENCE OF INEFFICIENCY (New York, 1952). Perhaps there is some correspondence between this hypothetical social interest and the "jural postulate" suggested in note 14 above.

37 See, for example, his COURTS ON TRIAL (Princeton, 1949) especially c. ii, "Facts are Guesses", and c. xxiv, "Da Capo."

38 *The Limits of Effective Legal Action,* (1916) 27 INT. J. ETHICS 150.

39 *Cf.* the remarks in Victorian Railway Commissioners v. Coultas, (1888) 13 App. Cas. 222, at 226; and see the discussion in 3 JURISPRUDENCE, 37-41.

40 In LAW AND MORALS (Chapel Hill, 1926), 67. Pound gives a reference to POLLOCK, A FIRST BOOK OF JURISPRUDENCE (London, 1904), 47. Pollock attributes the utterance to Dr. Keate of Eton.

41 See BUCKLAND, THE ROMAN LAW OF SLAVERY (Cambridge, 1908), 422-427.

tions caused by tale-bearing or intrigue or by alienation of affections, and the difficulties encountered in securing a right of privacy. There is no technical legal reason (apart perhaps from difficulty in proving the facts) why a remedy should not be given for such an infringement of interests. Perhaps Pound means that the granting of the remedy would be tantamount to shutting the stable door after the horse has fled, in any specific case, and would do little to deter future tale-bearers or intriguers. But this same comment can be made in many other instances in which law gives a remedy against a person who has infringed another's interests. The tort rules regarding negligence on the highway seem to have done little to encourage careful driving. The ambiguity of the phrase "secure interests" is the root of this difficulty. "Law secures interests by punishment, by prevention, by specific redress, and by substitutional redress: and the wit of man has discovered no further possibilities of judicial action." As a gloss on this Pound has been wont to quote an observation of one of Kipling's oriental characters:[42] "Is a man sad? Give him money, say the Sahibs. Is he dishonoured? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." Pound adds that it is not so obvious what else the law may do. Nevertheless, the Oriental would say that the law has failed to "secure" a man's happiness, honour, or integrity. Only prevention and, perhaps, specific redress can be said to "secure" interests, except so far as the threat of punishment or of substitutional redress may deter any man from interference with another's protected interests. It is perhaps as a partial result of this that Pound has presented us with revised postulates germane to the situation in which persons have suffered injury or misfortune, whether by "wear and tear" in the industrial process or otherwise. Because law has not been able to assure men of the security contemplated by the fourth and fifth of the original jural postulates, the expectation is now that if their physical integrity is damaged they will be assured of receiving adequate substitutional redress.

Pound sees as a final limitation on the effectiveness of legal action the necessity of appealing to individuals to set the law in motion. Apart from the deterrent effect of the risks involved in embarking upon civil litigation for the protection of interests, there seems to be a deep-rooted reluctance, in Anglo-American civilization at all events, to set the machinery of the criminal or quasi-criminal law in motion. In the course of the newspaper correspondence relating to "illegal" rubbish fires in the suburbs of Wellington, referred to above, the point

42 SOCIAL CONTROL THROUGH LAW (New Haven, 1942) 60.

was made that persons aggrieved by the lighting of such fires could easily complain to the local authority, which would then take any necessary action. It was clear, however, that the view of the aggrieved correspondents was that the local authority should itself detect the breaches of its own regulations. To do this of course would need a small army of inspectors. Their presence and their activities would no doubt before long evoke vigorous complaint, not improbably from the same persons responsible for the original complaints of non-enforcement of the law. Again one suspects a social interest (or it may be, a jural postulate) based on the inefficiency of law.

The "engineering" value of all this is obvious. If law is regarded as a tool, or a set of tools, or a piece of machinery, it is obviously necessary for those who would use it for social purposes to have a clear understanding of the limits of its capacity. Pound himself has said,[43] "It is not enough for the law-maker to study the form of the rule and the abstract justice of its content. He must study how far cases under the rule are susceptible of proof. He must study how far by means of his rule he may set up a tangible legal duty capable of enforcement objectively by legal sanctions. He must consider how far infringements of his rule will take on a palpable shape with which the law may deal effectively. He must study how far the legal machinery of rule and remedy is adapted to effect what he desires. Last and most of all he must study how to insure that someone will have a motive for invoking the machinery of the law to enforce his rule in the face of the opposing interests of others in infringing it."

As a corollary to this theme, one may glance at Pound's thesis of the hierarchy of forms in different systems of law.[44] The authoritative precepts which form part of the body of materials known as "law" may be subdivided into four classes: Rules, principles, conceptions, and standards. This classification is easily fitted into an "engineering" interpretation of law. Three of the classes in particular stand out as "tools" peculiarly adapted to specific purposes within the over-all task of law.

Rules are, as Patterson has said, "episodic."[45] They attach a definite detailed legal consequence to a definite detailed set of facts. They respond to the ideals of certainty and stability in the law. They

[43] *Op. cit. supra,* note 38, at 161.

[44] *Hierarchy of Sources and Forms in Different Systems of Law,* (1944) TUL. L. REV. 475; see now 2 JURISPRUDENCE, 124-128. Originally Pound included in the hierarchy "doctrines"; by 1941 (see TASK) he had dropped this class.

[45] JURISPRUDENCE (Brooklyn, 1953), 269.

form the staple of criminal law, the law of property, commercial law. Explicit and self-contained, the typical rule offers no possibility of growth or change within the legal system, except by interpretative fictions. Rules are the characteristic end-product of the legislative process. Where they emerge from the judicial process they do so in situations in which certainty and specificity are valued above flexibility and the potential of growth, though they may appear at times as instruments of experiment or of tentative growth.

Principles on the other hand are growing-points in the law; in Pound's own words, they are authoritative starting-points for legal reasoning. They are not typically the work of legislators. Pound also denies that they are the work of courts, and ascribes them to lawyers, usually writers and teachers. However true this may be of continental legal systems, it is wide of the mark when applied to the common law, especially in its original home.

