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Randall T. Shepard
Indiana Supreme Court

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Introduction: The Hundred-Year Run of Roscoe Pound

RANDALL T. SHEPARD*

The conscious mind of most Americans recalls but a handful of powerful speeches. Short as the list is, these addresses are part of the nation's common lexicon: Abraham Lincoln recalling "four score and seven years ago" at Gettysburg; Franklin Delano Roosevelt imparting "a date which will live in infamy"; Martin Luther King's ringing "I Have a Dream"; and, John F. Kennedy imploring us to "ask not what your country can do for you, ask what you can do for your country." Beyond these standouts, the balance of American oratory is largely the province of the history cognoscenti.

If there is any address of equivalent esteem in the world of lawyers and judges, it is Roscoe Pound's speech to the American Bar Association meeting in 1906. This speech, titled "The Causes of Popular Dissatisfaction with the Administration of Justice,"¹ may stand alone in history.² Simply put, Pound's address caught the imagination of the legal profession and provoked decades of reform.

Modern readers returning to Pound's text sometimes react to the renewed encounter by focusing on the structure of his remarks. Many questions emerge: How many "main points" are there? Is there a discernible outline that might provide a clue to his broader object?

A judge who lingers over Pound's speech may be struck by his stark recitation of a long history of public discontent about the administration of justice. So much of the history he mentions seems specially aimed at judges. He lifts up the words from the "Mirror of Justices," which laments that the state of society has fallen to so low a point that judges are no longer being executed for corrupt or illegal decisions.³ Pound recalls that King James I (chiefly remembered for commissioning the elegant work of the 1611 Bible) declared to his judges that "'the law was founded upon reason, and that he and others had reason as well as the judges.'"⁴ Later, Pound recites the common,

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2. Credible sources have urged that a prominent plea on judicial independence warrants equivocal rank. See Rufus Choate, Speech at the 1853 Massachusetts Constitutional Convention, in 17 J. AM. JUDICATURE SOC'Y 10, 10-20 (1933) ("The establishment of the tenure of good behavior was a triumph of liberty. It was a triumph of popular liberty against the crown.") (emphasis in original).


4. Id. (quoting a conference between King James I and the Judges of England, Prohibitions del Roy (1608), 77 Eng. Rep. 1342, 1343, 12 Co. Rep. 63, 65 (K.B.)). King James I was thus a predecessor to President George W. Bush and several other chief executives in asserting the right to create legislative and constitutional history through issuing statements accompanying their signatures to acts of Congress. The American Bar Association seems more concerned with statements by President Bush than it was with statements by his predecessors. See TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N, RECOMMENDATION AND REPORT 5 (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf ("To be
eighteenth-century complaint that judges are no more than "'legal monks, utterly ignorant of human nature and of the affairs of men.'"\(^5\) If law, designed to promote justice, peace, and stability, has in fact functioned at such depths for so long, one wonders how it has managed still to play so central a role in society.

Of course, the weight of the address is not history, it is prescription. Today's readers of Pound cannot help but notice how many of his points are still matters on which we toil a century later, though we carry on the modern debate with a different vocabulary. Pound observes, for example, that public dissatisfaction derives in part from a widespread belief that "justice is an easy task, to which anyone is competent."\(^6\) Although individuals can readily ascertain what they perceive to be "just" and therefore "easy to do" in a particular situation, rarely will that definition of "just" extend beyond the parties involved in the immediate dispute.

Concerns of precedent and policy are usually not in the forefront of an aggrieved claimant's mind. In any event, Pound's reflections on this subject represent an antecedent to twenty-first century discussions regarding misconceptions the American people have about courts. Their beliefs are affected by the excesses of popular television drama and by fake "judges" who seem to be long on harangue and short on legal knowledge. Would Pound think it was good news or bad news that Americans file complaints about such charlatans with judicial disciplinary commissions?\(^7\)

In another example, Pound points to complaints about "contentious procedure," so common in American courts of the era.\(^8\) This was in some ways a call to simplicity, and it eventually led to the adoption of the Federal Rules of Civil Procedure in 1938.\(^9\) At the present moment, the professionals and public alike regularly lament the complexity


\(^6\) Id. at 445.

\(^7\) Mike Farrell, member of the California Judicial Performance Commission, noted: "[T]he public regularly submits complaints about Judge Judy and other TV judges to the state Commission on Judicial Performance. Obviously, many people don't understand that Judge Judy and most of her cohorts are not current members of any judiciary.... [T]o preside in TV courts, you don't even have to be a lawyer." Mike Farrell, Editorial, There's Disorder in the Court—and Television Stands Accused, L.A. TIMES, May 31, 2000, at B9, available at http://www.mikefarrell.org/publications/disorder.html.

