



Foreword by former Supreme Court Justice
Sandra Day O'Connor

Rebuilding Justice

Civil Courts in Jeopardy and
Why You Should Care

Rebecca Love Kourlis
and Dirk Olin

Institute for the Advancement of the
American Legal System

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Praise for *Rebuilding Justice*

“Civil justice in America has serious problems, as Rebecca Love Kourlis and Dirk Olin vividly describe in *Rebuilding Justice*. This important book exposes unseemly judicial elections, the use of discovery as a weapon for extortion, and other distortions of justice. Kourlis and Olin also provide practical solutions that are certain to be influential in the inevitable battle to realign civil justice with the needs of a free society.”

—Philip K. Howard, Wall Street lawyer and best-selling author of *The Death of Common Sense* and *The Collapse of the Common Good*

“This book couldn’t have come at a more opportune moment. The American civil justice system is broken—jury service is in decline, the role of the judge has become bitterly politicized, the length and expense of civil litigation has made it prohibitive, and courts could not be less user-friendly if they tried. *Rebuilding Justice* offers a clear-eyed diagnosis of the breakdown of civil courts and jury trials and a lofty reminder of why our Constitution is alone in protecting access to them. This is a clarion call to repair the national treasure that is our civil courts system and a bracing lesson in what’s at stake if we don’t.”

—Dahlia Lithwick, senior editor at *Slate*, contributing editor at *Newsweek*, and former guest columnist for the *New York Times*

“Court reform is the crucial third leg of judicial reform to go along with judicial election and recusal reform. As someone who has personal experience in a protracted and ongoing legal battle, it has become apparent to me that real judicial reform cannot be attained without all three. Whether you have been in court or not; whether you are a business person or a private citizen, the issues presented in this book should be of front-burner importance to you.”

—Hugh Caperton, West Virginia businessman,
plaintiff in *Caperton v. Massey Energy*

“This thought-provoking book should be required reading for all Americans. Our justice system is admired around the world, but, sadly, the state courts across this country are slowly failing. Change and resources are desperately needed. Unless we act and act soon, meaningful, timely, and affordable access to justice—the bedrock promise of the American constitutional experience—will cease to be real. We have no time to waste.”

—John T. Broderick Jr., former chief justice of the
New Hampshire Supreme Court and current dean
of the University of New Hampshire School of Law

“This is an important book. It describes a crisis in our civil justice system that is not just brewing, but already fully brewed. And while others have written about many of these problems before, no one has drawn them together in so readable a form or sounded this clear and urgent a clarion call. Not everyone will agree with all the proposed solutions, but all are worth close consideration, and taken together they provide much food for thought—and action.”

—Larry D. Kramer, dean, Stanford Law School

Rebuilding
Justice

Foreword

Our country's courts are in danger. Our democratic society depends upon the existence of a qualified and independent third branch of government. A healthy, fully functioning judiciary provides the counterbalance to the political branches that is necessary to assure protection of our constitutional rights. But support for judicial independence has faltered, in large part because our education system is failing to impart an understanding of the role and importance of the courts. We must rebuild public support for maintaining and protecting the courts.

This book is an effort to contribute to that project. I applaud its contribution to the general level of knowledge about the courts—for lawyers and nonlawyers alike. And I commend its observations about developing judicial selection systems that take cash out of the judicial selection process and that provide objective judicial evaluation tools to assure accountability.

We are blessed with many excellent judges and court staff around the country, in both the federal and state systems. But they and all the rest of us have an obligation to work hard to improve the system so that it is both impartial and accountable and so that it provides just and efficient resolution of cases. It is a duty that falls to all citizens, not just to judges and

lawyers. This book should be of interest to individuals committed specifically to the health of the courts and, more broadly, to the health of our democratic system.

—former Supreme Court Justice
Sandra Day O'Connor

Preface

We gratefully acknowledge the invaluable assistance of Natalie Knowlton, research analyst with the Institute for the Advancement of the American Legal System (IAALS). Natalie helped us to synthesize our two voices into one; provided research and the benefit of her own work and knowledge on these various subjects; organized and checked our work; and generally made the train run on time. We thank you, Natalie. We offer our thanks as well to Jordan Singer, assistant professor of law at the New England School of Law, and Betsy Morris, former writer and editor with *Fortune* magazine and the *Wall Street Journal*. Jordy was involved in the early fashioning of this book and Betsy in the refashioning and reorganizing.

We further acknowledge those attorneys, judges, court administrators, and other participants in the system who lent their insights and voices to this effort.

Finally, we would like to thank the individuals, committees, and organizations with whom IAALS works. Without your input, support, constructive criticism, and creative optimism, this book—and the broader efforts to which IAALS is dedicated—would not be possible. Thank you.

