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IMPASSES IN JUSTICE

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This eighth annual lecture was delivered on April 24, 1956.

I

The temptation in addressing lawyers or law students is always to stress the grand achievements of the bench and bar over the centuries in building up law and order and at the same time promoting individual liberty and to ignore the obvious embarrassing shortcomings of the present, for which we are all collectively responsible. It takes some courage for me to face the facts of the particular problems I wish to discuss with you, for I have spent my working life with lawyers and judges, with law professors and law students—and I like them and I appreciate what they have done for civilization. I am emboldened to speak up, however, by the consciousness that what I have to say is based not on mere book learning, but rather on many years of varied experience—an experience of thirty-four years in the trial of cases and the argument of appeals in one state, an equal number of years of law teaching in another state with quite a different legal background, ten seemingly futile years as chairman of a judicial council working for court reorganization against the opposition or indifference of most of the judges and without any aid from the bar associations, seven years in a citizens' movement helping to achieve a new state constitution, and eight years as chief justice and as the administrative head of a new court system, struggling to overcome the ingrained defects of the old order without any changes in judicial personnel except by reason of incapacity or death or through the normal course of retirement at seventy. It would be much more pleasant to address you on some

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such subject as how to try a case or how to argue an appeal, but believing as I do that the most important problem confronting every branch of the legal profession—the bench, the bar, and the law schools alike—is the failure of the law and the administration of justice to keep pace with the needs of the times, I should not be serving either the bench or the bar, the lawyers of tomorrow or the public generally, if I failed to deal with the situation as I find it.

Although a considerable part of our substantive law is far from what it should be, popular discontent with the law centers around the techniques by which justice is administered—the organization of our courts and how they manage their business. It is in the courts, and not at the hands of the chief executive or the legislature, that men and women in actual life feel the keen, cutting edge of the law. They therefore judge the law by what they see and hear in courts and by the character and manners of judges and lawyers quite as much as by the law itself. Viewed in this light, what seems at first blush to be a mere matter of procedural machinery suddenly is revealed as of prime importance to the public. It is this very matter of machinery—the anachronisms, the technicalities, the absurdities and unfairness of procedure, and the inexcusable delays in disposing of controversies on the merits—along with occasional defects of judicial temperament or character—that has been creating in many places disrespect for law at a time when everyone should be continually conscious of the fundamental principle that it is the law alone and its adequate enforcement that make individual liberty possible. Yet, oblivious to all this, the bench and bar in too many places have neglected to further the necessary reforms for the improvement of the techniques by which justice is administered.

Fortunately the remedies for these procedural and administrative defects are relatively simple, at least when compared with many complicated problems of substantive law or with the intricacies of the organization, personnel, and procedure of the executive branch of government, especially at the national level. Moreover, the remedies for our judicial ills are well known and generally agreed on by those who have taken pains to study the situation objectively. No lengthy program of research or of experimentation is required; all we have to do is to recognize the seriousness of the situation, overcome our professional lethargy, and apply the remedies that study and experience have demonstrated to be effective, if we would satisfy the popular complaints as to the law's delays, the decision of cases on technicalities of procedure or by the use of surprise and would meet the just demands of the people for honest and competent judges and jurors. Unlike many of the differences concerning various problems of substantive law, there really cannot be any honest difference of opinion about the

high desirability of an effective system of judicial administration or the means by which it is to be achieved. These are self-evident; implementation is all that is necessary.

Before considering the deficiencies of the courts in some detail we should first seek the causes that produced them. Just fifty years ago, in 1906, Dean Roscoe Pound, then a young man of thirty-six, delivered before the American Bar Association at St. Paul a memorable address entitled "The Causes of Popular Dissatisfaction with the Administration of Justice."[1] Dean Wigmore later referred to it as "the spark that kindled the white flame of progress."[2] More than once have I said if I had my way I would make it prescribed reading once a year for every judge, practicing lawyer, law professor, and law student on the day he returns from his summer vacation and starts a new year of professional activity. Unfortunately all too much of what Dean Pound criticized fifty years ago still exists today. He noted in his address that American reform in procedure had stopped substantially where the New York Code Commission left off in 1848, and we have to add here that no advances worth recording occurred in this field from then on until the promulgation of the Federal Rules of Civil Procedure in 1938—ninety years later. Happily, however, much has been achieved since then, especially in the federal field, and there has been progress in some states, while in others there is encouraging ferment.[3] But the crucial question remains: Why with such obvious needs has there been so little progress in nearly a century?

It is not oversimplifying our problem too much to say that at the bottom of all our difficulties in court reform lie: (1) the equalitarian and antiprofessional movement of the Jacksonian Era in the second quarter of the nineteenth century, and (2) (this I fear will shock many) the failure of our law schools generally to recognize as their most important responsibility to society the improvement of the administration of justice.

With the election of Andrew Jackson as President in 1829 the spirit of the frontier took over control of the country, especially in the field of government and law. Jefferson had declared in 1776 that "all men are created equal," but by Jackson's time it was bravely asserted by the plain people that all men are *in fact* equal, and despite the obvious lack of reality of the new thought, they proceeded to carry it to its logical conclusion in public life. First to go were the restrictions on suffrage and officeholding that had operated to exaggerate inequalities

1. 29 A.B.A. REP. 395 (1906).

2. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUD. SOC'Y 176 (1937).

3. See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 9 (1950, Supp. 1956).

in a society that had proclaimed the equality of all men.[4] But the equalitarian spirit of the times demanded more. New state constitutions were popular, since through them the people extended their control of government;[5] the power of the legislature to act freely was limited in various respects,[6] and the number of popularly elected officials, judges included, was increased with a view to decreasing legislative and executive patronage.[7]

In this period, unfortunately, the leaders of the legal profession, able in the law as many were, not only failed to recognize the needs of the times, but by refusing to pay heed to valid popular criticism of the courts[8] invited popular interference with the administration of justice.

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4. Property qualifications for suffrage existed in all the thirteen original states. In 1800 only in Kentucky, New Hampshire, Pennsylvania, and Vermont was male suffrage comparatively unlimited. As the new western states entered the Union without suffrage restrictions the movement for extension of the suffrage gathered momentum in the older states. Restrictions were gradually lifted and by 1830 most of the old religious and property barriers to manhood suffrage had been eliminated. See generally PORTER, HISTORY OF SUFFRAGE IN THE UNITED STATES 1-102 (1918).

5. See BOWERS, THE PARTY BATTLES OF THE JACKSONIAN PERIOD 65-70 (1922); WHITE, THE JACKSONIAN, A STUDY IN ADMINISTRATIVE HISTORY 1829-1861, at 11 (1954).

6. See SCHLESINGER, THE AGE OF JACKSON 51 (1945); TURNER, THE UNITED STATES 1830-1850, at 128 (1935). In particular, the power of state legislatures to contract debts was curtailed. Rezneck, *Social History of an American Depression, 1837-1843*, 40 AM. HIST. REV. 662, 681 (1935).

7. Belief in the "virtue, intelligence and full capacity for self-government, of the great mass of our people" expressed in 1 DEM. REV. 2 (1837), led to the extension of the reach of the elective process. See *The Elective Franchise*, 22 DEM. REV. (n.s.) 97 (1848), in which the advantages of elective over appointed officials were developed. The great examples of the change-over from appointed to elected officials were New York and Pennsylvania. In 1820 the Council of Appointment in New York controlled 14,950 officers. The majority of these which were local were made elective in the 1820's. FISH, CIVIL SERVICE AND PATRONAGE 90-91 (1905). The 1846 Constitution which included provisions for an elected judiciary was approved of in the *Democratic Review* because of further reduction and decentralization of patronage. 19 DEM. REV. (n.s.) 339, 341 (1846). In Pennsylvania the transformation of a large number of offices from appointive to elective occurred at the constitutional convention of 1837-38. HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, at 22-23, 29 (1948). Provisions for the election of judges were not adopted, however, until 1850. HAYNES, SELECTION AND TENURE OF JUDGES 127 (1944).

8. The delays and costliness of legal proceedings, those proverbial evils with which lawyers and judges had failed to deal adequately, were one cause of popular discontent. See 4 LEWIS, GREAT AMERICAN LAWYERS 312, 351-52 (1909); LUDLUM, SOCIAL FERMENT IN VERMONT 1791-1850, at 203-04 (1939); Norton, *Judicial Reform in Michigan*, 51 MICH. L. REV. 203, 232-33 (1952). For examples of contemporary comment, see 18 DEM. REV. (n.s.) 403, 413 (1848); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1846, at 482, 574 (Bishop & Attree eds. 1846); MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835-36, at 282 (Dorr ed. 1940).

The standards of the bar and bench were not always high, nor adhered to; this and the difficulties of removing unsatisfactory judges contributed to dissatisfaction with the courts. See 1 STRONG, DIARY 106 n.3 (Nevins & Thomas eds. 1952). For excellent discussion of the frontier bench and bar and popular prejudices against common-law procedure and lawyers as debt collectors, see ENGLISH, THE PIONEER LAWYER AND JURIST IN MISSOURI (21 U. of Mo. Studies No. 2, 1947), especially at 11-13, 65-73, 87-89, 95-96. As to outrageous conduct of a drunken

Genuine dissatisfaction with the courts combined with the Jacksonian democratic doctrines of popular control of government to bring about: (1) changes in the manner of selection and the tenure of the judiciary; (2) restrictions on the power of the trial judge to conduct a trial; (3) the lowering of standards for the legal profession; (4) the increase in the functions of the jury; and (5) legislative attempts to codify and simplify procedure—all of which obstructed the administration of justice and resulted in genuine injury to the public which the courts are designed to serve.

At this time, except in the federal courts and a few of the original thirteen states,[9] judges appointed during good behavior in accordance with the common-law tradition were superseded by judges elected by the people—in reaction against the abuses that had developed through political maneuvers in the selection of judges whether by the legislature or the governor.[10] These elections were generally for short terms[11] in compliance with the new political principle of rotation in office that the doctrine of equality called forth, although the underlying motive was more frankly disclosed in the slogan: "To the victor belong the spoils."[12] The popular philosophy of the Jacksonian Era was marked by a rejection of educated and professional people and an emphasis on the capacity of the innate genius of the self-made man to solve all problems.[13] In almost every state, as the result of dissatisfac-

judge on the bench as contributing to the change to an elected judiciary, see FOOTE, BENCH AND BAR OF THE SOUTH AND SOUTHWEST 21 (1876).

The use of English procedural forms to defeat an action without a decision on the merits early had led to some statutory reforms which were often diverted from their purpose by courts anxious to adhere to traditional professional technicalities, with which the public had lost patience. As to the formalism of some early judges, see ENGLISH, *op. cit. supra*, at 86. For scathing criticism of the niceties of New York practice, see review of *Howard's Special Term Reports*, in 19 DEM. REV. (n.s.) 19 (1846).

9. HAYNES, *op. cit. supra* note 7, at 89-90, 97-100. For a tabular history of all the states in this regard, see *id.* at 101-35.

10. *Id.* at 80-136. See also AUMANN, CHANGING AMERICAN LEGAL SYSTEM 185-89 (1940). For examples of contemporary criticisms of politics in the selection of judges, see Bishop & Attree eds., *op. cit. supra* note 8, at 141-42, 410, 582-85, 787-93; 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 1850-51, at 86 (Smith ed. 1851); 2 *id.* at 355.

11. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 171-84 (1918).

12. As to the adoption of the principle of rotation in office, see WHITE, *op. cit. supra* note 5, at vii, 4-5, 300-01, 315-18, 325-31. For an explanation of the origins of this practice and of the spoils system, see FISH, *op. cit. supra* note 7, at 79-83, 90-104.

13. Among the Jacksonians "the reason of the university was rejected in behalf of the higher reason of nature." WARD, ANDREW JACKSON, SYMBOL FOR AN AGE 50 (1955). Ward contrasts this with the Jeffersonian emphasis on education and ascribes Jackson's 1828 victory to popular rejection of the trained intellect. *Id.* at 64-71, 167-78, 210, 213. An interesting example of the belief in the efficacy of native intelligence and its virtues as contrasted with the educated mind is to be found in a letter of George Washington Strong, the conservative successful New York lawyer. Writing, Dec. 31, 1827, contrasting Kent and Story with Parsons and Marshall, he remarked the former were great for their legal knowledge

tion with the bar and the general antiprofessional spirit of the era, standards for admission to the bar were lowered and in four states professional requirements were practically abolished.[14] At the same time, as part of the historical pattern of reliance on the jury as representative of the people, the jury's powers were extended and the common-law powers of a judge presiding at a trial were stipped from him by legislation reducing him to the position of a mere moderator.[15] In most of the states the judge was forbidden to ask questions of a witness, even though it was necessary to bring out the truth. He was not allowed to summarize the evidence to the jury, or to comment on it to make it understandable to the laymen who made up the jury, or even to charge the jury as to the law in his own language.[16] Instead he was required in most states—and still is—to compose his charge from the requests for instructions made by one or the other of the opposing counsel. This charge he was required to read to the jury, before the barrage and counterbarrage of the summations by the respective counsel. Inevitably the law of the case as thus given to the jury by the judge was lost in the flood of partisan advocacy that followed it. As a result, trial by jury became a popular show rather than an orderly search for the facts in the interest of justice.[17]

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but that the latter were great in another sense—they relied not so much on books as on the capacity of their minds: "Greatness in this latter sense is esteemed *greater* than in the former." 1 STRONG, DIARY xv (Nevins & Thomas eds. 1952).

14. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 85-90 (1921). By 1840 only one-third of the states required a definite period of preparation for admission to the bar. The 1851 Indiana constitutional provision extending the right to practice to all voters of good character was later explained: "The practice of law was regarded as a participation not only in the administration of justice, but in the administration of government itself, and why should the intelligent pioneer not have the right to defend his neighbor, in a criminal or civil case, when the professional lawyer was as scarce in the newly-settled communities as he was then?" Reinhard, *The Right to Practice Law*, 1902 IND. BAR ASS'N REP. 129. For contemporary testimony of the ease of admission to the bar, see BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI 51, 132 (1853); 1 STRONG, *op. cit. supra* note 13, at 164-65, 241.

15. See Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 584 (1939), discussing

> the judiciary's response to a specific demand of democratic theory—the demand that the jury in criminal cases should not only determine the facts but judge the law as well. . . . The conflict between democratic hopes and English common-law traditions, between a frontier concept of popular justice and an old-world fact of King's law, was sharply mirrored in the issue as to what limits were to be set to the jury's rights.

It was not until 1895 that it was conclusively decided in the federal courts that the jury was bound to follow the judge's instructions on legal questions. Sparf v. United States, 156 U.S. 51 (1895).

16. For consideration of the changes, see MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 224-34 (Vanderbilt ed. 1949); and series of articles probing into these matters by Curtis Wright, Jr: *The Invasion of Jury : Temperature of the War*, 27 TEMP. L.Q. 137 (1953); *Instructions to the Jury: Summary Without Comment*, 1954 WASH. U.L.Q. 177; *Adequacy of Instructions to the Jury*, 53 MICH. L. REV. 505, 813 (1955). For an interesting discussion of the responsibilities of the trial judge at common law, see Brown, *Judicial Independence*, 12 A.B.A. REP. 265, 272, 276 (1889).

17. In 1927 a committee of the Commonwealth Fund which had studied the needs for reforms of the law of evidence, considered as basic to such reforms the

The popular election of judges inevitably compelled all judicial candidates to take to the hustings, to work with all manner of candidates on a partisan ticket for every position from presidential elector to hogreeve and dogcatcher, and to become involved in their innumerable little deals for votes. The process of judicial selection became inextricably mixed with local, state, and national politics. I recall a judge wryly telling how he had been elected by—or with—Woodrow Wilson and later defeated by Warren Harding.

This radical change in the method of judicial selection need not have come about had the judges and lawyers of the time been alert to their responsibilities. In the Jacksonian Era in New Jersey there were only four professionally trained judges—a chancellor and three supreme court justices—but in the Constitutional Convention of 1844 these few judges and the leaders of the bar, in the face of the almost universal trend toward elected judges, brought about the adoption of a constitution providing for judges appointed by the governor subject to confirmation by the Senate. The state had had unsatisfactory experience with legislatively elected judges, as had others, and the bench and bar had no reason to believe that popular elections would prove any better, despite the contrary belief in other states.[18] The failure of the bench and bar in most states in this period to recognize their professional responsibility still plagues us. With the exception of Soviet Russia and its satellites, ours is the only country in the civilized world that elects its judges. In the popular election of judges we stand apart from all of the other countries where either the common law or the civil law holds sway. The plain truth that we have been slow in recognizing is that the Jacksonian Revolution, in every respect except that it involved no bloodshed, was far more drastic than the Revolution of

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enactment of a uniform statute providing that: "The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof." MORGAN, THE LAW OF EVIDENCE 9 (1927). The MODEL CODE OF EVIDENCE, prepared by the American Law Institute in 1942, embodies a similar provision in rule 8. In 1938 the American Bar Association took the lead in recommending "that after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury." Section of Judicial Administration, *Report*, 63 A.B.A. REP. 523 (1938). The UNIFORM RULES OF EVIDENCE approved in 1953 are deficient in this regard and fail to contain a provision directed at restoring to the trial judge his common-law powers. HANDBOOK OF THE NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 162 (1953).

18. L. Q. C. ELMER, THE CONSTITUTION AND GOVERNMENT OF THE PROVINCE AND STATE OF NEW JERSEY, WITH BIOGRAPHICAL SKETCHES OF THE GOVERNORS FROM 1776 TO 1845 AND REMINISCENCES OF THE BENCH AND BAR, DURING MORE THAN HALF A CENTURY 33, 318, 334-36, 396-98 (1872) (commonly known as ELMER'S REMINISCENCES). As to another state's belief that the change to election from the legislative selection would be an improvement, see Smith ed., *op. cit. supra* note 10.

1776, particularly in the field of law; and we have not yet recovered from it.[19]

Few judges have dared to tell the naked truth about the elective system either in the large cities or in the rural areas of the several states. In New York City alone the people are called upon to elect 182 judges, 33 or more candidates appearing on the ballot at a time;[20] obviously the electorate could not personally know that number of candidates, whose selections, of course, were made by the political bosses. There is no pretense that the best available men are nominated. Every year the newspapers deprecate the process editorially; some of the bar associations ineffectively endeavor to enlighten the public as to the "best choices"; and almost every year history repeats itself.[21] The situation is not peculiar to the large cities alone. Just a few months ago a courageous judge had this to say to his friends in the Iowa State Bar Foundation:

> The situation is even worse in the country. The lawyers control the nomination of the judges, and in many rural counties one of the lawyers is politically prominent who holds the delegation in his hand. You ought to sit in this spot: on one side of the table in a close case is a political nobody. On the other side is a man who controls your job. It is a farce to call this a system of justice where the employer of the judge is on one side of the table. That is your rural system.[22]

We should not be surprised to find that in a nationwide Gallup poll taken a few years ago the results showed that only 86% believed the federal judges to be honest, 76% the state judges, and 72% the municipal or local judges.[23] When to this expression of opinion on the question of honesty is added the obvious fact that the characteristics that

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19. "Jacksonian Democracy demanded that the courts, the lawyers, and the law be made subservient to the popular will." ENGLISH, *op. cit. supra* note 8, at 91. See also WHITE, THE JEFFERSONIANS, A STUDY IN ADMINISTRATIVE HISTORY 1801-1829, at viii (1951), commenting that 1829 marked the end of an epoch: "The gentlemen who since 1789 had taken the responsibility of government were driven from the scene, to be replaced by a new type of public servant and by other ideals of official action."

20. Editorial, *Selection of Judges*, N.Y. Times, Nov. 19, 1955, p. 18, col. 3. As to the fantasy in the popular selection of judges in New York see letter from Allen T. Klots, President of the Association of the Bar of the City of New York, to Harrison Tweed, Chairman of the Temporary Commission on the Courts (N.Y.), March 28, 1956, where he points out that the results of a poll taken in New York City and elsewhere in New York State revealed that most voters could not recall immediately after election day the names of the men for whom they voted in the judicial contest and could not even remember the name of the man they voted for as chief judge of the state's highest court. As to politics in the selection of judicial candidates, see Fox, *Judges and Politics*, 27 TEMP. L.Q. 1 (1953); Kales, *Methods of Selecting and Retiring Judges*, 11 J. AM. JUD. SOC'Y 133 (1929).

21. See, *e.g.*, MARTIN, THE ROLE OF THE BAR IN ELECTING THE BENCH IN CHICAGO 21-112, 175-210, 362-63 (1936).

22. Address by Judge Harvey Uhlenhopp, midwinter meeting of the Board of Directors of the Iowa State Bar Foundation, Nov. 30, 1955.

23. Am. Institute of Public Opinion, *Surveys, 1938-1939*, 3 PUB. OPIN. Q. 581, 595 (1939).

make an appeal in popular elections do not necessarily insure the choice of the most competent judges, we can well understand one of the chief causes of dissatisfaction of the people with our judicial system. The qualities that make for judicial competence are not likely to be found impressive on the platform, and the steps one has to take to obtain a party nomination are not likely to be compatible with the complete independence that is an indispensable requirement for a good judge.[24] Moreover, many desirable potential judges who would accept an appointment to the bench are disinclined to encounter the recurring hazards of a political campaign for election, and so the field of choice is unfortunately narrowed. Nor do the drawbacks disappear following election; in many states the county judge is forced to act as the unofficial, though actual, leader of his political party in the county, if he wishes to have a chance for re-election—an intolerable situation inevitably known to the citizenry. It has truthfully been said that a judge must not only be honest, but he must be believed to be honest. What must the public think of such enforced political activity on the part of a judge? In spite of various attempts to improve the techniques for the election of judges, such as the nonpartisan ballot, partisan pressures are inescapable wherever judges are elected. "The selection of a judge by this method is not only influenced by politics; it is politics itself."[25]

Popular, partisan judicial elections would have long since broken down were it not for the fact that about one-third of the judges die in

24. For evidence of what may be required to win an election and distaste for such activities, see BOK, BACKBONE OF THE HERRING 44-49, 285-91 (1941). See also for party demands, MARTIN, *op. cit. supra* note 21, at 251-58. For a persuasive indictment against the system of popular election of judges, see Memorandum submitted by the Justices of the City Court of the City of New York, Feb. 29, 1956, in support of legislation to increase their salaries where they admit to a lack of independence in these terms:

> The process by which one is chosen for the Bench has always been considered a most important determinant of the amount of compensation which should be paid the incumbent. Consequently, appointive judicial officers have been accorded less pay than elective judicial officers; and judges elected from a district within a county have always received less pay than judges elected on a county-wide basis.
>
> Each City Court justice, just like each judge in the Court of General Sessions and each Surrogate and each judge in the four County Courts, has ascended the Bench by having been elected to office by the majority of votes of an entire county. The significance of this as regards financial pressures coming from a large area and from innumerable applicants is well known. In order for any candidate to elective office to win in a county-wide contest, it is necessary for him to have solicited and used active aid and cooperation of many organizations and individuals: political, civic, religious, labor, fraternal, social welfare, and many others. This means that after ascending the Bench and as long as he remains on it, the City Court justice, like any other justice elected on a county-wide basis, is met with demands for contributions and subscriptions to various worthy causes in which his former helpers are active participants. Frequently these are demands which he cannot refuse and where pleading lack of money is not accepted as a satisfactory excuse.

25. Erskine, *The Selection of Judges in England: A Standard for Comparison*, 39 A.B.A.J. 279, 348 (1953).

office or resign, thereby giving the governor an opportunity to make ad interim appointments. These temporary appointees as a group are likely to be much better than the judges elected in partisan elections. When they run for election at the end of their ad interim appointments, the prestige of their position aids materially in their election.[26] In this manner the caliber of the judiciary is somewhat improved over what it might otherwise be, but not sufficiently so to overcome the shortcomings of the elective system.

Unquestionably there are many honest and competent elected judges, but it is in spite of, rather than by reason of, the method of their selection. Nor would I contend that the appointive system as practiced in the United States is perfect. We must admit that political influences are of prime importance in this country wherever judges are appointed by the executive,[27] but the elimination of such partisan considerations is the basic aim of all who are interested in improving the administration of justice. It is possible for undesirable political influences to be eliminated from the appointive system. All that is needed is to have the bar assert itself to demand good judges. No amount of such assertion from the bar will result in good elective judges, since for this it is necessary to inform and mobilize public opinion, and the selection of the numerous judges necessary cannot be expected to be of such interest as to lead to public action except under peculiar circumstances or where an outstanding office is to be filled. However, under the appointive system, the organized bar, without encroaching on the executive, can advise as to the qualifications of those who are being considered.[28] The requirement in Massachusetts and New Jersey that there be an interval of seven days between nomination of a judge by the governor and action on that nomination by the confirming body, allows such advisement and places the responsibility on the bar to act.[29]

The fundamental question as to how judges are to be selected is more than a question of who is best able to determine the qualifications of a potential judge. It involves the determination of how political considerations and partisan pressures may be eliminated from the process. Party regularity and service should not be the basis of receiving the office of judge. Since judges are not essentially representatives of the people as are legislators and the executive, judges, on prin-

26. Vanderbilt ed., *op. cit. supra* note 16, at 8, 27; Tunstall, *Why Ignore the Bar?* 38 VA. L. REV. 1091, 1098-99, 1108-09 (1952).