Pound speaks as if the distinction between rule and principle is clear-cut. In fact there is an infinite gradation or spectrum of generality. Even the legislative process must admit of a degree of generalization in the enunciation of rules. The range within the judicial process may be illustrated by contrasting the well-known decision of *Oliver v. Saddler and Co.*,[46] in which, within the framework of *stare decisis*, the decision of the House of Lords was as nearly episodic as was possible, with Lord Atkin's famous "neighbour" principle as enunciated in *Donoghue v. Stevenson*.[47] The subsequent history of *Donoghue v. Stevenson* illustrates, too, the way in which the potential growth of a principle may be checked when it meets boundaries already set by precepts falling within the "rule" part of the spectrum.[48]

Standards are defined by Pound as "general limits of permissible conduct to be applied according to the circumstances of each case." As Pound points out, they have always a certain ethical quality; indeed, the judgment by which they are applied is quasi-ethical in character. In this they differ from principles. Once the selection of the governing principle is made it is applied by an essentially deductive process. Standards are the principal tools for individualization of decision. A phenomenon frequently noted is a reaction of the judicial process against excessive individualization, perhaps against the painful nature of the individualized decision, a reaction which is sooner or later corrected by a fresh insistence on the importance and the function

46 [1929] A.C. 584.

47 [1932] A.C. 562.

48 See for an illustration the writer's *Some Recent Developments in the Law of Torts*, (1958) 4 U. WEST. AUST. ANN. L. REV. 209, at 211.

of the standard. An example is the attempt made in the 1930's, in a group of cases involving collisions with unlighted objects at night,[49] to elevate that canon of good driving which says that a driver must travel at all times at such a speed that he can pull up in half the clear distance ahead into a rule breach of which automatically meant that the colliding driver had been negligent, *i.e.*, had failed to come up to the standard of care of the reasonable man. More recently there have been dicta in the House of Lords[50] emphasising the function of the standard of the reasonable man in cases involving a master's liability for injury to his servant, and criticising the tendency to seek for rules in past decisions in similar cases rather than to individualize the decision in the instant case by direct reference to the standard.

The task of Jurisprudence.

Enough has already been said of the origin of Pound's main ideas to show that he is an eclectic. The fairest evaluation is probably Patterson's:[51] "It is true that Pound has built upon the work of many others, but he has built." Pound himself has quite recently indicated what were some of the major influences on his thought.[52] What he has taken from Kohler and Jhering and James he has, of course, developed. Elsewhere, as in the important early articles on *The Scope and Purpose of Sociological Jurisprudence*,[53] he has been frankly synthetic. His approach to the legal philosophies of the past and present seems to have been governed by two attitudes: The first, summed up

49 Tart v. Chitty, [1933] 2 K.B. 453; Baker v. Longhurst, [1933] 2 K.B. 461; Tidy v. Battman, [1934] 1 K.B. 319.

50 See Qualcast (Wolverhampton) Ltd. v. Haynes, [1959] 2 All E.R. 38, *per* Lord Keith at 42, Lord Somervell at 43-44, Lord Denning at 44-46. *Cf.* Davie v. New Merton Board Mills, [1959] 1 All E.R. 346.

51 JURISPRUDENCE (Brooklyn, 1953), 509. See also Simpson, *Roscoe Pound and Interpretations of Modern Legal Philosophies,* (1948) 23 N.Y.U.L.Q. REV. 393, at 409-410.

52 *Philosophy of Law and Comparative Law,* (1951) 100 U. PA. L. REV. 1, at 17-18. "I owe much to Kohler's idea of the jural postulates of the civilization of the time and place, to Radbruch's antinomies and his ideas of justice and of morals. I owe much also to Hauriou's great contribution in his idea of the "institution." In common with most Americans who had a scientific training in the 80's of the last century, I was brought up on Comtian positivism and turned thence to Comtian sociology at the beginning of the present century. Studying law in the meantime, like all Americans of the latter part of the nineteenth century, I fell under the spell of Sir Henry Maine and thus of Savigny. Ultimately the radical empiricism of William James seemed to do most in enabling me to see the task of law and how we go about performing it. Without enlisting as Thomist, or Kantian or Hegelian or Comtian, I am helped by much each has to tell me and can use much of what they have worked out in advancing the practical science of law."

53 (1911) 24 HARV. L. REV. 489; (1911-1912) 25 HARV. L. REV. 140, 489.

in the course of Pound's controversy with the Realists, that[54] "there are many approaches to juristic truth, and [that] each is significant with respect to particular problems of the legal order . . . . in the house of jurisprudence there are many mansions. There is more than enough room for all of us and more than enough work. . ."; the second, that the legal philosophy of every age may be seen as responding to the needs of that age. This approach is reflected by his inclusion in his definition of "law" the "received ideals" of the society of the time and place as governing the development and application of legal precepts.

The specific tasks of jurisprudence or philosophy of law in the twentieth century are implicit in Pound's eight-point "programme" for sociological jurisprudence. This runs as follows, in Pound's own words:[55] "Sociological jurists insist upon eight points: (a) Study of the actual social effects of legal institutions, legal precepts, and legal doctrines. (b) Sociological study in preparation for lawmaking. (c) Study of the means of making legal precepts effective in action. (d) Study of juridical method: psychological study of the judicial, legislative and juristic processes as well as philosophical study of the ideals. (e) A sociological legal history . . . (f) Recognition of the importance of individualized application of legal precepts—of reasonable and just solutions of individual cases. (g) In English-speaking countries, a ministry of justice. (h) That the end of juristic study . . . is to make effort more effective in achieving the purposes of law." Behind these, or in addition to these, there is a more fundamental demand. In 1905 Pound asked the question,[56] "How shall we lead our law to hold a more even balance between individualism and socialism?" and he answered "[By] training the rising generation of lawyers in a social, political, and legal philosophy abreast of our time." In 1951 the demand was more urgent.[57] "We need, in order to meet the tasks of the law today, if it is possible, a received measure of values or at any rate development and formulation of a practical theory of valuing interests. Here above all we need a fruitful philosophy of law."

Summary.

The chief propositions arising from those aspects of Pound's legal philosophy outlined above may be summarized as follows:—

54 *The Call for a Realist Jurisprudence,* (1931) 44 HARV. L. REV. 697, 711.
55 OUTLINES OF LECTURES ON JURISPRUDENCE (5th ed., Cambridge, Mass., 1943), 32-34.
56 *Do we need a Philosophy of Law?,* (1905) 5 COLUM. L. REV. 339, at 352.
57 *Philosophy of Law and Comparative Law,* (1951) 100 U. PA. L. REV. 1, at 16.

(a) That law as an instrument of social control is a coercive order, operated through both judicial and administrative processes (each having a special part to play in the overall functioning of law) utilizing precepts of varying degrees and generality and flexibility, applied and developed in accordance with received techniques varying within different legal orders.

