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TOWARD JUDICIAL REFORM

*Edward J. Gurney**

PRESIDENT NIXON has several times in the recent past publicly recognized a growing national attitude—the American people, as a class, are losing confidence in the ability of their governments to govern. And this unfortunate lack, or at least diminution of confidence, is nowhere more evident than in the way the average citizen views the courts of this country.

The United States is happily a nation of law-abiding citizens. Many citizens have never been to a court of law. When the average American does go to a courthouse to answer a traffic ticket, to serve as a juror, to press or defend some civil claim to which he is a part, or simply to observe a trial or proceeding which is under way, he often is amazed, bewildered and disgusted.

He has been told of the majesty of the law and of its dignity and deliberation. What he finds has no relationship to that ideal. He finds crowded, frequently dirty premises, noisy and disorganized proceedings, and one of two contradictory conditions—either unseemly haste, or agonizing delay. It has been suggested with some justification that in some jurisdictions jurors and potential jurors are treated little better than common criminals.¹ They are herded into waiting rooms, forbidden to move around, and abused by insensitive attendants who behave more like jailors than public servants. Civic-minded citizens who regard jury service as a duty when summoned, are frequently embarrassed and humiliated by the experience.

Almost universally, the citizen's reaction to the realities of a court experience today would be unfavorable. Patience with the "law's delay" is understandably wearing thin. Chief Justice Warren Burger, in his address to the Judicial Conference of the United States at Williamsburg in March of this year, touched on the same point:

We are rapidly approaching the point where this quiet and patient segment of Americans will totally lose patience with the cumbersome system that makes people wait two, three, four or more years to dis-

* United States Senator from Florida; Member of the New York & Florida Bars; LL.B., Harvard, 1938; LLM., Duke, 1948.

¹ If he is a prospective juror, he plays the old Army game: "hurry up and wait."

pose of an ordinary civil claim while they witness flagrant defiance of the law by a growing number of lawbreakers who jeopardize cities and towns and the life and property of law-abiding people, and monopolize the courts in the process. The courts must be enabled to take care of both civil and criminal litigants without prejudice or neglect of either.²

It is significant that more and more businessmen are writing arbitration clauses into contracts, not because they prefer arbitration to their recourse at law, but because from arbitration they can expect a reasonably prompt resolution of any dispute and an award with a degree of finality seldom duplicated in the courts. However, smaller businessmen and private individuals with limited resources are often left to the mercy of the judicial system.

In the past, when a breakdown in the judicial machinery was eminent, corrections could be attempted by the "patchwork approach." The leaky faucet could be repaired and the installation of new plumbing left to the next generation. No longer is this approach a viable alternative. There is an increasing realization in the Bar that the judicial machinery of the nation, particularly the state and local court systems, has been stretched to the breaking point. If remedial action is not taken quickly, we risk anarchy. As Chief Justice Burger observed in the aforementioned Williamsburg address, the administration of justice is the "adhesive—the very glue—that keeps the parts of an organized society from flying apart."³

SPEEDY TRIAL

Every person accused of a crime has the right to a speedy trial, and that right is enshrined in our Federal Constitution⁴ and in the constitutions of all the states.⁵ All too frequently of late, that right has been lost or neglected, not only to the prejudice of the accused, but also to the prejudice of the public. The public has an interest in the speedy trial guarantee because a speedy trial gives the public through its agent, the prosecutor or district attorney, the right to present the state's case in an orderly and timely fashion. Unconscionable delays sought and obtained

² Address by Warren E. Burger, National Conference of the Judiciary, Williamsburg, Va., Mar. 11, 1971.

³ *Id.*

⁴ U.S. CONST. amend. VI.

⁵ See, e.g., VA. CONST. art. I, § 8.

on behalf of accused persons can result in a miscarriage of justice. Witnesses disappear, die, or become unavailable; memory of events in the distant past becomes hazy or unclear; identifications become more difficult.

The victims of this neglect are the poor and the uneducated. The policeman has become a figure of derision and the victims of street crime have no redress for their injuries.⁶

Another indicator that a speedy trial is more a memory than a reality was the jail census recently completed by the Department of Justice. The appalling figures are that about fifty-two per cent of the inmates of city, county and local jails around the country have never been convicted of anything.⁷ Whether convicted or not, the report said that many of the inmates of these institutions "endured less than human conditions."⁸

This situation is outrageous. It is truly offensive to the national sense of justice. Something must be done about it and done quickly.