27. See WARNER & CABOT, JUDGES AND LAW REFORM 11, 182-85 (1936); Evans, *Political Influences in the Selection of Federal Judges*, 1948 WIS. L. REV. 330; Shartel, *Federal Judges—Appointment, Supervision and Removal*, 28 MICH. L. REV. 485 (1930).

28. As to the effectiveness of consultation of the State Bar by then Governor Warren, see Smith, *The California Method of Electing Judges*, 3 STAN. L. REV. 571, 597, 600 (1951).

29. MASS. CONST. art. IX, § 68; N.J. CONST. art. 6, § 6(1).

ciple, should be chosen on a nonpartisan basis. In England appointments by the Crown to judicial office formerly were greatly influenced by political considerations. Recently, however, this has been changed and English judges are now selected on the basis of merit without consideration of party, as indicated by Lord Chancellor Jowitt's eighty-one appointments to judicial office, which included only two members of his own Labor Party.[30] The administration of justice should not be vested in a single party in any community. Accordingly, bipartisan appointments are the best way of proving to the public that one party does not control the courts and that the courts are not in politics.[31] The matter is of special importance in the decision of highly controversial political issues. If all the judges in a bipartisan court, regardless of party affiliations, concur in the decision of such an issue, as they frequently do, their decision carries a weight that an opinion from a partisan bench could not possibly do.

The problem of the tenure to be accorded those who hold judicial office is inextricably interrelated with the question of the mode of selection. Limitations on judicial tenure were the first expedient of a people critical of their courts and desirous of influencing and controlling judicial selection. Historically, short terms of office have gone hand in hand with the selection of judges by the electorate.[32] But in actual practice where the judicial term is short, it is more likely that judges will use the office as a rung on the political ladder, a mere step in a political career. Just because the judicial task is a specialized one for which, however, in the common-law system, no special training is given or required,[33] it is most important for a judge to be able to de-

30. Erskine, *supra* note 25, at 280-81. Erskine comments that the other seventy-nine appointees were not necessarily active conservatives but were probably *non*-political.

31. In Delaware a provision for a bipartisan bench is included in the Constitution (art. IV, § 3). In New Jersey a bipartisan judiciary is a matter of tradition and practice in the supreme and superior courts. See speech of Senator Smith of New Jersey, 97 CONG. REC. 3473 (1951). In the county courts when there are several judges in the county a bipartisan bench is required by statute. N.J. STAT. ANN. 2A:3-14 (1952).

32. For limitation on judicial tenure, see CARPENTER, *op. cit. supra* note 11, at 173-79; HAYNES, *op. cit. supra* note 7, at 100.

33. The common-law courts' lack of requirement of special qualifications of experience or training contrasts with that in other countries. It is to be noted, of course, that in England as compared with the United States there is a limitation on the group of law-trained personnel from which the judges are selected. In England "only barristers are eligible for appointment; and not only is this class itself small, but its leaders are bound to be known." HAYNES, *op. cit. supra* note 7, at 149.

In the continental civil-law countries the judicial career is a specialized profession for which certain training is required, and prior so-called "judicial" experience is necessary for all, except for the initial appointment to a minor court. The judicial profession includes not only judges but prosecutors and those who staff the Ministry of Justice which administers the court system, and the judicial experience necessary to promotion to the higher courts may include assignment to any of these tasks. See generally ENSOR, COURTS AND JUDGES IN FRANCE,

vote years in office, gradually increasing his understanding and competence. The testimony of Justice Henry I. Lummus on this point is interesting. His judicial career has included fourteen years as a part-time judge of a district court in Massachusetts, a trial court of limited jurisdiction, during which period he continued also to practice law; eleven years on the superior court, the trial court of general jurisdiction; and to date twenty-four years on the highest appellate bench in Massachusetts. He says:

> Being a judge ought to be a career in itself, and not merely an interlude in the practice of law or the holding of political office. It ought to be a stepping stone to nothing except a higher judicial office. Forty years, I think, is the ideal age for the beginning of a judicial career in the higher trial courts in America.... For his first few years on the bench, at least, a judge ought to devote all his spare time to the study of law and practice. His whole viewpoint changes when he dons the robe. His search is for truth, and not for usable arguments. Many things look different from the bench. Being a judge is a different profession from being a lawyer....[34]

In the long period from 1848 on, the only important advances in judicial selection and tenure in this country are the provisions of the New Jersey Constitution of 1947 giving judges of the supreme and superior courts tenure during good behavior after a trial term of seven years,[35] and the selection of judges by the plan variously known as the Missouri or California or American Bar Association plan.[36] The essence of this plan is that vacancies are filled by appointment

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GERMANY AND ENGLAND (1933); Ploscowe, *The Career of Judges and Prosecutors in Continental Countries*, 44 YALE L.J. 268 (1934).

In the United States where judges are selected from the legal profession at large, as contrasted with the English limitation and the continental practice, it may be wise to inquire whether it is not too much to expect that a man selected, as many judges are, from office practice, be expert in conducting the trial of cases or the hearing or disposition of appeals. See Marx, *Justice is Expensive*, 36 J. AM. JUD. SOC'Y 75 (1952). In this matter the postwar experience of Japan, which owes much to its earlier civil-law background as well as the present American influence, may be of interest. There, a Judicial Research and Training Institute, supervised by the Supreme Court—a development of an earlier institution—has been concerned with the retraining of judges in the law of the new constitution and postwar legislation, training assistant judges, research by judges in special designated subjects, and the training of judicial apprentices. This latter group includes persons aiming to be judges, public prosecutors, and lawyers who have passed the bar examination. The two-year training course which is in addition to the university legal education, is primarily a practical training in law firms, public prosecutors' offices, and in the courts. T. HATTORI, A SUMMARY OF THE SYSTEM OF THE JUDICIAL RESEARCH AND TRAINING INSTITUTE OF JAPAN (unpublished manuscript in Chief Justice Vanderbilt's files 1946). See also Oppler, *The Reform of Japan's Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290, 305-17 (1949).

34. LUMMUS, THE TRIAL JUDGE 38-39 (1937).

35. Art. 6, § 6(3).

36. See recommendations, Special Committee on Judicial Selection and Tenure, *Report*, 62 A.B.A. REP. 893-97 (1937); Second Meeting of the House of Delegates, *Proceedings, id.* at 1026, 1033; AMERICAN BAR ASSOCIATION, SECTION OF JUDICIAL ADMINISTRATION, HANDBOOK ON THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 80-88 (3d ed. 1952).

through a commission composed of high judicial officers and other citizens. At the end of this term the judge runs, not against the field, but on his own record. The question on the ballot is: "Shall Judge Blank be retained in office?" Unfortunately, it has been adopted only in two states—in both California[37] and Missouri for the appellate courts and in Missouri also for the trial courts in the two largest counties.[38] Even such a plan may not in itself be a guarantee against political interferences. That the vigilance of the bar and the public must be constant was illustrated recently in Missouri where the plan has operated satisfactorily for more than fifteen years. Efforts to pervert the plan were almost successful. Fortunately, the action of the bar in changing its representative on the nominating commission and the action of the governor in going outside his own party for two out of three appointments saved the day.[39] The practice of the political election of judges has gone on in most of our states so long that it has come to be regarded as normal, whereas, as we have seen, it is truly exceptional both in the common law and the civil law. Any attempt, however, to provide for appointed judges would be played up by the politicians as an effort to deprive the people of a great right, although in most places the power of the people to elect their own judges is sheer illusion.[40]

Here we find ourselves face to face with the first great impasse in the administration of justice in this country. Judges should be the leaders in every phase of improving the work of the courts. As it has worked out in practice, the popular election of judges resulting from the Jacksonian Revolution has served for well over a century, almost everywhere, to stifle judicial leadership and bar support for court re-

37. CAL. CONST. art. VI, § 26 (1934). See Special Committee on Judicial Selection and Tenure, *Report*, 63 A.B.A. REP. 420-21 (1938). Appointments are made by the governor subject to confirmation by the Commission on Qualifications. The procedure is also available for the selection of superior court judges in any county upon approval of the electorate but has not yet been so adopted. For history of the constitutional provision and appointments thereunder, see Smith, *supra* note 28.

38. MO. CONST. art. V, §§ 29(a)-(g). The governor makes the appointment from a panel of nominees sugested by the commission. The plan originally was adopted in 1940. For comments on its operation, see PELTASON, THE MISSOURI PLAN FOR THE SELECTION OF JUDGES (20 U. of Mo. Studies No. 2, 1945); Bundschu, *The Missouri Non-Partisan Court Plan—Selection and Tenure of Judges*, 16 U. KAN. CITY L. REV. 55 (1948); Hyde, *Missouri Plan for Selection and Tenure of Judges*, 9 F.R.D. 457 (1950).

This plan has also been adopted for the selection of circuit court judges in Birmingham, Alabama. See AMERICAN BAR ASSOCIATION, *op. cit. supra* note 36, at 81.

39. For editorial approval of the governor's action, see Kansas City Star-Times, Feb. 8, 1956. Another example of a governor's appointment outside his party is reported in *Non-Partisan Selection of Judges in Missouri*, 37 J. AM. JUD. SOC'Y 99 (1953). See also Hyde, *supra* note 38, at 464-65, indicating that the predominance of a party's vote for other officials did not affect the retention in office of judges of the opposite party.

40. N.Y. Times, April 20, 1956, p. 1, col. 1, reporting on lectures given by Federal Judge Harold R. Medina.

form. Judges cannot be expected to attack the method of judicial selection by which incumbents of judicial office must be elected, yet obviously the method of judicial selection must be the first point of attack. The record of a century and a quarter shows that except in rare instances we may not hope for progress here.

The second great impasse in the administration of justice is not so formidable nor, I must add as a law school man, so humanly excusable as the default of the judges. In the law schools the fundamental problems of court organization, personnel, procedure, and administration have been quite neglected since the introduction of the case system of law study three-quarters of a century ago. As a result not only the law school students of today but many generations of lawyers know next to nothing of judicial administration. Here I must confess the embarrassment I feel when I meet and talk to foreign jurists and law students over here seeking to learn improved methods for the administration of justice. In many ways their systems surpass ours, though in others they do not. But what embarrasses me is their great interest in these problems and their desire to learn from other systems of law, while here the profession as a whole shows no interest in improving judicial administration, much less any desire to study the subject comparatively and to learn from others. This inertia of the profession, and in many instances its active opposition to needed procedural and administrative reform in the face of widespread popular complaint and dissatisfaction, must be ascribed in large part to the shortcomings of the legal education of its members.

How are we to account for this strange anomaly—the best law schools in the world, yet with the least interest in improving the administration of justice? The answer is that the case system of law study, the adoption of which chanced to parallel the development of our industrial civilization, was so admirably adapted to the teaching of the substantive law of our business civilization, and the demand for such education has been so great, that almost everything else once in the law school curriculum has tended to be neglected, especially the critical study of procedure. Fifty years ago we were taught just enough of the elements of common-law pleading — demurrers, traverses, pleas in confession and avoidance, novel assignment, and departure—to enable us to read and grasp the procedure of the cases in the substantive law we were studying in other courses. The only things I can remember of that course are that we were told that it was demurrable to plead that one threw a stone gently, but that it was not demurrable to plead that the events alleged in the declaration occurred on the Island of Minorca, to wit, in the Parish of St. Mary le Bow in the Ward of Cheap at London, provided one did it under a *videlicet*! The jurisdiction of the courts and what was really going on

there was a mystery never revealed to me while I was in law school, though I soon came to know that if I wanted to be a real lawyer I had better learn every aspect of these matters. The best clients often know more about the substantive law of their business than their lawyers; they come to their lawyers because they want advice on procedure and especially on whether to settle or fight.

A quarter of a century passed by before the law schools saw the need of teaching anything about the organization of the courts or the fundamentals of actions at law, suits in equity, and procedure under the codes of procedure. It was not until the last three or four years, however, that the significance of the Federal Rules of Civil Procedure began to be recognized by a few of the law schools. But not even to this day do the law schools generally concern themselves with the fundamental problems of the essential reforms of judicial administration and especially with the need of overcoming the shortcomings of the courts with respect to which the public has become most articulate.[41] I can best illustrate the extent of the allergy against procedure that actuates every branch of the profession by citing to you an incident that occurred in 1938 when the Federal Rules of Civil Procedure were promulgated, ushering in an entirely new type of procedure in the United States courts with which lawyers generally were quite unacquainted. Western Reserve University Law School in Cleveland, situated in the population center of the nation, collaborated with the American Bar Association in giving a course of lectures on the new practice which was to govern proceedings in all of the federal trial courts, with outstanding members of the Advisory Committee of the United States Supreme Court as lecturers. Imagine my surprise when less than 500 lawyers in the entire country registered for the course, even though it was free and given in July when court engagements and the press of professional obligations would least interfere.[42]

This particular deficiency of the average lawyer was, in truth, foreshadowed in the law schools. When all we were taught about procedure was a few fundamentals without connecting them with the rest of our world, can the bar be altogether blamed for not taking a burning interest in the problems of the organization of courts, judicial selection, and simplified procedure? The average lawyer's aversion to all these problems originates generally in his law school work. The courses in procedure are likely to be the most unpopular in the curriculum, taught by the latest arrival on the faculty only until another new arrival appears on the scene. This is due largely to the fact that

41. A pioneer course oriented in this direction is discussed in BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE 137-39 (1948).

