PROFESSIONALISM IN THE JUSTICE SYSTEM: THE DIVINE COMEDY OF ROSCOE POUND*

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I graduated from law school in 1970. No one taught ethics or professionalism. In our Bar Admission course, the six months of weekly exams following our year of articling, the then Chief Justice of the province gave one one-hour class on being a lawyer. He told us to never wear brown suits or white socks to court. The 10 women in the room of 500 men smiled — no one seemed to care what we wore.

Yet despite the fact that the only lecture on being a lawyer in four and a half years of legal education was about what a lawyer should look like, there was a tacit yet clear consensus about what it meant to be a lawyer. It meant being a professional, which meant all those romantic notions about decency, civility, trustworthiness, and fairness, to name a few. The lawyers who had good reputations were the lawyers who practised law with those adjectives as conduct guides. Some of them made a lot of money, which no one begrudged them or presumed. And quite a few of them were very smart. But they were also overwhelmingly white, male, able-bodied, and socially advantaged. Diversity was a word we used to describe the variety of cases we handled, not our consumer or collegial environments.

We have come a long way. Today's professional environment is bursting with diversity, far better educated about ethics, far better paid, and far more stressful. But it is also a professional environment where the consensus about what it means to be a professional has broken down, as has the consensus about what the criteria should be for awarding good reputations.

What worries me about this is not so much the absence of a consensus, although this is undoubtedly an unsettling reality. It is the threat I fear to the very legitimacy of the profession, and to the professionals and institutions in it. Although I quickly concede that this is not a new issue, it has a feel of urgency to me in this ideologically polarized, rampantly partisan, intellectually sclerotic, and frenetically

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fluid era.

There is undoubtedly a crisis of professionalism generally, and that crisis in turn is having a supply-sided impact on everyone, including lawyers. It should surprise no one that lawyers are affected by the spirit of the times, but neither should it surprise lawyers that the public expects them to rise above it.

The public is our audience, the people for whom we perform the justice play. They do not direct us, but they are very interested in what is going on. If they stop clapping, we are in deep trouble. We have to figure out if it is because of the script, the props, the cast, or all of them. We know that we will always have an audience, because the play is called the 'Rule of Law', and the public's attendance is mandatory. Since we give the public no choice about whether or not they are subject to the rule of law, we have to care about whether they like the performance. And that will depend to a large extent on how professional they think our performances are.

To me, the American Bar Association Professionalism Committee's *Report on Teaching and Learning Professionalism* got it right when it said that professionalism was about dedication to "justice and the public good."[1] I want to tackle one aspect of that professionalism in this lecture, and that is whether we are delivering justice and serving the public good in the place to which the public comes to settle its disputes: the courts.

I cannot immediately tell you why the words inscribed over the infernal gates in Dante's *The Divine Comedy* came to mind when I thought of this topic, but they did. They say "Abandon hope, all ye who enter here,"[2] and that put me in mind of how exotically appropriate that epic poem might be as a framework for this talk.

But I also thought that history is a wonderful teacher, and that we have had this conversation before. And that, not surprisingly, put me in mind of Roscoe Pound's famous 1906 speech on what the public thinks about how we professionals in the

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[1] American Bar Association, *Teaching and Learning Professionalism: Report of the Professionalism Committee* (Chicago: American Bar Association, 1996) at 6.

[2] Dante Alighieri, *The Divine Comedy*, trans. G.L. Bickersteth (Oxford: Basil Blackwell, 1981).

courts do our jobs.[3]

Permit me then to offer a more generic look at professionalism — not at whether we have it, because I think in some ineffable way we do and always will have, but at whether in our professionalism we are paying enough attention to why and for whom we are professional. I propose to look at our professionalism from the outside in, not at how we see ourselves, but at whether justice is seen as being done, which is, in my view, the essence of professionalism.

Rather than look at the issue of professionalism from the perspective of specific ethical problems, I want to look at the morality of the overall institutional framework in which these interstitial ethical judgment calls are made daily.

Dante's epic poem, *The Divine Comedy* was in three parts – the Inferno, Purgatory, and Paradise. There is something wonderfully oxymoronic about the notion of a religious vision called *The Divine Comedy* which consists mostly of stories about hell and purgatory; perhaps it merely recognizes that at times we must go through the purgatory of reform to get the epiphany of paradise.

This paper is about the 'Divine Comedy' in North America that is Civil Justice, an analysis in three Acts offered by someone who entered the profession with unbounded enthusiasm and pride a generation ago, and who has never once regretted that entry.

