Roscoe Pound's Legacy: Engineering Liberty and Order

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HENRY W. MCGEE, JR.∗

"The final cause of law is the welfare of society."

—Benjamin N. Cardozo†

INTRODUCTION

Dean Roscoe Pound will be forever remembered as the most learned and prolific writer in the history of American jurisprudence,1 indeed the most productive writer in "the whole history of the law."2

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† The Nature of the Judicial Process 66 (1921).

A sketch of Pound's life is an article in itself. However, the following comments by Harvard's Arthur E. Sutherland, Jr. place Pound in historical perspective:

"Roscoe Pound lived nearly ninety-four years. His life covered more than half the independent existence of the United States. He was born five years after Appomattox, in the frontier town of Lincoln, Nebraska, capital of the then newest state in the Union. Grant was in his first term as President. The United States then was nearing forty million inhabitants. The first railway had joined the Atlantic and Pacific coasts a year before.

"During the next nine decades, while the nation was utterly transformed in size and character, Pound became a scientist, a jury-lawyer, a judge, dean of several university faculties of law, a scholar in jurisprudence whose thought was weighed wherever men wondered about the nature of justice, and an adviser sought out for his wisdom and fairness by his own and foreign governments. As formal preparation for all this, his higher discipline, measured by today's criteria of scholarship, concerned only botany. He spent one year as an academic student of law; he never bothered to complete the prescribed requirements for any law degree, and, largely self-taught, he became the most notable jurist of his era." A. Sutherland, Jr., One Man in His Time, 78 Harv. L. Rev. 7 (1964).


Support for Solicitor General Griswold's assessment may be found in two volumes which list Pound's work. The first bibliography, by Franklyn C. Setaro (1942), was complete through Pound's 70th birthday, and includes 773 items, 256 of which are books or major papers. The second bibliography, by George A. Strait (1960), was complete through Pound's 90th birthday and includes 283 items, 47 of which are books or major papers. Additional work appeared after publication of the Strait volume.
He "liberalized the study of law in America by his insistence on what Holmes had emphasized—that law is part of human life and therefore subject to the same winds of doctrine and climate of opinion that prevail in our political, economic, religious, and other social views and activities; that our legal experience could be illumined if we studied other legal systems and the writings of those who had reflected upon them."

Pound's early article *Law in Books and Law in Action,* written on the threshold of the most distinguished career in American legal scholarship, is a masterpiece of legal realism. Though always sharing some realist insights, Pound early decamped from the realist school, and in later years issued *The Call for a Realist Jurisprudence,* pointed out that there is no absolute reality, and declaring: "Faithful portrayal of what courts and law makers and jurists do is not the whole task of a science of law. One of the conspicuous actualities of the legal order is the impossibility of divorcing what they do from the question what they ought to do. . . ." Moving from a largely realist perspective, Pound more and more came to stress the importance of the role of ideals in shaping the law's end. "Men tend to do what they think they are doing," he noted, and he considered professional and judicial ideas of the social and legal order as decisive factors in legal development. Ultimately, it was as historian of ideas that he developed the engineering of both order and liberty, stability and change in his philosophy of law.

Though Pound diverged from the realists, or better, though the realists failed to maintain Pound's sense of equilibrium, both "shared a common desire to make jurisprudence useful: even in

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4 44 AM. L. REV. 12 (1910). The article contains such compelling aphorisms as: "The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice." Id. at 20.
5 44 HARV. L. REV. 697 (1931).
6 Id. at 700.
8 Pound did not unify opposites in the manner which Herbert Marcuse has found "characterizes the commercial and political style [and] is one of the many ways in which discourse and communications media make themselves immune against the expression of protest and refusal." H. MARCUSE, *One Dimensional Man* 90 (Beacon ed. 1968). Pound maintains, not obscures, the tension between opposing concepts, but sees an inherent vitalism in a polarity which reinforces without distorting.
the most cynical writings of the realists there runs often a burning passion for law reform. Law in action is studied, not for its own sake, but in order to discover how action may be made more effective.⁹ But in Pound, the incarnation of American sociological jurisprudence, the notion of a useful jurisprudence is developed to a point where it is "objectively valid as engineering experience."¹⁰ "Summarily stated, the sociological jurist pursues a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena, and criticizes them with respect to their relation to social conditions and social progress."¹¹ In a fuller elaboration of sociological jurisprudence, Pound wrote in a way that makes his definition and elaboration relevant to the current struggle to maintain liberty in the rising ocean of discontent in contemporary America:

Sociological jurisprudence presupposes a specialized form of social control, namely through the pressure of politically organized society, and that legal institutions and doctrines and precepts are in that sense instruments of social control, capable of being improved with reference to their ends by conscious, intelligent effort. This does not exclude the ethical side of the legal order or of the body of legal precepts, nor of the judicial process. Philosophy, ethics, politics and sociology are called on to help, but to help in what are regarded as problems of jurisprudence. There is no attempt to make the law lift itself by its own bootstraps. Whatever philosophy may find, if it ever does so, as the ultimate measure of values, jurisprudence has to find an immediate measure since men will not rest easily under a system of norms claiming no higher authority than imposition by those who wield the power of the political organization. This practical measure is found . . . in an idea of social engineering—an idea

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⁹ G. Paton, Pound and Contemporary Juristic Theory, 22 Canadian Bar Review 479, 483 (1944). Paton offers some explanation of the antagonism between Pound and the realists:

"In the first writings of any new school, we naturally find exaggerations of emphasis and the lack of a balanced view. Tolerance and a sense of proportion are lacking in the writing of the early realists but are possessed by Holmes and Pound to a great degree. It was natural, therefore, for the realists to concentrate on Pound—we quarrel most bitterly with those who are nearest to us. Pound had given the stimulus, but he refused to go all the way to reach what he regarded as one-sided conclusions." Id. at 481.

