BOOK REVIEW

Money and Justice: Who Owns the Courts?, LOIS G. FORER, W.W. Norton and Co., New York, New York, 1983, pp. 244.

In *Money and Justice: Who Owns the Courts?*, Judge Lois Forer makes several perceptive and timely observations on the current state of the law. "The price of justice and who shall pay it are leitmotifs of this book."[1] She offers insight gained from her varied career as a litigator, adjunct law professor, and most recently, as a Pennsylvania trial court judge in both criminal and civil matters. As a judge on the "front lines" of the justice system, Judge Forer offers several challenges to the legal profession and to contemporary society. This is not yet another scathing indictment of law and lawyers. Instead, it is a rare and refreshing exception to the wholesale, nihilistic criticisms that are currently in vogue. While the questions of unequal justice is a timeworn theme, she examines it from some novel angles. Despite the grave imbalance in the quality of justice attributable to socioeconomic class, Judge Forer remains convinced that the United States legal system provides more justice than that of any other nation. The task is to translate the fundamental guarantees of equal protection and due process from platitudes into realities, regardless of individual economic means. She avoids the pedantic, turgid style of conventional legal scholarship and instead writes in a crisp, straightforward style. Her analyses are enlivened through several vivid case studies.

Judge Forer maintains that the courts are dominated by the interests of the wealthy, while the poor and middle classes are relegated to a second class, perverted "turnstile" justice. This is the central thesis and the core problem posed in the book. According to Judge Forer, "despite lip service to the doctrine of equal protection of the laws, the courts have in effect put a price tag on justice."[2] Although the current bifurcated situation is not the product of conscious malevolent design, it is imperative that the problem be consciously rectified.

The United States has always been a consumer society, and that mentality has permeated the legal system. The pernicious but wholly predictable result has yielded justice based on ability to pay. For example, last year over one hundred thousand persons were confined simply because they were unable to make bail. Justice has never been free, and attorney fees are usually the single largest com-

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[1] L. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? 54 (1984).
[2] *Id.* at 110.

ponent of the legal cost equation. The essential objective is to mitigate the economic considerations so often determinative of the quality of justice that is available. Rule of law depends on equal protection for all persons regardless of the individual's ability to pay. Faith in law has been betrayed by ability to buy justice, and the ideal of law has thus been reduced to a hollow platitude. Leading corporate law firms devote the vast bulk of their time to a tiny percentage of the population, serving major corporations and a handful of very wealthy individuals in complex civil law matters. Apart from some pro bono activity, criminal law practice is virtually unknown to these elite firms. The indigent, the working poor, and even the middle classes are consigned to burdened public defenders and sole practitioners usually unable to concentrate attention or resources on behalf of any single client. As a result, meaningful due process is not afforded to those consigned to assembly line justice.

Examples of the disparate legal treatment accorded the less influential abound. Most poor criminal defendants never have a trial. Unable to afford expensive private legal talent and pressured by beleaguered public defenders, they plead guilty en masse. Unable to fund the often prohibitive costs of effective preparation in civil litigation, those less wealthy often settle claims prematurely or entirely forego valid actions. Corporate antitrust litigation can span nearly two decades, involve hundreds of attorneys, and cost the taxpayers millions. Meanwhile, thousands of cases could have been heard. John Hinckley, after a seven week trial replete with testimony from batteries of expensive expert witnesses, was found not guilty by reason of insanity for his assassination attempt on President Reagan. On the other hand, average trial time in civil and criminal matters is less than two hours; the average family court judge hears thirty-five juvenile cases per day.

The solution is not to deprive corporations and wealthy individuals of their due process rights. Rather, the mandate is to afford at least minimal justice for the great bulk of those litigants not economically well-positioned. All litigants are not entitled to months of trial at taxpayers' expense, and not every criminal defendant deserves the services of an F. Lee Bailey. One suggested improvement may be to require wealthy litigants to pay for the public resources utilized by their protracted litigation, thereby freeing the indigent of seemingly nominal, but nonetheless often prohibitive, filing fees. While justice cannot be measured via a time clock, it certainly must no longer be rationed out primarily by ability to pay. Adequate due process protections transcend time constraints.

