Some Reflections on Pound's Jurisprudence of Interests

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SOME REFLECTIONS ON POUND’S JURISPRUDENCE OF INTERESTS

by

REV. DR. FRANCIS J. POWERS, C.S.V.*

I

Roscoe Pound is regarded by many as the world’s foremost living jurist. Indeed, such is his stature that he may well be assured a niche in the gallery of the great legal figures of the ages. His learning, it has been said truly, is massive in weight and panoramic in scope yet microscopic in intensity. Possessed of an erudition unsurpassed in modern jurisprudence and a rare genius in analyzing and tracing the development of legal systems and formulating broad historical and jurisprudential generalizations, Dr. Pound has deepened appreciation of our legal heritage and enriched greatly the literature of the law. But he is no mere legal historian or antiquarian. For fully half a century, as a leader at the bar, as a law school teacher and dean, as a renowned lecturer and brilliant writer, he has pioneered in the practical task of improving the social machinery for the administration of justice. This has been his special province and his great passion. Even his adversaries, and they are many, respect him as a towering figure among the scientists of the law. He is regarded as the father of the American school of sociological jurists. His early juristic years were spent in the formulation of his system; his latter years have been spent largely in defending it vigorously against the attacks of its own wayward offspring.¹

To write that Professor Pound is no facile subject for a brief general survey is to state the obvious. The immensity of the man and his work is almost overwhelming and it is with considerable temerity and an uneasy feeling of inadequacy that one ventures a descriptive study of even a phase of his thought. But this paper will concern itself with outlining the underlying premises of Poundian thought on the jurisprudence of interests, which is the core of sociological jurisprudence; and it will also enter into an examination and appraisal of the role of religion as an interest in this system. Pound himself has said that the legal order

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*Assistant Professor, Department of Politics, The Catholic University of America; M.A., LL.M., S.J.D.

¹ See Sayre, The Life of Roscoe Pound (1948); Setaro, The Writings of Roscoe Pound (1942), a bibliography of Pound’s writings which are now close to a thousand in number; Wu, The Juristic Philosophy of Roscoe Pound, 18 Ill. L. Rev. 285 (1923); Cassidy, Dean Pound: The Scope of His Life and Work, 7 N. Y. U. L. Q. Rev. 897 (1930); Farnum, Dean Pound—His Significance in American Legal Thought, 14 B. U. L. Rev. 715 (1934); Grossman, The Legal Philosophy of Roscoe Pound, 44 Yale L. J. 605 (1935); Ames, Roscoe Pound in Modern Theories of Law 86 (1933).
"cannot dispense with its philosophical side"\(^2\) and, that in the realm of jurisprudence, "we are dealing ultimately in what ought to be."\(^3\) Apology need not be made, then, for centering attention on the philosophical foundations and implications of Pound's system rather than on its functional aspects. In approach, the article undoubtedly will display notable bias in favor of scholastic natural law concepts.

While Montesquieu rightly may be regarded as the intellectual fore-runner of sociological jurisprudence,\(^4\) the greatest practical impetus to the movement in more modern times initially was provided by the German jurist, Rudolph von Ihering, who revolted against the inflexible jurisprudence of concepts of the historical-metaphysical school of the late nineteenth century and pioneered the functional approach to law.\(^5\) Ihering has been commonly classified as a social utilitarian, but he was little interested in defining or systematizing law in the Benthamite fashion. The legal thought of his time was predominantly individualistic, and its concepts largely divorced from the realities of the social order. Legal speculation then centered around the intrinsic nature of law. Ihering shifted emphasis to the consideration of the function and end of law. An awakened consciousness of the need for coordinating law with changing social conditions and an insistence on the functional nature and social purpose of law were his chief contributions to legal science.\(^6\) Challenging the law's devotion to an exaggerated individualism, Ihering's thesis was that the individual's welfare was itself not an end but was recognized only insofar as it aided in the securing of the larger social welfare. The protection of individual rights, in other words, was dictated solely by social considerations. What some termed natural or inalienable rights were actually nothing more than legally protected social interests. Failure to answer the question of ultimate ends, an inability to solve satisfactorily the problem of the relationship between the individual and the state, and the lack of reasonably objective criteria for the selection and preferment of interests by the legal system were his chief deficiencies in this area of thought. But for the era in which he wrote, his thought was advanced if not revolutionary, and was destined

\(^2\) Contemporary Juristic Theory 55 (1940). Unless otherwise noted all references hereafter are to Pound.
\(^3\) Id. at 54.
\(^4\) Ehrlich, Montesquieu and Sociological Jurisprudence, 29 Harv. L. Rev. 582 (1916). The "spirit of the laws" was essentially the interrelation between laws and their physical and societal environment.
\(^5\) Ihering, Law As A Means To An End (1913). This translation of his Der Zweck Im Recht is his best known work in the United States.
\(^6\) For good summaries on Ihering see MacDonnell and Manson, Great Jurists of the World 590-599 (1914); Berolsheimer, The World's Legal Philosophies 337-351 (1919); and Stone, The Province and Function of Law 299-318 (1946).
to exert profound influence on Pound and provide a starting point for the modern school of sociological jurisprudence.