Among the most comprehensive responses to Pound's differences with the realists is Karl N. Llewellyn's Some Realism About Realism, 44 Harv. L. Rev. 1222 (1931).

¹⁰ R. Pound, Contemporary Juristic Theory 83 (1940).

of giving the most complete security and effect to the whole scheme of human demands or desires, which have pressed or are pressing for recognition and securing, with the least sacrifice of the scheme as a whole, the least friction, the least waste.\textsuperscript{11}

As overlord of American jurisprudence,\textsuperscript{13} Pound's singular contribution was his formulation, after Rudolf von Jhering of a theory of interests, and after Josef Kohler, the definition of jural postulates. Along with a distinct emphasis on the importance of legal philosophy as a method of rationalizing change while satisfying the need for stability, Pound's theory of interests and jural postulates comprise the theoretical framework for balancing of the "social interest in the individual moral and social life, or in the individual human life."\textsuperscript{14} As he said, the "end of law" should be thought "in terms of a great task or great series of tasks of social engineering. . . . [W]e are seeking to secure as much of human claims and desires—that is as much of the whole scheme of interests—as possible, with the least sacrifice of such interests."\textsuperscript{15}

\section*{I}

THE ESSENTIAL JURISPRUDENCE OF ROSCOE POUND

Roscoe Pound's rendering of Rudolf von Jhering's interest theory in terms of William James' conception of human claims or demands was an intellectual \textit{tour de force}. Surely its ultimate detailing

\textsuperscript{11} R. Pound, \textit{Fifty Years of Jurisprudence}, 51 Harv. L. Rev. 777, 810 (1938).


and elaboration was a triumph of scholarship. James had suggested that "the guiding idea for ethical philosophy (since all demands jointly cannot be satisfied in this poor world)" was "simply to satisfy at all times as many demands as we can."\(^6\) By intellectual sleight of hand, Pound substituted his own "as much of the total amount as we can" for James' "as many demands as we can."\(^7\) James' formulation provided Pound with a basis for expanding Jhering's triune doctrine of interests—individual, public and social—into a highly complicated and classified scheme in which an endless number of juridical relationships find expression.\(^8\)

Pound viewed the essential problem for the judge or legislator as the ascertainment of the objectives society seeks to achieve by law, and selection of the alternatives that will best further those purposes.\(^9\) In any given society at any particular moment, the individuals therein press certain wants, desires, claims, interests, and they look to the law to secure those wants. Thus in order to determine the ends of law in society, the first step is to classify the social phenomena with which the law must deal—the interests men press for law's recognition. From this grand picture, the jurist must extrapolate the fundamental principles relative to human behavior which most of the claims

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\(^{16}\) W. JAMES, THE WILL TO BELIEVE 196 (1897). The essay has, of course, been reprinted numerous times and in various editions. Among the recent printings which include the work is W. JAMES, PRAGMATISM AND OTHER ESSAYS 193 (Washington Square press ed. 1967).

\(^{17}\) R. POUND, 3 JURISPRUDENCE 16 (1959); THE SPIRIT OF THE COMMON LAW 199 (1921).

\(^{18}\) R. JHERING, DER ZWECK IM RECHT (1877), translated by I. HUSIK as LAW AS A MEANS TO AN END 348-359 (1924). Action without interest was, to Jhering, an impossibility. "Being interested in a purpose, or briefly, interest, is an indispensable condition for every action—action without interest is just as much an absurdity as action without a purpose; it is a psychological impossibility." Id. at 40.

\(^{19}\) This synopsis of the Poundian interest theory largely follows that of Julius Stone in his A CRITIQUE OF POUND'S THEORY OF JUSTICE, 20 IOWA L. REV. 531 (1935). In its terseness, it well expresses the central motifs of Pound's jurisprudential thought.

Of course Pound wrote throughout his life on his interest theory, the culmination being his exposition in his five volume magnum opus JURISPRUDENCE (1959). Among the major articles preceding JURISPRUDENCE are: The Scope and Purpose of Sociological Jurisprudence, published in the HARV. LAW REV. in three parts, viz.: I. Schools of Jurists and Methods of Jurisprudence, 24 HARV. L. REV. 591 (1911); II. [The Social-Philosophical Jurists in Their Relation to Sociological Jurisprudence], 25 HARV. L. REV. 140 (1911); III. Sociological Jurisprudence, 25 HARV. L. REV. 489 (1912); The End of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195 (1914); Interests of Personality, 28 HARV. L. REV. 343, 445 (1915); Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177 (1916); A Survey of Public Interests, 58 HARV. L. REV. 909 (1945), and the articles cited elsewhere herein.
or behavior presuppose. Naturally, some of the claims will presuppose principles opposed to those presupposed by the great majority of claims. These of course the law does not recognize, indeed forbids. The presuppositions undergirding the recognized claims are called by Pound the jural postulates of civilization of the time and place.

The jural postulates are working hypotheses which explain most adequately human claims, demands or interests. They are formulated as a result of observing social phenomena and are hence always subject to further inquiry. As Julius Stone so perfectly expressed it, they are "postulates for law not postulates of law." That is, they express what men believe the law ought to do, not what in fact it invariably does. They are not predicated on the legal order alone, but drawn from the entire field of social phenomena.

