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Courts for Methuselah

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COURTS FOR METHUSELAH

HANS ZEISEL*

More than ten years ago two colleagues and I published a careful study of the delay problem.[1] To return to that problem is a melancholy, pedestrian, and dismal task. Court delay has been with us too long, and it seems so futile to continue writing and talking about it.

It is hard to understand why the United States, with its great resources, continues to allow the ground floor of its judicial system to remain in such disrepair. We go to the moon and our managerial abilities are unrivalled; yet we are either unable or unwilling to secure for an injured plaintiff his right of a prompt trial. Depending on where they can go to court, injured parties may have to wait two or even five years. The detrimental consequences of such delay are many.

Initially, if a plaintiff is not satisfied with the settlement offered by the defending insurance company, he is given to understand – if not by the insurance company, then by his own lawyer – that if he refuses the offer he will have to wait years, a hardship few litigants are rich enough to bear. Delay, therefore, seriously weakens the bargaining power of the injured. The remote trial date forces him to accept less than his due.[2]

Furthermore, if the case finally comes to trial, witnesses – if they are still available – will be asked to testify about remote events, for example, exactly what happened one hazy evening at 5:35 at the corner of Wabash Avenue and Randolph Street, five long years ago. Thus, delay renders the careful rules of evidence and the precision of our laws of substantive law a mockery.

Finally, court delay generates a variety of secondary evils. Pressure on litigants to settle often creates an atmosphere in which insisting on trial becomes almost an impropriety. Additionally, proposals emerge to reform procedures and substantive laws for the sole (and therefore insufficient) reason that they might reduce the workload of our courts. In the end, delay corrodes further a commodity that is always in precariously short supply: the citizen's respect for the courts.

THE NATURE OF THE PROBLEM

The special nature of the delay problem is characterized by four points:

(1) For many years the Institute for Judicial Administration has audited the delay figures in state courts, revealing that delay is by no means a universal sickness of our courts:

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1. H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, DELAY IN THE COURT (1959).

2. *Id.* ch. 2.

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TABLE 1[3]

State Court Delay by Size of County Population

(Personal Injury Cases, 1968)

County Population	No. of Courts Reporting	Delay in Months Between Answer and Trial — Average	Range		
Over 750,000	(29)	32	10 (Miami)	to	60 (Chicago)
Between 500,000 and 750,000	(30)	21	4 (Delaware County)	to	47 (Suffolk County, N.Y.)
Under 500,000	(42)	13	2 (Spokane)	to	31 (Manchester, N.H.)
Total	(101)	24*	2	to	60

*Average, weighted by size of county population.

Delay appears to be more prevalent in the large metropolitan courts than in the smaller ones; but even some of the largest counties have managed to keep delay down to a moderate level, while courts in some of the smaller counties are marked by long delays. Note that the average delay for all state courts is about twenty-four months.

(2) As Table 2 illustrates, delay is *not* a chronic disease, even for some of the most delayed courts:

TABLE 2[4]

Delay 1969 and 1964 (in months)

	1969	1964
Chicago	60	58
Brooklyn	51	51
New York	51	20
Los Angeles	36	22
San Francisco	31	25
Pittsburgh	20	28

Delay in some courts, such as those in Los Angeles and San Francisco, has increased during the last five years; Pittsburgh has reduced it, but for most courts the Chicago and Brooklyn situation is typical. These courts have a backlog of cases that impedes speedy trials, but these courts hold their own in that they try sufficient cases to dispose of their annual input. The situation is similar to that of a man who has owed the same amount for a very long time, but has managed throughout that time to pay his current expenses. All these courts need is one major cleanup operation. Once the backlog is removed, good housekeeping should prevent its reemergence.[5]

3. Institute of Judicial Administration, Calendar Status Study (1969).

4. Institute of Judicial Administration, Calendar Status Study (1970); *id.* (1965).

5. To be sure, the jurisdictions that now have an inordinately high delay of four or five years must probably anticipate on some increase in the proportion of cases that will have to be tried once the delay is removed. *Cf.* H. Zeisel, H. Kalven, Jr. & B. Buchholz, note 1 *supra*, ch. 10.

