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JUDICIAL REFORM: A SYMPOSIUM

INTRODUCTION

TOM C. CLARK*

It was Goethe who reportedly said: "If you must tell me your opinions, tell me what you believe in. I have plenty of doubts of my own." The contributors to this symposium of the *University of Florida Law Review* certainly should have no doubts regarding the problems that face the judiciary. These authors candidly offer possible solutions to these problems, which is no easy task as we who have worked in the vineyards of judicial administration can attest. The *Review* is to be congratulated on its presentation and the benefits that, hopefully, will result.

The purpose of this Introduction is to relate briefly the basic problems presently facing the courts in the administrative and procedural areas, pinpoint the major resulting injustices, and suggest some solutions. In so doing I must admit that recent experience as a trial judge in the Northern District of California at San Francisco has opened my eyes to the monumental tasks that face those hardy souls. In addition to a caseload that has almost doubled, these judges in San Francisco receive an avalanche of state prisoners habeas corpus applications, literally a trunk full of motions of every description, and pre-trial orders that are measured by the hundredweight. To compound the confusion they are confronted by picket lines, demonstrations, sing-ins, and watch-outs that would test the patience of Job. As if this were not enough, they have the Haight-Ashbury stripe of people who are as rough and ready as the dirty beards and hair that they grow with such evident relish.

THE BASIC PROBLEMS FACING THE COURTS

The many causes of the present unsatisfactory state of the judiciary were enumerated forcefully by Chief Justice Burger in his memorable address to the American Bar Association at St. Louis in the summer of 1970; they may be summarized as follows:

> the creation of new causes of action and the enlargement of existing remedies by both the legislative and judicial branches;
> the growth of population and its movement to urban centers;
> the current unrest of our citizenry and the increase in criminal activity;
> the antiquated system used in processing litigation and the lack of adequate facilities, modern equipment, and trained staffs;
> the insufficient number of judges in some jurisdictions and the lack of sufficient supporting staff; and
> the wholly inadequate funding of the operation.

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Florida Law Review, Vol. 23, Iss. 2 [1971], Art. 1

Two universal criticisms of the courts are the backlog in cases that have accumulated in metropolitan jurisdictions and the inordinate delay incident to bringing litigation, especially criminal prosecutions, to a conclusion.

A third dissatisfaction is expressed by the poor, the black, and persons of foreign extraction who point to the discrimination against them. There seems to be much truth in this complaint when one studies prosecutions in the criminal field. Studies indicate that few prosecutions are dismissed, delayed, or reduced to a lesser offense or number of counts when the accused is in any of these classes. Moreover, sentences may be much more severe and probation and parole more difficult to obtain in such cases. Some attribute this to waiver of counsel and resulting expedition in handling; others say an overreaction by the prosecution is the cause. Regarding probation and parole, the opportunities afforded defendants in these classes are much less favorable because of deficient education and training and other disadvantages. Furthermore, the success of probation and parole depends in large measure on employment; but employment is often delayed while probationers and parolees await appropriate opportunities or sufficient training.

Many other injustices prevail in our court systems. The courts have been closed to great masses of our people for lack of counsel. This is forcefully illustrated in California where the Rural Legal Assistance Program has brought significant relief to the underprivileged through class actions in both state and federal courts. Some seventy-five such actions involving the health and welfare of literally millions of people have been successfully concluded, running all the way from discrimination against welfare recipients to mistreatment of farm workers. One of the most far-reaching actions involved the testing of retarded children. Intelligence tests based on the understanding of the English language disqualified thousasnds of children who were fully qualified but spoke other languages, predominantly Spanish. In another case a federal judge recently entered an order requiring the State of California to meet federal requirements in welfare payments. Millions of citizens have likewise suffered injustices in small claims courts where installment buying brings them face to face with strange problems with which they cannot adequately cope.

Our court problem is further compounded because our law schools do not equip students to practice law. They are well grounded in legal theories and substantive rules but not in trial practice. Judges, consequently, must conduct what might be called "post graduate" courses for new practitioners. Indeed, the situation was so acute in the criminal field after passage of the Criminal Justice Act of 1964, which allowed compensation for court appointed counsel, that a list of defenses — now known as the Omnibus Hearing List — was made up by James Carter, a United States district court judge. Since young lawyers handled the bulk of this work, it was found necessary to outline the various defenses available in criminal trials. This list has now become a valuable tool in discovery and is used widely in the federal courts.

In fairness to the law schools, it must be said that they have never professed to train the student to be a practicing lawyer immediately upon graduation. As Dean Bayless Manning of Stanford, one of our most knowl-

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edgeable and progressive educators, said in a recent article in the *American Bar Association Journal*:[1]

> The primary educational objective [starting at Harvard in 1905] was to acquaint the law student with substantive doctrinal categories. . . . The curriculum adopted, substantially intact, the categories set out by Blackstone in the survey lectures he delivered at Oxford beginning in 1753. The great innovation of the American law school was its emphasis on reading appellate judicial opinions.
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> . . . .
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> The fact is that law schools have changed significantly in recent years and are on the brink of much greater change in the next few years.

