

University of Michigan Journal of Law Reform

Volume 2

1969

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Recommended Citation

Louis H. Masotti & Michael A. Weinstein, *Theory and Application of Roscoe Pound's Sociological Jurisprudence: Crime Prevention or Control?*, 2 U. MICH. J. L. REFORM 431 (1969).

Available at: <https://repository.law.umich.edu/mjlr/vol2/iss2/11>

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THEORY AND APPLICATION OF ROSCOE POUND'S SOCIOLOGICAL JURISPRUDENCE: CRIME PREVENTION OR CONTROL?

Louis H. Masotti and Michael A. Weinstein***

I. Introduction

The current interest in reforming the administration of justice has been triggered by a number of factors including the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice¹ and the treatment afforded arrestees during the civil disorders of the past few years². The nation is alarmed at the reported annual increases in crime, and this alarm was manifested in the 1968 presidential election when "law and order" became a major issue. Superficially the answer may seem clear: more effective enforcement of the law and, when necessary, more stringent laws. The critical issue, however, is a jurisprudential-philosophical one: ought the "proper" approach to crime essentially be its *prevention* through methods such as the rehabilitation of criminal offenders, or its *control* through efficient administrative procedures? This is not a new question in jurisprudence, but it remains an important and unresolved one.

This article will examine an analytical approach to this problem which was developed and applied by Roscoe Pound, one of America's most eminent jurists. After describing and interpreting Pound's concept of sociological jurisprudence, we will relate it generally to the reform of criminal justice administration and analyze Pound's attempt to apply his theory as Director of the Cleveland Crime Survey of 1921. Finally, we

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This article is drawn from a larger study of the Cleveland Crime Survey, CRIME, POLITICS & REFORM, to be published in the near future. The authors are indebted to the Institute of Law and Criminal Procedure, Georgetown University, for financial support of the project.

¹ NATIONAL COMMISSION ON LAW ENFORCEMENT & THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

² See Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967*, 66 MICH. L. REV. 1542 (1968).

will compare the recommendations of that Cleveland study and the recent report of the President's Commission in a modest effort to assess their impact on the administration of criminal justice and to draw some lessons for future reform endeavors.

II. Pound's Sociological Jurisprudence: The General Theory

Roscoe Pound defined the goals of sociological jurisprudence in an essay on the philosophy of law:

What we are seeking to do and must do in a civilized society is to adjust relations and order conduct in a world in which the goods of existence, the scope for free activity, and the objects on which to exert free activity are limited, and the demands upon those goods and those objects are infinite. To order the activities of men in their endeavor to satisfy their demands so as to enable satisfaction of as much of the whole scheme of demands with the least friction and waste has not merely been what lawmakers and tribunals and jurists have been striving for, it has also been put in one way or another by philosophers as what we ought to be doing.³

This statement contains a summary of Pound's program. In the perfect society all claims put forward by individuals would be immediately satisfied. However, such a utopia does not exist in the world and people cannot satisfy each of their demands. Further, men come into conflict when they desire the same scarce goods. The basic tenets of sociological jurisprudence place Pound in the tradition of Hobbes:

And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies: and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavor to destroy or subdue one another.⁴

³ TWENTIETH CENTURY PHILOSOPHY: LIVING SCHOOLS OF THOUGHT 69 (D. Runes ed. 1958) [hereinafter cited as *Runes*].

⁴ T. HOBBS, *LEVIATHAN* 105 (1951 Bobbs-Merrill edition).

Pound articulated a conflict theory founded on individual interest. To escape from a state of nature men devise systems of law which enable them to fulfill "as much of the whole scheme of demands with the least friction and waste." The legal system is made effective through a monopoly of coercive power:

I think of law as in one sense a highly specialized form of social control in a developed politically organized society—a social control through the systematic and orderly application of the force of such a society.⁵

Thus, sociological jurisprudence introduces two components into its definition of law. On the one hand, law is a means of alleviating conflict through the imposition of organized force. On the other, law functions to secure the realization of as many individual interests as possible. An appropriate question arises here whether the second assertion is meant to state a fact or prescribe an ideal. We will examine this question, but for now we may accept these components as the starting point for Pound.