If this insight is correct it follows that whatever remedy is adopted should be one with which we will be satisfied after the delay has been cured. It would be a mistake to adopt a remedy that would permanently lower the quality of the judicial process or the substantive law. Thus, remedies should be of only two kinds: emergency measures, certain to be abandoned once the problem is solved, and permanent measures that would cure delay and at the same time raise, or at least not impair, the quality of our judicial system.

(3) The only occasion at which a case consumes a significant amount of the court's time is at trial.[6] Cases that do not reach trial, no matter how long they stay on the docket, even if they occasionally reappear on the calendar, require only a negligible amount of the court's time.[7]

(4) A peculiarly simple structure characterizes the delay problem. There are three, and only three, ways of resolving it: reduce the number of cases that must be tried; reduce the time required to try cases; or increase the available judge time for trying cases. Unless an effective remedy is found along at least one of these routes, *it is no remedy.*

The last point can be reduced to a simple mathematical formula:

(a)		(b)		(c)
Number of cases to be tried	×	Average time it takes to try these cases	=	Court (Judge) time necessary to try these cases

As long as the *available* court time is equal to the *necessary* court time (c) the current input of cases into the court will be disposed of without delay. If the court, in addition, has a backlog of cases, somehow *extra court time* must be provided.

Stating the delay problem in this fashion illustrates that any remedy must provide trial time for backlog cases; furthermore, the amount of trial time provided is the precise measure of its remedial power.

The formula further shows that the sheer number of backlog cases is almost irrelevant; only the cases that require trial are pertinent.

A fairly simple method of estimating the time required to remove the backlog can also be devised: multiply the number of judges in that part of the court by the number of years the calendar is delayed. Suppose delay in a court has been fairly steady around three years, and ten judges have been available. Under those circumstances roughly 30 (10 x 3) judge years will be required to remove the backlog.

To repeat, a remedy will be effective to the extent it provides time for trying the backlog, either by making more judge time available and thereby increasing the right side of the equation (c) or by decreasing the necessary trial time by reducing the left side of the equation — (a) fewer trials or (b) shorter trials.

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6. The only exception, and it is a minor one, is the time spent on pretrial. *See* note 31 *infra* and accompanying text.

7. However, these cases often require a considerable expenditure of the lawyers' time and hence the clients' money.

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ALTERNATIVE SOLUTIONS

Route 1: More Judges

New Judges. In the 1959 study of the delay problem,[8] this remedy was almost disregarded as a subject of analysis because it seemed too obvious that the appointment of more judges would almost automatically solve the problem. Since nothing new could be said about the political merits or difficulties of that solution, it was given short treatment.

In retrospect, viewing this solution as "too obvious" may have been overly optimistic. Barring the unreal possibility of an unlimited expansion in the number of judges, it appears that simply adding more judges, without adding other measures, is far from being the radical remedy it theoretically appears to be.

The Chicago court, for instance, in 1964 had nine full-time judges trying jury cases in the law division. Today their number exceeds thirty, however, despite this formidable increase the delay has remained substantially the same. To be sure, without that increase the delay might now be considerably larger, but such an experience indicates that remedies should always be viewed as part of a system rather than considered in isolation. It is conceivable, for instance, that adding judges may result in fewer daily hours per judge or in some other counterbalancing effect.