Following closely upon Ihering and manifesting much the same spirit in the domain of philosophy came William James and his pragmatism. According to James, every *de facto* claim creates, in so far as it is advanced, an obligation, and that as a consequence the primary norm for ethical philosophy is simply that of satisfying as many demands as possible with a minimum of waste and friction. Accepting James' doctrine that "the essence of good is simply to satisfy demand" and that "the guiding principle for ethical philosophy ... be simply to satisfy at all times as many demands as we can," Pound regards this same objective as the end and function of law. Pound transferred James' idea to the realm of jurisprudence. "This seems to me a statement of the problem of the legal order", said the professor. "The task", he continued, "is one of satisfying human demands, of securing interests or satisfying claims or demands with the least of friction and the least of waste, whereby the means of satisfaction may be made to go as far as possible." The satisfaction of wants is viewed by the pragmatists as the central problem of society and of the legal order. These wants are also termed demands, claims, assertions or interests—all interchangeable—with the last, interests, being perhaps the most widely used. Professor Pound envisions the task of the law as that of "social engineering", that is, the systematic adjustment and reasoned orderings of these interests according to an authoritative technique.

While affinity between Pound's theory of interests and that of Ihering are so marked as to show clearly the influence of the latter on Pound; it was from James that he derived the philosophical and ethical basis for his system. Moreover, there are important differences between Pound and Ihering. The civil law and a near absolute and paternalistic state constituted Ihering's setting; Pound's is that of the common law and constitutional democracy. A sincere though inadequate attempt to protect the individual is manifest in the Poundian system, while Ihering's insistence on the subordination of the individual to a utilitarian social interest in a Machiavellian state is marked. Pound is not a mere American disciple of Ihering; he has drawn liberally from the jurisprudential concepts of others, notably Kohler and Stammler, and fashioned them into a system which bears his own distinctive impress. Others may have

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7 Interpretations of Legal History 157 (1923), citing James, *The Will To Believe*, 195-206.
8 Ibid.
9 Cf. Hall, Readings In Jurisprudence 237-258 (1938), a group of readings under the chapter heading "Pragmatism."
10 15 Proceedings, Am. Soc. Soc. 16 at 44-45 (1920); Social Control Through Law 64 (1942); Justice According To Law 31 (1951)
supplied much of the material but Pound is the chief architect of the
edifice of American sociological jurisprudence.

Professor Pound's efforts to bring the legal order into harmony with
the social milieu undoubtedly are notable contributions to American
jurisprudence. "Law must be stable", Dr. Pound has written, "but it
can not stand still." Stability, certainty, received ideals, and taught traditions
are accorded due respect, yet the law must be dynamic. "But continual changes in the circumstances of social life demand continual
new adjustments to the pressure of other social interests as well as to new
modes of endangering security." As part of the process of social engi-
neering the legal order "must be overhauled continually and refitted
continually to the changes in the actual life which it is to govern." Dr.
Pound's thesis that law cannot be understood apart from society or its
functional role in society is a proposition to which scholastics long have adhered. Thomists, enlightened jurists now appreciate, view law and
legislation as dynamic and not static. Scholastic natural law, contrary
to misconceptions in some quarters, is no jurisprudential straight-jacket.

One feels that St. Thomas Aquinas himself would have had much
sympathy toward the challenge of Ihering and Pound to the formal and
sterile social and legal thought of the late nineteenth and early twentieth
centuries. In fact, it is no great exaggeration to say that few modern
jurists more clearly have envisioned the underlying dialectic nature of
law than did St. Thomas. Interestingly, both Ihering and Pound have
had laudatory words for St. Thomas' social concept of law. Ihering, by
his own admission, was amazed to discover his own basic theme on the
interrelation between law and social change set forth "in perfect clear-
ness and in most pregnant formulation" in the writings of Thomas.
Professor Pound, too, has expressed admiration for the correlating genius
of St. Thomas in the realm of law but carefully has excepted himself from
the ranks of the neo-Thomists. Despite the existence of several areas

