Buffalo Law Review

Volume 15 | Number 2 Article 24

12-1-1965

The Courts, the Public, and the Law Explosion. Harry W. Jones (ed.)

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Erratum
On page 473, lines 27-28 which read: It is the trial judge who does or "undoes" is. Should have read: It is the trial judge who does or "undoes" it.

BOOK REVIEW

THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION. Harry W. Jones (ed.): Prentice-Hall, Inc. [The American Assembly, Columbia University] 1965, pp. v-viii, 1-177. $1.95

> London. Michaelmas Term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. Implacable November weather . . . mud in the streets . . . smoke . . . . Fog everywhere . . . and the dense fog is densest, and the muddy streets are the muddiest, near that leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.
>
> Bleak House
> Charles Dickens

Charles Dickens was cogently critical of the performance of Her Majesty's court and Her Majesty's judges in the 19th century. William Shakespeare ("first, let's kill all the lawyers") was critical of the performance of Her Majesty's courts and Her Majesty's judges in the 16th and 17th centuries. There have been, and there will be, others critical of the performance of the judiciary. Doubtless the 21st century will produce its share, although a blithe skepticism impels one to the conviction that the 21st century's critics will not approach the art or invention of a Dickens or a Shakespeare. Both men are without peer as evocative critics of courts and lawyers "from without"; but neither man undertook to evaluate the workings of legal institutions "from within." Both the Common Law and the Lord High Chancellor objectively may have fallen short of the ideal, and may continue to do so. But criticism of "Her Majesty's" courts and judges has, in the past, tended to ignore or overlook the "from within" problems of court organization, court workloads, legal procedures, political road-blocks, the varying competence of attorneys, the psychological and other requirements of a trial judge, *et al.* This failure to look beyond the façade of judicial administration has not been a fault confined to laymen: lawyers and judges themselves have probably known less about the inner workings of their profession than have any other professionals known about their own professions. Lawyers and judges simply have been "too busy" to concern themselves with these problems in perspective. Rather, they have been content with the comforting thought that, via their "experience," they have a "sense," a "feeling," an "instinct" about what is actually happening within the legal profession on a day-to-day basis. Gradually, and very recently, our gentle profession is beginning to indulge in serious self-analysis and self-reexamination. Proposals for court reorganization, improvements in civil and criminal procedures, resurrection of the "art of advocacy," continuing legal and judicial education, selection and tenure of judges, etc., all manifest a willingness within the legal profession to forego operating on the basis of unconscious habit and custom. Instead, there appears

to be a real desire within the legal profession to "know itself" and to re-assess its public responsibilities. No doubt this development has been prompted in part by the 20th-century advancement in certain arts, *viz.*, psychology and technology (data retrieval); but probably the prime impetus to analyzing the administration of law "from within" has been the "law explosion" which is being experienced in the mid-20th century. This book deals, in a threshold but finely searching manner, with this subject. Stated simply, since the beginning of the century, there are "twice as many people, therefore twice as many disputes to be settled, twice as many civil claims to be heard and weighed, twice as many criminal charges to be tried and determined. . . . New rights . . . have been brought into being. . . . New social interests are pressing for recognition in the courts. Groups long inarticulate have found legal spokesmen and are asserting grievances long unheard."[1]

The book contains six separate essays, all of which are noteworthy, and all of which are composed by honorable and highly capable men. No one could wish for more sound discussions of such subjects as the business of trial courts,[2] court congestion,[3] appellate review,[4] mass production in criminal cases,[5] profile of the trial judge,[6] and judicial selection and tenure.[7] After one ponders the exquisite irony of the assembly-line treatment of the criminally accused as juxtaposed with the snail-like disposition of civil claims; after one reflects upon the realities of appellate disposition under a "free-appeal" rule as distinguished from a "final decision" rule; and after one debates with oneself concerning whether the "Missouri Plan" or some other "plan" is best for selecting judges, it seems inevitable that one comes to grips with an ultimate reality: in more than 90 percent of all cases, because they are not appealed for one reason or another, the trial court is in truth "the court of last resort." Most often, therefore, it is in the trial court that final "justice" is done or undone. It is the trial judge who does or "un-does" is.

The awesomeness of the responsibilities which are placed upon the trial judge is intimately interwoven with the manner in which the trial judge is selected, and necessarily one considers the question of "who is qualified" to be a trial judge. In this regard, the essay in this book by Professor Jones[8] on the nature of the trial judge and his work probably does as much as any of these essays in isolating and identifying the central problem which has resulted from the "law explosion." This is a fine and definitive piece of work, and Professor Jones is deserving of high commendation. He has looked at 20th century American justice "from within."