CRISIS IN THE COURTS

There is in fact a judicial crisis in the courts of our nation. There is more litigation than ever before and the decrepit legal machinery fashioned one hundred and fifty years ago is breaking down. Backlogs in civil and criminal court dockets are scandalous; in New York City, for example, there are currently more than 700,000 untried criminal cases.⁹ The fact that the exact number of untried cases is unknown indicates the casual approach to record keeping that prevails throughout the court

⁶ The perpetrators of crime are not effectively deterred from committing further outrages because the chances of their being apprehended and prosecuted are now roughly twenty to one, and rising. A recent estimate of crime in New York City put the odds even higher; in felony cases, the chances that the city can arrest, indict, successfully prosecute and imprison the culprit are about two hundred to one. In New York City, in the year between July 1, 1968 and June 30, 1969, approximately 75,000 arrests for felonies were made; in the same time period there were 608 felony trials completed in the courts of the city. For misdemeanors, the same time frame showed 450,000 cases with 18,000 persons sentenced to imprisonment. See CONG. REC. S4232 (daily ed. Apr. 1, 1971).

⁷ As of March 15, 1970, there were 160,863 persons in local, county and city jails of whom 7,800 were juveniles. *Id.*

⁸ *Id.* Four of the jails which are now in use in this country were built before George Washington's first inaugural address. Twenty-five per cent of the local jails around the country are more than fifty years old.

⁹ *Id.*

system. Overcrowded dockets are by no means the exclusive problem of big cities, but indeed are the rule everywhere, in big cities and small cities, in rural areas and in suburban areas.

Substantial improvements have been made in the federal judicial machinery in recent years, and hopefully additional improvements will be made in the years ahead. In the criminal field, only a tiny percentage of all crime falls within federal jurisdiction. Most criminal conduct falls under state jurisdiction, and that is where the essential problem is today—in the state and local courts. However, it is clear that the Federal Government must assist in this judicial revitalization process by making available to the states and localities the benefit of its experience and expertise, and most importantly by providing financial and technical assistance which will help produce the remedy.

MODERN MANAGEMENT TECHNIQUES

Many of the problems in the courts of the nation today are attributable to poor management. Often, we have good men but bad systems. Organizational molds cast a century or more ago simply cannot answer present-day needs. Chief Justice Burger recently remarked that Alexander Hamilton, Thomas Jefferson, John Marshall or John Adams could try a case in almost any jurisdiction today, provided they had a minimal briefing on procedural changes and a fast cram-course on certain substantive laws.¹⁰ His point was not that the continuity in the adjective law is necessarily a bad thing, but that what sufficed procedurally for a nation of 10 million persons has come to be inefficient for a nation of 205 million.

A valid accusation is often made that the American court system has never been subjected to a careful and thorough scrutiny aimed at eliminating time-consuming and outmoded procedures. We do things now in our courts because we have always done them; jury selection and *voir dire* come immediately to mind. In this time of great concern for the substantive rights of the accused, we must scrap some of the old ways and replace them with efficient modern tools in order to avoid the substantial denial of justice to any individual. There are or should be vested rights in efficient judicial management.

Record keeping is merely one area in which modernization is necessary. In an age of computers and microfilm the docket room of any

¹⁰ Remarks of Warren E. Burger, ABA Convention, St. Louis, Mo., Aug. 10, 1970.

civil court would exasperate any proponent of efficiency. We still persist in filing dockets the way they were filed before Madison denied Marbury his commission as Justice of the Peace in the District of Columbia.¹¹ Surely we can do better than that. There have been experiments in several jurisdictions with recording of records in microfilm libraries and coding by means of computers. There is nothing holy or sacrosanct about handwritten dockets, ledgers or court journals. They can and should be consigned to the dustbins with perukes and other anachronisms.

