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## Causes of Popular Dissatisfaction with the Administration of Justice in the Twenty-First Century

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# CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE IN THE TWENTY-FIRST CENTURY

Robert A. Stein\*

We are here today to celebrate and be challenged by a remarkable speech delivered by Dean Roscoe Pound on August 29, 1906.<sup>1</sup> We meet in the city where Dean Pound gave his historic address. On that occasion, Dean Pound was not Dean of the Harvard Law School, which he later became, but rather was the 36-year-old Dean of the University of Nebraska College of Law.<sup>2</sup> He was a well-educated man, having both a law degree from Northwestern University School of Law and a PhD in Botany from the University of Nebraska,<sup>3</sup> but he was not very well known. Most of his famous writings were yet to come: *The Spirit of the Common Law* in 1921;<sup>4</sup> *Law and Morals* in 1924;<sup>5</sup> and *Criminal Justice in America* in 1930.<sup>6</sup> He had not yet founded the movement for “sociological jurisprudence,” nor was he yet a leader of the movement for American Legal Realism.<sup>7</sup> All of that was yet to come.

Indeed, he was somewhat of a surprise choice to give a major address at the twenty-ninth annual meeting of the American Bar Association.<sup>8</sup> Writing about the occasion thirty years later in 1936, Professor John Wigmore, the great evidence scholar, described that evening in August of 1906 in the following manner:

Some 370 members [of the ABA] . . . were registered for the convention, and almost all of them (with many of their ladies) were present in the spacious auditorium of the Capitol.

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<sup>1</sup> Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the Am. Bar Ass'n (Aug. 29, 1906), in 29 ABA REPORTS, p. 395 (1906), reprinted in AMERICAN BAR ASS'N, NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 3 (1976) [hereinafter ABA NAT'L CONFERENCE].

<sup>2</sup> See N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN 7 (1997).

<sup>3</sup> *Id.* at 41.

<sup>4</sup> ROSCOE POUND, THE SPIRIT OF THE COMMON LAW (Marshall Jones Co. 1921).

<sup>5</sup> ROSCOE POUND, LAW AND MORALS (Rothman Reprints, Inc. 1969) (1924).

<sup>6</sup> ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA (Da Capo Press 1972) (1930).

<sup>7</sup> See HULL, *supra* note 2, at 2.

<sup>8</sup> See John H. Wigmore, Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress, in ABA NAT'L CONFERENCE, *supra* note 1, at 27, 28.

The title of the address was "The Causes of Popular Dissatisfaction with the Administration of Justice."

Now you must understand that the typical Bar Association address of that period was a sober, solid, exposition of some sober, static subject—"American Institutions and Law," "The Civil Law and Codification," "Alexander Hamilton," "The Alaska Boundary Case," and so on. And the speaker was by tradition a lawyer of national eminence . . . whose name and repute alone was sufficient attraction. And the members attended as a matter of duty and respect, to be cheered by the speaker's well-turned eulogium on our institutions or by his smooth exposition of a familiar principle of law.

But now it was something different. The speaker was a youngish lawyer in his early thirties, a local light in Nebraska—brought on this national stage simply because the Association's president had recently heard him speak at a meeting of the Nebraska Bar Association. And what was his topic? "Popular Dissatisfaction with the Administration of Justice!" Dissatisfaction! *Are* the people dissatisfied? What can they be dissatisfied about? Do *we* not give them a good enough justice? Whose idea can it be that things are wrong? Well, we are here; so we might as well stay and listen politely; the president's reception does not begin till 9:30 o'clock. Such were the "old-timers" thoughts.<sup>9</sup>

So wrote Professor Wigmore, reminiscing about the speech 30 years later.<sup>10</sup>

Professor Wigmore describes his excitement, his thrill in listening to the speech. "[A]s the address proceeded, we knew that the truth was being unfolded to us."<sup>11</sup> Wigmore felt, however, that most of the lawyers "were sensing alarm."<sup>12</sup> He describes the conservative hearers sitting "in dumb dismay and hostile horror at the deliverances of the daring iconoclast . . . . Our 'system of courts is archaic.' 'Our procedure is behind the times.' 'Our judicial power is wasted.'"<sup>13</sup>

Wigmore says the staid members of the bar "listened courteously enough. And they would have said nothing at the time to express their

<sup>9</sup> *Id.* at 27–28. See also HULL, *supra* note 2, at 65.