Pound did not regard the jural postulates as absolutes. New facts could render them inapplicable. Until obsolete however, they are useful for bringing society's legal institutions into harmony with the jural postulates, and thereby harmonizing them with the actual demands of men in the society. Thus the jural postulates may be seen as yardsticks of organization around which given demands coalesce. These demands are given expression, or as Pound would have said, secured by the creation of reasonable expectations that the demand will be satisfied. This sense of expectation is of course what lawyers usually describe as a "right." Pound neatly skirts the question of whether there is a moral or philosophical dimension to the notion of "rights" by declaring:

Apart from philosophical or metaphysical considerations, a person may have reasonable expectations based on experience, or on the presuppositions of civilized society, or on the moral sentiment of the community. Some one or all of these may be recognized and backed by the law whereby they become the more reasonable. We say that a natural or moral right has been made also a legal right. But the expectation may arise simply and solely from the law, in which case we say there is a legal right only. It is seldom that a legal right is conferred conciously and intentionally otherwise than as a recognition of reasonable expectations, expressing presuppositions of civilized life.21

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20 20 IOWA L. REV. at 538.
21 R. POUND, SOCIAL CONTROL THROUGH LAW 80 (1942).
I. The jural postulates and critical views of Pound.

What are the presuppositions of civilized life? Are they reducible to formulae? Pound's suggestions on these fundamental questions may be gleaned from an examination of the postulates which he articulates in lapidary fashion. Before setting out the postulates, a word more is in order about their relationship to the theory of interests. While to some extent the two theories interlock, or as Julius Stone has said, the interest theory comprises a "mediating stage between the detailed problems of administration of justice and the working hypotheses of the civilization of the time and place," the two theories are really different "modes of approach." The jural postulates show what "we may expect to find asserted and calling for recognition and securing, as well as the basis of recognizing and securing." But the interests scheme, a "classified inventory of the expectations, claims or wants asserted and calling for recognition and securing," indicates "what have been recognized and secured and what are pressing for recognition and securing so far as the course of legislation and adjudication can indicate." With the relationship between postulates and the theory of interests having been thus faintly adumbrated, Pound's suppositions of civilized life are best related in his own words:

I. In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

Corollary. One who intentionally does anything which on its face is injurious to another is liable to repair the resulting damage unless he can establish a liberty or privilege by identifying his claim to act as he did with some recognized public or social interest.

II. 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 labor, and what they have acquired under the existing social and economic order.

III. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence

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22 Supra note 20.
24 Id. at 8.
26 Id.
(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;
(c) will restore specifically or by equivalent what comes to them by mistake, or failure of the presuppositions of a transaction, or other unanticipated situation whereby they receive at another's expense what they could not reasonably have expected to receive under the actual circumstances.

IV. In civilized society men must be able to assume that those who engage in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others.

V. 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 their proper bounds.\^20

Time eroded the jural postulates as Pound wrote them. Indeed, he later confessed as to the second postulate, "there may well be some question about the first two of the three propositions."\^27 Before reviewing the interest theory in light of the postulates,\^28 consideration of criticism of the postulates by Pound's associate Julius Stone must be noted along with an assessment of Pound's contemporary relevance.\^29

\^20 Id. As noted, the original suggestion for the jural postulates is Josef Kohler's. See his PHILOSOPHY OF LAW 4-5, 58-62 (A. Albrecht transl. 1914).
\^27 Id. at 9. Pound early set out the postulates in his INTRODUCTION TO THE PHILOSOPHY OF LAW 169-193 (1922), later in SOCIAL CONTROL THROUGH LAW 81-83, 112-118 (1942) and OUTLINES OF LECTURES ON JURISPRUDENCE 168, 179, 183-184 (5th ed. 1943). After crystallizing them for the last time in JURISPRUDENCE, supra notes 19 and 23, he commented at 9: "Each [of the propositions of the second postulate] was significant in pioneer America, but they have lost most of their significance in the urban, industrial society of the time. Acquisition by discovery of minerals was of great importance in the mining law of the Pacific and Rocky Mountain states and is still possible on the public domain of the United States. As to creation by labor, under present day conditions things are created by the labor of many working together or successively upon materials belonging to another."

\^28 Whether a discussion of the theory of interests should properly precede the formulation of the postulates, or the reverse, is a variant of the chicken—egg conundrum. Pound had it both ways, but in JURISPRUDENCE, supra notes 19 and 23, considered the postulates first. This plan of discussion has generally been followed here.

\^29 As instructor and afterwards assistant professor at Harvard Law School,
Stone’s most pungent criticism of the jural postulates is his attack on Pound’s notion that law should be brought into conformity with the conditions of the times. As Stone indicates, the position tacitly assumes that the law will be “better” when it is brought “into harmony with the conditions of the times.”

But in fact, argues Stone, “law is forever a handmaid to society, and . . . it must rise and fall with the rise and fall of society, that it has no absolute ends which it is constantly seeking to achieve, and no minimum standard of ideals.”

Bringing law into harmony with society may mean segregation or apartheid or Nürnberg laws. Second, while the Jamesian pragmatist approach ostensibly eliminates value judgments in the recognition of claims having ipso facto validity, since the jural postulates only presuppose “substantially all” the claims, “it follows inevitably that the formulation of the jural postulates involves a judgment as to what the preponderant mass of claims presuppose, and conversely as to what claims may be ignored because of this preponderance.”

