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John M. Cooley

*Private Practice, Evanston, IL.*

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# ATTENTION CONSUMERS OF JUSTICE: IT'S TIME TO GET CREATIVE ABOUT COURT SYSTEM DESIGN

John W. Cooley\*

*Editor's Note: The following article is the first installment of a two-part article on creativity and court system design. The first installment describes students' creative ideas generated in a course on dispute resolution taught by the author in the Fall of 1990. The second installment, scheduled for the next issue of the Reporter, will describe the court system innovations proposed by the author after teaching a similar course in the Spring of 1992 in which the students were provided as resource materials, among others, the 1991 Report of the President's Council on Competitiveness, and the 1992 American Bar Association Blueprint for Improving the Civil Justice System.*

[T]he Court of Chancery; which ... so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give — who does not often give — the warning, "Suffer any wrong that can be done you, rather than come here!"<sup>1</sup>

## I. Introduction

If one did not recognize the opening quote as Charles Dickens' description in BLEAK HOUSE of the Chancery Court in mid-nineteenth century London, one could easily mistake it as a present day description of a court system in any one of several major cities in the United States.<sup>2</sup> Change in court systems is as slow as the movement of honey in a tilted jar. As Dickens implied in his preface to BLEAK HOUSE, the public tends to accept, with fatalistic resignation, that which it perceives is beyond its power to change.

Aside from fatalism, another factor inhibiting change in court systems is that, over the centuries, justice has meant different things to different people. Consider, for example, the following multiple choice question: which of the following descriptions of justice systems are fictitious? (Read items (a) through (g) before reading the related footnotes):

(a) A jury panel consists of 6000 citizens, from whom a 500 citizen jury is selected, which decides the case by majority vote.<sup>3</sup>

(b) If a gap is perceived in the law, a judge may create whatever new rule that would have been enacted if the judge were the legislature.<sup>4</sup>

(c) There are no witnesses and no trial. A case proceeds to decision after the gradual accumulation of papers in successive waves.<sup>5</sup>

(d) Every opinion of the trial court is a draft which comes into legal force only after a higher court approves it. In this system all cases are appealed.<sup>6</sup>

(e) Appellate court judges read nothing before oral argument. Counsel read aloud the lower court decision and record to the appellate court panel for hours, sometimes, days.<sup>7</sup>

(f) All of the above are fictitious.

(g) None of the above is fictitious.

If you picked answer "g", you are correct. And, as strange as it may seem, these are only a few of a multitude of unusual aspects of systems which human beings have designed over the centuries to mete out justice.<sup>8</sup>

With the advent of increased use of Alternative Dispute Resolution ("ADR") over the last few years, and with over two hundred years of experience with the American judicial system, it is time to reexamine and reevaluate how our state and federal systems can be changed — redesigned to improve their effectiveness and to advance the cause of equal justice under the law. To initiate this design process, we, as consumers of justice, must discard fatalistic thinking and free ourselves to explore new notions of justice. We need to suspend judgment about our current judicial

systems and engage in creative thinking techniques. Quite simply, we need to ask the questions a child would ask about things we think we know best.

The purpose of this Article is to generate myriad judicial system design ideas (without regard necessarily to their practicality) in the hope that one or more of the ideas will trigger creative design solutions, or matters for experiment, in the minds of readers.

## II. Background: An Experiment In Creative Thinking

In the Fall of 1990, the author taught a seminar for seventeen Northwestern University seniors entitled "Dispute Resolution, New Roles, New Vistas." The seminar, as the author designed it, addressed the subject of Alternative Dispute Resolution and consisted of a blend of lectures, videos, live demonstrations and inter-active small group exercises. There were three sessions on negotiation, two on mediation, one on arbitration, one on hybrid processes, and two on court adjudication. The students, several of whom were in the process of applying to law schools, were introduced to different thinking techniques<sup>9</sup> and were familiarized with an inter-disciplinary approach to problem solving.

The centerpiece of the course was a written, graded exercise in creative problem solving—the design of the optimal court system. Each student was required to submit a term paper that described the design of a hypothetical court sys-

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\*John W. Cooley is a former United States magistrate in Chicago. He is presently in private practice in Evanston, Illinois; an Adjunct Professor of Law at Loyola University Chicago School of Law; a member of the Dispute Resolution Colloquium, Dispute Resolution Research Center, Northwestern University's Kellogg Graduate School of Management; and he serves as an arbitrator, mediator, and consultant in dispute system design.

