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The theme suggested for this happy occasion gives opportunity for reflection on society's demand for both stability and change in the laws which protect our person, our property, and our freedom. Some of the distinguished speakers who have preceded me have discussed the social, economic, technological, and ethical changes which tend to force adjustments in our laws and in their application. Others have dealt with community resources and responsibilities. The two speakers whom you have just heard have dealt with the response of the legislative, executive, and judicial branches of government to these demands of society. I have been asked to speak of the lawyer's response and this I do with some trepidation, especially as my audience is composed largely of lawyers and lawyers-to-be, some of whom are also judges and legal educators.

The late John W. Davis, with characteristic clarity, described the lawyer's role in our society in these words:

> True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state. We may not construct the levers, pistons and wheels of society, but we supply the lubrication that makes its even running possible.[1]

We need not worry about the lawyer's response to the need for stability in the law. The average lawyer is a conservative chap who does not favor change unless the need for it has been proved to the hilt. Nor need we tender *full* apologies for this hardheaded attitude, for, as Judge Cardozo once said, "certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement."[2] At times, however, we have allowed these considerations, important as

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1. Address Before the Seventy-Fifth Anniversary Meeting of the Association of the Bar of the City of New York, March 16, 1946.

2. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 30 (1947).

they are, to outweigh even more compelling reasons for change. And at times there has been foolish resistance in some quarters to experimentation designed to test the value of suggested changes.

In contrast, the medical profession presents quite a different image to the public. On television, on radio, and in the public press, doctors appear to be constantly engaged in seeking new and better methods for treating the ills of their patients. Admittedly the public relations of our sister profession are not always good but generally speaking, the doctor basks in a better light than the lawyer.

If we are seeking better methods for serving our clients, we have not succeeded in letting the public know about it. Nor, if we believe existing procedures to be modern and adequate, have we persuaded our clients that this is so.

The truth is that much of our law, both substantive and procedural, is as antiquated as the Model T Ford. But it is also true that substantial segments of our profession have been and are striving to modernize and make more uniform our case and statute law as well as our rules of procedure.

Solid and intensive work is being carried on year after year by judicial conferences and committees, bar association sections and committees, legislative commissions, the law schools, and such scholarly organizations as the American Law Institute, the American Bar Foundation, The Institute of Judicial Administration, the American Judicature Society, and the Commissioners on Uniform State Laws. It is the collective action of these groups, in which the work of lawyers predominates, that has produced the more important legal reforms in recent years. But the general public is not aware of this.

Many a change in the law has also been accomplished through the efforts of a single lawyer battling for his client. The decision in *MacPherson v. Buick Motor Co.*[3] is an apt illustration. And witness the work of assigned counsel, just the other day, in persuading the United States Supreme Court to overrule *Betts v. Brady*.[4]

The practising lawyer who never enters the courtroom also influences the development of the law. The contract or convertible debenture he prepares, the advice he gives, the last will and testament he draws—all may have an impact on the law which could lead to changes.

Much of the criticism leveled at our profession revolves around the claim that lawyers generally oppose improvements in the law as they wish to preserve their time-honored methods and privileges. I would

3. 217 N.Y. 382, 111 N.E. 1050 (1916).
4. Gideon v. Wainwright, 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455 (1942).

not deny that there are such lawyers but the charge is in the main a false one. Nevertheless, it teaches that we must learn better ways of acquainting the public with the fact that lawyers are interested in improving their service to the public and that the organized bar, many judges, the law schools, and lawyer organizations are working to improve the administration of justice. In recent years the American Bar Association has greatly improved the public relations of the bar, but there is plenty of room for further improvement, particularly at the state and local levels.

Improved Methods For Law Revision

Now I turn to consideration of possible methods for improving the effectiveness of the organized bar and individual lawyers in responding to society's demand for changes which may or may not represent improvements in the law. Experience has taught us that improvements in practice and procedure frequently require experimentation, and adjustments in this area should usually be made under the direction of the courts with the advice and assistance of the bar, rather than by the legislature. Revisions of substantive law and major changes in procedure will ordinarily require legislative action.