(b) That while the principal ends of the earlier stages of law, namely, that of keeping the peace, that of maintaining the existing social order and establishing certainty and uniformity in social relations, that of providing a reasonable and ethical solution of controversies, and that of securing the maximum of individual self-assertion through recognition of individual rights, have influenced modern law both by providing the materials with which law must work and by establishing subsidiary ends of the legal order, the chief end of law today is the development of civilization in the sense of the maximum of human control over external and internal nature.

(c) That in its task of creating the conditions necessary for the development of civilization law may be guided by certain jural postulates of civilized society, necessary preconditions of twentieth-century Anglo-American civilization.

(d) That (within the framework of these postulates?) the end of law is to satisfy the maximum of human claims, wants, and desires with the minimum of friction and waste (Pound's "engineering value"). That in order to achieve this all asserted claims, wants, and desires (generically described as "interests") be categorized as either individual or social interest, in accordance with the catalogue already sketched; that the interests affected by granting such asserted interests be similarly categorized; and that after weighing the competing interests the legal process recognize and protect such interests as it chooses in accordance with the "engineering value" above stated to such extent as the existing materials, techniques, and ideals will allow.

(e) That as all legal philosophies have responded to and reflected the needs of a particular age the need of the twentieth century is for a legal philosophy which will provide a practical theory or measure for valuing interests. In the meantime "social engineering" (and the jural postulates?) provide a stopgap criterion.

Some criticisms of Pound's approach.

It is some indication of the weight and influence of Pound's philosophy that there has been relatively little criticism of his approach, and such criticism has generally been directed towards complementing it rather than supplanting it. The major attack has undoubtedly been

on the absence or apparent absence from his philosophy of any theory of values. Thus F. S. Cohen,[58] referring to a number of Pound's earlier publications, which he described as "taxonomic studies", asked whether Pound would now give an affirmative statement of valid legal standards or ideals. Eight years before this Walter B. Kennedy[59] had attacked Pound's theory of interests as a "give-the-people-what-they-want" theory. He criticised Pound's statement that he was sceptical as to the possibility of absolute judgments in valuing interests by asserting that, "As a practical science, law requires an appreciable degree of uniformity, stability, and certainty. It does not suffice to shuffle the mass of wants and claims of the litigants into a confused pile and then give effect to as many as we can in so far as harmony will permit." Law, he concluded,[60] requires something like the traveller's or hunter's compass to give it direction. The criticism was echoed in 1958 by Joseph W. Planck in the *American Bar Association Journal*:[61] "[O]nce the interests to be served are listed and illustrated, Pound and his school seem ready to adjourn. They have devised no guide to tell when one interest must be subordinated to another. In short they stand halted at the threshold of the theory of values . . ."

To begin with, it is obvious from what has already been said above concerning the task of jurisprudence that Pound is not unaware of the need for a theory of values.[62] It is, however, equally obvious that he is looking to future legal philosophy to provide a satisfactory theory. In the meantime he has suggested at least three possible interim-theories. The first is the so-called Jamesian criterion: Satisfy as many claims or wants or desires as you can. The second, according to his interpreters, is the theory of social interests which, as Patterson has pointed out,[63] answers in part the problem of the construction of objective values or criteria of value. The third is his theory of the

58 ETHICAL SYSTEMS AND LEGAL IDEALS (1933), 6, note 8.

59 *Pragmatism as a Philosophy of Law,* (1925) 9 MARQ. L. REV. 63, at 75, reprinted in HALL, READINGS IN JURISPRUDENCE (Indianapolis, 1938), 246, at 249.

60 *Ibid.,* at 71 and 247 respectively.

61 *Producing Great Lawyers: Jurisprudence and Legal Philosophy,* (1958) 44 A.B.A.J. 327, at 332, note 12.

62 *Supra,* at 308. A theory of values for the valuing of interests, consistent with modern psychology and philosophy, without being tied fast to any particular body of psychological or philosophical dogma of the moment" was the sixth item in Pound's programme of relative-realist jurisprudence: *The Call for a Realist Jurisprudence,* (1931) 44 HARV. L. REV. 697, at 711. But it is perhaps significant that not even in JURISPRUDENCE has he attempted to fill the need.

63 "Pound's Theory of Social Interests", in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES (New York, 1947), 558, at 560.

jural postulates of civilized society. Not only does the word "civilized" imply a value-judgment, but two of the five original postulates contain also the value-word "reasonable." Indeed, Fr. Davitt[64] has seen no difficulty at all in describing the jural postulates as nothing but natural law judgments, arrived at, perhaps, *à posteriori* rather than *à priori.*

Curiously enough, there is no clear attempt by Pound to combine or reconcile these theories,[65] and we are left to form our own views as to their interrelation. Our sole guide seems to be one of Pound's more recent utterances. In 1954 he admitted,[66] ". . . I have come to feel that instead of putting the task of law, as William James did, in terms of satisfying as much as we can of the total of human demands, we do better to speak of providing as much as we may of the total of men's reasonable expectations in life in civilized society with the minimum of friction and waste." This relegates the first theory to the least preferred position. But which of the other two theories gives us a criterion by which to test men's reasonable expectations in life in civilized society? The formulation seems to point strongly to the jural postulates. But in that case, what becomes of the theory of social interests? Or did Pound intend that the Jamesian injunction should be applied to both social and individual interests, or to social rather than to individual interests?[67] The first would be inconsistent with his insistence that conflicting interests be reduced to common terms, either as individual interests or as social interests, before they are weighed. The second meets with the difficulty that the Jamesian injunction loses its meaning when applied to social rather than individual interests.

64 "St. Thomas Aquinas and the Natural Law", in ORIGINS OF THE NATURAL LAW TRADITION (ed. Harding, Dallas, 1954), 26, at 42. Given the Thomist view that human law in some way reflects divine law, and the fact that the jural postulates substantially reflect the present state of the law, this is perhaps not surprising.

65 Except that now, in 3 JURISPRUDENCE at 8, he speaks of "The jural postulates of civilization in the time and place as a measure of interests to be recognized and secured."

66 *The Role of the Will in Law,* (1954) 68 HARV. L. REV. 1, 19 (*cf.* now 3 JURISPRUDENCE 334). In the light of the final sentence of the paper: "Free self-determination is a much prized and eminently reasonable expectation which must ever be weighed in adjustment of relations in and by politically organized society", one wonders whether a new or revised "jural postulate" is called for. Perhaps the postulate suggested in note 14 above responds in part to this expectation.

