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THE PARADOX OF PROCEDURAL REFORM

OSCAR G. CHASE*

INTRODUCTION: THE PARADOX DESCRIBED

This symposium properly celebrates the fiftieth anniversary of the Federal Rules of Civil Procedure. Let me add a cheer for another procedural anniversary: 1988 is the twenty-fifth year in the life of the New York Civil Practice Law and Rules (the "CPLR"), which became effective on September 1, 1963.¹

The CPLR is the principal statute regulating dispute adjudication in New York State. It prescribes civil procedure in the Supreme Court—the trial court of general jurisdiction—and in the County Courts.² It also governs practice in the appellate courts³ and, to a limited extent, in the inferior trial courts.⁴

In this Article, I will relate something of the background of the CPLR and argue that this history presents an example of a neglected paradox of procedural reform. The recognition and description of this paradox may improve our understanding of the reform of procedure in New York and, perhaps, elsewhere. Put simply, the political engine which has driven procedural reform in New York, as illustrated by the case of the CPLR, has been discontent with the slow pace of litigation.⁵ The enactment of the

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¹ N.Y. CIV. PRAC. L. & R. 10005 (McKinney 1977) [hereinafter CPLR].

² See CPLR 101; D. SIEGEL, *NEW YORK PRACTICE* 3 (1978). See generally O. CHASE, *CIVIL LITIGATION IN NEW YORK* x-xi (1983) (explanation of how CPLR applies to courts of differing jurisdiction).

³ See CPLR arts. 55-57.

⁴ See D. SIEGEL, *supra* note 2, at 3-4.

⁵ H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* xxiv (2d ed. 1959) [hereinafter *DELAY IN THE COURT*]. In this classic study Zeisel, Kalven, and Buchholz argue that, despite its many negative effects, court delay "is a political issue of curiously low intensity, not one that commandeers persistent political pressure on its behalf." *Id.* This view may be seen as opposed to my attempt here to ascribe some political force to discontent with court

CPLR would probably not have been achieved without a delay crisis directly traceable to the wave of auto accident litigation which began in the late forties. Paradoxically, reform of the rules of procedure within the ambit allowed by the restraints of culture and politics is unlikely to have, and in the case of New York's reform has apparently not had, any positive effect on litigation pace.

I. THE ROOTS AND LIMITS OF PROCEDURAL REFORM

The enactment of the CPLR, according to then-Governor Rockefeller, represented "the first major revision of civil procedure in the New York Courts in over a century."⁶ Not all contemporary observers shared this grand gubernatorial perspective. The Senate Finance Committee, in its important Sixth Report on the proposed CPLR,⁷ noted that the Field Code of 1848 (to which Governor Rockefeller referred) was replaced in 1880 by the Code of Civil Procedure—commonly known as the Throop Code—which was revised in turn and recodified in 1920 as the Civil Practice Act, which in its own turn yielded to the CPLR. From another view, then, the CPLR was one of a series rather than one of a kind. Perhaps we can allow the former Governor his place in procedural history while at the same time observing that New York does seem to have a rough forty-year cycle of procedural reform in this area.⁸ If that is so, we are at the mid-point of the cycle and this, too, offers incentive for examining procedural reform. Furthermore, procedural change is effected apart from wholesale code revision. One procedural historian reported that between 1846 and 1953 there were twenty-five commissions devoted to the topic which produced 30,000 pages of reports.⁹ Also, the law of procedure lies in cases, as well as statutes and rules, and it therefore grows and changes as a

delay. The conflict does not in fact exist. I do not argue that delay is a domestic political issue equivalent in the public mind to taxes, education, housing, or crime. I do argue that it is the only concern which has focussed public attention on the problems of civil procedure. Likewise, Zeisel, Kalven, and Buchholz recognize that there has been a long history of public concern about delay in New York. *Id.* at 19.

⁶ Governor's Memorandum on Approval of Civil Practice Law and Rules (Apr. 4, 1962), reprinted in [1962] N.Y. Laws 3621 (McKinney) [hereinafter Governor's Memorandum].

⁷ SIXTH REPORT OF THE SENATE FINANCE COMMITTEE, reprinted in [1962] N.Y. Laws 3333 (McKinney) [hereinafter SIXTH REPORT].

⁸ This cycle was apparently first observed and commented upon by Daniel H. Distler. See Weinstein, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 86-87 (1960).

⁹ Nims, *New York's 100 Years Struggle for Better Civil Justice*, 25 N.Y. ST. B.A. BULL. 83, 88 (1953).

part of the common law, through judicial decisions.¹⁰

In this vein, the very adoption of the CPLR, or of any reform that involves the scrapping of one procedural code for another, is especially interesting. It requires a major expenditure of effort by talented people, the mobilization of legislative attention, and the overcoming of a natural inertia in favor of the settled and familiar, as both the bar and the judiciary always have an interest in the maintenance of the *ancien régime*.

Why does reform happen? In part, the answer is traceable to a general streak of reformism that runs through American public life. Were our society not reformist, there would be no CPLR or Federal Rules and no anniversaries to mark. There are two ingredients to reformism as I use the term here. First, the notion—almost a metaphysical stance—that social institutions are, if not perfectible, at least improvable and that they can be improved through the application of the rational processes of study, thought, and discussion. Lawrence Friedman suggested that the nineteenth century movement to codify procedural and substantive law reflected the “Age of Reason.”¹¹ This is also true of the adoption of the CPLR. The second relevant aspect of reformism is the governmental inclination to respond to popular dissatisfaction, insofar as the political conditions then current permit. In this regard, reform is a political phenomenon. To the extent that one can judge from public statements and actions of political leaders, one complaint stands out as a driving force in the history of procedural reform in New York: delay. In substantial part, the adoption of the CPLR can be traced to continued dissatisfaction with the pace of litigation in New York (which, as we shall see, came to a head in the 1950s) and, by implication, to the failure of earlier reforms to make the desired improvements.¹²

¹⁰ See Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97, 98 (1973) (argues that the reform of pleading in nineteenth century Massachusetts was effected first in judicial decisions which were only later enacted into statute).

¹¹ See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 393, 403 (2d ed. 1985).

