Modern American Supreme Court Judicial Methodology and Its Origins: A Critical Analysis of the Legal Thought of Roscoe Pound

Beau James Brock

Available at: https://works.bepress.com/beau_brock/36/
The Journal of the Legal Profession

The University of Alabama School of Law

Articles

Modern American Supreme Court Judicial Methodology and Its Origins: A Critical Analysis of the Legal Thought of Roscoe Pound

Beau James Brock

Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics

Debra Moss Curtis

Attorney Advertising and the Decline of the Legal Profession

William G. Hyland Jr.

Entering Law Students’ Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society

Verna E. Monson
Neil W. Hamilton

Student Commentaries Compilation

Volume 35 Spring 2011
MODERN AMERICAN SUPREME COURT JUDICIAL METHODOLOGY AND ITS ORIGINS: A CRITICAL ANALYSIS OF THE LEGAL THOUGHT OF ROSCOE POUND

Beau James Brock

I. INTRODUCTION

Roscoe Pound was born on the frontier prairie of Nebraska in 1870, and his entire life was consumed by law. He lived until July of 1964 completing his final great contribution to law, JURISPRUDENCE, in 1959. He was office-trained and school-trained; he was a trial lawyer in the rugged courthouse world of pioneer Nebraska and a master of the appellate brief; he was a judge, a teacher, a dean, an advisor to government, and a scholar whose name became a synonym for legal wisdom.

Pound's parents were remarkable people and doubtlessly had great influence in his intellectual development. His father was a lawyer and judge in Lincoln, Nebraska. The most striking feature of his father seems to

1. This article reflects only the personal opinion of its author and is not, nor intended to, represent any official position of the Louisiana Department of Environmental Quality or the State of Louisiana. This article is dedicated to Professor Paul Baier and Professor Patrick Martia of the L.S.U. Law Center with the continuing gratitude I have for their inspiration and dedication to the study of critical legal analysis.
2. Beau James Brock currently serves as the Special Assistant to the Secretary of Louisiana Department of Environmental Quality. Mr. Brock was appointed to this post on February 11, 2008, and as such, he practices in the field of environmental law and policy as a member of Secretary Peggy Hatch's Executive Staff. Previously, Mr. Brock served as the Regional Criminal Enforcement Council (RCEC) for EPA Region VI in Louisiana from March 1999 – February 2008. He is a graduate of L.S.U. in 1988 and the Paul M. Hebert L.S.U. Law Center in 1991.
4. He was born "Nathan Roscoe Pound," but dropped Nathan as a formal name when he went to college. No one called him Nathan or Roscoe for that matter throughout his life. See Paul Lombard Sayre, The Life of Roscoe Pound 32 (1948). Throughout his adult life, he simply went by "Pound" and I will obligingly refer to him as such in this paper.
have been his character,\textsuperscript{5} which allowed him to be elected district judge from 1875-1887, and also the first president of the Lincoln Bar Association. He was heavily involved in state politics as a Republican, and taught his son the values of individualism and distrust of the politics of the masses.\textsuperscript{6} His mother, a former schoolteacher, became dissatisfied with Pound's formal schooling as a child and instructed him personally until he was twelve.\textsuperscript{7} Her curriculum stressed reading the literary classics, memorization, and the study of German. Further, even as a small boy, Pound developed an interest in plants and insects which his mother encouraged.\textsuperscript{8}

He entered a college preparatory school at the age of twelve in 1882 and received his baccalaureate from the University of Nebraska majoring in both the classics and in botany in 1888,\textsuperscript{9} and thereafter received his Master's degree in botany in 1889.\textsuperscript{10} His botanical studies channeled him toward a suspicion of absolutes and provided an unusual framework for his future.\textsuperscript{11}

At this point, partly because his father wished it, Pound decided to enter the Harvard Law School planning to attend only one year.\textsuperscript{12} Harvard was under the mastery of Dean Christopher Columbus Langdell who had introduced the modern “casebook” method of teaching in the early 1870's.\textsuperscript{13} The three professors that influenced Pound the most were John Chipman Gray,\textsuperscript{14} James Barr Ames,\textsuperscript{15} and James Bradley Thayer.\textsuperscript{16} He inherited the notion of judicial creativity and realism from Gray, learned to respect legislation and judicial restraint from Thayer, and often heard Ames scold the legal profession for its lack of professionalism.\textsuperscript{17}

\textsuperscript{5} See, WIGGOR, supra, at note 3, and 9, where it states “His [Pound’s father’s] reputation for integrity became almost legendary in Nebraska. ‘I was on a jury once in that early day,’ recalled Charles Wake shortly after Judge Pound’s death, ‘and we failed to get a verdict because half of the jury declared, they would not convict a man whom Mr. Pound defended, as they knew he must have been convinced of the man’s innocence, or he would not have taken his case.’”

\textsuperscript{6} See SAYRE, supra, at note 4, at 48-53.

\textsuperscript{7} Id. at 35.

\textsuperscript{8} Id. at 37.

\textsuperscript{9} Id. at 63.

\textsuperscript{10} Id.

\textsuperscript{11} See WIGGOR, supra, at note 3, at 30.

\textsuperscript{12} Id. at 31.

\textsuperscript{13} Id. at 34-35.

