

ROSCOE POUND
AND
CRIMINAL JUSTICE

EDITED BY
SHELDON GLUECK

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Edited, with an Introductory Memoir, by

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Chief Justice of the United States

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PREFACE

Last spring I received an invitation from Matthew Matlin, Editor of *Crime and Delinquency*, to prepare an appraisal of the work of Dean Roscoe Pound in the administration of criminal justice, with special reference to his contributions to the fields of interest of the National Council on Crime and Delinquency. NCCD, successor to the National Probation and Parole Association, is a standard-setting organization in matters concerning the prevention, control, and treatment of delinquency and crime.

I suppose it was only natural that I should have been asked to prepare the proposed article, since I have the honor of having been the first incumbent of the Roscoe Pound Professorship at the Law School of Harvard University. But although I accepted the assignment, I did so with a heavy heart. Dean Pound was very ill. I had visited him in the hospital from time to time; and while it was apparent that his condition was extreme, I was impressed and pleased when, occasionally, I found his mind clear and his courage undiminished. Indeed, once he blurted out: "How long are they going to keep me in this place? I've got work to do over at Langdell." This from a very sick man on the way to ninety-four years of age!

I set to work to reread many of Pound's writings that I had first become acquainted with as a student, and to read some I had missed. It soon became apparent that it would take many months, if not several years, to cover Pound's intellectual terrain. I limited myself to scanning parts of his massive treatise, *Jurisprudence*, and to certain of his writings on courts, crime, and correctional treatment. As I set down my reactions to Pound's writings, what was intended to be a brief article grew into a sizable monograph. I present it here, realizing full well that a definitive appraisal of Pound's manifold and varied contributions must await the perspective of time and the participation of many minds. In the meantime, I trust the reader will find matters of interest and stimulation in the premature account herein presented.

The major portion of the present volume consists of a selection of some of Dean Pound's more notable articles and addresses on criminal justice, probation, and court organization. Since some of these items have long been out of print and others are obtainable only in old journals, readers may find it useful to have, in convenient form, these

mirrors of Pound's mind in at least one field of his many areas of interest.

I must thank Mr. Matlin and his able assistant, Mrs. Adrienne Miller, for their effective editorial aid. It happened that the galleys came from the printer at a most inconvenient time for me—while I was attending the sessions of the First International Congress on Social Psychiatry, in London, and the Ninth International Congress of Penal Law, at The Hague. The galley proofs had to be returned promptly, so I was confined to my hotel room reading them for much of the time when I should have been more actively participating in these two congresses. However, it was Mr. Matlin's and Mrs. Miller's cheerful aid and gentle encouragement that helped to see me through.

I must also thank Milton G. Rector, Director of the National Council on Crime and Delinquency, for recognizing the desirability of the preparation of a timely article on Dean Pound's contributions to the better understanding and improved treatment of delinquency and crime, not alone through his writings but also as an active officer of the National Probation and Parole Association and the National Council on Crime and Delinquency.

I must also thank my wife and frequent co-worker for her patience and understanding during three weeks of turmoil in June in Cambridge, when I read Poundiana night and day, and for many hours of preoccupation with proof while in Europe.

Finally, my gratitude is due Chief Justice Earl Warren for his gracious acceptance of my invitation to write the Foreword to this book. His contribution is an additional laurel wreath on the tomb of one of the world's leading legal scholars.

Sheldon Glueck

Harvard Law School
September 20, 1964

FOREWORD

This compilation of some of the writings of Roscoe Pound on the subject of criminal justice is as timely as it is appropriate to the memory of one of the great pioneers in this field of the law. It is fitting that the editor, himself Roscoe Pound Professor of Law, Emeritus, at Harvard, should be another pioneer in the field of criminal law. Sheldon Glueck's memoir of Dean Pound is a moving tribute to his illustrious predecessor.

Dean Pound was a prodigious writer. A bibliography compiled at the time of his ninetieth birthday numbered more than a thousand items. The selection which Professor Glueck was required to make in this publication was thus challenging and one which he has discharged most wisely.