<sup>10</sup> I would like to thank U.S. District Judge Donald Alsop for bringing to my attention the resource materials for a Conference in 1976 revisiting the Pound speech of 1906 in which the Wigmore recollection is reprinted. See *supra* note 1.

<sup>11</sup> Wigmore, *supra* note 8, at 28.

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

<sup>13</sup> *Id.* at 29 (quoting Pound, *supra* note 1).

sentiments.”<sup>14</sup> But then an astonishing thing happened. Before the President could introduce the evening’s second speaker, a well known reform lawyer from New York offered a motion. “The motion proposed that *four thousand copies of [Pound’s] address* be immediately printed (without waiting for the annual volume) and be sent to every member of the Association and to the committees on judiciary of the federal senate and house!”<sup>15</sup>

As Wigmore recalled it in 1936, “[t]his outrageous motion let loose the repressed indignation of the assemblage. It was hard enough to have had to listen in silence to the address. But to sanction its heresies! And to print and publish them broadcast! Intolerable! Impossible!”<sup>16</sup>

An extraordinary and emotional debate began, and the motion was tabled until the business meeting the next day.<sup>17</sup> And then what Wigmore describes as the “pent-up storm really burst into fervid expression.”<sup>18</sup>

Wigmore provides a colorful description of the angry reaction by the members of the bar. “The ‘attack on the judiciary’ was too unconscionable to discuss . . . . [T]he address was ‘an attack upon the entire remedial jurisprudence of America.’ It was an attempt ‘to destroy that which the wisdom of the centuries has built up.”<sup>19</sup> Not a single voice was recorded in favor of the address throughout the debate, except that of the maker of the motion. The attack on the motion was so emotional and vehement that the maker of the motion, to avoid defeat, withdrew it and instead moved that the speech be referred to the Bar’s committee on judicial administration and remedial procedure.<sup>20</sup> So angry was the bar that many opposed even referring the speech to committee and there were many parliamentary maneuvers and points of order.<sup>21</sup> Eventually, however, the modest motion to refer the speech to committee was passed.<sup>22</sup>

While the predominant reaction of the bar was one of angry disapproval, Wigmore says that he and some other young turks were thrilled and inspired. “[A]t last the surgeon’s skilled diagnosis had been made . . . the broad underlying causes of the ailments in our justice had been made clear to all . . . .”<sup>23</sup> The young turks gathered the next day on the steps of the Minnesota Capitol and “resolved to do *something* about it in our own limited spheres.”<sup>24</sup> One of Wigmore’s co-conspirators was William Draper Lewis,

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Wigmore, *supra* note 8, at 29.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 29–30 (quoting statement of James Andrews of New York).

<sup>20</sup> *Id.* at 30.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Wigmore, *supra* note 8, at 30.

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

Dean of the University of Pennsylvania Law School, later one of the founders and first Director of the American Law Institute.<sup>25</sup>

And Roscoe Pound's reputation as a great leader of reform of the administration of justice in America was born. With Wigmore's support, he was appointed a professor at Northwestern University Law School and then moved to the University of Chicago Law School.<sup>26</sup> In 1910, he joined the faculty of Harvard Law School, where he became Dean in 1916 and continued in that position for two decades.<sup>27</sup>

So those were the events surrounding that remarkable speech we recall and celebrate today. But why was it so alarming to so many members of the bar, and why was it so electrifying to the young reformers? On that occasion, for the first time, a scholar of the law laid out an indictment of the system of laws and courts under which our country operated.

