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Cooperation Between the Bar and the Public in Improving the Administration of Justice

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Two agencies share between them the responsibility for safeguarding and justifying popular confidence in law as a basis for government. One is the legislature, which is charged with the duty of making the laws which society needs. The other agency is the courts, which administer that law. Good laws are worthless without good administration. They are only the groundwork upon which social relations may be built. But unless the laws are well and fairly enforced there is no justice. If men are to surrender to society their primitive right of fighting for their own, society must faithfully execute the trust. It must give the remedy which it asks the individual to renounce. And if, in spite of its fair promises, society denies a man the justice which he has a right to expect, is it strange that his confidence in social institutions is shattered, and he feels that he has been betrayed?

Now the administration of justice is the weak spot in the American social system. The state undertakes to protect its citizens from crime. But it does not do so. The police may be swift but the courts are slow. Technicalities clog the wheels of justice. Overzealous lawyers abuse the confidence of too tolerant judges. Juries are sometimes tampered with in secret and frequently imposed upon in public. The criminal defendant is given so much protection that the victims of crime—those of us who are law-abiding and rely upon the state's assurance of protection, get almost none at all. Hence the argument:—The courts are a failure, let us take the law into our own hands. This is anarchy. Again, the state offers to enforce the payment of just debts. But the courts are slow, the costs are great, the issue is uncertain. Appeals and reversals and retrials loom in the distance, deterring all but the stoutest heart or the longest purse. One experience with a lawsuit is often enough to last a man for the rest of his life. He argues:—The justice which I am offered is a delusion and a snare. I am through with courts.

It is not alone those who use the courts who feel this want of confidence in the ability of the state to give the protection which it promises. Every failure of justice is a public warning that the rest of us, if ever we should need the aid of the law, may find ourselves in the same plight. The courts may be viewed as the means by which the state insures its citizens against injustice. Every citizen is a policy holder. But who can feel entire confidence in an insurance enterprise which even occasionally defaults in its obligations?

Now I do not believe that many intelligent people question the moral integrity of our courts. The more one sees of them the more one must be

convinced of the honesty and good faith and devotion to duty which characterizes most of the men who are spending their lives in the judicial service. But that is not enough. "By their fruits ye shall know them." If the courts do not produce the results which men have a right to demand from them, they fail to justify the confidence which we are expected to place in them. If one asks for bread and is given a stone, it is poor consolation to be assured that it was given with the most honest and kindly intentions. Inefficiency can wreck an enterprise as thoroughly as dishonesty. And the tragic thing is that the poor and unfortunate, the ignorant and oppressed, who most need the active aid and latent support of courts of justice, are the very ones who are usually victims of judicial inefficiency and conservatism. Is it strange that they look at the courts as hypocritical engines of oppression?

The courts operate in two different capacities. They provide the machinery for asserting and defending rights. They also define what those rights are, supplementing or interpreting the work of the legislature.

The first involves a highly technical field, and yet one in which the public has a vital concern. For poor machinery may ruin any organization. And it is here that the laity have a peculiar though unacknowledged responsibility, because, under prevailing political conditions, they are an agency absolutely essential to any adequate program of reform. And this is due to the fact that the lawyers themselves, in a large degree, are by training disqualified for performing the task alone. The public has too long waited for the legal profession to bring about adequate procedural reform. The public does not understand class psychology. Self criticism is rarely effective. Nobody has ever expected the railroads to correct all their own abuses. Nobody expects employers of labor to provide adequate correctives for long hours, bad conditions, or to formulate by their own unaided efforts a workable system of compensation for industrial accidents. Criticism requires a detached view, an objective attitude, a freedom from the bias of habitual ideas. The best critic must be a sound prophet; he must have imagination and vision; but he must be an outside observer.

