2010

Saving Civil Justice: Judging Civil Justice

Elizabeth G. Thornburg

Southern Methodist University, Dedman School of Law

Follow this and additional works at: https://scholar.smu.edu/law_faculty

Part of the Courts Commons, Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation

Elizabeth G. Thornburg, Saving Civil Justice, 85 Tul. L. Rev. 247 (2010)
BOOK REVIEW


Reviewed by Elizabeth G. Thornburg*

I. INTRODUCTION..............................................................247
II. JUDGING CIVIL JUSTICE .............................................250
   A. The Case for Civil Adjudication as a Public Good...........250
   B. Starving the Courts..................................................252
   C. The Selling of ADR..................................................255
   D. The Role of Judges................................................257
III. LESSONS FOR THE UNITED STATES ................................258
   A. The Tie Between Public Good and Public Funding............258
   B. The Tie Between Public Funding and Strategies To Deter Court Use.................................................260
   C. The Disconnect Between Saving Court Costs and Saving Party Costs......................................................264
IV. CONCLUSION .....................................................................266

I. INTRODUCTION

Asking the right question can be as important as giving the right answer. In her book Judging Civil Justice, Dame Hazel Genn forcefully argues that the right question about the civil justice system is not “[h]ow much justice can we afford” but “how much justice can we afford to forego.” Genn has spent her professional lifetime studying

* © 2010 Elizabeth G. Thornburg. Professor of Law, Southern Methodist University Dedman School of Law; B.A., College of William and Mary; J.D., Southern Methodist University.

1. HAZEL GENN, JUDGING CIVIL JUSTICE 15 (2010) (alteration in original). Hazel Genn is a Professor of Socio-Legal Studies at University College London. Judging Civil Justice grows out of the Hamlyn Lectures, which she delivered in 2008 in London and Edinburgh. The prestigious Hamlyn Lectures, of which Genn’s were the sixtieth, are funded by the Hamlyn Trust, which was created by the will of the late Miss Emma Warburton Hamlyn, who died in 1941. The first Hamlyn Lecture (1949) was delivered by Lord Denning, and the list of all the lecturers includes prominent Law Lords, practitioners, and academics from the United Kingdom, the Commonwealth, and the United States. Id. at i, ix–xiv.
methods for resolving civil disputes. A pioneer in empirical legal studies, she has for thirty years interviewed litigants, lawyers, and judges and studied courts, tribunals, and ADR methods. Genn is a clear-eyed observer, deeply sympathetic to the plight of modern courts but unwilling to ignore the politics that underlie the rhetoric of court reform today.

Although the specific symptoms come from the English civil courts, Genn's diagnosis has important lessons for nations the world over that are struggling with the trade-offs between justice and delay, between competing demands for government funds, and between the private and public aspects of dispute resolution. She challenges both policy makers and ordinary citizens to focus on the benefits the court system provides:

We need a positive understanding of the role and value of the civil justice system. . . . Our judgment about the quality of our civil justice system should not be measured simply in terms of speed and cheapness, or by how many cases we can persuade to go elsewhere. . . .

[W]e need to re-establish civil justice as a public good, recognising that it has a significant social purpose that is as important to the health of society as criminal justice.

The challenge is thus to do the balancing in a different way—one that recognizes that the resolution of civil disputes is a public good, that gives weight to the accuracy of enforcement of legal norms, and that pays heed to the benefits of litigation and not just its costs.

Genn's critique begins by exposing the severe underfunding of the civil side of the English court system, followed by an examination of its result: civil justice policy that focuses first and foremost on pushing cases out of the court system. This manifests itself in processes that discourage litigation, efforts to move disputes into mediation, and the changed role of judges as they are expected to "manage" more cases more quickly with fewer resources. To justify these measures, legal elites disparage litigation—including the unseemly tendency of judges themselves to suggest that adjudication is overpriced and unreliable and no more worthy than any other method of resolving disputes. Throughout the book, Genn bemoans the lack of empirical data supporting and evaluating changes adopted under the rubric of court reform.

---

2. See id.
3. Id. at 76-77.
4. See id. at 32.
Her message has not been greeted with unanimous praise. “Some months have passed since I delivered the lectures and in the intervening period, as a result of both oral and written communications, I have realised, . . . first how controversial were some of my views and second how very strongly those . . . who disagree with me feel about the subject.” While her information is accurate, her interpretation raised hackles. Suggesting out loud that the efforts to limit civil litigation might be motivated by something other than the desire for justice broke a professional taboo. Clearly by advocating greater funding of civil courts, less slavish adulation of mediation, and a more nuanced view of the judicial role, she risks the ire of politicians, ADR providers, and managerial judges.

_Judging Civil Justice_ is valuable on its own terms as an examination of recent policy decisions that brought about dramatic changes in England’s civil courts. For readers in other countries, though, it has an additional benefit. Genn’s book is a lens through which we can examine our own legal systems more clearly. Its depiction of the logical consequences of case-management-meets-tight-budgets provides a sobering view of dispute resolution stripped of its lawmaker, norm-setting function. The book also illustrates the abundant cross-fertilization of procedural thought: case management techniques were pioneered in U.S. federal courts, where they spread from huge cases to ordinary ones despite a lack of empirical evidence that they in fact saved time or money. They were picked up in other countries, most notably and dramatically by Lord Woolf, the architect of England’s procedural revolution of the 1990s. Now Genn has analyzed ten years of experience under Woolf’s rules and government budget cuts, utilizing the practical and jurisprudential concerns of American academics like Luban, Galanter, and Resnik, as well as

5. _Id._ at 187.

6. JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT, at xx-xxxi (1996) (finding that early case management was associated with shorter time to disposition and significantly increased attorney work hours and that setting an early trial date was the only management tool that had a statistically significant effect on time to disposition, cost of litigation, lawyer satisfaction, or perception of fairness); see FED. R. CIV. P. 16. See generally JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL 2001, http://www.fjc.gov/public/pdf.nsflookup/civillitig01.pdf/$file/civillitig01.pdf.


8. David Luban, Frederick J. Haas Professor of Law and Philosophy, Georgetown University; Marc Galanter, John and Rylla Bosshard Professor of Law and South Asian Studies, University of Wisconsin and LSE Centennial Professor, London School of
leading British procedure scholars like Jacob, Zuckerman, and Zander in examining the resulting English system.

U.S. readers of Judging Civil Justice will learn more about both the British system and their own by considering Genn’s account. At this very moment, the American Bar Association is concerned that pretrial processing has replaced trial to such an extent that trials have “vanished.” In addition to using aggressive management tactics and mandatory mediation, courts enthusiastically enforce predispute arbitration clauses, even in cases involving statutory rights and adhesion contracts. Meanwhile, amid continuing clamor for faster and cheaper litigation, the United States Supreme Court has ratcheted-up the pleading requirements to try to keep cases out of the courts at the outset, and the Advisory Committee on the Federal Rules of Civil Procedure hosted a conference in May 2010 to consider requiring heightened pleading and allowing less discovery. Civil justice is up for grabs, as Genn’s book provocatively warns.

II. JUDGING CIVIL JUSTICE

A. The Case for Civil Adjudication as a Public Good

Judging Civil Justice begins with a reflection on the function of the court system, and especially on the ways in which the role of the courts goes beyond merely processing and resolving private disputes. “If the law is the skeleton that supports liberal democracies, then the

---

Economics and Political Science; Judith Resnik, Arthur Liman Professor of Law, Yale University.

9. Genn, supra note 1, at xiii, 2-3; Sir Jack Jacob, deceased, in his time the leading civil proceduralist in England and Hamlyn Lecturer in 1986 (“The Fabric of Civil Justice”); Adrian Zuckerman, Oxford University (Fellow, University College); Michael Zander, Professor Emeritus, London School of Economics and Political Science.


11. See generally Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration, 74 WASH. U. L.Q. 637, 644-74 (1996). Developments in arbitration law have further expanded contractual ability to opt out of the court system, and the Supreme Court recently held that an arbitrator, under certain circumstances, has the exclusive authority to determine whether an arbitration clause is enforceable. See Rent-a-Center v. Jackson, No. 09-497, slip op. at 9-12 (U.S. June 21, 2010).


machinery of civil justice is some of the muscle and ligaments that make the skeleton work."

Genn reminds us that beyond the mechanical operations of the courts lie decisions about rights. "[H]aving imposed duties and obligations, having devised a policy for enforcing behaviour or ameliorating some social ill, what opportunities and structures do we provide for the public to enforce those rights and obligations or make good their entitlements?" Procedure, then, must be recognized as the means by which substantive rights are enforced. The resulting decisions are the means through which the substantive law is developed and articulated.

Adjudication itself is an important part of this public function. Even though most cases do settle, a credible threat of litigation is important to the enforcement of underlying norms, and it is adjudicated cases that give the courts the opportunity to articulate those norms, to interpret and develop the law. Here Genn uses the example of one of the most famous English tort cases of all time, a case that set the stage for modern product liability law:

Take the case of Mrs Donoghue and the snail in the ginger beer bottle, decided by the House of Lords in 1932. The case effectively transformed the law. Whatever view is taken of the decision, the case established protection for consumers, created an incentive for those who create risks to take care and the possibility of redress for those harmed by negligent actions. In this way the common law has developed on the back of private and business disputes and thousands of cases have been settled in its wake.

What would have happened, she asks, if Mrs. Donoghue’s claim was instead managed and settled away?

Having argued for the public importance of civil litigation, Genn turns to pressure points that threaten its role. She identifies two forces—which she labels external and internal—that challenge the public’s access to the court system. The external threat takes the form of resource constraints. In England, a single Ministry of Justice administers both the civil and criminal side of the courts, and the inexorable demands of the criminal side have continually leached budget from the civil side. The internal threat is philosophical and

---

15. Id. at 11 (alteration in original).
16. Id. at 20-21.
17. Id. at 22 (discussing Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) (appeal taken from Scot.)).
18. Id.
rhetorical. In the process of endorsing valuable options for improving civil justice, the advocates of case management and alternative dispute resolution (including judges) have, Genn suggests, marketed their services by bashing the courts, arguing that “adjudication is always unpleasant and unnecessary,” that “there are no rights that cannot be compromised and that every conflict represents merely a clash of morally equivalent interests.”