Stone also suggests that Pound’s “civilization of the time and place” can neither be limited to an ascertainable geographical area or limited to a given period of time. And if there was the possibility of limiting space and time, there would still be the problem of transition in which there would be the formulation of two mutually incompatible set of jural postulates as schemes of interests, “the ones obsolescent, the others speculative.”

Dean Pound had other critics. But Stone’s exegesis suggests

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Stone assisted Pound in teaching jurisprudence from 1932 to 1936. In 3 Jurisprudence, supra notes 19 and 23, at 9 and 11-15, Pound acknowledged and responded to Stone’s criticism.

30 Supra note 20, at 545.
31 Id. at 546.
32 Id.
33 Id. at 549. Pound foresaw the emergency of new postulates, observing “it has been becoming more and more evident that the civilization of the time and place presupposes some further propositions which it is by no means easy to formulate, since the conflict of interests involved has by no means been so thoroughly adjusted that one may be reasonably assured of the basis upon which the adjustment logically proceeds.

“In general, a postulated claim of the job holder to security in his job is becoming recognized. . . .

Another emerging jural postulate appears to be that in the industrial society of today enterprises in which numbers of men are employed will bear the burden of what might be called the human wear and tear involved in their operation. Some such postulate is behind workmen’s compensation laws.” Social Control Through Law, supra note 21, at 115.

34 Morris R. Cohen accused Pound of failing to develop a “coherent” legal
ways of considering the unrest that disrupts the social and political life of the United States. For has not the emergence and search for power of a black underclass thrown in doubt some of the presuppositions of American civilization, especially those which flow from ancient and deeply engrained notions of cultural and racial superiority? To what extent are the white and black ethos actually compatible? Does not the destructive assault upon the nation’s institutions by the young, the poor and the black represent fidelity to new and different conceptions of the nature of man and the ends of society? Pound’s legal philosophy is particularly fragile when tested in the crucible of social upheaval revolutionary in its dimensions. He assumed continuity where oppression might impel revolt. With characteristic optimism, he never spoke to those dark, demonic forces which in times of stress can surface to rend forever the social fabric.

2. Pound’s theory of interests reviewed.

The jural postulates and the theory of interests comprise a calculus for development of the end of law in the modern age—that end “the satisfaction of as many human demands as we can with the least sacrifice of other demands.” Having treated the jural postulates somewhat separately from the theory of interests, a more detailed sketch of Pound’s conceptions of claims and demands is necessary to an appreciation of the contours of his legal philosophy.

Law, or the legal system, classifies and recognizes most of the claims pressing for recognition and securing, and fixes “the limits within which it endeavors to secure the interests so selected. These limits may be fixed in view of other interests which are also recog-

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nized, either directly or indirectly by the limitations imposed on directly recognized interests."38 Finally, the system "prescribes canons of values for determining what interests to recognize, for fixing the limits of securing recognized interests, and for judging of the weight to be accorded in any given case to the practical limitations on effective legal action."37 Therefore, asserts Pound, there are five points to be considered in determining the scope and subject matter of a legal system:

(1) We must take an inventory of the interests which press for recognition and must generalize them and classify them. (2) We must select and determine the interests which the law should recognize and seek to secure. (3) We must fix the limits of securing the interests so selected. (4) We must weigh the means by which the law may secure interests when recognized and delimited. We must take account of the limitations upon effective legal action which may preclude complete recognition or complete securing of interests which otherwise we should seek to secure. (5) In order to do these things we must work out principles of valuation of interests. Their chief importance is in determining what interests to recognize; in selection of interests to be recognized. But we must use them also in fixing the limits of securing recognized interests, in fixing upon the means of securing interests, and in judging of the weight to be attributed in any given case to the practical limitations upon effective legal action.38

Pound recognized that in the last analysis claims or interests are asserted by individuals. But that does not make them individual interests for all purposes. Although individual interests "are claims or demands or desires involved in and looked at from the standpoint of the individual life immediately as such,"39 there are public interests as well as social interests.40 Public interests are individual claims looked at from a political perspective, "the claims of a politically

36 Pound, supra note 23, at 21. Pound gives as an example the common law's indirect recognition of the child's interest by limiting the parent's privilege of correction. Supra note 11.
37 Supra note 23, at 21.
38 Id. at 22.
39 Id. at 23. See also Pound, supra note 21, at 69.
40 Id. Julius Stone argued that there were in fact only two principal ways of looking at interests—public and individual. He suggested that social and public claims arise from the same source and that the category "social" was encompassed by the category "public." J. Stone, THE PROVINCE AND FUNCTION OF LAW 490-492 (1950).
organized society thought of as a legal entity." Social interests are claims "thought of in terms of social life and generalized as claims of the social group."

This overview of the three divisions of the claims does not, of course, do justice to Pound's painstaking elaboration of the demands in each category. However, for purposes of this discussion, it is enough to limit consideration to those aspects of the theory of interests directly germane to Pound's engineering of the social interest in peace and order so that it compliments the claim of individuals for liberty, a demand which finds expression both as a social interest in individual life and as an individual interest in freedom.

INDIVIDUAL INTERESTS

In Pound's scheme, individual interests are divided into personality interests, domestic interests, and economic interests or interests of substance. His treatment of interests of personality are here important.

