

Orison S. Marden Lecture

# Keepers of the Rule of Law

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**O**ne hundred years ago this year, Roscoe Pound delivered to the American Bar Association his landmark address on "The Causes of Popular Dissatisfaction with the Administration of Justice." It was a formidable tour of the horizon of American law and lawyering as it appeared at the dawn of the last century, and it launched a conversation about professional values that has continued, with greater or lesser intensity, for the ensuing century.

Reading it now, one is impressed both with the scope and ambition of Pound's treatment, and the remarkable endurance of his audience—

the speech must have lasted two hours. Luckily for you, I have no illusions about ending on a triumphant note the debate he began. Rather, I would like to suggest some ideas about the terms upon which that conversation might profitably continue in the years ahead.

Before going on, I'm bound to honor a custom Pound established—and from which his successors have scarcely ever departed—to set ruminations like this one in context with a reminder of just how ancient the complaints about lawyers seem to be. His chronicle starts with Plato, and includes probably the most famous battle-cry of lawyer-bashers, the moment in *Henry VI, Part 2*, when Shakespeare has Dick the Butcher sidle up to the rebel leader Jack Cade, and famously advise him, "The first thing we do, let's kill all the lawyers!"

Enough bad has been said about lawyers in modern days that there is not much need to dwell on *old* screeds, even to satisfy Roscoe's ghost. One should be enough, and I'm sure Pound would have used it if he'd found it, as both Norman Vesey and Deborah Rhode have done. In 1770, Grafton County, New Hampshire provided the following census report to King George III:

Your Royal Majesty, Grafton County...contains 6,489 souls, most of whom are engaged in agriculture, but included in that number are 69 wheelwrights, 8 doctors, 29 blacksmiths, 87 preachers, 20 slaves and 90 students at the new college. There is not one lawyer, for which fact we take no personal credit, but thank an Almighty and Merciful God.

Grafton County, New Hampshire, as it happens, is across the river from the Vermont home of a friend of mine with whom, in the early 1970s, a group of us did some work in our community on issues of racial justice based on the Kerner Commission Report. Our friend comes to mind just now because he constantly used to urge us to attack a policy issue "at the scale of the problem."

That is a pertinent reminder tonight. The true scale of the problem of lawyer professionalism has, I think, been trivialized in recent years. One respected senior lawyer told me a while back that the only point of the "professionalism enterprise," as he called it, was "to get lawyers to stop shouting at each other." Well, that would be a good thing, but it is not the point; it is not the scale of the issue at all.

Rather, to continue usefully the discussion Pound began at the start of the last century, we have to take into account some realities of this

century. There have been dramatic changes in the demographics and economics of the practicing bar since Pound spoke. Those changes have, in turn, rendered obsolete some of the rationales offered in yesteryear for a sense of identity in the legal profession. At the same time, lawyers have been beset by centrifugal pressures like those generated by new technology, increasing specialization, and more avid competition. A scholarship of disillusionment has become fashionable in the legal academy, and old structures of initiation, acculturation and mutual support—from collegial law firms to thriving bar associations—have struggled to avoid erosion.

All these phenomena and others have combined to stress to the breaking point the notion that American lawyers share a common ethos that defines them as a profession. For Pound's discussion now to proceed constructively—at its true scale—we need to take a moment to consider whether the game is worth the candle, to answer the questions: Does there survive, can there be nourished, a common understanding of what it means today to be a lawyer? Is there a coherent basis for a fresh, contemporary sense of professional identity and worth?

The invitation to give this lecture was an offer I couldn't refuse because I so profoundly believe that the answers to both of those questions is, "Yes." And because I also believe that a failure of our collective imagination that leaves large numbers of lawyers in doubt of that answer imperils our continuation as an autonomous profession, the quality of our service to clients, and, in the end, a very fundamental value of American democracy.

That value is an enduring and consistent respect for the Rule of Law. That value and its implications shape a modern notion of what American legal professionalism is—and asks of us.

My thesis in short is this: The Rule of Law is essential to the distinctive American social contract; lawyers, in their everyday private practice, are essential to the Rule of Law in America; and our whole professional value system is only as relevant—as alive—as is our appreciation of this understanding. Let me expand on that for a few minutes.

Let's start with my first proposition—one that I think should be an axiom, but may take a moment's reflection to appreciate fully. The Rule of Law is indispensable to the American experiment in liberal democracy. I'm not talking here about the network of positive law and the profusion of regulations about which reasonable people can differ and regularly do. I'm talking about something much more fundamental: the necessity in our culture that people in general respect and obey the law. It is a value that, like gravity, we generally ignore but that conditions virtually everything we do and how we do it.

The American enterprise, when you reflect on it for a moment, is full of deliberately designed tensions. We are a nation built on proudly proclaimed oxymorons. There are many, but lest I test your endurance like Pound, consider just two:

We pledge allegiance to a land with “liberty and justice for all” no matter how disparate and conflicting the claims and aspirations of our people may be.

