HARVARD LAW SCHOOL SURVEY OF CRIME IN BOSTON, IV

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JUDGES AND LAW REFORM

BY

SAM BASS WARNER
AND
HENRY B. CABOT

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VOLUME IV

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SAM BASS WARNER AND HENRY B. CABOT

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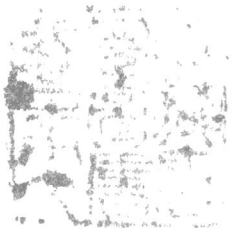

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PREFACE

THIS volume, the fourth of the Harvard Law School Survey of Crime and Criminal Justice in Boston, is concerned with the administration of criminal justice in the courts. Is it swift and is it sure? Is the public a willing participant? What can be done to improve the quality of juries? Why have judges failed to take the lead in reform and can we expect them to do so in the future? These are some of the problems considered. The study is not, however, exhaustive. Time, the availability of information and its pertinence to our main thesis led to the selection of the topics covered. The book was substantially completed by the summer of 1935 and no systematic attempt has been made to incorporate more recent information.

We are deeply indebted to Mrs. Marion D. Frankfurter for reading our manuscript and making many valuable suggestions with regard to both style and substance. Such literary qualities as the book may possess are due to her. The courtesy and cooperation of judges, clerks, police, and other court officials, too numerous for personal mention, has been unfailing. William M. Prendible, Esq., Clerk for Criminal Business of the Superior Court for Suffolk County, and William D. Collins, Esq., Clerk for Criminal Business of the Boston Municipal Court, and their assistants, crowded and busy as they are, have been most kind and helpful. We also wish to thank Mrs. Frances Matteson and Mrs. Mary Hoadley for their careful work in verifying the tables and footnotes.

S. B. W.
H. B. C.

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April 1936

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JUDGES AND LAW REFORM

CHAPTER I

THE ADVANTAGES OF JUDGES ENGAGING IN LAW REFORM

"I LOOK forward to the day when the chief justice will be Chief Justice of Massachusetts and not merely chief justice of the Supreme Judicial Court." [1] So, in substance, said a former president of the Massachusetts Bar Association. We suspect that he had the vision, common to so many lawyers, of a unified and simple system of courts, presided over by judges who hold in their own hands the responsibility of so modifying their administrative practices and forms of procedure that the great judicial organization of the state would be constantly adapted to the changing needs of an active and energetic community. Why is it that this ideal seems still to be far off in the distant future? The chief difficulty does not lie in an antiquated and complex judicial structure but in certain defects in the structure which adversely affect the attitude and caliber of judges selected for the bench.

In the past, particularly since the middle of the last century, the duty of making judicial procedure responsive to the needs of a rapidly changing society has rested upon the shoulders of our legislators. In recent years many persons have come to realize that the legislature, by its very nature, is not equipped to deal adequately with such a technical subject. The object of this book is to consider particular points at which the administration of justice fails to meet modern needs and the extent to which judges could advantageously assume the task of changing court procedure and improving judicial administration. Though the illustrations are all taken from Boston, or at least from Massachusetts, one could substitute for Massachusetts any other American state and instead of Boston could cite New York, Chicago, Detroit, or

[1] 8 Mass. L. Q. (Nov. 1922), 29.

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any other large American city without changing either the point of criticism or the applicability of the particular illustration. The problems discussed all relate to the administration of criminal justice, but in our opinion judges might play the same part in reform on the civil side.

In the first half of the last century judges in Massachusetts and other states played a much more active role than they do today in administering justice fully and expeditiously. They did not then conceive of themselves as something akin to umpires, whose principal duty it was to see that the contending parties kept within the rules. But public opinion in the latter part of the nineteenth century curbed judicial control. The spread of a democratic philosophy, the influence of pioneer conditions of life, and the memory of Jeffries and his like in seventeenth-century England all bred antagonism to the exercise of power by the judiciary. Rule-making smacked of law-making and hence was regarded as a prerogative of the legislature, which was conceived to be par excellence the representative of the sovereign people. As a consequence the bench, the bar, and the public turned to that body whenever they desired a change even in the minutiae of court procedure.[1] When a bold judge stood out against the tendency to assign the star roles in the court room to the attorneys, he was considered arbitrary and his action was likely to furnish an excuse for further legislative curbs upon judicial