"Inviolability of the physical person is universally put first among the demands made by the individual." Thus Pound commences his hierarchical classification of the interests of personality. Freedom of the will and integrity of the physical person are high on the schedule of claims made by individuals on their own behalf. He suggests that the first wrongs dealt with in the history of the law were injuries to the body. Conjointly "pressing for recognition" is "the claim to free exercise of the will, free determination of what one will do and what transactions and relations he will enter into."

Pound's elaboration of the individual interest in protection of personal reputation and honor is particularly important because it demonstrates the interconnection between the various claims. "Men will fight in defense of their honor no less than in defense of their physical persons. Hence the most elementary of social interests, the interest in general security, demands that the one individual interest be secured no less than the other."
Pound's reflections on privacy as an interest of personality are particularly timely because of the continuing public debate on wire-tapping. However, the reinforcing nature of individual and social claims is best seen in the claim of the individual to believe according to his own reason and conscience, and the "social interest in free belief and free expression of opinion as guaranteeing political efficiency and promoting general progress, economic, political and cultural."  

**PUBLIC INTERESTS**

Even when Dean Pound was a youth, the state had become, at least in the West, the dominant social institution. He lived long enough to see the rise of the totalitarian state, the absolute and all-pervasive hegemony of the political organization of society. His argument that the claims of the political organization are a different species of demands than other social interests has special force in the chaotic confrontation of nation-states and the proliferation of new aggregations of collective ego structures.

Pound argues that the existence of political organization generates claims consistent with its existence and effective function. Some idea of his view of the nature of public interests may be seen in his discussion of the state as a juristic person. Finding that there is an interest in self-preservation and independence of the state and to the right of exclusive legislation and jurisdiction within its territory, Pound suggests (in what may now be seen as ironic analogue) that the state asserts a claim of equality and dignity as an "interest of personality."  

Having grown to manhood when the frontier was a dominant
influence in shaping values, Pound was to find an imbalance between the social interest in the individual life and the social interest in the security of social institutions. With great insight, Pound suggested in his landmark *Survey of Social Interests*\(^5\) that in valuing claims or demands against other claims or demands, "we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance by our very act of putting it."\(^5\) So also in the conflict between free expression and the honor of the state, the matter has been treated as if there was only competition between individual and public interests. Pound observes:

Those who exercise the power of a politically organized society easily identify themselves with the personality of the state and consider any threat to their tenure of power a threat to the existence of the state. The political, economic, and social status quo is closely related to the general security, and in times of transition all agitation as to political institutions, all advocacy of political reforms, all criticism of public officials and their doings, may be made to appear attack upon politically organized society and the legal order and so menacing to the general security.\(^5\)

Pound persuasively argues that overstress upon the public interest in the personality of the state, upon the social interest in the security of political institutions at the expense of the social interest in the individual life and the social interest in general progress, "has led to restrictions upon the individual interest in free association with others,"\(^5\) as well as curbs on other aspects of personal liberty in which there is a societal as well as individual interest.

**Social Interests**

In the articulation of the "claims or demands or desires involved in social life in civilized society."\(^5\) Pound isolated and placed into perspective what Professor Arthur L. Goodhart described as "extreme individualism with its emphasis on individual rights so that questions of the highest social importance are dealt with as if they were

\(5\) *Harv. L. Rev.* 1 (1943).

\(5\) *Id.* at 2.

\(5\) *Pound*, * supra* note 23, at 241. America's "free world" allies Greece and South Africa come at once to mind.

\(5\) *Id.* at 245.

\(5\) *Pound*, * supra* note 21, at 69.
mere private controversies . . ." 55 For Pound, in any survey of social interests, "first place must be given to the social interest in the general security—the claim or want or demand, asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence." 56 At bottom, the interest may be seen as the basic safety of the people. Nineteenth century American constitutional law, according to Pound, put the general safety of the people along with the general health and general morals in the police power as a "ground of reasonable restraint to which natural rights must give way." 57 Closely allied with this interest in the general safety are the interests in the health and in peace and public order. Finally, as might be anticipated, Pound, rooted firmly in common law tradition and marshalling arguments impressive at least for their scholarship, propounded "a social interest in the security of acquisitions and a social interest in the security of transactions." 58 Pound had elsewhere spoken of "[a]n instinctive claim to control natural objects as an individual interest of which the law must take account," 59 a notion which Morris R. Cohen described as "antiquated." 60

The security of social institutions was second in Pound's scheme of social interests. He saw a primary and major claim in the life of all civilized societies that its fundamental institutions be secure from action which threatens their existence or impairs their efficiency. Domestic, religious, political and economic institutions are the major social mechanisms that claim security.

Pound also found a social interest in the general morals and in conservation of social resources. However, it is in his discussion of the social interest in "general progress" and "the individual life" that the most dramatic oscillation occurs in his work between an emphasis on order and a stress on individual freedom. As a social group moves "toward higher and more complete development of human powers," 61 an interest appears in economic, political and cultural progress. Thus while economic policies against monopolies may su-

56 Pound, supra note 23, at 291.
57 Id. at 292.
58 Id.
60 Cohen, Book Review, 22 Col. L. Rev. 774, 778 (1922).
61 Pound, supra note 23, at 311.
perfecially be viewed as an interest in the security of economic institutions, properly analyzed it reflects a drive for economic progress. Similarly, the provisions in American bills of rights, and in written constitutions which make possible free criticism of public men, public acts, and public officers, traditionally viewed as an expression of individual rights, also represent an interest in political progress.62

