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# THE GOLDEN AGE OF POUND *

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## I

The functional approach to law, and the question "What are you good for?" have now been the jurisprudential order of the day for more than half a century, so that younger lawyers who first acquired a curiosity about jurisprudence at mid-century, might well have the impression that they represent an old-fashioned orthodoxy rather dampening for the romance and adventure of jurisprudential speculation. The programme of the sociological school of jurisprudence, as one of them seems to say, is all very well, and it is so little worth arguing about that even a Kelsen "need not take exception to a single point".[1] Pound's recent treatise on *Jurisprudence*, it is said, is too practical, it too persistently asks of everything "What are you good for?", and altogether it is too 'functional".

Any lawyer of longer memory will want to open in a different way. He will want to say that few branches of Anglo-American law, whether as enacted by legislators or applied by courts, fail to manifest daily the ubiquitous and generally beneficient effect of half a century of persistent asking of the question, "What are you good for?" either by Pound himself, or by those who have joined in this enterprise of importunity. He will want to say that the fact that we are at this point in 1961 is largely a consequence, on the juristic side, of nearly three-quarters of a century of the resolution, courage, and of the rare combination of knowledgeableness about legal practicalities, historical processes

* A review article of *Jurisprudence*, by Roscoe Pound, St. Paul, Minnesota, West Publishing Co., 1959; 5 vols. A shorter book review by the present writer of the same work is appearing in the *Harvard Law Review* for April, 1962. A number of passages appear in both journals by mutual arrangement.

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[1] H. Morris, "Dean Pound's Jurisprudence" (1960) 13 *Stanford L. Rev.* 185-210, at 197.

[2] H. Morris, article cited, at 186.

and philosophical theorisings (not to mention the sheer hard work), of this single man, Roscoe Pound.

He is likely to be tempted therefore to reflect on the taste of our mid-century jurisprudential gallant, from whom these solid virtues and achievements receive but a bored and perfunctory notice beside the fresh charms, gadgets and sophisticated accessories of his own generation of jurisprudential flappers. For our gallant, little is worth a glance, let alone a love-suit, or the joust of a champion, that is not bedecked and beautified in a mid-century manner. The "foundations" of discourse must have the lines which reveal "social structure", "power process", "decision making", and the like; the face of it must highlight such cultivated features as "shared values", "shared powers", and "shared knowledge", and hands and fingers must be designed to harmonise with the psychic mood which such symbols express or provoke.

*De gustibus semper desperandum.* Not only the oncoming generation but even our own fading generation, are entitled to be stirred by contemporary versions of jurisprudential pulchritude, and its techniques of appeal. What we are surely not entitled to do is to force our own mid-century tastes on the erudite and venerable Roscoe Pound, who has shown for seventy years a more wide-ranging appreciation, and a deeper understanding of the relation between styles and fashions and the underlying virtues. Much less are we entitled to ask him at ninety-two to emulate the wandering and often ephemeral fancies which come naturally in the world of the mid-twentieth century; after all, he has lived through much that went before.

For these reasons we should surely not look to Pound's *Summa* for light on such new-found fancies as Scandinavian realism, or on linguistic analysis, or for that matter on the revelation according to McDougal's Yale. And if (as I, indeed, do) we find Pound's treatment of such matters in these five volumes either absent, peremptory, or sometimes even incomprehensible, we should neither be surprised, nor let all this obscure Pound's first magisterial achievement, of which this work is a massive symbol. This achievement was precisely to re-focus the juristic interests of the last quarter of the nineteenth century in Anglo-American countries on the question, "What are you good for?" These volumes are, therefore, in the first place, an authentic consolidation by the master himself of the reinterpretations of law and legal ideas which have occupied his lifetime, and by which he convinced hardheaded lawyers, judges and law teachers, to quite a remarkable extent, that the question "What are you good for?" must never cease to be asked.

## II

There is another reason why no reviewer, whatever his age and whoever his teacher, can adequately approach these volumes with the preoccupations of our generation. By this we do not mean that it is improper to ask how far Pound's work on problems of the last hundred years or so illuminate the scholarly preoccupations of the present decade. Obviously, this is not only proper, but may be a duty implicit in scholarly respect. Yet to take such immediate preoccupations as the *focal* criterion for assessing Pound's work would surely be wrong. At the worst, it would resemble the activities of the less noxious species of mosquito, drawing enough blood to swell itself, but not enough to affect the victim; at the best, it would be like the uncomprehending stare of a *parvenu* for the events and ideas which set the stage for the *monde* in which

he aspires to live. And in either case it would amount to a blinkered view of the momentary products of legal culture with the meaning of the culture and the place of these products in it, all shut out.

We are saying, more affirmatively, that the focal significance of these five volumes must surely be as documenting the growth of a mind which pioneered, or at any rate rationalised and traditionalised into the Anglo-American world, a century of activism about law which may yet prove to be as momentous as that which was heralded by the work of Bentham. The juristic counterpart of this activism could perhaps be said to date from the years when Rudolf von Ihering underwent his conversion from a Saul into a Paul, from a *Begriffsjurist* to an apostle of the dynamics of human purpose, and when Holmes' aphorisms helped this activism to grow roots of respectability for American lawyers and judges. It is to make nonsense of history to pretend that this pioneering did not have to be done; and to assert now with condescension that even neo-positivists like Kelsen have always regarded inquiries concerning the relation of law and society as important.[3] For even if that be part of the truth, another part of the truth, without which it becomes rather a lie, is that Kelsen was still asserting, nearly half a century after Ihering, that such inquiries, whatever their importance, are not a proper concern of "the science of law", as he thought fit to appropriate that term. No one surely should suggest, as some critics are almost doing, that the narrow confines of late nineteenth-early twentieth-century juristic concern were a kind of strawman of Pound's own invention. Would they also say that when, from 1860 onwards, von Ihering revolted against the *Begriffsjurisprudenz* of himself and his fellow-Pandectists, he too was inventing strawmen on whom to rain his blows?[4]

One focus of appreciation of Pound's work must be, therefore, his success in winning the attention of those in charge of the legal order and process to the centrality of the insistent question "What are you good for?" Another focus must surely also be its significance in breaking through the insularities of legal and juristic thought, not only of American and English, but also of continental lawyers. The bridges that have by now been built, and the quite remarkable mobility of both men and ideas at the present time, are no doubt the product of many factors, including the social and political traumas of two world wars, and the general undermining of the sense of security in social, political and international relations. But Pound had already, even before the First World War, gone far to state the basic requirements for the broadening and reorientation of juristic thought which we now take for granted. No doubt the ungenerous critic of the 1960's can advert upon the fact that Pound foreshadowed the appearance of the present comprehensive work on jurisprudence in 1911; but there is room for even the least generous critic to recognise the pioneering achievement in setting clear lines of juristic work at that time which were to become, a half-century and two world wars later, a commonplace of our own juristic epoch.

Far more was involved in such an achievement than seeking out some renowned

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[3] *Ibid.*

[4] It is moreover a further liberty with history to assume that it proves a point about Austinians or Kelsenites, to make a new exegesis on some passage from Austin or Kelsen, especially when the passage is carefully selected. Austin, for example, as we ourselves have always recognised (see e.g., J. Stone, *The Province and Function of Law* 1946, repr. 1950), 9, 32, 196 (hereinafter cited as "Stone, *Province* (1946)"), was deeply interested in the theory of justice as well as in analytical jurisprudence. Yet it may still be true that analytical jurists who followed Austin were generally not so interested.

teacher of known *Weltanschauung* at whose feet to sit, so as to learn how to see and state and seek answers to the problems of the contemporary world. There was in the 1890's and 1900's no teacher anywhere in the world from whom Pound could learn what he set out to learn, and in due course to teach. There were many raw facts of legal history, and there were the interpretations of legal history of the Liebermanns, the Savignys, the Maitlands and the Maines, not to mention — on another level — the Cokes and the Blackstones, and there were, of course, the general philosophies of history. There were the works of Bentham and Austin on the utilitarian theory of legislation. There were endless lines of philosophical theories and their juristically relevant offshoots, from Greek natural law onwards. There was also, of course, the vastly proliferating body of principles emerging from the *corpora iuris* of developed systems, especially the Roman law and the common law, which were to a degree interlocked both with the course of legal history, and with the rich variety of philosophical theorisings of the lawyers and the legal theorisings of the philosophers. These were some of the heterogenous bodies of ideas, for the most part unco-ordinated, and lacking often even any contact with each other, out of which Pound built the orderly body of ideas which are here presented as a whole. It was an orderliness loose enough to leave room for most of what was significant in the whole body of knowledge, and yet tight enough for answering the question "What are you good for?" for most parts of Western legal systems as they then stood. Above all it was also an orderliness sufficiently tight to ensure that the left hand of jurisprudence had no excuse for ignoring what the right hand was doing.

Only failure to understand this phase of jurisprudential history could, we believe, give renewed currency to the criticism of Pound, first made (I believe) by Holmes, that Pound has "overticketed and pigeonholed",[5] because (said Holmes, *inter alia*) most judges neither know nor care "a sixpence for any school". When another generation now uses Holmes' words as a stick to chastise the age of Pound, we have again a half-truth which is also half-false. It cannot, of course, be denied that Pound has tended to "over-ticket" and "pigeonhole", he does so still in these five volumes. But if the criticism were fatal to his contribution it would not need to be prefixed with the word "over". The fact is that Pound's tendency from the start to "ticket" and to "pigeon-hole" is but the outward sign, and even the banner, of his massive victory over parochial insularity of both continental and common law thought.