\textsuperscript{14} The teacher who most influenced Pound at Harvard was Gray. Id. at 39. As a definition of law, Gray often used a passage from a sermon that Benjamin Hoadly, the Whig bishop of Bangor, preached before the King in 1717. “Whoever hath an absolute authority to interpret any written or spoken laws...it is he who is truly the law-giver intents and purposes, and not the person who first spoke or wrote them.” Id. at 41.

\textsuperscript{15} Ames viewed legislation with particular alarm, insisting that the “power of legislation is a dangerous weapon. Every lawyer can recall many instances of unintelligent, mischievous tampering with established rules of law.” Id. at 37.

\textsuperscript{16} Thayer taught constitutional law and lectured that the Supreme Court, in considering the constitutionality of a statute, must resolve every reasonable doubt in favor of Congress. WIGGOR, supra, note 3, at 45.

\textsuperscript{17} Id. at 47.
Upon his return to Nebraska in 1890, Pound enrolled in the University of Nebraska seeking his doctorate in botany, and also passed the Nebraska bar. He worked full-time as a practicing attorney and spent the rest of his time in the botany seminar at Nebraska. The pinnacle of Pound's scientific contribution to botany was his survey of plant life in Nebraska entitled *PHYTOGEOGRAPHY OF NEBRASKA* published in 1898.\(^{18}\) He received his Ph.D. in botany from Nebraska in 1897. During this period his legal career saw him in a partnership, then as a sole practitioner, and as the 1890's closed, he formed another partnership of Hall, Woods & Pound.\(^{19}\)

Pound was then appointed a commissioner (Judge) to the Supreme Court of Nebraska in 1901 and served two terms ending in 1903. His tenure on the Court was not marked by any revelations about the theory of law, but he did attempt to further his own understanding of the place of law in modern society.\(^{20}\)

Since 1895, when Pound gave his first lecture on Roman Law in the Latin Department at the University of Nebraska,\(^{21}\) he developed a hunger for a continuing participation in the academic field of law.\(^{22}\) He was named assistant professor of law of Nebraska’s College of Law in 1899, and dean in 1903. After he issued his famous address on *Causes of Popular Dissatisfaction with the Administration of Justice in 1906*, he was invited to teach at Northwestern School of Law in 1907, and after one year moved on to the University of Chicago Law School. In 1910, Pound returned to the Harvard Law School as a professor and remained there until 1947 while acting as dean from 1916 through 1936.

Throughout his teaching career, Pound churned out an enormous amount of legal scholarship. According to Karl Llewellyn, Pound provided "an encyclopedia acquaintance with Anglo-American judicial writing up to say 1930 which few have ever matched."\(^{23}\) It is through these works that Pound influenced a generation of scholars, judges, attorneys, and students.

Beginning in the final years of his deanship at Harvard and through the rest of his life, new developments of legal thought were spawned from his ideas of sociological jurisprudence, which were unacceptable to

---

18. Sayre, supra, note 4, at 67-69. Pound was even recognized by German scientists as well as by contemporary American authorities, and this recognition took the form of naming a fungus in his honor. Dr. Otto Kuntze named the new fungus *Roscoepoundia.* Id.
19. Wigoda, supra note 3, at 70.
20. Id. at 92-98
21. Sayre, supra note 4, at 137.
22. Pound did not like to match wits with other lawyers in petty devices to secure advantage in a trial, nor to impair the fair presentation of his opponent's case. Id. at 139.
Pound.  During this philosophical confrontation, in promoting an idea of more and more controlled pragmatism, he reversed his previous positions in areas of the law such as administrative agencies. This struggle with his own ideological writings when utilized by other theorists spiraled him into an intellectual malaise.

After World War II, Pound went to China to help in the development of its fledgling legal system, however, the success of the communists in 1949 ended his participation. His final teaching position was at the University of California at Los Angeles Law School from 1949-1953. After his work at U.C.L.A., he returned to a less turbulent life at Harvard in 1953, but continued to write articles and address bar associations by the score.

II. OVERVIEW OF PRINCIPAL CONTRIBUTIONS & INFLUENCE

The greater part of Pound’s life was as an educator and legal theorist who attempted to reconcile the dualistic concepts of legal order and juristic social reform. His influence over modern American legal thought in the field of social engineering has provided the seed for jurists and theorists alike. Llewellyn himself stated that “Pound has contributed ... more than any other individual ... to making legal thought in this country result-minded, cause-minded, and process-minded.” Let us now take a closer examination of this struggle between conflicting notions that Pound attempted to harmonize.

A. Juristic Social Reform

Throughout Pound’s writings he exhibited a belief in an inherent cyclical development of the law. His vast knowledge of Roman legal history and European legal development led him to conclude that:

Legal history shows a constant swinging back and forth from an extreme reliance upon systematic administration of justice according to legal precepts and an unsystematic administration according

24. Wigdor, supra note 3, at 255.
25. Id. at 267.
26. Id. at 277-78.
27. Id. at 280.
29. For further discussion on cyclical theories of law see J. Stone, PROVIDENCE AND FUNCTION OF LAW 37-38 (1950).
30. See e.g., Pound, Theories of Law, 22 Yale L.J. 114 (1922), wherein he sets out from Greek law through twentieth century Anglo-American legal thought the dichotomy between law based on right and justice (ius, Recht, droit, diritto, derecho) and law that was enacted or set authoritatively (lex, Gesetz, loi, legge, ley). The cyclical developments and counter-movements are detailed in depth in this article.
to the will of magistrates or administrative officials for the time being. 31

