

BOOK NOTE

THE LITERATURE ON COURT DELAY*

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A reader of latter day writing on the problems of the civil courts must be struck by the new look of the literature of the last two years. It reflects a sharp accent on systematic fact-finding as against arm-chair cerebrating. The "field" rather than the law library is the researcher's work place.

This new mode of examining problems of judicial administration represents a great advance from the days of fact free debates that pitted one side's theories and hunches against the other's. It will no longer do to assume or to argue about what the situation may be if evidence can be obtained to show what it is. Observation has begun to catch up with speculation as a lawyer's tool in assessing the impact of law in action. And well it should. Court problems today are not likely to wait for brilliant flashes of insight born of naked intellectual force such as only a Cardozo can produce.

Court delay has been a natural focus for field research. It has emerged as a highly visible, concrete, and urgent problem in the administration of civil justice in this country. In the growing body of serious writing on the subject of court delay, two books stand out: *Delay in the Court*, by Professors Hans Zeisel and Harry Kalven, Jr. of the University of Chicago law faculty and Bernard Buchholz of the New York bar, published in 1959; and *Dispatch and Delay*, by Professor A. Leo Levin of the University of Pennsylvania law faculty and Edward Woolley of the New York bar, published in 1961. Both books embody extensive field research efforts and make major contributions which reach far beyond the matter of backlogged courts.

Delay in the Court focuses on the question of how to liquidate the backlog of cases in the state supreme court in New York County and thereby eliminate extensive delay in civil trials. The authors have developed a theoretical framework for the investigation of court delay that is at once illuminating, penetrating and pragmatic, and in working with the data they have brought to bear highly imaginative analytical techniques. For these contributions, without more, the work has had a widening impact upon research in the administration of justice.

* This is a companion piece to the author's survey of the problems of excessive delay in the civil courts, and attempted remedies in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* (Jones ed. 1965), where it appears as Chapter 2, "Court Congestion: Status, Causes and Prospects."

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In the opinion of Professors Zeisel and Kalven and Mr. Buchholz their major substantive findings were that "there are a severely limited number of ways of doing something about court congestion and delay" in the New York court, but that "the problem is well within the reach of practical solution."¹ However, the most often cited finding of the book is that a judge-only trial is, on the average, about forty percent less time consuming than a jury trial. Though not one of the better based conclusions of the work, that assertion has been used as a scholarly shield by various unscholarly segments of the legal profession who argue that it improves their case for retention of the civil jury.² Occasional misuse of this book is far exceeded, however, by the growing attention it has received from serious students of judicial administration. *Delay in the Court* will be valued for decades to come as a pioneering effort and as a high standard for research into court processes.

The other major effort, *Dispatch and Delay*, reflects its authors' meticulous study of the life cycle of litigated civil cases in seven Pennsylvania counties. With the devotion of scientists, Professor Levin and Mr. Woolley identified and traced nine stages through which a case may pass from plaintiff's first visit to counsel until final disposition. The authors were able to localize the points in the process where most delay was very substantial and concluded that elimination or reduction of court system delay would by no means assure prompt dispatch of litigation. The Levin-Woolley report has X-rayed the anatomy of delay by lawyers in the same illuminating way that the Zeisel-Kalven-Buchholz study of the New York court did for court system delay. *Dispatch and Delay* will likewise command great and continuing respect from all who engage in research on law in action.

While not strictly a work on court delay, a recent volume by the present writer, *The Pretrial Conference and Effective Justice*, warrants mention here because it gives extended attention to the problems of court efficiency and trial quality, and to scientific efforts to measure them. The book reports the results of the only controlled official experiment to date in the area of civil justice. The field work was done in 1960-1962 by the Columbia University Project for Effective Justice. The book exposed several major misconceptions about the impact of compulsory pretrial conferences in negligence cases, and, according to the New Jersey authorities, helped produce a change in that state's pretrial rules.

The Columbia Project's intensive field studies on court delay, litigation dynamics, and the effects of a variety of measures designed to improve the efficiency of the judicial process have been reported in a series of monographs. In 1959 there appeared one report analyzing the flow of accident cases in New York City from the crash to settlement or judg-

¹ ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURT* 18 (1959).

