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Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 72 U.S. L. Rev. 28, 42 (1938)

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Fri Aug 25 13:52:39 2017

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The Causes of Popular Dissatisfaction with the Administration of Justice

BY ROSCOE POUND

*An Analysis of Fundamentals, Published in the American Law Review
Thirty Years Ago, but Strikingly Appropriate Today*

DISSATISFACTION with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and to poor,¹ and the king exhorts that the peace be kept better than has been wont², and that "men of every order readily submit . . . each to that law which is appropriate to him."³ The author of the apocryphal *Mirror of Justices* gives a list of 155 abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased.⁴ Wyclif complains that "lawyers make process by subtlety and cavilations of law civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law."⁵ Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised."⁶ James I reminded his judges that "the law was founded upon reason, and that he and others

had reason as well as the judges."⁷ In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men."⁸ In the nineteenth century the vehement criticism of the period of the Reform Movement needs only to be mentioned.

In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or under-rating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first encountered, the tendency to give the fullest scope to the common-law doctrine of supremacy of law, and to tie down administration by

¹ E.g. Secular Ordinance of Edgar, Cap. 1; Secular Ordinance of Cnut, 2; Laws of Ethelred, VI, 1; Laws of Edward, preface.

² Laws of Athelston, IV; Laws of Edward,

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³ Laws of Ethelred, V, 4.

⁴ *Mirror*, Chap. V, sec. 1.

⁵ See Maitland, *English Law and the Renaissance*, 53.

⁶ *Id.* 42.

⁷ Conference between King James I and the Judges of England, 12 Rep. 63.

⁸ Lord Campbell, *Lives of the Chief Justices* (3d ed.), IV, 119.

common-law liabilities and judicial review, was until recently very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present-day administration of justice in America. Assuming this, the first step must be diagnosis; and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, moreover, to civil justice. For while the criminal law attracts more notice, and punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define those invisible boundaries within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer, and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.

With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) Causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our

Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

It needs but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor.⁹ It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any system of law I believe to be the following: (1) the necessarily mechanical operation of rules, and hence of laws, (2) the inevitable difference in rate of progress between law and public opinion, (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint.

II

The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring

⁹ Dr. v. Liszt, Professor at Berlin, delivered an address in the Rathaus in Berlin on this

very subject, recently, if we may credit press accounts.

the public administration of justice into touch with changed moral, social, or political conditions. But such periods of reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes stable and uniform, and the new element, whether custom or equity or natural law, becomes as rigid and mechanical as the old.

This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these

rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him

say with Luther, "good jurist, bad Christian."¹⁰

III

A closely related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated.

In a rude age, the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke down under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian dikastery, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than

the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules, once made, stand till abrogated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead.¹¹

The unconscious changes of judicial law-making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

IV

A third perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which any one is competent. Laws may be compared to the formulas of engineers.

¹⁰ Courtney Kenny, "*Bonus Jurista Malus Christa*," 19 *Law. Quart. Rev.*

¹¹ Spencer, *Principles of Sociology*, II, 514.

They sum up the experience of many courts with many cases and enable the magistrate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. None the less, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate, and legislative¹³ or judicial law-making against *stare decisis*, in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class-feeling, or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of courts of justice.

Another necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in

the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common-law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sagebrush," says Owen Wister, "ill tolerate anything which stands for discipline, good order, and obedience; and the man who lets another command him, they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted — namely, the spirit of independence gone drunk."¹³ This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man the commonwealth," says Hobbes, "and his command that maketh law."¹⁴ This man, however, is abstract. The concrete man in the street or the concrete mob is much more obvious; and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administra-

¹³ See an instance in the address of Mr. Justice Brown, *Rep. Am. Bar Ass'n 1889*, 282.

¹³ Quoted in Ross, *Foundations of Sociology*, 388.

¹⁴ *Leviathan*, Chap. 26.

tion of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different.

V

Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) the individualist spirit of our common law, which agrees ill with a collectivist age, (2) the common-law doctrine of contentious procedure, which turns litigation into a game, (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law, (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case-law.