Further, that "[i]f the nineteenth century carried the idea of certainty and uniformity too far, it was largely in reaction from a time which had carried this attempt at individualization too far." 32 Through his historical analyses of law, Pound determined that his contemporaries in the judiciary were stagnating the natural course of the development of the law. This natural course was mired in what Pound termed "mechanical jurisprudence." 33

Pound assaulted current legal dogmas which served only to thwart justice without advancing the law. He commented that:

One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten, while their unsound conclusions are held for gospel 34 ...there is the special tendency of the lawyer to regard artificiality in law as an end to hold science something to be pursued for its own sake... 35

He believed that for rules sake did not serve the betterment of the law, nor did it accommodate the lay community's appreciation of justice. 36 In a scolding indictment of his era of procedural formalism, he wrote that "[w]e are told that formal. He continues stating that "delay of justice is denial of justice. Every time a party goes out of court on a mere point of practice, substantive law suffers an injury." 37

Pound had a revulsion to the pigeonholing of issues and "slot-machine" 38 theories of adjudication in which the court would spout out the appropriate analytical result deduced from prior case law. 39 He regarded

32. Id.
33. See, Pound, Mechanical Jurisprudence, 8 COLUMBIA LAW REVIEW 605 (1908).
34. Id. at 606-607.
35. Id. at 607.
36. See, Pound's oft borrowed quote of Lord Herschell to Sir George Jessell: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it. Atlay, Victorian Chancellors, II, 460, referred to in Pound, Justice According to Law, 13 COLUMBIA LAW REVIEW 702 (1913); see Mechanical Jurisprudence, supra, at note 33, at 506.
37. Mechanical Jurisprudence, supra note 33 at 619.
38. See, R. Pound, THE SPIRIT OF THE COMMON LAW 170-171 (1921) wherein he observes [that a mechanical theory] makes the court a "sort of slot machine." The facts are put into the judicial hopper and the decision comes out automatically. The facts may not "always fit the machinery, and, hence we may have to thump and joggle the machinery a bit in order to get anything out. But even in extreme cases of this departure from the purely automatic, the decision is attributed, not to all to the thumping and juggling process, but solely to the machine." See also, ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 15 (2d. ed. 1968).
the propensity to grant judgment to those who could fit their case under certain buzzwords or "magic words" as antithetical to the proper administration of justice. His solution to this pseudo-juridical science, when law is determined "[l]ike Habib in the Arabian Nights, we wave aloft our scimitar and pronounce the talismatic word," was sociological jurisprudence. He posited that:

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

This sociological movement was seen by Pound as providing the bridge between the mechanical jurisprudence of the nineteenth century and social reform in the twentieth. He averred that "[n]ot a little of the worldwide discontent with our present legal order is due to modes of juristic thought and juridical method which result from want of 'team-work' between jurisprudence and the other social sciences." Comparing sociological jurists with jurists of other schools, Pound stated that they look more to the working of the law than to its abstract content; regard law as a social institution which may be improved by intelligent human effort; stress the social purposes of law rather than upon its sanctions; and urge that legal precepts are regarded more as guides to results which are socially just and less as inflexible molds.

The gospel of methodology for sociological jurists is found in Pound's A Survey of Social Interest. His basic premise is that earlier juridical notions of legal actions simply being conflicts between competing individual interests are incomplete. Sociological jurists must now adjust their

---

40. Mechanical Jurisprudence, supra, at note 33, at 621.
41. Id. at 608.
42. Id. at 621.
43. Id. at 609-610.
44. Roscoe Pound, The Scope and Purpose of Sociological Jurisprudence, 25 HARV. L. REV. 510 (1912). Pound cites Humble for the proposition that "[s]o far as any direct influence upon our courts is concerned, our modern textbooks upon economics might as well be written in Chinese." Id. at note 85.
45. Pound, supra note 44, at 516.
46. See Roscoe Pound, A Survey of Social Interests, 57 HARV. L. REV. 1 (1943). These ideas were originally set forth by Pound in Pound, A Theory of Social Interests, 15 PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY 16 (1921). Llewellyn considered this article "the Poundians' delight, which one might have hoped to see developed in the true center of Sociological Jurisprudence..." K. Llewellyn, supra, at note 23, at 501.
47. A Survey of Social Interests, supra note 46, at 1, 4-5, 10, 12.
adjudication to a "satisfying [of] wants." These wants or interests are the claims of human beings either individually or in groups whose conduct must be regulated or relationships adjusted through judicial intervention. He divided these interests into individual, public, and social classifications. As he put it:

individual interests are claims or demands or desires involved immediately in the individual life and asserted in title of that life. Public interests are claims or demands or desires involved in life in a politically organized society and asserted in title of that organization...Social interests are claims or demands or desires involved in social life in civilized society and asserted in title of that life.

