

METHODS OF LEGAL REFORM

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My predecessor, Dean Hutchins, visited your charming state last year before his translation to the Olympian heights of a college presidency on the occasion of Dr. Turner's inauguration as head of your state University. He brought back such glowing tales of your kindness and hospitality and of your interest in legal research and law reform that I could not resist your invitation to be here today. But, like him, I find myself at a loss as to what I may tell you or how I may presume to instruct you. You are doing so well so many worthwhile things that a visitor can only look upon you with awe not unmixed with envy. I must content myself therefore with a statement of my warm approval of your program and with some few suggestions regarding it. I am the more emboldened to do this because your work, admirable as it is, may after all be considered in the nature of promise, with fulfillment indeed forecast but not absolutely guaranteed.

My remarks will concern chiefly the Report of the faculty of the College of Law of West Virginia University, Submitting Suggestions Concerning Pleading and Practice in West Virginia, which has just been placed before you. I congratulate its authors for producing so fine a document. I congratulate you for making it possible. Later I shall refer to some of its more important points. But I am especially concerned, as I trust you all are, with considering means to cause it to be accepted as the official act of your state. Even in this forward looking part of the world it seems that legislative bodies run true to type. Your Association reports disclose the dire fact that the West Virginia Legislature has not looked with favor upon your previous proposals. In 1926 one of your distinguished members, Judge McClintic, said that when the name of the Bar Association is used in connection with a bill that kills it in the Legislature every time. Judge Robinson aptly replied that this condemned the Legislature, not the Association. The apparent conclusion was that nothing could be done and that the reform proposals should merely be laid before the Legislature to be taken or left, presumably left, by it. I am reminded of a similar post mortem held by the Connecticut Judicial Council of which I have recently had the honor to become a member. We were surveying the wreck of our proposals before the Connecticut Legislature last

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spring where almost nothing was salvaged and where the bitterest blows were delivered by two local bar association committees. What was to be done about it? Some of us felt that we should attempt to organize an active campaign for the future. But one of our best members hung back on the ground that the function of a council was to offer a program, not to try to force it upon a reluctant community.

Now this is a natural position for reformers to take. It requires sustained intellectual effort of a high order to organize and develop a plan of practical judicial reform. One would not devote himself to such a thankless task unless moved by a sense of public obligation. When such public service is rejected, and rejected often with a scorn which seems to impugn the motives of those who offer it, dignity opposes a plaintive appeal for support. But no matter how justified such a feeling is, it is one which wholly fails to view the task of judicial improvement realistically. It may be high minded, but it is unfitted for our actual legal world. Any program of reform of justice which does not face the likelihood of an indifferent, if not hostile legislature, and a bar at least one-third inert and one third openly antagonistic is not based upon the realities of past experience. When we blithely inaugurate our projects for improving the administration of justice we hardly realize the long and arduous journey upon which we have set forth. In England the reform movement began in 1776. It was then that Jeremy Bentham made his famous attack upon the smugness of Blackstone's Commentaries. Notwithstanding the strenuous efforts of himself and his associates, no definite results appeared until the adoption of the Hilary Rules of 1834. Curiously enough these were drafted by a commission of experts. We may well take warning and be humble when we consider what that first group of procedural experts did. For they were dominated by Stephen, author of the famous book on Common Law Pleading, to whom must always be attributed the great mistake of picturing that system as simple and logical. For thus he was able to make the new reform a closer approach to common law pleading than even the former practice had been. A generation of the strictest and most technical legal formalism ensued. The spirit of the change is well indicated by a part of Sergeant Hayes' famous dialogue "Crogate's Case". This as you will recall was a colloquy in the Shades of whom one of the participants was Baron Surrebutter, identified as Baron Parke, later Lord Wenleysdale, a great judge though over zealous on pleading technicalities. The other was Crogate, he who gave his name to the famous case of Coke's time dealing with the nature of the replication *de injuria*. The baron has been trying without much

success to convince Crogate of the beauty of the decision against him in that case. He adverts to the new rules just adopted. Then Crogate says: "Oh! you've been making new rules about pleading, have you, then I suppose, as a matter of course, that you've pretty nearly done away with the whole thing? *Surrebutter, B.* Done away with special pleading? Heaven forbid! On the contrary, we adopted it * * * in even more than its original integrity. * * * And we framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the Court, have been decided upon points of pleading. *Crogate.* You astonish me. But pray, how do the suitors like this sort of justice? *Surrebutter, B.* Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adopted to suit the tastes and capacities of the ignorant."