After noting that "[d]issatisfaction with the administration of justice is as old as the law," Pound went on to say, "we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respects for law which exists in the United States today."<sup>28</sup> He asserted that there then existed "more than the normal amount of dissatisfaction,"<sup>29</sup> and proceeded to identify the nature and causes of that dissatisfaction. He did not attempt to propose solutions. "[T]he first step," said Pound, "must be diagnosis, and diagnosis [of the causes of dissatisfaction] will be the sole purpose of this paper."<sup>30</sup> And he limited his inquiry to civil justice only.<sup>31</sup>

Many of you are familiar with the great speech. In a masterful way, Dean Pound grouped causes of dissatisfaction with the administration of justice under four main heads: "(1) causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration."<sup>32</sup>

The speech is a tour de force. In the space of one speech, Dean Pound identified and offered a brilliant analysis of 18 different causes of dissatisfaction under his four group headings.<sup>33</sup> And some of the causes are further explicated by subheadings of causes.<sup>34</sup>

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<sup>25</sup> American Law Institute, For Librarians, <http://www.ali.org/index.cfm?fuseaction=about.should> (last visited Sept. 3, 2007).

<sup>26</sup> HULL, *supra* note 2, at 72.

<sup>27</sup> *Id.* at 75.

<sup>28</sup> Pound, *supra* note 1, at 3-4.

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 5.

<sup>33</sup> The causes of dissatisfaction under the first heading, dissatisfaction with any system of law, are:

In the past 100 years we have made major strides in addressing several of the causes of dissatisfaction identified by Dean Pound. Particular progress has been made in responding to the concerns Dean Pound grouped under the heading "Causes lying in our judicial organization and procedure." Court restructuring and improvements in civil procedure have reduced enormously the complexity Dean Pound describes and traces back to earliest Anglo-Saxon days.<sup>35</sup> And modern court management has reduced the waste of court resources by better allocation of those resources to meet the needs of contemporary litigation.<sup>36</sup>

Nevertheless, several of the causes of dissatisfaction identified by Dean Pound remain causes of dissatisfaction and challenges today, 100 years later. For example, "delay and expense," he said in 1906, "have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."<sup>37</sup> Those words remain as true today as when Dean Pound expressed them, and now we have empirical

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- (1) The necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint.

Pound, *supra* note 1, at 5. Pound argued that dissatisfaction with the American legal system is caused by:

- (1) The individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

*Id.* at 10–11. Under the third heading, dissatisfaction from structural causes, Pound denounced an archaic court system and procedure; the "uncertainty, delay and expense" of litigation; and the fact that cases were decided upon "points of practice." *Id.* at 16–17. Finally, under the fourth heading, dissatisfaction resulting from judicial administration, Pound listed:

- (1) Popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press.

*Id.* at 23.

<sup>34</sup> See, e.g., *id.* at 17 (identifying three reasons the courts are archaic).

<sup>35</sup> See generally FED. R. CIV. PROC.; see also The Judicial Improvements Act of 1990, Pub. L. 101–650, 104 Stat. 5089.

<sup>36</sup> See, e.g., 28 U.S.C. § 1406 (2000) (providing for transfer of venue when appropriate).

<sup>37</sup> Pound, *supra* note 1, at 16–17.

evidence to support that and many other concerns expressed by the public about our system of administration of justice.

I am sure Dean Pound's address or any address on "Causes of Dissatisfaction with the Administration of Justice" would be more thoughtfully received by the bar today. Fortunately, the bar has become more willing—indeed, eager—to examine shortcomings in our administration of justice during the past 100 years. This Symposium today is further evidence of this change in attitude in the bar. The American Bar Association and many state bar associations survey the public, on a regular basis, about their satisfaction and concerns with the courts, the legal profession, and the administration of justice in this country.<sup>38</sup> These studies overwhelmingly show that, while we have made major strides in improving the administration of justice in the past 100 years, our fellow citizens continue to have serious concerns about the administration of justice and the legal profession that demand our attention.

I would like to discuss some of those concerns today, and, in doing so, I would like to refer to two major comprehensive empirical studies on this subject by the American Bar Association. The first is a comprehensive nationwide survey of perceptions of the U.S. justice system held by the general population, sponsored by the American Bar Association and published in 1999.<sup>39</sup> I will refer to this study as the "Justice System Perceptions Study."

The other major comprehensive study to which I will refer is a 2002 empirical study of the public's perception of lawyers commissioned by the Litigation Section of the American Bar Association and funded by Chicago attorney, Robert Clifford, Chair of the Section that year.<sup>40</sup> I will refer to this second study as the "Lawyer Perceptions Study."