It is easy to forget how deep this insularity was at the turn of the century, and how vastly, therefore, Pound's victory transformed the outlook for jurisprudential thought throughout the world.[6] John Austin's analytical work which had dominated the English scene for more than half a century before Kelsen began to write, did not come to the attention of Kelsenites till the 'twenties, and Kelsen himself devoted no serious attention to it before 1942. The first modern French analytical theorist, Ernst Roguin, discovered Austin in his *La Science Juridique Pure* in 1923, thirty-four years after his basic work *La Régle de Droit.* A substantial part of the preface to the 1923 book is devoted to a generous acknowledgment that Austin had anticipated many of the essential notions. The Kelsenites in their turn, approaching the zenith of their influence in the '20's and '30's, gave no serious attention to Roguin's work.

In the late 1920's, while this reviewer was at Oxford, it was related that

[5] 2 *Holmes-Pollock Letters* (1941) 115.
[6] *Cf.* K. N. Llewellyn, Book Review (1960) 28 *Univ. of Chic. L. Rev.* 174, 175 (hereinafter cited as "Llewellyn, Book Review").

one of the early Rhodes Scholars from the United States asked a distinguished (and now lamented) English jurist, fellow of a neighbouring college, why Roscoe Pound, so great a figure in American jurisprudence, was never referred to by Oxford law dons. He was given the short answer that Pound's work was "far too allusive". This story was always related at Oxford at the time as a quip against Pound, rather than as a quip against Oxford. The Rhodes Scholar concerned, and this reviewer, were among the rare exceptions who saw it the other way. There were, of course, even then, and even at Oxford, jurisprudential areas where bridges were being built. Such were the "historical jurisprudence" of Savigny and Maine; the classical natural law; the very fertile sub-area of history cultivated by Maitland from the garden of von Gierke; and, indeed, some daring forays into the sociological area limited however to specified works like Cardozo's *Nature of the Judicial Process*, and Holmes' *The Common Law*. Yet by and large jurisprudential awareness in common law countries of the range of inquiries proceeding on the continent, and *vice versa*, was a product of the Golden Age of Pound.

The problem of getting guests who are strangers to each other into communication is difficult enough even when the guests have names which are familiar to each other. It is nearly hopeless if they are to be left in mutual anonymity. Was not this the setting, as it were, for this part of Pound's pioneering? He accepted the mission of ending the mutual strangeness of isolated legal cultures. Could this mission have been fulfilled without giving names to the unfamiliar, and at least sufficient context to the names to allow strangers to know whether they could communicate, and about what? However qualified the answer, can it be sensible for us now, half a century after Pound's successful attack on this isolationism, to attack him for "ticketing" and "labelling", as if this were a personal idiosyncrasy, or merely a gratuitous importation into jurisprudence of the habits of botanists?

It is permissible, of course, to say of a work published in 1959 that the labelling has lost much of its functional value, or even that its use in characterising contemporary work is unrevealing or misleading. But this, after all, should be a rider to a historically correct comment, not a substitute for it. A just critic, in short, should make clear that the fault he chastises is the residue of another of Roscoe Pound's great achievements in pioneering. This man it was, more than any other man, and the work here consolidated more than any other work, that are to be largely credited with the degree of mutual recognition and communication which has been reached between the English, American and civilian legal cultures.

## III

No reviewer, certainly not one whose debt to Pound is as great as the present reviewer's, need blush to defend him against historical travesties. Yet these opening remarks are intended neither as apologetics for Pound, nor as a claim for special immunity from contemporary criticism for this monumental work. The intention is rather to perform the elementary duty of any reviewer. The prospective reader must at least be told, first, what the author aimed to do when he wrote what the book contains; and second, what was the historical context within the particular field of knowledge which gives to the effort such sense and importance as it may have. This duty is especially heavy with a work of which the bulk was first published at an earlier point of time, as sometimes

here more than a half-century ago. For, obviously, the cogency of criticisms must vary according to the state of knowledge itself, and of men's concerns, here and now, as contrasted with a half-century ago. After this duty is fulfilled there then, indeed, arises that of assessing the work for our own times, and to this we shall in due course turn.

Before that, however, we must try to indicate the range and reach of matters here dealt with. These five learned volumes aggregate, if we exclude all fore-matter and indexes, no less than two thousand, nine hundred and fifty pages. Admittedly the printing is luxurious far beyond what publishers usually think that their authors deserve. But even then, almost every page is rich in ideas and information which Pound delights to marshal from all ages and societies, in a style which has always had some deceptive qualities. In fact only a reviewer who had combined practical with academic legal experience over something like the Author's span of time, working at something like the Author's steady pace, could be confident of grasping evenly the multifarious streams in the spacious delta of this communication. And only such an even grasp could provide a fully sound and fair basis for overall criticism. In fact, Pound's jurisprudential style, by its sonorous flow, its command of the technical vocabulary of many legal systems, not to speak of that of nineteenth century philosophy, and early twentieth century social science, conveys admirably the spirit, mood, and broad movement of ideas, and the overtones of enthusiasm, concern and scepticism. But almost by the same token the style rather conceals than exposes to analysis *the precise grounds* for these attitudes.[7]

An effort must nevertheless be made to indicate at any rate the scope of these volumes, if only for the sake of those who have not been taught by Roscoe Pound, and have read only sporadically among his formidable list of learned articles and monographs. We proceed, therefore, to offer some impressions of the plan adopted in this consolidation, and of the contents of its various parts. When this has been done we shall try to assess the value of this *corpus jurisprudentiae* for the social and legal perplexities of the second half of the twentieth century.

## IV

The two parts of Volume I are devoted repectively to the scope, history and schools of jurisprudence, and to the ends (or better, the purposes) of law as developed in legal precepts and juristic thought. And there is more in this way of beginning than merely telling the reader what Pound understands by the title "*Jurisprudence*" which he adopts for his work. In this volume, even more than the others, the pigeon-holing and the labelling come thick and fast; and the function of this activity is also clear. It is that of performing the introductions which were necessary when most of these sections were first written; which means of breaking down the isolationisms of Anglo-American and continental jurists. In this book, as in the published *Outlines of Lectures on Jurisprudence* and as in his oral lectures at Harvard, Pound is concerned to establish the unity and continuity of the Greaco-Roman jurisprudential-philosophising tradition. Apart from some references under "Sources, Forms and Modes of Growth of Law",[8] the author has not sought to embrace in this work the actual

[7] This is perhaps the truth as between Llewellyn's praise of Pound's language (Book Review cited, at 174) and John H. Crabb's bitter complaints about alleged "obscurantism", *infra* p. 24.

[8] Vol. iii, pp. 379-671.

or potential contributions of other traditions of thought, for example of ancient Confucianism or Buddhism. Even the Jewish and Christian traditions, indeed, enter only through their influence on Western juristic thought.

The broad channels of thought thus mapped flow obviously from Aristotle and Plato and other Greek speculators on ethics, politics and natural law, through the Roman principles of the *ius gentium* and *ius naturale* and the rich crop of ideas raised by Roman legal craftsmanship on the fertile grounds of Greek philosophy. They then move on to the "reception" recultivation and adaptation of these ideas in Europe after the twelfth centry. These middle reaches of the juristic streams are seen by Pound as double-systemed, though with networks of interconnecting tributaries between them. There was the secular system of study and practice, stimulated by the enterprise of mediaeval universities, and much fortified by the recognition by administrators of the Holy Roman Empire, and of the greater Princes who gave it an uneasy fealty, that the maturest form of Roman juristic tradition provided a model of hierarchical legitimacy. The streams of work in this system are those of successive generations of Glossators, Commentators, and the Humanists, leading in to the work of nineteenth century German Pandectists, who systematised the Roman law as it had become adapted into the legal orders of West European peoples, and finally into the great modern civil law codes.

There was also, however, the system of streams of thought associated with the religious establishments of the Roman church and the great dissenting movements from it. St. Thomas claimed and many still believe that his natural law can stand without theological underpinning. And the close affinity of his natural law positions to those of the pre-Christian Greek philosophers make the claim plausible to this day. Yet as a socially operative force, Thomism was (and probably still is) the jurisprudence of the Catholic Church. It was under the shadow of the *Summa Theologica* that the Protestant and Spanish jurist theologians strove to interpret the expanding world of the sixteenth and seventeenth centuries and to win the intellectual and spiritual allegiance of the newly emergent forces of modern Europe. It may be true that it was not the Devil but St. Thomas Aquinas who was the first Whig; but it is also true that Thomism served to give to the comparatively turbulent and immature Europe of these centuries an anchorage in the mature jurisprudential thought of Ancient Greece and Rome.

Clearly, however, Pound regards the more proximate working ideas for the modern common law as a product of the lines of thought which began with the Grotian secularisation and popularisation of natural law in the first quarter of the seventeenth century, and with Coke's *Institutes* of the same general period. These he sees as elaborating themselves, mostly by reaction, into the nineteenth century schools of analysts, historicists, utilitarians, revived natural lawyers, and the jurisprudential versions of Kantian and Hegelian and early sociological doctrines. Equally clearly, half a century of tumultuous change of the twentieth century world, and the movement into the ken of jurisprudence of dozens of new States from Asia and Africa, with a juristic history and equipment quite alien to Graeco-Roman traditions, have not shaken Pound's view that sociological jurisprudence presents both a vision and a practical programme for twentieth century man. These receive a loving exposition of 70 pages; all thought prior to the nineteenth century receives only 18; all the nineteenth century schools less than 50, and all the twentieth century schools together other than the sociological, only 150.