Nonetheless, the budgets and funding patterns of the law schools continue to be those inherited from an earlier day, based on the image of the 1905 model. Moreover, older lawyers, I find, are in many instances not prepared when they come to trial. My experience in San Francisco indicates that the philosophy of the trial bar is based on the assumption that the lawyers, not the judges, control the cases. This is erroneous in my view. The minute a case is filed in the courthouse it becomes freighted with a public interest and its fate is then in the hands of the judge; it is the judge's duty to make certain that the disposition of the case, while fairly reached, is expedited. Often, judges have not exercised this function and have therefore found themselves at the mercy of lawyers. Generally, discovery is undertaken promptly, and cases are allowed to lay on the docket without action for months. Dilatory motions are made but seldom sustained; continuances are granted freely, and every litle controversy over discovery problems is brought to the judge rather than worked out by counsel. Of the five cases I have now tried in San Francisco (two by jury) the lawyers were prepared in only two. Indeed, one of the cases required twice as much time because of the lawyers' unpreparedness. I do not like to say these things and I know that the bar does not like to hear them; but they are true. Indeed, I dare say that the cause of the backlog in most of our metropolitan courts today can be laid at the door of the profession — either on the basis of inefficient operation, insufficient training, concentration of cases in a few firms (especially in admiralty, patents, and antitrust), or lawyers' insistence that they be permitted to control the litigation.

The Unjust Consequences

The over-all consequences of this condition is a great public dissatisfaction with the courts. Among some groups it has reached the point of overt distrust. Certainly, a growing disrespect for the judiciary has reached wide proportions.

Specific unjust consequences include the denial of justice through inordinate delay in the disposition of cases. This causes many people not to resort to court action; others may settle matters after filing a case; and the less

1. Manning, *Financial Anemia in Legal Education; Everybody's Business*, 55 A.B.A.J. 1123, 1124 (1969).

Florida Law Review, Vol. 23, Iss. 2 [1971], Art. 1

affluent but determined may suffer long periods of delay with its accompanying loss. In the criminal field, delay is the best defense since witnesses die or disappear and memories become hazy. Perhaps the most disastrous effect in this regard is that the deterrent effect of the prosecution becomes practically "nil" depending on the length of the delay. The Constitution has provided those charged with crime a "speedy" trial, and the public is entitled to no less.

Finally, the courts should be open to the poor as well as to the more affluent. Our failure to make them so has contributed much to present unrest. Where other branches of the government do not take the initiative to relieve discriminatory conditions, the courts must do so. But they can act only on justiciable issues when and if brought to them. When the poor and underprivileged have no such recourse, the result is grave problems that undoubtedly contribute to public dissatisfaction and sometimes to untoward action.

Suggested Solutions

Let us begin with the bar's philosophy to which we earlier alluded. The policy of the law schools has operated to reduce the size of the trial bar as well as its efficiency. The courts have necessarily depended on a small trial bar that has been burdened with an inordinately large caseload. In order to handle this volume, techniques and procedures have been adopted that have placed the control of litigation in the bar. Consequently, enormous backlogs of cases have developed in the courts. I submit that we must change this philosophy, place control of litigation in the court, and require more expeditious and efficient handling. Seminars on expedition of litigation should be organized by judges where techniques and procedures tending to expedite dispositions would be developed and put into practice. We must also have a larger trial bar. For example, thirty per cent of the docket (about 3,000 admiralty cases) in the federal eastern district of Pennsylvania were found to be concentrated in five or six firms, including both plaintiff and defense.

It is, therefore, very encouraging to hear that educators such as Dean Manning are advocating a modernization of the law school curriculum. As he accurately states:[2]

> Tomorrow's law school will be even more different. Multiple curricular tracks will be opened to serve the different interests of different students. A scholarly track may lead in five years or more to something like a Ph.D. in law. A vocational-professional track may be reduced to two years. Clinical experience—something like internship experience — will become normal for students pointed toward the practice. Law schools will train not only lawyers, but paraprofessional personnel to work with and increase the work output of lawyers, as medical technicians give leverage to medical doctors. A much closer interaction and relation between the law school and the Bar is in the offing, with the practitioner acting both as teacher and student.

I hope that the law schools will soon abandon the present three-year curriculum and stustitute a two-year basic course followed by a one-year clinical course. Students electing to specialize should spend their third year

2. *Id.* at 1126.

in clinical work in their specialty. Those electing to go into general practice or trial work should devote their third year to clinical advocacy on assignment to prosecution, defense and legal aid staffs, or to other trial work programs organized by the law schools, the courts, and the trial bar. A promising field in the latter area would be neighborhood law offices in the ghettos, low-income housing groups, and the like. Likewise, prison clinics such as those now organized by the Federal Judicial Center would be a rewarding field of endeavor. This curriculum would afford the students exposure to the actual workings of the court system. Hopefully, they would assist in improving procedures and changing present attitudes toward litigation. In any event, it would certainly result in a larger and more effective trial bar.