² E.g., Appleman, *Attacks Upon the Jury System*, 14 *Federation of Insurance Counsel*, Nov. 1962-Mar. 1963, pp. 65, 69; Editorial, *In Defense of the Civil Jury*, 29 *NACCA L.J.* 27, 29-30 (1963).

ment,³ and another assessing the effect on Arkansas dockets of a legislative shift from contributory negligence to comparative negligence in personal injury cases.⁴ In 1961 came an article analyzing voluminous New York City court records which reflected the economic yields and costs of accident litigation,⁵ an article summarizing the findings of a field study of compulsory arbitration of small claims before volunteer lawyers in Philadelphia,⁶ and another evaluating the effects of the use of court appointed hearing officers, called auditors, in Massachusetts.⁷ In 1962 after completing field research on the impact of the New Jersey pretrial conference experiment which resulted in the 1964 volume, the Columbia Project began a nationwide survey of the day to day operation of federal pretrial discovery. One of the subjects covered in a forthcoming publication on the findings of the discovery research will be the effect of discovery upon delay and congestion problems.

An offshoot of the Project's investigation of negligence cases in the New York courts was the survey conducted by Roger Bryant Hunting and Gloria S. Neuwirth of the New York bar by interviewing accident victims. Their findings and recommendations for easing the claims process in automobile accident cases involving minor injuries were reported in their 1962 volume, *Who Sues in New York City?* The book is a fascinating, highly readable account of the factors which motivated the victims to press claims in borderline cases, and of the economic consequences for the claimants.

Members of the staff of the Chicago Jury Project, in addition to publishing *Delay in the Court*, have released a report of the effects upon court efficiency of splitting negligence trials into serial installments, submitting to the jury first the liability, then if necessary the damage issues.⁸ The study was based on experience in the federal district court in Chicago.

A noteworthy collection of essays on the problem of "Lagging Justice" appears in the March, 1960, edition of the Annals of the American Academy of Political and Social Science under that title. Of the numerous reports on court delay by legislative committees and other governmental bodies two noteworthy efforts are a pamphlet published in 1961 by the Judicial

³ Rosenberg & Sovorn, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115 (1959).

⁴ Rosenberg, *Comparative Negligence In Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959).

⁵ Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961). See also Hunting, *Payment for Accident Victims: The Claimant's Eye View*, 33 N.Y.S.B.J. 81 (1961); Rosenberg, *Payment for Accident Victims: The Law and the Money*, 33 N.Y.S.B.J. 89 (1961).

⁶ Rosenberg & Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961).

⁷ Rosenberg & Chanin, *Auditor in Massachusetts as Antidotes for Delayed Civil Courts*, 110 U. PA. L. REV. 27 (1961). See also Spangenberg & Neumann, *Auditing the Auditor System: A Study of Auditor Referrals in Suffolk County, Massachusetts*, 44 B.U.L. REV. 271 (1964).

⁸ Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963).

Council of California⁹ and a monograph issued in 1957 by the New York Temporary Commission on the Courts.¹⁰

Lawyer groups have produced innumerable publications on this subject of which the best known is *Ten Cures for Court Congestion*, written in 1959 by a special committee of the American Bar Association. Its bold title and bolder prescription did not rest on any original research into the efficacy of the potions that were recommended. The special committee obviously labored with diligence and wrote its conclusions in a vigorous, forthright way. It is a pity they lack support in the facts.

Unique in the literature is a report entitled *Congestion and Delay in the Court* prepared in 1961 by a management consultant firm at the instance of the Greater Philadelphia Movement. The report concluded that mathematical methods can be used to define and measure delay, as well as its causes and methods of relief. The authors suggested a formula for calculating the best relationship among the three key parts of the process—court facilities, waiting time at various stages, and variations in time spent at each stage.

The past decade has been remarkable for the surge of empirical research and writing about court delay as a focal problem in the administration of justice. It is predictable that in the next decade or two the law schools and the bar will be more closely attuned to the usefulness of field research as a tool for teaching and improving the law. Their interests will not be limited to the court delay problem, but will surely draw heavily on the literature which delay inspired.

⁹ 18 CAL. JUDICIAL COUNCIL, BIENN. REP. 49-68 (1961).

¹⁰ 4 REP. OF N.Y. TEMPORARY COMM'N ON THE COURTS (1957).