We shall have occasion later to question some of the assumptions with which this work tries to confront the world of the 1960's; as well as to the question whether Pound has sufficiently attended to the present positions of his sociological jurisprudence in the face, not only of this world, but also of the criticisms which his theories have received. But certainly, the rounded account of sociological jurisprudence by this Pioneer, Master and Servant of it, must stand as a definitive statement of its aims hitherto. Whether it will also be a measure of the success of this approach in the future will depend on many other factors, beyond but including its own cogency.

These introductions made, Volume I proceeds according to a design which has always seemed to the present writer cumbrous and ill-adapted to either the pedagogical or the practising function. Part 2 of the Volume (from p.361 to the end) surveys "The End of Law", first as developed in legal precepts and doctrine, then as developed in juristic thought. Why the term "Theories of Justice" should be appropriated to the former rather than the latter has never been clear to this reviewer. One may also question the helpfulness of parallel and inadequately correlated surveys in terms respectively of legal precepts and juristic thought.

## V

Part 3 (embracing the whole of the second Volume) is wholly devoted to "The Nature of Law" under a series of chapters entitled "Theories of Law", "The Nature of Law", "Law and Morals — Jurisprudence and Ethics", "Law and the State — Jurisprudence and Politics", and "Justice According to Law". Here again, despite the vast historical coverage, the communication of ideas falters due to treatment in separate parallels of matters really not separable at all. English analytical theory, for example, figures as a section in each of these separate Chapters. Yet how can this theory be adequately stated as one of the "Theories of Law", without necessarily also stating what it holds to be "The Nature of Law", as well as its positions on the relations of "Law and Morals", and on sovereignty? Despite the resulting repetitions, however, few readers will fail to be interested in the many problems discussed, or to gain from it an invaluable historical perspective on many matters which continue today as centres of warm controversy.

## VI

The first half of the third volume (pp. 3-376) is given over to "The Scope or Subject-Matter of Law", which is to be understood in the specific sense of Pound's sociological jursiprudence. For, in fact, it is wholly devoted to the problems of surveying and inventorying, and valuing and securing the "interests" (which for Pound means *de facto* claims, or demands or desires) which press for recognition and protection by law in modern society. Anyone familiar with Pound's thought will recognise here the assembly of some of Pound's most seminal articles, the latest being his "Survey of Social Interests" in volume 57 of the *Harvard Law Review* in 1943.

This, too, is the aspect of Pound's work which has most concerned and influenced the present reviewer, ever since he first taught the graduate seminar at Harvard in the 'thirties. Close study led him indeed, at that time, to be rather critical on a number of points which he canvassed in an article of 1935.[9] Today,

[9] J. Stone, "A Critique of Pound's Theory of Interests" (1935) 20 *Iowa L. Rev.* 53.

however, a number of aspects of Pound's theory of interests which we still accepted as recently as 1946,[10] require careful re-examination. In the later sections of this article we shall review the answers which Pound offers to past critiques, and also some new difficulties arising from recent movements in human societies. This re-examination is suggested in continuing admiration and affection, but in the earnest hope that it may lead to a reformation, either by Pound himself or by others, more adequate for the coming decades. If there were no answer to these difficulties, which seem to this reviewer to obstruct the use of this theory for legislative policy-making, serious limits would be indicated to the guidance derivable from this approach even in the older Western democratic countries. All the more there would be brought into doubt its relevance to the problems of newer States, engaged in massive national planning, and to some of the most intractable policy issues of the present half-century.

Even then, however, great value would still remain for the student and the jurist in Pound's translation back into terms of human demands, of the decisions of judges and legislators which make up the technicalities of case-law and statutes. No doubt the adequacy of the re-translation can sometimes be questioned; and no doubt the range of cases and statutes here selected is not always contemporary. Yet the broad sweep of the re-translation remains in general both accurate and enlightening. For practitioners, judges and legislators, these chapters provide a vantage ground from which to see both the high and the low points of their social performance or that of their predecessors. It allows them to pinpoint the decisive juristic battles of the past and to interpret the consequences of the battles. And even if, as this reviewer fears, they will find no reliable maps and strategies for the battles of the future, nor even a treatment always fully up to date,[11] they will certainly find (as will law students who must later join their ranks) inspiration and mood and awareness of great enterprises which will help them to confront their own life's work. Not least, they are likely to acquire a range of historical insights, and a capacity for penetrating legal technicalities to the substance of policy. The Yale approach to these same problems has, no doubt, a more modern streamlined appearance; but that of Pound still has solid pedagogical advantages. Here, the translation of judicial decisions back into the values they express never moves too far from the cases. The re-translation does not itself become an independent technicality with its own jargon; and it proceeds from legal experience back into speculation, rather than from one level of speculation to another.

## VII

The second half of Volume III on the "Sources, Forms and Mode of Growth of Law" displays again Pound's constant drive towards the larger vision, seeking to reconcile on a different level the conflicting legal ideologies of the nineteenth and early twentieth centuries. And here, too, he keeps on asking interminably "What are you good for?", this time addressing his question to the giants equally of the historical, analytical and utilitarian lines — the Savignys, the Austins, the Benthams, the Livingstones, and the rest. And he is

[10] Stone, *Province* (1946) c. 15.

[11] K. N. Llewellyn's Book Review properly draws attention to many of these omissions. As he points out they can sometimes not be explained as matters of oversight. See e.g., on 179-180 the background of the omission of any reference to K. N. Llewellyn, "What Price Contract?" (1931) 40 *Yale L.J.* 714; and as to John Dewey *id.* 180-81.

concerned to show that while the *primum mobile* in any society is the pressure of human claims, the transmission of this force into legal energy and its products is never a single system. At some points, as with priestly interpretation, fictions and popular custom, and judicial precedent, the transmission is diffuse, unself-conscious, slow-moving and comparatively wasteful. At others, as with legislative and administrative action, it is direct, self-conscious, swift-moving, and comparatively efficient. Theories focused on tradition or custom as a basis of law, as well as those focused on centres of legislative power and decision-making, all have their place, and are marshalled by Pound to illustrate not only the variations of legal historical experience, but also the problems of legal stability and change within a modern society, and the great nineteenth century struggle for codification of law.

The account of codification[12] spreads out from the adoption of the master codes of Europe, the Austrian, French, German and Swiss Civil Codes, but it extends to the diffusion and adaptation of these codes among other peoples of the world, including peoples of Asia whose social, political and cultural inheritance are so vastly different. Here again we must observe that the richness and cogency of Pound's exposition rather stops short at the boundaries of the Greco-Roman, and Judaeo-Christian worlds. The "traditional element" in the growth of law is one thing when a code is being constructed for a nation on the basis of its own legal culture. It may be quite another when, as with the western-type codes in China and Japan, the legal culture from which the code sprang is that of an alien nation, having little or nothing in common with the nation adopting the code. Here again, Pound's exposition is challenged, at least in its emphasis, by the facts of a world in which something over half the State societies and far more than half of the world's population, are in a process of being "planned" from above. They are being "planned", often into abandoning their existing demands, and into making new demands, and learning how to create the means of satisfying them. An exposition which revolves merely around an assertion of the importance of both the traditional and imperative elements in legal growth, sidesteps many of the most important questions. How far can a nation, whether benevolently or ruthlessly, as in the early decades of the Soviet Union, be "planned", as in India, out of its traditional legal culture? Can Pound's approach through *de facto* human claims leave him any freer than were the philosophical radicals, to mould people into demanding what the legislator thinks they ought to have, and is in a position to give them? There is no way of answering these questions which does not either undermine Pound's main propositions, or leave them relevant only within the confines of stable Western societies.

"The Application and Enforcement of Law", and "Analysis of General Legal Conceptions", which together make up Volume IV of Pound's *Jurisprudence*, are rather disparate in both scope and tendency. All that is here included under the title "Application and Enforcement of Law" is a single Chapter 20 on "The Judicial Process in Action", which is surely not an adequate fulfilment of the main title. This single chapter itself is concerned with the ethical, psychological and sociological substance of the judicial process, the fact that it is often not a mechanical process, the need for individualisation and the various modes and machinery of individualisation. It is one of the least satisfactory in the five volumes,[13] maintaining a level of generality short of much detailed

[12] Vol. iii, pp. 675-738.

[13] But it loses some of its inadequacy when read along with Chapter 13 on "Justice

mid-century work such as Llewellyn's *Common Law Tradition* (1960), or the present writer's *Province and Function of Law* (1946) Chapter 7, and its later elaborations,[14] and for that matter much other literature after 1930.