In a fallible legal system, there can be no failsafe guarantees of justice in every case. However, as Judge Forer reminds us, "[w]hat can be ensured is that every party with a claim or defense receives an adequate due-process hearing in a court of law."[3] While the lack of a fair hearing can compromise a civil litigant, it can condemn a criminal defendant to death. Bifurcated justice cannot be simplistically attributed to the purported explosion in the volume of cases filed and appeals brought in the state and Federal courts. While an increase in the number of cases was recorded throughout the past decade, recent projections strongly suggest that the volume of civil cases is beginning to level off. The number of new filings will decline significantly for the foreseeable future. Concomitantly, demographics and FBI reports indicate that crime is also declining. Thus, the largely uncritical and indiscriminate rush to alternative despute resolution (ADR) is unwarranted. Refinement of conventional litigation processes, rather than their abandonment in search of a quick fix, is the optimal means of furthering justice.

Perhaps the most valuable portion of the book is Judge Forer's forceful contention that ADR may often be counterproductive to justice. Judge Forer thus joins a few other cautionary voices in opposition to the otherwise near universal call for ADR, echoed most prominently by Chief Justice Burger. Indiscriminate utilization of ADR may insidiously consign the lower economic classes to short circuited due process, while preserving formal litigation channels, with the full panoply of due process protections, for the wealthy. Claims only recently brought with any measurable effectiveness on behalf of the historically disadvantaged can be fully asserted only in litigation. Relegating to ADR matters of race and sex discrimination, personal injury and disability claims, and juvenile and prisoner rights may cripple the rights of those economically less privileged. Values of formal litigation are manifold; their attendant costs are the price required for furnishing meaningful due process and protection of the law.

The purpose of Judge Forer's commentary, however, is not to condemn ADR. Rather, she urges that the potential disadvantages of ADR be carefully examined prior to its sweeping implementation. She states that "in the interests of speed and economy, [the ADR advocates] would sacrifice procedural regularity and due process of law. A few warning voices have been raised. But catchpenny panaceas have taken the public fancy."[4] As Judge Forer perceptively

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[3] *Id.* at 29.

[4] *Id.* at 191.

summarizes, "dispute-resolution mechanisms are simply a means of resolving private disputes outside the protections and safeguards of the legal system . . . . [T]he cost of courts is what Americans pay for a free and lawful society."[5] Channeling disputes en masse into ADR modes will not eliminate the disputes themselves. Because only a small fraction of cases ever proceed to trial, it is clear that ADR already occurs, informally but effectively, in the vast majority of cases. Widespread use of ADR in lieu of litigation may be overkill, and the primary sacrifice would be the rights of the poor. As Judge Forer maintains,

> the thrust of the popular panaceas is to deny access to the courts for a wide variety of problems. Under the proposals the bulk of the cases that would be diverted from the courts involve poor people . . . . [I]n operation they would institutionalize two separate and unequal systems of justice: courts of law with rights and constitutional safeguards for the rich and speedy extralegal forms for the poor.[6]

ADR has its place in the legal system, but ultimately cannot be substituted for the courts.

While criticizing fellow judges and lawyers, Judge Forer refrains from the indiscriminate excoriation of the profession so egregiously popularized by Chief Justice Burger. Rather than indulge in the same sort of tiresome and perverse professional self-hate, Judge Forer provides several positive recommendations for improving the quality of the bench and the bar.

Unfortunately, she occasionally does not adequately explain or reconcile some of the tensions in her recommendations. While she chides law students for avoiding courses in legal history and jurisprudence, which are at the very heart of the legal tradition, she also faults the law schools for failing to teach adequate trial skills. Implementation of both recommendations would either result in a six-year curriculum or deprive students of electives. If her suggestion of a bar exam prerequisite consisting of preparation for and participation in trials is added, the study of law would span nearly a decade. Judge Forer accuses law school faculties of homogeneity and artificial distance from practitioners. Typically, after graduating from prestigious law schools and completing Federal clerkships, many young lawyers are recruited directly into the ranks of law faculties without any practice and perhaps even without having taken a bar exam. This is an obvious problem. However, senior partners in prominent law firms are not queing to apply for law faculty

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[5] *Id.* at 43.

[6] *Id.* at 195.

positions paying less than one-tenth of what they earn in practice. Because competent, established practitioners rarely want to make the compensation sacrifice to teach, law schools choose to respond to affirmative action concerns by quickly hiring their best minority and female graduates soon after graduation. In this respect, the present system has definite virtues. Judge Forer fails to suggest how law schools can realistically attract established practitioners and also satisfy affirmative action considerations from a small pool of senior minority and female attorneys.