11 The Need of a Sociological Jurisprudence, 19 Green Bag 607 (1909); Law in the
Books and Law in Action, 44 Am. L. Rev. 12 (1910); The Scope and Purpose of Sociol-
ogical Jurisprudence, 24 Harv. L. Rev. 591 (1911); 25 id. 140, 489, 616, (1912).
12 Interpretations of Legal History 1.
13 Ibid.
14 Ibid.
15 An exposition of the principles of scholastic jurisprudence is beyond the scope of
this paper, but on this point see Brown, Jurisprudential Aims of Church Law Schools in the
United States, 13 Notre Dame Law. 163 (1938); M. T. Rooney, Law and the New Logic, 16
Proceedings, Am. Cath. Phil. Asso. 193 (1940); Chroust and Collins, "The Basic Ideas
of the Philosophy of Law of St. Thomas Aquinas at Pound in the Summa Theologica, 26
Marq. L. Rev. 11 (1941); Mulligan, A Note on Legal Pragmatism, 21 Thought 513
(1946); Constable, Natural Law Jurisprudence and the Cleavage of Our Times, 39 Geo.
L. J. 365 (1951).
16 Quoted from Der Zweck Im Recht II, 161 (3rd ed. 1898) by Chroust and Collins,
supra note 15, at 11-12.
17 The Church in Legal History in Jubilee Law Lectures 97 (1939).
of common agreement with scholastic natural law jurisprudential concepts, Poundian thought, as will be indicated, is vitiated by its underlying pragmatic character.\textsuperscript{18}

II

Having observed the totality of de facto claims or assertions which human beings are urging and seeking to satisfy and have recognized by the legal system, the next step for the jurist, in Poundian theory, is the synthesizing of the fundamental principles relating to human conduct which the various claims or interests presuppose. This process of reducing, abstracting or translating the great mass of interests or human assertions into systematized working hypotheses of the underlying principles of a particular society terminates or results in the formulation of what are termed the "jural postulates of the civilization of the time and place."\textsuperscript{19} The jural postulates, few in number, have been described by Professor Pound as the "presuppositions of life in civilized society which people take for granted in their everyday life so that the law seems to give effect to them as presuppositions of the legal order."\textsuperscript{20} They are working hypotheses of what men in a specific society want the law to accomplish.\textsuperscript{21} Guided by these jural postulates, the task of the law is to bring legal institutions into harmony with the claims or interests of the society of that time and place which give expression to its underlying aims. Formulation of the scheme of interests follows next. The third step in the process is a systematized inventory and catalogue or arrangement of interests based on the presuppositions of the jural postulates of that society at that time. It is a classification of interests hierarchically arranged into individual interests, social interests, and public interests which the law will recognize, adjust, secure, and enforce.\textsuperscript{22} The individual interests are claims involved immediately in the individual life and asserted in title of that life. They embrace interests of personality, that is, physical integrity, freedom of will, privacy, honor, reputation, belief, and opportunity; domestic relations; and interests of substance.

\textsuperscript{18} Dr. Wu once wrote that "it is impossible to realize the real position of Pound without relating him to that general tendency of thinking which is called Pragmatism." Wu, supra note 1, at 287.

\textsuperscript{19} Pound borrowed the idea of the jural postulates of the civilization of the time and place from Kohler. See Interpretations of Legal History 141-151. Kohler's chief work is available in English as Philosophy of Law (1914).

\textsuperscript{20} New Paths of the Law 32 (1950).

such as property, succession, and testamentary disposition, advantageous relations with others, right of association, and the like. Public interests are claims involved in life in a politically organized society and asserted in title of that organization. They include the interests of the state as a juristic person and the interests of the state as guardian of the social welfare. Social interests are claims involved in social life in civilized society and asserted in title of that life, claims of the social group as such. This classification embraces the general security, that is, peace, safety, health and order of the community; the general morals; the conservation of social resources; the general progress; political progress; and the social interest in the individual life. They are all, says Pound, reducible to interests of individuals but in each instance asserted from a different viewpoint. When competing claims are being considered they must be compared on the same plane, social interests with social interests, and so on. The value of such classification, it is said, is its utility as a device for making inarticulate premises articulate and thus making the jurist or legislator conscious of the nature of the basic issues involved in a specific case. The final phase of Pound's theory of interests is the analysis, appraisal, and evaluation of competing or conflicting interests within their respective categories as they press for securement in a specific instance. That interest will be preferred and given effect which will permit the satisfaction of the widest number of claims with the minimum amount of friction and waste to the entire system, that which will least disturb the scheme of interests as a whole. Such is the mechanics of the theory of interests and the task of the law in the process of social engineering.

Interest now is the basic term in the law and the core concept of the new jurisprudence. Any ordering or adjustment of human relations and conduct must take account of these interests. It is to be remembered that they are not created by law. The legal order simply recognizes and adjusts them. Some interests are eliminated immediately in the process of formulating the jural concepts of the society of the time and place. Assertions or demands inconsistent with these postulates are thus eliminated from further immediate consideration by the legal order. They may, of course, continue to be assertive and may actually later attain recognition if changed social conditions bring about alteration of the jural postulates. Similarly, the fact of recognition of an interest at any given time by the legal order does not insure its perpetuation. The fate

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23 Friedman, Legal Theory 231-232 (2nd ed. 1949).
of any asserted interest is dependent on its reception and acceptance or rejection by the forces of civilization of the particular time and place. The significant characteristic of an interest is that in the eyes of the legal system it possesses no fixed or absolute value. Relativity of value is fundamental in the jurisprudence of interests. An interest is not recognized by the legal order, much less secured, because of its intrinsic worth or validity. It is accorded place because it is an assertion not inconsistent with the general presuppositions of life in that civilization and strong enough to muster support. Interests are relative to the jural postulates and to each other.