¹² I do not suggest that New York is the only jurisdiction in which litigation delay has been a problem. Dean Vanderbilt collected examples of complaints about it from Biblical times, the Roman Empire, fifteenth century England, Shakespeare, and others. See A. VANDERBILT, *IMPROVING THE ADMINISTRATION OF JUSTICE—TWO DECADES OF DEVELOPMENT* 6-8 (1957). For a recent comparative treatment, see Chase, *Civil Litigation Delay in Italy and the United States*, 36 AM. J. COMP. L. 41, 46-48 (1988) (describing marked delay plaguing contemporary Italian courts).

For a variety of reasons no reform has solved completely the problem of litigation delay in New York. Statutory amendments are not always received with benevolence by the courts which must apply them. Judges who have been educated under, and spent a lifetime applying, one set of procedural rules are tempted to reintroduce them through interpretation of new laws. Such was said to be the fate of the pleading reform which was at the heart of the Field Code.¹³ Moreover, social and economic changes ultimately combine to outmode even salutary changes. I refer here partly to changes in fashion¹⁴ and partly to changes in underlying reality.¹⁵ Most important—and at the heart of my present thesis—is that the type of change in the rules of civil litigation which is politically possible simply cannot significantly affect litigation delay and is unlikely to improve it at all. The restraining politics are multilevel.¹⁶ There are the immediate politics of interest groups which oppose delay reduction whenever it hurts their particular interests. Liability insurers may be an example. More fundamental are the

¹³ See C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 83 (2d ed. 1947) (“[t]he cold, not to say inhuman, treatment which the infant Code received from the New York judges is a matter of history”) (quoting *McArthur v. Moffett*, 143 Wis. 564, 567, 128 N.W. 445, 446 (1910)).

¹⁴ An example of change in procedural fashion is the use of a single judge to control the trial calendar of the court and rule on all applications for adjournments. This approach, then called the “Cleveland plan,” was urged, and later adopted, as an important time saver. See REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE, LEG. DOC. NO. 50, at 28-37 (1934) [hereinafter ADMINISTRATION OF JUSTICE REPORT]. In 1986, it was scrapped, as part of a reform effort directed in part at delay, under which cases are assigned to a single judge for all purposes, including calendaring for trial. See [1988] 22 N.Y.C.R.R. §§ 202.3, 202.22.

¹⁵ See *infra* notes 67-76 and accompanying text (discussing rise in auto accident litigation).

¹⁶ Geoffrey Hazard has succinctly described his view of the difficulties of streamlining existing procedures:

Immediate resistance to such reforms of course emanates from the legal profession, for change radical enough to have much effect threatens the bar's intellectual capital, which is its specialized knowledge of present practice. There are also deeper difficulties entailed in radical procedural change. Streamlined procedures by definition involve more limited examination of individual cases and by necessity can yield different outcomes, as compared with preexisting procedures. Yet existing procedures by definition constitute legal fairness. Procedural change therefore raises issues of principle, often ones of constitutional significance. To this evil is added the fact that changes in procedure may reflect differences in outcome. Since present outcomes by definition legally conform to the requirements of distributive justice, procedural change necessarily entails the risk of distributive injustice.

Hazard, *Court Delay: Toward New Premises*, 5 Civ. Just. Q. 236, 241 (1986) (footnotes omitted).

restraints which are so deep as to be properly called "cultural" rather than political. As Jerold Auerbach has observed:

In every society there is a wide range of alternatives for coping with the conflict stirred by personal disputes. . . . The varieties of dispute settlement, and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves, and the quality of their relationships with others. . . . Ultimately the most basic values of society are revealed in its dispute-settlement procedures.¹⁷

Change which affects disputing processes in a way that implicates considerations of this order is unlikely, regardless of the degree of efficiency improvement promised.¹⁸ Here the civil jury is a good example. Undoubtedly litigation would be faster without it. Yet its elimination would be enormously difficult politically and would not, in my view, be worth the gain in any case because it is such an important social and political institution.

I do not contend that profound procedural reform has never occurred; nor that such reform has never achieved the goal of delay reduction. Cappelletti has described impressive nineteenth century Continental examples of reforms which substantially improved the pace of litigation in the countries adopting them.¹⁹ The fact is, however, that he speaks of a single major reform in each of several countries over a period of centuries. Moreover, the reforms of procedure he describes all seem to have taken place as a part of major social transformations in the relevant nations, as in France after the Revolution, or Austria after the decline of the Empire. Thus, these rare counter-examples in fact support my thesis that the reform of procedure is usually motivated by political movements arising from litigation delay and is paradoxically limited by the po-

¹⁷ J. AUERBACH, *JUSTICE WITHOUT LAW?* 3-4 (1983).

¹⁸ ADMINISTRATION OF JUSTICE REPORT, *supra* note 14, at 56. This report was a major study which took the problem of delay as one of its foci. In their conclusion, the Commission said:

Nor was it intended that we should devote these many months to vain speculations upon what our system of law might have been if its origin and unusually consistent development had been different. That course would have led us where others would have been unwilling to follow. Hence our proposals for reconstruction are confined strictly within the framework of our established system, in the belief that the structure itself is still sound

Id. The same sentiment was expressed by those who drafted the CPLR. See Weinstein, *supra* note 8, at 53.

¹⁹ Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 851-60 (1971).

litical culture in which it is attempted.

In assessing the limited success of procedural reform in New York, we must, lastly, keep in mind that while delay reduction provides the political will for procedural reform, it should never be the only goal. Expense reduction, improved fact finding, simplification, modernization, and distributional politics have all played their part. I do not discount the achievements that have been made in these respects, but will not try in this Article to evaluate them.

II. PRE-CPLR REFORM

A. *The Field Code and Its Successors*

Complaints about litigation delay in New York's courts can be traced back at least as far as 1839, when David Dudley Field wrote, "Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare."²⁰ Despite the adoption of the Field Code in 1848,²¹ the problem did not go away. Although statistics are not available, discontent is evident in the various proposals to amend or replace the Field Code which culminated in the Throop Code of 1876.²² This was of little avail, as far as reducing delay, and by 1902 the legislature found it appropriate to establish a Commission on Law's Delays (the "Commission").²³ The Commission, which reported in 1904, found that "the conditions which embarrass the courts and menace their usefulness and authority . . . are not temporary and of recent origin but chronic, and arise

²⁰ Letter from David Dudley Field to Gulian C. Verplanck, *The Reform of the Judicial System of this State* (1840), quoted in A. VANDERBILT, *supra* note 12, at 5 n.12. There is some indication that Field was primarily concerned with delay in the Court of Chancery. See Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 145 U. PA. L. REV. 909, 937-38 (1987).

