

1923

Discussion of Judge Pound's Paper, A

J. P. McBaine

Follow this and additional works at: <https://scholarship.law.missouri.edu/lr>



Part of the [Law Commons](#)

Recommended Citation

J. P. McBaine, *Discussion of Judge Pound's Paper, A*, 27 Bulletin Law Series. (1923)

Available at: <https://scholarship.law.missouri.edu/lr/vol27/iss1/6>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in University of Missouri Bulletin Law Series by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

edly procedural law has modified if it has not created substantive law.

Furthermore it is bad for the non-studious youthful person to have the practical side of the law magnified. He thinks the practical side is the profitable side; he will magnify it far too much without help, and what he needs is to have burnt into him as much substantive law as can be compressed into a few years. A man who is fairly grounded in substantive law and reasonably instructed in the history of law may easily learn in the first year of his office experience all the practice that he needs for the rest of his life,—if he substantively amount to anything. For these reasons I think it is the duty of the law schools to spend all the meagre time at their command in impressing on material not very well prepared (on the average) all that it can be compelled to take of the origin, development, and tendencies of substantive law.

The apt scholar will acquire his practice later and easier. The clever lad who inclines to the business side of the law will in time be thankful for the learning thrust upon him in his salad days; and the mere dullard will be benefited by being thrown out of the legal ship.

In my opinion the law schools have in my time very sensibly raised the standard of legal education. I think it their duty to continue the good work by concentrating on the academic side of our labors; the practical part will come soon enough, and be better done, by managing clerks and trial judges than by professors.

Judge United States Circuit Court of Appeals, 2nd Circuit.

CHARLES M. HOUGH.

A DISCUSSION OF JUDGE POUND'S PAPER*

I am sure I voice the sentiment of all law teachers in saying that we very much appreciate the interesting and helpful paper by Judge Pound that has just been read.

We indeed heartily welcome the views, favorable or other-

*This paper was read at the annual meeting of the Association of American Law Schools at Chicago, December 29, 1922.

wise, of members of the judicial branch of the legal profession on law school questions of first importance, such as the question discussed by Judge Pound, viz, the curriculum.

The legal profession in America, by virtue of the nature of the work performed, may be said to be divided into several distinct groups; the practicing bar; the judiciary; and the law teachers. These groups have much in common. They are engaged in work of the same nature, though in each branch the application of the material with which they are working is different.

The modern law teacher who gives his time exclusively, or almost exclusively, to the work of the law school keeps in contact with the judiciary by reading the reports of the opinions of the courts. For the most part these are opinions of appellate courts. It would seem, then, that his opportunity for keeping in touch with the appellate courts is better than his opportunity for keeping in touch with trial courts. However, inasmuch as most of the opinions of the appellate court are reviews of some feature of the work done in a trial court, we are also able to keep in touch with the operation and the problems of the trial courts. The law teachers who are using the case method are therefore constantly dealing with the work of the trial and appellate courts.

Our contacts with the practicing bar are perhaps not so direct. For the most part our contacts with the bar are gotten from the opinions of the courts. What the practicing bar does is reflected in most respects in the court opinions.

The law teacher, too, makes a written record of much of his work, by writing articles for law magazines, law treatises, and compiling case books. The judge and the practicing lawyer know of the work of the law teacher from these written records. The work of the law teacher is also brought to the attention of the bench and bar by our speaking witnesses, the young lawyers. Our separate fields, then, are closely related, and our contacts sufficient to keep each group informed of the efforts and results of the other groups; and sufficiently related to make the suggestions and criticisms of one group valuable to the other groups.

We of the law teaching profession feel that our work is

second to none of the other groups in its importance to our common profession and to society as a whole. The work of no branch of the legal profession is of more importance than that of the branch intrusted with the professional training of the men and women that constitute the profession. The professional life of the lawyer is of short duration so that his preparation and training while in school are of especial significance.

Therefore, it seems, that it is of the greatest importance that legal education should be of great concern to the practicing lawyer and the judge; and, also that we, the teaching members of the profession, should frequently have their views as to our work. We need their interest and their help.