67 An answer would appear now to be given in 3 JURISPRUDENCE at 333: ". . . We look at the individual demand in its larger aspect, as subsumed under some social interest in order to compare it with other individual demands treated in the same way," and at 334: "Secure all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole."

Again, how is the "minimum of friction and waste" to be measured? It has already been suggested that the postulates can be interpreted as "effort-economising"—which is the same thing as minimizing friction and waste. Or does this merely correspond to the social interest in the conservation of social resources?

These questions invite a brief inquiry into the relation between social interests and jural postulates. Take the first postulate. It corresponds in part to the social interest in the general security. But this interest is wider than the mere interest in the security of the physical person; how is the social interest in the general health to be fitted under this or any other postulate? Again, the social interest in the general security includes an interest in the security of acquisitions (to which the second postulate would appear to correspond) and in the security of transactions (partly covered by the third postulate). But where (apart from the existence of the requirement of good faith in the third postulate) does the social interest in the general morals fit in? Pound specifies, as already indicated, a social interest in the conservation of social resources and a social interest in the general progress. Apart from the fact that the first of these may be inconsistent with the second postulate (the "property" postulate) each of them is obviously a necessary condition of "civilization" as defined by Pound. Each might well be expressed as a jural postulate of civilized society. We must, it seems, conclude that if the jural postulates provide us, as Stone asserts,[68] with Pound's theory of justice there is need to supplement them with fresh postulates drawn from the social interests which Pound finds as already secured or pressing for recognition.

68 THE PROVINCE AND FUNCTION OF LAW, c. xv, *passim*. Stone interprets the postulates as criteria for evaluation of conflicting interests in terms of the civilization of the time and place. But it is not clear that this corresponds precisely to Pound's own thought. As has been pointed out, in c. vii, INTERPRETATIONS OF LEGAL HISTORY (Cambridge, 1923), 141 ff., Pound suggests the theory of jural postulates and the theory of social interests as alternative interpretations of the end of law. Twenty years later, in SOCIAL CONTROL THROUGH LAW (New Haven, 1942), 112-118, Pound restated this: though (at 115) he suggests that the postulates represent the basis upon which conflicting interests have been adjusted, he still puts the theories as alternatives. If it could be said that men's interests—their claims and wants and demands—are unchanging, it might be argued that the securing of different interests in different legal systems is the result of the differing values of those civilizations, and that the values are represented by the postulates. But it is assumed that men's interests, too, vary with the civilization of the time and place. See now, however, 3 JURISPRUDENCE 15, in which the theories are treated as alternative teaching tools, and *id.* 32: "[The jurist] might seek to formulate the jural postulates of the civilization of the time and place as a measure of interests to be recognized and secured"—a technique which Pound then rejects.

Even if this be done there will be need to choose from time to time between conflicting postulates or social interests. How is this to be done? Ultimately, I think Pound would concede, there is a point at which choice becomes intuitive,[69] though before intuition takes over, there is a further range of relevant considerations, including the limits of effective legal action, the availability of native or borrowed legal material, the persistence of legal tradition, the influence of past decisions, and the received ideals as to the end of the legal system which may enter into or govern the making of the choice. One suspects that it is this recognized persistence of intuition as an element of final judgment which leads Pound to this scepticism of the possibility of arriving at any absolute values. But if Pound's attitude is ultimately that of "give-it-up" he struggles further towards the goal than the philosophies which he has more than once criticised under the same label.[70]

A second criticism of Pound has been directed at his method of arriving at the schema of interests. This is well represented by Beutel:—[71]

"Dean Pound has attempted to classify these interests [the human interests which law adjusts] and to call attention to some of the legal devices for securing them. Unfortunately, however, such systems are little more than rational speculation based on the legal status quo and are supported by little or no experimental evidence." Beutel further asserts, "[T]here are conscious or unconscious interests, that is, what the individual, group, or society wants, and what is good for it regardless of its wants."

Again, Pound himself would concede some measure of validity to this criticism. In his paper *The Call for a Realist Jurisprudence*[72] Pound describes the fifth item in his programme for "relativist-realist jurisprudence . . . as it might be" as "(5) A theory of interests and of the ends of the legal order based on or consistent with modern

69 See what Pound has said in *The Theory of Judicial Decision*, (1923) 36 HARV. L. REV. 940, at 951, on the role of the trained intuition of the judge in the judicial process.

70 See, for example, SOCIAL CONTROL THROUGH LAW (New Haven, 1942), 37—the reference is apparently to the neo-Kantian relativist philosophy of Radbruch (before 1945); Paton, *Pound and Contemporary Juristic Theory*, (1944) 22 CAN. BAR REV. 479, at 487. Paton points out that Pound too is a relativist, but of a different sort.

71 *Some Implications of Experimental Jurisprudence*, (1934) 48 HARV. L. REV. 169, at 177.

72 (1931) 44 HARV. L. REV. 697, at 711.

psychology, without being tied absolutely to any particular dogmatic brand of psychology of the moment."

Lacking such a theory (it may be pertinent to ask, why did Pound not construct it himself?), the method of examining past and present litigation, and legislation actual and proposed for the raw materials of a catalogue of "interests pressing" is at least a step in the direction of a coherent theory of interests. The sources mentioned are obviously the only ones for a catalogue of interests secured. Some of the weaknesses of the method may be inherent in the nature and techniques of the legal system which is used as the source. A too rigid application of the doctrine of *stare decisis* may result in an interest asserted in the wrong fact-situation, or before the time is ripe for its recognition, being "driven underground", repressed and overlooked. A legal system whose rules as to costs encourage rather than discourage "speculative" litigation[73] and in which the legal profession is prepared to do its work on a "contingent-fee" basis, may well provide a richer source of material for a survey of pressing interests than a legal system in which the price of failure in litigation is heavy.