There is some positive news in this research. A conclusion of the Justice Systems Perceptions Study was that, overall, a majority of the public in this country believes that "in spite of its problems, the American justice

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<sup>38</sup> See, e.g., Am. Bar Ass'n, *Perceptions of the U.S. Justice System* at 54 (Nov. 1998), available at <http://www.abanet.org/media/perception/perceptions.pdf> (last visited Sept. 3, 2007) (hereinafter *Justice System Perceptions Study*).

<sup>39</sup> See *Justice System Perceptions Study*, *supra* note 38. The study was based on a survey of one thousand U.S. respondents age eighteen or older. The survey was conducted in either English or Spanish with the adult member of the household who was next to celebrate their birthday. The sample "closely matche[d] the profile of . . . the United States population . . ." *Id.* at 3.

<sup>40</sup> Am. Bar Ass'n, *Public Perceptions of Lawyers: Consumer Research Findings* (April 2002), available at <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf> [hereinafter *Lawyer Perceptions Study*]. The research had three parts: A survey of the head of household of 450 representative U.S. households nationally; Ten consumer focus groups—consisting of between eight and ten participants selected to mirror the demographic composition of the community—conducted in five U.S. markets (Birmingham, Boston, Chicago, Dallas, and Los Angeles); Following the focus groups, an additional survey of the heads of 300 representative households nationally. *Id.* at 2–3.

system is still the best in the world.”<sup>41</sup> Eighty percent of respondents in the study strongly agreed or agreed with that statement.<sup>42</sup> Furthermore, of all the institutions respondents were asked to evaluate, the U.S. Supreme Court received the highest expression of confidence, with 50% of respondents expressing themselves extremely or very confident in it.<sup>43</sup> Lower federal courts received a lesser expression of confidence, 34%, and the U.S. justice system in general received a 30% high confidence rating.<sup>44</sup> But those confidence ratings significantly exceed those of the state legislatures (19%) and the federal Congress (18%).<sup>45</sup> Before you become too complacent with the relatively high confidence expressed in our justice system, let me note that lawyers received a high confidence rating of only 14%.<sup>46</sup> That is the second lowest of the institutions that were part of the study. The only lower confidence rating was given to the media, which received a rating of only 8%.<sup>47</sup>

The second study to which I referred, the Lawyer Perceptions Study, asked the same question three years later about confidence in institutions. Although the percentages are slightly different, the results are virtually the same—the U.S. Supreme Court ranked highest in public confidence among the institutions, followed by the U.S. justice system in general, the lower federal courts, state courts, the federal Congress, lawyers, and—again at the bottom—the media.<sup>48</sup>

Notwithstanding these positive findings in these studies, serious concerns about the justice system were expressed by a majority of respondents in a number of areas. Near the top of the list of concerns are two of the causes of dissatisfaction noted 100 years earlier by Dean Pound: Cost and Delay.<sup>49</sup> In the Justice Systems Perceptions Study, 78% of the respondents strongly agreed with the statement that “It takes too long for courts to do their jobs,” and 77% of the respondents strongly agreed with the statement that “It costs too much to go to court.”<sup>50</sup> These two concerns were both reflected in the concern that received the greatest support in the study, with 90% of the respondents strongly agreeing with the statement that “wealthy people or companies often wear down their opponents by dragging

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<sup>41</sup> Justice System Perceptions Study, *supra* note 38, at 6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 50.

<sup>44</sup> *Id.* Both percentages represent the proportion of respondents that said they were extremely or very confident in the respective institutions. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Justice System Perceptions Study, *supra* note 38, at 50.

<sup>47</sup> *Id.*

<sup>48</sup> Lawyer Perceptions Study, *supra* note 40, at 6. The percentage of respondents in this survey that said they were extremely or very confident in the institutions are as follows: U.S. Supreme Court (46%); U.S. justice system in general (39%); lower federal courts (37%); state and local courts (31%); the federal Congress (22%); lawyers (19%); and the media (16%). *Id.*

<sup>49</sup> Pound, *supra* note 1, at 16–17.

