Roscoe Pound and Legal Education in America

– Issues, Methods and Theory

© Copyright January 1st 2013

All Rights Reserved

Dr. Mathias Alfred Jaren

MPA. JD, LL.M, Ph D

Opening Thoughts:

“ I had anticipated worse from the Harvard Law Review which has usually sent my books to what I would call unfriends. But it has been my inflexible rule never to answer attacks. Such in time the attacks are forgotten.” [[1]](#footnote-1)

The great Oliver Wendell Holmes Jr. took the view that Langdell’s academic design of the case method was “ a misspent piece of marvelous ingenuity” , and that such a legal curriculum only represented the powers of darkness’. (Harvard Law Dean (1870+) and law professor credited with law school case study pedagogy) Holmes continues this sentiment in a letter to Sir Frederick Pollock (Professor of Law, Oxford) writing that Langdell’s view of legal training represented “ the narrow side of his mind, his feebleness in philosophizising, and hints at his rudimentary historical knowledge. - I think he (Langdell) is somewhat wanting in horse sense.” [[2]](#footnote-2)

“The idols of the cave...which a school bred lawyer is sure to substitute for the facts......may be much better material for intellectual gymnastics than the facts themselves and may call forth more enthusiasm in the pupils, but a (law) school where the majority of the professors shuns and despises the contact with actual facts has got the seeds of ruin it and will and ought to go to the devil.” [[3]](#footnote-3)

ACKNOWLEDGEMENTS

It is never easy to remember the many people who made doing a work of this form possible. Dr. Avrom Sherr Director of the Institute for Advanced Legal Studies at the University of London provided me many opportunities to meet scholars and present my ideas. My friends at the Socio-Legal Studies Centre, Oxford refreshed my perspectives when they had become tread-worn. Librarians at Harvard Law School found me when I was often lost in the “Red Collection”. In Lincoln Nebraska and Iowa City the archivists at the University of Nebraska and University of Iowa located documents, photos and letters I would otherwise have never seen. As a doctoral student at the University of Minnesota my advisor Dr. Bill Ammentorp was not suitably compensated for his support of these inquiries. While a law student at Rutgers I gained many new perspectives from Dr. N.E. H. Hull, insightful and keen of mind, a genuine inspiration. In September of 2010 I participated in the Legal Science and Legal Theory Conference Oxford University, led by Dr. John Gardener. The many fine papers and presentations by legal philosophers rekindled my interest in this work, and made clear I needed to offer it in publication. Dr. Norma Aubertin-Potter of All Souls College , Librarian in Charge at The Codrington Library Oxford afforded me Reader Access to the rare books including papers of William Blackstone. On quiet sunsets in the Botanical Gardens at Oxford University, Charles Dodgson and Alice Liddell often joined me in solitude on an old wooden bench, and cheered me on in many small reflections. To have accommodations in Oxford at Balliol, Magdalen and St. Edmunds Colleges facilitated many fine evenings of thought, rest and discourse. Last, to Rose at the Oxford University Club, she stayed late in more than one English Storm, in that I might have a room.

Abstract

Artists and scholars often work in some form of abstraction. In many ways qualitative methods are organizing principles to move one step beyond abstractions into a sense or reference regarding some complex set of issues or conditions which warrant attention, and change. This work seeks to discover that intersection of philosophy, practice and shared beliefs in American Legal Education. Roscoe Pound held a pivotal position in legal education during the birth of legal education following the collapse of the legal apprenticeship system. Langdell at Harvard Law School made the case study method into the core of our legal curriculum as we know it today. Other’s like Karl Llewellyn and Fred Rodell knew very well the deficiencies, yet their work failed to change the crucible of law school teaching, how law reviews are managed and prepared, and entirely missed the many deficiencies of entry to the legal profession, the bar exam. The structure of legal discourse, learning and knowledge has many false mirrors, in effect the “legal paradigm” has become too self serving, as I hope to illustrate here.

What has been attempted is to illuminate a scholarly path which led to nowhere, and excite others to pick up the grail of legal discourse once again.

The twentieth century in legal education began with Dean Roscoe Pound of Harvard Law School demanding that law take broader perspectives . The time had arrived for sweeping changes in how judges judged, law professors taught, and lawyers practiced. For thirty years Roscoe Pound labored tirelessly in the design of a “Sociological Jurisprudence.” Toward the end of Pound’s twenty years as Dean of Harvard Law School, Karl Llewellyn of Columbia Law School crafted a second perspective on law, which he called “Legal Realism”. Pound retired from his role as Dean in 1936.

In 1935 the German Scholar Ludwig Fleck published a work which studied the nature of science, and articulated important precepts and maxims about how the structure of science precluded innovation and creative design. By 1963 Thomas Kuhn published a sequel to Fleck’s work titled “The Structure of Scientific Revolutions.”

Kuhn endeavored to set the contours of science which could be identified as constraints to the formation of new knowledge.

Roscoe Pound and Karl Llewellyn set out to bring the American legal process forward by monumental steps in how law was taught and practiced. American legal education up to the late nineteenth century was a system of apprenticeships. Young men paid law firms to gain experience in the law. Their time was sold for more than they were paid, and law firms enjoyed the benefits of the apprenticeship system. Today, law schools approved by the American Bar Association prepare and graduate candidates for licensing exams . Thirty percent of those are not prepared to be examined, and fail the state bar exams.

This work explores the process used by Pound to create his “Sociological Jurisprudence,” examines Pound’s biographical and personal history, studies his design process, then articulates qualitative design questions and policy recommendations for improvements in the construction of new legal paradigms and academic policy for law school graduates. By comprehending how difficult change is in design though understanding Fleck and Kuhn’s constructions of paradigmatic constraints, a path is carved to forward new scholarship representative of Pound and Llewellyn’s skills and abilities. I argue Pound’s “ Sociologist” is all inclusive, and represents an excited interest in law and the legal profession of many scholars.

TABLE OF CONTENTS

CHAPTER I INTRODUCTION , Insights, Issues & Fundamentals

Background 9

The Problem 25

The Study Design 32

CHAPTER II – SETTING THE CONTEXT - POUND’S BIOGRAPHICAL BACKGROUND , REMARKS AND CORRESPONDENCE

Early Years 37

Pound ; as Botanist, Lawyer, Judge, Dean and Scholar 43

Theories and Ideas in Development 47

CHAPTER III – SENDING THE MESSAGES – AN ANALYSIS OF POUND’S ARTICLES ON LEGAL EDUCATION AND THE PROFESSION - A FOCUSED INQUIRY INTO POUND’S THEORY FORMULATING LAW REVIEW ARTICLES

“What is a Penal Statute?’, 70

Vo1 42 Central Law Journal p. 135 Feb 14th 1896

“Dogs and the Law” 71

8 Green Bag p.172 April, 1896

“Are Judgments Quasi-Negotiable?” 72

Vol. 43 Central Law Journal p. 440 November 7th 1896

“ The Decadence of Equity” 74

Proceedings of the Nebraska State Bar Association

Vol. 1 p. 152-166 1903

“Do We Need a Philosophy of Law?” 76

5 Columbia Law Review 339 Vol. 5, May 1905

“The Spirit of the Common Law”

18 Green Bag 17 January 1906 83

“Executive Justice”

The American Law Register Vol. 46 No 3 p. 137 92

“Spurious Interpretations”

Columbia Law Review Vol. VII June 1907 No 6. p 379 96

“The Need of a Sociological Jurisprudence”

The Green Bag - Vol. XIX p. 607-615 1907 99

“Enforcement of Law”

The Green Bag Vol. XX, p. 401 1908 Boston 109

“ Mechanical Jurisprudence”

8 Col. L. Rev. 605 (1908) 117

CHAPTER IV

WAYS OF INTERPRETING LEGAL THEORY 129

METHODS AND MODELS - A FOCUSED STUDY OF METHODOLOGICAL OPPORTUNITIES IN LEGAL THEORY CONSTRUCTION AND ASSESSMENT

Background on Attributes of Legal Theory & Design 129

The Work and Utility of Dr. William M. Ammentorp, 131

et. al., Integrating Legal Theory Building with

Social Design Postulates

Method & Language – Building Perspectives 133

Environmental Testing of Ideas

Design Implementation to Limit Uncertainty 138

Paradigm Discussions

& Revolutions in Knowledge Management 144

Classification Taxonomies and Linguistics 164

Ludwig Fleck 175

Thomas Kuhn 181

CHAPTER V SUMMARY & CONCLUSIONS 189

Formulated Case Study Questions for Legal Education 190

and the Profession

The Process of review 195

Derived Policy Issues for Legal Education and Bar 205

Final Remarks 213

Further Research 217

Bibliography 220

Letters 229

Cases Cited 230

Pamphlets 231

CHAPTER I. INSIGHTS ISSUES AND FUNDAMENTALS

BACKGROUND

Scholars to date have done little research on American legal education. The technical and theoretical materials associated with legal education are significantly different from those in other areas of research scholarship, limiting the range of intellectual interest from outside the legal profession. Legal education in the United States has been a closely held guild, controlled over time and in varying degrees by lawyers, law faculty, and to a very limited extent, the universities with which they are associated. Publications and documents relating to legal education are substantially controlled by lawyers , law students, law schools and legal associations. This creates a dilemma, and presents striking similarities to the intellectual dialog exploring paradigms of science during the past century.

Legal scholarship and the legal academy exist apart from traditional disciplines in higher education. The use of doctrines and black letter law to ensure reliability in predicting dispute outcomes is arguably efficient, but the “legal science” associated with that learning process exists only in law school curriculums. For example, a primary lawyer’s value to a client is an ability to accurately predict outcomes of a legal dispute. Predictability is wholly reliant on doctrinal interpretation and rule-based consistency. This is the legal doctrine of *stare decisis.*

When rulings come from cases that are substantially different from earlier precedents, predictability ends. New interpretations and legal reasoning must then be employed, public policy is often considered, and new law emerges.

This demands a strong focus by legal educators on practical – professional skills. Law schools are not engaged in educating legal “scholars”.

The central purpose of legal education is to prepare individuals for practice in the legal profession.

To study the nature of legal education, and get a perspective on the attributes of legal scholarship that is not focused on training lawyers, one must look beyond the traditional law courses and doctrines. Subjects like torts, contracts, property, civil procedure, while invaluable for lawyering, teach little about the nature of law in broader contexts. The result has been that looking at law from other academic disciplines is limited. Studies which explore legal thought from the perspective of paradigm formation are rare. While legal theory and jurisprudence are common topics, the nature of their construction and the limitations of their purpose remain poorly understood.

To find sufficient material for a study of legal theory and paradigm formation, one needs to work in biographical and primary writings. This study evaluates Dean Roscoe Pound’s writings, background, and personal correspondence. Pound, who was Dean of Harvard Law School from 1916-1936 is widely recognized as the founder of a school of thought identified as “Sociological Jurisprudence”. His scholarship attacks traditional legal practices and argues that lawyers should be more broadly educated to understand the social aspects of the law they practice. The arguments are very substantial and encompass many areas of law in the twentieth century.

One argument supported by the literature published concurrently and subsequently to Pound’s writings is that Pound set the stage in legal thinking for the twentieth century. Dean Pound’s scholarship was profuse.

He wrote numerous significant articles over a fifty year period, making him an ideal choice for this research. Pound was selected because he represents a nexus between legal education at Harvard Law School, and the theoretical formulations of his time. Pound’s work included careful rethinking of administrative schemas in many areas of the judicial system and its training antecedents. Harvard , with Pound at the helm, sought to influence American law schools and the American legal profession. Harvard established a powerful leadership position in American Legal education by 1880 following the broad adaptation of Christopher Columbus Langdell’s case method for legal study. Langdell, Dean of Harvard Law School during the year Pound was enrolled, originally ran Harvard law Library. Given a shortage of books, and his failing eyesight, Langdell crafted a process of study whereby students had to know cases to engage in his lectures. One could regard Langdell’s case method as a paradigm in legal education. Pound tried something far more dramatic.

Pound’s search for a Sociological Jurisprudence attacked the profession, the bench, and the schools. In this thesis his work is organized along with his biographical and personal writings to discover the categories and attributes of his scholarship to legal theory construction and the broader concept of a “legal” paradigm. Useful questions for further research were constructed and appear in Chapter V.

The presumption was that a scholar positioned at the point between personal and biographical items which report actual attributes of Pound’s reasoning and life could define the backdrop of his work as a theory builder. Conclusions made by the Pound, which appear in his law review articles are then better understood. One derivative event, which has powerful qualitative implications, is that one can review the alternative choices which were not selected by the Pound as his crafted his scholar on the topic. The intricacies and value weighing performed by the original writer become visible, and the powerful lessons relating to theory building can be learned. This becomes an unusual moment in the intellectual experience.

My argument is that law school curriculum for the twentieth century is locked up in an abstraction of the apprenticeship training system to which it owes its nineteenth century origins and traditions. An intense need for law schools to remain above professional criticism, while remaining true to its traditions, locks out broader conjectural thinking about variations in legal education systems and legal thinking. Pound tried to resolve these dilemmas by broadening the perspectives held about law in his articles about sociological jurisprudence. In today’s law school courses the practical and applied curriculum denies law students access to fundamental legal scholarship and exciting legal theory that is at the nucleus of their discipline.

Nearly everyone is familiar with Supreme Court rulings that substantially changed how America thinks.

Legal controversies appealed to the U.S. Supreme Court are actually screened for their potential in resolving doctrinal and precedential disparity between state and federal court rulings. The high court does not hear all cases put forth on appeal. Each case sent up from the appeals courts is reviewed but only those with the greatest potential for resolving an important social problem or economic conflict are granted *certiori*. This certification process has many purposes. The high court is most concerned with establishing uniformity in federal judicial districts. Social issues are often transformed into legal holdings that may encourage a change in doctrinal interpretation.

(See, e.g., *Brown v. Board of Education,*[[4]](#footnote-4)supporting a change in both the interpretation and application of the 14th Amendment.) These transformations however are infrequent.

The primary goal of creating social balance and legal continuity paradoxically serves as an obstacle, denying access to the dialogue, forum and process of the law. As a result of formal procedures, forum access for non legally trained individuals who wish to participate is severely limited. These limitations occur on at least two levels. The forum is rigorous and the dialogue is driven by precedent. Even juries are provided with careful instructions to review facts presented by lawyers in court cases. Individuals confronting law in the judicial system must cope within well defined, rigid systems of reasoning. Untrained individuals simply cannot effectively represent themselves in a court of law. Problems result from static systems of thinking, as we shall see in the discussion of methods and paradigms. In particular, the existing paradigm of lawyer training significantly impacts law students, both on entry to the legal profession, and during their careers.

Academic and scholarly inquiries from other disciplines, the social sciences, and philosophical critiques are largely ignored by the forum and its well-established proscriptions. It is rare for courts to rely even on legal scholarship appearing in law reviews when writing their decisions. There is a formalism in law that has consistently survived numerous attempts at transformation or re-definition. It is that formalism that serves as a barrier, perhaps intentional, to prevent entry on a meaningfully level for those who have not acquired the requisite legal training.

Within the legal education framework, doctrinal ideas and paradigmatic designs of theoretical change exist in a gestalt[[5]](#footnote-5) framed by professional associations that accredit law schools, legal practitioners, and the faculty members who serve as the sources of legal scholarship. It is a curious state of affairs. Because the law requires great stability, any ideas about significant changes had to be made under the guise of “jurisprudence”. Make no mistake, however, the jurisprudes[[6]](#footnote-6) were intentionally looking to improve the “professional bar”.

It is in the smaller legal world of the jurisprudes that we find real “higher education” developing. It is the jurisprudes who wanted to administratively change legal education in the twentieth century. They also sought to change the courts, the way lawyers think, and the way legal scholars teach legal subjects.

Law schools and American legal education were evolving at the same time Harvard Law School Dean Roscoe Pound was constructing a complete change in the way legal thinking and process were perceived.

Uniquely interesting are two concurrent events. Pound almost single handedly drove the 20th century transformation from legal formalism to sociological jurisprudence, legal realism, and beyond. Subsequently a total paradigm shift in the discipline occurred among some law faculty, yet the legal system remained unchanged.

In the 1930’s when legal scholars attempted to shift the paradigm of legal traditions beyond Pound’s ideas into a paradigm of “legal realism, “ a similar result can be observed. The legal system changed little, and law school curriculums remained much as they appeared in the late 19th century.

In the earliest debates about law schools and legal education by members of the American Bar Association “ First Committee” and the soon to follow AALS Committee on Legal Education, conversations focused on the problem of changing an apprenticeship training system to a college based professional curriculum. Early twentieth century legal scholarship by academic leaders like Pound occurred apart from the movement by the National and State Bar Associations to take control of law schools and formalize legal education into an organized and highly controlled professional/technical curriculum. This is one of the greatest misfortunes for legal education in the twentieth century. The intellectual excellence of legal scholarship emanating from Harvard and Columbia came to represent an apartheid of legal jurisprudence, distinct from legal professionalism. American law school graduates today study very few doctrinal treatises, and rarely study any restatements of the law.

Instead they graduate having reviewed hundreds of selected appellate cases in “casebooks”, [[7]](#footnote-7) with no foundation discussing the evolution[[8]](#footnote-8) of legal concepts that they must fully comprehend and propound as legal practitioners. Law school graduates arrive at state bar exams without a background for the intricate analytical demands evaluated by state bar examiners.

Worse yet law school graduates must hire contractors to teach them how to answer these unique questions with the split second timing of an Olympic sharpshooter all while sitting for two days in an electrified sweat filled hotel or auditorium on temporary, portable furniture. We have not come far in the area of professional licensing. And law schools do not prepare their graduates to engage in these licensing exams. The eloquence of learning, quiet reflection, and experiencing the joys of self confidence and certainty of success are simply eliminated from the entire process. It is a great and expensive tragedy.

It is possible to conclude that the scholarship done by academic leaders like Pound on theoretical matters allowed the bar association and state bar examiners to take control of law schools. They were able to formalize curriculums into an organized “ associate ship” not unlike legal apprenticeships during the first two hundred years in American history.

The legal practitioners who prevail in accreditation and licensing matters uphold the values of their 19th century predecessors. The result of their activities has the consequence of retaining the “attributes” of the apprenticeship system.

The present consequence is a law school faculty cohort who are for the most part practitioners with no scholarly training other than their experience in practice and when they themselves were law students in “practitioner” law schools. A review of the credentials of the approximately 5,000 American law faculty members listed in the AALS [[9]](#footnote-9)annual review results in locating very few academics other than individuals trained in law schools.

Individuals like Pound, an outstanding example of a legal scholar, must be classified as different and apart from the apprenticeship & practitioner associate model. Pound only attended Harvard Law School for one year before returning to his home in Lincoln, Nebraska, first to earn a PhD in Botany, then to become a lawyer through the apprenticeship system. Pound did not vigorously attack bar examinations and accreditation policy activities. Much of what Pound wrote constructively questioned practices within the legal profession. Ironically legal education was unresponsive to his new ideas. There is an enormous gap between decades of unchanged curriculum in law schools, and at Harvard, which distinguishes theoretical work in law from academic legal training.

Pound attacked the status quo of the legal profession as an academic leader, from the pulpit as dean of the nation’s leading law school. While law schools were to graduate law clerks, deans were supposed to write theoretical materials about legal change and process. This was a major trade off between being Dean and being a reformer of the profession. By default the relationships between the American Bar Association accreditation practices and legal education administrators forces a presumption that legal scholarship and the regulation of the legal profession cannot be separated. It is time to understand that these relationships are inefficient.

One hundred years of self interest and curriculum traditions that deny intellectual growth in the law, producing 56,000 law school graduates annually , one third of whom are not capable of passing a state bar licensure examination is certainly no great legacy.

Curiously, while it can be argued that the transition from apprenticeship systems to formal educational requirements was fragile, there seems now to be little support for continuing the earlier arrangements. Law schools have matured. Arguably external professional reviews are mere formalities.

Bar exams of law school graduates are absurd relics of earlier control systems imposed upon expanding law schools and formal legal education. Law schools are quite capable of self appraisal. The original premises upon which the ABA and state bar examiners were granted the roles of law school accreditation and bar examining of law school graduates are now extinct. Individuals in possession of the Juris Doctor degree will make better contributions during their careers as judges and advocates if they enter the profession with a comprehensive understanding of scholarly inquiry, and the history of the profession in which they intend to build their careers.

Both areas are absent from most (American) law school curriculums. Roman law[[10]](#footnote-10) disappeared decades ago, as did Equity Pleading.

Law school graduates receive no incentives toward their careers to learn and understand issues and problems in the selection of judges, judging as an art, the behavior of juries, the attributes of their profession, or the wisdom of legal thinking over the centuries. Social science and philosophical scholarship has been omitted from the education of future attorneys.

While Pound had the authority and legal credibility to articulate views which encompass some of these areas, the same remarks would have been ignored if they were advanced by scholars in the social sciences.

My inquiry points to an educational evolution which occurred in parallel contexts. Law schools are a relatively recent phenomenon. Prior to formal classes in law, legal training was entirely accomplished by apprenticeship arrangements. Apprenticeships in the American bar began early in the country’s history.

George Washington paid considerable funds for an apprenticeship for his nephew, Bushrod,[[11]](#footnote-11) who was ultimately appointed as a Supreme Court Justice. The first law school in America started in 1784 at Litchfield Ct.

The school was enormously successful, graduating 1,500 men[[12]](#footnote-12) in its 60 year existence, among them two U.S. Vice Presidents, 100 U.S. Congressmen, twenty-eight Senators, 14 Governors, 39 State Supreme Court Justices, and three U.S. Supreme Court Justices. [[13]](#footnote-13) It took about 100 years following the Litchfield school for other educators to determine that legal formal academic training was an excellent source of revenue for universities. A few caught on early. Notably among them Harvard Law School, chartered in 1817. Why have we never again seen a Litchfield law school? The answers are very important and interesting.

Subsequent legal training occurred on smaller scales in rural areas, at times at colleges and universities, but equally as often in small groups at law firms and in judge’s chambers.

Between 1800 and 1885 little in the way of formal legal education was expected or required. Many lawyers discouraged formal training, favoring the apprenticeship. The value of an apprentice was two fold. First, the apprentice paid for his seat to work in the office, generating revenue for the firm, and second he created revenue [[14]](#footnote-14)streams from billable hours.

There were many small regional bar associations, but nothing of a national character occurred until 1878. Then, under the leadership of 100 lawyers from 21 States, the American Bar Association was formed in Saratoga Springs, New York. Of particular importance to this study is the ABA “First Committee” on legal education. The members of this committee to this day have substantial influence on legal education. In effect there is a long held tradition of lawyers overseeing their apprentices that was not to end. Instead it would be transformed and brokered between law schools and law firms through the ABA First Committee on Legal Education. The prevailing sentiment was and is that the ABA should retain an apprentice “oversight” of law school graduates, while the state bar examiners control access to practice.

The ABA “First Committee” did not retain their exclusive role for long. Law professors are also lawyers, and as law schools became stable during the late 19th century, law professors organized and formed what in 1900 would be called the American Association of Law Schools, the AALS.

The organization began in the context of small but meaningful faculty collaborations , initiating written standards for many aspects of law school teaching and administration. The origins of the AALS were in the ABA First Committee.

Law school faculty sought and gained control of the ABA “First Committee”, then transformed this power base to a new and separate organization, now the present day American Association of Law Schools. [[15]](#footnote-15)

Requirements for graduation, curriculum content, and eventual entrance to the bar would all continue to be determined first by ABA members who were practicing lawyers, true even to this day.[[16]](#footnote-16) These powers were never transferred to the AALS. No one was initially thinking about change, they were more focused on preservation of their profession . As such, legal education remains astonishingly unchanged, but for the actual case law being taught. Major legal texts from 1930 can actually be of a higher quality than those in current use. (Llewellyn, 1931) Insofar as explicit doctrinal issues can be held relatively constant, many very early writers were more articulate than their contemporary law faculty cohorts. It is an interesting phenomenon, not unlike Greek scholarship which often seems to have far more clarity than much that followed in subsequent centuries.

As we shall discover legal practitioners as members of the ABA overwhelmingly won the contest over what would happen in American Law schools and legal education back at the start of the twentieth century. The discussion turns into a demonstration of a caste system, where the lowest members of the caste are very likely to stay there. Theoretical contemplations about the law are not entitlements of law students.

Law students will be fortunate enough if they can run the post law school gauntlet of a bar exam. Although America has a compelling need for legal scholars, there is strong evidence that most law schools have no design or desire to produce them. There exists a sustained effort to see law beyond the Juris Doctor case method system. Law school faculty and bar examiners have managed to ignore it. A wide range of legal scholarship has emerged, having gone through considerable transformation since the founding of the ABA and the AALS. This scholarship demonstrates complete shifts in how to perceive the law.

The shifts are dramatic. The changes have initiated new perspectives; they are easily viewed as paradigm shifts. (Kuhn, 1963) Arguments for change such as these were normally “out placed” from mainstream exchanges about law schools and curriculum, and instead were made more subtle. Theoretical scholars called their work “Jurisprudence” [[17]](#footnote-17), the philosophy of law.

However there is little which is conjectural in their writings, and much which represents strong advice about contemporary judging, lawyering, and the acts of courts and legislatures in their conduct of the American legal experience.

The Legal Realist movement, a direct descendant of Pound’s Sociological Jurisprudence[[18]](#footnote-18), had no better luck effectuating change in legal tradition. Theory cannot articulate tradition.

It becomes rather clear after considering the work to construct a sociological jurisprudence that the constraints understood in paradigms are valid constraint operative in the American Legal System. Law schools would not become excited about intellectual skills foreign to holders of Juris Doctorate Degrees.

Pound himself, never having graduated from law school, instead was a scholar of the recently articulated Darwinian view of classificatory schemes. And to this task Pound was exquisitely suited. Pound brought many new frames of reference to the debates and discussions where “law” was contemplated.

But Roscoe Pound was substantially different from the majority of law school deans and faculty during his time, and would still be perceived as unique today. Law schools do not invent nor mold into legal scholars individuals similar to Dean Pound.

Socratic case book dialectics, in concert with the proscriptions of Dean Langdell (Shreve, 1983) and the case method approach , are an antithesis to the scholarly development of thinkers who ask broad and important questions about the law. The case study method introduced by Langdell , appointed Dean of Harvard Law School in 1870 takes presumed, as did many in the time that law is a science. Langdell viewed the classroom[[19]](#footnote-19) and the library as laboratories where students could pursue the scientific analysis of law . In the world of legal conjecture and theory, the story is different. Here one can discover an ideal range of legal scholarship that has evolved through considerable transformation since the founding of the ABA and the AALS. Mysteriously, the great debates about American legal thought occurred outside the law school curriculum .

Roscoe Pound’s work, which he called “Sociological Jurisprudence”, was actually a very explicit manner of seeing legal issues and procedures, no less so was “legal realism”. Pound used the broad spectrum of jurisprudence to lecture directly to judges, lawyers and court administrators about the legal process and context. There was very little conjecture, and very substantial advice in much of Pound’s “Sociological Jurisprudence.”

Law was viewed first as a science, (Amos, 1870) then as something mechanical, [[20]](#footnote-20) next as a phenomenon which could be understood from a sociological perspective,[[21]](#footnote-21) and subsequently as a body of and way of perceiving knowledge which had to be “realistic” (Llewellyn, 1930) . This argument continues on into visions of critical and post modern theory analogs. (Unger, 1986) He worked in a context of “science” viewed as a legal concept far different from usage of the same term in the natural sciences. [[22]](#footnote-22) One set of elements in Pound’s legal analysis was a search for policy mechanisms.

These variables can be discovered in the cultural and social influences which existed between the committees , criticisms, personal correspondence and lecture notes which can be attributed to Pound’ s scholarship. What is so important about Roscoe Pound is that he was building a vision of what law should be in the twentieth century and beyond.

As a man of the 19th century, Pound returned to Harvard prepared to discern one or more models of legal theory building. Pound’s legal theory was an operative applied legal process, derived from jurisprudential authorities of his time. His analysis included a search for policy mechanisms, cultural and social influences which related to actual case law and adjudication, and the process of how to contemplate the many dimensions of legal discourse. While his work was constrained by the legal “paradigm”, his skills at model construct in legal theory are brilliant, and worth substantial exploration.

The Problem

All the Deans and the AALS bargained with the ABA early in the twentieth century to create a model of legal education which still exists and is in operation to this day. The great lawyer and scholars spoke about change, but did so under the guise of being legal philosophers.....jurisprudes.[[23]](#footnote-23) Their agendas were hidden in materials they called legal philosophy and legal theory. As we shall discover, what Pound and others really sought was fundamental change in legal process and thinking at the practical and professional level. One qualitative dimension reviewed later in this work is the nature of legal theory building in its primacy.

By locating specific intersects of literatures, lectures, personal correspondence, records of meetings, and biographical facts, the very nature of how and why Dean Pound discovered Sociological Jurisprudence becomes visible to the scholar. The nexus between law’s intense need for predictability and the attempts to “shift the paradigm” by legal scholars and educators away from traditional practices is an important and difficult to define intersect of this inquiry.

In many disciplines scholars using qualitative research sought to derive from natural discourse constructs which could be “translated” into viewable categories, then reinterpreted following assimilations into grouped generalities for decision making. Rigorous sequels and relational rankings of choice events strongly clarify process research associated with thinking and reasoning sequels. While legal practitioners need stability and predictability, paradoxically academics are promoted and gain their reputations as a consequence of their attempts at original scholarship; scholarship which frequently tests system stabilities.

This creates an insular thought vacuum in the legal profession. It has been well demonstrated that paradigms constrain science. Scholarly testing of the formal attributes in law has little value to the active bar, and even excellent arguments are slow to be recognized. It may take years for innovative thinking to influence judges. These matters become antithetical to legal theory construction, and the scholarly evolution of new ideas in law.

Certainly the relationship between accrediting and the legal profession should be strong. But what of legal theories, how do these ideas cause change or influence the management of law schools? When do these theories also influence litigation?

Do the professional practitioners who lead the ABA , the organization that accredits law schools, and the state boards of bar examiners who administer bar exams, function in parallel non related contexts? Simply stated are they acting in ignorance of one another? Do these activities serve to enhance or deter growth and development in legal education? [[24]](#footnote-24)

Accreditation activities but not bar examiners substantially drive the curriculum of legal education. These organizations have little to gain by reformulating the legal process – they exist to perpetuate it. Legal educational stability and licensure for professional practice are predictable rituals with measurable consequences . While these are serious problems, the problems have identifiable solutions. Failure rates among bar examinees of 30% or higher, or pass rates for all graduates of some ABA approved law schools below 38% for the entire class should have caused someone to take issue with curriculum arrangements and the licensing process.

Yet the system keeps running. One might wish for more scholarly training for law school students, yet it appears they will never get such training in the United States.

Theory building among legal scholars in legal education necessarily required great sensitivity to the law school educational process, the profession, and the courts.

Pound was selected at Harvard to be at the center of this work by virtue of his vision and leadership as Dean of Harvard Law School. Pound can easily be viewed as the master craftsman in legal theory of twentieth century. What he sought to accomplish never became part of legal education.

If we argue there exists a two-tiered hierarchy, one of professional accreditation and professional licensing[[25]](#footnote-25) , the other formed by a few academic elites who could substantially modify the meaning of law and legal education, would it ever be possible that they could act in concert where all benefit?” - A new and different legal academy? One hears little which resembles a concert. Opposition to change has been the central theme of the ABA and AALS.

The concept of opposition is operative between sub-groups of legal scholars and practitioners, but presumed to be unapparent, unobservable, and in effect a derivative misfortune of managerial and system anomalies and obscurities. The principal parties in the problem definition have no perception of an issue in existence. In the discussion which follows the tension of administrative (legal education) organizations acting in opposition or in ignorance of the other[[26]](#footnote-26) will be explored to ascertain the degree to which they serve no purpose, are archaic or out of synch.

Little evidence of a connection exists in archival materials at Harvard Law School [[27]](#footnote-27) or Harvard’s Official Archives.[[28]](#footnote-28)

This lack of information indicates that administrative acts performed by Pound as Dean were not directly associated with his writings or his relationships outside the law school. [[29]](#footnote-29) Also, no evidence was discovered in Pound’s archives or the Harvard University Official archives which indicated the Harvard Board of Overseers ever disagreed with Pound.

Viewing the existing checkpoints to legal education, one must conclude that neither the accreditation process conduction by the ABA nor the licensing process controlled by state boards of bar examiners is effective. The inquiry takes on elements of “quality control”. If bar examinations are being used to regulate the quality and character of law school graduates, and the ABA is also accrediting law schools, the legal apprenticeship system would appear to still be in place. Legal skills and abilities taught to law students are insufficient to become licensed professionals, yet the ABA approves the schools.

The two part argument to be justified is (1) The ABA should no longer accredit law schools, and (2) State bar examinations of individuals who have graduated from AALS law schools is a waste of time and resources.

There is a history that partially explains the split between the legal academy and the legal profession. Unfortunately the costs and consequences of that split remain substantially ignored.

The legal academic (expert) and legal practitioner are no longer in a practitioner and apprentice mode. They became separate over time and remain so to this day. The rituals of accreditation and examination for licensure remain as the two formal ties to the old system. Neither ritual is either necessary or efficient. Law schools, accreditation agencies , lawyers and the courts appear to act with little collaboration. But to what end ?

First, the partition of power is grossly inefficient. Professionals in the ABA and state bar associations continue to demonstrate a compelling need to control law schools and their graduates while ignoring legal scholarship that scrutinizes and reviews their profession. It is here that the inquiry begins.

Law school certification is still the exclusive province of the ABA. Although the certification process has been challenged in the courts,[[30]](#footnote-30) thus far the ABA remains in control. Troublesome and difficult outcomes result directly from this iron hand approach to legal education accreditation. Legal practitioners are not educators, and nothing in their work or profession advances any skills to educate, hence to examine, the skills of others.

Of 53,559 law school graduates awarded the Juris Doctorate in 1999 who sought licensure to practice law, nearly 30%[[31]](#footnote-31) failed U.S. State bar examinations. These examinee failures are graduates of ABA approved law schools, sitting for licensing examinations prepared and scored by ABA members. There is another curious problem.

Long ago the ABA refused to allow law school degrees alone to be sufficient for bar admission. [[32]](#footnote-32) One glaring reason is the state bar associations needed a mechanism to regulate the influx of new lawyers. State exams were also used to exclude members of discreet and insular racial, ethnic, and religious minorities in earlier years. Gender was not a problem at the exam level, because women in large were not welcome to attend law schools.

State bars also excluded women even if they were trained under the apprenticeship system, and the high court agreed with this position on public policy grounds. (See, e.g., *The case of Myra Bradwell*, [[33]](#footnote-33)).

Not only do practicing lawyers decide which schools will teach the law, they also decide who among the graduates of these schools will practice law. Practicing lawyers are the individuals who sit on state bar examination committees. They are also the graders who read bar examination answers. This all may seem obvious, but some of the implications are not. There are serious curriculum questions.

The unchecked nature of the degree of course relatedness to eventual licensing exams is appalling. Policy decisions in law schools regarding curriculum design rarely go beyond the central need of licensing graduates to practice law. And within this policy thinking, a national annual failure rate of 30 % remains unexplained, going unanswered year after year. It is an enormous expense. The cost of bar prep courses could easy be transferred into graduate legal education. As we consider the repair of curriculums, it is no less important to repair the bar exam ritual. If bar exams are necessary, they should be done in segments during the legal education experience over three years, similar to the way medical licensure takes place. In fact the State of Wisconsin has no bar examination, yet seems to have no difficulties with the operation of the state bar. Of course this renders absurd the current practice of bar exams.

In addition to not teaching individuals how to become licensed attorneys and the obvious conclusion that they are ABA certified Juris Doctor degree holders who cannot practice law, law schools have no focused curriculums to teach students how to contemplate legal theories, how they are constructed,

or how legal paradigms and theories pass from center stage into history. Law schools do not produce graduates educated with skills to reform their profession. Worse, given the budgets most law schools have to prepare and graduate students, new course design and development projects present substantial risks to innovators. New teaching strategies may further reduce the skill level of graduating students in bar exams[[34]](#footnote-34) .

From this perspective additional scholarly analytical techniques are ill-advised and unaffordable expenses to both the school and the student. It is a paradox worth addressing.

From all appearances , as a direct consequence of the ABA pressures on legal curriculum and licensing, law school graduates are ill prepared to do anything but subordinate preparatory work. A radicalized “legal apprenticeship” lies deep within the case method system, and remains at the core of legal education and practice.

THE STUDY DESIGN

Acknowledging inefficiencies in contemporary legal education, I hope to craft useful qualitative research questions which address those inefficiencies . Understanding the model building process of Roscoe Pound, I plan to recommend that more scholarly work can be performed by following useful model elements discovered in Pound’s work. I shall then endeavor to demonstrate the eloquence of legal theory building. Finally I intend to show that major changes for the legal profession were expected by scholars in the beginning of the twentieth century.

It is important to explore legal theory construction within this dialog. The facts which result articulate the view that limitations to future critical scholarship of the legal process are driven by antiquated and archaic administrative, accreditation and curriculum practices. The finest example of a change process in legal practices can be understood in the life scholarship and educational leadership of Roscoe Pound, Dean of Harvard law School from 1914 to 1936. This analysis attempts to qualitatively re engineer Pound’s contributions in building legal theory, and call for change in the entry to the legal profession. It is of great importance to understand what did not happen as a result of Pound’s ideas. This can be understood from the perspective of paradigm discourse offered in scholarship by Ludwig Fleck and Thomas Kuhn, which identified major flaws in scientific discourse.

This is a study of Pound’s attack on the status quo of the legal profession as an academic leader, an attempt to create a model of his work, and a sample of a model that can be replicated. The analysis here is to evaluate what Pound did to build legal theory. We examine how, in Pound’s writings and correspondence, models were construed as legal paradigms shifting conceptually among the interest groups associated with legal education. We question how one individual can assert such substantial influence on the discipline. From the methodological perspective this work is a discussion of two qualitative levels associated with legal theory building. One is about process. How are legal theories constructed? Using a model from higher education administration , a methodological taxonomy of relational constructs evolves which associates qualitative choice making events along a continuum of time . One attribute which is particularly unusual is the longitudinal framework of the study. The analysis covers the work of Dean Roscoe Pound over 30 years of writing and scholarship.

To reach a conclusion on the viability of a methodological theory construction model , many articles, personal correspondence and biographical files had to be explored, and categorized.

The nexus between law’s intense dependence on uniformity and predictability, and attempts by legal scholars and educators to “shift the paradigm” away from traditional practices, is another object of study in this inquiry. The argument is that doctrinal ideas and paradigmatic frameworks exist somewhere between the professional associations that accredit law schools, and the faculty members who are sources of legal scholarship traditionally published in law reviews. Legal scholarship often tests the prevailing norms of legal thinking, seeking change.

For the purposes of argument, there exists in abstract a qualitative core where the confluence of change and stability moderate legal process improvements.

We look for evidence of a model which helps us understand how to shift legal paradigms, while studying how one individual asserted such substantial influence on an entire discipline. It is insufficient to leave the study, however, without having apprehended the paradigm shift.

The end point of qualitative research is discovered in part by reconstructing the design, and reviewing categorizations of materials as they are collected. Viewing Pound as a leading scholar and leading law school dean, and the work he produced, will help us draw conclusions about law schools, and propose new pathways for legal education. The underlying pretense and assumption is that legal theory construction should be considered the highest form of vision building and innovation in legal education. Pound’s scholarship appears to have remained constrained by a legal paradigm. One which includes the intense need of the judicial system and the profession to remain in full control of the system in which they work and practice.

The literature in Pound’s years of productive writing reveals that he had a vision, which resulted in remarkable changes[[35]](#footnote-35) among law faculty at a few major law schools. It is not clear why the origins and attributes of Pound’s influence and ability to change the legal profession were ignored .

It is time to reclaim the examining process, humanize it, and make it part of the law school experience. Multi state and professional responsibility exams can easily be given on computers in law school libraries at any time throughout the school year.

Practice exams and tutoring should be available as part of the law school curriculum. In short legal theories such as those by Roscoe Pound clearly indicate the gap to be filled

No law school wants to report high annual fail rates for graduates, yet law schools are driven by ABA controls in accreditation, dependent on results from a runaway licensing examination, and embrace practices that have no current alternatives. Many “ Fourth Tier” law schools in the United States have no grasp of why their graduates cannot pass a bar exam.

What follows is a study of Roscoe Pound, then a review of his emphatic law review articles in which Pound used legal philosophical frameworks to demand changes in legal education and the profession. Having considered many perspectives argued by Pound, and learning about his methods of argument , the meaning of paradigm analysis in legal theory is explored.

In the review of qualitative methods which follow, analytical arrangements focused on actual analysis of the theory building process used by Pound are presented. These methods are useful in understanding legal education as an institution, and warrant inclusion into new discourse on accreditation, bar examinations and legal education.

The selected methods are also understood as the best of many qualitative procedures to view Pound ‘s own work. Parallels are drawn which were discovered central to his theory of Sociological Jurisprudence.

The summary and conclusion includes a set of case study questions developed from this research which can be applied to any number of a range of important twentieth century legal scholars and law school leaders.

CHAPTER II. SETTING THE CONTEXT - BIOGRAPHICAL BACKGROUND, SPEECHES AND CORRESPONDENCE

EARLY YEARS

Nathan Roscoe Pound was born in Nebraska on 27th October 1870. His Father, Stephen Bosworth Pound, began practicing law in New York in 1863. Along with his new wife, Laura Biddlecombe they emigrated to the Nebraska prairie in 1866, thus joining in the formation of the State of Nebraska in 1867, and witnessing the beginnings of the University of Nebraska a year before Roscoe’s birth, in 1869. The early years in Nebraska were vibrant, an active Father and Mother were stimulating people with whom to experience childhood. Roscoe’s sister, writing to Pound’s 1948 biographer, Paul Sayre, reports that “ Intense intellectual interests’ were not pressed on Roscoe nor any of us. We had much more time for play than most children. In fact it was Roscoe that pressed his intense intellectual” curiosity on his parents. They had to hustle to keep with him.” [[36]](#footnote-36) Roscoe’s other sister, Louise, reports to Sayre several years earlier: “ My Mother did teach Roscoe until he was able to enter the Preparatory department of the University of Nebraska, which was taught by University professors. ...Mother realized that Lincoln schools in the early days were not very satisfactory. She also realized that it was hard enough for her and Father to keep with Roscoe. A teacher harassed by 30 or 40 active youngsters would be unable to handle Roscoe. She and father in self defense had had to teach Roscoe to read . They always enjoyed reading to each other. Roscoe bothered them so much asking them what they were reading, that they had teach him to read books for himself.