Finally, in the social interest in the individual moral and social life, Pound finds the affirmation of personal freedom not premised simply in terms of an autonomous individualism, but as an expression of a more inclusive order of concerns. By viewing individual liberty from the perspective of social interests, Pound fused the concept of "rights" with correlative responsibility. Thus he argues that the "doctrine that one may justify action injurious to others by his natural liberty of action, except where his action takes the form of aggression and so threatens the general security" is an example of a "recognition of a social interest in individual physical self-assertion."63

Pound regarded as the paramount phase of the social interest in individual self-assertion, the policy recognizing that the individual must not be subjected arbitrarily to the will of others. In Pound's words:

If one is to be subjected to the will of another through the force of politically organized society, it is not to be done arbitrarily, but is to be done upon some rational basis, which the person coerced, if reasonable, could appreciate. It is to be done upon a reasoned weighing of the interests involved and a reasoned attempt to reconcile them.64

Freedom of the will, among the noblest expressions of individualism, becomes a social interest along with the social interest in individual conditions of life and in individual opportunity in Pound's view.

The encyclopedic breadth of Pound's theory of interests, which nevertheless remained open-ended,65 never obscured his vision of the

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62 Pound also discerned a social interest in cultural progress, which finds expression in a policy of free science, free letters, encouragement of arts and letters, and a policy of promotion of education and learning. "Closely connected with the interest in cultural progress is a social interest in aesthetic surroundings which recently has been pressing for legal recognition." POUND, supra note 23, at 314.

63 Id. at 317.

64 Id. at 318.

65 "[T]here is a constant pressure to recognize claims which have not been admitted. There is a constant struggle to obtain a higher valuing of claims which
fundamental importance of the individual. As he said in the summer of 1921 at Darmouth College:

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

II

SOCIAL CONTROL AND DISCRETION IN CRIMINAL JUSTICE

The administration of the criminal law is the current cause celebre of the American legal system. After more than a decade of Supreme Court decisions reshaping the constitutional contours of criminal justice, an outpouring of literature which includes an important study under the aegis of former President Lyndon B. Johnson, have obtained recognition." POUND, supra note 21, at 78.

Nearly twenty-seven years after Pound's words were published, University of Cambridge sociologist Edward Shils warned that "the individual's new self-assurance has led him to make bolder and more aggressive demands on governments at a time when the sheer complexity of problems have made governments less self-confident than ever . . . [with] an increased 'probability of public disorder.'" Shils' statement was contained in the fourth annual report of the Harvard University Program on Technology and Society, which asserted "that technology has created a society of such complex diversity and richness that most Americans have a greater range of personal choice, wider experience and a more highly developed sense of self-worth than ever before." N.Y. Times, January 18, 1969, § 1, at 1, col. 4.

Later published as THE SPIRIT OF THE COMMON LAW 110, 111 (1921).

Like other revolutions, the one in criminal law has seeds that precede its flowering. Among the first notices of the Supreme Court's "reassertion" of judicial control over the criminal process was contained in the Court's message to the Cleveland police who were advised they couldn't convict Dollree Mapp by stripping her of her constitutional rights. Mapp v. Ohio, 367 U.S. 643 (1961). (The phrase "reassertion of judicial control" is a paraphrase of words in Martin Mayer's THE LAWYERS 182 (Dell ed. 1968). The requirement of counsel in felony cases however best represents the evolutionary nature of the revolution in criminal justice. Compare Gideon v. Wainwright, 372 U.S. 335 (1963) with Chewning v. Cunningham, 368 U.S. 443 (1962), Hamilton v. Alabama, 368 U.S. 52 (1961) and Betts v. Brady, 316 U.S. 455 (1942). Miranda v. Arizona may be seen as both the culmination and triumph of the movement. 384 U.S. 436 (1965).

and Congressional elections in which "the crime problem" was an over-
riding issue, criminal law and procedure may be said without over-
statement to be subjects of concern both within\(^6\) and without the law
schools.\(^7\)

It was not always so. Certainly it was not the case on April
29, 1906 when Dean Pound, then an obscure University of Nebraska
professor, spoke at the twenty-ninth annual American Bar Association
meeting in St. Paul, Minnesota on "The Causes of Popular Dissatis-
faction With the Administration of Justice."\(^71\) The speech was the
first of a series of papers devoted to study and reform of the criminal
justice process, and by which Pound, more than any other man, legit-

\(^6\) Where once there was the lone course in criminal law, and now and then a
course or seminar in criminal procedure, there are now what amount to "depart-
mants." Thus the University of Chicago's law school houses The Center for Studies
in Criminal Justice, the Universities of California and of Pennsylvania sponsor
research centers concerned with the operation of the criminal justice system.

\(^7\) "The public sees crime as one of the most serious of all domestic prob-
lems. The Commission's . . . survey asked citizens to pick from a list of six
major domestic problems the one they were paying the most attention to. . . .
Crime was second to race relations as the most frequently mentioned problem . . .

Public concern about crime is mounting. National polls by Harris and
Gallup show that the majority of people think the situation in their own communi-
ties is getting worse, that a substantial minority think the situation is staying about
the same, and that almost no one thinks the situation is improving. . . . In July
1966, Harris surveys reported that in each recent year there has been an increase
over the year before in the percent of persons worried about their personal safety
on the streets." CHALLENGE OF CRIME, supra note 68, at 49-50.

