Volume 68
Issue 2 *Dickinson Law Review - Volume 68, 1963-1964*

1-1-1964

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JUDICIAL REORGANIZATION—A SOLUTION TO CONGESTION?

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Ever since the publication of Dicken's Bleak House and Gladstone's famous dictum, "Justice delayed is justice denied," proponents of structural reform in the English and American court systems have been using the crushing backlog of untried cases in our courts as the strongest argument for court reorganization. Justice without delay has become the battle cry in every struggle for structural change from the English Judicature Act of 1873, through Roscoe Pound's strictures,[1] through the New Jersey Court reform of 1947,[2] and on to the New York and Illinois judicial article changes.[3]

The reorganization plans have much merit so far as improving the quality of justice is concerned. The plans secure better judges and probably better and less disputatious trial lawyers, eliminate technicalities, particularly at the pleading and appellate level, and produce a stronger and shorter chain of administrative responsibility. It is only when claims are made that they will improve the quantity of justice *overnight* that some question arises as to whether or not court reorganization is being oversold.

Undeniably, there are other sound reasons for restructuring the courts. These objectives include eliminating the duplication of courts of concurrent jurisdiction, obtaining some mobility of judicial manpower, increasing both the quantity and the quality of judges, restoring to the courts their control over procedure, and centralizing administrative control.[4] Surprisingly, almost all of these advantages sought by the reforms, with the possible exception of the quality of judicial talent, relate at least indirectly back to the problem of expeditious disposition of cases.

It might be well to analyze the situations in some prominent eastern industrial states to see whether cure of congestion and delay is a justifiable reason for structural change, whether avoidance of delay is capable of achievement without change and whether the change will necessarily or even probably reduce the backlog of cases already filed and waiting months or years to

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1. See Pound, *Causes of Popular Dissatisfaction With the Administration of Justice*, 21 J. AM. JUD. SOC'Y 177 (1937).

2. See generally VANDERBILT, THE CHALLENGE OF LAW REFORM (1955).

3. N.Y. CONST. art. VI (approved Nov. 1961); ILL. CONST. art. VI (approved Nov. 1961 and became effective Jan. 1, 1964). North Carolina and Colorado adopted significant reforms at the same time as Illinois; however those changes are not discussed in this Article. The Michigan changes are both too recent and too limited. See MICH. CONST. art. VI.

4. See McWilliams, *Court Integration and Unification in the Model Judicial Article*, 47 J. AM. JUD. SOC'Y 13 (1963).

be tried. Of these states, New Jersey alone has had more than fifteen years of experience with a remodeled system; New York and Illinois are in the course of putting into effect rather extensive reorganizations; Ohio and Pennsylvania are still in the talking stage. Statistics on delay are available in varying degrees from those states. New York and New Jersey provide excellent studies in this area.[5] Reports from Ohio and Illinois are rather generalized,[6] and information from Pennsylvania is scattered and not readily available.[7]

The standard judicial reorganization proposed and generally adopted tends up to a point to follow lines of the Model Judicial Article of the American Bar Association. Thus, the streamlining seeks a "unified" court, on the model of the English Judicature Act, which is divided into a supreme court, sometimes an intermediate appellate court, and a trial court of general jurisdiction. Extensive powers of administration over the whole system are given to the chief justice and to an administrative staff functioning under his direction.[8] Until some effort was made in Illinois in this direction, the major states tended to turn their back on the recommendations of the Model Article as it affected the so-called minor courts.[9] New York, for example,

5. Those of New York are issued by its Judicial Conference annually in printed hardback form complete with tables showing intake and disposition by types of cases from every county and every district and, in particular, giving realistic calculations of delay in jury cases for all areas. The New Jersey statistics, published by the Administrative Director of the Courts, gives detailed statistics, charts, and graphs on all types of cases and dispositions for the state at large. Its emphasis is on productivity of individual judges rather than particular geographical areas.

6. The Illinois reports, issued out of its supreme court by the Administrator and the Deputy Administrator for Cook County in printed pamphlet form, contain detailed textual analysis of the delay situation in each of its circuits and in Cook County. Material on jury delay by circuits is extensive, but tables bearing on Cook County are somewhat abbreviated.