Act 1: INFERNO

We begin by leaving Dante momentarily to join Santayana who said in 1905:

> Those who cannot remember the past are condemned to repeat it.[4]

In this first Act, we remember that one year after Santayana made his observation, Roscoe Pound made a few of his own which we have regrettably

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[3] R. Pound, "The Causes of Popular Dissatisfaction With the Administration of Justice" (1937) 20 J.Am. Jud. Soc. 178. Although the text of Roscoe Pound's speech was published in this Journal in 1937, he actually delivered this address at the annual convention of the American Bar Association in 1906.

[4] G. Santayana, *The Life of Reason, Introduction and Reason in the Common Sense* (New York: Charles Scribners' Sons, 1936) at 284.

forgotten and have been condemned to repeat ever since. Pound's 1906 speech to the American Bar Association was entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."[5] It is, remarkably, still painfully relevant almost 100 years later.

Let us first set the historic stage. 1906 was three years after the Wright Brothers' maiden flight at Kitty Hawk, ten years after *Plessy* v. *Ferguson*[6] told blacks that segregation was constitutional, eight years before the most cataclysmic war the world had ever fought, a generation before rural America became urbanized, and two generations before its governments became decidedly distributive.

And what were the opening sentences of Roscoe Pound's speech in those long ago, agrarian, newly industrialized, minimally bureaucratized times?

> Dissatisfaction with the administration of justice is as old as law ... discontent has an ancient and unbroken pedigree.[7]

Already by 1906, when the American Bar Association had barely been formed, a leading voice in the profession put what he considered a flawed civil justice system on a diagnostic slide and placed it for critical analysis under his professional microscope. What did he see?

He saw, he said, that all legal systems necessarily attract complaints.[8] These complaints arise largely because laws are rules and appear to operate mechanically; because as rules they require interpretation which is necessarily discretionary; and because as law they offer a promise of justice whose definition is difficult to harmonize when a divided and diverse community has conflicting conceptions of the promise. Pound subdivided the issues, and compellingly observed the unwillingness of the system to respond to change.[9]

And the most important thing he felt needed change in 1906 was the civil justice

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[5] *Supra* note 3.

[6] 163 US 537 (1996).

[7] *Supra* note 3 at 178.

[8] *Ibid.* at 179.

[9] *Ibid.*

system's exaggerated preoccupation with contentious procedure.[10] Wigmore called this preoccupation the "instinct of giving the game fair play."[11] Pound, less charitably, called it the "sporting theory of justice,"[12] a theory he asserted was so rooted in the profession that it was taken for a fundamental legal tenet, when in reality he felt it was probably only a survival of the days when a lawsuit was a fight between two clans. In Pound's view,

> the idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every turn ... The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.[13]

The dissatisfaction with the courts is more clearly understood, Pound observes, when in addition we consider the following strains: the strain put on the courts when questions of economics, politics and sociology are so routinely being turned into questions of law and tried as "incidents of private litigation;"[14] the strain of the fiction that in interpreting law the courts are not making it; and the strain of the lack of any general ideas or philosophy of law which Pound says "has been characteristic of our law from the beginning and ... a point of pride at least since the time of Coke."[15] But above all, Pound attributed public disaffection with the courts to the fact that the system was archaic and the procedure behind the times.[16]

It is extraordinary to find that almost a century ago, in making a plea for a streamlined system, he was able to make the following observation which reverberates through the century and lands, regrettably and comfortably, in a modern setting:

> Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, [are] direct results of the

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[10] *Ibid.* at 182.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.* at 183.

[15] *Ibid.*

[16] *Ibid.* at 186.

organization of our courts and the backwardness of our procedure...[17]

While in his diagnostic tour de force, Pound also blamed the making of the legal profession into a "trade,"[18] the politicization of the judiciary,[19] and the "public ignorance of the real workings of courts due to ignorant and sensational reports in the press,"[20] in the end, the causes lay, he felt, in the undisputable reality that the administration of justice was "simply behind the times"[21] in 1906.

Act II: PURGATORY

That speech cast Pound somewhat in the role of Savonorola, the 15th century Florentine monk who with his followers tried to persuade his fellow citizens to cleanse themselves of their Vanities, their earthly manifestations of spiritual decline, by burning them in a bonfire in the town square. The entertainment of the Bonfire of the Vanities continued until rival monks denounced Savonorola as a heretic, Florentines got tired of the asceticism, and Savonorola was himself burned at the stake.

Pound's rejection by the Bar was significantly less dramatic, but it was not enthusiasm that greeted Pound's affinity with the public's discontent. It was 70 more years before his ideas, largely through a 1976 American Conference in honour of his 1906 Speech and its insights, had dramatic results with the birth of Alternative Dispute Resolution, or A.D.R., movement. (The time is ripe, if I may be permitted a digression, for yet another Pound Revisited conference.)