When Roscoe was eight years old, Mother took some work in German at the University. She used to say over her paradigms while doing the housework. She decided to teach him German while learning it herself”. [[37]](#footnote-37)

Roscoe Pound’s early life at home was rich and stimulating. Between his Mother’s language skills, and his Father’s Quaker and judicial activities, Pound had significant early academic influences. Pound was also quite fond of an audience, and solicited one often during his early years at Nebraska. These early skills, along with his move off the prairie into Chicago, then on to Harvard, also represent many years of focused effort and strategic thinking about how to evolve his life, and career. The Pound family was deeply rooted in American history, even by the 1870’s. John Pound had arrived from England two centuries before to settle in the Delaware valley of Pennsylvania-New Jersey in 1648. Under a grant received under William Penn’s colonial charter , he became a successful farmer, working a portion of land lying in what was then “ West Jersey.” Roscoe Pound refers to his heir as being “ ...a devoted man of conscience ..in the violent conflicts of his day, the teachings of plain speaking and truth telling and worthy living with the avoidance of the vanities of heraldry and of war spoke to him imperatively.” [[38]](#footnote-38) These are principles of living which recur in subtle themes of Roscoe’s life. They are distinctly Quaker. The Quaker traditions are with Pound in subtle themes throughout his life. Pound’s own ancestors on his Mother’s side, as has been said had come to Boston Harbor on a later voyage of the Mayflower in 1630.

In commenting to his biographer Paul Sayre, [[39]](#footnote-39) Pound disclaimed a few sentences Sayre had entered , with a ringing assertion: “ Why pay any attention to what “captios and petty persons say? It has been my invariable rule to ignore personal attacks, to try to understand rather than criticize, and to respond to critics by discussion of the subject rather than by polemics as to their views .”

Pound has no recorded collection of great detractors, yet to one uncovered by Sayre, Pound again emphasized: “ I had anticipated worse from the Harvard Law Review which has usually sent my books to what I would call unfriends. But it has been my inflexible rule never to answer attacks. Such in time the attacks are forgotten.”

During Sayre’s work on Roscoe’s biography, Olivia Pound was to tell Sayre [[40]](#footnote-40) “ We are never in our family disturbed by criticism. When Louise’s first book - an epoch making one it proved to be, came out, some Harvard reviewer said it was the maunderings of a disordered mind”. Louise Pound was for years at Swarthmore College in Pennsylvania. Roscoe joined the Hicksite Quaker Meeting at Swarthmore, and according to Sayre “ ....he did quite definitely take the view that perhaps the heart of the Society of Friends was in their emphasis on conduct and “ spirit” or “inner light”, not upon theological or superhuman dogmas.” [[41]](#footnote-41)

Reading the “Spirit of the Common Law” one will detect, at all times quite subtle, Pound’s search for the spirit of man’s work in legal reasoning. In fact the observation is rather prophetic, - literary connoisseurs of Pound’s writings will see clearly that he searches quite arduously for the paradigm in which individuals can as a function of legal perspectives reach their most enlightened terms of human existence. Themes of individual rights are explored in various literatures by Pound, starting with law’s western origins in Roman discourse , through the evolution of English Common law, French codes, and into the colonies, where people who incorporated these legacies into the affairs of individuals would build the nation.

Individuality plays a strong and recurrent theme for Roscoe Pound. Perhaps here it is best as well to introduce the tensions, which underlie the dynamism of his writings. The notion of individual thinking which Pound finds so important sources to his own perspective on individual qualities. The law to Pound was an individual experience, where great reflection was in order, to solve every nuance of the human experience when invariable conflicts perplex social discourse.

Pound sought to halt any advance in legal practice, which shifted away from a proper caring and reflection upon each individual’s right to a dignified life.

To attain this operative discourse, nothing philosophical, or reasonably associated with academic inquiry of his day was left out. The course of his own academic demeanor is reflected often:

“ Mr. Justice Holmes, with his customary felicity of phrasing, was driven to coin a word to describe Roscoe Pound, whom he most appropriately characterized as “uniquity.” “ Roscoe Pound is not only one of the rare encyclopedic minds of the law and the surrounding social sciences, but by common consent our most widely known American Jurist,- past or present ; he has always made his unique catholicity of interests and his astounding depth of erudition serve the common cause. A pioneer in American procedural reform, the guiding genius of the Cleveland Crime Survey, vigorous opponent of administrative absolutism and Founder of the School of Sociological Jurisprudence, he has brought to each successive task of law reform the resources of both the common law and the civil law and the disciplines of the several social sciences.” (Vanderbilt, 1948) This accolade is truly an understatement.

Knowing people in their many biographical dimensions is one of the great joys of reading. The “catholicity” Dean Vanderbilt [[42]](#footnote-42) attributed to Pound , was not something Pound would say about Mr. Justice Holmes: Writing to Paul Sayre [[43]](#footnote-43)“ “ I quite agree with you that there has been a deal of nonsense written of late about Mr. Justice Holmes. It is the fashion for everybody with any sort of wild idea to try to attach it to Holmes’ memory . He certainly was an outstanding figure among American judges and American legal scholars.

At the same time, it must he confessed that his work was somewhat unequal. He was by no means good on questions of criminal law, for a long time he had notions about equity derived from Massachusetts where equity was very behind hand in its development, and for a long time he somewhat obstinately held to the notion that negligence could be reduced to a body of detailed rules.

I am afraid that by way of reaction from the extravagant stuff that has been written about him of late he may come to be unappreciated in the next generation.” Indeed, among the titans of twentieth century legal discourse.....”even Homer sometimes nodded.” Roscoe Pound was no less critical about himself :

“ Why am I in the law? - Why, because my father wished it. Why do I make the pretense of being civilized when I am at heart one of the most uncivilized creatures at large? [[44]](#footnote-44) This cry from the soul of a would be Botanist, collector of plants from the Nebraska prairies, reflecting one evening while penning a letter to a dear friend after an arduous day of practicing law. Pound started his own academic career seriously engaged in the study of plants. Well, nearly always serious. Reflecting on the botanist in Roscoe, listen to some words in recollection of him by a classmate, many years later: “ Pound was a literary and classical student but he did not share the contempt that the “Lits’ had in those days for everything scientific. The scientific group in the University was small but it had some of the outstanding professors. If a scientific student was caught alone on the campus by a bunch of “Lits” they would “toss’, him and otherwise make life miserable for him. Pound got the scientific bunch together and turned the tables. We wound up by filling a row of telephone pole holes, which were being dug across the Campus, with “Lits” one in each hole. We kept them in there until they promised to be good……. It broke the war.” [[45]](#footnote-45)

Growing up in Nebraska was to come of age in a legacy of the west following the brutal civil war.

It was not so long before Roscoe was a student, and clearly not distant from his own Father’s recollections, that central Nebraska was to play a theme in a far more nefarious plot than the thrashings of a few errant “lits”. Roscoe’s sister, Louise, quoting the local paper, describes the scenario: (Pound, L. 1948) “ John Brown, Captain John Brown, of Osawatomie . .passed through this city late last Friday evening at the head of a herd of stolen niggers taken from Southern Missouri, accompanied with a gang of horse thieves of the most desperate character. They had a large number of stolen horses in their possession-two of which were taken and are now held by the deputy sheriff of this County. There is an appropriateness and fitness in nigger stealing being associated with horse thieves that the rankest black republican cannot fail to appreciate.” -

POUND AS BOTONIST, LAWYER, DEAN AND SCHOLAR

Evolving in Roscoe Pound, in 19th century Nebraska, was an identity matured in a collision between the ruthless Wild West, and the temperate and resolute placidity grown in generations of Quaker thinking. Pound became a student at Harvard Law School in 1889. Harvard Law School is aptly characterized in the period from letters between John Chipman Gray , Professor , and Harvard’s President, Charles Elliot: (Gray, 1892, p.14)

“The idols of the cave...which a school bred lawyer is sure to substitute for the facts......may be much better material for intellectual gymnastics than the facts themselves and may call forth more enthusiasm in the pupils, but a school where the majority of the professors shuns and despises the contact with actual facts has got the seeds of ruin it and will and ought to go to the devil.” [[46]](#footnote-46) Harvard Law School of the period wasn’t going to fit Roscoe Pound’s interests and expectations.

Pound, however, was not alone in his opinion, and distinctly was not one of the “Idols of the cave.” (Howe, 1963) . Christopher Columbus Langdell was then Dean of Harvard. David Wigdor, writing a second biography (Wigdor, 1974) on Roscoe Pound refers to Langdell’s educative system as a “ catholicity of science, - drawing upon English and American reports for the development of Legal principles...”. [[47]](#footnote-47) Langdell was not to have enraptured all of his fellow scholars. The great Oliver Wendell Holmes Jr. took the view that Langdell’s academic design of the case method was “ a misspent piece of marvelous ingenuity” , and that such a legal curriculum only represented the powers of darkness’. [[48]](#footnote-48) Holmes goes on his letter to Sir Frederick Pollock writing that Langdell’s view of legal training represented “ the narrow side of his mind, his feebleness in philosophizising, and hints at his rudimentary historical knowledge. - I think he (Langdell) is somewhat wanting in horse sense.” (Howe, 1961, p. 35) 1889 for Pound was an exciting year , but Harvard and Boston were not yet to become a central source of gratification to him. One could reasonably conclude other students felt similarly.

He left law study after one year at Harvard , returning to Nebraska, and blending back into his botanical inquiries. [[49]](#footnote-49)

These years were a mixture of botanical study and law practice with his Father. Pound’s first Nebraska jury case in 1893 was pleaded against another rising star in American justice, - William Jennings Bryan. [[50]](#footnote-50) Pound studied Botany and earned his Ph D in 1897, becoming the Director of the Nebraska Botanical Survey.

He also retained an interest in the law, practiced during the decade, taught “adjunct” in the new law school at Lincoln. In 1899 he was appointed Professor of Law at Nebraska, having taught Roman Law part time since 1895. In 1901 he was appointed Judge to the Nebraska Supreme Court. Interesting opinions he wrote from the bench would surface again, later, in his articles. Pound ruled that “ a religious organization must determine its own polity.”[[51]](#footnote-51) Another case which followed Pound held against the County Treasurer, and he reasoned that the Nebraska statute which required purchasers of land at tax sales to immediately reimburse the country treasurer or pay a late payment was ruled inviolate of the buyer’s reasonable rights to perform under the statute. Pound stated that “ we ought not ask purchasers to pay faster than the proper officials can take their money.” [[52]](#footnote-52)

By 1903 one can see that Pound was more inclined to agree with John Chipman Gray and Oliver Wendell Holmes and disagreed with Christopher Columbus Langdell’s pedagogical obsessions by reading from an early opinion he wrote while on the Court in Nebraska:

“ The law consists not in the actual rules enforced by decisions of the courts at any one time, but the principles from which these rules flow; that old principles are applied to news cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of facts require.” [[53]](#footnote-53) This judicial opinion of the law as stated in 1903 is a central theme, which Pound, would explore many times. He became the Dean of the University of Nebraska Law School the same year, a position in which Pound would continue to evolve his own ideas and philosophies of law. Pound’s refutation to legal positivism[[54]](#footnote-54) was noted in 1904 when writing in the Journal University Studies. (Pound, 1904) According to Pound, “ no conception has been[[55]](#footnote-55) more fruitful in legal history than the notion that the foundation of law is in ideal or natural justice.” However, Pound in 1895 had earlier refuted the idea in a letter to his close friend Omer Hershey, “ For my part I am inclined to stick to the analytical theory of law....It may be that my scientific dabblings have unduly prejudiced me, but I cant feel very well satisfied with any theory that refers anything to an ultimate source in divine justice.

I have read a good deal in Natural Law lately, have read quite systematically all I could get hold of on the subject, and I am not a convert to it.”[[56]](#footnote-56)

Theories and Ideas in Development

Writing in 1905 (Pound, 1905) the first thesis of his views of “mechanical jurisprudence” was stated, incorporating his own scholarship while using the law of equity as a backdrop. Before looking into the decadence Pound discovered in equity law, knowing Pound better will serve as a useful guide. Reflecting more broadly of his former colleague, Kocourek describes Pound: (Kocourek, , 1947, p. 419) “‘Somewhat like Holmes, Pound’s plan of life was simple-tackle the thing before you and get what you can out of it.’ A metaphysician might object that this represents no genuine philosophy, and that it is not a demonstrable counsel of perfection. However that may be, the formula is one that works, and that is all that pragmatism requires.”

Understanding legal pragmatism is a significant task, but a useful summary was edited into Sayre’s 1947 collection of essays. (Sayre, 1947) A former colleague of Pound’s offers a cogent and brief characterization:

“ The burden of all pragmatic philosophy is that to arrive at final truth is fatal. But equally fatal is failure to know whether our striving brings us nearer or farther from the truth. In a word, our task is to define truth in such a way that, although we must never arrive at it, yet we must be able to approach it indefinitely. Truth becomes an unattainable, indefinitely approachable ideal. And the philosophy of science is the working out of the conditions of this ideal in the form of a fruitful methodology for science. We accept then the fundamental tenet of pragmatism. No generalization or law remains final. It becomes fact or datum in the further pursuit of truth. No fact is final. It’s meaning becomes absorbed in law or generalization.

There is no fixed starting point for science. Neither rational intuitions nor the data of experience are the unalterable first beginnings of knowledge.

Any intuition, whether rational or sensuous, may serve as a starting- point. So much for the expansive power of the pragmatic insight .” (Cowan, 1963, p.140)

It would be reasonable to conclude that one of Pound’s colleagues would have the better grasp of Pound’s philosophical range. David Wigdor, Pound’s second biographer, writing a decade after Pound’s death in 1974, draws a strong conclusion quite distant from the center ground of legal pragmatism:

“ Pound earned a reputation during the Progressive era as one of the most innovative American Legal Theorists, but his commitment to the common law fostered a fascination with organics, traditionalism, and professionalism that restricted his intellectual range. His creativity, checked by internal contradictions, was spent upon peculiarities. The separate instrumental and organic elements of his thought, developed in isolation, created an unreso1ved dualism within his jurisprudence and made it impossible for him to develop the grand system that he pursued so assiduously”. (Wigdor, 1974, p. 10)

It is the merger of pragmatism and Pound’s own intellectual power that makes his scholarship so interesting. His contemporaries reflect on this: “ Holmes said of Pound, ‘the number of things that chap knows drives me silly.” Pollock reflected , ‘He seems to have read every mortal thing published in English, French, and German about the philosophy of law, besides a vast mass of reported cases.’ Pollock, to whom Holmes had given a letter of introduction, spoke of him (Pound) as ‘monstrous learned’ and as ‘the learned and ingenious Pound.’ ( Howe, 1961, p. 115 )

The “ingenious” Pound to which Pollock refers can be explored in the shadows of reflections and comments among his early writings. Reading Pound’ s works reveals several levels of activity to be occurring within parallel analytical contexts.

The analysis of cases is antecedent to the comparative exploration of doctrinal materials in the treatises. In his 1905 article which he titled “ The Decadence of Equity” [[57]](#footnote-57) Pound aggressively searches for the intellectual high ground, and does not take prisoners. Equity as a decision framework for dispensing justice is a central point, balanced between a conflict of laws, that of equity, and that of court rules in the contexts of judgments, and civil procedure, employing the notion of estoppel.

Pound forces the impossible generalizations of the treatises into a compressed context of doctrinal shifts in equity and procedure. This technique renders meaningless the generalizations made by the text writers, and “ The text writers state the exception far too broadly, and ignore the general rule.” One has to think carefully about the point. Is this a criticism of Langdell’s case method? An appeal to the sensibilities of an audience, or Pound’s personal complaint? The question warrants considerable reflection. By now, Pound as Judge, Law School Dean, Spokesman before the Nebraska Bar Association, and author has begun to form strong opinions. He reflects in the article “ laws are general rules recognized or enforced in the administration of justice. But the very fact that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them mechanical in their operation. “ A mechanism is bound in nature to act mechanically, and not according to the requirements of a particular case. “ [[58]](#footnote-58)

Here Pound introduces a major analytical and reasoning paradigm he will often revisit. This particular example has two components. The first, mechanisms, and mechanical behavior, is a merger of his scientific thinking as a Botanist, seeing plant organisms in their various forms as having both specific functions, yet also limitations. By imputing those organic typologies as functions and limitations to thinking and reasoning processes in the law , we discover Pound’s idea of boundaries.

Such “ abstract general rules” become “bound in nature”, existing at fixed points, having finite applications and limitations. What Pound holds back in his argument, what he presumes the reader understands, is that human discourse and conflict when addressed by legal thinkers is highly individualized. The concept leads one effectively into the second dimension in the argument, where Pound addresses the “ requirements of a particular case”. Individuals as adversaries have unique problems, which cannot be reconciled using legal prescriptions, which over decades have assimilated into doctrinal views. The “Decadence” to which Pound refers is the use by legal professionals of classical maxims in equity in place of rigorous thinking to solve individual legal conflicts.

This reasoning comes out clearly in Pound’s own assertion: “...the judge, bound hand and foot by a code and the maxim that that law is best which leaves least to the discretion of the judge, is our natural goal, not the oriental cadi administering justice at the city gate by the light of nature tempered by the state of his digestion for the time being. [[59]](#footnote-59) “Certainly Dean Pound would be pleased to conclude this idea with his own statement:

“So soon as a system of law becomes reduced to completeness of outward form, it has a natural [[60]](#footnote-60) tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand. We are dealing, however, with the present and immediate future . Commercial and industrial development, as Baron Montesquieu (Montesquieu, 1752) saw in his day, make for certainty. The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion. “ [[61]](#footnote-61) 1905 was a banner year for Pound, Columbia Law Review took two of his articles.

The second is an article in which Pound asks the legal community, “ Do We Need a Philosophy of Law?” [[62]](#footnote-62) This article presents the second a major construct in Pound’s thinking, one that predates the 1921 “ Spirit of the Common Law” by 16 years. As an element of scholarship, one discovers a noteworthy appreciation for the lengthy time taken for the germination of ideas. An thus Pound declares: “Today, for the first time, the common law finds itself arrayed against the people; for the first time, instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire. It cannot be denied that there is a growing popular dissatisfaction with our legal system . No amount of admiration for our traditional system should blind us to the obvious fact that the law exhibits too great a respect for the individual, and for the entrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age. “[[63]](#footnote-63) Pound’s analysis and argument which underlies this assertion examines the wage and hour laws, citing nine cases which culminated in the judicial holding [[64]](#footnote-64) that labor rights in contexts of 8 hour laws were unconstitutional. This analysis predates the famous “Brandeis Brief” used in the arguments before the U.S. Supreme Court in Muller V. State of Oregon [[65]](#footnote-65) by three years. Pound is opposed to the constitutional use of individual rights to obstruct stabilization of labor interests in America’s growing industrial society. Entering the twentieth century, the notion of individual rights took on a very different form than readers entering the twenty first century might conclude. After reviewing nine labor related court decisions, Pound explains:

“ I do not criticize these decisions. As the law stands, I do not doubt they were rightly determined. But they serve to show that the right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between our laboring population and oppression. “ Constitutional invocations of government supervision over contracts did not sit well with Pound:

“This right of the individual and this exaggerated respect for his right are common-law doctrines. And this means that a struggle is in progress between society and the common law ; for the judicial power over unconstitutional legislation is in the right line of common law ideas. [[66]](#footnote-66) “ To reinforce this view, Pound hammers in several dramatic arguments:

1.“to-day the isolated individual is no longer taken for the center of the universe. “

2. “We see now that he is an abstraction, and has never had a concrete existence.”

3. “To-day, we look instead for liberty through society. We no longer hold that society exists entirely for the sake of the individual.”

4. “The common law , however, is concerned, not with social righteousness, but with individual rights. “[[67]](#footnote-67).

From these and other precepts, Pound concludes:

“ the Common law, in the interest of the individual, is struggling with the prerogatives of the people, represented by the police power, as it struggled with a like prerogative of the crown from Henry V 11 to James 11.” In this second article Pound traces English law, and by historical argument illustrates the tenacity of the common law. Pound draws the conclusion that the tension over economic rights and individuals who occupy vastly different positions in the financial strata can be reconciled within common law judicial reasoning and constitutional police powers . This tension flows from the following logic:

“ ..is furnishing the antidote for the intense regard for the individual, which our legal system exhibits. , ......In fact a progressive liberalizing of our constitutional law is noticeable already, and to all appearance, a slow but sure change of front is in progress.” [[68]](#footnote-68)

The “ progressive liberalizing” Pound observes in his world at the beginning of the twentieth century must be tempered: ” the residuary power is ill defined, and the common law is jealous of all indefinite power.”

Having worked the notions into a great crescendo of history and philosophy, interpolating common law, Pound in 1905 asks the crucial question of the twentieth century:

“ How shall we lead our law to hold a more even balance between individualism and socialism ? “

This is another question he will recurrently visit in his writings.

In this article, his first answer:

“ To my mind, the remedy is in our law schools. It is in training the rising generation of lawyers in a social, political and legal philosophy abreast of our time.” [[69]](#footnote-69)

A little article came out in 1906 bearing the same name as this collection of essays bearing the same title: “ The Spirit of the Common Law” later published in 1921 [[70]](#footnote-70) The article was part of Pound’s 1906 attacks on the profession, which started in St. Paul Minnesota at the ABA convention. It is worth considering how he got to St. Paul. His early years in Nebraska consisted of frequent presentations before local bar associations, small meetings, speeches, and other leadership roles associated with being a State Supreme Court Judge. As Dean of Nebraska’s fledgling law school, his forum was expanding. Legal titans of the 20th century were evolving. Pound, from the forum of the Nebraska Law Dean’s position, was to continue his search for associations and other scholars, audiences to whom he could state his interests.

From a speech given to the Nebraska Bar Association came an invitation to Pound to present before the 1906 American Bar Association Meeting in 1906 in St. Paul, Minnesota. [[71]](#footnote-71) The speech is well described by John Wigmore[[72]](#footnote-72) , present that summer evening :

“It was a pleasant summer evening in St. Paul, and the date was August 29, 1906. The twenty-ninth annual meeting of the American Bar Association had convened in the Capitol building of St. Paul.[[73]](#footnote-73) At 10: 30 in the morning the clan of the respectable Bar had assembled for a business meeting, and had later taken a recess until 8 in the evening. At the evening session there were to be two addresses - the first by ‘Mr. Roscoe Pound, of Lincoln, Nebraska,’ and the second by John J. Jenkins - later a federal judge of Wisconsin. Some 370 members ( at the time the national total 5400) were registered for the convention, and almost all of them (with many of their ladies) were present in the spacious auditorium of the Capitol. The title of the address was ‘The Causes of Popular Dissatisfaction with the Administration of Justice”[[74]](#footnote-74) The speaker was a youngish lawyer in his early thirties, a local light in Nebraska-brought on this national stage simply because the Association’ s president had recently heard him speak at a meeting of the Nebraska Bar Association. The speaker opened with the concession that dissatisfaction with the administration of justice is as old as law,’ and quoted examples from past history. But he proceeded promptly to assert that there was today in our own country ‘more than the normal amount of dissatisfaction with the present day administration of justice in America.’

Then, limiting his inquiry to civil justice (which Was a preliminary jolt to the conservatives ~ for of course that was their special field of practice), he proceeded to a diagnosis of those causes.

And herein came the first recorded instance of the philosophic approach; for he classified the causes under four heads-from greater to less, from permanent to changeable:

(1) Causes for dissatisfaction with any legal system;

(2) Causes lying in the peculiarities of Our Anglo-American legal system;

(3) Causes lying in our American judicial organization and procedure.

(4) Causes lying in the environment of our judicial administration.

When the speech came to its main thesis, a concrete bill of particular defects, the conservative hearers sat in dumb dismay and hostile horror at the deliverances of the daring iconoclast (all phrased, nonetheless, in coldly calm description). ‘Our system of courts is archaic.’ ‘Our procedure is behind the times.’ ‘Our judicial power is wasted.’ ‘The worst feature of procedure is the lavish granting of new trials.’ ‘The court’ s time is frittered away on mere points of legal etiquette.’ ‘Our legislation is crude.’ ‘Putting courts into politics had almost destroyed the traditional respect for the Bench!” (Wigmore, 1937, p. 176)

The reactions were interesting, while there were many critics and detractors, Pound had correctly calculated the balance.[[75]](#footnote-75)

The 1906 speech was for years considered a landmark, and turning point in how many of the members of the legal profession perceived themselves. It is well assessed by Albert Kocourek in 1947: (Kocourek, 1947, p. 419)

“ Whenever the question is mooted of the progress of reform in our administration of civil justice- whenever may he heard impatience at the profession’ s too-leisurely speed, let this be remembered, that it all started after the speech at St. Paul.

That speech made history - At that period there was universal complacent torpidity in the profession: the thermometer of conscious progressive and collective effort was at freezing point. The rise of its temperature has all taken place in the last thirty years.” Dean Wigmore of Northwestern recruited Pound to become a Professor at the school in Chicago in 1907. Roscoe Pound meets Dean of Northwestern John H. Wigmore at the 1906 conference, and Wigmore ( Roalfe, 1962, p. 285) becomes an ardent supporter of the controversial propositions laid down by Pound in his presentation. (Wigmore, 1937) Wigmore had been captivated by Pound’s speech the previous year in St. Paul. Wigmore was to recruit Pound away from Nebraska, and curiously, from a man who would become Dean of Harvard law School, Pound when reflecting on no longer being Dean of Nebraska’s Law School accepted the position as a Professor at Northwestern, stating:

“ Having been my own fasces and lictors I shall not miss any of the insignia authority. I have wasted as much time on petty administration as I can justify, and am heartily glad to be rid of it.”[[76]](#footnote-76) The subsequent Deanship at Harvard in 1916 eight years later, appears to have been a changing point from this perspective held during the Chicago years.

Little doubt exists among those who came to know Roscoe Pound that the pioneer spirit, and lust for life, continued on in his rapidly developing academic career. Pound left the Nebraska prairie to far away places, first Chicago in 1907, as a Professor of Law at Northwestern and then in 1909 to the University of Chicago to teach law. During the Chicago Years at Northwestern Pound attended the 1908 Seattle ABA convention and benefited when that convention adopted elements of his 1906 vision building speech presented in St. Paul, Minnesota . (Pound, 1908, p. 179)

“The Legal Problem, “ asserted Pound, writing in 1908 to the Sociologist Edward A. Ross his friend during the early Nebraska Years, “ is only part of a larger one - he who tries to separate it tears a seamless web.” [[77]](#footnote-77) In 1909 Pound, at direction of Wigmore, organizes the National Conference on Criminal Law and Criminology at Northwestern. (Pound, 1908) According to Wigdor, (Wigdor, 1974, p. 143) participants included notables of the day, among them Edward A. Ross, (Sociologist from Univ. of Wisconsin and formerly Nebraska, close friend of Pounds and oft cited facilitator of Pound’s Sociology of Jurisprudence). Jane Addams, of Hull House, Clarence Darrow, Ernst Freund, Julian Mack, and Graham Taylor were also participants in the conference. These luminaries are significant additions to Pound’s circle of friends and influence. Indeed they are also to influence Pound’s own thinking and views. Pound opened the conference stating:

“ Intellectuals must become social engineers...the light of all these multidisciplinary participants, ( psychologist, sociologist, jurist) must be concentrated into one ray which shall throw upon our system of punitive justice the combined wisdom of all those who are entitled to bring scientific knowledge to bear upon it.” (Wigdor, 1974, p. 3)

It may not be the case that Pound was centered in the criminal law, rather, because Dean Wigmore allocated Criminal Law as a teaching duty to Pound, forever the organizer of people and events, even in the early years at Nebraska with the SemBot, [[78]](#footnote-78) and later as Secretary to the Nebraska Bar Association, we witness Roscoe on the move, aligning people and events, with their interests and theories.

Roscoe is a quintessential broker of ideas and the needs of people and circumstances.. this contradicts Wigdor’s view of Roscoe having a struggle with dualism and theories. Quite the contrary, Roscoe was a genius at acclimating himself to new circumstances, extrapolating the genus of those conditions, and applying the phylum to taxonomies of varying individual desires and expectations.

Consistent with this view is the fact that Pound was to be recruited away from Northwestern to the University of Chicago in 1909, a short two years after coming to Northwestern, by William Harper Rainey. (In the letters is an interesting diatribe quotes about the stealing of Roscoe) Perhaps it had been Wigmore steering Pound toward the criminal law. More likely an influence was Rainey’s own vision of the law, a law which would be “ a scientific study which involves the related sciences of history, economics, philosophy - the whole field of man as a social being.”[[79]](#footnote-79) One need not conjecture to realize the formidable opportunity Pound’s move to the University of Chicago was given Rainey’s own vision of legal education and the law. Pound now was positioned to integrate the 1906 St. Paul speech elements further into American legal education.

As no coincidence, Pound focused his efforts during this period again as a member of the American Bar Association and expanded his promotion of procedural reforms in judicial decision making. As Wigdor explains, [[80]](#footnote-80) the theme of Pound’s message during the Chicago period focused upon the failure of judges to see the case for issues presented. Instead, legal reasoning was clouded by the “ettiquette of justice”.

Pound argued that cases too frequently turned on procedural anomalies. “ The trial judge was forced to be so rigorously scrupulous about procedural niceties that he was able to devote little attention to the merits.” [[81]](#footnote-81) This of course, is the bedrock of legal formalism, and Pound is coming forth as an advocate of reform in judicial reasoning. From the vantage point of Pound’s second foray into the bar Association, Pound no doubt could easily visualize the interest he was generating among members of the trial bar, including such luminaries around Chicago like Clarence Darrow.[[82]](#footnote-82)

It was during the University of Chicago years that Pound’s scholarship shifting to work in articles such as mechanical jurisprudence. Consistent with his Bar Association platform for procedural reforms, among academics Pound was attacking the “rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of actual facts.”[[83]](#footnote-83) Thus Pound attacks the formalistic nature of judicial reasoning at its origins, the process of trial, and the many structured attributes of pleading common to the courts of the period.

Watchful scholars of the academic literature would have noted Pound’s analysis of the court where the discussion of liberty of contract was related to wrongful invasion of one’s due process rights to liberty. [[84]](#footnote-84) It was in fact Brandeis in 1911 who would bring full force of the formalism failures elucidated by Pound into the U.S. Supreme Court in Mueller v. Oregon. Doubtless the case was pleaded originally about the time of the initial article publication. In fact a similar case to Mueller is discussed by Pound in the Liberty of Contract article.[[85]](#footnote-85) According to Wigdor, Natural Law was for theologians and metaphysicians, it had no place in the lawyer’s learning. Analytical jurisprudence, alternatively, had no concern with morality or justice. [[86]](#footnote-86) Pound’s other influence , Austin, postulates that positive law, “ is concerned with law as it necessarily is, rather than law as it ought to be, with the law as it must be, good or bad rather than law as it must be if it be good.” (Austin, 1865, p. 18)

Speaking before the Kansas State Bar Association in 1910 , Puritanism in the law, vis, liberty of contract, assumption of risk, and contributory negligence, Pound claimed, were all Puritan notions,[[87]](#footnote-87) According to Pound, his was a descendent John Pound Puritan immigrant, who arrived in New Jersey in 1608.

In the year 1910 Harvard Law School offer’s Pound the Story Professorship.[[88]](#footnote-88) Pound would remove from Chicago to Boston in a time of the Progressive Era, Legal Pragmatism, and moral economics .

Thinkers of the period include Oliver Wendell Holmes Jr, Thorstein Veblen, and James Harvey Robinson. Others included William James the founder of pragmatism. (James, 1914) Wigdor’s summation of Pound extrapolating pragmatism is of particular interest:

“ It has not proved enough to give everyone a free road, relieved of physical interference by the strong and protected against fraud and deception.”[[89]](#footnote-89)

“......let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self sufficient...let us not become legal monks.”[[90]](#footnote-90) While at Harvard in 1912 Pound was elected President of the American Association of Law Schools. Before the AALS he preached a “ conservative radicalism”[[91]](#footnote-91) ….“ the great central machine may attempt too much. Friction and waste are not necessarily eliminated by setting this machine (government) to do what may be done better by spontaneous individual initiative.”[[92]](#footnote-92) Stating further it is “ Over ambitious plans to regulate every phase of human action “[[93]](#footnote-93) Pound continued to make his mark by publishing and in 1913 Pound was named Carter Professor of General Jurisprudence at Harvard.[[94]](#footnote-94) It is a bit of irony that Pound attacked his theories. For further clarification see Pounds review of Carter.[[95]](#footnote-95)

In 1916 Pound was named Dean of Harvard Law School. It was a time of the World War, and during WWI Harvard Law School’s enrollment drops from 850 students in 1916 to 70 in 1918.

“Pound’s reputation continued to grow after 1920, but the creative period in his intellectual development had ended”[[96]](#footnote-96) Pound is held out as inclined toward socialism, and contemplates resignation from the Harvard Deanship, Brandeis and Holmes urge him to stay on. Post WWI America was a time of social radicals. Major events included the Palmer raids of 1920. Pound at the time allied with Zechariah Chaffee, Felix Frankfurter, and Ernst Freund, issuing a report “To The American People”[[97]](#footnote-97) Pound is then endorsed by Lucille Milner, Secretary of the American Civil Liberties Union . During this time Frankfurter and others are involved in Baldwin’s[[98]](#footnote-98) expansion of the ACLU. It was a time of issue choosing and self de selection from new trends. Thorstein Veblen [[99]](#footnote-99)rejects Baldwin’s ACLU invitation to join the organization.[[100]](#footnote-100) It is a time to care in one’s social identity. In 1921 the Red Scare comes to Harvard, and one consequence is the Harvard Heresy Trial.

In part of all the rhetoric and charges the claims of Austin G. Fox of includes condemnations regarding members of Harvard Law faculty and these are presented to the Board of Overseers. Wigdor states Fox also was involved in the opposition to Brandeis nomination to the U.S. Supreme Court .[[101]](#footnote-101)

Pound disclosed in reflections on the times to his biographer, Sayre of Iowa, for preparation of materials during the 1940’s. “ What you write about University politics only confirms my notions of reform. Reforms generally substitute a pack of rascals or a set of fellows who were chiefly obnoxious while in office. Isn’t it a great spectacle to see every office filled with incompetence for the purpose of reforming things ? The inevitable result will be to seat the machine all the more firmly in the saddle. It always results that way.” ( Sayre, 1948)

Pound for years had been talking about the slippery nature of words that lawyers use carelessly. For that matter, Holmes in his “Common Law “ did the same thing many years before Pound and both of them worked at it long before Hohfeld [[102]](#footnote-102) and his followers. When Pound tried to moderate the fanaticism with which the Hohfeldian system swept the country in the Twenties, Pound was accused of lack of originality, or inability to recognize the pure light of original genius in others. It is a great irony again, for personal correspondence between the two men reveals they were dear friends.

“ It has always seemed to me that Holmes missed the point when he intimated that Pound’s strength lay in the massive unity of his knowledge rather than in any sting of genius”, for which Holmes himself was so famous. Pound didn’t seen the quantitative folks being strong contributors, even back in those early years of the twentieth century:

“My own belief is, after two years of study of American procedure that very little can be accomplished until a thorough and patient study is made of the statistics of American judicial procedure.” To take another example:

“ I see no reason why sociological study of problems which are legal quite as much as sociological should be endowed but study of the same problems from the legal standpoint should not. This quote continues, it is very important, because Pound is quoted directly as trying to weave theory and the practice of legal scholarship in legal education together:

“ I cannot but feel that a department of legal research could accomplish at least no less in this field than endowed sociological research. For another example: In your “Path of the Law” you suggest that the reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law and restate it.

If the actual extent of this restatement and the extent to which gaps are left could be ascertained from thorough study of the reports of three or four jurisdictions, and the extent to which such restatement serves for the whole body of law in jurisdictions in which the courts cite only their decisions-such as Illinois-could be determined in the same way, current discussions of case law and legislation would be of much more value. Such work is legal laboratory work, and can and will be done only by legal laboratory workers.”[[103]](#footnote-103)

In contemplation of Wigdor and others who remark that Pound never got the whole cake together, i.e., Pound and the dialectic, Pound and the grand theory, consider Pound’s remark to Chief Justice Holmes in 1915:

“ In other words, our specialization of the nineteenth century which tried to put everything in its watertight compartment as a whole complete in itself - something that has been breaking down in many things less practical than the law - is quite out of place in a matter which is so intimately a part of life as the law. This, of course, does not give aid and comfort to the cult of incompetency which, as in my native state, would transfer men from the shoemaker’s bench to the judicial bench. But, on other hand, the legal monk who can wish that he had lived in ways of the Plantagenets[[104]](#footnote-104) is after all but little more useful for the administration of justice.”[[105]](#footnote-105)

As an anticipation to the Heretical trial of 1920-21, associated somewhat with the arrest of Sacco and Vanzetti April 15th of 1921 as anarchists, Pound tells Holmes of things to come, the kettle, so to speak, is already boiling:

“ With an enforced year of idleness[[106]](#footnote-106) on my hands, I plan to write up Ehrlich’s Juristische Logik, the new edition of Geny, the new third volume of Binding, Somlo’s new book, an excellent one, Kohler and Wenger’s Allgemeine Rechtsgeschichte, and a few minor things. Whether I shall be allowed to publish in the Harvard Law review is a lesser matter. There has been violent objection to Laski’s writing therein and I am now told that there must be less jurisprudence and more that is “practical”.

Many zealous alumni think that all my writing is a cover for socialism, - and they are increasingly clamorous......Perhaps I need not tell you that I never have been in any degree a technical socialist-even when socialism was academically fashionable. But the universities are just now in a blue funk. “[[107]](#footnote-107)

Pound may have inadvertently stated his own introduction to “ Spirit of the Common Law “ when writing to Holmes several years following the lectures, in 1918:

“When one brings it together in one outline, there does seem to be a huge mass of writing about jurisprudence, much of which is vain and much more of small worth for the effort involved in reading it. But isn’t that quite as true of many other subjects? Whether a first-year student reads the cases or a graduate student the books on jurisprudence, he must dig up a great deal of rock for a relatively small amount of pay ore. Perhaps in each case it is worth something to learn how to recognize and extract the pay ore. In my experience, however, it is worth more to lead students to perceive the basis of their critique of juristic writing. “ Just why this is useful and that of little use? What was the problem to which so much that seems drool was addressed ? Why is so much that has been written by able men so wide of what we take for the mark? - “ When students are led to understand before they criticize and to criticize the grounds of their criticism, they find much more that is useful than they had suspected.” [[108]](#footnote-108) Sayre quotes Pound’s synthesis of jurisprudential philosophies as written in the Harvard Law Review :

“First, then, what is meant by realism in this connection? As I read them, the new juristic realists hardly use realism in a technical philosophical sense.

They use it rather in the sense which it bears in art. By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they imagined to be, or wished to be, or as one feels they ought to be.

They mean by realism faithful adherence to the actualities of the legal order as the basis of a science of law. But a science must be something more than a descriptive inventory. There must be a selection and ordering of the materials so as to make them intelligible and useful. After the actualities of the legal order have been observed and recorded, it remains to do something with them. What does realism propose to do with them which we had not been doing in the past? What are the features of the program of the new realists which make it one of juristic realism?

Let us consider first the program of faithful adherence to actualities, and then the program of doing something with them when observed, and recorded. The former would think of jurisprudence as an organized body of knowledge with respect to the phenomena social control through politically organized society, treating of the phenomena themselves rather than preconceptions of what they must be or ought to be. But there is nothing new in the assumption of those who are striking out new paths of juristic thought that those who have gone before them have been dealing with illusions, while they alone and for the first time are dealing with realities. The rationalists put forward the same claim. They claimed to stand upon a solid and unchallengeable ground of reason in contrast to an illusion of authority and the broken down academic fiction of continuity of the empire on which the medieval conception of the binding force of the corpus juris had been built.”

CHAPTER III. SENDING THE MESSAGE - LAW REVIEW ARTICLES ON LEGAL EDUCATION AND THE PROFESSION - A FOCUSED INQUIRY INTO POUND’S THEORY FORUMULATING

The central idea in the following analysis in to demonstrate how facts and legal issues are shaped by Pound over a period of years into his vision of Sociological Jurisprudence. Of great importance is the awareness that Pound had a vision which took many years to construct into a theory which had enough material to justify the concept of theory. In another sense, the work was a sequel of ideas which could become a paradigm of legal thought, which it remains to this day. Readers should understand that in the early twentieth century this work took form as “Sociological Jurisprudence.” While the philosophical nature of jurisprudence is an attempt to set boundaries of discourse and thought, it is not rich in organizing materials seen the later legal and social theory models incorporated into this research. Two questions arise in examining the work of Pound, and other legal philosophers/theorists. Were there attempts at creating theories about law? Then, were there attempts at creating a model of reasoning which could be described as a paradigm, and evaluated using the constructs of thinking associated with paradigms? Before trying to answer either question, the actual work of Pound must be examined. Several articles central to his life’s view of Sociological Jurisprudence are reviewed. They are not exhaustive of Pound’s work. The purpose of this review is to isolate the elements of Pound’s discourse. Of particular importance to faculty in legal education is the demonstration of the range of inquiry and work to which Pound endeavored in his career. It is hoped that a demonstration of the quality and extent of Pound’s intellectual inquiries will be instructive to law faculty in the design of their course materials and the strategies of their life scholarship.

For an added convenience to the reader, the actual article page numbers are included in parenthesis.

ARTICLES:

“What is a Penal Statute?”

