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THE Board of Editors, hoping to create some novelty in its first issue, has suggested to its contributors that they engage in some soothsaying on the future development of the law. Frankly, I have no clairvoyance; but this newborn HOFSTRA LAW REVIEW and its Staff entrance me, and I offer some calculated guesses on a purely novelty basis.

Let me first congratulate the Law School on conceiving and achieving this first issue. It has taken great courage, much maneuvering and lots of hard work. As it joins the array of law reviews I hope that HOFSTRA will bring a love for justice to all with whom it comes in contact.

BACKGROUND FOR CHANGE

Some say that the present profile of the judicial process is the weakest in our history. That it has seriously deteriorated of recent years is evident. However, we have brought much of its present defacement upon ourselves. Although Dean Pound called out a shrill warning in 1907, we turned him a deaf ear. Since that time five Chief Justices of the United States, some Chief Justices of the State courts and other dignitaries have made repeated calls for the humanization of our laws and the modernization of the judicial process. For example, one Supreme Court Justice, later Chief Justice, Harlan Fiske Stone, back in 1934, looked for "a new force in American legal life,"[1] but it failed to show. We heard each of these cries and did much talking but took little action.

This Rip Van Winkle attitude is nothing new. Four hundred years ago a like call for reform was made by Francis Bacon, Lord Chancellor of England. It also fell on deaf ears. Bacon made his call in the form of a message—a "Proposition" he called it—to James I

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1. A. T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 381 (1956).

to prepare a Digest of English Laws, to expunge all obsolete laws from the new Digest and to strip those remaining of any contradiction. Bacon's Proposition died a'borning. However, as Lord Chancellor, he was able to change the structure of the Chancery Court and modernize its procedures so as to bring "speedy justice in a court notorious for delays .... Talkative lawyers were rebuked, sometimes held in contempt, as with one barrister whose argument covered ten skins of parchment 'containing . . . idle and impertinent matter for the purpose of putting the plaintiff to unnecessary trouble and expense to the derogation of the court.' "[2]

Indeed this change in times also brought a change in substantive law. The Lord Chief Justice, Edward Coke, had held that the King should not be under man but under the law and under God, citing Lord Bracton. But James reprimanded him at the instance of Bacon, and the Royalist doctrine that the judges were lions, but under the throne, became the rule of decision. Later Bacon, in turn, was repudiated and after several about-faces between the Royalist philosophy and that of the common law, England settled down to a system of parliamentary government. But it took over three centuries in the settling process.

Reasons for Change

My brother Frankfurter attributed changes in the law to "The eternal struggle . . . between constancy and change . . . largely a struggle between history and reason, between past reason and present needs."[3] I would amplify my brother's views by submitting that *present* experience, *present* memory of the past and *present* expectation for the future bring *present* changes in both our substantive and adjective law. By present experience I mean the development of science, medicine, literature, education, business and morals among the people. I add morals because the law reflects the mores of the people. They suffer only those laws which they themselves can endure. By present memory I include the history and philosophy of the law as well as of civilizations; and by present expectation, I include those social, material and religious needs that the people insist upon for themselves.

The Inevitability of Change

The law has changed through the ages because people demanded it and often gave their lives for it. Liberty comes only to those who

2. C. D. Bowen, Francis Bacon 122 (1963).
3. Frankfurter, *Mr. Justice Holmes and The Constitution*, 41 Harv. L. Rev. 121, 160 (1927).

seek it and, after securing it, remain always on guard to protect it. Aside from the use of force by revolution, liberty must be sought and sustained through peaceful means, such as exercise of the right to assembly and free speech, petition to constituted authority and use of the judicial process. Where one branch of government fails to respond to such a public demand, people resort to another branch of government and failing there to the third branch. The courts are usually the last resort because results are much slower. When bad situations are brought to the attention of the appropriate court, the judicial mind often seeks to fashion judicial procedures to honor the necessities of plain justice. Thus, even in the face of the doctrine of *stare decisis* a court might weigh the necessity that required the application of that rule in the light of the present situation. As Mr. Justice Cardozo cogently stated: "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function they are diseased. If they are diseased they must not propagate their kind."[4] And Mr. Justice Story said a century before, describing the views of Mr. Chief Justice Parker: "The rules . . . of all substantial law must widen with the wants of society; . . . they must have flexibility, as well as strength; . . . they must accomplish the ends of justice, and not bury it beneath the pressure of their own weight."[5]

The Predicted Changes

And so I believe that changes must come when the people demand them; that there are many demands being presently made; and these demands will be honored by some branch of the Government. We are, of course, bound to the past but we are not irretrievably bound to it. One need only cite the fate of *Plessy v. Ferguson*[6] to support this conclusion. When, where and how *to break* with such a rule is for us to decide. Only consider the recent case of *Furman v. Georgia*,[7] involving the infliction of the death penalty. When, where and how *to make* such a rule is for us to decide. And so, in my view, it is high time that we yield a willing deference to justice and bring about some changes:

A. *In the Law Schools*

It is said that "Law Schools cannot teach practice skills effectively because, for the most part, they do not have faculty members capable

4. B. Cardozo, The Nature of the Judicial Process 98 (1921).
5. J. Story, *Miscellaneous Writings* 210 (1835), excerpt in The Wisdom of the Supreme Court at 402 (P. E. Jackson, ed. 1962).
6. 163 U.S. 537 (1896).
7. 408 U.S. 238 (1972).

of imparting current practice techniques and skills."[8] To me this appears to be a serious indictment of law professors. I personally know many who are skilled trial lawyers. In my view, every law professor should have some trial practice in the courts; otherwise he cannot be a sound teacher of the law because he does not possess those insights so necessary to determine the details that make the law significant.

In view of this, the Professional Efficiency and Economic Research Committee of the Texas Bar organized a six-day skills training program for young lawyers to bridge the gap between law school and the practice. It includes training in file organization, necessary forms, systems analysis, fee setting and collection, client relations and billing, and some courtroom practice. The program is being reported as extremely successful. It is to be applauded, but the young lawyers involved in it could hardly learn much on courtroom practice. The importance of the program is that the Bar is taking notice of the need for trial court practice on the part of the young lawyer.

I submit that the law schools should themselves conduct practice clinics in the courts under the supervision of licensed lawyers. The clinics should be required in lieu of the present senior year, which is now a squeezed orange to the students. The clinics would be conducted in cooperation with the entire profession, including the Bar, the courts, the prosecutor, the defender, and other interested agencies, both judicial and administrative. In addition, the curriculum for the first two years of study at the law school would include instruction on judicial administration. Finally, the bar examination as presently conducted would be abolished and a more realistic test of the student's ability to practice law would be devised. "I really believe," said Mr. Justice Stone in 1934, "that the law schools will take the lead and ultimately turn the tide in the other direction."[9] The law schools did not follow the Justice's suggestion. But it's not too late. If the law schools will "turn the tide" by teaching advocacy through the use of clinics, both the profession and the courts will soon enjoy a better image. This is true because these young people will not put up with the present injustices of justice and the antiquated procedures used in many of our courts.

B. *The Bar*

In 1934 Mr. Justice Stone expressed his concern about the "commercialized" state of the Bar and its failure to rise above its basic,

8. 37 LEGAL ECON. NEWS 1 (ABA Stand. Comm. Econ. Law Prac. 1972).
9. MASON, *supra* note 1 at 384.

narrowly defined ideal of loyalty to private clients. He charged that the lawyer had forsaken his traditional role as guardian of the common welfare and did little to make law more readily available as an instrument of justice to the common man.[10] While the leaders of the American Bar Association are men of high character, great intellect and sincere dedication to the profession, they number a very small percentage of the profession. Lawyers still measure success, as Mr. Justice Stone said, "largely in terms of their professional income."[11] Just the other day I attended the meeting of a mid-Western Bar where a lawyer (during the "happy hour") said that he had recently attained the ambition of his life, a million dollar fee. When he said that he had not heard of another such fee since Frank Hogan handled the Teapot Dome Case, a listener said that he knew of several and he rattled off their names and states. At a Judicial Selection Commissions Study Seminar in Utah last Fall every lay member of the various commissions was present (numbering about twenty) and most of the lawyers were absent (about forty). At another annual meeting of a state bar, an out-of-state speaker from the East developed the art of the defense of narcotics cases. His presentation was directed to highly technical motions (relating, for instance, to tracing custody of the drug), how to outwit the prosecutor and the technique of "briefing" the defendant and hoodwinking the judge and jury. Apparently all of his clients were guilty but he had a knack for getting them not-guilty verdicts, suspended sentences or fines. This is one of the chief criticisms that is levelled at the Judiciary and here this lawyer was bragging about his prowess. He has not been properly trained in the duties of a lawyer. He worships false Gods—winning his cases regardless and making big fees. As far back as Aeschylus (458 B.C.) the Bar has been warned:[12]

> Yea, whatsoe'er befall, hold thou this word of mine:
> Bow down at Justice' shrine,
> Turn thou thine eyes away from earthly lure,
> Nor with a godless foot that altar spurn,
> For as thou dost shall Fate do in return,
> And the great doom is sure.

