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"Administration of Justice Is Archaic"-The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions

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"Administration of Justice Is Archaic"—The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions

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Note: This is a heavily edited and partially reorganized version of the CCJ/COSCA panel on "The Rise of Modern Court Administration." In it, Sue Dosal and Mary McQueen assess three changes advocated by Pound in respect to the organization of courts, based on their experiences as state court administrators in Minnesota and Washington, and their familiarity with court administration in other states. Russell Wheeler introduced the session, posed the questions, and was primarily responsible for editing, annotating, and partially reorganizing the panel transcript, which Dosal and McQueen edited as well.

INTRODUCTION: POUND AND HIS TIMES

MR. WHEELER: According to two court scholars, Roscoe Pound in his 1906 speech[1] "initiated the agenda of court unification."[2] In fact, though, it is likely that even had Pound not been invited to St. Paul in late August of 1906, the propositions associated with his address would have come to dominate the last century's court reform movement. Pound's diagnoses and prescriptions were part of the Progressive Era approach to governmental reorganization in general and judicial system reorganization in particular, an approach that dominated court reorganization efforts through much of the twentieth century.

Progressives sought to reshape United States public and private institutions that seemed unable to cope with the waves of immigration, urbanization, and industrialization that transformed the United States in the decades after the Civil War. Progressives were committed to simplicity, unification, "business-like" methods, and the use of the "efficiency experts" that Frederick W. Taylor described in 1911 in *The Principles of Scientific Management.*[3] The movement was hardly a monolith; different strands were represented by Theodore Roosevelt, who sought to win back the presidency in 1912 on the Progressive Party ticket; William Howard Taft, the

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1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906).

2. DAVID B. ROTTMAN & WILLIAM E. HEWITT, TRIAL COURT STRUCTURE AND PERFORMANCE: A CONTEMPORARY REAPPRAISAL 5 (1996).

3. FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (Norton 1967) (1911).

incumbent Republican whose re-election Roosevelt helped thwart; and Democrat Woodrow Wilson, the victor in 1912. Pound himself remained a Republican throughout the period, although he "became attracted to the moderate progressive wing of the Republican Party in the early 1900s."[4] As N.E.H. Hull put it, the progressivism to Pound's "liking . . . was elitist, was pro-business, recognized the value of expertise, and was supported by some members of the legal fraternity."[5] It was not the progressivism that called for the election of judges and recall of judicial decisions, favored by some who wanted to provide more "popular" control in order to decrease "popular dissatisfaction" with the courts.

In the judicial area, Progressives confronted an uneven terrain of specialized state and local courts—including juvenile courts, traffic courts, municipal courts, and small claims courts—all testimony to the truth of Robert Tobin's observation that "Americans have rarely been content with courts of general jurisdiction."[6] These courts, moreover, were dependent for funding on the localities that created them and were often the province of locally elected judges and clerks.

Progressives wanted to change all of that, and more. As we discuss below, part of the remedy they sought was (1) consolidation of disparate local trial courts, as well as all the appellate courts, into one single, state-wide court with divisions; (2) vesting superintending authority over the single, state-wide court in the chief justice; and (3) organizing the administrative personnel of the court under the control of judges, with a mandate to gather and analyze quantitative information about how the courts perform.

Obviously, the unified judiciaries that Progressives advocated did not come to pass, certainly not in the early twentieth century and never in the specific, one-court form they advocated. Resistance to their proposals was intense in the early twentieth century. Dean Wigmore's eyewitness account of the floor debate in St. Paul after Pound's 1906 address reveals the resistance with which the established bar greeted Pound's proposals. One commentator on the floor promised to "'show the *contrary of every one of the material positions taken in the paper*,'" and defended contemporary legal procedure as "'the *most refined and scientific system ever devised by the wit of man*.'"[7]

However, Progressive Movement judicial reform principles—unification, clear lines of authority, and administrative control—were embodied in the court organization pronouncements and standards that have represented the conventional wisdom of court administration for much of the century. In 1909, a special ABA committee appointed in the wake of Pound's address (a committee on which Pound served) recommended:

> The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court

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4. N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 62 (1997).