42. AM. BAR. ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 177 (Dawson ed. 1938). This course was given just before the annual meeting on July 25, 1938, of the Am. Bar Ass'n which in that year had 30,820 members, of whom 2,706 attended the meeting. 63 A.B.A. REP. 185, 849 (1938).

what little procedure has been taught, has traditionally been presented historically and for the benefit of the courses in substantive law. This predilection for the historical approach has unfortunately led the beginning student in the law over a rough road through the technicalities and complexities of the various forms of action at common law which are of no importance today except for the light they shed on the principles of contract, torts, and property. No attempt is made to relate the principles of procedure to the present-day work of the courts.[43]

Lest my remarks be taken as reflecting on the teaching in the law schools, let me hasten to say that they are not so intended. I have said many times before, and I hasten to reaffirm my conviction now, that nowhere in the whole realm of higher education do more minds come to life than through the study of law under the case system. As Dr. Joseph Redlich, who examined carefully the methods of legal education in the civil law and common law countries, said of Langdell's case method, it "really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. . . ."[44] However, I am sure that no good law school would lightly deny the present-day importance of any of the subjects I have been mentioning or fail to see that if the future lawyer's interest in them is not aroused while he is in law school the chances are against his ever mastering them—especially inasmuch as the large majority of the students will rarely enter the courtroom but will devote themselves to office practice. The parallel, however, between the shortcomings of the average lawyer and the failure of the law schools to deal with these matters does raise the embarrassing question of whether the law schools have not erred in the past in letting the legal profession, through the boards of bar examiners, shape the curriculum, just as our business civilization has in turn too largely dictated the standards of the profession. However that may be, the fact remains that the subjects germane to our business civilization have dominated the law school curriculum to the detriment of both procedure in the broadest sense and the administration of justice.

43. I am not arguing that knowledge of the forms of action is not essential to an understanding of the common law for, as Maitland truly said, these "we have buried, but they still rule us from their graves." MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1936). However, their importance today is not for procedure but for the substantive law.

44. REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 39 (Carnegie Foundation for the Advancement of Teaching, Bull. No. 8, 1914). While recognizing that American law schools' primary function was to train students for legal practice, Redlich thought Langdell's reforms developed a new "calling, that of the non-practising law teachers of America," and he visualized these new legal scholars with the aid of lawyers and judges creating "a scientific system of the common law, and a reform of . . . substantive law, as well as of civil and criminal proccedure." *Id.* at 63. See also Redlich's pregnant comments as to the need to widen the scope of the law school course if law reforms are to succeed. *Id.* at 65.

Realizing how difficult, indeed, how well-nigh impossible, it is to bring about court reform through judges and practicing lawyers, my thesis is that, if we are ever to make the progress we should in improving the administration of justice, we must have the aid of the law schools. Surely they have no greater duty than to save the courts. There is nothing novel about this. In 1932, before he became a judge, Professor Frankfurter had this to say:

> But, when all is said and done, the law schools ought to have, if they have not, dominant influence in the directions pursued by the bar, and in fashioning the standards which lawyers observe and not merely profess. And the bench fundamentally is always an offspring of the bar. Not the least function of law schools, and of the profession which they nurture, is the influence which they ought to exert on lay opinion regarding the requirements of legal administration and the qualities that ought to be demanded for the judicial office.[45]

Unhappily this perfectly reasonable goal for the law schools has scarcely been recognized.

What has been done over the past half-century since Dean Pound sounded his clarion call has been largely the work of a relatively few men, primarily in the federal field. For nearly twenty years Thomas W. Shelton led a crusade for an act to give the United States Supreme Court the same kind of rule-making power in actions at law that it had long exercised in equity, thus avoiding the evils of the Comformity Act,[46] only to face year after year the opposition of Senator Thomas J. Walsh, then Chairman of the Senate Judiciary Committee. Shelton died before the battle was won, but in 1934 Attorney General Homer S. Cummings, who by a strange quirk of history and judicial good fortune was Walsh's successor as Attorney General, sponsored the act that resulted in the Federal Rules of Civil Procedure in 1938.[47] The Federal Rules of Criminal Procedure followed in 1946.[48] Meantime, largely through Attorney General Cummings' leadership, the act establishing the Administrative Office of the United States Courts —the first of its kind in this country—was passed.[49] In 1938 seven distinguished committees of the American Bar Association dealing with various phases of judicial administration, under the leadership of John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, made thoroughgoing reports on minimum standards of judicial administration which were unanimously adopted, save for a single provision, by the American Bar Association as its contin-

45. Frankfurter, Book Review, 45 HARV. L. REV. 596, 597 (1932).
46. Act of June 1, 1872, c. 255, § 5, 17 STAT. 197.
47. See Cummings, *Immediate Problems for the Bar*, 20 A.B.A.J. 212 (1934); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).
48. See Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L. J. 694 (1946).
49. 53 STAT. 1223 (1939), 3 U.S.C. §§ 601-10 (1952).

uing program for the state courts.[50] In 1947 New Jersey modernized its judicial structure and practice with a view to eliminating popular complaints in a movement led by laymen, and in 1951 Delaware did the same thing under the leadership of its bar. On the basis of its acceptance of the American Bar Association's minimum standards of judicial administration, Missouri likewise ranks high. Outstanding are its adoption of a nonpartisan plan for the selection of judges and its recent replacement of its justice of the peace with magistrate courts staffed by judges who must be lawyers.[51] In judicial administration the more that is done the more seemingly remains to be done. Missouri has already achieved the major objectives, but it still needs a chief justice with continuity in office, a full-time administrative office, simplified jury laws, the restoration of the trial judge's common-law powers, and the abolition of the present limitations on discovery before trial. In these three states, however, as well as in the federal system, many of the objectives for improved judicial administration are being substantially accomplished. It is significant that all of these jurisdictions in which great strides in judicial reform have been made have judges who are not, for the most part, selected by popular election.

The improvement of the administration of justice is too vital a matter to wait for the achievements of individual men or small groups of leaders in their respective states. The bar as a whole must be educated with respect to the fundamental problems of the courts and its responsibility for their solution. Frederic W. Maitland long ago told us: "Taught law is tough law."[52] In the field of judicial administration there has been very little "tough law"—indeed, little procedural law of any kind has emanated from the law schools over the last century. I appreciate the competition for time in the law school curriculum, but I agree wholeheartedly with Mr. Justice Frankfurter as to the responsibilities of the law schools for exerting their influence on the bar as well as on lay opinion regarding judicial administration. Fortunately, the essentials of the underlying problems are so simple, the ideals to be attained have been so clearly stated, the remedies have been so well defined, and the amount of time which will be taken up in presenting these matters is relatively so small, that I cannot believe that the law schools will longer attempt to justify their apathy. They have the power as well as the duty to break *their* impasse; it is to them alone that we must look for nationwide leadership.

50. Section of Judicial Administration, *Report*, 63 A.B.A. REP. 522 (1938). See Vanderbilt ed., *op. cit. supra* note 16, for summary of status of the states as based on their standards.

51. As to the Missouri plan for judicial selection see note 38 *supra*. The relevant provisions governing the magistrate's courts are to be found in MO. CONST. art. V, §§ 18-21, 24, 25; MO. REV. STAT. c. 482 (1949).

52. MAITLAND, ENGLISH LAW AND THE RENAISSANCE 18 (Rede Lecture 1901).

I shall devote the rest of this lecture to outlining some of the principal problems of judicial reform that have resulted from the great impasses in justice, the solution of which, in my judgment, is the primary obligation the law schools owe to the law and to the legal profession as well as to the public. I shall deal with these problems in two groups, the first centering chiefly around the causes of popular dissatisfaction with the courts, the second dealing with problems with which we all should be very much concerned, but with reference to which both the profession and the public have been relatively indifferent.

II

The essentials for the sound administration of justice today are: (1) a simple system of courts; (2) competent judges and jurors; (3) the use of judicial manpower in the most effective manner through an administrative head of the courts; (4) a simple flexible procedure aimed at securing a decision of every case on the merits and avoiding undue delay, technicalities and surprise; and (5) an effective appellate practice. These principles apply to both the administration of civil and criminal justice.

(1) The work of the best bench and bar can be greatly handicapped by a multiplicity of courts with overlapping jurisdictions.[53] Lord Coke lists seventy-four courts in his *Fourth Institute*, but three are all that are needed in a modern judicial establishment: a local court of limited civil and criminal jurisdiction, a trial court of general statewide jurisdiction, and an appellate court with an intermediate court or courts of appeal depending on the needs of the particular state.

(2) I have already spoken at length of the need of well trained independent, impartial judges. Honest and intelligent juries, representing a cross-section of the honest and intelligent citizenry of a county, are as essential to the administration of justice as upright and learned judges. It is a mockery of justice to go through the form of a trial with a dishonest or unintelligent juror in the jury box. The jury is an integral part of the administration of justice and the selection of the panel from which juries are drawn should therefore be entrusted to the courts or to commissioners appointed by the courts. This has been done in thirty-three states, but in the remaining fifteen states the selection of the jury panel is in political hands, with the inevitable resultant dangers to the administration of justice. In many states the

53. For a history of American developments, see generally POUND, ORGANIZATION OF COURTS (1940). For an analysis of the basic court structure of the various states, see Miller, *The Judicial Structures in the "Common Law" State: A Comparative Analysis*, 7 LA. L. REV. 490 (1947). For examples of the problems of courts in metropolitan areas, see LEPAWSKY, THE JUDICIAL SYSTEM OF METROPOLITAN CHICAGO (1932); N.Y. CITY BAR ASS'N, BAD HOUSEKEEPING, THE ADMINISTRATION OF THE NEW YORK COURTS (1955); VIRTUE, SURVEY OF METROPOLITAN COURTS, DETROIT AREA (1950).

jury laws are antiquated and complicated. Qualifications for service and exemptions from service are frequently without rhyme or reason. Alternate jurors are not often provided for. It is difficult to understand why there has been so much neglect of matters so essential to effective judicial administration.[54]

(3) Although, as we have seen, only three courts are called for, instead of the many courts with special jurisdictions as we have even now in many states, there should be considerable specialization by judges in the trial courts in metropolitan areas. It is impossible for a trial judge to be an expert in every field of trial practice. Without limiting the general jurisdiction of each trial judge to dispose of all the issues in any case assigned to him, sound reason dictates that he should be assigned in general to a division of his court specializing in the kind of work for which he is best qualified—criminal, civil (generally with a jury), equity, probate, juvenile, traffic, and the like. Some very good equity judges shrink from jury work and some very good law judges dislike equity. For sound judicial administration, therefore, someone should have the power to assign the judges to the work for which they are best fitted and where they are needed. The exercise of this power will result in the creation of several groups of specialist judges—appellate judges, law judges who customarily function with a jury, equity judges, and matrimonial judges. It is sheer waste of time and effort to have judges rotating from one kind of work to another. Each kind of judicial work involves not only special knowledge but special techniques. Each member, moreover, of a group of specialist judges learns much from another. The ideal is to assign each judge to the kind of work he likes and can do best. Because this power of assignment is a delicate one to be exercised only on mature reflection for the best interest of the judicial establishment as a whole, it may best be committed to the chief judicial officer in the state and he, in turn, would do well to seek the advice of his colleagues, even though the ultimate responsibility for assignments must be solely his.

Equally important in the management of a judicial system is the exercise of the power by the administrative head of the courts to assign the judges where they are most needed. Not only is it ridiculous to have some judges half-idle while others are falling behind with their work, but here we have made the interesting discovery that two judges

54. For the facts as to jury selection and jury service, see Vanderbilt ed., *op. cit. supra* note 16, at 146-206. An investigation of the jury system is currently being conducted at the University of Chicago Law School. See Meltzer, *A Projected Study of the Jury as a Working Institution*, 287 ANNALS 97 (1953). See also Note, *Psychological Tests and Standards of Competence for Selecting Jurors*, 65 YALE L.J. 531 (1956), viewing current criticism of juries inadequacies as following from weaknesses in jurors' selection, the result of vague statutory qualifications and antiquated methods of selection, and suggesting the adoption of standards of jury competence and the use of objective tests to assess jurors' qualifications in order to improve the operation of the jury system.

sitting in the same courthouse and working on a common calendar can try half again as many cases as these same two judges can try sitting in different courthouses and working on separate calendars. The phenomenon continues up to the limit of trial judges available, the courtrooms available, the number of trial lawyers available, and the number of cases awaiting trial.