No mention of the name of Roscoe Pound can be made without reference to the memorable and prophetic address which he made to the Annual Meeting of the American Bar Association in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." Professor Glueck properly begins his compilation with a reprint of that address, the message of which remains as pressing and vital six decades later as it was in 1906. Fittingly, Professor Glueck ends the volume with one of Pound's later articles on "The Place of the Family Court in the Judicial System" (1959), in which he closes with a call for the creation of a Ministry of Justice, which he had been urging since 1916.

Roscoe Pound was impatient with what he called the tendency to overlook everything but the rule element in law. The story is told that when his father first sought to interest him in the study of law, he gave him two books: *Blackstone* and a compilation of American laws. The experience apparently made him reluctant to pursue the study of law. He deplored the nineteenth-century definition of litigation as a game which forces the parties "to learn the rules and play the game correctly at their peril."

The law rests, Pound said in his lectures on Criminal Justice at Brown University in 1923, upon the basis of its accord with the conditions of life in civilized society. He had developed this concept earlier in his well-known article on "The Need of a Sociological Jurisprudence," written in 1907 and reprinted herein by Professor Glueck. The law has fallen into disrepute, he says, because it has fallen behind the times—

an inevitable result "unless the law is in the hands of a progressive and enlightened caste whose conceptions are in advance of the public and whose leadership is bringing popular thought to a higher level." The same criticism applies to the law teacher. He should be a student of sociology, and of economics and politics as well. He cannot be a "legal monk" passing his time in an atmosphere of pure law and separated from the "restless world of flesh and blood."

Pound applies these concepts to criminal justice. He sees the history of criminal justice as one of compromise between the conflicting needs of society for order and security and the desire for freedom. The administration of criminal justice requires the sociological approach; it deals not simply with men but with the political machinery they have created and with the environment in which they live.

These principles he applied to the studies of criminal justice in the American city, to the juvenile court and to the family court, all problems which are still with us today. It is important to recall that his long life in the law began when the nation had just completed its first century, when industrialization and urbanization were proceeding unabated, and ten years before the first juvenile court was established in the United States. The essays reprinted herein relating to criminal justice, to the juvenile court, and to the family court reflect the prophet and pioneer in Pound. We still have much to learn from these profound analyses to which we have thus far paid insufficient heed.

Dean Pound did not hesitate to call the legal profession to task for its shortcomings and its lack of vision. He once said that the neglect of the study of criminal law in our law schools reflected both the demands of the student and the attitude of the profession. His well-known contemporary, Dean Wigmore, in commenting on Pound's earlier addresses, said that they came as a shock to a profession which had become complacent and self-satisfied. Lawyers today should be ever alert to the message which Dean Pound tried to convey to them.

Professor Glueck has thus done the nation and the law profession a distinct service in selecting these articles. He pays tribute to one of our most eminent legal scholars and teachers of the law. In a broader sense he calls attention to the problems still before us, which Dean Pound saw so clearly and about which he wrote so convincingly. The "inevitable reshaping of our institutions of public justice to the requirements of the times" is necessarily a continuing one, calling for constant reappraisal in light of the needs of tomorrow as well as today.

Earl Warren

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Roscoe Pound and Criminal Justice

A Memoir in Appreciation of the Dean of
American Legal Scholars

I. Impressions of the Man and His Works

1. ROSCOE POUND

AT THE Twenty-ninth Annual Meeting of the American Bar Association, held in St. Paul in August 1906, Roscoe Pound, the young Dean of the Law Department of the University of Nebraska, presented a notable, indeed historic, paper entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."¹ Thirty-

¹ Pound, "Causes of Popular Dissatisfaction with the Administration of Justice," Report of the Twenty-ninth Annual Meeting of the American Bar Assn. 396-417 (1906); 40 Am. L. Rev. 729-49 (1906); 20 J. Am. Jud. Soc'y 178-87 (1937). For typical panegyric reactions to Pound's memorable address, see A. L. Harding (Ed.), "Professor Pound Makes History," The Administration of Justice in Retrospect—Roscoe Pound's 1906 Address in a Half-Century of Experience 3-23 (1957).

two years later Professor John H. Wigmore, the distinguished legal scholar and law reformer, entitled his Introduction to a reprinting of this same paper in the *Journal of the American Judicature Society*, "Roscoe Pound's St. Paul Address of 1906: The Spark That Kindled the White Flame of Progress." In the spring of 1964 admirers of Dean Pound and his works gathered together in St. Paul to commemorate his famous address with appropriate ceremonies and the placing of a plaque on the site of its delivery.