The Ohio reports, mimeographed and issued monthly to all judges, contain little more than basic input-output figures from each court. Annual compilations give breakdowns on business transacted in each county, but only by three major classifications of litigation. No comparative tables, graphs, or analyses of delay are attempted. These annual reports are compiled largely by volunteer help from dedicated general jurisdiction judges, without help from any paid statistical section.

7. In Philadelphia a local court administrator was appointed in late 1962 to maintain statistics among other things. Private studies, publications including INSTITUTE OF JUDICIAL ADMINISTRATION, DISPATCH AND DELAY (1961), and newspaper accounts are sources.

8. See Holt, *The Model State Judicial Article in Perspective*, 47 J. AM. JUD. SOC'Y 6 (1963).

9. In many states which did not jump into full scale reorganization, progress was made in replacing the fee system of the justices of the peace with adequate minor courts of record. Virtually all jurisdictions have created city or municipal courts for large centers of population, but Ohio in 1951 was one of the first to reduce them to some sort of uniform jurisdiction and common procedure. See OHIO REV. CODE ANN. §§ 1901.01-.38 (Baldwin 1958). Ohio also eliminated the justices of the peace in rural areas by creating county courts. Ohio Rev. Code Ann. §§ 1907.011-.012 (Baldwin Supp. 1958). Connecticut's circuit courts and Maine's district courts represent later and more effective refine-

was permitting its crazy-quilt pattern of city and town courts as well as the justices of the peace to continue,[10] and New Jersey, in addition to its county district courts, was suffering with some 512 municipal courts which were manned by part time judges, many of whom were untrained in the law.

In the face of the claims of elimination of congestion, what is the likely impact of the enumerated advantages of reorganization on a delay problem which exceeds five years in some portions of New York and Illinois at the present time?

ELIMINATION OF COURTS

The strictures against duplication of courts go back even beyond Pound's speech to the days when the Field Codes were developed. Once separate equity courts were abolished, for the most part in the last century, there was for a long period little jurisdictional overlap. The overlap that has developed since that time has resulted from an effort to assist directly the court of general jurisdiction with its docket load as in the cases of the New York and New Jersey county courts, the Illinois superior court, and the Connecticut common pleas court.[11] This overlap also results from an indirect effort to assist by the creation of minor courts of record with expanded monetary jurisdiction in substitution for the outmoded justice-of-the-peace system.

Whatever the reasons for re-creation of duplicating jurisdiction and whatever the vices of courts with concurrent jurisdiction, delay will result only if the two sets of courts carry grossly unequal docket loads, so that the one is idle while the other is overloaded. In most localities this is not true. If one set of courts is loaded, so too is the other. In reorganized New Jersey, pre-reorganized New York and unreorganized Ohio, there exist provisions whereby the overloaded court of general jurisdiction can transfer suitable cases to the lower court for trial. This device has been used extensively in New Jersey, considerably less in New York, and to an unreported but probably very minor extent in Ohio.[12] The presence of the device, however, and its

ments. See Williamson, *A Down-East Approach to Local Justice*, 47 J. AM. JUD. SOC'Y 64 (1963). For other partial efforts, see [1962-1963] WIS. JUDICIAL COUNCIL BIENNIAL REP. 1 and KARLEN, JUDICIAL ADMINISTRATION (1962).

10. But New York has taken steps to give its justices of the peace some special training. N.Y. CONST. art. VI, § 20(c). For the detail of the training course, see 1963 N.Y. JUDICIAL CONFERENCE ANN. REP. 101-28.

11. The Illinois superior court was formally consolidated into the circuit court by constitutional amendment. There are current proposals for similar consolidation in New Jersey and Connecticut. KARLEN, JUDICIAL ADMINISTRATION 723-25 (1962).

12. New Jersey reports 4591 cases so transferred in 1961-1962. 1962 N.J. AD. DIRECTOR OF THE COURTS ANN. REP. 24. In New York 2161 cases were transferred before trial and 582 at pre-trial. 1963 N.Y. JUDICIAL CONFERENCE ANN. REP. table 12. There are no statistics available from Ohio where by statute the consent of the transferee judge is required. OHIO REV. CODE ANN. § 2305.1 (Baldwin Supp. 1963).

prompt use where needed would appear to indicate that the mere consolidation of the two court systems would of itself have a very limited effect on reducing delay.