Now many lawyers are of just this type. While learned in the technique of their profession they are nevertheless able to elevate themselves above its forms and routine and see it in its true relations. But it goes without saying that most lawyers are not. Technical training and technical practice always tend to narrow the vision and destroy the perspective. This is a limitation of human nature, and lawyers are usually only human. Every man is obliged to think in terms of what he knows. His daily tasks build his horizon, beyond which it is hard for him to see. The more proficient he is in doing his work the less he is concerned about defects in his methods. One cannot be expected to coldly condemn or lightly discard a technique acquired by years of patient effort. The instinct of self-preservation springs to the defense of the familiar system which we understand and views with alarm the unknown dangers lurking in every departure from beaten paths. In view of this inevitable tendency toward conservatism the bar has made notable progress in eliminating causes of dissatisfaction with the administration of justice. Bar associations are effective agencies by which the profession studies itself and tries to make itself more useful to the public which it aims to serve. Still more influential in their liberalizing effect are the better modern law schools, which

are giving the new generation of lawyers a more critical and detached view of professional duties and obligations and are emphasizing the danger of over-capitalizing rules of legal procedure. But neither able leaders nor bar associations nor law schools can change human nature and entirely remove the inherent hostility produced by a laboriously acquired technique toward innovations which diminish its value.

The only way in which the courts can be made to render the service which the public ought to have is for the public to take enough interest in the operation of the courts to find out what it wants. It is certainly no more the duty of the legal profession to propose ways of rendering greater service to the public than for the public to inform the legal profession what kind of service it requires. If the public is too indifferent to study and criticize the judicial establishment is it strange that the bench and bar fail to become greatly aroused? The public must insist upon receiving adequate service. And the first thing to be done is for the public to secure exact information about the present status of its courts and the precise effect of their present methods of doing business.

Unintelligent dissatisfaction does not build up; it only destroys. The Bolshevik is filled with contempt for social and political institutions. But it is based on lack of knowledge, and not being able to distinguish the bad elements from the good, he demands the destruction of the whole. Bolshevism is the counterpart of ignorance, and if we can prevent the one we can save ourselves from the other. This is the paramount duty of our intelligent and responsible citizens. We are too easy going a people. We are too tolerant. We are too ignorant and too obedient. We do not fight for our rights. We do not insist on service from our officials. We do not know what they are doing. The English public is far more inquisitive and relentlessly demands what it believes it ought to get. The American public stupidly takes what is given to it. British administration of justice is the envy of the rest of the world, but its excellence is not an accident but the result of eternal watchfulness.

The British public takes an interest in the administration of the law as an important part of the government. British newspapers devote much more attention to judicial problems than do American newspapers. British business men do not hesitate to investigate, criticize, and suggest ways of improving the service. They consider the courts, in fact as well as in theory, actual servants of society, and they insist on knowing what their servants are doing—and telling them what they ought to do. And this is not resented but welcomed by the bar and the bench. Master and servant,—the public and the profession,—cooperate and aid each other with advice and suggestions.

This is not the place to make a minute study of those details of legal procedure which illustrate the serious lack of practical cooperation between the American public and the American legal profession. They are not working at cross purposes but neither are they working together. There is no full and frank interchange of views. The bar does not appreciate how the laymen regard the methods of litigation and the laymen do not understand how far or in what respects improvements are practicably feasible. The bar does not know what the public wants, and the public does not know what the bar can furnish. The result is that legal procedure does not change to meet

the changing needs of society. Old methods once suitable tend to stay on because nobody realizes how archaic they have become. They become incrust-ed with precedents which have long since lost all vitality. In default of in-telligent contemporary criticism the profession falls back upon historical regularity. Instead of dealing with the rules of legal procedure as practical methods of producing practical results in a modern, business-like way, the public looks upon them as esoteric doctrines upon which laymen should not lay their impious hands. The doctrines of the law are viewed with the same helplessness as the doctrines of theology, and the same patient fatalism sus-tains the victim of litigation in this world and the aspirant for salvation in the next.

One or two salient features of administrative methods in our courts will show how badly in need they are of the application of modern business principles, and how easy it would be for the public, by devoting even a slight amount of attention to the matter, to exorcise the medieval ghosts which haunt our halls of justice.

There is probably no feature connected with the administration of the law about which there is more popular ignorance and misunderstanding than the jury system. Most people have a vague idea that the jury was estab-lished by Magna Charta as the palladium of popular liberty and that it has ever since remained the chief bulwark of the people against oppression. As a fact the jury, as we use it, is the most archaic, cumbersome, expensive and inefficient means of trying cases that could well be devised. If one should deliberately search for a system of trial which would open the widest door to sympathy, prejudice, chance and ignorance, I do not know how he could improve on our present jury system.

