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OUR JUDICIAL SYSTEM is one of the chief assets in our struggle to win the minds and hearts of men all over the world and to fortify the faith of our own citizens in their form of government. We are justly proud of our courts as defenders of our liberty, property and security. Ideally, we set them apart as institutions above the compromises and accommodations to be encountered in most walks of life and beyond the politics with which we associate most public offices.

Here we can be proud that the picture we show the world is in marked contrast to the brand of justice dispensed by the courts of many other lands.

Our system of justice can never be perfect, but lately its imperfections have seemed to loom larger and deeper than formerly. Change is the rule of life, and the fast-moving events of to-day underline the failure of our legal system to keep pace. The law should be deliberate and not commit itself to new patterns without full consideration—but deliberation is a far cry from stagnation, and when the world moves, the law must move. The Bar and the Bench are the custodians of the country's judicial system and because of their experience and expertise we would expect them to be the architects of its future growth. My purpose here is to urge Bench and Bar to shake off their inertia and fulfill their responsibility to the public; to square reality with the still radiant image of American justice, and direct the course of change so that the revisions will be efficient and harmonious, rather than revolutionary and dislocating.

I am sure I need not spell out again for you the increasingly serious problems which confront our legal system—problems which plague us largely because we have persisted in ignoring the advent of the Twentieth Century. Our courts are functioning with much the same facilities they had fifty years ago when they were attuned to the tempo of a smaller population and a less complex age. The accumulating pressures have made the Ameri-

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[*Editor's Note:* This is the substance of an address (his first since becoming Presiding Justice) delivered recently at the House of the Association of the Bar of the City of New York. Some editorial condensation has been done, with the permission of Justice Botein and of the New York Law Journal, the daily legal newspaper of New York City. Though couched in terms of the New York situation, the observations here stated apply with equal force in almost every jurisdiction in the Nation.]

can ideal of justice—envisioning an even-handed, serene and contemplative determination of controversies—more and more illusory.

I have spoken before at some length about the increasing emphasis on quantitative disposition of cases, which will inevitably result in changing the courthouse from a dignified forum for the deliberate resolution of legal disputes to a market place for bargaining on cases—particularly accident cases. Competent, dedicated judges are reduced to the status of glorified claims agents. I shall not enlarge upon this theme, other than to say that the spectacle is sordid and undignified, and presents a tarnished and degraded image of our Goddess of Justice to our people and to the world.

Much of our difficulty lies in the fact that, while we have temporized with makeshift expedients, we have made no real plans to accommodate ourselves to the sweeping changes of science and society. We are like harness manufacturers who hoped the public would forego the automobile for the horse and buggy. But the world of the law is a microcosm which limits the larger world of affairs. Every far-reaching technological and social change must inevitably have an impact on our judicial system. In the last half century our population has doubled, and our productive system has multiplied tenfold. The more complex society of to-day demands improved methods of dealing with disputes in a hundred new areas of friction and controversy. The advent of one invention alone—the automobile—is responsible for many of our current problems.

The vast increase in court business in our civil courts has reflected largely an increase in the number of cases to cover damages for personal injuries. Over 85 per cent of the new law issues in the Supreme Court of New York for the past year were personal injury actions. The percentage is higher in the lower courts. Over 60 per cent of these cases arise from automobile accidents. They clutter our court calendars in constantly growing numbers, so that in some of the judicial districts of the state it takes three or more years before tort jury cases can move to the head of the calendar.

Fewer and fewer cases are actually tried, however, although judges are busier than ever, probably because so few personal injury cases are brought with any expectation of trial. I imagine most of them are instituted with the knowledge that all of the resources of the court will be brought into play to effectuate settlements. At the turn of the century, statistics show that 50 per

cent of the cases on the calendar were tried. Twenty-five years ago 25 per cent of the cases were tried. To-day the figure is 9 per cent. In New York County last year, only 295 cases were tried by jury, about one-third as many as were tried twenty years ago.