5. *Id.* at 62–63.

6. ROBERT W. TOBIN, CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM 54 (1999).

7. John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUDICATURE SOC'Y 176, 177 (1937) (emphasis in original).

> should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work . . . .[8]

The ABA did not adopt this report,[9] but the American Judicature Society said the report was where "the conception of the unified state court system first received adequate expression."[10] (That would seem to belie Dean Wigmore's 1936 claim that "[f]or many ensuing years the St. Paul speech was the catechism for all progressive-minded lawyers and judges."[11] Similarly, Felix Frankfurter and James Landis, in their ground-breaking study of federal jurisdiction, hailed the 1909 report for "giv[ing] the lead to all contemporary movements for judicial reform."[12] They gave Pound's speech only a brief prefatory reference.)

Progressive Movement themes continued to dominate even after the Movement itself had faded. The ABA's first set of court organization standards, approved in 1938, called "in each state for a unified judicial system with power and responsibility in one of the judges to assign judges to judicial service so as to relieve congestion of dockets and utilize the available judges to the best advantage."[13] The ABA adopted subsequent, similar versions, often referred to as the Vanderbilt Standards because of the advocacy of New York Law School Dean and later New Jersey Chief Justice Arthur Vanderbilt.[14] More recent versions of the ABA court organization standards still advocate "a court system that is unified in its structure and administration," although no longer insisting on a single court.[15] The 1990 standards propose a "simple" structure: "a trial court and an appellate court, each having divisions and departments as needed."[16] Reflecting post-Progressive Era social science,[17] the 1990 standards place less emphasis on

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8. Am. Judicature Soc'y, *The State-Wide Judicature Act*, 1 J. AM. JUDICATURE SOC'Y 101, 101 (1917) (quoting *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 34 A.B.A. REP. 578, 589 (1909)).

9. *Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, *supra* note 8, at 587–602.

10. Am. Judicature Soc'y, *supra* note 8, at 101.

11. Wigmore, *supra* note 7, at 178.

12. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 223 (1927). For a more extended analysis of the apparently limited impact of the 1906 address, see Russell Wheeler, *Roscoe Pound and the Evolution of Judicial Administration*, 48 S. TEX. L. REV. 943, 944–949 (2007).

13. NAT'L CONFERENCE OF JUDICIAL COUNCILS, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 29 (Arthur T. Vanderbilt ed., 1949).

14. Vanderbilt's MINIMUM STANDARDS volume, NAT'L CONFERENCE OF JUDICIAL COUNCILS, *supra* note 13, contains iterations of this court organization and other standards in the 1940s.

15. 1 JUDICIAL ADMIN. DIV., AM. BAR ASS'N, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION § 1.10 (1990).

16. *Id.*

17. *See, e.g.*, Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35 (1976) (criticizing the conventional hierarchical structure of judicial administration and advocating a more dynamic approach).

"control" and more on participation: "All judges throughout the system should have a voice in policymaking through their chief judges, committee work, and other means."[18]

Pound and his 1906 address, though, deserve their due. Although his St. Paul indictment was but one of the Progressive Era's call for change, it gave a particular voice to the era's prescriptions for the judicial branch. Three propositions that Pound offered are especially linked to the "rise of modern court administration." For those propositions, we turn only partly to Pound's 1906 address, because it dealt only marginally with how to organize courts and not at all on how to administer them. It was more concerned with the purposes society expects courts to serve and the procedures courts use.