Whether substantive or procedural, however, changes in our law should preferably come after careful study and evaluation by small and highly qualified groups who are not under deadline pressures and who can deal objectively with all the considerations involved. It is desirable that the recommendations of such groups should then be tested further by bar association committees, legal organizations, and, where legislative action is desirable, by the legislature. Any proposal which can survive such tests is likely to be very worthwhile.

Ideally we should have public agencies in every state, and in our federal system as well, where small groups of highly respected lawyers, judges, and legal scholars, with staff assistance, would spend the greater part of their time, year in and year out, in reviewing judicial decisions and statutory law and in proposing desirable changes in legislation and court rules.

Dean Pound was an early advocate of such an agency for law reform.[5] Judge Cardozo proposed a "Ministry of Justice" charged with the full time duty of considering the need for clearing up ambiguities in statute law and proposing legislation to correct such defects as well as inequities disclosed by judicial decisions.[6] In his words, "Let

5. Pound, *Juristic Problems of National Progress*, 22 American J. of Sociology 721, 729-31 (1917).

6. Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921).

us gather up the driftwood, and leave the waters pure."[7] A Law Revision Commission in my state was created for these purposes and has had a fruitful start.[8] In its first twenty-three years the Commission submitted 315 bills dealing with 245 subjects, of which 181 were enacted by the New York legislature.[9]

On the federal scene, there may well be even more need of such an agency, as Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit has recently pointed out.[10] He has suggested the creation of a public agency, headed by a retired federal judge and composed of the chairman and the ranking minority members of the judiciary committees of the Senate and the House, together with four to six lawyers and legal scholars assisted by a permanent staff. This national agency would study existing federal statutes and court decisions and suggest to the appropriate committee of Congress remedial legislation to clear up ambiguities or imperfections in federal statutes which the courts are powerless to correct or change. Many needed changes are minor and non-controversial. In the words of Judge Friendly, they are simply "weeds" which "have grown for lack of a gardener." Hopefully, the agency would also study the need for more important legislation and take the lead in suggesting appropriate measures. The public stature of the agency and the presence of legislative leaders among its members should ensure careful evaluation of its recommendations by Congress. State agencies organized along the same lines should enjoy equal status and usefulness.

Another thoughtful jurist, Presiding Justice Bernard Botein of New York, has suggested that such an agency should also devote time and thought to planning for legislation that is likely to be needed in tomorrow's world. In his words, we must learn to:

> anticipate rather than merely to await the challenge and make impromptu *ad hoc* response. . . .
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> . . . . .
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> It is patently inefficient, if not ineffectual, to leave the resolution of future problems that are presently recognizable, solely to the happenstance of the successive lawsuits in which they may arise. In that setting the watchdogs of the law will forever pursue a mechanical rabbit which will always outstrip them. The uneven caliber of counsel and judges, the strictures imposed by the particular issue in controversy, and the limited breadth of inquiry inherent in the judicial process all militate against exclusive reliance upon the case-by-case resolution.[11]

7. *Id.* at 126.
8. N.Y. LEGIS. LAW §§ 70-72 (1952).
9. N.Y. LAW REVISION COMM'N REP. 8 (1957).
10. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).
11. Botein, *The Future of the Judicial Process: Challenge and Response*, 15 RECORD OF N.Y.C.B.A. 152, 153, 168 (1960).

