

BOOK REVIEWS

DELAY IN THE COURT: AN ANALYSIS OF THE REMEDIES FOR DELAYED JUSTICE. By Hans Zeisel, Harry Kalven, Jr. and Bernard Buchholz. Boston: Little, Brown & Co., 1959. Pp. 313. \$7.00.

A few years ago the University of Chicago Jury Project was announced, and shortly became the object of considerable discussion, partly because of objections to any inquiry that might reveal the true operation, good or bad, of an institution as encrusted with sacredness (in public theory as distinguished from private practice) as is the American jury system, and partly because of objections to an experiment which by its nature required some invasion of the traditional privacy of specific jury rooms. The present volume is the first published product of that Project, though in a sense it is a side product. As the jury study proceeded, and especially as the relationship between jury trial and congested court calendars came to be considered, need for a study of the character and causes of delay in the courts as an independent topic came increasingly to be recognized. Eventually such a study was undertaken. This book is a report of its procedures and findings.

The study as carried out and reported is rigidly statistical. Value judgments are avoided, except as they are inherent in the statistics or are so generally accepted as to be substantially beyond argument. Almost the only example of the latter type of judgment is the basic assumption that "delay in the courts is unqualifiedly bad." Even that judgment is limited to cases in which there is "too much" delay, roughly identifiable as delay beyond the time when the parties and issues are ready (or in normal course should be ready) for trial.

Exactness and specificity were achieved for the study by basing it primarily on an analysis of the personal injury trial work of one particular court. The court used is the Supreme Court of New York County, New York. That is the court which has general trial jurisdiction for the mass of actions, above a certain monetary minimum, brought in the island of Manhattan. It is not as badly behind in its dockets as are some other courts in the nation;¹ in fact, it is not behind at all in three of its four dockets. It is behind only in its per-

1. The 1959 Calendar Status Study prepared by the Institute of Judicial Administration of New York University shows the Superior Court of Cook County, Illinois, to be 52.9 months behind on its calendar, the Circuit Court of the same County to be 50.3 months behind, and the Supreme Court of Queens County, New York, to be 44 months behind. Since 1953 the number of courts 25 or more months behind, in counties of more than 500,000 population, has fluctuated between six and thirteen.

sonal injury jury trial docket, which has an average delay of 29.8 months in reaching for trial all the cases on its calendar, and an average delay of 39.3 months in reaching the run of cases which are not advanced on the calendar under some sort of preferential treatment. In contrast, the three other dockets, for personal injury non-jury trials, general (commercial and property cases) jury trials, and general non-jury trials, are kept substantially current. For reasons of policy which the study does not evaluate, New York County concentrates its calendar congestion in the personal injury jury trial docket. Furthermore, New York County is different from some other judicially congested areas in that its backlog of cases is essentially an inherited one, since cases currently disposed of equal new filings. It is only the backlog of filings from years gone by that keeps the court from being current even on its personal injury jury trial docket.

The basic statistic arrived at by the study is 11.7 "judge-years" as what would be required to dispose of the personal injury jury trial backlog. A "judge-year" is taken to be the amount of work which one average trial judge in New York County does in one year. The statistic means that it would take one additional judge 11.7 years to bring the docket to currency, or 5.85 judges two years or 11.7 judges one year to do it. Arriving at this figure was no simple process. The relevant factors and the variables affecting them are considerably more numerous and complicated than the ordinary lawyer, however well acquainted with the general problem, might think. It is evident that some of the relevant considerations did not become evident to those who conducted the study until they were well under way with it, and it is at least possible that more factors will yet come to light even though the study has been formally completed. There is no claim of perfection for the study. But the analysis of factors and their relative weight is convincing, and the final figure cannot be far from correct. Actually, the important thing is that the same information about calendar status in another court, analyzed in the same statistical fashion, would similarly yield for that court a comparable basic statistic which would measure exactly, or almost exactly, for it the congestion problem it has to deal with.

Since New York County has the equivalent of 25.7 judges assigned to it at the original jurisdiction level for law and equity cases, with 15.1 of these trying law cases, it at once appears that the docket could be brought up to date fairly quickly by the designation of additional judges. The temptation is to take that as the easy and obvious answer to the problem, one which would involve no tampering with vested interests in the existent way of doing things.² The main object of the

2. Cf. Mullally, *Let's End the Hullabaloo: Two Self-Destructive Legal Myths*, 45 A.B.A.J. 1039 (1959). The first of the "myths" condemned by the author is

study, however, is to discover what gains could be made by other devices that have been suggested for handling judicial business without employing more judges.

One broad area of such suggestions has to do with methods for shortening the time used in trials. Three major possibilities are taken up in this area. (1) One chapter reaches the conclusion that approximately 40 percent of the time used in personal injury jury trials would be saved if the same cases were all tried by a judge without a jury. Taking all factors into account, this would clear up the New York County backlog in between five and seven years, and would then leave the county with more judge-power than it needs to keep its docket current without jury trials. But abolition of jury trial is not seriously regarded as a real possibility for dealing with the problem. (2) Increasing the number of jury waivers could work toward the same end. But New York County already does about all it can do to encourage waivers, by offering prompt trial if the parties will shift their cases to the non-jury docket. Thus the fact of delay itself is a major inducement of waivers; if delay were eliminated there probably would be fewer waivers. This assumes that the parties are correct in their standard assumptions that delays are somehow advantageous to defendants and that jury trials result in larger verdicts for plaintiffs—assumptions that are borne out by the statistics. Not much can be done to encourage more waivers so long as there is a real difference between jury verdicts and judge awards. (3) The possibility of speeding up jury trials by tighter control of the trial judge over them appears very real. Comparable trials in New Jersey, where judges do exercise tighter control, definitely take less time than in New York, and separate New York statistics bear out this conclusion also.