These groupings, however, did not constitute rigid categories of interests in our society, and due process of law by definition involves a weighing and balancing of the various interest groups which overlap or come into conflict. In order to properly weigh and balance these interests, it is "important to subsume the individual interests under social interests and to weigh them as such." Pound submitted that the Fourteenth Amendment did not set these or any other interests as absolute legal rights, and that a legislator should follow the example of reason that the common law has always subscribed to in weighing these interests before trampling over them. One may question by whose values will these interests be balanced. Pound stated that:

ethical philosophers have urged that there could be no accepted measure of valuing interests for legal purposes till we were all

---

48. *Id. at 1.*
49. *Id.; see also, Roscoe Pound, Social Control Through Law 63 (1942).*
50. A Survey of Social Interests, *supra* note 46, at 1. This classification comes directly from Rudolph van Jhering's *Der Zweck Im Recht* 467 (1877) translated by Husak, *Law As a Means to an End* 348 (1921).
52. See *id.* at 15 where he writes "A generation ago... [w]e should have deduced the several social interests as presuppositions of generalized social existence. But schemes of necessary presuppositions of law or legal institutions seem to me to be bottom schemes of observed elements in actual legal systems, systematically arranged, reduced to their lowest terms, and deduced, as one might, say to order." See also, Roscoe Pound, *The Call For A Realist Jurisprudence*, 44 HARV. L. REV. 697,703 (1931). Where he notes "This question of ought, turning ultimately on a theory of values, is the hardest one in jurisprudence. Those who long for an exact science analogous to mathematics or physics or astronomy have been inclined to seek exactness by excluding this hard problem from jurisprudence altogether. But such a jurisprudence has only an illusion of reality."
54. *Id.* at 3.
55. *Id.* at 4. *The Call For A Realist Jurisprudence, supra*, at note 52, at 706.
agreed on the highest good. But jurisprudence could not await the outcome of the endless debates on this question.  

This response comports with his belief that there are no metaphysical absolutes to be found in philosophy or jurisprudence. Because of this, society should entrust the judiciary to make reasoned value decisions on the basis of significance of interests as "jurists [have] succeeded in coming to certain general ideas which [have] served well enough for the legal science of the last century."

Pound also attacked the canon of statutory construction that legislative enactments should be narrowly construed by the judiciary in order to further his beliefs in social reform. He went about historically to prove that this interpretation was not necessary nor inherent to our legal system, and survived in its present form because of judicial jealousy of the reform movement. He argued that the political reasons for judicial interference with legislation had ended. He wrote that [i]n the sixteenth and seventeenth centuries, the courts stood between the crown and the individual. Today, its stance places it "between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it."

He reasoned that legislative law-making is much more of a deliberative process than judicial law-making, and that legislation is the more democratic form of law-making being the direct and accurate expression of the general will. He concluded his discussion on the relationship between the common law and legislation by declaring them co-equal sources of law, which ought to abide together rather than seek supremacy through their own particular mechanisms. Pound sought to put this into practice when he argued, as special counsel for the government, in the famous *Hammer v. Dagenhart* child labor case. He contended that the goal of the federal government’s action was social justice, and under the Commerce Clause, Congress could regulate the interstate movement of virtually any article of commerce. John W. Davis, the Solicitor General of

---

56. See also, Social Control Through Law 108-109, 133-134 (1942).
57. Pound, supra note 52, at 699; see also, Roscoe Pound, Social Control Through Law 109 (1942) where he writes "Einstein has taught us that we live in a curved universe in which there are no straight lines or planes or right angles or perpendiculars."
58. The Call for a Realist Jurisprudence, supra note 52, at 706. (emphasis added).
60. Pound, supra note 59, at 388.
61. Id. at 403.
62. Id.
63. Id. at 405-406.
64. Id. at 407.
66. Wigdor, supra note 3, at 196-197.
the United States later sent the seventy-page brief prepared for the United States Supreme Court to Pound for inspection. Pound approved of it, understandably, as "it included the pertinent sociological underpinning and yet had focused sharply on the issues at law." 

Accordingly, in summary, Pound advocated an innovative methodology for the judiciary to embark upon entitled sociological jurisprudence, which sought to supplant the nineteenth century mechanistic wielding of precepts with the pragmatic weighing and balancing of competing interests.

B. Legal Order

Pound understood that "courts and [judges were not] the whole task of [the] science of law." His recognition of legislation as a source of authority for judges to rely on was tempered by his perception that it was ill-suited for certain legal dilemmas. These areas of judicial dominance occur in the weighing and balancing of human conduct and passing upon its moral aspects. Pound had a religious devotion to the common law and the institution of the judiciary. The ability of the law to ascertain the general will of society through legislation is limited and can only be achieved along general lines. Hence for most people, a judicial allocation of their competing interests through his trained reason will be their only relief.

He stated that "Law is more than a complex body of rules..." Rules may be the bone and sinew of the legal order, but technique is its life blood and the ideals are its brains. The idea of law used by modern tribunals contains three elements consisting of legal precepts; traditional ideas of interpretation; and a body of philosophical, ethical, and political ideas as to the end of law. He quoted von Jhering's apt phrase that the process is one of juristic chemistry in which, instead of creating the chemicals, the jurist selects and combines these sources for his purpose.

68. Harbaugh, supra note 67, at 117.
69. The Call For A Realist Jurisprudence, supra note 52, at 700.
70. See, Common Law and Legislation, supra note 59, at 405-406.
71. See, Individualization of Justice, supra, at note 29, at 158; Justice According to Law, supra, at note 34, at 703.
73. See e.g., Pound, supra, at note 37.
74. See e.g., Wigdor, supra, at note 3, at 221.
75. Justice According to Law, supra, at note 36, at 703. See also, Theories of Law, supra, at note 28, at 150.
76. Id.
77. Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 482 (1933).
78. Id. at 486.
giving form to the result. Among these principles which the judiciary should utilize have been and remain to be the works of classical legal authorities. These scholars, although they present idealistic systems which are non-existent, provide the jurist with an instrument of the “highest utility for the administration of justice according to law.”

