

Opening Statement

Tigers at the Gates—The Justice System Approaches Melt-Down

by Robert N. Sayler
Chair, Section of Litigation



There once was a smoker so disturbed by reading stories about the harmful effects of smoking that he decided to do something about the problem—he stopped reading.

Students of the state of the justice system in 1993 sometimes do the same thing. There has been a torrent of scary writing about our problems, including reports about: rampant underfunding and other crises in the state courts; threatened shut downs of crucial federal court services; drastically increased criminal caseloads; substantial state and federal budget cuts for the administration of justice; real dollar decreases in the level of the funding of legal services for the poor; the increased costs and delays of litigation; the continuation of racial and gender bias throughout the legal system; a stunning decrease in the level of public (and especially business-user) confidence in the legal system; and a sharp escalation in lawyer dissatisfaction with the profession.

Some will read such troubling literature. Yet the nigh irresistible impulse is the same as the smoker's: to stop reading or, more likely, to push such reports over into every lawyer's favorite spot on the desk—the "too tough to deal with" pile.

More attention must be paid than that. The widely emulated American system of justice is the best in the world when working at its best. It isn't doing that now.

• System Overload

While the claimed epidemic of civil tort cases is exaggerated, courts throughout the land do struggle under the weight of a vast caseload increase, particularly on the criminal side. Drug cases more than tripled in the '80s; they now increase 20 percent a year. The criminal caseload in federal courts increased 70 percent between 1980 and 1990. This increase will continue, partly because of the congressional propensity to federalize more and more

crimes: at the founding of this country there were three federal crimes; now there are over 3,000. The number of local assistant U.S. attorneys today is two and one-half times as many as in 1980. And, of course, criminal cases are now harder to dispose of promptly because of mandatory minimum sentences and sentencing guidelines, present both in federal and many state court systems. Criminal cases also take priority over, and cause delay in, the disposition of other cases because of speedy trial requirements.

The pressure from the criminal docket is not confined to the overburdened courts. More criminal cases mean more convictions, and that requires more prisons. We are running out of prison space. There are now more than one million inmates in the country's prisons, a number that has doubled since 1980. Between 1985 and 1990, the amount states spent on penal institutions nearly doubled to \$13 billion. The Bureau of Prisons has doubled in size since 1986. The growth in prisoners translates into a need for more than 1,000 new prison beds (the equivalent of two or three entirely new prisons) *every week*. Prison systems in 43 jurisdictions are under court orders to reduce overcrowding. Today, more than one-third of all the money spent on the justice system is devoted to corrections.

• Pervasive Underfunding

In recent times, about 3 percent of all state and federal government funding has gone to the activities of the criminal and civil system of justice. But a whopping 80 percent of that funding supports police functions and corrections. That means that just 0.6 percent of government monies are available to finance all other justice system functions. A quick example of the distortion in the budget process: Texas spends less each year for the operation of its courts than it does for painting divider lines on the state's highways.

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Despite the explosion of the criminal docket, its level of funding has not kept pace. Instead, it has dropped, and it gets worse each year. Twenty-five states reported budget cuts to elements of the justice system in 1991. Thirty-five states made additional cuts in 1992, and more cuts are expected this fiscal year. Fifteen states reported layoffs of justice system personnel. Civil jury trials in parts or all of eight states closed for all or part of calendar 1991; the situation in 1992 was no better. More than half of the states report using early release of prisoners to address crowding in prisons and jails. In five states, public defenders have been forced to reject cases because of intolerable caseloads. In fact, the American Bar Association's Special Committee on Funding the Justice System reported, after a protracted study of the states' justice systems, that all jurisdictions except three are in a state of crisis, with many faltering in myriad components of their justice system. The report concluded that "the justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding."

The picture on the federal level is hardly rosy. Absent an emergency supplemental appropriation, the federal courts were prepared last summer to cease all civil jury trials and payments to public defenders. That crisis was averted at the eleventh hour, but it remains true that, in real dollars, the budget for the federal courts has decreased recently, and prospects for substantial increases are far from certain.

• Expense and Delay

Even though the problem has been overblown in recent political rhetoric, there can be no fair doubt that civil litigation often costs too much and takes too long. Reports are legion of backlogs two, three, and even five years to get to trial in civil cases in many areas. Even the most ardent supporters of the status quo acknowledge that some reform in the discovery process is needed, given the exceptional expense often associated with modern discovery. In fact, the basic reason for the Civil Justice Reform Act of 1990 was a nearly unanimous perception of the pressing need for cost and delay reductions in the courts. Such problems only worsen on the civil side because of the

pressure from the spate of criminal filings, coupled with the obstacles to prompt disposition of criminal cases and the fact that criminal proceedings get priority.

• Inaccess to Justice

Judge Learned Hand once warned: "Thou Shalt Not Ration Justice." Yet we do. American Bar Association studies conclude that 80 percent of the legal needs of the poor remain unmet. In real dollars, the level of Legal Services Corporation funding has decreased by 50 percent in the last 12 years, with further cuts threatened this year, even though the number of poor has increased. Polls show—and there's reason for it—that middle America feels priced out of access to justice, at least where their legal problems require sophisticated counsel and complex proceedings.

• Gender and Racial Bias

The Ninth Circuit, the D.C. Circuit, 36 states, and the ABA are conducting comprehensive studies on the degree to which racial and gender bias persists in the court system. These studies cover everything from juror attitudes, to the treatment of court staff, to the manner in which women and minorities are treated by courts and opposing litigants. They are all reaching the same conclusion: Bias problems are not just perceived but real, and much work remains to be done.

