Maine State Bar Association
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The Quality-Quantity Crunch

I thought I'd start out with what I know best, my own problems, and then extrapolate a bit - because I think my problems are linked with your problems. It is hard for me to realize, but I have been on my court over seven years. This is almost the length of time in which I practiced law in Maine, almost twice my time in Congress, and twice that in the executive branch. In that period I have seen our case load zoom from 200 cases a year to over 400, my yearly opinion and memoranda rate go from thirty to seventy-three. We, still the smallest circuit court, with the irreducible minimum of three active judges, have coped with this rising flood by screening cases in advance, selecting some for summary affirmance or reversal, limiting or eliminating argument, resorting to unpublished opinions or memoranda and orders, and, simply, working harder.

At times I look back 2300 years to the reign of Chandragupta who managed, in seven years, to wipe out all of Alexander's authority in India and then to rule in a golden reign for 24 years. We are told by a Greek ambassador of those times, that the people of India lived a happy life. Said he, "The simplicity of their laws and their contracts is proved by the fact that they seldom go to law. They have no suits about pledges and deposits, nor do they require either seals or witnesses, but make their deposits and confide in each other." If you wonder how this state of affairs was brought about, perhaps part of the answer lay in the asserted fact that Chandragupta divided his day into sixteen periods of ninety minutes each, saving only three of them - or 4-1/2 hours - for sleep. If cutting down a bit on sleep would reduce litigation, I am sure that most Judges would be tempted to try it. But then you and we would be out of work and we'd be very tired.

There must be a better way. And a search for better ways of improving what, to borrow a term from our medical friends, we might call the justice delivery system is rapidly becoming a major preoccupation of our times. This is the beginning of one of those infrequent periods of ferment when the American people turn their attention to the fundamental institutions of their Justice system. It does not happen often. It happened in 1891 when the pressures on the Supreme Court produced the Evarts Act creating the federal circuit courts of appeal. It happened in 1925 when the same pressures led to the institution of discretionary appeals to the Supreme Court by certiorari rather than by appeals of right. Now, almost five decades later, we are seeing a resurgence of institutionally-oriented reform.

This is quite different from the constant processes of change in substantive and procedural law to which we have become accustomed in the past forty years - the development of administrative law in the 'thirties; the widespread replacement of common law pleading by, first, code provisions, and then new court-authorized rules of civil procedure, also beginning in the 'thirties; the creation of the declaratory judgment remedy also in the 'thirties; the century-delayed enforcement of civil rights commencing in the 'fifties; the enlargement of civil liberties begun in the 'sixties. Indeed, looking back, it is remarkable that our justice system was resilient enough to absorb these changes within its structure. But the increase of population - fifty per cent in the quarter century since I started practice; the inexorable tide of technology and urbanization; the rediscovery of the equal protection and due process clauses of the Constitution; the spread of

civil rights, environmental, safety, consumer, housing, welfare and other social and economic legislation; the awareness of their rights on the part of tenants, welfare recipients, students, teachers, prisoners, conservationists, stockholders, voters, draftees, servicemen, government employees, the press, blacks, Indians, Spanish-Americans, other minorities, women, the poor; the outpouring of alert young lawyers from the nation's law schools; the widespread existence of legal assistance and public defender agencies; new concepts of standing to sue, class actions, officials' responsibility, and products liability - all these causes have coalesced to produce an ominous and ever-rising tidal wave of litigation of increasing complexity.

In the federal system, cases in the district courts have risen from 87,000 in 1960 to 143,000 in 1972, an increase of 64 per cent; appeals to the circuit courts have risen from 4,000 to 14,000, an increase of 270 per cent; and cases on the Supreme Court's docket in the same time span have doubled, and, in the past thirty years, have quadrupled. The pressures on the state system are best known to you, but reflect the same exponential curve.

So it is not surprising that this decade has ushered in proposals for reform unparalleled in our history. A partial catalogue reveals their scope. Some are relatively minor institutional or procedural changes, such as the decriminalization of some crimes, shifts in federal and state Jurisdiction, resort to parajudicial personnel for help in screening cases, the use of magistrates in petty cases, the creation of the profession of court executives, omnibus pre-trial hearings in criminal cases, the limitation of oral argument, summary disposition without opinion, limitations on publication of opinions, vigorous time limits for the prosecution of criminal cases, resort to computerized case management techniques and videotaped depositions, and the creation of more judgeships. Other proposals are more fundamental: the adoption of the six-man jury; provision for majority verdicts; abolition of the grand jury; creation of intermediate appellate courts and of specialized courts; abolition of appeal as of right to the highest court of a state; the reduction of formal legal education to two years and far—reaching curriculum changes; the establishment of ombudsman-like institutions to investigate and process prisoner complaints; a community arbitration service outside the court system for small claims; and the creation of new institutions to direct the course of institutional reform -the Federal Judicial Center, the National Center for State Courts, and the proposed National Institute of Justice. Finally, there are two proposals which go to the basic structure of the federal court system: the reorganization of federal circuits; and the creation of a new National Court of Appeals.