At this time the profession generally is of the opinion, as Judge Pound points out, that it is impracticable to train young lawyers in the law offices of those in active practice. The time has long since past when the capable lawyer has time to guide the student in his office in systematic study of law. This statement need not be elaborated. The recommendation of the American Bar Association that the minimum of education required of one seeking admission to the bar should be two years of college training in liberal arts and science and three years of professional study in a full time law school, shows, I take it, that the prevailing view of the bar of this country is that the young lawyer must now be prepared in a law school.

Judge Pound, in his paper, very properly approaches the subject from two angles. He discusses (a) the kind of training the law student should receive, and (b) the subjects of the law that should be taught in the law school. As to the nature of the training the law student should receive I find myself in accord with his view as expressed in this statement in his paper:

"The proper purpose of law school training is not only to impart knowledge but also to develop in the student a disciplined and active mind. If it fails, in either task, it leaves its work incomplete."

This is the kind of training that law schools represented in this Association are now striving to give their students, viz., intensive training as to the fundamental principles of the law. We

try to teach our students methods of sound legal reasoning; the manner in which the courts reason in formulating rules and in applying them to the facts at hand. Our methods of teaching should no doubt be those that teach the student to think clearly, and deeply, as to complicated, and often new controversies, so as finally to be competent to advise people what to do, and what not to do, and to represent them in the courts, and before other bodies established to regulate and control man's business activities. The client doesn't come to the lawyer's office with his problem so analyzed that all the lawyer has to do is to repeat from memory, or read, a rule of law from some text book or decision. His task is not that easy. The lawyer must first find out the facts—the things that have occurred, or that the client desires to happen—always bearing in mind that he is looking for those facts primarily as they have, or have not, some legal significance. The man whose mind is stored only with rules of law which he has memorized is of very little value to his fellow man who seeks advice as to his rights or duties, or, who wants to know the legal consequences of acts that he is interested in doing. Said Mr. Justice Holmes: "We must think things, not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and true."

And again he says: "A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer. Hence the futility of arguments on economic questions by any one whose mind is not stored with economic facts." It seems to me he might also have added, "Hence, also, the futility of legal advice; of representation in court, by one whose mind is not stored with facts of legal significance." The valuable lawyer is not a walking or sitting law book, but a man of broad learning in the great principles of the law he deals with; who has judgment and capacity for seeing the significant facts, who is capable of weighing them, and determining their importance according to the best thought of the day and generation. The lawyer, I say, is a thinker who must "Think things not words". I find myself, then, in accord with Judge Pound's view, as I understand it, that we should put the emphasis

upon training the young man to reason soundly as to legal matters, and this can be done best by directing the major part of the three years of student life to an intensive study of those subjects where we find applied those fundamental principles upon which our law is based.

We should, I understand him to say, sacrifice the acquisition of information for intensive study of the most important principles if we have not time while in law school to cover all the law. And that we have not the time within the three years usually devoted to law study Judge Pound points out, and with him every one agrees who has given thought to this subject.

So then, as to this I should like to say that I fully agree with Judge Pound when he says, "The law school should primarily aim to be an efficient agency for imparting legal principles to be used in the practice of law."

Summing up prevalent theories of law teaching, Judge Pound says:

"The theories of law teaching adopted by the schools may be grouped under three heads: First, the theory that law teaching should have no avowed object except the development and discipline of the mind of the student. Under this theory information is incidental. Secondly, that its object is primarily to instill information, and that mental discipline is a by-product. Thirdly, that while mental development and the legal attitude must be of primary consequence in teaching fundamentals, the less important courses may well be taught by methods candidly instructive rather than disciplinary. The first may be called the Harvard method; the second the hasty method. The third has been conspicuously the Cornell method."

Perhaps a difference between law schools, for instance, that are members of this Association lies in this: Some law schools act upon the theory that all courses—fundamental and not fundamental—can be given best by the intensive case method of instruction. Other schools act upon the theory that the case method is essential for the more important subjects but that subjects of secondary importance may be treated best by calling in experts from the bench, or bar, who will give a short series of lectures.

