

From the Bag

Law in Theory, Law in Practice

ROSCOE POUND'S PRACTICAL PROGRAM OF PROCEDURAL REFORM

Morgan Cloud

"From the Bag" periodically features reprints of hard-to-find yet historically important legal articles, with commentary from modern scholars. For this first "From the Bag," Professor Morgan Cloud introduces Roscoe Pound's article, *A Practical Program of Procedural Reform*, which first appeared in the original *Green Bag*, at 22 *GREEN BAG* 438 (1910). Pound's article is reprinted beginning on page 75.

The editors' decision to reprint Roscoe Pound's article, *A Practical Program of Procedural Reform*, in this inaugural issue could not be more fitting. Both the theory and practice of American law have changed dramatically in the past century, and no individual was more responsible for those changes than Roscoe Pound. When the *Green Bag* first appeared in 1889, the country was just entering what came to be known as the *Lochner* era in constitutional theory. Pound's fame as a legal philosopher resulted in part from his persuasive attacks on the legal theories which undergirded *Lochner* and its ilk.¹ As he was developing his version of legal pragmatism – which he labeled "sociological jurisprudence" – Pound also worked relentlessly to reform the nation's systems of justice. Pound championed his jurisprudential theories and procedural reform programs in numerous arti-

cles published in a variety of legal journals, including the *Green Bag*.

Roscoe Pound is remembered as an intellectual leader of the turn-of-the-century "revolt against formalism" in American law. The pragmatist critique of formalism is familiar. Pound and others argued against formalist theories they claimed were overly conceptual, paid undue deference to foundational principles, and excessively emphasized logical deduction and formal reasoning. They worked to replace legal formalism with pragmatist theories that recognized law's plasticity, its contextual nature, and its instrumental functions. They succeeded in the effort. Today, the term "formalism" serves as an imprecise but ubiquitous epithet among legal commentators, and pragmatist ideas so permeate our legal consciousness that we take them for granted.

Morgan Cloud is a Professor of Law at Emory University.

1 See, e.g., Roscoe Pound, *Mechanical Jurisprudence*, 8 *COLUM. L. REV.* 605 (1908).

Like some other early pragmatists, Pound's theories were influenced by his training as a scientist. He was a botanist. Pound grew up in Lincoln, Nebraska, where his father was a successful attorney and prominent judge. Pound attended the University of Nebraska, earning a bachelor's degree and a masters degree in botany before studying for a year at the Harvard Law School. He returned home to Nebraska to practice law. Yet even while starting a successful law practice, Pound continued to work as a professional botanist.² On the way to a botany Ph.D., he conducted innovative and controversial field research for which he received international attention and professional awards. His research helped "establish ecology as a new field of study."³ Pound's work even prompted a prominent European botanist to name a fungus in his honor – *Roscoe-poundia*.⁴

Pound was an inveterate classifier. Even the short article re-published here is jammed with lists and categories. Commentators have suggested that this attribute of his legal writing is the product of his background as a botanist, and particularly his work classifying Nebraska's flora. But Pound was no mere taxonomist. He was influenced by the changes in nineteenth century scientific theory, including

those spurred by Darwin. Pound's study and experience as a botanist and early ecologist contributed to his pragmatist ideas about law – ideas that altered the legal consciousness of the nation.⁵

Pound argued for a "sociological jurisprudence" that was rooted in social reality, and much of his most influential work was intended to change the ways lawyers and judges practiced their profession. The title of the accompanying article aptly describes a central goal of Pound's professional career – to reform legal practice and procedure. Indeed, it was a speech proposing procedural reform that made Pound a figure of national prominence in the legal world. That 1906 speech and Pound's subsequent efforts promoting procedural form were so influential that the speech's 70th anniversary was commemorated by a national conference sponsored by several of the nation's most important legal and judicial organizations.⁶

The attached article is an example of Pound's efforts to promote his proposals for reforming practice and procedure. One of the most interesting characteristics of the article is the way it integrates his theoretical assumptions and his practical reform program. Pound stressed, for example, that the procedural re-

2 Pound's work as a botanist is discussed by his biographers. See, e.g., David Wigdor, *ROSCOE POUND, PHILOSOPHER OF LAW* 49-67 (1974); Paul Sayre, *THE LIFE OF ROSCOE POUND* 63-72 (1948).

3 Wigdor, *supra* note 2, at 66.

4 Wigdor, *supra* note 2, at 65; Sayre, *supra* note 2, at 69.

5 Pound had a successful career as a legal academic, as well. He was born in Nebraska in 1870 – only two years after statehood. He was a successful practitioner, was appointed a commissioner of the Nebraska Supreme Court (with duties that were essentially those of the court's judges), became a professor, and then Dean, at the University of Nebraska law school. In 1907, Dean Wigmore brought him to Northwestern as a Professor of Law; in 1909 he moved to the University of Chicago; and in 1910 to Harvard. He became Harvard's Dean in 1916, and held that post for twenty years. He published numerous books and articles, and was involved in numerous and varied professional and political activities. Roscoe Pound died in 1964.

6 The Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, sponsored by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States, are reprinted in A. Leo Levin & Russell R. Wheeler, *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (1979). The text of Pound's speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, is reprinted as an appendix to the volume.

forms he advocated were “but part of a general movement in all departments of mental activity away from the purely formal, away from hard and fast notions, away from traditional categories which our fathers supposed were impressed upon the nature of things for all time” (p. 77). Pound argued that implementing his practical proposals for procedural reform would do nothing more than mirror changes that were occurring in all areas of intellectual life. Pragmatism in law was part of a

movement [that] is remaking the natural and physical sciences, is rewriting history, is recasting political theories, is making over economic theory, and, under the name of sociology, is changing our attitude toward all problems of social life. It is inevitable that jurisprudence, and ultimately the law itself, be affected profoundly. For whatever its validity in other fields, pragmatism must be the philosophy of the lawyer (p. 77).

Theory and practice were not separate. Theory arose from practical experience in the world, and both theory and experience dictated the practices and procedures which should be adopted in our legal system. But Pound wanted to do more than simply jettison archaic methods and procedures. For example, when he proposed eliminating some of the rules that had evolved from the hoary distinction between law and equity, Pound obviously pursued changes in the everyday practices of lawyers and judges. But he also hoped to change how his world defined the very nature of law and its functions. The measure of his success is that the end-of-the-century American lawyer likely will find that Pound’s proposals to reform legal theory and practice reflect the common assumptions of our time.

A Practical Program of Procedural Reform

Roscoe Pound

ONE NEEDS BUT LOOK about him to see that procedural reform is in the air. The subject has progressed beyond the stage of discussion by jurists and teachers and controversy in periodicals, legal and lay, and has entered upon the practical stage. To say nothing of the elaborate measure pending in this state, bills for reform of federal procedure, including one for a commission to draft a complete federal practice act, are before Con-

gress, and procedural reform has received the weighty approval of the President; a commission on delay in the administration of justice has reported recently in Massachusetts; a committee of the Association of the Bar of the City of New York has put forth a printed report on simplification of procedure; Kansas has adopted, at the instance of the State Bar Association, a revised code of procedure which embodies many notable reforms; the

Presented at the annual meeting of the Illinois State Bar Association, June 23, 1910. Originally published at 22 GREEN BAG 438 (1910).