Court organization and administration, however, were prominent in a document Pound co-authored eight years after his 1906 address. The *Preliminary Report on Efficiency in the Administration of Justice*, commissioned by the National Economic League,[19] was the product of five individuals. Pound, by now a professor at Harvard Law School, was clearly the lead author, but the identities of the other four say something about the integral relationship between court reform and political reform in the Progressive Era. The most famous was Boston attorney and future Supreme Court Justice Louis Brandeis, well known for his reliance on quantitative data in his briefs challenging workplace conditions and rate gouging by public utilities and carriers. Charles W. Eliot had recently retired as president of Harvard University. Moorfield Storey, a Boston attorney, had been president of the American Bar Association and was one of the founding members of the National Association for the Advancement of Colored People. Adolph Rodenbeck, an attorney of Rochester, New York, had been involved in efforts to simplify civil procedure.[20] (Henry Friendly credited the *Preliminary Report* as the impetus for his 1928 analysis of diversity of citizenship jurisdiction,[21] but did not mention the 1906 address, even though diversity jurisdiction was one of Pound's main targets in 1906—more evidence that the address achieved iconic status as the "but for" cause of the modern court reform movement only well after its delivery.)

I. COURT UNIFICATION

In 1906, Pound said that "[m]ultiplicity of courts is characteristic of archaic law."[22] He compared the situation in state courts in the United States, where much litigation concerned whether the case had been filed in the proper forum, with the situation in England, "[w]here the appellate tribunal and the court of first instance are branches of one court, [and therefore] all expense of transfer of record, or transcripts, bills of exceptions, writs of error and citations is wiped out."[23]

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18. 1 JUDICIAL ADMIN. DIV., AM. BAR ASS'N, *supra* note 15, § 1.10.

19. CHARLES W. ELIOT ET AL., PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE, *reprinted in* RUSSELL R. WHEELER & HOWARD R. WHITCOMB, JUDICIAL ADMINISTRATION: TEXT AND READINGS 48 (1977).

20. *Id.* at 47–48.

21. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 483 & n.2 (1928).

22. Pound, *supra* note 1, at 409.

23. *Id.* at 410.

The 1914 report elaborated on this theme and introduced the concept of specialist judges:

> Effective administration of justice in the urban communities of today requires a unification of the judicial system whereby the whole judicial power of the state shall be vested in one organization, of which all tribunals shall be branches or departments or divisions. . . . Multiplication of tribunals is the first attempt of the law to meet the demand for specialization and division of labor. Yet it is at best a crude device. The need is for judges who are specialists in the class of causes with which they have to deal. This need may be met by specialized courts with specialized jurisdiction. But it may be met, also, by a unified court with specialist judges, to whom special classes of litigation are assigned. Undoubtedly much specialization is desirable and will be desirable increasingly in the future. But concurrent jurisdictions, jurisdictional lines between courts, with consequent litigation over the forum and the venue at the expense of the merits, and judges who can do but one thing, no matter how little of that is to be done nor how much of something else, are not the way to provide therefor. Rather there should be specialized judges.[24]

Was Pound correct in his call for unified courts and specialized judges?

MS. DOSAL: I think Minnesota is the poster child for his argument for unified courts. We have a single trial court. That's it. There are no municipal courts; there are no other kinds of courts, only a single trial court, and an intermediate court of appeals and a supreme court.

Over a twenty-year period, Minnesota unified and streamlined its trial courts. Our work started during the national court reform period in the early 1970s. The spark came in part from Warren Burger, who was originally from St. Paul. It was fueled by federal funds from the now-defunct Law Enforcement Assistance Administration, which allowed each state to have judicial planning committees that examined court organization and administration reform issues.

In the 1970s, we had a plethora of different kinds of lower courts. We merged them into a single county court. And then a dozen years later we moved to merge them into the general jurisdiction court. We've had a single court since that time.