According to a contemporary publication, *The Democratic Review*, in 1846 the Supreme Court in New York City was two and a half years delayed, and the average disposition time in the Court of Chancery was five years. See Nims, *supra* note 9, at 83.

²¹ Ch. 379, [1848] N.Y. Laws 497. The Field Code took effect on July 1, 1848 and acted as the code governing civil procedure in New York for almost 30 years. Coe & Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238, 242 (1942).

Lawrence Friedman states that the nineteenth century reform movement, which resulted in the Field Code and its followers in other states, was in part a response to the need of businesses for an efficient system of case processing. See L. FRIEDMAN, *supra* note 11, at 389, 396-97.

²² See Nims, *supra* note 9, at 84.

²³ Ch. 485, [1902] N.Y. Laws 1109 (amended and supplemented by Ch. 634, [1903] N.Y. Laws 1434); see DELAY IN THE COURT, *supra* note 5, at 19-20; Nims *supra* note 9, at 85.

from profound causes which the previous efforts of lawyers and legislators have failed to remove."²⁴ More specifically, the Commission reported that the trial term in the Supreme Court for New York County was about three years behind in its calendar.²⁵ None of its recommendations, however, were adopted.²⁶ It was not until 1920 that a new procedural code was enacted. This was the Civil Practice Act,²⁷ which, "[e]ven at the time of its enactment . . . was widely criticized as being little more than a recodification of the old Code of Civil Procedure."²⁸ The Civil Practice Act was "subjected to a generation of constant amendment,"²⁹ and the problems of civil litigation—especially the issue of delay—continued to be of concern.

B. Roosevelt and His Era

It has been forgotten that an enthusiast of procedural reform during the late twenties and early thirties was Franklin Delano Roosevelt. He is perhaps the only person of whom it can be said that his efforts were important in the history of both the adoption of the Federal Rules and the CPLR. The "double anniversary" we celebrate is an apt occasion for recalling his contributions.

Judicial administration was a theme of Roosevelt's gubernatorial election campaign. In his nomination acceptance speech, he said:

I would also speak very briefly of a subject that goes deep to the roots of effective government: the system by which justice is administered. I am confident that the procedure of both civil and criminal law has failed to keep pace with the advancement of business methods and with the needs of a practical age; that this procedure is too costly, too slow, too complex; and that the present methods are at least in part responsible for disregard of law and for many miscarriages of justice.³⁰

²⁴ REPORT OF THE COMMISSION ON LAW'S DELAYS, S. DOC. NO. 21, at 4 (1904).

²⁵ *Id.* at 9.

²⁶ Nims, *supra* note 9, at 85.

²⁷ Ch. 925, [1920] N.Y. Laws 19. The adoption of the Civil Practice Act was the culmination of studies by the New York Board of Statutory Consolidation, which produced reports on procedural reform in 1912 and 1915. See Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1056-61 (1982).

²⁸ REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, LEG. DOC. NO. 45, at 20 (1955).

²⁹ *Id.*

³⁰ The Candidate Accepts the Nomination for the Governorship (Oct. 16, 1928), *re-*

Roosevelt returned to this theme in a campaign address, this time calling for a commission to study the causes of litigation delay and emphasizing the need for lay involvement in the project.³¹ As Governor, Roosevelt worked for the creation of a commission to study litigation problems. He vetoed the first legislative response because the bill enacted would have created a body composed only of lawyers.³² His objection was not based on populism but on a mistrust of the bar's willingness to question its own assumptions and on a desire to see the commission reflect "business efficiency":

The function of such a commission should be to examine not merely the superficial defects of the present administration of justice but rather the very frame-work and foundations of the system, which is universally regarded as archaic, expensive and inefficient. With that end in view, the commission should be composed of a large percentage of business[men] and other laymen, whose interest would be centered on this broad survey.³³

The Legislature soon enacted, and the Governor signed, a bill more to his liking.³⁴ The Commission on the Administration of Justice in New York State (the "Justice Commission") was constituted in 1931, when its fourteen members were appointed.³⁵ In 1934, the Justice Commission produced a lengthy and detailed study with numerous recommendations.³⁶

In the meanwhile, Governor Roosevelt sought the support of the bar in his reform efforts. His address to the Association of the Bar of the City of New York, entitled *The Road to Judicial Reform*,³⁷ was an important document because in it Roosevelt set

printed in 1 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 13, 15 (1938) [hereinafter PUBLIC PAPERS].

³¹ Campaign Address (Oct. 30, 1928), reprinted in 1 PUBLIC PAPERS, *supra* note 30, at 64-65.

³² The Governor Vetoes a Bill Creating a Commission, Exclusively of Lawyers, to Study the Administration of Justice (Apr. 5, 1929), reprinted in 1 PUBLIC PAPERS, *supra* note 30, at 268.

³³ *Id.*

³⁴ See Ch. 186, [1931] N.Y. Laws 531. Roosevelt said, "I feel confident that [this law] will go a long way toward making justice in this State cheaper and speedier." The Governor Approves a Bill Creating a Commission of Layman and Lawyers to Study the Administration of Justice (Apr. 23, 1930), reprinted in 1 PUBLIC PAPERS, *supra* note 30, at 270.