The terms in which Beutel's criticism is couched suggest the question, what has modern psychology to contribute to a theory of interests? To one lacking a training in modern psychology the question is difficult to answer—yet some tantalizing lines of inquiry appear, even if the answers are out of reach. How far is the progress of "civilization" (Pound's general value-criterion of the end of law as he defines it) productive of maladjustment, delinquency, neurosis—all of them wasteful of human resources and corrosive to the individual life? If psychology discloses a sharper conflict than we ever dreamed between the social interest in the general security and the social interest in individual life, how is the conflict to be resolved? Can psychology provide the answer to the "social engineering" inquiry—what is the minimum of friction and waste? I take Beutel's "unconscious interests" to contemplate such interests as I have sketched; but in that event how are we to know what is *good* for society? Unless we pin our faith on the psychological good, we are back to the problem of value-judgments again, and Poundian philosophy ceases to be a guide.

What has just been said suggests that the "end of law" as Pound sees it—the progress of "civilization"—may contain within itself the

73 That is to say, litigation in which, because of the novelty of the fact situation or the point of law involved, the chances of success seem little more than even, or perhaps less than even; yet it is worth the plaintiff's while to "give it a go" since he will not have to pay the defendant's costs if he loses.

seeds of contradiction. At the beginning of the paper this end was more specifically defined as being "to achieve the maximum of human control over external nature and over internal nature for human purposes." Is it possible that in achieving control over external nature the human race may be losing control over its internal nature? If so, the task of reconciliation is perhaps greater than Pound himself has recognized, and the need for a standard of values more urgent.

One last word may be said. The phrase cited above "for human purposes" underscores the fact that Pound's is a purely secular philosophy of law. There is not a word in it of man's eternal destiny. Perhaps this is all as it should be. Perhaps Pound himself would say that the preservation of spiritual values—the recognition of a social interest in the individual spiritual life—is beyond the limits of effective legal action.[74] Yet one cannot but feel disquiet that the most characteristically American of twentieth-century legal philosophies should be at bottom so purely materialistic.

The application of Pound's theories.

It is proposed to select three specific problems by way of illustration of Pound's method and some of the difficulties attending its application.

The first considers the operation of the theory of interests in the judicial process, and illustrates the difficulty of detecting the precise nature of the social interests underlying a particular case or line of cases. In the course of a discussion, in his *A Textbook of Jurisprudence*,[75] of the theory in question, Paton has characterized the rule in *Russell v. Russell*[76] that in divorce proceedings a husband could not give evidence of non-access to his wife so as to bastardize a child born in wedlock as founded on a public policy which protected the legitimacy of the child. Public policies often, as Pound has pointed out,[77] express a valuation of social interests. Clearly apart from the

[74] Others beside the writer may have felt misgivings about the passage in the Prayer for the Church Militant in the 1662 BOOK OF COMMON PRAYER, "And grant unto Her whole Council, and to those that are put in authority under Her, that they may truly and indifferently minister justice, to the punishment of wickedness and vice, and to the maintenance of true religion and virtue." *Cf.* the preamble to the Statute of Westminster I (1275), cited by Pound, 3 JURISPRUDENCE 300, reciting that Parliament had met to make laws "for the common profit of holy Church, and of the Realm."

[75] (2nd ed., Oxford, 1951), 112.

[76] [1924] A.C. 687. See now Pound's brief discussion, 3 JURISPRUDENCE 298.

[77] *A Survey of Social Interests*, (1943) 57 HARV. L. REV. 1, at 4-5; see now 3 JURISPRUDENCE 270-277.

interest of the parties in the divorce proceedings there is an individual interest of the child that he should not be bastardized, and a countervailing interest of the father that he should not be saddled with the son of another as his own. But how are these interests to be "socialised" That of the child seems to hover uneasily between the social interest in the security of domestic relations and the social interest in the individual life;[78] that of the father to be susceptible of subsumption (Pound's term of art) under the same two. Socialization of the conflicting interests takes us no further in choosing between the two. Perhaps this is a case where, if these are the only two interests involved, they may be compared at the level of individual interests.

Looking at the state of the law as expounded in *Russell v. Russell* however, we find that other interests appear. The rule is said to be founded on "decency, morality and policy."[79] This was interpreted by the Earl of Birkenhead[80] as meaning that "a deeply seated domestic and social policy rendered it unbecoming and undecorous that evidence should be received from such a source; upon such an issue; and with such a possible result." This language suggests that the paramount interest to be considered is the social interest in the general morals, reinforced by the presence of an individual interest in legitimacy. But in the *Poulett Peerage Case,*[81] in which the wife was delivered of a full-term child six months after marriage, the husband was allowed to give evidence of non-access to his wife *before* marriage. Here the individual interest of the child in legitimacy is invaded, and if there is any adverse effect on the social interest in the general morals it would seem to be the same as that feared in *Russell v. Russell.* Invasion of the interest of the child is contemplated, again, in *Ettenfield v. Ettenfield,*[82] in which it was admitted that if a husband goes to the other side of the world on a business visit for more than a year, and twelve months after his departure his wife gives birth to a child, his non-access may be proved by evidence other than his own. It is difficult to see in all this the protection of an individual or "socialized" interest in legitimacy; and if it is not so protected where general morals are

78 Does the fact that the child might perhaps have become the heir to a peerage involve another type of individual interest—perhaps even a social interest in the security of social institutions? *Cf.* Poulett Peerage Case, [1903] A.C. 395—*infra,* note 83.

79 *Per* Lord Mansfield in Goodright v. Moss, (1777) 2 Cowp. 591, 592-594, 98 E. R. 1257-1258.

80 [1924] A.C. 687, at 699.

81 [1903] A.C. 395. *Quaere,* however, the effect of the fact that the succession to the peerage was directly involved—see note 78, *supra.*

82 [1940] P. 96.

not, or are not thought to be, in question, it is difficult to see why it should be an interest-factor in *Russell v. Russell.*

Can it then be said that in *Russell* the social interest in the general morals was paramount—that in the words of Lord Sumner[83] "The sanctity of married intercourse" must be protected by excluding such evidence? If so, is *Ettenfield v. Ettenfield* to be regarded as protecting the sanctity of married non-intercourse? Moreover, in Lord Sumner's own trenchant phrase,[84] "the sanctity of married intercourse passed into the limbo of "lost causes and impossible loyalties" in 1857."