TRANSFER OF JUDGES

The prospect of transferring judges from underworked to overbusy courts has always been an attractive one for the judicial reorganizers. Taking the total number of judges in all courts in all geographical divisions of a state and putting them into a single unified structure to deploy where needed would appear to be the equivalent of creating a multitude of new judgeships and would appear to go a long way toward reducing the judicial backlog of cases. If judges are to be considered geographically as bishops and rooks on a giant chessboard, such may be the case. But judges are also men, often men with growing families and local ties. As public servants, judges should expect within limits to have to travel where the work takes them, but there are limits. Four or five months per year of residence in a hotel while relieving the docket of a distant metropolitan area is neither attractive to nor a wholesome influence upon a country judge.

A judge transferred to a new area may find himself unsuited for the different legal environment. The judge who performs well in rural communities may find his talents are not fitted to cope with the personalities and the methods of the personal injuries trial practitioners of the city. Thus, the dividends resulting from complete assignability of judges under a unified court system may be much more apparent than real.

Under an almost unified court system, New Jersey manages an impressive total number of judges assigned for service outside their respective counties of residence in addition to judges transferred from court to court within the same geographical area.[13] Such an achievement is not, however, exclusive with the unified court. Transfers from downstate Illinois to Cook County and elsewhere were extensive even before the state's reorganization.[14] Also, unreorganized Ohio, rich in its number of general jurisdiction judges, contributed an astonishing total of 302 downstate judges to other counties for periods varying from two or three days to three weeks or longer.[15] This achievement in "horizontal" transfer was in addition to some limited success in "vertical" transfers, where probate judges are authorized to sit within their own county as general jurisdiction judges.[16] In New York which uses

13. 1962 N.J. AD. DIRECTOR OF THE COURTS ANN. REP. Supp. table 12.

14. 1962 ILL. COURT ADMINISTRATOR ANN. REP. 64.

15. 1962 OHIO COURTS SUMMARY 38. Unfortunately there is no record available of total days served. Since assignments in Ohio are for a full three-month term, it is likely that the 25 assignments to Cuyahoga County (Cleveland) alone represented at least 500 judge days.

16. The use of probate judges for general jurisdiction purposes in the larger counties

the vertical method of assignment of judges of lesser courts to sit temporarily as general jurisdiction judges, the results have not been so successful; for the delay problem is merely transferred to the overcrowded court from which the judge was originally transferred.[17]

Admittedly, the restructuring by constitutional amendment and the creation of powers in a chief justice to assign trial judges where needed would be helpful in cases where these powers do not exist. Before assuming that such a course is necessary, however, it should first be inquired whether or not the power exists without an elaborate restructuring. If it exists, as it does in the states noted, for example, has it been used to any considerable extent? From the bare statistics from Illinois and New York, it would appear that much more could be done; yet, even Ohio's record, which seems impressive, has been attained in a manner almost casual and without detailed planning and programming.[18] Certainly, it would not seem necessary to reorganize the entire court structure merely to put advance planning into a program of assigning judges.

Increase in Quality and Quantity of Judges

It is conceded by all that substantial increases in both quantity and quality of judges would aid in reducing congestion and delay. The difficulty lies in seeing just how a restructuring of the courts accomplishes such a result. It is usually assumed that the quality of judges is assured by two advantages—tenure and money. Improvement of tenure can of course well be achieved as part of a reorganization plan; yet, New York's constitutional revision omitted this element entirely; and Illinois only adopted half of the Missouri plan of achieving tenure.[19] It is not surprising that New York should place little emphasis on improvement of tenure since both there and in Pennsylvania terms are relatively long[20] and opposition to incumbents infrequent.

Judicial salaries, concededly, are effectively controlled by the legislatures, although the Model Judicial Article for Constitutions contains provision for

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is not feasible, but the fact that, in the smaller counties, the probate judge is available in the absence of the others probably contributes to the willingness of the general jurisdiction judge to go on assignment.

17. See 1962 N.Y. Judicial Conference Ann. Rep. 21.

18. 32 counties in Ohio which are served by resident judges have fewer than 300 cases filed per year. 1962 Ohio Courts Summary table 5. It is apparent from the tabulator's report that not all of these served or were asked to serve assignments to overcrowded counties. 1962 Ohio Courts Summary 37.

19. The half which was adopted secures to a judge an unopposed position on future ballots after he has once been elected. For commentary on the apparent cynicism of this partial adoption, see Karlen, Judicial Administration 718 (1962).