Although the theory of interests was prefigured in nineteenth century jurisprudence, Pound brought the approach to maturity.⁶ He devised categories under which to subsume the demands enunciated in social systems:

If we take, as it were, an inventory of the concrete claims which press upon the law for satisfaction and seek to classify those which the law recognizes and endeavors to secure, they fall conveniently into three groups: individual interests, public interests, and social interests.⁷

Individual interest are demands which particular people consciously and immediately recognize as their own, such as a demand for non-discriminatory treatment in hiring. Public interests are the claims pressed on behalf of a politically organized society, such as the desire for a new courthouse.⁸ Demands of the social group are social interests. These include the security of social institutions defined as the protection

⁵ *Runes* 67.

⁶ For the historical background of Pound's interest theory see H. REUSCHLEIN, *JURISPRUDENCE: ITS AMERICAN PROPHETS* (1951).

⁷ R. POUND, *CRIMINAL JUSTICE IN AMERICA* 5 (1930).

⁸ *Id.*

of economic, social and religious organizations; the general morals defined as the enforcement of social standards; the general progress defined as the increase of man's control over nature; the conservation of social resources defined as efficient use of the goods of existence; the general security defined as the defense of order; and the individual life.⁹ The social interest in the individual life consists of three demands: the desire for self-assertion, the demand for fair opportunity and the interest in a minimum standard of life.¹⁰

Since the law operates through general rules, specific "individual interests" or demands must be generalized before they are recognized as legal rights.¹¹ When generalized they become the social interest in the individual life noted above. Thus, our example of non-discriminatory treatment in hiring becomes a recognized legal right subsumed under the social interest in an individual's "demand for fair opportunity". For purposes of comparing and weighing interests, then, Pound considers all interests on the social level. When we come to discuss the application of the general theory of sociological jurisprudence to the administration of criminal justice, we will see that the jurist is primarily concerned with balancing the social interests in the general security and in the individual life.

Sociological jurisprudence is not a simple philosophy and there are many ambiguities in the argument as we have reproduced it in this simple form. In order to understand better what is meant by an "interest", it is worth noting how Pound's concept of "interest" has evolved. Contributions are drawn from several sources. Samuel Krislov points out that all interests must be traced to individual activity;¹² he emphasizes the danger that the term social interest might prompt us to believe that society has desires.¹³ Pierre Lepaulle adds to the concept by showing that if interests are to be balanced they must be consciously expressed.¹⁴ Finally, Lester B. Snyder argues that Pound used an empirical method to determine his matrix of interests:

Pound did not ascertain these interests by use of logical presuppositions about the ideals of existence in society. Nor did he ascertain these interests through a study of the fundamental behavioral tendencies of men. In a

⁹ *Id.*

¹⁰ *Id.* at 9.

¹¹ *Id.* at 6.

¹² Krislov, *What is an Interest? The Rival Answers of Bentley, Pound, & MacIver*, 16 W. POL. Q. 837 (1963).

¹³ *Id.*

¹⁴ Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 845, 845-46 (1922).

truly empirical fashion he has inventoried the claims that have actually become embodied in our positive law.¹⁵

Snyder is quick to assert that although Pound's categories are generalizations of demands already written into the law, sociological jurisprudence allows the legal system to recognize new interests as they emerge.¹⁶ The concept of "interest", then, refers to consciously articulated individual desires important enough to be recognized in the law.

If we examine more closely Pound's stated objective for the law, we discover that it is somewhat unclear whether Pound is claiming that legal systems always develop with a view toward satisfying a maximum number of interests or is prescribing a standard for evaluation among interests. To repeat, he defined the principal objective of a legal system as follows:

To order the activities of men in their endeavor to satisfy their demands so as to enable satisfaction of as much of the whole scheme of demands with the least friction and waste has *not merely* been *what lawmakers and tribunals and jurists have been striving for*, it has *also* been put in one way or another by philosophers as *what we ought to be doing*. [Emphasis added].¹⁷

Julius Stone suggests at one point that Pound was describing the system rather than prescribing for it:

So, Professor Pound, putting it for law, says that in any given society its legal system represents an attempt to adjust the interests of individuals with each other and with the interests asserted on behalf of society and the state, with the least possible sacrifice of the whole.¹⁸

However, Stone does not maintain this position consistently:

He thus seeks to make feasible the evaluation of the interests in conflict in a particular con-

¹⁵ Snyder, *A Legal Philosophy for the Practicing Lawyer: Roscoe Pound's Theory of Social Interests*, 36 CONN. B.J. 22, 22-23 (1962).

¹⁶ *Id.* at 25.