What of natural rights in the scholastic sense? That term, as far as fundamental meaning in the scholastic sense is concerned, has passed from the vocabulary of the sociological school. The operating principle of the maximum of want satisfaction with a minimum of friction and waste does not concern itself with a determination of what assertions or claims ought to be secured because of their intrinsic nature. For three decades Roscoe Pound in his writings has indicated most clearly that what many label natural or inalienable rights are simply interests which the society of a specific time and place thinks ought to be secured. They are no more than that. The deliberate exclusion of absolute ends is an inextricable element in the Poundian theory. What practical measure of values does the law utilize to gauge interests? "Put simply", Pound answers with consistent uniformity, "it has been and is to secure as much as possible of the scheme of interests as a whole as may be with the least friction and waste." Interests would lose their character as instruments for social engineering should they acquire a fixed status and immutable value. "We are thinking of interests, claims, demands, not of rights," the professor wrote, "of what we have to secure or satisfy, not exclusively of the institutions by which we have sought to secure them or to satisfy them, as if those institutions were ultimate things in themselves." Viewed factually, it is said, an interest, an instinctive assertion or drive, carries with it no overtones of moral worth. It would be difficult to refute the conclusion of Professor Jerome Hall, himself a

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26 Contemporary Juristic Theory 75-76.
26 Legal Right, 26 International Journal of Ethics 104 (1915); The Spirit of the Common Law 92 (1921); An Introduction to the Philosophy of Law 96 (1925).
27 Kreilkamp, Roscoe Pound and the Ends of Law, 9 Ford. L. Rev. 201 (1940).
28 Contemporary Juristic Theory 75-76.
29 Interpretations of Legal History 152.
noted teacher of jurisprudence, that Roscoe Pound has been the leading exponent of pragmatism in American law.\(^9\)

The idea of the jural postulates of the civilization of the time and place is borrowed from Kohler. Pound has explained the essence of the neo-Hegelian's thought substantially as follows.\(^{21}\) Law is relative to the civilization of the time and place. A universal body of legal principles valid for all civilizations is denied. No eternal law exists. Human civilization is the sole valid universal idea. There is no natural law, but there does exist a constant factor, namely, the relation between law and civilization. Law is both a means toward and a product of civilization. Civilization is conceived of as the social development of human powers toward their highest possible unfolding. The task of the law is to maintain existing values and to create new ones. The civilization of the time and place has particular jural postulates, ideas of right to be made effective by legal institutions. Jurists are to determine and formulate these postulates, not for all civilization, but merely for that of the particular place and time, and consciously shape the inherited legal institutions in such manner that they will make the postulates effective. The legal system thereby becomes an instrument in the unfolding and advance of civilization. Pound has expressed himself as dubious of the Hegelian overtones of this concept, but the following significant passage will show his close adherence to the general idea:

We may concede, if you will, that there is no absolute value; that value is relative to something. Perhaps value in jurisprudence is relative to civilization. Proximately it is relative to the task of the legal order, to the task of enabling men to live together in civilized society with a minimum of friction and a minimum of waste of the goods of existence. What accords with the jural postulates of the civilization of the time and place has juristic value. If it will work in adjusting relations and ordering conduct so as to eliminate or minimize friction and waste, it is a valuable measure for a practical activity.\(^{22}\)

Civilization of the time and place as the ultimate standard of value in jurisprudence has been challenged vigorously both within and without scholastic circles. Professor Julius Stone, a distinguished teacher and writer of the sociological school and one time colleague of Pound at Harvard, has touched the basic weakness of this phase of Pound's theory in his criticism that if the civilization of the particular time and place is retrogressive, a possibility which can not be ignored, then the process of bringing the legal system into harmony with such a declining civiliza-


\(^{21}\) Interpretations of Legal History 141-151.