\(^8\) Pound, supra note 1, at 447.

\(^9\) See ARTHUR T. VANDERBILT, THE CHALLENGE OF LAW REFORM 6–8 (1955). These rules ultimately became widespread in state court systems as well, though it took time. An early leader of this effort was Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court, who began to standardize judicial procedure throughout the state by creating rules based on the Federal Rules of Civil Procedure, thereby simplifying procedure, "so that technicalities and surprise may be avoided, and so that procedure may become a means of achieving justice rather than an end in itself." Id. at 10; see also G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION (1988) ("If you want to see the common law in all its picturesque formality, with its fictions and its fads, its delays and uncertainties, the place to look for them is not London, not in the Modern Gothic of the Law Courts in the Strand, but in New Jersey. Dickens, or any other law-reformer of a century ago, would feel more at home in Trenton than in London.") (quoting DENIS W. BROGAN, THE ENGLISH PEOPLE: IMPRESSIONS AND OBSERVATIONS 108 (1943)).
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and cost of litigation. Derivative of the public’s belief that justice is an easy concept, the public finds both high cost and complex litigation both unnecessary and unjust. In any event, righteous complaints about such matters have created an environment conducive to reform. That environment has supplied support for improving alternative dispute resolution and launching problem-solving courts, where aberrant behavior is altered, not merely litigated. Alternative dispute resolution and problem-solving courts step away from formulaic procedure to allow easier collaboration between judges, lawyers, and most importantly, the public in the search for just outcomes.

So many of Pound’s enumerated “causes of dissatisfaction” remain a source of today’s dialogue about the legal system. It thus seemed only natural to focus on the effectiveness of our modern efforts on these topics during the remarkable gathering that occurred in Indiana on the occasion of the hundredth anniversary of Pound’s address. The Conference of Chief Justices and the Conference of State Court

10. State and federal courts exercise little oversight of arbitration, for example, so as to promote the policy favoring arbitrations and the parties’ expectations. See, e.g., Brown v. Pac. Life Ins. Co., 462 F.3d 384, 392 n.5 (5th Cir. 2006) (“It appears inconsistent with the policy favoring expeditious arbitration to permit immediate appeals of arbitration orders where the underlying litigation is filed in state court and is not removable. . . . [T]ying the parties down in continued litigation of the issue and swelling the cost—in time, effort, and money—of resolving the dispute . . . is wholly at war with the purpose of arbitration . . . .”); In re T.B.H., 188 S.W.3d 312, 314 (Tex. App. 2006) (“Because the policy in Texas is to accord great deference to arbitration awards, scrutiny of these awards should focus on the integrity of the arbitration process, not on the propriety of the result.”).

11. The president of the Indiana State Bar Association recently outlined these efforts as follows:

Problem solving courts were created by criminal justice system officials who were dissatisfied with the traditional role of the courts in determining guilt and sentencing those convicted to prison. Inmates were not being rehabilitated in prison . . . . These alternative courts have taken many forms, including community courts, mental health courts, and drug courts.

Indiana’s drug courts were started when innovative, energetic judges decided to focus criminal justice system resources, including the judge, the prosecutor, the public defender and social service agencies, on intervening to address the substantial needs of nonviolent offenders addicted to drugs and/or alcohol.

Anecdotal reports of successful results from the drug courts are very encouraging.

James W. Riley, Jr., Indiana’s Problem Solving Courts Are Succeeding, RES GESTAE, Apr. 2006, at 5, 5.

12. For the reader unfamiliar with the organization:

The Conference of Chief Justices (CCJ) was founded in 1949 to provide an opportunity for the highest judicial officers of the states to meet and discuss matters of importance in improving the administration of justice, rules and methods of procedure, and the organization and operation of state courts and judicial systems, and to make recommendations and bring about improvements on such matters.

Membership in the Conference of Chief Justices consists of the highest judicial officer of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of American Samoa, Guam and the Virgin Islands.
Administrators held their annual convention in Indianapolis in late July and early August 2006. It was the first such meeting held in Indiana since these summits began more than a half century ago. During a two-day symposium, court leaders, leading academics, and practitioners examined the modern dilemmas lawyers and judges confront. Most of their observations are reflected in pieces published here.

Many thanks to the editors of the Indiana Law Journal for helping expand the audience for these deliberations. The winners will surely be our fellow citizens, who rightly expect that we will do all that lies within us to assure substantial justice.


13. For the reader unfamiliar with the organization:

The Conference of State Court Administrators (COSCA), established in 1955, is dedicated to the improvement of state court systems. Its membership consists of the state court administrator or equivalent official in each of the fifty states, the District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the Virgin Islands.