³⁵ See ADMINISTRATION OF JUSTICE REPORT, *supra* note 14, at 5. Six were appointed by the legislature, two by the New York State Bar Association, and six by the Governor. *Id.*

³⁶ *Id.*

³⁷ The Road to Judicial Reform (Mar. 12, 1932), reprinted in 1 PUBLIC PAPERS, *supra* note 30, at 271.

forth in some detail his view of the problems of the justice system. His position, though he did not acknowledge it, was clearly influenced by Roscoe Pound's famous 1906 speech to the American Bar Association, *The Causes of Popular Dissatisfaction with the Administration of Justice*.³⁸ Roosevelt said:

It is unnecessary to take time in establishing the fact that the administration of justice is generally unpopular with the people of this country. Growing complaint with the law's injustices, delays and costs has to a great extent characterized every generation. The present one is no exception. . . . Speedy and efficient justice in a vast community like this is a public necessity, to be ranked with health, sanitation and police protection. . . . It may be taken for granted that much of [the problem] is due to the fact that the rules of the legal game are such that in the absence of very strong administrative control they will be used, not for a direct search for the truth, but to permit such legal maneuvers as will further the interests of those who do not want the truth to be found.³⁹

Reform in the administration of justice, Roosevelt said, "means an attack much more fundamental than the mere alteration of rules of procedure."⁴⁰ He offered two examples of potential

³⁸ 29 A.B.A. REP. 395 (1906). Pound grouped the causes of popular dissatisfaction into four categories: "(1) Causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration." *Id.* at 397. Of Pound's specific points, one (which he put under the second of his broad categories) was what he described as:

[O]ur American exaggerations of the common law contentious procedure. The sporting theory of justice . . . is so rooted in . . . America that most of us take it for a fundamental legal tenet. . . . Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. . . . The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point.

Id. at 404-05.

Under his third general heading he included the "waste of judicial power" involved in our system. *Id.* at 409. He said:

Judicial power may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials.

Id. at 412.

³⁹ *The Road to Judicial Reform*, *supra* note 37, at 271.

⁴⁰ *Id.* at 275.

improvements, only one of which could be considered "fundamental." He suggested adoption of the "master calendar" system,⁴¹ and the development of statewide statistics on the operation of the courts in order to better measure the pace of litigation.⁴² The latter suggestion was subsequently recommended by his Justice Commission,⁴³ and adopted by later administrations.⁴⁴ At the least, Roosevelt deserves credit for the attention and energy he brought to the drive for procedural modernity. His constant attention to issues of speed and efficiency underscore my general thesis of the importance of the pace of litigation in the history of New York court reform.

C. *The Federal Model*

The same desire for an efficient system of adjudication that motivated efforts in New York was, during the same period, fueling those who wanted to modernize federal practice.⁴⁵ The basic issue for the federal reformers was whether there should be a federal code of procedure or whether the federal courts should continue to apply the procedure of the state in which they sat.⁴⁶ After decades of struggle, the matter was favorably resolved when the Rules Ena-

⁴¹ *Id.* at 276; see also ADMINISTRATION OF JUSTICE REPORT, *supra* note 14, at 26-27 (recommended adoption of the "Cleveland" calendar procedure in every county in which more than one court was in session).

⁴² The Road to Judicial Reform, *supra* note 37, at 277-78.

The value of such information, systematically gathered and intelligently presented, is of extraordinary importance. It will give officials themselves a picture of the state of litigation in the courts which will permit us to know what work the courts are doing, how much of it there is, and how long it takes to dispose of cases.

Id. at 277.

⁴³ ADMINISTRATION OF JUSTICE REPORT, *supra* note 14, at 38-39. The Justice Commission recommended the formation of a Judicial Council modeled after the Federal Judicial Conference which had been established by Chief Justice Taft. The Judicial Council recommended was to be composed of judges, lawyers, legislators, and laymen. It was to be responsible for monitoring the court system, keeping and compiling statistics, and making recommendations for improvements. *Id.* at 34-36.

⁴⁴ From 1935 to 1955 statistical reports were produced by the Judicial Council, from 1956 to 1978 by the Judicial Conference, and since 1979 by the Chief Administrator of the Courts.

⁴⁵ See Burbank, *supra* note 27, at 1043-47. For a discussion of the influence of the New York reformers on the early development of a federal procedure code from the end of the nineteenth century until 1915, see *id.* at 1043-50. Much of the attention was focussed on the proper allocation of power between statute and rules of court. See *id.*

⁴⁶ See *id.* at 1035-97 (comprehensive assessment of significant events leading up to passage of Rules Enabling Act).

bling Act was enacted in 1934.⁴⁷ Success has been attributed to the appointment of a new Attorney General who was enthusiastic about adopting a federal code and to the personal support of President Roosevelt.⁴⁸ The Federal Rules of Civil Procedure were promulgated, of course, four years later.⁴⁹

I have not attempted to determine whether and how the paradox which is the subject of this Article is relevant to the Federal Rules and their history. The "codeless" situation in which the federal courts existed until 1938 was unusual and arguably required a remedy even apart from any delay affecting the courts. Perhaps the Rules Enabling Act is better explained as an example of the tendency of the times to concentrate authority in the federal government. Yet, that tendency itself often proceeded in the name of efficiency. It is not unlikely that Roosevelt's support for the federalization of civil procedure flowed from his earlier campaign to rationalize, and thus speed, the operation of the New York courts. Only further research will answer these questions.⁵⁰

The Federal Rules were influential in spurring procedural reform in the states, some of which adopted them almost immediately.⁵¹ By 1958, fourteen states had "fully" adopted the Federal Rules.⁵² Given the consensus that existed as early as 1934 that New York's Civil Practice Act needed wholesale revision,⁵³ and the response of other states to the readily available federal model, one may speculate why New York did not adopt its own comprehensive

⁴⁷ See Rules Enabling Act, ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)).

⁴⁸ See Burbank, *supra* note 27, at 1095-98.

⁴⁹ See C. WRIGHT, *LAW OF FEDERAL COURTS* § 64, at 404 (4th ed. 1983). For a brief history of the period between the adoption of the Rules Enabling Act and the Federal Rules themselves, see *id.* at 403-04.

⁵⁰ On the motivation for the federal reform, see Weinstein & Weiner, *Of Sailing Ships and Seeking Facts: Brief Reflections on Magistrates and the Federal Rules of Civil Procedure*, 62 ST. JOHN'S L. REV. 429 (1988). The authors argue that the reformers sought to improve the federal judiciary's ability to address social problems and provide justice, and that expeditious case handling was important to these fundamental goals. The complex roots of the Federal Rules are also described in detail in Burbank, *supra* note 27, at 1035, and in Subrin, *supra* note 20, at 943. The goals most often mentioned are uniformity, flexibility, and the elimination of technicality.