Minnesota is one of only a handful of states that have a pure single-level trial court. [There appear to be eight such states and jurisdictions: California (superior court), District of Columbia (superior court), Idaho (district court with a magistrates division), Illinois (circuit court), Iowa (district court), Minnesota (district court), Puerto Rico (court of first instance, with "superior" and "municipal" divisions), and South Dakota (circuit court).][25]

We in Minnesota believe our experience shows that Pound's call for unification—at least as applied to the trial courts—has stood the test of time. There have been many benefits from this unification. Clearly there's no confusion over where to file a case. We have increased the flexibility in the allocation of judicial resources and the

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24. ELIOT ET AL., *supra* note 19, at 51.

25. *See* National Center for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/Ct_Struct/Index.html (last visited Aug. 4, 2006) (providing charts of the court structures of every state).

assignment of judges to cases. Judge time can more easily be allocated where the need is.

In the last ten to fifteen years, our caseload has changed dramatically. We've had an enormous increase, perhaps sixty percent in the last decade, in serious criminal and juvenile cases, while our civil cases have remained flat, and our minor cases have actually declined. Unification has allowed us, in a world of scarce resources, to decide which kind of cases are going to have priority and then to make that happen by how we assign our judges.

We have experienced cost efficiencies in both time and travel reduction. We are a rural state. Seventy-seven counties, roughly speaking, out of our eighty-seven counties are rural. Before unification, judges were literally passing each other on the roads as they went from one court to the other to hear the particular kind of case that they could hear. And, of course, we've also seen a reduction in delay as a result of the judges being able to hear the cases promptly.

As envisioned by Pound, Minnesota has, within the unified court, created what he called "specialist" judges in our larger jurisdictions. Judges rotate through divisions on two- or three-year terms. While they are not permanent, they're there long enough to gain expertise in some of the complicated areas. It also avoids the burnout of judges who are permanently assigned to particular kinds of case types. In recent years, we have seen the rise of problem-solving courts as well, which are actually special calendars with a kind of a specialist judge. All of this is quite easily accomplished within a unified court.

MS. McQUEEN: I think that court organization has been the area where Pound's impact has been greatest. Long-standing ABA resolutions, along with the Conference of Chief Justices' 1955 encouragement for all states "to measure court administration against the standards proposed by Chief Justice Vanderbilt,"[26] have contributed, in one way or another, to states restructuring their trial courts, based either on subject matter jurisdiction or organization.

What Pound meant by structural unification was a system that would eliminate the chaos and confusion about where people needed to go to file their cases. As Sue mentioned, only a few states have adopted a single-tiered trial court, but other states adopted—and the ABA standards provided for—a two-tiered trial court consisting of a general jurisdiction trial court and a professionalized court of limited jurisdiction.

Whether unification comes about, how it comes about, and what kind of unification comes about are heavily dependent on the cultural issues in the states, and, obviously, on the politics in the states. Political culture can influence the relative appeal of either a top-down approach with a constitutional amendment or a bottom-up approach where the courts recognize the efficiencies of restructuring themselves. The Washington state court system, where I served for years, is not—constitutionally—a unified system. The trial court judges, in conjunction with the supreme court, nevertheless recognized that in order to be an equal branch of government, in order to be able to interact effectively with the executive and the legislative branches, they had to speak with one voice. The statutorily created trial court associations supported a supreme court rule establishing a judicial board of directors—the Board for Judicial Administration (BJA)—charged with adopting positions on important legislative issues, setting priorities for court

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26. TOBIN, *supra* note 6, at 133.

innovation, and developing a court performance audit process. With the support of the BJA, the supreme court adopted a rule establishing the authority of trial court presiding judges and creating Trial Court Coordinating Councils to encourage cooperation between the two-tiered trial courts.[27] The BJA was also instrumental in the proposal and passage of a constitutional amendment providing for the sharing of judicial resources between the court levels.[28] Thus, the Washington experience seems to belie Pound's apparent view that only top-down superintendence would work.

