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Symposium on Judicial Administration and Legal Reform: Preface

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Preface

BY JUDGE SCOTT REED*

Very few people read prefaces. That cliché comforts me because I have not read the articles that comprise the issue of the Law Journal in which this preface will appear. Therefore, as the self appointed pundits who write letters to the editor fulminating about appellate opinions they have not read and as the law student who, after a one semester exposure to criminal law, writes a law journal note learnedly expounding about how a court was blinded by “technicalities” but forgot “justice,” I will blithely proceed to comment though in a thoroughly uninformed condition.

Having spent twenty years in the practice of law, about eight years in law teaching, five years on the bench of a trial court of general jurisdiction, and three years and five months as a judge on the Court of Appeals of Kentucky, I claim the right to inflict upon the unwary reader of prefaces my purely personal reactions to the foreboding question encircled by the majestic title of this issue: “Symposium on Judicial Administration and Legal Reform.”

The Kentucky Court of Appeals is the court of last resort of this Commonwealth and is the only appellate court to which appeals from the trial courts of general jurisdiction are addressed. The Supreme Courts of our sister states, however, are convinced that we must be an intermediate appellate court; on those rare occasions when they are driven to mention one of our opinions, they usually cite it as “Ky. App.” There are Kentucky lawyers and legal scholars who would regard “Ape” a more accurate designation than “App.” probably because “App.” might be mistaken for “Apt.” One of my colleagues, nevertheless, opined that a very important project to accomplish in the “judicial reform” movement was to assure that our court be renamed the “Supreme Court of Kentucky” and that our title of office be

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changed from "judge" to "justice." The first element in his recommendation intrigued me because it raised brazen hopes that we might then more successfully compete and have more of our decisions selected for the blue paper section of West's advance sheets; the second element appeared completely unattractive. "Judge" Learned Hand, even with his unique ideas about constitutional interpretation, evokes in me a greater respect and reverence for the craft of which I am a member than does "Mr. Justice" plus any number of names of past jurists who sometimes hit two baggers but never a home run, to paraphrase Karl Llewellyn.

I submit that the current workers in the vineyard for "judicial reform" refuse to pose the foreboding question clearly implicit in the slogan, "The American justice system is sick nigh on to death." The question is simply this: Can the United States in the times in which we live afford the system of justice that has existed in this republic since its foundation? Please note that at this point the inquiry is addressed to the *system* and not to its components. Although not explicitly articulated, the plain import of the conclusions of many observers is that we simply can no longer afford a separate, independent, coordinate branch of government to act as the dispute resolving mechanism. The end product of such a system according to these commentators is so delay ridden and unrealistic and unresponsive that it is no longer acceptable. The implication of that conclusion to the advocate-adversary system is so clear that it requires no savant to discern it.

Judge Traynor in his 1970 address to The American Law Institute noted that the public attitude toward the judiciary had changed from indifference to hysteria. What he did not say was that the response from within the judiciary and the organized bar, which then conditioned editorialists and reporters, was a crisis-ridden attack of fever with many unconsciously willing to throw the baby out with the bath water.

If one admits that the basic system is the fairest the world has ever known, then the recurrent problem of congestion and delay, which was enough problem in 1959 to merit a book by Zeisel, Kalven, and Buchholz, perhaps, should cause examination of components rather than system. The components of which I

speak are the judges. With the few exceptions in those states where a judicial removal commission is provided, there is no means except by the practically impossible route of impeachment to rid the system of its components who are too old, too lazy or too sick to adequately perform, and that condition prevails in both the federal and state courts. It just may be that at least part of the cause of the current crisis of public distrust of the system is the built-in obsolescence of its components.