In the first place we treat our jurymen to such hardships and drag our trials to such useless lengths, that no one with anything else to do wants to serve; and in the second place we put so high a premium on ignorance of the facts that in important and widely known cases no intelligent person can very well be chosen to serve.

Again, we have so little confidence in the ability of the jury to use good judgment and common sense in passing upon evidence, that we have devised an elaborate system of rules for excluding evidence from the jury, to keep it from going astray. These rules are so intricate and difficult that a life-time of study is scarcely sufficient to master them. I doubt if there is a lawyer in the United States who would have the hardihood to assert that he thoroughly understands them. And yet if a mistake is made, and some fact is excluded which ought to have been shown, or some fact is shown which ought to have been excluded, the whole effort expended on the trial is likely to be thrown away and the case sent back for a new trial by the supreme court.

Another absurdity is the system by which we refuse to utilize the ser-vices of the only competent and experienced and impartial person in the court rooms in passing upon questions of fact. Having first taken what pains we can to maintain a low standard of intelligence among jurors, particularly in the more important cases, and having insisted that the judge shall possess the skill and knowledge of a super-man in protecting the jury from improper evidence, we then demand that this extraordinarily competent judge refrain

absolutely from giving the slightest assistance to the inexperienced and easily deluded jury in passing upon the truth and weight of the evidence. Once upon a time there was a good reason for insisting that the judge keep his hands off the jury. When the common people were being ground to pieces between the upper millstone of the King, who controlled the judges of the king's courts, and the nether millstone of the powerful feudal barons who controlled the judges of the baronial courts, the juries were their only means of protection. The judge was then the agent of the oppressor. Now the kings and the barons have passed away but our courts are still haunted by the spectres of those forgotten times.

But we go still further. After the evidence is in and the jury is ready to consider its verdict, the judge instructs the jury as to the law of the case. Now the jury is a jury of laymen, who know nothing about the technical rules of law. They scarcely understand many of the terms used by the judge. But they are expected to listen to a law lecture by the judge covering the whole law applicable to the case before them, to understand all the fine legal distinctions which he learnedly points out to them, to appreciate the legal force and effect of each one of the numerous and often elaborate, confusing and ill-expressed instructions which the lawyers request the court to read, and then to go into the jury room and correctly apply all those principles of law to so many of the facts as they happen to remember. I venture the guess that not one jurymen in fifty could pass a satisfactory examination on the law as laid down to him by the court five minutes after hearing it, in any case involving more than the simplest rules.

Having done all these extraordinary things, we resort to something still more extraordinary to save ourselves from realizing the crudity, inefficiency and impossibility of our system. We allow the jury to render what is called a general verdict, by which they say merely that they find for the plaintiff, or the defendant, without any showing as to the basis of their verdict. What facts did they think were proved? They do not say. Did they understand the law given them by the court? They do not disclose. What process did they employ in applying what they thought was the law to the facts in the case? They do not indicate. Or did they give the plaintiff a verdict because she was a pretty woman, or because the defendant was a wicked corporation, or because they didn't like the looks of the defendant's attorney. No one can ever officially know. No one doubts that they frequently mistake the facts, that they often misunderstand the law, that many a verdict is based on sympathy or prejudice. But we piously draw the curtain. "Where ignorance is bliss 'tis folly to be wise." And we leave things as they are.

Once there was a good reason for putting the final decision in the hands of the jury. That was when the jury was the champion of the people against the cruel power of the nobility. They demanded the right to render a general verdict, because thereby they drew the teeth of the tyrant judges. But that was long ago. Now—

The knights are dust,
Their swords are rust,
Their souls are with the saints, we trust;

but their ghostly forms still haunt our court rooms, frighten our legislative

assemblies, and awaken in the people memories of the half forgotten struggles of the far away centuries.

