

The Courts, the Public, and the Law Explosion

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BOOK REVIEWS

THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION

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Dissatisfaction with the administration of justice is as old as law itself. Sixty years ago, in perhaps the most memorable address ever delivered before the American Bar Association, Roscoe Pound classified the causes of popular dissatisfaction with the administration of justice into four general categories, each containing numerous special ones: (1) Dissatisfaction with *any* legal system; (2) Peculiarities of the Anglo-American common-law system; (3) Nature of American judicial organization and procedure, uncertainty, delay, expense, multiplicity of courts, emphasis on procedure over substance, overlapping jurisdiction and unnecessary retrials; and (4) Environment of judicial administration, including public ignorance and apathy, the sensational role of the press, and emphasis on making law a trade rather than a profession. This brief volume consists of six lucid essays dealing principally with contemporary problems presented by Pound's third and fourth categories. These are not Olympian lectures delivered by an ivy-

tower law teaching profession to the lesser Estates of the legal system, the Bar (the Estate militant) and the Bench (the Estate triumphant). Rather, they are aimed at engaging the interest of a wider public in the trial courts and their pressing difficulties. Pound had concluded his lecture with optimism: "We may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all." The words "Law Explosion" in the collective title of these essays literally dynamites this hope.

"The Business of the Trial Courts" by Professor Milton D. Green surveys tribunals on the American scene, a system necessarily complicated by the federal nature of our government. In language intelligible to laymen, such involved concepts as federal-state interaction, jurisdiction over subject matter and over person, pleadings, and pretrial proceedings, are delineated. "Court Congestion" is the topic of Professor Maurice Rosenberg's essay in which causes and

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remedies are analyzed with respect to civil litigation. Professor Geoffrey C. Hazard, Jr. considers "The Realities of Appellate Review" and its effect on trial court procedure and functioning. To cope with increased volume in this area, it is proposed that the categories of appealable cases be narrowed, for example by fixing an amount in controversy in civil matters and requiring sentences of imprisonment in criminal ones, and also by requiring permission to appeal. Professor Edward L. Barrett, Jr. explores the administration of criminal justice in "The Problem of Mass Production," and asks whether quality can be maintained in the face of multiplying quantity. No simple solution is available, but it is proposed that society should pay more serious attention to the problem, more public money should be spent to increase judicial time, criminal docket loads should be reduced by substitution of civil remedies wherever possible, and experts outside the legal profession should survey the criminal administrative machinery. Professor Jones, finds, in "The Trial Judge," that there is little in legal literature on the enormous role in justice played by the trial judge. The case method of teaching law in America, with volumes collecting opinions of appellate judges, has obliterated in the minds of many students even the existence of other judges, much less their identity. In fact, appellate judges are the general staff of a legal system, and trial judges are the officers in the field who make the final decisions in the overwhelming number of cases that never reach appellate courts. Glenn R. Winters and Robert Allard, in the final essay, "Judicial Selection and Tenure," pose the problem of selecting judges and explore the so-called "Missouri Plan" and alternative systems.

The mid-century "law explosion" is, of course, partially the product of the post-war population explosion. The universal remedy of creating more judgeships is by no means a final solution. What would adoption of a population-judge ratio do to the Supreme Court of the United States, originally six in number when the population was fully fifty times less than today: imagine a decision with 150 separate dissenting opinions! The problem and its solution clearly involve more than mere numbers. On the criminal side, cases have been increasing at a rate five times that of the increase in population. Two causes are the waning influence of church, home and other non-legal agencies of social control, and the vast migration from small towns and rural areas to the big cities. Rapid clearing of criminal dockets by mass production disposition of cases involving liberty and the stigma of conviction, is treating symptoms and not causes.

On the civil side, again the astronomical rise of cases is caused, not by demographic changes but by technological ones. In 1950, a solemn warning was issued that the automobile had slaughtered in forty years twice as many Americans as were killed in battle in all the wars engaged in by the United States. It will not take forty more years to double that ratio; in just fifteen years since the warning three times as many have already been killed. Putting aside the tens of millions of traffic enforcement cases occasioned by the automobile, personal injury cases and more particularly those caused by automobiles account for about two-thirds of the tort suits.