## VIII

On the other hand, the 500 pages devoted to "Analysis of General Juristic Conceptions", and the whole of the last volume entitled "The System of Law" well satisfy most of the expectations which they raise.[15] They cover the traditional area of analytical jurisprudence, apart from certain introductory questions such as the nature of law to which (as has been seen) the second volume was devoted. Pound's main assumptions in Volumes III, IV and V, as the reviewer sees them, are these. The *de facto* human claims (which he examines in the first half of Volume III) are *the subject-matter* calling for legal adjustment. The "Sources, Forms and Modes of Growth of Law" (examined in the second half of Volume III) comprise the social techniques whereby the adjustments are brought about and stabilised. While the "General Juristic Conceptions" of "the System of Law" (with which the whole of Volume IV and the whole of Volume V are concerned) are artifacts of lawyers, in terms of which the particular adjustments of claims pressing for the time being are expressed and fitted into the legal order. They are, as it were, the conceptualisations and symbolisations of the advantages and burdens attributed by law for the support of *de facto* claims. The *précisation* of these artifacts of lawyers, these legally created and conferred burdens and advantages, is as central in the vision of the analytical jurist, as the identification and inventory of the *de facto* claims are central in that of the sociological jurist.

Of course, insofar as the sociological thinker is also concerned to assess the overall performance of the legal order in satisfying claims, and to explain its successes and failures, he has a deep interest of his own in "the general juristic conceptions". This interest, however, is not for their own sake. Pound has, indeed, been criticised precisely because he refuses to follow analysis beyond the point of perceived practical usefulness.[16] The reviewer thinks that censure somewhat harsh, if Pound's position on this is seen as part of his general approach to the problems of a legal order. As a censure of Pound's specific attitude to the extension of knowledge in the analytical field, it may perhaps have more substance. In the tradition of science the question "What are you good for?" may be a question not properly addressed to *any* knowledge which is held as true. Yet we should be reminded that even Austin and Bentham took a good deal of trouble to explain why their analytical work was "useful" or even essential to the progress of the law.

## IX

What the present reviewer had most awaited in these volumes was the restatement of Pound's theory of interests, and its built-in theory of justice. Not only has this been for nearly thirty years a main concern of the reviewer. In

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According to Law", in vol. ii, pp. 347-466.

[14] See e.g., J. Stone, "The Ratio of the *Ratio Decidendi*" (1959) 22 *Mod. L. Rev.* 597-620. *Cf.* Llewellyn, Book Review 178-179, 181.

[15] *Cf.* Llewellyn's praise for these parts (Book Review, 180), contrasting however H. Morris' strictures, article cited *supra* n. 1, at 207-208.

[16] See H. Morris, article cited *supra* n. 1, esp. at 197-98, charging Pound with "reading Kocourek out of jurisprudence".

addition the world has, during these years, undergone great changes which bear on this theory. Compared to thirty years ago, and even more to fifty years ago, when Pound first framed his theory of interests, we live in a world of legal orders that are turbulently restive even among the stabler and maturer peoples. For the younger peoples, who now make up a substantial part of the world, the legal orders under which they will come to live lie still gestating in the womb of time, if indeed they are yet conceived. In any case the inheritance which these legal orders will bear is still as speculative as the degree of guidance which they will tolerate as they move into independent life.

This changefulness raises a number of awkward questions for any theory of justice centred on the degree of satisfaction of articulated claims. Can the subject-matter of law be adequately stated even for the older democracies in terms of articulated claims, when articulation becomes as controlled, distorted, amplified, stultified, stimulated, or even created and simulated, as it is becoming under the operations of modern instruments of mass communication, high pressure advertising, persuasion and indoctrination? Can legislative policy rely for guidance simply on *de facto* human claims, actually pressing in the newer democratic countries such as India, when the objectives of national planning must apparently, according to all informed opinions, be geared to stimulating people to make demands not yet made, or to changing the demands made to accord better with national objectives? In both kinds of society, can the notion of justice centred on the maximum satisfaction of *de facto* human demands be moulded, without losing its sense, to a shape tolerant of the deliberate manipulation, stimulation and diversion of demands through the means of social control (including law)?

These questions challenge the assumption that Pound's theory of interests as a measure of justice can survive the contexts from which it sprang. These contexts were the abuses and failures of legal ordering in the America of the last quarter of the nineteenth century and the first decade of the twentieth. It was these contexts which provoked the theory, and many of the major practical adjustments of the three decades which preceded World War II were, at least in part, among its achievements. Such questions must be faced sooner or later by that wide range of lawyers throughout the world who, for decades, have regarded Pound's theory of interests as a beacon of light, open mindedness, and sanity in a jurisprudential world swinging between complacent inertia, and passionate iconoclasm.

Even in the contexts from which it sprang, however, the theory of interests was subject to a number of questions, which have not thus far received a satisfactory answer.[17] The appearance of this definitive work of Pound provides perhaps an appropriate occasion to draw together both the old and the new questions, and see what answers (if any) are available.[18] We may summarise the questions briefly as follows, before considering each at somewhat greater length.

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[17] Raised, for example, by the present reviewer in the article cited *supra* n. 9.

[18] Llewellyn (Book Review, 175, n. 6) expresses the view that the present writer's *Province* (1946) "was responsible for much of the up-dating of the Pound footnotes". E. W. Patterson (article cited *infra* n. 24, at 1129, 113) thinks that the two new and "startling" postulates first proposed in these volumes (Vol. i, 528) concerning the incidence of risks of social life, and minimal standards and satisfactions, are by way of response to Stone, *Province* (1946) 356-68 (perhaps we should add 769-777). If either comment were warranted we should regret the more that cardinal matters touching the viability of this central doctrine of the theory of interests, as a basis for the judgment of justice, did not receive attention commensurate with their importance.

A. *Periods of Transitional Civilisation.* What, if anything, can the theory of interests say about societies ideologically divided into evenly balanced opposing groups, with sets of demands correspondingly in conflict over a wide front?

B. *Complex Civilisation - Areas.* In a number of democratic societies, and within one same area of legislative competence, different groups may be found under conditions which, for geographical or historical reasons, make adjustments which are tolerable to one group, intolerable to another or others. This kind of incongruence between "civilisation area" and area of legislative competence may be, as it were, chronic or "normal" as in a number of federal societies. It may, however, also be very acute, or "pathological" as with the Bantus and Whites in South Africa, or Negroes and Whites in the southern states of the United States. It may be rather ambiguous between these two as with the numerous caste and tribal groups, and the major division between North and South, in India.

C. *Quantification of Demands.* At the point of evaluation for conflict adjustment, Pound's theory constantly resorts to apparently quantitative notions. We must "satisfy *as much of the total amount* of demands as we can", or so adjust conflicts of interests as will "*least* disturb the scheme of interests *as a whole*". What means, if any, of *measuring* demands are available?

D. *Ambiguities in the Notion of "Social Interests".* Are the terms "social interests" and "individual interests" to be regarded as merely two ways of looking at *de facto* human interests? If so, it is understandable that these terms must be mutually translatable, as Pound again and again has insisted they are. Or are "*social* interests" to be understood as some kind of intellectual device for measuring the relative weight or value of conflicting "*individual* interests"? If so, as Pound's language very occasionally also suggests, then social interests cannot refer to *de facto* human claims; and in that case what can they refer to? They then certainly cannot be mutually translatable with individual interests. But if they are not this, what are they?

E. *Problems of Genuineness and Adequacy of Articulation of Interests.*

F. *Applicability of the Theory of Interests in Developing Societies.*

G. *Confusions of the Theory of Interests in the International Legal Order.*

## X

This writer pointed out, in 1935,[19] that the workability of the theory of interests presupposed a minimal degree of homogeneity in the *de facto* claims within the particular civilisation area over a span of time. Without this the framing of *one* set of jural postulates, or *one* scheme of interests, by reference to which interests conflicting in a concrete case should be adjusted, would be impossible. For in transitional and revolutionary phases of social development there is such an undermining of old demands, and such an incoherence and inchoateness of new ones, as can be expressed only in mutually incompatible sets of postulates or schemes of interests. Twenty-five years ago, this might have been regarded as somewhat speculative for most Western societies, and rather irrelevant to the affairs of most Asian and African societies, most of which were still not politically independent, or (where independent) were in a rather inert and static condition. The instability and turbulent changes which now characterise the internal life of so many old States, and the birth and struggle for viability

[19] See the article cited in n. 9.

of the newer States, should remove any doubts as to the actuality of the problem.

Here again, India provides an eloquent example. In the stream of time, to which the present point relates, the comparatively educated and Westernised minority which provides executive and legislative government makes demands in terms of industrialisation, democratisation, and modernisation. These demands simply cannot stand in a single scheme or postulate system, with the worldly inertia and other-worldly expectations which characterise in the same stream of time the attitudes of the vast majority of India's people. As we shall later see, the actual path that is here being trodden turns the theory of interests upside down, a main objective of legislative policy being to create a structure of demands among the hundreds of millions such as will further the development plans. The creation of demands and the creation of the means of satisfaction of demands proceed in an uneasily staggered synchrony.

The uneasiness is made more acute by the courageous and (in a literal sense) successful experiment in political democracy based on adult franchise. For while the Indian parliament had assumed the role of Kohler's "far-seeing legislator" in seeking to raise the level of human powers over external nature well ahead of the *de facto* aspirations of most of its people, it cannot move too far ahead. Adult franchise still forces the governing party into constant compromises with attitudes and mores and institutional patterns which resist the implications of development, and the modification of traditional inertias. Those who set themselves the task of guiding India in the modern world are thus likely, for a long time, to carry this role amid a world of co-existence, not always peaceful, between old traditional civilisations struggling to preserve themselves and a new one painfully seeking to prove itself viable. There is also involved in this complex, as the reader will already have perceived, the problems of the retrogressive as well as of the transitional civilisation,[20] as well as of the plural civilisation - area, in which not only divers older cultures, but that of the more Westernised minority in whose hands political governance largely rests.