⁵¹ See Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 (1958) [hereinafter Clark, *Two Decades*]. See generally Clark, *Code Pleading and Practice Today*, in THE FIELD CENTENARY ESSAYS 55, 67-70 (1949) [hereinafter Clark, *Code Pleading*] (discussing adoption and influence of Federal Rules in states).

⁵² Clark, *Two Decades*, *supra* note 51, at 435 n.2.

⁵³ See ADMINISTRATION OF JUSTICE REPORT, *supra* note 14, at 41-47.

reform until twenty-five years later, as well as why New York's reform did not take the relatively simple solution of wholesale adoption of the Federal Rules.

D. New York Developments After the Federal Rules

By no means did New York reject the Federal Rules entirely. Charles Clark, the Reporter to the Supreme Court's Advisory Committee on Rules for Civil Procedure from 1935 to 1956 and a trenchant critic of civil procedure in New York,⁵⁴ found that by 1955 the state had amended its Civil Practice Act to incorporate the substance of the Federal Rules on party joinder, intervention, impleader, interpleader, and motions for directed verdict. In addition, he found that pretrial practice and discovery changes were also tending to follow the Federal Rules.⁵⁵ But these amendments represented only a small piece of the picture, as Judge Clark recognized when he urged "a really complete reform . . . [as] piecemeal reform is often worse than no reform at all."⁵⁶

Three years later, Judge Clark expressed "keen regret" about New York's failure to follow the federal pattern.⁵⁷ In addition to the obstacles he found applicable to all laggard jurisdictions (jealousy of the federal success and "the usual fear of older and settled members of the legal profession who see their skills being challenged"),⁵⁸ he offered several explanations for the New York resistance:

The sheer bulk of cases and of courts tends toward paralysis and inertia. The lack of clearly developed procedural objectives promotes such a diversity of ruling that support for practically any position, sound or unsound, can be found somewhere in the precedents. The historic and continuing rivalry between upstate New York and metropolitan New York City makes any co-operative advance seem but a dream; and now sharp discord between state and federal authorities has presented an added source of discord.⁵⁹

Other reasons also probably played a part. New York's power-

⁵⁴ See generally Clark, *A Modern Procedure for New York*, 30 N.Y.U. L. Rev. 1194 (1955) (suggesting procedural reform in New York should emulate federal model).

⁵⁵ *Id.* at 1201.

⁵⁶ *Id.*

⁵⁷ See Clark, *Two Decades*, *supra* note 51, at 448.

⁵⁸ *Id.* at 447.

⁵⁹ *Id.* at 448.

ful and prideful bar was not likely to simply seize someone else's model (the states that did were predominantly Rocky Mountain or Southwestern).⁶⁰ Nor was it obvious that what was good for the relatively small federal judiciary with its own mix of cases would also be appropriate for a very different bench and bar with a caseload of very different proportions. The New York Bar leaders had already invested enormous effort in their own study, the 1934 Report, and therefore had their own agenda for reform. Moreover, the state had sufficient resources and talent to perform an additional study to determine what rules would work best for it.⁶¹

New York's failure to adopt a new code until 1962 (whether or not modeled after the Federal Rules) may also be explained in part by the eruption of World War II, which naturally channelled energy elsewhere, and thus deflected whatever momentum for reform might have been generated by the Federal Rules' adoption.

Still, more than seven years passed from the release of the 1934 Report to Pearl Harbor. Enough time, surely, had there been the political desire to adopt a new code as well as the conviction that it would be desirable. But Roosevelt's election to the Presidency in 1932 meant that his energy was no longer behind state procedure reform.⁶² Also, and more to the point of my thesis, delay, which had peaked in the early thirties, had fallen off as the decade wore on.⁶³

III. THE COMING OF THE CPLR

A. *The Demand for Reform*

The goal of full reform of procedure in New York languished until 1953. In that year, Governor Dewey's annual message included a proposal to establish and fund a Temporary Commission

⁶⁰ See Clark, *Code Pleading*, *supra* note 51, at 67. Some states which had chosen to adopt the Federal Rules in substantial part later encountered difficulties in adapting them to their own practice. See Weinstein, *supra* note 8, at 57-59. The Advisory Committee which developed the CPLR was well aware of this phenomenon. See *id.* at 58-59.

⁶¹ See Weinstein, *supra* note 8, at 53-60 (describing process by which Advisory Committee decided whether to recommend federal rule or some other solution to procedural problems).

⁶² His efforts on the federal level contributed to the adoption of the Rules Enabling Act. See Burbank, *supra* note 27, at 1096.

⁶³ See FOURTEENTH ANN. REP. N.Y. JUD. COUNCIL 28 (1948) [hereinafter FOURTEENTH ANN. REP.]. "By 1941, as a result of a concentrated program of legislation, court rule and administration . . . the problem of delay which had loomed very large in 1934 appeared to have been substantially solved." *Id.*

on the Courts to evaluate the courts and their processes. The message stressed problems familiar to proceduralists, mentioning "[c]alendar delays, costly litigation, more costly appeals, procedural complexity and clumsy detailed practice statutes."⁶⁴ The Governor added, "We cannot be proud of this as a description of conditions in our State. In the neighboring state of New Jersey we have seen an enviable improvement in the administration of justice."⁶⁵ (New York second to New Jersey? What could better arouse lawyerly and political pride?) The Temporary Commission was subsequently authorized and funded by the state legislature.⁶⁶

By the early fifties an important new factor had been introduced, which accounts for the renewal of political attention. This was the relentless growth of litigation arising from auto accidents. The growth was caused by changing economics and technology after World War II: the boom in the car market, the end of gasoline rationing, and the widespread availability of insured defendants as a result of the adoption in New York of the Motor Vehicle Responsibility Act in 1941.⁶⁷ The number of new actions commenced in the Supreme Court, New York County, which had averaged about 4,200 between 1941 and 1945, rose to over 7,000 by 1946, to over 9,500 by 1948,⁶⁸ and exceeded 10,000 in the judicial year 1952-53.⁶⁹ Most of the increase consisted of negligence cases. In 1944-45, roughly 3,600 of these were added to the calendar of that court, but by 1946-47 there were over 6,000.⁷⁰

⁶⁴ See N.Y. Gov. Ann. Mess. (1953), reprinted in [1953] N.Y. Laws 2019, 2023.