Perhaps Judge Pound would agree with this statement and does not mean to be understood literally when he says the theory is acted upon in some schools "That law teaching should have no avowed object except the development and discipline of the mind of the student. Under this theory information is incidental."

I doubt if instruction as actually carried on by the majority of the members of the faculty in any American law school has no "Avowed object except the development and discipline of the mind of the student," and that "information is incidental".

My knowledge of the course given in the Harvard Law School (I am not a graduate of that school) leads me to think that the teaching practice of that school is to train thoroughly the student in fundamental legal principles and legal reasoning.

The method there employed is, I understand, study by the students of selected court cases, which involve the application of a general or fundamental rule of law; cases which bring out the history of the rule and the reasons why the rule was so made, followed by class room discussion on the part of the teacher and the students, together with an expression of opinion on the part of the teacher as to the soundness of the rule, and in many instances where there exists a division of authority, a statement as to which is the prevailing view.

The catalogue of the Harvard Law School for 1922-3 contains this statement as to their instruction:

"The design of this School is to afford such a training in the fundamental principles of English and American Law as will constitute the best preparation for the practice of the profession in any place where that system of law prevails. With this in view, the programme of study, which is designed to occupy the student three full years, will comprise the following subjects:" etc.

I think all of us will agree that there are certain subjects that are less difficult to master and sometimes of less practical importance, than others. One finds more basic principles in cases in Contracts, Torts, and Property, I am inclined to say, than in Patents, Bankruptcy and Admiralty. The emphasis is and should be put upon the basic subjects. As to the best method

of teaching the subject of secondary importance there is, no doubt, some difference of opinion.

I presume some law schools are of the opinion that the case method is a better method even in those subjects than the lecture method. I fully agree with Judge Pound, however, that the law student would get much from listening to lectures by great lawyers or judges. Many law schools of the country have experienced great difficulty in obtaining the services of these men for a sufficient number of lectures to cover the subject adequately. I am firmly of the opinion that our law students are missing something of great value, and inspiration, by not having a personal contact with great leaders of the bar and learned members of the bench.

I fully agree also that both students and faculty would benefit materially by having in their midst, as lecturers, learned judges, or learned practicing lawyers, for a substantial amount of time; a sufficient amount of time, I mean, fairly to cover a course. Perhaps, too, in some subjects the learned judge or lawyer might merely lecture, but if the time of the student permits of preparation before coming to the lecture, I am inclined to think the lecture might well be preceded by the study of cases under the direction of a resident member of the faculty.

I presume, for instance, if the student has only, say, six clock hours, and no more, to give to Patent Law, the most effective thing that he can do is listen to a great expert lecture on the subject. I wonder, however, if the student wants training to equip him to practice that branch of the law whether he would not come out with better preparation if well selected cases were put into his hand by the law teacher for study, and say 34 class room hours were employed for the discussion by the law teacher and students than by listening to a half dozen lectures by a practicing expert.

With Judge Pound's observation that no law school can turn out men fully equipped to practice law, or to sit on the bench, he might also have said, I fully agree.

I am sure that law teachers in member schools of this Asso-

ciation are almost unanimously, if not unanimously, of this opinion.

There are many practical matters to be learned that the law school cannot teach and does not attempt to teach.

I, also, fully agree with him in his observation that not all persons who successfully meet the test the law schools can require will certainly become useful lawyers. Natural aptitude for the profession is no doubt a big factor in the success of every man who makes law his life work.

The Subjects that Should be Included in the Curriculum:

As I understand Judge Pound's paper on this question, I think I need say but few words. He enumerates certain subjects that are of first importance and others of secondary importance. Those he regards of first importance, I think, are so regarded in most high standard law schools.

No doubt there is not full agreement among the law schools as to the subjects of secondary importance. Nearly all law students remain only three years in law school, hence the number of subjects, outside of those now regarded of primary importance, is not very great. It seems to me that certain subjects of secondary importance may well be omitted from the curriculum of most law schools as, for example, Admiralty and Mining Law. In only a few schools should these subjects be taught the future members of the bar.