In addition to what Dean Pound has called "the small amount of petty tinkering of the legal system which is necessary to keep it in running order,"[12] these agencies of justice, in collaboration with other lawyer groups, should also grapple with the larger policy problems which come with changing times. "We do not realize," as Holmes once said, "how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."[13] "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[14] "The first requirement of a sound body of law," he said, "is that it should correspond with the active feelings and demands of the community whether right or wrong."[15]

I have selected, almost at random, three important problems which might be considered at this very moment by public or quasi-public agencies devoted to law revision and reform:

(1) In urban centers our congested court calendars are clogged with personal injury claims. Scarcely ten per cent of these will be tried to completion before court and jury. The rest are settled before or during trial. Our judges are being forced to assume the unbecoming role of claim adjusters and our juries have become buffers and catalyst agents to force settlements between the parties. There must be a better way of fairly resolving these disputes, and without resorting to the workmen's compensation plan approach. I realize that this problem is receiving much attention in various quarters but there may well be special local situations which could be relieved by local plans conceived by a state agency on law reform.

(2) In recent years the volume of commercial litigation has diminished greatly. This is not because such disputes have decreased. Businessmen have found arbitration or even submission to unjust demands preferable to litigation in the courts. It is of course true that arbitration is often an appropriate means of resolving some commercial disputes. But the rules of conduct among businessmen have been forged largely in the courts and we are not now getting, at least to the same degree as in the past, judicial decisions in commercial matters upon the basis of which lawyers can advise businessmen as to the probable outcome of a course of action. Arbitrators are not required to state the reasons for their conclusions and neither well settled legal doctrine, statute law, nor even the plain terms of a contract between

12. Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142, 145 (1920).
13. Holmes, *The Path of the Law*, in JURISPRUDENCE IN ACTION 294 (1953).
14. *Id.* at 287.
15. HOLMES, THE COMMON LAW 41 (1881).

the parties is binding on the arbitrators, who are frequently laymen. Their decisions, moreover, are not appealable to the courts.

It is socially desirable, I submit, that most litigated business disputes be resolved in the courts, rather than by arbitration. If this be the correct view, how can our court procedures be simplified and changed so as to bring about the return of such litigation to the courts?

(3) Our federal judges spend much of their time in trying accident claims arising under the Jones Act and the Federal Employers' Liability Act. There is a substantial question as to whether these cases belong in the federal courts at all and there are glaring inequities among the remedies available for injured persons. Judge Friendly has recently pointed out some of these inequities:[16]

> I take as an instance the law governing liability for injury to workers in various forms of transportation. If an airline pilot or an interstate truck or bus driver is injured, he recovers a fixed amount, under a state workmen's compensation act, without having to prove fault or, usually, anything beyond the fact of injury. Their counterparts on an interstate railroad, governed by a quite different statute, recover an amount that is unlimited, but only after proving negligence, at least in theory,[17]—unless the accident is due to faulty appliances on rolling stock,[18] when even less need be proved, or to defects in a locomotive or tender,[19] when practically nothing need be.[20] Although the proverbial visitor from Mars might think this sufficiently irrational, in the colloquial phrase he 'wouldn't have seen nothing yet'; the maze of rules governing maritime workers awaits him. In addition to the ancient remedy of maintenance and cure, which may render a shipowner liable for the illness of a seaman completely unrelated to the latter's activity,[21] our visitor would discover one regime of liability for fault, provided in the Jones Act,[22] and another of liability without fault, provided by the doctrine of unseaworthiness. At some times these two regimes are concurrent; at others, because of the restricted applicability of the Jones Act, they are not. Still more baffling than the seaman would be the harbor worker, covered by a federal compensation act[23] passed to place him on a parity with similar workers covered by state compensation statutes, yet also given the judge-made remedy for unsea-

16. Friendly, *supra* note 10, at 799-800 (1963). Footnotes 17-27 *infra* are the same as footnotes 75-85 in the original text.

17. Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958); see Sinkler v. Missouri Pac. R.R., 356 U.S. 326, 332-34 (1958) (Harlan, J., dissenting).