The circuits have remained unchanged since federal courts of appeal were created in 1891 to help relieve the pressure on the Supreme Court. Now Congress has directed that a Commission undertake a study of the circuits and propose changes in geographic allocation, in numbers, and even in the manner of their operation. Their growth has varied so widely that the distortion in pattern is enormous, ranging from the far-flung Fifth and Ninth Circuits with twelve and fifteen active judges to our own tiny First, with three active judges. To increase the large circuits seems inadvisable; to increase the number of circuits will add to the burden of the Supreme Court; to reallocate states to different circuits poses tangible political problems. The solution, called for in a mere six months* time, would tax the wisdom of Solomon.

The most fundamental change of all is the new proposal of a prestigious group of scholars headed by Paul Freund of Harvard to create a National Court of Appeals. This would consist of seven judges drawn on a rotating basis from the federal courts of appeals to serve staggered three-year terms. It would give the final decision on all except the most momentous conflicts between the circuits and would screen all of the 4,500 petitions for certiorari and appeals that now go to the Supreme Court, referring from 400 to 450 to the Supreme Court, and

denying the rest. The Supreme Court would pick its cases for argument and opinion from these cases.

All of these proposals wrestle with the quantity-quality dilemma. For the process of justice necessarily implies a mind-crafted, carefully sculpted result harmonizing insofar as possible general principles and precedents to fairness in the case at bar. It is of the essence of the pre-industrial age. As Professor Freund says, it is "at the opposite pole from the 'processing' of cases in a high-speed, high-volume enterprise." But all of the forces of demand leading to mass production of goods and services bring their pressure to bear on justice. What is finite and limited is the supply of judges. And they cannot, like Henry Ford, convert to mass production, automation, or, let us hope, to synthetics. Nor can we deal with justice as we do when we face a scarcity of goods, and ration it.

The next few years will be years of testing our deepest wisdom. We reshape our institutions at our peril, for institutional changes are much less easy to repeal than substantive or procedural laws. Perhaps we have no other choice for a people's confidence in the justice system erodes when existing institutions do not work well. To this process of institutional reform the bar should dedicate its best efforts. No group of technicians, scholars, or legislators can quite duplicate the experience and intuition of those who inhabit the courts. If the quality of justice is not to be sacrificed to the demand for increased quantity and speed, the bar as the court's best amicus curiae must involve itself to the end that each institutional change not be adopted without the most probing and reflective deliberation.

I have been referring to the national picture. Speaking to you now as the bar of Maine, I make the same plea. Only here your opportunities to resolve the quality-quantity crunch face brighter prospects. In the field of justice as in so many other fields, our problems are more manageable than in megalopolis. But they won't manage themselves. I sometimes wonder if we don't take our court system for granted. Perhaps the fact that Maine is 43rd in the salary level of its Supreme Court Justices, and the lowest in New England, means that we are willing to exploit the sense of honor and dedication of the fine lawyers who, over the years, have embellished our highest court. Perhaps because we expect and receive so much from all our judges we have not provided them with the law clerks whose assistance can spare a judge exhaustion from the many labors of corroborative research and double-checking of authorities which go into a polished opinion. And we have such confidence in the penmanship of our Superior Court justices that we provide them with no secretarial help. I question whether, when we deal with a system of justice, we really can afford the luxury of these indignities. But wholly apart from them is the critical question of basic institutional change in Maine's justice delivery system - whether, from the viewpoint of either quality or economy - the management of scarce human personnel and courthouse facilities, we can afford to perpetuate a hydra-headed, almost system-less administration of our superior courts, with the state and sixteen counties sharing responsibilities. The Judicial Council of Maine has studied and recommended a proposal for a more centralized state court system; your Board of Governors has endorsed it in principle. But, without the bar as a whole involving itself in depth in this issue, informing itself completely, making every effort to reconcile the legitimate interests of the counties, of the consumers of the justice system -the lawyers, litigants, judges - and of the state and its taxpayers, I suspect that something less than adequate and timely institutional reform will take place.

In short, I suggest that we are taking too narrow a view of the responsibilities and opportunities of ourselves as members of a modern bar association. I believe that it is possible to achieve a system of justice in Maine, without intolerable expense, which need fear comparison

with no other state. But that happy result depends upon the bar becoming a real amicus curiae - a friend in deed in time of need.