It took nearly another half-century to undo the results of this "disastrous mistake" of Stephen and his associates, as the historian Holdsworth terms the Hilary reform. There ensued the long contest which Professor Sunderland has so brilliantly described in his article entitled "The English Struggle for Procedural Reform". Not until 1873 was the final step taken—the passage of the Judicature Act. The general success of the system then inaugurated was due in large measure to the organization of a rules committee charged with the duty of suggesting procedural changes as need therefor should arise. The draftsmen of your Report have wisely drawn largely upon the English experience in providing a means of continuing control of practice. They have thus avoided any danger of making a mistake such as that made by Stephen and his associates. They demonstrate the wisdom, too, of exercising care in selecting your experts, and the advantage of selecting those who will study all aspects of the subject rather than those committed to one ideal, of pleading, and that an antiquated one, as was Stephen.

In this country, too, significant examples of the inertia or hostility of the bar to law reform are not wanting. The New York Code of 1848, the model for the present procedure of over one-half the states, was, it is true, the work of a lawyer, David Dudley Field. But the opposition of bench and bar to that Code is a matter of history. Had the courts construed the code system of practice more in an endeavor to carry out its purpose and less in an attempt to continue the old formalities, many of its difficulties which now cry out for reform would never have arisen. A modern example of the same attitude is available in New York. A few years ago a strong board of judges and lawyers

was charged by the Legislature with the duty of recommending a new practice code. This board after some years of study brought in a scholarly and workmanlike report recommending a system based on the English model. But it was rejected. The lawyers in the New York Assembly consulted their brethren at the bar and learned that many of its provisions were undesirable or unworkable. Curiously several of those happened to have been giving satisfaction for many years, not farther away than in the adjoining State of Connecticut. So the Assembly adopted the Civil Practice Act of 1920, a hybrid combination of the former New York and present English procedure, where the new was largely offset and nullified by the old. The result has been the confusion which should have been foreseen. It happens that in 1927, the congestion of business in the courts of New York City forced the Assembly to adopt one of the proposals previously rejected—automatic waiver of trial by jury unless seasonably claimed. An immediate lessening of the congestion followed, stimulated also by the imposition of a sizable jury fee and by the investigation of ambulance chasing lawyers.

Another striking example appears in a little book published in 1927 on the Law of Evidence, which gives the results of researches of a committee of the Commonwealth Foundation. One rule examined by the committee was that concerning the admissibility of evidence of declarations by a deceased in actions by or against his estate. In New York as it happens the common law rule is applied and such evidence is rejected. In Massachusetts by statute it is received where the declarations are in writing and their authenticity is shown to the satisfaction of the trial judge. In Connecticut under a statute of long standing the evidence, where relevant, is freely received without restriction. The committee consulted lawyers from each of these states on the operations of these quite diverse rules. True to their traditions, the lawyers in each state pretty generally felt that the only possible workable rule was their own.

How marvellously powerful are those intangible lines which separate one state from another! Connecticut may be the home of the wooden nutmeg; but, its people may be trusted with the sayings of their dead in a way which is not to be conceived of for those who live on the outer side of its boundaries.

Sometimes the lawyers will oppose reforms which seem clearly to their own advantage. The Connecticut Judicial Council this spring urged a bill under which a mild penalty would be imposed for violation of the rule that answering pleadings must be filed within 20 days after a case is brought to court. The bill was fought and defeated by lawyers of the class recognized as plain-

tiffs' attorneys. Yet the Council was able to show by statistics compiled for it by the Yale Law School that defendants were habitually delaying their answers far beyond the limits set by the rule and in fact for months. The present practice was therefore working in favor of delinquent *defendants*. Can it be that a plaintiff's lawyer after all has little interest in forcing his case to trial speedily?

