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John P. Frank

Commentary

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It is especially pleasant to come back here to the Earl Warren Institute to honor my dear and esteemed friend Roger Traynor. As I gave the dedicatory lecture when this building was opened in 1969, I cannot avoid the joys and sorrows of reminiscence. At that time, under the heading *American Law: the Case for Radical Reform*,[1] I unburdened myself of some three dozen recommendations on things that needed doing. Justice Tom Clark wrote the preface to those lectures. In a dreadfully biting sentence, he said, "As Mr. Frank points out, there is much law but little justice. Would it not be better to have more justice and less law? That, in short, is what Mr. Frank proposes." He then went on to say, "The quicker we get it," the better.

My moments this evening are so brief that I would rather look forward than backward; hence the title for this lecture, "Same Song, Second Verse." In some few of the several dozen suggestions I made then, headway has been made. This progress is obviously not the result of anything I said, but simply because the time had come.

Except for expansion of the Federal Judicial Center and creation of the National Center for State Courts, the vast changes proposed fifteen years ago either have not happened or are happening slowly. We have not got auto accidents out of the court systems, and it no longer appears very likely that we will. The single most important recommendation of yesteryear, that all lawsuits be broken down into a series of decision points and that as many as possible of them be disposed of summarily, is making some headway. Despite the admirable efforts of Chief Justice Burger, the concomitant proposal to measure all legislation in terms of the decision point impact on the courts, remains

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1. J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM (1969).

more an aspiration than a reality. The recommended amplification of Federal Rule of Civil Procedure 36, which would have imposed heavier costs upon losing parties who refuse to admit, has made very little progress. The Supreme Court in a lamentable decision has, by preventing the allocation of costs to losers, restricted the application of Federal Rule of Civil Procedure 68 instead of expanding it.[2]

The original recommendation suggested that a Warren Commission Conference be called to develop a Marshall Plan for American justice. No conference has been called, although under the leadership of American Bar Association President Janofsky, an Action Commission has been created that is seriously trying to resolve some of the problems that lie before us.

In 1969, I was looking into a clouded crystal ball and never anticipated the bleak times that would lie ahead in the next ten years. Who could know that expanding population would puff up the litigation system to anything like its present volume? The rise and fall of the Law Enforcement Assistance Administration, which was a sincere attempt to get money where it would do some good in law enforcement and for other purposes, represents a noble effort now snuffed out.

There is some hope that the State Justice Institute Act introduced by Senator Heflin of Alabama and Representative Kastenmeier with strong bipartisan support, may repair some small part of the loss so far as state courts are concerned. The happiest new development in the education of judges has been the creation of a masters program for judges at the University of Virginia Law School. This program, which is a wise mix of the intellectual and the practical, was put together partly by Professor Meador, who heads it at Virginia, and Justice Cameron of Arizona for the state courts.

The tragedy of the decade is the determined effort to wipe out legal services for the poor; this effort is the blackest blot on the contemporary scene. It is simply incredible—beyond one's wildest imaginings—that a national administration could seriously set out to bar the poor of the country from all access to justice. Great as is the need to reduce caseloads, the price should not be frustration, bitterness, resentment, and a universal sense of injustice. I have spent enough hours myself as a volunteer in a legal aid office to know what it means to the economically disadvantaged in my own community to have a resource to which they can turn when the pressures of life become inexorable. As for myself, I would not be willing to give up this little social service for the sake of thrusting an MX missile onto the landscape of good friends from Utah who do not want it anyway. During the 1960's, in a momentary burst of social reform, the law offices themselves were carrying on a great deal of public service work. Perhaps this sense of

2. Delta Air Lines v. August, 450 U.S. 346 (1981).

social responsibility can be revived, but meanwhile we should not eliminate the public alternative.

Let me turn from this morose retrospect to an affirmative foresight. In this few minutes I can do no more than hastily run through a list in the hope that, in the rapid enumeration, each of you may find something that fits your own interest and your own thinking. Many of these ideas apply equally to the federal and state systems because the problems are endemic to both, although some of the ideas are more applicable to the federal system.