And, as for those people, we pledge allegiance to *one* nation, which our Great Seal proclaims to be “E pluribus unum”—“One from many.”

At the start of our nation’s life—almost up to the point Pound spoke—the pledge of “liberty and justice for all” could be redeemed by the lure of the frontier. The oppressed, the misfit, the opportunist, could “go west” to find a new chance or a safe haven. But no more. Justice Potter Stewart made the point, and described its significance for *us*, some years ago: “In my lifetime,” he said, “The courts have replaced the frontier. When this country was new, a nonconformist or someone who just wasn’t making it could always go west. There was always space. Now there is no more space, and the courts have been called upon to protect the rights of these individuals. The courts are trying to provide that space.”

The pledge of allegiance renders in poetic language what political theorists call a scheme of “ordered liberty.” But whether stated in poetry or prose, managing and continuously resolving the tensions inherent in that self-competing aspiration is the job of law. As Pound put it, “Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world.”

Put only slightly differently, the Rule of Law is a necessary precondition to the functioning of a democracy in conditions of freedom. Fareed Zakaria has made this point convincingly in his wonderful little book, *The Future of Freedom*. Zakaria reminds us that, despite our American tendency to conflate them, democracy and freedom are not the same thing, that creating each of them is a somewhat different endeavor, and that managing their inherent tension over time requires a robust and sustained adherence to a set of generally accepted limiting principles and the means of enforcing them—that is, the Rule of Law. That we Americans tend to blur the distinction between democracy and freedom in our prescriptions for other societies, like Iraq, is, in Zakaria’s view, a testament to how much we have become used to the existence of a functioning Rule of Law regularly providing its mediating function in our society.

Not that the tensions have disappeared, or that the sovereign claim of the Rule of Law goes unchallenged here, of course. The fraught issues

of recent months and years over the authority to make pre-emptive war, to detain and render prisoners in the war on terror without legal process, to intercept domestic communications without warrants, are vivid clashes of the claims of order with the claims of liberty. And the Senate's recent reconnaissance of the border between judicial authority and presidential power is fundamentally about whether such vivid clashes, and others less dramatic, will be resolved by law or prerogative.

The thesis holds, I submit. To balance the equally proclaimed values of liberty and justice, freedom and democracy, in short to sustain the social order to which we pledge our allegiance, requires an equally sturdy allegiance to the Rule of Law.

That is even more so in a nation as diverse as ours, attempting continuously to forge "one from many." Our diversity is now, as it has always been, a great strength. We are one of the few genuine polyglot democracies ever attempted in the history of the world. But our diversity is now, as it has always been, a great confusion, too; our melting pot has always been at the boil. The organizing ideal that provides the instrument to make one coherent nation across the manifold divisions of race and culture and moral perspective, custom, manners, ideology and ambition, is a common acceptance that the adjustments required from each of us to live with others, if not made voluntarily, will be provided by the Rule of Law.

To say that this is commonly accepted does not mean that this submission to law is easy or the outcomes are undisputed. Here's Pound again, reminding us from a startlingly simpler era what we know in our bones today: in contrast to what he called "Periods of absolute or generally received moral systems" societal conflicts are "greatly intensified" "in periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition." Never mind globalization, one might add. Pound points out that "The law seeks to harmonize the activities [of society] and adjust the relations of every man with his fellows [well, it was a century ago] so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult."

To be sure, that is so. One only has to look at the contests over abortion, affirmative action, gay rights and a host of other "hot button" issues to know it's so. But one only has to notice that all those issues are played out in the halls of legislatures and courts to know that, hard as it is, our society has remitted those clashes to the law for resolution.

Looking at just these two self-competing promises—that we have order and liberty, that we be one though many—shows, I think, how crucial a vibrant respect for the Rule of Law is to our society. You would find the same, I think, if you looked at our claim that “All persons are created equal” which is manifestly untrue in nature and nurture but is true in the eye of the law. Or at the strains imposed by our embrace of a free market system upon our ideal of equal opportunity for all.

The Rule of Law is the indispensable instrument by which we manage all these tensions—and others—inherent in our grand national experiment; by which—across all that divides us—we make the adjustments needed to live as one; by which we create the conditions in which a free economy can operate efficiently and fairly, where private plans can be reliably laid and carried out, where disputes can be resolved peacefully and order kept with a reasonable approach to justice. In our world of oxymorons, the Law is both the glue and the lubricant of our diverse society.

But what the law is *not*, as Oliver Wendell Holmes one observed, is “a brooding omnipresence in the sky.” It is the composite of thousands of cases and matters, laws made and used, advice given and received, day in and day out. If the Rule of Law is crucial to American society, then lawyers are crucial to that Rule of Law, since they deliver it every day in every case or transaction in which they act on a client’s behalf. It is not an exhortation, but a description, to say that lawyers in private practice are *always* engaged in a public calling.