20. Pennsylvania common pleas judges are elected for 10-year terms. Pa. Const. art. V, § 15; New York supreme court justices serve 14-year terms. N.Y. Const. art. VI § 6(c).

a floor on all judicial salaries.[21] Here again, it should be noted that the judges of New York and Illinois, prior to judicial reorganization, and those of Pennsylvania, among the unreorganized, have long enjoyed a pay status among the most satisfactory in the nation.[22]

As to the quantity of judges, court reorganization almost never attempts to freeze into a constitution a provision for the number of judges, nor should it for reasons of flexibility. It is perhaps noteworthy that while the voters of New York gave the courts a new structure, the New York legislature at the same time gave these courts little new additional personnel with whom to operate[23] even though its Judicial Conference has pleaded in each of the past two years for the creation of large numbers of additional judgeships and has painted a dark picture of probable breakdown of the courts if congestion grew worse. It is just barely possible that the New York legislature took the reorganization advocates at their word and decided to let them prove that reorganization alone, without all the judges requested, would do the job. The Illinois legislature, well before the effective date of its new judicial article, supplied the quantity of additional judgeships which was badly needed to reduce the five-year backlog of Cook County jury cases; and some token progress in this reduction is evident, even before the structural reform has become effective.[24] Delaywise, Illinois' reorganization eventually may be pointed out as a glowing success and New York's a dismal failure; yet, in both cases it will be for reasons which have absolutely nothing to do with the merits of the reorganizations themselves. On the other hand, it is Ohio, with an uncoordinated court system and a rather ill-paid and ill-tenured judiciary,[25] whose legislature has done the most to upgrade the quantity, if

21. Section 7, para. 1, provides: "The salaries of justices, judges and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the State government other than the Governor."

22. Base pay of Illinois circuit judges is $29,000 for those in Cook County and $20,000 elsewhere. ILL. REV. STAT. ch. 53, § 3 (Smith-Hurd Supp. 1963).

Base pay for Pennsylvania common pleas judges is from $21,500 to $25,000 depending on county population. PA. STAT. ANN. tit. 17, § 830.26 (1962).

Base pay of New York supreme court justices is $21,000 plus additional compensation awarded by the city for its resident judges with nonresidents getting one-half of such amount. N.Y. JUDICIARY LAW, §§ 142, 144.

23. In 1960, 8 supreme court justices were added. 1961 N.Y. JUDICIAL CONFERENCE ANN. REP. 717. In 1961, 8 more were added. 1962 N.Y. JUDICIAL CONFERENCE ANN. REP. 151. In 1962, 12 supreme court justices were added. 1963 N.Y. JUDICIAL CONFERENCE ANN. REP. 25. The conference had requested 31 additional supreme court justices and 7 additional county court judges in that year.

24. In 1962, 17 new judgeships were created in Cook County alone. The judges were inducted in December and 14 of them were busy on the badly jammed law-jury assignment by January 1963. See 1962 ILL. DEPUTY COURT ADMINISTRATOR FOR COOK COUNTY ANN. REP. 78, 81, table III.

25. Salary for common pleas (general jurisdiction) judges ranges from a high of $17,000.00 down to a low of $9,000.00 in rural counties. For comparable salaries in nearby

not the quality, of judicial performance. Over a ten-year period from 1953 to 1963, that legislature has increased by stages the general jurisdiction bench in Cuyahoga County, which includes Cleveland, by more than fifty per cent[26] and made proportionate increases elsewhere. As a result, while no inroads were made into the backlog of pending cases, the delay problem in Ohio has not grown appreciably worse in recent years. This effect was achieved even before judicial reorganization had gotten beyond the casual conversation stage.