The two most widely discussed problems in contemporary administration of justice are court congestion and the selection and tenure of judges. All sorts of proposals to

clear civil court dockets have been made, including the more carefully considered ones of split trials, pretrial conferences, the Pennsylvania plan of compulsory arbitration of small claims and the Massachusetts system of auditors. Professor Rosenberg in his essay has found each of these deficient. The split trial, though hailed as "the most forceful remedy for court congestion," has been demonstrated to have a substantive backlash favorable to defendants. The pretrial conference, (*i.e.*, for the purpose of narrowing the issues, as distinguished from pretrial conferences for the purpose of settlement) though insisted upon most often by lawyers for defendants, has been shown by follow-up studies to have little or no effect upon delay but, rather, measurable effect upon producing verdicts for plaintiffs. The arbitration procedure was found to have required three hearings for each jury trial saved, and juries reversed arbitrators' findings in thirty-two percent of the negligence cases, usually by overturning awards for plaintiffs. The auditor system involves referral of motor vehicle cases by the trial court to one of a number of approved referees. A dissatisfied litigant may then have the case re-tried in court, but the auditor's report is *prima facie* evidence and may be read to the jury. Though only twelve percent of the cases heard by auditors returned to the court for trial, two out of five of these resulted in reversal or modification of the auditor's decision. The chief justice of the court in question has recommended repeal of the statute authorizing this procedure.

To the litigant injured by an automobile, delay may be measured from the moment of impact until the cashing of his check for damages. Much of the aging of the case

is attributable to the litigant and dilatory lawyers on both sides. Delay due to court congestion cannot realistically be measured in days, months or years, until issue has been joined and everyone is ready for trial. It is unlikely that court-system delay can ultimately be solved by procedural devices alone, for it is unlikely that treatment of symptoms can cure disease. Ideally, measures that would prevent automobile accidents in the first place are the most effective remedies. Short of that, serious consideration of substantive changes in the law that makes fault the basis of liability in automobile cases ought to be undertaken.

Merit selection of judges—and particularly of trial judges—is another such problem. One solution advocated in the final essay is the "Missouri Plan," adopted in that state for some judges in 1940 and for others in 1945, and actually initiated in 1913. The plan involves the selection of three nominees by a commission, appointment by the executive of one of these for the prescribed term, and re-election by the people. Failing re-election of an incumbent, a new judge is selected in the same manner. The nominating commission, a non-partisan group, consists of members of the Bench and Bar and non-lawyer citizens. In 1962, four additional states adopted this plan or a modified version of it, leaving appointment of judges in four states to the legislature, and in nine states and the federal government to the executive with legislative or similar confirmation. In the remaining states judges are elected, and it should be noted that half of the states employing the elective method now do so on separate non-partisan ballots.

Judicial temperament is not a necessary attribute of either the most successful advocates or the most prolific professors of

law. For the sake of comparison, the Continental legal system makes separate professions of the calling of a judge, advocate and law teacher. One source of determining important judicial qualities is the estimate of one judge for a colleague, if for no other reason than it is as revealing of the writer as it is of the subject. On the occasion of the retirement of Chief Judge Cardozo from the New York Court of Appeals to become Associate Justice of the Supreme Court of the United States, Judge Cuthbert W. Pound said:

The bar knows with what earnestness of consideration, firmness of grasp, and force and grace of utterance you have made your power felt; with what evenness, courtesy and calmness you have presided over sessions of the court. Only your associates can know the tender relations which have existed among us; the industry with which you have examined and considered every case that has come before us; the diligence with which you have risen before it was yet dawn and have burned the midnight

lamp to satisfy yourself that no cause was being neglected. At times your patience may have been tried by the perplexities of counsel and of your associates, but nothing has ever moved you to an unkind or hasty word. You have kept the court up with its calendar by promoting that complete harmony of purpose which is essential to effective work. The rich storehouse of your unflinching memory has always been open to us.

Judicial craftsmanship of that order can be exercised only in an atmosphere of patient hearing and deliberative investigation. Just administration of law cannot be achieved at any assembly line pace. Only recently have judges become aware of responsibility for the management of courts and not just for the decision of cases. In communicating this awareness to those with ultimate responsibility for the administration of justice, the community at large, this volume renders a public service of inestimable value.
