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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

# A Reflection on American Justice at a Crossroads: A Public and Private Crisis

Maureen A. Weston\*

In April, 2010, a prominent group of judges, attorneys, academics, private dispute resolution professionals, and policymakers gathered to reflect upon the current state and future of the American justice system. A symposium entitled *American Justice at a Crossroads: A Public and Private Crisis* was held at Pepperdine University School of Law under the joint sponsorship of the Straus Institute for Dispute Resolution, the Pepperdine Dispute Resolution Law Journal, and the International Institute for Conflict Prevention and Resolution (CPR Institute). This special symposium edition of the Journal is comprised of select papers and speeches presented at that event and provide thoughtful considerations for meaningful reform in our public and private justice system.

Thanks is owed to Dean Ken Starr, conference panelists the Honorable Barbara Rothstein, Charles “Tim” McCoy, Vaughn R. Walker, Daniel Winslow, Hon. Ben Tennille, Dean Lisa Kloppenberg, Professor Jack Coe, and Michelle Leetham for joining with us to contemplate, debate, and aspire *American Justice at a Crossroads*. Individuals who helped make this conference a reality and a success include: CPR’s President Kathy Bryan, Academic Director of the Straus Institute, Professor Thomas Stipanowich, Symposium Editor Julie Dilworth, the administrative expertise of Lori Rushford, as well as the hard-working law students of the Dispute Resolution Journal. This essay recaptures some of the discussion and ideas generated at the conference on *American Justice at a Crossroads*.

In his 1906 address to the American Bar Association, Dean Roscoe Pound posed a challenged. He asked us to think about the “Causes of Popular Dissatisfaction in the Administration of Justice.”<sup>1</sup> Dean Pound cited the overly formalistic and adversarial nature of U.S. litigation among the

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1. Roscoe Pound, *Causes of Popular Dissatisfaction in the Administration of Justice*, 40 AM. L. REV. 729, 742 (1906).

causes for public mistrust of the legal system.<sup>2</sup> Over a century later, such concerns linger and compound. A sobering report from the Institute for the Advancement of the American Legal System, authored by Rebecca Love Kourlis, documents deep problems with the public justice system.<sup>3</sup> Civil litigation takes too long, costs too much, and becomes too complex. Cases are not filed at all or settle primarily because of cost concerns, rather than reasons related to the merits.<sup>4</sup> Discovery, which should be about information, can be abused and fuel disproportionate cost to coerce settlement. Electronic discovery has been described as “a nightmare and a morass.” Of the [electronic discovery] data, 10%-20% is relevant, while 80%-90% is not.”<sup>5</sup> But the alternative, private arbitration, often shares these same problems to the point that arbitration may be pejoratively described as the “new litigation.”<sup>6</sup>

Years after Pound’s watershed speech, the *American Justice* conference panelists and attendees were asked to reflect upon justice and how to provide “justice for all.”<sup>7</sup> The Rules of Civil Procedure are intended to provide for the speedy resolution of disputes.<sup>8</sup> Yet the issues of how to provide affordable access to the justice system, speedy resolution, as well as to address the needs and relationships of the parties in the underlying conflict endure. Dean Starr said this dilemma requires that we have to be smart.<sup>9</sup> How can we do justice and be smart? What can be done about the condition of the American justice system—public and private? CPR Institute President, Kathy Bryan, reframed the issue from thinking about all the reasons things do not work, think of reasons why things can work. She counseled that

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2. Edward Sherman, *Dean Pound’s Dissatisfaction with the “Sporting Theory of Justice”: Where Are We A Hundred Years Later?*, 48 S. TEX. L. REV. 983 (2007) (referring to the ‘gamesmanship’ engaged in by lawyers and examples of sensationalism in litigation practice).

3. Rebecca Love Kourlis, *Civil Justice at a Crossroads*, 11 PEPP. DISP. RESOL. L.J. 3 (2010).

4. *Id.* (noting that ABA, NELA, ACTL surveys cite that costs, including attorney fees, are the primary barrier precluding individuals from filing a case. Litigation costs may be disproportionate to the value of a case, and the common minimum threshold for lawyers to accept a case is \$100K).