Reassignment of Judges. The division of the court experiencing delay may, of course, obtain more judges from other parts of the court system. If some judges in the system are underemployed, such temporary reassignment is among the most natural, and most frequent, remedies. The more delicate question concerns the reassignment of judges who are fully employed and whose removal would effectuate additional delay in their own division while reducing it elsewhere. Although not always so recognized, this is the obvious result of certain conscious administrative practices. That is, the high average delay of one section of the court — usually the personal injury jury division — is never a natural event but always results from an arbitrary decision of the court. With the exception of criminal cases, there apparently exists no constitutional basis for such singling out. Unfortuately, the increasing delay in other divisions, especially the criminal one, has made reassignment of judges as a source of relief less and less available for the personal injury area.

More Court Days and Longer Hours. This remedy is equally trivial. To have judges work harder during more court days per year and more hours per day is hardly a profound idea. Little can be said about this remedy except perhaps for three remarks. First, it is well established that some courts have shorter vacations than others, that some courts work harder than other courts, and that some judges work harder than other judges; thus, there does seem to be room for improvement.[9] Second, the setting and supervision of

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8. H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, note 1 *supra*.

9. *Cf., e.g.*, H. JAMES, CRISIS IN THE COURTS 25 (1968): "In Chicago, the city with the

such working standards must be left to the courts. Third, such standards should be established *and* published.

Reduce Calendar Gaps. Since judge time on the bench is the only pertinent factor, one of the more important opportunities for extending the judge's trial time is to avoid gaps in his trial calendar.

Judges often blame lawyers for these gaps. The personal injury trial business, judges claim, is concentrated in too few law offices. No evidence exists, however, to support the claim that this concentration, which indeed exists, in any way causes delay, provided the courts properly do their part. Since delayed courts have literally thousands of cases waiting, a properly functioning calendar system should easily reveal a case ready for trial. So long as *any* case is tried that will have to be tried eventually, it does not matter whether it is an old case or a young one.[10]

The most difficult situations involve cases that are unexpectedly settled early in the trial. In such a situation, much valuable time can be lost if no other case is immediately assigned.[11] There remain two schools of thought regarding the best assignment system: the *individual* calendar in which a case is assigned to a judge at the time it is filed, and the *general* calendar in which the case is assigned only at the time of trial. Hopelessly inept research has advanced the alleged superiority of either system.[12] Apparently, a well-functioning general calendar in a larger court might be better able to predict statistically the frequency of "unexpected" settlements and hence the needed number of "on deck" cases. In any event, much hinges on adequate communication between trial judge and assignment judge.

Route 2: Shorter Trials

Abolish the Jury. The second route, cutting the time required to try a case, also has its radical cure: follow the English example and abolish the

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biggest civil backlog, this reporter has checked all 114 courtrooms in the New Civic Center several times.

"On a typical day he found judges on the bench in only 11 of the 114 courtrooms between 9:30 and 10 a.m.; 58 of the 114 benches filled between 10 a.m. and 10:30 a.m.; 45 judges sitting between 10:30 a.m. and 11 a.m.; and the same number between 11 and 11:30 a.m. Between 2:30 and 3 p.m. there were only 34 of the 114 benches with judges sitting."

I might add here a personal recollection of some years ago about the Los Angeles court. I had come to Los Angeles to discuss the delay problem with the then presiding Judge Burke. At some point the judge asked me whether I did not want to watch a trial. I looked at my watch and said, "It is past 4:30, I don't expect many judges to be still on the bench." Judge Burke smilingly took me from one courtroom to the next. As I recall it, not a single one was empty.

10. Tauro, *Court Delay and the Trial Bar*, 52 JUDICATURE 414 (1969); Zeisel, *Court Delay Caused by the Bar?*, 54 A.B.A.J. 886 (1968).

11. *Cf.* note 18 *infra* and accompanying text.

12. One judge has informed the author of a recent so-called "experiment" in which one of our major federal courts utilized three enthusiastic volunteers to show what wonders the individual calendar can perform and suggested their success be accepted as evidence of the efficacy of this approach generally.