¹⁷ *Runes* 69.

¹⁸ J. STONE, *THE PROVINCE & FUNCTION OF LAW* 357 (1950).

troversy by reference to the manner and the degree in which the whole scheme of interests is affected.¹⁹

There is no doubt that Pound sometimes took the first of those positions.²⁰ However, such a statement on his part would certainly be historically incorrect. That position does not reflect the existence of class legislation and differential treatment of groups by administrators. Further, if legal systems naturally tend towards realizing his ideal, Pound would not have had to direct a crime survey which was supposedly undertaken because the whole system of criminal justice had "broken down." In this article we will consider Pound's discussion of interest fulfillment as prescribing a standard by which to evaluate and compare competing interests. It may be argued that this standard implies that there are no principles through which choices between conflicting interests can be guided. The most complete critique of this standard has been undertaken by R.W.M. Dias.²¹ Dias argued that standards in legal philosophy must be decisional principles rather than directives to balance interests.²² He reasons that the administrator, judge or citizen is confronted by a maze of interests in each particular situation. Some must be satisfied, and others must be sacrificed. The injunction to arbitrate conflicting claims by striking a balance between them cannot point to a solution of the problem of which interests are important. Rather, a decision, if it can be justified at all, must be subsumed under a juridical ideal. Pound supplies no such ideal, argues Dias, and thus leaves us where we were before the analysis began. Further, the theory does not point to any recognition of new interests. According to Dias, whether or not we are willing to listen to a new claim is a policy decision and has nothing to do with balancing. Pound does not provide a procedure for judging which new interests we should secure.²³ Dias concludes that "... as a guide to the administration of law the listing of interests is unhelpful."²⁴

The criticisms put forward by Dias should not be accepted as a refutation of Pound's philosophy. First, an accurate listing of the interests which gain recognition in our legal system is a valuable starting point for a standard of evaluation. Pound at least has provided us with categories defining the problems we want to solve. Second, the administration of justice involves elements of what Dias treats as decision and

¹⁹ *Id.* at 359.

²⁰ *Runes* 69.

²¹ R. DIAS, *JURISPRUDENCE* 458 (1964).

²² *Id.*

²³ *Id.* at 460.

²⁴ *Id.*

what Pound calls balancing. Certainly police officers, prosecutors and judges must often choose to sacrifice one interest at the expense of another, and it is true that any rational justification of their decision must be made in terms of an ideal with more substance than the principle: "Satisfy as many desires as possible." However, there are many cases in which a compromise can be made between conflicting demands, where each demand is partially fulfilled and a balance or harmony of interests results. Dias is too much of an idealist to allow for such a middleway.

Finally, Pound *does* have an ideal to which we refer choices: civilization. He attempts to provide the necessary jural ideals in the form of a prescription to decide in favor of the development of civilization:

Instead of valuing all things in terms of individual personality, or in terms of politically organized society, we are valuing them in terms of civilization, of raising human powers to their highest possible unfolding—toward which spontaneous free individual action and collective organized effort both contribute.²⁵

Civilization is defined in terms of the pragmatic standard of the free development of all the potentialities of the human being. This is undoubtedly a vague standard. Yet it is hardly open to the objection that men have the potential to kill as well as to create good works, for Pound's ideal clearly implies some element of commonly-understood values. The phrase "*raising* human powers to their *highest* possible unfolding" rules out a static universe and substitutes an evolving cosmos in which new opportunities for satisfaction are ever appearing. Demands to maintain the *status quo* for the sake of preventing change can be dismissed. The phrase gives the benefit of the doubt to experimentation and is therefore liberal. It puts the burden of proof on those who would stifle individual expression. In short, the standard of civilization does guide the official in his process of balancing interests, although it is concededly too abstract to allow him to find a ready answer in each particular case. If a critic demands more of Pound than his emphasis on human development, he is asking Pound to deny the open universe and replace it with an unchanging moral realm which has little significance for a modern industrialized society.

The concern with human development must always be tempered with a knowledge of what most people are willing to accept. Pound claims that "we must strive to meet the demands of the moral sentiment of the community," and often pursue administrative activities which inhibit the

²⁵ POUND, *supra* note 7, at 10-11.

useful expression of human potentialities.²⁶ There is an evident tension in his standard between the ideal and the possible. On the one hand, under theoretical conditions we must reject all demands for inhibiting development unless good reasons are given to justify them. On the other, to some degree we must defer to the dictates of public opinion.