Judging Civil Justice sees an unholy alliance between government bean counters and ADR hawkers growing out of these twin threats. “A powerful meeting of minds has developed between an emerging profession of private dispute resolvers and judicial opinion formers which perfectly suits the financial realities of a cash-strapped justice system struggling to process a growing number of criminal defendants.”

B. Starving the Courts

Teeing up the issue as whether the “underpinning structures and processes of the civil justice system may be crumbling,” Judging Civil Justice turns more specifically to the declining support for civil courts. Genn suggests that in England, the government deliberately discouraged the filing and encouraged the quick disposition of civil cases for budgetary reasons. Like any other government agency, the Lord Chancellor’s Department (now the Ministry of Justice) set spending targets, including targets that required a decreased number of civil cases. The Department is judged on its ability to meet those targets, and so it took action, most notably the decrease in legal aid and drastic increase in court user fees, to get the numbers down.

On the legal aid front, the government cut the budget that provided lawyers to indigent citizens (with most remaining funds needed for criminal defense). For example, between 1997 and 2005, expenditure on civil legal aid fell by a quarter while spending on criminal matters increased by thirty-seven percent. “Like all areas of public expenditure,” said the Department for Constitutional Affairs, “legal aid has to live within an overall budget and the demands on the scheme must be met from within that budget. The growth in criminal spending has meant we have had to reduce the spending on civil,

---

19. Id. at 24-25.
20. Id. at 25.
21. Id. at 26.
particularly on legal [aid] help, and family legal aid." The case for these cuts was made not by admitting that some people would not get help, but by attacking lawyers. The Lord Chancellor at the time, Lord Irvine, reframed legal aid as a "gravy train for ‘fat-cat lawyers’ who were greedily stuffing their pockets with taxpayers’ money." Later Lord Chancellors also attacked the resulting conditional fee system that arose as a substitute for legal aid. In 2008, for example, the Lord Chancellor criticized the lawyers who represent clients on a "no win no fee" basis: "It’s claimed they have provided greater access to justice, but the behaviour of some lawyers in ramping up their fees in these cases is nothing short of scandalous."

Filing fees increased dramatically beginning in the 1990s. Civil justice, now identified as a mere dispute resolution service for citizens with issues, was expected to pay for itself, and so fees were set to approximate the actual cost of delivering court services. "The entire cost, including the cost of the judges, was to be met from court fees." Perhaps more shockingly, figures from 2006 revealed that civil justice was producing a "profit" of £30 million, which was used to offset the cost of criminal cases rather than to support the structures needed for civil adjudication. Instead, the civil part of the budget was cut further. The results are visible and go beyond the number of judges per pending case. According to Genn, the result was "[i]nadequate information technology; stressed administrative staff; too few books

---

23. Genn, supra note 1, at 41 (alteration in original) (quoting Dep’t for Constitutional Affairs, A Fairer Deal for Legal Aid, 2005, Cm. 6591, ¶¶ 2.12-.18 (U.K.)).

24. Id. at 44 (citing David Hughes, Irvine To Name the Legal Aid Profiteers, Daily Mail, Apr. 28, 1998, at 29).

25. Lord Justice Jackson, 1 Review of Civil Litigation Costs: Preliminary Report 2 (2009), available at http://judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/civil-litigation-costs-review-reports. Ironically, because the government itself is sometimes the defendant in these cases (as when a medical malpractice case is brought against the national health service, or a local authority is sued for failing to act properly) under a "loser pays" system, the government ends up paying the legal fees of the lawyers who sued it when the suits are successful.

26. Genn, supra note 1, at 47.

27. See Sir Henry Brooke, Should the Civil Courts Be Unified? ¶ 75, at 30 (2008), available at http://www.judiciary.gov.uk/publications-and-reports/reports/civil/civil-courts-unification. The Ministry of Justice reported in 2008, however, that the "over-recovery"—caused by the fact that county court fees exceeded the cost of running county courts—had been eliminated. Ministry of Justice, Civil Court Fees 2008, at 10 (2008), available at http://www.justice.gov.uk/consultations/civil-court-fees-2008-consultation.htm. It also endorsed the general rule that "[c]ourt fees should be set, so far as possible, at levels that reflect the full cost of the process involved." Id. at 7 (alteration in original).

28. Brooke, supra note 27.
for the judiciary; rushed listing; and judges required to wander down to
waiting rooms to collect their next case because there is no one else to
do it for them.\footnote{29}

Genn describes the public areas of some civil courthouses as
"squalid" and "run down," comparing them to the "worst to be found
in NHS hospitals."\footnote{30} If public confidence in the system is one piece
of what makes a civil justice system work, this decreased ability to track
and process cases can only cause further damage to the courts’ ability
to maintain public respect for law and the legal system.

Faced with declining budgets and increasing concern about the
expense of litigation, the Lord Chancellor in 1994 commissioned Lord
Woolf to oversee a study of civil justice. When the resulting report
recommended "pre-action protocols" that would resolve some cases
before filing, as well as rules that ration pretrial processes, impose
deadlines, and all but require mediation, the potential budgetary relief
must have been welcome. Genn does not suggest that Lord Woolf’s
intention was to save money and notes that he certainly “did not intend
civil justice to be subsequently starved of resources.”\footnote{31} Nevertheless,
the rhetoric\footnote{32} and recommendations of his report were “available to be
used by government to support and justify squeezing resources for the
civil courts.”\footnote{33} If the problem with the civil courts is inefficiency and
the bad behavior of lawyers, they need more adult supervision, not
more funding.