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tem, incorporating ADR processes where appropriate. As a starting point for innovative restructuring, students could use either the federal court system, a state court system of their choice, or no present court system at all. Students were given completely unfettered freedom to be creative and revolutionary in their designs. They were not constrained by limitations contained in state or federal constitutions, but they had to justify the fairness of their court system designs. Each student was free to contact court administrators, judges, lawyers, ADR professionals, and others, to obtain information useful to the development of their respective designs (and several did). The results were remarkable and some of the students' design suggestions are reproduced under pertinent topical headings below.<sup>10</sup> The students created multiple-tier, ADR-integrated court system designs, with some highly unusual and thought provoking aspects.

### III. Creative Design Suggestions

#### A. Trial Court Innovations

##### 1. Screening of Cases

More than half of the students addressed, in some detail, the need they perceived for screening cases to determine the appropriate treatment (optimal case-processing method). One student envisioned a "Civil Value Board" that was composed of court system professionals and knowledgeable experts who would evaluate civil cases upon filing and place them into three tiers—less than \$50,000, between \$50,000 and \$500,000, and more than \$500,000. The resolution process used for a particular case depended on which tier the Civil Value Board placed the case.

Another student established a "Court of Assessment" which performed a function similar to that of the Civil Value Board and also took into account in the screening process power imbalances and the precedent value of disputes. In that system, cases involving huge power discrepancies between the parties would be assigned to traditional

courts where the stronger party would be less capable of taking advantage of the procedural informality of ADR. Traditional courts also would be used in cases where financial resources prevented a party from properly advocating its claim or defense. To prevent an indigent party from being exploited, a court-appointed lawyer would be assigned to present and argue the case. In this system, the only other cases that would be channeled out of the ADR forum and into traditional courts would be unusual cases that had precedent-setting potential in relation to the development of common law.

##### 2. Suggestions for Improving the Search For Truth

Several students made suggestions to enhance the truth-determining function of the court. These suggestions included proposals to eradicate the practice of "buying" the testimony of expert witnesses and to permit juries to impose monetary penalties against parties and witnesses who testify falsely. One student created a new functionary for the criminal court which she called an "orator" and whose role she described as follows:

The most prominent feature of the full, orated court in safeguarding against perpetuation of social inequality is the "orator." The orator is a court employee, much like the court recorder, who serves a functional and not substantive purpose within a trial. Orators are vocationally trained in methods of verbal presentation, concise writing techniques, logical argumentation, legal terminology, and editing and reading on sight. They are committed by contract to present an impartial, non-theatrical presentation of facts and lines of reasoning outlined by the parties. The orator has a full caseload each day, rotating between different cases within the courthouse. A different orator is used per each section of a case in order to provide 1) minimal opportunity for the orator to identify with one party in a case and 2) variety

for the jury and judges in the proceedings— both to revitalize a waning attention span and to allow diverse visual representation so that viewers do not identify a "type" with either side of the case. In this system, in order to maintain orator impartiality, the orators would never meet the witnesses or parties involved. Prior to trial, lawyers would provide the orators with a written outline for each section of the case.... Lawyers would not communicate directly with the orators at any point. All meetings or examinations between lawyers and the other side's witnesses would occur outside the courtroom and in the presence of an officer of the court; and time limits would be strictly enforced.

Another student suggested simultaneous subjective and objective trials before separate juries which would meet jointly afterwards to decide the case. In this design:

[t]wo parallel trials ... take place for each case, with five jurors present at the first trial, and four jurors present at the other trial. ... In ... [the] first trial, theatrics, impressions, and subjectivity can [be] used on jurors. One party may not be as attractive, or one lawyer may not be as authoritative and therefore many appear less credible.

In the other trial scene, objectivity is the goal. Manipulation by lawyers is minimized. The four jurors will not see the plaintiff, the defendant, or any other person assisting on their behalf, [including] the lawyers. Instead, a third party orator will present as objectively as possible the sides of both parties, worded in a manner consented to by both lawyers. ...

After the closing arguments, the jury from the subjective trial and the jury from the objective trial will confer and deliberate together. Their ruling will be binding.

### 3. Financial Disincentives and Equalizing Costs

Nearly half of the students included significant financial disincentives in their court system designs to discourage the abuse of their newly created court system and to encourage the use of ADR. Similarly, approximately half of the students saw a need to equalize the costs and fees normally associated with dispute resolution.

