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Hamline Law Review
Summer, 2007

Symposium Issue

A Century Later: Answering Roscoe Pound's Call for Change in the Administration of Justice

Article

***555 LOST OPPORTUNITY: LEGAL EDUCATION AND THE DEVELOPMENT OF PROFESSIONAL
IDENTITY**

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In his 1906 speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Dean Roscoe Pound identified a number of causes for unhappiness with the American judicial system. [FN2] He did not, however, mention legal education as one of those. In fact, Pound criticized progress in judicial administration as falling behind advances in legal education, which he praised by saying that “law schools . . . are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law . . .” [FN3]

As we reflect on Pound's words a century later, we must examine legal education as one of the possible causes of current popular dissatisfaction with the administration of justice. Legal education is the most common link among those responsible for designing and operating our modern judicial system; almost all lawyers and judges became licensed to practice law after a formal legal education. What they learned in law school about the role of lawyers in administering justice shapes the judicial system and contributes greatly to popular dissatisfaction with the legal system.

Lawyers' educational experiences are more similar than they are different. Although there are almost two hundred ABA approved law schools today, one lawyer's legal education looks very much like any other lawyer's education. Most law schools include a first year in which the same basic legal courses are taught, followed by specialized courses in the second and third year. Exposure to skills training, whether through simulation or clinical and externship courses, occurs after the first year. [FN4] The primary teaching method in the first year is the Socratic Method, which engages the student and professor in an often adversarial exchange. The primary text in the first year is the casebook, in which students read excerpts of judicial opinions, from which they develop a synthesis of general principles of common law.

Traditionally, those responsible for legal education have thought about law school from the perspective of what students need to know when they graduate. In the last twenty to thirty years, the perspective has *556 expanded to include skills training, that is, what students should be able to do when they graduate. [FN5]

The administration of justice would be improved if, instead of thinking only about what we want lawyers to know and what we want them to be able to do, we thought instead about who lawyers should be when they

graduate from law school. In reflecting upon Pound's remarks, I found myself asking whether there would be greater satisfaction with the administration of justice if legal education focused more than it does on the development of the lawyer's professional identity.

The years spent in legal education are a powerful time of transformation for students; students learn not just skills and knowledge, but also receive a number of messages about the appropriate roles and expectations of lawyers in serving clients, in ensuring the delivery of justice, and in interacting with society at large. Professional identity affects a broad range of moral and ethical choices that lawyers make in both their personal and professional lives, yet the influence of the structure, curriculum, and pedagogy of legal education on the development of personal identity is often overlooked.

In 2001, I began a project to determine the effect of legal education on students' personal and professional identities, in association with a study of legal education undertaken by the Carnegie Foundation for the Advancement of Teaching. [FN6] Since then, I have continued the project in one form or another, asking several hundred law students about their law school experiences. My effort has been to understand what changes students experience during law school and how those changes affect their transformation into lawyers and their understanding of their future lives as lawyers.

I have gathered the information in a variety of settings, including seminars on legal education, advanced legal ethics, and law and literature, as well as in large, traditional classes. Students discussed readings assigned from a variety of sources, wrote reflective essays, completed research papers on an aspect of legal education, and regularly participated in an online discussion board. As a basis for discussing issues related to professional identity, some students read fictional accounts of law and lawyers and others read biographies of lawyers, living and dead. Some students interviewed *557 lawyers as a part of their coursework. In some classes, lawyers and other professionals interacted with the students in one and one-half day retreats, and in others, lawyers were guest speakers throughout the semester. [FN7] These experiences have convinced me that legal education has both positive and negative effects on students' transformations into lawyers. The negative effects have some quite harmful consequences for lawyers, their clients, their families and friends, and the administration of justice.

My perspective on Pound's remarks, therefore, is through the lens of legal education and its effect on professional identity. That perspective raises two questions. First, what would be different about legal education if law school were conceived not only as a time during which one acquires certain knowledge and skills, but as the time during which a lawyer's character and identity as a professional are formed? [FN8] Second, would those differences affect the administration of justice? I think that the answer to both of these questions is "yes." This essay discusses five ways that legal education would be different if it focused on the development of lawyers' professional identity and argues that those differences would improve the administration of justice.