Ten years after the Woolf reforms were implemented, a new study
documents (mostly anecdotally) what most suspected: the cost of
litigation to the litigants has increased rather than decreased. Prefiling
exchanges of information and demands still take lawyer time (and
fees); procedures that front-load lawyer activity may actually increase
party costs; status conferences are billed by the hour; lawyer drafting
of written witness statements takes considerable time; and attorney
participation in mediation (and sometimes the mediator’s time as well)
must be paid for.\footnote{34} Nevertheless, from the perspective of court budgets

\footnote{29. Genn, supra note 1, at 51 (alteration in original).}
\footnote{30. Id.}
\footnote{31. Id. at 58.}
\footnote{32. Id. at 53-54. Woolf blamed the adversarial attitudes of lawyers for the delays in
processing disputes, using labels like “battlefield” and “gamesmanship” and accusing them of
massive flouting of the rules. Id.}
\footnote{33. Id. at 58.}
\footnote{34. Lord Justice Jackson, Review of Civil Litigation Costs: Final Report
(2009), available at http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-
civil-litigation-costs/civil-litigation-costs-review-reports; see also Anthony Clarke, The Woolf
Reforms: A Singular Event or an Ongoing Process?, in The Civil Procedure Rules Ten}
the last decade has seen savings—the numbers of both filings and trials are down.\(^\text{35}\)

Other than speed and expense, the impact of the changes on outcomes is still largely unknown. Genn notes throughout this book that research has not been done to assess the changes' effect on the ability of citizens to access the courts, the fairness of settlements, or the quality of decisions in the disputes that make it to trial. Since settlement rather than adjudication is the focus, the value of procedure is its ability to move cases along, and the availability and use of evidence is immaterial. Whether procedural changes have affected the accuracy of outcomes and the enforcement of legal norms is largely undiscussed.\(^\text{36}\) Using her own anecdote, Genn recounts a conversation with a court manager who noticed a dramatic reduction in the number of cases seeking to remove children from dangerous homes. It seems that the filing fee for such cases had increased from £150 to £4000, and the local authorities were balancing the need to protect children against their own budgetary limits.\(^\text{37}\)

C. The Selling of ADR

Genn is not antimediation. She acknowledges that it is "an important supplement to courts [that has] rightly become a feature on the landscape of dispute resolution."\(^\text{38}\) Further, Genn notes that "the public and the legal profession should be properly educated about the

---

\(^{35}\) Genn, supra note 1, at 57. Professor Michael Zander suggests, however, that the numbers were already decreasing prior to the Woolf reforms. See Michael Zander, The Woolf Reforms: What's the Verdict?, in \textit{The Civil Procedure Rules Ten Years On, supra}, at 34, at 417, 427.


\(^{38}\) Genn, supra note 1, at 79.
potential of mediation from the earliest possible moment and . . . that mediation facilities should be made easily available to anyone contemplating litigation.\textsuperscript{39} Nevertheless, her second Hamlyn Lecture asked "who and what is driving ADR policy, and why?"\textsuperscript{40}

Judging Civil Justice raises the same kinds of concerns when addressing mediation as when deploring the underresourcing of civil courts. Voluntary resolution of disputes can be a good thing—but it should not be foisted on the unwilling in the interest of reducing the need for court funding, and it should not be sold through anticourt, antilaw condemnation of civil adjudication.

Nor is Genn comfortable with mediation's emphasis on resolution rather than rights. Here she invokes the story of her mother-in-law:

For example, take my mother-in-law's stair lift which she bought a few months ago at considerable expense and which keeps sticking. The installers have twiddled with it, but it is still sticking. They refuse to come back again. She keeps getting stuck. Is this a problem involving a clash of morally equivalent interests—the installer's interest in not having to come out to fix it and my mother-in-law's interest in not getting stuck halfway up her stairs one night on the way to bed since she lives alone and is immobile? Or is this about the seller's obligation under the contract to ensure that the stair lift is in working order and my mother-in-law's right as a consumer to have a working stair lift?\textsuperscript{41}

English authorities have tried very hard to motivate disputants and their solicitors to mediate. The civil procedure rules allow courts to order stays for mediation and to penalize with cost orders parties who refuse to attempt mediation. On the legal aid side, litigation funding will be denied if there is any informal alternative. As a policy matter, the funding code provides that "all forms of ADR are accepted to have at least equal validity to court proceedings."\textsuperscript{42} And once again, judges as well as mediators suggest that litigation is both undesirable and a sign of failure.

Genn argues that litigation needs to remain the main event with mediation the alternative, rather than the other way around. "Mediation without the credible threat of judicial determination is the sound of one hand clapping."\textsuperscript{43} And in order to fulfill even this

\footnotesize{39. \textit{Id.} at 80. \\
40. \textit{Id.} at 79. \\
41. \textit{Id.} at 122-23. \\
43. \textsc{Genn}, \textit{supra} note 1, at 125.
function, the civil courts must be an acceptable choice. "We need modern, efficient civil courts with appropriate procedures that offer affordable processes for those who would choose judicial determination."  