One student proposed that a Legal Aid Finances System ("LAFS") be established which would analyze the resources of the parties and identify financial aid sources — foundations, governmental agencies, individuals — to financially equalize the disputants. If the recipient of money obtained a positive award, the loser would be required to reimburse the organization that donated the funds. If the aid recipient lost, he or she would be expected to return a portion of the funds. A limited amount of loan money also would be available, though only at the request of the party. Loans generally would be discouraged because the courts and the government would want to help parties resolve their own disputes, not help them finance litigation. Increased freedom in funding arguably would allow the lower socio-economic classes to obtain more effective settlements because the quality and competitiveness of representation would be raised. The purpose of LAFS and other economic equalizers would be to improve the settlement experience for the user.

### 4. Training

Approximately half of the students expressed a need for the training of functionaries in their court system designs. Some students suggested apprenticeships for mediators and arbitrators, required seminars on ADR for parties when they file lawsuits in court, and required courses in ADR in public schools and law schools. One student suggested that training related to dispute resolution begin at the kindergarten level:

My idea is ... , simply, to infuse young, formative minds ... [with] the impor-

tance of successful negotiation techniques and manners of solving disputes on their own. ... [W]hat I have in mind would begin at the kindergarten level. Two children are given a block of wood fitted together from disparate and oddly shaped pieces. The children are then asked to divide the block between themselves and come to some agreement over the necessary unequal division. Courses with this idea could easily be implemented all across our mass education system. These values could then be reinforced at a later age, in high school specifically, with required courses in basic negotiation and mediation. The emphasis would not be so much on tricky techniques and the like, but instead, on instilling the ability of successful resolution of one's disputes as a positive value of society. Once a foothold was gained in creating this societal value, it would continually reinforce itself.

### B. Appellate Court Innovations

Noting the massive increase in the number of appeals in our present court system and the exorbitant cost to the trial court victor of being dragged through the appellate process at the behest of the trial court loser, one student proposed an appellate system that required an appellant who loses on appeal to pay all of the other side's appeal expenses, including attorney fees. That student's system also required each side to hire a new lawyer on appeal (using the former lawyers as consultants) ostensibly to provide a fresh look at the appeal-worthiness of the situation and to allow for the exploration of new and creative avenues for settlement.

Another student's appellate court design included a mandatory pre-briefing settlement conference procedure, placed greater emphasis on oral rather than on written arguments, and required oral decisions from the bench. The student suggested that the parties be required to meet for a settlement

conference before writing their briefs. The settlement conference would encourage disputants to resolve their differences without the use of the adversarial process and to avoid the cost and time required for an appeal. If the settlement conference were unsuccessful, then the process of writing appellate briefs would begin. This appellate court system would seek to improve efficiency by reducing the time allotted for brief writing and placing a greater emphasis on oral argument in appeals. Appellate judges would render an immediate oral decision after each argument, and would write their opinions afterwards, instead of handing down their decisions with the written opinions as they do presently.

### C. Miscellaneous Suggestions

#### 1. Subpoena to Settle

In an effort to promote the use of ADR, one student created a "subpoena to settle" as part of the new court system. This document would be sent by the complainant directly to the opposing party. It could be submitted to the opposing party without the oversight of the civil courts and would require the parties in question to meet and attempt to mediate their problem. If it also were filed with the court, the court would have jurisdiction over the case. In both situations, the defendant(s) would be required to agree to submit to mediation. If mediation were unsuccessful, the parties could choose to proceed with arbitration, a summary jury trial, or other forms of negotiated settlement.

#### 2. Governmentalizing Legal Services

In one student design, all of the personnel involved in assisting in the resolution of disputes, including the lawyers, would be public servants. The student acknowledged that removing the present field of law from the free market and placing it in such a regulated system would not be easy and "would be fought tooth and nail by lawyers in a free market system." The student further noted, however, that this new system would not entail a transition, since it would

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be constructed "from the ground up." The arbitrators, mediators, and lawyers in this system would be licensed by a government department set up for that purpose, and they would be paid by the municipality in whose courts they would operate. The arbitrators and mediators would be "free lance" to the extent that they would not be restricted to working for specific municipalities.