David Rottman and William Hewitt of the National Center for State Courts in 1996 assessed empirically whether trial court unification affects trial court performance, measuring performance by user satisfaction. They found—acknowledging some definitional ambiguity about what constitutes "unification"—that the court systems in their study that "consistently received above average satisfaction ratings . . . also have the most unified [trial] court systems."[29] Nevertheless, court unification per se will not necessarily produce better performance. As Rottman and Hewitt summarized their findings: "unification remains an essential tool for court reform, but its potential contribution appears to be less than what can be gained from changing other aspects of how trial courts organize their work," in particular how judges are assigned cases, distinctions between central and chambers support staff, and the position of the chief judge.[30]

Finally, structural unification is separate from state funding. In Washington, for example, in the 1970s there were two attempts to adopt structural reorganization and state funding, and both failed, partly in the face of trial judge opposition.[31] In the last five years, however, Washington formed a special Court Funding Task Force to look at a functional approach to state funding.[32] First, what services are constitutionally required, such as juries, indigent defense, investigation, interpreters, and judicial salaries? The trial judges have supported state funding of those things, and supported as well a supreme court rule on the authority of presiding judges[33] and a constitutional amendment allowing cross-assignment of judges.[34] This has happened in a state that's not formally unified.

QUESTION: I understand the concept of a unified, one-trial-level system for specialized judges, but are the specialty courts that are arising going to eventually erode the concept of one-level trial court? We just unified the trial courts in my state and now we're hearing, "Oh, we need more specialized courts." Do you think that specialty courts are actually eroding the concept of a unified trial court?

MS. DOSAL: Well, I don't, because I think it is actually consistent with Pound's idea of generalist courts and specialized judges. What we call our drug courts, our

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27. WASH. GEN. R. 29.

28. WASH. CONST. art. IV, § 7 (amended 2001).

29. ROTTMAN & HEWITT, *supra* note 2, at 63.

30. *Id.* at 5.

31. *See generally* Philip B. Winberry, *Washington State Court Reform*, ST. CT. J., Spring 1980, at 3 (discussing failed legislative and citizen-action attempts to achieve judicial reform in Washington).

32. COURT FUNDING TASK FORCE, BD. FOR JUDICIAL ADMIN., JUSTICE IN JEOPARDY: THE COURT FUNDING CRISIS IN WASHINGTON STATE (2004).

33. WASH. GEN. R. 29.

34. WASH. CONST. art. IV, § 7 (amended 2001).

community courts, mental health courts, and domestic violence courts are actually calendars, created within the unified court. We're able to move judges around as needed, and for that reason, I don't see an inconsistency between specialized courts—more accurately calendars—and the unified trial court.

MS. McQUEEN: An alternative view is that the more these courts are identified with social services, it's more difficult to see them as merely calendars. Tension is created by moving judges who don't have the experience into courts dealing with the housing authority or with the child protective services. We're all waiting to see what the ultimate impact is, but there's definitely that tension. In some courts with specialized calendars, one can see almost a jealousy developing within a single general jurisdiction trial court if it appears that a judge with one of these specialty assignments gets more resources or more emphasis. I agree with Sue that a good cross-assignment system can help avoid some of the tension, but I doubt it can eliminate it.

Rottman and Hewitt found a somewhat different problem in their 1996 study. They note that one of the most common reasons for resisting unification is "a firm belief that it will make it more difficult to find judges with the necessary specialized legal knowledge and temperament for certain kinds of cases," especially emotionally draining cases, and thus they suggest a form of unification that "consciously provides for the recruitment and assignment of judicial officers to handle specialized dockets without controversy, but that also provides for the inclusion of these judicial officers in the court's management decisions."[35]

II. COURT ADMINISTRATION

MR. WHEELER: Another theme on which Pound elaborated in the 1914 "Preliminary Report" was superintendence of the entire court system—and keep in mind that by "court" he was referring to the entire judicial system of a state, organized as one unified court with divisions. He wrote:

> Some one high official of the [unified] court should be charged with supervision of the judicial business of the whole court, and he should be responsible for failure to utilize the judicial power of the commonwealth effectively. He should have the power to superintend the calendars of the different branches and divisions and to make such classifications and distributions of the business in each branch or division as experience shows to be suited to advance its work. He should have power to make reassignments of judges or temporary assignments to particular branches [and] . . . to transfer or specially assign causes or proceedings . . . according to the condition of the calendars. He should be responsible to the people for insuring that the whole judicial power of the commonwealth is fully and effectively employed upon all the business of the court.[36]

Beneath this overall superintendent, Pound advocated divisional chief judges:

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35. ROTTMAN & HEWITT, *supra* note 2, at 7.

36. ELIOT ET AL., *supra* note 19, at 51–52.

> [U]nder the general superintendency of this head of the court, there should be a like judicial officer, since no clerk should be given such powers, for each branch and division, and where there are large cities, for each locality. This officer should have similar powers with respect to the branch . . . of which he is the chief or presiding judge, and should be responsible to the chief of the whole court for the classification and distribution of its business and effective disposition of the causes assigned to it. Concentration of responsibility in this way should be a sufficient safeguard against abuse of these offices.[37]

And then, in an era when elected clerks of court dominated the administration of courts, operating from their own electoral power bases, Pound called for what today we would call court administrators:

> [T]he court should be given control of the clerical and administrative force through a chief clerk, responsible to the court for the conduct of this part of its work. We have hampered the administration of justice by the extreme to which we have carried the decentralization of courts. In many jurisdictions the clerks are independent officers, over whom the courts have little or no control. . . . Each clerk's office [in most states] is independent of every other. It is no one's duty to study the system, suggest improvements, or enforce them when made. What responsibility will do in this connection, when joined to corresponding power, is shown in the Municipal Court of Chicago, where the system of abbreviated records is said to have effected a saving of $200,000 a year. Moreover, if courts are to do the work demanded of the law in large cities . . . and in industrial communities, they must develop much greater administrative efficiency, and must be able to compete in this respect with administrative boards and commissions.[38]

What has been the shelf life of these prescriptions?

MS. DOSAL: With respect to the consolidation of authority in the chief justice, if taken literally to mean vesting all authority in one person, that has not stood the test of time, in my view. However, if one takes this to mean that authority for the administration of the state judicial branch should be centralized, I think it has stood the test of time, not only in Minnesota, but around the country.

Pound seems to have assumed that unifying the courts under central supervision would automatically lead to consistent procedures, improved management, and therefore improved judicial output, and he talked about a visible chain of command. Consolidation of authority is certainly necessary, but it's not sufficient to do what Pound was hoping to do.

In Minnesota, a 1977 Act of the legislature made the chief justice the administrative head of the judicial branch of the state.[39] The legislature gave him or her supervisory authority over all courts within the state. That made a difference. It gave the chief justice the authority to assign judges, to put in place a statewide information system, create an inventory of our cases statewide, and propound other overarching goals or aspirations such as case processing time standards. The Act also created chief judges at

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37. *Id.* at 52.

38. *Id.*

39. Act of June 2, 1977, ch. 432, 1977 Minn. Laws 1147 (codified as amended at MINN. STAT. §§ 2.724, 480.15, 480.17 (2005)).

the local level, elected by their peers, as administrative heads of the courts within the judicial district, subject to the superintending authority of the chief justice. But the chief justice, even with this authority, was something of a toothless tiger, because the majority of the funding for the trial courts that the chief justice was to supervise was at the local level. Pound's advocacy of a judicial superintendent without funding authority ignores the so-called "golden rule": "he who has the gold makes the rules."

In order to get where Pound wanted to go, in Minnesota we believed we also needed budgetary unity within the judiciary. This included a uniform personnel system for the state. A budget is a policy document expressed in fiscal terms, and without that ability to control the budget, in my view, it is nearly impossible to develop consistent statewide policy and then actually make it happen by allocating personnel and operating resources to it.

