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Book Review: The Courts, The Public and the Law Explosion

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the total charge of Trial Judge Thayer is set out in the *Defendants' Exceptions* so there was obviously no possibility of a warped view arising from the cause assumed by Felix; and Third, the only record that was in any sense "official" at the time Frankfurter wrote was the *Defendants' Exceptions*. This was the only record then or since certified to be accurate by the trial judge and the prosecuting attorney. The silly assumption that there is a built in bias resulting from Frankfurter's citation of *Defendants' Exceptions* raises a grave doubt as to whether the author had an adequate appreciation of the material he was dealing with at this crucial point. What is even more shocking, though it is not expressly stated in the book, is that by necessary implication Felix must brand Frankfurter either a liar or a dupe. Frankfurter, in the introductory paragraph of his *Atlantic Monthly* article said: "The aim of this paper is to give in the briefest compass an accurate resume of the facts . . ." ⁴ This assertion of an impartial review was expanded when the material was put in book form to read as follows: "Obviously, to tell the story within limited space requires drastic compression. The necessary selection of material has been guided by canons of relevance and fairness familiar to every lawyer called upon to make a disinterested summary of a protracted trial. . . ." ⁵ Frankly, Frankfurter is much more convincing on the point than Felix. There really is not much of a contest.

It is rather a shame that Felix's book comes apart at such a crucial point. He is an adroit writer. He has gathered within the modest size of the book a moving, panoramic view of the case, the interesting personages around it and the fascinating legend that grew from it. *Protest* is fun to read, but obviously, it cannot be taken too seriously.

Willard D. Lorensen^{*}

THE COURTS, THE PUBLIC AND THE LAW EXPLOSION. Edited by Harry W. Jones. Englewood Cliffs, N.J.: Prentice Hall, Inc., 1965. Published under the auspices of The American Assembly. Pp. 177. \$1.95.

⁴ Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, March 1927, at 409.

⁵ FRANKFURTER, THE CASE OF SACCO AND VANZETTI 3 (Grosset & Dunlap ed. 1962).

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This is a stimulating analysis of the legal problems facing the contemporary American society. The book is comprised of essays taken from the American Assembly meeting held at Columbia University in April and May of 1965. The authors undertake to apprise the public of the problems facing the American judicial system. The problems are attached in six substantive chapters. The titles of these chapters are, respectively: "The Business of the Trial Courts"; "Court Congestion: Statues, Causes, and Proposed Remedies"; "After the Trial Court—the Realities of Appellate Review; Criminal Justice"; "The Problems of Mass Production"; "The Trial Judge—Role Analysis and Profile"; "Judicial Selection and Tenure in the United States."

Concepts of reform and public awareness are fairly epitomized in the introduction by editor Jones, as is the selection and analysis of material throughout the study. These analyses are not detailed nor exhaustive, but they stimulate the reader's interest and awareness of exigent current issues.

The law exists to meet the needs of society. To measure its success in obtaining this end is to evaluate the operation of the courts which have the responsibility of transferring the law into meaning. This book is a realization of the difficulties created by a modern urban society. Although urbanization has affects almost every area of the legal system, the authors place emphasis upon the role of the trial judge and the "inferior courts" in their administration of justice. The authors make it apparent that there is no single set of answers to the problems faced by the judicial system.

Perhaps most widely discussed of the problems facing the courts today is delay. It is difficult for an individual, suffering a wrong, to realize the adequacy of justice when he is required to wait two or three years for the settlement of his claim. The problem of delay is complex and to a degree inherent in the judicial system. The ever increasing number of civil cases is primarily attributable to the automobile which is responsible for approximately two-thirds of all tort claims; the increase in criminal cases is due to a combination of an ever increasing urban population and a break down of family influence and other social controls.

The authors point out four major proposals to aid in reducing the "backlog" of cases in civil actions. First is the split trial, in which

the issues of liability and damages are tried separately. Although some time is saved by this approach, there has been an offsetting disadvantage of a pronounced substantive backlash. (p.48) This split procedure "introduces loaded changes into the process by which the jury deliberates" and has resulted in more verdicts for defendants than in unified trials.(p. 48) The amount of time saved by a routinely applied splitting procedure is of questionable value when the price which must be paid is the risk of appreciable distortion of substantive rights.

The second proposal is the pre-trial conference. This technique when used in an "across the board fashion" absorbed an appreciable quantity of the judges' time with only negligible effects on settlements. Trials were not shorter nor were juries waived any more frequently when compared to its non-use. (p. 50). However, pre-trial conferences do improve the quality of the trial process, promote the lawyer's preparedness and enhance the clear presentation of the theories of the cases as well as curb the frequency of tactical surprise or deficiencies in the evidence. It was noted that the average amount recovered, when the judgment was for the plaintiff, was higher if the pre-trial conference was used and, ironically, the defendants usually were the parties asking for the pre-trial conference. The conclusion would indicate that pre-trial conference would be used to the greatest advantage in selective cases as opposed to its universal application. The author fails to give any criteria for determining whether the pre-trial conference should be applied. His only suggestion is that experience will tell in which case this technique should be used. It would appear this method is one of the best ways to expedite trial procedure, while producing the smallest possible change in the present system.