The Federal Structure

I have written my praise of Chief Justice Burger in his efforts at improved judicial administration, and will enlarge on that theme later. In one or two respects, however, I think he is as wrong as he can be, a privilege he good-naturedly concedes. In respect to the management of the Ninth Circuit, Chief Judge James Browning is on a better track.

Earlier this year, the Chief Justice advocated splitting the Ninth Circuit into three separate units. This idea, with all deference, is a genuinely bad one. Fortunately it seems dead in the water. The Fifth Circuit could be divided because it was a shoestring-shaped circuit, running from Florida to Texas.[3] Whether it should have been divided is another question, but at least a scissors could be taken and a snip could be made in the middle. The Ninth Circuit is not so easily tailored. The bulk of the work in our giant circuit is in California and Arizona, and, primarily, in California itself. A division of California is highly objectionable and nothing else would make much difference. If California were carved out as a one-state circuit, leaving Arizona to dangle at the bottom of a cresent that runs north to Alaska and west to Hawaii with its administrative center in Portland, we could not be blamed for being unhappy.

Judge Browning's approach towards keeping the circuit unified far transcends these relatively petty factors of convenience. If we make more circuits, we necessarily make more conflicts, and we increase the business of the Supreme Court instead of reducing it. We are maximizing our problems instead of lessening them. The goal should be to have larger circuits, not smaller ones, to take the pressure off the Supreme Court by resolving conflicts on a regional basis.

In the Browning administration, the problem of resolving conflicts within the circuit has been well resolved by the creation of an en banc system of eleven judges, a majority of the court, to decide the very important or conflict type cases. Judge Browning's name is used here

3. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

symbolically because the entire enormous circuit of twenty-three had to agree on a system. All the same, one can detect the gentle but effective leadership of the presiding judge. It is true that Mr. Seth Hufstedler and I, resisting in Congress the abortive effort to split the circuit, advocated an en banc procedure with a panel of seven because every extra judge derailed from his or her regular duties for en banc purposes is necessarily pulled away from normal functions, and with the heavy caseload of the Ninth Circuit, this waste is hard to bear. I would observe that, if nine judges are enough to make the final decisions for the country as a whole, probably something fewer than eleven would be adequate for our western region. All this depends on how one feels about getting on with the business at hand. Nonetheless, the difference between seven and eleven is not important enough to matter.

What is important about the Browning system is that it is working; we are settling our differences at home and thus avoiding the necessity of shipping them off to Washington. The Browning plan reduces the burdens in Washington instead of increasing them, and this reduction is much to be grateful for.

Criminal Justice

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Domestic crime has become a flaw in the fabric of American life that takes its place in an awesome and ugly trinity with inflation and unemployment as the greatest problems of our society. We as lawyers and judges, in an institutional sense, cannot do much about two of those problems, but we can do something about crime. We cannot do as much as we are charged with being responsible for; the attacks on the judiciary in this connection are the worst kind of cheapshot demagoguery, worth only total contempt. At the same time, we have a duty to be sure that we are doing as well as we can with the tools we have. We cannot expedite the trials to conviction in the cases that are never brought because the police cannot find the culprits. If our homes become fortresses, armed or unarmed, and our streets become battlegrounds and jungles, it would be because of a social deterioration essentially beyond both our causing and our control. Nonetheless, there is action to be taken in our own front yard.[4]

4. Widespread social deterioration does not exculpate lawyers from their share of responsibility for a decline in morality that contributes to a rise in crime. The episodes surrounding the Nixon impeachment, for example, were not a proud day either for the country or for the profession. Insofar as the actions of some in the legal community cause a lessening of respect for law, we must accept a portion of the responsibility for the problems we face.