It took us a long time to get there—fifteen years—but since last July, Minnesota has fully state funded its trial courts as well as its appellate courts. That means we now for the first time have the real ability to affect policy on a statewide basis.

With the shift to full state funding, we believed that a new look at the governance of a unified branch was needed. We concluded that a total top-down approach to governance as Pound suggested would not work for this newly unified and, much larger organization. While it is critical to centralize statewide administrative policy making, our solution—given the elected and independent nature of a judge-dominated system—was to share the power of the chief justice as the administrative head with a broader body. We ultimately looked to Utah and California and created a judicial council.

The Minnesota Judicial Council is a twenty-five member body, with nineteen voting members who are judges, fifteen of whom are from the trial court. And there are six administrators representing the state, judicial district, and county levels. The Council is heavily dominated by trial court representation but chaired by the chief justice, with the state court administrator serving as the chief executive officer and staff to the Council. It is now clear that administrative responsibility and accountability for the entire system rests within that one group. The members of the Council by order of the chief justice are charged with making decisions in the best interests of the system as a whole. The composition has worked to ensure broad perspectives as significant policies are considered and also "buy in" from the various levels of court as tough issues of governance are addressed.

There is, of course, a need to balance strong central leadership with the necessary amounts of local autonomy and discretion. Pound alluded to this in suggesting that central administrative authority be delegated to officers in the "major branches of the court." Within the Minnesota structure, primary powers at the state level that are vested in the Judicial Council include the overall budget and staffing allocation, setting and monitoring branch performance measures, the approval of a judicial branch strategic plan, and the development of "ends" policies, which focus on outcomes to be achieved—the "what" rather than the "how." The implementation of statewide administrative policies is delegated to the state court administrator, and day-to-day management and operations are left to the court units.

As to the equal importance of the administrative side, I certainly think that Pound was correct. I may be biased, given my particular position, but I think that the rise of the professional administrator is one of the most consequential developments for court administration and the advancement of the administration of justice in the hundred years since Pound's speech.

We had elected clerks in Minnesota until 1971. We really needed the administrative machinery of the judiciary to be accountable to the judicial branch, and the constitutional amendment that authorized the judiciary to appoint clerks made possible the rise of professional administration in our state. We subsequently created professional regional trial court administrators, gave them more authority, and also clarified the authority for the state court administrator. With all of that came many of the advancements that we all know about in terms of modern business practices: management information systems, business practice evaluation and redesign, uniform rules of court, solid budgeting practices, cultivating professional and personal relationships with the staff of local and state funding bodies, professional media and public information capabilities, and the development of research and evaluation units that allow us to manage by data, not by anecdote.

In a broader sense, with the assistance of professional administrators, we in the judiciary are now moving beyond just processes. Pound was talking about processes and the scientific management concept that if you direct things correctly, efficiencies and improvements naturally follow. Today we are moving beyond only numbers to focus on outcomes. We see this in the rise of problem-solving courts and the responsibility of administrators to help courts articulate the impact of courts in a way that funders and the public can understand and support. We want to be able to answer the questions funders ask: why should scarce government funds—what our former Commissioner of Finance called opportunity dollars—be spent on the courts instead of someplace else?

Answering that question has a lot to do with our ability to articulate the courts' role in promoting public safety and assuring access to justice, and through our problem-solving courts, making a positive difference in the lives of people who come before our courts by interrupting that cycle of recidivism. Pound may not have envisioned this kind of proactive, outcome-oriented focus—fearing as he did that courts were unable to compete with administrative agencies[40]—but I think he would applaud it.

MS. McQUEEN: I think one thing that Pound did not take into consideration in recommending vesting supervision in a single court official was the methods of judicial selection across the states. We struggle with that phenomenon all the time, the problem of supervising equals.