D. The Role of Judges

Genn's chapter on the role of judges demonstrates her respect and empathy for those who undertake the difficult task of judging. Her work in judicial training and on the judicial appointments commission has given her "a keen interest in the challenges that the judiciary face in civil cases, how they do what they do and the pressures under which they increasingly and often, in my view heroically, work."  She notes the almost complete lack of empirical study of how judges, especially trial judges in the lower courts, do their work. This, in turn, makes it difficult to decide what kinds of skills one should seek in a judge as well as what kind of training those judges should receive to help them handle the cases that come before them. And this lack of information comes at a time when "the reforms of civil justice, together with resource pressures, have fundamentally changed the nature of the judicial role. . . . The post-Woolf judge in the civil courts is an active case manager [who must] balance values of efficiency, equality, expedition, proportionality and careful allocation of the scarce resources of the court."  

Recent changes to the jurisdiction of the various English courts has pushed more and more legal business to the District Judges, those "in the trenches" of everyday disputes. (This is also a budget-cutting measure, as proceedings in the lower courts are less expensive, not least because judicial salaries are lower there.) A low level of funding for civil litigation means that these judges have a heavy case load without sufficient resources to cope with it. Much of their work is done in chambers, involves a wide variety of legal issues, and is brought by and against pro se litigants. Genn fears that it is in these courts, where the problems of the less legally sophisticated and less powerful citizens are determined, that the lack of resources creates a particular strain—a strain that cannot be helped with preaction

44. *Id.; cf.* Lord Clarke of Stone-cum-Ebony, Master of the Rolls, Mediation: An Integral Part of Our Litigation Culture (June 8, 2009) (agreeing with primacy of litigation, but supporting the propriety of mandatory mediation and urging lawyers to increase the percentage of settled cases to a number in excess of ninety-eight percent).

45. *Genn, supra* note 1, at 127.

46. *Id.* at 172-73.
protocols, shorter timetables, or limits on adversarial lawyers. And the justice system’s ability to aid these ordinary citizens is a fundamental function on which its legitimacy depends.

III. LESSONS FOR THE UNITED STATES

American lawyers, judges, academics, and legislators should read this book. It is, in part, an antidote to the oft-repeated claims that the expansive nature of the U.S. civil procedure rules is uniquely responsible for cost and delay, and that if its courts would only return more closely to its common law roots the problem would disappear. Genn’s book is, instead, evidence that England’s extensive prefiling requirements, particularized pleading rules, and active management have not provided the silver bullet that will make litigation fast and cheap. More, it is a cautionary tale about the dangers of viewing civil courts as providing benefits only to the disputing parties. There are many parallels between the English and U.S. experiences, and it is sometimes easier to recognize problems in someone else’s system than when examining one’s own.

A. The Tie Between Public Good and Public Funding

As was true in England, opinion leaders in the United States have been waging a campaign for decades to convince the public that civil litigation is a bad thing. Part of this has been aimed at denigrating individual plaintiffs and the lawyers who represent them. Political and business elites promoted a "jaundiced view" of the civil justice system, declared a "litigation explosion," and launched a campaign to limit corporate responsibility, reduce tort litigation, and make access to the courts more difficult. Even scholars who have no intention to demonize civil litigation have tended at times to characterize it as a purely private matter, so that, for example, there is no reason to make discovered information public, to limit secret sealed settlements, or to be wary of arbitration clauses.

47. It is worth noting that civil law jurisdictions in Europe have also turned to case management, although perhaps to a lesser degree. See generally JUDICIAL CASE MANAGEMENT AND EFFICIENCY IN CIVIL LITIGATION (C.H. van Rhee ed., 2008).
49. See, e.g., Richard L. Marcus, A Modest Proposal: Recognizing (At Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public, 81 CHI.-KENT L. REV.
What American proceduralists may not have seen coming is the logical extension of this philosophy—if courts merely provide a service to private disputants, those disputants should pay for the cost of disputes, and the way they do that is through filing fees. Although the English system does provide fee reductions for the impecunious and subsidizes some family and small claim matters, about eighty percent of the cost of the civil side of the court system is paid for through user fees. Filing fees alone can exceed £1000, and then each step in the process—such as assigning the case to a track, filing motions, holding hearings, and receiving orders—also requires the payment of a fee. Compared to that, filing fees in most U.S. courts are modest, and the cost of running the courts comes from state and local government budgets.