[1] The public has become so accustomed to seeking reform of the administration of justice from the legislature rather than the courts, that statutes are often sought to regulate matters that could be infinitely better handled by the judges themselves. A few among the many examples which might be cited are bills to give the defendant the closing argument, House Doc. no. 178 (Mass. 1930); Sen. Doc. no. 48 (Mass. 1885); to separate men and women defendants, House Doc. no. 46 (Mass. 1903); to authorize the exclusion of the public from court rooms, House Doc. no. 244 (Mass. 1912); Report of Atty. Gen. (Jan. 1898), p. xvii; House Doc. no. 425 (Mass. 1881); to provide night sessions, House Doc. no. 587 (Mass. 1921) and no. 39 (Mass. 1913); to regulate procedure when a defendant pleads guilty in a district court to avoid his doing so by mistake, House Doc. no. 219 (Mass. 1915) and no. 930 (Mass. 1921); to prevent a judge from accepting a plea of guilty unless he thinks the defendant knew what he was doing, House Doc. no. 930 (Mass. 1921); and to regulate the office hours and office routine of the clerk, House Doc. no. 1104 (Mass. 1918) and no. 828 (Mass. 1900).

power. Thus public opinion, aided by legislation, cut the part of the judge to its present proportions.

Since the curtailment of judicial power occurred all over the United States, too much emphasis must not be laid upon specific incidents which brought about the change in any one state. Nevertheless the experience of Massachusetts is interesting as illustrative of the forces at work and the attitude of mind of the bar at that era. General Butler relates in his book an experience which predisposed him against judicial prerogatives.[1] When, in 1851, he was a candidate for the legislature from Lowell, the *Lowell Courier* printed the following libel:

> BEN BUTLER
>
> This notorious demagogue and political scoundrel, having swilled three or four extra glasses of liquor, spread himself at whole length in the City Hall last night. . . . The only wonder is that a character so foolish, so grovelling and obscene, can for a moment be admitted into decent society anywhere out of the pale of prostitutes and debauchés.

The editor was indicted for criminal libel and tried before Judge Ebenezer Hoar. According to General Butler's report, after charging the jury that the prosecution must prove beyond a reasonable doubt that the article was intended for Benjamin F. Butler, Judge Hoar said:

> You must try it upon the evidence before you. It is not sufficient to read the article. If the name that is given to it corresponds, that is sufficient. The article is headed "Ben Butler," and this is the only proof I have heard that it applied to Benjamin F. Butler. If this is sufficient by its application to the complainant, the defendant must be found guilty. I am at a loss to see that there is any evidence upon this point to make it sufficient. There is nothing except the article itself to prove to whom it applies. The burden is upon the government and you must not conjecture anything.

Whereupon the jury, much to Butler's disgust, found that the libel did not refer to him, "when everybody in the courthouse knew that it did."

Ben Butler had a long memory, and this and some other arbitrary charges — only a few of them so far as history

[1] B. F. Butler, *Autobiography: Butler's Book* (Boston, 1892), pp. 108–109.

records — together with one or two incompetent judges, enabled him in 1859 to put through the statute depriving judges of their power to charge juries on the facts.[1] The judges' control over their clerks was also reduced by making many of them elective. Furthermore, several judges of whom the public and bar did not approve were removed from office by the expedient of abolishing the Court of Common Pleas and substituting for it a new court — the Superior Court.[2]

Legislative control over judicial procedure was the result, therefore, of the general attitude of exalting the legislative branch of the governmental trinity and of certain measures which specifically limited the judges' common law powers. This came about in spite of the constitutional provision for the separation of powers, but of course it was never assumed that the judges had lost all power of changing even the minutest detail of practice and procedure. On the other hand, no limit was set to legislative control. The constitutionality of statutes limiting the number of written interrogatories a party may file, governing the calling of trial lists, and regulating many other details of procedure which would seem to be clearly within the judicial power has passed unchallenged.

As a result judges have been hesitant to assume authority not clearly given them by statute or custom. Our study, in Chapter X, of the Reports of the Judicial Council shows that this has been the attitude of the bar as well as the bench. The most extreme example is the recommendation of the Council that a statute be enacted requiring that chairs be provided for witnesses.

The conception that control of court procedure is the function of the legislature has been effective in warning courts off the field of procedural reform, but has not resulted in the legislature occupying it. As we shall see in the next chapter, the organization of Massachusetts courts and their procedure in criminal cases is today substantially what it was fifty years ago. The legislature is a hard worked body without the in-

[1] Gen. Statutes (Mass. 1860), c. 115, §5. See remarks of Richard W. Hale, 11 Mass. L. Q. (Jan. 1926), 57–59.

[2] Acts (Mass. 1859), c. 196.

terest, experience, or technical knowledge necessary to keep legal procedure up to date. Nevertheless, if courts are to perform their function it is imperative that this be done, especially in a period of change like that since the Civil War, a period which has seen the growth of great centers of population like Metropolitan Boston and the profound alteration of our ways of life by electric light, the automobile, the airplane, radio, and other products of modern science.

The work of the lawyer has become highly specialized during this period. The tendency to become expert in a single branch of the law has grown to such proportions that we now have tax lawyers, copyright lawyers, patent lawyers, "house" lawyers, the financial bar, and other specialists. In the large offices there is usually an expert on every activity in which a client may engage. It is no longer possible, as in the days of Rufus Choate, to single out "the leader of the bar" in terms of forensic distinction, since in all probability he may not have been inside a court for a decade.