Who was this man and what are the works of his hand and mind, especially those relevant to the reform of criminal justice?²

In June 1947, at the age of seventy-six, Roscoe Pound retired from the Harvard Law School with the title of Professor Emeritus, after forty-eight years of teaching, thirty-six of them at Harvard. At that time and age he was startlingly but indubitably a man still in the prime of life. During his long tenure he had held the distinguished chairs of Story Professor of Law (1910-1913), Carter Professor of Jurisprudence (1913-1917), Dean of the Law School (1916-1936), and University Professor—the first at Harvard—(1936-1947). Hailing his seventy-sixth birthday, a number of outstanding scholars published a *Festschrift—Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound*;³ and saluting his ninety-second birthday, the members of the American Society for Legal History offered to Dean Pound "a garland of laurel" in the form of *Essays in Jurisprudence*, "the spontaneous expression of the affection and esteem in which he is held in the company of scholars throughout the world."⁴

When he withdrew from teaching at Harvard (only a temporary digression for a born teacher, for he later taught at several other universities), he explained that "it is best to retire before people begin wondering why you don't." But this "retirement" merely meant that he would have more time to devote to his scholarly pursuits, such as his treatise on jurisprudence and a plan to reorganize China's judicial system for Chiang Kai-shek.

Before being called to Harvard, Pound had taught at the University of Nebraska, Northwestern University, and the University of Chicago. At the age of twenty-two he was appointed Director of the Botanical Survey of Nebraska, a post he held for about a decade, simultaneously practicing and teaching law during part of the time.

² "Criminal justice," in this paper, is broadly construed to include the practices in juvenile courts, probation, and other aspects in addition to the usual procedures.

³ Edited with an Introduction by P. Sayre (1947).

⁴ R. A. Newman (Ed.) in Preface to *Essays in Jurisprudence in Honor of Roscoe Pound* (1962).

At thirty he was appointed Commissioner of Appeals of the Supreme Court of Nebraska, a post equivalent to a judgeship on that high tribunal;⁵ and at thirty-three he was called to the deanship of the Law Department of the University of Nebraska.

Born on October 27, 1870, in the then still frontier but rapidly developing community of Lincoln in the Territory of Nebraska, the son of Judge Stephen Bosworth and Laura (Biddlecome) Pound, he displayed very unusual gifts early in life. At seventeen he obtained the A.B. degree from the University of Nebraska, where he majored in botany and the classics. A year later he won the A.M. degree.

Pound entered the Harvard Law School at nineteen. Even in those days Harvard Law School students were famous (not to say notorious) for their studiousness, but even among them young Pound was in a class by himself. Who ever heard of a first-year law student diligently studying the Year Books and reading law in several languages while earnestly pursuing the standard curriculum? Yet despite the tremendously heavy schedule he had mapped out for himself, Pound found time for varied diversions. He wrote home enthusiastically but with critical insight about the Shakespearian performances he witnessed—the immortal Edwin Booth and Helena Modjeska in *Hamlet*, *The Merchant of Venice*, and *Much Ado about Nothing*—and about the performances of new Gilbert and Sullivan light operas. He also found time to attend various athletic events, including boat races on the Charles and baseball games.

After spending but one academic year at the Harvard Law School (1889-1890), he was admitted to the bar and embarked, in 1890, on what developed into a very busy law practice. He practiced from 1890 to 1901 and again from 1903 to 1907. In 1897 he received a Ph.D. in botany. His writings in botany are still recognized as outstanding.⁶ Indeed, in 1898, in recognition of his contributions to

⁵ Of this appointment, the *Botanical Gazette* had this to say: "Dr. Roscoe Pound, whose studies on the phytogeography of Nebraska have made him well known as a botanist, has been appointed a member of the new Supreme Court Commission, which is to assist the Supreme Court of Nebraska to clear up its docket. The work of the Court is far in arrears, and the commissioners are *de facto* justices. Dr. Pound is winning laurels in his vocation as well as in his avocation." *Botanical Gazette*, No. 5, May 1901, p. 367. Pound was appointed under Laws of Nebraska, 1901, chs. 25, 331.