So while these cases are not the stuff of constitutional history, and add little to the development of jurisprudence, they are by volume and economics the main concern of our juridical system. Since 1942 the number of registered automobiles in New York State has doubled and the number of vehicle accidents has trebled. All projections for the future indicate constant increases.

Each new procedure has managed to roll back the tide somewhat at the time of adoption but then the effect wears off and the flood waters begin to rise again.

For example, the initial impact of our latest procedure, the statement of readiness, has already begun to level off. As a result, there has been an increase of six months in the waiting time for a tort jury trial in the Supreme Court, New York County, since June, 1957. The court's resources are now being strained close to the breaking point. The judges are working long, hard and conscientiously. Yet we can expect the intake of business steadily to increase. If we have been unable to cope successfully with the impact of the automobile, which has been with us for half a century, how will we manage with the problems further technological advances in the offing will thrust upon us?

Swept along on the swift torrent of modern living, few of us have the foresight or energy to think beyond those problems that touch us immediately. If I were practicing law, and doing well at the same old stand, I doubt that I would experience the urgent concern I am voicing tonight. Most lawyers to-day appear in court infrequently, and so have no immediate, impelling incentive to improve the judicial system. Those who do appear regularly, the specialists in personal injury litigation, are well satisfied with things as they are. The courthouse affords a cozy, familiar place in which to settle 95 per cent of their cases. And calendar delay doesn't bother them; they maintain an inventory that never decreases in value.

I can understand, even if I don't applaud, the indifference of the legal profession; but abuses in our court system will not cure themselves. I therefore urge the members of the legal profession to join forces in a common effort to improve the structure and functioning of the courts because I believe it is their

solemn obligation and simple duty. Lawyers and judges are best qualified to assume leadership in performing this task and I believe that at no time in our history has it been so important that our legal system justify the faith still reposed in it by the public.

We may not be favored with the dispensation sometimes accorded futility—of slowly fading away into ultimate eclipse. If we fail to undertake this assignment, if we shrug it off as someone else's job, there must come a time when an aroused public will be goaded into taking it out of our hands. Hence, if we are not the planners and engineers of the new order, we may well be swept along by the ground swell of public reaction.

Now it may be that the public, like the profession, will wince whenever it looks at the untidy face of justice, but then hurry by and become immersed in its more engrossing affairs. Few of us will bestir ourselves about general conditions that do not affect us specifically and acutely. Very likely a new generation knows of no other kind of justice.

The fact that court shortcomings sting only a small portion of the people at any one time may account for the fact that they have not yet been spurred into activity. But when the economics of judicial inefficiency hits the pocket-book of the average citizen hard enough to make him wince, he will demand action.

The sparks which may ignite a smouldering situation into flame can already be detected in the automobile injury situation. Automobile insurance is now compulsory in New York. All of us feel the pinch of its cost. The experience of other states, such as Massachusetts, with compulsory insurance laws, is that the rates never fall, but always rise. Court statistics show that the recoveries in personal injury suits are rising sharply and continuously. Since 1939 the size of the average New York County jury verdict has more than tripled. It would therefore appear likely that the cost of automobile insurance will also rise in the years to come—perhaps to the point where it comes dangerously close to pricing itself out of the market for certain low or moderate income groups. And if the cost of insurance means the difference between operating and not operating a car, those people will want to know why.

They will learn that the insurance companies claim they can operate profitably only if they pay out less than fifty cents of each premium dollar for claims. Furthermore, a study of the closing statements filed in the New York Appellate Division reveals that the average claimant, after deducting lawyer's fees and expenses, retains only about half of the total recovery on his claim. In

other words, only a little over twenty-five cents out of every premium dollar finds its way into the pocket of the injured party, and often years after the money could be used most efficiently. Over a period of profitable insurance company operations, the public pays in insurance premiums alone four times the actual compensation that the accident victims receive.