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jury in personal injury cases. Such change would convert nearly eighty per cent of present jury trials to bench trials, thereby reducing trial time in the jury division by about one-third.[13] Abolishing the jury in personal injury trials would indeed eliminate all delay at current levels within a foreseeable number of years.[14] However, the decision to retain or abandon the jury in civil cases should not be made because it may save time. Such a decision should be made only on the merits, that is, only if it is believed that the jury should be given up even if the courts were up-to-date. If jury trial is abolished *only* because it takes more time, the result will be a court system that is up-to-date, but substantially inferior to what presently exists.[15]

Therefore, a determination must be made whether trial by a judge is preferable to trial by jury. Initially, does there exist a substantial difference between the way juries decide personal injury cases and the way judges decide them? In roughly twenty per cent of these cases the jury arrives at a liability verdict that differs from the one the judge would render. Juries and judges also differ on the damages question: on the average, juries award approximately twenty-five per cent higher damages than do judges.[16] Second, given these discrepancies, an investigation should attempt to determine when they arise and the reasons for them. Finally, these reasons must be evaluated. Together, the three steps permit decision concerning which adjudication is considered superior — the judge alone or the judge with a jury.

Jury Waiver. In attempting to abrogate court delay, desirable alternatives to abolishing the jury include devices designed to increase the voluntary waiver of jury trials in individual cases. Unfortunately, unless improper lures are offered or improper pressures are exerted or a local custom of jury waiver exists, such voluntary waiver is unlikely.[17] So long as the probable jury verdict will differ from that the judge would render, and the direction of the difference is predictable within limits, *one* of the litigants will find it to his advantage to opt for the jury. Since one opter is enough in this instance, a jury trial ordinarily will be sought.

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13. Removing the jury will cut about 40% of the trial time. *See, e.g.*, H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, note 1 *supra*, ch. 6. Forty per cent of 80% of all jury trials would amount to (.40 x .80 = 32%) 1/3 over-all savings.

14. It will be quite instructive to estimate roughly the number of years required by reference to a hypothetical example. A court that has a steady delay of 3 years would, to begin with, require only 2/3 of 3 years, that is, 2 years for trying the backlog. Since the court would also free 1/3 of its regular trial time, abolishing the jury would remove the delay in that court within 6 years. Since each year the court would be able to spend 1/3 of its judge time to trying backlog cases, and 2 years require 6 one-thirds of a year.

15. *See, e.g.*, Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Zeisel, *The Jury and Court Delay*, 328 ANNALS 46 (1960).

16. These are data from the forthcoming volume on the civil jury, the sequel to *H.* KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY (1966).

17. Waiver may result from the promise of an early trial to the plaintiff, coupled with a binding general offer to waive from insurance companies who, for political reasons, might not want to antagonize the court. Clearly, a sufficiently high statutory fee for filing a jury request might have a similar effect.

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Settlement During Trial. One event that drastically shortens trial time is settlement during trial. However, the value of that remedy, if any, is impaired by two circumstances. First, not much is known about the mechanics of reaching a settlement. Second, unless a court's calendar system is quite flexible the time gained by prematurely ending the trial will often be lost to the court because another case is not readily available. Settlements can be successfully encouraged. Past studies indicate, for example, that the appointment of an impartial medical expert increases chances of settlement during trial. Although permitted in many jurisdictions, such appointments are nonetheless rare; the tradition of adversary experts is deeply rooted. Moreover, there remains some legitimate doubt as to whether this type of medical expertise is indeed objectively so well established that it justifies the aura that an "impartial" expert is bound to impart before a jury.[18] Judges rightly complain that settlements "at the steps of the courthouse" — either shortly before or after opening of the trial — are an unconscionable misuse of the court's time. Some lawyers settle their cases at the very last minute, either because they believe they get a better settlement at that time or simply because they were not familiar with the case until it reached trial. In any event, these settlements gravely impair the smooth functioning of the courts, and learning how to avoid them would be valuable. A change in the rules of lawyer cost assessment, discussed below, would help.[19] If a court were to announce and strictly adhere to a rule under which the court would not lend its authority or time to settlement negotiations during the first trial day, positive effects might result. While such a policy might produce some short-range setback, it eventually might force earlier settlements for litigants who do not seriously intend to try their cases. Again, this policy is one that a court should implement on a trial basis so that all courts could learn from its experience.[20]