The first of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, has been treated of on another occasion.¹⁵ What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common-law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers is mandamus or injunction by a tax-payer to prevent waste of the proceeds of taxation. The reliance for keeping public-service companies to their duty in treating all alike at reasonable price is an action to recover damages. More-

over, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief; if he hires as an employee, he assumes the risk of the employment; if he buys goods, the rule is *caveat emptor*.

In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortion at rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common-law methods of relief have failed. The courts have not been able to do the work which the common-law doctrine of supremacy of law imposed on them. A wide-spread feeling that the courts are inefficient has been a necessary result.

But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially in-

¹⁵ "Do We Need a Philosophy of Law?" 5 *Columbia Law Rev.* 339; "The Spirit of the

Common Law," *Green Bag*, January, 1906.

terested than in the protection of every individual's private rights."¹⁶ Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us. But the common-law guaranties of individual rights are established in our constitutions, state and federal. So that, while in England these common-law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people, and legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

VI

A no less potent source of irritation lies in our American exaggerations of the common-law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play,"¹⁷ as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet. But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take

it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice.

The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional foot-ball coach with the rules of the sport. It leads to exertion to "get error into the record," rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations."¹⁸ It prevents the trial court from restraining the billying of witnesses, and creates a general dislike, if not fear, of the witness-function, which impairs the administration of justice. It keeps alive the unfortunate Exchequer-rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the

¹⁶ 1 Bl. Comm. 139.

¹⁷ 1 Wigmore, *Evidence*, 127.

¹⁸ 2 Wigmore, *Evidence*, 1112.

game of justice.¹⁹ It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived.²⁰ The inquiry is not, what do substantive law and justice require? Instead, the inquiry is, have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers, in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses, and jurors, in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury-box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

VII

Another source of irritation at our American courts is political

jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics, and sociology, upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation.

This phase of the common-law doctrine was felt as a grievance in the seventeenth century. "I tell you plainly," said Bacon as attorney-general, in arguing a question of prerogative to the judges—"I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Michell."²¹ King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing the income-tax overthrown in a stockholder's bill to enjoin waste of corporate assets, and at seeing the important political questions in the *Insular Cases* disposed of in forfeiture proceedings against a few trifling imports.

Nor is this the only phase of the common-law doctrine of supremacy

¹⁹ *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100.

²⁰ *DeGraw v. Elmore*, 50 N. Y. 1.

²¹ *Collectanea Juridica*, I, 173.

of law which produces political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of habeas corpus which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight-rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

VIII

Lack of general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke,²² contributes its mite also toward the causes of dissatisfaction with the courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is, *interpret it*. But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common-law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it."²³ Thus another unnecessary

strain is imposed upon our judicial system, and courts are held for what should be the work of the legislature.

The defects of form inherent in our system of case-law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion, and incompleteness inherent in all case-law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision *somewhere* in support of any conceivable proposition.

IX

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay, and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

Our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves.

²² Co. Lit. Preface.

²³ *Fragment on Government*, XVII.

The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects.

Multiplicity of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts, and the private courts of lordships; besides which one might always apply to the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas, and Exchequer, all doing the same work, while appellate jurisdiction was divided by King's Bench, Exchequer chamber and Parliament. In the *Fourth Institute*, Coke enumerates seventy-four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature, and the House of Lords.

At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof.²⁴ The recommendation as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity

and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court, complete in itself, embracing all superior courts and jurisdictions, (2) to include in this one court, as a branch thereof, a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate, and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established.

This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, of transcripts, bills of exceptions, writs of error, and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review, is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause.

On the other hand, our American reports bristle with fine points of

²⁴ Report of Judicature Commission, 1869, p. 13.

appellate procedure. More than four per cent. of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely, volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty per cent. involve points of appellate procedure. In volume 87, of 53 decisions of the Supreme Court and 97 of the Courts of Appeals, 28 are taken up in whole or in part with the mere technics of obtaining a review. All of this is sheer waste which a modern judicial organization would obviate.

X

Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be

worth while. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Courts of Appeals in civil cases average 76 to the volume. Of these, on the average, between four and five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average 73 decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the *form* of the petition for removal.