The true interest intended to be protected by the rule as laid down in cases before *Goodright v. Moss* was probably the social interest in the efficient working of legal institutions. Lord Sumner suggested with some cogency in *Russell v. Russell*[85] that the evidence of husband and wife was excluded in bastardy cases as being the evidence of interested parties. In *Goodright's* case[86] Lord Mansfield suggested that the existence of interest was the criterion of the admissibility or otherwise of a widow's evidence as to the date of marriage in a peerage case. Unfortunately, he found it necessary to utter the general dictum above referred to, predicating the refusal to admit evidence by the spouses as to non-access upon protection of the social interest in the general morals. One may doubt whether the dictum was the product of a serious consideration of the conflicting interests which might be involved; but the public policy thus enunciated has remained in the law, in spite of attempts at judicial erosion, until removed in many jurisdictions by the legislative process.[87]

Two comments may be made on this. First, if, in response to Pound's assertion that law is to satisfy as many conflicting interests as possible, the task of weighing interests is to be left to the judicial process, some means should be devised to ensure that all the interests pressing, and especially all the social interests, are brought before the court.[88] The "Brandeis brief" is an obvious example of an attempt to

83 [1924] A.C. 687, at 746.

84 *Ibid.*

85 *Ibid.*, at 737-738.

86 (1777) 2 Cowp. 590, at 593, referring to Lord Valentia's Case (1771), unrep.

87 See PATON, JURISPRUDENCE (2nd ed., Oxford, 1951), 112. Once laid down as a rule of public policy it of course became a rule of law binding future courts—see STONE, THE PROVINCE AND FUNCTION OF LAW, 500. For a more extensive criticism of the law as left by the cases see the report on *The Abolition of the Rule in Russell v. Russell,* (1945) 23 CAN. BAR REV. 536 *et seq.*

88 See the examples given in Patterson, *Some Reflections on Sociological Jurisprudence,* (1958) 44 VA. L. REV. 395, at 402-405, especially the reference at

achieve this. When Pound himself referred to the failure of the courts in the nineteenth century to work out adequately public policies, he may be thought to have had in mind the fact that they did not have all the relevant considerations before them.[89] Second, if a legal system includes rules of precedent which so operate that decisions based on public policy generate rules of law, choices between conflicting interests will tend to ossify the valuation of interests in terms of the values of the time and place of decision. Adjudication in terms of conscious choice in each individual case between the interests involved may, however, ultimately demand so thorough a revision of the rules of *stare decisis* that many of the techniques, traditions, and values of the common law would be lost. In the preceding summary of Pound's views it was said that interests are "to be secured to such extent as the existing materials, techniques, and ideals will allow."[90] Pound does not appear to go so far as to suggest that for the sake of the protection of interests the whole of the present machinery of law be scrapped and replaced with new. To do so might attack seriously the social interest in the general security and even the social interest in the efficient working of social institutions. It seems clear enough, however, that protection of new social interests, and the reversal of the protection formerly accorded to social interests which no longer need protection,[91] or no longer need protection in the same way, may increasingly be the task of the legislature rather than the courts.

This last point leads to the second of the problems to be considered, the usefulness of Pound's theories in relation to the legislative process. Patterson has very recently said[92] that Pound's programme placed no limit on the study of facts by the lawmakers nor on what radical laws might be made in consequence thereof. Perhaps this could be illustrated by the kind of inquiries and suggestions that might

404-405 to the sociological evidence in the school segregation cases and its apparent effects.

89 *A Survey of Social Interests,* (1943) 57 HARV. L. REV. 1, at 6-7; but in 3 JURISPRUDENCE 273 he attributes the nineteenth-century attitude towards public policy to "a weighing of the social interest in the general security against other social interests which men had sought to secure through an overwide magisterial discretion in the stage of equity and natural law."

90 *Supra,* at 309.

91 For example, the protection of the interest in the security of domestic relations by prohibiting actions between husband and wife (Pound, *op. cit. supra,* note 89, at 21; 3 JURISPRUDENCE 297) partly relaxed by the various Married Women's Property Acts (in England, sec. 12 of the Married Women's Property Act 1882) but increasingly out of touch with realities of modern life, especially with the growth of accident insurance.

92 *Some Reflections on Sociological Jurisprudence,* (1958) 44 VA. L. REV. 395, at 397.

be made if a thoroughgoing sociological attack were to be made on the prevention of what Professor Parsons[93] has called "Death and Injury on the Roads."

To begin with, it is clear that the fourth of the jural postulates, perhaps also the fifth,[94] might provide a value towards which law should move. Clearly also these postulates look to the protection of one facet of the social interest in the general security (the social interest in the security of the physical person). In the light of the tremendous cost to the community of traffic accidents—loss of man-hours, absorption of time of doctors, nurses and others, occupancy of hospital beds, waste of potential productive effort in repair, are obvious examples—the social interest in the conservation of social resources would undoubtedly be served by a reduction in accidents.

Obviously if there were no motor traffic at all, or if all traffic moved at a very slow rate, the problem would be substantially solved. But at this point the social interest in general progress is or may be seriously affected,[95] and so may the social interest in the individual life, embracing *inter alia* individual interests in the freedom and mobility which the motor car affords. At some point it seems obvious, the interests must be balanced. Some control of traffic volume, of speed, of driving skill, or of all three, is necessary.

Nothing has so far been said about the causes of accidents, beyond the assumption that volume of traffic and speed are involved. Traffic regulations are everywhere in force, and their purpose is to prevent accidents. Data are undoubtedly available to show how many accidents are caused by breaches of the traffic regulations.[96] The adoption of

93 (1955) 3 U. WEST. AUST. ANN. L. REV. 201. Parsons has some comments on the problem under discussion at 283-284; he emphasises that the tort rules as to liability do not prevent accidents.

94 The development of the French law on the topic has been from a Code provision (Art. 1384) bearing close affinity to the fifth postulate: See Parsons, *op. cit.* at 206-209, for a brief account of this development.

95 *Cf.* what was said by Erle C.J. in Ford v. L. & S.W. Rly. Co., (1862) 2 F. & F. 730, at 733, concerning the running of a railway: "It is easy to conceive a precaution, for example, a slower rate of speed, which would add a very small degree of security, while it would entail a very great degree of inconvenience. And a [railway] company ought not to be found guilty merely because they possibly might have done something more for safety, at a far greater sacrifice of convenience."