Procedural Reform

The standard approach of reorganization advocates is to reason that the leisurely, time-consuming process of pleading can be speeded up immensely if only the legislatures will restore to the courts their inherent power to control procedure, particularly that involved in bringing cases to issue.[27] There is little doubt that in most states the time allowance for the pleading process and "getting to issue" is absurdly long. These time allowances became fixed when the legislatures took the function over from the courts in the mid-nineteenth century. At a time when roads were poor, the telephone unknown, and the typewriter at most a toy, a case could be made for these liberal time allowances. With modern communications, transportation which places lawyers (and clients) at remote crossroads within a half hour of any county seat, and where duplicating machines are called on to supplement the typewriter and carbon paper, these same time allowances seem overly generous. Undoubtedly, allowances could now be reviewed and appreciably shortened if reorganization restored to the courts their power to control procedure; however, the question remains, whether or not the trial courts would use this power to telescope the time delay in getting cases to issue. Experience in the past with these trial courts would indicate not. Far from eliminating delay most trial judges contribute to it, for extensions of time in order to allow opposing lawyers to file pleadings are the rule, not the exception. In at least one court, the judges have delegated to the lawyers in each case the power to waive the time limitations on filing pleadings, and the "leave to plead" has become the "consent to plead" ten, thirty, sixty days late, without the judges' foreknowledge but with their approval.[28] It must be confessed

populous states, see note 22 *supra*. The maximum term of office is six years, with appointees required to run, opposed, at the next general election for the remainder of the original term.

26. In 1954 there were 15 common pleas judges in Cuyahoga County. Elections by 1964 will qualify a total of 23.

27. See McWilliams, *supra* note 4, at 16-17.

28. See Ohio C. P. Ct. for Cuyahoga County R. 8(d). The approval quickly evaporates when these same lawyers attempt to file such "consents to delay" in other Ohio jurisdictions, although one criminal defendant's counsel filed elsewhere a "consent" of five months to file assignments of error and brief on appeal while his client

that, in that particular county and in many others where the practice is indulged, such delays in getting to issue seem small as compared with a later thirty-month delay in getting to trial; but since calendars are made up from cases "at issue," the first delay is merely added to the second. Thus, the trial judges seem remarkably unlikely depositories for the power suggested.

Supreme Court Control Over Trial Court Administration

It is argued that confiding full administrative control and direction over the trial courts to a state supreme court will have an important effect on the conditions permitting delay. There appears to be much surface merit to a plan which gives the chief justice full power to make and enforce assignment of trial judges where needed. But just how much additional force can be asserted by a chief justice on a trial judge who is unwilling to go elsewhere? Securing judges who will do a willing and satisfactory job in another community is still a matter largely of salesmanship. Judges are induced, not compelled, to take assignments, whether the power to assign judges elsewhere is confided loosely by statute or strictly by constitution.

New Jersey is frequently cited as the classic example of how power of control in the supreme court aids in reducing congestion. New Jersey, however, has been an example, not of how the naked power controls, but of how a forceful and magnetic person in a position of power can create devices to insure that the work gets out. Under Chief Justice Vanderbilt and his successors the "stop watch" system of keeping count on a judge's time has produced dividends in the productivity of individual judges. It would be quite interesting to observe whether or not control, if conferred, would result in equally effective time and motion studies in Chicago, Philadelphia, Cleveland, Milwaukee, and Pittsburgh. Certainly, if such studies carried with them the threat of exposure of the laggards by the press, the darkened courtrooms might be fewer, or if the judges were not in chambers they might at least be found in the law libraries rather than at clubs and board rooms on weekday afternoons.

Perhaps an outstanding example of the difference between bare power and the vigorous use of such power is illustrated by the difference in treatment given the minor courts in the states of New Jersey and Ohio. Following reorganization in New Jersey its supreme court in the exercise of rule-making power imposed upon the minor courts in traffic cases not only uniform procedural rules but a complete form of pleading and record-keeping. This system was called, for simplicity, the Uniform Traffic Ticket,[29] and was

was serving his sentence in a state institution. A year after conviction his client had not had his appeal heard.

29. For a description of the tickets and the system, see Economos, *Administration*

subsequently instituted by Missouri and some other jurisdictions. Since Ohio's minor courts are creatures of statute with no constitutional inhibitions against similar control, an experiment in this limited field was planned there. The legislature conferred precise powers on the supreme court to set up a similar regulation,[30] and a committee was designated in 1960 to draft the rules and pleadings. It did so. After a hearing on them the court altered the committee. The changed committee restudied the problem and reported once again. In 1962 the court concluded that it did not desire to impose any such rules or forms "at the present time."[31] In 1964 Ohio still has no uniform rules or forms for minor courts in traffic cases despite four years of legislative authority to create them.

Imposition of traffic court uniformity is a far cry from the problem of imposing effective rules for prompt disposition of cases in courts of general jurisdiction. Lack of desire to exercise the former, however, would indicate equal indisposition to face up to the challenge of the latter, thus forecasting that the Supreme Court of Ohio will scarcely be bursting with enthusiasm to assert any effective degree of control over the practices of trial courts.