### 3. Incentives to Lawyers for Early Settlements

Another proposal suggested that each municipality be required to establish a system of incentives to encourage lawyers to speed up the process of resolving disputes (subject to approval of the "national department"). Such incentives might include bonuses for resolving disputes ahead of a determined schedule, or a pay scale that would reward lawyers with higher pay the shorter the trial lasts. Separate scales could be constructed for different categories of disputes. This student believed that it was important that each municipality play a part in determining its incentives system, because municipalities would seemingly be more inspired to make the system work if they felt it was of their own creation.

### 4. Making Court Settlements Public

Another student expressed a belief that making ADR a regular, integral part of the court system eventually would require deprivatizing the results of resolutions. As that student reasoned, knowing full well that any ADR-resolved dispute would end in full public disclosure, parties would have a greater incentive to negotiate more effectively and to settle disputes outside the courts. This would, in turn, save court resources and possibly time and expense for the parties.

### 5. Court Use of ADR Counselors

Another student design established the position of "ADR Counselor." In that student's court system, the ADR Counselor would be

an employee of the court, and, like an Assistant District Attorney, would be responsible for overseeing several cases. The Counselors would work either in conjunction with the attorneys of both parties or, as a counselor for those lawyers with a limited knowledge of ADR.

The purpose of the ADR Counselor would be to promote the efficient and knowledgeable use of ADR. The Counselor would be responsible for moving the proceedings along and for relieving the dispute processing concerns of both parties. The Counselor would also be available for consultation with the arbitrator or mediator in deciding whether a traditional trial might be necessary.

### 6. Computerized Decisionmaking

An essential element of one student design was a computer system. The amount of damages in a case would be estimated (by social economists or other qualified personnel) by utilizing the many variables in the "justice equation" and plugging them into a computer program. These variables would include the seriousness of the harmful conduct, probabilities of occurrence (of the action being charged), degree of fault of each party, total physical and emotional damage, etc. These considerations would be given a value and a final quantity would be reached. This ultimate calculation would not be binding, but rather a tool upon which the arbitrator and the parties involved could try to base an agreement.

The computer could also be used in a settlement precedential way to print out a mini-history of previous cases that are very similar in allegations, circumstances, or in any other way applicable to the case at hand. Summed up at the end of the report could be the number of cases favoring either side with different ranges of awards. The compilation of cases could provide an advisory or suggestive tool to facilitate an eventual agreement in similar cases.

### 7. Computerized Case Treatment Tailoring

One student proposed that laboratory experiments be conducted in which "the same dispute ... [is]

dealt with in a variety of dispute resolution processes, and ... a variety of disputes ... [are] dealt with using the same dispute resolution process." The results of these various lab experiments could then be used to design a computer program that could fairly accurately determine the optimal method of case processing for various types of disputes.

## IV. Conclusion

Centuries ago, Socrates — that fellow who was subjected to a jury trial before 500 of his "peers" — taught that if you can convince yourself that you know nothing, you will be at the threshold of wisdom.<sup>11</sup> One interpretation of that principle is that although experience is a good teacher, it can also produce blinding assumptions that obscure creative, effective solutions. Sometimes the most creative solutions emerge from those who have no experience in a given field. That statement is as applicable to the field of science and technology as it is to the field of law and court system design. We have much to learn from our yet uninitiated students. Just listen:

...It appears that those who are in the greatest position to force change— judges, lawyers, the bar association, and the legislature— have not yet felt a strong enough need, perhaps because they are the ones still served the best by the [present] system. I would think that my ideas in this paper are far too radical as a whole, but viewed in part, they perhaps give an inkling of the best direction of change. That, at least, is more than most public officials have been willing to do.<sup>12</sup>

And another student wrote:

...Experiments in the past decade have shown ADR does offer an effective alternative to adjudication in some cases. Whether it could be implemented wide-scale in the federal court system as I have proposed to do is a question social scientists will have to grapple with in the upcoming decade. The future of ADR lies in the resolution

of that question. It will either remain in the periphery of our justice system or take on added importance and a more central role in resolving disputes. Time holds the answer....