To a large extent law depends for its enforcement upon the extent to which it can identify social interests with individual interests, and can give rise to or rely upon individual desires to enforce its rules.²⁷

It is this tension in sociological jurisprudence which conditions both Pound's critique of the administration of justice and the proposals for reform which appear in *Criminal Justice in Cleveland*.

III. Sociological Jurisprudence and the Administration of Criminal Justice

The application of sociological jurisprudence to a particular branch of the legal system necessitates choosing certain relevant interests from the general scheme of social interests. When the jurist considers the administration of criminal justice, he is primarily concerned with balancing the social interests in the general security and in the individual life:

Criminal law has its origin, historically, in legal regulation of certain crude forms of social control. Thus it has two sides from the beginning. On the one hand, it is made up of prohibitions addressed to the individual in order to secure social interests. On the other hand, it is made up of limitations upon the enforcement of these prohibitions in order to secure the social interest in the individual life.²⁸

The sharp distinction between the desire that order be effectively preserved in society and the demand that procedural treatment of individuals be closely controlled creates a conflict of ideals in criminal justice which makes the problems of administration more difficult in this sector of the law than in any other:

²⁶ CRIMINAL JUSTICE IN CLEVELAND 576 (R. Pound & F. Frankfurter eds. 1921).

²⁷ *Id.* at 575.

²⁸ *Id.* at 577-78.

... over and above the general problems involved in all securing of interests by means of the law, criminal law has special problems. It must define absolute duties so as to preserve a just and workable balance between the competing social interests involved. It must safeguard the general security and the individual life against abuse of criminal procedure, while at the same time making that procedure as effective as possible for the securing of the whole scheme of social interests. It must devise effective enforcing agencies, both punitive and preventive, while at the same time giving due effect to the interest in the individual life.²⁹

Pound is not satisfied with pointing out the interests which must be balanced in the administration of criminal justice. He employs his ideal of human development to suggest principles for evaluating which interests should be satisfied. For Pound, the ultimate solution to the problem of criminal administration lies in the increasing use of *preventive justice*. The goal of the free exercise of potentialities requires that we remove the social and psychological conditions which produce crime instead of punishing the "evil will" in penal institutions.³⁰ Punishment is an ineffective instrument for controlling crime because it does not treat the sources of criminal activity. However, Pound did not claim that his plan could be put into effect easily:

In effect, what there is in the way of preventive justice, in the domain of the criminal law, is achieved not by legal but by extra-legal agencies. It is done for the most part not by the agencies of the law, but by social workers. In other words, we have yet to devise the machinery and learn the technique of preventive criminal justice.³¹

Short of the realization of a system of preventive justice Pound has few suggestions for improvement. He remarks: "Until experience has shown us the paths which we may follow with assurance, we must expect ineffectiveness and dissatisfaction."³² In *Criminal Justice in the American City* Pound is even more pessimistic:

²⁹ POUND, *supra* note 7, at 10-11.

³⁰ *Id.* at 28.

³¹ *Id.* at 35.

³² *Id.* at 25.

... until proper compromises between the interest in the individual human life and the general security, security of social institutions, and general morals are worked out at many points, there is likely to be vacillation, uncertainty and inefficiency in the administration of criminal justice.³³

Pound, however, did direct and edit the Cleveland Foundation's survey of criminal justice. Therefore, we must assume that he held some principle which allowed him to engage in reform even though his ideal could not be attained. For practical action Pound relied upon his proposition that public opinion must be consulted in any evaluation.

Behind Pound's pessimism about the prospects for preventive justice was an appreciation of widespread and deep-rooted attitudes in the American citizenry. The most important belief frustrating the realization of the ideal is that "legal and political miscarriages resolve themselves into a matter of good men and bad men, and that the task is a simple one of discovery and elimination of the bad."³⁴ In order to catch the offender and punish him Americans blindly set up a vast legal mechanism:

Along with the bad-man interpretation there commonly goes a faith in legal machinery in and of itself: a belief that when anything goes wrong we should appeal at once to the legislature to put a law upon the statute book in order to meet the special case, and that if this law is but abstractly just and reasonable, it will in some way enforce itself and set things to rights.³⁵

Pound thus criticized the two dominant conceptions of reform which were prevalent when he wrote: the demand to get rid of the rascals and the faith in institutional manipulation. If he could have had his way he would have substituted a scientific and humane system of crime prevention for these two remedies. However, he was aware that the best practical measures would have to take both public opinion and the actual nature of man into account, rather than attempting a creative release of human potentialities based purely on individual self-help and self-direction:

The general security requires us to repress self-help. Also we must strive to meet the demands of the moral sentiment of the community. The considerations constrain us to

³³ CRIMINAL JUSTICE IN CLEVELAND 587 (R. Pound & F. Frankfurter eds. 1921).