Another broad group of possible time savers would operate to encourage settlements and thus lighten the ultimate trial load. Four devices aimed wholly or partially at this end are considered. (1) The use of a panel of impartial medical experts in personal injury trials tends to fix the evidential facts beforehand and thus induce settlements. (2) Allowing interest on successful tort plaintiffs' claims from the date of the accident, as is done in three or four states, does not increase settlements but only raises the amounts paid on settlements. (3) A pre-trial procedure aimed directly at inducing settlements unquestionably can and does produce that result, though the saving from this may be much more in trial-time than in judge-time alone, since

that there is undue calendar congestion in American courts. He argues that much of the talk about congested court calendars is based on a misuse of statistics, and that any congestion there may be could be quickly cured by bringing the judiciary up to proper numerical strength.

a substantial amount of judge-time may be used up in the pre-trials themselves. (4) A requirement that both parties file a "certificate of readiness" for trial showing completion of all regular pre-trial steps, as a condition to putting their case on the trial calendar, has in the New York court apparently encouraged compromises in a substantial number of cases, though more in the commercial than in the personal injury dockets, and thus has indirectly helped the personal injury docket by making some additional judge-time available for it. Each of these four devices obviously has inherent values apart from the elimination of court delay alone, and one needs in reading the book to keep this in mind, since the book quite properly restricts its analysis of them to their effect on delay only.

The next part of the report deals with more effective use of the present judges' time. (1) The first calculation in this part is as to the number of days annually on which judges conduct trials. Only about 196 days in a year are practically available for trials, and some judges achieve almost the maximum. Others do not. (2) As to hours of work per court day, generally the same judges who have the worst rank in lost working days also are at the bottom in hours lost per day. (3) Concentration of cases among a small number of members of the trial bar, both on plaintiffs' and defendants' sides, has some delaying effect, especially if cases postponed because counsel are busy elsewhere cannot be replaced on the calendar by other cases that are ready for trial, but there are ways in which judges can control this situation. (4) In New York County, "leveling the calendar" by removing the preference given to all except personal injury jury cases and trying all of the latter docket as the cases are ready for trial would speedily bring that docket down from its 29.8 months delay to a delay period of ten or twelve months, but it would move the other calendars from their present no-delay status up to a ten or twelve months average delay also. (5) The use of arbitrators, masters or temporary judges of some kind, until the backlog is eliminated, involves more complications than advantages.

A section of the report deals with the relation between "claim consciousness" and personal injury filings and trials in various geographical areas. The conclusion is that there really is such a thing as greater "claim consciousness" in some communities than in others and that congested calendars generally are found in "claim conscious" communities. The correlation is striking, but it is difficult to suggest anything to do about it.

Finally, in a departure from straight reporting, the book makes an argument for scientifically controlled official experimentation by courts and in the judicial system generally as being the only way in which we can reliably learn much of anything about how the system

works. This of course is in a sense a defense not only of what is reported in the present volume but of the entire University of Chicago jury study project. It is an argument that it is better to do a bit of discreet tampering with judicial processes, with a minimum of interference or practically no interference with their actual operation, than it is to remain in ignorance of how they actually operate, and that this is particularly true when a body of untested legend has grown up around a portion of the judicial process concerning which there are vigorous demands for reform. The point is that purported reforms based on ignorance are as unwise as lethargy based on ignorance. The acquisition of reliable information should be a prerequisite to either action or inaction.

Delay in the Court serves as a model for the acquisition of such information. It specifically provides the information as to one particular area, it describes a technique whereby other congested court systems can be studied in the same manner to the same end, and it provides inspiration for other studies of equal quality on other aspects of the judicial process. That is a great deal for one small book to do.

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THE GREAT LEGAL PHILOSOPHERS. Edited by Clarence Morris, Philadelphia: University of Pennsylvania Press, 1959. Pp. 571. \$9.00.

Two decades ago the teacher of jurisprudence had little choice of materials for class use unless he was willing to take the heroic step of gathering his own. Professor Hall's pioneer *Readings in Jurisprudence* (1938) apparently demonstrated a need which could be satisfied in various ways and induced the casebook press, and jurisprudence teachers generally, to bring out the same profuse offerings that had long confronted teachers in more routine fields. Since that time we have had readings by Cohen and Cohen, Fuller, Simpson and Stone, Snyder, and Dr. Wu, besides textbooks by Julius Stone and by E. W. Patterson. With this variety of choices for a course that seldom, I suppose, enrolls students in great numbers, the publishers must have incurred losses, and one would think that even tastes as peculiar as jurisprudence teachers' must have been satiated. And this raises the question whether there was need for Professor Morris' *The Great Legal Philosophers*. In my opinion, little promising as the prospect may have seemed, there was. This book consists of extracts from twenty-two of the greatest philosophers and legal philosophers, and reaches from Aristotle to Roscoe Pound. The arrangement is substantially chronological, so that after Aristotle each philosopher writes

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