⁶⁵ *Id.*

⁶⁶ See Ch. 591, [1953] N.Y. Laws 1382. The alleviation of delay and congestion was one of the goals assigned to the Commission. See *id.* § 2.

⁶⁷ See PRELIMINARY REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, LEG. DOC. No. 66, at 13 (1954) [hereinafter PRELIMINARY REPORT]; FOURTEENTH ANN. REP., *supra* note 63, at 29; Hecht, *Expediting Trial of Cases in New York County*, 287 ANNALS 134 (1953).

The Judicial Conference reported in 1956 that while the state's population had increased by 22.2% between 1942 and 1955, the number of motor vehicles registered had increased by 78.3%, and the number of motor vehicle accidents by 163.5%. This change was the major cause of the court congestion then current. See SECOND ANN. REP. N.Y. JUD. CONFERENCE 43 (1957).

⁶⁸ See Hecht, *supra* note 67, at 134.

⁶⁹ See TWENTIETH ANN. REP. N.Y. JUD. COUNCIL 94 (1954) (statistical table recording case volume in New York State). The judicial year ran from July 1, 1952 to June 30, 1953. *Id.*

⁷⁰ See FOURTEENTH ANN. REP., *supra* note 63, at 29. The trend in the other metropolitan counties was the same. *Id.* Statewide, the total number of new cases rose from 33,524 in 1944-45 to 52,897 in 1946-47. See TWELFTH ANN. REP. N.Y. JUD. COUNCIL 30 (1946); FOURTEENTH ANN. REP., *supra* note 63, at 36. Caseload records were recorded from July 1 of one year to June 30 of the next.

The courts were unable to keep pace with this flood of litigation. Delay had been virtually eliminated during the war years; however, "[w]ith the return of peacetime conditions . . . delay in tort jury cases in the Supreme Court in New York City ha[d] increased steadily."⁷¹ This made delay in the Supreme Court of New York a personal concern of the public at large, arguably for the first time.⁷² This delay was evidenced by at least seventy-five references to court congestion problems in *The New York Times* during the first ten months of 1956.⁷³ Thus, a necessary ingredient of the reform process—a politically viable demand for change—was in place. The connection is apparent in the Preliminary Report of the Temporary Commission appointed by Governor Dewey. It noted that in 1943 only four counties had delay on their jury calendars of more than six months (from filing of note of issue to trial) and that the maximum was nine months; by 1953, nineteen counties were experiencing six-month delay and the maximum was fifty-six months.⁷⁴ The delay was apparently confined to the tort jury calendar; even in New York County the commercial (and other) calendars were up to date.⁷⁵

The Temporary Commission attributed the tort calendar delay to the automobile related factors mentioned above. One witness before the Commission, a judge sitting in Queens County and President of the County Judges' Association of the State of New York, stated:

"The public won't stand for the delays. . . . They all ask you exactly the same question: 'Why does it take so long? And if we don't settle it, how long will it be before our case is tried?' When I tell them . . . it may be a couple of years or three or three and a half years, they can't understand why."⁷⁶

⁷¹ See FOURTEENTH ANN. REP., *supra* note 63, at 28.

⁷² Prior reforms owed more to the demands of commercial classes than to the public at large. See L. FRIEDMAN, *supra* note 11, at 389, 396-97.

⁷³ See DELAY IN THE COURT, *supra* note 5, at 297. An accompanying bibliography lists dozens of articles about court delay published in professional and popular publications during the early fifties. See *id.* at 298-303; see also Hecht, *supra* note 67, at 134-40 (discussing factors responsible for delay in New York Courts and possible solutions).

⁷⁴ See PRELIMINARY REPORT, *supra* note 67, at 13.

⁷⁵ *Id.* "Up to date," under New York's statistical system does not mean that the litigants did not experience delay resulting from discovery, motion practice, or lawyer neglect, it only means that the courts were prepared to entertain any case ready for trial. *Id.*

⁷⁶ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BAD HOUSEKEEPING, THE ADMINISTRATION OF THE NEW YORK COURTS 16-17 (1954) (quoting Statement of William B. Groat, president of the County Judges' Association of the State of New York, *Hearing Before the*

The Temporary Commission produced several studies and recommended several measures for improving the administration of justice. In its 1956 report, the Commission recommended a revision of the procedural code, which it said, "is one of the fundamental conditions for the elimination of the causes for popular and professional dissatisfaction with the workings of our judicial system—expense, delay and the determination of cases on points of procedural technicality rather than on their substantive merits."⁷⁷ The Commission found that "an over-all study and revision is required if New York State is to have a satisfactory system of civil procedure."⁷⁸ To promote the revision the Temporary Commission appointed an Advisory Committee on Practice and Procedure. The Advisory Committee, which was composed of ten attorneys from throughout the State, retained a paid staff, the chief of which, as Reporter, was Jack B. Weinstein, then a professor at the Columbia Law School.⁷⁹

Between 1955 and 1961 the Advisory Committee produced four preliminary reports and a final report, plus numerous studies and draft provisions.⁸⁰ It was quite rightly said that their study of civil practice was "one of the most complete ever made."⁸¹ Yet the end results show the constraints within which procedural reform can take place.

B. *The Legislative Reaction*

Bills based on the preliminary reports were introduced in the legislature in 1960. They were widely circulated among the bar and were the subject of public hearings held throughout the state in 1960.⁸² Professor Weinstein, speaking of the 1960 draft while it was still under consideration, described the changes and improvements it would make, but added:

These new provisions are, nevertheless, essentially conserva-

Temporary Commission on the Courts (June 22, 1954).

⁷⁷ See REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, LEG. DOC. No. 18, at 38 (1956).

⁷⁸ *Id.*

⁷⁹ Jack B. Weinstein is now a judge of the Federal District Court for the Eastern District of New York.

⁸⁰ For a description of the work of the Advisory Committee on Practice and Procedure, see SIXTH REPORT, *supra* note 7, at 3334-40.

⁸¹ See *id.* at 3337.

⁸² See *id.* at 3334-35.

tive. They preserve our present legal institutions without appreciable change. One of our alumni . . . told me that he was disappointed because we had not tried to develop a model procedure, but we had taken account of the realities of New York practice and the realities of some New York political problems and the realities of our present New York institutions. . . .