³⁴ *Id.* at 559.

³⁵ *Id.* at 560.

keep many things in the criminal law which are purely retributive, and thus serve to preserve a condition of fundamental conflict between different parts of the system. Undoubtedly the law and its administration should reflect the sober views of the community, not its views when momentarily inflamed. But the sober views of the average citizen are by no means so advanced on this subject as to make a wholly scientific system possible.³⁶

Pound is an idealist and a realist at the same time. Confronted with the certain defeat of his philosophy, which lacked the potential of sufficient popular approval, he was driven to formulate a second-best standard. His compromise incorporated the dominant reform motives.

The local conditions of cities demand *centralization and organization of administrative agencies, coordination of responsibility with power, and reliance upon personality* rather than upon checks and balances as emphatically as a pioneer, rural community demands decentralization, division of power, independent magistracies, and checks upon administration. [Emphasis added].³⁷

Thus, when it came to applying his legal philosophy to a concrete situation, Pound rejected his standard of human development and relied upon the dictates of public opinion. After studying his assertion that the proper way to reconcile the conflict between the interests in the general security and the individual life was through preventive justice, how are we to understand his choice of a reform program with plans focusing on the punishment of the evil-doers and on the streamlining of administration? We find that he concluded that the administration of criminal justice was weighted too much in favor of the individual life:

The professional criminal and his advisers have learned readily to use this machinery and to make devices intended to temper the application of criminal law to the occasional offender a means of escape for the habitual offender.³⁸

Pound believed that the legal philosopher should never neglect to consider the human material with which he was working in his calculations;

³⁶ *Id.* at 576.

³⁷ *Id.* at 593.

³⁸ *Id.* at 592.

the philosopher could express many beautiful ideals, but when faced with a need for *immediate* reform he had to defer to the common ideas of the time.

When Pound chooses such a "second-best" program of reform, he is deferring to the possibilities of the time. However, there is evidence that the tension between the ideal and the possible is an inherent part of his theory of sociological jurisprudence itself. He attempts to combine in one theory a pragmatic idealism and a pragmatic realism. Pragmatic idealism in legal philosophy is directed towards a rational ordering of society through creativity and science:

The embattled interests, ideals and values are found in the cultural environment; the jural postulates are not found but invented in the legal process. They are the legislators responding to the challenge of their generation for a rational ordering of human life on the juridical level.³⁹

At the same time the idealist approach employs ethics to establish directions for development: "The functional approach to jurisprudence involves the rehabilitation of an active idealism which subjects legal institutions and legal norms to a process of ethical evaluation."⁴⁰ On the other hand, pragmatic realism is conservative and stresses the importance of received values:

... we must note that Pound is not a pragmatist in the negative sense of much that we find in James and Dewey. Pound insists on retaining all the intangibles in this business of judging conflicting claims. Not only must they be judged in the light of the received ideals in addition to all the enunciated social interests, but this illusive and powerful thing called "pursuit of justice" must have its play in his system.⁴¹

It is difficult to reconcile pragmatic idealism and pragmatic realism in the same philosophical system. In the present context one pushes towards the goal of human development while the other pulls towards recognition of the limitations of the concrete social situation. Pound

³⁹ Aronson, *Roscoe Pound & the Resurgence of Juristic Idealism*, 6 J. SOCIAL PHILOSOPHY 82 (1940).

⁴⁰ *Id.* at 69.

⁴¹ P. SAYRE, *THE LIFE OF ROSCOE POUND* 376 (1948).

never adequately synthesized the two. Instead, he relegated preventive justice and the release of creative powers to the realm of ideals while adopting widespread contemporary conceptions of reform for his practical programs. Linus J. McManaman has remarked that sociological jurisprudence was a revolt against the juristic pessimism which characterized nineteenth century Anglo-American legal thought after utilitarianism had lost its charm.⁴² It would be more accurate to say that Pound veiled a deep pessimism with a sterile pragmatism.