5. Thomas Stipanowich, [powerpoint presentation at the conference], survey of corporate counsel.

6. Thomas Stipanowich, *Arbitration: The New “Litigation.”* 2010 U. ILL. L. REV. 1.

7. Ken Starr, Dean, Pepperdine School of Law, Address at American Justice at a Crossroads Symposium (April 15, 2010).

8. FED. R. CIV. P. 1. 8(a)’s notice pleading standard requiring only “[a] short and plain statement of the claim showing that the pleader is entitled to relief,” was regarded as a reform favoring access. Sherman, *supra* note 2, at 987. The simplified notice pleading standard is also controversial and potentially in demise after the Supreme Court’s rejection of the liberal pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937. See also Sherman, *supra* note 2, at 988 (noting that notice pleading may provide inadequate information supporting complex claims and lead to unnecessary discovery).

9. Starr, *supra* note 7.

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when change is hard, we need to “switch” and change our mindset to explore how to change. But to change big problems with big solutions is misguided. Ms. Bryan said that the best way is to pick and shine a bright light on something that is working well.<sup>10</sup> Each of us can affect what we do every day; little by little, we can evolve into an improved system. Individuals more than institutions lead change. What can each of us do to lead that change? Can we make the “switch” and find reasons for hope in the future of justice for all?

In a panel exploring “And Justice For All,” Dean Ken Starr moderated a vibrant discussion among judges, including The Honorable Barbara Rothstein, Director, of the Federal Judicial Center in Washington D.C., Hon. Charles “Tim” McCoy, of the Los Angeles Superior Court, and Hon. Vaughn R. Walker, of the U.S. District Court in the Northern District of California. The panelists described their perspectives on the current state and future of the American Justice System. Citing U.S. Supreme Court Justice Hugo Black’s “Our Federalism,”<sup>11</sup> Dean Starr noted that state and federal justice systems face unprecedented challenges. Courthouse closures, furloughs, and budgetary considerations can impact our system’s ability to provide for justice. With systemic problems of severe resource limitations, delays, protracted discovery, criminal and civil docket management, is there justice for some, or for anyone? What might be the impact of this potential trend? The concerns about the vanishing trial extend to vanishing juries, vanishing courts, and vanishing justice.

The mission for access to justice is a continuing one. Reminding us that complacency is not an option, Judge Rothstein expressed that, “Eternal vigilance is the price of freedom, and it’s the price of justice.” We can switch and reflect upon the reasons for hope. The dialogue and the speakers gave us that hope and pointed us to innovations that are happening in our court system.

As Kathy Bryan asked us to switch our mindset about how we approach conflict management, Judge McCoy noted the need to change our mindset on how resources are used. The answer is not necessarily more rules or a “one size fits all” process. The approach for a multi-door courthouse, proposed by Professor Frank Sander in the 1980’s, must have application

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10. Kathy Bryan, President and CEO, International Institute for Conflict Prevention and Resolution, Address at American Justice at a Crossroads Symposium (April 15, 2010) (referencing the book CHIP HEATH & DAN HEATH, SWITCH: HOW TO CHANGE THINGS WHEN CHANGE IS HARD).

11. *Younger v. Harris*, 401 U.S. 37 (1971).

beyond the courthouse steps.<sup>12</sup> Judge McCoy noted that Los Angeles has the largest self-help center in the United States.<sup>13</sup> While increased access to information is to be applauded, the unfortunate counterpart is the question of “Why are so many people without lawyers?” Lawyers provide a vital role in providing access to representation. It does make a difference, even in civil cases, when people have lawyers. Judge McCoy reminded us that there is dignity in serving the so called “small cases,” small in terms of monetary value or in terms of those who have the ability to pay for the lawyers but certainly not in the significance to those involved. Demand is great in family, juvenile, small claims, and limited jurisdiction cases. Reforms tend to address the big commercial cases; lest we forget the real need to serve a vast and growing population and justice that touches lives and where people live. That civil litigants deserve counsel also needs to be part of our mindset. Los Angeles civil courts have litigants who speak hundreds of different languages, yet there is no right to an interpreter in civil cases (although such a right exists for criminal cases). These are large social issues. Judge McCoy expressed that as lawyers and judges; we have a duty and honor to ensure access and representation to those in need, as well as to the big paying clients.