But the car owner as a taxpayer also pays his share of the estimated cost of over $60,000,000 a year for the maintenance of the New York court structure, largely for civil courts. When he learns that only 5 or 6 per cent of the personal injury cases go through trial, so that most of this money is spent to afford the parties a place to bargain and haggle under judicial auspices, he may want to take a long, hard look at his courts. He will want to know whether an expensive court structure is justified, especially when reliable studies tell him that 80 per cent of the cases closed in the New York County Supreme Court brought less than $6,000, which is the jurisdictional ceiling of the City Court; that in the City Court less than 1 per cent of the cases realized more than $3,000, which is the jurisdictional ceiling of the Municipal Court; and in the Municipal Court 95 per cent of the recoveries were under $1,000. The citizen may then feel it's an indefensibly involved, long and expensive way to secure a trial for so few accident victims, who will moreover wind up with only about half of the jury's award. Top off this heady brew with the fact that our calendars will probably fall even further behind, and in the flood of his resentment he may sweep all this business out of the courts. Unless lawyers and judges make a real, combined effort to reduce costs by greater efficiency in processing of personal injury claims, both in the courts and in the law offices, they may find they have priced their product so highly that the public has taken it out of their hands and provided some other non-legal and non-judicial means of dealing with it.

I personally believe personal injury litigation can best be handled in the courts—provided it can be done efficiently, economically, with dignity and without delay. But the legal profession must interest itself and work toward that end—or relinquish that right to those lacking its competence.

How do we go about achieving desperately needed improvements—not only in the handling of personal injury litigation but in so many branches of court work, such as matters affecting the family as an integral unit, commercial disputes and other areas? How do we conform the administration of the courts to the stand-

ards lawyers would require in their law offices, or that the businessman would demand in his establishment? In two ways—the one immediate and the other long-range.

First, we must solve yesterday's problems, and then move on to tomorrow. We have taken many new lodgers into our house, but we have made no structural changes. We have improvised as we went along, often sweeping our problems under the rug. We must begin by a real housecleaning job, knocking down useless partitions, eliminating overlapping, and installing modern housekeeping methods. Fortunately, the Bar has a ready-made program to which it can apply its shoulders—a program that has been conceived and, more important, in large measure preserved, in the face of discouraging odds. The planning, spade work and slow, grim, tenacious building has been the work of a few dedicated lawyers. I refer, of course, to the plan of the New York Temporary Commission on the Courts, headed by Harrison Tweed.

Understand, this is not a program projecting far into the future. If it's not quite a rescue operation for a sinking ship, it is at least an emergency measure for a badly floundering and buffeted one. And most of us, the only persons possessed of the skill and experience properly to overhaul the ship, are content to sit on the decks and go down with the status quo.

This is the time of decision—the year in which a plan must be launched by the Legislature or we give up all hope of ever reorganizing the court system pursuant to a plan shaped and presented by the legal profession. We must all do everything we appropriately can do to advance its progress.

There are those who imagine they possess vested interests in the courts as they are presently constituted. There, of course, can be no moral, social or economic justification for setting the selfish interests of the few above the welfare of the community. And at this critical juncture in world history, when the image of American justice should shine forth radiant and unblemished, it is simply unthinkable that the selfishness of a handful of entrenched men should disenchant millions with their courts.

[*Editor's Note: After this was written, in late March, 1958, the New York State Legislature defeated the New York Court Reorganization Plan.* Of this, a *New York Times* editorial said (March 27, 1958):

> "The Assembly has disgraced itself, and popular government generally, by its cynical defeat of the court reorganization measure. Seldom has there been so widespread a public demand for legislative action in this state as for court reform. Tuesday's vote was a slap in the face for the voters and a triumph for those politicians and officeholders with a vested interest in things as they are."]