Government funding problems, however, could make the “full cost recovery” fee option appealing to American politicians. Even before the current global financial crisis, U.S. courts—especially state courts—were underfunded. For example, a 2003 study by the National Center for State Courts found that in response to budget cuts, 84% of states had frozen or delayed hiring, 56% had reduced training, and 31% had cut funding to specialty courts. The next year, an ABA study found similar examples: the state of Alabama lost 475 court positions due to budget cuts, and New Hampshire suspended jury trials for a month to avoid having to pay jurors their per diem fees. More recently things have gotten worse. California now closes its courts on the third Wednesday of every month, and Georgia courts can have a sixty-day wait for temporary custody hearings. Kentucky’s court


54. Id. at 6. Even in the comparatively better-funded federal courts, the pressure of the criminal caseload (exacerbated by the War on Drugs and the Speedy Trial Act) took resources away from the civil side. See Thomas M. Mengler, Federal Civil Jurisdiction: A Report to the Long Range Planning Committee of the Judicial Conference of the United States 3 (1993).


system received an $8 million budget cut, leading the chair of its House Judiciary Committee to warn that “we’re getting perilously close to reducing services that must be provided to the public.” As in Genn’s example of the district courts in England, the institutions that are often hardest hit by budget woes are those whose work impacts the vulnerable. “The brunt of the budget cuts has fallen on the high-volume courts hearing family and juvenile matters, misdemeanors and small-claims disputes.”

Faced with those budget pressures, it will be tempting for politicians to make further cuts to court budgets, especially on the civil side. In order to avoid even greater congestion and delay, courts out of self-preservation will face the temptation to push cases out—whether by raising filing fees, requiring prefiling mediation, or by changing the actual procedure rules to block unpopular or expensive litigation.

B. The Tie Between Public Funding and Strategies To Deter Court Use

Budget problems and procedural reform are not often talked about together, but the need to cut costs can make certain kinds of changes appealing. Any suggestion of cost-cutting as a *motivation*, however, is extremely controversial. Genn’s suggestions that the English government’s desire to cut civil court funding lay behind Lord Woolf’s reforms has caused pointed backlash, albeit in a polite academic way. Lord Woolf has taken offense at the suggestion that his goal was to cut costs. At a 2009 seminar at University College London, Woolf argued that Genn was “absolutely wrong” and had misunderstood the motivation behind the systemic overhaul of the civil procedure rules. He was not asked, he said, to find ways to save costs but to find ways to improve civil justice. Woolf also suggested that Genn had been over-influenced by American academic critics, and commented that the lectures did not reflect “the Hazel I knew.”

---

57. Tom Loftus, *Final Courts Budget Less Than Either House or Senate Had Passed*, COURIER-JOURNAL, Apr. 8, 2010 (alteration in original).
58. Editorial, *supra* note 56. In addition to decreased court resources, there is decreased funding to help fund legal representation for the poor in civil cases. This same time period has seen civil legal aid budgets shrink, not only from state budget cuts but also because revenues from state IOLTA programs—Interest on Lawyers Trust Accounts—have plummeted as their income depends on the interest rate set by the Federal Reserve.
60. *Id.*
There are, however, at least hints here and there that reform and budget limitations are related. Some come from other common law countries. At about the same time that Lord Woolf was doing his study in England, civil justice reviews in other countries assumed the need to limit government spending on civil justice and latched onto case management and ADR as the answer.\textsuperscript{61} In 1994, for example, Ontario set up a review of civil justice whose mandate was to "maximize the utilization of public resources allocated to civil justice."\textsuperscript{62} Its 1995 report recommended the integration of ADR and case flow management.\textsuperscript{63} Australian reforms in the 1990s were also motivated at least in part by the need to reduce spending on courts and legal aid.\textsuperscript{64} The terms of reference that led to the 2000 report of the Australian Law Reform Commission, \textit{Managing Justice}, started with a call for a "simpler, cheaper" legal system, and the report noted the need for legal aid to strive for "optimal use and coordination of limited resources."\textsuperscript{65} A study of civil procedure reform in Trinidad and Tobago noted that "there will always be reluctance amongst politicians and taxpayers to increase the size of the slice which the cost of the Administration of Civil Justice is to be allowed from the National Pie."\textsuperscript{66} As Genn points out, the pattern around the world was the same: "the wholesale introduction of ADR, cost control, stripping down of procedure and active case management by the judiciary to save costs to the justice system and the parties."\textsuperscript{67}

U.S. sources also link court budget concerns with the movement toward case management and ADR. Resnik has noted that the American institution of the managerial judge began as a response to claims that federal judges were lazy and inefficient.\textsuperscript{68} Hensler explains that decreased budgets, coupled with increased case filings, gave rise to the case management movement.\textsuperscript{69} Certainly one motivation for the judicial case management requirements of the Civil Justice Reform

\begin{thebibliography}{99}
\bibitem{61} Genn, \textit{supra} note 1, at 58.
\bibitem{62} \textit{Id.} at 59.
\bibitem{63} \textit{Id.}
\bibitem{64} Ted Wright, \textit{Australia: A Need for Clarity}, 20 \textit{JUST. SYL.} J. 131, 146-49 (1999).
\bibitem{67} Genn, \textit{supra} note 1, at 68.
\end{thebibliography}
Act was to reduce the resources needed by the federal courts by making them more efficient. And today, court personnel responsible for implementing various managerial tasks are aware that they must justify their existence by saving money.

As in England, a more explicit call to save court dollars could lead to dramatic increases in filing fees, which could both raise revenue and decrease demand. This option has at least been discussed in the United States. The Long Range Plan for the federal courts, proposed back in 1995, rejected the idea of raising fees based on the committee’s concern that high fees would price low- and moderate-income litigants out of federal courts. But academic commentators have suggested fee hikes for some time, and some state courts have begun to experiment with raising fees as a revenue source. Increasingly tight state budgets may reinforce this trend.

