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## **Minnesota Reflections on a Century of Change and Stasis: Roscoe Pound's Visit to St. Paul**

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# HAMLIN LAW REVIEW

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**MINNESOTA REFLECTIONS ON A CENTURY OF CHANGE  
AND STASIS: ROSCOE POUND'S VISIT TO ST. PAUL  
AN INTRODUCTION AND ESSAY**

*Jon M. Garon*<sup>1</sup>

"The law is the highest inheritance the sovereign  
people has, for without the law there would be no  
sovereign people and no inheritance."<sup>2</sup>

One hundred years ago, at the Minnesota Capitol in St. Paul, the young Roscoe Pound addressed *The Causes of Popular Dissatisfaction with the Administration of Justice* before the annual convention of the American Bar Association.<sup>3</sup> He summarized that speech by saying:

With law schools that are rivaling the achievements  
of Bologna and of Bourges to promote scientific study of the  
law; with active Bar Associations in every state to revive  
professional feeling and throw off the yoke of  
commercialism; with the passing of the doctrine that politics,  
too, is a mere game to be played for its own sake, we may  
look forward confidently to deliverance from the sporting  
theory of justice; we may look forward to a near future when  
our courts will be swift and certain agents of justice, whose  
decisions will be acquiesced in and respected by all.<sup>4</sup>

A century has passed since Pound leveled his criticism at the legal profession and held out this branch for hope. Through our institutes of legal education, our professional associations and the judiciary, he called for a change to swift and certain justice. Like Luther, Pound nailed his complaints to the door of the ABA, and the ABA listened. Through his simple statement, Pound has arguably transformed justice in America. Pound went on to become dean of Harvard Law School and a seminal voice in the growth of law as a profession in America.

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<sup>1</sup> Dean and Professor of Law, Hamline University School of Law. J.D. Columbia 1988. I would like to thank the many deans and faculty members who have commented on the proposal.

<sup>2</sup> *The Work of Justice*, TIME, May 5, 1958, available at <http://www.time.com/time/magazine/article/0,9171,863304-1,00.html> (quoting Roscoe Pound, 1958 Law Day U.S.A.).

<sup>3</sup> Roscoe Pound, Dean, Harvard Law Sch., *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before the American Bar Association (Aug. 1906), in 35 F.R.D. 273 (June 1964).

<sup>4</sup> *Id.* at 291.

In this symposium issue of the *Hamline Law Review* and the live symposium *A Century Later: Answering Roscoe Pounds Call for Change in the Administration of Justice*, held at Hamline University School of Law April 13, 2007, scholars from Hamline and throughout the country have an opportunity to take another look at how far we have come since that moment and how far we still have to go.

Throughout this symposium issue many of the structural problems of the legal system will be addressed. Student articles on the ethical imperative to improve the profession's responsiveness to our clients' inquiries<sup>5</sup> and changes to professional marketing and advertising<sup>6</sup> highlight both what has changed and what has not. Of course, formal advertising did not exist a century ago, but undoubtedly the informal pecking order was reinforced through the techniques of the day. Through social clubs and a more stratified societal structure, the "Super Lawyers" of the Nineteenth and Twentieth Centuries were promoted, and the concerns of fairness and transparency were as rampant as they are today. I am impressed by Susan Stephan's *Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game*, which applies sophisticated law and economics analysis to problems identified by Pound well before economics had been suborned to serve the law's academic needs.<sup>7</sup> Perhaps even more important are the reflections of Dean Daisy Hurst Floyd in *Lost Opportunity: Legal Education and the Development of Professional Identity* on the implications that Pound's address should have on legal education itself.<sup>8</sup>

The April 13, 2007 symposium and this symposium issue of *Hamline Law Review* are most noteworthy for the diversity of ideas they explore.<sup>9</sup> The breadth highlights the broad canvas on which Roscoe Pound painted his vision of a more perfect profession.

I am honored to add my voice to the authors represented in this journal issue, and I have chosen to focus my opening essay on four concerns raised by Pound on the environment of our judicial administration. In many respects, this series of criticisms could have been presented at any ABA convention in the past century, and the truth of the complaints would have remained self-evident at any time. Nonetheless, despite the lack of change on these topics, the concerns demand ongoing attention.

Pound's first criticism was the "[p]opular lack of interest in justice, which makes jury service a bore and the vindication of right and law

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<sup>5</sup> Stephen E. Schemenauer, *What We Have Here . . . is a Failure . . . to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 *HAMLINE L. REV.* 629 (2007).

<sup>6</sup> Joshua A. Dorothy, *Impervious to Kryptonite: Why Minnesota's "Super Lawyers" Can Continue Advertising*, 30 *HAMLINE L. REV.* 683 (2007).

<sup>7</sup> Susan Hayes Stephan, *Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game*, 30 *HAMLINE L. REV.* 587 (2007).