In addition, as Dean Manning indicated, the bar and the law schools must have a closer relationship. Indeed, it would be helpful if the law schools organized continuing legal education classes on advocacy for lawyers. Experienced and capable practitioners could be used as faculty with the course being devoted to the effective trial of cases. Courses that would deal with appellate advocacy should likewise be developed. From my eighteen years on the Supreme Court I would say that half of the cases presented there were not effectively handled. Courses on this subject with a faculty of appellate judges and experienced lawyers would be most helpful to the appellate courts.

Some say we must have more judges. While some jurisdictions do need more judges, experience teaches that the omnibus creation of new judgeships has not been the answer. What is needed is a more efficient judge and staff operation plus a modernization of facilities and equipment. This will require a complete reorganization of courts' administrative work. There should be a division of labor between strictly judicial functions requiring the action of a judge and administrative functions that can be handled by a non-judge. Presently we lose much judicial manpower because we have saddled the judges with so many non-judicial functions. They should be free to devote their entire time to judging.

The court staff must be efficiently organized, and the metropolitan ones (say six or more judges) should have administrators. This position must be filled by a highly skilled and court-oriented executive who has been trained in court and administrative management. He would organize and supervise the over-all administrative operation of the court, including all of its non-judicial functions. Many of our present clerks, with some special training, could perform this task. All of the clerical, custodial, security, and other non-judicial functions would be under his supervision and control. This would include all of the management chores incident to the filing, docketing, calendaring and recording of cases, and all paper work incident thereto. This should be standardized to promote efficient operation. Additional functions that the staff might handle would be continuances, stipulations, settings, pre-trial up to the point of requiring action by a judge, selection of jury, preparation of orders, judgments and other papers in cooperation with counsel, the expedition of records on appeal including transcripts, and close

Florida Law Review, Vol. 23, Iss. 2 [1971], Art. 1

liason with counsel to the end that cases are handled with efficiency and dispatch.

On the judging side, the court would handle only judicial matters requiring a judge's decision. The cases should be organized on an individual assignment calendar so that there will be individual judge responsibility from the date a case is filed until its final disposition. To prevent judge-shopping, a blind filing system — as is used in the federal court in Chicago — should be installed. There would continue to be a chief judge, but his function, aside from judging, would be overseeing his brother judges in the performance of their judicial functions so that the court would operate smoothly and efficiently as a whole. Monthly, the chief judge would be furnished statistical information by the administrator so that he and his brother judges would know the over-all position of each judge and the relative standings on backlogs and dispositions. Seminars on continuing judicial education would be organized by the chief judge unless otherwise available, and it would be his duty to see that his staff was also provided with continual legal education similar to that provided for judges and staffs in the federal system by the Federal Judicial Center.

Continuing Legal Education

As previously indicated, provision should be made for the continuing education of both the judge and his staff. In the federal system Congress has created the Federal Judicial Center (FJC) to perform this task. In addition, the FJC also does research, conducts experiments in judicial administration, and adapts scientific devices to court management.

There should be organized a National Court Center for state courts that would coordinate and supplement the present activity of the National College of State Trial Judges, the Special Courts School, the Academy of North American Judges, the Administrators Academy in Colorado, and the Appellate Seminar at New York University. This center would act as a clearing house for the advancement of judicial administration in state courts and serve as a coordinator of existing national organizations now working in the judicial administration field. These existing organizations would be utilized in this effort to ensure that judges and their staffs; including the clerical, secretarial, administrative, law clerk, and security employees were well trained. In addition, the National Court Center would also carry on research.

The center would also work with the American Judicature Society in improving the state court structure, as well as the selection and tenure of judges and their removal for cause. Likewise it would assist the National Council on Crime and Delinquency in its work in corrections and like groups in that and other fields.

Furthermore, the center would act as a catalyst in the promotion of effective administration of justice in the state courts at all levels, furnishing advice, assistance, and financing to existing organizations where appropriate.

FINANCING

This would cost money. On the federal side it is proposed that the money be appropriated by Congress to the Federal Judicial Center and that it carry out for the federal courts all of the functions enumerated.

On the state side it is suggested that the various organizations organize a joint venture somewhat along the line of the Joint Committee for the Effective Administration of Justice, which functioned in the early sixties. This venture would be called the National Court Center (or any appropriate name) and would perform the functions outlined above. It would be funded through private financing and operated under the supervision of a board of directors selected by the cooperating organizations.

It is believed that these suggestions — if accomplished — would bring about a more effective administration of justice in both the federal and state courts. In any event, I solicit the views of those interested.