In other words, in 19.3 per cent. of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven per cent. of these that question depended on the form of the pleadings. A system that permits this and reverses four judgments a year because the cause was brought in or removed to the wrong tribunal, is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of remand, no beginnings again with new process.

Judicial power may be wasted in three ways: (1) by rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with

points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects. The federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction, and the survival of the obsolete Chinese wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the Federal Reporter examined, of an average of 76 decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of 73 decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

XI

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented

ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves details to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, *five* commissions have put forth *nine* reports upon this subject.²⁵ As a consequence, we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the *record*, not the *case*. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variance. We still reverse them because the recovery is in excess of the prayer, though sustained by the evidence.²⁶

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the Federal Reporter referred to, there are, on the average, 25 writs of error in civil cases to the volume. New

²⁵ Lord Eldon's Commission, 1826; Royal Commission, 1829, 1830, 1832; Commission on Pleading and Practice in Courts of Common Law, 1851, 1853, 1860; Chancery Com-

missioners, 1852, 1854, 1856; Judicature Commissioners, 1869-1874.

²⁶ Brought v. Cherokee Nation (C. C. A.), 129 Fed. 192.

trials are awarded on the average in eight cases a volume, or nearly 29 per cent. In the state courts, the proportion of new trials to causes reviewed, as ascertained from investigation of the five last volumes of each series of the National Reporter System, runs over forty per cent. In the three last volumes of the New York Reports (180-182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state²⁷ an action for personal injuries was tried six times, and one for breach of contract²⁸ was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three per cent. of the cases reviewed, it is evident that our methods of trial and of review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court, who dispose on the average of 5,600 contested cases and have before them, in one form or another, some 80,000 cases, each year. In Nebraska there are twenty-eight district judges, who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year 4,320 cases, of which they disposed of about seventy per cent. England and Wales, with a population in 1900 of 32,000,000, employ for their whole civil litigation 95

judges, that is, 37 in the Supreme Court and House of Lords, and 58 county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose 129. But these 129 are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

XII

Finally, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) popular lack of interest in justice, which makes jury service a bore and vindication of right and law secondary to the trouble and expense involved, (2) the strain put upon law in that it has today to do the work of morals also, (3) the effect of transition to a period of legislation, (4) the putting of our courts into politics, (5) the making the legal profession into a trade, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Each of these deserves consideration, but a few points only may be noticed.

Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality."²⁹ The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious.

Another strain upon our judicial system results from the crude and

²⁷ Omaha St. R. Co. v. Bocsen, 95 N. W. 617. Cf. Mutual Life Ins. Co. v. Hillmon (C. C. A.), 107 Fed. 834 (tried six times).

²⁸ Wittenberg v. Molyneaux, 60 Neb. 107.

²⁹ Sidgwick, *Methods of Ethics* (6th ed.), 457.

unorganized character of American legislation in a period when the growing point of law has drifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration share the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common-law branding of felons, in which a piece of bacon used to be interposed between the branding-iron and the criminal's skin,³⁰ breed disrespect for law. Putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game.

There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies.³¹ In press accounts of the proceeding, the conspiracy clause of the bill was copied *in extenso* under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form any just estimate of our courts of justice from such data.

XIII

Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for individual freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon as Master of the Rolls sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges today in party conventions.³² Dodson and Fogg and Serjeant Buzzfuzz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797, out of 550 pending writs of error, 543 were shams or vexatious contrivances for delay.³³ Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law, with active bar associations in every

³⁰ Bentham, *Theory of Legislation* (tr. by Hildreth), 401.

³¹ *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816.

³² Lord Campbell, *Lives of the Chief Justices* (3d ed.) IV, 70-73.

³³ *Works*, VII, 214.

state to revive professional feeling and throw off the yoke of commercialism, with the passing of the doctrine that politics too is a mere game to be played for its own sake, we may look forward confidently

to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

THE COURT RECONSIDERS

“BUT those cases were grumbled at, and the reversal of that judgment in *Yelv. 4*, was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in *2 Cro. 667*.”—Holt, C. J., in *Crooks v. Bernard* (1704), *2 Ld. Raym. 909, 920*.