\(^71\) The speech appears in 20 J. OF THE AM. JUDICATURE SOC'Y (1937) and has
been reissued as a reprint by the society of which Pound was a founder. It
has also been printed in 8 BAYLOR L. REV. 1 (1956) and 40 AM. L. REV. 729
(1906). The causes assigned by Dean Pound (in skeletal outline) were: 1.)
Causes for dissatisfaction with any system of law, which he listed as the neces-
sarily mechanical operation of rules, the inevitable difference in rate of prog-
ress between law and public opinion, the general popular assumption that the
administration of justice is an easy task, and popular impatience with restraint.
2.) Causes stemming from the American legal system, which he said were the
"individualist spirit of our common law, which agrees ill with a collectivist
age;" the "common law doctrine of contentious procedure, which turns liti-
gation into a game;" rivalry with the other branches of government; lack of a legal
philosophy which results in "petty tinkering where comprehensive reform is
needed," and formal defects due to the case law system. 3.) Causes lying in
judicial organization which included a needless multiplicity of courts and concurrent
jurisdiction and a waste of judicial power. Pound pointed out that rigid districts
left some courts idle, others swamped, and that judges were devoting excessive time
to procedural questions and to retrials. 4.) Causes "in the environment" of judicial
administration which included lack of public interest in jury service, the strain put
on law as a result of doing the work of morals, the effect of transition from case
law to legislation, mixing courts and politics, making the legal profession into a
trade, and public ignorance of the reality of the process due to newspaper distor-
tions and sensationalism.
mated academic concern with the criminal law. And it is in Dean Pound's life long study of criminal justice that his philosophy of law, his theory of interests can be seen in action.

Foremost among the problems Pound grappled with in his study of criminal law was that of discretion, one of the oldest and most vexing issues in the administration of criminal justice. "On the one hand, a body of criminal law is made up of rules prohibiting specific items of conduct. On the other hand it is made up of checks and limitations on the enforcement of those prohibitions, and so on the activity of those who are charged with enforcing them." Civil peace of course depends on the law's capacity to maintain an equilib-

72 The response was less than instantaneous. Writing in 1935, Dean Pound asked "how does it come that [criminal law] has been so neglected by American law schools?" He observed that when "we turn to the directory of law teachers, we find listed one hundred and forty-seven teachers of civil procedure, common law pleading, and code pleading, and ninety-six teachers of contracts as compared with eighty-seven teachers of criminal law and procedure combined as one subject." Pound, Toward A Better Criminal Law, 21 A.B.A.J. 499, 502 (1935).

73 "Skilled in the exercise of juridical reasoning as it actually develops in adjudicated cases, and enriched by a profound understanding of the history of legal institutions, Roscoe Pound borrows a lance from the Aristotelian armory and pacifies these embattled antinomies by reconciling them. Form and matter, he recognizes, far from being antagonistic concepts are in fact imminent within each other, and merely represent two different aspects of the same reality. A similar relationship holds between rest and motion, between tradition and novelty, between authority and reason, between legal supremacy and administrative discretion, between the real and the ideal. If liberalism appears to clash with conservatism, that conflict occurs only in the imagination of abstract conceptualists; in nature they mutually implicate each other." M. Aronson, Roscoe Pound and the Resurgence of Juristic Idealism, 6 J. SOC. PHILOS. 47, 72 (1940).

Aronson has defined Pound's approach as one of "synthesis," and observed that it "bears the impress of the American soil and reflects the authentic characteristics of a frontier-nurtured athletic mentality grappling with the perplexities engendered by the rising tide of industrialism swirling against the background of a rural economy. . . . Pound retains in his own synthesis the enduring insights of the great jurists of the past while he focuses them anew upon the problems of the present." Id. at 47, 67.

Others have used the word synthesis in considering Pound's work. Patterson spoke of "Pound's synthesis of social interests." E. Patterson, Pound's Theory of Social Interests, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 558, 560 (1947). The Founder and President of the Indian School of Synthetic Jurisprudence declared that "the most valuable component of synthetic jurisprudence is sociological jurisprudence, for the true purpose behind law and legal institutions is that of maintaining the social equilibrium through the procuring of a harmony of interests. . . . Without the most precious sapphire of sociological jurisprudence, the beautiful necklace of synthetic jurisprudence would lose its brilliancy, its grace, its charm and value." M. Sethna, The True Nature and Province of Jurisprudence From the Viewpoint of Indian Philosophy, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 99 (R. Newman ed. 1962).

rium which avoids both despotism and anarchy. The unchecked enforcement of law, law and order without justice, threatens not only the quality, but indeed the very existence of individual life. In turn, the paradoxical instability of totalitarianism ultimately threatens the general security, for violent revolution is the most commonly prescribed antidote for tyranny.

The central tension in law between certainty and exigency was well expressed in Pound's much quoted aphorism that "[l]aw must be stable and yet it cannot stand still."\textsuperscript{75} Man's unending quest for security and certainty inexorably presses for an immutable basis for the regulation of life. But as a contemporary legal philosopher has elaborated upon Pound, "law cannot be stable, in any effective sense, \textit{if} it stands still."\textsuperscript{76} Thus the proverbial pendulum swings\textsuperscript{77} between law's twin tasks—the provision of certainty and the regulation of change, the maintenance of order without the denial of freedom. A body of law without the capacity for change would impede the adjustment which every society must make as circumstances change in its social life. A body of law without stability and certainty, aside from being a contradiction in terms, would lead to such chaos as to make the achievement of progress and liberty impossible.