He believed that the process of the common law had set up the proper mechanisms so that the axiom of justice that “[o]ne will must not be subject to the arbitrary will of another” could be best achieved. He wrote that:

[i]f rules and over-rigid standards sometimes hinder the judge and prevent the best solution of which he is capable, they secure us against the well-meant ignorance of the weak judge and are our mainstay against improper motives on the part of those who administer justice...[as] a judge [is] tied down... by rules of law and the necessity of publicly setting forth his reasons upon the basis of such rules...

Pound felt that even in the earliest and rudest systems of justice the will of the judge was probably not wholly free of the constraints of these rules or principles. The protection of citizenry from judicial caprice through these standards realizes the paramount social interest in general security. The best protection from the dictates of judicial caprice is the trained reason and disciplined judgment of the magistrate. The utilization of these standards do not mandate a return to the mechanistic jurisprudence of the nineteenth century. He asserts that the standard of *stare decisis* does not have as much force in practice as legal theory purports it to have. Further, the “doctrine of precedents” is not a legal precept at all but a traditional art of judicial decision-making. Pound posited that the judiciary and the bar may not ignore the demand for stability in the law

80. *Id.* at 643.
81. *Id.* at 655.
82. *Id.*
85. *Id.* at 696.
86. *Id.* at 704.
88. *See, Mechanical Jurisprudence*, supra, at note 33, at 622 where he states “the task of a judge is to make a principle living, not by deducing from it rules... but by giving a fresh illustration of the intelligent principle to a concrete cause, producing a workable and just result.” See also, *Individualization of Justice*, supra, at note 31, at 158 which declares the over-rigidity of the nineteenth century judicial system was the result of a “want of team play with the social sciences.”
90. *Id.* at 648.
even in periods of rapid growth. The stability of the judiciary was to be established upon the principles of the common law system which beget justice according to law. He explained that:

Administration of justice according to law means administration according to standards, more or less fixed, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment.

The advantages to administration of justice according to law are (1) predictability; (2) security against an individual judge's erroneous judgment; (3) security against the improper motives of a judge; (4) it provides ethical standards of the community to assist the judge; (5) it provides the magistrate with the experience of his predecessors; and (6) law prevents sacrifice of ultimate interests, social and individual, to the more obvious and pressing but less weighty, immediate interests.

Conversely, there have been periods of administration of justice without law that have been necessary to liberalize over-rigid bodies of rules, or to bring the administration of justice into touch with new moral, social or political conditions. However, these periods have always been succeeded quickly by an evolution of new rules.

Judicial discretion in administering justice according to law is inherently checked through the modern common law system. The claims of the parties are set forth in a public record, and in the case of appellate courts, the reasoned decisions are published and are subject to criticism by the profession. Finally, discretion is controlled by the whole training and habits of the judge as we have the guarantee of objectivity in the stabilizing effect of a taught tradition and of authoritative received ideals.

Pound's support of the common law was also based on practical expediency. He stated that "[l]aw is a practical matter." Legal traditions have persisted because it is less wasteful to keep old settled paths than to layout new ones. Evoking the thought of Aristotle, Pound asserted that:

the really universal truth in the economic interpretation is to be found in a conception of law as a social device to eliminate friction, and to prevent waste; as one means by which civilization

\[\]
conserves energy and conserves the goods of existence to meet human needs. 100

Thus, Pound envisioned a judiciary that was to be the dynamic force in certain areas of the law. Also, the institution of the common law would provide order for society as it adjudicated on recognizable and predictable standards, its reasoning was accountable to the public, and its use of discretion was checked in the administration of justice according to law.

C. The Resultant Paradox

The attempt to reconcile the divergent concepts of sociological jurisprudence and a structured legal order dominated Pound’s post-1930 writings. His answer 101 was that the success of a legal system is to be measured by its ability to achieve and maintain a balance between the extremes of arbitrary and limited authority. 102 This process is all the more difficult as the balance cannot remain constant due to the external pressures of the progress of civilization. 103 He does concede that possibly this balance cannot be resolved. 104 However, a rejection of conceptions of juristic reality, 105 as regards rules or principles of adjudication, was unfathomable to Pound. 106 He contended that nothing would be more unreal than to conceive of the administration of justice as a mere aggregate of single determinations without recognition of the significance of such principles as instruments toward the ends of legal order. 107 Further, scholars who are skeptical of judicial justice, and give up the quest to discern this balance ignore the fact that civilization has not thrived by a doctrine that law is not whatever is done officially, but rather what is done officially may be, and ought to be according to law. 108

Pound publicly thought that philosophers should spend their time analyzing the law instead of each other, and that the trash of proposed legal systems wasted time better spent on improving the science of law. 109 He would also make frequent use of the axiom that the boast of every legal philosopher is that he is dealing with reality while those who would apply

100. Id. at 1059.
101. Writers have suggested that Pound brought forward many issues and arguments for both sides of the debate to develop, but he himself did not provide the answers.
102. Individualization of Justice, supra, at note 29, at 166.
103. Id.
104. Id. at 154.
105. The Call For A Realist Jurisprudence, supra, at note 52, at 698.
106. Id. at 707.
107. Id. at 707-708, 710.
108. Individualization of Justice, supra, at note 31, at 165.
109. The Call For A Realist Jurisprudence, supra, at note 52, at 706.
the label "law" differently than him are dealing with illusion.  