Over-refinement and Delay

The great truism of the criminal law, as Justice Clark observed in his preface to these lectures of a decade ago, is that "sure and undelayed punishment for those who offend the law is the greatest of all deterrents." As far as I am concerned, and I think so with most of you, we are engaged in a great conflict testing whether any nation dedicated as is ours to liberty and justice can survive. I have absolutely no sympathy for those who criticize the Speedy Trial Act[5] and lament that civil cases must stand in line while the criminal cases are moving, nor for those judges who are pushed to precipitate action in last-day situations because cases are required by law to move. Of course, it is extremely unfortunate to delay civil litigants, from the auto accident victim to the business contestant or the consumer with a fair complaint. Yet to the householder whose home is broken into, to the woman who is raped in the streets, to the family of an innocent who is murdered while minding his or her own business, it is simply not very important that an auto accident case is going to have to wait. If the exigencies of the law require, as they did a few years ago, that every single division in New York City be taken off civil work and be put into criminal work, then so be it.

The fifteen million Americans in military service during World War II did not enjoy their life interruptions very much either, and the domestic citizenry who faced rationing and other severe controls had fair cause for complaint, but they could perceive the relative value of things and very few of them did complain. We, too, must not complain. No matter what the sacrifice to the rest of the system, a sure and swift criminal justice is the most important value we can deliver.

In part, this goal of a sure and swift justice means that some of our refinements need to go. This statement is not to suggest, however, the barbarism of the so-called fair trial accompanied by the inevitable speedy hanging. I have fought my own battles, in favor of the *Miranda* rule, for example, or against the death sentence. Nonetheless, starting from the unarguable premise of the need for fairness, the views expressed on this point a few years ago by that great leader of the American bar, Dean Erwin Griswold, are sound. He wrote that, when a typical collection of study materials in criminal law consists of four parts criminal procedure to one part substantive criminal law, the system has become overly complicated and overly precious.[6] As a concrete illustration, *Anders v. California*[7] is a time-consuming, money-costing myth and it ought to go. The expansion of the law of chal-

5. 18 U.S.C. §§ 3161-3174 (1976 & Supp. III 1979).

6. Griswold, *Criminal Procedure, 1969—Is It a Means or an End?*, 29 MD. L. REV. 307, 307-08 (1969).

7. 386 U.S. 738 (1967) (appointed counsel for indigent appealing defendant who finds

lenges to the competence of counsel is a game clearly not worth the candle. First we try the defendant, then we try his lawyer, and then we try the judge who tried the lawyers. I oppose the interruption of criminal cases with interim appeals, and decry the spread of *Abney v. United States*,[8] which should be confined to its facts. The way to get on with criminal cases is to get on with them. Continuances should be an extraordinary exception. This country should adhere rigorously to the fundamental premises of the fourth, fifth, and sixth amendments without refining them into a series of endless ceremonials.

Collateral Attack

I supported the rule that became *Gideon v. Wainwright*[9] for twenty-five years before it was adopted by the Supreme Court and believe in it absolutely. Collateral attack should be restricted to situations of this sort, to the absolute fundamentals of a fair trial; but, with my next suggestion, collateral attack can largely be avoided altogether.

A Special Court

Collateral attack is necessary because it is impossible in each case to achieve res judicata through denial of certiorari by the United States Supreme Court. In other words, there is no practical way in which federal questions can be raised and carried to the federal system by direct appeal. There are simply too many cases; there are thousands of them, and the Supreme Court can in fact hear perhaps 150 cases a year. Hence it has wisely concluded that the denial of certiorari will not be regarded as having a res judicata effect, thus permitting habeas corpus proceedings in the federal courts or, as has happened in the past ten years, the creation of parallel collateral attack systems in the state courts. The result is thousands upon thousands of retrials of criminal cases after they should be done.

In recent years, Dean Griswold, Judge Haynsworth of the Fourth Circuit, and Justice Cameron of Arizona have argued strongly in favor of a special intermediate federal court that would be large enough to review the state criminal convictions fairly and to give them res judicata effect, thus eliminating collateral attack very nearly altogether. The adherence to this proposal by Justice Cameron, in his capacity as head both of the Appellate Judges Conference and as former Chairman of the Conference of Chief Justices of the United States, is particularly

appeal wholly frivolous must so advise court, and must file brief referring to anything in the record that might arguably support appeal).

8. 431 U.S. 651 (1977) (denial of motion to dismiss criminal case on claim of double jeopardy is a final judgment, appealable when made without awaiting trial of the case).