The criticism which I am here making of the rank and file of the bar—not I hope you will notice of the leaders of the profession—is, I believe, amply merited. No group is more backward in putting its own house in order. Yet the law is naturally a conservative profession. It bases its rules upon the precedents of the past. And the air is full of reform notions and panaceas. I sympathize very much with the point of view of the lawyer who asks to be shown as to any new proposal to remodel the courts. Legal reform which is to be effective must come from the student of the subject not from the mere chance shot of the headlines. The judicial councils and the law teachers working together must develop the proposals. The bar associations must see that they are adopted. Unless the more public spirited members of the bar, organize in associations, take up the cause of reform in an active, wholehearted way, it is lost.

Consequently I am most interested to see what you are going to do with this Report. Approve it, yes; but as experience has shown, mere formal endorsement by your Association is not enough. Unless you can secure a support from the bar as a whole you can hardly expect legislative approval. With local support from all parts of your state it is probable that your legislature will respond. I believe the way to success is by decentralization of your organization. In Connecticut we are planning to have local committees appointed by each county bar association to co-operate with the judicial council in suggesting, developing and supporting projects of judicial reform. I do not know whether your organization lends itself to the adoption of a similar plan, but at least the appointment of local committees seems possible. To be effective, the committees must be carefully selected from among men willing to put their time and energy to the task. Such men are, however, available in every city of any size, particularly from among the younger lawyers who have a quite proper desire to distinguish themselves. The committees should be expected to do more than register approval of your projects; they should actually participate in them and make them their own. Even if your judicial council is organized, it will make its work more effective by such co-operation with local committees. Moreover the organization of your bar association will be

strengthened. One of the strongest associations in this country, the Federation of Bar Associations of Western New York, is composed entirely of delegates representing local and county organizations. It is true that such a plan will not entirely eliminate opposition from lawyers. But a nucleus of interested and informed lawyers in each community will go far to offset the inertia or hostility of the remaining members of the bar.

I hope and trust, therefore, that you will not content yourselves with merely placing this reform before the Legislature with almost an invitation to have it tossed out of the window; but that you will seriously and even prayerfully consider ways and means of making your real influence felt as it deserves to be.

Why should support be given to the particular plan developed in this Report? Because it is the simplest and yet most effective possible means to secure constant study and improvement of your judicial system. It puts into express form plans which have been developed successfully but extrajudicially elsewhere. The machinery suggested consists of a judicial council which has rule making power, facilities for research through the use of the faculty of the state law school and data to show what it and the courts are doing supplied by the bureau of statistics.

The conferring of rule making power upon the Judicial Council is a novel but sensible plan. This places the power where it is likely to be exercised and exercised rightly. It is now thoroughly recognized that legislative control of procedure, arbitrary, uninformed, capricious and occasional as it must necessarily be, is undesirable. But judicial rule making power is all too often accepted as a final solution of all problems of judicial reform. The courts are too busy with other things to spend the time and study necessary to improve their own processes. Experience has shown that unless the pressure for improvement comes from without, the courts will not exercise the power conferred upon them. It is not fully realized how constant and continuing should be the study of the court processes if they are to be kept most effective. As we have seen, the lawyers who hate change and who have solved the old procedure to their own satisfaction oppose attempts at improvement. But it is precisely because they have so well solved and even circumvented the old system that change is necessary. Procedure is a tool, a means to an end and not an end in itself. That end is the application of rules of substantive law to the case in hand. Unless that end be lost sight of, the process to reach it must be constantly re-examined and subordinated to the ultimate objective. Here was the final defect of the common law system. The process became so important that it dwarfed the product.

We often think of a law suit as a game of skill. When the process is thus overemphasized, the comparison becomes apt. Our great athletic contests are brilliant spectacles. The rules are designed to this end, that is, to glorify the process rather than the result. The public likes the open game in foot-ball and rules are adopted favoring the forward pass. It likes home runs in baseball and a special resilient ball is manufactured. Recently on the sporting page of my local paper I was attracted by a headline which seemed out of place there and to belong with the crime news. It read "Eddie Elkins robbed at Walnut Beach". It turned out, however, that the robbery was of a decision in a boxing match in which Eddie was one of the principals and that the crime was committed by the referee, while "2000 fight fans looked on aghast". In spite of this miscarriage of justice, a good time seems to have been had by all, and another is in anticipation since by reason of the robbery Eddie was considered entitled to another go at his opponent. Thus in boxing as in law a misguided decision leads to a return engagement. But a result so satisfactory in athletics can hardly be regarded with like equanimity when the administration of justice is involved.