1. Students Would Learn to Integrate Cognitive Tools with Moral and Ethical Standards

Students would learn to integrate a lawyer's cognitive skills with their own moral standards and sense of justice and to put those skills to use in service of a client's moral standards. The frequently articulated purpose of law school is to teach students "to think like a lawyer." The evidence is strong that legal education does a good job of meeting that goal. Students report that the first year of law school instills in them the ability to reason inductively, to separate relevant from irrelevant facts, to base arguments on precedent, to depersonalize disagreement, and to articulate their thoughts in a logical, analytical manner. All of these are essential skills for lawyers.

The law has its own language and method, and one cannot effectively represent a client or work within the law without being adept at that language and method. Therefore, teaching students “to think like a lawyer” is valuable and necessary. It is, however, insufficient training to safeguard our legal system and to fulfill the promise of justice.

The problem with legal education's emphasis on thinking like a lawyer is that it places disproportionate weight on one aspect of an individual's identity—the cognitive. Law school pedagogy and culture value rational, analytical thought almost to the total exclusion of other qualities. In *558 particular, law school devalues emotional and ethical matters, including students' personal values, individual sense of justice, and the sense of purpose that brought many students to the study of law. Legal education provides lawyers with an important cognitive tool, but withholds the development of other qualities necessary for morally responsible use of that tool. [FN9]

In legal education we create lawyers who believe that their role in the administration of justice is almost entirely cognitive and that their own ethical values are irrelevant or improper to bring to the arena of justice. We create lawyers who learn to compartmentalize their professional and personal lives. We create lawyers who are incomplete as professionals, and who therefore treat their clients as incomplete human beings. They may be able to solve problems in their own lives with the fullness of emotional, moral, and analytical judgment, but they bring only the latter to bear when helping clients to solve their legal problems. [FN10]

We should not be surprised, then, that there is dissatisfaction with the way in which the legal system solves problems. The best lawyers understand and take into account the emotional and moral aspects of their clients' lives in helping them resolve legal problems. [FN11]

Pound notes a divergence of individual and communal ethics as one of the causes for dissatisfaction, but he argues that the divergence is necessary to the fair administration of justice. He states:

[t]he lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either *559 event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, ‘Good jurist, bad Christian.’ [FN12]

Would it not be better if jurists understood that they could be good jurists and also good Christians, or good Jews, or good Muslims, or just generally good people, whatever the source of their moral or ethical code? Perhaps law school should help teach students how to integrate their personal and professional standards rather than perpetuating a system that expects that the judge's role in administering the law will be at odds with personal moral or religious values. Doing so might result in a system of justice that in turn allows or even encourages parties to integrate their personal moral or religious values with legal solutions to their problems.

I want to be clear. I am not arguing for ad hoc substitution of individual ethics for law. History is replete with examples of the harm that such an approach can cause, and I agree with Pound that the law appropriately represents communal values developed over many years. Perhaps in our zeal to teach lawyers impartiality and fairness, however, we have gone too far and have instead taught that individual moral and ethical values are always irrelevant to one's work as a lawyer or jurist.

2. Relationship Skills Would be More Highly Valued

Legal education would value relationship skills as highly as cognitive and practical skills. Lawyers would have a better understanding of the dynamics of the attorney-client relationship and that legal problem solving includes consideration of the impact of legal solutions on relationships.

The need for a system of laws arises from the social nature of human beings. Laws are about relationships, just as practicing law and achieving justice are always concerned with relationships, for example, the creation or dissolution of relationships involving marriage, families, finances, business, or property. [FN13]

Pound notes the importance of relationships to laws when he describes the pervasiveness of civil laws:

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 *560 transactions, are conditions precedent of modern social and industrial organization. [FN14]

Yet, the pervasive curriculum, pedagogy, and environment of legal education includes very little attention to relationships, and in fact, sends messages that diminish the importance of relationships to the lawyer's professional identity. Few classes focus on relationships or interpersonal communication and those that do come after the first year, which is a critical time for the formation of professional identity. [FN15] The choice of casebooks as texts in most first-year classes means that students' introduction to the lawyers' role is almost exclusively about the law. The client and the centrality of the attorney-client relationship are nearly non-existent in first-year studies. To the extent that the client is present in judicial opinions, it is with a description that includes only the legally relevant facts and may even exclude the client's name. The client may be known as plaintiff, defendant, employer, employee, tenant, or landlord. The competitive environment and the Socratic Method as prevailing pedagogy send the message that being a lawyer is highly individualistic. Relationships between students (and by analogy between lawyers as colleagues) are devalued and many students feel isolated.

