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## ARTICLES

### REASONS FOR CASE REVERSAL IN TEXAS: A PREFACE

JACK POPE\*

Equal justice under the law is the noble and unique promise that this nation made to the world. In my judgment, we are doing an acceptable job of keeping that promise. We are delivering more justice to more people than has been achieved at any other time or place in history. But for the most part, the public and our own profession make negative and unstudied evaluations about the quality of justice and the public's access to the courts. Recently, parts of the justice system have been subjected to empirical research, and the system received better scores than expected.

The School of Law of the University of Wisconsin published a report in March 1983,<sup>1</sup> following a thorough empirical study of our justice system. I found the lengthy two-volume report bearing the title, *Civil Litigation Research Project*, as tedious and dull as it is

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1. D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT (Mar. 1983) (University of Wisconsin Law School).

complete and scholarly. The researchers' study of the supporting data led to their surprisingly positive conclusions that our justice system is far better than what the unfavorable reports to which we have become accustomed have led us to believe.

Professor Marc Galanter, using a similar innovative research method, published his study in October 1983, under the title that carries his message: *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*.<sup>2</sup> His conclusions, like those of the earlier Wisconsin study, show that we have been basing our evaluations of the justice system on popular myths, folklore, and legends. We are not, according to these studies, more litigious than we used to be,<sup>3</sup> nor are we more prone to engage in lawsuits than are the English, Australians, and people of other common law countries.<sup>4</sup> The evidence shows that in almost all cases studied, both the plaintiff and defendant regarded the court experience as financially successful.<sup>5</sup> Only twelve percent of the cases that are filed involve more than \$50,000,<sup>6</sup> and half of the cases that reach the trial stage require no discovery or pre-trial proceedings.<sup>7</sup> Ninety-eight percent of all cases filed and disposed of are handled by state courts rather than federal courts.<sup>8</sup> These are samplings of many things we have not known, because we have not done the research to unearth the truth.

The National Center for State Courts published its report, *The Business of State Trial Courts*, during 1983.<sup>9</sup> Chapter three is entitled "Myths About Court Business." Careful scholarship and true data uproot our most cherished preconceptions about our legal machinery. There is, for example, the public myth that criminal cases make up the bulk of court business.<sup>10</sup> The fact is that only fourteen percent of the cases (not counting traffic and parking) in all trial

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2. 31 UCLA L. REV. 4 (1983).

3. *See id.* at 38.

4. *See id.* at 55.

5. *See* D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT 15, 53-78 (Mar. 1983) (University of Wisconsin Law School).

6. *See id.* at 22.

7. *See id.* at 23.

8. *See* V. FLANGO, R. ROPER & M. ELSNER, THE BUSINESS OF STATE TRIAL COURTS 5 (1983) (National Center for State Courts).

9. *See id.* at 5.

10. *See id.* at 24-28.

courts are criminal cases.<sup>11</sup> In Texas, only ten percent are criminal cases, and only seven percent of all filings are felony cases.<sup>12</sup> There is the other popular myth that tort cases are flooding the courts.<sup>13</sup> Only ten percent of our civil filings concern personal injury.<sup>14</sup> The National Center discovered that only four percent of our civil trials are tried before a jury.<sup>15</sup> In Texas, only two percent of our civil trials are jury trials.<sup>16</sup>

All of us delight in discussing, and the media loves to report, the rare megacase that is so big it does not fit any system, or the horror story of the case that went awry. As these recent scientific studies demonstrate, we unjustly make the greatest justice system in the world into our national devil. We do it by what Professor Galanter calls a "lack of scholarly development," a "pattern of repetition and cross-citation," and "the reappearance of the same atrocity stories."<sup>17</sup> Our false views about the judicial machinery, he concludes, reflect "the weakness of contemporary scholarship."<sup>18</sup>

The fact that three scholarly studies produced in 1983 reach similar positive conclusions about our American system of justice raises serious questions about our touted legal investigative methods. Perhaps the method employed in the new scholarship is as significant as the lessons the studies produced. Why are we not asking penetrating questions and pursuing research about the system itself? Good information about the administration of justice in our courts would reveal the precise points at which delay and waste occur in the system. How long must a case be on the docket to be a part of a backlog? What is a backlog? What is the impact of legislation upon filings? How many courts does it take to handle deceptive trade practice cases, a class of cases that did not exist prior to 1977? How many new rights, remedies, and actions did the 68th Texas Legislature create by its enactment of 7020 pages of new laws? Why is it

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11. *See id.* at 24-28.

12. *See* 55 TEX. JUD. COUNCIL ANN. REP. 89-91 (1984).

13. *See* V. FLANGO, R. ROPER & M. ELSNER, *THE BUSINESS OF STATE TRIAL COURTS* 30-35 (1983) (National Center for State Courts).

14. *See id.* at 31-32.

15. *See id.* at 53.

16. *See* 55 TEX. JUD. COUNCIL ANN. REP. 89-91 (1984).

17. *See* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 64 (1983).

18. *See id.* at 5.

that the law is the only significant discipline that is open-ended as to performance date? How long should it take to complete a misdemeanor, felony, juvenile, divorce, collection, personal injury, or nuclear power case? Why do we not have realistic time standards for the disposition of cases in trial and appellate courts? Why is it that courts in Kansas, New Jersey, Arizona, Ohio, North Dakota, and in many other states are able to clear their dockets every year?<sup>19</sup> What are they doing that is different from what we do or fail to do in Texas? What does it cost Bexar, Dallas, or Harris County every year to retry criminal cases that are reversed? Why are cases reversed?

The legal establishment is mired in an intellectual bog. We minutely dissect recent appellate opinions in notes, comments, and articles. Assignments for research and writing are rather easy so long as courts regularly produce "noteworthy" cases. We are sawing sawdust. The plethora of writing about the law hides the vacuum of learned attention devoted to the judicial machinery, judicial administration, and the system. It is the system that must succeed. Sound administration must accompany good laws in the delivery of high quality justice.

We thank the editors of *St. Mary's Law Journal* for recognizing these things and for embracing this broader approach to the improvement of the law and the system itself. It may be that everyone already has an answer to the question, "Why Are Cases Reversed on Appeal?" Easy answers, like so much of what we know and don't know (and think we know), are usually a part of the folklore about our legal culture and are probably wrong. Susan Gellis has done this empirical study of one corner of our legal system. She has found some correct answers. We can perceive some patterns from her charts that we did not realize before she did her work. We hope that this effort will portend a greater and broader academic research interest in the strengths and weaknesses of the justice system generally, and of the Texas system in particular.

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19. See Lipscher, *Court Rules Have Limits: How New Jersey's Speedy Trial Program is Meeting with Success*, 23 JUDGES' J. 37, 37 (1984); Schwartz & Broomfield, *Delay: How Kansas and Phoenix are Making it Disappear*, 23 JUDGES' J. 22, 22-25 (1984).