Again, if it is accepted that the system itself should be preserved, a further relevant inquiry is suggested concerning the components. From the beginning to the present, the predominant majority of judges have been selected because of partisan political activity either by the individual himself or at least by his sponsoring friends. When the system is assessed by a public attracted by "the new populism," when its work is assayed by a generation distinguished by its refusal to accept absolutes and to examine in an invariable attitude of inquiring criticism, it should not be the source of wonder that the aura of public respect which once attached to the judiciary is no longer with us. The fact that Democrat presidents and senators usually find that the best qualified professional for appointment to the federal bench is a Democrat, and that Republican presidents and senators usually find that the best qualified professional for appointment to the federal bench is a Republican, once was glossed over or the act was dismissed as "just natural." What alienates the more sophisticated public of today is the hypocrisy insisted on by the politicians who publically prate that the whole system is one of merit selection and that they place "the good of people over the interest of party." The occasional appointment by a president of a safe friend of the opposite party to the Supreme Court is generally regarded as a veneer to disguise the truth of how the selection process generally works. By like token, any popularly elected judge who is not interested in the politics involved in his own reelection is either ready to retire or is striving to achieve extinction.

When the pragmatist cries we can't sell a method of "real merit selection" to the people, my reaction is that if this means the public will not accept a method whereby the judge is a political appointee for life subject only to impeachment, then I

agree. It, nevertheless, is the method provided by our federal Constitution whose strength is in its insistence on independence of the judicial branch, but whose weakness is in not providing for a more expeditious method of judicial removal. The same crisis deluded pragmatist would surrender the judicial branch to the legislative by the simple device of constitutional amendment so that the legislature would have the power to prescribe from time to time the method of selecting judges and their tenure. This would short-circuit popular sentiment, but we are told this sugar-coated laxative would achieve "judicial reform." It would also convert the judicial branch of government into a department of the legislative at best and if the legislative branch is subservient to a strong executive it would at worst convert our dispute resolving mechanism into a subbranch of the executive. That was a proposal seriously advocated by well intentioned lawyers and judges and supported by editorialists who lamented its temporary demise because they believed, they said, that we should have a "simple" judicial reform proposal to make courts more responsive to the people and not structured for the convenience of judges!

The more sophisticated public of today is not too easily fooled for any significant length of time. There are better and more honest ways of selecting judges and the judges recruited would be more productive and more efficient and more responsive. Rather than the frenetic cries for more para-judge assistants and sturdy and continuous application of the principles of Parkinson's Law, we should be hearing of hard studies of better methods for selection and retention of judges with built-in protective devices to assure judicial accountability. The experience of states which have tried such systems would doubtless reveal bugs as well as virtues. In my judgment the public wants a sufficient number of qualified, accountable judges to make the system deliver what it represents as its reason for existence. The public deserves an overhaul of the components of the system. If the approach is truthful and the plan is as workable as knowledgeable men can make it, and it does not secure public approval, then what more can be done except admit that the system itself is a luxury that the modern United States can no longer afford?

Traynor recognized that our ancient house cannot be com-

pletely cleaned overnight. This then raises the problem of priorities. The claimed case load problem of the Court of Appeals of Kentucky may very well not deserve the first priority which is assigned to it by some. In many instances, a crime is committed, the defendant is processed through the tier of lower courts, and his appeal is decided within the same calendar year. Workmen's compensation appeals are decided in many occasions within thirty days after the last brief is filed. The case load statistics show that the hump on the graph is caused by criminal cases and workmen's compensation cases. As the court processes these cases with dispatch, the so-called ordinary cases are put back. Intelligent control measures addressed to the isolated problem are not considered. The court's reaction is to cry "Look at those unanalyzed filing statistics. We are lost." The public replies, in effect, "We've heard that song before" or "Why do you recess so often?" When one deals with the system itself and its effect on human lives, the appellate phase proves relatively less important than the critical necessity of acceptable performance in all the trial courts, however limited their jurisdiction may be. We must marshal our priorities and tell the public why and what is coming next and when.

Although George S. Kaufman said that his father advised him to try everything before he died except incest and folk dancing, my father was not that permissive. One fact, however, I safely assert: I have never been invited to give a commencement address. I also am persuaded that the panpandrums of the Section on Judicial Administration of the ABA would never want me to conduct a seminar. I have more than a suspicion, nevertheless, that modern physics has not completely invalidated the old Newtonian principle that for every action there is an equal and opposite reaction; ergo, for every "quo" a "quid" must be paid. As we assess the recommended "quos" let us at least fleetingly consider how much the "quids" cost.