It is not just that law school fails to teach students about relationship skills; for many students, legal education actually diminishes or eliminates the ability to form and sustain relationships that they possess when they begin law school. By emphasis on the cognitive, on winning, on hard work, students are taught that the successful law student (and later lawyer) does not get deterred on the road to success by focusing on relationships. One student told me that she lost the ability to sustain relationships with family and friends within three weeks of beginning law school. She compared the experience of losing relationships during the first few weeks of law school to experiencing her grandmother's death.

Legal education ill prepares lawyers to handle the demands of relationships in the practice of law. This failure impacts the fundamental relationship of attorney and client. One does not practice law without being in relationship with a client, whether corporate or personal. Although judges do not have clients, they perform their duties in the context of relationships with the parties and lawyers who appear before them. Therefore, understanding the dynamics of those relationships should be a part of any practitioner's legal education.

*561 Additionally, the failure to teach lawyers about relationship skills impacts their ability to effectively solve legal problems. An individual's need for a lawyer and for access to the judicial system grows out of his or her own relationships. In fact, rarely does a client seek the help of a lawyer for a reason that does not have something to do with the client's relationship with another human being. The failure to acknowledge the importance of relationship skills in law school fails to prepare lawyers for the relational aspects of practicing law. For

example, a client who seeks a lawyer's help with a problem in a business partnership with a family member will seek advice regarding whether legal action may or may not be successful. However, moving towards a particular legal outcome without taking into account its effect on a lifelong relationship is likely to leave the client dissatisfied, even in the face of a legal victory.

Pound notes the eighteenth century criticism that “the bench was occupied by ‘legal monks, utterly ignorant of human nature and of the affairs of men.’” [FN16] While modern lawyers are not legal monks, to the extent that they see their roles as being about laws and not about human beings and human relationships, some of the same criticism pertains. The treatment of relationship issues by lawyers as if they can be resolved by knowledge of the law and analytic judgment alone shortchanges both clients and the legal system. The result is that the promise of justice is not fulfilled.

If law school valued relationships as highly as it valued the law, the curriculum, pedagogy, and evaluation structures would be radically altered. The law school curriculum would include more courses about such things as communication skills, family systems, the impact of cultural or personality differences on human interactions, the psychology of conflict, coping with fear, making mistakes and surviving them, and the relationship between psychological wholeness and professional competence. These topics, and similar ones, would be a part of the first year of law school and would be more fully integrated with learning the law. Clients would become more central to all students' legal educations. Law school assessment would measure students' abilities to perform in interpersonal situations as well as their cognitive abilities. Students would be encouraged to collaborate in their coursework. Grading curves and emphasis on class rank would be reconsidered.

3. The Law School Culture of Competition Would be Replaced with a Culture of Collaboration and an Understanding of the Complexities and Uncertainties Inherent in Professional Judgment

The structure of legal education would not value winning and competition over collaboration and problem-solving. Success in law school *562 is measured by certain identified prizes, which students report hearing about during the orientation period before first-year classes have begun (and sometimes even earlier). Law students are told repeatedly that a successful law student is one who places in the top ten or twenty percent of the class, is invited to join law review, and gets the high-paying, prestigious summer or permanent job. Students learn that the way to achieve those prizes is through performance in first-year exams, which measure almost exclusively cognitive skills, and excelling in a grading system that operates on a curve. By definition, therefore, only a small minority of students will obtain the prizes (after all, eighty percent will not be in the top twenty percent of the class), and law school becomes a zero sum game.

This environment has the effect of isolating students from their peers and faculty. Students learn to succeed at someone else's expense, rather than through collaborative problem-solving. It also creates feelings of failure and inadequacy among students, who overlook the fact that almost all of them will be successful in graduating from law school and becoming lawyers.