Judge Pound makes this statement as to a course in Elementary Law: "A preliminary course in elementary law would enable a student at the beginning to obtain a mastery of first principles as recognized and applied by the state in the administration of justice which he might otherwise fail to acquire."

I presume he does not advocate giving a course to beginning students that is made up of easy problems, treated superficially, in Contracts, Torts, Property, Persons, etc., sometimes called Elementary Law. A course of this nature at one time was thought to be of value for first year men. It is now very generally agreed that such a course has no place in a modern curriculum. Nor does he mean, I take it, that we should give to first

year students a comprehensive course in jurisprudence, for he classified such a course as a graduate course.

He is of the opinion, I understand, that perhaps our present requirements of our first year classes are somewhat too strict. As to this, he says:

"My first thought is that it (the law school) sometimes expects too much from the average beginner who is introduced at once to courses of study in various branches of the law in each of which a specialist concentrates his energies in imparting knowledge."

Many law teachers have felt for some time that probably our first year law student might well be given a course in the nature of law that would be of great assistance to him in mastering his first year subjects and would furnish him at that early period in his career something of a philosophy of law. We now attempt to accomplish this object by our method of handling our first subjects of Property, Contracts, Torts, Criminal Law, and Common Law Pleading. The latter subject is retained in many schools for the purpose—not of teaching in detail that system of pleading—but for the purpose of enabling the beginning student to better understand the history of many of the fundamentals of our present substantive law.

One school (Columbia) at one time gave a course in Constitutional Law to first year students for the purpose of giving to them a general point of view as to law. That school now gives to first year students a course in Common Law Actions.

Another (Yale) gives an introductory course which is described as follows:

"(a) Legal analysis and terminology, legal bibliography and use of library, the common-law forms of actions.

"(b) Required auxiliary reading and selected cases.

"(c) Briefing and arguing cases: Each student will be required to brief and argue three cases. Briefs must be submitted in triplicate and should be typewritten."

Another (Stanford) gives an introductory course of lectures which it describes as follows:

"Lectures on the function and nature of law; observation

of the processes of the preparation and trial of an action at law; analysis of series of selected cases."

This course seems not to be a required course.

Another (Minnesota) gives a course entitled "Common Law Actions and Equity," which is described as follows:

"The several forms of action at Common Law. Relation of forms of action to substantive law. Introduction to equity."

Another (Northwestern) a course described "General Survey of the Law", described as follows:

"An elementary survey of the fundamental terms and principles in the general body of the law."

Another (Chicago) gives two courses to first year men which, I presume, have in part, at least, for their object instruction in the nature of law. "Equity I." This course is described as follows:

"Nature of equity jurisdiction; relation of common law and equity. Specific reparation and prevention of torts; waste; trespass; disturbance of easements; nuisance; interference with business, social, and political relations; defamation; injuries to personality."

Also a course entitled "Remedies", which is described as follows:

"General theory of actions as remedies: recovery of damages for breach of obligation; recovery of debt; recovery of chattels; recovery of land. Steps in actions; functions of judge and jury; scope of covenant, debt, detinue, account, trespass, trover, replevin, ejectment, trespass on the case (tort and contract)."

Harvard gives to first year students a course in "Civil Procedure at Common Law", a course dealing with the nature of the common law actions, pleading at common law and under modern code, trial practice, etc.

Another (Cornell) gives a course entitled "Problems", which is described as follows:

"This course is designed to afford training in analysis of legal problems and constructive thinking in determining the relationship between law and facts. Attention will be given to the

use of law books, the making of briefs, and to oral presentation in controversy.

In our school (Missouri) we give a course in the Common Law Actions primarily for the purpose of helping the student to understand the development of the substantive law.

From these few instances it is apparent that there is not general agreement among law schools as to a course for the beginner that will give him some idea of what law is, and something of the history of the English Common Law.

