General Analysis of and Introduction to the Problem of Court Congestion and Delay, A Rules and Procedures

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A GENERAL ANALYSIS OF AND INTRODUCTION TO THE PROBLEM OF COURT CONGESTION AND DELAY

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The topic of court congestion and delay is, as you all well know, a big and burgeoning one. The architects of this morning's program have decided it was the better part of valor not to attempt to cover it all, but to provide a sharp focus on two of the more controversial and important remedies suggested; the use of the split trial for liability and damage issues, and the increased use of pre-trial. The format is the familiar one of debate; so we will have Professor Zeisel debating Mr. Corboy on split trial and Judge Doyle debating Mr. Morrison on pre-trial.

Thus far the programming makes excellent sense and we are now left only with the question of what my function is. It is, as I understand it, to provide the generous overall view of the problem and to philosophize a bit about what must be the least philosophical of all topics. And in so doing I shall heavily plagiarize myself.

A few years ago my colleague at Chicago, Hans Zeisel, and I published a book on the court congestion problem entitled *Delay in the Court*. It is really a damn fine book and much of what I say this morning you will find said better in its pages. One of the more encouraging aspects of a generally dismal picture in judicial administration here is that the topic has enlisted the aid of the academic law community. There have been by now several important studies made at the leading law schools including, in addition to our own at the University of Chicago, the book by Professors Levin and Wooley at the University of Pennsylvania, the numerous specific studies by the Institute for Judicial Administration at New York University under the leadership of Professor Elliot, Professor Karlen and Professor Green; the impressive sequence of studies of the Project for More Effective Justice at Columbia University under the leadership of Professor Rosenberg. Thus there is now a formidable formal literature on court delay and we have one of the happier convergences here between the interests of the organized bar and the law schools.

I am tempted to add that these studies do make a difference. For example when our definitive work was published, Chicago had a delay of about 4½ years; now some three years after the publication of the book the delay is up to about 6½ years!

I invite you at the outset to pause for a moment with me to reflect on the stubborness of the problem of delay. It is not a new phenomena

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antiquity. We are told for example that in 42 A.D. the Emperor Claudius exhorted the Roman Senate to pass a law introducing a summer session into the congested Roman courts. Goethe in his autobiography writes fathered by the automobile but a problem of almost legendary of the court in Wetzlar: “An immense mountain of swollen files lay there growing every year, since the seventeen assessors were not able to handle even the current workload. Twenty thousand cases had piled up. Sixty could be disposed of each year while twice as many were added.” He notes further that it was not unusual in this eighteenth century German court to have cases remain on the docket for over 100 years. A dispute between Nuremberg and Brandenburg had been filed in 1526 and was still undecided when the court was dissolved in 1806. And in the New York court which was the special subject of our study we were readily able to cite reports of official commissions going back at least 100 years complaining of the chronic state of the court delay issue. Judge Ulysses S. Schwartz of the Illinois Appellate Court has perhaps given the definitive statement of this theme that delay is an old, old evil in his opinion in Gray v. Gray:

The law’s delay in many lands and throughout history has been the theme of tragedy and comedy. Hamlet summarized the seven burdens of man and put the law’s delay fifth on his list. If the meter of his verse had premitted, he would perhaps have put it first.

I do not mean to utter a counsel of despair or to advance the thesis that old problems never die or get solved. But it is well at the outset to recognize the peculiarities of court delay as a social issue. Everyone agrees that delay is an unqualified evil if the litigant must wait for justice until a court is available. And this is true whatever the counter points about speed and justice being properly opposing ideals. If, then, nobody wants court delay and nobody—and I think this includes the plaintiffs bar and the insurance company defendant—benefits from it, how does it come to pass that we still have it and that it is growing with each passing year? In the words of the title to a popular article on the administration of justice a few years back: “Okay Blind, but Why So Slow?”