Table of Contents

<i>Foreword</i>	<i>xi</i>
<i>Preface</i>	<i>xiii</i>
Introduction	1
1. Civics and the Courts: A Crisis Hidden in Plain View	17
2. Gambling on Judges.....	33
3. The Importance of Trials.....	61
4. Funding Justice and Fostering Innovation.....	79
5. Discovery: The Deluge	91
6. The Conestoga Wagon on the Information Highway.....	109
7. Changing the Process: It Is Time	129
8. Divorce Court	145
9. Insiders Speak	167
10. Building Citizen-Centered Courts	187
 <i>Primer: Courts and Lawsuits 101</i>	 195
<i>Endnotes</i>	207
<i>Glossary</i>	226
<i>Index</i>	233

Introduction

This book is an effort to sound the clarion call about the crisis in the courts in twenty-first-century America. Its purpose is to illuminate why courts are critical and how they are being eroded, defaced, and undermined—and to present some solutions, both internal and external. *Rebuilding Justice* is a joint product of two authors: one a former trial judge and state court justice who has seen the system from the inside for thirty years, and the other a legal affairs journalist who has made a career of following and commenting on the system from the outside. We hope that, between the two of us, we provide a balanced perspective.

Our stories differ, so we will begin them separately.

The Judge

After a few years in California, earning undergraduate and law degrees from Stanford University, I came back to Colorado and started practicing law. Over the following ten years, I practiced in a medium-size firm, a large national firm, and a Main Street law practice in a small agricultural town in Colorado. After that diverse experience, I became a state trial court judge in a small rural district in northwestern Colorado. I handled death penalty murder cases (my first being

two weeks after I took the bench, having never practiced criminal law), divorces, complex commercial disputes, water cases, juvenile and probate cases. It was a diverse docket in every sense of the word. I rode circuit among three counties, over one very mountainous pass.

My first day as a judge, the docket was set in what is referred to as a “cattle call” mode. In short, everything was set for two times: 9:00 AM or 1:00 PM. The courtroom was packed. Prisoners from the jail were seated in the jury box, with sheriff’s deputies on either side. Attorneys and their clients milled in the hallway and crowded the benches. It fell to me to call out the cases in some numerical or other order. The long and short of it was that everyone sat and waited while other cases were being heard. The only person in the courtroom who benefited from the docket method was the judge. Everyone else waited, spent money on attorneys, and wasted their time. That system was a court-centric model—not a user-centric model.

After seven years on that trial court, I spent one year as a mediator and arbitrator and then eleven years as a justice on the Colorado Supreme Court. Over that almost twenty-year period, I saw countless examples of a system that is judge- and lawyer-centric, and not citizen-centric. I found myself spending more and more time advocating for the redesign of the system and the reshaping of expectations—everything from allowing jurors to take notes and ask questions of witnesses (written out, then passed to and posed by the judge) to not keeping jurors waiting in a back room while the judge and attorneys handle other matters; from streamlining the way grievances against attorneys are addressed to sorting out the best way to

handle divorces for the benefit of kids and families. The citizens rely on the system, and they are the ones who should be at the center of it. It is my mission in life to work toward that goal.

It is also the reason I left the court to found and serve as the executive director of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver (<http://legalinstitute.du.edu>). The mission of IAALS is to identify problems within the legal system, research, propose solutions, support implementation of those solutions, and then measure their success. In short, we try to fix things that are amiss in the legal system in order to make it more responsive, transparent, efficient, and impartial. This book is the outgrowth and overview of that work.

I am not riding circuit as a trial judge anymore, but my experiences in that position shape everything I see and believe. I know how important it is for everyone who walks out of a courtroom to believe that they have been treated fairly.

My husband is a sheep and cattle rancher, and I often look to him as my lodestar. He has two maxims that apply here. First, if a system or a portion of a system does not make sense, something is wrong and needs to be fixed. Second, the measure of how much people care about something is how hard they are willing to work to make it better. There are parts of the legal system that just don't make sense, and I care about the system enough to work very hard at trying to change those parts.

The Journalist

I attended Dartmouth College on a debate scholarship, with every intention of going to law school. But my

passion for writing combined with a growing interest in politics to send me in a different direction—albeit one that eventually led back to the justice system. After graduating from Northwestern University's Medill School of Journalism, I covered Congress for the *New Republic* and the *St. Petersburg Times*. I met senators and presidents, dodged a bullet while writing stories about the Nicaraguan Civil War, and delved extensively into debates over Social Security and immigration. Occasionally, I also covered oral arguments before the US Supreme Court. That, along with research I conducted for a biography of William Brennan (written by Stephen Wermiel and published in 2010) increasingly led me into legal affairs.