⁶ Among his better known contributions are the following: "Symbiosis and Mutualism," *Am. Naturalist* (1893); "The Synchrony, Mucoraceae, and Entomophthoraceae of Nebraska," in *Flora of Nebraska*, Part I (1895); with Dr. F. E. Clements, *The Phytogeography of Nebraska* (1898 enlarged and revised edition, 1900); with Dr. F. E. Clements, "A Method of Determining the Abundance of Secondary Species" (1898); "An Addition to the Parasites of the Human Ear," 22 *Transactions of the American Microscopical Society* 81 (1901); "The Vienna Propositions" (re nomenclature), *Am. Naturalist* (1895).

the plant branch of biology, a genus of fungi ("Roscoepoundia") was dedicated to him by an outstanding botanist.

Much could be said about the astonishing gifts of this modern exemplar of the Renaissance Man. He was a tremendous worker. He was a very rapid reader. His memory was phenomenal. "The secret of my success," he once wrote, "is my blamed memory." It has been said that as a boy in Lincoln he would sometimes disrupt a Sunday school class by rattling off a chapter of the Bible after a single reading. In writing my book on *War Criminals*,⁷ I came across an obscure statement by a little-known German scholar. The reference was not clear. After spending much time trying to find the passage, I dropped into Dean Pound's office and mentioned it. He puckered his brow and finally said, "If you will look at Volume X of [a German journal the title of which I myself do not now remember!], I think you will find it there." And sure enough, I did find it there, although as far as I knew the Dean had never expressed any interest in the problem of war criminals.

Pound had an unusual command of languages. He had been taught Greek, Latin, and German at his mother's knee. He could deliver discourses in French, German, and Italian and could read several other languages as well. He lectured at leading English universities and in Australia, Germany, Italy, Holland, and France.

A handsome man, Dean Pound was well set up and of dignified presence, with a full moustache and hair parted in the middle. He liked to smoke cigars and he enjoyed a social drink. To accomplish what he did, one has to have not only mental gifts of a superb quality but also a rugged physique. The many friends of the Dean can testify to his ruggedness, but his substantial extension of the Biblical "three score and ten" is the best evidence. After his retirement he still used to start the day's scholarly work at 7:00 A.M. Early last winter, looking through the window of my apartment one morning, I saw Dean Pound trudging through a severe snowstorm toward the Law School. When I later dropped in to his office to urge that he wear an overcoat during the inclement weather, I began, "Dean, I saw you this morning around eight o'clock, and you. . . ." That's as far as I got. He broke in with: "Well, I'm sort of getting along in years, you know. You can't expect me to start the day's work at six or seven any more." This from a man of ninety-three! One writer speaks of Pound as "a distance runner physically and a sprinter mentally," and as a man "who in all weathers wears an idea instead of a topcoat."⁸ And

⁷ S. Glueck, *War Criminals: Their Prosecution and Punishment* (1944).

⁸ G. J. Miller, in book review of P. Sayre (Ed.), *Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound*, 1 U. Fla. L. Rev. 116 (1948).

a boyhood acquaintance wrote that Pound "could run a mile in less than five minutes until he was near fifty." However, he had one physical defect: as a boy he contracted measles, and overuse of his eyes during convalescence left him with weak eyes. He constantly wore a green shade.

Candor compels one to record that Pound was given to occasional explosive outbursts of temper, even in class; but his innate kindliness quickly shone through to dispel the temperamental storms.

A man of deep but outgoing religious sense, Pound was more interested in good works than in formal worship. Of Quaker ancestry, he did not actively participate in any traditional church ceremonials. At the age of sixty he joined the Hicksite branch of the Quaker Meeting at Swarthmore.

Twice a widower, Pound unfortunately left no offspring. He became the ever poignant "last leaf on the tree."