There is no need to tell this group that this role is most obvious in the courtroom, where lawyers play their socially assigned part in asserting their clients’ rights and interests. These rituals of stylized combat are designed—however imperfectly—to resolve conflicts without strife. They are a social peacekeeping system in which lawyers, by ably representing their opposing clients, perform a public as well as private service.

But it may be worth a moment to remind ourselves that private practice is truly public, too, in the less obvious setting of transactional work. A few years ago, Stephen Carter of Yale spoke at a symposium in Minnesota ambitiously entitled, “The Future of Callings—An Interdisciplinary Summit on The Public Obligations of Professionals into the Next Millennium.” His remarks included an insight that illustrates my point. “The principal law-givers in America” he said, “are neither courts nor legislatures, nor administrative agencies, but rather lawyers” “This,” he continued, “is because most people’s principal experience with understanding their legal obligations, and their legal rights, is working with a lawyer. Whether it is a matter of buying a house, defending a lawsuit, or estab-

lishing a business, the lawyer becomes, in the life of that person, the law-giver. It is the lawyer who comes forward to say these are the possibilities of what you may do or not do." So, in the daily counseling practice of lawyers, the adjustments of interests made by the Rule of Law are delivered by the lawyer to the client, and become, for that client, the law.

And all the drafting that we do in our offices at the behest of clients has this same public character. Think of it: when we draft an instrument we are actually enlisting the power of the state to give effect to the relationship we are establishing by what we write. Remember, that is why the racially discriminatory covenant in a private transaction was held to violate the Fourteenth Amendment in *Shelley v. Kramer*; the requisite state action was found to inhere in the fact that the covenant was backed and enforced by "the full coercive power of government." That public power had been conscripted by private lawyers writing a private contract.

Mary Ann Glendon describes another public aspect of private transactional practice this way:

Office lawyers frame agreements, bylaws, contracts, deeds, leases, wills, and trusts, that...aid citizens to live together with a minimum of friction, to make reliable plans for the future, and to avoid unnecessary disputes....The authors of well-crafted corporate charters and by-laws, collective bargaining agreements, leases, trusts and estate plans, parliamentary procedures, constitution-like regulatory schemes, and so on, have extraordinary opportunities to affect for better or worse the quality of everyday life in our large commercial republic. Theirs is the delicate job of providing structure and order while leaving as much room as possible for spontaneity and creativity.

All these are *public* goods. So it is the regular work of American lawyers—however unconscious of the fact they may usually be—to manage the myriad tensions peculiar to the American enterprise. We create and maintain the conditions of order, stability, freedom and justice in which it is at all possible for commerce and creativity, and for that matter, ordinary lives, to flourish. We operate a system in which disputes can be peacefully resolved and justice can be sought and often achieved. We do all this incrementally, by providing counsel and advocacy to people and institutions in need of them. We are, so far as the Rule of Law is concerned, as my colleague Paul Saunders has put it, "where the rubber meets the road."

The American lawyer, then, belongs to a distinctively public and helping

profession. The notion is captured in the preamble of the Model Rules of Professional Conduct: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” The twin ideas of public character and private service are given this prominence in the Model Rules because they are the wellspring from which the profession’s claim to legitimate autonomy and its fundamental ethical principles flow. Ethics are supposed to be the authentic expression in behavior of a community’s ethos—its fundamental character and understanding of itself. For us that understanding must be that we advance a transcendent public purpose by doing well our particular private work.

If, as I believe, that is the core conception of what an American lawyer is, as this century moves along, then it defines what the “professionalism enterprise” is about, and does so at the appropriate scale. The first step in continuing Pound’s conversation, I think, is to consider and savor what such a self-conception of our profession means for us and our work. Some years ago, also in a speech to the American Bar Association, John Sexton twice used a dense, packed formulation of this idea. Speaking of legal education in terms that are equally relevant to legal practice, he said he believed “that reflection and vigilance will be necessary if we are to notice and maintain what we subconsciously cherish about what we now do.” We need to be alive to how important our work is in the American design of things, and then relate how we do our work to how well it uses the tools of the legal system to move the nation closer to that ideal of justice defined a hundred years ago by Pound as the compromise that harmonizes the competing interests always at play in our society.

The prescripts of our ethics codes, and the aspirations of professional behavior that go beyond them, all have life and command respect just so far as they create and preserve the conditions necessary in the real world to allow lawyers to function in accordance with this vision of who they are and what they do.