<sup>50</sup> Justice System Perceptions Study, *supra* note 38, at 58.



out the legal proceedings.”<sup>51</sup> It is clear that these causes of dissatisfaction, identified by Dean Pound 100 years ago, continue to be widely and deeply felt in the twenty-first century, and it is a major challenge for those of us who care about the administration of justice in this country to continue to work to find new, alternative, and less costly ways to resolve disputes and complete legal transactions.

The concern about the cost of legal services was reflected in the Lawyer Perceptions Study as well. That study concluded that most households who have an occasion to hire a lawyer do not actually hire one.<sup>52</sup> Among those households who had an occasion to hire a lawyer in the prior twelve months before the survey, less than half (45%), had already hired a lawyer or said that they planned to do so.<sup>53</sup> That result confirmed the finding in an earlier study by the Temple University for the Consortium of Legal Services and the Public on “unmet legal needs among low-income and moderate-income Americans.”<sup>54</sup> In the Lawyer Perceptions Study, respondents representing one-third of all U.S. households said that they did not hire a lawyer on at least one occasion when they had considered doing so.<sup>55</sup> “When asked why they decided not to hire a lawyer, the expense of doing so was mentioned most often (28%).”<sup>56</sup> In short, the potential demand for legal services is high, but much of this goes unmet. There are, certainly, other important reasons why many persons in this country do not have assistance of counsel in addressing their legal needs – including the relative lack of diversity in our profession and the need for more pro bono work by lawyers. Nevertheless, cost is a major driver of this result. This cause of dissatisfaction with the administration of justice remains a major challenge in the twenty-first century and is one which demands our attention.

Another cause of dissatisfaction noted by Dean Pound 100 years ago is “public ignorance of the real workings of courts due to ignorant and sensational reports in the press.”<sup>57</sup> In amplification of this point, Dean Pound explained that “the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game.”<sup>58</sup> Enormous improvements in media coverage of the courts have been made since Dean Pound spoke in 1906. At that time, newly sensationalistic newspaper chains were being established in various regions of the country, and wildly inaccurate stories were common as a means of

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<sup>51</sup> *Id.*

<sup>52</sup> Lawyer Perceptions Study, *supra* note 40, at 26.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 27.

<sup>56</sup> *Id.* The next two most common reasons offered were that the respondents took care of it themselves (19%) and that it would not have been worth it or would not have done any good (15%). *Id.*

<sup>57</sup> Pound, *supra* note 1, at 23.

<sup>58</sup> *Id.* at 23–24.

expanding circulation of these newspapers.<sup>59</sup> Journalistic ethics that promote more fair and impartial news coverage are much improved today.<sup>60</sup> And today radio and television reports can give the public a more direct report of what is occurring in a trial. Nevertheless, I remain concerned about the “game aspect” of news coverage of high profile trials that Dean Pound referred to in 1906. With the intense media coverage of high profile trials, it is a temptation for reporters and commentators to opine about the state of a trial day-by-day as it proceeds. We hear the news commentators say, “Today was a good day for the prosecution,” or “Today the defense made major gains.” The coverage often resembles a football game where the ball is moved up and down the field depending on what happened in that day of the proceeding.<sup>61</sup> This encourages the public to think of trials as great games between gladiators rather than as a search for truth as to the matters in dispute. The public should be encouraged to have patience and await the outcome of the trial before forming judgments as to guilt or innocence or other outcome of a case. I believe we do not fully understand how to manage the media challenges presented by the phenomenon of 24 hour cable news channels and nationwide coverage of high profile trials. The game character of media coverage reinforces the public cynicism of the justice system observed by Dean Pound 100 years ago.

With respect to one of the causes of dissatisfaction noted by Dean Pound, recent developments are more favorable. Dean Pound identified as a cause of dissatisfaction, “[p]opular lack of interest in justice, which makes jury service a bore . . . .”<sup>62</sup> More recently, the public appears to have a greater interest in the justice system, as evidenced by several popular television shows about lawyers and intense media coverage of high profile trials.<sup>63</sup> In the Justice System Perceptions Study, respondents expressed great support for the jury system. Two of the statements receiving the highest degree of strong agreement were: “Juries are the most important part of our judicial system” (69%); and “The jury system is the most fair way to determine the guilt or innocence of a person accused of a crime” (78%).<sup>64</sup> Of the 1,000 respondents in the Justice Systems Perceptions Study, 27% had

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<sup>59</sup> *Id.* at 24.