Split Trial. One of the more effective devices for shortening the trial time is the separate or split trial, in which the jury decides first the issue of liability. Only if liability is affirmed does the jury hear evidence on and decide the amount of damages. On the average, such separation saves twenty per cent of the court's trial time. This saving results partly from the approximately one-half of the cases in which the jury finds no liability and partly from the increased tendency to settle once liability is established.[21] It has been argued, however,[22] that such separation prevents the jury from engaging

18. *Cf.* H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, note 1 *supra*, ch. 11.

19. *See* notes 32-36 *infra* and accompanying text.

20. The Chicago court will attempt to solve this problem by pretrying, once more, all cases immediately before they are scheduled for trial and then refusing to allow the trial court to be used as a forum for settlement. The experiment was scheduled to begin Sept. 1, 1970. *See also* note 31 *infra*.

21. *See, e.g.,* Zeisel & Callahan, *Split Trial and Time Saving: A Statistical Analysis,* 76 HARV. L. REV. 1606 (1963).

22. *Cf.* Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power,* 14 VAND L. REV. 831 (1961).

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in its acknowledged practice of relaxing its liability criteria where damages are large. Although it is too early to evaluate this argument, preliminary evidence from jury data does *not* suggest that a jury would engage in such practice significantly more often than a judge trying the case without a jury.[23] In any event, courts could guard against stultifying the normal inclinations of juries and rescue this powerful timesaver simply by advising the jury, at the outset of the liability trial, of the nature of the injury claimed by one side and disclaimed by the other. Conceivably, the nature of the injury might even be partly stipulated. Such an announcement would also equalize the position of plaintiffs whose injuries are plainly visible to the jury with plaintiffs whose injuries are not visible.

Faster Trials. Other suggestions have considered the reduction of trial time, perhaps by reducing the latitude allowed by some courts in *voir dire* examinations.[24] Moreover, courts might increasingly insist upon stipulation of facts prior to trial, a practice that has enabled tax courts, for instance, to operate with great expedience. Here again, trial lawyers fear that a jury will be less impressed by a stipulated fact than by one presented in full. Such concern might be mistaken, however, and experimentation along these lines would seem worthwhile.[25] Quite aside from such specific suggestions, there exists little doubt that some judges try their cases more expeditiously than others and that some courts are performing better than others. Cases in the New York (Manhattan) court, for instance, take substantially more time to try than do comparable cases in New Jersey.[26] It would seem worthwhile to study this problem in detail so that courts may learn to try cases expeditiously *and* well. Some court time is wasted here that could be pried loose.

Simpler Tort Laws. Attention should also be directed to a problem that is not usually regarded as connected with the delay problem. Every refinement in the law necessarily increases the number of decision points, thus augmenting the necessary evidence and, accordingly, the length of trials. "What is happening in the course of the law is an almost endless increase in the number of decision points, usually without much regard to the consequences that that increase will have on the legal system."[27]

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23. *See* note 16 *supra* and accompanying text.

24. On the whole, trial lawyers prefer latitude; many of them believe they win their cases (if they do) during *voir dire,* partly by doing the smart selecting and partly by putting the jurors into what they consider the "right frame of mind."

I have never heard a good argument explaining why elaborate *voir dire* proceedings are in the interest of justice. If counsel on both sides are equally skilled, their effectiveness will cancel out; and if one should indeed win only because he knows better how to select jurors sympathetic to his side, this does not seem a good ground for allowing a litigant to win.

25. Pretrial is, of course, expected to accomplish this aim. However, the little experimental evidence that exists does not show any effect. *Cf.* M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 52 (1964).