No doubt there exists an opportunity at this time to organize a first year course that would be highly beneficial to the beginning student, and that would enable him to better understand his other first year subjects, and, also would give him a positive idea of what is law. I predict that the future will bring forth a suitable course for first year students that we may properly call an elementary course in the nature of law.

What may the Law School accomplish in teaching Procedure, including Evidence, Pleading, and Practice?

I found Judge Pound's views on this subject of very great interest. He no doubt has touched upon a topic upon which there is not unanimity of opinion. How to teach courses in procedure is a perplexing problem, as all law teachers know.

Judge Pound evidently is of the opinion that the law school cannot graduate finished and accomplished trial lawyers, and, as I have said, law school teachers generally agree with that point of view. He says, however, that the "Average Judge or lawyer condemns the law school for failure to teach procedure or where the attempt is made, to teach it effectively." I take it, he is of the opinion that procedure should be taught in the law school, that though there is much of value in the present procedural courses, that much more of value might be put into those courses. He says the attempt that is often made resembles "An attempt to teach auction bridge without cards, card tables, players or stakes." He then says, as I understand him, that Evidence and Pleading may be taught best dogmatically and Practice, if at all, can be taught best by "The study of printed records of cases on appeal."

I cannot fully agree with Judge Pound's views, as I understand them, on these questions. I am inclined to think that his comparison of teaching procedure with teaching auction bridge can just as well be made with teaching any so-called substantive law subject. He says: "The whole subject of Practice deals with law in action and law school instruction is relatively static and thus an artificial thing." In the law school, as he says, we cannot have real cases to conduct in a real court. Nor can we have real clients with whom to confront our students, a real contract to put in writing, a real deed to draft, or to examine, a real will to write, a real trust to create, a real personal injury suit to prosecute or defend, or a real criminal prosecution to institute or defend, etc. All our study of law is not and cannot be, in the very nature of things, in direct contact with life. We cannot as a process of study, have our law students actually deal with the facts of life while they are happening, or, directly after they have happened. All we can do is to study how they have been dealt with by our constituted agencies for law enforcement.

For example, we study contracts by reading about and discussing many many sets of facts, and decisions thereon, which relate to alleged contractual relationships. By this we think that we can master the fundamental principles of the subject. The man just graduated from a modern law school with a sound knowledge of the fundamentals of contracts, and a knowledge of the English language, natural aptitude for dealing with men, as an advisor of men, will be able actually to draft a contract that will express the understanding of the parties and will be legal; and also will be able to advise a client as to his rights and duties under a contract already made. I agree, however, that the law student, fresh from the law school where a thorough course in contracts is given, will probably not, at once, stand as an accomplished expert in contracts, but I believe the law school has given him the training and knowledge that will enable him, by practice, to become an expert in that branch of the law.

I see no argument for dogmatic teaching of pleading and evidence that cannot be made for dogmatic teaching of substantive law subjects. The rules of pleading and of evidence are just as

real as the rules of torts or contracts. In Torts and Contracts we are dealing with rules. Defining law, Professor Gray, in his book "The Nature and Sources of Law", says:

"The Law of the State, or of any organized body of men, is composed of the rules which the Courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties."

All law is intangible. It is nothing more than a body of rules. We set up courts to apply and enforce these rules that fix rights and duties. In English Law we have rules—necessarily, it seems to me—as to how one may invoke the power of the Courts, how he may show the court—(or the court and a jury)—what has happened; and, how the court (or the court and a jury) shall conduct its work in the application of the rules of rights and duties. The rules I have just described constitute the law of Pleading, Evidence, and Practice. These rules are made to bring about an accurate decision of controversies, a correct application of the substantive law. The history of the rule and the history of the institution that made the rule are often of the utmost importance in understanding the rule. Court decisions are full of instances where the rules of procedure have been carefully considered and applied. If it is best to build up in students' minds the rules of Contracts by court decisions and class room discussion thereof, I see no reason why it is not best also to build up the law of Procedure in the same way, viz., by intensive study of cases where questions of procedure have been considered and decided, followed by a full and free class room discussion of those rules and their various applications. The courses in procedure, in my opinion, can best be taught by the case method of instruction.