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1. P. 2.
2. Pp. 7-28, Milton D. Green.
3. Pp. 29-59, Maurice Rosenberg.
4. Pp. 60-84, Geoffrey C. Hazard, Jr.
5. Pp. 85-123, Edward L. Barrett, Jr.
6. Pp. 124-45, Harry W. Jones.
7. Pp. 146-77, Glenn R. Winter and Robert E. Allard.
8. Pp. 124-45, "The Trial Judge—Role Analysis and Profile."

In addition to being charged with utilizing production-line techniques in disposing of criminal cases, trial judges are also accused of tolerating delay in the disposition of civil cases. Respecting the matter of civil litigation, it may be appropriate to analyze the trial judge's role from *his* point of view—"from within." Most judges consider that the major factors contributing to delay in civil litigation include the following: attorneys placing a great number of cases on the calendar which they never intend shall be tried; the presence on the calendar of cases which attorneys have over-valued and which should be brought in courts of limited jurisdiction rather than in a court of general jurisdiction; attorneys' failures to settle vintage cases which continue on the calendar long after pre-trial preparations have been completed; attorneys' engagements in other courts and trials; and attorneys' dilatory tactics, both as individuals and in friendly concert with one another. Judges tend to feel that calendar delay, for which the judges themselves appear to receive the majority of public blame, in fact is almost exclusively the fault of attorneys, and often their clients. The result is that judges feel obliged to spend a considerable amount of time and energy arranging settlement conferences; screening out the small-claims cases; urging attorneys to go to trial or seeking out attorneys who *are* ready for trial; hearing cases after attorneys have consented to re-open default judgments; etc. In short, trial judges find themselves performing an increasing mass of technical house-cleaning chores which take valuable time more suitably devoted to hearing and deciding the merits of lawsuits.

The publicity given to the sheer number of cases on a court calendar tends to be deceptive, and trial judges feel that the ogre of delay in the courts has been exaggerated and unfairly attributed to them. There is agreement that 80-90 percent of the cases appearing on the calendar will never reach trial, and that only 3 percent will ever go to a verdict. Thus, judges consider that delay in civil litigation becomes a serious matter only when counsel who are desirous of and ready for trial are unable to have their cases tried within a reasonable number of months. Therefore, in order intelligently to deal with the problems both of "delay" and of court re-organization, statistics on court performance should probably reflect the true delay time actually attributable to judges themselves. This would contrast with the theoretical statistical delay which is based upon the raw number of cases appearing on a given court calendar.

It seems apparent that, to most judges, the attorneys who practice before them have not kept abreast of the "law explosion." For example, a problem which seems common to every judicial district is that caused by "engaged counsel," whereby cases otherwise ready for trial must be continued solely because the attorney for one side or the other is allegedly busy elsewhere. Such attorneys are those whose eminence and popularity cause them to be retained in a great number of cases. From the vantage point of judges, the trial bar is felt to be far too small to handle adequately and effectively the mass intake of cases in our courts. Thus there are urgings that it is in the best interests of

the profession that law schools, the bench, the bar associations and the insurance carriers do their utmost to encourage and train law students and young lawyers to become litigation advocates in order to increase both the quantity of trial lawyers and the quality of legal advocacy. Currently, materials for the teaching of the "art of advocacy" are being prepared by a joint committee composed of members of the Association of American Law Schools, the American College of Trial Lawyers and the Section of Judicial Administration of the American Bar Association.

It is not surprising that judges consider that their responsibility in the law explosion begins and ends only where they have effective power. Admittedly, judges have no power over the number and quality of cases placed on the calendar, nor do they have power to solve the shortage of attorneys engaged in litigation practice. Given the reluctance or disinterestedness of legislatures (who often are given to shrinking judicial power rather than expanding it), the trial judge in the "law explosion" must make do with such judicial power as he has. Concededly, the trial judges have inherent power to control their calendars as they find them—and this power includes the power to control the attorneys and the parties. It is clear that some judges are more reluctant to exercise this power than others, and some judges prefer not to exercise their power without a formal rule of court. In general, given an intimate knowledge of the attorneys who regularly practice before them, probably most judges fulfill their "law explosion" responsibilities by negotiation and suggestion rather than by actual use of the powers they admittedly have.

As stated by Lord Herschell in the 19th century, "Important as it is that people should get justice, it is even more important that they be made to feel and see that they are getting it." To accomplish this goal, a first step is to improve the reality of justice in our trial courts. This is acknowledged throughout this book; and the book itself should serve as a highly useful tool to chart a course to meet the demands of contemporary life.

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