<sup>8</sup> Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 *HAMLINE L. REV.* 555 (2007).

<sup>9</sup> See *supra* notes 5-8 and *infra* notes 32-33 and accompanying text.

secondary to the trouble and expense involved.”<sup>10</sup> Pound further noted that “the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents.”<sup>11</sup>

Today, the lack of popular interest in justice could be reversed from the prior century – if we can accept that Court TV, Judge Judy, and former judges serving as shock-hosts on CNN, Fox and other cable television networks inform the public in a meaningful and representative manner. Public interest in attack journalism, of course, is not the same as public interest in justice, since an understanding of justice requires context, contemplation, and shared values. Instead, the media sensationalize the issues, ignore the detail essential to effective administration, and profit on human suffering to sell advertising time.

Pound described this part of the problem as “public ignorance of the real workings of courts due to ignorant and sensational reports in the press.”<sup>12</sup> A century later, we are probably just one click away from “YouTube Court,” where civil disputes will be heard over the Internet, a public jury will blog its deliberations, and the outcome will be determined by a twelve-minute instant poll. With downloadable filings, pop-up evidence windows, and instant-message cross examination, some blog-pundits might even suggest that this will enhance the delivery of justice because it increases visibility of court activities.

This version of engagement is not what Pound identified as our need in society. Instead we need to make participation in the judicial process (as well as the electoral process) a core obligation of our nation’s citizens, rather than a chore to be avoided. We need to inform the public regarding the true nature of the judicial controversies, not merely the salacious facts that increase viewership and web hits.

Second, Pound lamented “the strain put upon law in that it has today to do the work of morals also.”<sup>13</sup> Pound’s emphasis is on the transition from a society rigidly bound by notions of hidebound religious doctrine to one struggling without a common core value.

Law is the skeleton of social order. It must be “clothed upon by the flesh and blood of morality.” The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious.<sup>14</sup>

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<sup>10</sup> Pound, *supra* note 3, at 290.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Again, the description could be applied to the twenty-first century. The law cannot be expected to replace morality. Controversies surrounding issues such as gay marriage can be reflected in law but they should not be debated there or legislated there.<sup>15</sup> Not only would Pound have decried the Massachusetts Supreme Judicial Court decision declaring same-sex marriage constitutionally protected, but he would have also objected to unenforceable legislative bans on such relationships.<sup>16</sup> The Law – particularly the procedural rules of the game – should not be used to distort the public debate. Instead the moral center must be established by consensus after robust, but respectful discourse. We differ from the America of a century ago in that we recognize how long it has been since moral and supernatural sanctions united our culture, but we are more fragmented and less in concert than in 1906.

Nonetheless, law cannot be neutral regarding justice. Courts cannot shy away from the great controversies before them. But neither do they serve the public when they artificially adjust public debate on fundamental topics of morality. Pound reflects this tension regarding the “supremacy of law.”

By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics, and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation.<sup>17</sup>

When courts are entangled in these political questions, neither the judiciary nor the public is benefited. The modern parlance of “judicial activism” tries to invoke this same criticism, that judges do not benefit the parties or society when they accept the invitation of private litigants to legislate from the bench. But judicial restraint has no ideology; it applies equally to judicial attempts to commune with the inner thoughts of the founding founders<sup>18</sup> as it does to the appearance of Christmas Trees in

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<sup>15</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>16</sup> See *Defense of Marriage Act*, 28 U.S.C. § 1738C (2005).

<sup>17</sup> Pound, *supra* note 3, at 282-83.

<sup>18</sup> *E.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); *Locke v. Davey*, 540 U.S. 712 (2004); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

municipal buildings,<sup>19</sup> the appellations “San” and “Santa” from all municipalities or religious iconography in city seals.<sup>20</sup>

Third, Pound recognized that the corollary of judicial legislating is the desire by politicians to control the courts. “Putting courts into politics and compelling judges to become politicians, in many jurisdictions, has almost destroyed the traditional respect for the Bench.”<sup>21</sup> Not only have judicial elections continued as part of our political landscape, but *Republican Party of Minnesota v. White*<sup>22</sup> now expands this role by enabling candidates to take political positions,<sup>23</sup> as well as allowing party endorsement and direct financial solicitation.<sup>24</sup> Through these cases, the Minnesota Republican Party and others successfully sued to remove the prohibition on judicial candidates from taking public positions on issues that might come before the court.<sup>25</sup>

Indeed, it would be ironic if consequences were not so troubling. The present Court has lost heed of Pound’s seminal voice, interjecting both politics into the judiciary and the judiciary into politics.<sup>26</sup> The Supreme Court even noted that Minnesota’s judicial elections changed from partisan to nonpartisan in 1912,<sup>27</sup> shortly after Pound made his call for change. Without heeding Pound’s voice of concern, the Supreme Court returned to the status which existed prior to Pound’s seminal call for change.