Both Genn’s description of the English situation and the American experience give reasons for caution in associating budget savings with most management techniques, however. Unless a technique keeps a case entirely out of the court system (for example, a requirement for pre-filing exchange of information and settlement offers) or effortlessly moves a case that would have taken time out of the system (for example, a mechanically generated mediation order that results in settlement of a case that would otherwise have occupied judicial time), judicial management might or might not save court time and money. As researchers have pointed out, hands-on management can actually take more rather than less time, and any time spent on


71. See, e.g., Robert W. Rack, Jr., Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation, 17 OHIO ST. J. ON DISP. RESOL. 609, 622 (2002) (noting that the court-annexed mediation program “was created and is expected to settle cases; our primary cost justification to Congress and court budget managers must be related to case terminations, that is, settlements”).

72. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 95-96 (1995). The committee also worried that fees would be an unreliable source of revenue. Id. Some commentators have suggested that the court should raise fees to something closer to actual cost because otherwise the demand for litigation is artificially high. See, e.g., Patrick E. Longan, Congress, the Courts, and the Long Range Plan, 46 AM. U. L. REV. 625, 661-63 (1997).


cases that would have settled without judicial intervention is a net increase in demand on court resources. Compulsory mediation may save the system money if the parties must privately pay the mediator but will increase costs for the court system if mediation is provided by government-paid neutrals.

If courts are going to innovate with an eye toward budget savings, we can expect more of the kind of procedures that remove cases from the courthouse. Some of the possibilities: (1) pre-action protocols, similar to those used in England, that prohibit filing lawsuits until the parties have exchanged a quite specific series of pleading-like documents, disclosures, and settlement discussions, with failure to comply made the basis for fee shifting; (2) increased mandatory referrals to noncourt mediation, with sanctions for failure to bargain reasonably; (3) increased enforcement of pre-dispute arbitration clauses, including delegation to the arbitrator of all questions including the enforceability of the arbitration clause so that the disputes are not brought to court at all; and (4) significantly higher filing fees, caps on attorney fees, and increased “loser pays” cost shifting in an effort to deter the filing of lawsuits. On the procedure rule end of the spectrum, we may also see more judicial interest in motions to dismiss on the pleadings—taking the place of summary judgment motions as the favored filtering device—because those motions take less judicial time and get cases out of the system earlier.

Alternatively, courts might fight back. Perhaps emboldened by Genn’s Hamlyn Lectures (one of which was delivered in Edinburgh), the civil justice review in Scotland tried making the case that a better justice system warrants increased funding. Led by Lord Gill, the review did recognize “the cost of litigation to the public purse.” But it


76. See, e.g., MINISTRY OF JUSTICE PRE-ACTION PROTOCOL FOR PERSONAL INJURY CLAIMS (2010), available at http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm. Most are subject-specific, as well as quite specific as to content.

77. Empirical studies of the effect of cost-shifting rules, however, reveal that their impact on costs is quite complex and under some circumstances, a “loser pays” rule will increase rather than decrease costs. See JACKSON, supra note 25, at 91-92.

78. See generally Ashcroft v. Iqbal, No. 07-1015 (U.S. May 18, 2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Summary judgment motions, because they may require reviewing an extensive record, are generally more time-consuming for courts than 12(b)(6) motions. Cf. Iqbal, No. 07-1010, at 10 (explaining why the Iqbal order that refused to dismiss the case was appealable).

also forthrightly acknowledged the stress put on the civil docket by the needs of the criminal caseload. “Our remit requires us to consider to some extent the interaction of the criminal courts with the civil justice system. We remain convinced that no real progress can be made in the civil justice system until the distorting effects of criminal business are removed.”

Lord Gill’s review proceeded to make several recommendations that would in fact require increased government spending on the court system, such as the introduction of new courts and judges, improved information technology, and the establishment of a permanent Civil Justice Council. “Good justice does not come cheap; but, just as importantly, it requires the effective expenditure of money.” How the Scottish Parliament will react to the suggestions remains to be seen.

In a similar way, U.S. court systems have sometimes challenged legislatures to provide more funding and tried to articulate the loss to the public when the civil courts function poorly. Some have even resorted to litigation in an effort to force budget increases. The long-term success of such efforts, though, would require convincing taxpayers (in an era of Tea Party protests) that litigation is in fact a public good, not just a service that, like trash collection or the neighborhood crime watch, should be paid for by those who use it.

C. The Disconnect Between Saving Court Costs and Saving Party Costs

When discussing cost savings, it is imperative to ask, “cost savings for whom?” Measures that might save taxpayer spending on courts may easily have no effect at all on lowering litigant costs and may in fact raise them. This proved to be the case with Lord Woolf’s

80. Id. at iii.
81. Id. at ix.
82. Justice Secretary Kenny MacAskill, in response to a question about the government’s intentions, said on March 11, 2010:

The large group of recommendations for structural changes to the judicial hierarchy and for the different handling of cases in the proposed new structures are closely intertwined and currently subject to a costing exercise being undertaken jointly by the Scottish Court Service and the Scottish Government; the costs of recommended reform will be jointly considered by the government and the judicial working group established by the Lord President before the government publish a formal response to the recommendations, later in 2010.