1976, with the call for Alternate Dispute Resolution, brings us to Act II of our 'Divine Comedy,' when reforms are tried, courts merged, cases managed, issues mediated, rights arbitrated, languages simplified, and settlements induced. There is no need to dwell in Act II, largely because so much literature already abounds in this area. It has in fact become the Justice System's occupational equivalent to the M.B.A. programme — no one heard of it 20 years ago but it is now regarded as the best game in town. And there is little doubt that A.D.R. will remain for some time

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[17] *Ibid.* at 183.

[18] *Ibid.* at 186.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

the biggest growth industry in the civil litigation market.

But the other reason not to dwell on Act II's reforms, even though they are necessary and even necessarily permanent adjuncts to the civil justice system, is that alternatives to courts do not get at the root of what Pound had in mind.

What Pound had in mind, in my view, was examining the first principles of what happens *within* courts. What he had in mind were the Vanities, literally and metaphorically: the processes, assumptions, traditions, and trappings of the system, not the ways to avoid it entirely.

Yet the scholastic, juridical and legal modern reaction to Pound in 1976 was to tinker around the edges of the Vanities, throwing only the glitziest into the fire (like too many levels of courts), or finding ways to avoid using the courts, while essentially leaving them intact. The core was essentially untouched.

Act III: PARADISE

This brings us to the present, and to the issue under review: is the public dissatisfaction with the profession Pound talked about in 1906 here today? And if so, is it valid? And if it is valid, is it valid for the same reasons?

Affirmative answers to all three questions entreat us to enter Paradise in Act III. They suggest that if Pound was right that the public was unhappy with civil justice in 1906, by now it is practically inconsolable.

Did Pound have it right? We cannot know for sure. But neither can we be sure that he got it wrong. Should we cling to old ways because they are the ways we have always done it? Do we cling because "if it ain't broke we don't fix it?" Who decides if it is "broke?" Who decides if the quality of justice is strained? What does "quality of justice" mean? And whose dictionary are we going to use to define it — those who can or those who cannot afford it? How many lawyers themselves could afford the cost of litigating a civil claim from start to finish?

First, the old stage and its props revisited and modernized. The horse and buggy of 1906 have been replaced by cars and planes; morphine for medical surgery has been replaced by anaesthetics, and the surgical knife by the laser; *caveat emptor* has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced

by the compact disc player; the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones.

And yet, with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. It is the one area we seem congenitally allergic to changing, out of fear that if we experiment in this area, we will break out in a rash ... of injustices.

Back to first principles. What is the purpose of a civil trial? To get at the truth? If it is, then we need courts less and accurate lie detector tests more. And what is truth? Whose version, like the movie *Rashomon*, ought we believe? And even if we do believe a version, can we be sure of its accuracy in every respect so many months or years after the event? And is cross-examination the way to find out if it is accurate? And does it help to spend days in Discoveries? And if one disagrees with a judge's decision about what happened so long ago in his or her role as a historian sifting through versions of facts, will layer after layer of appeal bring someone nearer my truth to thee? And if the judge is not to be analogized to an historian trying to assess what aspects of the past are credible or relevant, what is the proper judicial function? Pound said civil justice is about prevention and compensation.[22] If he was right, then we have to figure out what information the judge needs and how best to get it there; and who should be there when he or she gets it; and whether he or she even needs to be a judge.

While it is true that we live in cranky times and that every public institution is under intense scrutiny – if not siege – civil justice is the last frontier. The public appears forcefully and finally to be saying, "lawyer, heal thyself," and we in the system cannot be heard to say that we are not sick enough to take the cure. Public trust is eroding because, to move from Savanorola's Vanities to those more recently immortalized by Tom Wolfe, the civil justice system's status quo feels too extravagant, complicated, and expensive for what it delivers and to whom.

Let me offer a possible theory about our excess reliance in civil litigation on procedural rules. Rather than design a system uniquely appropriate to the kinds of remedies we seek in the civil justice world, we adopted without question the criminal justice system's procedure-laden values. Criminal justice is a system designed to

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[22] *Supra* note 3 at 179.

determine questions of guilt or innocence, and to provide guarantees of an individual's presumptive right to protection from unjustifiable state action. It is and should be about process. But why should the procedural rules be the same in civil justice as the ones designed to protect the presumption of innocence? The issues, relationships, public policy, and remedial issues are entirely different. So, therefore, can the procedural approaches be.