96 R. G. Clarke, executive director of the National Safety Council, said recently that ignorance of regulations was as great a cause of accidents as the wilful disregard of regulations: *West Australian,* 8th August, 1958, 10. This invites inquiry into the effectiveness of means of disseminating information about legal rules.

the "Poundian" approach might suggest a social-psychological study of the reasons why people disobey regulations, with a view to discovering—

(a) whether better or stricter methods of law enforcement would reduce the number of non-conforming drivers on the road; and perhaps

(b) whether there are persons in the community whose attitudes are such that it may fairly be predicted that they will be persistent violators of traffic regulations.[97]

Suppose that it were possible to discover the answer to (a) and the answer were "yes." The question would then arise, whether the cost of such enforcement, which might amount to a significant diversion of human resources from other tasks, and a substantial encroachment on individual interests of substance by way of taxation, and its infringement on individual liberty and consequently on the social interest in the individual life, would outweigh the gains. Only if jural postulates involved could be regarded as absolute values could we answer "yes."

Suppose again that it were possible to discover the answer to (b) and the answer were "yes." The problem might then be whether the refusal of a driver's licence to persons who were "psychologically unfit" to drive a car would be so great an invasion of the interests of the individual in question,[98] and so of the social interest in individual self-assertion, as to outweigh the value of avoiding harm that might be caused by him. The general public policy that insists that a man be judged only by his actions and not by his "tendencies"—responding to a social interest in the recognition of individual self-responsibility—is deeply-rooted and would, one might predict, long prevail in this situation.

Even an attempt to increase the degree of skill among motor drivers by the imposition of stiffer driving tests, in addition to amounting to an infringement of a number of individual interests and hence of the social interest in the individual life, may well affect the social interest in the general progress by reducing the demand for motor-cars

97 See the data on "accident-proneness" in McNiece and Thornton, *Automobile Accident Prevention and Compensation,* (1952) 27 N.Y.U.L.Q. REV. 585. at 591-592, and see *ibid.,* at 593-594 for some suggested remedies.

98 Present-day encroachments in various communities include laws for the certification and control of mental defectives, habitual-criminal legislation, and regulations prohibiting the issue of drivers' licences to persons suffering from certain diseases.

and thus adversely affecting the general economy.[99] So, too, might a general stiffening of enforcement measures, which might include mandatory permanent suspension of the licence of a persistent traffic offender.

Enough has been said, it is hoped, in this brief sketch to indicate the range and nature of the enquiries demanded by a sociological attack on a current problem of law enforcement, the range of possible interests to be weighed and balanced in any attempt to tackle the problem legislatively and administratively, and the absence of any clear standard of values by which to choose between competing interests. For though the postulates cited seem to provide an initial goal, some of the interests which would be infringed by adoption of the suggested measures, notably the interest in general progress, seem themselves to be involved in the definition of "civilization" which Pound has put forward and which he regards as the ultimate goal of the legal system.

The third of the problems to be examined in the light of Pound's insights is that of the protection of the "right to privacy."[1] In 1916 Pound suggested[2] that the law would be glad to secure effectively the right to privacy if it might. The difficulty, as has already been said, seemed to lie in the absence of means for "securing" the right, or the interests involved in the right. Generally speaking, the law will not grant or threaten substitutionary redress for the invasion of an interest unless the consequences of that invasion are reasonably measurable in monetary terms. And though the sanctions against criminal libel might appear to protect persons against the grosser invasions of their privacy by printed publication of true statements about them, those sanctions were inapplicable to the many subtler modes of infringing privacy obviously contemplated by Pound. But quite apart from this, as will be shown later, it is by no means clear that the law even in 1916 regarded all the interests involved in the "right of privacy" as entitled to protection against all invasions.

Certainly when it has been possible to view the invasion of privacy as invading some interest capable of being valued in monetary terms

99 See a statement by Mr. John Buckley, managing director of British Motor Corporation: "Any government that restricts the growth of the motor industries restricts the growth of Australia." (*West Australian,* 5th August 1958, 14).

1 See also the discussions in STONE, THE PROVINCE AND FUNCTION OF LAW, at 514-515; FLEMING, THE LAW OF TORTS (Sydney, 1957), at 611-617; and POUND, 3 JURISPRUDENCE 58-59.

2 *The Limits of Effective Legal Action,* (1916) 27 INT. J. ETHICS 150, 163.

the courts have been willing to grant some redress. Thus the nineteenth-century English cases of *Prince Albert v. Strange*[3] and *Pollard v. Photographic Co.*[4] were predicated upon the existence of a property right and an implied contract respectively. Not dissimilar is the approach adopted in New York and a few other states requiring that plaintiff establish as a necessary element in the cause of action the defendant's commercial purpose or advantage in the invasion of the plaintiff's privacy. It may be thought that these interests are independent altogether of the so-called "right of privacy." But the clear tendency in the United States has been to subsume them under this right or interest. Thus in the recent case of *Miller v. N.B.C.*,[5] the plaintiff, who in 1951 had perpetrated in Tucson, Arizona, a bank robbery for which at the time of the litigation he was serving a term of imprisonment, brought an action against the N.B.C. television network, which had televised (or "telecast") a dramatic re-enactment of the bank robbery without his knowledge or consent. His action was based on two submissions, (1) that of an implied contract consummated when defendant dramatized his acts—a theory of "unjust enrichment" —and (2) interference by the defendant with a valuable property right—the right to sell that phase of his (Miller's) life story—and only inferentially an infringement of his right of privacy. The court first dealt with the matter under this heading, however, pointing out that on the facts averred no recovery could be premised upon infringement of the right of privacy. It then went on to point out that both the cases and the legal literature show that the implied contract and property right theories have now been subsumed under the general protection of the right to privacy,[6] and so presumably stand or fall by the existence of that right. This approach incidentally suggests a gloss on Pound's theory of interests to the effect that the law will protect certain "primary" interests—in this instance, an individual interest in privacy—but only to the extent that certain "secondary" interests, measurable in economic terms, are also present.