26. *See, e.g.,* H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, note 1 *supra,* ch. 9.

27. J. FRANK, THE CASE FOR RADICAL REFORM, LECTURES UPON THE DEDICATION OF THE

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Route 3: Fewer Cases to Trial

Special Laws for Automobile Cases. Here again, one radical remedy or, more precisely, a number of such remedies have been offered, beginning with the proposal to remove all automobile accident claims from the courts to an agency fashioned after workmen's compensation boards. The more prominent of these proposals — already introduced into several state legislatures — was made by Professors Robert Keeton and Jeffrey O'Connell in late 1964. Their proposal would introduce a type of insurance that entitles the victim of an automobile accident a minimum compensation (up to 10,000 dollars) for personal injury damages (but not for pain and suffering) without regard to fault. Only damages in excess of such claims would go to the courts in the traditional manner.[28]

Eliminating the need to prove fault for automobile accident claims under 10,000 dollars would undoubtedly reduce litigation drastically, particularly in courts of limited jurisdiction whose awards cannot exceed this amount. The extent to which this plan would eliminate litigation in courts of unlimited jurisdiction would be an appropriate goal of study. In any event, the plan would be a radical remedy for the delay in our courts.

The total transfer of all automobile cases to an administrative board, of course, would cure delay almost overnight, and might well confront us with some unemployment in the courts. Quite clearly, abandoning the fault principle in automobile cases, or the removal of all these cases, are such formidable and radical proposals that their discussion far transcends the present article.[29] The concern here is with more modest remedial actions.

Increase Settlements. As a practical matter, courts have concentrated on only one avenue towards reducing the number of cases, namely, encouraging litigants to settle. The devices range from modest pretrial conferences to mass pretrials, special settlement marathons, and calling particularly recalcitrant insurance company defendants on the carpet. Certainly the settlement process is already extraordinarily effective. With variations, not more than one to three out of every hundred personal injury claims ever reach the trial stage.[30] Query, however, whether much potential remains in the system for an increase in settlements?

Ideally, a court should merely invite the litigants to settle and offer its good offices. There should be only one pressure for settlement: the prospect, or threat, of a speedy trial. An up-to-date court needs no announcement to convey the message.

The most widely used settlement device is obligatory pretrial. The judge who conducts it has the satisfying experience of settling in one day more cases

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EARL WARREN LEGAL CENTER, UNIVERSITY OF CALIFORNIA 69 (1969).

28. *See* Keeton & O'Connell, *Basic Protection — A Proposal for Improving Automobile Claims Systems,* 78 HARV. L. REV. 329 (1964).

29. *See, e.g.,* C. GREGORY & H. KALVEN, JR., CASES AND MATERIALS ON TORTS ch. 11 (2d ed. 1969).

30. *See* H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, *supra* note 1, at 117; Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation,* 59 COLUM. L. REV. 1115 (1959).

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than he could try in a month. However, evidence indicates that many of these cases would have been settled regardless of pretrial. Data emanating from one of the few controlled experiments ever made in the field of judicial administration showed that obligatory pretrial is counterproductive. It costs court time yet fails to settle more cases than the much less time-consuming *optional pretrial,* which offers pretrial only if one of the litigants demands it.[31]

More interesting and promising opportunities for increasing settlements might arise through reappraisal of the prevailing system that allocates the costs of trial. Presently, costs are typically allocated as follows: plaintiff's counsel, on a contingent fee arrangement, pays his own costs if he loses; if he wins, his winning client pays him.[32] Defendant's counsel—win or lose—is always paid by his client.[33] This situation may encourage some lawyers to try a claim that has a relatively small chance of winning if the penalty for losing is small, unless his time is fully taken up with cases that promise greater remunerative possibilities.[34]