The emphasis on winning and the competitive environment have another consequence, as well. Law school culture is intolerant of fears, anxieties, vulnerabilities, and mistakes. Therefore, students who struggle with the complexity of law school, who are anxious about the responsibilities that come with being a lawyer, and who make or fear making mistakes interpret those things as signs of inability or incompetence. They develop self-doubt about their competence as lawyers and about their choice of profession, but learn to hide the self-doubt behind masks of assuredness and even arrogance. Because of the isolation felt by students, they do not know that

others are also experiencing fears and vulnerabilities. The belief that the profession does not tolerate mistakes begins a professional pattern of failing to acknowledge mistakes and deal with them appropriately. Thus, law school sends terribly inaccurate messages about being a professional, who, by definition, must exercise judgment in the face of uncertainty and often in situations where the stakes are high for the client.

As Pound acknowledges, the administration of justice should not be left to just anyone; it should be the province of individuals capable of understanding the complexities inherent in law. [FN17] A legal education that implies that good lawyers do not struggle with the demands of complexities and uncertainties, but instead have quick, certain answers, is fertile ground for dissatisfaction.

These lessons impact lawyers for the remainder of their careers. When students' professional identities are developed in an environment that values winning, their goals as lawyers will be to win over a perceived opponent by whatever means are within the bounds of the law and ethical standards. Their measures of professional success become constricted and exclude creative and collaborative solutions. Lawyers will therefore present *563 a narrow range of options for resolving or preventing disputes, and will operate on the Holmesian “bad man” theory of a client. Lawyers who have the depth and self-awareness to feel anxiety or uncertainty when confronted with difficult legal problems will not thrive in the modern legal culture, meaning that we lose the very lawyers from the profession that are needed for a just legal system.

Pound provides a long list of negative consequences that flow from what he calls “contentious procedure.”

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 the law. . . . If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness. [FN18]

Lawyers first learn that “contentious procedure” or treating the legal system as a game is consistent with their professional responsibilities during law school. They learn it by messages, both explicit and otherwise, that a good lawyer beats his or her opponent through cleverness and the application of analytical and cognitive skills to the exclusion of other qualities.

4. Students Would Develop Connections with Lawyers

Legal education would provide more opportunities for students to form connections with lawyers. Many students do not know lawyers and therefore develop their professional identities as lawyers through reading judicial opinions, classroom interactions, and images of lawyers in popular culture. These provide an incomplete or distorted notion of lawyers' identities, for the reasons outlined above.

Students who have opportunities to hear from lawyers about their experiences report a broadening of their expectations and hopes for their future lives as lawyers. Students are reassured by hearing lawyers discuss their own successful searches for meaning in their professional lives, and for *564 achieving balance and integration of their professional and personal lives. They are relieved to hear professionals talk of dealing with fear, and of

making mistakes and correcting them. They are moved when they hear about lawyers' relationships with clients and the differences that they have made in clients' lives. For many students, meeting lawyers whom they admire and who are interesting and enjoyable to be with is reassuring. It helps to mitigate the negative public perception of lawyers. One student's comment about the interactions with professionals is illustrative; she said that they offered "insight to people starving for guidance, hope, and reassurance, which we all need from time to time. I am grateful for the opportunity."

5. Law School Would Help Students to Retain their Sense of Purpose

All of the above changes would help students retain and deepen the purpose that brought them to law school in the first place. Most students arrive at law school with a strong sense of purpose for their work lives and a passion to do something important. They have some sense of a lawyer's professional identity, although it may be vague and uninformed by experience with the legal system or lawyers. For most students, those early professional identities include engaging in work with value and meaning. They see lawyers as problem-solvers who act in service to others, both clients and society at large. Their early understanding of lawyer's work includes work in relationship; students begin law school with a desire to connect with clients and others.

Yet, legal education's emphasis on the rational and analytical to the exclusion of other qualities chills discussion of meaning and purpose. The adversarial and competitive environment of law school overcomes students' problem-solving and collaborative instincts. The lack of interaction with clients, and the failure to include the client's perspective in first year discussion of legal analysis, removes the relational aspect of lawyering from their identities. Students deduce that their personal visions of lawyering are naive and unrealistic, not realizing that these early identities capture well the possibilities available in the practice of law, although they are at odds with the prevailing law school culture. Students do not realize the disjunction between legal education and the best kinds of law practice. Instead, their changed identities accompany their emergence into law practice and, for some, their service as judges.