To know what each judge is doing and where judges are most needed requires current statistics week by week as well as quarterly and annually.[55] To assist him in this work the chief justice requires an administrative director of the courts to handle all of its business affairs. The courts are the only statewide business operating in most jurisdictions without any semblance of business management. The wonder is that they have done as well as they have. An awareness of the need of a business manager in the courts is gradually being understood by the entire country. Since 1939 administrative offices have been established in seventeen jurisdictions.[56] In all the jurisdictions where such offices have been established, the bench and bar and the people are unwilling to return to the former lack of method. But false notions of democracy still operate to prevent this in some states. In the Jacksonian period so extreme were the notions of equality that it was deemed undemocratic that one judge should be permanently designated as chief justice. Today, in twelve states the chief justice shifts every year or two, and in two states every six months.[57] Imagine trying to run any other large statewide business on such a basis. It will do little good to create administrative offices if the responsible head of the courts shifts on such short intervals. Last year Michigan abandoned this absurdity, showing that progress is possible even under the elective system. Only false judicial vanity stands in the way of this much needed improvement.

(4a) With competent judges and jurors and adequate administrative powers, it is not a difficult matter to overcome popular complaints as to the law. The law's delays have been by all odds the greatest source of these complaints. One of the most annoying forms of this evil is the failure of the judge to open court on time and to stay on the bench attending to court business throughout the appointed hours of the day. This offense yields readily to sound example from the ap-

55. For recognition of the seriousness of these problems and recapitulation of provisions in the states for the assignment of judges and the collection of statistics, see Vanderbilt ed., *op. cit. supra* note 16, at 29-87; AMERICAN BAR ASSOCIATION, *op. cit. supra* note 36, at 21-36.

56. Elliott, *Judicial Administration*, 31 N.Y.U.L. REV. 162, 175 (1956). In addition Puerto Rico has such an office; New York and Ohio also have offices of this type but theirs are limited in the scope of operation and effectiveness.

57. 11 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1956-1957, at 206 (1956). In addition, in six states the chief justice of the court of last resort is the judge having the shortest term to serve.

pellate court establishing the same court hours for itself as for the trial judges and rigidly living up to the rule.

The second great cause of undue delay is not getting cases on for trial after the pleadings have been filed and various pretrial procedures have been completed. The extent of this type of delay is truly alarming. According to figures published at the end of June 1955 by the Institute of Judicial Administration, while the average nationwide time interval from the date at which a case is at issue to the trial of a jury case is 11.4 months—a time nearly twice as long as it should be—a jury case has to wait for trial the preposterous period of 46 months in Worcester County, Massachusetts, 44 months in Queens County, New York, and 40 months in Cook County, Illinois (Chicago), to mention the three worst offenders. In nine other courts the delay for jury cases is 25 months or more. In some courts the arrearages have been substantially reduced; thus the Circuit Court of Jackson County, Missouri (Kansas City) has been one of those making remarkable progress within a single year by shortening this period from 24 to 14 months.[58]

There is no reason why a citizen should have to wait more than six months between the time when a case comes to issue and a trial and decision of the dispute. Such a period allows time for preparation of the pleadings, preparation for trial, full discovery of the facts before trial, and thorough preparation on the law by counsel. Any period longer than that invites the utilization of administrative and other nonjudicial procedures for the decision of disputes. The failure to give a prompt and efficient trial in the plethora of automobile negligence cases which today crowd the court calendars is particularly dangerous. Laymen cannot be expected to continue to put up with this state of things which is so costly to both litigants. Procrastination in needed reforms may result in depriving the courts of their jurisdiction in such cases and handing it over to administrative tribunals as was done with industrial accidents a half-century ago.[59] Such proposals have been discussed for years, but lately with increasing emphasis largely as a result of the law's delays. Such justice is admittedly rough justice, but it is better than no justice at all.

58. STATE TRIAL COURTS OF GENERAL JURISDICTION, CALENDAR STATUS STUDY (1955). It is reported that most "of the courts in which trial delays are longest are in the great metropolitan centers, but this is not true of all of them. . . . And some metropolitan areas . . . have reasonably short average delays for jury trial cases. . . ." *Id.* at 4.

59. This is not a new suggestion, see Clark, *Summary and Discussion of the "Columbia Plan,"* 8 VA. L. WEEKLY DICTA COMP. No. 13 (1955); Marx, *Compulsory Insurance Legislation Advocated,* 8 *id.*, No. 16 (1956). See also Ehrenzweig, *Auto Negligence: Is It an Anachronism,* 8 *id.*, No. 14 (1956); Greogory, *A General Summary of Automobile Negligence,* 8 *id.*, No. 3 (1955); Richardson, *Horse and Buggy Law in the Automobile Age,* 8 *id.*, No. 8 (1955). And see articles cited in Conard, *Workmen's Compensation: Is It More Efficient Than Employer's Liability?* 38 A.B.A.J. 1011, 1012 n.14 (1952).

Before turning automobile accident cases over to an administrative tribunal, would it not seem wise to investigate the workmen's compensation commissions to see how well they are really working?[60]

60. As to the need for inquiry into these matters, see Conard, *supra* note 59; Kossoris, *Workmen's Compensation in the United States*, 76 MONTHLY LAB. REV. 359 (1953); *Symposium: The Current Status of Workmen's Compensation*, 7 IND. & LAB. REL. REV. 31 (1953). Conard, *supra* at 1013-14, 1058-59, reports on the findings contained in CONRAD & MEHR, COSTS OF ADMINISTERING REPARATION FOR WORK ACCIDENTS IN ILLINOIS (1952), which while admittedly merely a pilot study indicates that a workmen's compensation system does not automatically bring about a reduction in operating expenses and suggests the need for further studies of the results of such administrative procedures to determine the extent of their claimed efficiency. The Conard and Mehr Illinois study indicated that under the FELA system about one-fifth of the total cost was operating expense while under the workmen's compensation system about one-third of the total cost was operating expense. See *id.* at 1, 54. For interesting statistics as to distribution of costs under workmen's compensation, see *id.* at 30-34; and for sources of such expenses, *id.* at 37-41. From this study and the statement that "perhaps the most amazing thing about this huge public program [workmen's compensation], costing over $1,250,000,000 a year, is that so little is known about it; even the basic statistics are lacking. . . ." (H. & A. Somers, *Workmen's Compensation: Unfulfilled Promises*, 7 IND. & LAB. REL. REV. 32, 41-42 (1953)), it is obvious that research in this field is necessary before an intelligent evaluation can be made.

It is interesting to note, however, that in one state, New Jersey, the Workmen's Compensation Division of the Department of Labor, has 14 deputy directors who preside at formal hearings, 4½ formal referees hearing cases and pretrials, and 3 informal referees sitting on uncontested cases, or a total of 21½ officials hearing claims. By way of comparison the superior, county, and district courts of the entire state (the courts of original jurisdiction), are staffed by 103 judges.

For further observations on the operation of the workmen's compensation systems, see Somers, *supra* at 39, discussing the failure of workmen's compensation legislation to achieve one of its major objectives:

> [T]he removal of disputes from the legal cockpit to simple administrative decisions based on the presumption of the right of the injured worker to be compensated irrespective of fault. . . . It is now estimated that over 100,000 compensation cases are litigated a year. The President's Commission on the Health Needs of the Nation . . . said recently "Excessive litigation is common, with both legal and medical chicanery."

The authors further note *inter alia*:

> The hope and anticipation that litigation could be removed from the system as presently constituted has gradually diminished. Even labor, which was originally vastly suspicious of the lawyers, has come to feel that, workmen's compensation being what it is, the assistance of counsel is needed.

Id. at 40. The inadequacy of the benefits under workmen's compensation is discussed *id.* at 34-36, 40-41. See also Black, *The Anomalies of Workmen's Compensation*, 7 IND. & LAB. REL. REV. 43 (1953), which after detailing the achievements of the system records that "a leading issue among the 'administrative' problems is that of mounting litigation." *Id.* at 44.

As to the inadequacy of benefits under workmen's compensation, see Pollack, *A Policy Decision for Workmen's Compensation*, 7 IND. & LAB. REL. REV. 51 (1953). The author poses an important issue for those who argue for turning automobile accident cases over to administrative tribunals: "The widespread failure to provide adequate benefits coextensive with disability or dependency is at least in part due to a question that has arisen as to the feasibility of providing assured and generous compensation." *Id.* at 57. The author also has these pertinent remarks to make as to the administration of these laws:

> [I]n only ten jurisdictions are benefits initially adjudicated by the administering agency or court. In the remaining thirty-nine states, claims are settled mainly by agreement between the parties, a procedure that is often to the disadvantage of the claimant. . . . With the limitation or shrinkage of government supervision, the procedure has become increasingly litigious, reviving the adversary roles of employer and employee, without the compensating advantages of court litigation for damages. . . . [T]he total costs of litigation and insurance are reaching unthinkable proportions.

Id. at 58-59.

Even more to the point, the obvious remedy, which it has been demonstrated in more places than one can be achieved, is to bring the work of the courts up to date. Parenthetically let me note that at least one great gain that has come from all this discussion is a very real interest in the abolition of the harsh rule of contributory negligence and the substitution of the more just rule of comparative negligence.[61] The acceptance of this doctrine will not only promote justice, but will do much to bring about settlements in this type of litigation.

We have already seen that by giving the chief justice the power to assign the judges where they are most needed and to the kind of work that they are best fitted to perform, the effective performance of the judiciary can be improved to a marked degree. The next step, which violates, of course, the Jacksonian ideals but is of great importance for efficiency, is the appointment by the chief justice of a presiding judge in each county. The presiding judge in the larger counties must be an expert in calendar control. We have had instances of a single firm of trial lawyers having several hundred cases on the docket; the answer we found was to have the presiding judge set up a special trial list for the firm until its cases were disposed of. They will disappear far more rapidly than they possibly would if left on the regular calendar. A case tried without a jury takes about half the time of one tried with a jury. Very well, then, encourage the waiver of juries by giving a preference in the day's call to those civil cases where the parties are willing to waive a jury.

Of all the devices in civil cases for saving time at the trial level none is so valuable, and yet none so widely misunderstood, as the pretrial conference.[62] It is not a means of forcing settlements; a judge who attempts to force a settlement should be censured. On the contrary, the pretrial conference really may be considered as a return to informal oral pleading. It is a planned effort to get the lawyers on each side to come to grips with their case before it comes on for trial. After the lawyers have conferred privately concerning the issues of law and of fact, they appear before the judge at a designated hour in open court—for obvious reasons it is essential that pretrial conferences be held in open court. The judge looks over the pleadings and

61. For suggestions of how to accelerate the work of the courts by trying "such cases without juries under the rule of comparative negligence," see Peck, *The Law's Delay—What Insurance Companies Can Do About It*, 1956 INS. L.J. 7, 8-10; Peck, *System of Jury Trial Cause of Court Delay*, 8 VA. L. WEEKLY DICTA COMP. No. 15 (1956). See also for summary of the acceptance of the doctrine of comparative negligence and a selected bibliography, INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE (1955).

62. Early experiments with the pretrial conference in Detroit and Boston led to the initiation of such procedure. FED. R. CIV. P. 16, authorizing such conferences gave a marked impetus to the adoption of this device. See Laws, *Pretrial Procedure—A Modern Method of Improving Trials of Law Suits*, 25 N.Y.U.L.Q. REV. 16 (1950).

calls first on the plaintiff's lawyer and then the defendant's lawyer to outline what they intend to prove. In this conference with counsel he quickly shakes the nonessentials out of the pleadings and proceeds to state the issues in their simplest form. Then he comes to the proofs and discusses with counsel what documents are to be offered in evidence; ordinarily they are produced then and there and marked in evidence so that they will be ready for presentation at the trial without calling attesting witnesses. Many facts likewise may be stipulated, such as the ownership of the automobile in question and the agency of the driver, and the amount of damages to the car, if the main issue is liability or the extent of personal injuries. Out of this process of consultation emerges a pretrial order which defines the issues, makes any necessary amendments to the pleadings and states the admissions of each side. It is dictated in open court and signed by the judge and the lawyers."[63]

What are the results of the pretrial conference? Very often for the first time the lawyers see the case, including their own side of it, in its true perspective. Very often it becomes apparent to them that the case has a settlement value, and in the two weeks intervening between the pretrial conference and the date fixed for trial three cases out of four are settled by the voluntary act of the parties without any interference from the court.

But settlements are by no means the most important aspect of the pretrial conference nor is the fact that they shorten the trial of cases by a third to a half. The great thing about pretrial conferences is that the judge can try the case infinitely better than he could without the pretrial conference order before him. He knows exactly what the case is about from the beginning. If it involves some unfamiliar proposition of law he can order that briefs be submitted in advance of the trial so that he can know as much about the law of the case as the lawyers do.