This rebuff he pointed most sharply towards his critics in the newborn field of legal realism. In summary, he considered the law to be a fluctuating dynamic force which could not be simply understood though any universal theory of law as process.  

A conclusive answer from Pound as to his understanding of what a workable balance entailed did not develop. Perhaps an incisive clue as his solution comes from his own predilection about the law near the end of his life when he declared himself to be an "Aristotelian."  

This could be the best explanation of Pound after cumulating his thought on the validation of "social interests" whose benefits of social reform are the betterment of civilization as a whole.  

III. CRITICISMS OF POUND  

Pound lived to be ninety-six years old. His teaching career spanned seven decades. Thus, as a matter of history, he influenced a great many scholars, lawyers, and judges. He has been ascribed as everything from a revolutionary to a reactionary by other jurists. We will now examine these diverse criticisms of him from the perspective of his being the leading pragmatist, his influence on the adjudication of United States Supreme Court, and his position in mainstream legal thought.  

A. The Leading Pragmatist  

Pound's contemporaries had little reservation in declaring him the leading pragmatist of the day.  

He garnered praise for leading pragmatism's attack on the complacency of law in the face of cataclysmic changes in the social order of the times. It was felt that in modern controversies,
the pragmatic weighing and balancing of interests had a prominent place in
the judicial process. In spite of this fact, it was deduced by one commen-
tator that pragmatism worshipped at the altar of social reform, and
through attempted evolution the individuality of man may be altered.

It was understood that the achievement of pragmatic goals was to be
accomplished through judicial idealism. Some critics took an open-
minded approach to Pound’s sociological jurisprudence recognizing that
the uncertain future of pragmatism is premised on good purpose. How-
ever, others questioned what standards or tests the pragmatic school of
ered to enable proper weighing of competing interests. Further concern
was also found in there being no “particular endorsement of permanency
of any clause of the Constitution provided we can pile up enough social
interests to offset the sacrifice of the claims of others.” Another wrote
that “[e]very pragmatist, legal or otherwise, falls prey to his own attempt
to widen the boundaries of knowledge. Soon the law knows no bounds,
and the pragmatist disappears into the receding horizon, pursued by the
hounds of skepticism.” One supporter stated that Pound was different
than the rest for even though he was:

[be]st on every side by the legal nihilists whose every insistence
is that the bounds of the law be completely set aside, [he] has
sturdily resisted . . . [and] has [erected] borders beyond which he
will not go in pursuit of the legal uncertainty.

His express repudiation of any orthodox methods of weighing interests
was favorably viewed as the more cautious approach than the arrogant
dogmatism of the perfection of reason, although on occasion confusion
might occur when a judge has to weigh conflicting interests against the
standard of justice. Additionally, it was viewed as only providing
judges and legislators with a cryptic method of evaluation of values in a
particular case.

Pound’s theories of law were created through the synthesis of the great
legal scholars of history, and adapted a doctrine of pragmatic law arising

116. Id. at 66.
117. Id. at 73. (emphasis added).
119. Id. at 294, 304.
120. Kennedy, supra at note 114, at 71.
121. Id. at 69-70. This topic will be further developed in the following section.
122. Thomas A. Cowan, Legal Pragmatism and Beyond, INTERPRETATIONS OF MODERN LEGAL
PHILOSOPHIES 138 (1947).
123. Id. (original used quotations for emphasis).
124. Carleton Kemp Allen, Justice and Expediency, INTERPRETATIONS OF MODERN LEGAL
PHILOSOPHIES 25 (1947).
125. See, J. Stone, supra at note 27, at 363-365.
in human experience. 126 One of his greatest gifts was the ability to "milk [the] minds [of his predecessors]" in formulating his notions of the use of legal history to better understand the dynamics of law. 127

There were leading contemporaries who scoffed at Pound’s reformist assault against mechanical jurisprudence. 128 John W. Davis 129, saved much more of his personal venom for the realists who he felt were inspired but not endorsed by Pound. 130 However he may have felt personally, Davis did make use of sociological jurisprudence whenever his causes would be benefitted in the adversarial process. 131

Prominent realists, who regarded themselves as not constituting a school of legal philosophy, 132 acknowledged Pound’s leading influence on their individualistic movement since the turn of the nineteenth century. 133 When Pound spoke on jurisprudence, Llewellyn said, “men listen.” 134 Yet, although the profession has long relied on his ability to analyze and synthesize ancient and foreign jurists, he urged the legal community to suspend its verdict as to Pound’s condemnation of realism until the facts were before them. 135 The realists chief divergence from Pound was their distrust of traditional legal rules that "purport to describe what either courts or people are actually doing." 136 The result of such a movement was to declare traditional attempts to attain legal certainty illusory, 137 and thus castigated Pound’s sociological jurisprudence with claims of deluded workability under a system of law.