What has Pound to say about these difficulties in 1959? He has, indeed, addressed himself to them in Volume III as well as to some other matters raised by the writer. He there declares that of course new claims emerge and press upon the legal order, and that what these new claims are can be identified from current law reports, legislative committee reports, legislative debates, and proceedings of the various trade, labour, and voluntary associations. While he admits that it may be difficult to decide how far they should be given effect by reference to the prevailing jural postulates or scheme of interests, he thinks that evaluation would be no easier by any absolute measure of values. As to whether evaluation by any absolute measure would be easier, we make no argument. The point surely is that an absolute measure (supposing we accepted it) would *ex hypothesi* not be relative to the phenomena of the time and place; it is the difficulties which spring from such *relativity* with which we are here concerned. As to the main point, we respectfully think that his response is helpful only for societies moving at a moderate rate of change. It does not really confront the problems raised for the theory of interests by either "transitional" or "retrogressive" phases of a society's life, in the present writer's sense. Pound himself, indeed, concludes that "jural postulates of an era of transition are not

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[20] *Ibid.* and in Stone, *Province* (1946), esp. cc. 15, 20. For the corresponding problem of "compelling moral senses" in theories relying on the community's "moral sense", see the fascinating study of Julius Cohen *et al.*, *Parental Authority* . . . (1958) esp. 201-202.

readily discovered", and that "until the change to a distinct civilisation era is complete, formulation could hardly be profitable". We can see the jural postulates, he says, of a civilisation "complete for the time being", and also "how those postulates are ceasing to be those of the times and places in which we are living". We must "seek to understand these times as well as we may in an era of transition without expecting to lay down final formulations".[21] Perhaps the word "final" still slurs the difficulties.

## XI

Whether we use "jural postulates" or a "scheme of interests", the construction of such as are apt for the particular society will have involved what purport to be some essentially quantitative judgments.[22] The aptness of both depends, for example, on whether they express or represent what is presupposed by the *preponderant* mass of claims in the particular society. Moreover, in their use to adjust conflicting interests in a concrete case, Pound's precept is that we should choose that adjustment which will do *"least"* injury to the scheme of interests as a whole, or avoid *"substantial* impairment of the scheme of interests as a whole", or will "secure all interests *as far as possible with the least* sacrifice of the totality of interests or the scheme of interests as a whole".[23] The writer expressed the view in 1935 that, unless reality could be given to the apparently quantitative nature of these determinations, any determination made must include some elements of absolute valuation. His intention then was to draw attention to the difficulties of giving reality to the appearance of quantification. Here again Dean Pound's response takes the *tu quoque* line, this time that apparently "absolute" standards have often in fact been an idealisation of the "relative".[24] This answer does not, however, dispose of the real concern, which is that the theory of interests can only fulfil its promise if somewhat greater precision can be given to the implied notions of quantity. Without this we cannot tell what degree of objectivity (and therefore of verifiability) can be attributed to the apparently quantitative determinations on which, in Pound's thesis, every judgment of justice depends.

## XII

The doubts surrounding the possibility of quantifying interests are not unrelated to the major difficulty which must now be raised concerning what Pound means by "social interests". If quantification is to be taken seriously, arithmetic (even if not "simple" arithmetic) supplies the method of justice. And this reviewer, after years of treasured association with Pound at Harvard, believed that this was indeed Pound's position, until 1947, when Professor Edwin W. Patterson, a student of Pound of somewhat earlier vintage, published his article in the first Pound *Festschrift*,[25] itself following on Pound's late article

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[21] See Pound, *Jurisprudence*, Vol. iii, § 80 *passim*, esp. 11-15, the quoted passages being at 14-15.

[22] We do not here enter into the precise procedures which the application of Pound's method entails. See on this Stone, *Province* (1946) c. 15.

[23] Vol. iii, §100, p. 334.

[24] *Id.*, vol. iii, §80, p. 13.

[25] "Pound's Theory of Social Interests" in P. Sayre (ed.), *Interpretations of Modern Legal Philosophy* (1947) 558-71. And see his *Jurisprudence: Men and Ideals of the Law* (1953), here cited as "Patterson, *Jurisprudence*". Patterson has not revised his interpretation in his recent review article, "Roscoe Pound on Jurisprudence" (1960) 60 *Col. L. Rev.* 1124-1132, esp. 1128-29; nor has he adverted to the present writer's dissent from it in J. Stone, Book Review (1955) 50 *Northwestern L. Rev.* 130ff., esp. 134-37.

"A Survey of Social Interests" in 1943.[26]

Patterson's central assertion is that "Pound's theory of social interests . . . represents a teleological axiology like that of Bentham and Ihering". He means by this (he says) that for Pound, "social interests" are the final yardstick for adjusting conflicting interests in the judgment of justice. Each of Pound's "social interests", he tells us, is a measuring or testing device for "individual interests"; and (again) a "social interest is a means to the maintenance of a civilised society". As Patterson sees it, then, each of Pound's "social interests" is itself a measuring instrument, rather than a part of the phenomena (that is, the *de facto* human interests) to be measured. We shall see shortly that when this leads him into an *impasse*, Patterson offers a supplementary version which, however, seems even more at odds with the meaning which Pound has generally conveyed.

Patterson's main version (of which we now speak) would necessarily imply that "social interests" (as he thinks Pound uses that term) consist of different stuff from his "individual interests". If Pound's "individual interests", as is certainly clear, are always *de facto* human claims made at a given time and place, valid by the very fact that they are made, then "social interests" must (if Patterson is right) be something more (or, at any rate, something *other*) than this. Yet this reviewer has always understood Pound to say that all *de facto* human claims can be stated as either "social interests" or "individual interests".[27] Pound recognised that our ways of thought and speech often make it easier to think of some human claims (for instance, the claim to security of the physical person, or to free individual self-assertion) in terms of *individual* interests; but he has insisted that even these can be stated also in *social* terms, for instance, in terms of the social interest in the general security, and in a minimum individual life, respectively. And he has urged almost *ad nauseam*, that before the judging of a concrete conflict of interests, we must always bring *all* the conflicting claims to one same level, "social" or "individual". The purpose presumably is to neutralise any emotional prejudice stirred in the judge by either symbol.

Professor Patterson, however, asserts that "a social interest" is not merely a way of referring to a *de facto* human claim. He says that Pound would not recognise as a "social interest" any "interest" which was not a means of maintaining "a civilised society" on "a mature level of culture".[28] This means that "social interests" are not *de facto* claims or interests, but rather claims *deserving of approval*; it turns them, in other words, into criteria for judging *de facto* human demands. He has not explained how this can be true if, as Pound constantly insists, that the interests *he* is talking about are what *people de facto claim*, not what *the legislator thinks they ought to claim*. Not unexpectedly, in the circumstances, this main version of Patterson, even as he utters it, lands him in a confessed *impasse*. For he has to pose in the end, without offering any answer, the question how it can be possible for Pound to weigh "social interests" (in this version of them) against each other. This conundrum could only arise because of the above version of "social interests" which Patterson adopts. On Pound's own version, as we have always understood him (and as he continues to write in these volumes) it simply does not arise. He has never suggested that we should weigh either "social interests" *or* "individual interests"

[26] (1943) 57 *Harv. L. Rev.* 886.
[27] See the citations to Pound's earlier statements in my Book Review, cited *supra* n. 25.
[28] Patterson, *Jurisprudence* (1953) 525.

against each other *simpliciter,* but rather that we should ascertain how far the whole scheme of *de facto* human interests pressing for recognition in the particular society will be secured or frustrated by the alternative solutions offered. The words "social" or "individual" are to be discounted or (which is the same thing) neutralised before the moment of judgment. Pound's theory, as we have just shown, raises questions of quantification and commensurability of interests; but they are not the questions in Patterson's conundrum. And they make (we submit) a good deal more sense.

The fact that Patterson's main version, namely, that of evaluation by reference to a plurality of "social interests", ends in an *impasse,* is somewhat concealed by his introduction (almost inadvertently) of a rather different test of value. According to this, judgment is according to "the social consequences which *the social interest* designates as good or bad". In the present context this distinction between "good" and "bad" cannot turn on maximum satisfaction of demands. If "the social interest" is to determine whether "the social consequences" of one solution or another are "good" or "bad", the term "*the* social interest" must be but a symbol for whatever *final* evaluation is reached in the concrete case. Like Ihering's "social utility", and like the vulgar use of the terms "the public interest", and "the common good", "the social interest" is a name for the conclusion reached, and not a method of reaching it. It is difficult to see how such a meaning of "social interest" can stand along with his simultaneous main version, whereby Pound recognises many "social interests", each of which is "*a* measuring or testing device for individual interests". But, however that be, just as we have seen the latter to end in an *impasse,* so the former ends in a circularity.

What light do these volumes throw on these central notions of Pound's sociological doctrines? We think it important to show here, we hope once and for all, that the only view which makes sense of Pound's *main exposition* is the one which this reviewer has always understood him to hold. This is that his "social interests" are not (*pace* Patterson) a measuring device at all, but rather a way of referring to *de facto* human claims, just as the term "individual interests" is another way of referring to the same claims.