The last class of the law's delays is the failure of the trial judge to dispose of a case immediately after he has read the trial briefs, listened to the evidence, and heard the closing arguments of counsel. If he has been alert throughout the trial he knows more about the case then than he ever will again. Every day's delay will dim his memory of the case by reason of his concentration meantime on other cases. Delay thus means double or triple work for the judge and he should resist at all hazards the pleas of counsel to file briefs at a later date. In bygone years in New Jersey delays of two or three years in deciding cases were quite common, and delays of ten or twelve years or longer

63. See generally NIMS, PRE-TRIAL (1950); Crawford, *Legal Problems of the Pretrial Conference*, 31 CORNELL L.Q. 285 (1946); and bibliography in INSTITUTE OF JUDICIAL ADMINISTRATION, PRETRIAL RULES (1953).

were not unheard of. In contrast, on January 1st last there were only three cases in the entire state in which there were decisions outstanding over four weeks from the completion of the trial, and in each case there was a sound reason for withholding the opinion.

As a result of the application of these relatively simple ideas, the problem of chronic calendar congestion was solved in New Jersey and cases were better tried. In the first year under our new constitution the number of cases disposed of was increased ninety-eight per cent over the preceding year and the next year twenty per cent beyond that figure. Despite increases in the number of cases being started, at the end of the third year the number of cases on the calendar was the smallest in twenty years.[64]

(4b) Another popular grievance against the courts is the failure in too many civil cases to get a decision on the merits. All too often the tendency is for a trial to become a battle between opposing counsel rather than an orderly, rational search for the truth on the merits of the controversy. As Judge Learned Hand has put it,

> [It may be] hard to expect lawyers who are half litigants to forego the advantages which come from obscuring the cases. . . . It is important, nevertheless, that we should realize the price we pay for it, the atmospheres of contention over trifles, the unwillingness to concede what ought to be conceded, and to proceed to the things which matter. Courts have fallen out of repute; many of you avoid them whenever you can, and rightly. About trials hangs a suspicion of trickery, and a sense of a result depending upon cajolery or worse.[65]

The normal citizen has an instinctive dislike of the disposition of cases on technicalities of procedure. He believes naturally that every case should be decided on its merits. In a book written some years ago, Dean Stone, later Chief Justice of the United States Supreme Court, stated that sixty per cent of the cases decided in New York were disposed of on procedural grounds.[66] I am sure that this high percentage does not still prevail in New York, but wherever there is a legislative code of procedure, decisions on technicalities are inescapable, because the judges must respect the code which by reason of its embodiment in statutory form is inflexible in its command. The obvious answer to such a situation which serves to bring disgrace on the law is to authorize the highest court in the state to formulate simple, flexible rules of procedure.[67] The most important rule of procedure is one which we have had in New Jersey for over a hundred years:

64. For details and summary of disposition of litigation in New Jersey, see ADMINISTRATIVE OFFICE OF THE COURTS, NEW JERSEY, ANNUAL REPORTS.

65. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 N.Y. CITY BAR ASS'N, LECTURES ON LEGAL TOPICS 88, 104-05 (1926).

66. STONE, LAW AND ITS ADMINISTRATION 120 (1915).

67. For appropriate recommendation of the Am. Bar Ass'n on this point and considerations of the status of the rule-making power in the various states and its exercise, see Vanderbilt ed., *op. cit. supra* note 16, at 91-146; AMERICAN BAR ASSOCIATION, *op. cit. supra* note 36, at 10-21.

> The rules of this court shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any cases where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.[68]

The reasons why any state retains a legislatively enacted code of procedure do no credit to its bench and bar, for they can only stem from unwillingness to learn and use a simplified system of procedure making for decisions on the merits of each controversy. Unfortunately, what Elihu Root said over fifty years ago still is true of too great a proportion of the legal profession. In 1904 he wrote:

> [W]e conduct and try our cases too much as if we were playing a game, in which the Judge was umpire to award a prize to the most skillful player . . . delay in itself creates litigation and creates more delay; that the true way to improve conditions is not by making more judges and still more judges, but [is] to create a sentiment at the Bar and on the Bench which will discourage our vexatious methods; and I pleaded guilty myself to all the faults which I was pointing out. . . . [D]ilatory tactics are not exactly in favor, yet they are not considered discreditable, and we all get to dawdling and postponing and forgetting the merits of the cause in the intricacies of the practice.[69]

Whenever changes in procedure have been proposed, they have met with professional opposition because of the bar's uncritical acceptance of things as they are, and unwillingness to change and learn new ways.[70] The opposition to the Field Code, in its day a vast improvement over common law procedure, exemplifies this. Today's modern court-made rules have met with similar opposition in spite of the effective way they have worked in the federal courts and in those states where they have been adopted. Wherever such rules of procedure have been used, they have given satisfaction. These court-made rules of procedure should never be regarded as definitive. And this itself is difficult for the profession to accept. No system of procedure can ever be considered perfect. As new needs and abuses develop, procedural provisions must be elastic and subject to continual revision if they are to be useful and not to become rigid and an end

68. N.J. CT. ERR. & APP. RULE 45, originally adopted Oct. 24, 1845; see 3 MINUTES OF THE COURT OF APPEALS 36; for present rule (R.R. 1:27A), see 1 NEW JERSEY PRACTICE 59 (Supp. 1955). See also former rule 1 *id.* at 14 (R.R. 1:1-8).

69. 1 JESSUP, ELIHU ROOT 434-35 (1938).

70. Mr. Justice Frankfurter, as quoted in Gardner, *The Machinery of Law Reform in England*, 69 L.Q. REV. 46, 54-55 (1953), has said:

> [N]othing is more true of my profession than that the most eminent among them, for 100 years, have testified with complete confidence that something is impossible which, once it is introduced, is found to be very easy of administration. . . . Every effort to effect improving changes is resisted on the assumption that man's ultimate wisdom is to be found in the legal system at the date at which you try to make a change.

See also Fowler, *A Psychological Approach to Procedural Reform*, 43 YALE L.J. 1254, 1265-66 (1934).

in themselves. Procedural rules must be revised as experience dictates, with the aid of the bench and representatives of the bar in judicial conferences.

(4c) Closely related to the evil of procedural technicalities is the decision of a case through surprise. This can be obviated in large measure by the adoption of the modern civil rules patterned on those used in the federal courts freely permitting interrogatories, depositions in aid of discovery, and inspections and demands for admissions.[71] Discovery is useful not only to narrow the issues, but also to obtain evidence for use at the trial and information as to the whereabouts or existence of such evidence. Prior to the Federal Rules, English and Canadian experience as well as that of several of the states had demonstrated the advantages in trial practice of a preliminary examination of the evidence of both parties.[72] The value of the Federal Rules is to be found in the frequency of their use. The purpose of liberal rules of discovery is to enable each party to prepare to meet the evidence against him and to eliminate as far as is possible being taken by surprise.[73] The scope of discovery is limited only by the requirement that it deal with matters relevant to the pending action, and that it not inquire into privileged matters or without adequate reasons pry into the "privacy of an attorney's course of preparation."[74] I know that complaint has been made that the deposition process has been abused in some courts,[75] but it will not be if the profession and judiciary are alert. However, at almost every bar association meeting and conference of judges that I have attended in New Jersey in the last eight years I have asked that counsel and the judges let me know of any such case of abuse, and after eight years not a single complaint has been registered with me. The cure for any such abuse, if it occurs, is entirely within the control of the bar in the first instance and of the trial judge ultimately. With proper rules of procedure and with adequate opportunity for the free exercise of pretrial procedure, technicalities and surprise may be practically eliminated and a trial may become an orderly proceeding for the discovery of truth in the interest of justice.

We have already commented on the evils of the Jacksonian democratic trial methods. In over half the states in the Union the trial

71. FED. R. CIV. P. 26-37. See Speck, *The Use of Discovery in the United States Courts*, 60 YALE L.J. 1133 (1951); Note, *Discovery Practice in States Adopting the Federal Rules of Civil Procedure*, 68 HARV. L. REV. 673 (1955).

72. See generally RAGLAND, DISCOVERY BEFORE TRIAL (1932).

73. See Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205 (1942); Wright, Wegner, & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97 (1952).

74. Hickman v. Taylor, 329 U.S. 495, 511-12 (1947).

75. For enumeration and discussion of some complaints, see Speck, *supra* note 71, at 1143, 1152; Note, 36 MINN. L. REV. 364, 376 (1952); *The Practical Operation of Federal Discovery—A Symposium on the Use of Depositions and Discovery under the Federal Rules*, 12 F.R.D. 131, 142-45 (1952).

judges are still not allowed to comment on the evidence, not permitted to ask questions even though neither counsel has brought out a pertinent fact, and not permitted to sum up a case to the jury clearly in his own language. Where these rules prevail, a fair trial is an obvious impossibility. In some states instructions to the jury have become so complicated as to be beyond the power of the trial judges to cope with them, resulting in frequent reversals. The remedy is obvious: give back to the trial judge the powers that he had at common law and which he still exercises in the federal courts and a considerable number of others. This is the only way that frequent reversals from this cause can be avoided.

(5) Thus far we have dealt only with trial procedure, but our practices on appeal likewise leave much to be desired. I am not referring to those outmoded technicalities of the bygone era such as assignments of error, bills of exception, grounds of appeal, petitions of appeal, specification of causes for reversal, and writs of error,[76] which are mere excess baggage that can be thrown overboard at will when the bench and bar wake up. Rather am I concerned with the surprising number of appeals that are submitted on briefs alone without oral argument. Without oral argument how can the essentials of the issues be laid bare? How can lawyers or litigants be sure the bench understands the points at conflict? How can the judiciary resolve their doubts and questions arising out of the arguments set forth in the briefs? In only two states is oral argument required in all appellate cases.[77] Submission of appeals on briefs is beyond the comprehension of an English judge. "How," asked Judge Russell of Killowen of the House of Lords, "can you know that the judges actually read the record and the briefs?" Lord Chancellor Jowitt was equally frank, "No one would ever dream that if they left it to us to read it we would ever do so."[78] The arguments in English appellate courts are usually lengthy, but by the time the argument is over everyone can tell who is going to win the appeal and generally on what ground. Inevitably such a process produces respect for judicial decisions.

There is nothing in the field of law quite as futile as an appellate court solemnly listening to the arguments of counsel without having read and analyzed the briefs that counsel have gone—or should have gone—to great pains to prepare and on which they inevitably rely in making their oral arguments. Even assuming that the judges know all the law—a theory concededly contrary to fact—they certainly do not know the facts of the case to be decided. Not only should every mem-

76. For the common-law practice as to writs of error, see 3 BLACKSTONE, COMMENTARIES *406-11; SHIPMAN, COMMON-LAW PLEADING § 91 (2d ed. 1895). For one state's elimination of this antique provision, see N.J. SUP. CT. RULE 1:2-9. See also Vanderbilt ed., *op. cit. supra* note 16, at 401-06, 411-15.

77. See Vanderbilt ed., *op. cit.* note 16, at 437.

78. Address, N.Y.U. Law Center dinner, Sept. 26, 1947.

ber of the court read the briefs in advance of oral argument and prepare a typewritten memorandum of his tentative views, but it is also very helpful for the court to indicate to counsel at the outset of the argument which points most concern the court, leaving it to counsel, of course, to employ their time as they see fit. After hearing the arguments of counsel and particularly after listening to their answers to any questions which have been troubling us, we often find ourselves changing the views we had tentatively reached on the initial reading of the briefs. Many lawyers argue better than they write. If this is so, I am sometimes asked, why read the briefs before the arguments? There are several reasons: if you read the briefs in advance of the arguments, you will know what points the briefs leave unanswered in your mind, and you can ask questions concerning them at the oral argument. If you read the briefs only after the argument and questions arise in your mind, counsel will not be available for answering the questions you would like to ask him. Reading the briefs in advance, moreover, saves the court from interrupting counsel and asking questions that need not have been asked if it had read the briefs. Arguments to an informed court move faster than arguments to an uninformed court, particularly if any of the judges are talkative or disputatious. Furthermore, if counsel know that the court has studied the briefs, the temptation to stray from the facts or to color the law is removed; the penalty of exposure at the oral argument is something most counsel do not wish to endure. Finally, the volume of decisions in each state is so vast that no judge can possibly know all the cases; it is a great advantage to the judges therefore to get a general view of the law of the case before listening to the several parts of the argument.