\(^{22}\) Contemporary Juristic Theory 82.
tion would be a degradation of the law. Failure by Pound to qualify the use of the *de facto* civilization of the time and place in the formulation of the jural postulates by reference to some ultimate standard of civilization or some absolute value is rightly scored by Stone as a fatal weakness in the theory. There is much, also, to Laski's criticism that Pound's whole philosophy is fundamentally Hegelian and his doctrine on interests nothing more than a veiled rationalization of the status quo. Others fear that making legal values dependent upon contemporary society entirely subjects the legal order to the danger of caprice of ephemeral public opinion. Pound's faith that the community and society can do no wrong and that judgments arrived at will always be right is not shared by all. Dr. Karl Kreilkamp, an able scholastic writer, also decries Pound's thesis that the "sense of mankind for the time being as to what is just and right" is the highest measure of value for the legal order. Kreilkamp points out the incongruity inherent in the proposition that the only abiding norm for positive law is that it must fit itself to the ethical ideas of the community it governs. "By that criterion of positive law", he says, "there could be in existence at one and the same time two societies whose laws were each as just as laws can or ought to be, but whose social ends were diametrically opposite. . . ." The law of a community of gangsters, he concludes, is just and perfect if it expresses and adequately implements the aspirations of its members. Other very practical difficulties have been noted in reference to the use of the civilization of the time and place as a final determinant of values. It will be no easy matter for jurists to ascertain and delimit one clearly defined homogeneous civilization in any one specific time and place, and it will be no less difficult to posit one set of postulates which embrace all the *de facto* claims of that civilization.

III

Professor Pound is not unaware of the difficulties posed above. The measuring of values, he has said, is not alone a problem of jurisprudence but calls for the assistance of religion, ethics and the social sciences. He has written, moreover, that the standard of civilization of the time and place presupposes some further propositions which are difficult to

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36 *Scope and Purpose of Sociological Jurisprudence*, 24 Harv. L. Rev. 591, at 608 (1911).
38 *How Far Are We Attaining a New Measure of Values in Twentieth Century Juristic Thought*, 82 W. Va. L. Q. 90 (1936).
formulate and some see in this an unconscious reliance upon absolutes. Yet the professor scrupulously has avoided the postulation of absolute values. Indeed, as is evident from quotations above, he has openly denied such a possibility. It is his view that no theory of society, no concept of civilization, enjoys universal validity or immutability. There is no absolute reality. The law’s ethical norm, according to Pound, is society’s felt wants. All history, as he reads it, supports this claim. The more fundamental question of what human wants the legal order ought to secure because of their intrinsic validity is eschewed. At root, of course, the deficiencies of Pound’s system can be traced to his failure to comprehend the nature of the human person in all its aspects. One will search Poundania in vain for any idea approximating the scholastic concept of the relationship between the nature and destiny of man and the purpose and end of law. Moreover, it is very doubtful if Pound appreciates fully the instrumental nature of the social order in advancing the higher and non-social interests of the individual.

The dean of American legal scholars never has claimed that the element of evaluation is foreign to jurisprudence. His insistence has been quite in the opposite direction. Unceasingly he has warred on the so-called realists who as a group either deny the possibility or have given up the attempt to arrive at and apply a system of values in the legal order. Legal realism is at root a reaction against the idealism, such as it is, in Pound’s brand of sociological jurisprudence. Pound, labelling its claim to be realistic an empty boast, has dubbed it as a “give-it-up philosophy” because of its rejection of a teleology and philosophy of conscious effort. More and more, the recent writings of the learned Pound have emphasized the role of the ideal element in law, the need for a rule of law, the value of taught tradition, and the supremacy of law over arbitrary official conduct. Believing as he does that the legal order may be improved and directed by conscious effort he distinguishes himself from those who see no relationship between reason, will, and law. The relationship between morals, spiritual values, and the law finds strong affirmative expression in the professor’s writings.

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40 Social Control Through Law 115.
41 An Introduction to the Philosophy of Law 96.
42 The Call For a Realist Jurisprudence, 44 Harv. L. Rev. 697, at 699 (1931).
43 Interpretations of Legal History 20.
44 Kreilkamp’s articles, Roscoe Pound and the End of Law, supra note 27, and Dean Pound and the Immutable Natural Law, 18 Ford. L. Rev. 173. (1949), present an excellent study of Pound’s jurisprudence from the scholastic viewpoint.
46 Contemporary Juristic Theory; The Call For a Realist Jurisprudence, supra note 42.
47 Law and Morals (1924); Law and Morals—Jurisprudence and Ethics, 23 N. C. L. Rev. 185 (1945); The Ideal Element in American Judicial Decisions, 44 Harv. L. Rev. 136 (1931); Aronson, Roscoe Pound and the Resurgence of Juristic Idealism, 6 Journal of Social Philosophy 47 (1940).
happily, however, the Poundian conception of these elements and ideas generally are far from accepted Thomistic interpretations. An unawareness that Poundania has a semantics of its own has led some among the uninstructed to conclude hastily and erroneously that the professor is a scholastic at heart. Competent scholastic writers have dispelled the illusion by demonstrating that while Pound employs frequent terminology common or familiar to the scholastic, this does not necessarily identify him with the natural law school, as he does not furnish those terms with their traditional Aristotelian content.