IV. Sociological Jurisprudence Applied: The Cleveland Crime Survey of 1921

The recommendations for reform offered in *Criminal Justice in Cleveland* were applications of Pound's practical "second-best" standard which called for "centralization and organization of administrative agencies, coordination of responsibility with power, and reliance upon personality rather than upon checks and balances,"⁴³ and was designed to ensure that professional criminals would not be able to take advantage of the system. Throughout the specific reports on conditions in Cleveland we find numerous suggestions aimed at tightening the criminal process so that offenders will receive their proper punishment.

In his report on police administration Raymond B. Fosdick wrote:

The best escape from the difficulties inherent in the present scheme involves a *complete overhauling of the whole administrative machinery*. In the first place, there should be a *direct line of responsibility, running from a single head* down through the whole organization. There should be *no such short circuits* as now between the chief and mayor around the director, who is the chief's superior. *Final authority*, commensurate with responsibility should be *lodged exclusively with the single directing head*. This single leader should be *in immediate charge of directing the operations* of the force. [Emphasis added].⁴⁴

The reform proposals for police administration embodied each of the components of Pound's practical standard. The goal of centralization was pursued through the demand for "a direct line of responsibility."

⁴² McManaman, *Social Engineering: The Legal Philosophy of Roscoe Pound*, 33 ST. JOHN'S L. REV. 6 (1958).

⁴³ CRIMINAL JUSTICE IN CLEVELAND 593 (R. Pound & F. Frankfurter eds. 1921).

⁴⁴ *Id.* at 16.

Coordination of responsibility with power was promoted in the recommendation that "short circuits" between the chief and mayor intended to circumvent the director be eliminated. Finally, reliance upon personality was suggested in the proposal that a "single leader" should be in charge of directing the operations of the force. Other recommendations calling for a separate police department with a permanent civilian head and a chief executive officer, a consistent policy on promotions, a centralized method for meting out discipline and the acquisition of modern equipment followed a similar pattern. The only recommendation involving preventive justice was a proposal that a special service division be created to study the breeding grounds of crime, experiment with new methods and act as a liaison to social service agencies.⁴⁵

Alfred Bettman's report on prosecution also accepted the practical standard:

Therefore the organization, methods, and practices of the criminal courts and prosecutors and other agencies engaged in the administration of criminal justice should be such as to function with as great an *exactitude* as is possible in an apparatus of this nature and with a *reduction to a minimum of the opportunities for favoritism, corruption, prejudice, luck, and carelessness*. The procedure needs to be simplified so as to *reduce* as far as possible the *number of steps or stages* in which corruption, carelessness, or incompetence can play a part or which unnecessarily strain the resources, human and inanimate, devoted to the enforcement of the criminal law. [Emphasis added].⁴⁶

Bettman continued: "Our problem is, therefore, to suggest changes, easily obtainable and available, which will effect such organization, methods, practices, and prestige."⁴⁷ The same pattern of recommendations which characterized the report on police administration was present in the prosecution study. Bettman suggested that the chief municipal prosecutor be primarily an executive official, that the county prosecutor have the function of "systematizing" the activities of his office, that the grand jury be abolished, that the bail bond system be simplified, and that powers, such as "no-papering" which allowed the prosecutor to drop cases without giving any reason for so doing, be eliminated. All of these suggestions were aimed at administrative centralization, coordination of responsibility with power and reliance upon

⁴⁵ *Id.* at 80.

⁴⁶ *Id.* at 193.

⁴⁷ *Id.* at 194.

personality. All of the prescriptions were aimed at bringing offenders to justice as efficiently as possible.

The report on criminal courts by Reginald Heber Smith and Herbert B. Ehrmann did not depart from Pound's model. The authors asserted:

The evil of this *overcomplicated system* is that it has become *unwieldy*. It gets *enmeshed in its own technicalities* and defeats its own purpose. It fosters and makes possible the "professional" criminal lawyer, who finds it worthwhile to test and tamper with it until he discovers the weak spot through which his client may escape. The system may guarantee immunity for innocence, but it tends also to guarantee immunity for crime. [Emphasis added].⁴⁸

The remedies suggested were modest and practical:

There is no panacea for the existing ills nor is there any royal road to democratic self-improvement. These suggestions will not bring about the millenium, but they are respectfully offered in the firm belief that their adoption will effect substantial and genuine improvements.⁴⁹

The specific proposals were consonant with the general rule. Judges should run against their own records; a unified criminal court should be created; this court should have a chief justice; and a judicial council should be set up to advise the court on ways to tighten criminal procedure. The sole recommendation concerning preventive justice called for an adequate probation staff which would play a supervisory role: "To the probation force should be committed the task of collecting fines, non-support orders, and the technical custody of persons adjudged guilty who need actual supervision but not imprisonment."⁵⁰ Such a probation staff would be a limited instrument for preventive justice if it could be said to fulfill that aim at all.