Many a person has spoken of Pound's wit and sense of humor. Though of impressive mien, there was nothing pompous or stuffy about him. Despite his well-known tendency to quote Latin and to classify and subclassify the materials of his learned legal disquisitions along Linnaean lines, he rarely missed a chance to season his wide-ranging generalizations with a witty anecdote from Mark Twain, Dickens, Civil War history, or "Misther Dooley" (th' same that dis-civer-red that th' Supr-reme Cour-rt follows th' eliction retur-rns). Addressing a group of psychiatrists, he pointed out that "Many things in law depend on the way those who framed the laws and those for whom they were framed were raised."⁹ He then reminded them of Mark Twain's explanation of the judgment of Solomon: in Solomon's ample household one child more or less was nothing to that lusty monarch! Speaking before a meeting of the National Council of Juvenile Court Judges, Pound voiced opposition to the spread of the Welfare State or, as he preferred to call it, the Service State. He deplored the weakening of "the traditional characteristic American reliance upon individual initiative." He welcomed the resurgence of "American self-reliant individualism" in the cooperation being given the juvenile court by voluntary agencies of social work, the church, and fraternal organizations. "This cooperation of organized religion and organized morality with the law is the more gratifying," he observed, "because if individual, self-reliant, free enterprise has been an American characteristic, *cooperation* has not." He then went on to illustrate this sweeping generalization by an anecdote:

⁹ Pound, "Science and Legal Procedure," 8 Am. J. Psych. 33, 34 (1928).

An incident in the Civil War will make the point. On the first day of the fighting at Spotsylvania, General Warren with the Fifth Corps was trying to push through to Spotsylvania Court House, but was meeting stiff resistance and making little progress. General Sedgwick came up with the Sixth Corps, but the two corps were not working in concert and the attack was at a standstill. General Meade, commanding the army, then rode up and said, "General Warren, I want you and General Sedgwick to cooperate and push the attack." General Warren replied: "General Meade, you take command and tell me and Sedgwick what to do, and we will do it. Or, you put Sedgwick in command and he will tell me what to do and I will do it. Or you put me in command and I will tell him what to do and he will do it, or I'll shoot him. But I'll be damned if I will *cooperate* with anyone."¹⁰

As a young man Pound displayed a talent for seasoning wisdom with wit which stayed with him throughout life. His tongue-in-cheek dissertation, entitled "Dogs and the Law," one of his earliest writings, is so good and so characteristic that I may be pardoned for quoting a rather extensive extract:

It seems that the common law only took notice of a mastiff, hound, spaniel, and tumbler. But those days are long since passed. Today courts are compelled to take notice of all sorts and conditions of dogs and all manner of suits arising from their natural delight in barking and biting. . . . Considering the increasing number of cases in the reports having dogs for their subject-matter or arising out of the doings of dogs, it is somewhat strange, in this age of textbooks, that no one has produced a "compendious treatise" upon the subject. While the profession is waiting for this treatise, I venture a few observations which may be of use to the learned author and serve to help him in filling that portion of his two volumes (there will be two volumes, of course) not taken up by the table of contents and the table of cases cited.

In the first place, a few suggestions as to the title. If possible, the word Jurisprudence should find a place. . . . We have Medical Jurisprudence, Dental Jurisprudence, and other of the sort, and I could never see why an author who thought it worth his while to write on the law pertaining to horses, or on the law applicable to farmers, should omit the opportunity of giving us Equine Jurisprudence and Rural Jurisprudence. But perhaps the latter phrase . . . or any equivalent might be confusing, as suggestive of justices of the peace. 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

¹⁰ Pound, "The Juvenile Court in the New-Time America," *Juv. Ct. Judges J.*, March 1956, p. 85.

Treatise might possibly be compressed into one volume. Commentaries, never!

Next our author will investigate the historical aspects of the subject. He will examine the laws and customs of the Egyptians, he will quote a few passages from the Digest, and, if possible, from the Twelve Tables. *Cave canem* may be cited as a maxim of Roman Law applicable to modern conditions. The barbarous doctrines of the common law which did not make dog-stealing larceny will come in for vigorous invective. . . . We learn from Sir Henry Maine that Canine Jurisprudence had attained such development in old Irish law that a large portion of one of the Brehon Law Tracts is taken up with the law relating to dog-fights and injuries to persons attempting to promote or to put an end to them. . . . The Supreme Court of Indiana, without deciding whether or not dogs are "animals," has ruled that they are "brute creatures and domestic fowls." . . .