Increased judicial management, civil fast tracks, and rocket-dockets were among the reforms discussed. In complex litigation in California, the cost of discovery can be cut by two-thirds if the trial judge becomes personally involved in discovery. Judicial management is a key element. Justice as a service industry? Seven years ago, the Los Angeles courts hired trainers for Nordstrom’s department store, consistently top rated in customer service, to teach skills on customer service. The elements of quality customer service can help how we approach our work, our students, and our clients; treating others with respect rather than as another case. Judge Walker told us that ADR is going to prison, in a good way with prospects for relationships, understanding, and healing in victim-offender mediations. There are innovations out there. There are things we can do. The concerns about the vanishing trial may be negative but can also be positive.

A second panel convened for “Rethinking and Reforming Litigation,” exploring solutions and creative methods being developed to address the problem identified. Among these efforts, business courts use of specialized

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12. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 112, 130-133 (1976) (advocating a “flexible and diverse panoply of dispute resolution processes.”).

13. California Courts, *Self-Help Center*, <http://www.courtinfo.ca.gov/selfhelp/lowcost/flfcountylosangeles.htm>

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dockets and procedures.<sup>14</sup> Judge Tennille runs a “paperless court.” And if it works for marriage, how about a “civil litigation pre-nup,” as proposed in the Economical Litigation Agreement (ELA)?<sup>15</sup> The ELA is a model contract proposed for use by parties who agree to limits on discovery and motion practice, including agreements to mediate prior to filing suit and relaxed standard for service, extensions, and witness interviews. The ELA demonstrates an effort by parties to commit to economical and civil methods of litigation, rather than engaging in the gamesmanship marking litigation. In a similar effort, the College of Commercial Arbitrators (CCA) recently issued “Protocols for Expeditious, Cost-Effective Commercial Arbitration” detailing key action steps for users, counsel, arbitrators, and provider institutions to address concerns about delays and costs in arbitration.<sup>16</sup>

Alternative dispute resolution was proposed in the early 1980’s as a reform to the ills of litigation.<sup>17</sup> As with judicial reforms, alternative dispute resolution requires constant attention. Arbitration carries the same risks of cost, complexity, and delay, without transparency or meaningful appeal. Professor Stipanowich posits that arbitration is increasingly more “judicialized,” formal, costly, subject to extensive discovery and motion practice, as well as hardball advocacy. His survey of corporate counsel’s regard for arbitration was summarized by one respondent who stated that “I might as well be in court where I have an appeal right.”<sup>18</sup>

Responding to the contention that arbitration is the “new litigation,” a third panel of arbitration experts agreed that lawyers who bring their litigation practices into arbitration undermine arbitration’s benefits. Discovery and excessive, inappropriate, or mismanaged motion practice are also barriers to containing cost and time efficiencies in arbitration, leaving it subject to the same pitfalls as litigation. Dean Lisa Kloppenburg offered that, like judges, arbitrators need to be process managers, and parties need to

14. Benjamin F. Tennille et al., *Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases*, 11 PEPP. DISP. RESOL. L.J. 35 (2010).

15. Shari Qualters, *Litigation Pre-Nup to be Unveiled at Pepperdine Conference*, NAT’L LAW JOURNAL (April 15, 2010), available at <http://www.law.com/jsp/article.jsp?id=1202448091161>.

16. The College of Commercial Arbitrators, *Protocols for Expeditious, Cost-Effective Commercial Arbitration*, <http://www.utexas.edu/law/centers/cppdr/portfolio/2010%20Symposium/Reviscd%20CCA%20Protocols%20REV%203-25-2010.pdf>

17. Warren E. Burgcr, *Isn’t There A Better Way? Annual Report on the State of the Judiciary*, (Jan. 24, 1982) (“[L]itigation is not only stressful and frustrating, but expensive and frequently unrewarding for litigants.”).

18. Stipanowich, *supra* note 5 (powerpoint presentation).

share responsibility to limit the scope of the arbitration, discovery, and budget. She suggested training in this mindset and skills should start early, noting that her students at the University of Dayton all students take a course in Alternative Dispute Resolution. The Straus Institute for Dispute Resolution is long committed to teaching dispute resolution to students, professionals and judges.

American Justice is at a crossroads; yet, innovations in both public and private justice systems are possible. The rocket dockets and appropriate application of fast-track arbitration procedures, judicial involvement throughout the process to pursue speed and cost-control are among the steps that are necessary for continued viability of the public and private justice system. We all have a role in improving the justice system. Our attention, intentions, and openness to switch can make meaningful access to justice possible, hopefully for all.