Having thus judicially asserted the existence of an "interest" in privacy which calls for recognition, the Court proceeded to an evaluation of the interests involved. It said:—[7] "In matters of this nature courts must balance the right of the individual to be free from un-

3 (1849) 2 De G. & S. 652, 64 E.R. 293; (1849) 1 Mac. & G. 25, 41 E.R. 1171.
4 (1888) 40 Ch. D. 345.
5 (1957) 157 F. Supp. 240.
6 Citing as the starting point of that development (through PROSSER, TORTS (2nd ed., St. Paul, 1955), sec. 97) Warren and Brandeis, *The Right to Privacy*, (1890) 4 HARV. L. REV. 193.
7 (1957) 157 F. Supp. 240, at 243.

warranted[8] exposure with the right of the public to have the uncensored dissemination of ideas whether they are purely newsworthy or form the basis of an entertainment medium. Where the purpose is recreation, the right of privacy must prevail unless the circumstances fall within the concepts enunciated in *Bernstein*[9] and *Smith*.[10]"

The language the Court has used suggests that, contrary to Pound's insistence that interests must be reduced to the same terms before they are compared, it has attempted to weigh the individual interest in privacy against the social interest in the dissemination of ideas and information. In so doing it has asserted that this individual interest must yield to the public interest in having unrestrained access to "news", and will prevail over the public interest in being entertained only insofar as the "entertainment" is not, under the *Bernstein* doctrine, a revival or re-presentation of facts which because of their past newsworthiness are now "public property." It is true that the Court may be regarded as looking not at *this* individual's interest in his own privacy, but at the interest of all individuals in being private, and that this may be subsumed under the rather vague heading of the "social interest in the individual life."[11] But the subsumption does not conceal

8 Leaving unanswered the question, what is "warranted" exposure?

9 Bernstein v. N.B.C., (1955) 129 F. Supp. 817, aff. (1956) 232 F.2d 369, in which the question was whether a "public person"—*e.g.*, a formerly convicted criminal, may by the passage of time in private life, re-acquire a right of privacy as to his past life. It was held that while time may bring some protection to him, it is not protection against repetition of the facts which are already public property but merely against "unreasonable public identification of him in his present setting with the earlier incident" (129 F. Supp. at 828).

10 Smith v. N.B.C., (1956) 138 Cal. App. 2d 807; 292 P. 2d 600.

11 It is always possible that variation of facts in an individual case will disclose some other social interest calling for protection. In Melvin v. Reid, (1931) 112 Cal. App. 285, 297 P. 91, plaintiff was a reformed prostitute who had been tried on a charge of murder and acquitted. Defendant based a motion picture on the facts of her past life, disclosing her former occupation and using her true maiden name. The court concluded that merely to represent incidents from the life of the plaintiff from the public records would not be actionable, but predicated the right to recovery for invasion of privacy by subsuming the plaintiff's interest under a general social interest in the "rehabilitation of the fallen and the reformation of the criminal", obviously a branch of the interest in the conservation of human resources. This has produced the odd result that publication of facts which may lead people to identify a reformed criminal with his former crime (the facts of which are in the so-called "public domain") may infringe his "right of privacy", while a publication which identifies a criminal's victim with the former crime (however much it may distress him) is not actionable (Mau v. Rio Grande Oil Inc., (1939) 28 F. Supp. 845), nor is a publication which allegedly identifies with the crime an accused and convicted man who is later found not to have been guilty of it (Bernstein v. N.B.C., (1955) 129 F. Supp. 817, (1956) 232 F. 2d 369).

the fact that this and every other such case ultimately calls for a choice to be made between the interest of the individual and the interests of the mass, or society. Both the Jamesian criterion, and the theory of social interests, seem to favour the interest of society. Is there any other possible standard of valuation?

In truth this relatively small and unimportant area of law involves a fundamental conflict between differing ideals of "civilization" or "civilized society." In their pioneer article on *The Right to Privacy* published in 1890,[12] Warren and Brandeis attribute the growth of the interest in privacy substantially to the advance of civilization, which, they say, has subjected man to the refining influence of culture.[13] By contrast, a former student of Pound's said in 1936:[14] "It may be doubted whether the right [of privacy] is likely to have practical expansion in a civilization characterized by the candid camera, the tabloid newspaper, or the weekly newsreel." And in 1940, in the well-known case of *Sidis v. F. R. Publishing Corporation,*[15] Judge Clark said: "Regrettably or not, the misfortunes and frailties of neighbors and public figures are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of a community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day."

In a review[16] of Pound's *The Spirit of the Common Law,* written in 1922, Judge Hough remarked that the phrase "jural postulates of the civilization of the time" is "extremely easy of translation into keeping one's ear to the ground to hear the tramp of insistent crowds." The foregoing brief examination in terms of Pound's own theories of the attempts to secure protection for the right of privacy goes far to bear out Judge Hough's criticism.

12 Cited above, note 90.

13 "The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure and profit of life lay in physical things" (*op. cit.,* 195). "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual" (*ibid.,* 196).

14 *50 Years of American Equity,* (1936) 50 HARV. L. REV. 171, at 220.

15 (1940) 113 F. 2d 806, at 809.

16 Book Review of Pound, *The Spirit of the Common Law,* (1922) 22 COLUM. L. REV. 385, at 386.

Conclusion.

It is a difficult and invidious task to assess the magnitude and value of Pound's contribution to jurisprudence. He is not a man of one key idea or theory, to which the rest of his work is subordinated, but of many. Moreover, as the foregoing pages will suggest, he has not paused in the outpouring of his ideas to weave them into a consistent theory of law which may be identified as Pound's. Perhaps the fairest criticism and evaluation of his work is that in its range and variey, its repetitions, its occasional contradictions, and its apparent lack of cohesiveness it mirrors superbly "the Law" which is its subject-matter.

Perhaps it is because of this that there is no distinctively "Poundian" school of jurisprudence, and few who can be described as "disciples." The best-known are perhaps Stone and the late S. P. Simpson. Stone's *Province and Function of Law*[17] bears many *indicia* of Pound's influence; indeed, the pattern of the work bears clear affinities with Pound's view that each approach to juristic truth is significant with regard to particular problems of the legal order. Simpson and Stone's three-volume *Cases and Readings on Law and Society*[18] is a brilliant piece of sustained application of "Poundian" insights to what its compilers have called the cultural anthropology of law. Pound's general influence has however been of a different sort. In his manifold writings he sums up and brings together under the general rubrics of "sociological jurisprudence" and "social engineering" most of the trends of twentieth-century American jurisprudence. Even though Pound has professedly not seen eye to eye with the American legal realists,[19] many of their basic themes are adumbrated in his writings. It may be true that jurisprudence would have developed as it has in America even if Pound had never turned from botany to law. It is equally true that, having so turned, he has become the major prophet of jurisprudence in twentieth-century America.

E. K. BRAYBROOKE.*

17 (Sydney, 1950).

18 (St. Paul, 1949).

19 See Pound, *A Call for a Realist Jurisprudence*, (1931) 44 HARV. L. REV. 697; Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, (1931) 44 HARV. L. REV. 1222.

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