Following approved methods of classification, our author will doubtless proceed to consider (1) Rights of Dogs, (2) Duties and Liabilities of Dogs, (3) Duties and Liabilities of Persons dealing with Dogs. . . .

In considering the common law duties of dogs, our author will do well to follow Dr. Watts, whose classification of the propensities of dogs seems to have been confirmed judicially. In this way the duties of dogs may be classified under two heads, (1) to abstain from barking, (2) to abstain from biting. . . . The law appears to recognize a distinction between barking and biting, in that, while biting is always unlawful—at least where the bitee is human—barking is not *malum in se*, but only becomes reprehensible when accompanied by circumstances of aggravation, such as . . . combination and conspiracy . . . or the frightening of a horse, etc.

In discussing the rights and liabilities of persons having to do with dogs, our author will meet with many interesting questions. . . . He will find it laid down that the law has no respect for the characteristics and prejudices of dogs. (*Boulester v. Parsons*, 161 Mass. 182). But this statement must be taken with some qualification, for the same court has held that it is contributory negligence to pull a dog's tail. (*Raymond v. Hodgson*, 161 Mass. 184). On the other hand, it is not contributory negligence to offer candy to a dog, nor to step on a dog in the course of a scuffle with "a third party." (*Lynch v. McNally*, 73 N.Y. 347) (*Fake v. Addicks*, 45 Minn. 37). Nor is it contributory negligence to take a dog by the collar for the purpose of preserving the peace and rescuing a dog "rightfully in the plaintiff's custody." (*Matterson v. Strong*, 159 Mass. 497). But the court wisely suggests that a great deal must depend in such cases on the size and disposition of the dogs. . . .

Many other points might be noticed. But I trust enough has been said to indicate the field which lies open for some industrious author and enterprising publisher. The profession will wait im-

patiently for a Treatise on Canine Jurisprudence. I cannot hope for the honor of a dedication, which will be reserved for some eminent occupant of the bench. May I hope that these suggestions will be rewarded by a presentation copy of the two volumes when issued?¹¹

I must leave to others a great many other stories illustrating Pound's wit, sense of humor, and good fellowship. But this sketch ought not fail to mention his unfailing kindness to students and faculty alike. His former pupils throughout the world recall with gratitude his aid in obtaining scholarships, fellowships, teaching appointments, and other opportunities. I too have reasons to be grateful to him. Years ago, when my wife and I were young graduate students, he was instrumental in making it possible for us to go on a most enjoyable trip abroad so that I could study European police systems; and it was only by accident, much later, that we learned that it was his recommendation that brought this about. Another incident: when certain professors advised, discouragingly, that it was not a very good idea for me to try to write a doctoral dissertation combining law and psychiatry, it was Dean Pound who warmly encouraged me to go ahead. The result was *Mental Disorder and the Criminal Law*,¹² the publication of which led to my appointment at the Harvard Law School. I suspect also that it was through Dean Pound's kindness that I was appointed the first incumbent of the Roscoe Pound Professorship.

Let me close these impressions of Dean Pound with a statement by a distinguished scholar and colleague, the late Professor Zechariah Chafee, Jr., on the occasion of the establishment of the Roscoe Pound Professorship of Law on October 6, 1950, three weeks prior to Dean Pound's eightieth birthday:

Pound the great legal scholar is only part of Pound the man. I have heard him over the drinks quote Sappho in Greek followed by Catullus' translation of the same poem into Latin, or discuss McClellan's Peninsular battles while savoring Liederkranz cheese. . . . Pound is a master in running a men's dinner, occasionally moving each guest to a new seat so he will have a chance to engage in a fresh conversation. His extensive knowledge of botany enabled him to take the place of a government field botanist, who wanted to go off for a honeymoon. . . . Beyond all this he is a grand human being, quick to share in the joys and sorrows of others. Innumerable students received immediate help from him, whether it was getting up at midnight to bail out a man arrested by a policewoman for kissing his girl on Cambridge Common or producing the money to carry a drafted

¹¹ Pound, "Dogs and the Law," 8 Green Bag 172 (1896); 31 Ir. L.T.R. 163 (1897).

¹² S. Glueck, *Mental Disorder and the Criminal Law* (1925, 1927).