A judicial council is necessary, therefore, in order to keep the machinery of justice bright and clean. Since the rules are finally approved by the court, the constitutionality of the process seems assured. Even a judicial council, however, is not enough. The higher the calibre of the Council, the more probable it is that the members are busy lawyers who can not afford the time for extensive and onerous research. That must be done by scholars whose main activity it is. You have at hand the body fitted to the task in the law faculty of your state university. The ability and the enthusiasm is there. It is a practical application of the policy which Dr. Turner announced upon his inauguration of placing the facilities of the State University at the service of the State for the public good. It is wise too that the law faculty be given official recognition in the membership of the Council for this is additional insurance that the desired co-operation will obtain. You are indeed fortunate in the high calibre and devotion of your staff of experts. I hope that you will use them to the limit of their endurance. Only good can come of such a combination of resources.

We should not assume, however, that the law faculty will receive no benefits from the work commensurate with those it gives. At Yale where we have done similar research for the Connecticut Judicial Council we have found it of inestimable value for the development of our abler students. A superior type of man is needed for the work, but this we find by a system of selective

choice of our student personnel and rigid exclusion of the unfit. The particular research is then treated as honors work, to be done under faculty supervision but largely on the individual responsibility of the student. No better training in the technique of legal investigation can be conceived. The development of the student's own initiative is invaluable for his future career as a lawyer. The most ambitious report as prepared has been one on the summary judgment. The Judicial Council took this and drafted rules for summary procedure which have been adopted for the practice of our state. The draftsmen of your Report have followed these rules to a considerable extent in preparing Section 17 of this Act amending the motion for judgment procedure. Other matters which we have investigated for our Council include such topics as appellate procedure, discovery under modern statutes, comments on failure of the accused to testify, use of expert testimony as to insanity in criminal cases, pleading special defenses in criminal cases—the council has lately drafted and the judges have adopted new rules of criminal pleading—and the constitutionality of the exercise of the rule making power by courts. We have had pleasure and satisfaction out of the work, and the council has said publicly that it was indispensably necessary to them and that our School had performed a distinct public service to the state in undertaking it.

A sample of the kind of work which you may expect of your expert staff is contained in their proposed plan for amending the motion for judgment procedure. You will see that they have made their suggestions limited, conservative and practical. They have adopted the ingenious scheme of engrafting upon a simple and well understood procedure—the motion for judgment—a complete system of civil pleading. This reduces the difficulties of innovation to a minimum. And yet the procedure is so direct that as in Virginia the lawyers will probably tend to give up resort to the older and more cumbersome methods.

Noteworthy features of the proposed rules are the simple procedure for raising the issues in a case and the provisions for free joinder of causes and parties. Although the chief glory of common law pleading was supposed to lie in its effect in forcing the parties to a single definite issue, the system largely failed of its object by the very formality of the process. The issue was only arrived at by successive alternative pleadings, which were unlimited in number. When the issue was finally reached it was often not the most important or the solely important one. After all the delay the real sources of controversy might remain unrevealed or only partially revealed. Under code pleading on the other hand the emphasis was upon *stating the facts*. A desirable

plan in theory, in practice it led to the hopeless bog of deciding what a fact is, and distinguishing it from law and evidence. If you ask of a man whether he is married, are you asking him for fact, law or evidence? It is a fact which looms pretty large to most people still. Yet it must also involve a pretty important legal conclusion. And finally the answer may constitute a serious admission against interest. Facts do not easily separate themselves from law or evidence. The code courts have spent altogether too much time in attempting to extricate them from their surroundings. The way out is to require of the parties that they state their versions of the case simply and directly and then stop. If further details are desirable they can be brought out more easily at the trial than by prolonging these preliminary proceedings. If, too, the rules provide a set of official forms available for the more common types of law suit, convenience and celerity of action is insured. This is the admirable system which your draftsmen are proposing.