Finally, Pound decried “the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee.”<sup>28</sup> What does it suggest that Pound chastised the American Bar Association for this failure one hundred years ago? Perhaps the ideals for which we strive have always been aspirations, standards that were never really met by the generations before us. But if we are struggling to merely approach these standards, then how much more damage will be caused by the

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<sup>19</sup> *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 616 (1989) (“The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas.”).

<sup>20</sup> A variety of challenges have been made to religious endorsement. I do not believe “St.” has been challenged in the name of the Minnesota state capital. *E.g.*, *Friedman v. Bd. of County Comm’rs of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (county seal); *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (cross in city seal); *Harris v. City of Zion, Lake County*, 927 F.2d 1401 (7th Cir. 1991) (cross in city seal). *Cf.* *King v. Richmond County*, 331 F.3d 1271, 1284 (11th Cir. 2003) (Ten Commandments acceptable in seal when not legible).

<sup>21</sup> Pound, *supra* note 3, at 290

<sup>22</sup> 536 U.S. 765 (2004).

<sup>23</sup> *Republican Party of Minn. v. White*, 416 F.3d 738, 788 (8th Cir. 2005), *cert. denied*, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006).

<sup>24</sup> *Id.*

<sup>25</sup> The so-called “announce clause” provided that candidate for a judicial office, including an incumbent judge, shall not announce his or her views on disputed legal or political issues. *Id.* at 758.

<sup>26</sup> *Cf. Gore v. Bush*, 531 U.S. 98 (2000).

<sup>27</sup> *Republican Party of Minn.*, 416 F.3d at 768.

<sup>28</sup> Pound, *supra* note 3, at 273.

gargantuan size of some law firms, the global trade in legal services, and the erosion of the attorney-client relationship? The economics of law does not bode well to reverse this trend. The cost of legal education continues to rise, the access to affordable legal representation for the middle class continues to decline, and the public is turning to software packages for tax, estate planning, and other legal services.

Moreover, technology creates an imperative to provide instant answers to clients. The communication speeds have accelerated at the pace of Moore's law, transitioning from mail delivery to fax machines, to e-mails, to instant messages. Constant, real-time communication with clients cannot allow for careful review of the advice provided. Virtual private networks tying lawyers and clients into shared computer networks reshape the relationship between lawyer and client without the opportunity to engage in a reflective or structured analysis of what this relationship should mean to professional obligations, the lawyer's independence, or the client's needs.

Nonetheless, it may be that the present landscape and the landscape of the prior century look alike again, without assuming that there has been no change. The Model Rules of Professional Conduct, state accreditation standards, a high quality of legal education throughout virtually all the ABA-approved law schools, a national Inns of Court network and many other efforts have been made to improve the profession or incorporate professionalism into the new landscape before us.

Perhaps the next challenge will be to assure that the ideals of professionalism and an embrace for the lawyer's relationship with the client are inculcated into the technological innovation and globalization. Lawyering will not look the same one hundred years hence, but we can work to assure that the canons of ethics are included in the interactions with lawyer and client regardless of the speed with which they take place or where the lawyers are situated. Lawyers in India or China working on U.S. client matters should not only be held to the U.S. professional standards, but also given the concomitant level of training on these ethics and the obligations they impose.

It could require that we move another step beyond what is accepted today. For example, we hold ourselves to a value of *pro bono publico*, or "for the public good." The Latin does not require that the good works be voluntary, and a voluntary obligation may some day be insufficient to meet our obligation to serve the public good. If we lawyers were compelled to provide mandatory *pro bono*, would the profession romanticize the start of the twenty-first century as better because the service was voluntary or will our successors view us as unenlightened because we valued our autonomy more than our duty?

The only valid prediction I can make is that the nature of the debate on our profession being held in 2056 is beyond my contemplation. I am reminded, however, of the biblical passages in Deuteronomy. God first describes a nation in which there will be no needy among the Jewish



people,<sup>29</sup> and yet within the same chapter states “the poor shall never cease out of the land; therefore . . . open thy hand unto thy poor and needy brother, in thy land.”<sup>30</sup> In the same way, I look forward to a day when lawyers are not necessary because men have indeed become angels. I hope for a day when our voluntary adherence to our professional ideals creates an excess of legal services for the public. And I have sufficient confidence in the quality of our profession and the members who will join us in the next century, so I do not fear for our ability to meet the challenges set forth by Pound to improve the profession.