In 1989, my wife and I moved from DC to San Francisco, where I took the helm of the *San Francisco Daily Journal*, a legal affairs newspaper, and eventually its sister glossy magazine, *California Lawyer*. Soon after our arrival came the Loma Prieta earthquake, and the newspaper's staff geared up in anticipation of a deluge of personal injury litigation. But it was the dog that barely barked. Relatively few suits were filed. During the ensuing decade, I developed a much more nuanced view of the civil justice system's failings and challenges.

Slip-and-fall lawsuits were not what were choking the docket, I concluded, but business-on-business litigation that was just veiled commercial strategy. Simultaneously, I became increasingly dismayed by the rise in private judging (via high-priced mediation and arbitration) and a growing politicization of the judiciary, with moneyed interests pouring dollars into a system that had once enjoyed a fairly broad expectation of nonpartisanship.

Toward the end of the '90s, I took a sabbatical,

studying immigration law as a fellow at the University of California–Berkeley’s Institute of Governmental Studies. We then returned to the East Coast, where I launched what is today law.com and became national editor for the *American Lawyer* magazine. I subsequently collaborated on or directed many award-winning projects and features, including in-depth reporting on the fallout from the Enron scandal and the dot-com bubble bursts, as well as, most poignantly, writing on the liability fallout from the Catholic Church’s child abuse scandals. I also wrote a column (“Crash Course”) for the *New York Times Magazine* and occasionally contributed pieces on legal matters to the *Times’* op-ed page.

It was after writing one such piece—on the social corrosion I believed was wrought by New York’s ferocious and secretive judicial election system—that I received backing to launch a think tank. The Institute for Judicial Studies inaugurated unprecedented journalistic tracking of a judiciary whose members were too often installed by shadowy backers and whose record of performance was so underreported as to be virtually opaque. We harvested metrics such as reversal rates, docket dispensation numbers, and motion practice statistics, with our work appearing in the *New York Times*, the *Wall Street Journal*, and *Newsweek*. When funding for that project ended, I became editor in chief of *Corporate Responsibility Magazine*, where my experiences are today serving a new readership.

Just as I was making that switch, Justice Kourlis approached me about working on this project, and I leapt at the chance. Justice Kourlis and the institute’s reputation preceded them, and I eagerly joined as a fellow. My own writings about rebalancing

judicial independence and accountability jibed with the IAALS agenda, and the opportunity to combine my reporter's pad with the institute's extensive research on civil justice reform has been well worth the nights and weekends that I sacrificed to the effort.

The Story

The justice system is fundamental to our democracy. The courts are the counterweight to the other two branches of government, assuring that no branch becomes overzealous. Our founders specifically established a system of government that is not pure majoritarian rule; rather, it is a system that focuses on protecting the rights of individuals—even against the majority if need be. The courts are the last line of defense for those rights—the safeguard. And, just to be clear, this is about more than the rights that attach to criminal prosecutions or defense. The legitimacy and trustworthiness of the courts underlie our willingness to enter into a contract, hire or be hired, buy a house, drive a car, or get married. The courts ensure that *all* of the rights guaranteed by the US Constitution and state constitutions are enforced and upheld. The individuals who wear the mantle of this responsibility include not just judges, but jurors as well. We are the only country in the world that has the benefit of a right to trial by jury in civil cases as well as criminal cases, and the enshrinement of that right in the Seventh Amendment was no accident. The courts were positioned to balance the excesses of the executive or legislative branches, and the jury to balance the excesses of the judges. Trial by jury—in all kinds of cases—was envisioned as an additional way to place power in the hands of the governed, as well as to

ensure transparency and accountability of the court system. Lady Justice, more even than the Statue of Liberty, is the beacon of our freedom, our way of life, and our sustainability as a country.

Now, for the bad news.

Justice is in jeopardy, for a variety of reasons, but few Americans know or care. When the education or medical services systems are at risk, there is a national uproar. But, as chapter 1 addresses, because a majority of the American public does not understand the courts or recognize how vital they are to our body politic, there has been no public outcry about the justice system. (Speaking of understanding, for those of our readers who are not lawyers, you might find it useful to scan the Primer on page 193 and the glossary on page 224 before reading on. Lawyers whose practice does not regularly involve civil pretrial and trial practice might also find these sections to be a useful refresher course.)

One last introductory note: our focus is on court reform, not tort reform. Is that just a different consonant, a distinction without a difference, or perhaps just a less incendiary moniker for the same concept? No. Tort reform proposes amendments to the law that either limit the circumstances under which injured people may sue, limit how much money juries may award to injured people, or both. Court reform is a different animal. It is an effort to reform the *process*, not the substantive law. We believe that making the process work is the real objective: ensuring that if an individual or company has to file *or* defend a case, they will come away from the process believing that the judge was fair and impartial and that the process was just, efficient, and cost effective. That objective