First then, we take §81, where Pound restates his theory of interests as a criterion of justice. He there insists without qualification that the "interests", or "claims" or "demands" with which he is concerned are *de facto* psychological phenomena which pre-exist and are not merely the creations of the legal order. "A legal system," he says, "attains the ends of the legal order (1) by recognising certain *interests, individual, public and social;* (2) by defining the limits within which *those interests shall be recognised* . . . ."[29] Clearly, the measure for defining the limits of recognition cannot consist of "social interests", for these are expressly listed among the phenomena[30] for which a measure is required. And, later in the same section, Pound is even more emphatic that these "interests" are the subject-matter to which "the principles of valuation" are applied, adding that apart from these principles of valuation, the securing of interests is limited also by "the limits of effective legal action".[31]

All interests or claims asserted by human beings, he proceeds to explain,

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[29] Vol. iii, pp. 5-24, esp. 16-21.

[30] See this made even more explicit in §93, esp. 289-91.

[31] At vol. iii, pp. 288-89, he analogises his "interests" (both social and individual without discrimination) to the "instincts" of McDougal's *Social Psychology* (12 ed. 1917) 55ff. On "The Limits of Effective Legal Action", see vol. iii, pp. 353-73.

"fall conveniently into three classes, individual interests, public interests and social interests". The first are claims "involved in and looked at from the standpoint of the individual life"; the second (public) are the same claims looked at "from the standpoint" of "life in politically organised society"; the third (social) are claims, "*even some of the foregoing* in other aspects, thought of in terms of social life and generalised as claims of the social life", involved in the continuance "of social life in civilised society". "My claim to my watch" may be stated both as "an individual interest of substance", and "a social interest in the security of acquisitions".[32] If the somewhat loose words which we have italicised raised doubt on this otherwise clear passage, this is quite removed by our next point.

Second, then, the intertranslatability of "social" and "individual" interests implicit in the above statement becomes a major explicit affirmation in §100:

> In weighing or valuing claims or demands with respect to 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 in our very way of putting it. For example, in the "truck act" cases the claim of the employer to make contracts freely may be thought of as an individual interest of substance. In that event we must weigh it with the claim of the employee not to be coerced by economic pressure into contracts to take his pay in orders on a company store, thought of as an individual interest of personality. (Vol. III, §100, p.328.)

"In general, but not always," adds Pound, "it is expedient to put claims or demands in their most generalised form, i.e. as social interests, in order to compare them." But it may also, he thinks, be possible to look at them all as individual interests.[33] Nothing, we suggest, could be more at odds with either of the two versions which Patterson gives to Pound's notion of "social interests". Far from his "social interests" being the measure for valuing, they are presented along with "individual interests" as ways of referring to the same subject-matter, the *de facto* human claims, which are to be measured. It is to ensure that the measure will be impartially applied that the conflicting interests must be looked at as all of them "social", or all of them "individual".

Here, too, we admit, there are one of two loose phrases. In §100 itself he goes on to say that "often" these three phrases are "the same type of claims as they are asserted in different titles".[34] This word "often" (if we were astute to hold him to every word) may be said to deny implicitly his preceding assertion that the "social-individual" intertranslatability is absolutely essential. It is, however, a flimsy inference to reverse so emphatic an explicit assertion. So is his reference at the same point to the "subsumption" of "individual interests" under "social interests", as a basis for reversing his explicit statement that there is no reason (where this is convenient) why conflicting interests should not all be translated into terms of individual interests for purposes of comparison. Any doubt left by these, and by one or two other curiously ambiguous turns of phrase,[35] must surely be wholly and finally removed by the last three paragraphs

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[32] Pound, *Jurisprudence*, vol. iii, §81, pp. 23-24.

[33] See vol. iii, pp. 328-29. Even as to "public interests" he also writes in §92 (p. 236) that "ultimately they come down to a social interest in the security of social institutions, of which political institutions in the world today have taken the first place." There are different problems as to his notion of "public interests", which I have examined in Stone, *Province* (1946) (c. 20) and do not propose to re-examine here.

[34] Vol. iii, §100, p. 329.

[35] Thus later in the section he speaks of the problem as "a practical one of securing the

of §100, where he sets out his own departures from "social utilitarian" thinking.[36]

He first deals with Holmes' well-known formulation that "the true grounds of decision are questions of policy and of social advantage",[37] a formulation obviously cognate if not identical with Patterson's version of Pound which says that the test for valuing claims is whether "*the* social interest" designates the "social consequences" of the claims as "good or bad". Yet Pound is here concerned to reject this kind of test altogether. It is not a test at all, he says, since we do not know, and the test does not tell us, what "social advantage" is. To invoke it is merely to convert the inquiry about "justice" into an inquiry about "social advantage".

If, therefore, that Patterson version were to represent Pound's position, it would only do so against Pound's better judgment. Moreover the final paragraph of §100[38] gives a similar flat rejection to the other main version of "social interests" attributed by Patterson to Pound, whereby "*a* social interest" must be a means of maintaining "a civilised society" on "a mature level of culture", so that "social interests" serve as a plurality of measures for evaluating conflicting individual interests.

Pound attributes this kind of notion also to the "social utilitarians", and says it is "very generally assumed in recent practice". He describes it carefully, preparatory to rejecting it. According to this view, he says: "Individual interests are to be secured by law because and to the extent that they coincide with social interests, or better, because and to the extent that social interests are secured by securing them."[39] According to it, he goes on, "we secure individual interests so far as conduces to the general security, . . . to the security of social institutions, to the general morals", and the rest. On this view "while individual interests are one thing and social interests another, the law, which is a social institution, really secures individual interests because of a social advantage in doing so. . . . No individual may expect to be secured in an interest which conflicts with any social advantage unless he can show some countervailing social advantage in so securing him".[40] If Pound had deliberately focused on the main Patterson version he could not have described it more clearly; nor could the rejection which then follows be much clearer.

> My objection to this way of putting it is that it assumes demands may be referred absolutely and once and for all to a category of individual or one of social interests. Instead, I should say, we look at the individual demand in its larger aspect, as subsumed under some social interest in order to compare it with other individual demands treated in the same way.[41]

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whole scheme of *social* (italics supplied) interests so far as he may". (Vol. iii, §100, p. 331). And in §8 (p. 24) there is a sentence: "Every claim does not *necessarily* go, once and for all, in one of these categories" (i.e., "individual", "social", etc.). But to say that *every claim* does not *necessarily* so go, seems impliedly to deny, what in the immediately preceding paragraph he has squarely asserted, namely, that all of these categories are merely different ways of referring to the same *de facto* human claims.

I have not troubled to canvass in the text side-references such as those in the corollary to his Jural Postulate I, as to liability for intentional damage. He there describes the privilege situation as one where the act is shown to be done in accordance with "some recognised public or social interest". This kind of language is obviously inconclusive on the present issues, both because of ambiguity in the context, and because these are also traditionally sanctified terms in this context.

[36] Pp. 331-34.
[37] See vol. iii, §100, p. 331.
[38] *Id.* pp. 332-333.
[39] *Id.* at 332.
[40] *Id.* at 333.
[41] *Ibid.*

And his last word on the matter is an unambiguous reaffirmation of the *quantitative* basis of his own method of evaluation, thus stated:

> How far, if at all, may a *de facto* interest be recognised without substantial impairment of the scheme of interests as a whole. Accordingly, as I see it, the principle should be: Secure all interests so far as possible with the least sacrifice of the totality of interests as a whole.[42]

## XIII

Some very hard questions are concealed by the multiplicity of terms which Pound used interchangeably for the subject-matter of law. To speak of a "claim" or "demand" that is unarticulated seems self-contradictory; to speak of a "desire" or "expectation" or even "interest" that is unarticulated, is not. Clearly when Pound speaks of "claim" or "demand" it is still the "desire" and not the articulation of it, which is significant for the theory of interests, and the search for justice through that theory. Insofar as his position rests on that of James it is absurd to suppose that articulation should either increase or decrease the ethical merits which attach to the human desire as such. Yet for Pound, even more than for James, nothing can be done about demands that are not articulated. And it is also difficult to see how, under modern conditions, legislators can learn to distinguish when an articulation corresponds to a genuine human desire, and when it does not.

There is more, therefore, in the prefix "*de facto*" in the term "*de facto* interests" than appears on the surface. We ordinarily take this prefix as stressing that the interests relevant to the legislative judgment are those as actually felt by the subjects, not as the legislator might think they should feel, or might think was good for them, that it is the wearer who knows where the shoe pinches, and that the squeal is evidence of the pinch. In 1911 it was still possible to think that in the ordinary workings of democracy under universal franchise the squeals would correspond closely with the pinches, and the legislator be responsive to all of them. So that, in a sense, Pound's theory of interests and the practical working of democracy would run together.