You can not draft a workable set of practice rules without taking account of going institutions. In drafting we had to keep in mind the kind of facilities that are available and the kind and training of people who will administer them.⁸³

Nonetheless, the 1960 proposals were apparently too radical and were not enacted.⁸⁴ A new draft was proposed for the 1961 legislative session. The Senate Finance Committee listed forty-four changes in the new draft from the 1960 version.⁸⁵ A number of the changes could be expected to diminish the proposed code's potential impact on delay. For example, the final version provided that the summons could be served without the complaint, while the 1960 proposal would have required them to be served together.⁸⁶ Also, proposed pleading simplification was compromised in part, the twelve person jury was retained (as opposed to the proposed reduction to six), the right to appeal from intermediate orders was restored, a court order was required as a condition of obtaining interrogatories in negligence cases if a deposition had also been used, the power of the judge to conduct the *voir dire* was eliminated, the mandatory pretrial hearing was dropped, and a proposed "tender" device, which would have imposed costs on a plaintiff who declined a settlement offer under certain circumstances, was restricted so that it would not apply in negligence cases.⁸⁷

Enactment of reform failed again in 1961, necessitating further modifications.⁸⁸ One proposal, then eliminated, would have provided for payment of attorneys' fees for frivolous motions.⁸⁹ Further, all amendments to existing discovery practice were elimi-

⁸³ Weinstein, *supra* note 8, at 53 (footnote omitted).

⁸⁴ See SIXTH REPORT, *supra* note 7, at 3335.

⁸⁵ See *id.* at 3335-37.

⁸⁶ See *id.* at 3336; *cf.* Weinstein, *supra* note 8, at 72-73 (discussing reasons for and against requiring summons and complaint to be served together).

⁸⁷ See SIXTH REPORT, *supra* note 7, at 3336. For a discussion of some of these issues and an explanation of why they were adopted, see Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431 (1962).

⁸⁸ See SIXTH REPORT, *supra* note 7, at 3337.

⁸⁹ See SIXTH REPORT, *supra* note 7, at 3337; Weinstein, *supra* note 87, at 1438-39.

nated, the bill of particulars was restored, and intermediate appeal availability was again expanded, as was the right of appeal to the New York Court of Appeals.⁹⁰

Legislative control over the rule making process was a pervasive issue. The Advisory Committee had proposed that matters of "basic policy" would be enacted as statutes, subject to future change only by the legislature, and that procedural detail should be regulated by "rules" which could be controlled in the future by the Judicial Conference.⁹¹ Under a compromise, which reflected legislative hostility to the original proposal, the Judicial Conference was given the power to amend or adopt rules (so long as not inconsistent with statute), subject to legislative veto.⁹²

C. *The CPLR Enacted*

The CPLR was finally approved in 1962.⁹³ In his message of approval, Governor Rockefeller said that the legislation "holds the promise of helping to establish New York's judicial system once again as an example of modern and efficient administration of justice."⁹⁴

Although it is beyond the scope of this Article to evaluate the CPLR, it is important to note that despite its limitations, its achievements were real. Not the least of these were that by eliminating a good deal of unnecessary detail ("enough words to fill a substantial novel—though it would certainly be a dull one," stated Professor Weinstein)⁹⁵ and by imposing some rationality on the order in which the rules were organized, it made the litigation system more accessible to the practitioner and reduced the emphasis on "nicety." More substantial reforms, as listed in Governor Rockefeller's approval message, included: a modern long-arm statute which expanded the state's in personam jurisdiction; a modernization of the statutes of limitation; the establishment of a uniform procedure for "special proceedings"; a relaxation of the requirement of particularity in pleading a cause of action; and the substitution of

⁹⁰ See SIXTH REPORT, *supra* note 7, at 3337-38.

⁹¹ *Id.* at 3338.

⁹² *Id.* at 3338-39. The Judicial Conference, however, was later abolished. Presently, the legislature has the sole authority to amend rules and laws in the CPLR. See D. SIEGEL, *supra* note 2, § 2, at 1 (Supp. 1987).

⁹³ Ch. 308-318, [1962] N.Y. Laws 593 (McKinney).

⁹⁴ See Governor's Memorandum, *supra* note 6, at 3621.

⁹⁵ See Weinstein, *supra* note 8, at 51.

a single motion for summary judgment before answer for the many motions previously available.⁹⁶

Still, of the package actually enacted, Professor Weinstein later said, "Viewed in the perspective of four revolutionary decades, New York's recently adopted [CPLR] may be characterized as a conservative—in some respects reactionary—restatement of the practice as it had been developing."⁹⁷ He argued that the CPLR was conservative in two respects. First, it failed to incorporate some of the important technical procedural advances which had been achieved in other codes, such as, by failing to liberalize pretrial discovery practice.⁹⁸ Second, and more basically, it broke no new ground; it took no bold or imaginative steps. In this vein, he noted how little had been done in adopting summary procedures which would short circuit the normal litigation path.⁹⁹

It would be hard to argue that the changes brought by the CPLR could or would significantly improve the pace of litigation. Most of the Advisory Committee's recommendations that might have been helpful were not approved by the legislature. Others that could be imagined were not proposed, in recognition of their likely fate.

D. Delay in the Aftermath

Available statistics indicate that the CPLR did not, in fact, expedite litigation or reduce delay. Table A indicates that while the number of civil dispositions by the Supreme Court increased in the years following the adoption of the CPLR, this was more likely due to the addition of thirty-five new judges in 1962-63. The rate of disposition per judge actually dropped in that year and continued to drop for most of the following ten years. The reasons for this are obscure. It may be that unfamiliarity with the new code on the part of the bar and the judiciary accounts for the drop in dis-

⁹⁶ See Governor's Memorandum, *supra* note 6, at 3621. For a discussion of other positive elements resulting from the enactment of the CPLR, see Weinstein, *supra* note 87. A substantial reorganization and rationalization of the court system was also adopted in 1962. See Chs. 684-705, [1962] N.Y. Laws 2191 (McKinney); see also Governor's Memorandum on Approval of chs. 684-705, N.Y. Laws (1962), reprinted in [1962] N.Y. Laws 3649 (McKinney) (praising and discussing elements of court reorganization). This reform, like the CPLR, could be traced to the Temporary Commission on the Courts. See PRELIMINARY REPORT, *supra* note 67, at 11, 27.