Judge Forer's law school curriculum and faculty reforms, however, are the only attenuated recommendations in the book. She also suggests that legal research is not sufficiently empirical, and she advances some proposals to integrate more economics, and social and behavioral sciences into computer-based legal studies. She perceptively predicts that narrow doctrinal research will become increasingly inane and dysfunctional unless and until academics acquire facility with empirical methods of contemporary scientific research modes.

Despite the many blatant case examples of professional incompetence and corruption examined in the book, she maintains that most lawyers and judges are conscientious and concerned. If her suggestions are to be implemented, these members of the bar will be the audience to act upon her recommendations. Without the effective support of the bar, it is impossible to see legislatures unilaterally allocating desparately needed resources to improve the quality of justice now so infrequently afforded to the less privileged classes.

Last year, Judge Forer notes, the cost of maintaining the entire Federal judiciary was less than one-tenth the cost of building 1,000 small missiles. This pointedly highlights the nature of the problem. Judges, especially those presiding in the state courts, labor in often appalling conditions, lacking even minimal support staff, and buried under impossible case loads. This lack of resources for judicial administration partially accounts for the warped assembly line justice accorded to the nonelite. Judge Forer deplores the often conscious and widespread judicial abdication of core responsibility to law clerks, which occurs at every level of the judiciary. Likewise, she assails the processes of judicial appointment often contingent on political connections and cronyism rather than on intellecutal merit and ability. Some of her recommendations for reform are exaggerated. She advocates a minimum requirement of fifteen years of active litigation experience for any judicial appointment. However, under this criterion, William O. Douglas and Felix Frankfurter would have been kept from the bench.

For the most part, Judge Forer avoids falling into a mechanical

litany and instead offers more useful general benchmarks to foster judicial competence. She castigates the ominous recent developments in some Federal courts of appeals not to publish opinions. Two-thirds of the decisions of the prestigious Second Circuit are not published. Over half of all state and Federal appellate decisions are not reported for publication. If this practice is not halted, the value of precedent will be utterly compromised. The ultimate result of this atomized, ad hoc justice will be a legal Tower of Babel. Responsible appellate decisions historically have clarified and shaped the evolution of law. To abandon this rich history in favor of the seduction of simplistic expedition is a grave mistake. Instead, she forcefully argues that the appellate process should be strengthened and refined.

Particular attention is focused on family courts, reflecting Judge Forer's own experience as a judge in juvenile and domestic matters. It is here that the lack of resources and the press of cases is most severe. Consequently, juveniles are the most victimized by routine deprivations of due process in the form of fair hearings. The average juvenile hearing is concluded in a matter of minutes. Incarceration for years despite the absence of any proof of crime is an all too common occurrence. Yet, since juveniles and prisoners are politically powerless, lacking the resources of organized lobbies to crusade for reform, it is not surprising that these travesties of justice continue. Again, Judge Forer posits that they are largely reducible to economic considerations. Although perhaps no court has more important responsibilities than the juvenile courts, the best attorneys and judges usually do not practice there. There is very little money to be earned in the representation of children from poor families. Further, the historic social subordination of children largely deprives even altruistic lawyers of the prestige and gratification of performing indispensable work.

The goal is to provide justice to all, with the costs of the legal system borne equitably. Rather than reduce the rights accorded to the wealthy, the objective is to translate the promise and ideal of justice into reality for all of society. Individual litigants are entitled to sufficient court time to obtain a fair hearing; assembly line processing must stop. Legal education must be continually revised to ensure professional competence of both bench and bar. The appellate process must also be strengthened to afford protections and to elucidate the law. Courts should have the benefit of more empirical legal research. There are no solutions that will easily and definitively provide equal justice regardless of economic position. Realistically, the problems of unequal justice are likely to plague society and the legal profession for the foreseeable future. Indeed, some of Judge Forer's suggestions, while thoughtfully

presented, seem to defy realistic implementation. Fortunately, on balance, she provides more than a simplistic litany that reiterates shopworn themes. Her unique perspective as practitioner, professor, and judge provides positive and refreshing new insights on the old problems of affording equal justice. She has fulfilled the timeless role of Socratic gadfly on the legal conscience. The book merits the serious attention of the entire legal profession. One hopes that some of the recommendations inspire positive action.

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