Already in America, and increasingly in other Western countries, other problems arise. The prefix "*de facto*" should now warn us not only against confusing the legislator's own desires and his views of what *should be* the desires of the subjects, with *their actual desires*, but also of the difficulty of distinguishing articulations by the subjects which express their own desires from those which are the result of manipulation by operators of various sorts, especially those who are able to use the expensive instruments of mass communication and mass persuasion. If there can be no effective screening of articulations to ensure that they do indeed express the *de facto* desires of the subject, would not the theory of interests surrender justice to the competing groups of organised professional persuaders, open and hidden? and the more the powers of government intervene to check or counteract such manipulations, the more are we likely to face an even greater perplexity. For the legislative power itself is then likely to increase its own resort to the stimulation, suppression, diversion and manipulation of human demands. No doubt some forms of State persuasion are less unacceptable than others, and at a certain point this difference divides totalitarianism from democracy. But in principle any degree and kind of conscious legislative stimulation, suppression, diversion or manipulation, strikes

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[42] *Id.* 334.

at the vitals of Pound's whole theory of justice. The legislator's task cannot be said to lie in giving maximum effect to the *de facto* interests pressing in his society, if he himself is getting people to press the "*de facto* interests" *which he thinks good.*

*De facto* interests which are *ersatz* or phoney, in other words, must abuse or abort the theory of interests as Pound conceives it. The converse difficulty of genuine interests which lack articulation is also very grave, though not perhaps insuperable. If it is men's desires which are valid by the fact that men hold them, the legislator must ensure that he is advertent to these desires. This presupposes that they will be evidenced by some form of articulation. But channels of articulation that will ensure that genuine demands are not unheeded become daily less accessible to individual initiative. No doubt these tendencies are not irreversible. Pound himself has been urging for half a century the establishment of true Ministries of Justice to serve precisely to open such channels of articulation for the individual citizen.[43] The late Harold Laski was confident that parliamentary constitutionalism could be recast to ensure interest representation of all members of the community.[44] Neither of these answers, however, has been put into effect. We make do with a rich medley of voluntary associations, supplemented by public opinion surveys, and public relations operations. And, as long as we do, more and more demands are likely to find it more and more difficult to make themselves heard. Is the legislator justified in ignoring demands that cannot make themselves heard?

## XIV

"Planning" by totalitarian States has obviously presented some problems for Pound's theory of interests. Yet insofar as totalitarian planners could be regarded as imposing their own values by naked power, the problems could be dismissed as irrelevant to the validity of Pound's theory, and as illustrating merely the obvious fact that legislators may be unwise, or may legislate for other ends than social justice.

Much more difficult to handle is the "democratic planning" such as the Indian Five Year Plans, on the third of which that country has entered. It is equally indubitable that India has a democratic form of government, and that many of the principal demands to the satisfaction of which the Plans are directed are not the *de facto* demands of any but a small segment of India's 430 million people. What, if anything, can Pound's theory of interests say about such a situation?

This kind of society adds further complexities to those of the articulation of interests in the maturer democracies which we have just discussed. It can be said in defence of Pound's position *vis-à-vis* totalitarian societies that the difficulties arise from excesses and abuses which we must struggle to check. But the situation in a democracy such as India simply does not lend itself to this kind of answer. Suppose those who guide the destiny of India tried to make their decisions by reference to the maximum satisfaction of the *de facto* demands of India's 430 million people. What facts would they face?

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[43] Pound, *Jurisprudence* (1959) vol. i, pp. 356-357; vol. iii, 735-736, and earlier writings there cited, esp. "Juristic Problems of National Progress" (1917) 22 *Am. Jo. Soc.* 721.

[44] H. J. Laski, *A Grammar of Politics* (3 ed. 1938), c. vii.

First, they would have to face the fact that about three-quarters of India's 430 million people have no particular demands which they are concerned to press on organised society. Claims within the family and caste are, of course, a part of the pattern of life, but beyond this the inertia of tradition and of acceptance of the inherited worldly lot dominates the lives and attitudes of individuals. This inertia is reinforced by centuries of remoteness from the main centres of urban civilisation and culture; there was a deliberate shunning of such contacts when it was likely to entail official contact with alien rulers, Muslem or British. For the oral tradition of the elders associated rulers rather with looting, punishment, exile and forced labour, than with welfare and the satisfaction of human demands. These inhibitions also have deep roots in the teachings of Hinduism, which enjoined acceptance of one's inherited lot, and even of the misfortunes of life, as a punishment for some earlier unworthy existence or preparation for a happier and more worthy one. Such an ethic left little room for the pressing of *de facto* interest of individual human beings for recognition by organised society. Where there was room for it, the business was not that of individuals but of the head of the joint family, and the received tradition was that the interests were to be mediated and negotiated, rather than pressed or litigated. To add to all this, the unchanging subsistence rural economy was not likely to stimulate new demands, which are a function of a mobile and dynamic rather than of a static, relationally-organised, society. Finally, the dominance of the national struggle for independence joined with indigenous traditions to prevent any effective contention for national leadership which might have led, through competing bids for popular votes, to the stimulation of popular demands.

Those elected to govern such a country could scarcely be expected to wait on the pressure of demands from these hundreds of millions, most of whom are still, in any case, illiterate and innocent of civic consciousness to guide their policies. They took their directives from simple indubitable statistics — of births and deaths, of an average rural workday of only two hours, of 25-30 million people constantly unemployed, of food supply and deficiency diseases, of buildings and sanitation arrangements, of famine and flood, ignorance and sickness. One irony is that even as the minority of Indians who guide the nation's destiny pursue their plans for Village Community Development, and for Small and Heavy Industry Projects, and the like, governmental paternalism, and the interposition of the system of cooperatives, are likely to leave individual demands and initiative as recessive as ever. Even down to the level of attention to the stagnant puddle in the village lane, the Indian picture remains fifteen years after independence, one of legislative striving to stimulate and even create a structure of *de facto* human demands. As late as 1959, indeed, the entire rural Village Community Plan was overhauled precisely with this aim in view on the principle of "democratic decentralisation". It was sought to shift responsibility for the initiation of projects from the Block Development Officers of the State Government to the villagers themselves organised in tiers upwards from the village *panchayat*. Initiated in Rajasthan in 1959, this attempt from above to make way for or even stimulate a pattern of demands corresponding to the legislative recognition of "objective" needs, may or may not succeed. Either way it represents a stage or condition of democratic society in which Pound's theory of interests, without some drastic adaptation not yet in sight, can give little guidance in the international community.

## XV

The tendency to interdependence of nations on a world scale, not only in a military, but in a social, economic and psychological sense, is, of course, noted by Pound. He has long written and continues here to write as if the claims of State entities were assimilable in his theory to the *de facto* claims of human beings, or at least could be dealt with in a rather analogous way as public interests. I have criticised this from the aspect both of the "interests" of "the State" within its own society,[45] and even more at length from that of the interests of the State *vis-à-vis* other States.[46] I am left still, by these volumes, with the questions whether such easy assimilations and analogies are not an evasion of the real question; and whether on the axiom (which is Pound's as well as James') that human demands are valid by the fact that they are made, the theory of interests must not always reckon with *de facto* demands of human beings, rather than with such *supposed* demands of *juristic* persons; and whether in these circumstances the theory of interests can be of much use internationally unless we are able to overleap the frontiers of States in applying it.

## XVI

Any thoughtful reader will obviously have many particular reservations, and dissents, not to speak of plaintive "So whats!", as he moves through so vast a storehouse of ideas and commentations. Yet it is surely unfitting and even tiresome and misleading for reviewers to direct themselves to particularities.[47] What is important with such a work as this is not whether and how this work as such can be improved, but which of the main themes of the author himself, and subject to what qualifications, can help us meet the juristic tasks of the decades before us.

The few notices thus far mostly recognise the prudence of this self-denying ordinance. The central point of Edwin W. Patterson's concern is close to this reviewer's, and we have dealt with it in Section XII at some length.[48] Karl Llewellyn[49] places the contents of these volumes briefly, as we have done rather more fully, in historical perspective. They are, he says, "the basis of our forward looking thought of the '20's and '30's" providing "half of the commonplace equipment on and with which our work has since builded". In the area of his own special concern, the judicial process, Llewellyn offers a thesis central to any assessment of the future value of Pound's contributions to the theory of judicial decision. He recalls Pound's series of epochal papers up to 1914 on the going problems of American law, beginning with "The Decadence of Equity"[50] and "The Causes of Popular Dissatisfaction with the Administration of Justice",[51] and the fact that (apart from Dewey) no one has done more to make American legal thought "result-minded, cause-minded and process-minded".[52] Yet Llewellyn thinks that Pound's warmest dedication was not to

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[45] Stone, *Province* (1946).

[46] J. Stone, "International Law and International Society" (1952) 80 *Canadian Bar Rev.* 170; J. Stone, "Morality and Foreign Policy" (1954) *Meanjin* (Australia) 185; J. Stone, ". . . Sociological Inquiries Concerning International Law" (1956) 89 *Hague Recueil* 65-175 *passim*.

[47] For the present writer's view on many such particularities, see Stone, *Province* (1946) 355-69, 391-420, 487-48.

[48] His review should be read with his other writings, cited *supra* n. 25.

[49] (1960) 28 *Univ. of Chic. L. Rev.* 174-82, at 175.

[50] (1905) 5 *Col. L. Rev.* 20.

[51] (106) 20 *A.B.A. Report*, pt. i, 395.

[52] (1960) 28 *Univ. of Chic. L. Rev.* at 179.