Vol 42 Central Law Journal p. 135 Feb 14th 1896

This early article by Pound explores the meanings and significance of statutes created by states to fine offenders of the public interest. Mentioned are penalties associated with railroad operational and economic transgressions upon communities and individuals. Pound distinguishes between the individual who sues, and the public which was also injured. The rule of law during the period directed fines levied upon violators of penal statutes to be partially paid to the “informer” and substantially paid into public education funds. The apparent legislative rationale was that the public well being would be improved by acts of aggressive “informers” who would be compensated for their litigation. Thematically interesting is Pound’s choice of subject. Here by discussing the fees and awards paid to the public, informers, and litigators for complaints they filed against railroads and other 19th century corporations, Pound centers into a diverse audience, and focuses himself into the dialog of quasi tortuous 19th century public interest law. It appears that penalty fines for violations were aggregated, in one example a $25.00 per day penalty imposed for failing to construct a rail terminal became an $ 80,000 damage award. Pound summarizes by setting the distinction between the amount of award to be given the “informant” and that to which the state should be entitled.

“Dogs and the Law”

8 Green Bag p. 172 April, 1896

The Green Bag for Lawyers according to the editors in 1896 “An Entertaining Magazine for Lawyers”. As this early article illustrates, Roscoe Pound had a genuine, rich, and deep sense of humor, which intertwines with his observations and scholarship. If one looks about in the literature of legal issues in 1896 there can be found several serious discussions about the ownership and responsibilities dog owners. Pound here is not serious, as the Green Bag itself attests, the law in 1896 had a lighter side. “The law pertaining to dogs has ….reached considerable bulk, if nothing more, and considering the increasing number of cases in the reports having dogs for their subjects-matter or arising out of the doings of dogs, it is somewhat strange, in this age of textbooks, that no one has produced a “compendium treatise” upon the subject…......At any rate our author must ponder well before he discards Canine Jurisprudence. Commentaries on Canine Jurisprudence? – How insignificant is “ A Treatise on the Law of Dogs” in comparison. A Treatise might possibly be compressed into one volume. Commentaries, never! One may do well to start their legal writing class with Pound’s satirical law article on the dog.

“The barbarous doctrines of the common law which did not make dog-stealing larceny will come in for vigorous invective.” Pound rages on about how the law can go to the dogs, at times, and concludes with a hint about his own views of humanity. “ ..I trust enough has been said to indicate the field which lies open for some industrious author and enterprising publisher. The profession will wait impatiently for a Treatise on Canine Jurisprudence. ….May I hope that these suggestions will be rewarded by a presentation copy of the two volumes when issued?

- I fear not, such is human ingratitude, unless I can outdo the regular writers of testimonials and reviews for circular publication, and furnish the enterprising publisher aforesaid quid pro quo.” It isn’t likely the 1896 Harvard law academic elites waited impatiently in 1896 for their new Dean, Roscoe Pound. One might reasonably conclude that “Dogs and the Law” was met to be a serious blow to the rituals of law review scholarship.

“Are Judgments Quasi-Negotiable?”

Vol. 43 Central Law Journal p. 440 November 7th 1896

Pound’s next article studies a treatise “ Freeman on Judgments”, and compares it with two other legal sources, “ Black on Judgments “ and the “American and English Encyclopedia of Law.” From these Pound derives a conclusion that “ It may seem somewhat rash to contend that the assignee of a judgment takes subject to all equities, and that judgments do not possess any character of quasi negotiability.” (at 441) This reasoning about “equities” bridges Pound into the foggy array of equities, and frames his attack upon Pomeroy’s Treatise “ Equity and Jurisprudence.” The article examines case decisions in various states, and posits that ownership of judgments by third parties in the context of “latent equities” is largely abrogated . Citing one case in Georgia, Pound makes the argument that “ judgments for value should take free from the claims of third persons.” The discussion Pound extrapolates in this little article is focused on a criticism of texts written by Freeman, and others, “ ….it is apparent that the conclusion stated by Freeman in his former editions , and now repeated by him and by all the text writers, is far broader that the cases cited will warrant”.

“The result of an examination of the cases cited by the text writers shows that where a third party has by his own act knowingly put it in the power of the assignor to confer the absolute title, he is to set up an equity in himself against an assignee in good faith for value who took relying upon the title he had apparently conferred. …..The assignee of a judgment takes subject to all equities of all persons. In fact the latter statement is the general rule; the former is an exception to it.

Equity,[[109]](#footnote-109) as later writing will illustrate, was not a legal subject which fit well into the 19th century science of jurisprudence. It is useful for the student of Pound’s work to see that he is quite willing to attack conventional scholarship. Reading Pound’s works reveals several levels of activity to be occurring within parallel analytical contexts. The analysis of cases is antecedent to the comparative exploration of doctrinal materials in the treatises. The issue itself is a central point, balanced between a conflict of laws, that of equity, and that of court rules in the contexts of judgments, and civil procedure, employing the notion . Pound forces the impossible generalizations of the treatises into a compressed context of doctrinal shifts in equity and procedure. This technique renders meaningless the generalizations made by the text writers, and “ The text writers state the exception far too broadly, and ignore the general rule.” (444)

“ The Decadence of Equity”[[110]](#footnote-110)

21 Columbia Law Review 1905 Vol. 5

“ Everywhere we find two antagonistic ideas at work in the administration of justice-the technical and the discretionary. These might almost be called the legal and the anti-legal; with entire accuracy we may term them the legal and the pre-legal. “ (20) “ laws are general rules recognized or enforced in the administration of justice. But the very fact that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them mechanical in their operation. A mechanism is bound in nature to act mechanically, and not according to the requirements of a particular case. (20)

“…the judge, bound hand and foot by a code and the maxim that that law is best which leaves least to he discretion of the judge, is our natural goal, not the oriental cadi administering justice at the city gate by the light of nature tempered by the state of his digestion for the time being. “ (21)

Pound quoting Dillon’s “Laws in Equity and Jurisprudence”: The existing diversity of rights and remedies must disappear and be replaced by a uniform system of rights as well as remedies.” He then posits, “ As I shall endeavor to show that it will, the undue elimination of the element of judicial discretion, the result can not be permanent. The conflict between the two ideas, justice according to law and justice without law, will not down.”

“So soon as a system of law becomes reduced to completeness of outward form, it has a natural tendency to crystallize into a rigidity unsuited to the free applications which the actual circumstances of human life demand.”

We are dealing, however, with the present and immediate future- . Commercial and industrial development, as Montesquieu (Montesquieu, 1752) saw in his day, make for certainty. The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion. “(24) “ I venture to think that a court, which no longer sees anything about a principle, which is before it to be applied, to indicate that it demands greater laxity in its application than he ordinary rules of law, will be very apt to apply one like another, and all in the legal, not the equitable way. “ (26)

“ Prior to the fusion of legal and equitable procedure, the symptoms of appendicitis had appeared. The law had cast off its medieval shell. It had become modern. Its rules had become liberal, and the only grounds of complaint, as far as its substance was concerned, were with reference to minor details or based on the inevitable results of the mechanical action of any legal system.”(27)

“We now regard precedent as at least of equal weight with the equities of the case on questions of equitable distributions. It may be said that is an equitable principle borrowed by the law, and that its fate is an incident of the general absorption of rules of equity by the law. But other equitable doctrines are going the same way. If any doctrine is distinctly equitable, it is that equity regards that as done which ought to be done.” (33)

“I am merely seeking to point out how an equitable principle can give us a hard and last rule which in its necessarily mechanical operations will fall upon the just and the unjust. “ (34)

“ As Dean Ames[[111]](#footnote-111) puts it, equity is made to convert “ a regulating principle which depends for its life solely on natural justice, into a positive rule having no defense either in policy or in principle.” (34)[[112]](#footnote-112)

Pound concludes his study of equity and decadence:

“ To declaim against the fusion of law and equity to-day is no less futile than were the ponderous arguments of the sixteenth century sergeant-at-law who inveighed against chancery in his “ replication” to Doctor and Student. [[113]](#footnote-113) The moral, I take it, is simply that we must be vigilant. Ihering has told us that we must fight for our law. [[114]](#footnote-114) “No less must we fight for equity. Law must be tempered with equity, even as justice with mercy.

“Do We Need a Philosophy of Law?”

5 Columbia Law Review 339 Vol 5, May 1905

“Today, for the first time, the common law finds itself arrayed against the people; for the first time, instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire. It cannot be denied that there is a growing popular dissatisfaction with our legal system .” (344)

“ No amount of admiration for our traditional system should blind us to the obvious fact that it (the law) exhibits too great a respect for the individual, and for the entrenched position in which our legal and political history has put him,

and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age.” (344)[[115]](#footnote-115)

After reviewing the decisions, Pound comments:

“ I do not criticize these decisions. As the law stands, I do not doubt they were rightly determined. But they serve to show that the right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between our laboring population and oppression. “ (345)

“This right of the individual and this exaggerated respect for his right are common-law doctrines. And this means that a struggle is in progress between society and the common law ; for the judicial power over unconstitutional legislation is in the right line of common law ideas. “(345)

“to-day the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence.”[[116]](#footnote-116) (346)

“To-day, we look instead for liberty through society. W e no longer hold that society exists entirely for the sake of the individual.” (346)[[117]](#footnote-117)

“The common law, however, is concerned, not with social righteousness, but with individual rights. “(346)

“the common-law theory of litigation is that of a fair fist fight, according to the canons of the manly art, with a court to see fair play and prevent interference. …... To give them this fair play, we sacrifice public time and money ; incidentally also, for if all men are equal, their pocket-books are not, giving certain litigants a conspicuous advantage in reality through a theoretical equality.”(347) [[118]](#footnote-118)

“Now that the common law has so thoroughly prevailed that legislative trial and punishment are abrogated, one may sometimes wonder whether lynchings are not our modern bills of pains and penalties. Is this common-law respect for the individual inherent and fundamental ?” (348)

“the Common law, in the interest of the individual, is struggling with the prerogatives of the people, represented by the police power, as it struggled with a like prerogative of the crown from Henry V11 to James 11.” (349)

Pound traces English law, and illustrates the tenacity of the common law:

“ We must admit that it has shown a marvelous power of regeneration in the past. From Richard II to Elizabeth, the rise of the court of chancery preserved it from medieval dry rot. Under James 1 and Charles I, the indefatigable zeal and uncompromising dogmatism of Coke saved it from subversion by royal authority. “ (350)

The phrasing used by Pound becomes a bit confusing here. It will be useful to restructure syntactically the sentences of the article as a syllogism:

1. The common law lawyer will find the common law available to defend the interests of the people “ hence the common-law lawyer need not despair. He should only look about him to find within our law the means of bringing it once more abreast of the time and of ranging it where it belongs,-on the side of the people. “ (350)

“When the common law was in danger of fossilizing, it gave us equity. To-day, when the sovereign people stands in the shoes of the sovereign king as parens patriae, this residuary authority has given us the police power.”(350)[[119]](#footnote-119)

(the police power doctrine)….”has been worked out slowly at the same time that the common law has been gaining its firm foot- hold in our constitutional law. It is furnishing the antidote for the intense regard for the individual which our legal system exhibits. “ (351) Pound then asserts that a parallel equation exists between the assimilation of equity (chancery courts) into the common law courts, and the assimilation of the police powers into common law legal decision making:

“ And it is in the right line of our legal history and in full accord with the genius of our system to absorb and assimilate this principle as it absorbed and assimilated equity.” (351)

According to Pound, this tension between constitutional police power and common law individual rights :

“ ..is furnishing the antidote for the intense regard for the individual which our legal system exhibits. , …...In fact a progressive liberalizing of our constitutional law is noticeable already, and to all appearance, a slow but sure change of front is in progress.” (351)

This “progressive liberalizing” of the constitutional law, according to Pound, must be tempered, for “ .. the residuary power is ill defined, and the common law is jealous of all indefinite power.”[[120]](#footnote-120) (351) Pound sees the solution to this tension to exist in the framework of a compromise. It is interesting to contemplate how abstract Pound’s idea of a compromise is as a construct.

“We see now that the Middle Ages were right in holding that the individual depended on something wider and more lasting than himself. But the Middle Ages realized these ideas only in fixed outward organizations. Hence the revolt of the individual was inevitable.

This revolt, however, when carried beyond its time and made the basis of a permanent theory of society proves false and dangerous. “ (352) [[121]](#footnote-121)

Pound tests his concern for the great compromise by alluding to the philosopher Thomas Hobbes, who arguing against Coke’s invectives against natural law and the crown, discovers by reason that “ it is not the obstructers trial or wisdom of subordinate judges, but the reason of this our artificial man the commonwealth, and his command maketh law.” (Hobbes, 1651, p. 25) And now, out of the philosophical and jurisprudential tension of English justice and philosophy rises Pound’s crucial question:

“ How shall we lead our law to hold a more even balance between individualism and socialism ?

* “ Some suggest packing the bench, and the Chief Justice of North Carolina has given this plan the weight of his great authority. “[[122]](#footnote-122)

“ Others suggest codification. But it is not improbable that a code would codify our legal habits of thought as they are and transmit them in a fossil form to the future. “ But neither of these is an answer: Thus speaks then Dean of Nebraska’s law school:

“ To my mind, the remedy is in our law schools. It is in training the rising generation of lawyers in a social, political and legal philosophy abreast of our time.” (352)

Here Pound in 1905 anticipates his position to continue to call for professional reforms as a law school Dean, mapping the relevance and importance of legal education. The necessary strategy required to turn this message into actual reforms becomes diluted into theoretical abstractions.

The center position between being a Dean and a reformer of the legal profession is a curious one, tensioned between the position of accreditation practices controlled by the American Bar Association, and the knowledge that the members of the bar often failed to deliver professional services. Even today many opportunities for improvement, such as in licensing practices and curriculum design, rest explicitly on this tension.

“ In view of his (the lawyers) relation to a state wherein the most intimate problems of sociology and economics are tried in actions of trespass and suits to enjoin repeated trespasses, must not a philosophy of law founded on a sound knowledge of the elements of the social and political science of to-day form part,-and a necessary part–of the equipment of the trained lawyer ?” [[123]](#footnote-123) It would be reasonable to conclude that there are at least four readings of this article. The first is the broad tension between the common law and constitutional law as a contemporary problem. This is reduced into a discussion of the police power as a constitutional dimension of American Society, and the individual in conflict with that police power.

The second is an analysis of the evolution of the common law, a parallel development of the chancery courts, and the shifts from ecclesiastical – chancery courts into the King’s courts of the power to conduct reasoning , legal and philosophical, over the fate and rights of individuals.

The third prong of the article is a demonstration of how complex that reasoning process is, using Hobbes’ notion of the artificial state, or legal fiction, of the judicial system, and devolving Hobbes from Coke’s point that law is an act of artificial reason, learned by long hours of study and contemplation . Coke in essence saying that some form of “natural reason” is not the source of resolving English society’s interpersonal conflicts. The fourth prong is Pound’s treatment of a broad tension between progressive thinking (which he does not devote time to describe) and the state versus the individual as an economic and social problem.

Thus, the conclusion that law schools must rise to the occasion, and teach lawyers to do more than read case law and litigate.

“ The Spirit of the Common Law” [[124]](#footnote-124)

18 Green Bag 17 January 1906

“Nothing in the history of our common law is more striking than its tenacity in holding ground.” (17)

“Not only has the common law as a system successfully resisted all attempts to bring in some other law in its place, but in those parts of our system where alien and more flexible methods have existed or have arisen, in contravention of the fundamental theory of the common law that litigation is contentious, and where ever arbitrary discretion has obtained a serious foothold, the common law has ultimately prevailed.”(17)

“ Whether it is the innate excellence of our legal system or the innate cock-sureness of the people that live under it, so that, even as Mr. Podsnap talked to the Frenchman as if he were a deaf child, we assume that our common-law notions are part of the legal order of nature, and are innocently unable to understand that any reasonable being can harbor conceptions that run counter to them, the Anglo-Saxon refuses to be ruled by any other law.”(18)

“ An achievement strictly in line with the history of the common law is the entrenchment of its doctrines in our constitutions, state and federal, culminating in the fourteenth amendment, so that its fundamental and distinctive dogmas are beyond the reach of ordinary state action, and are to be dislodged in many cases only by amendment of the Federal Constitution itself.” (18)

“ If Coke were to come among us…..he would be thoroughly at home in our constitutional law. There he would see the development and the fruition of his Second Institute. All that might surprise him would be that so much had been taken from him and made of his labors with so little recognition of the source.” (18) Pound discusses two dangers associated with the decline of common law. First, he examines “ The most obvious danger, and the one most frequently adverted to , that of legislation.” Pound dismisses legislation, even if it is occurring at an alarming rate among many different legislative bodies, as the central threat to the common law.

“ In the first place there is little legislation that is original. Legislatures imitate one another. One may number on his fingers the landmarks of legislation in common law jurisdictions, and copies or adaptations of them. Secondly, everything indicates that codification, as such is still far remote…..legislative innovations are impossible in America.” (19)

The real danger to the common law, Pound states, is that “ hitherto, the people have been with it.”

This analysis is premised upon the historical fact that the English monarchs were compelled to yield to the will of the people of England, at least to the extent that the English Courts of Chancery and the Church itself were transitioned into agencies of a state which some nobility and citizens had voice. Pound extends the popular voice into colonial America, noting that the Continental Congress “resolved that the several colonies were entitled to the common law of England.”

And at this intersect, Pound exclaims:

“ The common law side (of the law) was the national and popular side. But today the popular side is not the side of the individual, but that of society.

Today for the first time the common law finds itself arrayed against the people; for instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire. It cannot be denied that there is a growing popular dissatisfaction with our legal system. There is a feeling that it prevents everything and does nothing. “ (19) A few sentences later, Pound takes what appears to be a contradictory view:

“ No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual, and for the entrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age. “

Arguing by example using case holdings in wage and hour disputes during the late 19th century, Pound exclaims that “ …the right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between a portion of our population and repression.”

Pound is seeking to interpolate the liberty of contract constitutional doctrine of the period with the central tenant of the common law, which recognizes individuals. This interpolation pivots around a central tension: “A struggle is in progress (and note the use of the word) between society and the common law; …” and here the sentence is of such paramount importance that it warrants being split:

“…for the judicial power over unconstitutional legislation is in the right line of common law ideas.” (20)

“….the common law has not changed, Indeed the common law knows individuals only….....But today the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence.”

“ To day we look….for liberty through society…we no longer hold that society exists entirely for the sake of the individual.” (21)

“ …we are not so much concerned with the liberty of each, limited only by the like liberties of all, as with the welfare of each, achieved through the welfare of the whole, whereby a wider and surer liberty is assured to him” (21)

To contrast these principles with the common law, Pound observes:

“ The common law, however, is concerned, not with social righteousness, but with individual rights.” Quoting Blackstone to reinforce his view

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community…..

…....In vain it may be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no.

Besides, the public good is in nothing more essentially interested, than in the protection of every individual’s private rights.” Pound explores this notion of an individuals private rights by illustrating the extent to which criminal law of the period in which he writes acknowledges the individual. In the criminal law, there is “ an exaggerated respect for the individual.” “ The individual, in short, gets so much fair play, that the public gets very little.” (21) It is important to stress here that Pound is trying to reconcile “popular discontent with our legal system.”(21) By illustrating that individual rights are recognized by the criminal courts to a point of excess, Pound is really saying that one has little to complain about with respect to criminal law.

Alternatively, “ There is nothing more glorious in our legal history than the judges of England telling the king that he ruled sub Deo et lege….yet that very scene resulted in constitutional doctrines that enable a fortified monopoly to shake its fist in the face of a people and defy effective investigation or regulation.” (22) From this devolves Pound’s historical and polemic analysis in to his definition of the *Spirit of the Common law*:

“Three characteristics set off the common law system from all others☹22)

1. the supremacy of law

2. case law and precedent

3. contentious procedure

These are defined and grounded in their historical origins:

“ The supremacy of the law , the doctrine that all questions may be tried in the course of orderly litigation between individuals, and that no person and no act is beyond law – is the Germanic principle that the state is bound to act by law.”

“ Our doctrine of precedents is almost as old. The first precedents were writs, and Glanvill’s book is a collection of them. Bracton relied on the judgment rolls, and his Note Book is something like a report. “

“ Contentious procedure is Germanic,[[125]](#footnote-125) and characterizes English law from before the Conquest.

Pound’s discovery from these historical doctrines is that

“ these three doctrines resolve themselves to a fundamental proposition that law exists for individuals, and hence is to deal with every question as a contest between individuals , and is to decide it on its individual facts, not arbitrarily, but as like cases have been adjudged for others, and is to allow the parties to fight out the contest for themselves, and as much as possible in their own way.” (22)

As a derivative of a brief historical analysis of English case law treating the public goods in commerce such as the use of poison dyes in woolen garments and individual rights to be protected from such practice, Pound then asserts:

“The common law in the interest of the individual is struggling with the prerogative of the people, represented by the police power, as it struggled with a like prerogative of the Crown from Henry VII to James II.”

“Times have changed, “ Pound tells us, - “ The individual is secure and new interests must be guarded. The common law renders no service today by standing full armored before individuals, natural or artificial[[126]](#footnote-126), that need no defense but sally from beneath its aegis to injure society.” [[127]](#footnote-127)(22)

And now, a recurring theme: Pound’s integration of the police power into the common law:

“ When the common law was in danger of fossilizing, it gave us equity. Today, when the sovereign people stand in the shoes of the sovereign king as parens patriae, this residuary authority has given us the police power.” (23)

(The police power) ..”….is furnishing the antidote for the intense regard for the individual which our legal system exhibits. “(23)

“The problem therefore of the present is to lead our law to hold a more even balance between individualism and collectivism. Its present extreme individualism must be tempered to meet the ideas of a modern world…..we must revert for a season to the residuary power of the parens patriae.

The power of rejuvenescence[[128]](#footnote-128) inherent in our legal system must be invoked. We must cease to mistake seventeenth century dogmas, in which temporary phases of its individualist bent were formulated, for fundamental tenants of the common law.” (24)

Pound suggests to his readers that he discovers this notion in the “ Laws of Ethelred””. [[129]](#footnote-129) Paraphrasing, the common law has a core of individualism:

“ In the courts or moots of the Teutonic polity, every free man took part; the titles were in the memories of the free men of the vicinage and the law was a tradition held by them all, expounded by them all, and administered by them all.

Every man was bound to bear his part in keeping the peace and in doing justice.”[[130]](#footnote-130) Where Pound is coming from in his search for the Spirit of the Common Law ends up here:

“ It is not to a paternal central authority, but to the free action of the individual and of the local community that the common law entrusts the maintenance of right by the might of the state.” (24)

Curiously, the spirit discussed in this article finds its origins in remarks made by Admiral Nelson, whose last words according to Pound were. “ ..Every man expects England to do his duty.” (25) Pound then reasons:

“ It is chiefly. Because of such a spirit, because of a feeling that responsibility is not and should not be upon each individual, but instead is and should be upon society, that the common law is out of touch with the times. The common law expects, as Nelson did, that every man will do his duty. It asserts that the individual is responsible for the preservation of the peace, the upholding of the law , and the maintenance of right. Granting that some modification of the extremities to which this spirit has been developed is inevitable, it is none the less manly and fortifying. We talk much and glibly of “ the people” in the abstract. What we need to do is, as does the common law – to talk of the individual in the concrete. The rights and duties of the people are the duties of individuals.” (25)

This reasoning concludes into a proscription of the common law:

“ Hence, this same obstinate individualism of the common law, which makes it fit so ill in many a modern niche, may yet prove a necessary bulwark against an exaggerated and enfeebling collectivism. “(25)

Pound closes this discussion of the Spirit of the Common Law by asserting a bold ethical premise, quoting a favorite German legal philosopher: [[131]](#footnote-131)

“ Everyone has the mission and the duty of cutting off the head of the hydra of unreason and lawlessness wherever it bows itself. Everyone who enjoys the blessings of law, must for his share contribute to hold upright the power and the majesty of the law. In short, everyone is a champion of right in the interest of society.” (25)

Setting up some terms for legal pragmatism, and grounding them in an association of Holmes and Pound, Kocurek reports:

“Somewhat like Holmes, Pound’s plan of life was simple-tackle the thing before you and get what you can out of it.’

A metaphysician might object that this represents no genuine philosophy, and that it is not a demonstrable counsel of perfection. However that may be, the formula is one that works, and that is all that pragmatism requires.” (Kocourek, 1947, p. 419) Both Pound and Holmes were in adversities with Theordore Roosevelt. Pound openly declared he did not like him, and Kocourek recalls a statement by Roosevelt of Holmes after reading Holmes dissent in the Northern Securities Case:

“ President Theodore Roosevelt was enraged, and said of Holmes, he had appointed to the court, ‘I could carve out of a banana a judge with more backbone–of course, Mr. Roosevelt made a great mistake about the quality of Holmes backbone”.[[132]](#footnote-132) Kocourek read into the letters between Holmes and Pollock, making the following observation:

“ Holmes said of Pound, ‘The number of things that chap knows drives me silly.” Pollock observes, ‘He seems to have read every mortal thing published in

English, French, and German about the philosophy of law, besides a vast mass of reported cases’. Pollock, to whom Holmes had given a letter of introduction, spoke of him (Pound) as ‘monstrous learned’ and as ‘the learned and ingenious Pound.’[[133]](#footnote-133)

“Executive Justice” – March, 1907 – The American Law Register[[134]](#footnote-134)

Vol. 46 No 3 p. 137

“ Complete elimination of the personal equation in all matters affecting the life, liberty, property, or fortune of the citizen seemed to have been attained.” 139 “..the paralysis of administration produced by our American exaggeration of the common-law doctrine of supremacy of law has brought about a reaction.

And that reaction, just as the last remnants of legislative justice are disappearing, has brought back the long obsolete executive justice and is making it an ordinary feature of our government .” 139

This distinction between executive and legislative justice to Pound was seen in English legislative reviews of divorces, bills of attainder and special or private acts for individuals. While parts of colonial America to which Pound refers in this article were for a period still issuing divorces and bills of attainder, “ The federal constitution put an end to them.” (138)

What is this paralysis of administration? Pound tells us that “ The recrudescence of executive justice is gaining strength continually and is yet far from its end. “ (139) The disease to which Pound refers is what he observes in annual reports of the American Bar Association.

“ From fifteen to twenty statutes giving wide powers of dealing with the liberty or property of citizens to executive boards, to be exercised summarily, or upon such hearing as comports with lay notions of fair play, may be seen enumerated in the reviews of current legislation in each of the last ten reports of the American Bar Association.” (139) The meaning of this to Pound is simple: “ . A brief review of the course of judicial decisions for the past fifty years will show that the judiciary has begun to fall into line, and that powers which fifty years ago would have been held purely judicial and jealously guarded from executive exercise are now decided to he administrative only and are cheerfully conceded to boards and commissions. “ (139)

In Pound’s view this reallocation of judicial review procedures into executive /administrative proceedings is an “ extra legal, ..if not anti-legal element to our public law.” (139) In his search for an explanation, Pound states:

“ Perhaps the beginning of judicial acquiescence in a departure from the common-law jealousy of arbitrary executive action is coincident with the general introduction of an elective judiciary. Certainly the submissiveness of elected judges under legislative encroachments upon the judicial department has been well marked. “ (140) To Pound the role of the judiciary had been substantially weakened, and he illustrates this, stating:

“ ….our appellate courts have acquiesced in legislation prescribing how and when they shall write opinions and give reasons for their decisions. Even more, the trial judges in a majority of our commonwealths lave been shorn of their just powers of advising the jury and have been reduced to mere umpires, in the interest of unfettered forensic display; and no protest has been heard.” (140)

After citing Coke’s argument before the King’s bench that “ no wrong nor injury, either public or private, can be done, but that shall not be reformed or punished in one court or another by due course of law,” [[135]](#footnote-135) a “new”(1893) [[136]](#footnote-136) point of view on the controversy quotes Pound is that in the absence of clearly defined opponents in a legal controversy, the proceedings which even in appearance are on points of law are different from the administration of justice. (144)

Pound doesn’t see this shift from judicial control over to administrative boards to be caused by life’s complexity or the division of labor.

Rather “… we see in this recrudescence of executive justice one of those reversions to justice without law which are perennial in legal history and serve, whenever a legal system fails for the time being to fulfill its purpose, to infuse into it enough of current morality to preserve its life.” (145)

This argument Pound employs to dismiss any contentions that complexity of life and divisions of labor are to blame for diminishing judicial powers, for in fact, “ …complexity and this division of labor developed for generations in which the common-law jealousy of administration was dominant.”(144)

To Pound, “Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials.” (145) The origins of executive justice, in Pound’s historical assessment, are the courts of equity in Rome and England. Equity courts “…acted without rule in accordance with general notions of fair play and sympathy for the weaker party. The law was not fulfilling its end; it was not adjusting the relations of individuals with each other so as to accord with the moral sense of the community .” (145)

Thus early 20th century executive justice, in effect administrative law, “…is an attempt to adjust the relations of individuals with each other and with the State summarily, according to the notions of an executive officer for the time being as to what the public interest and a square deal demand, unencumbered by rules.”(145) Of course, these behaviors of political caprice to Pound are a serious matter for resolve.

“Summary administrative action becomes the fashion. An elective judiciary, sensitive to the public will, blithely yields up its prerogatives, and the return to a government of men is achieved.”[[137]](#footnote-137)

Thus Pound concludes: “ ..if we are to preserve the common-law doctrine of supremacy of law, the profession and the courts must take up vigorously and fearlessly the problem of to-day-how to administer the law to meet the demands of the world that is. “ (146)

“Spurious Interpretations”

Columbia Law Review Vol. VII June 1907 No 6. P 379

This article is Pound’s view of legal analysis. It is as fitting for what we now in law schools call legal writing and research, as it was in 1907. The particular value this article retains is Pound’s exposition of legal analysis in contexts of human and moral reasoning.

Pound’s setting for legal interpretation is Austin’s analysis which Pound takes from Austin’s essay on Interpretation. ( Austin, 1865, p. 138) Austin’s thesis on legal interpretation as explained by Pound falls into three categories:

1. which of two or more co-ordinate rules to apply,

2. for the purpose of determining what the law –maker intended to prescribe by a given rule,

3. or, to meet deficiencies or excesses in rules imperfectly conceived or enacted.

“ Spurious interpretation “ occurs when legal analysis is performed under Austin’s third premise.

“ The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed.

Its object is to enable others to derive from the language used “ the same idea which the author intended to convey.” (381)

However, “..As it often happens, these primary indices to the meaning and intention of the law-maker fail to lead to a satisfactory result, and recourse must be had to the *reason and spirit* of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under guise of interpretation, becomes more difficult. “(381)

For Pound, interpretation takes on two dimensions, which while obvious are left to great subtlety for many contemporary law teachers:

”The former means of interpretation tries to find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.” (381)

“ if the former fails to yield sufficient light, (one) seeks to reach the intent of the law-maker indirectly. “…....Pound here alluding to the “….reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, ..”.(381)

This spurious interpretation is “ …..essentially a legislative, not a judicial process, made necessary in formative periods the paucity of principles, feebleness of legislation, and rigidity of rules characteristic of archaic law…......Spurious interpretation- is an anachronism in an age of legislation. It is a fiction. Lhering has called the process, when applied in a period of growth by juristic speculation, “ juristic chemistry.”

Savigny, considering it with reference to the adaptation of authoritative texts to new circumstances, calls it “ the correction of an incorrectly expressed laws.’ Lieber points out that it is essentially legislation. (Lord) Bryce calls it simply and plainly , evasion. It is in truth, what we may call a general fiction. “ (383)

Pound then factors “ spurious interpretation into his thesis of a separation of powers, seeking to distinguish judicial practice from other forms of political decision making. Also, Pound in this discussion delivers his continuing thesis that “ Cases must be decided, and they must be decided in the long run so as to accord with the moral sense of the community.” (384).

The reconciliation of this series of problems has a familiar ring:

“ It is often better that some other organ perform the special function in single instances, than that it go wholly unperformed. Just as in the organic body, when any one organ fails in its function others are pressed into service to do its work as well as they may, so in the super-organic body politic failure of one organ to do its whole work, or to do it well, puts pressure on the other organs to fill the gap. “(384)

“ Popular feeling that courts make law, and hence that judges are political officers to be elected as such, is making more than one commonwealth realize Bacon’s saying, - An ignorant man cannot, a coward dares not be a good judge.” “Spurious interpretation reintroduces the personal element into the administration of justice. The whole aim of law is to get rid of this element. However popular arbitrary judicial action and raw equity may be for a time, nothing is more foreign to the public interest, and more certain in the end to engender disrespect if not hatred for the law. “

Thus Pound concludes, “..over-rigid constitutions, carelessly drafted statutes, and legislative indifference toward purely legal questions are not permanently remedied by wrenching the judicial system to obviate their mischievous effects. As the sins of the judicial department are compelling an era of executive justice, the sins of popular and legislative law-making are threatening to compel a return to an era of judicial law-making.”

“The Need of a Sociological Jurisprudence”

The Green Bag – Vol. XIX p. 607-615 1907

“ …it must be admitted that the law of the land has not the real hold upon the American people which law should have, and that there is a growing tendency to insist upon individual standards and to apply them in the teeth of the collective standard which is or ought to he expressed in the law. “

Pound argues this is true based on a review[[138]](#footnote-138) of ninety trials observed in the National Reporter System. The trials were in the “highest courts” against employers for personal injuries, “….because the verdicts were not sustained by evidence warranting a recovery. “ (607)

Thus Pound continues: “ it is notorious that a crude and ill- defined sentiment that employers and great industrial enterprises should bear the cost of the human wear and tear incident to their operations, dictates more verdicts than the rules of law laid down in the charges of the courts.” (607) This of course does not suggest a pro-labor sentiment. In fact, Pound notes, as in one form or another he often alludes to newspapers, which he must have read frequently, a comment by Gompers in a footnote:

“ Since the foregoing was written, we have been afforded a good example in the Labor Day address of Mr. Gompers, in which if correctly reported, he said “ he would obey no injunction that deprived him of his rights.” Chicago Inter-Ocean, September 3, 1907”[[139]](#footnote-139) “ Such of this individual self-assertion against the law is due, no doubt, to the lack of a settled social standard of justice during a period of transition.

But a large part must be attributed to a wide-spread disrespect for law, to a general sentiment ; that unless the individual does so assert himself, he or those in whom he feels an interest will not be dealt with as justice requires.” (608)

“ For my part, I believe that current disrespect for law is not, in intention at least, disrespect for justice, and that the fault must be laid largely to the law and to the manner in which law is taught and expounded.” (608) Some key terms pass, nearly unnoticed. First Pound is at least conceding to the fact that social change is operative. He allows the period in which he is living to be an attribute of legal change. Pound doesn’t go far enough to dismiss the master – servant tort claims of 1907, or allow for Gompers a free reign in the “ lack of settled social justice.” – These litigious folks to Pound just don’t have faith in the law. Knowledge transmission in 1907 is accelerating, and data accumulates everywhere.

Decisions can be made based on sound information. Pound explains: “ A flood of bulletins goes forth annually to spread far and wide the latest result in the application of natural and physical science to health and wealth, in the application of economic theory to our material well –being, in the application of sociological principles to problems of state and municipal life. It ought to be someone’s duty to advise the people of the progress of juridical science and to make its results public property.

It ought to be someone’s duty to gather and preserve statistics of the administration of justice[[140]](#footnote-140) and to apply thereto or deduce there from the proper principles of judicial administration. Law teachers ought to be making clear to the public what law is and why law is and what law does and why it does so.

But no one can obtain statistics at all complete or at all authoritative upon the most everyday points in judicial administration. [[141]](#footnote-141) No one is studying seriously or scientifically how to make our huge output of legislation effective.” (608) Thus does one see for the first time a call for legal education to be responsive to the public, in an extremely broad framework. Law professors are called upon to educate the public. Perhaps this is Pound’s own model of Lincoln Nebraska, layered over the entire continent, and all law schools. One has a little sense that here one sees an increment of “creeping idealism” – that perhaps missing in Pound’s model is a homogeneous community . Being Dean at Nebraska included being a citizen who knew most of the town, most of the lawyers in the state, and frequent contact as well. The size of the bar in 1906 for the entire nation totaled 5,800. If Pound’s formulations were going to work, he’d need an evolving consensus. Absent in the ideals to which Pound ascribes in 1907 is a realization that America’s economic change is being recognized by the courts . Influenced by violent acts in society, judges apprehend further dangers and temper their decisions.

Pound steps back from his opening act, and digresses into a jurisprudential climb back into his thesis. Comparatively, historical and analytical legal reasoning are infused with “ attempts to distinguish cases superficially analogous and to establish ‘differences’ or “diversities”(608)[[142]](#footnote-142) This comparative “tendency” of legal thought is followed by a philosophical tendency.

The Philosophical tendency is legal thinking which “ …the rule must conform to reason, and if it does not, must he reshaped until it does, or must have reasons made for it.” (609)

“ To this philosophical tendency an analytical tendency succeeds by way of revolt. The validity of the so-called reasons is examined. Being for the most part ex post facto and, though specious, neither historically sound nor critically adequate, they fall to the ground, and often carry the rules with them. Hence the analytical period usually coincides with a critical tendency and an era of reform through legislation.” (609) The taxonomy of Pound’s analysis of legal transformations from historical underpinnings to support legal decisions, through the “reasoned” philosophical conclusions of judges to assert holdings, into critical transformations of legal thinking based upon analytical “differences or diversities” – falls to reform by legislation. Each of these legal thinking paradigms to Pound can only be a “tendency”. This is likely so because the legal thinking paradigms then, as now could be seen all occurring together in one opinion. Legislation oddly becomes the burial ground for long held legal maxims in Pound’s taxonomy.

While Pound does not state it, in his taxonomy the law as characterized in a series of legal reasoning paradigms collapses because social change cannot be reconciled by any of the legal thinking models which exist. Thus to Pound “ we must seek the basis of (legal) doctrines …....in a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of today.” (611)

Legal education in 1907 to Pound looms as a core problem: “ So long as the one object is to train practitioners who can make money at the Bar, and so long as schools are judged chiefly by their success in affording such training, we may expect nothing better…they are not bound to teach traditional legal pseudo-science. “ (611) ….“ law schools not only make tough law, they make tough legal science, …...

…….we must not make the mistake in American legal education of creating a permanent gulf between legal thought and popular thought. “ (611)

For those teaching at Harvard before Roscoe arrived, beware:

“ Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood.” (612)

And, a call for action:

“It is the duty of American teachers of law to investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction, and, while teaching the actual law by which courts decide, to give to their teaching the color which will fit new generations of lawyers to lead the people as they should, instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists .”(612)

At the time Pound is writing the article in 1907, he asserts that “ The idea has been, so far as possible, to allow everyone to do and to acquire all that he can.

The individualist conception of justice as the liberty of each limited only by the like liberties of all has been the legal conception .“

(612) This phenomenon we would grasp as Laissez-faire economic thought.

Pound integrates this assertion into the time:

“ To-day , while jurists in America are repeating individualist formulas of justice, sociologists are speaking rather of , the enforcement by society of an artificial equality in social conditions which are naturally unequal….

They are defining justice as the satisfaction of everyone’s wants so far as they are not outweighed by others’ wants.”[[143]](#footnote-143)

Pound doesn’t relent, contrasting a legal text to the maxim’s of Ward’s Sociology. He quotes from a law book in use: “ , the right of property is of divine origin derived by title-deed from the universal creator of all things and attested by universal intuition. “ (613) The author of that text on property, if living when Pound cites him, likely did not become a proponent of Pound’s ideas. This is an article however about a few themes, running concurrently. It is not an unfamiliar frame of mind for Pound, and the reader must be ever watchful for the shifts of theme. It is not too great of a leap to see the articles as segments of a Quaker Meeting, where parishioners sitting in silence stand and speak their feelings, i.e., a mind having many voices.

“ A passing of ultra-individualist phases of common-law doctrines on every hand, both through legislation and through judicial decision, is sufficiently obvious.” (613) Pound cites several examples, which may beneficially be paraphrased:

1. Freedom of Contract: This agreeably to Pound is” the right of each man to say for

himself what engagements he will undertake and to settle the details thereof himself”

[[144]](#footnote-144)

The Problem: - “ modern legislation is constantly abridging this right by creating classes of persons and classes of subjects, with respect to which rights and obligations are defined by law and made conclusive upon the parties, irrespective of stipulations attempting to set them aside;”

2. The contract of insurance: “ The older decisions were extremely strict in insisting upon the right of a surety to make his own contract in every respect. The slightest deviations, which had the effect of varying in some degree the obligation for which he engaged to become answerable, sufficed to relieve him. “

The Problem: “the advent of the surety company has already produced a change. It was felt that the right of every person to make his own contracts for himself must give way to a public demand for enforcement of contracts of insurance unless some substantial injury to the insurer appeared, and this feeling has led to a line of judicial decisions with respect to contracts of surety companies that cannot well be reconciled with the settled course of adjudication as to natural persons.”

3. Spendthrift Trusts: The common law insisted vigorously on individual responsibility. It was not possible for a debtor through any device to enjoy the whole substantial benefit of property free from claims of his creditors.

The Problem: The American decisions which permit such trusts are, as he[[145]](#footnote-145) points out, at clear variance with *the spirit of the common law[[146]](#footnote-146).*

They are another sign of the drift toward equality in the satisfaction of wants rather than equality in freedom of action as the standard of justice;”(613)

Note here the absolute tension between the two themes nested in a “standard of justice”: equality in satisfaction of wants is counterpoised against equality in freedom of action. Thus each of these examples Pound uses to argue his case are examples of the “drift” to which he refers.

4. The Doctrines of Contributory Negligence: “ Recent legislation with respect to employer’s liability is almost wiping out those doctrines.

It seems to be felt that nothing short of fraud ~ or disregard of life or limb so gross as to amount to fraud, should preclude recovery. No less characteristic is the view which the common law takes of industrial accidents. It insists that such accidents must be due either to wholly preventable conditions or to the negligence of some person. Either the employer, it holds, was negligent or the employee.

The Problem: the business itself, and not the negligence of some person operating therein, may he responsible for the accident, ….