Other Solutions to Delay

If structural changes are not the answer to the problem of delay in the litigation process, what other solutions exist? The most popular solution among judges is, of course, more judges. The Ohio and the recent, but limited, Chicago experiences of adding judges would seem to show some promise. Ohio has not at least slipped appreciably further behind in its docket problem. Its total pending civil case load at the end of 1962 had grown only by 2,700 cases from 1960 to a total of 46,741 undisposed-of cases as compared with 45,000 cases filed in that year.[32] These figures compare favorably with the New York record of an increase of 12,000 cases in a similar period, reaching a grand total of 69,000[33] pending cases with 59,000 cases filed.[34] In the same period New Jersey's pending list grew by some 3,500 cases to 25,000 out of 26,000 cases filed.[35]

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of Traffic Court, in JUDGE AND PROSECUTOR IN TRAFFIC COURT 65 (American Bar Ass'n Pub. 1951).

30. OHIO REV. CODE ANN. § 2937.46 (Baldwin Supp. 1963) (Effective Jan 1, 1960). The purpose of the provisions were fully disclosed in advance by the Ohio State Bar Association.

31. Feb. 14, 1962. 35 OHIO BAR 210 (1962).

32. 1962 OHIO COURTS SUMMARY 32; 1960 OHIO COURTS SUMMARY 18. The increase in civil case pendency was partly offset by a decrease in pending cases of other types.

33. 1960 N.Y. JUDICIAL CONFERENCE ANN. REP. table 11; 1963 N.Y. JUDICIAL CONFERENCE ANN. REP. table 11. Matrimonial cases are included in the New York reports but not in the Ohio and New Jersey totals.

34. 1963 N.Y. JUDICIAL CONFERENCE ANN. REP. 174.

35. Total pending cases in New Jersey for purposes of comparison are 23,693 in the

If figures alone are consulted, apparently an increase in the number of judges does not noticeably decrease individual productivity. Ohio averaged 496 dispositions for each of its 170 judges[36] compared with 385 for each of New York's 137 judges[37] and 301 dispositions for each of New Jersey's 104 judges.[38] There does, however, appear to be a leveling-off point in individual productivity when the number of judges is increased. In 1960 Cuyahoga County judges disposed of an average of 783 cases each; the following year with more judges, average disposition fell to 746; in 1962 it rose again to 821, although there is reason to believe that a generous infusion of assigned judges who were not taken account of contributed to that year's result. Pending case load in Cuyahoga County increased in 1960 by some 1,300 cases; the following biennium it remained relatively constant.[39] Thus far in Ohio more judges have managed merely to stay even with the number of filings and have not cut into the pending case backlog.

Various devices, some bordering on the bizarre, have been contrived to reduce docket congestion. In New York and Illinois "blockbuster" techniques of assigning old, hard-core cases to a special group of experienced trial judges for limited periods have produced some results.[40] In Philadelphia special assignment to arbitrators has been tried. In Cleveland the device of using trial lawyers as pre-trial judges was tried until the realization came about that a lawyer busy pre-trying someone else's case could not at the same time be preparing and trying his own and that the pre-trial lawyers' cases were piling up more than usual. New York, New Jersey, and Ohio have all tried transferring cases for trial to the lower courts.[41] Unfortunately such cases are often not so transferred until pre-trial time, which means that they are by then old cases. Particularly in New York, but also in New Jersey, major criminal cases are routinely tried in the subordinate court, which has only resulted in severe docket congestion in the subordinate courts themselves.

Certainly the most bizarre approach was tried in New York. There a "readiness rule" was adopted in 1956 which merely delayed placing the

law division and 1,500 general equity cases. 1962 N.J. AD. DIRECTOR OF THE COURTS ANN. REP. 9, 10, 18. The actual total of pending cases is somewhat higher than the figures show since New Jersey, unlike Ohio, shows a case as pending for this purpose only when the first answering pleading is filed. *Id.* at 9; see also 1962 OHIO COURTS SUMMARY tables 2, 3.

36. For the purpose of this comparison criminal cases disposed of are excluded from the total output since in New York the overwhelming majority of felonies are disposed of other than in its court of general jurisdiction.

37. 1963 N.Y. JUDICIAL CONFERENCE ANN. REP. 132, 177.