A number of schemes have been proposed to increase the risk of the litigant who refuses his opponent's settlement offer and then, in the subsequent trial, fails to obtain more than the offer he had refused. The simplest of these plans would assess costs for the opposing lawyers to the party who had refused the offer and insisted on trial, which in retrospect proved superfluous.[35] Such a scheme—again, disregarding its intrinsic merits or demerits—is likely to reduce the incidence of trial. To ensure that it does, however, and to evaluate its effectiveness, a rational legal system should persuade one jurisdiction to introduce such a cost assessment scheme on an experimental basis so that other jurisdictions could learn from the experience.[36]

Miscellaneous Devices. Some court systems require a *certificate of readiness,* in which the litigants declare that they have made every effort to settle the case, but have failed and are now ready for trial. However, evidence has

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31. M. ROSENBERG, note 25 *supra.* When Rosenberg compared a random sample of New Jersey cases with obligatory pretrial to those with optional pretrial no differences in the settlement ratios emerged. However, whether total abolishment of pretrial would reduce the rate of settlements is a question to which the answer is not clear and one that would deserve further study.

32. It is still largely a matter for speculation as to whether and to what extent juries calculate this expense into their award.

33. There are minor exceptions to the rule. Statutory filing fees, fees for jury requests can be recovered from the opponent who lost.

34. In contrast, the losing party in most continental European systems—plaintiff or defendant — must pay the costs of the lawyers on both sides. In addition, the losing party must also pay court costs, which depend on the number of pages of complaint, answer and other briefs, and on the number of trial hours. All of these fees (and incidentally also lawyer fees) are graduated according to the size of the claim. Such a system obviously shifts the calculus: claims with marginal chances of recovery will not be pursued because of the risk of paying costs to the other side

35. *See* Mause, *Winner Takes All: A Reexamination of the Indemnity System,* 55 IOWA L. REV. 26 (1969).

36. *See* H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, note 1 *supra,* ch. 21.

not supported the contention that the certificate increases the number of settlements.[37]

Proposals have been made to charge the defendant, if found liable, interest on the award from the day of the accident or suit. Whatever the equitable merits of this proposal, it too would not increase settlement.[38]

Recently, an eminent advocate has argued for the more frequent use of summary judgment on the pleadings:[39]

> Of all of the correctional procedural devices, summary judgment is the one best calculated to reduce court dockets. The vanguard position . . . was taken by the late Judge Charles E. Clark, the draftsman of the rules which include the remedy . . . but I would . . . push the use of the remedy beyond the point to which he was ready to go.

EPILOGUE

All, or almost all, of the possible remedies for court delay have been listed in systematic order. If the removal of court congestion were a simple, straightforward problem, like developing a super bomb or going to the moon, all would be well. Then, wherever a court was in arrears, somebody would sit down and put numbers to the basic workload equation described earlier. He would begin by putting down:

(1) how many judge hours it will take to dispose of the pending backlog cases, assuming no change in court rules or trial procedures;

(2) how many judge hours it will take, again assuming no change, to dispose of the current annual input of cases, the cases expected next year and the year thereafter;

(3) any remedy that, if adopted, would reduce either the number of current or backlog cases requiring trial or the time needed to try these cases, and hence would reduce the number of required judge hours as estimated under (1) and (2) above.

Our hypothetical man would then put numbers to the other side of the equation:

(4) how many judge hours will be in fact available this year, next year, and the year thereafter. These judge hour figures are the composite products of the number of available judges, times the number of their working days per year, times the number of their working hours per day, minus the number of hours that for one reason or other they cannot spend on trying cases.

Once he has answered these four questions, our man knows that if the total number of available judge hours:

37. *Id.* ch. 14.

38. *Id.* ch. 12.

39. J. FRANK, *supra* note 27, at 161.

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(a) is smaller than required to dispose of the current input of cases (2 above), the court will fall further into arrears and its delay will increase at a predictable rate.