The delays in the administration of criminal justice, which for the most part are unconscionable, are inexorably tied up with the civil calendar delays. In most jurisdictions, judges sit on both civil and criminal cases. Delays in the civil calendars necessarily make for delays on the criminal side. If we are to reform the courts, we must address ourselves to the problems of the civil as well as the criminal cases. Here again, the use of sophisticated technology, computers, para-professional personnel, and court administrators would, by easing the burdens of civil calendars, improve the administration of the criminal courts.¹²

The legal profession should learn from the changes wrought in the field of medicine. Doctors and hospitals long ago learned the uses of modern management techniques. The practice of medicine would be severely hampered today without its technicians. A doctor should properly be in charge of a patient's case; he must diagnose and prescribe the cure. But, he is not expected, nor should he be expected to take the x-rays, run the routine tests or do the clinical busy-work. While he bases his treatment upon the results of such tests, he relies on technicians to do those specialized chores for him. Additionally, a doctor cannot be expected to concern himself with the effective operation of his "forum of cure"—the hospital. This task is left to an administrator specifically trained to handle such problems.

Similarly in the law, it is axiomatic that the judge must retain control of the cases that come before him; but he can properly delegate the busy-work to trained subordinates and devote his valuable time to the work

¹¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹² This is not an appropriate place to discuss no fault auto insurance or its pros and cons, but one observation is completely in order: if somehow the level of auto negligence cases in the civil courts of the nation could be reduced, a great step toward easing civil court calendar delays would be made. That relief would trigger almost automatically improvements in the backlog of criminal cases in our nation's courts.

he was hired to perform—that of presiding at trials.¹³ Para-judges, professionals below the level of judges, should be used to arrange calendars and delineate the facts at issue in pretrial conferences and discovery proceedings.¹⁴ The para-judge could properly be used to hear pretrial motions and, presuming we set up adequate means for appellate review, no party would be aggrieved by such a practice. The Federal Magistrates Act of 1968¹⁵ permits such innovations in federal practice. Under that legislation, federal judges can appoint magistrates to preside at certain pretrial hearings and to set motion calendars. These professionals can act as special masters in various proceedings. The experiment is working, and it has obvious applicability for use by state courts.

There would also be a beneficial side effect to such a system. As it stands now, we have no intermediate stage between the Bar and the Bench. Lawyers are catapulted from one to the other. The office of para-judge would provide useful training for young lawyers interested in a judicial career.

A MEANS OF REFORM

An essential fact about the states and localities in America today is that they are broke. All other considerations pale to insignificance beside this consideration. New York City this year will have a \$300 million deficit and some predict a \$1 billion deficit next year. Other states and cities have similar difficulties, the only difference being the degree of the problem.

The states and localities therefore do not have the resources necessary to even address, let alone solve, the crisis in the courts. Yet, there is a growing consensus, exemplified by the recent Williamsburg Conference on the Judiciary, that the crisis must be tackled immediately.

With this background in mind, the author recently introduced into

¹³ See Kauffman, *The Judicial Crisis, Court Delay and the Para-Judge*, *Judicature Magazine*, Nov., 1970 [hereinafter cited as Kauffman].

Mr. Chief Justice Burger commented that we have fifty-eight astronauts ready to go to the moon but not that many legal technicians. Remarks of Warren E. Burger, ABA Convention, St. Louis, Mo., Aug. 10, 1970.

The program at the University of Denver Law School to train legal technicians should be duplicated throughout the country. See Address by Warren E. Burger, National Conference of the Judiciary, Williamsburg, Va., Mar. 11, 1971.

¹⁴ See Kauffman, note 13 *supra*.

¹⁵ 28 U.S.C. § 631 (1968).

the Senate the National Court Reform Assistance Act.¹⁶ The Statement of Purpose of the bill recognizes that a crisis exists in our state and local courts which threatens to undermine the confidence of the people in the ability of their governments to provide for swift and efficient administration of justice. The bill calls for the creation, within the Department of Justice, of a Judicial Assistance Administration. The court assistance functions which are now a neglected stepchild of the Law Enforcement Assistance Administration (LEAA) would be assigned to this new entity.

Basically, the bill calls for a five year program of financial grants to the states to accomplish a modernization of state and local courts. The new administration would act as a clearing house, serving state court systems by providing data, statistical analyses, and studies geared to accomplishing reform. Ninety per cent of the funds required would be contributed by the Federal Government¹⁷ and ten per cent by the participating states.

The operation of the program would be entirely voluntary; no state could be required to furnish data or participate in the program except on a consensual basis. This element is essential. It is not desirable to frame a Procrustean couch for the states and to force them into this mold or that mold. It must be assumed that the states know what is the best solution for their individual problems. Hopefully the Federal Government can provide the tool, by way of financial and technical assistance, which will permit the states to achieve their own reforms in their own fashion.