Profound changes have occurred also in the treatment of offenders. The first probation law in the United States was passed in Massachusetts in 1878.[1] The use of probation is now so general that there are 36 probation officers in Boston alone, and over a quarter of the defendants convicted in the Superior Court are placed on probation. The last half-century has seen, in addition, the origin and development of the indeterminate sentence and the juvenile court, together with the application of parole to persons convicted of serious offenses. The growth of the ideal of reforming the individual has led also to the creation of specialized institutions for offenders: the Massachusetts Reformatory in 1884, the Prison Camp and Hospital in 1898, and the State Prison Colony at Norfolk in 1927.

All these changes in other fields of endeavor have served to emphasize the lag in judicial procedure and administration and to convince the public that there must be improvement here also. For some time it has been realized that the legis-

[1] Acts (Mass. 1878), c. 198, §§ 1–3. See also F. R. Johnson, *Probation for Juveniles and Adults* (Century Co., 1928), pp. 12–13.

lature cannot of its own motion keep in current contact with the problems of judicial administration: hence the movement for judicial councils as an instrument for acquainting the legislature with the problems of procedural reform. But at the present time opinion seems to be more and more in favor of restoring to the judges the power to control procedure free from legislative interference. This is most clearly seen in the current agitation to allow the courts to control procedure by means of rules of court. The movement is making rapid headway. The Federal statute conferring on the Supreme Court of the United States the power to make rules governing procedure in actions at law is the most striking example.[1] Even lay bodies have taken up the cause. In the spring of 1935 a bill was introduced in the Massachusetts legislature by the Boston Chamber of Commerce to confer similar power on the Supreme Judicial Court of Massachusetts. At a hearing on this bill before the Joint Judiciary Committee of the General Court, the presidents of the Massachusetts Bar Association, the Boston Bar Association, and some county bar associations, as well as certain members of the Committee, expressed the belief that legislative control of judicial procedure was probably an unconstitutional interference by the legislature with the judiciary. This is a striking demonstration of a change in the mental climate. A further illustration is to be found in the recent opinions of the Supreme Judicial Court holding that the legislature cannot control admissions to the bar nor admit corporations to practice law, these being matters for the judiciary.[2] Only a few years ago the question debated was whether it would be constitutional to give the judiciary control of procedure.[3]

The signs seem to indicate, therefore, that sooner or later judges will have the control of judicial procedure returned to them. But such a step will be ineffective unless the judges strive to give concreteness to their enlarged function. If they

[1] 48 U. S. Stat. L., c. 651, approved June 19, 1934.

[2] Opinion of the Justices to the Senate, 279 Mass. 607 (1932), and Senate Doc. no. 426 (Mass. 1935).

[3] For example, see E. M. Morgan, Judicial Regulation of Court Procedure, 2 Minn. L. R. 81.

fail to do so, as they did in the last century before deprived of their common law powers, the proponents of the change will be rudely disappointed.

Rule-making power has never been continuously or even frequently exercised by the courts to which it has been committed. The United States Supreme Court has substantially revised the equity rules but three times in 140 years. The grant of unrestricted rule-making power to the Supreme Court of Appeals of Virginia has produced one rule in 20 years. A similar grant to the Supreme Court of Alabama 23 years ago has resulted in nothing down to the present time. Substantially the same condition exists in New Jersey. In Michigan, where the practice has been largely regulated by court rules for more than 80 years, the initiative has always rested with the state bar association.[1]

This is a discouraging record to those who, like the authors, believe in the transfer of the rule-making power from the legislature to the judges. Perhaps the qualities required by the strictly judicial function of deciding cases are to a certain extent incompatible with those implied in the exercise of what are after all administrative tasks. Professor Sunderland of the University of Michigan has strikingly pointed out [2] that the conservative functions and traditions of our judges, the press of cases, and the lack of competitive urge all predispose a judge against taking an aggressive part in making needed changes. But in spite of these difficulties and the failures of the past, we feel convinced that the hope of reform lies in the judges. The initiative should often come from the bar and the public through a judicial council. But the judges' attitude should be one of active interest and cooperation in all efforts looking to improvement. The problem is twofold: to create among our judges a sense of responsibility for the administration of justice and to devise some method for initiating and pressing suggestions upon them.

Although there is a very wide field open to judicial action under the existing system, the continued existence of legislative control discourages initiative. A judge's natural inclination is to leave everything to the legislature. Therefore,

[1] Prof. Edson R. Sunderland in 21 Am. Bar Assn. J. (July 1935), pp. 459–460.

[2] See 10 Indiana L. J. 202.

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