<sup>60</sup> See, e.g., Irwin Gratz *Ethical Questions are Often Answered by SPJ's Code(From the President)*, 93.3 THE QUILL 4 (April, 2005).

<sup>61</sup> See, e.g., Associated Press, *Testimony of Preacher's Wife Helped Her, Lawyers Say*, CNN.COM (Apr. 20, 2007), available at <http://www.cnn.com/2007/LAW/04/20/winkler.verdict.ap/index.html> (last visited Apr. 21, 2007).

<sup>62</sup> Pound, *supra* note 1, at 23.

<sup>63</sup> See ROBERT M. JARVIS & PAUL R. JOSEPH, *PRIME TIME LAW: FICTIONAL TELEVISION AS LEGAL NARRATIVE* (1998); see also, <http://www.google.com/Top/Arts/Television/Programs/Dramas/Legal/> (last visited on Aug. 27, 2007), (listing television programs with a legal theme); *THE PRESS ON TRIAL: CRIMES AND TRIALS AS MEDIA EVENTS*, ch. 15 (Lloyd Chiasson Jr. ed., 1997).

<sup>64</sup> Justice System Perceptions Study, *supra* note 38, at 54.

actually been called for jury service.<sup>65</sup> Of those that had been called for jury service, 40% considered it to be an excellent or very good experience, and another 31% rated it a good experience.<sup>66</sup> A significant minority considered it only a fair (19%) or poor (7%) experience.<sup>67</sup>

In order to promote public support for the jury system and improve the experience of persons serving on a jury, the American Bar Association (ABA) in 2005 undertook a major project to accomplish those results. The American Jury Initiative<sup>68</sup> was comprised of two groups, each with an important and slightly different mission. One of these groups was the Commission on the American Jury, which was charged with outreach to the public and led by U.S. Supreme Court Justice Sandra Day O'Connor as Honorary Chair, and New York Chief Judge Judith Kaye, Chicago lawyer Manuel Sanchez, and Oscar Criner, foreman of the Arthur Andersen jury, as Co-Chairs.<sup>69</sup> The work of that group had a number of great successes, including the declaration of a week as National Jury Week by President George W. Bush;<sup>70</sup> a national campaign of posters in airports carrying messages about the importance of the American jury and featuring celebrities' testimonials about serving on a jury; and other public service announcements in the media.<sup>71</sup> In part due to the efforts of this Commission, a Jury Service Stamp will be issued to the public in September 2007 by the United States Postal Service.<sup>72</sup> This kind of support for the American jury should be continued on a recurring basis.

The second group that was part of the ABA's American Jury Initiative was a led by Chairs of several ABA Sections.<sup>73</sup> That group drafted a statement of nineteen principles that define "fundamental aspirations for the management of the jury system."<sup>74</sup> The preamble to their report recognized "the legal community's ongoing need to refine and improve jury practice so that the right to a jury trial is preserved and juror participation enhanced."<sup>75</sup> Each of the nineteen principles was "designed to express the best of current-day jury practice in light of existing legal and practical constraints."<sup>76</sup> The statement expressed the hope that "over the course of the next decade jury practice will improve so that the principles set forth will

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<sup>65</sup> *Id.* at 42.

<sup>66</sup> *Id.* at 43.

<sup>67</sup> *Id.*

<sup>68</sup> See Am. Bar Ass'n, American Jury Initiative, <http://www.abanet.org/jury/moreinfo/home.html> (last visited Sept. 3, 2007).

<sup>69</sup> *Id.*

<sup>70</sup> Proclamation No. 7891, 70 Fed. Reg. 23,771 (Apr. 29, 2005).

<sup>71</sup> See, e.g., Am. Bar Ass'n, American Jury Initiative: Juror Appreciation Kit, <http://www.abanet.org/jury/moreinfo/jurorkit.html> (last visited Sept. 3, 2007).