It is coming to be well understood by all who have studied the circumstances of modem industrial employment that the supposed contributory negligence of employees is in effect a result of the mechanical conditions imposed on them by –the nature of their employment, and that by reason of these conditions the individual vigilance and responsibility contemplated by the common law are impossible in practice. ….

…...while the common law insists upon the workman taking the ordinary risks of his occupation, requires him to show negligence on the part of his employer as a prerequisite of recovery, and holds him to account rigidly for negligence of his own contributing to the accident, the public has been coming more and more to think that the employer should take the risk of accidents to his men, as of accidents to his plant and machinery, where there is no willful injury and no fraud – is one of these ordinary risks.”(614) Thus Pound admonishes his readers to be watchful , “ …we must note here once more that higher regard for the person and regard for equality in the satisfaction of wants are the controlling elements in the newer doctrine. “ (614)

But there is yet one more legal conception that is “ *repugnant to the spirit of the common law*.” (614) That is the shifting from the standard of so-called legal justice to that of social justice , which according to Pound can be “ seen in the tendency of modern legislation to reintroduce status or something very like it.”

Sociological Jurisprudence to Pound is not an enlightenment of the common man in the early 20th century. Pound closes this article in an analysis of standards, framed as a dichotomy between freedom of action and satisfaction of wants. It is here, between acting freely as a “man”/person and experiencing a satisfaction of wants that Pound finds a legal/social problem. Between the freedom of action and satisfaction of wants stands the common law. According to Pound the”…. common law point of view was extremely individualistic. It left the individual free to assume whatever obligation he chose and to determine its details for himself. …. it also imposed responsibility corresponding to this freedom. If he chose to assume an obligation, the common law held him to it jealously. He had weighed the risk and had taken it. As he was allowed to incur it like a man, he must bear its consequences like a man.”(615) “ ..today exemption, homestead, and appraisement statutes, not to speak of bankruptcy and insolvency laws, greatly restrict the power of the creditor to enforce the liability assumed.”(615)

“ The principle that promises must he kept yields to the demand that satisfaction of the reasonable wants of the debtor be first reasonably provided for.” (615) Summarizing, Pound sees freedom of action in 1907 to yield to satisfaction of wants.

Therefore, he asserts: “ In all cases of divergence between the standard of the common law and the standard of the public, it goes without saying that the latter will prevail in the end. Sooner or later what public opinion demands will be recognized and enforced by the courts. “(615)

The meaning of all this for legal education, and a sociology of jurisprudence, is that the “Bench and Bar trained in individualist theories and firm in the persuasion that so called legal justice is an absolute and necessary standard (note the phrase which immediately follows this sentence) may retard but cannot prevent progress to the newer standard recognized by the sociologist.” Pound, inside this long sentence, made a seemingly more profound remark, phrased as follows:

“ is an absolute and necessary standard from which there may be no departure without the destruction of the legal order..”. Paradoxically, we are warned that a move ahead can be a disaster for the legal order. We are admonished to be at all times cognizant of the individualistic nature of common law holdings relating to individual rights, yet to expect that all this will be set aside as the future unfolds.

So within this act to obstruct, “ In this progress[[147]](#footnote-147) lawyers should he conscious factors, not unconscious followers of popular thought, not conscious obstructers of the course of legal development. , ….it is the duty of teachers of law, while they teach scrupulously the law that the courts administer, to teach it in the spirit and from the standpoint of the political, economic and sociological learning of to-day. “ (615)

And finally, the mandate to law faculty:

“ It is their task to create in this country a true sociological jurisprudence, to develop a thorough understanding between the people and the law, to insure that the common law remain, what its exponents have always insisted it is –

the custom of the people, the expression of their habits of thought and action as to the relations of men with each other.”(615) . It is important in this conclusion and mandate to catch the 1907 definition Pound assigns to the common law:

, *to insure that the common law remain, what its exponents have always insisted it is – the custom of the people, the expression of their habits of thought and action as to the relations of men with each other.”(615)*

“Enforcement of Law” [[148]](#footnote-148)

Green Bag Vol. XX, p. 401 1908 Boston.

“…it is a serious condition if legislatures are sitting at no small expense to no purpose and volumes of reports are pouring forth filled with mere academic discussions of principles that do not obtain in action. “ (401)

“ Undoubtedly the prevalence of eighteenth- century theories of natural law in our legal and political education leads men to think of the individual conscience and the individual reason as the ultimate arbiters in the matter of obedience to law. “ Pound casually indicts the American Legal System, one thinks perhaps to wake the audience, it is a familiar theme ;

“ which has no excuse for existence in the progressive age and among a business-1ike people – archaic judicial organization and obsolete procedure.

Thus we may recognize our chief causes of the difficulties which beset enforcement of law today in the United States:

(1) Shifting of the standard of justice, shifting of the emphasis from property to person, shifting of the standpoint from individualism to collectivism, shifting of the end of law from the old so-called legal justice to the new social justice – a process which is going on the world over and is giving rise to the same problems everywhere;

(2) conflict between legal theory and judicial practice in the application of law;

(3) want of accord of the common-law theory of the relation of law to administration with the needs of the time, so that on the one hand , vigorous executive action is hampered and on the other hand the law staggers under a burden of administrative work it is ill adapted to and all application of law is made unduly difficult ; and

(4) the backwardness of judicial organization and procedure in America. “(402)

…”As the law is conservative and even more lawyers are conservative, legal theory is very apt to be a reflection of ethical theory of the past. The older conception of law, to which very likely a preponderance of jurists as well as a great majority of practitioners still adhere, was thoroughly individualist. “ (402) This of course is a problem, because the world is changing, Pound explains:

“Today moralists and sociologists are taking another view of justice. Not liberation of energies but satisfaction of wants is made the Central point. They are defining social justice.” (403)

The foundation of law, however, as Pound reports, lies elsewhere, “Jurists are taking a different view.” (403):

Here, those views are identified – bifurcated in time from the evolution of individualistic formulations, into a broader view of the needs of society.

First, the underlying individualist theories are postulated: [[149]](#footnote-149)

“Individual rights are the whole foundation of Blackstone’s System”

“ Austin’s followers make individual rights the end of law”

“Savigny held that the end of legal rules was to give secure and free opportunity to the existence and activity of each individual.”

“A German institutional book on Roman law translated and widely used by students in this country puts as the end of law the granting to individuals a power over the outside world.”[[150]](#footnote-150)

Then, Pound suggests a more recent tendency which shifts “continental jurists’ thinking into a social conception of the law:

lhering defined law as “ the securing, under the form of constraint, of the vital conditions of society.’

Jellinek defines it as “ the sum of conditions necessary for the maintenance of society.’ A French author has recently defined it as “ the aggregate of rules whose application should assure the normal functioning of society .” [[151]](#footnote-151)

This all leads to Pound’s conclusion and viewpoint:

“ …..the center of juristic theory is no longer the individual; it is society.” (403)

If organic metaphors of a healthy legal system aren’t illustrative of the period, here is Pound, using a machine metaphor:

“ …the legal machinery loses precision and accuracy of operation. Certainty is impaired, and as these failures of the judicial machine to work true become generally perceived, lack of confidence in legal system results.” (403) This machinery grinding to a sloppy drift, failing to manufacture good law, is cogged up with “ verdicts which are crude attempts to vindicate half-grasped conceptions of social justice.

Judges feel that settled legal doctrines are leading them in particular cases to results that jar their feelings of right and of distributive justice, and resort to lax or equitable application of the law.” (403)

The cogs will be removed, and the machinery back in fine operating shape, when :”..the shifting to the newer standard of justice is accomplished, when education and the labors of sociologists have brought about the internal conditions of life measured by reason, the judicial machine will run normally once more and law will speedily take care of the external conditions.” Pound tries to explain to the Illinois Bar Association the tensions in this judicial machine by extrapolating judicial interpretation frameworks from German juridical writings. Here, to the reader’s delight, is really an indictment of judicial reasoning in the United States. Nay, the clever Pound would never say it, so, criticize the Germans.

“ Three schools may be distinguished in Germany today, differentiated according to the manner in which they apply code provisions and the point of view from which they approach the code. First, there is what we may call the literal school. They endeavor to find the proper code-pigeonhole for each concrete cause, to put the cause in hand into it by a pure logical process, and to formulate the result in a judgment. Their standpoint is essentially analytical…”.the analytical theory has always been a concomitant of periods of legislation.” Pound doesn’t find much enlightenment in this analytical enterprise. “…..;the whole human element is excluded. The process and the result are conceived of as something purely logical and scientific.”[[152]](#footnote-152) Pound clarifies this entertainingly:

“ The facts of concrete causes are to be thrown into the judicial sausage-mill and are to be ground into uniformity; and the resulting sausage is to be labeled justice.”(404)[[153]](#footnote-153) “ Secondly, there is an historical school.

With the adherents of this school the code provisions are assumed to be in the main declaratory of the law as it previously existed; the code is regarded as a continuation and development of pre-existing law…..their method of application of the law, however, is substantially the same as that of the literal school . …..they agree that when it is interpreted and its content is ascertained, the process of application is a purely logical one.” (405)

“A third school, which one might call the equitable school, has sprung up and waxed strong in Germany in the last ten years.” Conveniently, this school has many of the attributes which Pound advocates.” The starting-point of this school is philosophical or sociological. To this school the essential thing is a reasonable and just solution of the individual controversy.” This school of juridical reasoning and problem solving has a defined sequel of maxims which are followed:

1. It conceives of the legislative rule as a general guide to the judge, leading him toward the just result; but it insists that within wide limits he should be free to deal with the individual case so as to meet the demands of justice between the parties and accord with the reason and moral sense of ordinary men. (405)

2. It insists that *application of law is not a purely mechanical process*.[[154]](#footnote-154) It contends that the process involves, not logic merely, but discretion ; that the cause is not to be fitted to the rule but the rule to the cause. (405)

To this now Pound opens his discussion of the “ mechanical operation of legal rules” “ The necessarily mechanical operation of legal rules is an inherent difficulty in the administration of justice.

This mechanical operation, the penalty we must pay for certainty and uniformity and *elimination of the personal equation in the administration*[[155]](#footnote-155)of justice, is a perennial source of irritation. “ (406) What “devices” [[156]](#footnote-156) of “mechanical jurisprudence are irritating?

1. “The first crude device was fiction – a pretending that a cause fell within or without a rule contrary to obvious fact. .

2. “ Another crude and primitive device was an executive dispensing power, ‘

3. “ Another device which operates with great effect at some periods of legal history is interposition of a praetor or Chancellor on equitable grounds; the claim that a higher body of rules exists, by virtue of which magisterial interference to prevent exercise of strict legal rights may he justified, or a power of acting pursuant to principles assumed to obligate the individual to a higher standard than that of the law and requiring him to use or abstain from using his legal rights or powers accordingly.” (406)

To this Pound appends and concludes: “ But in process of time equity crystallizes into a system everywhere and becomes but little less mechanical than the law itself. “ Thus equity as a legal resolve to individual rights framed within specific controversies will succumb to a process of mechanistic legal thinking.

Pound next evolves a thesis that law making and decision making in American Courts , being bound up by the variables described, takes judicial powers back to the equitable application of legal rules. Again, he uses German jurisprudence as a backdrop, but the criticism is of American courts.

“ In Germany it is admitted - A scientific theory is worked out to explain and justify it, and an open controversy rages as to its propriety. *With us the process is concealed. (406)* This has particular importance when reflecting on sets and groupings. Pound defines the “ process”:

“ The process reveals itself under the name of implication or in the guise of two lines of decisions of the same tribunal upon the same point, from which it may choose at will, or in the form of what one might term soft spots in the law, spots where the lines are so drawn by the adjudicated cases that the court may go either way, as the ethical exigencies of the cause in hand require, with no apparent transgression of what purports to be a hard and fast rule.” (407) Having introduced, extrapolated, and comparatively explained this process of mechanical and spurious lawmaking, Pound suggests that the process of legal reasoning he has been describing would not be respected by the public. “....the method by which it (the process) is carried out in this country is rightly felt to be unlegal. It injures respect for law. If the court does not respect the law, who will? There is no one cause of the current attitude toward law. But this judicial evasion and warping of the law, in the endeavor to secure in practice a freedom of judicial action not conceded in theory, is a prime cause.”[[157]](#footnote-157) Pound next delineates some interesting attestations, or opinions, which he tells the audience: (407)

1. “....legal principles after all can only furnish a broad outline. “

2. “...all attempts to tie the law down tight lead in the end to fictions, or spurious interpretation, or the rise of a new system of rules of assumed higher validity, or equitable application.”

3. “..In an epoch of matured law, when growth takes place by legislation, when

doctrines are stable and principles fixed and rules determined, when the ordinary

mitigating agencies of interpretation and judicial law-making have ceased to be e

effective, equitable application is but an assertion of the element of discretion, of

reason, of equity in its wider sense, inherent in all law. “(409)

The article shifts into a closure when Pound revisits the common law. [[158]](#footnote-158) “....the individual has all the advantage against society in our legal system and the local community every advantage against the state. Each to large extent may defy society with impunity; for the common law was developed to protect them, not to bring them to their knees. “ (409) “ Another unfortunate feature of our common-law polity is the every-day spectacle of law paralyzing executive action, whether by compelling resort to the futile enforcing agency of criminal prosecution, or by its narrow rules as to jurisdiction of administrative tribunals, its presumptions against them and its hyper-critical scrutiny of their proceedings, or by legal liabilities imposed upon administrative officers for action under color of their offices, or by direct judicial interference by injunction.” (409)

“Such a system, however wisely the judges administer it, however proper it was in the past, however much it wrought formerly for individual liberty, is wholly out of joint with the present. Not only is it clumsy and wasteful, but it is demoralizing.” (409)

“ Law is ill-adapted to do administrative work, but we throw a large burden of the purely administrative upon the courts.” (410) “ the problem of law in the past was to repress force. The problem today is to repress cunning.” (410

“Mechanical Jurisprudence”

8 Col. L. Rev. 605 (1908)[[159]](#footnote-159)

Pound begins by explaining scientific jurisprudence :

“ The marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its anti- thesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice -or equity or natural law. “ (605)

“Law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance. “ (605)

“ Legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence.”(607)

“ Undoubtedly one cause of the tendency of scientific law to become mechanical is to be found in the average man’s admiration for the ingenious in any direction, his love of technicality as a manifestation of cleverness, his feeling that law, as a developed institution, ought to have a certain ballast of mysterious technicality.” (607)

“The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also.” (608)

“ We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs. “ (609)

“ The sociological movement in jurisprudence is a movement for pragmatism as a 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.”( 610)

Here evolves another view of how the common law retains (or surrenders) the vitality of legal systems:

“ The development of the common law in America was a period of growth because the doctrine that the common law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study the conditions of application as well as the conceptions and their logical consequences.

Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules.

This is the condition against which sociologists now protest, and protest rightly.” Watch the shells, ladies and gentlemen, watch the hat and the rabbit, the grand master of legal maxims is about to report:[[160]](#footnote-160)

The process of getting to the deterioration of mechanical jurisprudence having been resolved, the next construct in the series of failures in legal process is legislative activity. Legislative activity “ ....supervenes to supply, first new rules, then new premises, and finally a systematic body of principles as a fresh start for juristic development.” (612)

“...In the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. “ (612)

This imperative theory gets partially defined, but only in its shadows. “ Austin’s proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform-movement in English law.” (612) The apparent meaning of this model is that law ends up in fixed conceptions, while society experiences new and different standards of social and economic discourse. In his writings, if one feature of law can be attributed to Pound as explicitly aggravating, perhaps as a botanist would say, it becomes fossilized.

New rules and premises elicited in legislative halls may exacerbate the fossilization, but even so, this problem of an “imperative theory” sets in, and rigidity of thinking once again “ the law becomes a body of rules.”

But there is a new horizon

“ In Europe, it is obvious that the different schools are coming together in a new sociological school that is to dominate juristic thought. Instead of seeking for an ideal universal law by metaphysical methods, the idea of all schools is to turn “the community of fact of man into a community of law in accord with the reasonable ordering of active life......

hence they hold that “the less arbitrary the character of a rule and the more clearly it conforms to the nature of things, the more nearly does it approach to the norm of perfect law.”[[161]](#footnote-161)

Pound then relates these attributes to the new German Business Code (this is 1908)[[162]](#footnote-162) “ It (the German Business Code) lays down principles from which to deduce, not rules, but decisions ; and decisions will indicate a rule only so long as the conditions to which they are applied cause them to express the principle. This, and not lax methods of equitable application, into which American courts are falling so generally, is the true way to make rules fit cases instead of making cases fit rules.” (613) Here is no small piece of legal analysis. In fact, the small paragraph serves to integrate the legal thinking process as Pound envisions it with sociological reasoning of the period. *It therefore is an extremely important integrating phrase.*

While Pound himself writes:

“ The sociological theory of the present is a theory of legal science”(613) stated differently, legal rules must change as the conditions which they exist to address are changed. The coda warrants being repeated, and rephrased, for it is important:

(German business code) ...decisions are derived from principles of business, and those decisions indicate a rule only so long as the conditions express the principle.

This means that legal decision making becomes something distinct from legislation and rule making, ...legislation necessarily would fall behind such an efficient legal process, because the rule making would always follow. In effect business conditions which did not express the principles would significantly attenuate legal decision making, and any previously “indicated” rule would fall away from the formulae within the legal decision. If one doesn’t mind too much the huge leaps in generalities, the conclusion is quite clear. Pound will attack the legislative process again:

“ An efficient cause of the failure [[163]](#footnote-163)of much American legislation is that it is founded on an assumption that it is enough for the State to command. (Remember Austin’s imperative theory a few paragraphs ago?) Legislation has not been the product of preliminary study of the conditions to which it was to apply. It has not expressed social standards accurately. It has not responded accurately to social needs.” The legislatures are not alone the cause of distress. “ ...Our case law at its maturity has acquired the sterility of a fully developed system, (and this) may be shown by abundant examples of its failure to respond to vital needs of present-day life. “

These are enumerated: (As case law failures)

1. Its inadequacy to deal with employers’ liability; [[164]](#footnote-164)

2. the failure of the theory of “general jurisprudence” of the Supreme Court of the United States to give us a uniform commercial law;

3. the failure of American courts, with centuries of discussion before them, to work out a reasonable or certain law of future interests in land;

4. the breakdown of the common law in the matter of discrimination by public service companies because of inability to make procedure enforce its doctrines and rules;

5. its breakdown in the attempt to adjust water rights in our newer states, where there was opportunity for free development;

6. Its inability to hold promoters to their duty and to protect the interests of those who invest in corporate enterprises against mismanagement and breach of trust;

7. Its failure to work out a scheme of responsibility that will hold legal entities, or those who hide behind their skirts,[[165]](#footnote-165) to their duty to the public-”(614-15)

The evolution of case law alone, as Pound amply demonstrates, does not reconcile economic and societal dilemmas. [[166]](#footnote-166) “...judicial revolt from mechanical methods to-day is more likely to take the form of “officious kindness” and flabby equitable application of law.” (615)

“...examples of the failure of our case law to rise to social and legal emergencies. ...(are) the manner in which the Fourteenth Amendment is applied affords a striking instance of the workings to-day of a jurisprudence of conceptions.

Starting with the conception that it was intended to incorporate Spencer’s Social Statics in the fundamental law of the United States, [[167]](#footnote-167) rules have been deduced that obstruct the way of social progress.[[168]](#footnote-168)

The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat liberty......

The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated.” (616) [[169]](#footnote-169)

“Deductions from this and like conceptions, assumed to express the meaning and the sole meaning of the clause, have given us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate.” (616)

Pound is still in Chicago, and we recollect that Wigmore, the Dean who recruited Pound from the 1906 St. Paul ABA Convention is a close acquaintance.

Perhaps this influences the next contemplation:

“Procedure, with respect to which every thoughtful lawyer must feel that we are inexcusably behind the rest of the English-speaking world, suffers especially from mechanical jurisprudence.

The conception of a theory of the case, developed by the common-law forms of action, has, in nearly half of our code jurisdictions, nullified the legislative intent and made the practice more rigid than at common law. [[170]](#footnote-170) “

In deductions from this conception they lose sight of the end of procedure, they make scientific procedure an end of itself, and thus, in the result, make adjective law an agency for defeating or delaying substantive law and justice instead of one for enforcing and speeding them. “(617) [[171]](#footnote-171)

“ Trial procedure is full of mechanical jurisprudence born of deduction from conceptions.”

The litany of this premise thus follows: (As a paragraph written in the form of a sentence)

1. “ the decisions as to the effect of a view of the locus by a jury, in which judgments are reversed unless jurors are told, in the face of common-sense, not to use what they see as evidence, in order to vindicate a conception of the duty of a court of review;

2. The *wilderness of decisions* as to the province of court and jury, in which, carrying a conception of distinction between law and fact to extreme logical results, the courts at one moment assume that jurors are perfect and will absolutely follow an abstract instruction to its logical consequences in the face of common-sense and the evidence, and at the next assume that they and will be misled by anything not relevant that drops from the court;

3. the practice of instructions, one way or the other, when doubtful points of law arise, a general verdict, and a new trial, if the court of review takes another view of the point, when the verdict could have been taken quite as well subject to the point of law reserved, and a new trial obviated......(619)

Each of these precepts therefore: “ ....illustrate forcibly the extent to which procedural conceptions, pursued for their own sake, may defeat the end of procedure and defeat the substance of the law. “ (619)

Which to Pound results in the following conclusion:

“ ....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- The life of the law is in its enforcement. “(619)[[172]](#footnote-172) Consider how many state courts now compel mandatory arbitration in civil proceedings!

“ Evidence also has been a prolific field for the unchecked jurisprudence of conceptions. The decisions by which in a majority of jurisdictions jurors are not permitted to learn directly the views of standard texts upon scientific and technical subjects, but must pass upon the conflicting opinions of experts without the aid of the impartial sources of information to which any common-sense man would resort in practice, carry out a conception of the competency of evidence at the expense of the end of evidence.”(620)[[173]](#footnote-173)

Here the article closes with questions and a summary:

“ How far the mechanical jurisprudence, .....which forgets the end in the means, is made manifest by the stock objection to attempts at introducing a common-sense and business-like procedure. We are told that formal and technical procedure “makes better lawyers.”[[174]](#footnote-174) One might ask whether the making of good lawyers is the end of law. “(620)

“ The nadir of mechanical jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used, they cease to be conceptions and become empty words. “ (621) [[175]](#footnote-175)

“ Current decisions and discussions are full of such solving words: estoppel, malice, privity, implied intention of the testator, vested and contingent,-when we arrive at these we are assumed to be at the end of our juristic search.

Like Habib in the Arabian Nights, we wave aloft our scimitar and pronounce the talismanic word. “ (621)

**“ with legislative law-making in the grip of the imperative theory and its arbitrary results, and judicial decision in the grip of a jurisprudence of conceptions and its equally arbitrary results, whither are we to turn ? ..........That we may put the sociological, the pragmatic theory behind legislation, is demonstrating every day. ......common-law lawyers will some day abandon their traditional attitude toward legislation; will welcome legislation and will make it what it should be. ...juristic principles may be recognized and juristic speculation may be put into effect quite as well by legislation as by judicial decision.” (622)**

“...the task of a judge is to make a principle living, not by deducing from it rules, .......but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result.” (622)

“ The real genius of our common law is in this, not in an eternal case-law.. Let the principles be formulated by whom or derived from whence you will. The Common Law will look to courts to develop and expound them~ the Civil Law to doctrinal treatises. It is only a lip service to our common law that would condemn it to a perpetuity of mechanical jurisprudence through distrust of legislation. “ (623)[[176]](#footnote-176)

“ *Herein is a noble task for the legal scholars of America*.

To test the conceptions worked out in the common law by the requirements of the new juristic theory,”[[177]](#footnote-177) *to lay sure foundations for the ultimate legislative restatement of the law*, from which judicial decision shall start afresh,- this is as great an opportunity as has fallen to the jurists of any age.” (622)[[178]](#footnote-178) Additional articles continue up to and including the famous and still frequently assigned “Spirit of the Common Law” collection of Storrs lectures given at Dartmouth by Pound in 1921. [[179]](#footnote-179) The articles reviewed and presented are viewed sufficient in range to draw conclusions about Dean Roscoe Pound, and his work for legal education, and the legal profession.

CHAPTER IV. METHODS & MODELS

A FOCUSED STUDY OF METHODOLOGICAL OPPORTUNITIES IN LEGAL THEORY ASSESSMENT AND CONSTRUCTION [[180]](#footnote-180)

Background on Attributes of Legal Theory & Design

Pound is unique among legal theorists because he was Dean of Harvard Law school for many years, yet also was a prolific writer and legal scholar. As a leader in the legal profession and legal education, he was able to articulate a vision of substantial change in American legal traditions from the Dean’s pulpit at Harvard Law School and as a principal in professional associations. The networks of influence he enjoyed as Dean were effectively associated with his speaking tours, association memberships and scholarship. This work attempts to demonstrate by an examination of his personal correspondence, and actual writings how Pound’s study of materials and articulation of ideas over a long period of time evolved into a grand legal theory. Other scholars in the network of this period knew Pound, corresponded with him, and wrote about topics related to his work. This study is important. Identified relationships between erudite legal theory construction and applied legal practice in legal education are nonexistent. Little time is required to find many anthologies of collected articles on legal theory, many authored (edited) by well known legal scholars. A clearly articulated vision of paradigm constraints in the evolution of legal thought has yet to be written. The problem has many origins. For example, law schools do not graduate professionals who are legal scholars prepared in the skills of qualitative and quantitative analysis. This should be no surprise. American Law schools are designed to train individuals to become legal practitioners.

Arguably a few law students explore legal theory in graduate legal studies, but very few. Knowing this, the study of how Roscoe Pound arrived at his inquiry, how he handled this inquiry, and how his writings became the framework of Sociological Jurisprudence becomes instructive in the search for qualitative issues in paradigm constraints which have limited change in the American Academy of legal education and the American legal profession.

Law school curricula are static. There is little difference today among many of the courses from courses taught in the 19th century. One might think reams of law review publications [[181]](#footnote-181)which call for revisions and change in curriculum materials would have influenced law school curriculum committees. Legal paradigms have come and gone, but the student as navigator must still find a path through very traditional curriculums , then following graduation find a contractor providing instructions in skills to get the same student through a state bar exam. The goal of this work was to capture key elements of legal reasoning in the work Pound was doing. Illustrating his vision, that vision is then contrasted with the rate of failure in licensing exams for new lawyers. [[182]](#footnote-182) Observing that law schools remain in a paradigm of unchanged traditions of training which must be concluded are not effective, critical questions remain about how to examine the problem qualitatively.

Are there points of thinking and reasoning which can be extrapolated from Pound’s scholarship that can then be sorted into models of a dialog about legal education? Do we construct legal theory to facilitate the quality of our legal and judicial discourse? This Chapter opens that dialog, and encourages further inquiry.

If answers to such questions can be discovered , those answers can be infused into law school curriculums, then law school graduates may have a greater sense of value about their legal education, higher expectations of their own legal careers, and a broadened sense of their professional abilities and community importance.

Contemporary qualitative and quantitative research has been substantially influenced by searches for paradigmatic formularies. Scholarship which examines the constraints of scientific paradigms helps one understand that new perspectives about law, as well, can reasonably be held to scholarly inquiry from the perspective of paradigm constraints illustrated by parallel models used in building scientific theory. The notion that legal theory concepts can be set into qualitative questions is verified by this research.

The Work and Utility of Dr. William M. Ammentorp, et. al., Integrating Legal Theory Building with Social Design Postulates

My own doctoral advisor made this point:

“We need a better understanding of how paradigms come into being and how they are transmitted among professionals.”[[183]](#footnote-183)

This inquiry into Pound’s writing and papers was intended to explore and then methodologically demonstrate the evolution of Pound’s jurisprudence paradigm over a thirty year period. As a perspective on method, the work represents a very broadly characterized longitudinal process . One methodological approach to this question included a search for the analytical constructs which were “key” organizing principles in the writing construct subsets of Pound’s search for a Sociological Jurisprudence. As more digital beds of information are formed, more efficient studies of this form of scholarship can be practiced. Unfortunately when reviewing historical and archival materials the digital techniques of qualitative research are not available without a monumental entry of materials. Particularly unique scholarship materials, such as the many personal items of dairies and letters found in Pound’s archives are not likely to become digital files because of the limited number of file inquiries by scholars. Many are also handwritten. Hence, computer analysis of documents was either extremely costly or fundamentally unrealistic.

Qualitatively , the reading and categorization of emergent ideas and arguments of constituent parts of Pound’s evolving paradigm and theory proved to be extremely informative. Design problems and their sources could be identified. Through this process an argument about inquiry can be asserted. The components of a model of legal theory building can be derived from examining the formal writings , personal correspondence and biographical information of an eminent scholar like Roscoe Pound. It is primarily because of the richness of his materials in archival collections. Several twentieth century legal scholars were extraordinarily prolific in their writing. Supreme Court Justice Oliver Wendell Holmes Jr., Columbia Law Professor Karl Llewellyn , and Oxford University’s Sir Frederick Pollock are comparable examples of legal scholars and practitioners who produced thousands of pages of legal scholarship. Their correspondence and personal papers are also substantially archived, and the biographical writings regarding each scholar are numerous.

Method & Language – Building Perspectives

By formulating an effective analytical technique to explore the paradigm building and theory development of Pound, the model can be evaluated against the voluminous work of Llewellyn, Holmes and Pollock in future scholarship. For example, Llewellyn is considered to be the founder of the legal realist movement . Pollock, a jurisprudential scholar at Oxford University , presented a range of important legal scholarship during his legal career in Britain. The legal realism paradigm presented by Llewellyn argued that law should be viewed through a template of realism to include substantial quantitative measures of the effects of judicial decision making. Ironically the legal realism movement failed in large part specifically because of the demands the realists placed on quantitative data. The legal system of adjudication would not tolerate the depth of analysis demanded by the legal realists. Oliver Wendell Holmes intriguingly bridges the two legal paradigms [[184]](#footnote-184) in both time and intellectual posture. Holmes was an important figure in Boston Law, briefly a Professor of Law at Harvard prior to Pound’s arrival, and later a very substantial figure in American Constitutional history as Chief Justice of the U.S. Supreme Court. Holmes was likely to have been influential in Pound’s arrival and career at Harvard. It in fact was a small world.

The Senior Oliver Wendell Holmes, Oliver’s Father , in addition to being a surgical pathologist, was an ardent plant collector, a trait Pound presented as a botanist who studied at the doctoral level. The Senior Holmes would likely have highly approved of Pound. Both were highly eclectic individuals.

The critical nature of paradigms in law is easily illustrated by classical legal books having titled associated with ”The Common Law”. The matter is striking. Holmes, (Holmes, 1881) Pollock, (Pollock, 1904) Pound, (Pound, 1921,1998) and Llewellyn (Llewellyn, 1960) were all to write a book discussing attributes of “The Common Law” .

The grand antecedent to all these works is a two volume work entitled “The Spirit of Laws” (Montesquieu , 1752) Each publication is distant in decades from the predecessor’s work. The point of this illustration is that there are many new analytical opportunities for additional comparative scholarship which evaluates the titans of legal thought during the past century.[[185]](#footnote-185) However, the comparative analysis to accomplish this outcome remains to be discovered. One step toward this analysis is to search for and establish the methodological and process design model which can then be further evaluated when applied to the materials generated by other legal scholars. Pound’s scholarship, extrapolated earlier, serves very well as the cornerstone for such analytical work. The qualitative questions articulated in the final chapter of this work are a demonstration of the elements which would comprise such a model. The design process and the controversies relating to paradigms are addressed in this chapter.

Pound and Llewellyn were primarily legal educators, yet they were also practitioner activists [[186]](#footnote-186) who for lack of a more formal characterization were hell bent for change in how the law in America achieved its goals and outcomes. This is no less true for the extraordinary Holmes, who as Chief Justice of the Supreme Court literally changed America into the 20th century using a gavel in his “qualitative” doctrinal perceptions about law and the U.S. Constitution.

To understand this better I argue that any legal methodological process can only derive from a longitudinal l historical and evaluative study of model and theory building work presented by legal scholars.

In constructing materials for law school curriculums, it is essential to examine the generative process of discovery and articulation of new theoretical ideas in legal discourse. As I hope to have started to demonstrate with Pound’s work, paradigms like “Sociological Jurisprudence” and “Legal Realism” flowed from shorter writings of theory and conjecture which occurred over considerable periods of time. This longitudinal attribute of change in legal thinking reinforces the perspective that paradigmatic influences are operative during short studies of legal issues and ideas.

The manner and extent legal paradigms influence theory construction and the rate of failures by ABA law school graduates at state bar exams appear to be inversely related. The more you think, the less likely you can succeed in becoming a licensed attorney. If you can really think clearly, no one who grades your bar exam can read your essays. [[187]](#footnote-187)

The economic and social costs to law as a discipline, students who purchase legal education, and the academy of law faculty are very substantial , and there is much waste to be observed. This is Pound’s message over many years of writing. Yet something is clearly missing in the rules of the game if so many who are trained to play the game can’t score a point in a professional examination. How does legal theory begin to address or influence such a question?

Methodologically, the law propagates legal rulings through the strict application of a doctrine called stare decisis. The argument is fairly direct. A judge is highly constrained by prior decisions on questions of law within his or her jurisdiction.

This process becomes more elaborate if the structure of differing jurisdictions of courts and the hierarchy of courts is considered. The point of importance is that there are very rigorously applied rule and doctrinal frameworks which were intended to ensure continuity in the resolution of conflicts and disputes which resemble matters already judicially resolved. Be careful to note that precedential legal reasoning (aka stare decisis) can and often does create many “bad” legal decisions. Legal reasoning procedures which could be argued to be troublesome cousins of stare decisis are also embedded in identified patterns of legal analysis identified by Pound and others. These “patterns”[[188]](#footnote-188) include ideas such as process jurisprudence, mechanical jurisprudence, scientific jurisprudence, analytical jurisprudence, and legal realism, to name a few. Strong argument has been made that judges when making decisions and rulings behave in mannerisms sufficiently obvious that these can be identified and categorized as “ mechanical legal reasoning.” [[189]](#footnote-189) Sadly that skill appears to be highly prized in bar exam essay writing. Stated differently what Pound disliked intensely 100 years ago has become an institutionalized process.

Argued metaphorically bar associations that control bar exams, and to a great extent, law school curriculums, turn prime beef into export balony. Receiving into the great halls of Ivy the best and the brightest students who study law, and graduating them as demonstrated failures in the profession at their point of entry characterizes a system of legal education and the legal profession which is in very poor condition. We search here for some of the reasons why.

Crucial to the understanding of large accruals of knowledge and associated thinking is the task of creating a core of organizing principles. This process no less important to the judge than the legal and social science scholar.

Judges must bring together and weigh many facts against standards of decision making formulated over long periods of time in communities and states. Because law rarely deduces conclusions using quantitative patterns of data, the qualitative sciences and methods become extremely pertinent to legal scholarship. In very subtle forms, qualitative analysis as we presently view it methodologically does occur in legal reasoning. [[190]](#footnote-190)

One can review Pound’s early twentieth century legal scholarship through the lens of qualitative analysis which did not become social science analytical inquiry until the early 1980’s. Directionality of subsets of elements can be viewed. Categorizations of the work can be created, and information can be clustered. A weak form of this analysis is done in legal interpretation of cases by constructing a matrix of facts, holdings, and other interpretive concerns.

Environmental Testing of Ideas –

Design Implementation to Limit Uncertainty

Steps toward analysis of Pound’s materials using tools of qualitative inquiry and legal discourse on legal theory construction are best considered by first asking the following questions:

1. Is it legitimate to view this approach as a process of understanding?

2. In parallel with qualitative research, does legal theory formation by necessity force or evolve a condition subsequent to the theory constructs?

3. Can a legal theorist be consistently correct for a long period of time and be totally misunderstood, or wrong?

By reviewing several approaches to these ideas and questions, useful design questions can be formulated. The richness of data has and will elude many law faculty and legal researchers unless core teaching and instruction is developed in law schools to frame materials into useful decision and support models.

This is another law school curriculum problem. It is also a casebook problem. The Langdell method[[191]](#footnote-191) of case teaching which causes Socratic tremors of confusion and stupefaction can be much improved . Despite its irrelevance to bar exams, Socratic teaching dominates how law is presented in casebooks, and the pedagogical process.

Using templates for knowledge organizing which result in taxonomies of legal ideas that associate with applications of rules and elements is one way this complex field can be better understood.

Subsequent scholarship that can relate this kind of inquiry to explicit doctrinal legal thinking and common law practice needs considerable attention in future scholarship.

The method of inquiry chosen for this inquiry was premised on the author’s observation that Pound was a reformer and change agent who never expected to create a grand theory of legal process by scholarly argument.

While Pound’s early career thesis was that there existed a sociological Jurisprudence he never formulated any grand opus on the topic. However, he was a highly successful Dean of Harvard law School for 20 years, and constantly tested the courts and legal profession in his writings. The fact that he was an early PhD student in Biology before his career in Law and as a legal scholar strongly suggests that great legal thinkers are not created by the present case method Juris Doctor Degree Program in the U.S. Pound initially studied the classificatory methods of botany at the University of Nebraska is later revealed in his powerful command of legal scholarship, and by the way Pound later would extrapolate elements of multinational legal and philosophical materials and infuse them into problems of American Courts and the legal profession. In a word, this set of skills is missing from American Legal Education and the Legal Curriculum. The second prong of the problem is associated with this issue.

Legal theory has become a lost orphan of the legal profession. While the profession demands the production of new entry workers who can be “ billed out”, no demands exist which insist on new formulations and ideas in legal thinking, reasoning and discourse. It may be the central failure of legal education in the twentieth century. The matter of influence from the law school pulpit on legal theory remains a curious problem. Deanship and professional leadership are distinct.

But for one incident[[192]](#footnote-192) no one sought to remove Pound during his 20 years as Dean yet he often challenged the profession and the courts to accept new thinking and change. Pound could draw on the resources of Harvard law School, but did not appear to associate the externalities of his writings and audience with curriculum or management of the law school. Student notebooks[[193]](#footnote-193) from his lectures, many personal letters to other Deans, and a few graduate thesis and doctoral works exist which strongly illustrate Pound’s views and sources of ideas. Influence from other correspondence files is less revealing. Those files typically mirror bar membership issues and policy planning conducted by Pound. Drawing from his associations, Pound articulated experiences gained from his presentations and committee memberships in public forums into prototypical ideas relating to the policy and administration of legal matters within the courts and profession.

Frequently the language and thematic visions occurring in the different scholarly correspondence files can be observed to elicit useful “ideations” [[194]](#footnote-194) which later became his law review articles. This morphogenesis of ideas , from loosely coupled interactions between committees, other scholars, coupled with observations drawn from legal and philosophical writings illustrates the intellectual fabric[[195]](#footnote-195) of what would come to be called “Sociological Jurisprudence”. It is an important process worth much contemplation.

There is in the law a very subtle sentiment that one should, or reasonably could never cast their thought to such lofty inquiry. That sentiment is pronounced in the welcoming message of most law schools during student entry orientations. Rigorous model formulas of legal thinking which can be derived from social science qualitative methodologies; taxonomies and algorithms show considerable promise in rescuing “Speluncian Explorers” (Fuller, 1949). Doctrinal and treatise materials in law are rarely be seen by candidates for the American Juris Doctorate law degree. The social science disciplines are antithetical to legal practitioners, and would be considered of little use to law students. Yet the current curriculum at law schools still results in a 30% failure rate in state bar examinations. The search here will be for the new light, the distinct variables that are not simply mirrors of the past. For example it is not sufficient merely to change lenses with vocabulary templates and attribute those arrangements to the evolution of science, scholarship and thinking.

Pound’s work comprised a long sequel of choices and decision making which then had to be explored in executions of participatory and journalized discourse.

Notably absent from both forums are typical American Lawyers. It is a remarkable incongruity, and illustrates the “great divide” between legal system inquiry and practice.

The works, as we observed in Chapter Three are iterative and longitudinal. Theory for Dean Pound was not the astonishment of ”Ah Ha!”. Rather it was a deep and long exploration of many ideas, tightly held to a few carefully planned and selected organizing tools. Once external data was filtered through his elections and deselecting of extraneous materials, Pound would present components of his works, gather the observable effects, add attenuating “internal data” then revisit though more information acquisition his initial ideas. The initial ideas were again retested in law review articles, speeches and lectures, and the cycle of development and transformation continued effectively for many years. This process becomes more obvious as the model is reconstructed, using traditional legal and social science tools of research and study. The questions presented in Chapter five can be modified and used to group the many sources of legal theory building employed by Pound, set them apart relationally and conceptually as components of eventual conclusions in specific law review articles. (Setaro, 1941) One can then better understand the nature of sociological jurisprudence as a legal paradigm. The article review process in Chapter three of this thesis attempts to illustrate the activities required to accomplish the tasks. The final chapter articulates the important research questions derived from that analytical process.

Frequently the language and thematic visions occurring in different scholarly disciplines usefully elicit “ideations” which better describe the content of existing knowledge and information. This is a characteristic of Pound’s own work. A simple model serves to discuss the contention. In this example the analytical framework is the “environment”.

Using the language of the articles reviewed in Chapter Three an allocation and distribution of Pound’ s theoretical variables was demonstrated . Influence from “agents”[[196]](#footnote-196) differs among the voices which can be discovered in his personal correspondence files.

Intelligence gathering and policy planning conducted by Pound in the extension and presentation of prototypical ideas relating to the policy and administration of legal matters within the courts and profession can be clearly identified. Original and new ideas which Pound sets forth in his articles are extraordinarily subtle. By examining the materials he used to prepare the articles , difficult choices between variables become strikingly apparent. Once the articles are examined, and his personal background becomes clarified, the arrangements of constructing legal theories and the tensions of paradigmatic thinking can be explored. As the inquiry becomes focused, categorizations of the information facilitates the formulation of two questions: (1) What events and measures of Pound’ s rich recorded inventory of life and scholarship might reveal the elements of his idea generation process?