38. Criminal case dispositions in New Jersey and Ohio are excluded for the reason given in note 36 *supra*.

39. 1962 OHIO COURTS SUMMARY table 5; 1960 OHIO COURTS SUMMARY table 5.

40. 1962 N.Y. JUDICIAL CONFERENCE ANN. REP. 42-44; 1962 ILL. COURT ADMINISTRATOR ANN. REP. 76.

41. See note 12 *supra*.

case on calendar until certain additional statements and filings had been made. The initial result was statistically to reduce the calendar but not the number of pending cases and to show on the calendar only those cases which were due or long overdue for trial but not all those which had been commenced. As was predicted, this purely statistical gain was at best a temporary expedient which masked the real problem.[42] Now cases "at readiness" have hit the general jurisdiction courts in New York in their full volume. A similar statistical result obtains in New Jersey where a case is not pending for calendar purposes until answering pleading is filed.[43]

A Workable Solution

If neither reorganization of courts nor some of the dubious expedients noted above are to be relied upon for reducing congestion and delay, are there any answers besides the unthinkable (to most lawyers) solutions of abolishing the jury system or even of having administrative tribunals handle the personal injury cases which now clog jury dockets? It is suggested that three steps, resolutely followed, would produce the desired results:

The first step is the application of the standard panacea of more judges. The Ohio experience in the past ten years indicates that this would at least eliminate any *increase* in congestion and delay. A number would be needed which would at least make the total general jurisdiction judges times their *average* disposition rate equal the present filing rate plus ten per cent. The ten-per-cent increment is a purely arbitrary figure which would dispose of accumulated backlog at a different rate in Chicago, Pittsburgh, and New York, where the delay times are 74 months, 67 months, and 62 months respectively, than in Cleveland where the delay time is normally not in excess of 30 months. However the ten-per-cent figure is the maximum which should be sought; otherwise, there is the real possibility that once docket congestion is reduced there would be many idle judges.[44] Also, once the delay time is reduced, the added percentage will be needed because of the increased filings within the next few years resulting from increased litigation due to the exploding population now beginning to reach adulthood. There is, however, some ground for suspicion that more judges are not a complete answer. The slight but none the less discernible decrease in productivity of individual judges when their total number is sufficient to cope with the volume of in-

42. 1962 N.Y. Judicial Conference Ann. Rep. 21.

43. Only 75% of complaints filed in the court year 1962 in New Jersey went on the calendar for statistical purposes in that year. 1962 N.J. Ad. Director of the Courts Ann. Rep. 8.

44. Also to be considered is the effect on already overworked trial counsel who necessarily will have to take on more associates as their cases are spread around more courtrooms with possibility of required simultaneous appearances in two or more at the same time.

coming cases indicates that these judges may, even unconsciously, fear that if they work too hard they will eventually work themselves out of their jobs. They might, therefore, merely divide the incoming case load by the total number of judges so that there would always be a backlog.

Secondly, a way must be found to maintain and increase individual productivity. The New Jersey "stop watch" system is a partial, but only a partial, answer. Under that system each New Jersey judge disposes of approximately 415 cases, criminal as well as civil, per year. Without it, each New York judge disposes of not quite 400 per year. Also without it, the average Ohio judge disposes of more than 500.[45] It is true that in Ohio this figure includes not only pleas in criminal cases but also certain tax judgments and commercial judgment confessions (cognovits) which involve an absolute minimum of judicial effort, but it is probable that the New Jersey and New York cases also involve like cases. In any event, the "stop watch" system apparently needs some refinements, for a system of merely finding out what a judge does with his time, without more, is like that of collecting other judicial statistics, without more; both are merely a first step toward doing something constructive. What is needed, as a second step, is the difficult and unpopular one of informing judges that some of the cases are not worth so much time to society and that they should dispose of those cases more quickly in order to get on to the next ones. This requires some specialized knowledge and some authority, either legal or moral, over the judge who puts in excessive time on easy cases. The threat of exposure by a co-operative press might in this case be a most useful adjunct to the incentive of more judges. In areas like Ohio which have rural judges without a sufficient workload,[46] a more determined and organized effort to get them to places where there is more work to be done is essential. While in the past it has always been known where extra judges were needed, not much effort has been expended in determining, in advance, how much time the underworked judges can spare and in encouraging them to plan their availability for assignment well in advance.