Professor Pound has on many occasions stressed the value of "received ideals" as a vital element in law. But as Dr. Kreilkamp warns, when Pound pleads for a reinstatement of ideals in the legal order he is not referring to permanent ideals, for he holds that no ideals are valid outside of the civilization of the time and place. Pound's ideals are ever-changing expressions of the "sense of mankind for the time being as to what is just and right." The learned jurist tells us that the end of law is justice. But what is justice? Justice, Dr. Pound says, is regarded differently in different theories of law. It has been regarded as an individual virtue, as a moral idea and as a regime of social control. The first two meanings he has consistently rejected. By justice Pound means a regime of social control:

... social control makes it possible to do the most that can be done for the most people. As the saying is, we all want the earth. We all have a multitude of desires and demands which we seek to satisfy. There are very many of us but there is only one earth. The desires of each continually conflict or overlap those of his neighbors. So there is, one might say, a great task of social engineering. There is a task of making the goods of existence, the means of satisfying the demands and desires of men living together in a politically organized society, if they cannot satisfy all claims that men make upon them, at least go round as far as possible. This is what we mean when we say that the end of law is justice. We do not mean justice as an individual virtue. We do not mean justice as an ideal relation among men. We mean a regime. We mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and to do things, go round as far as possible with the least friction and waste.

In another place Pound subscribes to the view that "there is nothing intrinsic in law to tie it irrevocably to any particular conception of justice." Thus is the relativistic cycle completed.

Many years ago the cosmopolitan Dr. Wu provided the key to Poundian thought when he wrote that it is not possible to appreciate

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48 Cf. Elliott, *The Los Angeles Natural Law Institute*, America 84: 305-306, (December 9, 1950), wherein Dean Pound is referred to as "a scholar who has modified his philosophy to the point where he is in substantial accord with the proponents of natural law."
49 See footnotes 44 and 60.
50 Law and Morals 87.
51 Scope and Purpose of Sociological Jurisprudence, supra note 36.
52 Social Control Through Law 64-65.
53 Contemporary Juristic Theory 12.
the real position of Pound without relating him to that general manner of thinking labelled pragmatism. Pragmatism, Pound has written approvingly, “sees validity in actions, not in that they realize the ideal, but to the extent that they are effective for their purpose and in purposes to the extent that they satisfy a maximum of human demands.” The Poundian concept of morals is to be understood in this manner. The words used belie their promise. A theory of law which ignores morals or minimizes the significance of the continual points of contact between law and morals in judicial administration is, according to the dean, an incomplete theory of the law in action. It is not a virtue in law, he has said, that legal precepts are at variance with the requirements of morals.

But just as it is a mistake to divorce the legal from the moral so is it a mistake, according to Pound, to identify them wholly as the natural law jurists sought to do. But absolute moral or ethical norms are, as has been seen, anathema to Pound. The civilization of the time and place is the highest moral standard disconcernible in his writings. His test for truth, his epistemology of jurisprudence, is summed up in these words: "The true juristic theory, the true juristic method, is the one that brings forth good works." As for ethical values, he has long taught that whatever technique secures a maximum of interests with a minimum sacrifice of interests possesses ethical value. Pound’s adamant refusal to recognize the possibility of any absolute standard of value has, more than he appears to realize, led to a de facto separation of law and morals in the practical legal order—or at least led to a strong tendency in that direction. This feature of his theory has led a number of legal writers to point out the incongruity of Pound’s vigorous attacks on the “give-it-up philosophy” of the realists for their abandonment of ideals and values while he, himself, has compromised considerably on the same point.

As the writer of a recent article on Pound wrote rather picturesquely, Pound is guilty of “a dodge from responsibility” and has “himself given up the quest.”

Professor Pound has written much, and not disapprovingly, of the revival of natural law. Unhappily, however, as Dr. Meriam Theresa Rooney has shown, he thinks of natural law “in terms of patterns, concepts, and ideals, after the manner of Plato, rather than according to the

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84 Wu, The Juristic Philosophy of Roscoe Pound, supra note 1.
85 Interpretations of Legal History 11.
86 Law and Morals 63.
87 Id. at 38.
88 Id. at 72.
89 Scope and Purpose of Sociological Jurisprudence, supra note 36, at 598.
91 Walter, supra note 30, at 207.
principles of Aristotelian-Thomistic realism." Despite his extensive and appreciative reading of the sources, Dean Rooney states, he apparently misunderstands the scholastic concept of natural law and thinks largely in terms of Hegelian idealism. Perusal of Pound's works justify the conclusion of Kreilkamp that what emerges is a notion of natural law that is applicable to any practical ideal for a particular legal order. "If you have any ideal at all for your legal system, any notion of a fundamental norm, spirit, or structure in it that you would like to see developed," Kreilkamp says of Pound's notion, "you are a believer in natural law." Pound's scepticism of any natural law theory requiring faith in absolutes has already been noted. Immutability and universality are attributes carefully expurgated from the use of the term by Pound. "For all his talk about the philosophy of law, and a natural law theory of law", Kreilkamp writes caustically, "what Pound is proposing is really more a technique than a philosophy. He is closer to the analytical school than he thinks." Before Professor Pound may be accorded complete fellowship with scholastic natural law jurists it appears that his relativism will have to undergo a purifying baptism.