Some reasons for the delays over delay are not difficult to discern. First the problem has no sex appeal as a political matter. It is an issue for which there is no natural pressure group. Thus while no one may want delay, it is not to the sharp self-interest of any group to move the political machinery to do something about it. In this connection it is instructive to note how different the criminal trial situation is. Here the constitutional privilege of a prompt trial gives leverage to the criminal defendant and makes it unthinkable that delays in reaching trial remotely comparable to those in civil cases will be tolerated. Second, and ironically for a society in which we constantly accept as obligatory new levels of government expenditure not only for rockets but for welfare measures, the popular commitment to spending money on the number one welfare service—the administration of justice—is singularly weak.

Third, and perhaps as a result of this second point, the very way the issue of court congestion is posed is dismal. The quest is for a solution
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that will not cost anything. There must, so the argument runs, be some new and better way of arranging procedures that will eliminate the delay; and the call is for study and ingenuity in devising such procedures. Fourth, there is a strong tendency for the allies in this cause to respond to the challenge in this form, each with his own pet all-sufficient remedy, be it split trial, pre-trial or, among the extremists, no trial. The result is that we get endless controversy between the faction that argues we should do something about the concentration of the trial bar and the faction that argues we should change the rule of damages as to interest in tort actions prior to judgment, or go to comparative negligence or whatever. Every reformer here has his own gimmick and hence an inherently common sense practical problem of management is made to look controversial. Finally a proper respect for the truth that a judge is not an ordinary employee has been carried too far and norms of judicial dignity and autonomy have kept simple managerial judgments from being made or sought. For an obvious example, court statistics are for the most part wretched.

Let me now come back to and develop in a bit more detail my third point. I had said that the quest was for solutions to court congestion that will not cost anything. Here we confront an important oddity in the whole issue of delay. If, for example, we had a roughly comparable problem of a growing backlog in, say, a stenographic pool so that after dictation letters waited for several days for transcription, the presumption would be in favor of hiring additional stenographers. To be sure, attention would also be paid to the possibilities of internal economies but primarily as an adjunct measure to buttress the request for additional help by indicating on a realistic basis the rock bottom number needed.

I dwell on this homely example for two reasons. First, because in the case of court congestion a homely problem of management of productive activity has been blown up into something pretentious and it might prove healthful to cut it down to size. Second, because in the case of court congestion we seem to have the remedial steps almost in reverse. The emphasis is on solving the problem without resort to additional judges—as though it would be unsporting, or spoil the problem to intrude this note. It is as though we are terrified by the threat of Parkinson's law.

If there is a secret to the court congestion problem it must reside here in the special distrust we have developed of the claims for more judges. In a way the whole matter is embarrassing. There is really no problem of delay in any court system since it can always be solved by appointing sufficient additional judges. Further, solving the problem by additional judges is the kind of insight that a reasonably bright three year old would have. So what have we been talking about for so many years now and why are we here today?

I offer you a formula for the proper relationship between more judges and the roster of specific remedies. It is much as it was with the stenographic pool except that the specific measures are more complex and interesting. The formula is: save what time you can by exploiting specific measures such as split trial, pre-trial, summer sessions, relocation of
judges, impartial medical experts, certificates of readiness, etc., and then appoint the additional judges that will be required. Or to put this another way, we should make only sober, responsible, measured requisitions for additional judicial manpower; to do so requires that we put the house in order first and have some idea of what internal economies can accomplish.

This is, I think, the proper relationship between judges and the other remedies. It preserves a decent role for the specific remedies and perhaps justifies the attention and ingenuity that for the past decade has been lavished on them. I say perhaps because I am beginning to wonder whether it might not be better to separate the curing of court congestion from increasing the efficiency of the court system. Should we not perhaps appoint the judges first and deliver prompt justice to the citizens, and worry only later about the various ways of making the court system more efficient? This latter is always a fair topic and should not depend upon the crises of five year backlogs to generate an interest in it.

The current concerns with delay, whatever their beneficent impact on the study of judicial administration, have generated two widely popular notions that seem to me unwelcome and dangerous. First, there is the enthusiasm for settlement as contrasted to litigation; litigation is now seen as the villain since it is of course true that if there were no litigation there would be no delay. It is about time someone put in a good word for the decency of insisting on litigating one’s claims. I urge you to resurrect the ideal of third party adjudication as the civilized way of disposing of some controversies and as the traditional and proper business of the courts!