⁹⁷ Weinstein, *supra* note 87, at 1431.

⁹⁸ *Id.* at 1437-39.

⁹⁹ *Id.* at 1433-34.

position rates in the five years after enactment and that the improvement after 1969 is evidence that a learning period was necessary. On the whole, however, the statistics do not suggest that the CPLR improved the efficiency of the courts.¹⁰⁰

TABLE A¹⁰¹

New York State Supreme Court Caseload and Disposition Rates: 1955-1977

Year	New Cases (Notes of Issue Filed)	Dispositions	Pending Cases	Number of Supreme Court Trial Justices Authorized	Civil Dispositions per Judge
1955-56	56,057	54,794	48,344	106	536
1956-57	55,774	51,985	52,014	106	490
1957-58	50,635	57,615	36,566	106	544
1958-59	59,097	49,005	46,970	115	426
1959-60	61,138	50,728	57,362	121	419
1960-61	58,633	52,510	63,483	129	407
1961-62	59,156	52,832	69,760	137	386
1962-63	56,477	64,309	61,837	172	374
1963-64	58,363	63,391	56,758	172	369
1964-65	58,142	57,732	57,068	172	336
1965-66	58,261	53,572	61,442	171	313
1966-67	59,854	53,684	67,579	171	314
1967-68	62,683	58,406	71,855	171	342
1968-69	69,783	69,706	71,685	225	310
1969-70	75,809	77,988	69,151	225	347
1970-71	86,026	85,426	68,428	227	376

¹⁰⁰ The right hand column of Table A purports to measure the efficiency of the court system by reporting the disposition rate per authorized judge. This should be viewed with caution for several reasons. First, this table does not reflect the impact of the criminal docket of the Supreme Court. These figures are not published; criminal dispositions are reported as a composite of the county courts and the Supreme Court. This problem is compounded by the fact that in 1962 the legislature abolished the Court of General Sessions of the City of New York and the County Court for the City of New York and transferred their criminal and civil jurisdictions, and their personnel to the Supreme Court. [1962] N.Y. Laws 692 (McKinney). Second, the rate of disposition may have been affected by other procedural or court management techniques introduced apart from the CPLR. Third, the number of authorized judges does not usually equal the number of judges actually available. Some positions may not be filled in some years. On the other hand, "para" Supreme Court Justices are sometimes employed, such as Civil Court judges temporarily assigned to the Supreme Court. Unfortunately, these statistics are not published. Nonetheless, the disposition rate, if accepted as only a rough guide, is useful in spotting trends.

Insofar as Table A reports incoming, pending, and disposed of cases, it reflects only those which were placed on the calendar. Since only cases certified as ready for trial are placed on the calendar, there are actions started, pending, and disposed of which are never reported. It is unclear whether this is a significant number.

¹⁰¹ ANNUAL REPORTS OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK [hereinafter ANNUAL REPORTS].

1971-72	94,425	98,326	64,846	232	424
1972-73	95,762	101,620	58,232	232	438
1973-74	104,414	107,180	55,442	257	417
1975	115,514	111,193	62,363	257	433
1976	111,018	109,049	62,899	257	424
1977	112,992	109,769	66,398	257	427

Table B shows the delay in two traditionally backlogged counties, New York and Nassau. Since a case cannot be on the calendar until it is ready to be tried,¹⁰² all time that expires after that can be considered delay. Indeed, considerable delay might already have elapsed before the case was put on the calendar. Table B indicates some improvement in Nassau County in the years after the CPLR was adopted, but also shows a worsening of the situation in New York County.

TABLE B¹⁰³*Average Months on Calendar at Time of Disposition: 1957-1972*

Year	New York County		Nassau County	
	All Cases	Tort Jury	All Cases	Tort Jury
1957-58	9.0	15	20.0	44
1958-59	7.0	21	24.0	56
1959-60	8.0	18	14.7	61
1960-61	10.1	20	15.1	65
1961-62	11.5	18	23.7	56
1962-63	10.8	18	29.3	44
1963-64	10.0	12	24.8	36
1964-65	9.3	15	21.0	28
1965-66	11.2	19	18.5	28
1966-67	12.7	27	18.7	28
1967-68	14.1	34	16.7	32
1968-69	14.5	39	16.8	31
1969-70	14.9	44	15.7	29
1970-71	14.1	44	14.1	25
1971-72	15.1	28	9.3	21

CONCLUSION

The CPLR and its history provides a paradox of procedural reform. The political will that led to this reform of civil procedure in New York came largely from popular and professional concern

¹⁰² See [1988] 22 N.Y.C.R.R. § 202.21 (Uniform Rules for Supreme Court and County Courts). Under the certificate of readiness rule adopted in 1956, a case cannot be put on the calendar until it is certified as ready for trial. *Id.* For historical background and analysis of the certificate of readiness rule, see DELAY IN THE COURT, *supra* note 5, at 155-67.

¹⁰³ ANNUAL REPORTS, *supra* note 101.

with civil litigation delay. Nonetheless, the reform actually adopted was unlikely to, and in fact did not, have any salutary effect on the pace of litigation. This pattern has probably been repeated not only in New York but in other jurisdictions. Court delay is perhaps the only issue likely to bring civil procedure to popular attention and thus to the attention of political leaders. But reform of procedure within culturally and politically acceptable limits cannot have a substantial effect on the problem. This is not to suggest that nothing can be done to improve litigation pace apart from adding judges or closing the courthouse door to certain kinds of cases. On the contrary, some literature supports the claim that court administration techniques used by effective managers can do so. Nor do I suggest that the health of a court system can be measured predominantly by the rate of its output. Quality of result and fairness of procedures are much more important. Nonetheless, the paradox of reform illustrated by the CPLR deserves further attention from students of procedure. Is it possible to substantially improve the pace of litigation in a society through procedural reforms which do not violate the essential norms of its dispute resolution system? If so, under what conditions may the political will to do so be mobilized? The history of the CPLR suggests that delay crises can mobilize political will, but not necessarily enough to provoke fundamental change.