Then, by establishing longitudinal arrangements , and grouping decisions by antecedent research and consequential findings, different groupings of the elements of Pounds scholarship are revealed as sources which drove the assertion of his central ideas.

Paradigm Discussions & Revolutions in Knowledge Management

Research on the influences of paradigms in science helps clarify the point that decision making done by a scholar like Pound was highly reliant on a cycle of feedback and transformation from shifts in the environment of legal thinking and process. Pound would identify and associate primary materials with his broader philosophical and doctrinal ideas. Some philosophical and literature streams examined by Pound revealed extreme limitations in lawyering and judicial reasoning. Alternatively his treatment of other literatures resulted in articles which aggressively attacked procedural and system changes attributes of American justice.

The process of Pound’s work is addressed by design elements constructed to explore the formation of scholarship models. A segmentation process of sorting events by typologies, then discerning a means to weigh their relationships to his theory had to be constructed. Pound’s theory building environment appeared to be contoured in an external environment very distant from the daily affairs of Harvard law school. His work of information acquisition could be understood from personal archives , determining the resources he used, and the materials which influenced his scholarship. To the extent personal letters and his diaries clarified key questions [[197]](#footnote-197), it was possible to observe Pound working with different literatures, making judgments regarding different ideas which were later incorporated into his articles.

Thus not only was there a stream of work which could be identified as “course of action” events, but also elements of materials are identifiable which represent the constructs of a “transformation module” ,

where concepts like “Sociological Jurisprudence” come into existence as written ideas. The distinction between decision making and the transformation module is one of time and place. For decision making, Pound would eliminate or expand on literature streams in which he was working. After the ideas were formulated in writing, they would again be improved upon by transformations in his work which resulted from feedback loops represented in responses to his articles, letters he received, remarks made to him in lectures, and general observations at gatherings such as bar association meetings.

Analytically, the process takes the following form. Part of Pound’ s effectiveness, [[198]](#footnote-198) can be observed in hand written notes where he eliminates alternative courses of action in his reviews of materials before he asserted major procedural or system reforms. It is instructive to isolate these relational components as sequels of a categorical analysis.

For example the following elements were employed in coding as part of the literature review of Pound’s writings, to identify component parts of :

1. Policy

2. Reference

3. Goal

4. Thesis

5. Argument

6. Interpretation

7. Denial of counterfactuals

8. Extrapolation of theory elements (also as elements across articles and years)

These constructs can be further expanded into more carefully defined areas of inquiry. The analysis takes the form of frequencies of occurrence, observable feedback learning from the environment, de evolution, and the design of frames, clusters, frontiers, and arguably paradigm elements forming in associated literatures.

Arguably there occurs a set of CONSEQUENTIAL paradigm elements. This suggests that the crafting and design of antecedent elements which relate to a theory in law are bounded by existing paradigms, yet the important new elements which could beneficially shift the paradigm are only viewable outside the existing paradigm. These elements are the questions which must be answered. Questions of this form are provided in Chapter Five. Thus paradigms are time shaped, and because they are the accrual of consensus in theory[[199]](#footnote-199), questions which seek to evaluated the veracity of consensus, particularly in law, are not welcome.

In part this set of arguments and postulates is a search for the referential identities[[200]](#footnote-200) of paradigm testing questions useful in further qualitative analysis of legal theory building and construction. Pound’s attempt to shift law into an academy of Sociological Jurisprudence was viewed to be illustrative of many dimensions of the problem.

His writings were prolific, he sought to modify or change major legal theories and procedures, and his personal records retained by Harvard[[201]](#footnote-201) , Iowa[[202]](#footnote-202) and Nebraska[[203]](#footnote-203) proved to be vast holdings of background information. Qualitative research offers great opportunities to work with the core process of legal theory building. Organizing large amounts of data and allocating identities of the data assimilations into place allows for “cluster attribution” The sets of data and their purpose become obvious as a “ condition subsequent” to a first gathering of resources, ideas, or reports and background frames of reference. This form of research has a peculiar “ push” to it, wherein as an initial goal the outcomes are not expected to be fully understood. The outcomes are only plausible as research forms a sufficient backdrop from which one can raise important questions. The great and interesting value of this study is the use of early 20th century legal discourse , readily available high quality scholarship from the academic legal environment. No known models of interpretation or analysis have previously been applied to work such as that of Dean Pound which would help organize a theory building model inherent in his decades of writing and academic leadership. The strange end to the evolution of legal education at the beginning of the twentieth century, while legal theory raced on into the twenty first century, is an extraordinary counterpoint. The legal profession is well situated to resist change. State bars highly constrain their member conduct.

The powerful constraints of paradigmatic thinking which lock scientific discovery into narrow bands of research appear strongly associated with the resistance of legal traditions and practices, both in teaching, the profession, as well as in the adjudication of human conflicts. Legal system collusion in State Bars constrains the significance and meaning of both the U.S. Constitution and the legal rights of individuals. Such attributes of State Bars turned graduate legal education into “Bar Schools”.

In legal discourse the academic and published scholarship of the past two thousand years effectively illustrates that law had few quantitative attributes. Sadly there has been much emphasis on a legal “ catechism” of rules and the subjective privilege to redefine rules with impunity. Law is not democratic. Alternatively the consequences of legal discourse have been a perennial source of great contemplation, social evolution and human development. Most scholars of jurisprudence would understand Pound sought to articulate a “ sociological jurisprudence”. Alternatively the manner and context in which Pound accomplished the feat was never effectively understood. To set the process of analysis into perspective, a short commentary on biographical studies of Pound is useful. Pound’s biographer Paul Sayre (Sayre, 1948) worked for several years examining Pound’s papers, and then spent the same number of years corresponding with Pound about the project. Sayre failed [[204]](#footnote-204) (or wisely choose not to address) the twenty five years of theory building done by Pound.

The fact of the matter is that he may never have had the perspective to comprehend it. [[205]](#footnote-205) An alternative and fair representation would be that while Pound was alive, for Sayre to articulate a broad assessment would have been difficult professionally. [[206]](#footnote-206)

A second biography attempting to explain Pound’s work, written nearly 20 years later by Wigdor (Wigdor, 1974) also failed to consider the decades of theory building work attempted by Pound . Wigdor’s [[207]](#footnote-207) understanding of Pound borders on self professed confusion and obscurity, from Wigdor’s perspective “ His (Pound’s) creativity, checked by internal contradictions, The sets of data and their purpose become obvious as a “ condition subsequent” to a first gathering of resources, ideas, or reports and background frames of reference. The absence of any reasonable assessment of Pound’s undertaking as a scholar , particularly from the perspective of his method as a theory builder, is striking. One explanation would be that no evaluative tools prior to recent qualitative research models existed. An equally plausible idea is that Pound’s work, legal in nature, has been ignored by scholars in Higher Education Administration and other social sciences for the same reason his Sociological Jurisprudence was largely ignored. No one could get the whole picture because of the nature of his “disciplines” and their boundaries of thought. This explanation fits well with the characterizations of paradigms in science, which are explained later in this chapter.

This theme of interdisciplinary confusion is developed effectively in an early work on theory building in the social sciences with an organizing sentence which describes the process as being imbued with an “absence of sensibilities”. (Reynolds, 1971)

Analytical models which work from the perspective of content review and evaluation such as the Social Design themes developed by Ammentorp, et.al. at the University of Minnesota have yet to be applied to the legal discourse framework. In 1998 Professor William Ammentorp [[208]](#footnote-208) presented a paper in Cape Cod, Massachusetts. (Ammentorp, Copa, Morgan, Gunderson, (1998)

The Paper calls for a more careful understanding and assessment of higher education learning, and further articulates an important viewpoint that “..we have to get away from the P & L statement and design for the long term - based on interdependencies...”. (Senge, 1998) This important argument extends the idea that “Design, so construed, is the core of all professional training....” (Simon, 1969, p. 55) and argues that today’s organizations and environments are characterized by a kind of social turbulence where traditional patterns of action can no longer accommodate emerging realities.” A model of legal theory building which focuses upon the biographical underpinnings of Roscoe Pound, Writer , Lawyer, Professor and Dean of Harvard Law School verifies Ammentorp’s idea.

From Pound’s materials we observe a concert of views , experiences, referential support from peers and colleagues, and of paramount importance, feedback. Pound had to recognize the “social turbulence” and “emerging realities” of his discipline. Ammentorp et.al. , being alert to these problems in the professions, and using medical and health care examples, argue several key propositions exist in design perspectives. The are equally valid in the legal academy and profession. [[209]](#footnote-209) There is good reason to think that these propositions in design and understanding are even more valid in the discipline of law and legal scholarship. In the legal profession the process of reasoning and articulation of social value through case reviews and rulings has always been explicitly qualitative yet also a non quantitative “science”. [[210]](#footnote-210) The process of exploring methodological constructs associated with legal theory can begin from many differing perspectives. Because the work and scholarship of Roscoe Pound is very available and extensive, proposition testing from other disciplines is possible. Using Ammentorp’s five propositions as a template, an argument is advanced qualitatively that his model and propositions can be demonstrated as valid analytical frames for materials which originated in the early twentieth century. The propositions are also demonstrated to be powerful tools for this analysis. The 40 year process employed by Dean Pound to transform American legal thought can be clearly understood because of the efficiency of Ammentorp’s organizing principles.

Legal models such as Pound’s are viable organizing devices of preexisting literatures and case reasoned materials, drawn from spatial and cognate as well as longitudinal frameworks. Our research problem was to explore the events which had to occur to reach the model stage. A discussion of ideas and issues follows. Ammentorp’s postulates follow as enumerated headings, then interpolations of those postulates to socio-legal [[211]](#footnote-211) theory construction are discussed. Some analogous formulas to Ammentorp’s original ideas are also offered.

Proposition 1 : Social Design rests on the “ruling paradigms” ( of human services) Examining Kuhn’s (Kuhn, 1963) notion of a ruling paradigm, Ammentorp’s thinking draws from the influence of elements of a ruling paradigm. From a qualitative perspective the law is highly suitable for this inquiry. Elements in legal discourse for centuries have been those rule sequels which organize the matter (and fact patterns) under review. Elements in the law are also understood as subsets of doctrinal ideas. Paradigms in the law could be thought of as legal doctrinal viewpoints regarding the proper manner in which law and absence of truth are comprehended by those who seek to find it, and articulate it in case law holdings. Pound operated at the level of infusion of legal process changes, writing law reviews on topics of change, but always trying to infuse the discipline with alterations at other levels of analysis. Thus Pound would manipulate elements of various paradigms [[212]](#footnote-212) to attenuate the contours of his opus theoretical backdrop, sociological jurisprudence. Pound never wrote up the theory. Alternatively he was prolific as an author . It is reasonable to conclude that the wise good Dean knew the theory, if set down to paper, would become an obstacle to the process of change and improvement in his ideas as they became the subject of legal discourse in the twentieth century.

The argument here is that Pound intrinsically understood what Kuhn would later discover, that a paradigm would inhibit future discourse on improvements in law and legal education. This is a useful point about the formation of theory in general. The energy and opportunity for change lies below the level of theory. Laws schools did not change. The energy required for the schools to change was dissipated in the satiety of legal professionalism.

Theory is but a benchmark of anachronisms to be reconciled. (Reynolds, (1971) As Ammentorp (et.al. ) argue, “..all paradigms are under continued pressure to change.” Casti, (Casti, 1989, p. 40) notes the idea more aggressively, expanding Kuhn’s discussion of paradigms. Examining change in the set of rules and the model of shared visions among “knowledge communities” [[213]](#footnote-213) Casti posits that when paradigms change the underlying issues are not rational , but emotional, and are settled not by logic, syllogisms and appeals to reason, but by irrational factors like group affiliation and majority or mob rule. The American Bar Association and American Association of Law Schools grip on curriculum and professional licensure to practice law are immediate examples of this idea. Pound appears to have crafted a dual world, understanding in form Casti’s later view on this point. Just why this paradox occurs becomes extremely interesting and the answer somewhat elusive.

N.E.H. Hull [[214]](#footnote-214) captures the truth of this postulate in her book on the Pound-Llewellyn controversy in the 1930’s over legal realism. (Hull, 1997) The distinguishing idea is that Pound’s course of action to shift thinking about law from mechanical jurisprudence and legal formalisms was significantly different from Llewellyn’ s method of starting the legal realist movement. For Pound it was an offering of ideas and propositions, to Llewellyn the change theme was one of criticism and quantitative inquiry.

This articulation of quantitative visions in law is a crucial illustration of how scholars viewed the similar legal topics from different perspectives. Pound’ s method can be contrasted with Llewellyn’s attempt to formulate “ legal realism”.

The differences can be observed in attenuations or differences in searching for the important theoretical variables related to the opus, or paradigm being articulated. [[215]](#footnote-215) Performing these contrasting points of method result in a more clear understanding of method relating to theory building and paradigmatic system design. Pound sought to encourage changes in the judicial and legal reasoning process, and like Casti (Casti, 1989, P. 40) and Hofstader (Hofstader, 1989) there was a “Gestalt” serving as a backdrop for both his comprehension and dialog. This gestalt should be understood as a mixture of disciplines and ideas which result in new visions and definitions. The point here is that paradigms can be changed, if one agrees with Casti or Hofstader. This is an extension of Pound’s efforts to change legal perspectives at the beginning of the twentieth century. Thinking was contextual, Pound derived certainty for his contentions by drawing from public forums support and encouragement to warrant acceptability for the features of his “Sociological Jurisprudence” written into the American law reviews of the period. [[216]](#footnote-216)

Llewellyn at Columbia Law School was a vitriolic radical demanding that the law view reality [[217]](#footnote-217)for what it is, and this paradigm burst forth from a group of dissident law faculty at Columbia Law School beginning in about 1925. [[218]](#footnote-218) To the realists, their formulations were the correct resolution to a static and “mechanical “ legal profession and system of training and adjudication. Their group was small in number, associated by Llewellyn in a curious list of members, wherein even the members were uncertain of their “realist” viewpoints. Ammentorp et. al. raise the question of design space with regard to paradigm generation and change. The Pound- Llewellyn conflict [[219]](#footnote-219) over what should properly be understood by the legal profession as the prevailing view of legal thinking validates the design space[[220]](#footnote-220) criteria.

While both Pound and Llewellyn used law review articles to prognosticate, Llewellyn had limited access to bar associations and the AALS during his attempts to change the paradigm of legal reasoning. [[221]](#footnote-221) That limitation of access likely drove the index of criticisms up and away from collaborative infusions of new ideas, isolating Llewellyn.

This conclusion directly correlates with the findings in this thesis that Pound was able to grow and expand his ideas as a direct consequence of external feed forward loops from collaborations he sustained outside of Harvard Law School with the profession and its related associations. [[222]](#footnote-222)

The collected data and materials [[223]](#footnote-223) illustrate the power of these design concepts in formulating “paradigms and theories”. “ It is there but it is not there”(Olivelle, 1998) The absence of the obvious was explored in great depth by the unknown original authors of the Isa Upanishad, one analect of the Mahabharata. [[224]](#footnote-224)

So it is with Pound’s craft, - you see the theory building classificatory process constantly developing in Pound’ s work, but in goes unnoticed. It is not pronounced because Pound did not want to convey his own intellectual process, he wanted to articulate legal argument and discourse. This exploration of such thinking is also explicitly absent in the legal realism literature. The researcher - scholar becomes the link. Subsequently the minuet of reflections must be articulated from nuances carefully collected yet previously undiscovered. For analytical purposes the model illustrates a useful cognate mapping of dimensional change in broader space. For example, Llewellyn set out with a broad agenda of reforms, in contrast Pound spent years of constructive articulation of his broad ideas in subsets of process and advice relating to many dimensions of legal issues. If one altered these variables into value sets to view the theory building of Roscoe Pound, a “virtual” X Y axis of attributes could be constructed.

Yet, quantitative formulas, which may seem intuitively attractive, will not work. There are too many intersects between papers, conferences, personal letters, lecture notes and the resulting articles. By necessity one must begin with some concrete linguistic [[225]](#footnote-225) model, explicate useful definitions of the system and organization , then proceed with measurement and evaluation opportunities. The intersects would be substantial and the actual model would be exceedingly complex. This creates the kind of quantitative dilemma in research which drives scholars to more qualitative measures of meaning.

Egon Guba’s (Guba, 1990) academic career in the study and development of statistics for 25 years shifted into a belief that evaluation required “naturalistic inquiry” which would over the 14 years to follow become “constructivist” inquiry. For Guba, the methodology associated with this inquired is described as:

“ Hermeneutic, dialectic – (wherein) individualistic constructions are elicited and refined hermeneutically, and compared and contrasted dialectically, with the aim of generating one, (or a few) constructions on which there is substantial consensus. “ [[226]](#footnote-226)

Guba’s transition from a statistician to a sophisticated qualitative methods designer demonstrates why the quantitative associations of materials such as legal doctrine and the formulations of those doctrines would be less understood from quantitative perspectives. Better perceptions are crafted by associations of design and the articulation of ideas observed in the actual works of those who created the materials, and a review of the primary works. The ideas can be usefully illustrated by continuing to examine the contrasting skills of Pound and Llewellyn.

Llewellyn was highly effective at attenuating, and appeared successful in moving elements of “sociological jurisprudence” into “legal realism”. The fact that the theoretical “guts” of both paradigms [[227]](#footnote-227) are quite similar, and that Pound did the lion’ s share of anticipatory scholarship, is as yet not articulated in the literature. The position taken by Llewellyn in the initial years of his attempt to lead a paradigmatic change in the law was central to the failure of the legal realist movement. Llewellyn entered into a bitter exchange of views (Hull, 1987) with Pound in articles published by the Harvard Law Review. (Llewellyn, 1931) By not giving Pound sufficient credit for his subsequent work, Llewellyn lost value in his own vision building.

Postulate 2: [[228]](#footnote-228) Exploration of design possibilities results in linguistic models of social organization. (i.e. design = linguistic models = theory =paradigms)

Validation of this proposition occurs in the materials associated with Pound’s theoretical and process change discovered in Pound and Llewellyn papers, as well as in a broad range of other legal literatures examined covering legal doctrine and education from approximately 1600 to 1950.[[229]](#footnote-229) The difficulty of getting in and out of literatures that are doctrinal and simply issue framed[[230]](#footnote-230) arduously tests the parameters in qualitative research. This point is clarified by understanding that legal doctrine is powerful and stable. Issues which arise in legal controversies are controlled by doctrinal thinking which has formed over many decades, or centuries. The design problem is locked to the doctrinal thinking. In legal doctrine the presumption is that social behavior is static. Moral perceptions of appropriate social and economic relationships exist in doctrinal ideas about law which only shift with changes in social consensus. Thus if social organization takes a dramatic shift in economic or behavioral expectations, doctrinal ideas may also shift.

The point of observation qualitatively requires an assimilation of discourse signals which indicate expectations about legal doctrine which appear in literatures over lengthy periods of time. Pound’s writings which call for changes in the administration of justice, styles in judging, the rights of individuals in the state, are all indicators of anticipated shifts in legal doctrine.

Llewellyn’s demands for realism in legal thinking clearly expect that legal doctrine will recognize his pretensions about how to understand law. Of further “complexification” (Casti, 1994) is the stunning realization that many works on areas like legal education each took ten or more years of research for one author to complete.

Another very useful exploratory concept advanced by Ammentorp et.al. at Cape Cod further clarified this study, “Those involved in the design process must be able to converse in an environment where their discussions can be aggregated and analyzed. “ [[231]](#footnote-231) Two major themes appear in the literatures, scholarship and legal discourse, [[232]](#footnote-232) underlying the textual research base for this study. Pound gathered the philosophical underpinnings of legal reasoning, and applied them to specific legal procedures in the law review articles. Whether the discussion was in part driven by his position as Dean of America’s flagship law school, and published in the Harvard Law Review, is unclear. Because Pound’s analysis is very strong and carefully structured, this writer’s conclusion is that the “pulpit” of Harvard was at best a minor influence in the propagation of his ideas. Harvard was a benefactor of Pound’s genius, and appropriately acknowledged it by making him Dean in 1916, and Dean for the next twenty years. Biographically the data and materials illustrate the power of these design concepts in formulating “paradigms and theories”.

As this study illustrates the pulpit of educational leadership as Dean at Harvard Law School created the environmental conditions necessary to engage in the ideas and propagate them. We have examined the aggregation and analysis process.

Pound was a botanist, then a lawyer. His training in Nebraska at the doctoral level[[233]](#footnote-233) in the late 19th century discloses a powerful orientation to classificatory procedures. The theory building classificatory process by necessity must be operative “backdrop propagation”[[234]](#footnote-234) constantly at play in Pound’s work, but it goes unnoticed. This is the material of our search . It is explicitly absent in the legal realism literature. The distinction is quite important. The design argument relies upon the language formulation being sufficiently rich and detailed so as to “ capture the essential elements and relationships that will make up the ......system being created.” [[235]](#footnote-235) Clearly Pound accomplished this frame of design by employing classificatory skills in legal analysis from outside the traditional training in law.

## Postulate 3 –

Design models translate qualitative linguistic models into the systems and structures of social organization. (Legal Analysis of law & fact at trial = doctrinal perspective building = theory of law) The continuity of this method is established by viewing a parallel framework of the same form .

“ In this way any argument may be resolved into arguments each of which has one premise and two alternative conclusions. Such an arguments when completed may he called a dialogism.” (Pierce, 1880, p. 20) Contemplating this line of reasoning a condition of discourse exists whereby the following analytical condition can be observed: Resolving each dialogical possibility as subsets of theory building, the theory builder submits sentiments and expression to the vitality of the theory being expressed.

Qualitative research is a core process of model building which explores what when and how....... it has a “push” thesis to it, whereby the outcome is not fully understood during the formative and review stages of inquiry. This frame of reference engenders the argument that doctrinal ideas do not alone aggregate[[236]](#footnote-236) into legal paradigms, but remain “theory constructs” of legal reasoning. From this presumption research method questions abound. For example, how do the subsets of the opus “sociological jurisprudence” take form, and how can they be organized? Using longitudinal tools, what happened to a given scholarly idea, how did it form, and how does it flow across the years of writing and related literatures created by Pound?

One qualitative difficulty continued to be the acquisition of operational and descriptive vocabulary during the analysis of materials.

Many strange variables[[237]](#footnote-237) intervene which attenuate and shift the thinking and context of the Pound. These variables are important, indirect, and difficult to interpolate. Pound would see issues in slightly different ways as years passed in his cumulative thinking. The collected data and materials illustrate the power of design concepts in formulating “theories and paradigms ”.

Ammentorp et.al. present the idea that any design rapidly becomes modified in practice; so much so that” uncertainty increases and the Design has progressively less influence on the decisions and actions of...professionals”. [[238]](#footnote-238)

This construct is very observable in the legal realist movement articulated by Llewellyn. Legal practice is extremely hostile to uncertainty. There is substantial evidence that a design process with an extremely “ long view” (Schwartz, 1991) was operative during the decades Pound served as Dean at Harvard Law School. This becomes particularly relevant in the study of theory building.

It is interesting to inquire about the degree to which Pound argued uniquely his own visions about change in the law and the legal profession. The literature indicates that he was free to indulge in his own theoretical search for a language and vocabulary of legal thinking which acknowledged that social influences of necessity must he recognized in legal discourse.

This all becomes very troublesome by 1925, in arguments posited by the legal realists that moral subjectivity in the law is offensive and these offenses can be erased by quantitative proofs of the truth, in effect by quantifying reality . Setting this down to a formative process of linguistic thinking, the infusion of Roscoe Pound’s doctoral training as a botanist at Nebraska before he entered a career as a lawyer, academic and law dean is central to attenuating the Design model.

Classification Taxonomies and Linguistics

Classification taxonomies differ substantially from quantitative domains. In effect an entirely different perspective occurs. Law is constructed into sequels of rules, which associated on a related set of legal issues, become doctrines over time. The classification of those rules into doctrines is an art in law.

When a scholar arrives on the legal horizon who is trained to perform complex classificatory arrangements, the doctrines are subjected to far broader questions and arrangements of ideas. This is an extremely important dimension of Pound’s work. Rule formulation by Pound is argued to be set in a much broader context. Casti ‘s discussion of language and information which explores the work of several linguists is useful to argue the point that for grammars, ‘They are a set of rules enabling us to distinguish a sentence that is acceptable in a given language from a sentence that is not.”(Casti, 1989, p. 118) While the point seems simple enough, if an individual scholar secures sufficient control of the “grammars” of law, such that he can redefine them, he then also redefines the rules.

Consider the following example of a famous linguist and the context in which his ideas were developed. It all comes as no particularly astonishing surprise that Noam Chomsky at MIT, considered by Casti and others to dominate the field of linguistics, happens to profess his scholarship at the nation’s leading technical scientific university.

MIT of course is intensely involved in computer design and information processing[[239]](#footnote-239) of technology from both an engineering and design perspective. Artificial intelligence needed natural language transitions to machine language to simplify and improve the process of computing. Casti summarizes the work of Chomsky as a finite state Markov process when there are only a finite number of sets from which words are chosen. The intuitive brilliance of the entire matter is the capacity of a scholar to be central to the mission and purpose of the institution in which he or she resides. Intellectual life takes on opportunistic dimensions. Stated differently the associative relationships between institutional mission and individual contemplations attains to a level of career “macro-interfacing”. The relationship Pound had with Harvard fits the same model. To the extent a paradigm is maintained of an arrangement of research expectations, theory remains open to acceptable conjecture. [[240]](#footnote-240) The proposition that a translation from a design model into probable outcomes “must be seen contextually” [[241]](#footnote-241)- is affirmed.

The expansion of rule models demanded a legal system which could accommodate shifts in the relative positions of individuals in their economic and social legal affairs. Thus the design process at the theoretical level when associated with “particular contexts” can be highly successful when the language or elements of the organizing principals consistently follow the context (institutional purpose), as in this case, in modifications of the attenuated implications of rules of law .

At the linguistic level of the discussion, the argument began by asserting that Pound’ s initial training in botanical classificatory science was in effect a process “language” because he learned to use a complex and reliable system to organize diverse attributes of plant material . The force of Darwin’s ideas to which Pound was exposed in his 19th century doctoral training was for the time an astonishing and controversial [[242]](#footnote-242) classificatory process. If we extend this classificatory metaphor to legal codes, which are collections of rules, the matter takes on new attributes. It is more than selectable elements of rules which become legal code, it is an assimilation process having significant variables, roles, and omissions or exclusions. Pound translated this process into a form of legal systems arguments which he then proceeded to employ as an expository framework for the elements of his Sociological Jurisprudence. Code is a particularly important conceptual area, and rebounds in law, as well as many other forms of scholarship. Here it is important to reflect on code as consequential , meaning that substantial organizing and reflection, at times for many years, in fact is still incomplete material, sitting in wait for discovery. Later in this chapter we shall see Kuhn research a similar conclusion. For clarification, codes are rule sets which can be changed. Rule components may have discernible deficiencies, or be applied by courts in ways which have negative impacts on social or economic discourse. Few adversarial controversies are sustained in time for sufficient periods, or repeated in different jurisdictions in frequencies of rulings to force changes in code. The parallelism to constraints in changes of machine language codes is rather stunning. Computing machines are code constrained. The machines can only perform within the code. If the code is inefficient, thus so also are the machines. It is no less so for legal systems. Code is antecedent to nothing.[[243]](#footnote-243) For law the idea can be brought to focus with an example.

The Uniform Commercial Code [[244]](#footnote-244), is a broad assimilation of business practices created in the early twentieth century, and adapted by most states. Lawyers measure various acts of business against the U.C.C. Thus while understanding this Code is antecedent to any business act for the rational entrepreneur, the same Code when formulated was a consequence of consensual beliefs which may have lost their importance or meaning over time. An example of legal theory formation could be seen here as a sequel of contemplations to modify a “Code”. Artificial intelligence in part inquires upon parallel languages which can be operative simultaneously. Machine code is now sensitive to voice command. Many layers of code “events” exist between machine functions and voice activated commands. The relationship between code, theory construction and the elements of various codes remains to be explored. An algorithm of code attributions is possible.

Pound translated his code revisions into a form of legal thinking which he then proceeded to employ as an expository framework for the elements of his Sociological Jurisprudence. The art and craft of this process is discoverable in his writings, and that analysis is central to exploring attributes of theory building. It does not resolve problems relating to constraints of paradigms.

Postulate 4

Design implementation involves creation of organizational systems that limit uncertainty . Part of the Social Design model anticipates that it is impossible to predict where a given design might come to rest.” [[245]](#footnote-245)

The truth of this matter is viewable in the core of Pound’s theoretical effort. Pound translated this process into a form of legal thinking which he then proceeded to employ as an expository framework for the elements of his Sociological Jurisprudence.

Pound would attenuate his law review writings (where the theoretical material was being articulated) with discussions by correspondence, self dialogs in the form of extensive diaries, and by anticipatory presentations at meetings of the profession. Much of this activity should be viewed as environmental testing , such as with speeches at professional associations, and personal correspondence. The correlative influences studied textually and longitudinally with the evolution of Pound’s articles discloses attributes of the design process relating to external influences and choice of concept materials. It is then possible to matrix the variables required to carry forth particular arguments and legal propositions. Also, in Chapter Three the articles reveal that Pound did seek mechanisms which would anchor his ideas in procedural frameworks. His external relations strongly demonstrate efforts at uncertainty reduction. In public Pound argued ideas related to specific legal forums. For example, judges should no longer think “mechanically” , or administrative tribunals should not restrict the rights of individuals to articulate their concerns. The attractiveness of these ideas was evaluated by verbal and written audience reactions.

Postulate 5

Organizations are perceived qualitatively and are managed using highly linguistic models. This final proposition, extended to argue that social design is fundamentally qualitative” is more than correct with respect to theory building in the law, it is inherent. *There is no quantitative framework* associated with legal reasoning, doctrine, theory or practice. - Law is a profession and academic discipline central to the commercial and social discourse of all societies.

Understanding the meaning and usefulness of these design propositions contextually by reviewing the decades of scholarship invested by Pound to develop the elements of sociological jurisprudence is therefore highly instructive. For example, the core of one’s thinking and inquiry will change as information and data are gathered.

Qualitative thinking, as discussed elsewhere in this paper, does predominate legal discourse, albeit not in the manner seen in the social sciences. [[246]](#footnote-246) Legal languages and discourse can be very rigorous and substantially fact - attenuated. Law schools[[247]](#footnote-247) remain preoccupied with producing the twentieth form of apprentice, now called associates, for law firms. Understanding the meaning and usefulness of these design propositions contextually by reviewing the decades of scholarship invested by Pound to develop the elements of sociological jurisprudence is highly instructive.

Until law schools can reconcile the traditions of 19th century paradigms,[[248]](#footnote-248) such as case method teaching, and the academic process of creating legal practitioners, little in the form of evolution in legal discourse will occur. In part the future analysis will require a comprehensive study of theory construction behaviors. The tension of practitioner and scholar in legal contexts - its inefficiencies and sources, presents profound challenges to legal education.

The “mechanical” process of qualitative research was well articulated in the 1980’s and refined and simplified into the following decade, with few substantial changes in the process literatures.[[249]](#footnote-249) In all qualitative research the “analytic” ( research) questions, general or specific, are elaborated from conceptual frameworks. Data collection should have limits, and the frame of analysis usually takes on organizing principles, such as a longitudinal study where points in time of a concept or approach to an idea, or event set are collected from raw data and declared meaningful with supporting arguments.

In the mass of Pound’s background and writing the longitudinal opportunities are rich and interesting. Some research problems present rather quickly. Among them, how to organize the data for subsequent supporting generalizations and contentions regarding the manner and process by which be developed and propagated his grand theory of sociological jurisprudence. In broad terms QDA is an iterative process frequently requiring the form or shape of the study to change.

The procedurally inherent frustrations in this shift and change when performing qualitative research are numerous. These problems do adjust into very satisfying consequences, [[250]](#footnote-250)but are vexing during research activities.

In evaluating legal theory building, the long period of the scholar’s writings can be influenced by historical events, such as World War One [[251]](#footnote-251) or a major attack by an emergent scholar [[252]](#footnote-252) , such as Llewellyn’s legal realism. The evaluation of the legal theory building process over long periods of time [[253]](#footnote-253) has yet to appear among scholarly works. This thesis constructs evaluation questions and models, but does not articulate theory building per se. While the study discovered the issues, it does not create a new paradigm. Understanding that Pound did not capture the legal academy with his work of forty years, to accept that a doctoral dissertation could not do so is reasonable. If we consider other writers about legal theory , a pattern evolves. Most work instead simply states the theory, and discussions then follow reflecting on attributions of that theory. In this work the analysis is successful in crafting questions and categories of inquiry, and articulates policy recommendations.

There are very good biographical works discussing major legal scholars, but discovering actual elements of the specific works which disclose directional clues about where theory originates must be arduously examined. Biographical literature exploring eminent legal scholars and practitioners get to actual case work and reference work of the individuals, but the explicit relational elements which would disclose sequels of legal theory construction are not developed. Quantitative research on legal theory building is totally absent in the biographical materials .

Pre-qualitative forms of what now is understood to be qualitative thinking, as discussed elsewhere in this paper, do predominate legal discourse, albeit not in the manner seen in the social sciences. As we have observed elsewhere in these discussions, legal languages and discourse can be very rigorous and substantially attenuated.[[254]](#footnote-254)

Most useful guidance identifying correct procedures to perform qualitative research started appearing in the mid 1980’s with edition updates and spin off cook books”[[255]](#footnote-255) into the present time. Classic” guides and documents on qualitative research are at this in second or third editions. (Guba, Lincoln, 1981, 1984)

Other guide materials are broadly expressed procedural handbooks, that echo the sentiment of frustration in qualitative research. (Piantanida, 1999) Handbooks can provide useful dimensions of dissertation work, including meaningful evaluative criteria of the overall dissertation. [[256]](#footnote-256) Further reviews of the QDA process (Coffey, 1996) incorporate many “classics” and generalize the themes of the research process from those classics.

These can be quite useful because the “complexification “ (Casti, 1994) of seeing a peculiar study [[257]](#footnote-257) used to describe a research process [[258]](#footnote-258) has been omitted and the process of QDA is presented in generalized terms. In broad terms the QDA inquiry involves the linking of concepts and data , a phrase which loosely describes legal theory construction.

The framing process of understanding how to connect qualitative research with legal theory building requires the introduction of several other disciplines and their elements of “seeing” the accruals of data and organizing information. What repeats in this sequel of process analysis is the qualitative practice of coding related materials for further analysis. The problem of meaning relating to code again takes on new dimension. Coffey and Atkinson [[259]](#footnote-259) usefully organize qualitative research procedure into manageable frames, expressed as general rules:

1. The analytic procedures underpin coding procedures which establish links of various sorts. (p.27)

2. Important analytic work lies in the identification of concepts (p. 27)

3. Coding can be thought of as a range of approaches that aid the organization, retrieval and interpretation of data, suggesting coding as “the stuff of analysis” (Miles, Huberman, 1994)

4. Coding and retrieving is the procedure most often associated with coding as an analytic strategy. (p.29) This forms three sub- topic procedural attenuations of the process: (Kelle, 1995)

A. Noticing Relevant Patterns

B. Collecting Examples of the Phenomenon

C. Analyzing those phenomenon in order to find commonalities, differences, patterns, and structures.

Another attribute of discovering “centeredness” can be found in a useful idea from Kelle as an analog to QDA research frustration, which he effectively resolves by the following explanation:

“ ...coding can be conceptualized as data complication. ......it can be used to expand, transform, and reconceptualize data, opening up more diverse analytical possibilities.” (p.29) This reasoning encourages the researcher to get involved with original thinking about the topic being studied, and also transforms the attributes of frustration associated with new inquiries into a process of original scholarship and exploration. Here we see code as a legal set of maximums to have a very different meaning from code which is constructed by the qualitative scholar. Yet the point is of considerable value. Legal code should be more aggressively challenged by the assimilation of theories about law which can then draw upon existing legal paradigms with effective questions. The broader tensions of paradigms in scientific discourse have been usefully studied in the twentieth century. The generalities about paradigmatic constraints to scientific thinking are instructive. Before we review them, it is noteworthy to recall Masterman’s study of Kuhn’s work on paradigms wherein Masterman argues that Kuhn used the word paradigm in no fewer than 21 different ways. (Lakotos, 1970, p. 59)

Having understood that the paradigmatic dialog remains broad and unresolved, the key elements of that dialog will help clarify this discourse about legal education, legal theory construction, and changes in the legal profession.

# It is not widely understood that Kuhn’s work was largely anticipated by a

# German scholar in 1935. Ludwig Fleck (Fleck, 1935) wrote an inquiry which challenged ideas about European scientific discourse. Many maxims of that work would later appear in Kuhn’s book.

# Ludwig Fleck

# Fleck presents the following argument, which is instructive as one recollects the arguments posited about linguistics and metaphor:

A stylistic bond exists between many, if not all, concepts of a period, based on their mutual influence. We can therefore speak of a thought style which determines the formulation of every concept History shows that violent arguments can rage over the definition of concepts. This demonstrates quite independently of any utilitarian reasons just how little such conventions, which from the point of view of logic may seem equally possible, are in fact felt to be of equal value. Second, we can find specific historical laws governing the development of ideas, that is, characteristic general phenomena concerning the history of knowledge, which become evident to anyone who examines the development of ideas. For instance, many theories pass through two periods: a classical one during which everything is in striking agreement, followed by a second period during which the exceptions begin to come to the fore. It is also evident that some ideas appear far in advance of their rationale and independently of it. Again, the interweaving of a few strands of ideas can produce special phenomena. Last, the more systematically developed, the richer both in detail and in its relations to other branches a given branch of knowledge is, the fewer will be the differences of opinion in it. (Fleck, 9)

Fleck’s concerns were focused on the study of disease, the contours of his analysis and the perspective he brings to that analysis set the stage for a method of how qualitative questions should be designed:

It is not possible to legitimize the “existence” of syphilis in any other than a historical way. To avoid unnecessary and traditional mysticism it is thus appropriate to use the term “existence” restrictively as only a thinking aid and convenient shortcut.

But it would be a gross mistake merely to assert that the syphilis concept could not be attained without the consideration of particular historical connections.

We still have to examine possible laws behind these connections and discover operative socio-cogitative forces. (Fleck, 23)

Fleck would deduce from his analysis that metaphor and linguistics play a substantial role in the definition and study of disease. To him, words were origins of thought:

‘Words were originally not phonetic nexuses arbitrarily assigned to certain objects, such as the word UFA\* denoting a German film studio or ‘L’ denoting self” induction. They actually indicate a transference of experience and objects to a material that can easily be molded and is always available. Linguistic reproduction was therefore originally not a precise assignment according to logic but imagery in the dynamic sense of geometry. The meaning would be immediately implicit in deophones created in this way.” The actuality of pre-ideas probably permits the assumption of a similar relationship. Mental reproduction would be originally not a clear-cut assignment according to logic, but rather a transference of experience to a material that could easily be molded and would always be available. The connection between reproduction and experience would not be like the conventional relation between a symbol and what it symbolizes, but would reside in a psychological correspondence between the two. Evidence for this would be directly contained in the products of thought [ Denkgebilden] created in this way. Words, then, were not originally names for objects. And cognition, at least initially, does not depend upon mental reconstruction and preformation of phenomena or, as Mach taught, upon the adaptation of thoughts to some arbitrary external facts as revealed to an average person. Words and ideas are originally phonetic and mental equivalents of the experiences coinciding with them. This explains the magical meaning of words and the dogmatic, reverential meaning of statements. Such proto-ideas are at first always too broad and insufficiently specialized. According to Hornbostel, ideas-just as word meanings-have a development that proceeds “not through abstraction from the particular to the general, but through differentiation or specialization from the general to the particular. Once a structurally complete and closed system of opinions consisting of many details and relations has been has been formed, it offers enduring resistance to anything that contradicts it. “ (Fleck, 27)

Flecks ideas here reaffirm the methodological process incorporated in this thesis of examining Pound’s background, his correspondence, his diaries, and his articles in a search which revealed components of how to construct legal theory.

In this study the exploration became complicated by qualitative difficulties relating to the discovery of omissions to the paradigm of sociological jurisprudence.

We also have questioned the process of identifying theoretical attributes required to sustain a paradigm shift in law . Again, Fleck’s insights are instructive:

What we are faced with here is not so much simple passivity or mistrust of new ideas as an active approach which can be divided into several stages.

1. A contradiction to the system appears unthinkable.
2. What does not fit into the system remains unseen;
3. Alternatively, if it is noticed, either it is kept secret, or
4. Laborious efforts are made to explain an exception in terms that do not contradict the system.
5. Despite the legitimate claims of contradictory views, one tends to see, describe, or even illustrate those circumstances which corroborate current views and thereby give them substance.

This is one of the most important tasks in comparative epistemology to find out how conceptions and hazy ideas pass from one thought style to another, how they emerge as spontaneously generated pre-ideas, and how they are preserved as enduring, rigid structures [Gebilde] owing to a kind of harmony of illusions. It is only by such a comparison and investigation of the relevant interrelations that we can begin to understand our own era. (Fleck, 29)

This method proposed by Fleck is in form highly similar to the method employed to evaluate Roscoe Pounds scholarship on Sociological Jurisprudence. One can envision the constraints of legal doctrine, and easily understand why Sociological Jurisprudence is a historical phenomenon rather than a prevailing paradigm of law. Consider Fleck’s viewpoints on medicine and science:

To clarify the point a few examples might be mentioned showing the various degrees of tenacity of viewpoints.

1. When a conception permeates a thought collective strongly enough, so that it penetrates as far as everyday life and idiom and has become a viewpoint in the literal sense of the word, any contradiction appears unthinkable and unimaginable.

2. Every comprehensive theory passes first through a classical stage, when only those facts are recognized which conform to it exactly, and then through a stage with complications, when the exceptions begin to come forward.

This particular example well illustrates the important role that the tenacity of closed systems of opinion plays in the operation of cognition [erkenntnisphysiologie]. Cognition proceeds in this and in no other way. Only a classical theory with associated ideas which are plausible (rooted in the given era), closed (limited), and suitable for publication (stylistically relevant) has the strength to advance. To recognize a certain relation, many another relation must be misunderstood, denied, or overlooked.