9. 372 U.S. 335 (1963).

important. It indicates a willingness by the state courts to accept such a system.

This system can be combined with some of the earlier concepts of a special federal court of review stemming from the dialogue begun by the Chief Justice and carried into its first form by the Freund Commission. The Freund Commission proposals, as originally made, raised certain problems now widely recognized and started an invaluable discussion, which should not be allowed to die. Basically, the Freund Commission proposed a court of entry to the Supreme Court. In civil matters, we do not need a court of entry, and it is undesirable; but in the criminal field we need it very badly. In the civil field, what we need is a court of exit from the Supreme Court—a special national court to which the Supreme Court can refer those conflicts that are too numerous for it to handle, yet that warrant decision. A court of original appeal with res judicata authority in the criminal field would take thousands of duplicative criminal cases out of the state and federal systems. A court of exit for the surplus cases coming to the Supreme Court could be similarly valuable. By marshalling the proposals of Dean Griswold and Judge Haynsworth on the federal side and Justice Cameron on the state side, we may well have a true improvement of a grave situation.

Legislative Awareness of the Costs of Lawmaking: Decision Points

Of all the phrases in my earlier lectures here, the phrase "decision points" has most nearly come into common use. What that term means is that every lawsuit can be thought of as a series of separate, individual decisions, each of which can be called a decision point. To repeat from ten years ago, let me illustrate with a routine personal injury case. A complaint is filed. Assume that the state requires that process be served by a person over the age of twenty-one who has been a resident for a year. Arguably, the person who served this process was not properly qualified to do so, and the defendant moves to quash the service of process. The court must then decide whether the service is good or bad. Let us assume that each side puts $250 worth of time into preparation of a memorandum, affidavits, and oral presentation. The court listens for fifteen minutes, looks up a little law, and fifteen minutes later makes a ruling. At that point, two things have happened: the litigation has been loaded with a $500 cost, and thirty minutes of court time have been spent in making a decision. If the state had not had the requirement that the process server be a resident for one year and over the age of twenty-one, there would have been no issue. The $500 would not have been spent, the half hour not expended. In short, when the state

created the particular requirement, it created a decision point and with it the attendant costs in time and dollars.

The whole case becomes a series of these points. The goal should be to eliminate as many as possible, to merge as many as possible, and to permit as many as possible to be disposed of by summary order all at one time.

It is here that the legislatures and Congress are doing their worst, and it is here that Chief Justice Burger is trying to do his best. We have environmental impact statements for other purposes. There ought to be a judicial impact statement for every statute. Every law that is passed should be examined to ensure that the smallest possible number of burdens are being placed on the courts.[10] Not everything will permit a black letter, and the avoidance of decision points is not the only goal; justice must come ahead of efficiency. But every time a legislature calls for a "reasonable allowance," or says a regulation shall be measured by what is just and proper, or in any other legislative way throws in the sponge because it does not really know what it wants to do, the legislature simply pours more water into an overflowing judicial sea.

Decision points should not be avoided like the plague; they should simply be recognized. Environmental law, for example, adds decision points; the social value may well be a legitimate trade off. At least it should be a witting trade off, one in which thought is given to the amount of court time it would take as against the social evil that is sought to be controlled. Chief Justice Burger is not saying that legislatures should never add burdens to courts. What he is saying is that

10. Wise critics to whom I have circulated this essay for comment have conflicted on who is the greatest sinner in the world of avoidable decision-point production. Some find the judiciary the worst offender; others would make it the legislature. Judge Haynsworth, until recently Chief Judge in the Fourth Circuit, made the following comment:

"There is one additional matter which you might consider. It is analogous to your position that needless decision points should be eliminated.

