Washington Law Review

Volume 46 | Issue 2

1-1-1971

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REVIEWS

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AMERICAN LAW: THE CASE FOR RADICAL REFORM. By John P. Frank. New York: The MacMillan Company, 1969. Pp. 209. $5.95.†

Frank's major premise is that our state and federal courts are so slow in handling their caseloads that justice is simply unavailable to most of our citizens. Most of the congestion occurs in metropolitan centers where conditions have become inexorably worse. At the time this book was written, the plaintiff in an accident case in Detroit or Honolulu will wait four years for the case to come to trial; in Manhattan he will wait nearly five years; and in Brooklyn it will take more than five years before the litigants can be heard in court. In twenty-seven counties, each with a population exceeding 750,000 people, the average time from answer to trial in 1968 was over two and one-half years. From this statistical base, Frank predicts that as population increases and more "legalities" are applied to our lives in a complex, urban society, our system of justice will "bloat into immobility" unless a way is found to reduce the load.

Although bolstering the judicial ranks is often proffered as a panacea, Frank asserts that a mere increase in judicial personnel will not solve the problems of delay and congestion. Conceding that no one has satisfactorily explained why increasing the number of judges has generally failed to reduce the backlog, he suggests that this course

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† This book is based upon a series of lectures delivered by the author at the dedication of the Earl Warren Legal Center at the University of California. Mr. Frank's background qualifies him to speak as an authority on the reform of legal institutions. After graduation from law school, he served as a clerk to Supreme Court Justice Hugo L. Black. He subsequently served as Assistant Secretary of the Interior and as an Assistant Attorney General. He has also taught Constitutional Law and Legal Process at Yale and Indiana Law Schools. Since 1954, Mr. Frank has been engaged in full time private practice in Phoenix, Arizona. He has served as a member of the Advisory Committee on Civil Procedure of the Judicial Conference of the United States and has authored eight other books on legal subjects.

invariably creates a need for more committees and administration, which in turn decreases the time judges can spend hearing and deciding cases. As an alternative Frank would devise a system which identifies those judges whose production is low and increases their levels of production.

The author points out that the addition of new subjects for legal determination and the consequent legal complexities cause the whole body of law to grow faster than the courts can adjudicate it. Frank views the body of law as a composite of "decision points" to be adjudicated. There is today a dramatic increase in the number of decision points, continuing without regard to the consequences for the legal system. The legislatures continuously assign more tasks to the judiciary, while the courts have significantly increased their own burden by recognizing new areas of rights entitled to judicial protection.

Having made the case for radical reform, Frank then offers his own recommendations. However, he cautions that reform proposals must be tested practically in order to determine their merit, reminding the reader that many well-qualified reformers enthusiastically embraced the panacea of the mandatory pretrial conference before it was shown to be of only limited value. Specifically he sets out thirty-eight proposals. The length of the list of recommendations and the number of proposals which the author concedes need further study change the tenor of the work from radical and urgent to temperate and even tentative. The author's case would have been more effectively stated had he simply omitted a number of his proposals, some of which are even contradictory. He suggests, for example, that insurance company liquidations and receiverships be transferred from the state to the federal court system, while elsewhere pointing out that the burden on the courts will not be lightened by the mere removal of proceedings to another arena, nor by the creation of a special tribunal.

Frank's initial proposal is to alter legal education so as to expose and eliminate dilatoriness in lawyers. In his opinion the law school experience places a premium on sluggish legal problem-solving. He urges that with some ingenuity the process could condition lawyers to value the expedient resolution of legal disputes. One wonders if the problem can be so easily handled.

Frank strongly advocates a no-fault insurance scheme in the automobile accident field, which would relieve the courts of administering

remedies in these cases. He would establish a basic protection plan covering the first $10,000 and provide compensation procedures similar to those applied in the industrial accident field. Certainly such a proposal may represent the single most effective step toward relieving court congestion; one need only consider the condition in which our judicial system would be today were it not for workmen's compensation schemes. Frank notes with dismay that, other than schemes for handling automobile accident claims, there are virtually no significant proposals being advanced to unclog court calendars.

The author goes on to urge that legislatures minimize the number of "decision points" left for court determination. The recommendation is not likely to be implemented because of two factors that tend to enlarge the body of the law. The first is the need for new laws to cover new problems, such as pollution. The second is the well-established unwillingness of both the legislatures and the courts to fix arbitrary standards. The legislatures tend to establish general standards, which are often imprecisely stated, and leave reluctant courts with the task of determining whether a given set of circumstances befits them. Difficulty of implementation does not, however, detract from the wisdom of Frank's proposal. No doubt in many areas society would benefit from the establishment of arbitrary standards; the occasional injustice which would result would be offset by the elimination of the potential for judicial scrutiny of every legally significant act of man.

Frank also assails another massive contributor to court congestion—divorce litigation. He suggests that all jurisdictions would do well to follow the example set by the California legislature in eliminating the "grounds" requirement for divorce because it serves no useful social purpose and needlessly burdens the courts. He urges that property settlements be handled administratively on the basis of auditors' reports.

He also advocates revision of two procedural rules in order to shorten or eliminate trials. Rule 36 on Admissions should be used as a matter of standard practice to place the cost of proof, including attorneys' fees, on the losing party whenever an issue is unreasonably disputed. Likewise, he urges a dramatic revision of Rule 68 to establish a system whereby a claimant can make a demand, or a defendant an offer, with the result that costs, including counsel fees, will be appropriately charged where the judgment establishes either that the demand was

unreasonably high or the offer unreasonably low. Frank argues that Rule 56 summary judgment is also an appropriate vehicle to shorten litigation in many cases.

In the field of criminal law, Frank proposes that cases be heard only by experienced criminal law judges. The defense of insanity, he says, should be abolished insofar as it has any relevance to guilt or innocence, and should only be considered in sentencing. California has already adopted a bifurcated procedure.[1] One intriguing proposal would eliminate the need for witnesses and parties to be together at one time to give evidence in any trial by using video tapes of testimony made in the deposition process—the "trial" consisting of a replay of the tapes by the trier of fact.

While Frank does not engage in strong advocacy for any single proposal, he presents a persuasive argument that our court system is faltering and that nobody is very serious about remedying the situation. To my mind, the absence of any sense of crisis in the legal community is most remarkable. While in this state current court congestion is minor, it strikes me as incredible that lawyers and citizens in this part of the country would tolerate an unreasonable delay in bringing a case to trial. Surely such a situation should provoke widespread criticism and ultimately reform.

Why is there no evidence of any reform movement in those areas where litigation is apparently congested? One wonders whether the statistics cited and relied upon by Frank are really accurate or tell the whole story. If they are accurate, then one can only conclude that in the places where these conditions prevail people, even the Bar itself, must place a low value on the expeditious administration of justice.

Frank's well written, very readable presentation should stimulate interest in reform and will offer an excellent starting point for anyone attempting to develop solutions.

1. *See* CAL. PENAL CODE § 1368 (West 1970). If at any time during the pendency of a trial, a question arises as to the sanity of the defendant, the court may order the question of sanity to be determined in a separate trial.