Do we really need hundreds of pages of rules and annotations to resolve a private civil dispute between two or more people? Does the notion of justice in civil litigation grow with the number of rules, or is the procedural safeguard of criminal law the procedural hurdle of civil litigation? Are we not allowing ourselves to be intimidated by the anticipation of allegations of compromised quality (or "assembly line" justice) when we really have no idea whether justice, let alone public satisfaction with its distribution, is compromised one iota by reforms like time limits, efficiency or accessibility? How would we know what will be, or be perceived to be, compromised since we have not ever really tried basic and fundamental reforms? If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal profession reasonably resist experimenting with old systems of justice in order to find better ways to deliver it? People want their day in court, not their years.

If the task of designing a system for resolving civil disputes were given to a reasonable non-lawyer who had never been inside a courtroom, what would the system look like? There would undoubtedly be an independent, impartial adjudicator. There would undoubtedly be an opportunity for everyone to know the case they have to meet and have a chance to meet it. These, after all, are the essential props of the adversary system. But then what about the cost of the set? Would the system take years? Months? Appeals? How many? Lawyers? Rules? Judges? How many levels? How would they be picked?

It is hard to imagine that any reasonable member of the public on whose behalf we have designed this elaborate process we cling to so tenaciously would ever construct the labyrinth of rules, paper work, motions, and complications the legal profession lives by, let alone do it in the name of justice. Then why does the profession cling so tightly? Perhaps because fish do not know that water is wet.

This line of inquiry may lead us into yet another intellectual grazing pasture: rethinking what disputes we consider justiciable. After all, what is there about being a lawyer that qualifies us to translate all forms of human behaviour into adjudicated disputes? Or about being judges to decide them? And is there enough in the law

school curriculum to teach lawyers to think in a contextual, strategic, civic-minded, multi-dimensional and settlement-oriented way to enhance these capacities?

We are captives, we lawyers, of an old system which we should be taming and refining rather than the other way around, captives because it is the oldest and loudest beast in our neighbourhood and because we fear what will happen if we ignore its roar. We know by now the cost to the public of obeying its roar. Perhaps it is time to think about reducing that cost by reducing the roar. We have swallowed Dicey whole and now the beast is swallowing us.

Our head is already too far in its jaw. We should gently extricate ourselves, consult with the audience for whom we have been performing the same act for so long, and decide how much of (or whether) the old act is still bringing them in. We may find to our surprise, that neither the Rule of Law, nor due process, nor clients, nor lifestyles will be impaired. There is even the possibility that our experiment may in fact improve justice's performance.

Paradise in Act III is debunking the myths, providing a fair system based on real fairness rather than the traditional illusion of it, making law itself accessible and not so routinely plentiful, making all the resources available that real fairness demands, and concentrating on effective change for change's sake.

This is not about Cadillac models for expensive cases and Chevrolets for all the others — the Chevy may be just as important to its owner as the Cadillac is to its owner. A private dispute is a private dispute — the amounts involved do not change the principles involved. A more useful dividing line may be the public/private distinction. Cases that turn on their particular facts are Chevies; cases of principle with the potential for wider impact beyond the immediate parties are the Cadillacs. Constitutional questions, issues involving new jurisprudence, these are what civil courts should hear more expansively, but not necessarily more cumbersomely.

While only an unrepentant romantic would be swept away by the wave of neo-populism that lets "the people" decide everything and everyone, a pragmatic idealist could easily justify trying, with public input, to narrow the gap between Act I and Act III, the gap between reality and ideal. And that means at least paying serious attention to the public which has come to agree with what Roscoe Pound said almost a hundred years ago on its behalf: there is a hole in the justice system's ozone layer and too many people are getting burned. And among those feeling the psychological burns are the lawyers and judges in it who are doing what the system has educated

them to do and yet find themselves, to their genuine surprise, criticized for discharging effectively their designated traditional mandate.

This is the ultimate irony. The legal profession is taught that justice is procedural, which it partly is, and yet the public it serves procedurally wants justice of a more substantive kind. Getting there may be half the fun, but not if you are paying. *Being there* is what the public is interested in, being where the complaint can be resolved, and being heard there as soon as possible. Period. And if you can win too, so much the better.

At the moment we are still in Purgatory. We can see Paradise from where we are, but we are not sure, procedural experts though we are, how to get there. If we do get there, we could probably make the public happy. But can we get there and make our colleagues happy? Can we stand the slings and arrows of outraged fortunes? Can we resist the seductive glow of the Vanities, the comforts of the well-worn, the safety of the tried whether or not true?

On the other hand, maybe we do not know how close to Paradise we really are, and how close to the end of the siege we are getting. The siege has been going on for some time and a ceasefire would be welcome, at least until we can figure out what territory we are fighting over. We might even, if we took a hard, collaborative look, make the encouraging discovery that we are all, legal professional and public, on the same side.

Now all we need is a Dante ...