"The primary reason for the tremendous expansion of the federal judicial system in the last twenty years is the enactment by Congress of statutes creating private or public rights of action with jurisdiction in the federal courts. I have no quarrel with the congressional exercise of its right to remedy evils, but the Congress has been so enamored of the notion of judicial review that on many occasions it has expanded jurisdiction without considering whether other remedies might be more effective or less expensive or both. The Truth-in-Lending Act, for instance, has no means of enforcement except maintenance of a private right of action. The $1,000 penalty and the lawyer's fees provide the incentives. No direct appropriation to an enforcement agency of the Executive Branch was required, but enforcement, of course, requires the time of judicial personnel. The maintenance of such newly created rights has occasioned the appointment of many new judges, law clerks and secretaries, the construction of new courtrooms and the enlargement of clerks' offices. A small administrative agency with power to assess civil fines could enforce the Truth-in-Lending Act much more effectively and much more cheaply than can the courts." Letter from Judge Clement F. Haynsworth, Jr., to John P. Frank (June 17, 1981) (on file with the *Hastings Law Journal*).

these should not be mindless burdens, and that whenever better drafting would eliminate problems or decision points, legislatures should make these changes. Every view advocated here pales into insignificance as against this view: fifty state legislatures, one Congress, and countless administrative agencies issuing regulations can, through sheer slovenly carelessness and want of thought, make the judicial system absolutely impossible to operate. This deterioration is precisely what is happening. Let me challenge you as judges to ask yourselves how often you have run into a situation in which, if only the lawmakers had thought a little deeper and a little harder, your problem, and all the time and cost it took to solve it, would have disappeared entirely. To that aggregation of loud mouths in high places who decry judicial lawmaking, the response is, in the name of decency, make the laws yourselves.

Separating the Good from the Bad

In a time of reform, and when there is a sense of the necessity of reform, all sorts of ideas come afloat. Our task is to separate the good from the bad. Here are illustrations of each.

Diversity Jurisdiction

There has been much talk in Congress in recent years, now apparently abated, of moving some 30,000 diversity cases from the federal courts to the state courts. This proposal has been opposed by the American Bar Association, by the American Trial Lawyers Association, and, surprisingly, by fifty state bar associations. Dumping federal cases on state courts is the exact reverse of improvement; it is buck-passing. If we can reduce the number and complexity of cases, good. If we merely move the refuse from one pile to another, we do no good at all.

Patents

An even worse refuse-shifting proposal is that now actively moving in Congress to take all the patent cases out of the federal circuit courts and concentrate them in what would be a new court—a combination of the Court of Claims and the Court of Customs and Patent Appeals. Implementing this proposal would mean that everyone in America who has a patent problem at home would have to go marching off to Washington to get the answer. It would mean, without much respect, that we would be dumping into what have historically been two of our worst, slowest, and most expensive courts business better left for the people at home. It would mean, finally, that we would be creating a tribunal in which large corporate contributors, by controlling the appointment of one or two judges, could tax the entire population of

the United States in violation of the spirit of the antitrust laws. This proposal is retrogression masking as reform.

Settlement Devices

On the other hand, settlement devices in the trial courts, whether by mediation panels or by skilled judges, are reforms that need active promotion. During the period of his activity, a great judge like Judge Gumpert in the Los Angeles area was able to work miracles in disposing of cases without trial. There are countless methods; a particularly good one was used in Detroit during the lifetime of the late Chief Justice Kavanagh. Under this method, a mediation panel put a price on a case, which the parties were free to reject if they wished, but the party that guessed wrong, if wrong by more than a certain percentage, paid counsel fees to the other side. The device reduced the volume of the docket significantly. We need active experimentation with measures of this kind, which will take cases out of the courtroom entirely. They depend fundamentally on the use of trial judges who were seasoned trial lawyers or panels that are highly experienced and know how to put a price tag on a case. I regard this as an enormously hopeful mechanical device and would like to see it widely tried.