3 . We have mentioned concealment of an “exception” among the stages of tenacity in opinion systems. One of many exceptions was the orbital motion of Mercury as related to Newton’s laws. Experts in the field were aware of it, but it was concealed from the public because it contradicted prevailing views. It is mentioned only now because it became useful in the context of relativity theory.

4. The very persistence with which observations contradicting a view are “ explained” and smoothed over by conciliators is most instructive. Such effort demonstrates that the aim is logical conformity within a system at any cost, and how logic can be interpreted in practice. Every theory aspires to being a logical system but often merely begs the question. The liveliest stage of tenacity in systems of opinion is creative fiction, constituting, as it were, the magical realization of ideas and fiction, constituting, as it were, the magical realization of ideas and the interpretation . At any rate, once a statement is published it constitutes part of the social forces which form concepts and create habits of thought. Together with all other statements it determines “what cannot be thought in any other way.” Even if a particular statement is contested, we grow up with its uncertainty which, circulating in society, reinforces its social effect. It becomes a self-evident reality which, in turn, conditions our further acts of cognition. There emerges a closed, harmonious system within which the logical origin of individual elements can no longer be traced. (Fleck, 37)

One of the points argued in the conclusion of this study is that law schools are not effectively producing many graduates who can enter the legal profession.

Constructing qualitative and methodological questions regarding legal theory , the methods relating to those theories, or the resulting paradigms about law which result from many years of this form of scholarship were matters of central importance to the inquiry . Can these constructs influence the performance of scholars in the legal academy ? Fleck’s work suggests that such goals may be idealistic aspirations. The reasoning strongly reflects the powerful force of paradigms:

Nor is the didactic or authoritative type of introduction purely rational, for the current state of knowledge remains vague rational, for the current state of knowledge remains vague when history is not considered, just as history remains vague with the introduction to a field of knowledge passes through a period during which purely dogmatic teaching is dominant. An intellect is prepared for a given field; it is received into a self-contained world and, as it were, initiated. If the initiation has been disseminated for generations as in the case of introducing the basic ideas of physics, will become so self-evident that the person will completely forget he has ever been initiated, because he will never meet anyone who has not been similarly processed .

One could argue that, if there were such an initiation rite, it would be accepted without criticism only by the novice. The true expert must free himself from the shackles of authority and justify his first principles again and again until he establishes a purely rational system. But the expert is already a specially molded individual who can no longer escape the bonds of tradition and of the collective; otherwise he would not be an expert. For the introduction, then, Factors which are not subject to logical legitimization are also necessary, as well as essential both to the further development of knowledge and to the justification of a branch of knowledge that constitutes a science in itself. (Fleck, 54)

With respect to the analysis of classificatory procedures identified in Pound’s work, and the questions raised regarding the identification of methods used by Pound to construct the elements of his paradigm, consider the radical perspective forwarded by Fleck:

….it is altogether pointless to speak of all the characteristics of a structure. The number of characteristics can be as large as desired, and the number of possible determinations of characteristics depends upon the habits of thought of the given scientific discipline; that is, it already contains directional assumptions. Accordingly such mechanical combinatorial analyses are either arbitrary or actually conditioned by thought style. ……, new discoveries cannot be carried out by such tabulations and mechanically exhaustive combinations any more than, for instance, a poem can be composed by means of combining letters mechanically . (Fleck, 92)

This inquiry examined the work of Pound over a period of many years. Pound sought to employ the forum of law reviews to set out his ideas, adding variations and supporting arguments to his broad theories with individual articles.

It is not uncommon to see faculty at law schools seeking to build their intellectual careers and rights to tenure with similar arrangements. Fleck’s view of this process is not encouraging:

any attempts to organize journal science into a unified whole will soon encounter difficulties. The various points of view and working methods are so personal that no organic whole can be formed from the contradictory and incongruent fragments.

It is not possible to produce a vademecum simply from a collection

( articles that have appeared in journals) . Only through the socio cognitive migration of fragments of personal knowledge within the esoteric circle, combined with feedback [Ruckwirkung] from the exoteric circle, are these fragments altered so that additive, impersonal parts can arise from the nonadditive personal ones. (Fleck, 118) The vademecum is therefore not simply the result of either a compilation or a collection of various journal contributions. The former is impossible because such papers often contradict each other. The latter does not yield a closed system, which is the goal of vademecum science. A vademecum is built up from individual contributions through selection and orderly arrangement like a mosaic from many colored stones. The plan according to which selection and arrangement are made will then provide the guidelines for future research. (Fleck, 119)

The highly useful instruction in Fleck’s work is that a form of paradigm like Pound’s must emerge. Anything less that a paradigm would leave mixtures of (law) journal articles in disarray. Yet this thesis has not reconciled how to force change in legal education in a manner which would support the future welfare of law students and the legal profession. Nor did Pound’s monumental work on sociological jurisprudence. Nor did Llewellyn’s work on legal realism. How would Fleck have reconciled this problem?

Thus, a structure [Gebilde] is created step by step. Starting as a unique event or discovery, as seen from the history of thought, this is developed by the extraordinary forces of the thought collective into what seems to it to be a necessarily recurrent and thus objective and real finding. The disciplined, shared mood of scientific thought, consisting of the elements enumerated, connected with the practical means and effects, yields the specialized thought style of science. Good work done according to style, instantly awakens a corresponding mood of solidarity in the reader. It is this mood which, after a few sentences, compels him to regard the book highly and makes the book effective. Only later does one examine the details to see whether they can he incorporated into a system, that is, whether the realization of the thought style has been consistently achieved and in particular whether procedure has conformed to tradition (~ to preparatory training). These determinations legitimize the work so that it can be added to the stock of scientific knowledge and convert what has been presented into scientific fact. (Fleck, 145)

THOMAS KUHN

The second major work to examine paradigm issues in science was written by Thomas S. Kuhn. ( Kuhn 1963) Kuhn admits that he relied substantially on Fleck’s work in the formation of his own views. Again, to demonstrate that paradigm formation in legal thinking has many of the attributes found by Fleck and Kuhn, Kuhn’s organizing principles are presented in the following observations. To begin, Kuhn sets forth the notion that a paradigm must have consensus, and second, that the framework of the paradigm must allow for innovation and change:

(many)….. works served for a time implicitly to define the legitimate problems and methods of a research held for succeeding generations of practitioners. They were able to do so because they shared two essential characteristics. Their achievement was sufficiently unprecedented to attract an enduring group of adherents away from competing nodes of (scientific ) activity. Simultaneously, it was sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve. Achievements that share these two characteristics I shall henceforth refer to as paradigms,’ a term that relates closely to ‘normal science.’ (Kuhn, 10)

Kuhn’s observation about problem solving is revealing, and directly associates with Pound’s Sociological Jurisprudence.

Kuhn’s important point about method is that problem solving is constrained to assumptions of how the problem is identified. One might first react and assert this is simple equivocal reasoning. Yet on reflection, Pound sought to call the entire legal system a system which could be identified within a framework of “Sociological Jurisprudence.” The legal system, the practitioners and the courts, continued to follow the central doctrines of law beyond the life of Pound’s articles. Kuhn makes the point:

the existence of the paradigm sets the problem to be solved~ often the paradigm theory is implicated directly in the design of apparatus able to solve the problem. (Kuhn, 27)

Without directly stating that science cannot function without a paradigm, Kuhn appears to hold paradigms constant , defining them to take on a form or state exclusive of the components from which a paradigm is constructed:

One of the things a scientific community acquires with a paradigm is a criterion for choosing problems that, while the paradigm is taken for granted, can be assumed to have solutions. To a great extent these are the only problems that the community will admit as scientific or encourage its members to undertake. (Kuhn, 37)

Consistent with this inquiry, according to Kuhn the identification of rules and their usefulness in future education are key elements in the transformation of closed knowledge systems. A line of arguments in this thesis has been that law schools and legal education are unwilling to reconcile the economic and social injuries of antiquated teaching and examinations systems. Consider Kuhn’s view on the matter:

So far this point has been entirely theoretical: paradigms could determine normal science without the intervention of discoverable rules. The first, which has already been discussed quite fully, is the severe difficulty of discovering the rules that have guided particular normal-scientific traditions. That difficulty is very nearly the same as the one the philosopher encounters when he tries to say what all games have in common. The second, to which the first is really a corollary, is rooted in the nature of scientific education.

Scientists, it should already be clear, never learn concepts, laws, and theories in the abstract and by themselves. Instead, these intellectual tools are from the start encountered in a historically and pedagogically prior unit that displays them with and through their applications. A new theory is always announced together with applications to some concrete range of natural phenomena without them it would not be even a candidate for acceptance. (Kuhn, 46)

The problem of intellectual tools has been a central question in reviewing Pound’s work. Pound’s framework of analysis demanded that legal professionals recognize different perspectives on their traditions.

From Kuhn’s work, it would appear that an expectation of new learning will always be constrained by assumptions which are defined by tradition. The point has particular value when linked to Langdell’s case method of law teaching. *……,” these intellectual tools are from the start encountered in a historically and pedagogically prior unit that displays them with and through their applications”.*

Kuhn requires that an awareness of anomaly must exist to secure a paradigm shift. Pound struggled with components of the legal system and process in a search for what we could call anomalies in the administration of justice, the process of judging, the nature of court rulings in different jurisdictions, and the relationships between individuals and the law. According to Kuhn’s notion of a requisite set of anomalies, Pound was on the right course of action:

to a greater or lesser extent (corresponding to the continuum from the shocking to the anticipated result), the characteristics common to … all discoveries from which new sorts of phenomena emerge. Those characteristics include: the previous awareness of anomaly, the gradual and simultaneous emergence of both observational and conceptual recognition, and the consequent change of paradigm categories and procedures often accompanied by resistance. (Kuhn, 62)

This logic continues to be reinforced by Kuhn:

….awareness of anomaly plays a role in the emergence of new sorts of phenomena, it should surprise no one that a similar but more profound awareness is prerequisite to all acceptable changes of theory. (Kuhn , 67)

Yet Pound’s work appears to have halted in progress, never fully modifying how the judicial process performed, and never crafting a system which incorporated many of his views and ideas. Kuhn may have an explanation:

….as such , if my present point is correct, they (anomalies) can at best help to create a crisis or, more accurately, to reinforce one that is already very much in existence. By themselves they cannot and will not falsify that philosophical theory, for its defenders will do what we have already seen scientists doing when confronted by anomaly. They will devise numerous articulations and ad hoc modifications of their theory in order to eliminate any apparent conflict. Furthermore, if a typical pattern, which we shall later observe in scientific revolutions, is applicable here, these anomalies will then no longer seem to be simply facts. From within a new theory of scientific knowledge, they may instead seem very much like tautologies, statements of situations that could not conceivably have been otherwise. (Kuhn, 78)

Kuhn sets down a series of rules associated with anomalies, conditions which must be present to push the envelope of an existing paradigm:

it follows that if an anomaly is to evoke crisis, it must usually be more than just an anomaly. There are always difficulties somewhere in the paradigm-nature but most of them are set right sooner or later, often by processes that could not have been foreseen. (Kuhn, 80) An anomaly comes to seem more than just another puzzle of normal science, he transition to crisis and to extraordinary science has begun. The anomaly itself now comes to he more generally recognized as such by the profession. (Kuhn, 82)

….the crises begin with the blurring of a paradigm and the consequent loosening of the rules formal research. In this respect research during crisis very much resembles research during the pre-paradigm period, except that in the former the locus of difference is both smaller and more clearly defined. Crisis may end with the emergence of a new candidate for paradigm . The ensuing battle (is) over its acceptance. (Kuhn, 84)

How Pound’s ideas impacted the profession and the academy is not obvious.

Had they impacted both, one might imagine that law school graduates would be effectively prepared to enter their profession, which clearly we demonstrate they are not. Kuhn might have a useful explanation of the problem.

Paradigm shift is:

….a reconstruction of the field from new fundamentals, a reconstruction that changes some of the field’s most elementary theoretical generalizations as well as many of its paradigm methods and applications. ……there will also be a decisive difference in the modes of solution. When the transition is complete, the profession will have changed its view of the field, its methods, and its goals. (Kuhn, 85)

Pound’s work is not *a reconstruction of the field from new fundamentals.*

Rather he explored the field from many perspectives, making recommendations about change, making recommendations about definitions, but he was constrained by the field which would not allow an individual to change the entire perspective and meaning of the field of law. The nature of tradition is strong in paradigms, legal or scientific. Kuhn identified frameworks of theory change that might lead to paradigm shifts, but also demonstrates that only one will force an actual shift. The remarks are of particular interest because they raise a point about scholarly traditions.

Consideration of the materials which are assimilated in the many law reviews published in the United States will illustrate to researchers that articles rarely demand a change in doctrine or tradition in law. Worse, few if any law review articles are ever related to case holdings issued by judges, which define law. In effect legal scholarship strongly favors definitional affirmations of existing law because the presumption of a practitioner readership precludes work which denies the value of their legal practice . It is an area which even Pound had to tread lightly. But Kuhn requires a powerful challenge to change a paradigm:

….there must be a conflict between the paradigm that discloses anomaly and the one that later renders the anomaly law - like. There are, in principle, only three types of phenomena about which a new theory might be developed. The first consists of phenomena already well explained by existing paradigms, and these seldom provide either motive or point of departure for theory construction. The theories that result are seldom accepted, because nature provides no ground for discrimination. A second class of phenomena consists of those whose nature is indicated by existing paradigms but whose details can be understood only through further theory articulation.

These are the phenomena to which scientists direct their research much of the time, but that research aims at the articulation of existing paradigms rather than at the invention of new ones. Only when these attempts at articulation fail do scientists encounter the third type of phenomena, the recognized anomalies whose characteristic feature is their stubborn refusal to be assimilated to existing paradigms. This type alone gives rise to new theories. Paradigms provide all phenomena except anomalies with a theory-determined place in the scientist’s field of vision. (Kuhn, 97)

Pound’s work may be explained as incomplete by accepting Kuhn’s perspective. The problem is partially resolved by determined what Pound set forth to accomplish. If Pound actually wanted to have a paradigm of justice defined by broad Sociological terms, his rule and process reflections did not accomplish that end. A new paradigm for justice did not evolve. However, if Pound sought to welcome scholars to the dialog about justice, he succeeded. Kuhn’s view presents strong battle lines for the competition of ideas and measures of definitions:

Paradigm testing occurs only after persistent failure to solve a noteworthy puzzle has given rise to crisis. And even then it occurs only after the sense of crisis has evoked an alternate candidate for paradigm. In the sciences the testing situation never consists, as puzzle-solving does, simply in the comparison of a single paradigm with nature. Instead, testing occurs as part of the competition between two rival paradigms for the allegiance of the scientific community. Closely examined, this formulation displays unexpected and probably significant parallels to two of the most popular contemporary philosophical theories about verification. Few philosophers of science still seek absolute criteria for the verification of scientific theories. Noting that no theory can ever be exposed to all possible relevant tests, they ask not whether a theory has been verified but rather about its probability in the light of the evidence that actually exists. (Kuhn, 146)

The difficulties in this business of transforming the paradigms of learned societies is not a new matter. Kuhn brings two famous scientists into the conversation:

Darwin, in a particularly perceptive passage at the end of his Origin of Species, wrote: “Although I am fully convinced of the truth of the views given in this volume . . . , I by no means expect to convince experienced naturalists whose minds are stocked with a multitude of facts all viewed, during a long course of years, from a point of view directly opposite to mine. . . . But I look with confidence to the future,-to young and rising Naturalists, who will be able to view both sides of the question with impartiality.” Charles Darwin On the Origin of Species 6th English ed.~ New York. 1889 295-96

Max Planck, surveying his own career in his Scientific Autobiography, sadly remarked that “a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it,” Max Planck, Scientific Autobiography and Other Papers, trans. F. Gaynor New York.l949). PP. 33-34. (Kuhn, 150)

Kuhn leaves us with his own sentiment about the difficulties associated with paradigms and the people who influence them:

‘the transfer of allegiance from paradigm to paradigm is a conversion experience that cannot be forced. Lifelong resistance, particularly from those whose productive careers have committed them to an older tradition of normal science, is not a violation of scientific standards but an index to the nature of scientific research itself.

The source of resistance is the assurance that the older paradigm will ultimately solve all its problems, that nature can be shoved into the box the paradigm provides. Inevitably, at times of revolution, that assurance seems stubborn and pigheaded as indeed it sometimes becomes. (Kuhn, 152)

Kuhn’s last observation about models which define the manner of research and thinking in scholarly groups brings this research full circle to Egon Guba’s view that constructivist normative methods of qualitative research are most effective:

….though the strength of group commitment varies, with non- trivial consequences, along the spectrum from heuristic to ontological models, all models have similar functions. Among other things they supply the group with preferred or permissible analogies and metaphors. By doing so they help to determine what will be accepted as an explanation and as a puzzle-solution conversely, they assist in the determination of the roster of unsolved puzzles and in the evaluation of the importance of each. Note, however, that the members of scientific communities may not have to share even heuristic models, though they usually do so. There is no neutral algorithm for theory-choice, no systematic decision procedure which, properly applied, must lead each individual in the group to the same decision. (Kuhn, 201)

Kuhn closes his thinking with the contention that scientific paradigms are always subject to innovation, challenge and revision. One might wish that law, too , would welcome such challenge.

The final chapter of this thesis constructs future questions to pursue that challenge, arguing for change and illustrating the key elements of change which are required, in both the legal academy, and the legal profession. They are designed based upon the methodological constructs discussed in this thesis, and lessons illustrated and drawn from the life and writing of Roscoe Pound.

# CHAPTER V SUMMARY AND CONCLUSIONS [[260]](#footnote-260)

# FUTURE QUESTIONS - IDENTIFIED FRAMES OF ANALYSIS REFERENTIAL AND PRIMARY MATERIALS EXPLAINED

Formulated Case Study Questions for Legal Education and the Profession

The following composite set of questions on the process of inquiry were developed after all the literatures and methods materials were assembled. As a guide to the reader’s synthesis of articles in this literature review of Pound’s documents, the questions were viewed as useful tools to understand why elements of each article are extracted from the actual articles and presented in this work. This question series is an element of the design process discussed in the methods materials, the goal being to produce a useful case study “questions taxonomy “ on the topic of legal theory construction. In some respects qualitative thinking is the art of “thinking backwards.” It would be improbable or impossible to articulate these ideas without spending considerable time reviewing the contexts in which the issues arise. Given that task to be complete, the questions follow.

Formulated Case Study Questions For Legal Education and the Profession:

Legal Education and the Legal Profession

Academic Background

# What is the character and history of the legal academic discipline?

## Did major theories or paradigms drive academic behavior?

Were there major teaching models for the profession?

Did these models dominate or share the academic field?

Are there indicators of theory change in the field during the review period?

In what manner does the change appear to occur?

# The Profession

What was the character and history of the profession ?

Was the profession changing? If so, how?

If there are points of clear change events, how can

these be characterized?

What trends and problems were faced by the

profession?

Is there evidence in the literature which explains how

lawyers differ as Judges, Academics and Practitioners?

# The Scholar

What elements and attributes of the scholar’s background

educational training and career prior to the scholarship

exist in the data collections and archives which can be

determined to have been directly or plausibly influential

in the later theory building ? (Crispy distinctions)

What elements can be argued to have been necessary?

What elements are indicated as persuasive?

Which elements did the scholar have to reject or change?

How did that change [[261]](#footnote-261)occur?[[262]](#footnote-262)

# Major Competing Theories & The Process of Theory Formulation

What were the legal theories in the field which

contradicted or anticipated the scholar’s work?

What specific legal theories did the scholar reject?

By what identifiable process was the theory rejected?

Were their observable techniques used in theory

rejection?

What theories[[263]](#footnote-263) were used to support the scholars

arguments? Were they rejected or adopted or adapted?

What devices or procedures[[264]](#footnote-264) did the scholar

recommend to shift acceptance to his theoretical point

of view?

What were the major philosophical works and ideas

which framed the references of the theory?

How direct or indirect was influence of each competing

theory?

Can the theory be described as having a “life cycle”?

elements to study?

Were there events during the work on the theory which

could be described as academic politics ?

Between authors?

Between Law Schools? - Universities?[[265]](#footnote-265)

Were there events in professional associations which

substantially influenced any aspects of the formation

of identifiable aspects of the theory?

Were any of theses events in effect necessary or

persuasive in the scholar’s choice of ideas?

Are there immediately apparent alternatives

in choice of content at the identified events, which but

for the actual event , would have been equally plausible?

What justification[[266]](#footnote-266) was employed to support a

change[[267]](#footnote-267) in the practice or procedure associated with

the theory?

Why are each of these inquiry segments important, and how do they compare

as aspects of the theory and paradigm process ?

Are data gathering efforts in the area equally fruitful, or do some elements

better fit the evaluation of influential factors in the theory work of the

scholar?[[268]](#footnote-268)

Process of Review

This work developed these exploratory questions for case study analysis in legal education and theory by examining the personal papers, biographical materials and scholarship of Roscoe Pound. [[269]](#footnote-269) The process consisted of substantial data gathering and research, then, additional effort in crafting the relationships between the qualitative methods selected, and the artificial intelligence model selected. The thesis is an excellent point of departure for subsequent writings which further test and evolve the model . Several excellent legal scholars from the same time period with similar volumes of materials and archival sites exist to comparatively incorporate the same materials and data beds . Mentioned earlier, they include Holmes , Pollock and Llewellyn. Developing an appreciation for the qualitative method of research in this dissertation required that cyclical work be performed. First it was necessary to explore and understand the implications of research methods and analysis commonly employed in the discipline of Higher Education Administration. Next, to perform this analysis, it was necessary to earn a law degree, and to understand the nature of law, legal reasoning and legal philosophy.

In this broad context of law and education administration, a framework to integrate the two disciplines had to be discovered. Because the field of artificial intelligence has struggled for decades with the idea that human behaviors can be crafted into machine behaviors, their craft of algorithm building was imagined to be a rich source of model constructions Legal education and legal theory is also a difficult bridge to cross. Many individuals would argue Pound did nothing to articulate any legal theories. Roscoe Pound and his influence on the twentieth century proved to be the important linkage for a number of reasons. His personal correspondence is exquisitely preserved at Harvard law School, and at the Universities of Iowa and Nebraska, his work was sufficiently important to warrant several biographical inquiries of Herculean dimensions, and his Iowa biographer Paul Sayre was meticulous in keeping files, also well organized and well preserved at the University of Iowa.

Understanding what legal education has not accomplished in this static legal community is one of the challenges of reconciling the constraints of paradigms. Demonstrating what still must be provided to new law students can be seen as bound up in this complex environment of tradition, which has many parallels to the explorations of scientific paradigms. This is an extremely important and meaningful task to undertake. Thesis writing in multi-volume works is not encouraged, nor is it practical. By making it clear law schools fail to prepare many individuals for professional careers, the platform exists to justify the exploration of new improvements. Discovering the core of the problem, identifying historical issues relating to the formation of law schools, and the status of law schools from the perspective of the profession, needed to be clarified.

Legal theory has been the source of new ideas in law, thus, the art and practice of legal theory construction was viewed to be central to any new ideas generated relating to continued improvements in legal education and the legal profession. If Pound’ s ideas had been determined to be dated, (which they were not) alternative inquiries would have been required. Pound’s own method was successful in setting his ideas into legal education and the legal profession. Understanding by analysis and testing his method, alone, would be considered an accomplishment of reasonable scholarly undertaking. Building a legal theory engine algorithm is a good first step toward more model constructions to understand theory and explain any model’s future value. By interpolating variations of qualitative research into legal discourse the keys to major shifts in legal education and writings about legal education can move forward.

Recognizing that (the majority of ) law schools are and have not been producing effective student outcomes at an alarming rate of failure and expense underpins the timely importance of this study. We began by looking for the intersects between the contemporary outcomes of legal education,[[270]](#footnote-270) and the arguments presented at the beginning of the twentieth century , to improve the legal profession.[[271]](#footnote-271)

As a case study which considered the work of Roscoe Pound we are all better positioned to rethink methods for improving legal education and the legal profession. Pound is an outstanding choice, he is well understood to be one of America’s leading legal educators of the twentieth century.

We can intuitively understand from the high failure rate of law school graduates to become lawyers and lack of reforms in the judicial system and legal profession that Pound’s messages went unheard. Beyond intuition, we also examined Pound’s sentiments and the process he employed in constructing his ideas.

By employing “modern” methodological antecedents as analytical tools, we were able to skip back in time 100 years, and rethink useful strategies which led up to the construction of a “sociological jurisprudence”. The capture of that process into a “legal theory engine”[[272]](#footnote-272) is argued to be a useful map and mechanism for other scholars to qualitatively organize their inquiries on this subject . The schematic portrayal of paradigm formulations of is but one of many possible . Pound lived in a time of industrial growth, where process schemes were the rule of the economy. Pound reutilized cycles of events where he originally made presentations , repeatedly infusing the work with new ideas to succeed in grounding his theory , from small speech activities into major law review articles. Articles, as we know, which weren’t always welcome. [[273]](#footnote-273)

As qualitative research has resoundingly proved, discovery begins with broad ranges of inquiry, and by the very nature of crafting arrangements and aligning facts, the lawyer and scholar both can make cogent and meaningful statements about events and perspectives by gathering and organizing different resource materials .

The methods section of this work became an analytical process which demanded a careful inquiry into both biographical and published writing by Pound and observers of Pound to ensure that the backdrop and substance of the inquiry revealed meaningful results. Qualitative research matured during the decade of this study, from “cook book” generalities, into many focused qualitative studies which incorporate specific methodological designs into extended research. This dissertation mirrors that qualitative research evolution. Qualitative methods are bare bone perceptions of how to consider information .

The categorization of those materials is driven by the frames of reference from which it originates, the context in which it was produced , the period in history which it attempts to understand, and the referential skills of the author(s) who created the materials. Pound’s work studied the legal profession from a philosophical perspective. Here we have studied Pound as a Dean, articulating changes in the American legal profession . Qualitatively a narrowness worsens as the old and institutionalized discipline of legal analysis is attempted using social science qualitative methodologies. For that reason the “analysis” is in the methods. It is not unreasonable to argue they are inseparable.

The central value of understanding archival data for scholars in this field is the accrual of perceptions about contexts, and backgrounds. It isn’t really possible to distinguish between true brilliance in a scholarly argument unless the “normal” attributes of an individual are factored. The search of one’s craft in the formulation of profound and interesting ideas begins in archives.

Pound wrote far more articles that those presented in this analysis. The selected articles and the St. Paul speech of 1906 represent the core of his public voice prior to arriving at Harvard. Legal analysis of argument is a form of training and a discipline which does not come intuitively. There is much to what Pound argues in the articles which relates broader concerns to lawyers and judges as professionals. The personal remarks between the great men of American Law incorporated into this study adds clarity to the context in which Pound’s materials were produced. Law is no stranger to strong words. Pound was held in high esteem . The near biting sarcasm which occasions Pound’s letters, on reflections of men of poor cut, or law schools which are sausage factories, reveal Pound’s true sentiments.

The methodological schema was envisioned to ascertain a “field” model of analysis, which resulted in the design of a wide series of research questions presented in this conclusion. The proposition is that the field of higher education can explore the growth and development of legal education, and make useful design and structural improvements. The methodological materials which study the individual works of Pound were selected because theory construction, the development of code(s) , and the articulation of paradigms all require individual action within a definable field of events. Some of the articles present both attributes, others seem to come more from the heart, as an argument of self in the context of a profession. Most often Pound begins with a very powerful argument. This can either be a philosophical frame of thinking…” Why We Need a Philosophy of Law, or – a practitioner’s quandary…” (see The Decadence of Equity. )“

What remains a source of scholarly excitement is the connection between modern qualitative method, and the methods Pound employed at the beginning of the twentieth century. An excellent example is his article on “Mechanical Jurisprudence.”

While the work could be perceived as philosophical, in truth it is a qualitative measure of how judges act when those judges consider legal controversies. Pound invests considerable energy and takes a difficult position when he argues that judges are “mechanical thinkers” who in effect pay little or no attention to variations in facts, disputants, or the course of any trial. The condition worsened when judge began to disappear and administrative agencies of the governments started to make decisions in total disregard of individual needs and sentiments. The relational associations between theory construction and qualitative methodological analysis are an informative sequel of research and writing procedures having informative similarities and differences.

The project is a book in itself. A polarity[[274]](#footnote-274) of ideas is discoverable by beginning with the term “construction”. Building or examining the design process of the work from another is a qualitative process of allocating ideas into a supportive schema of classifications, categories, clusters or components. Qualitative work yields much to the inquirer. This can be a warranty for disappointment. Yet only if one has expectations which cannot be tolerated by changes in outcomes. We are often attracted to ideas and scholarship because the work is deemed important or of value by others. Roscoe Pound is a great man in America’s twentieth century. Surprises abound on a closer look. He remains after this study still a great man. He is more amazing because his ideas were at times formulated among humble and common men in the rural America of Nebraska, and North Dakota. An excellent example is the speech he gave in Valley City, North Dakota, which was followed by an article in the Columbia Law Review. The greatness comes from articulating the needs and requirements of humble men.

The message of course is that greatness can have many subtle surprises. Valley City, North Dakota, may have a long wait before another legal master visits, and after meetings with local attorneys, articulates their ideas in the Columbia Law Review. Construction and classification of thinking and reasoning is the foundation of qualitative research methodologies. Selecting items and materials which explain and identify the utility of qualitative techniques and setting forth a model of how the associated elements coalesce into outcomes is a critical skill. It is also difficult to learn. The freedom to experiment, reflect, and modify ideas is central to the process. Legal discourse is antithetical to such an arrangement. Formulating one best perspective and retaining it despite counterarguments is how facts are reconciled, and legal decisions are made. Crafting and following precedents and rules is how the process of “best legal perspectives” is understood. Loosing site of counterarguments and their significance is where the sharp edge of legal concision is dulled against the stones of a reductionist method. Pound knew this and demonstrated that one could build visions, create new classificatory schemes of ideas, and craft new departures in many aspects of legal education and practice. Broader learning patterns of interpretation and understanding taught Pound this skill in his life of inquiry, not his year at Harvard law School in 1889, when he left in frustration and returned to Nebraska.

Thinking about the law from several qualitative frames of reference is very useful. One qualitative framework used alone must be considered opaque – blurring the mind’s eye in many ways. Knowing several frames of reference , and using them concurrently raises the consciousness. Included among these frames is the employment of a generic process model of allocating idea formulations and points of transformation from ideas into outcomes.

The argument follows that qualitative analytical “backdrops” each serve a different and useful kind of contemplation and understanding that lead one to the methodological issues of assimilating, testing, reformulating and articulating arguments of significance and importance which are durable and lasting in the life of the law. Several outcome conclusions are warranted. Pound’s dreams and expectations have yet to be met by American Legal Education and the legal profession. The legal system Pound viewed during his years at Harvard is the same today. In fact is has worsened. The individual opportunity for a trial is obscured by ever widening administrative tribunals. Courts rely substantially on mediation and arbitration to reduce case loads. No procedural warranties exist for claimants in such forums. Agency and executive decision making regarding individual rights left the adversarial forum years ago.

Pound expressed concerns about the administrative state. The intervention of codes, legislatures, and governmental intervention in common law rights by administrative regulation have muted the individual’s access to the authorities of his community. Pound lived to see it, he did not write about his observations. A second result of growth in the law after Pound’s work is an enormous apartheid between law school curriculums, the profession, and legal scholarship. Some of the attributes of this gap have been identified, carved out of the glacier of legal education traditions. A great tragedy of failures exists. One out of three American Bar Association law school graduates fail state bar exams. Much reform is required. America could have a better legal system, and an improved third branch of government. In this research I set out to take control of many issues which would formulate into new streams of research and scholarship. Pound successfully isolated many fundamental issues which require further exploration .

To date they have been largely ignored.

The theme of “sets” represents one example. From Pound’s papers it was discovered that set construction was elemental in his work, in this work demonstrated to be grounded in many disciplines, over considerable time.[[275]](#footnote-275) Another continuity in Pound’s work that persuasively becomes an organizing principle is the practice, process and idea of codification, i.e., codes. Codes create reliability of ideas through consensus. Law in America would embrace codes in the decades after Pound’s analytical work . [[276]](#footnote-276) It is an area of considerable future importance. It is quite stunning to see Pound articulating ideas from German articles about business practices, arguing that the codification of business practices is important, then later, to observe the evolution of the American Codification movement of the 1920’s, the formation of the American Law Institute[[277]](#footnote-277) at the University of Pennsylvania,

and the direct involvement in the formation and publication of the Uniform Commercial Code by Karl Llewellyn after his early years of disputes with Pound over legal realism. Llewellyn was to later state his constant frustration with the legal practitioners on the panel, this in part affirms Pound’s influence flows beyond being the source of enlightenment and discovery of legal realism credited to Llewellyn.

Many useful methodological strategies flow from the interpolation of content and method. It would serve well many legal practitioners, scholars and judges to become significantly more familiar with qualitative methods. The time when oracular judging should be only remembered in history is upon us all.

Derived Policy Issues for Legal Education and Bar

Why address legal theory and legal education issues concurrently?

The answer is somewhat obvious, legal theory in the early twentieth century sought to reform legal education and the character of the active bench and bar. Instead of heeding the warnings, legal education unintentionally accepted the role of producing apprentice/associates. The ABA took over the First Committee on Legal Education, and the long term results are now obvious. Statistics prove law schools explicitly fail in accomplished that task. From the consumer perspective, if one of three products was explicitly defective, the producer would be out of business. Exploring the evolution of ideas about the legal profession required a significantly broad framework and backdrop to prepare arguments and conclusions. Pound’s work broadly explores the opening of the twentieth century in legal education. The statistics illustrate the end. The problem in the middle is opened by the formulation of the analytical questions presented in this conclusion.

The work which remains, and the problem which has been identified are both monumental. After my study of qualitative methods, the legal issues raised by Pound, and Pound’s background to his scholarship were examined to sort out the categories of his thinking which could be useful in illuminating attributes of theory construction. The categories were then revisited and infused them with personal remarks and phrasings from biographical materials, correspondence items, viewpoints of others, and stipulations made by Pound in his law review articles. This effort added to the nature of the methodological discussion, and facilitated the construction of questions for new research. The goal was to make abstractions into concrete examples related to legal education and the legal profession, not just as demonstrations, but to show process sequels in the actual thinking of Pound.

Stated differently this scholarship visits with Roscoe Pound, and asks him to disclose his method. It is fine art, and a great experience. One might be inclined to regard theory construction as far too narrow a field of perspective. Consider for example Pound’s 1906 Speech in St. Paul where he alienated a little less than half the audience.

The antecedent calculation required to insure that remarks were going to stir controversies but not result in being thrown out the door is rather difficult to quantify. It is the accrual of many small events that consequential theory explains. Yet we ignore them all because our perceptions cannot tolerate many small amounts of information. Thus while theory purports to organize the many events while underlie concept formation, we miss the events which would tell us the real story. The result is that we learn nothing. In a broader sense, perhaps this explains how law schools grew to be the inefficient institutions they are today. In considering theory, or the legal profession, one must see both for how they interrelate.

When an educational process purportedly aligns the richest forms of scholarship with the effectiveness of the profession, one might like to discover a trend of improvement over 100 years. It would be even more exciting to find positive results from the enormous expenditures of tuition by students to become legal professionals.[[278]](#footnote-278) The controversies around “bar schools” and their practices continue. Something less than useful has resulted. There is a scholarly minuet in law reviews, between law faculty and the student editors of the articles submitted by the faculties. (See Fred Rodell’s work) Student law review editing in fact is an important experience highly related to becoming a law professor.

Among the estimated 180 American Law schools which exist there are approximately 5,000 law faculty positions. Entering one of these, and retaining it, requires publication of law review articles. The entire process takes on the appearance of an enormous gathering of justifying the traditions of law. Legal tradition and doctrine welcomes affirmations, but abhors innovation. Innovative ideas in legal discourse put professionals at risk in their practice. Dissent and criticism can get you disbarred. One might see this as a “Divine Right of Kings” system, not at all resembling a democratic institution. Pound, while consistently on point with his ideas, couldn’t shift legal tradition. We intuitively grasp that scholarship is contextually driven. Pound and Chomsky and the specialized and unique institutions in which they played major roles disclose some attributes of this idea. While intuitively obvious, the argument is that actual scholarship has more or less value depending on the needs and interest groups of the audience and/or university. For example MIT needed natural language to expand the capacity of computers to function at higher levels of artificial intelligence. To his great success Noam Chomsky studied various human levels of cognition in linguistic frameworks. MIT and Chomsky needed each other to engage in the transformation of computing machines from calculators to more complex systems. Engineers alone could not perform the task. So it was at Harvard, with Pound at the helm of the Law School. Lawyers alone would never shift the paradigm of legal discourse. A fixed paradigm was and remains the source of any lawyer’s ability to succeed.. To shift that paradigm, the lawyer is tossed into a new set of high risk referential contexts. Pound asked the legal profession to accept new visions. While his ideas are rich and exciting, the legal profession prefers tradition. Engineers alternatively could hardly wait for computing machines to be capable of natural language tasks. Better process language would mean broader capabilities.

Different legal constructs would mean less reliability in the existing skills of the profession. A bit more nefarious is the real likelihood that the ABA endeavors to retain exclusivity over the members of the state bar associations, and the schools from which they graduate. Pound sought to be the bridge between legal education and the profession. It was and is a difficult position to occupy. Quality outcomes to this dispute will not originate in a finely crafted adversarial forum, because none exists.

Many useful questions flow from the exercise of evaluating different constructs of Pound’s Sociological Jurisprudence. Reading his original law review materials captures the decades later elements of paradigm transformation articulated by Fleck and Kuhn. During this inquiry some opportunities occurred that facilitated alignments between parallel elements in qualitative methods. Set and Code ideas were of particular importance. This is the core of legal process and method. One specific question was “Can New Models be constructed?” The tensions of code parameters and how sets are limiting fits the problem of how paradigms lock out innovation. These are closed systems just as those described in 1880 by Pierce. Law school curriculums , practitioners and legal theory builders are not free to explore the beyond the boundaries of knowledge which exist in the profession.

Fleck and Kuhn’s exploration of paradigms in scientific theory explain the problem . The six hundred thousand lawyers who are members of the American Bar Association are not interested in seeing their understanding of law changed. We identified that 30 % of ABA law school graduates fail state bar examinations. By definition of the profession they are unfit to practice law. The identification and approval of legal knowledge suitability is conducted by State Boards of bar Examiners. An important new question to study is the demographic composition of these Boards and their relationships to any curriculum planning events or course design workshops at law schools or at the annual meetings of the AALS.

Also it is observed that even with the curriculum focus to educate students to become practitioner – associates, the current teaching energies must be considered a failure. The ABA and Board of State Bar Examiners would have to concede that they are not correctly integrating their licensing protocols with law schools and the design of curriculums and courses. Many configurations of the licensure process to become a practitioner which are very different but equally plausible become valid. Lawyers are limited practice only in single state jurisdictions by examination for license.

*It becomes obvious the United States needs a separate Federal Bar.* The U.S. Supreme Court needs to take seriously and review aggressively the numerous flaws in the management of state judicial systems and the degree to which state bar associations influence state courts. Much of lawyering in various states and courts is substantially dissimilar from other states, even neighboring states, even in various courts within the state. Yet more than half of most state licensing point passing structures are premised upon test passage skills relating to a single national “multi state “ exam, having origins in 1931. . This exam has inherent fixed rates of passing applicants , with well understood and centrally managed frequency of correct answers for each question. Stated differently, the exam is wired with distributions of more or less passible answers to questions repeatedly used over decades of examination sessions in states. It is a derogatory state of affairs.

One might think it complex to make nonsense out of already existing nonsense. No so in the legal profession. The finest examples of the skill seem to reside in curriculum designers of law schools, and their oblique distant cousins, licensing essay question designers who often have long been absent from law schools, who contrive legal exam questions in an entirely private[[279]](#footnote-279) conversations. There are many well crafted insults of law professors, lawyers and judges. This is neither a new discussion, nor are the remarks outside the “set” of what has been accepted as “normal”. Recall at one point Pound referring to schools as “sausage mills of justice”.

From this research it follows that the skills and abilities delivered by law schools to the professional bar could be vastly improved from asserting higher expectations on law schools to produce graduates who have broader ranges of analytical skills beyond the de rigor of legal tradition . Lawyers do not define reality – They help others understand it. The time has come for far more understanding, and significantly less definition.

Law faculty are failing to teach sufficient skills to prepare graduates for licensure and the profession. Curriculum planning sessions with accreditation officials is of immediate and paramount importance. Law schools should be required to publish annual pass rate percentages for their students. Students upon graduation should be well prepared to explore, understand, review and reflect upon their profession. There is no sensible nor defensible reason to refuse bar licenses to 30% of law school graduates at the time they graduate from ABA law schools. Ideals that only exist on paper, in articles written 100 or so years ago, need to be recognized as invitations to move beyond existing legal paradigms. Law Deans need to come to terms with what is NOT happening at their law schools, understand the dynamics of professional licensure and their curriculums, and engage in the process of change required to shift the burden back to the faculty and away from the high risks of failure imposed upon the law school graduate.

“Bar Schools” need to discontinue hiring “ bar practitioners” as Law School Deans. It is an inherent and continuing disaster in legal education. Species failure resulting from inbreeding.

Bar licensure in the majority of American States is controlled by State Supreme Courts. Judicial Conferences could have a significant and influential impact on law faculties in their states. Judges should lobby for better controls between legal education curriculums and the production and management of examination procedures. They do not. The ABA “approves law schools” for State systems.

The ABA convinced State Supreme Courts to only accept their approved law school students in the period between the Flexner Report and the Second world war. (California is a notable exception). One can make the following arguments:

Law school which cannot produce effective pass rates above 90% of their graduating class should be placed on probationary review. When that rate is consistently not met over a period of years, law school accreditation should be withdrawn by the ABA, which represents the legal profession. The California Bar is currently pursuing these ends.