CONCLUSION

Pound concludes his remarks with an optimistic vision for the future, "we may look forward confidently to deliverance from a 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 *565 respected by all." [FN19] Pound would likely be disappointed that his vision has not been achieved in the century since he addressed the ABA about the need for court reform. As we reflect on whether his vision can be achieved going forward, I suggest that we examine legal education as one area ripe for reform. We have law students for six semesters. If we do not prepare them well for their professional lives, we have lost an opportunity to improve the lives of those who look to the legal system for justice and fairness. We can do better than we are doing now. Perhaps reconsideration of Pound's remarks will be the impetus we need for change.

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[FN2]. Roscoe Pound, Dean, Harvard Law Sch., *The Causes of Popular Dissatisfaction with the Administration of Justice* (Aug. 1906), in 35 F.R.D. 273, 275 (1964).

[FN3]. *Id.* at 291.

[FN4]. The exception is research and writing training which usually begins during the first year.

[FN5]. The development of legal education is well-documented elsewhere. See, e.g., William M. Sullivan, Anne Colby, Judith Welch Wagner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (The Carnegie Foundation for the Advancement of Teaching 2007); Robert Stevens, *Law School: Legal Education in America from the 1850's to the 1980's* (University of North Carolina Press 1983).

[FN6]. See Carnegie Academy for the Scholarship of Teaching and Learning, Daisy Hurst Floyd-Project Summary, http://www.carnegiefoundation.org/programs/project_summary.asp?scholar=58 (last visited May 6, 2007); see also Daisy Hurst Floyd, *The Development of Professional Development in Law Students* (2002), http://www.law.fsu.edu/academic_programs/humanizing_lawschool/images/daisy.pdf.

[FN7]. Floyd, *supra* note 6, at 1.

[FN8]. The work of the Carnegie Foundation has been helpful to me in thinking about legal education from the perspective of formation of character. *Educating Lawyers* suggests that legal education learn from clergy education, with its clear purpose of character formation. Sullivan et al., *supra* note 5.

[FN9]. See Steven Keeva, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life* (ABA Journal McGraw Hill 1999) for a description of the mental map developed in law school.

[FN10]. See Lawrence S. Krieger, [What We're Not Telling Law Students-and Lawyers-That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession From its Roots](#), 13 *J.L. & Health* 1 (1998); Sandra Janoff, [The Influence of Legal Education on Moral Reasoning](#), 76 *Minn. L. Rev.* 193 (1991), for empirical studies of the way in which the first year of law school causes a shift in students' moral reasoning and motivation.

[FN11]. I have been influenced in my thinking about this by the work of Parker Palmer. On this point, I am reminded of an illustration he uses in discussing a conversation with the dean of a medical school about medical education. ““For the first two years, the students sit in an auditorium while a professor up on the stage, pointer in hand, goes through the bones of a skeleton hanging from a rack. The students' task is to memorize all that information, feed it back on tests, and use it in laboratory settings. Then, at the beginning of the third year, they meet their first live patient-and we wonder why they treat that patient like a skeleton hanging from a rack!”” Parker J. Palmer, *The Courage to Teach: Exploring the Inner Landscape of a Teacher's Inner Life* 124 (Jossey-Bass 1998).

[FN12]. Pound, *supra* note 2, at 276-77.

[FN13]. Keeva, *supra* note 9, at 8.

[FN14]. Pound, *supra* note 2, at 274.

[FN15]. Interviewing and counseling courses include an emphasis on relationship skills in the context of the attorney-client relationship, and other skills courses may also teach such skills, for example, trial advocacy, negotiation, etc. However, these courses are usually electives, taught to a small number of students, and reside in the advanced, elective curriculum. They are mere additives to the main focus on cognitive and analytical skills.

[FN16]. Pound, supra note 2, at 274.

[FN17]. Pound, supra note 2, at 278-82.

[FN18]. Pound, supra note 2, at 282.

[FN19]. Pound, supra note 2, at 291.
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