<sup>72</sup> See USPS – The 2007 Commemorative Stamp Program, <http://www.usps.com/communications/newsroom/2007stamps/> (last visited Aug. 27, 2007).

<sup>73</sup> American Jury Initiative, *supra* note 68.

<sup>74</sup> AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS 2 (2005).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

have to be updated in a manner that will draw them ever closer to the principles to which we aspire.”<sup>77</sup>

To continue this effort, the American Bar Association in 2006 established an ongoing Commission on the American Jury Project with a continuing two-fold mission.<sup>78</sup> First, the Commission is to continue “the implementation of the ABA Principles on Juries and Jury Trials by working with courts, rulemaking bodies, state legislatures and the organized bar.”<sup>79</sup> Second, the Commission will “reach out to the public, third party interest groups, government officials, national media, and the legal profession as a whole on the importance of jury service and jury reform.”<sup>80</sup> These activities are important and must be continued.

Dean Pound expressly limited his remarks to the civil justice system.<sup>81</sup> He explained:

For while the criminal law attracts more notice, and punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define those invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.<sup>82</sup>

Dean Pound didn't have available national public opinion surveys, but he was undoubtedly correct that the public had a greater interest in punishment of wrongdoers than in operation of the system of civil justice in 1906. That has not changed in the past 100 years. In the Justice System Perceptions Study, the greatest area of concern expressed by the respondents was the perceived leniency of the criminal justice system in sentencing. Seventy-four percent of respondents strongly agreed or agreed with the statement, “The courts let too many criminals go free on technicalities;” seventy-two percent of respondents strongly agreed or agreed with the statement, “The courts offer convicted criminals too many opportunities for

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<sup>77</sup> *Id.*

<sup>78</sup> See Am. Bar Ass'n, Commission on the American Jury Project, <http://www.aba.net.org/jury/home.html> (last visited Sept. 3, 2007).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Pound, *supra* note 1, at 4.

<sup>82</sup> *Id.* at 4–5.

appeal;” and sixty-eight percent of respondents strongly agreed or agreed with the statement, “Lawyers spend too much time finding technicalities to get criminals released.”<sup>83</sup> For those concerned about maintaining treasured civil liberties protected by our Constitution, it is clear that there is a continuing urgent need to explain more effectively our criminal justice system to our fellow Americans. Dean Pound had it wrong when he concluded, “Revenge and its modern outgrowth, punishment, belong to the past of legal history.”<sup>84</sup>

Any serious effort to address the causes of public dissatisfaction with the administration of justice must include an honest and objective assessment of the profession to which our justice system has been entrusted—the legal profession. Earlier in these remarks I noted that lawyers do not stand very high in public opinion ratings.<sup>85</sup> I am sure that did not come as a surprise to anyone in the room. Only 14% of respondents to the Justice System Perceptions Study indicated they were extremely or very confident in lawyers as an institution.<sup>86</sup> The Lawyer Perceptions Study provided more information about public perceptions of the legal profession and can help us shape a message that will encourage greater confidence in our profession. In the latter study, 19% of respondents expressed themselves extremely or very confident in lawyers<sup>87</sup>—slightly higher than in the earlier study, but still the lowest of all the institutions in the study except for the media. The Lawyer Perceptions Study, however, revealed some ambivalence in the public about its lawyers. A favorable perception expressed about lawyers was that they are knowledgeable about the law and are interested in serving their clients (59%).<sup>88</sup> On the negative side, 34% of respondents said that lawyers deserve the bad reputation they have.<sup>89</sup>

Criticisms of lawyers expressed by respondents in this study can be grouped into four central criticisms: Lawyers, they said, “are greedy; lawyers are manipulative; lawyers are corrupt; and that the legal profession does a poor job of policing itself.”<sup>90</sup> In concluding that the public believes lawyers are primarily motivated by greed, the Lawyer Perceptions Study reported, “Over two-thirds of respondents (69%) agree with the statement that ‘lawyers are more interested in making money than in serving their clients.’”<sup>91</sup> News reports of large fees for lawyers in class action litigation in which class members receive little benefit reinforce this perception.<sup>92</sup>

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<sup>83</sup> Justice System Perceptions Study, *supra* note 38, at 54.