This criticism of Pound’s awareness of judicial realities continued, yet, reluctance to relinquish the myth that social reform may be accomplished under a system of law mechanically applied. 138 Jerome Frank analyzed Pound’s writings and determined that Pound thought that certain areas of the law demanded order and others were more accessible to non-mechanical means—such as problems involving human conduct. 139 Frank cannot agree with such a seemingly simplistic division of law maintaining

126. Cowan, supra note 121, at 138-139.
129. Davis, (1873-1955) who lived during the same time as Pound, was the leading appellate attorney in the United States, the Democratic Presidential candidate, an ambassador to England, and Solicitor General during his legal career.
130. W. Harbaugh, supra note 66, at 414.
131. See e.g., supra note 64.
132. Llewellyn, Some Realism about Realism, 44 Harv. L. Rev. 1222 (1931) as cited in K. Llewellyn, supra note 21, at 53.
133. Id. at 54.
134. Id. at 45.
135. Id.
136. Id. at 56.
137. Frank, supra at note 38, at 208, 215, 138; Id. at 209.
138. Id. at 209-212.
139. Id. at 213.
it as an example of abstract scholasticism. Finally, he quarreled with Pound's attempt to narrow the scope of judicial discretion, contending it was based upon an artificial scheme.

Another commentator, Edwin Patterson, stated that Pound's concept of social interests made a significant contribution to the unending search for basic values in the law and legal institutions. He posited that "Pound's theory of social interests is a teleological type of legal axiology, like that of Bentham or [von] Ihering; it corresponds to the type of ethical theory known as the theory of the good." He continued that "Pound's theory of social interests does not purport to override or supercede the positive law." However, after analyzing Pound's social interests, Patterson cannot determine when appellate courts should discard rules and precedents in favor of a policy method of adjudication.

B. The Supreme Court and Social Interests

During Pound's initial writings on juristic social reform, the Supreme Court was dominated by Chief Justice William Howard Taft. Before taking the first chair on the Court, Taft had expressed the view that courts must look beyond the positive law to adapt to new social conditions. However, Taft was to be the leading advocate on the Court against "outsiders." Pound in particular, who opposed the "sound" way of adjudication calling them "sentimentalists, socialists, progressives, and bolsheviks." Pound alleged Taft's "super-legislature" was conducting a "carnival of unconstitutionality." Pound's revolutionary ideas of social reform through legislation and the courts did not reach the Court during this period; between 1897 and 1937, two hundred and twenty-eight state statutes were nullified, and during the 1920's twelve congressional acts were set aside.

During the demand addressed to legislatures and the courts in the first three decades of this century for a working familiarity with the social sciences, critics have confirmed that Pound led the way. This emphasis on the social sciences in adjudication emerged in a landmark decision of the

141. Id. at 561.
142. Id. at 565.
143. Id. at 568-569.
144. Mason, supra note 38, at 66.
145. Id. at 67.
146. Id. at 70.
147. Mason, supra note 38 ("Up until 1925, only fifty-three congressional acts were set aside.").
150. Rosen, supra note 149, at 171-172.
twentieth century on social reform, Brown v. Board of Education of Topeka. Critics held that "Chief Justice Warren's rational explanation of law had to reflect a social reality which looks for verification to empiricism rather than to the norms of precedent and history." In Brown, Paul Rosen concluded, the social sciences cited by the Court were not only crucial, but they may have been compelling in their adjudication.153

By 1962, scholars were writing that "it appears that the 'balancing of interests' approach to due process is the test which has been accepted by the majority of the present members of the Supreme Court." Further, the balancing of interests formulated by Pound is a very flexible tool of adjudication in cases on due process. This is because, according to Edgar Bodenheimer:

"Due Process" is, perhaps, the least frozen concept of our law—the least confirmed to history and the most absorptive of powerful social standards of a progressive society.156

Professor Bodenheimer conceded that whether the Supreme Court has always succeeded in striking a just balance between individual and social interests in its decision-making is a matter of debate and criticism. However, concluding, he has faith in Pound's theory, and regards the concept of justice generally guiding the majority of judges in due process cases appearing to be an acceptable one.158

The Warren, Berger, and Rehnquist Courts having accepted this balancing of interests approach to due process have sought to expand its use into other fields of constitutional adjudication. Justice Black, concerned over this development, wrote in dissent in Griswold v. Connecticut:159

The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I be-

151. Id. at 172.
153. Id. at 488.
154. Id. at 489. Professor Bodenheimer is quoting from Justice Frankfurter's concurring opinion in Griffin v. Illinois, 351 U.S. 12, 21, 91 L.Ed. 1903, 67 S.Ct. 1672 (1956).
155. Id. at 495.
156. Bodenheimer, supra note 152, at 489.
159. Id. at 521.
believe and am constrained to say will be bad for the courts and worse for the country. 161

Commentators have asserted that from this decision, the majority of the Supreme Court has affixed a “mantle of arrogance” upon itself in the right to privacy arena. 162 Recently, Justice Antonin Scalia has attempted to throw off this mantle which he considers an “albatross about the neck of the Court.” 163 Its results are only “unchanneled individual views” which create greater unpredictability in determining rights under the due process clause of the Constitution. 164

Pragmatic balancing by a conservative Court, which could result in the deprivation of constitutionally protected rights, was foreshadowed by Walter Kennedy as far back as 1925. 165 Julius Stone also commented that even Pound must frankly recognize that the law is a handmaid to society, and it must rise and fall with the rise and fall of society. 166 Therefore, when society’s values change, the valuation of those social interest, under the law, must accommodate those changes. 167 The case of Maryland v. Craig 168 is just such an example of conservative pragmatism gone amuck. 169 The Court, in holding that the right to confrontation does not mean what it purports to say in the Constitution, determined that the social interests of the individual victim and the social interest of the public order outweigh, at least in some cases, a defendant’s right to face his accusers. 170 One critic chastises that:

[n]ow, an individual, in the direst peril of his liberty, can be denied his or her basic rights under the Constitution in a case-by-case adjudication which provides a litigant’s legal counsel no appreciable opportunity of outcome-determination. 171

In conclusion, Pound’s influence on the Supreme Court, as interpreted by some commentators, has been enormous, as interest-balancing is currently pervasive throughout constitutional adjudication.