Thus, the reform proposals contained in *Criminal Justice in Cleveland* satisfied the requirements of Pound's "second-best" standard. Primarily they dealt with the creation of centralized administrative machinery staffed with capable and responsible persons. The contributors to the study always kept in mind the goal of capturing and convicting the

⁴⁸ *Id.* at 359.

⁴⁹ *Id.* at 364.

⁵⁰ *Id.* at 367.

maximum number of offenders and eliminating any loopholes through which the guilty might escape. The contributors did not claim that their reforms would solve the problem of criminal justice. Rather, they believed that the measures which they suggested were the only ones which could appeal to public opinion and still provide a degree of improvement in the effectiveness of the criminal process. They were attempting to be realists and were quick to argue that they were not appealing for utopian schemes. The ideal of preventive justice was sacrificed to the dominant reform ideologies calling for organizational manipulation and for good, responsible men. *Criminal Justice in Cleveland* was a result clearly imprinted with the practical side of Roscoe Pound's thought.

V. Sociological Jurisprudence and Modern Reform: The 1967 Report of the President's Commission

While *Criminal Justice in Cleveland* is usually considered the first thorough crime survey, it was by no means the last. In form, philosophy and methodology it was followed by major surveys in Illinois, Missouri, New York and elsewhere, as well as by the Wickersham Commission's national study in 1931.⁵¹

At the present time there is again a profound concern with the administration of criminal justice. In 1967 the President's Commission on Law Enforcement and Administration of Justice issued a detailed report, *The Challenge of Crime in a Free Society*,⁵² which is very similar to *Criminal Justice in Cleveland*. Following tradition, the President's Commission articulated the ideal that preventive justice should become the primary value served in the administrative process:

Finally, this report has emphasized again and again that improved law enforcement and criminal administration is more than a matter of giving additional resources to police departments, courts, and correctional systems. Resources are not ends. They are means, the means through which the agencies of criminal justice can seek solutions to the problems of preventing and controlling crime.⁵³

Expressing the principle that a "national strategy against crime must be in large part a strategy of search," the Commission recommended that the policy be implemented through formal machinery for *planning* estab-

⁵¹ NATIONAL COMMISSION ON LAW OBSERVANCE & ENFORCEMENT, REPORT TO THE PRESIDENT (1931).

⁵² NATIONAL COMMISSION ON LAW ENFORCEMENT & THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

⁵³ *Id.* at 279.

lished by state and local governments.⁵⁴ In a proposal which recalls the special service division suggested in the Cleveland survey, the report's major recommendation calls for an agency in every state and every city which would be "responsible for planning improvements in crime prevention and control and encouraging their implementation."⁵⁵ However, while the formal ideology of *The Challenge of Crime in a Free Society* includes the principle of preventive justice, the specific recommendations stress the practical standards of institutional efficiency.

Due to changes in the American ideology of reform since *Criminal Justice in Cleveland* was published, the program of the President's Commission stresses education of personnel and technological innovation rather than administrative centralization, "reliance upon personality" and "coordination of responsibility with power." For example, police officers should be given special training programs "in such critical problems as organized crime, riot control, police-community relations, correctional supervision of offenders being treated in the community, [and] the use by police and juvenile court intake personnel of social agencies in the community."⁵⁶ Judges, prosecutors and defense counsel for indigents should be given special educational programs, and corrections personnel should be given education and training in "experimental treatment methods."⁵⁷ Expert consultants should be retained to conduct "management studies" at all points in the administrative process because "... ineffectual administration can negate otherwise promising attempts to increase effectiveness against crime. . . ."⁵⁸ Information on the patterns of crime should be centralized, and special demonstration projects should be funded "to show all cities and States how much major changes can improve the system of criminal justice."⁵⁹ Finally, the President's Commission was particularly interested in speeding the application of technological research and development to the problems of criminal justice. Here the emphasis is placed almost wholly on efficiency. Computers should be used to collect and analyze data "the system needs to understand the crime control process"; two-way radios should be given to patrol officers; computer "command-and-control systems" should dispatch patrol forces; advanced fingerprint recognition systems should be employed; and a wide range of investigative, warning and control innovations should be explored.

