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Essays: The State of the Adversary System 1993

REFLECTIONS ON THE ADVERSARY SYSTEM

WARREN E. BURGER*

In 1906 Roscoe Pound presented a lecture in St. Paul, Minnesota to the Annual Convention of the American Bar Association. This was the first truly comprehensive, critical analysis of the American justice systems and the problems that had arisen over the first 130 years of their development. In summarizing what had been accomplished in the way of needed reform, he said there had been only "tinkering where comprehensive reform [wa]s needed."¹ Under the guidance of Pound and other leaders of the judiciary and the legal profession, like William Howard Taft and Arthur T. Vanderbilt, many of Pound's ideas were implemented and our justice systems became better prepared to face the legal complexities of the Twentieth Century.

By the mid-Twentieth Century, however, new problems had arisen that called for new answers, and in the early 1970s it became apparent that our systems of justice suffered from deferred maintenance. Consequently, I consulted with the leaders of the American Bar Association, and Chief Justice Charles House of the Supreme Court of Connecticut, then Chairman of the Conference of State Chief Justices, to discuss the issue. As a result of these discussions, the American Bar Association, the Conference of Chief Justices and

* Chief Justice of the United States Supreme Court, 1969-1986; Chairman of the Commission on the Bicentennial of the Constitution, 1985-1992.

1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REPORTS OF THE A.B.A. 403 (1906).

the Judicial Conference of the United States assembled once again in St. Paul, Minnesota at what we called, "The Pound Conference: Agenda for 2000 A.D. —The Need for Systematic Anticipation." The Conference was convened precisely seventy years after Roscoe Pound gave his 1906 speech in St. Paul.

At the 1976 conference, with its impressive program of speeches, ranging from Robert H. Bork, then the Solicitor General of the United States, to A. Leon Higginbotham, Jr., who was soon to be appointed as a Circuit Judge on the United States Court of Appeals for the Third Circuit, we explored the problems of justice and the need to anticipate problems that were not then clearly identified that the nation would face in the remainder of this century, and beyond. The primary purpose of the Conference was to focus on the unfinished business placed on the agenda by Pound in 1906. Drawing on Pound's speech, our central theme became "The Causes of Popular Dissatisfaction with the Administration of Justice."

As a result of the ideas that flowed from the Pound Conference in 1976 and the dedication of so many judges and lawyers in implementing them, much of the deferred maintenance of the American systems of justice that was desperately needed has been accomplished. To name a few examples, the Court of International Trade was created, as was the Eleventh Circuit Court of Appeals. Congress passed the Omnibus Judgeship Act in 1978 and also enacted the Dispute Resolution Act. Modern computer systems are commonplace in our courts, and we have seen improved juror protection and compensation in the federal and state systems alike.

But now we stand on the eve of the Twenty-First Century. Are the judicial systems prepared for the challenges that lie ahead? The world has never experienced an era of technological advancement like the one which occurred over the past forty years. With the advent of the computer and fax machine, information is gathered and disseminated at lightning speed. With such developments, there has been a concomitant increase in the complexities of our laws and the nature of our legal disputes.

Yet litigation in our courts remains a timely and costly endeavor for everyone involved. Indeed, because our disputes are more complicated, litigation has become an increasingly timely and costly matter. In the early 1980s the Rand Corporation conducted a study which indicated that the average cost to taxpayers of a jury trial, in all federal courts and a major state jurisdiction surveyed, was nearly \$8000 per case, taking into account only the direct operating costs of the courts. And the costs to the parties was approximately the same, \$8000. The Rand Study also found, however, that the amount of recovery in about seventy-five percent of civil trials in one typical major urban jurisdiction was less than \$8000. To think that we as a society are

spending nearly \$16,000 to process a vast number of cases that yield only half that amount! This is solid evidence that, once again, change is needed. I have no doubt that the disparity between what is spent on litigation, both financially and emotionally, and what is recovered has only increased from the early 1980s.

Reflecting on such statistics and the state of our adversary system prompted me to accept the opportunity to endorse and contribute in some small way to this issue of the Valparaiso University Law Review focusing on *The State of the Adversary System 1993*. In reviewing the articles I could not help but ask: "Are we litigating when we should be arbitrating? Are we modifying rules that need no alteration, and ignoring genuine problems with other rules? Are we content with the jurisdiction of and interaction between the federal and state courts?" These and many other questions need to be asked on a continuing basis, and when clear answers emerge, we need to act.

One point is certain, however. As Professor Stempel noted in his Article, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*,² when we embark on a course of piecemeal reform founded on inadequate understanding and incomplete information, we have chosen nothing more than a "problematic path" of reform. I commend the Valparaiso University Law Review for publishing essays that provide some of the needed understanding of the underlying problems in our systems of justice and advance progressive and useful suggestions for reform.

2. Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 VAL. U. L. REV. 313 (1993).