The third proposed solution is compulsory arbitration of small claims. The jury trial is preserved by permitting a dissatisfied party to appeal to court upon payment of a prescribed fee. The arbitration panel consists of three lawyers who hear facts and render an award. While this system permits disposition of small claim cases more quickly and saves the court a substantial number of cases, about 32% of the cases appealed were reversed, usually in favor of the plaintiff. (p. 52) One reason this system has worked in small cases is that settlements are often only one or two hundred dollars and neither party is willing to risk the fee required to appeal for a new trial. There is little evidence that this system would work in

larger cases where the cost of returning to court is not prohibitive. If the fee is raised to such an amount that it serves as a deterrent to appeal, it might be struck down as an indirect prohibition of trial by jury. Though this plan may work in small claims it does "not warrant adoption as an antidote for delay in major courts." (p. 53)

The fourth possible solution is the auditor procedure. The auditor, whose function is similar to a referee, receives evidence and renders a written report setting forth the facts and a legal ruling. Either party may ask for a revision of the auditor's award or for a retrial in court. On the retrial the auditor's findings are prima facie evidence which may be read to a jury. There is no prescribed fee required for appeal to a court as is the case in compulsory arbitration of small claims. Of the 12% of cases returned for court trial, about two out of five resulted in reversal or modification. (p. 53) The difference between the auditor's findings and those of a jury is that the auditors tended to find for the defendants more frequently.

Although there does not exist a great problem of delay in criminal cases, the crisis in criminal law is quantitative. In criminal cases the law explosion has resulted in "mass production" justice or compromise pleas. In criminal cases screening by police and prosecutors substantially reduces the number of cases that will go to trial. Of the cases brought to trial nearly 75% of the defendants, through compromise, plead guilty. (p. 107) Perhaps most affected by "mass production" justice are those persons charged with minor offenses who are processed in volume, with a minimum of judicial time spent in disposing of each individual case. The author points out that the mass production justice technique used in traffic courts and misdemeanor cases is likely to create disrespect for the law and the judicial process. It is noteworthy that "the most significant fault in our present system of criminal justice is that in those areas where it comes in contact with the average citizen, as opposed to the working criminal or the depraved person, its performance is poorest." (p. 115) The reform of the criminal process must impart serious consideration to the magistrate courts, where justice takes on reality for many hundreds of thousands of people every year.

As Judge Cardozo said, "In the long run there is no guarantee of justice except the personality of judge." (p. 124) It is obvious that the men who fill the position of trial judge must be of exceptional

integrity and of professional excellence. Therefore, the method of choosing judicial officers is very important. One of the most common methods of selection is by election—either partisan or non-partisan. A weakness in both types of elections is that voters lack non-partisan public information on most judicial candidates. The chief source of information relied on by the average voter is the political party with only a small percentage of the voters availing themselves of the organized bar's evaluation of the candidates. In the competitive partisan election it is the political party that selects the candidates and all too frequently they are chosen for reasons other than judicial qualifications. Thus, a significant objection to the political system of judicial selection is that it makes judges subject to the suspicions that members of the public entertain about politicians and the political processes generally. Although non-partisan elections correct some of the faults of partisan elections, it has some undesirable effects. While it frees judicial nominations from control by politicians, it nullifies whatever responsibility political parties feel to the voters to provide competent candidates. The non-partisan selection also withdraws whatever financial and campaign support the candidate's party may have provided.

The second prevailing method of selection of judges is by executive appointment, usually with consent of some legislative body. Even though a state may have an election system, a significant number of judges are appointed due to retirement and deaths among the judiciary. The appointing individual must rely upon his advisors and on the voluntary efforts of community organizations. The advisory role of the organized bar is helpful only to the degree the appointing individual is willing to accept its evaluation.

One of the better methods of selecting judges is the "Missouri Plan." A non-partisan nominating commission, comprised of representatives of the legal profession and community representatives, screen and select a list of candidates. This list, of perhaps three, is submitted to the executive official who appoints one. The judges, under this plan, are required to face a non-competitive re-election at periodic intervals. The voters have a choice of returning the judge or having him replaced by another selected in the same manner. Because it takes even well qualified persons time and experience to become a good judge, the "Missouri Plan" appears to have the advantage of keeping the well-qualified judges in their positions, yet permitting the removal of unsatisfactory judges. This

plan avoids the problem of life tenure, while at the same time not requiring the judge to campaign for re-election.

Another area of reform which is receiving attention is the investigation and discipline of judges. The traditional impeachment, address and recall processes are not only expensive and time consuming, but tend to be inflexible remedies unsuitable for dealing with judicial misconduct which warrants some form of discipline short of removal. A flexible procedure for judiciary disciplining is desirable. A feasible suggestion is the creation of a commission on judicial qualification with the power to investigate a complaint concerning incapacity or misconduct on the part of judges and to make recommendations to the supreme court that he be retried, removed or punished in a suitable manner. This procedure provides the desirable flexibility to cope with all types of judicial misconduct and incapacity.

The problems created by the law explosion are both numerous and complex. The solution to the problems probably cannot be found in a single sweeping reform procedure, but will evolve through the combination of the best plans and procedure. From the studies now being conducted, theory must be intermingled with the practical to produce desirable results. It seems unlikely that a workable solution will leave unchanged the present system of administration of justice. Any solution will undoubtedly produce unexpected changes in the present system, some desirable and some undesirable. In the administration of the law, as elsewhere, lack of understanding and indifference to the problems are the greatest enemies of reform. If respect for law and the administration of justice is to retain its heritage, it is imperative that the people realize that justice is being done; and to most, the reality of justice is a black robed judge in a trial court or the magistrate in a crowded room of the police station.

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