

BYU Law Review

Volume 1981 | Issue 3

Article 12

9-1-1981

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Rex E. Lee

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Recommended Citation

Rex E. Lee, *The Profession Looks at Itself-The Pound Conference of 1976*, 1981 BYU L. Rev. 737 (1981).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1981/iss3/12>

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The Profession Looks at Itself—The Pound Conference of 1976

*Rex E. Lee**

Occasionally, something that a law professor says makes a difference. Perhaps the most notable such contribution occurred on August 29, 1906, in the Minnesota State Capitol Building in St. Paul.

The occasion was the 29th Annual Meeting of the American Bar Association, where a group of 374 members (out of a then total ABA membership of some 5,000) had gathered. The speaker for the evening was the young dean of the University of Nebraska Law School, Roscoe Pound. The title of his paper was "The Causes of Popular Dissatisfaction with the Administration of Justice."¹ The ABA delegates, who at the time represented a fairly narrow cross-section of the conservative elite of American lawyers, heard the young man from Nebraska assert such propositions as "[O]ur system of courts is archaic";² "[The court's] time is frittered away on mere points of legal etiquette";³ and "[T]he lack of general ideas or legal philosophy . . . gives us petty tinkering where comprehensive reform is needed."⁴

On that summer evening of 1906, Pound's speech drew a mixed reaction. Everett Wheeler of New York made a motion that 4,000 copies of the address be printed and circulated to members of the Association and the United States House and Senate Judiciary Committees. Another New Yorker, James Andrews, took a less favorable view. He declared that the American judicial system, far from being archaic, "is the most refined and

* Solicitor General of the United States. Former Dean, J. Reuben Clark Law School, Brigham Young University (presently on leave as Professor of Law). B.A., 1960, Brigham Young University; J.D., 1963, University of Chicago. Assistant United States Attorney General, May 1975-January 1977.

1. Address by Roscoe Pound, Annual Meeting of the American Bar Association (Aug. 29, 1906), reprinted in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 337 app. B (A. Levin & R. Wheeler eds. 1979) [hereinafter cited as Address by Roscoe Pound].

2. *Id.* at 347.

3. *Id.* at 351.

4. *Id.* at 343.

scientific system ever devised by the wit of man," and that Pound's attack was "too unconscionable to discuss." Mr. Spoons of Texas further declared that the Pound address was an attempt "to destroy that which the wisdom of centuries had built up."

Seventy years after that 1906 address, considered by at least some to be "the most influential paper ever written by an American legal scholar,"⁵ some 270 persons gathered in the same room where Pound had spoken. They were participants in a conference that would consider current problems of American judicial administration and chart a course for improvement by the turn of the century. The theme of the conference was taken from the title of Pound's earlier speech, and frequent reference was made to it. For three days the conferees heard the views of leaders of the profession and held discussions concerning the American judicial system and the best ways to improve that system. The formal proceedings of the conference (with the exception of the small group discussion sessions) are collected in a volume entitled *The Pound Conference: Perspectives on Justice in the Future*. The volume also contains a report of the follow-up task force.

From one perspective, a comparison of Pound's 1906 address with the proceedings of the Pound Conference seven decades later is cause for pessimism. The comparison reveals that, while change has occurred, some of the changes have become the new targets of reform—that our system's response to some of the things criticized by Pound three quarters of a century ago are now the very things of which the Pound Conference participants complained. Pound asserted, for example, that one of the five "causes [of dissatisfaction] lying in our peculiar legal system" was the "conflict between the individualist spirit of the common law and the collectivist spirit of the present age."⁶ He criticized our system's unremitting retention of the individualist spirit and explained his position as follows:

From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers is

5. Gossett, Segal & Smith, *Foreword* to *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* at 7 (A. Levin & R. Wheeler eds. 1979).

6. Address by Roscoe Pound, *supra* note 1, at 343.

mandamus or injunction by a tax payer to prevent waste of the proceeds of taxation. . . . Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. . . . In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. . . . Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates.⁷

A significant departure from this "individualist spirit of the common law" is represented by the modern class action, which was, nevertheless, one of the targets of some of the 1976 conferees.⁸

An even more pervasive theme of Pound's 1906 speech was his plea for "deliverance from the sporting theory of justice."⁹ He asserted that "[t]he sporting theory of justice, the 'instinct of giving the game fair play,' as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet."¹⁰ The result, in his view, was that "in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference."¹¹ The extent to which the public interest is served by judges becoming more involved in the game was also a substantial focus of the 1976 Conference, with specific references being made to the roles played by Judge Johnson in litigation involving the Alabama prison system, and Judge Lord in the broad spectrum of antibiotic cases. There was disagreement, however, over whether such judicial activism was good or bad.¹²

The effect of the Pound Revisited Conference—like the effect of the 1906 speech which inspired it—cannot be adequately assessed until some decades after the event. At the very least, it was a noble effort that is bound to have some positive effects.

7. *Id.*

8. The most vigorous critic of class actions was Francis R. Kirkham of the San Francisco Bar. *Id.* at 214-17. See also remarks of Judge (later to become Solicitor General) Wade H. McCree, Jr., *id.* at 221, Kirkham's response, *id.* at 234, and Report of the Follow-up Task Force, *id.* at 304.

9. Address by Roscoe Pound, *supra* note 1, at 353.

10. *Id.* at 344.

11. *Id.*

12. Compare the views, for example, of Messrs. Halpern and Kirkham. *Id.* at 229, 235, 237.

The formal papers contained in the report of the proceedings are the product of some of our profession's most thoughtful observers. Most of the major topics discussed—diversity jurisdiction, jury trial, and alternative forums for resolution of some kinds of disputes—are controversial subjects, and some of the disagreement appears in the report of the Conference. These are subjects that warrant the continuing attention of the profession, and if nothing else, the Conference had merit in that it focused major attention on important problems. It is perhaps significant that most of the task force recommendations called for further study rather than specific change.

The opening sentences of Pound's 1906 address stated, "Dissatisfaction with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree."¹³ The prediction that the pedigree will remain unbroken would seem a perfectly safe one. As long as there is a judicial system, it will be attended by discontent. But the inevitability of discontent is no reason not to worry over its causes. Toward that end, the Pound Revisited Conference stands as a commendable effort.

13. Address by Roscoe Pound, *supra* note 1, at 337.