Even more vicious than appeals submitted on briefs or appeals heard by courts which have not read the briefs are "one man" decisions on appeal. Yet in over half of our appellate courts cases are assigned to the judges for opinion writing in regular sequence before the argument or any discussion in conference. How in these circumstances, to paraphrase Lord Russell, does one ever know whether *all* the judges have read the briefs or listened to the arguments? The system reaches the height of absurdity in two states where the justice to whom a case is assigned may write not only the majority opinion but one of his own in dissent.[79]

When I think of the time and energy that has been devoted over the years to the study of opinions, I wonder that more time has not been devoted to a study of the rationality and the effectiveness of the methods by which those opinions have been reached.

79. Vanderbilt ed., *op. cit. supra* note 16, at 440.

III

Important as the administration of civil justice seems to private litigants, it can readily be demonstrated that the administration of criminal justice in any country is a far more important matter to both the state and the individual citizens. A nation that cannot maintain peace and order within its boundaries will not be able long to withstand its enemies from without the country. Inevitably it will perish. But notwithstanding the clear logic of the situation, popular concern over the courts centers not in the criminal law but in the administration of civil justice. Not only is this so among the people, but likewise in the law schools there is much more concern over civil remedies—the justice, if you please, of our business civilization—than there is in the enforcement of the criminal law. This is doubly unfortunate, because on the civil side the courts have it within their power, if they will but exert themselves, to carry out their responsibilities unaided by other departments of government, but in the administration of criminal justice the courts are largely dependent on the action of officials in the executive branch of government to detect, apprehend, and prosecute criminals. Whatever the deficiencies of the courts, they are in general far less involved in politics than the executive or legislative branches. And it must always be remembered in this connection that not only are the problems of criminal contests much more complicated in an age of science, but the social conscience of the times demands much more of the criminal law than it did fifty or a hundred years ago. Obviously the courts need more help in the criminal field than in the civil. But regrettably the bar is even less interested in criminal law than in civil law and lawyers practicing criminal law are least interested of all in improving it. Their professional interest all too often is in helping rascals escape the clutches of the law.

(1) In dealing with the administration of the criminal law it will doubtless surprise you that I shall speak first of what I regard as the most important court in any state—the local or municipal court—a court, however, to which most people and likewise most lawyers give very little attention, though the public has, perhaps unconsciously, expressed its opinion by rating the judges of such courts four per cent lower in honesty than the judges of the state courts and fourteen per cent lower than the judges of the federal courts.[80] The reason for popular lack of faith in these courts does not require a lengthy search; it is in the local criminal courts that most citizens have their only contact with the courts and the impressions they form are often unfavorable. There was a time when the justice of the peace was merely a local judge dealing with cases of disorderly conduct or holding over

80. See note 23 *supra.*

offenders for the grand jury. The advent of the automobile[81] worked a revolution in this and the other local, so-called "inferior" courts. No longer are they frequented exclusively by the local flotsam and jetsam of society; people of every rank, young and old alike, are haled there. Traditionally the justice of the peace has been paid by fees—fees paid by the defendant.[82] If the defendant were to win, the justice would get no fee. This is a situation which inevitably tends to produce tension in the judicial breast, if justice pure and undefiled is the objective. Especially is tension apparent when the defendant is a motorist from out of town or, worse yet for him, from out of the state. Not that there are not honest justices of the peace, but for many, the opportunities are indeed alluring.

This situation led to that opprobrious American custom known as the *fix*—the illegal suppression of traffic tickets.[83] While traffic offenders are generally otherwise law abiding citizens, the amazing fact is that the temptation to "fix" traffic tickets is seemingly irresistible for many who would condemn the fixing of a judge or jury in an ordinary case, and they succumb to the temptation without compunction. The fix is a nationwide custom[84] except in a relatively few places. The extent of its use may be easily shown. In the largest city in New Jersey, after adequate means were instituted to eliminate the fix, there were in the first quarter of the year only 607 tickets that were not answered in court as compared with 14,529 tickets in the corresponding quarter of the preceding year under the old order.[85]

What are the means by which the fixing of tickets is eliminated? Simply the use of a uniform nonfixable traffic violations ticket, which the police officer makes out in quadruplicate with the aid of carbon paper, the original going to the traffic court, one copy to police headquarters, one retained by the police officer who handed it out, and one to the offender.[86] The tickets are all numbered and every ticket issued to an officer must be accounted for. All of this means that this kind of a ticket cannot be fixed without the active cooperation of three public officials—the judge, the police chief, and the issuing officer. An attempt to interfere with a ticket constitutes a contempt of court. In

81. See WARREN, TRAFFIC COURTS (1942); Vanderbilt ed., *op. cit. supra* note 16, at 263-67, 275-92; Economos, *Traffic Courts and Justice of the Peace Courts*, 25 N.Y.U.L. REV. 66 (1950).

82. For details of survival of the system of fee-paid justices, see WARREN, *op. cit. supra* note 81, at 202-03, 211-22; Smith, *The Justice of the Peace System*, 15 CALIF. L. REV. 118, 120-21 (1927). See also Vanderbilt ed., *op. cit. supra* note 16, at 306-16; Sunderland, *A Study of Justices of the Peace and Other Minor Courts*, 15 MICH. JUDICIAL COUNCIL REP. 57, 106-09 (1945); and opinion of Chief Justice Taft in Tumey v. Ohio, 273 U.S. 510 (1927).

83. Vanderbilt ed., *op. cit. supra* note 16, at 300-02.

84. For results of recent investigation indicating extensive ticket fixing in Suffolk County, New York, see N.Y. Times, Feb. 20, 1956, p. 1, col. 1.

85. Director of Public Safety, Newark, Report (1949).

86. See Vanderbilt ed., *op. cit. supra* note 16, at 292-93.

these circumstances, after weighing the slim chances of success against the very real dangers of failure, offenders wisely conclude that it is not worth their while to run the risk. Last year the nonfixable ticket resulted in one person out of five in New Jersey paying his respects to the traffic courts in over a million cases with fines aggregating over $6,500,000.[87] The state has the third lowest accident rate per mile in the country, notwithstanding its heavily travelled interstate arteries of traffic. We would not be so brash as to suggest that it is solely because of this fine record of the municipal courts for law enforcement that New Jersey is the third lowest state in the Union in the number of fatalities per miles traveled, but we do venture to assert that without this type of law enforcement New Jersey could never have achieved its present high standing. One has but to consider the number of defendants who appear in the traffic courts and to estimate the number of witnesses in addition thereto in order to appreciate the unique opportunity of traffic judges to increase—or decrease—the average citizen's respect for law.

One would imagine that such a ticket would be used in every state of the Union. In spite of the success of the uniform nonfixable traffic ticket in New Jersey for some years, it has not been adopted throughout any other state, though it has found acceptance in various parts of several states. Is it unreasonable to suspect that politics may explain why such a simple efficacious remedy has not found uniform acceptance? Both the Conference of Chief Justices and the Conference of Governors unanimously approved the nonfixable ticket in 1952. If we are at all concerned either about the conservation of human life against a killer which has been demonstrated statistically to be more dangerous than war itself,[88] or with respect for law, which cannot exist without respect for the courts, this problem should arouse us to action. If traffic courts and the police can be fixed, the citizen is entitled to wonder if all other judges and all other officials are not susceptible.

Traffic court business is big business. The overall dollar cost, including property destroyed, loss of wages or value of services in the cases of temporary disability, and the present value of anticipated

87. ADMINISTRATIVE OFFICE OF THE COURTS, NEW JERSEY, REPORT 1954-55, Tables AA, BB.

88. In December, 1951, the United States had its 1,000,000th death by automobile as compared with 467,711 soldiers killed in battle from the Revolutionary War through World War II. INFORMATION PLEASE ALMANAC 232 (Kieran ed. 1952). In 1950 alone, there were some 8,500,000 automobile accidents in the United States which caused the death of 35,000 persons, injuries to 1,200,000 more—100,000 permanently—and caused property damage amounting to $7,500,000. The National Safety Council has estimated that 1950's traffic accidents cost this nation a total of $3,100,000,000. Address by Pyke Johnson, President of the Automotive Safety Foundation, Annual Congress of the American Public Works Association at Detroit, Sept. 19, 1951.

future earnings in case of total permanent disability or death and medical expenses, totals upwards of four billion dollars a year. Forgetting for the moment the loss of human life and the human suffering that traffic accidents cause, and thinking only of respect for law in an age when respect for law is needed as it has never before been needed in the world's history, can there be any doubt that ticket-fixing in the traffic courts and easy sentences or no sentences at all for traffic offenders, are breaking down respect for law throughout the country in a way that all of the other courts in the land cannot possibly hope to offset? If the average citizen finds corruption in or about the traffic court, which is the court he is most likely to know out of his own experience, what reason is there for his thinking that the other courts in the state are more honest? In 1950 there were at least fifteen million defendants haled into traffic courts throughout the country.[89] In addition thereto, nobody can tell us how many witnesses were summoned or how many tickets were fixed so that the defendants never had to go to court. Compared with this multitude, the number of people who appear in the ordinary civil and criminal courts is indeed small and the number who appear in our appellate courts altogether negligible. The Conference of Chief Justices and the Conference of Governors studied the situation and in 1952 adopted sixteen resolutions designed to ameliorate the situation,[90] but they have found little acceptance in the several states. Are not these problems such as should be brought to the attention of every law student? He will inevitably have contact with them early in his practice either in the criminal courts or in negligence work or in administering the estates of the victims.

(2) When we turn from such a seemingly simple matter as traffic law enforcement to crime in general, we find ourselves confronted with a host of problems, the existence of which the profession dare not remain ignorant if society is going to be a safe place in which to live and carry on business. In 1919 Charles Evans Hughes portrayed conditions in the police courts:

> I never speak of this work of our higher courts without the reflection that after all it is the courts of minor jurisdiction which count the most so far as respect for the institutions of justice is concerned. . . . If our Bar Associations could create a sentiment which would demand that in all our cities the police and minor civil courts should fairly represent the Republic as the embodiment of the spirit of justice, our problem of Americanization would be more than half solved. A petty tyrant in a police court, refusals of a fair hearing in minor civil courts, the impatient dis-

89. MODERN PROCEDURE AND JUDICIAL ADMINISTRATION 1237 n.1 (Vanderbilt ed. 1952).

90. *Resolutions Set Standard for Traffic Court Improvement*, 35 J. AM. JUD. SOC'Y 133 (1952).

> regard of an immigrant's ignorance of our ways and language, will daily breed Bolshevists who are beyond the reach of your appeals. Here is work for lawyers. The Supreme Court of the United States and the Court of Appeals will take care of themselves. Look after the courts of the poor, who stand most in need of justice. The security of the Republic will be found in the treatment of the poor and the ignorant; in indifference to their misery and helplessness lies disaster.[91]

Is there any evidence that these conditions have changed for the better in the last forty years? Should not every law school in connection with its traditional course in criminal law enlighten its students as to the basic facts of the extent of crime in the United States, of the efforts which are being made to overcome it, and the current methods for the treatment of criminal offenders? According to the report of the Director of the Federal Bureau of Investigation, in the first half of 1955 there were an estimated 1,128,350 major crimes in the United States, although the year 1955 marked a break in the previous seven years of upward trends.[92] I am not advocating any detailed study of crime control, for I realize full well the preciousness of time in the law school curriculum, but surely we cannot continue to teach criminal law in a vacuum. The report of the Kefauver Committee has brought out in startling form the connection between crime, graft, and government.[93] There is no reason to suspect that the era it portrays is a thing of the past; are the law schools doing their proper job unless they present not only the facts of criminal behavior but also study new methods of control such as permanent statewide crime councils for controlling the situation? One of the encouraging signs of the times is that the American Bar Foundation has undertaken an adequately financed survey of criminal law enforcement throughout the United States, which should be a source of very real encouragement to the law schools to make this field their own.[94]

(3) Of late years we have been much concerned with juvenile delinquency. Juvenile courts under one name or another have been increasing in number and in many places they are making enlightened efforts to cope with the problem.[95] But must it not be obvious even in counties where such courts are instituted that the volume of work

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91. *The President's Address*, 42 N.Y.S.B.A. REP. 224, 240 (1919).

92. 26 UNIFORM CRIME REPORTS 3 (1955).

93. See KEFAUVER, CRIME IN AMERICA (1951).

94. See AMERICAN BAR FOUNDATION, THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES, PLAN FOR A SURVEY (prepared by Sherry & Pettis 1955). For preliminary work in this field, consideration of the Kefauver Committee testimony and recommendation for state action, see AMERICAN BAR ASSOCIATION, COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT (Ploscowe ed. 1953) (2 vol.).