18. Safety Appliance Act §§ 12-13, 36 Stat. 298 (1910), 45 U.S.C. §§ 11-12 (1958).

19. Safety Appliance Act § 23, 36 Stat. 913 (1911), as amended, 45 U.S.C. § 23 (1958).

20. Lilly v. Grand Trunk W.R.R., 317 U.S. 481 (1943). For the less exacting standard under the Safety Appliance Act, 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-43 (1958), as amended, 45 U.S.C. §§ 38, 42, 43 (Supp. III, 1962), seo Raudenbush v. Baltimore & O.R.R., 160 F.2d 363 (3d Cir. 1947).

21. See, *e.g.*, Dragich v. Strika, 309 F.2d 161 (9th Cir. 1962) (Parkinson's disease).

22. § 20, 38 Stat. 1185 (1915), as amended, 46 U.S.C. § 688 (1958).

23. Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1958), as amended, 33 U.S.C. §§ 907-41 (Supp. III, 1962).

> worthiness against the ship because he is doing work traditionally done by the ship's crew.[24] One wonders whether even if the Martian visitor had followed up to this point, he would understand the next steps—that unseaworthiness of the ship and consequent recovery from it may flow from a defective appliance brought on board by the injured stevedore himself,[25] and that after the stevedore has recovered from the ship for the injury from the defective equipment furnished by his employer, the ship can then recover from the employer what it has paid the stevedore although the stevedore's direct recovery from his employer would have been limited by the Longshoremen's and Harbor Workers' Compensation Act.[26] Finally, these legal doctrines as to a seaman or stevedore who has been injured are of the starkest simplicity as compared to those concerning one who has been killed.[27]
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> How, in the last half of the twentieth century, can we defend such a complex and disparate set of regimes of liability for injuries to transport workers within the sphere of federal legislative power?

I have mentioned only three of many areas involving broad questions of policy to which agencies of law reform could devote their earnest attention. This of course is in addition to the important "housekeeping" work to which reference has been made and to the vital role of the organized bar, the judges and judicial conferences, the law schools, and all groups and agencies devoted to improving the administration of justice.

Two Urgent Subjects: Judicial Selection and Defender Facilities

Let me now turn briefly to two urgent matters requiring changes in state and federal legislation and in which the bar as a whole must assert the leadership and pressures to accomplish the desired objectives. First, there is the matter of improving our methods of selecting judges. A nationwide movement is now under way to substitute for obsolete and unsatisfactory methods modern procedures to assure so far as is humanly possible the selection of our best qualified lawyers to administer the law. In this great work, which has been spurred on by the organized bar at all levels and by such catalyst agents as The American Judicature Society and the nationwide Joint Committee for Effective Administration of Justice, great strides have been made in recent years and even in the past few months.[28] Let us not lose the

24. Pope & Talbot, Inc. v. Hawr, 346 U.S. 406 (1953); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

25. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954).

26. Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp., 350 U.S. 124 (1956).

27. See Gilmore & Black, Admiralty 301-08 (1957); Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* in 1960 Supreme Court Review 158 (Kurland ed.), quoting from Ibsen's *The Wild Duck*.

28. See, *e.g.*, Winters, *Editorial*, 46 J. Am. Jud. Soc'y 45 (1962).

momentum which has been gained at such great effort. Let each of us examine the procedures being followed in his own state with a critical eye and then join, if reform be desirable, in efforts by bench and bar to assure that only the best qualified shall ascend the bench.

Second, there is a matter of critical importance which in my judgment should have the highest priority. I refer to the need for organized defender services in our larger cities and counties. For over twenty-five years this step has been advocated by leaders of bench and bar. The number of offices has increased substantially in the past fifteen years but even today there are nearly forty counties with populations of 400,000 or more which have no organized service whatsoever. Moreover, existing facilities in most cities are inadequate to meet the real needs of the community.