One solution could be that licensing examinations are held in cycles associated with course studies at ABA law schools. This would collapse the billion dollar bar prep industry. Like the Medical Boards in the United States, bar examinations should be given in sequels, following each year of law school, for periods of no more than three hours in one day. Law schools should provide reciprocal summer institutes for their students on bar examinations techniques and issues. Such procedures could be mandated by State law following design of a model piece of legislation. Bar examination Board Membership should include significant mandatory faculty representation resulting from appointments of faculty as board members from law schools of the state over which the Board Presides.

Board work should be limited to reasonable [[280]](#footnote-280)character and fitness reviews, and oversight of law school administered licensing examinations which must be passed prior to graduation. The abuse of law school graduates by the “Invisible Hand” of state authorities must come to and end.

State Bar Associations have substantial “post doctoral” legal training programs known as “Continuing Legal Education”. Unfortunately the “CLE” activities have yet to be understood as “post doctoral research” or “fellowship” activities of learning on paths toward professional work.[[281]](#footnote-281) Typically they are short four hour summaries of current law or state related practice issues. In many states retention of one’s license to practice is conditioned on the annual completion of designated numbers of credits. In principle this is because each state has numerous distinct differences in the application of state laws relating to practice areas as well as procedural work. As an innovation law students could complete a specified number of these “practical rule” forms of CLE courses during law school, which then could be considered a waiver of sections of licensing examinations in the same jurisdiction on the topic area. CLE materials relating to specific course areas of the law school curriculum should also be announced on course syllabi for the benefit of enrolled students seeking entry into practice of the jurisdiction in which the law school is located. Contemporary digital systems make this recommendation simple to implement. “Foreign” students could make arrangements to work with materials from their “forum” state

(It is already often required that students register with the state in which they intend to practice BEFORE they attend any “foreign” i.e., other state law school ) . Legal education and the legal profession needs to come to terms with the global economy.

The entire reason for these arguments being included in this study is that the goals and purposes articulated by scholars like Roscoe Pound and Karl Llewellyn are lost in the 20th century shift into “bar schools” which exclusively serve the State Bars and their members, who by design are capable of restricted the number of new law school graduates entering their state bars, or worse restricting new bar members to graduates if law schools within their states.

# Final Remarks

There is a strange disconnect between the “Cathedra” classroom and the roadside speech circuit Pound worked in lectures, meetings and presentations. It almost takes on the aura of randomly being somewhere making a speech. Seeing Pound’s diaries, which were extremely detailed, one can observe another dimension of his method, “ If you go out and say it somewhere, and everyone remains in the room, you might have something really worth writing about . “ To wit “The Sociological (legal) movement is a pragmatism to adjust human conditions , principles and doctrines. One is to consider acts of governing by putting the human factor in the central place and relegating logic to its true position as an instrument. “ (p. 199) “ Lawyering is the end of law…one might ask whether anyone is making any good…”– (201 ) - Consider for example the wilderness of decisions, and juristic speculation. Jurors are overwhelmed by experts. Remedies include taking judges to fresh illustrations and intelligent applications, not by rule deduction.” - And this is good.

There are many pathways ahead. Continued work in the craft of being a legal educator and scholar is critical.

Several examples of other legal scholars worth at least the same degree of inquiry have been presented. Karl Llewellyn and Oliver Wendell Holmes, Jr. are excellent examples. Legal theory has moved away from the frames of reference used by Pound, and traveled in many directions. Law school curriculum designs and bar examination practices are in serious need of review.

Legislative action is urgently needed to change the manner by which states license new lawyers. Law schools should be obligated to be responsible for the welfare of their students, and to afford students the opportunity to choose curriculums which are more immediately related to gaining entry into the legal profession. If law school graduates seek further legal training it should occur in graduate law programs.

The American Juris Doctorate degree was an LL.B. until 1918, and arguably should be so again. One does not receive a doctor of law (JD) in Britain. This is obviously a Global marketplace, yet comparative legal education with other nations is in a state of near total darkness. Legal systems of other countries are ignored by the American legal academy. Last, the range of analytical skills in the repertoire of the average lawyer’s range of abilities is in urgent need of improvement. This creates a significant argument that graduate legal education which enriches legal practitioners in their analytical skills and range of human understanding is missing. The final step between graduating from law school and entering the legal profession should not be bar study courses managed by market competitors. That step for many decades used to be the apprenticeship system in America. - Bar prep courses, the millions spent on them, and the arbitrary results are no suitable replacement.

Change and improvement comes from within. The work done by Pound, and how he did it, were examined and discussed in this study. Pound knew intrinsically that legal education was not satisfactory if only the doctrinal and procedural aspects of law were taught. That he called for scholars and educators, lawyers and judges to become reformers, and bring the American experience of social conflict and problem resolution into the academic frameworks of law is obvious. The drama of failures in the profession of students who graduated from the American Bar Association accredited law schools is a matter of statistical truth. Beyond the offensive abuses heaped upon law graduates trying to enter the profession, consider the myriad of disciplinary events of lawyers in the profession. For Bar Associations claiming to be in management and control of the quality of the legal profession, given enormous discretions and clear holdings articulated by the U.S. Supreme Court, the inherent failures are obvious and substantial.

Worse this data does not include the many lawyers who after being brought forth to State disciplinary Boards, and were surreptitiously “disbarred”. Many never enter the legal profession after law school, bar examinations unrelated to what is taught in law school leave them “barred” from the legal profession in very large numbers. This is enormous economic damage, one Posner might consider in his studies of law and economics.

The “ Case Method” given birth by Langdell at Harvard, used constantly in law schools, and in “case” books has very little to do with bar exams. This explains two things. One, it explains why there is an enormous bar prep industry for law graduates, which is pointless. Two, it explains the 30% failure rate. Arguably, the entire design is to restrict entry into the legal profession, and further burden law school graduates. Few practicing lawyers work in more than two areas of law.

Why exclude law school graduates by demanding exacting examined skills in 14 or more areas of common, state and federal law, with many questions on materials never seen in law school? Why aren’t these areas specializations one certifies into after being licensed? How does the ABA warrant these students to be prepared to practice law to State Supreme Courts, in the schools they approve, then sit back and ignore the enormous failure rates?

It is time to reclaim American Legal Education, to demand that law schools be responsive to the students and states from whom they collect their fees.

State “ Bar Examiners” using canned questions from a fifty year old NCBE inventory of questions known from prior testing to result in very well calculated rates of failure represents a willful intent of gatekeepers in the profession to eliminate participation in the legal profession of many law school graduates. In simple terms it is fraud. *An analysis of law school course syllabi is essential prior to crafting licensing questions.* In fact he questions cannot be reasonably constructed without a full validation of the questions using the course syllabus material from law school classes. *Law students need to be included on panels which prepare bar licensing questions*. If the students who took the courses never saw the question material, how can it be reasonably used to allow them to enter a state bar? Knowing one of three individuals who answer bar exam questions will certainly get the wrong answer, taking their money for the exam, then failing them, is both conversion and fraud. Grinding law students through hundreds of hours of case method work may sharpen their dialectic and analytical skills, but this process of education will not improve skills to take a bar examination. It is time to teach new lawyers the art and practice of “sociological jurisprudence” in the twenty first century. “The Sociological (legal) movement is a pragmatism to adjust human conditions , principles and doctrines.

One is to consider acts of governing by putting the human factor in the central place and relegating logic to its true position as an instrument. “ (p. 199)

“ Lawyering is the end of law…one might ask whether anyone is making any good…”– (201 ) - Consider for example the wilderness of decisions, and juristic speculation. Jurors are overwhelmed by experts. Remedies include taking judges to fresh illustrations and intelligent applications, not by rule deduction.” - And this is good.

# Further Research

This inquiry opens s many pathways ahead. Continued work in the craft of being a legal educator and scholar incorporating the scholarship of the great “jurisprudes” has the potential to overcome the vile character of the legal profession and its restrictive influence on legal education and entry into the legal profession. Numerous examples of other legal scholars worth at least the same degree of inquiry have been presented. Karl Llewellyn and Oliver Wendell Holmes, Jr. are excellent examples. Legal theory has moved away from the frames of reference used by Pound, and traveled in many directions. Law school curriculum designs and bar examination practices are in a critical need of review. Legislative action is required to change the manner by which states license new lawyers. Law schools should be obligated to be responsible for the welfare of their students, and to afford students the opportunity to choose curriculums which are more effective. Comparative legal education with other nations is in a state of near total darkness. Legal systems of other countries are ignored by the American legal academy .

Last, the range of analytical skills in the repertoire of the average lawyer’s range of abilities is in urgent need of improvement. Continued scholarship in the craft of being a legal educator and scholar is critical.

Several examples of other legal scholars worth at least the same degree of inquiry have been presented. Karl Llewellyn and Oliver Wendell Holmes, Jr. are excellent examples.

The old “ contract” between the ABA and State Supreme Courts needs to be tested to see if what was promised decades ago has actually been delivered (i.e. the States agreed that only ABA approved law school grads could sit for their examinations). Law schools should be obligated to be responsible for the welfare of their students, and to afford students the opportunity to choose curriculums which are more immediately related to gaining entry into the legal profession. If law school graduates seek further legal training it should occur in graduate law programs. The American Juris Doctorate degree was an LL.B. until 1918, and arguably should be so again. One does not receive a doctor of law (JD) in Britain. This is obviously a Global marketplace, yet comparative legal education with other nations is in a state of near total darkness. Legal systems of other countries are ignored by the American legal academy. Last, the range of analytical skills in the repertoire of the average lawyer’s range of client support abilities is in urgent need of improvement. This creates a significant argument that graduate legal education which enriches legal practitioners in their analytical skills and range of human understanding is missing. The final step between graduating from law school and entering the legal profession should not be bar study courses managed by market competitors. That step used to be the apprenticeship system in America.

It is time to reclaim American Legal Education, to demand that law schools be responsive to the students and states from whom they collect their fees.

It is time to teach new lawyers the art and practice of “sociological jurisprudence” in the twenty first century. It is time to call for a properly and reasonably managed legal profession and state court system structure with stronger Federal Supreme Court oversight. There are no constitutional excuses for the existing alternative.

Bibliography

Ammentorp, W., Hooker, C. (No Date) Knowledge Organization in Educational Administration: Toward a General Theory of Paradigm Formation., University of Minnesota at p. 4

Ammentorp, W., Copa, G, Morgan, T., M Gunderson, P. (1998) Qualitative Perspectives on Social Design Twelfth international Workshop on Qualitative Reasoning, May 26th-29, 1998, Cape Cod, Mass.

Amos, Sheldon (1870) A Lecture on the Best Modes of Studying the Science of Jurisprudence – London, Ridgeway, 1870.

Amos, Sheldon (1874) Science of Law N.Y. Appleton

Here can be seen the foundation of Langdell’s (1880) method of law teaching

Austin, John (1865) Lectures on Jurisprudence, 3rd ed. London, Murray p. 1023

Bandler, Richard, and Grinder, John (1982) Reframing - Neuro-Linguistic Programming and the Transformation of Meaning Oceana

Bernhoft, Freidrich (1907) Burgerliches Recht, Encyklopadie der Rechtswissenschaft at 46 , Rostock

Casti, John (1989) Paradigms Lost, ~ Tackling the Unanswered Mysteries of Modern Science- Avon Books, NY , p.40

Casti, (1994) Complexification: Exploring a Paradoxical World Through the Science of Surprise NY Harper Collins

Coffey, Amanda, and Atkinson, Paul (1996) Making Sense of Qualitative Data - Complimentary Research Strategies Sage, Ca.

Cowan, Thomas A. (1963) A Reaction to Ehrensweig’s Schools of Jurisprudence, Int’l Assn for Philosophy of Law

Durkheim, E. (1911) The Real & Unreal, Paris, Pars.

Fleck, Ludwig (1935) Genesis and Development of a Scientific Fact c. 1935 Benno Schwabe & Co. Basel Switzerland, c. 1979 University of Chicago Press

Fuller, Lon (1949) The Case of the Speluncian Explorers, 62 Harv. L. Rev

Gray, John Chipman , (1982) Methods of Legal Education 1 Yale Law Journal 1892 @ p. 161

Gray, John Chipman (1892) Some Definitions and Principles of Jurisprudence 6 Harvard Law Review April 1892

Gray, John Chipman (1895) Restraints on Alienation of Property, 2nd ed.

Boston Book Company

Guba E.G. & Lincoln, YS. (1981) Effective Evaluation, Sage

Guba, Egon G. (1990) The Paradigm Dialog Sage Publications Newbury Park, Ca

Guba. E.G. (1994) Competing Paradigms Sage

Hargrave, Francis (1792) Law Tracts, P. 322, London, Brooke

Hobbes, Thomas (1651) Leviathan, Cap. XXVI, London, Crooke

Hofstader, Douglas P., (1989) Godel, Escher, Bach - An Eternal Golden Braid N.Y. Vintage Books

Holmes, Oliver W. (1881) The Common Law, Brown, Little & Co. Boston 1

Howe, Mark DeWolfe (1961) , Holmes-Pollock Letters; The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932, 2 vols. Cambridge, Harvard Press

Howe, Mark DeWolfe, (1963) " Justice Oliver Wendell Holmes; The Proving Years, 1870- 1882,” Cambridge Harvard University Press

Hull, N.E.H (1989) Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism , 1989 Duke L. J. 1302

Hull, N.E.H (1997) Roscoe Pound and Karl Llewellyn : Searching for an American Jurisprudence, U Chicago Press

James, William (1907)) Pragmatism: A New Names for Some Old Ways of Thinking Longman’s, Green NY

Jaren, Mathias A. & Hamilton, Neil, (1998) Introducing the 1998 Reprint, Spirit of the Common Law by Roscoe Pound, updating & replacing the introduction by U.S. Supreme Justice Arthur Goldberg

Jaren, Mathias A. (2000) Design Elements of a Legal Theory Engine,

Centre for Social Legal Studies, Oxford, England, Sept ,2000. Unpublished

Paper presented at the Conference on Method in Legal Theory. Chair,

Dr. Reza Banakar.

Jaren, Mathias A. (2001) Ending the Influence of Nineteenth Century American Legal Education presented in the summer of 2001 at the University of London Institute for Advanced Legal Studies

Jitta, Daniel Josephus (1890) La subtance de obligations dans le droit international prive I, 18” LaHayne, Belinfante Freres

Kelle, U, Sibert, E Shelly, A. Hesse-Biber, S, and Huber,(1995) Hypothesis examination in Qualitative Research - in U. Kelle ‘Computer aided qualitative data analysis; Theory Method and Practice p. 55-56 Sage

Kocourek, Albert (1947) Roscoe Pound as a Former Colleague Knew Him, pp. 419, 433 in Sayre’s (1947) Anthology of edited reflects about Pound.

Kuhn, Thomas, (1962) The Structure of Scientific Revolutions University of Chicago Press

Kuhn, T.S. (1970) The Structure of Scientific Revolutions (2nd Ed.) Chicago, University of Chicago Press

Llewellyn, Karl N. (1930) A Realistic Jurisprudence – The Next Step 30 Col. L. Rev. 431

Llewyllyn, Karl (1931) Casebook and Materials on the Law of Sales Chicago, Callahan

Llewellyn, Karl N. (1931) Some Realism About Realism – A Reply To Dean Pound 44 Harv. L. Rev. 1222

Llewellyn, Karl N. (1933) The Bar Specializes – With What Results? Annals of American Political and Social Science, Phila, May 1933

Llewellyn, Karl N. (1935) On Whats Wrong With American Legal Education, Col. L. Rev. Vol. XXXV, Vol 5. May 1935

Llewellyn, Karl N. (1960) The Common Law Tradition - Deciding Appeals. Little, Brown & Co.

Masterman, M. (1970) The Nature of a Paradigm. In I. Lakotos & A. Musgrave (eds.) Criticism and the Growth of Knowledge (pp. 59-89) Cambridge. Cambridge University Press.

Miles, M.B. & Huberman, A.M. (1994) (1984) Qualitative Data Analysis Sage

Montesquieu, Baron de, (1752) Spirit of Laws , 2 vols, J. Nourse & P Vaillant, London . The first American edition would appear in 1802 , Isaiah Thomas, at Worchester, Mass.

Olivelle, P (1998) Early Upanisads: annotated Text and Translation - India, The Isa Upanisad , Oxford Press

Piantanida, Maria & Garman, Noreen B (1999) The Qualitative Dissertation Corwin Press (SAGE)

Pierce, C.S. (1880) Algebra Of Logic - American Journal Of Mathematics, Ill, 20.

Pollock, Sir Frederick, (1904) The Expansion of the Common Law London, Stevens & Sons

Pound, Louise, (1948) Nebraska Cave Lore , Nebraska Historical Society 1948 quoting the Nebraska City News dated February 12th 1859. The infamous John Brown , in his quest to free American Negroes, was well known in central Nebraska.

Pound, Roscoe (1896) Dogs and the Law, 8 Green Bag 172, April, 1896

Pound, Roscoe (1904) A New School of Jurists. University Studies Vol. 4. No. 3 p. 249-266 July 1904

Pound, Roscoe (1905) The Decadence of Equity, 21 Col. L. Rev. 1905 Vol. 5

Pound, Roscoe, (1906) The Spirit of the Common Law, 18 Green Bag 17 January 1906

Pound, Roscoe, (1906) The Causes of Popular Dissatisfaction with the Administration of Justice, 40 American Law Review, 729 Sept 1906

Pound, Roscoe, (1911) The Scope and Purpose of Sociological Jurisprudence, 24 Harvard Law Review 591, 25 Ibid. 140, 489, June, December 1911, April 1914.

Pound, Roscoe (1912) Taught Law 3 American Law School Review 164 Nov, 1912

Pound, Roscoe (1912) Social Justice and Legal Justice 75 Central Law Journal 455 Dec. 1912

Pound, Roscoe (1912) Theories of Law, 22 Yale Law Journal 114- Dec, 1912

Pound, Roscoe, (1912) Introduction to Study of Law , Library of American Law and Practice, vol. 1, p 1 (1912)

Pound, Roscoe (1914) The Organization of Courts American Judicature Society

Bulletin 6 ,

Pound, Roscoe (1910) Law in Books, Law in Action American Law Review 44 Jan-Feb. 1910 p 35

Pound, Roscoe (1914) Justice According to Law, 13 Columbia Law Review 696

Pound , Roscoe (1914) The Socialization of the Common Law 26 Green Bag 1914 166

Pound, Roscoe (1916) The Limits of Effective Legal Action, Intl. Journal of Ethics, 27 Jan 1917 P.151

Pound, Roscoe Anachronisms in Law, 3 Journal of the American Judicature Society 142 Feb 1920.

Pound, Roscoe, (1920) The Future of Legal Education , Indiana University 1820-1920, Centennial Memorial Volume, p. 259

Pound, Roscoe (1920) The Law School and the Common Law, Two Addresses Delivered Before the Alumni of Harvard Law School, p. 1 (1920)

Pound, Roscoe (1921) Judge Holmes’s Contributions to the Science of Law, 34 Harvard Law Review, 449 (1920)

Pound, Roscoe, (1921) The Maxims of Equity, 34 Harvard Law Review 809 June 1921

Pound, Roscoe, The Spirit of the Common Law 1st ed. Marshall Jones, 1921 See also Transaction Press Edition , 1998, with introduction by Mathias Alfred Jaren & Neil Hamilton

Pound, Roscoe (1923) The Work of the American Law School, 30 West Virginia Quarterly Nov, 1923

Pound, Roscoe (1923) Interpretations of Legal History, Cambridge, England, The University Press 171 pps.

Pound, Roscoe (1924) Classification of Law, 5 American Law School Review, 269

March, 1924, see also 34 Harvard Law Rev. 933 June, 1924

Pound, Roscoe (1925) The Law School and the Professional Tradition,

24 Michigan Law Review 156 Dec 1925

Pound, Roscoe, (1925) Soziologische Jurprudendenz in Amerika , 1 Jarbuch fur Soziologie, Eine Internationale Sammlung 88-100

Pound, Roscoe (1926) The Crisis in American Law 10 Journal of the American Judicature Society 5-10 26 June 1926

Pound, Roscoe (1931) The Call For a Realistic Jurisprudence 44 Harv. L.Rev. 697

Pound, Roscoe (1931) The Opportunities for Developing Research in the Field of Jurisprudence Journal of the Proceedings and Addresses of the 33rd Annual Conference, Association of American Universities, p. 119 Nov, 1931

Pound, Roscoe (1933) What is Good Legal Education? 7 American Law School Review 887

Reynolds, Paul D. (1971) Primer in Theory Construction Bobbs Merrill.

Roalfe, William R. (1962) John Henry Wigmore - Scholar and Reformer

Journal of Criminal Law, Criminology and Police Science 53 Sept. 1962 285-286 -

Saleilles, Raymond (1901) “ De la declaration de la volonte, of Leonhard, Der Irrtum als Ulsache nichtiger Vertrage. 2nd ed II 128. F. Pichon

Salmond, J. (1893) First Principles of Jurisprudence Sweet & Maxwell, p. 75

Sayre, Paul (1947) Interpretations of Modern Legal Philosophies –Essays In Honor of Roscoe Pound Oxford Press, N.Y.

Sayre, Paul (1948) The Life of Roscoe Pound State University of Iowa

Schon, Donald, A. (1983) The Reflective Practitioner - How Professionals Think in Action Basic Books NY

Schwartz, Peter (1991) The Art of the Long View - Planning for the Future in an Uncertain World Bantam Books

Senge, P. (1990) The Fifth Discipline...The Art and Practice of the Learning Organization. Doubleday

Setaro, Franklin (1941) Bibliography of the Writings of Roscoe Pound Harvard Series of Legal Bibliographies, - President & Fellows of Harvard College

Shreve, Gene R., (1983) Book Review – History of Legal Education 97 Harv. L. Rev. 597, 599-600 (1983)

Simon, Herbert (1969) The Science of the Artificial , pp 55-56 MIT Press

Tesch, R. (1990) (1988) Qualitative Research Sage

Travers, Max (2000) Theory and method in Socio-Legal Research Conference Report – Oxford, Sept 2000 , In Socio-Legal Newsletter, No. 33 March 2001

Unger, Roberto, (1986) The Critical Legal Studies Movement Harvard Press

Vanderbilt, Arthur (1948) of NYU Law School, speaking at the Lotos Club, New York, June 28th 1948 (University of Nebraska Archives)

Watzlawick, Paul, Weakland, John H. And Fisch, Richard (1974) - Change - Principles of Problem Formulation and Problem Resolution NY, Norton

Wigdor, David (1974) - The Life of Roscoe Pound Greenwood Press, Westport, Ct, C.1974

Wigmore, John H. (1937) Roscoe Pound’s St. Paul Address of 1906; The Spark that Kindled the White Flames of Progress” Report of the American Bar Association, 1906, part 2, p. 16 in Journal of the American Judicature Society, Feb 1937 pp. 176

Letters

Feb 10th 1895 Letter Pound to Omer Hershey, , U of Iowa Archives,

June 15th 1907 letter to Wigmore from Pound dated, from the John Henry Wigmore Papers, Northwestern University School of Law Library.

April 2, 1908 Letter from Pound to Holmes as Chief Justice of the U.S.

Supreme Court University of Iowa Archives,

July 22nd 1915 Letter from Pound at Harvard to Holmes University of Iowa Archives, Sayre Collection

July 24th 1919 Letter from Pound at Harvard to Holmes in Washington University of Nebraska Archives

April 24th 1928 letter from Pound to Holmes , Harvard Red Collection

December 1, 1941 Letter, Pound to Sayre University of Iowa Archives

November 15th 1944 Letter to Sayre from Albert F. Woods, U of Iowa Archives

December 1st 1944 Louis Pound to Paul Sayre, University of Iowa Archives

January 8th 1947 Letter to Sayre from Pound U of Iowa Archives

March 30, 1947 Letter , Olivia Pound to Paul Sayre, University of Iowa Archives

August 2,1948 Letter to Sayre from Olivia dated U of Iowa Archives

CASES CITED

Bonacum V. Harrington, 65 Nebraska 831 (1902)

Bradwell v. State , 83 U.S. 139 (1872)

Brown v. Board of Education 347 U.S. 483 (1954)

Brown v. Maryland (1827) 12 Wheat 419.

Cleveland v. Clements Bros (1902) 67 Ohio St. 197

Com. v. Perry (1891) 155 Mass 177

Fiske v. People (1900) 188 Illinois 206

Frober v. People (1892) 141 Illinois 171

Godcharles v. Wigeman (1886) 133 Pa. St. 431

In Re Eight Hour Law (1895) 21 Col. 29

In Re House Bill 203 (1895) 21 Col. 27

In Re Preston (1900) 63 Ohio St. 428

Kellyville Coal v. Harrier (1904) 207 Illlinois 624

Leavitt v. Mercer Co. 64 Nebraska 31 (1902)

Leep v. St. Louis (1894) 58 Ark. 407

Loan Association v. Topeka (1874) 20 Wall. 655, 622

Lochner v. New York (1905) 198 U.S. 45, 75

Low v. Rees Ptg. Co (1894) 41 Neb. 127

Mass. School of Law v. American Bar Assn, et. al. , 952 F. Supp 884 (1997)

Millett v.People (1886) 117 Illinois 294

Muller v. Oregon , 208 U.S. 412 (1908)

People v. Coler (1901) 166 N.Y. 1

Richie v. People, 155 Ill. 90 (1895Ex Parte Kubach (1890) 85 Cal

Republic Iron & Steel v. State (Ind. 1903) 66 N.E. Rep. 1005

State v. Fire Creek Coal (1889) 33 W. Va. 188

State v. Goodwill (1889) 33 W. Va 179

State v. Julow (1895) 129 Mo. 163

Wallace v. Georgia C. & N.R. Co (1894) 94 Ga. 732

Williams v. Miles, 68 Nebraska 463, 470 (1903)

Pamphlets

Annual Report, National Conference of Bar Examiners, Madison, Wisconsin.

Report of the American Bar Assn. 1912 vol. 37 @ p. 3x, +

To The American People, Report Upon the Illegal Practices of the United States Department of Justice. - Washington, National Popular Government League, 1920

1. Quoted from a Pound letter to Paul Sayre University of Iowa Archives [↑](#footnote-ref-1)
2. Oliver Wendell Holmes, jr., to Sir Frederick Pollock, 10 April, 1881, in Mark DeWolfe Howe (ed.), Holmes-Pollock Letters; The Correspondence of Mr. ]justice Holmes and Sir Frederick Pollock, 1874-1932, 2 vols. (Cambridge: Harvard University Press, 1961), quoted from Wigdor, p. 35. [↑](#footnote-ref-2)
3. Quoted from a letter written to Charles W. Elliot, President of Harvard, from John Chipman Gray ]an 8th 1883 from Mark DeWolfe Howe's book, " Justice Oliver Wendell Holmes; The Proving Years, 1870- 1882, Cambridge 1963 [↑](#footnote-ref-3)
4. 347 U.S. 483 (1954) [↑](#footnote-ref-4)
5. German Psychological paradigm of referential space, See Fleck, Ludwig (1935) [↑](#footnote-ref-5)
6. “Jurisprude” - A legal philosopher, the term often used sarcastically, i.e., prudish thinker of distant, philosophical ideas......... [↑](#footnote-ref-6)
7. Christopher Columbus Langdell Dean of Harvard Law School , 1875-1895 [↑](#footnote-ref-7)
8. For example, pleadings can still be entered into American Courtrooms which rely on doctrines arising from English Equity from old English Courts of Chancery, yet few if any schools offer courses on Equity. [↑](#footnote-ref-8)
9. American Association of Law Schools, Annual Guide to Faculty, AALS, Wn. D.C. [↑](#footnote-ref-9)
10. Pound taught the course as an adjunct professor at the Nebraska Law School in 1895 [↑](#footnote-ref-10)
11. The name Bushrod may relate to the survey business [↑](#footnote-ref-11)
12. Women were not welcome in the profession, well into the twentieth century at Harvard. New York Law School graduated important women of the twentieth century, among them Crystal Eastman, who helped Roger Baldwin start the American Civil Liberties Union. [↑](#footnote-ref-12)
13. Litchfield Historical Society, Litchfield, Ct. 2001 [↑](#footnote-ref-13)
14. Today’s law office associate, a six year prospect, when “billed out” at $ 175, and paid $ 40, creates a very meaningful revenue stream for “Partners”. Ten associates would produce nearly three million per year in revenue. This model was understood early in the Bar, and remains today. [↑](#footnote-ref-14)
15. The two organizations often held annual meetings, same time, same towns, in effect concurrently. [↑](#footnote-ref-15)
16. A few states retain an apprenticeship path to State Bar Exams, but passage is rare. [↑](#footnote-ref-16)
17. The real issue is “sociological jurisprudence” was actually a very explicit manner of seeing legal issues and procedures, no less so was “legal realism” . This of course is quite different in content than a notion like “pragmatism”. [↑](#footnote-ref-17)
18. Sociological jurisprudence” was actually a very explicit manner of seeing legal issues and procedures, no less so was “legal realism” . This of course is quite different in content than a notion like “pragmatism”. [↑](#footnote-ref-18)
19. Pound alternatively viewed the classroom as a “cathedra”. [↑](#footnote-ref-19)
20. Pound and others used the term “mechanical” to criticize judges who were “formal” [↑](#footnote-ref-20)
21. Roscoe Pound – Harvard Law Library “The Red Collection” [↑](#footnote-ref-21)
22. There is a deep 19th” century sequel to law as science, pre and post Darwin, albeit not richly developed by an single work. The English legal scholar Sheldon Amos is an excellent 19th Century authority on the topic. [↑](#footnote-ref-22)
23. A curious twist on the term jurisprudence, to refer to lawyers who are prudish philosophers. An indication of how they are viewed by the academic legal community. [↑](#footnote-ref-23)
24. The ABA was sued in 1997 over accreditation procedures. See Mass. School of Law –v- American Bar Assn, et. al. , 952 F. Supp 884 (1997) The case illustrates conflict between control of law schools by National Associations and local needs of state students. [↑](#footnote-ref-24)
25. American Bar Association, National Conference of Bar Examiners, State Boards of Bar Examiners [↑](#footnote-ref-25)
26. I would call the process “fragmented simultaniety” – concurrent antithetical wastage [↑](#footnote-ref-26)
27. The wonderful collection of Pound’s correspondence and article drafts, along with much of his personal items, like his annual and carefully maintained diaries, is known as the “Red Collection” now on microfiche, at Harvard law School. Very little relating to acts as Dean can be found in this collection which focus on internal affairs at the school. Correspondence with other Deans is substantial. [↑](#footnote-ref-27)
28. The Harvard Official Archives are the collected official materials of the University. Therein are some files associated with law school affairs, in particular a study of the students in the 1930’s to try and ascertain why their grades were so poor. Again, however, planning materials relating to acts as Dean, are scarce. [↑](#footnote-ref-28)
29. There is some evidence which suggests a “divine right of Deans” existed, in effect Deans could formulate sweeping changes in the judicial process, but were expected to leave law schools operating as preparatory schools for students to become apprentice-associates. [↑](#footnote-ref-29)
30. Massachusetts Law School – v- American Bar Association (1997) [↑](#footnote-ref-30)
31. 1999 Annual Report, National Conference of Bar Examiners, Madison, Wisconsin.

    To add irony to the story, Wisconsin, where the National Conference resides, does not require Wisconsin Law School graduates to sit for Bar Examination in order to be licensed to practice! [↑](#footnote-ref-31)
32. Wisconsin allows Wisconsin grads direct license access with no exam, Washington State has a track of apprenticeship with no law school to sit for exams, and various non ABA law schools with very low exam pass rates exist in California. [↑](#footnote-ref-32)
33. Bradwell v. State , 83 U.S. 139 (1872) [↑](#footnote-ref-33)
34. Some ABA-AALS accredited law schools have a first time pass rate of the State Bar exam below 40%! [↑](#footnote-ref-34)
35. Wesley Newcomb Hohfeld at Yale was a personal correspondent of Pound’s, many letters remain between the two men. Regrettably Hohfeld died of influenza at a young age in 1917. The bright young Robert Maynard Hutchins, and Karl Llewellyn by 1926 were to become central figures as proponents of new views of the American Legal system. [↑](#footnote-ref-35)
36. Olivia Pound to Paul Sayre, March 30, 1947 University of Iowa Archives [↑](#footnote-ref-36)
37. December 1st 1944 Louis Pound to Paul Sayre, University of Iowa Archives [↑](#footnote-ref-37)
38. Undated memo to his Biographer Paul Sayre, in the University of Iowa Achieves, Iowa City Iowa. [↑](#footnote-ref-38)
39. Letter to Sayre from Pound 8 January 1947 U of Iowa Archives [↑](#footnote-ref-39)
40. Letter to Sayre from Olivia dated 8/2/1948 U of Iowa Archives [↑](#footnote-ref-40)
41. Paul Sayre, Law Professor at the University of Iowa until 1959. In a discussion with the current Dean of Iowa Law School, William M. Hines, during the summer of 1996, Sayre was remembered as "One of the most eccentric faculty we've ever had. He always brought his dog to class when lecturing, and on more than one occasion would forget to get off the train when sharing good-byes with visitors. He would end up in Chicago, no money in his pocket, hours away from Iowa City. In a curious letter to Pound dated March 18th 1949, a few peculiar phrases can be recounted reinforcing this image of eccentricity: " If you sent me all the little books together ...then I will be like an early Christmas hermit who has just received some new manuscripts of the gospel story by especial camel delivery at his hut in the desert." (Pound apparently kept scrupulous logs each year of his appointments, of which by 1949 many had accrued.)

    "You speak lightly of your log. It means the life to me against the mere existence I endure now. .....these events alone are enough to start exciting chains of thought in my mind which will lead to all manner of reading of your books, and other books, and investigating of other things that will make the final job ten times richer and clearer and truer that it otherwise could be....perhaps you overlook my starving condition....". [↑](#footnote-ref-41)
42. This writer received the Arthur Vanderbilt Prize for the outstanding paper in legal history, 1996, in a paper on this area. [↑](#footnote-ref-42)
43. Letter, Pound to Sayre 1 December 1941 [↑](#footnote-ref-43)
44. Letter, Pound Omer Hershey, dated Feb 10th 1895, U of Iowa Archives, cited also in Sayre, P. 85 Hershey, a Harvard Law classmate and close friend of Pound's - yes, related to the Chocolate Family [↑](#footnote-ref-44)
45. Letter to Sayre from Albert F. Woods, November 15th 1944 U of Iowa Archives [↑](#footnote-ref-45)
46. Quoted from a letter written to Charles W. Elliot, President of Harvard, from John Chipman Gray an 8th 1883 from Mark DeWolfe Howe's book, "Justice Oliver Wendell Holmes; The Proving Years, 1870- 1882, Cambridge 1963 [↑](#footnote-ref-46)
47. Id. at p. 35 [↑](#footnote-ref-47)
48. The Case method, - American legal education today, wasn't anybody listening to Holmes? [↑](#footnote-ref-48)
49. Even today, a walk around the campus at the University of Nebraska one feels the sense of splendid gardens and the scent of wholesome prairie, likely distant from the 19th century industrial Boston which confronted Pound. [↑](#footnote-ref-49)
50. Bryan, later to become a Presidential hopeful, orator of the "Chautauqua Circuit" and 1925 opponent against Clarence Darrow, (who Pound would meet in Chicago, in the next decade) in the infamous 1925 Scopes Trial which tested "Creationism: vrs. evolution. For the period, it is notable to observe the connections between lawyers who would later become national figures. Pound also knew Darrow in Chicago prior to Pound’s years at Harvard. [↑](#footnote-ref-50)
51. Bonacum V. Harrington, 65 Nebraska 831 (1902) [↑](#footnote-ref-51)
52. Leavitt v. Mercer Co. 64 Nebraska 31 (1902) [↑](#footnote-ref-52)
53. Williams v. Miles, 68 Nebraska 463, 470 (1903) This is a prophetic observation, which runs strongly in Pound's articles. Pound, of course, being the author of this opinion. [↑](#footnote-ref-53)
54. Legal Positivism defined - “ a law is simply a command given by a political superior to a political inferior [↑](#footnote-ref-54)
55. Id at p. 257 [↑](#footnote-ref-55)
56. Letter to Hershey from Pound in Sayre collection, University of Iowa Archives, Iowa City [↑](#footnote-ref-56)
57. 21 Col. L. Rev. 1905 Vol 5 As with many of the writings, Pound had already made a speech on the topic to some association, in this case, materials preceding the “Decadence of Equity “ were presented to the Nebraska Bar Association’s third annual meeting. It was from that meeting that Pound would be solicited by the President of the ABA to present the following year at St. Paul, Minnesota, which in turn, resulted in the famous Professor of Evidence, Wigmore, , from Northwestern University of Chicago, to hear the 1906 speech and recruit him away from Nebraska. [↑](#footnote-ref-57)
58. Id. at 20 [↑](#footnote-ref-58)
59. Id. at p. 21 [↑](#footnote-ref-59)
60. The reader does well who recognizes Pound is not using the word “natural” as a positive attribute. [↑](#footnote-ref-60)
61. Id at p. 24 [↑](#footnote-ref-61)
62. 5 Col. L. Rev. 339 May 1905 [↑](#footnote-ref-62)
63. Id. at p. 344 [↑](#footnote-ref-63)
64. 198 U.S. 45 Lochner v. New York (1905) [↑](#footnote-ref-64)
65. 208 U.S. 412 (1908) [↑](#footnote-ref-65)
66. 5 Col. L. Rev. 345 [↑](#footnote-ref-66)
67. Id. at p. 351 [↑](#footnote-ref-67)
68. Id at p. 351 quoting his case holding Loan Association v. Topeka (1874) 20 Wall. 622, 655 [↑](#footnote-ref-68)
69. Id at p. 352 [↑](#footnote-ref-69)
70. 18 Green Bag 17 January 1906 [↑](#footnote-ref-70)
71. ABA Reports Vol. 29 pp. 395-417, 1906 and 40 Am. L. Rev. 729, 1906 [↑](#footnote-ref-71)
72. Wigmore on Evidence [↑](#footnote-ref-72)
73. Minnesota has excellent water, obviously, for also from Minnesota came U.S. Supreme Court Chief Justice Earl Warren, US. Supreme Court Chief Justice Warren Berger, Supreme Court Justice William O. Douglas, as well as Supreme Court Justice Harry Blackmun. [↑](#footnote-ref-73)
74. “…. The attack on the judiciary was too unconscionable to discuss. Mr. Spoonts of Texas asserted that the attack was an attack on the entire remedial jurisprudence of America. It was an attempt to destroy that which was the wisdom of the centuries has built up..It embodied the old idea of seeing the ideal…the unattainable, the Eldorado. ….then the critic declaimed four verses of poetry from Edgar Allen Poe." [↑](#footnote-ref-74)
75. Pound was quite effective at assessments of winning majorities. He pursued the idea deeply, wandering on long hikes with Omar Hershey across old empty Civil War battlefields, reassessing each event. Holmes, having been shot three times in the civil war, would likely have appreciated Pound’s interests. [↑](#footnote-ref-75)
76. Letter to Wigmore from Pound dated June 15th 1907, from the John Henry Wigmore Papers, Northwestern University School of Law Library. [↑](#footnote-ref-76)
77. The Papers of Edward A. Ross, Pound to Ross December 23rd 1908, Harvard Red Set [↑](#footnote-ref-77)
78. The SemBot is the Botany Seminar Club at the University of Nebraska, where young Pound made life long friends, and learned much about classification and collaboration. [↑](#footnote-ref-78)
79. Wigdor p. 146 quoting Rainey’s vision of legal education

    “ The President’s Forty-first Quarterly Statement, The University of Chicago Record 6 April 1902 [↑](#footnote-ref-79)
80. Wigdor p. 151 [↑](#footnote-ref-80)
81. Wigdor. p 151 [↑](#footnote-ref-81)
82. Clarence Seward Darrow, 1857-1938 Famous Chicago Trial Lawyer “hedonistic defender of the poor and downtrodden”. Argued in favor of evolutionism against William Jennings Bryan (also of Lincoln Nebraska) in the 1925 Scopes Monkey Trial. [↑](#footnote-ref-82)
83. See Wigdor p. 162 and Pounds article “Liberty of Contract, Yale Law Journal May 18th 1909 p. 462. Pound expands his views on Mechanical Jurisprudence in Columbia Law Review 8 , Dec. 1908 p. 605 in his article entitled “ Mechanical Jurisprudence”. [↑](#footnote-ref-83)
84. Lochner v. New York 198 U.S. 45 (1905) [↑](#footnote-ref-84)
85. See Liberty of Contract, Yale Law Journal 18 at 476 and Richie v. People, 155 Ill. 90 (1895). [↑](#footnote-ref-85)
86. Wigdor at p. 168 [↑](#footnote-ref-86)
87. There is an argument that Pound was a practicing Quaker, attended Hicksite meetings at Swathmore with his sister, and claimed direct roots to a second Mayflower crossing [↑](#footnote-ref-87)
88. Judge Story died in 1845 after many years of teaching and service on the bench. [↑](#footnote-ref-88)
89. Pound, Social Justice and Legal Justice p. 118 in Wigdor at 192 [↑](#footnote-ref-89)
90. Pound, R. “ Law in Books, Law in Action” American Law Review 44 Jan-Feb. 1910 p 35 [↑](#footnote-ref-90)
91. Pound, Reform in Court Organization p. 205 [↑](#footnote-ref-91)
92. Pound , Society and the Individual p. 106 [↑](#footnote-ref-92)
93. Pound, The Limits of Effective Legal Action, Intl. Journal of Ethics, 27 Jan 1917 P.151 [↑](#footnote-ref-93)
94. Pound was only a law student at Harvard for one year, and did not earn the LLB in 1889. [↑](#footnote-ref-94)
95. Report of the American Bar Assn. 1912 vol. 37 @ p. 3x, + [↑](#footnote-ref-95)
96. Wigdor, p. 233 [↑](#footnote-ref-96)
97. To The American People, Report Upon the Illegal Practices of the United States Department of Justice. - Washington, National Popular Government League, 1920 [↑](#footnote-ref-97)
98. Roger Baldwin, who Brandeis encouraged through Baldwin’s Father to

    travel to St. Louis to “learn the world” became founding Director of the American Civil Liberties Union in New York, with a lot of help from Crystal Eastman. This author’s paper, “Roger Baldwin and the American Civil Liberties Union” done at Princeton’s Seely G. Mudd Archive Collection in 1995 while a Rutgers Law Student. Princeton never got a law school. Andrew Carnegie insisted Princeton use his donation to create an artificial lake, stating law schools were “no good” . [↑](#footnote-ref-98)
99. Thorstein Veblen, our fellow Minnesotan was visiting at the time as Professor of Economics at NYU [↑](#footnote-ref-99)
100. See Baldwin Papers, Princeton University, Seeley G. Mudd Archives [↑](#footnote-ref-100)
101. The tensions here, the role of Fox and others, is as yet unexplored, the matter of the red scare clearly heightens not only one’s interest in Academic Zealotry, but also the middle ground which derives from the tension between leaders and their detractors in the subsequent organizational character which results from the foray. It is the consequential derivative of the tensions that urges further inquiry. Such paradigms as risk analysis may resolve the question. [↑](#footnote-ref-101)
102. Wesley Newcomb Hohfeld, Yale Professor of Law and early confidant of Pound’s, with much good material in their letters is developed in their correspondence. [↑](#footnote-ref-102)
103. Letter from Pound to Holmes as Chief Justice of the U.S.