<sup>84</sup> Pound, *supra* note 1, at 4.

<sup>85</sup> See *supra* notes 45-47 and accompanying text.

<sup>86</sup> Justice System Perceptions Study, *supra* note 38, at 50.

<sup>87</sup> Lawyer Perceptions Study, *supra* note 40, at 6.

<sup>88</sup> *Id.* at 17.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 7.

<sup>91</sup> *Id.* at 8.

<sup>92</sup> See Study: *Class Actions Against Insurers Surged in 1990s; Many Resolved Behind Closed Doors*, INS. J. (Apr. 10, 2007), available at <http://www.insurancejournal.com/>

In reaching the conclusion that the public believes lawyers are manipulative, the study found that the public believes lawyers “manipulate both the system and truth. Nearly three in four respondents (73%) agree that ‘lawyers spend too much time finding technicalities to get criminals released.’”<sup>93</sup>

The finding that lawyers are corrupt was supported by comments in focus groups that said lawyer tactics “border on the unethical, and even illegal.”<sup>94</sup> Focus group participants told stories of lawyers who “stage accidents, send clients to doctors for injuries they don’t have, and even offer to pay off judges or prosecutors.”<sup>95</sup> It is difficult to hear, much less believe these stories, but study participants reported them as real experiences.

And the bar itself does not come out very well in this study. Only one quarter of the respondents in the study agreed with the statement, “The legal profession does a good job of disciplining lawyers.”<sup>96</sup> Bar associations are viewed “as an ‘Old Boys Network,’ more similar to a union or club than a professional association.”<sup>97</sup> The majority of the respondents felt that “they have no recourse if their attorney fails to properly represent them. While they acknowledge that some bad attorneys give the rest of the profession a bad name, they blame the entire profession for not keeping its house clean.”<sup>98</sup>

It is not pleasant to hear these criticisms. Our instinct is to protest by saying that they are not true. Nonetheless these are perceptions expressed by respondents representing an overwhelming majority of the public about our profession, and they demand our attention. It is not sufficient to conclude that lawyers have always been unpopular with the public, and so it will always be that way. Any serious attempt to address causes of popular dissatisfaction with the administration of justice must take account of public attitudes toward the profession most responsible for the administration of justice in this country. We must develop new and better ways of describing what lawyers do and why we do it. It is a continuing task.

Dean Pound ended his speech in 1906 on a positive note. Perhaps he needed to do that in light of the controversial nature of his remarks reported by Professor Wigmore.<sup>99</sup> As he came to the end of his speech, Dean Pound noted among favorable developments the recent rise of great law schools.<sup>100</sup>

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news/national/2007/04/10/78621.htm (last visited Apr. 21, 2007) (citing a study by the RAND Institute that showed cases where attorneys’ fees constituted up to 90% of the settlement fund once funds were actually dispersed).

<sup>93</sup> Lawyer Perceptions Study, *supra* note 40, at 8.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 7.

<sup>97</sup> *Id.* at 10.

<sup>98</sup> *Id.*

<sup>99</sup> See *supra* notes 9–22 and accompanying text.

<sup>100</sup> Pound, *supra* note 1, at 25. Law schools were then a relatively new way of training lawyers rather than the formerly prevailing system of apprenticing in a law office. See HULL, *supra* note 2, at 40.

He also noted the beneficial effect of bar associations becoming active in reviving professionalism and removing commercialism from the bar.<sup>101</sup> And so he concluded: “[W]e 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>102</sup>

We have made important improvements in many ways in the past 100 years. But I think we would all conclude that Dean Pound was overly optimistic in predicting the coming of a hallowed day when the causes of popular dissatisfaction with the administration of justice would all be resolved. The challenge to address these causes is never ending. New and varying causes will continue to appear. But persevere we must. At stake is nothing less than public confidence and trust in the administration of justice. And that is the foundation of the rule of law.

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<sup>101</sup> See HULL, *supra* note 2, at 40.

<sup>102</sup> *Id.*