But if this plan is done to death this year, it will be by its friends as well as its foes—by the indifference of decent lawyers and the opposition of persons of good intentions who are playing into the hands of foes of court reorganization and fail to understand the legislative process in actual operation. The genius of our form of government lies in its capacity to absorb all kinds of compromises and yet make substantial progress. I believe the recently announced Tweed Plan, if approved, marks a giant step forward. Yet, there are some ardent friends of court change who would like to see it make two giant steps forward and who are denouncing the plan as inadequate. They are doing the cause of court reorganization a tremendous disservice.

We must not be political Pollyannas and insist on going down to glorious defeat, when on the eve of achieving the most extensive court improvement in this century. The much vaunted court reorganization in New Jersey left many courts untouched, which are just now receiving attention.

Now, the Tweed program will help immensely with our present and immediate problems, and without its adoption the future will be bleak indeed. But it will not, if adopted, solve many problems. It is unlikely, for example, to affect appreciably the evil of calendar congestion. Once we have dealt with the problems which now confront us, we can turn to planning for the future, so that we need never again be compelled to plunge into emergency measures to shore up an overburdened judicial structure. We can avoid such sporadic adventures by continuing long-range studies in the process of litigation designed to result in lasting benefits for our changing society. However, before venturing to make any profound change in our judicial process, such studies must be made in depth and in all dimensions. This requires a search for data not usually available to judges and lawyers in their respective roles. A case, our usual daily fare, measures individual reactions to laws, but in tailoring our juridical processes to the greatest common good we might at least try to measure mass or societal reactions.

I would like to try to extend to our professional life modern scientific research methods that are used in other fields of human endeavor. We men of law are traditionally not good scientists. We rely on the force of argument to form *a priori* conclusions. This may be effective in litigation, but not in social planning. In our studies, the social science methods of objective inquiry might be most productive.

Some studies that are under way are beginning to scratch the surface in this regard. One of these is the Columbia University Project for Effective Justice, which has been in operation since the summer of 1956. Many of the statistics I have quoted were gathered by this excellent project. It began its work with no preconceived bias as to what remedies should be proposed to deal with existing flaws in our system of civil justice. It is interested in investigating some of the important questions that are capable of investigation along empirical lines. Knowing the facts often makes the solution self-evident. The Columbia Project seeks out those facts. For example, right now it is investigating these questions, among other things:

(a) What do the contingent fee closing statements filed in the New York Appellate Division, First Department, show with respect to various aspects of personal injury cases in that department?

(b) Has the comparative negligence rule in the seven states that adopted it resulted in fewer and shorter trials or fewer jury trials?

(c) Would a rule awarding interest from the date of injury (instead of judgment) facilitate or complicate processing of personal injury cases?

(d) Does the Massachusetts auditor system reduce or increase the amount of time and work needed to process auto injury litigation?

Recently, this Association (of the Bar of the City of New York), has joined forces with Columbia in a combined endeavor that will broaden the scope of the original project. I anticipate great things from this alliance, as the Columbia Project has already exhibited the fruits of its imaginative yet painstaking research; and the judges in this department have long had good reason to regard the Association of the Bar as a staunch, intelligent and forward-looking friend of the court.

To sum up then—our job, as I see it, is twofold. First, we must come to terms with the past so we can function to our full potential in the present, by modernizing our court structure along the lines of the Tweed Commission program. Then we must turn to planning for the future so that we can not only keep abreast of changes in society, but be a step or two ahead.

The life of the law may well have been experience, but its continued survival may lay in anticipation. We, ourselves, must

conform to the standards we daily apply to litigants, and like our creature, the hypothetical prudent man, we must take all necessary steps to deal with that which is reasonably foreseeable. A program of sound, scientific study of our needs and problems is an indispensable requisite to constructive and knowledgeable change. I do not profess to know what such studies will show about our existing problems, developing trends, or atrophying functions—but I do know this—we will not get the answers unless we first ask the right questions.