The third and final step concerns the problem of internal scheduling of cases for trial, a scheduling that will keep trials moving smoothly from one case

45. Including criminal cases the average disposition of the Ohio judges reaches 579 cases, a figure which is reduced considerably by the average output of 145 cases per judge (due to lack of raw material) in Ohio's nine smallest counties. The average out-put per judge in Ohio's ten largest counties rose from 770 cases in 1960 to 777 in 1962. 1962 OHIO COURTS SUMMARY table 8.

46. Ohio gave up any meaningful distribution of its common pleas judges into multi-county districts or circuits in 1912. OHIO CONST. art. IV, § 3 adopted that year requires that there be at least one resident judge in each of its 88 counties, no matter how small. Nine of these counties of less than 20,000 population each have a total of nine judges to handle a total of 1,437 cases filed. Twenty other counties with fewer than 30,000 persons each have twenty judges to handle a total of 4,469 cases.

to the next. This involves starting trials promptly, avoiding initial delay for settlement conferences which should have been held weeks before, recessing in order to summon the witnesses who should have been summoned but were not, and conferring in chambers to discuss points of law that should have been anticipated but were not. It involves reasonably accurate scheduling of trials several days in advance so that it will not be discovered on the eve or morning of trial that counsel is due in two courtrooms at the same time.[47]

CONCLUSION

Some of the solutions to these problems—such as pre-trial disclosure of number, names and estimated time pan of witnesses' testimony,[48] or the disciplining of counsel who refuse to bargain in good faith at pre-trial but negotiate endlessly with the jury in an anteroom—may take the romance out of the courtroom; however, they will dispose, on a businesslike and equally fair basis, claims from a multitude of whiplashes, sprained joints, and broken bones. Personal injuries attorneys have long made a business of their profession; they should not be heard to object if the courts elect to become businesslike too. There is nothing about judicial reorganization that is inconsistent with such an approach as is suggested in this Article.[49] There is always the fear, however, that judges will take so long becoming accustomed to their new structural relationships that they will be tempted to postpone any real effort to streamline trial scheduling themselves or to engage competent business or production-line managers to do the job for them.[50] Nor is there anything about reorganization that forbids putting on adequate manpower for the job; it is merely that the real need for the manpower may be overlooked in the rush to reorganize.

47. The "engaged counsel" rule which permits counsel to set over a case if actually engaged in trial in another court has some validity as long as cases come out of central assignment rooms at random into nineteen or twenty-five jury courtrooms on the same day. With advance scheduling, including elimination of cases marked for speedy settlement, the courts may reasonably require trial counsel to engage a number of associates sufficient to try the total number of his cases that must, after reasonable adjustments, be tried within a stipulated period.

48. This solution is particularly infuriating to certain experienced trial counsel when used by federal courts as a matter of required disclosure to avoid surprise and "trial from ambush." For comments during a forum discussion of the practice, see 30 INS. COUNSEL J. 574, 576-78 (1963).

49. At least the tenure aspect of reorganization is recommended before trial judges impose all the scheduling reforms suggested; otherwise, many of the trial judges might well become trial lawyers after the next election.

50. Most judges as well as lawyers will shudder at the thought of having anyone but a trained lawyer telling them when a case should go to trial and how long it should take to try it. Cries of "lack of due process" will be heard; yet, some experience on the trial bench listening sympathetically to stories from counsel as to why a case cannot be tried at a given time would convince anyone that the job of saying "no" is better left to someone outside the camaraderie of the working bar. Due process is very seldom an element in denial of continuances.

Judicial reorganization is undoubtedly important to the quality of justice rendered. It has little effect on its quantity, and presently it is the quantity plus years of neglect which is the overriding problem. If quantity and quality can be simultaneously improved, so much the better. But where the public will not buy both at the same time, as is probable, the legal profession is in the unfortunate position of having to insist on quantity first and to hope that the courts can be reorganized later. If judicial reorganization continues to be sold under the claim that it will, in and of itself, eliminate or reduce docket congestion without improving judges' work habits and without radically streamlining the process of trial scheduling, then it is being oversold. If, as appears to be the case in New York, mere reshuffling of the courts is being substituted for adequate staffing and businesslike management of trials, sheer volume of undigested and indigestible litigation threatens a breakdown of the processes of justice.