83. See Baker, supra note 73, at 726-27.
reforms in England, so that after ten years of practice under management-heavy procedure rules, there is near unanimous agreement that party costs have increased rather than decreased. Some even attribute increased party costs to decreased funding of court infrastructure. The same is likely to be true in the United States, as the early Kakalik study of case management indicated. While many hope that curtailed discovery and earlier settlements may offset the cost of increased attorney activity required by case management, those savings have not been documented in the United States and the English example suggests they will not be.

If Genn's inferences are correct, it is British politicians (and some judges) who have promoted management and diversion schemes in order to reduce the cost of running the civil court system. In the United States, on the other hand, adoption of case management methods seems to have grown initially out of the judges' own desire to manage mega cases, and lawyers' desire to interact more regularly with judges. More recently, the turn from deadline-setting management to procedure-rationing management came more from repeat litigants who perceived themselves as more likely to benefit from limits on discovery and other pretrial processes. Their interest in saving money for themselves as litigants will not overlap perfectly with the government's interest in reducing the cost of maintaining civil courts or with judges' interest in coping with reduced resources.

Nevertheless, as party costs remain high, and as court budgets come under increased strain, the alliance of interest between budget writers and defense lawyers (together with the judges' own desire to move cases quickly through their dockets) may create momentum to further ration access to courts and their processes. This can be seen already in the rhetoric of the Supreme Court in its recent pleadings cases, echoing defendants' complaints about the cost of discovery. Dismissal without discovery is required, they say:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process

84. Turner, supra note 34, at 85-86.
85. Kakalik et al., supra note 6, at 12-15.
87. For example, the practices mandated by the Civil Justice Reform Act were spurred on by the claims of Vice President Quayle's Council on Competitiveness. The current proposals to limit discovery and require fact pleadings were instigated in part by the American College of Trial Lawyers and other corporate counsel groups.
through "careful case management" given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.\textsuperscript{88}

Approaches that terminate disputes quickly and permanently will have increasing appeal for all but the parties whose rights have become more difficult to assert, and who have lost the courts as an institution to help even out disparities in information and resources.

IV. CONCLUSION

Who can pinpoint the dominant factor in mixed motives, or sort out the different concerns of different members of the legal elite? And whatever the motive, government actors are unlikely to say, "we know that this process will result in a poorer quality of justice, but it's all we're willing to provide. The taxpayers will give you a Focus, not a Ferrari." Yet it is quite clear that the civil justice system is currently making decisions that some cases are worth more resources than others. Calls for proportionality seem to indicate that the monetary stakes are the primary sorting mechanism, and the Woolf reforms in England created "tracks" that work along these lines.\textsuperscript{89} Other rationing decisions, however, are linked to particular types of claims, using devices such as imposing a floor on justiciable personal injury claims, rerouting employment claims to administrative tribunals, or creating noncourt compensation systems for certain types of disputes. In some Australian states, for example, an injured person may not sue for personal injury damages unless she can show a particular percentage of permanent whole person impairment under the American Medical Association Guide to the Evaluation of Permanent Impairment.\textsuperscript{90} People may agree or disagree with the decisions to deny court access or the setting of the cutoffs. But these schemes do at least publicly

\textsuperscript{88} Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (citation omitted); see also Ashcroft v. Iqbal, No. 07-1015, slip op. at 21 (U.S. May 18, 2009) (alteration in original) (referring to "[o]ur rejection of the careful-case-management approach").

\textsuperscript{89} Cf. TEX. R. Civ. P. § 190 (West 2010) (listing discovery control plans with different default limits based on amount in controversy).

The transubstantive nature of U.S. procedure means that rationing decisions are not usually made—or not openly made—based on the subject matter of the litigation.\textsuperscript{91} However, even when applying facially neutral procedure rules, court decisions have heightened pleading requirements for some types of cases based on a desire to discourage litigation in those areas.\textsuperscript{92} Case management encourages similar evaluative decision making, because the judge is called on to decide how much process a particular case is worth, \textit{in light of other competing uses for the court’s time}. Yet with this type of management rationing, neither the individual judge nor the court system is required to publicly articulate the reasons that certain cases or types of cases deserve more resources than others. Genn’s challenge to the English courts applies to other countries as well. It is neither efficient nor politically honest to allow ad hoc decisions about what process is due. “We need a strategy for the cases that we want to encourage into the system and those that we would prefer to discourage and we need to articulate our reasons for both of these choices.”\textsuperscript{93}

\textit{Judging Civil Justice} is an important book that can give proceduralists additional perspectives on familiar issues. Whether one admires case management or finds it worrying; whether one advocates more privatization of dispute resolution or seeks a return to public trials; whether one believes in better court funding or less government spending, Genn’s book raises crucial questions about civil justice that should not be ignored, and her dose of empiricism and tough-love belief in adjudication is an important voice in the debate.

\textsuperscript{91} Occasionally legislation, such as the Private Securities Litigation Reform Act passed by Congress in 1995, does clearly target a particular kind of litigation for less favorable treatment.


\textsuperscript{93} Genn, \textit{supra} note 1, at 76.