Now all these serious defects in our jury system are easily curable. In the present day courts of Great Britain and the British dominions juries are impanelled almost as fast as their names can be called. It is a rare occurrence for a juror to be asked a single question. And the trials are conducted with such business-like promptness that the minimum sacrifice of time is asked of the jurors. In those courts the judge is allowed and expected to give the jury the benefit of his advice and counsel on every phase of the case, helping them to properly value the evidence and reach a true verdict. With this constant supervision and assistance from the trained judge on the bench the effect of errors in the admission or exclusion of evidence is reduced so much as to have little prejudicial effect. Finally, the whole difficulty involved in instructing the jury on the law can be avoided by having the jury do no more than answer specific questions of fact, leaving it to the judge to apply the right principles of law to the facts so found. This might be inadvisable in criminal cases, where the jury ought to have more power, but it is perfectly feasible in all civil actions.

Will it be said that all this is too technical for the public to understand? I do not believe it is. But at any rate, if courts of justice can become such in fact as well as in name only through the active cooperation of the public, and that seems to be the case, the result to be attained is well worth the effort.

The delays incident to the trial of cases are another very serious indictment against the courts. Justice delayed is often justice denied. Delay means expense, trouble, uncertainty. But delay to any damaging extent is not necessary. It is only a habit which the courts fall into. It can be eliminated if the public insistently and persistently demands more speed. Continuances and postponements are readily granted on stipulation of counsel, and are too often ordered in spite of the opposition of counsel, but it is because the public does not know what it is entitled to and makes no clear demand. If a judge, realizing the supreme importance of speedy justice, undertakes to break the lethargy which is strangling the courts, he only incurs the hostility of some members of the bar but gets no support from the public, for the public does not know

I venture to say that the general public has no definite information as to the degree of promptness with which business is done in the various courts of this state. They do not know how much business is done, nor what kind of business is done, nor the cost of different classes of business, nor the normal duration of a law suit, nor the means which are available to speed up justice, nor the comparative success or failure in this regard of different judges. Our courts do not publish reports of what they do. No accurate information is obtainable. Why should not the government require full reports from the judges, showing what they have done, how long it has taken them to do it, how many days they have held court, how many jury cases they have tried and what was involved, how many equity cases they have heard and what was their nature, and other items of public interest? In England these reports are required and are published, and the public can see what is going on.

Here is an example from Pennsylvania, which Mr. Reginald Heber Smith gives in his book on *Justice and the Poor*.

"A wage earner had a claim for \$10, which represented a week's work. On Jan. 19, 1911, the Legal Aid Society tried his case in the Magistrate's Court and secured judgment. On February 8, 1911, the department appealed to the Court of Common Pleas, which gave him the right to have the entire case tried all over again. On March 11, 1911, the Plaintiff's claim was filed in the Court of Common Pleas and the case marked for the trial list. Owing to congested dockets the case did not actually appear on a trial list until Feb. 7, 1912.

"Here entered a rule of procedure which would be incredible if it did not exist. A case marked for trial Monday must be tried on Monday or Tuesday or else go off the list entirely. That is, if any prior case or cases marked on Monday's calendar should occupy the time of the court during Monday and Tuesday, then all other cases assigned on that list are cancelled and the parties must begin at the bottom again, re-marking the case for trial and awaiting the assignment. While this is going on in one session, another session of the same court may have no cases and so be obliged to suspend for, under the legal procedure, it was forbidden to do the common sense thing of transferring cases from a congested to an empty session of the court.

"The wage-earner's case, assigned for Feb. 7, 1912, was not reached on that day or the next, and so went off the list. It was remarked and assigned for April 3, 1912. Not being reached on April 3 or 4, it again went off and did not reappear until Oct. 10, 1912. Fortunately, it was reached and tried on Oct. 11, 1912, and judgment entered for the plaintiff. It took a year and nine months, and required 11 days in court for both attorney and client, to collect the original \$10."

The British people understand the value of publicity in promoting efficiency in public service and to them the courts are servants who must render an account of their stewardship. Why should not our people make a demand for more publicity in America, with a view to reestablishing and confirming the courts in the public esteem? Our people must cease their indifference. They must carry the responsibilities of free people if they are to preserve their freedom. They must take the legal profession into their confidence and cooperate with it in making the administrative machinery of the law adequate to the strain of modern times.

More than thirty years ago Lord Justice Bowen, speaking of English justice, said: "It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation." Would any one undertake to make a similar claim in any American state? And yet the English are no smarter than we. But the English people have known what they wanted and insisted on getting results. We have neither known the one nor demanded the other.