Again they are accepting the liberal English rules of joinder of parties and of causes. At common law, the system of forms of action restricted joinder of causes, and the rules of substantive law governed and limited joinder of parties to cases involving joint rights or duties. Joinder as a purely procedural device to lessen the number of law suits was not known. The code system marked some advance from this position, but unfortunately the code makers framed their provisions largely in the light of the old tradition. They permitted joinder of causes only within certain specified classes, constructed without logical consistency as to each other and apparently as a result of a curious combination of the ancient common law and the more modern equity principles. As to parties they adopted the equity rule to apply to all actions. But they made an unfortunate mistake in their expression of the rule. At that time current theory called for the statement of all law in the form of a rigid statute or code. So a code of practice must be couched in arbitrary statutory form, with nothing left to the discretion of the court. One can hardly think of a more unsuitable method of stating a merely procedural rule, governing *process* and not *product*. Nevertheless they attempted such a formulation of the rule. They made "interest in the subject of the action" and "interest in the relief" the tests of joinder. At least these should have been stated as alternative, not cumulative requirements. But the statute as enacted contained the word "and" instead of "or", and the result was seriously to limit party joinder in all actions calling for legal relief. The modern English practice now permits joinder in cases where a common question of law or fact is involved, the trial

judge having discretion to order separate trials. These provisions have been made the rule in New Jersey, in New York, and by recent enactment in California. They form the basis of the first of the two forms of section seven as recommended in your Report.

Of these two forms, the first is unquestionably preferable. Here joinder of causes and of parties are properly treated together. One result of the hybrid reform of the New York Civil Practice Act was an attempted combination of the English provisions for joinder of parties with the old code rules for joinder of causes. The New York courts have construed these provisions in such a way that the widely heralded reform of the rules of party joinder has been largely wiped out by the old code restriction on joinder of causes. The first form of section seven here suggested avoids this danger.

One additional provision I hope to see adopted in this state in time is the use of the motion procedure in equity cases also. If the practice can be employed in both law and equity actions interchangeably, if legal and equitable claims can be joined and legal and equitable defenses filed, you will have achieved by simple means a true union of law and equity. No procedure can be considered simplified if two separate systems owing their origin to historical conditions and no longer necessary, are still required for the redress of essentially similar reforms.

The final recommendation, one of the most important of the entire report, is for the establishment of a bureau of statistics. Jurists and scholars are only now coming to realize our lack of knowledge of what the courts are actually doing due to the dearth of reliable judicial statistics. Almost no such figures are available in this country as compared to the detailed reports in other countries, particularly Scotland and Germany, and to a somewhat lesser extent, England and her colonies. Bookkeeping and adequate accounting systems are a necessity of modern business. The question is being asked how long courts can afford to do without such systems. Thus the Pennsylvania Crime Commission said this year "No private enterprise could long exist without providing adequate means of determining the relation between its machinery and its product. Is it not, therefore, fair to assume that this huge public machine called the administration of justice could be made more effective by the installation of some system which would determine the effectiveness of its operation?" And Chief Justice Taft said in 1926:

"No single agency to induce Congress and State Legislatures to the enactment of measures to improve the administration of the criminal law could be more effective than the practical truth in respect to the condition of the courts in the prosecution of

crime, and nothing would more stimulate a demand for greater speed in the disposition of the civil cases in behalf of the litigating public than the truth as to the delays and congestion in the civil docket.”

Crime Commissions and Judicial Councils generally are voicing the same views. Your Report recommends what would be the first official state bureau for the gathering of judicial statistics.

We at Yale are particularly interested in this development in West Virginia. Two years ago we began a statistical investigation of the trial courts of Connecticut. Last year the work was extended also to Massachusetts and New York. Under a grant from one of the Foundations it will continue for at least four years more. So valuable have the results seemed to us that we have been anxious to see the extension of the investigation to other places. Dean Arnold and his faculty have been particularly interested in the project. We have completed joint plans with them to develop the work here. I think Dean Arnold with his force and vigor and with some assistance which we can offer him, will manage to make a beginning at least, even without state help. But an official state bureau is most desirable. After all this is a function of the state and should be so maintained and financed. Moreover the gathering of the statistics is made comparatively easy if the state officials are required by law to file the records on uniform forms with a central office. And lastly the official character of the records is valuable as a badge of their authenticity and accuracy. All those interested in statistical method as applied to law will watch with interest the result of this plan for your state.