**ENDNOTES**

- 1 CHARLES DICKENS, BLEAK HOUSE 2 (Oxford Press 1987)(1853).
- 2 Just the titles of contemporary news articles tell the story of the current court system crisis: Marcia Coyle & Fred Strasser, *Rehnquist Warns on State of Court System*, NAT'L L.J., Jan. 13, 1992, at 5; James Barron, *With Cogs Laid Off, Wheels of Justice Jam Even More*, N.Y. TIMES, Oct. 3, 1991 at B1; Sheldon H. Elsen, *U.S. Courts Are at Risk*, NAT'L L.J., July 22, 1991, at 13; Ted Gast and Scott Minerbrook, *Little Hope for Justice*, U.S. NEWS & WORLD REP., Apr. 9, 1990, at 24; Fred Strasser, *Massachusetts State Courts at "Crisis Point"*, NAT'L L.J., Apr. 8, 1991, at 14; *Budget Woes Delay Justice: Trial Lawyers Sue Vermont High Court Over Civil-Trial Moratorium*, 76 A.B.A. J. 16 (May 1990); Randall Samborn, *Steady Rise in State Court Backlog, Says Study*, NAT'L L.J., May 28, 1990, at 14.
- 3 This system was in effect in Athens, Greece at the time of the trial of Socrates in 399 B.C. See E. WARMINGTON AND P. ROUSE, GREAT DIALOGUES OF PLATO 423 (W.H.D. Rouse, trans. 1984); See also I. F. STONE, THE TRIAL OF SOCRATES 181 (1989).
- 4 This form of judicial flexibility was allowed under the Swiss Civil Code of 1912. See MARTIN M. SHAPIRO, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS 145-46 (1981); See also HENRY W. EHRMAN, COMPARATIVE LEGAL CULTURES 111-12 (1976).
- 5 This is the trial-level procedure for decisionmaking used in classical Rome. SHAPIRO, *supra* note 4, at 38.
- 6 This system was used in Tokagawa Japan. SHAPIRO, *supra* note 4, at 51.
- 7 This was the British tradition, in use as late as the 1960's. See RICHARD M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 88 (1967).
- 8 For example, in certain African criminal procedure, the consent of a father or brother of a defendant accused of murder must be obtained to impose or carry out the death penalty. See TASLIM OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 224 (1956). District magistrates in imperial China were legally permitted to use torture to extract testimony and confessions of parties in both civil and criminal cases. This practice is no doubt responsible in part for the citizenry's overwhelming resort to mediation rather than to the court system to resolve differences even into modern times. See SHAPIRO, *supra* note 4, at 179-83. In France, as late as the 1960's, when a decision of one regional appellate court was appealed to the highest court, that highest court could remand to a different regional appellate court which could elect to follow the judgment of either the highest court or the first regional appellate court. See SHAPIRO, *supra* note 4, at 142. The Italian legal system officially denies the existence of *stare decisis*. Judges look for legal maxims suitable to the facts before them, regardless of the facts of the case which is the source of the maxims. Specific fact situations are frequently edited out of published case reports. See SHAPIRO, *supra* note 4, at 142.
- 9 See E. DE BONO, LATERAL THINKING: CREATIVITY STEP BY STEP (1990).
- 10 The quoted and paraphrased excerpts from the students' papers are published here with the written permission of the students concerned.
- 11 RICHARD ROBINSON, PLATO'S EARLIER DIALECTIC 13 (1953).
- 12 This student was evidently unaware of the work of the Federal Courts Study Committee, the President's Council on Competitiveness, and the American Bar Association's Blueprint for Improving the Civil Justice System, whose recommendations for judicial system improvements were issued in 1990, 1991, and 1992 respectively.

## Marketers Tie Their Products To Political Causes

Even if the candidates won't address the issues, corporations are beginning to discuss hot political issues as they tie their products to causes. For example, Ben & Jerry's Homemade, Inc. makes PEACE POPS and RAINFOREST CRUNCH ice creams from which a percentage of profits goes to benefit pacifism and rain forest preservation respectively.

The practice of tying a consumer good to a cause is called point-of-purchase politics, and it is gaining in popularity as companies like Ben & Jerry's are enjoying record sales and profits. Point-of-purchase politics may distinguish a product in the minds of the 20 million Americans who indicate in surveys that they consider themselves socially conscious.

Traditionally, marketers have shied away from activism, fearing that they would drive away consumers who either disagreed with their position or resented their preaching. Now, however, many companies are finding that their message has special appeal for their market.

For example, Esprit de Corp, a clothing manufacturer, runs ads featuring young people, their principal market, discussing gun control and AIDS. Kenneth D. Cole, the president of Cole Productions, has actively supported AIDS research, and he notes that "[p]eople feel good supporting people who believe the same things they do."

Stuart Elliot, *When Products are Tied to Causes*, N.Y. Times, April 18, 1992, at 17, 22.