Take three quick examples of this from the many available:

We are called upon to keep secret what our client tells us, not because in and of itself it is a moral good or an intrinsic characteristic of the lawyer-client exchange. We are required to do it because society has agreed with us that it is useful to keep such information private so that we better can do our job of advising and advocating for our client. It is a purely utilitarian assessment of what is the best way to promote good legal advice and able advocacy. And the society has an interest in that, despite the cost of lost access to information, because both the Rule of Law, and

an approach to the ideal of justice, are thought to be served by facilitating the lawyer's role. When it is thought widely enough that the social costs of providing legal advice on those terms are too high, and prejudice rather than advance the Rule of Law, we will, over time find that our clients' opportunity privately to communicate facts to us, and ours privately to advise them, will begin to shred.

Or, again, it is only because we have the fundamental role I have described tonight that we have a legitimate claim to independence. Independence in both senses that we lawyers use the word: our autonomy from supervision by others, and our ability to give disinterested advice to our clients. We are allowed to be independent in the first sense because it is necessary for our independence in the second sense. Thus, we are called on, by the professional self-conception I have suggested tonight, to be able and willing to speak truth to power, whether the power is held by the President of the United States, or the CEO of Enron, or a valued and valuable client. It is truly a case of use it or lose it: our profession's claim to collective autonomy depends, over time, on our individual willingness to use our freedom from outside interference to provide to our clients the advice we know they need to hear, whether we think they want to hear it or not.

And—in order not to disappoint my friend who thinks that professionalism is about shouting lawyers—I admit that it is about that too. The aspirational guidelines on the point are intended, as their introduction puts it, “to encourage lawyers and judges...to observe principles of civility and decorum.” But why? Not because—as used to be the unspoken rationale—white gentlemen of a certain class don't behave badly; they quite often did and do. Not because it makes lawyers' work more agreeable, though it assuredly does. Not because we thereby forbear from contributing to a general coarsening of manners in the culture, although it does that too. Rather, we adhere to civil behavior because not to do so betrays the values that give our contemporary profession meaning. Incivility hurts rather than helps clients, as study after study has shown; and it tears down respect for the law and undermines the public enterprise in which we are called to be engaged. We inveigh against incivility because it is both stupid and a civic sacrilege.

So, I propose that we continue Pound's discussion with a renewed awareness of the centrality of the Rule of Law, and hence of lawyering, to the continued vitality of the American social contract in times of rising stress upon it. And also with a lively appreciation that our notions of professionalism are derived from and are informed by this understanding.

Let me, as if I were a good real estate draftsman (which I am not), come back to the point of beginning, where the thoughts I have offered tonight are, I think, confirmed by briefly revisiting those two diatribes of old I mentioned there.

Dick the Butcher's homicidal ambitions about lawyers were stirred up not because any lawyer, or all lawyers, had disappointed his expectations. Quite the reverse: he understood—however crudely—that it was the essence of a lawyer's role to stand for a balance of order and liberty, and to face down the forces of disorder and oppression. He could never achieve the Rule of the Mob he sought while there remained a Rule of Law serviced by lawyers.

And, while thanksgiving to an Almighty and Merciful God is always to be admired, in Grafton County's case, I suspect it was misplaced. Living in a bucolic, homogeneous community with abundant open space and experiencing one of Pound's "periods of absolute or generally received moral principals," they had little need of lawyers to manage tensions they did not yet have. But the "new college" to which they refer—Dartmouth—was destined in not too long a time to produce one of the great formative disputes of our legal history, which would famously be argued by one of the greats, Daniel Webster. It wasn't God's mercy; Grafton's time had not yet come. When it did come, its people sought relief, as Americans now regularly do, in the hands of the best lawyer they could find.

Speaking of great lawyers brings me to my concluding thought this evening. Close observers of this lecture series will think I have overlooked one of its most congenial conventions. I have not. A predecessor of yours, Chief Judge, wrote of bar associations that "professional associations justify their existence to the extent that they further the standards and the ideal" of the profession. It is small wonder then, that Orison Marden served as President of this Association, and New York State Bar Association, and the American Bar Association—the only person ever to have held all three posts. Orison was President here when I joined the Association and I remember with affection the great warmth with which he went out of his way to make us rookies feel welcome and valued. He was a man of some oxymorons himself: he was intensely committed to his profession, and wholly relaxed in demeanor. He was serious about what he did and the excellence with which it should be done, but he was unfailingly cheerful with an engagingly sly sense of humor. He was an achiever on a grand scale, but a man of innate modesty and unassuming courtesy. Even while he held positions of prestige, power and influence in his firm and at the wider bar, he made his way weekly to the Legal Aid Society office at

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125th Street and Seventh Avenue, where he literally rolled up his sleeves and got to work with impoverished clients, who sought—and in him found—redemption of the promise of “justice for all.” Without any contradiction, he was a great encourager—he certainly encouraged me. And he was a walking, talking, living lesson of what it meant then, and means now, to be an American lawyer. It has been an honor and a genuine delight to share my few ideas with you tonight in his memory.