We ean wait no longer. Barely two weeks ago, the Supreme Court of the United States, in overruling its 1942 decision in *Betts v. Brady*, held squarely that the federal constitution requires each state to provide the assistance of counsel to indigent persons accused of crime.[29] On the same day the Court held that the State of California was required to provide a convicted defendant with counsel to present his appeal to the appellate court[30] and that federal habeas corpus is available to review, in the federal courts, state convictions no longer reviewable in the state courts.[31]

These and other recent decisions have made an already acute problem even more critical. The private bar cannot carry, and should not be expected to carry, the increasingly heavy load of *ad hoc* appointments to defend the thousands of indigent persons who each year will be accused of crime, or to brief and argue appeals from convictions or to pursue post-conviction remedies. It is perfectly obvious that the defense side must be organized along the same lines as the prosecution side and this is the spirit of the proposed Criminal Justice Act of 1963, now pending in Congress.[32] This legislation would provide compensated counsel and investigatory facilities in the federal court system through (1) an appointed public defender, or (2) contract arrangements with a private defender or legal aid society, or (3) appointments of individual lawyers, or (4) a combination of two or more of these methods, as local conditions may dictate. This legislation has significant bipartisan support in Congress and was introduced with a special message from the President of the United States.

The need for organized defender systems is even greater in the state

29. Gideon v. Wainwright, 372 U.S. 335 (1963).
30. Douglas v. California, 372 U.S. 905 (1963).
31. Fay v. Noia, 372 U.S. 391 (1963).
32. S. 1057, 88th Cong., 1st Sess. (1963).

courts, where there is a larger volume of criminal business. Leadership and pressures must be exerted by the bar in every section of the country to assure the setting up of adequate defender facilities. Such offices may receive their financial support from tax funds contributed by state, city, or county, or they may be supported by the community fund or by both. The important thing is that these offices be established and that they be manned by decently compensated competent lawyers with necessary investigatory help who will be available as needed to defend indigent persons accused of crime and to prosecute appeals and other post-conviction remedies.

A state by state audit of defender facilities and of methods now being used to provide counsel in criminal cases is under way. This audit, which has been financed by the Ford Foundation, is being conducted by the American Bar Foundation with the active cooperation of the American Bar Association and all state bar associations. The results of the national survey will be of substantial significance and help in planning the future development of various types of defender services to be suggested for communities of varying size. However, no audit or survey is needed to demonstrate the immediate need for defender offices in the larger counties and cities.

The bar must lead the way. As stated by the first—and the greatest—Chairman of the Standing Committee on Legal Aid Work of the American Bar Association, Charles Evans Hughes:

> Whatever else lawyers may accomplish in public affairs, it is their privilege and obligation to assure a competent administration of justice to the needy, so that no man shall suffer in the enforcement of his legal rights for want of a skilled protector, able, fearless and incorruptible.[33]

In closing, let me recall Elihu Root's statement of the lawyer's obligation to the law, its stability and its development:

> He is a poor-spirited fellow who conceives that he has no duty but to his clients and sets before himself no object but personal success. To be a lawyer working for fees is not to be any the less a citizen whose unbought service is due to his community and his country with his best and constant effort. And the lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come. If he fail in loyalty to this cause; if he have not the earnestness and sincerity which come from a strong desire to maintain the reign of law; his voice will ring false in the courts and will fail to carry conviction to judicial minds.[34]

33. Hughes, *Legal Aid Societies, Their Function and Necessity*, 45 A.B.A. REP. 227, 234 (1920).

34. Root, *Some Duties of American Lawyers to American Law*, 14 YALE L.J. 63, 65 (1904).

The bar has an unrealized potential for leadership and prestige which is of enormous proportions, particularly in those areas which are the primary responsibilities of our profession. To reach the heights which lie open before us the skill and dedication of a high percentage of our membership will be needed.

As we dedicate the new home of this great School of Law let each of us resolve, with Mr. Justice Holmes, that:

> Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart.[35]

35. Holmes, *The Path of the Law,* in JURISPRUDENCE IN ACTION 294 (1953).