Consultation and Carry Through

The plea made twelve years ago for a "Marshall Plan" for law reform, based on a National Conference for Improvement of Justice, remains a fair idea. Not much progress can be made by isolated expressions such as this one of mine; indeed, you may discard them as simply a bundle of prejudices and perhaps you are right. What is needed is for leaders to put their heads together. Under the very dynamic leadership of Professor Rosenberg of Columbia, Professor Meador at Virginia, and Dean Carrington at Duke, there have been worthwhile national conferences on appellate improvement, which have resulted in concrete proposals that, in many cases, are working well. The Janofsky Action Commission, chaired until recently by Mr. Hufstedler, gathers together lawyers, professors, and judges from around the country. It has been funded by the American Bar Association and by foundations, and is well staffed. Ideas are hammered by consensus and experiments are undertaken. A great contribution of Mr. Janofsky, above all others, is his role in persuading the American Bar Association to conduct long-term projects. To paraphrase Chief Justice Vanderbilt, law reform is no sport for the short-winded, and annual modifications of policy with each change in the administration of leading legal organizations are doomed to futility. Yet, for all the value of those enterprises that I have been describing, these are relatively small improvements. They show what could be done with more

far-reaching reforms. We need more money, more time, more determination. The federal and state centers provide many of these resources. The State Center under Mr. McConnell has become one of the most creative appellate centers in America, and it would be a calamity if lack of funds were to curtail this invaluable program.

Our task is twofold: first, find a means of settling on deliberate policies; and second, find a means of staffing and executing experiments to determine whether reform proposals are workable and helpful. These thoughts lead me to my concluding point.

This is the Place

May the spirit of Brigham Young not deem blasphemous my borrowing of his famous phrase because of the depth of the conviction with which I utter it: This is the Place.

We are in the center of an institute dedicated to the memory of Earl Warren, the great Chief Justice. Earl Warren deeply believed in the fair administration of justice and in the reform of the administration of justice to make it workable and to bring it within the reach of all.

In the course of my remarks this evening, I imagine that I have stepped on as many tender toes and gored as many sacred oxen as anyone is likely to in this compass of time, and so I may as well go for a clean sweep. When I helped to dedicate this building some twelve years ago, it was with a spirit of profound optimism that it would be used to promote improvement of judicial administration. The Institute is being used hard and well. It assists in the raising of research grants. In the recent past, it has had programs on economics and government, on important first amendment issues, and on psychological consequences of divorce, and this is but a smattering of the activities.

All the same, with full appreciation that the relatively casual act of having been in on the creation gives one no proprietary rights to direct the course of the universe, aside from a couple of judicial conferences like this one each year, there has not been much in the Institute in the field of judicial administration. Earl Warren was a dear friend as well as a beloved leader. I came here twelve years ago in the sincere hope that we were truly dedicating an edifice in which his spirit would go marching on.

In all candor, I do not hear his falling footsteps. So far as I know, I am in touch with nearly every procedural reform activity in the United States, and in twelve years I have heard none emanating from here.

The need is greater now than ever before. The federal government is withdrawing from a position of leadership and, what is more, from a position of funding. Of course, this great state has its problems with

Proposition 13.[11] Nonetheless, it is the most populous state in the union, and this is one of the finest universities, with one of the noblest law schools in the land. The Ninth Circuit is about to have a new executive; hopefully, both federal and state liaisons of cooperation can be worked out with the Earl Warren Institute. The responsibility for making so little use of this Institute for purposes of improving the court system must lie primarily upon you, the judges, and the bar.

Cannot this bar, this university, this legislature, you judges take advantage of this facility by finding ways to fund and inspire the projects of cogitation and experimentation that we so badly need? Cannot this building become a center for debate and an inspiration for action? America found its intellectual legal leadership in Chief Justice Traynor; some years ago, in testimony before a federal commission on a proposal to move Arizona away from California in the circuit, I said truly that "Chief Justice Traynor is our Chief Justice too." Not since Cardozo has there been any figure who so totally blanketed the country in imagination and in leadership as this one man.

This great California spirit cannot, and surely does not, want to coast on its yesterdays. You had Chief Justice Traynor, and you had Earl Warren. Now, I beseech you, give leadership to our country in the reform of the system of justice under which we operate. I propose, unabashedly and without humor, that your university, with the support of all the powers in your state, seriously mount and launch a program for the reform of practically everything in the system of justice. The challenge may seem great to the point of the absurd, but it is not too much for a needy country to ask of this great university in our foremost state.

11. CAL. CONST. art. XIIIA.