Our work at Yale has been hampered by being a private venture. We have had to send our investigators into the offices of the various clerks of courts, there laboriously to dig out the statistics from the files of the completed cases. But the unique value of the data thus collected seems apparent to all. It is of especial interest to the lawyer and judge in predicting future court action, to the reform organization in showing the places where improvement is needed and to the student of law and social institutions in supplying a rich store of materials dealing with the social life of the community.

I wish time was available so that I might tell you in some detail of this work. But I must content myself with a few of the facts we have discovered and refer you generally to our reports. Some of those facts are perhaps obvious but I doubt if they have been thought of. Thus how many of you have considered the odds of success in the ordinary law suit? They favor the plaintiff to a truly surprising extent. In a small claims court, his

odds are twenty to one; in the general courts they are ten to one. In contested cases they are naturally reduced but are still high—three to one in all such cases and four to one or greater in the contract and debt cases. Thus a trial judge may know as a case comes before him that the chances of a plaintiff's judgment are three to one or greater. In the light of these figures perhaps our rules of burden of proof and of presumptions should be materially revised.

Again trial lawyers generally cherish the notion that juries are notoriously favorable to plaintiffs. Actually there are many more *verdicts* than *court judgments* for defendants. With the possibilities of a disagreement or reversal included, a defendant has almost a fifty-fifty chance, while before the court he wins in only 23% of the contested cases. These figures are in a jurisdiction where jury trial is frequently waived, and possibly mean no more than the jury habitually gets the weak or desperate case.

Judicial statistics are invaluable in showing the places where improvement is needed. Your practice may be as generally effective as this Report indicates and yet by very lack of formality lend itself to abuse as our Connecticut violation of the rule for filing answers shows. In this connection we discovered some rather startling figures on the administration of criminal justice. In one of our largest counties jury trial had practically disappeared; it was limited to two cases a year. Our law permits of waiver of jury trial by the accused. But there were very few court trials. Actually the public prosecutor was disposing of the bulk of the business by obtaining pleas of guilty or recommending *nolles*. The latter were especially frequent in the cases of the lesser offenses. Thus *nolles* were entered in 90% of the appeals from police court convictions for reckless driving of motor vehicles. Either police courts or appeal courts must be grievously at fault for such results to obtain.

The figures also indicate the large amount of automatic and essentially ministerial actions performed by the courts. In our court the largest number of cases are divorce actions and these, especially where uncontested, result in judgments for the plaintiff. Foreclosures follow next in number and with similar results. The Conference of Commissioners on Uniform State Laws has thought this unnecessary and has adopted a uniform mortgage act where court foreclosure is not required. Such a system already obtains in Massachusetts and our researches there indicate little dissatisfaction for bills to redeem or prevent foreclosure are so infrequent as to be negligible. Our court machinery now lacks sorting devices which would place the similar cases together and provide for a short and simple, and where possible, an automatic

or semi-automatic disposition of them. Possibilities of this kind are indicated by the Workmen's Compensation tribunals and the small claims courts.

Working along this line is a suggested plan for a compensation act as a solution for the automobile accident cases now clogging our courts. A committee of judges, lawyers and law teachers is now investigating the problem under a grant from one of the Foundations and we have assisted in the collection of the judicial statistics. This work, too, is about to be extended to West Virginia, and Dean Arnold and his colleagues will have a part in it. The value of accurate statistical information for such study is clear.

Other uses of such judicial statistics to the student of the law and of society are becoming more and more apparent. Perhaps our case books for law study will require revision in the light of the knowledge thus gained. Thus why should we spend time in instructing the student in all the details of slander and libel—colloquium, innuendo, inducement and so on—when such cases comprise considerably less than one-half of one per cent of all cases tried? Students of crime, of divorce, of family law and of commercial and business law all may here find important and realistic data of actual court activities. Some few years of delving in this material may produce results startling perhaps in confirmation or disaffirmation of cherished ideas.

These then are some of the vistas opened before you by this Report. I hope I have been able to bring to you the alluring prospects of pleasure to yourselves and of service to the state contained in this program. If I have helped in this way, and if I have not wearied you past all endurance, perhaps I may look forward to visiting you again at some future time when the promise now so apparent of your activity in the cause of legal reform shall have been redeemed by wholly adequate performance.