(b) if it is larger than needed for disposing of the current input (2 above), the court's delay will decline. The rate of decline is easily estimated: it will take as many years to remove the back log, as the excess of available judge hours (over 2 above) is divisible into the judge hours needed to remove the backlog (above 1),[40] and if the available judge hours are just sufficient to dispose of the current input of cases (2 above) the delay will remain unchanged.

If it is all that simple, then why does no court in the country—not a single one, if I am not mistaken—proceed in this fashion? The answer is complicated and strange, but its main point is simple: Nobody cares sufficiently.

When *Delay in the Court*[41] was published in 1959, one of Chicago's newspapers decided to arouse public opinion, first by an editorial about our study and then by publishing every single day for a full week something about Chicago's frightfully delayed courts.[42] When the week was over the newspaper had established a record: never before had it raised an issue to which public response turned out to be *absolutely nil*. "How is this possible?" one might ask. Initially, the defendant insurance companies and their lawyers —however much they might protest this allegation—do not mind a situation in which they can say to a plaintiff: "If you don't like what we offer, come back in five years." Then there are the plaintiffs; a few do not mind waiting because they have means of their own; some, if they cannot wait but have a good case, are carried by their lawyers; a handful will even get an advanced trial date. However, the bulk of the plaintiffs will settle a long time before they could have their trials, partly because they need the money and partly because they find the insurance companies eager to settle, albeit at their price. The individual plaintiff is unable to perceive that what he gets in settlement, by the laws of economics is less than what he would get if the insurance companies were confronted with an early trial date. The plaintiffs' lawyers also do not find this situation altogether disagreeable; whatever burden the delay imposes on them, the cases to be tried in two, three, four, or five years guarantee them an income for years ahead. Finally, whoever would want to change the situation would have to take on the courts, something few lawyers care to do. As a result, the sum total of the dissatisfaction of the litigants or potential litigants is imperceptible.

The duty to remedy the situation, therefore, evolves, as one might have always thought, on the courts and only on them. Why they fail to act is more

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40. Since only (b) offers any mathematical difficulties, an example will be helpful: (1) needed for current input . . . . 10,000 judge hours; (2) needed for backlog disposal . . . . 5,000 judge hours; (4) available for backlog disposal . . . . 11,000 judge hours. The excess of (11,000 − 10,000=) 1,000 judge hours is 1/5 of the amount required to dispose of the backlog, hence the delay will be removed within 5 years.

41. H. Zeisel, H. Kalven, Jr. & B. Buchholz, note 1 *supra*.

42. Chicago Tribune, March 27-April 3, 1969 (various sections and pages).

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difficult to understand than why the litigants and their lawyers tolerate the delay. The problem begins with the difficulty of persuading judges, however learned in the law and however devoted to the proper running of the court, to share the power of court administration with expert administrators.[43] There is also the difficulty of persuading judges that it might be necessary to count the judge hours actually available for trial. Finally, there is the danger that judges will believe the installation of a computer will solve all problems. A computer is, however, no substitute for putting numbers to the workload equation because, by itself, it does not solve a single problem.

These are the main difficulties. There are others: almost every court believes that its delay problem is utterly unique and is ready to reinvent the wheel time after time. Parochialism rules the field; cooperation between states, or even between courts within the same state, is rare. Yet cooperation is essential if one court is to learn from the successes and failures of others.

Given the triviality of the problem and the importance of solving it, there is something truly sinister about the unwillingness or incapability of some of our courts to fulfill their primary administrative duty. It will not suffice for them, as some have attempted, to point the finger at others, at such alleged culprits as the bar or the legislature. The first court that puts before the public a clear, honest accounting of its workload, its capabilities, its needs, and couples it with an unequivocal commitment to remove the backlog is bound to succeed. But where is that court?

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43. The emphasis is on *sharing the power*. There are many able court administrators around and more are being groomed in an Institute for Court Managements sponsored by the American Bar Association with the help of a Ford Foundation grant.

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