"process-and-result-directed work" at all, nor "to the dirty detail and to the working out of theory about detailed process". He could do this supremely well when public concern required it of him; but Pound's preferred interests were (Llewellyn thinks, and we agree) definitely in "study of theory", "verbalised theory", "writers' theory". Llewellyn, as might be expected from the author of *Bramble Bush*,[53] who found *The Cheyenne Way* and matured into the author of *The Common Law Tradition*,[54] stresses the slightness of Pound's interest in Geny's *Méthode d'Interprétation*[55] as compared with that same writer's *Science et Technique en Droit Privé Positif*,[56] as a sign precisely of Pound's merely limited interest in the judicial process. He is content, for the rest, to note indulgently the pre-1930 flavour of the literature cited, crediting responsiveness to the present reviewer's work for much of the "up dating".[57]

Associate Professor John H. Crabb of the University of North Dakota, is a reviewer of a different ilk. He represents some (though happily not all) of the graduate students who have taken Pound's course at Harvard. Crabb thinks that many eulogies of Pound "smack somewhat of sycophancy". He must of course also recognise that many do not, and that when a Llewellyn praises Pound's greatness, and indulges his weaknesses, it is because he has a deep sense of Pound's historical place in the opening and closing of juristic eras. Lack of this sense demeans the reviewer rather than the work reviewed. Alice gulped at the bottle which said "Drink me!" until she thought she was small enough to get through the tiny door. Then alas! she found she was so small that she could not reach the key that would open the door. A reader who took Mr. Crabb's review seriously as a way of being introduced to Pound's work would come to even greater despair. He would not only shrink too small to reach the key; he would also find to his dismay that the door was in any case so big that even if he could reach the key he could not reach the keyhole. Those who lack this sense necessarily miss the point of Pound's lifetime of work, whether (like Mr. Crabb) we surprised ourselves by passing Pound's jurisprudence examination or, whether (with Herbert Morris) we graduated in law from Yale Law School in 1954, and from Oxford as a Doctor of Philosophy in 1956.

John H. Crabb declares himself to be as intimidated today as he was as a student by "the staggering amount of citations". He is distressed by what he thinks is "slighting of the natural law tradition". He thinks that Pound must be a "positivist", but since he thinks that Kelsen too is a "positivist", and knows that Pound is critical of Kelsen, he ends up not very sure of anything at all, concluding with a strangely grounded reason[58] for suspecting that Pound must at some time have become a natural lawyer. For the rest he now confesses to finding the same "obscurantism" in these volumes, "the same disparity" between "prodigious scholarship" and capacity to communicate it, as he formerly found as a student. He finally attributes all this to three things: First to Pound's habit of trying to embrace all the nuances, qualifications and implications within his initial statement on a matter. Second to his use of untranslated "foreign words and phrases", and third to the fact that these volumes are "not in the nature of

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[53] (1930, repr. 1951).
[54] (1960).
[55] (1899, 2 ed. 1919).
[56] (4 vols., 1913-1924).
[57] See *supra* n. 18.
[58] Vol. i, p. 332, discussed (1961) 37 *N.D.L. Rev.* 131, 133.

an encyclopaedia", but rather build "from chapter to chapter", making it difficult to isolate a particular topic and inform oneself on Pound's treatment of it alone.[59]

We think that there is also a deeper reason than any of these. And it is to stress this that we have paused to glance at these other notices. What Llewellyn has written is a fitting greeting to these volumes because Llewellyn knows where Pound's thought started, and also where it now is. Because he knows what problems Pound had to meet, he also understands what Pound is saying (or failing to say) about them. A reviewer who does not know the ones, can have little to say about the others.

And this, too, despite other rather obvious differences, explains the somewhat sour reaction of Herbert Morris.[60] He pays his tributes to the "lone and aged giant", to the "unique and awe-inspiring work", to "practical legal experience, seventy years of study and fifty-four years of teaching", to the "larger endeavour" of "a thorough, systematic, intelligent study of law",[61] to "contemporary interest" and "legal ordering for a better life". But, this done, he charges that these volumes are a vast and erudite exercise in asking everything "What are you good for?", in "functional questioning" rather than "philosophic reflection", in "horizontal rather than vertical thinking", "lacking in intellectual adventure",[62] in classifying the "exciting steps beyond conventional thought" *taken by others*. He arrives at these bold results, we believe, because he sees neither backward nor forward, but remains tensely fixed throughout on (for him) one all-absorbing question to be answered by Roscoe Pound, namely "What are you good for, I mean to Herbert Morris and in 1960?" Morris' unawareness of Pound's basic pioneering for the first half-century, which Llewellyn so rightly makes his focus, is almost as complete as if Pound had *first* published what these volumes contained on a certain day *in 1959*.

Morris' critique, for example, of Pound's "theory of interests" is about as woodenly verbalistic as anything which Mr. Crabb might have submitted for the indulgent approbation of Examiner Pound.[63] It is hard to see how anyone who goes an inch past the words could fail to understand that when Pound says that the law "*must do something*" about *de facto* interests that press in a given society, he is merely offering this as an approach to just judgment. But Morris succeeds in failing. We may, of course, reject any view of justice in terms of maximum satisfaction of *de facto* interests, as well as have the gravest doubts about Pound's methods of implementing the view, if one accepted it. But only a scholar of limited age and range of historical and juristic reference could fail to recognise what Pound is talking about. And one might hope for a range wide enough to be aware, for example, that most of the difficulties at which he stares in 1960, with either blankness or a wide-eyed sense of discovery, were already canvassed in the literature more than a quarter of a century ago.[64]

It is this same "*Zeitgeist*-blindness" which also explains Morris' repommelling of Pound's analysis of "mechanical jurisprudence."[65] It was after all in 1908 that Pound's major paper on this was written.[66] Either it should be

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[59] (1961) 37 *N.D.L. Rev.* 131.
[60] "Dean Pound's Jurisprudence" (1960) 13 *Stanford L. Rev.* 185-210.
[61] (1960) 13 *Stanford L. Rev.* 185.
[62] P. 186.
[63] See pp. 190-92.
[64] See e.g., J. Stone, article cited *supra* n. 9.
[65] Pp. 201-10.
[66] (1908) 8 *Col. L. Rev.* 605.

read, as it were, *tunc pro nunc*, in which case Morris' severities are an anachronism in reverse. Or, if it is to be read *nunc pro tunc*, Mr. Morris should at least show awareness that many of the questions he presses have been addressed by later writers working, as Llewellyn says, with the equipment which Pound made commonplace.[67] The default is not remedied by the fact that Morris makes two or three worthwhile criticisms of Pound on particular matters, such as his too sweeping dismissal of neo-Kantian methodological distinctions;[68] and his tendency in over-enthusiasm for the non-precept element in "the legal order" to lose interest in analysis of the structure of a legal "rule", and in the differences between such rules, and the different ways of fulfilling them.[69]

By contrast both with the basic incomprehensions of Crabb and Morris, and with Llewellyn's balanced contextual appraisal, stand the adoration of Eli E. Nobleman,[70] and the discipleship of Edwin Patterson.[71] Surely Mr. Nobleman is right to say that Pound's pre-eminence as the great American jurisprudent and legal scholar depends neither on the present work, nor on the fact that he has so happily remained with us to complete it in his mature age. Yet when his account of Pound's remarkable life and of the scope of this work is climaxed by the statement that Pound has given us (presumably as at the present time in 1961) "a detailed documented history and analysis of all the world's legal knowledge, with special emphasis on . . . our own Anglo-American legal heritage", it surely is also running into error. For Morris' one-eyed misjudgment of Pound's positions *nunc pro tunc*, he has substituted the converse error, less distorting but still one-eyed, of *tunc pro nunc*, of assuming without more that what Pound's thinking achieved in the first half-century must repeat itself in the next.

For Roscoe Pound himself, towering as he does, as Albert Kocourek put it, like an Alpine peak above the surrounding landscape of legal science and philosophy, neither error is fitting. As a man, Pound is entitled to expect that his life's achievement be assessed, bearing in mind the state of general knowledge in which he began his pioneering tasks. And his readers have a corresponding duty to remember that if we seem to be much further on in 1962, it was still he who blazed the trails and charted the new areas; and that we often now see inadequacies in Pound precisely because of the inadequacies that Pound made us see.

Yet, since Pound is also a scholar of unrivalled dedication to his field, it would also be wrong to treat these volumes published in 1959 in terms *merely* of what their content contributed to the jurisprudential life of a generation or two ago. For this would but write *finis* to that contribution; whereas such a scholar is entitled to ask that whatever he has given which may still yield insights, shall enter and remain within the stream of knowledge with which we face the changing world of the second half-century. Here, too, there is a corresponding duty on his readers, the duty of probing his main lines of thought for their degree of relevance and adequacy in meeting contemporary and future perplex-

[67] At this point Morris' failure to penetrate beyond words to the stream of thought itself becomes strangely wilful. He is obviously aware, for example, of this reviewer's own later treatment, for he cites *Province* (1946) c.vii, in the footnote. He cites it, however, only for the purpose of implying that I there agreed with Judge Konstam in "praising" judicial "distrust of logical reasoning". In fact I merely quoted the judge to show that this view was openly held in England. Morris does not at all refer to my "Ratio of the *Ratio Decidendi*" (1959) 22 *Mod. L. Rev.* 597-620.

[68] Pp. 195-98.

[69] Pp. 198-201.

[70] (1961) 10 *Am. Univ. L. Rev.* 177.

[71] (1960) 6 *Col. L. Rev.* 1124-1132; and see *supra* n. 25.

ities. As soon as this is acknowledged, it must be clear that notices which fail to go beyond marveling praise, however well deserved and however sincerely intended, are neglectful of duty. None of us can perform this duty for more than a small part of the range of matter which, in its time, the mind of Pound encompassed. Yet as each does his part, with both reverence and integrity, this monument of a juristic century just ending may yet be found to be one beacon for the century that lies ahead.