• Public Disdain

Nasty cracks about the legal profession date back centuries. Perhaps lawyers have always rivaled the farmer's daughter as a principal butt of jokes. Yet we have always comforted ourselves by: (1) claiming that while the people may say they do not like lawyers in general, they revere their own lawyers and; (2) accepting the bromide that lawyers will never be popular so long as they are truly doing their jobs. These comforts are no longer valid: Recent polls show a sea change in popular disregard for lawyers, judges, and courts. The whole lot of us are now seen by broad segments of the public—from corporate executives to the poor—as a blot on society; expensive, elitist, overpaid, unethical, mean-spirited Rambos. The list of epithets goes on and on. Twenty

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American Arbitration Association. Today, there is more competition. The Judicial Arbitration and Mediation Services, Inc., known as JAMS, maintains a staff of retired judges and offers speedy, economical, and professional mediation and arbitration assistance. The Center for Public Resources, a non-profit organization in New York, is well known for innovative approaches to dispute resolution. The field is expanding rapidly.

Inevitable Radical Changes

The past twenty years have seen radical changes in litigation, but many were inevitable. Litigation is part of, a manifestation of, society; and society has changed at least as much. Social and technological changes have affected lawsuits no more or less than they have affected the lives of all. Inflation, incivility, and increased drug use have hurt most Americans; the difficulties they have brought to litigation are simply part of broader problems.

Are the litigation changes good? Litigation and those involved in it are freer from past prejudices and can do more because of technological advances. But many positive changes have a dark side. ADR is a good thing—it would be a useful adjunct in a perfect system. But its main impetus has been frustration with a seriously flawed system; it is mostly a symptom of a problem. Technological changes are stunning and often helpful, but they also facilitate the less attractive aspects of litigation—more paper; more argument; last minute late-Friday-before-a-holiday ambushes; more artificial pressure.

Seemingly positive litigation-related changes, in our view, either pale in comparison to the negatives or are actually symptomatic of serious flaws. The system has developed big problems in the last two decades: There is too much law, too much litigation, too much acrimony, too much cost, and too much delay. The courts are left to cope with symptoms and side effects of broader problems that must be dealt with (if they are to be solved) by the politically accountable branches of government.

During the past two decades, the courts have tried to cope with drug cases, mass torts, clogged dockets, and the burdens of civil litigation. The next twenty years promise more of the same. But even more will be required. There

must be a greater effort to get at the underlying social and economic problems that have hurt litigation and the judicial system. There should be a recognition that individual judges and lawyers can only do so much. Effective reform of the civil justice system will come not merely through the docket control efforts of individual judges, but through legislative initiatives. Reforms in the tort system, to the extent necessary and desirable, will come from legislative action as well.

The changes during the past twenty years should at least provide a blueprint for what needs to be done over the next twenty. Litigators have accepted certain changes with grace—particularly changes that meant more litigation. The future challenge is for the same lawyers to promote and accept changes that get at the root of problems and do more than offer more of the same. □

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years ago Lou Harris reported that 24 percent of those surveyed had a “high regard” for law firms; now that figure is down to 8 percent. Just focusing on that one point, we have lost two-thirds of previously weak support in only two decades. More recently, we have been at the center of intensive bashing in the advertising and political arenas. Perhaps some of this distrust, even disdain, will fade as the attack does. Even so, we have much work to do to convince the public that our system is not only worth saving, but worth funding at much higher levels.

• Lawyer Dissatisfaction

The polls say one more thing: In sharply heightened numbers, lawyers themselves report dissatisfaction with their jobs. A poll of the California Bar in January 1992 indicated that 70 percent of the respondents would start a new career if they had an opportunity and that three-quarters would advise their children not to become lawyers. And the ABA's 1991 State of the Legal Profession Report showed a 20 percent decline from 1984–1990 in the percentage of

lawyers who were very satisfied with their jobs. That is disturbing on many grounds—not the least of which is the difficulty of calling on dispirited troops to wage the battle necessary to solve the profession's daunting problems.

* * * * *

Fixing all these problems is a mighty tall order. It cannot be done in a day—or fully in a decade. But prodigious work is well underway. The Litigation Section has been, and increasingly will be, centrally involved. I conceive our mission for this and coming years as grappling with, and starting to solve, these big picture problems.

This year and next we will co-sponsor National Symposia, with a broad base of support, for important civil justice and criminal justice reforms. We will conduct a National Conference for Federal Judges on the effective use and implementation of alternative dispute mechanisms. We will be involved in monitoring plans implementing the Civil Justice Reform Act and assisting in the preparation of revisions to those plans. We will participate in the revival of the Pound Conference of 1976 dealing with the causes of dissatisfaction with the system.

We will sponsor pilot programs throughout the country looking toward the provision of legal services to children and enhanced educational opportunities for very young children, especially those crack-addicted at birth. We will host conferences on women advocates and problems they confront in achieving an equal role in our profession. We will direct programs and reports on means to assure the eradication of racial bias in the courts. We will be active in efforts to target more funding for treatment, rehabilitation, and education as a means of dealing with the drug epidemic. We will do everything we can to assist in the provision of more legal services to the poor. And, as advocates, we will do what advocates should do: a better job of making the case that the system, while needing improvement, deserves the effort to achieve that change.

In these pages in coming months, I propose to describe how many of us think the system can be improved, and the ways in which this Section is contributing to those solutions. I will solicit suggestions from everyone on approaches and opportunities that we may miss. □