We can best understand a rule—not by hearing it dogmatically stated—but by studying it in its application to the facts.

Perhaps Judge Pound would not teach Practice by the case method because he feels that there is no general or fundamental law of practice. As to Practice, he says:

"The rules of Practice in their essentials are moreover local and not general, technical and not reasonable. To teach 'broad

principles' of practice seems a wasteful expenditure of time, if the end is to qualify the student for the practice of the law."

I think it may be demonstrated that there is a general law of practice in America, that there are certain rules that are basic, and are to be found to control or affect the practice in all the states of the United States. For example, the law of trial practice in civil cases has a body of rules to be found in practically all the States. These rules too are of great importance.

For example, the subject of process is highly important and is based upon the same idea everywhere in this country. The summons is a general conception and the law as to its requisites, as to substance and form, is not purely local. The summons is the basis of jurisdiction over the person and there exists a body of law as to personal service that is general. The law of the officer's return of the summons; privilege and exemption from service, will be found to be of general application.

Due to the provisions of our federal constitution there is a general body of law, particularly, as to constructive service of process. There is no more important or interesting body of law than that relating to jurisdiction *in rem* and notices by publication. *Pennoyer v. Neff*, should be understood by every law student no matter where he intends to practice law.

Though there are various statutory modifications there are certain underlying principles as to the power of the court when a defendant has been served with process and fails to appear and plead, or to appear after pleading.

In the selection of the jury there is much in common in every State in the Union. Challenges to the polls, for cause and peremptory challenges can be reduced to certain general rules.

The demurrer to the evidence, the directed verdict, the nonsuit and motion for a new trial, as developed by English Common Law, if mastered, will be of great use to the trial lawyer no matter what his local practice act may be.

The province of the court and the jury may be studied in the practice course, where the case method is employed, with great benefit. This can be done best by a careful study of cases where

a question has arisen in connection with instructions to the jury that have been given or refused.

The manner in which the substantive law is applied is of the utmost importance. In the field of contracts, oral and written, it is of the utmost importance to understand fully what questions are for the court and what for the jury. In the field of torts; liability for negligence; deceit, false arrest; and malicious prosecution; libel and slander, there exist many interesting questions of the province of the court and jury. As has been pointed out by Mr. Justice Holmes:

” ,
 “From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact * * * *

“I venture to think, on the other hand, now, as I thought twenty years ago, before I went on the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men at random from the street.”

Surely questions of this sort can be studied in as definite a way as questions of substantive law. They can be understood best, it seems to me, not by listening to dogmatic statements, but by studying many cases where the problem confronted the bar and the court and a rule was made and applied. I submit that these questions are not purely theoretical and that to teach them, as I have suggested, is not the same sort of thing, “As a doctor might do in prescribing for a hypothetical patient on a general statement of suppositious symptoms.”

Time prevents giving other examples or attempting to show how Pleading and Evidence may also be taught best by the case method, not by the lecture method, and from attempting to show that rules of Pleading and of Evidence are no more abstractions than the rules as to liability for negligent conduct causing personal

injury to another. I took my examples from the field of Practice as this is one of the subjects that law schools have only lately taught by the case method.

Should the Law School teach local or general principles?

I fully agree with Judge Pound's statement that "the University Law School must have vision to look beyond the vicinage." University law schools do not teach only local law. I do not know that any law school teaches merely local law. I agree, too, with Judge Pound that the law school should state to the intending student whether it gives any attention to the local law, or whether its chief emphasis is upon the local law, or whether it teaches no local law.

I presume that he is of the opinion that it is unwise to teach only local law, and that to do so is narrowing, and, that the local law, perhaps, does not in most cases contain all the needed material for instructional purposes. This is the prevailing theory in the schools represented in this Association.

Finally, I should like again to be understood as saying that we are very grateful to our distinguished and learned guest for his paper. We earnestly desire the advice and help of the bench and bar in this important task of ours. We cannot best succeed without it. His paper contains many points of interest and much good advice.

Columbia, Missouri.

J. P. McBAINE