We've also found that even without a statute or a constitutional amendment that establishes that authority specifically in the chief justice, there are still ways in which chief justices can lead. One example is the state of the judiciary address, which almost all chief justices have embraced as a forum for sharing with the other branches of government, for seeing courts more on an equal basis. Another leadership opportunity is mandatory judicial education—more specifically, chief justices' supporting mandatory judicial education is a way to indicate accountability to the public for the quality of judges.

Another component of leadership, regardless of whether the constitution vests superintending authority in the chief justice, is the "chief executive officer / chief operating officer" team model, in which the chief justice and state court administrator

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40. *See* Pound, *supra* note 1, at 396 ("Courts are distrusted, and executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion.").

form a team that is more powerful than the sum of its parts. Judicial impact statements afford another leadership opportunity. We have the ability to develop and gather management information or data; we can now use those data for analysis in order to warn about the impacts, the unintended impacts, on the courts of legislative policy.

We also need to consider the power of research. Justice Brennan, speaking in 1958 to the American Bar Association's Section of Judicial Administration, recalled Pound's observation that local communities, and their lawyers, resist reform. "'Grave obstacles stand in the way of improvement,'" said Pound in 1926.[41]

> The present system works well enough in the average rural community, and legislators from those communities see no need of change. The instinct of the lawyer to scrutinize with suspicion all projects to reform has always retarded the progress. Imperfection of our legislative methods . . . will hold back statutory improvements. . . . Popular suspicion of lawyers . . . will impede the adoption of durable methods.[42]

But then, as Justice Brennan noted, Pound went on to say that the one thing that can overcome all these obstacles is sound empirical research. "[T]hese obstacles will hinder little, in the end, if our projects of reform have a sound basis in thorough, impartial, scientific research."[43] The National Center for State Courts, I should add, has contributed to that body of evaluative and empirical research.[44]

Finally, I too believe that the rise in judicial administration as a profession has been one of the major changes since the Pound speech, encouraging court executive development programs and leadership opportunities for chief justices. Chief justices very much more see their role as the leader and the spokesperson for that equal branch of government, and have embraced the responsibility of the court to govern itself.

States may not be unified through a constitutional amendment, but they can achieve some of the same results that unification offers through such devices as supreme court rules or other administrative actions establishing performance audit standards, developing statewide automated information systems, human resource directors, public information officers, performance audits, and evaluation units.

Unification may be what I might call the Poundian standard, and it is a worthy goal, but not reaching it shouldn't be an excuse for not trying to look at other alternative opportunities to strengthen the judicial branch.

In the final analysis, as Sue said, assessing outcomes rather than simply counting the number of filings and terminations is perhaps the major contribution of what our panel title calls the "rise of modern court administration." It has very much changed the

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41. William J. Brennan, Jr., *Improving the Administration of Justice Today*, *in* HANDBOOK FOR JUDGES 135, 138 (Donald K. Carroll ed., 1961). Although Justice Brennan quoted Pound without citation, the cited passage is found in Roscoe Pound, *The Crisis in American Law*, 10 J. AM. JUDICATURE SOC'Y 5, 10 (1926).

42. Pound, *supra* note 41, at 10.

43. *Id.* at 26.

44. *See, e.g.*, THOMAS CHURCH, JR., ALAN CARLSON, JO-LYNNE LEE & TERESA TAN, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978); ROTTMAN & HEWITT, *supra* note 2; National Center for State Courts, Court Statistics Project, http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html (last visited Aug. 4, 2006) (providing an overview of the Center's multi-faceted research on the work of the nation's state courts).

complexion of the courts, and I think that's something that Pound did not anticipate in any way.

Bob Tobin, whom some of you know, was one of the early research consultants at the National Center. He stated it this way: You have to centralize in order to decentralize rationally.[45]

45. *See* TOBIN, *supra* note 6, ch. 7 (discussing "The Unification Movement and the Advent of Judicial Administration").