IV

The general relationship between law and religion and the impact of religious institutions on the law have, on occasions, been the subject matter of lengthy and scholarly presentations by Professor Pound. In the order of ideals the religious ideals are accorded an eminent position. The contributions of religion, as an ideal, to the law have been acknowledged in eloquent passages. Religion, Pound has written, is very likely to be a controlling factor in the new era of legal growth upon which we are entering, just as it was a great factor in the past in shaping the law, for it is through religion that definite content is given provided for ideals of value. "Through religion we shall give a definite content to our ideas of the social, the political, and the legal order", Pound said, "and thus our picture of what we are trying to do through law will acquire some definiteness of outline." Religious ideals and values form a background, a critique, for the formulation of the jural postulates. Religion is the enduring nexus in transitions in the legal order because it is perhaps the ultimate ideal which gives shape to the broader social order. The civilizations of the time and place, in the past at least, have been largely fashioned to the religious ideals of the time and place. It is important

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62 Rooney, supra note 60, at 291.
63 Ibid.
64 Kreilkamp, Dean Pound and the Immutable Natural Law, supra note 44, at 178-179.
65 Id. at 203.
to notice that the concept of religion, in this connection, is purely relative. But Pound does read history as confirming the proposition that there is an intrinsic relationship between religion and the guiding ideals of the social and therefore the legal order and he notes without surprise that the present day Marxist materialistic philosophy which violently attacks religion also preaches most zealously the disappearance of law.  

The powerful and beneficent influence of the medieval Church in the development of the four leading ideas which guided the formation of the modern legal order—the ideas of universality, authority, good faith, and the notion of law behind and above human laws—was traced brilliantly in Pound’s Jubilee Law Lectures at the Catholic University of America.  

In another noteworthy series of lectures under the general title of “Law and Religion” at the Rice Institute, the professor unleashed a powerful attack upon all shades of so-called legal realism. The legal realists argue in common that formulas of what-ought-to-be should be shaped to the facts of social conduct and not social conduct to fanciful formulas of what-ought-to-be. Nowhere, perhaps, is the existence of common ground between Pound and scholastic natural law jurists more marked than in their joint stand against the new school of legal realists. In opposition to the realists and in union with the scholastics, Dr. Pound holds, that the fundamental problem in politics and jurisprudence “is to find and apply a measure of values.” He has great faith that such a standard can be found and applied. The give-it-up philosophers of the law who discard the value element in jurisprudence and denounce it as a mischievous concept long have been the recipients of Pound’s stinging rebukes. In this arena he appears to be defending the cause of the angels, but it is tragic and ironic that in combatting error in others he is oblivious to the fact that he too is afflicted with the same malady. Pound’s standard for value judgment is an unhappy compromise between scholastic realism and the give-it-up realists of the law. 

While Pound’s treatment of the influence of religion as an ideal upon the law is interesting, the nature of religion as an “interest” and its status in relation to other interests is of more immediate concern and practical importance in days such as the present when the issue of the role of religion in social and public affairs and its relation to the legal order is so

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68 The Church in Legal History, supra note 17, at 3-97.
69 Law and Religion, supra note 67, at 151-172.
70 Id. at 157.
frequently before our courts. The question of the weight of religion as an interest is far from merely academic today. One might gather from Pound's encomium on religion that it would command key position in any theory of interests. Such, however, is not the case. In the catalogue of interests, religion is classified both as an individual interest—namely the freedom inherent in a rational creature to believe and to express that belief—and as a social interest. But the emphasis decidedly is on its social aspect. Religion, its role, exercise, and observance, before the law are reduced to a simple status of but one of several competing claims or interests. Its recognition, its observance, its protection, its being secured by law are chiefly based, to quote Pound, on "the social interest in the security of social institutions, domestic, religious, political, and economic." The scheme of interests, groups and classifies religion with other social institutions, with labor unions, and political parties, with pressure blocs and other economic and political organizations; and religion competes with these groups as rival social institutions in courting the favor of the law. So when religious interests are asserted as claims under other titles they compete with other interests within that category for recognition. In the theory of interests religion enjoys no preference as an interest. If in the civilization of the time and place it enjoys high valuation, the law should secure it; if its prestige is low in the civilization of a particular time and place it may be subordinate to some other competing claim which has favor for the moment.