161. Id.
162. Id. at 641.
163. See supra note 120.
164. J. Stone, supra note 27, at 363.
165. Stone, supra note 29, at 365-68.
168. Id. at 643.
169. Id. at 644.
C. Mainstream Legal Thought

As illustrated in the previous sections, Pound’s balancing of interests was accepted into mainstream legal thought even prior to his death. His pragmatic philosophy provided the foundation for new theories of law which sought to advance pragmatic balancing by giving substance to judicial valuations of interests. 172 This influence may be overlooked by some as “[h]e was so influential that much of what he wrote now seems completely commonplace because of [i]ts almost universal acceptance by subsequent writers.” 173 Legal theories of “law and economics” have been attributed to Pound’s efforts and writings which encouraged an integrated use of the social sciences in law. 174 Owen Fiss echoed Pound’s notion of judicial authority to weigh competing values, but also restated that “this dialogue is taxing, at times almost beyond the powers of anyone.” 175

Professor Julio Cueto-Rua writes:

Today, a judge cannot look at the conflict before him from a purely individual standpoint. The social, or general, point of view must be taken into account. In a sense, just as the legislator recognizes or protects an interest by enacting a general rule of law, the judge recognizes or protects such an interest by rendering a decision. 176

Thus, the pragmatic philosophy of law has come to be regarded as a textbook method of adjudication. Cueto-Rua concluded that pragmatism provides the judge with opportunity to do justice when logical treatment is insufficient or when legal development has gone too far. 177

IV. CONCLUSION

The critics of Pound’s sociological jurisprudence attacked him for his lack of revolutionary vision, and his failure to erect judicial safeguards to protect his philosophy in practice. The most telling commentators of all have been the judges themselves who utilize his balancing of social interests in their adjudication of cases. Finally, his pragmatism has been assimilated into mainstream legal thought producing innovative attempts to

173. Id. at 8.
175. Id. at 191.
176. See e.g., Kocurek, Roscoe Pound as a Former Colleague Knew Him, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 419-420 (1947).
177. See e.g., Kocurek, Roscoe Pound as a Former Colleague Knew Him, INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 419-420 (1947).
address the possibly unanswerable question of the proper valuation of competing interests.

\begin{quote}
\textit{A. Kampf Fü Recht}
\end{quote}

Pound’s life work was a struggle to discover justice and law. He seemed to have read and understood legal philosophies from Aristotle to von Jhering.\textsuperscript{178} His work was influenced heavily by reading these philosophers in pursuit of bettering society as a whole.

The stagnation of the mechanistic American jurisprudence of the latter nineteenth century provided Pound with the perfect opportunity to raise his theory of sociological jurisprudence. For Pound, who heavily relied on von Jhering, this would be the final expression of law as a means rather than an end. However, as the criticisms started to come in, and the courts did not say how high when Pound told them to jump, he restrained his progressive proposals.

He did not do this by moderating his principles of social reform, but by incorporating the common law and its inherent restraints into social engineering. This new formulation was to augment Pound’s original “revolutionary” ideas into “evolutionary” ones. Thus, social reform could be actively pursued by legislatures and the courts without the waste of scrapping its existing institutions.

The new jurisprudential movements that have arisen since Pound set forth his theory of social interests have been built upon the rock of pragmatism. The fatal error of the realists was their denial Pound’s conception of law being evolutionary, and constrained by juristic principles of adjudication.

Other jurists have attempted to restrain the judiciary’s discretion by organizing systems for the proper valuing of competing interests. Pound never attempted this act of forcing the social sciences upon the legal system. He was wary of any such constraints on the judicial process preferring to rely on the season and intellect of the judge.

\begin{quote}
\textit{B. Legacy}
\end{quote}

Pound’s struggle for social justice has left an indelible mark on our judiciary and idea of law. One may ask, when did adhesive strips become “Band-aids?” When did tissues become “Kleenex?” And finally, when did Roscoe Pound’s weighing and balancing of interests and policy-made law become so ingrained into our legal tradition that we no longer recognize his genius for providing it to us? His influence on our perception of law is

\textsuperscript{178} \textit{Id.}
without equal. Society does not look to metaphysical absolutes as expressions of law anymore. We are constantly balancing and adjusting competing interests through legislation and judicial proceedings.

Pound’s sociological jurisprudence has its dangers, this cannot be denied. One merely has to look to the work of the Supreme Court, and read what Justices Black and Scalia have said about it to find fault. However, the wonders of social reform that have been accomplished through pragmatic balancing instead of being constrained to dogmatic absolutes must be acknowledged as well.

The secret to sociological jurisprudence is that it never promised any particular interest overriding preference over another. Pound’s primary aspiration was to order civilization for the betterment of mankind through these competing interests. No interest is absolute or complete in modern society as valuations of these interests will rise and fall with time. We should take comfort in this Aristotelian theory, and take arms against the evil we can see, though the struggle itself may threaten us with an evil we cannot see.