At the half-way point in the centenary, Pound, then Dean Emeritus of Harvard Law School, tracked the transformation in the law, making “the careful distinction between Law and laws. Says he: ‘The vital, the enduring part of the law is in principles - starting points for reasoning - not in rules. Principles remain relatively constant or develop along constant lines. Rules have relatively short lives. They do not develop; they are repealed and are superseded by other rules.’”<sup>31</sup>

The principles identified by Pound have endured. As well illustrated by the articles in this volume, his emphasis on the elimination of the sport of arcane procedure led to the adoption of the modern Rules of Civil Procedure, the professional code of ethics, and leadership in legal education at Harvard that have served to shape the modern legal landscape. Despite suggestions incorporated in this volume, a public advocate should not place his or her clients or the courts into service merely to achieve the lawyer’s professed agenda.<sup>32</sup> We are servant leaders who owe a duty to further our client’s needs. Pound would have decried the notion that lawyers use the prosecution of legal claims to further the lawyer’s public agenda.

Similarly, Pound would likely have rejected the notion that we need “schools of justice” rather than “schools of law” as suggested by Professor Peter L. Davis.<sup>33</sup> Such a prediction is based, in part, on Dean Pound’s profound impact on the shape of modern legal education from his vantage as Harvard’s dean. As Pound predicted the improvement in justice, “our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.”<sup>34</sup> Dean Floyd points this out by qualifying her thoughtful analysis: “I am not arguing for *ad hoc* substitution of individual ethics for law. History is replete with examples of the harm

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<sup>29</sup> “[T]here shall be no needy among you – for the Lord will surely bless thee in the land which the Lord thy God giveth thee for an inheritance to possess it – if only thou diligently hearken unto the voice of the Lord thy God, to observe to do all this commandment which I command thee this day.” *Deuteronomy* 15:4-5 (Jewish Pub. Soc. 1917).

<sup>30</sup> *Deuteronomy* 15:11 (Jewish Pub. Soc. 1917) (internal quotations omitted).

<sup>31</sup> *The Work of Justice*, *supra* note 1.

<sup>32</sup> *But see* Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to be Competent in Public Advocacy*, 30 *HAMLIN L. REV.* 567 (2007).

<sup>33</sup> *See* Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 *HAMLIN L. REV.* 513 (2007).

<sup>34</sup> Pound, *supra* note 3, at 291.

that such an approach can cause, and I agree with Pound that the law appropriately represents communal values developed over many years.”<sup>35</sup>

This is not to suggest that justice is not the ultimate ideal to be pursued. But such a principle is about the fairness and impartiality of decisions, the legitimacy of the judiciary and the refusal to subvert the most accurate outcome of a matter regardless of the plight of the parties.<sup>36</sup>

This justice is taught throughout every aspect of legal education. Translating justice into notions of social equity and fairness are goals Pound feared and resisted because these changes are precisely the mercurial laws that change with the political wind and should be avoided.<sup>37</sup> Does legal education undermine these ideal? Dean Floyd raises the question well. “Perhaps in our zeal to teach lawyers impartiality and fairness, however, we have gone too far and have instead taught that individual moral and ethical values are always irrelevant to one’s work as a lawyer or jurist.”<sup>38</sup> Neither Pound’s words nor his legacy would encourage us to lose sight of our communal moral and ethical values. From the range of ideas incorporated into this symposium issue, we may be able to build upon those normative values and be better informed by using the framework Pound created when he mounted the steps of the St. Paul capitol building.

Pound’s societal challenges remain before us. We must continue to educate the public regarding the value of the judiciary as an independent branch of government, holding it accountable based on its integrity and not by political standards of the day. We can, however, hold it responsible if its members dally with politics and threaten its independence. We must guard against the ever-increasing trend to sensationalize what occurs by journalists. Interestingly, this may mean providing greater access to the public so that the courts can reduce the reliance on reporters to serve as mediators of the activities of the court. However this is achieved, the public can only be served by accurate and complete information about the ongoing activities of the courts rather than the fictionalized or sensationalized versions more commonly presented.

Finally, we must empower the courts to say no to those cases which strain the fabric of society under the shield of private dispute. Again, we can achieve this result only through education. If both sides to a debate recognize that any judicial opinion will serve to distract from the underlying social issue, perhaps the parties will realize that the courts are not the venue in which to spend resources. Pyrrhic victories are expensive and distracting.

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<sup>35</sup> Floyd, *supra* note 8, at 559.

<sup>36</sup> See *Deuteronomy* 16:18–20. “You shall not judge unfairly; you shall show no partiality; you shall not take bribes, for bribes blind the eyes of the discerning and upset the plea of the just. Justice, justice shall you pursue, that you may thrive and occupy the land that Adonai your God is giving you.” *Id.*

<sup>37</sup> *The Work of Justice*, *supra* note 2.

<sup>38</sup> Floyd, *supra* note 8, at 559.

Like Pound, I have confidence in our legal education and our citizens to believe that the values of the judiciary and the profession will continue to flourish, despite the many challenges. I second his wish that “we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.”<sup>39</sup>

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<sup>39</sup> Pound, *supra* note 3, at 291.