It is discretion which mediates the rigor of the law's precepts. "Discretion is a tool, indispensable for individualization of justice," an administrative law scholar has recently written.\textsuperscript{78} "All governments in history have been governments of law and of men. Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in government and in law."\textsuperscript{79}

The administration of criminal justice relies especially upon the

\textsuperscript{75} R. POUND, \textsc{Interpretations of Legal History} 1 (1923).
\textsuperscript{76} H. Jones, \textit{The Creative Power and Function of Law in Historical Perspective}, 17 \textsc{Vand. L. Rev.} 145, 139 (1963).
\textsuperscript{77} "Legal history shows a constant swinging back and forth from an extreme reliance upon systematic administration of justice according to legal precepts, and an unsystematic administration according to the will of magistrates or administrative officials for the time being." Pound, \textit{supra} note 74, at 155.

"Legal history shows a constant movement back and forth between wide judicial discretion on the one hand, and strict confinement of the magistrate by detailed rules upon the other hand." Pound, \textit{Justice According to Law}, 13 \textsc{Col. L. Rev.} 696, 699 (1913).
\textsuperscript{78} K. DAVIS, \textsc{Discretionary Justice: A Preliminary Inquiry} 25 (1969).
\textsuperscript{79} \textit{ld.}
use of discretion. The “cutting edge” of the criminal justice process, “the cop on the beat,” has a degree of discretion unique in both the latitude as well as the frequency of its use. Indeed, as has been widely recognized, the police discretion not to do anything at all is the most powerful aspect of their discretionary power and “largely determine[s] the outer limits of law enforcement. By such decisions, the police define the ambit of discretion throughout the process of other decision makers—prosecutor, grand and petit jury, judge, probation officer, correction authority, and parole and pardon boards.”

In terms of sheer numbers of decisions, the police of course exercise more discretion than any other agency concerned with the administration of justice. However, the actual power of the police is probably exceeded by that of the prosecutor. Mr. Justice Jackson said when he was Attorney General of the United States:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole.

The other institutions exercising discretion in the criminal justice process are not wanting in power. The grand jury has the power to indict and has been called “unquestionably the most celebrated of the pre-trial screening devices.” Petit juries return general verdicts of not guilty despite the most careful instruction and in the face of certain proof, a power which southern juries have used for more than a century to free whites tried for the most heinous crimes imaginable.

against blacks.\textsuperscript{83} 

The ultimate power of the judge is self-evident. "The formality of the trial and the honor accorded the robed judge bespeak the symbolic importance of the court and its work."\textsuperscript{84} Judges have discretion in sentencing, exercised with amazing and much lamented disparity,\textsuperscript{85} and indeed need not impose a jail sentence at all but may grant probation.

Even after the defendant has finished the trial, and presumably all major issues have been decided, he must still confront the power of the parole and pardon boards which exercise virtually unchecked discretion.\textsuperscript{86} Finally, while waiting for parole or pardon decisions, prisoners are subject to the broad discretionary powers delegated to correctional administrators who manage the various penal systems.\textsuperscript{87}

What the administration of criminal justice indicates therefore, is that there is in law and will always be a constant striving for the read-

\textsuperscript{83} "Secure in the knowledge that Negroes will never sit in judgment upon him, the white juror may safely weight the scales of justice with loyalty to race." \textit{Tucker, Discrimination in Virginia Jury Selection, 52 U. Va. L. Rev. 736, 743 (1966).}

\textsuperscript{84} \textit{CHALLENGE OF CRIME} 125.

\textsuperscript{85} "There has been, in recent years, growing concern over some aspects of judicial sentencing. The concern has been directed primarily to the wide disparity in sentencing between different individual trial judges and over what are thought to be unduly short or unduly long sentences." \textit{F. Remington et al., CRIMINAL JUSTICE ADMINISTRATION} 754 (1969). Federal Judge Edward J. Devitt admitted in a 1966 sentencing institute: "Unjustified disparity is the main complaint, and it seems that regardless of how many sentencing institutes we have and how often we get together to discuss consensus among ourselves, the facts, supported by dependable statistics, continue to reflect unjustified disparity between the sentences imposed for the same crime upon persons in like circumstances and with similar histories and backgrounds." 42 F.R.D. 218, 220 (1967).

\textsuperscript{86} The most egregious example of parole board discretionary power is that wielded by the United States Parole Board. "In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents; the degree of openness of proceedings and records is about the least possible; and procedural safeguards are almost totally absent." \textit{K. Davis, supra} note 78, at 126.

\textsuperscript{87} "Congress and state legislatures have, in effect, fostered the creation of miniature legal systems which are largely independent of outside control. Prison officials, consequently, enjoy virtually absolute authority over the destinies of the approximately 220,000 prisoners confined to adult penitentiaries throughout the United States. At their direction classification decisions are made; policy guidelines and rules are promulgated and enforced; disciplinary violations are adjudicated and punishments assessed; and decisions are reviewed—all with little or no intervention by civilian judicial, legislative or other agencies." \textit{Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Rights-Civ. Lib. L. Rev.} 227 (1970).
justment of claims and interests, in Pound's words, an effort to achieve "practical compromise between over-minute law-making and over-wide discretion."88

CONCLUSION

Pound's legacy is his elaboration of law as the supreme social organism for the arrangement and ordering of interests and claims. Law exists, not as an end in itself, but to serve and secure those interests compatible with ever-widening horizons of human achievement. And thus does the social interest in order exist, not as a self-sufficient objective, but as a systematic and rational way to liberate the energies and imaginations of free-willing individuals. As Pound might have said, it cannot do more, it must not accomplish less.

88 R. POUND, CRIMINAL JUSTICE IN AMERICA 42 (1930).