While the law of late has become more available to the common man, the credit is due largely to associations working in that field—

10. *Id.* at 376.
11. *Id.*
12. Aeschylus, *Eumenides*, in W. J. OATES AND C. D. MURPHY, GREEK LITERATURE IN TRANSLATION at 227 (1944).

not to the Bar. This was one of the chief complaints of Mr. Justice Stone almost forty years ago. Some of the larger firms are permitting *pro bono publico* work by juniors, but the typical scope of such work is highly restricted and fails dismally to bring justice to the poor. On the criminal side, appointed counsel are gradually becoming a handful of lawyers. Indeed, more and more counsel are making a living off court appointments and have so many cases on their docket that delays result.

Still we hear that Boards of Legal Examiners are being reminded by lawyers that the profession cannot absorb the high output of the law schools. More and more applicants are failing the bar. There may be too many lawyers but the country certainly has an acute shortage of capable advocates. The truth about it is that we need more lawyers. Millions of people are without legal representation. I have been hearing with increasing frequency of the plans being drawn for prepaid legal insurance similar to hospital and health insurance in the medical field. And federal poverty legislation includes funded legal service projects. All of these innovations will require the services of more and more lawyers, and we must be ready to meet them. It is a shame that we do not already have group legal insurance. The Bar should have had foresight sufficient to organize such a program years ago. Moreover, the recent Supreme Court case extending the right of counsel to all persons facing a jail sentence[13] will also require a large number of conscientious lawyers. The Bar has neglected indigent cases on the ground that there were not sufficient lawyers. They cannot have it both ways!

The Bar has also neglected to discipline its members. Although the American Bar Association adopted a Code of Professional Responsibility, as well as procedures for its enforcement, the Internal Revenue Service reports that a higher percentage of lawyers are found guilty of violating federal tax laws than is true of members of any other profession. This is an outrage. And I daresay *not one* has been disbarred. The reason is that failing to file an income tax return is a misdemeanor and does not involve moral turpitude!

These things must be corrected and I verily believe that they will when the *laissez-faire* attitude of the Bar is corrected. Again, the law schools, too, can be a force for good in this area by conducting seminars on legal ethics with the Bar.

13. Argersinger v. Hamlin, 407 U.S. 25 (1972).

C. *The Courts*

Our court system has been sorely neglected. The courts have not been given the tools necessary to modernize their techniques and procedures. More and more states are adopting new judicial articles that unify the system, install merit selection with disciplinary control in an independent commission and provide for modernization of court procedures. This takes time and money. The Bar and the law schools must take a stronger position in this program. The judges are now coming to realize the importance of this modernization effort but they cannot get the job done alone. We must have interested laymen join in the effort. Lawyers can be of particular effectiveness in interesting their clients in the program. Thus far the brunt of the effort has been made by The American Judicature Society.

D. *The Law*

If we can get some of these projects going, I submit that they will soon have a tremendous impact on the law. Through the law school clinics we can dispose of our criminal cases with swift dispatch and with more justice. We can do a much more effective job on bail, dispositions by plea, the trial of cases, the sentencing and correction of those found guilty.

We can, as Lord Bacon suggested 412 years ago, make a digest of our criminal laws, eliminate those offenses that should not be prohibited (*e.g.*, drunkenness, gambling where not organized, sexual intercourse by consenting adults, marijuana); revise our sentencing procedures, modernize our corrections, eliminate conflicts and do away with dual prosecutions, *i.e.*, federal and state prosecutions for the same offense.

These improvements will bring dignity to the judicial process and improve the image of the judiciary, the Bar and the law schools. We are all watching the course of Hofstra in these and related matters. It can be a leader—and quickly too—if it will act as one.

SOOTHSAYING

Some may wonder what has become of the prognosis on the substantive law. Let me give you a short resume. The Supreme Court will not overrule existing cases, such as *Brown v. Board of Educa-*

tion,[14] *Mapp v. Ohio*,[15] and *Miranda v. Arizona*,[16] but there may be some nuances of interpretation. Rather than restricting, I predict the Court will enlarge human rights, and those of juveniles, tenants, employees, etc. Antitrust may suffer some setbacks but nothing disastrous. Class actions will be refined and abuses eliminated. These decisions will improve our judicial system and add stability to it. State and federal judges will have a much better rapport and existing conflicts in state prisoner cases will be largely eliminated. Corrections will receive specific attention at both levels and will be vastly improved.[17]

14. 347 U.S. 483 (1954).
15. 367 U.S. 643 (1961).
16. 384 U.S. 436 (1966).
17. *Editors' Note:* In its original form the final paragraph contained the following sentence: *"In the criminal field the uniform rules of evidence proposed by the Judicial Conference will become law."* Two weeks after the Article was received by the REVIEW the Rules were promulgated by the Supreme Court, 41 U.S.L.W. 4021 (U.S. Nov. 20, 1972). As the REVIEW went to press it was not clear whether Congress would void the Rules within 90 days of their promulgation. *See* 28 U.S.C. § 2072 (1972).