     Supreme Court from Northwestern University dated April 2, 1908, [↑](#footnote-ref-103)
104. Henry Beauford Plantagentet, Cardinal Bishop of Winchester, Chancellor of Oxford University in 1399, died 1447 Built Winchester Cathedral [↑](#footnote-ref-104)
105. Letter from Pound at Harvard to Holmes July 22nd 1915 [↑](#footnote-ref-105)
106. The absence of students, WWI [↑](#footnote-ref-106)
107. Letter from Pound at Harvard to Holmes in Washington July 24th 1919 Harvard Red Set [↑](#footnote-ref-107)
108. Letter from Pound to Holmes April 24th 1928 Red Collection Harvard [↑](#footnote-ref-108)
109. Pound does not appear to press upon the significance of earlier Equity scholarship from Britain which actually supports his views, , and thus they were omitted from this discussion. They are however important illuminating elements, and commended to future scholars. See Bodleian indexes for further clarification, (Oxford Law School). [↑](#footnote-ref-109)
110. This according to Pound’s footnote, was a paper presented to the third annual meeting of the Nebraska State Bar Association. [↑](#footnote-ref-110)
111. Dean of Harvard Law School 1895-1910 [↑](#footnote-ref-111)
112. Quoted from 5 Harvard L. Rev. p. 240 [↑](#footnote-ref-112)
113. Quoting Hargrave, Law Tracts, P. 322 [↑](#footnote-ref-113)
114. Quoting Kamph um’s Recht (14th Ed.) p. 52 [↑](#footnote-ref-114)
115. Pound launches a discussion here about wage and hour laws, citing nine cases which related to the controversies of labor rights in contexts of 8 hour laws being unconstitutional, and statutes relating to social management of individual rights,

     including the corporate deduction of wages for hospitalization, salaries for coal miners, etc. The nine cases range from 1886 to 1901; the wage hour theme occurs elsewhere in Pound’s early writing, and later, in his relations with Brandeis, up to and associated with the famous case of Mueller v. Oregon.

     Ex Parte Kubach (1890) 85 Cal. 72

     Low v. Rees Ptg. Co (1894) 41 Neb. 127

     In Re: Eight Hour Law (1895) 21 Col. 29

     Fiske v. People (1900) 188 Illinois 206

     Cleveland v. Clements Bros (1902) 67 Ohio St. 197

     Godcharles v. Wigeman (1886) 133 Pa. St. 431

     Frober v. People (1892) 141 Illinois 171

     Leep v. St. Louis (1894) 58 Ark. 407

     Republic Iron & Steel v. State (Ind. 1903) 66 N.E. Rep. 1005

     Com. v. Perry (1891) 155 Mass 177

     Kellyville Coal v. Harrier (1904) 207 Illlinois 624

     Millett v.People (1886) 117 Illinois 294

     In Re House Bill 203 (1895) 21 Col. 27

     In Re; Preston (1900) 63 Ohio St. 428

     State v. Goodwill (1889) 33 W. Va 179

     State v. Fire Creek Coal (1889) 33 W. Va. 188

     People v. Coler (1901) 166 N.Y. 1

     Wallace v. Georgia C. & N.R. Co (1894) 94 Ga. 732

     State v. Julow (1895) 129 Mo. 163 [↑](#footnote-ref-115)
116. Pound extrapolates this idea in a footnote “ A recent writer tells un that the constitutional importance of the magna carta is nothing but a myth invented by Coke when he wanted a stick to beat Charles I with” {see 21 Law Quart. Rev 6} n.d. [↑](#footnote-ref-116)
117. Pound credits this idea, albiet he does not quote- Licy, “Philosophy of Right” {Hastie’s Transl. II, 3.} [↑](#footnote-ref-117)
118. Pound concedes this framework of thinking to Manson,

     “ Law is in the nature of a cock-fight, and the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs. 18 Law Quarterly Review 161 [↑](#footnote-ref-118)
119. In a footnote Pound traces this phrasing to Brown v. Maryland (1827) 12 Wheat 419. [↑](#footnote-ref-119)
120. Quoting Loan Association v. Topeka (1874) 20 Wall. 655, 622 [↑](#footnote-ref-120)
121. Pound has supported this contention using an argument drawn from one of Lord Cokes outbursts : “.....life, or inheritance, or goods, or fortunes of his (majesty’s) subjects are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it.” {From a conference between James I and the Judges of England (1612) 12 Rep. 63} [↑](#footnote-ref-121)
122. This 1905 court packing plan according to Pound is discussed in 16 Rep. Va. Bar. Assn 181 [↑](#footnote-ref-122)
123. Pound prior to this conclusion of the article makes an almost humoresque disclaimer “ I am no advocate of jurisprudence in the air, nor of systems of juristic metaphysics drawn from the inner consciousness of a German philosopher. “

     But.......(at 353) [↑](#footnote-ref-123)
124. Predates Book having the same title, published in 1921 by 15 years [↑](#footnote-ref-124)
125. Pound may be somewhat overwhelmed by the Germanic influences in his reasoned discourses, there is evidence is Greco Roman law that the legal traditions upon which he relies are much older. In fact there are tenants of Hebrew and Egyptian doctrines which would appear similar in the notion of contentious procedure.

     The trial of Christ by the Romans stands out as an excellent cross cultural example. One could perhaps find Germanic influences, but they are not properly entitled to the elevated status afforded them in Pound’s otherwise correct analysis. Essentially, there may be a bigger Spirit lurking in the common law. [↑](#footnote-ref-125)
126. Artificial, here are the legal fictions of artificial persons, i.e., corporations, or as in the period, corporate monopolies. [↑](#footnote-ref-126)
127. Coming up from 1906 into more contemporary phrasing, corporations and individuals having great power should have no right to protections under the common law to litigate legal barriers inhibiting the prerogatives of what must be assumed is the middle class of the earlier 20th century. Yet more important, Pound demands such privileged parties must not be afforded opportunities to sally (run) about having the aegis {support and protection, vis. greek, a shield of Zeus} and as a consequence and in derivation of those “full armors” injure society. [↑](#footnote-ref-127)
128. Rejuvenescence - a term useful to contemplate Pound’s deeper senses of Quaker inner reflection and the individual consequences of reforming the viewpoints one holds, while adhering to essential doctrinal proscriptions. This term, at least with respect to its implications is arguably one of the most important words in the article. It serves as an important clue of how Pound relied on the internal stabilities of common law doctrine, and further explains how the people as individuals must be ensured their fair share in the American experience. By accomplishing this, the common law would be as a litigation process the mechanism by which America could be “rejuvinated.” [↑](#footnote-ref-128)
129. Which he cites “Laws of Ethelred, II, 6” [↑](#footnote-ref-129)
130. Again, history has other examples, such as the Viking Sagas which reveal the “Althing” which would reinforce Pound’s historical argument. [↑](#footnote-ref-130)
131. Ihering, “ Kampfum’s Recht” (14th ed.) p. 52 [↑](#footnote-ref-131)
132. Id. p. 430 [↑](#footnote-ref-132)
133. Id. p. 420 [↑](#footnote-ref-133)
134. University of Pennsylvania [↑](#footnote-ref-134)
135. Pound’s note 46, p.144 cites to 4 Institutes 71 [↑](#footnote-ref-135)
136. Pound note 47, p.144 Salmond, First Principles of Jurisprudence (1893) p. 75 [↑](#footnote-ref-136)
137. Pound’s analysis is explained partly in his footnote 52 p. 146...” the decisive reason for such specialization (i-e, the separation of powers) is not the practical security of civil liberty, but the organic reason that every function will be better fulfilled if its organ is specially directed to this particular end, than if quite different functions are assigned to the same organ.” Bluntschili Allgemeine Statslehre, Bk. VII Chap. 7. Hence if such organ fails in any respect, the practical ground for the separation of powers ceases to operate.” [↑](#footnote-ref-137)
138. Early bibliometric work! [↑](#footnote-ref-138)
139. Pound’s note 1 p 607 in “ The Need for a Sociological Jurisprudence” 1905 [↑](#footnote-ref-139)
140. Pound predicts the Legal Realism of Llewellyn by two decades. [↑](#footnote-ref-140)
141. It is important to note these discussions of statistics and law precede the famous Brandeis brief in Muller v. Oregon 208 U.S. 412 (1908) [↑](#footnote-ref-141)
142. To law faculty and students this phrase represents the core of legal teaching and analysis. In moderns terms, understanding the “ similarities and differences” between facts. [↑](#footnote-ref-142)
143. Pound here is framing the arguments of Lester Frank Ward, in “Applied Sociology” ...it is interesting to see the equation of law and legal culture being balanced between an academic emerging discipline, Sociology, and the more solidified legal traditions.” [↑](#footnote-ref-143)
144. The difficulties of the period with contract and at will employment would be set down in the Holmes brief of the period [↑](#footnote-ref-144)
145. Citing John Chipman Gray, “ Restraints on Alienation of Property, 2nd ed. (1895) [↑](#footnote-ref-145)
146. This of course, is a phrase which Pound returns to often [↑](#footnote-ref-146)
147. In 1907, much of the social and economic experience was “progress” in a variety of forms. Hence, “ Progressive” as is frequently used to identify the period and behaviors of the early 20th century. It is interesting to see “progress” used in a colloquial sense by Pound. [↑](#footnote-ref-147)
148. Pound cites this in a footnote as “Address before the Illinois State Bar Association, at Chicago, June 25th 1908 [↑](#footnote-ref-148)
149. Again, excellent classificatory skills from the Botany-science background [↑](#footnote-ref-149)
150. Pound cites this as Sohm, Institutes of Roman Law [↑](#footnote-ref-150)
151. Here Pound slips in the French philosopher Worms, quoting “Philosophie des Sciences Sociales” Note the shift from classic legal scholars into authorities which are not legally trained, or indoctrinated, as the reader may choose. [↑](#footnote-ref-151)
152. Recall the “Science of Law” (1870) is the Sheldon Amos foundation of Langdell’s (1880) method of law teaching [↑](#footnote-ref-152)
153. Or perhaps the Uniform Commercial Code. [↑](#footnote-ref-153)
154. Two points, First; here we are introduced in writing to the

     evils of “mechanical jurisprudence.” Second, as it follows, the “cause is not to be fitted to the rule...”. Note the preservation of individualism, and the preservation of the legal process, nested within a process of social change. [↑](#footnote-ref-154)
155. “Elimination of the personal equation in the administration of justice” repeat’s a thesis in Pound’s writings, that the individual is being factored out of “justice” and the law. [↑](#footnote-ref-155)
156. For the reader who enjoys historically unique and original text, note that “devices” are used in the machine metaphor in lieu of “elements” - the rich and powerful epoch of the industrial age. Perhaps more directly, people are being extended their justice by machines, not humans. And to Pound machines which are not themselves very impressive. [↑](#footnote-ref-156)
157. The courageous implications of this allegation against whimsical judicial grime are profound [↑](#footnote-ref-157)
158. By now in another part of the article Pound has acknowledged the audience as an “ audience of common law lawyers” col. 2 p. 407 [↑](#footnote-ref-158)
159. Pound’s footnote 1, “ The substance of this paper was presented before the Bar Association of North Dakota, at its annual meeting at Valley City, N.D. Sept 25th 1908.” Pound is still in Chicago at this time. Imagine today congealing your jurisprudential cognitions at the first public airing, in Valley City, North Dakota....a long way from the Ivy and pomp in Cambridge, Mass. [↑](#footnote-ref-159)
160. Albeit virulently sarcastic, Pound thinks and lives in a parallel world where mechanical abstractions just simply add more gears and cogs, as the giant mad hatter’s watch turns, and grinds out enormous subsystems of legal process and discourse. Certainly two problems arise, we endeavor to learn and clarify how Pound knows to interconnect very diverse schools of information. And second, to aspire to being more scholarly, can we grasp what he sees between the lines? [↑](#footnote-ref-160)
161. Pound here quotes Jitta, “ La subtance de obligations dans le droit international prive I, 18” [↑](#footnote-ref-161)
162. Always Prescient Pound, the significance of quoting the German Business Code in 1908 is of paramount importance. Later American Codification of Commerce will come, but not for a decade or more in any organized sense. (Uniform Commercial Code, Karl Llewellyn ) Pound references “ Bernhoft, Burgerliches Recht, Encyklopadie der Rechtswissenschaft at 46” and Saleilles, “ De la declaration de la volonte, of Leonhard, Der Irrtum als Ulsache nichtiger Vertrage. 2nd ed II 128. [↑](#footnote-ref-162)
163. It is worth a moment’s contemplation....an efficient failure. By now it is becoming obvious that Pound is not an advocate of the legislative process. [↑](#footnote-ref-163)
164. Pound cites in his note 38 to a Magazine entitled “Everybody’s” Sept/Oct 1908 for a layman’s view of employer’s liability [↑](#footnote-ref-164)
165. Are these corporate managers nasty and irresponsible children hiding behind their corporate mother’s skirts? The metaphor is outrageously funny, but complex. [↑](#footnote-ref-165)
166. Two significant issues, One; is this another clue to the antecedents that anticipate the Brandeis Brief? Two: See Durkheim, 1911 The Real & Unreal, as literature that anticipates the realist viewpoint. [↑](#footnote-ref-166)
167. Citing Holmes in Lochner v. New York (1905) 198 U.S. 45, 75 [↑](#footnote-ref-167)
168. Pound refers to an article by Henderson, 11 Am. Journ. Sociol. 847. This presents an excellent example of how Pound feels quite free to integrate disciplines as he presents new concepts and arguments; vis..” jurisprudence of conceptions” Law would not be willing to do this in later decades. Llewellyn is the exception. See the outstanding work by Dr. N.E. H. Hull on Pound and Llewellyn [↑](#footnote-ref-168)
169. Raw pragmatism? - “A matter of fact treatment of things?” Given the intellectual girth of Pound’s interpolative skills and visions, he doesn’t really fit the pragmatist clothing, particularly in 1908. To the contrary, he seems to be “running” at approximately 12 to 15 years ahead of the intellectual pack. [↑](#footnote-ref-169)
170. Pound in his footnotes cites a litany of cases demonstrating this problem. See note 51 of the article at P. 617 [↑](#footnote-ref-170)
171. Assuming license to paraphrase this, the reasoning process of case theory is obscured by procedural nuance that appears to obscure the trial, in effect, using the guise of “science” - being highly efficient under a rule set of procedure, the actual issues are lost to procedural organizing principles. [↑](#footnote-ref-171)
172. This is an important quote, and better illustrates the earlier article “Enforcement of Law” which Pound wrote. As with many Titles Pound uses for his articles, at the moment the article is written the title seems distant from the article, alternatively, when one can connect the phrases and thoughts lying about in the articles as they evolve, then one sees that Pound has a clear reform and teaching agenda. It may be that Pound ‘s ideas even outran his opportunities to express them. In effect, a “gestalt,” (no doubt he would have loved it.) His theorizing was constrained by the time manner and place in which it could be presented. Consequently his ideas flow forward in time, building while also reflecting, and retrenching earlier concepts. One might consider that the elegant nature of Pound’s intellectual energy was in part driven by the early joys of academic botanical discovery and classificatory work on the Nebraska prairie. [↑](#footnote-ref-172)
173. Pound cites here to the “excellent critical discussion” in 3 Wigmore, Evidence note 59 p 620 [↑](#footnote-ref-173)
174. i.e., procedurally proficient lawyers who can’t or won’t operate at trial on the theory of the case have been educated and trained into acting like automatons, thus mechanical, consequently, they are products of a mechanical, industrial machine age. A useful vision of this comes in the 1926 German film by Fritz Lang “Metropolis”. [↑](#footnote-ref-174)
175. Pound credits this reasoning in the text to William James’ and a quote from his book, “Pragmatism”: It here as a footnote appears directly in the article text. Of particular significance, the quote centers Pound on the matter of “spirits” as well as pragmatics. Again, we are thinking here of “conceptions which become empty words, “Metaphysics has usually followed a very primitive kind of quest. You know how men have always hankered after unlawful magic, and you know what a great part in magic words have always played. If you have his name, or the formula of incantation that binds him, you can control the spirit, genie, afrite, or whatever the power may he. \* \* \* So the universe has always appeared to the natural mind as a kind of enigma of which the key must be sought in the shape of some illuminating or power-bringing name. That word names the universe’s principle, - and to possess it is after a fashion to possess the universe itself. ‘God,’ Matter,’ Reason, ’the Absolute,’ Energy,’ are so many solving names. You can rest when you have them. You are at the end of your metaphysical quest.’,”. [↑](#footnote-ref-175)
176. Note I have juxtaposed the final remarks of the article slightly. [↑](#footnote-ref-176)
177. The new juristic theory gets short play here, but Pound’s Footnote 69 on p. 622 sheds light: “ One of the cardinal points of the doctrine of sociological jurists is that it is enough to work out such rules as may clearly govern particular facts or relations without being over-ambitious to lay down universal propositions. (Jitta,\* op. cit I,20). Doubtless courts have been led into excess of zeal to lay down universal propositions by having to do much of the rightful work of legislatures. But at an earlier period when conceptions were not so thoroughly worked out and rules were not so numerous there was always before them the practical problem of devising new theories for a concrete cause. Today the principles are hidden by the mass of rules deduced from them , and, as these rule are laid down, as and taken to be universal, not mere expressions for the time being of the principles, we have an administration of justice by rules rather than by principles. Legislative superseding of this mass of rules by well-chosen and carefully formulated principles seems to offer the surest relief.” {\* Jitta, “ La substance des obligations dans le droit national prive” is first referenced in this article as footnote 30 on p. 613} [↑](#footnote-ref-177)
178. Note the intense prelude to the eventual foundations of the American Law Institute, and the various restatements of law propounded by that institute. See William Draper Lewis, University of Pennsylvania, 1925-28. [↑](#footnote-ref-178)
179. See Jaren, Mathias A. & Hamilton, Neil, Introducing the 1998 Reprint, “Spirit of the Common Law” by Roscoe Pound, updating & replacing the introduction by U.S. Supreme Justice Arthur Goldberg [↑](#footnote-ref-179)
180. A variation of this methods section was presented as a paper at the University of Oxford Law School’s Centre for Socio-Legal Studies in discussions of Legal Theory and Legal Method. September 29th 2000. [↑](#footnote-ref-180)
181. See Fred Rodell’s "Goodbye to Law Reviews" Virginia Law Review 1936, “Rodell famously remarked, "There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.” [↑](#footnote-ref-181)
182. Approximately 33% of all U.S. law school graduates fail State Bar Exams [↑](#footnote-ref-182)
183. Ammentorp, W., Hooker, C. “Knowledge Organization in Educational Administration: Toward a General Theory of Paradigm Formation.’, ND University of Minnesota at p. 4 [↑](#footnote-ref-183)
184. Here it is quite interesting to see Holmes as Chief Justice of the Supreme Court in effect a “straddle” practitioner, and also scholar, crossing paradigmatic frames of reference, and using a range of thinking which includes parts of many different views. The derivative argument is that a true theory which incorporates “sociological jurisprudence” and “ legal realism” does not yet exist. Each paradigm represented lifelong efforts by titans of 20th century legal thought to reach toward legal system paradigms by articulating theoretical elements in small steps. [↑](#footnote-ref-184)
185. To that effect this writer has designed a law school course entitled “Legal Biography and Legal Theory”. [↑](#footnote-ref-185)
186. These individuals, judges and academic administrators, differ from legal philosophers like H.L.A. Hart and John Rawles, or Ronald Dworkin who devoted their energies entirely to law as an extension of Philosophy. These were men who lived the law as contemplative practitioners. [↑](#footnote-ref-186)
187. Literally, res ipsa loquitur [↑](#footnote-ref-187)
188. One could easily make the argument that legal thought is the original “fuzzy logic”. [↑](#footnote-ref-188)
189. Much criticism of this form of judging flows from the legal academy [↑](#footnote-ref-189)
190. See *United States v. Carroll Towing Co.* [159 F.2d 169](http://en.wikipedia.org/wiki/Case_citation) ([2d. Cir.](http://en.wikipedia.org/wiki/2d._Cir.) [1947](http://en.wikipedia.org/wiki/1947)) for Judge Learned Hand’s powerful demonstration of legal analysis. [↑](#footnote-ref-190)
191. Christopher Columbus Langdell, Harvard Librarian and later Dean of Harvard Law School [↑](#footnote-ref-191)
192. The New York Challenge, Fox and the controversies surrounding the “socialist” attributes of Pound’s work. At various times, Pound was accused of being a Nazi sympathizer and virulent socialist by critics given to peculiar self serving views. [↑](#footnote-ref-192)
193. Harvard Red Set, Harvard Law Library, An extensive collection of Pound’s writings and correspondence, once in Red binders, now on microfilm. [↑](#footnote-ref-193)
194. IDEATE, See Oxford English Dictionary and the following:

     Gale, 1677

     J.S.Mill, 1829

     Huxley 1829

     Sir William Hamilton 1830

     To form the idea of ..to frame devise or construct in idea or ..imagination. To imagine , conceive.

     1610 Donne A state which Plato ideated - As some men have imagined divers ideas... and so sought what a general or king, should be...so these men have ideated what a Pope would be.

     1680 Sir Thomas Brown Could we comprehend the ideated man we might comprehend our current degeneration. The compact Edition of the Oxford English Dictionary Oxford, England (1979) p. 1368 [↑](#footnote-ref-194)
195. See “ The Law Of Contracts” Prefatory remarks, Copyright 1920, Samuel Williston “One who attempts to write on any topic of the law is likely to realize that what Maitland said of the historian is also true of the law writer, he is tearing a seamless web. The law cannot be divided into parts marked by exact boundaries, and the problem of where to stop continually confronts him.” [↑](#footnote-ref-195)
196. Agents would be officials and members of organizations who were not part of Pound’s “inner circle” of friends. [↑](#footnote-ref-196)
197. Pound created powerful resources for clarification of his ideas, for example he created daily diaries for many years. Diaries which he refused to disclose to his biographer, Paul Sayre. [↑](#footnote-ref-197)
198. Several ideas and notions of effectiveness include the success associated with speaking engagements, Publications, circle and span of influence, and consequential change in the legal process and profession. Some of these evaluative constructs do not exist in legal discourse and education. [↑](#footnote-ref-198)
199. Critical Legal “studies” and “Crit” theory is an excellent more recent example (Unger, 1986) [↑](#footnote-ref-199)
200. There are likely to be discovered losses and gains in theory transformations, and an itemization of theoretical subsets, usefully understood as paradigms, would benefit future scholarship. [↑](#footnote-ref-200)
201. Harvard Law School Red Collection [↑](#footnote-ref-201)
202. This archive is a collection of papers gathered in the 1940’s by Pound’s biographer, Paul Sayre. [↑](#footnote-ref-202)
203. Two archives are in Lincoln Nebraska. One is at the University of Nebraska, the second is in the State of Nebraska Historical Archives. [↑](#footnote-ref-203)
204. The Biography was not appreciated by Pound privately. The supporting materials and letters are largely kept at the University of Iowa and Nebraska, and the Nebraska State archives. A synthesis of the letters exchanged has been prepared and is in the literature review. [↑](#footnote-ref-204)
205. Stories exists describing Sayre as eccentric. He often brought his dog to lectures, and was know to get on train in Iowa City with no pocket money, and call from places like Chicago for return fare. Worse yet he never intended to leave Iowa City, but was seeing off a visiting lecturer. [↑](#footnote-ref-205)
206. Sayre’s career was spent as a Professor of Law at the University of Iowa. [↑](#footnote-ref-206)
207. Not to be confused with Wigmore, the Master of Evidence in 20th Century American legal doctrine [↑](#footnote-ref-207)
208. Professor Emeritus , University of Minnesota, and this writer’s doctoral advisor [↑](#footnote-ref-208)
209. Id pps 3 - 12 [↑](#footnote-ref-209)
210. The notion of “legal science” articulated in the 19th century by British and American jurisprudents refers to a form of legal method whereby truth can be discerned from law and fact, “science”. [↑](#footnote-ref-210)
211. In Britain, The Socio-Legal Studies Association is a substantial academic community [↑](#footnote-ref-211)
212. Paradigm in this analytical context would be an area of the law such as a model of courts administration, or the shift in powers from courts to the Legislature. [↑](#footnote-ref-212)
213. Given that law is not a science, it is necessary to step out of the scientific genre of paradigmatic thinking, and understand paradigms as knowledge or belief assumptions [↑](#footnote-ref-213)
214. Dr. Natalie Hull, JD-PhD , Distinguished Professor of Law, this author had the privilege of being Dr. Hull’s Research assistant while earning the ]D at Rutgers law School, 1994-95-96. [↑](#footnote-ref-214)
215. More broadly speaking as a dialectic process [↑](#footnote-ref-215)
216. The range of law reviews and articles examined cover the period 1896 to 1936. Pound would write more and lived to be 97, but subsequent to being Dean of Harvard Law School his writings and service to the legal community followed lines of statesmanship and synthesis of his earlier works. He would become advisor to Nationalist China in the forties to reform the Chinese legal system, and also issue treatises on jurisprudence. [↑](#footnote-ref-216)
217. The idea was not new, but the words were changing to describe the idea that law and society had to be understood in the nexus of case law articulation and social change. As the terms of art changed, focus increased on new thinking and visions in very specific social /civic areas. [↑](#footnote-ref-217)
218. Among the luminaries of the time, William O. Douglas and Robert Maynard Hutchins. [↑](#footnote-ref-218)
219. The conflict is substantially one of values and opinions, highly consistent with Ammentorp et.al. Position that design space can be defined and qualitatively examined. [↑](#footnote-ref-219)
220. Central to the notion of design space would be the law review framework where scholarship occurs [↑](#footnote-ref-220)
221. Llewellyn’s access and influence at the ABA and AALS changed substantially as he focused away from his legal realism and into the codification of the Uniform Commercial Code. [↑](#footnote-ref-221)
222. The legal community consists of legal scholars as faculty members, the American Association of Law Schools, a consortium of law school administrators, and the American bar association. Distinct from this “iron triangle” are the courts and lawyers who are the “meat and potatoes” of the profession. Little theoretical or applied academic thinking ever reaches the profession or the courts. It is particularly curious to note the absence of law review citations of court opinions-

     An important focus of new inquiry is the gap between legal education and the practicing bar, which includes lawyers and judges. In 1999 the Carnegie Foundation launched a new evaluation of legal education. This variable is curiously absent from the Foundation’s list of methodological inquiries and ranking of concerns. A possible explanation is the leader of that multiyear study is a former law Dean and AALS President The entire Carnegie Study affirms Casti’s point “ we always see by interpretation, and the interpretation we use is given by the prevailing paradigm.” (at 42) (l989) [↑](#footnote-ref-222)
223. Archival data from the University of Nebraska and Nebraska State Historical Assn, and the collected materials which were not published and did not gain inclusion in Sayre’s biography (1948) of Pound, archived at the University Of Iowa (Paul L. Sayre, Professor Of Law, University of Iowa, see “The Life of Roscoe Pound ,” Iowa College of Law Press, 1948) [↑](#footnote-ref-223)
224. I do a bit of disservice to the genius the Hindu theosophical scholars of the 8ths century B.C., the volumes of their work are substantial. Important here is that the thought process has striking associative value. [↑](#footnote-ref-224)
225. Linguistic to the degree one has a controlled framework of conceptual variables [↑](#footnote-ref-225)
226. Id. at p. 27 [↑](#footnote-ref-226)
227. The best way to understand this is that both were paradigms of an incomplete theory [↑](#footnote-ref-227)
228. Ammentorp, Cape Cod Paper at p. 8 [↑](#footnote-ref-228)
229. The notion is discoverable by comparative reviews of British and American Tort and Contract laws, and British and American Curriculums in legal education. This author was greatly helped by the Centre for Socio Legal Research at Wolfson College, University of Oxford, and the (British) Society for Social Legal Theory. Professor Reza Banakar at Oxford made several important suggestions. [↑](#footnote-ref-229)
230. i.e., “Doctrine of Implied Authority” – Agency Law [↑](#footnote-ref-230)
231. Ammentorp, Cape Cod 1998 at p. 7 [↑](#footnote-ref-231)
232. Here legal discourse is defined as the personal letters, diaries and correspondence exchanged between Pound, other law deans, leaders of the bar and AALS, etc. . Pound also has a field of correspondence relating to advisory responses to specific legal questions. These documents are not evaluated to demonstrate the models. More extensive detailed work should include them. [↑](#footnote-ref-232)
233. Pound was wonderfully serious about his botanical work, and a life long enthusiast and correspondent with his Nebraska botany group, including members of the “Sem Bot” a small study group in which Pound spent many hours. Indeed the Sem Bot was not all business. One news note at the Nebraska archives reports the club “ stuffed a rival club member or two into the holes sunk for the new telegraph lines on the campus:.” [↑](#footnote-ref-233)
234. In effect, the contours of an idea are defined by the backdrop against which they are anchored. [↑](#footnote-ref-234)
235. Ammentorp Cape Cod p. 8 [↑](#footnote-ref-235)
236. This point of view supports the idea that law schools and the profession obsess with stagnation. An interesting contrast is the unification of Europe, with its attendant urgent need to consolidate legal systems having very different doctrinal elements. [↑](#footnote-ref-236)
237. Pound had a hobby of studying old battlefields, and Civil War radical John Brown used to ride through Lincoln Nebraska with freed slaves past his Father’s home. In the late 19th century, while a practitioner in Nebraska, Pound argued a case against William Jennings Bryant. Holmes was shot three times by confederate soldiers on separate occasions, and Llewellyn was shot by American forces while serving with a German Regiment in WWI before he returned to America and Yale law School . [↑](#footnote-ref-237)
238. p.10 Cape Cod 1998 “ Qualitative Perspectives on Design” [↑](#footnote-ref-238)
239. The meaning of this is more than associative. MIT scholars were explicitly trying to create languages used in computers which were “natural” languages to humans. [↑](#footnote-ref-239)
240. Consequently there should exist a discoverable ratio of values between scholarly thought , institutional values, and techno - industrial demands. [↑](#footnote-ref-240)
241. William M. Ammentorp - University of Minnesota [↑](#footnote-ref-241)
242. Controversial in the sense that the origin of man would not be resolved, God or monkeys, the Scopes trial of 1925 [↑](#footnote-ref-242)
243. Code is required to operationalize and exchange, but is always consequential [↑](#footnote-ref-243)
244. Which curiously was developed by Karl Llewellyn [↑](#footnote-ref-244)
245. Ammentorp 1998 Cape Cod Paper at 12 [↑](#footnote-ref-245)
246. And this distinction results from the social sciences striving to evolve methodically, while the law embraces with peculiar delight compulsive archaic traditions of discourse. [↑](#footnote-ref-246)
247. Law librarians do craft some bibliometric composites of citations, and cases are “Sheppardized” to future holdings and reversals or distinctions, but these procedures are trade oriented to the profession of litigation, not toward scholarly inquiries of the legal education process. [↑](#footnote-ref-247)
248. See “Ending the Influence of Nineteenth Century American Legal Education” presented in the summer of 2001 at the University of London Institute for Advanced Legal Studies , Mathias Alfred Jaren. [↑](#footnote-ref-248)
249. An assessment of SAGE publications on the subject, and the predecessor literatures strongly indicates that the “science” of qualitative research went from a period in the 1980 ‘s of useful applications to quick and “user friendly” templates. [↑](#footnote-ref-249)
250. Subsequent to deep reviews of field literatures, items of correspondence, papers publishing which present competing ideas, and a careful evaluation of major streams of thought, along with philosophical definitions from original scholars, a “vision” subsequently occurs. [↑](#footnote-ref-250)
251. Harvard Law School, like many schools during WWI had few students, and women were not admitted until much later in the century. [↑](#footnote-ref-251)
252. Columbia Law Professor Karl Llewellyn began an aggressive written attack in law reviews against Pound’s ideas in the mid 1920’s. [↑](#footnote-ref-252)
253. Hence, a longitudinal study, with qualitative attenuations. [↑](#footnote-ref-253)
254. [↑](#footnote-ref-254)
255. Sage Publications, for example typically has 20 or so on sale. Many are very specific to a particular research work, such as anthropology, nursing, etc. [↑](#footnote-ref-255)
256. Piantanida & Garman reference several criteria:

     Integrity - ; Is the work structurally sound?

     Verite - Does the work ring true?

     Utility - Is the inquiry useful and professionally relevant Is the inquiry important, meaningful, and nontrivial?

     Aesthetics - Is it enriching and pleasing to anticipate and experience?

     Ethics - Is there evidence privacy and dignity have been afforded all participants? [↑](#footnote-ref-256)
257. One especially troublesome example with an exciting, but misleading title: “Strategies for Interpreting Qualitative Data” Feldman, Martha, Sage University Papers, (1995) in which the entire discussion centers on her study of university residence hall management. [↑](#footnote-ref-257)
258. Casti of course uses the term in a much broader sense. The useful proposition is that method and process, when argued from the perspective of a particular work evolves full of attenuations inherent in the contextual materials of the work itself, and the value of the procedural attributes of the qualitative research are diluted [↑](#footnote-ref-258)
259. [↑](#footnote-ref-259)
260. This section of the work is the backdrop of a paper prepared for presentation at the University of London Centre for Advanced Legal Studies W.G. Hart Colloquium on Problems in the Legal Profession, June 2001. [↑](#footnote-ref-260)
261. Change is really a central organizing principle to this inquiry. [↑](#footnote-ref-261)
262. On this evaluative and analytical point, there are several useful works to support the inquiry:

     1974 - “Change - Principles of Problem Formulation and Problem Resolution”

     Watzlawick, Paul, Weakland, John H. And Fisch, Richard

     1982 “Reframing - Neuro-Linguistic Programming and the Transformation of Meaning”

     Bandler, Richard, and Grinder, John

     1982 “ The Reflective Practitioner - How Professionals Think in Action”

     Schon, Donald, A. [↑](#footnote-ref-262)
263. Because legal thinking can often confuse legal doctrine and legal theory, care will be taken to distinguish the two in the categorization and distribution of findings. A legal doctrine would be closely associated with scholarship in paradigm development and share similarities. One difference is that legal doctrines tend to be very specific and defined in great detail. Legal theory more broadly appears to be a framework of agreed upon argumentative engagement, lasting decades, with attenuating features in actual practice. Examples of actual cases that bear a strong resemblance to evolving theory can be found. An excellent example is Brandeis arguing in Muller -v- Oregon on women’s working conditions in Oregon laundries . Pound has done some opinion and article work on the framework of social influences prior to 1911 that are clearly anticipatory to the famous “Brandies Brief” of this Supreme Court Case. Pound and Brandeis further had a direct association in Boston between the time of Pound’s earlier writings and the filing of the briefs. It remains an unusual early direct example of the relationship between law review scholarship themes and actual pleading in legal argument. [↑](#footnote-ref-263)
264. Example: Pound argued that legal thinking was “mechanical” and that judges merely applied static rules to resolutions to complex social problems with equally meaningful but different possible outcomes. [↑](#footnote-ref-264)
265. The idea that universities were involved is rather useless . Law schools located within university systems have rarely been influences by anything at the institution per se, albiet early formative development .

     Because legal thinking can often confuse legal doctrine and legal theory, care will be taken to distinguish the two in the categorization and distribution of findings. A legal doctrine would be closely associated with scholarship in paradigm development and share similarities. One difference is that legal doctrines tend to be very specific and defined in great detail. Legal theory more broadly appears to be a framework of agreed upon argumentative engagement, lasting decades, with attenuating features in actual practice. Examples of actual cases that bear a strong resemblance to evolving theory can be found. An excellent example is Brandeis arguing in Muller -v- Oregon on women’s working conditions in Oregon laundries . Pound has done some opinion and article work on the framework of social influences prior to 1911 that are clearly anticipatory to the famous “Brandies Brief” of this Supreme Court Case. Pound and Brandeis further had a direct association in Boston between the time of Pound’s earlier writings and the filing of the briefs. It remains an unusual early direct example of the relationship between law review scholarship themes and actual pleading in legal argument. Example: Pound argued that legal thinking was “mechanical” and that judges merely applied static rules to resolutions to complex social problems with equally meaningful but different possible outcomes. The idea that universities were involved is rather useless . Law schools located within university systems have rarely been influences by anything at the institution per se, albiet early formative of legal education and law schools was an important and direct interest of universities in the mid to late 19th century when legal education transformed from an apprentice system to an “academic” subject. Some states still accept bar applicants who have no university law training, but several years of agreed upon apprenticeship training from a licensed practitioner. [↑](#footnote-ref-265)
266. The problem of justification could become complex. The variable is proposed to frame a direct evaluation of the reasons why various legal acts should occur, and not others. Not merely as a form of legal analysis, but from the perspective of how to cause through teaching and instruction changes in the legal profession. The required assumption is that publishing in law reviews does this, of which there remain many detractors. Numerous studies of legal education in large conclude that the core changes little. This authors research at Oxford and Cambridge Universities in Britain of doctrinal materials dating from the early part of the 17th century in areas such as evidence, contracts, and procedure strikingly resemble present day American legal practice materials. [↑](#footnote-ref-266)
267. Change as an organizing principle in qualitative research of design issues and in theoretical development of legal materials is fundamental to this inquiry. Regardless of the qualitative tool employed, the selection and elimination of alternative choices in reasoning or perception by the scholar remain the most informative and usefully descriptive determinants of future theory building models in the law. [↑](#footnote-ref-267)
268. This question is of particular importance. The biographical studies of major legal theorists and scholars have very mixed reviews and in some cases represent decades of research by the authors. Legal biographies of major figures like Pound and Llewellyn, and legal analytical works on legal “movements” or theories such as legal realism struggle to grasp more than a few segments of the overall context and meaning of thinking and scholarship in the field being explored. The near total absence of such knowledge among judges and legal practitioners is something likely to have substantially vexed Pound, and his 20th century fellow scholars, such as Holmes or Llewellyn. A further difficulty arises when contemplating the fact the Holmes enormously influenced legal thought, but only briefly taught at Harvard .

     One indicated consequence of this information is that there exists an “arena” or tripartite framework of legal theory building where no one relational position in particular controls the thought marketplace. Alternatively, each individual did have a persuasive “pulpit”. Holmes as Chief Justice of the Supreme Court, Pound as Dean of Harvard, and Llewellyn as Professor of Law at Columbia. Llewellyn appears to occupy the least powerful “pulpit.” It is astonishing to see that each scholar felt compelled to write an opus about American Common Law. [↑](#footnote-ref-268)
269. Segments already appear in the “ Introduction to the Spirit of the Common Law”

     (Original edition, Pound 1921) 1998 Edition, Rutgers Press, updating the earlier work by Justice Arthur Goldberg, by Mathias A. Jaren and Neil Hamilton [↑](#footnote-ref-269)
270. From Britain, - The problem is even more serious “ Unfortunately in Britain we have the historical legacy of a largely vocational law degree, and little contact between lawyers and social scientists” – Max Travers “ Theory and method in Socio-Legal Research Conference Report – Oxford, Sept 2000 , In Socio-Legal Newsletter, No. 33 march 2001 p. 7 [↑](#footnote-ref-270)
271. A modification of this summary was accepted for presentation at the University of London Centre for Advanced Legal Studies June 2001, the W.G. Hart Conference on the English Legal Profession. [↑](#footnote-ref-271)
272. Jaren, Mathias A., (2000) Unpublished paper, Legal Method, The Design of a Legal Theory Engine Oxford Centre for Socio-Legal Theory, Fall, 2000 [↑](#footnote-ref-272)
273. Quote on introductory pages, the Harvard law Review, according to Pound, sent his submissions to his “unfreinds”. [↑](#footnote-ref-273)
274. The term “polarity” is used to explicate fundamental distinctions between qualitative research and traditional legal analysis [↑](#footnote-ref-274)
275. see for example, C.S. Pierce (1880) and Casti (1994) work separated by 100 years, but very similar [↑](#footnote-ref-275)
276. Codes recur in law, over many centuries, in various cultures. In the 19th century Stephen Field crafted a New York Code of Pleading. [↑](#footnote-ref-276)
277. ALI-ABI – Formed with the support of Penn’s then Dean William Draper Lewis [↑](#footnote-ref-277)
278. Entering the legal profession is a serious life undertaking. Passage of a bar exam after quitting work for three years, studying five hours a day, and spending an additional

     $ 100,000 is not a matter taken lightly by individuals who fail bar examinations. [↑](#footnote-ref-278)
279. The contours of this “privacy” require full psychometric disclosure, including measures of content and convergent job related validity studies. [↑](#footnote-ref-279)
280. There are numerous draconian measures by many State Boards, which if applied to the members of their existing bar, would significantly reduce the herd. [↑](#footnote-ref-280)
281. The obvious value includes recognition, loan deferrals, and interim status for pay of law school grads. [↑](#footnote-ref-281)