The dependence of the President's Commission upon education and technology should not obscure the similarity of its recommendations to those of the Cleveland survey. At best, *The Challenge of Crime in a*

⁵⁴ *Id.*

⁵⁵ *Id.* at 280.

⁵⁶ *Id.* at 285.

⁵⁷ *Id.* at 286.

⁵⁸ *Id.*

⁵⁹ *Id.* at 287.

Free Society gives more attention to rehabilitation than *Criminal Justice in Cleveland*. However, neither survey makes a concerted attempt to orient specific programs to the ideal of preventive justice. The policies suggested are "practical" in the sense that they would tighten enforcement and alter existing organizational procedures to make administration more efficient. The President's Commission retains the goals of sociological jurisprudence in its statement of purpose but, like the Cleveland group, deemphasizes them when specific proposals are suggested and relies on that which public opinion will accept, in this case, education and technological research and development. The same problems which characterized the implementation of Pound's ideal in *Criminal Justice in Cleveland* seem to bedevil the report of the President's Commission. While practical reform programs have shifted from involvement with organizational relationships to preoccupation with technology and information, the fit between the ideal and the possible as reflected in recommended practice is still poor.

VI. Conclusion

Sociological jurisprudence did not become a powerful ideology of reform in the Cleveland of 1921, and it is unlikely to gain wide acceptance among those who must actually revise the law in contemporary America. Pound and the other contributors to the survey tried to suggest those measures which would be acceptable to the public, and in so doing they failed to inspire a movement for *renovating* the administration of criminal justice. The causes of their failure cannot be traced to the realm of legal philosophy. However, the weaknesses in their philosophy can provide us with several lessons which are relevant to current programs.

Pound's jurisprudence is characterized by a tension between the ideal of human development and the necessity for taking account of public opinion. In criminal administration, human development is expressed as a recommendation for preventive justice and public opinion as a demand for an effective administrative organization staffed by responsible persons. If we are convinced that crime prevention is the best way to alleviate the difficulties which we detect in the administration of criminal justice, why should we produce reform proposals which are not aimed at the relevant variables? The only justification for such self-defeating behavior is an assumption that the public will reject the ideal in favor of more "practical" reforms. If this is the case, the proper method of reform would be to attempt to convince the public that preventive goals are the best. Unless we are juristic pessimists, we will not become such hard-nosed realists that we internalize positions with which we cannot agree in our reflective moods.

Further, it may not even be practical to adopt the dominant popular themes of reform. Popular ideas may be unsound and inconsistent. A

realist need not be one who follows the *zeitgeist*. Rather, he can be a man who studies the political process closely and makes a prudent determination of how to fulfill the greatest part of his program. The realism of the Cleveland survey came to terms with certain widespread values as they were found to exist. A more intelligent and far-sighted realism would mark out paths of influence to decision-makers. Pound forgot that public opinion can be led. The successful reformer must find the appropriate leaders and convince them that proposed changes are in their interest.

Although the influence of surveys is limited, they would nevertheless be an effective educational device to mold new opinions. The modern reformer who combines something of both the political scientist and the philosopher jurist will seek through this device empirical support for the ideals arising out of abstract but thoughtful reflection.

Sociological jurisprudence as developed by Pound provided the philosophical background for *Criminal Justice in Cleveland*. His view is a legal philosophy that contains the seeds of its own destruction as it must apparently resolve its inherent schizophrenic tension ultimately against the abstract ideals from which it starts. Any crime survey done in the future should not rely on such a weak foundation. A much better approach would require careful clarification of what is *really* wanted and what will be consistently sought from the beginning to the end of the reform process. Pound's classification of interests does provide a framework in which such clarification can be undertaken. After the basic values have been chosen, there should be no loss of nerve. It is both hypocritical and impractical to sacrifice the fruits of reflection for popularity. It may also be unproductive if our deepest thinking tells us that criminal justice should be preventive and we continue to propose reforms which emphasize only crime control. *Criminal Justice in Cleveland* may have been succeeded by *The Challenge of Crime in a Free Society*, but the basic issue remains the same.