The fund allotments shall be made to the states fifty per cent on the basis of population and fifty per cent on the basis of need. The need can be gauged by calculating the number of persons in correctional institutions awaiting trial. If we can channel funds into the areas most in need of improvement, we can hopefully best correct this situation with the available funds.

When assessing the needs involved, it is well to remember the money expended in other fields during these years of judicial neglect. Chief Justice Burger made an interesting comparison in his speech before the American Bar Association in St. Louis in August, 1970:

The changes and improvements we need are long overdue. They

¹⁶ S. 1439, 92d Cong., 2d Sess. (1971).

¹⁷ \$100 million would be authorized for this purpose in the first year of the program with significant increases thereafter.

will call for a very great effort and they may cost money; but if there are to be higher costs they will still be a small fraction, for example, of the 200 million dollar cost of a C-5A airplane. The entire cost of the Federal Judicial System is 128 million dollars. Military aircraft are obviously essential in this uncertain world, but surely adequate support for the Judicial Branch is also important.

Wall Street experts recently estimated that American citizens and businesses spend more than 2 billion dollars a year on private security and crime control. Aside from the ominous implications of this in a free society, just think what 2 billion dollars could do for public programs to prevent crime and enforce law. That is where such support belongs.

More money and more judges alone is not the real solution. Some of what is wrong is due to the failure to apply the techniques of modern business to the administration or management of the purely mechanical operations of the courts—of modern record keeping, systems planning for handling the movement of cases. Some is also due to antiquated, rigid procedures which not only permit delay but often encourage it.¹⁸

Other suggestions have been made in this important area¹⁹ and the National Court Reform Assistance Act is not offered as the “be-all, end-all,” but only as a starting point. The existing tragic neglect that the Attorney General and the Chief Justice have so properly pointed out cannot be allowed to continue.²⁰ As a goal, on both the federal and state levels, an alleged criminal act should be brought to trial within six months of the indictment or presentment which initiates the proceedings. The magnitude of this problem does not admit to simple solutions, panaceas or overnight cures. It will take a long time to achieve a remedy, but the work must start immediately.

SPECIAL OBLIGATIONS OF ATTORNEYS

Alexis de Tocqueville suggested in *Democracy in America* that our

¹⁸ Remarks of Warren E. Berger, ABA Convention, St. Louis, Mo., Aug. 10, 1970.

¹⁹ See generally AMERICAN LAW: THE CASE FOR RADICAL REFORM (1968); F. KLEIN, JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION: A BIBLIOGRAPHY (1963); CURRENT ISSUES ON THE JUDICIARY (Selected Readings prepared by the American Judicature Society for the National Conference on the Judiciary, 1971); Kauffman, note 13 *supra*.

²⁰ Attorney General Mitchell called the administration of criminal justice in the United States “an astonishing tale of neglect.” Washington Post, Feb. 20, 1971. See also Remarks of Warren E. Burger, ABA Convention, St. Louis, Mo., Aug. 10, 1970.

country was governed by an aristocracy of lawyers.²¹ He did not mean aristocracy in the European sense, a group that owed its distinction to an accident of birth; but rather aristocracy in its literal and original sense, government by the most capable persons within a society. The American Bar owes a special duty to this country, and it must seek to live up to this ideal. Lawyers have made significant contributions to the development of this country throughout its history. There are now, and there will inevitably be in the years to come, new and more complex challenges to our system, that will in many instances go to the essential assumptions which undergird our form of government.

At the outset of any attempted reform of the judicial system, it should be recognized that the system as it exists is essentially good, and not, as some would suggest, essentially corrupt. By achieving meaningful reform and modernization, it shall be demonstrated that the system is still dynamic and vital, capable of recognizing and correcting its shortcomings.

In this process of reform and revitalization of our institutions and resources, the American Bar must play a central role. It is very heartening that enrollments in law schools have been rising steadily for several years and that the latest figures show a truly substantial gain. This indicates an increased awareness on the part of many of our young people, that law is the profession through which our institutions, social, political and governmental can be perfected. Therefore, it behooves all judges, legislators, lawyers, and law students to realize that the Bar has a special relationship and obligation toward our country and its people. We must discharge that duty with devotion, honor and integrity.

²¹ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 301 (1867).

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