Ihering remarked that there is a definite proportion between the social attitude toward a particular good and the efforts made in the interests of securing that good. The degree of legal protection which society accords a social good is an indication of its social value. Sociological jurisprudence will attach to religious interests such protection and security as the civilization of the time and place demands—and no more. Jurists, according to the teaching of this school, recognize and weigh the social demand for the enforcement of interests. They give legal effect to the evaluations of the social order. The legal order measures interests only

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71 From 1939 to 1947 the Court was besieged with a dozen or more cases involving the basic issue of freedom of religion and conscience, the so-called Jehovah Witness line of cases. See Powers, Religious Liberty and the Police Power of the State (1948). From 1947 the issue in the cases has centered around the non-establishment of religion provision of the Federal Constitution—auxiliary services for parochial school children, released and dismissed time educational programs in the public schools and the recitation of prayers and the reading of selections from the Bible in the public schools. See Powers, Current Decisions on Religious Education and Observances in Public Schools, 39 Cath. Ed. Rev. 217-227 (1951).


73 Social Control Through Law 77.


75 Ihering, Law as a Means to an End 367.
insofar as it must determine which of two competing interests before it in a particular instance is to be preferred. But it is the chief tenet of sociological jurisprudence that the legal order is to give effect to that interest to which that society at that time regards as predominant. It is not the function of the sociological jurist to appraise the matter independently of this standard and in terms of philosophical absolutes. When, in the civilization of a particular time and place, religious values are at a low ebb the fate of religious interests before the law will experience a proportionate decline.

One unfamiliar with the ethos of Poundian jurisprudence would feel that there is serious inconsistency between the professor’s attitude toward religion as an ideal and religion as an interest. That seeming inconsistency is explained away by the simple statement that it is not the task of the law to create interests but to recognize those which are socially predominant. What has to be done to secure religious interests is to establish in the social order an environment which will insist that the law give to these interests the maximum of security. The social will reflecting the postulates of the civilization of the time and place is the only absolute for the legal order. Sociological jurisprudence is ill disposed toward advancing religion for its own sake, nor does the prevailing non-scholastic philosophy of the day any longer accord religion protection against inimical pressures such as atheism. For example, “we have come to think of blasphemy as involving no more than a social interest in the general morals,” wrote Pound, and Sunday laws “only in terms of a social interest in the general health.” Anti-religious activity is justified and protected on the basis of “the social interest in the general progress.” When outmoded ideas of morality come into conflict with newer ideas arising out of changed social conditions, or more modern religious and philosophical views, we must, say the sociological jurists, “reach a balance between the social interest in the general morals and the social interest in general progress.” The law, and the fortunes of religion as an interest, are relative to the jural postulates of the civilization of the time and place!

Religion is a series of relationships between man and God. It is something due to God. It involves belief, worship, and moral conduct. It is a vital necessity. It has a rightful place in the social milieu. If the ends of the law are to be appraised in terms of the ends of human life as a whole, as scholastics insist, religion must always be its center of reference. According to St. Thomas Aquinas, the law denotes a kind of plan directing acts toward an end and assisting materially in bringing

\(^{76}\) A Survey of Social Interests, supra note 22, at 23.

\(^{77}\) Id. at 26.
about conditions conducive to the common good. As tests of its fulfillment of its social purpose, St. Thomas lays down three requisites: it must foster religion, it must be helpful to man, it must further the commonweal.\textsuperscript{78} Nothing could be further from the Poundian faith or the tenets of the sociological school of jurisprudence than this first condition laid down by St. Thomas that law foster religion for in the theory of interests the law neither creates nor fosters, it merely gives legal effect to those which the social will desires to be secured. Religion, viewed in this light, is stripped of its transcendental character and completely secularized.

The exercise of religion as a civil right or freedom of conscience has not been treated by Pound to any significant degree except in terms of the historical development of the bills of rights. There are those, however, who believe that civil liberties rest upon a most precarious basis in his system.\textsuperscript{79} One Supreme Court justice, commonly regarded as a leader of the sociological school, has indicated beyond all doubt in his decisions and opinions relative to religion as a civil liberty, that rights of conscience rest exclusively on the inconstant basis of the prevailing social attitude on the issue.\textsuperscript{80} Fortunately, the majority of the Court has rejected the thesis that religious liberties and rights of conscience rest upon the determination of popular majorities.\textsuperscript{81} But implicit in the theory of interests as expounded by Pound, is a veiled philosophy of force, in that the social will, and not the nature and destiny of the human person, determines the existence and extension of rights and liberties. Constitutional limitations would, of course, act as restraining influences; but, one might question the efficacy of even constitutional limitations on the infringement of personal freedoms unless they are accompanied by an abiding jurisprudential faith in the existence of inalienable natural moral rights in the individual.

Such, in brief, are the major dogmas and chief characteristics of the celebrated Poundian jurisprudence of interests, particularly as they relate to philosophical and ethical norms and religious interests. Further implications of the application of the theory of interests to controversies involving the place of religious values in our public institutions, issues now currently urgent in our courts, will be left to the ingenuity of the reader.

\textsuperscript{78}St. Thomas Aquinas, \textit{Summa Theologica} I-II, q. 95, art. 3.
\textsuperscript{81}Mr. Justice Jackson for the Court in \textit{West Virginia State Board of Education v. Barnette}, 319 U.S. 624 (1943).