Contrast with Lord Bowen's statement the following case, cited by Mr. Morefield Storey in his *Reform of Legal Procedure*. It was a New York case against an insurance company. "Owing to reversals and new trials ordered by appellate courts, it had to be tried nine times. It was in the courts from 1882 to 1902. The plaintiff became at last so sick and disheartened with his interminable law suit that he abandoned it; refused to go to his lawyers

to consult with them about it or to appear when the case was being tried. The lawyers had themselves spent over forty five hundred dollars fighting the case, and had worked on it nearly twenty years. Their client having abandoned them, they settled the case for thirty thousand dollars and took the money themselves for their fees." And this is not an unusual case of delay. No more tragic chapter in the civil life of America has been written than the long record of such lawsuits.

But there is a still more important phase of the court's activity. Over and above the machinery of justice stand the laws which determine human rights. These must be construed by the courts, and in so doing may be progressive or reactionary. Shall these laws be construed in the interest of society or in the interest of legal logic? Shall they be read in the living spirit of the present or in the ghostly shadow of the past? Shall their operation be quickened by social needs or strangled by the dead hand of precedent? The people may pass laws to enlarge human opportunities, but the courts have the power to rob them of the fruits of their efforts.

It was this feature of the operation of courts which so aroused our great president, Theodore Roosevelt, and led him to advocate the recall of judicial decisions by popular vote. He was not an anarchist, but, on the contrary, one who saw in the stubborn opposition of judges to social progress the seeds of a deep and sinister revolt against the tyranny of society and of government. He says in his autobiography, regarding the decision on the tenement house law of New York:—

"The Court of Appeals declared the law unconstitutional, and in their decision the judges reprobated the law as an assault upon the 'hallowed' influences of 'home.' It was this case which first waked me to a dim and partial understanding of the fact that the courts were not necessarily the best judges of what should be done to better social and industrial conditions. The judges who rendered this decision were well-meaning men. They knew nothing whatever of tenement house conditions; they knew nothing whatever of the needs, or of the life and labor, of three-fourths of their fellow-citizens in great cities. They knew legalism, but not life. Their decision completely blocked tenement house reform legislation in New York for a score of years, and hampers it to this day.—I grew to realize that all that Abraham Lincoln had said about the Dred Scott decision could be said with equal truth and justice about the numerous decisions which in our own day were erected as bars across the path of social reform, and which brought to naught much of the effort to secure justice and fair dealing for workingmen and workingwomen, and for plain citizens generally."

Every law, even the fundamental law of the constitution, must be read in the light of the current spirit of the age. And as the needs of society change the words of the law must be given new meaning. The Constitution of the United States has never submitted to being kept in a straight-jacket, and though laws have often been declared unconstitutional by the Federal Supreme Court, in the end the people have won and social progress has not been stopped. A multitude of activities of the federal government are today recognized as within its constitutional powers which would once have been regarded by the courts as the plainest usurpation. Indeed the whole history of the Supreme Court of the United States exhibits a steady development in

the process of making old words mean new things when new meanings are called for by the need of the times. The same development goes on in our state courts. Almost nothing which society really wants can long be denied, and if the courts become convinced of the public demand they are entirely able to alter or reverse their decisions or permit the desired result to be accomplished by other means. An adverse decision upon social legislation is in effect a temporary injunction against it with a notice to show cause why the injunction should not be made permanent. And due cause may be shown and the permanent restriction escaped by the determined refusal of the people to be satisfied.

Chief Justice Erle, of England, once facetiously remarked:—"I have known judges bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common sense and to common convenience."

It is such "strong decisions" that help to impair that confidence in the courts which must be maintained if government based on law is going to survive. The people must make clear their dissatisfaction with technical and legalistic interpretations of the law, and must insist that it is as true today as it was nineteen hundred years ago that the letter killeth but the spirit giveth life. In this fight of the people to preserve a workable government based on law the first essential is knowledge. There must be a partnership between the profession and the laity for improving the administration of justice. Law must become a matter of public concern, and not be treated as a mere perquisite of a professional class. We must educate our people in the problems of government, and among all those problems none is more vital, more full of interest to the average citizen, and more worthy of serious study than the problem of the administration of justice.