The second point goes to court congestion as a stimulus toward law reform. Justice Holmes once observed: “Ignorance is the best of law reformers.” Be that as it may, court congestion may well be the worst. It is wryly amusing to watch reforms which have lain inert for years suddenly come to life as “hot” issues because suddenly someone sees in them some hope of impact on court delay. Consider such measures as abolition of the jury in civil cases, comparative negligence, or auto compensation plans. These are all reforms that have respectable champions and deserve serious attention. But they deserve attention in their own right and on the merits and not because of some adventitious connection with the delay issue. The only safe rule is that such measures should be adopted or rejected without giving the delay problem the decisive vote. We should not, that is, redesign the basic architecture of our legal system simply to solve the homely problem of delay.

Having now rid myself of all my pet peeves about the delay problem, I turn to the task of placing specific remedies on a meaningful map.

Our book has at page 39 a table that has always seemed to me to yield a basic insight into the dynamics of the delay issue. It correlates the various routes by which cases are disposed of with the amounts of court time required by each mode of disposition. Thus for our sample of cases, 64% of all suits were disposed by settlement prior to assignment for trial, another 7% after assignment but before trial, 14% during trial...
and finally 15% only after the completion of trial.

When we match these shares of disposition with court time, we see that the cases disposed of before assignment took 11% of the time, those disposed of before trial took 5%, those disposed of during trial took 31%, and those tried to completion took 53%. To put this now in summary form, the point is that 71% of the dispositions take only 16% of the time whereas the cases that reach trial—29% in all—take up 84% of the court’s time.

This is, of course, the familiar point that by some benevolent destiny the vast majority of suits filed are disposed of informally with only minor help from the court system. If this were not the case the delay would be too horrendous to contemplate!

For our present purposes what is important here is the insight that the chief target of any remedies for court delay must be that minority of cases that start trial. Indeed a remedy will be significant almost exactly in terms of what it will do to move this hard core trial workload.

From this perspective of the dynamics of the processing of cases, it is now possible to say that there are only three basic ways of increasing the efficiency of the trial process.

(i) the time required for the disposition of cases can be shortened;
(ii) the number of cases requiring official disposition can be reduced;
(iii) the amount of available judge time can be increased either indirectly or directly.

As the comedian used to say, that's all there is folks, there isn't any more. You can speed up the trial process, you can affect the settlement ratio, you can increase judge time. Any specific remedy which claims to be effective must claim to operate via one of these routes and using these three very simply notions one can chart systematically the entire file of delay remedies.

Sometimes the connection is obvious, as with the change in the rule as to interest on damages and the hoped for impact on the settlement ratio—the defendant under the proposed rule, it is thought, will no longer be able to afford to delay settling, thus running up a bill for interest. Sometimes the chain is complex, as with Judge Peck’s proposal a few years back for a comparative negligence rule for bench trials only. Here the thesis was that jury trials are more time-consuming than bench trials, that people elected jury trials because the jury was thought to follow a de facto comparative negligence, that if the courts were explicitly to follow such a rule the main advantage to jury trial over bench trial would disappear, and that as a result under the rule there would be a happy increase in the jury waiver ratio thus speeding up the trial process!

It is in this sense that a kind of theory about court congestion is possible, useful, and even interesting. In large measure our book, Delay in the Court, was a systematic working out of the implications of a long roster of proposed remedies, measuring their impact empirically wherever possible.

I come finally to the two remedies we are to hear debated today. I will steal the thunder of the speakers that follow only to the extent of noting
where each remedy falls on our proposed map. A remedy may, of course, operate through more than one of these basic channels and in fact both split trial and pre-trial do.

Split trial to be effective must have its primary impact on speeding up the trial process by shortening the length of some trials. Pre-trial to be effective must have its primary impact on the settlement ratio by causing the settlement of some cases that would otherwise be litigated. Further, split trial will have some impact on the settlement ratio and pre-trial in turn will have a secondary impact on trial time.

I have now finished my introductory chore. May I deliver you to the speakers that follow by repeating a happy quote from our book in which we attempted to summarize our final assessment of the delay problem. Written some four years ago, the comment is, I think, still valid: "Neither despair," we said, "nor recourse to heroic measures is called for."