95. See INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE COURTS—JURISDICTION (1954), for a summary and selected bibliography on juvenile courts. See also INSTITUTE OF JUDICIAL ADMINISTRATION, SELECTED BIBLIOGRAPHY OF REPORTS AND STUDIES, CHILDREN AND YOUTH LAWS (1954).

is so great and that it varies so much in seriousness that the judge cannot hope to attend to what are called minor cases of juvenile delinquency? And yet, who can tell what are minor cases and when, if neglected, they will lead to more serious offenses? I have been much impressed with an experiment in New Jersey with municipal juvenile conference committees that first sprang up locally and informally at the grass roots, and after success in a single county were extended with official recognition on a statewide basis.[96] These committees are made up of public-spirited citizens drawn from various walks of life and generally include the local magistrates, representatives of the clergy and the school systems, businessmen, and leaders in women's organizations. A representative of the county probation office constitutes the liaison between the committee and the juvenile court. The committee calls the delinquent and his parents before them and patiently and systematically develops the facts. It acts only in instances when the members are unanimous in their decision and there is, of course, an appeal from any decision of the committee. Appeals, however, are rare, the decisions of the committees generally satisfying the common sense of the juvenile and his parents, as well as the injured party. In a surprisingly large number of cases the self-respect of the juvenile is awakened and a new start made toward good citizenship. Should not plans of this sort be the subject of discussion in law school?

(4) Our greatest concern with the oncoming generation, I submit, relates to the perversion of young minds through the mass media of the movies, television, radio, and the press, especially so-called comics.[97] The problem is only beginning to receive the consideration its seriousness calls for. Here is a field in which the law schools are well equipped to furnish leadership in a controversy where rare discrimination and courage are required.

(5) We are coming to increasingly understand that there is a very definite connection in many instances between the children of broken homes and juvenile delinquency and ultimately serious crime. It has been estimated that in 1953 there were 1,546,000 marriages and 390,000 divorces involving 300,000 children. In these circumstances, does the state not owe it to itself to make a serious effort at reconciliation in the case of threatened divorce, particularly in instances where minor children are involved? Such reconciliation

96. N.J. SUP. CT. RULE 6:2-2 (adopted Jan. 1, 1953) governs. See ADMINISTRATIVE OFFICE OF THE COURTS, NEW JERSEY, REPORT 1954-55, at 12; for discussion of the operation of these committees, see *Sixth Public Hearing Before the N. J. Legislative Commission to Study Juvenile Delinquency*, May 25, 1955.

97. WERTHAM, SEDUCTION OF THE INNOCENT (1954). See also FEDER, COMIC BOOK REGULATION (Univ. of Calif. Bureau of Pub. Admin. 1955).

proceedings have been tried with remarkable success in some states,[98] notably California. Should not the law schools consider these possibilities?

(6) No law school discussion on the problems of the criminal law can be adequate without dwelling on the functions of probation and parole as a means of individual rehabilitation of various types of offenders.[99] Indeed, the outlook would be dismal without them and yet these and other similar social agencies raise fundamental constitutional problems that may not be ignored. In their zeal to care for children and to prevent repeated crime, neither judges nor welfare workers can be permitted to violate the Constitution, especially the constitutional provisions as to due process that are involved in moving a child from its home. The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties; and finally, a fair hearing. All three must be present, if we are to treat the child as an individual human being and are not to revert, in spite of good intentions, to the more primitive days when he was treated as a chattel. Centuries before juvenile courts, welfare workers or public schools, at a time in the development of the law when children were still little more than property and were spoken of in the law in terms of title and possession, the Court of King's Bench developed its prerogative writs and extraordinary remedies for the purpose of holding the subordinate courts and the administrative officers and bodies of that day to their respective orbits. Mandamus commanded them to do some prescribed ministerial act; prohibition forbade them to proceed on matters beyond their jurisdiction; certiorari, the most flexible of all these writs, was the means of questioning the jurisdiction or action of any inferior court or administrative body; and habeas corpus commanded the production of the body of any person detained or imprisoned anywhere in the kingdom to inquire into the legality of the detention. Every judge or child welfare worker would do well to ponder these writs or their modern equivalents, for they are the indispensable means whereby a free society remains free by preserving a rule of law as distinguished from a government of men. They apply as much to judges and welfare workers as to all other officials and citizens. This is a phase of our jurisprudence which our law students should know both as future lawyers and as citizens.

(7) Closely connected with these problems is the related field of

98. See Chute, *Divorce and the Family Court*, 18 LAW & CONTEMP. PROB. 49, 58 (1953).

99. See generally UNITED NATIONS, DEP'T OF SOCIAL AFFAIRS, PROBATION AND RELATED MEASURES (1951).

the rights of the mentally ill,[100] a difficult topic calling for the best thinking of our ablest legal scholars.

(8) Finally, we need to remember that it is in the realm of the criminal law that the great constitutional issues involving civil rights are likely to arise. And if our system of criminal law is not operating effectively, as obviously it is not in most places, how can we hope for the orderly enforcement of civil rights? No substantive rights, not even the rights guaranteed by the Federal and state constitutions, are really assured to one until he is vouchsafed the most fundamental right of all—the right to a fair trial.

Of what real avail is a suit for the breach of a contract or a libel action for injury to one's reputation, if the judge on the bench or the jury in the box or one's attorney at the counsel table is either incompetent or corrupt, or if the system of procedure under which they attempt to function is dilatory and cumbersome, or excessively expensive or unduly restrictive of the search for truth? Even today after several centuries of development in the law, a fair trial is not always assured in its entirety by our constitutions, statutes, rules of court, decisions, and practice. As every lawyer knows, and as every law student should quickly learn, the right to a fair trial is still being developed in the courts.[101] More progress, to be sure, has been made in this vital matter in the last eighteen years than in the entire preceding century, yet much remains to be secured. Every lawyer has a definite professional stake in the orderly and complete development of the right to a fair trial, just as every honest litigant has a personal interest in it. Indeed, it is fundamental in our civilization. On it, in the last analysis, depends general respect for law, and without general respect for law our kind of government cannot long survive. One of the most important aspects of the study of procedure for the individual student, therefore, is to learn to what extent the right to a fair trial is protected by constitution, statutes, rules of court, court decisions, and practice in the jurisdiction in which he intends to practice, and how much is yet to be achieved,

100. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954); GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW (1952). The enactment of the Mental Health Study Act of 1955, 69 STAT. 381, 42 U.S.C. § 242(b) (Supp. III, 1956), indicates the widespread awareness of the seriousness of the current problem resulting from mental illness. For interesting discussion, see *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317-404 (1955).

101. Some may question whether there is such a general right as a right to a fair trial, just as lawyers of an earlier day questioned whether there was a law of contracts and not merely actions in debt, covenant, and assumpsit, or a law of torts rather than a variety of actions *ex delicto*; *cf.* HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 218-23 (1920). I venture to prophesy that the growing concept of the right to a fair trial will be one of the major developments of the law in the twentieth century; see, *e.g.*, the concurring opinion of Jackson, J. in Shepherd v. Florida, 341 U.S. 50 (1951).

for on his admission to the bar he, too, will be charged with the duty of perfecting it. It will doubtless come as a shock to many law students to see how far short of fair standards the courts of their own state fall, but the shock is essential to a realization of the challenge that defective standards impose on them. As Sir Maurice Sheldon Amos aptly puts it: "Procedure lies at the heart of the law."[102] It is important for us to see clearly that it is only the rights that can be adequately enforced in our civil and criminal courts which constitute the sum of our actual freedom. Without such enforcement our alleged rights become a snare and a delusion. In this connection we shall do well to keep in mind the pointed warning of Mr. Justice Brandeis that "in the development of our liberty insistence upon procedural regularity has been a large factor."[103]

IV

To summarize, everyone must concede the failure in many states of the administration of both civil and criminal justice to keep pace with the needs of the times in many fundamental respects. It is unthinkable that a proud profession should allow such a condition to continue with respect to a branch of government which is their peculiar concern and which affects the lives of the people at so many points.

The administration of justice in this country has been peculiarly affected as nowhere else in the common-law world by the democratic notions of the Jacksonian Revolution, which still dominate the methods of judicial selection, the procedural law, and the trial and appellate methods in many states. In these circumstances it is futile to look to our elective judges for leadership in far-reaching court reforms, for they must look to the prevailing system for continuance in office. Not only is the bar inclined to follow the judiciary in court matters, but many lawyers who are interested in politics have a personal stake in the existing order. Few lawyers, moreover, have ever made any systematic study on a comparative basis of the problems of judicial administration—they have no interest to do so since the large majority of them devote themselves exclusively to the office practice of the law—and they therefore tend to regard the system of procedure prevailing in their state as natural and inevitable, despite the many contrasts to be seen in the federal courts sitting in their own state. I do not eliminate the possibility of a movement led by distinguished members of the bar as a possibility for law reform, because there are states in which such movements seem to be stirring, but they inevitably suffer from the lack of knowledge of lawyers generally as to what it is all about.

102. *A Day in Court at Home and Abroad*, 2 CAMB. L.J. 340 (1926).
103. Burdeau v. McDowell, 256 U.S. 465, 477 (1921).

Court reform may also come as a last resort through popular revolt, but this may be as dangerous as were the reforms of the Jacksonian Era if adequate professional leadership for such a movement does not emerge. If the bench and bar fail to put their house in order, fail to keep the machinery of justice operating properly, and the public loses patience, measures for reform may be adopted under lay leadership which may only multiply the problems. And because of their popular origin and their frequent incorporation in state constitutions, such changes are particularly difficult to alter. The popular election and limited terms of the judiciary, and the legislative codes of procedure, and the failure to alter these despite the obvious and admitted inadequacies and evils, are examples in point.

In any event, the law schools must prepare the leaders of tomorrow. In teaching procedure they must change their approach. They must no longer burden the subject with the ancient forms of action, but consign them where they belong, to Contracts, Property, and Torts. They must teach not only what is, but what ought to be. Procedure should not be studied as something perfect and immutable, but rather as a working system that, no matter how good it is, needs constantly to be developed in competition with the best that has been achieved elsewhere. The approach to the problems of procedure should be comparative and critical. As students we should be as much concerned with what the law should be as with what it is or has been. Going further, it is the duty of the law schools to instruct their students in the major problems of the administration of justice and to prepare them to lead in the initiation and the acceptance of such reforms. This is an obligation they owe to the courts, the profession, and the public generally, if litigants are not, as Judge Learned Hand has said, to "dread a law suit beyond almost anything short of sickness and death."[104] It is an obligation which can be fulfilled in a relatively few semester hours. With adequate law school instruction, the bench and bar may stimulate the necessary changes and discharge their professional responsibility for the improvement of the law. The law schools must make every effort to bring home to their students the fact that the judicial system is not operating effectively and to indicate the reforms which are necessary if the public is to be expected to continue to employ the judicial system. A critical approach to these problems must be cultivated so that reform will be a continuing process. If there were such a course in every law school, the chaotic conditions and public dissatisfaction which characterize the whole field of the administration of justice would not long continue to exist.

I believe if the law schools interest themselves in improving the

104. Hand, *supra* note 65.

administration of justice they will generally sense that in addition to instruction at the undergraduate level they should conduct post-graduate seminars in the basic principles of judicial administration and modern procedure. Particularly do trial and appellate judges, prosecutors, and leaders of the profession who have it in their power to institute reforms need an opportunity to become educated in these matters or it will take another generation to make up for the law schools' shortcomings of the past.

Next, the law faculties themselves should supply leadership in studies in the field of judicial administration. What makes the situation especially challenging is the relative simplicity of the task and of the changes that are needed to make our judicial establishments effective.

Where can the traditions of the bar be built up if not in the law schools? We have no Inns of Court, where the barristers congregate daily for lunch and where the benchers and their wives eat together on Sundays after attending their own church. In this country we had similar unifying influences in the earlier days of circuit-riding and of foregathering at the state capitol at the opening of each term to hear the opinions of the appellate court read and, possibly, to criticize them at the tavern nearby. The benefits to the profession of such contacts cannot be overestimated. They make possible traditions that are handed down from generation to generation that affect the daily lives of the bar far more than any formal canons of professional conduct. The contacts of our modern lawyers, on the other hand, are casual, and even where we have strong bar associations their meetings are infrequent. I am not suggesting that the law schools carry these burdens alone. They are entitled to the aid of the leaders of every branch of the profession. I am saying that the law schools, it seems clear, furnish the one intellectual meeting place that is available for mobilizing the constructive forces of the profession to solve our great problems, particularly with respect to the modernization and amplification of the law.[105]

Thus, the law schools may help us escape from the first impasse in the administration of justice caused by the Jacksonian Revolution, which resulted in immersing judges in politics by reason of their selection by popular election and in the hamstringing of the trial judge, as well as from the second impasse in justice, caused by their concentration on the study of the substantive law of our business civilization. It could be a triumph for legal education, second not even to the success of the case system of law study. The remedies

105. *Cf.* REDLICH, *op. cit. supra* note 44.

are simple; they have been clearly demonstrated. The underlying issue in legal education clearly is, will the law schools respond to the challenge and assume their proper leadership in improving the administration of civil and criminal justice?