POUND CONFERENCE

NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, St. Paul, 1976

April 7-9, 1976
St. Paul, Minnesota

Addresses presented at the Pound Conference

v.1

Papers presented

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Keynote Address by Warren E. Burger
Chief Justice of the United States

AGENDA FOR 2000 A.D. -- NEED FOR SYSTEMATIC ANTICIPATION

at the
National Conference on the Causes of Popular
Dissatisfaction with the Administration of Justice
House Chamber, State Capitol
St. Paul, Minnesota
Wednesday, April 7, 1976
5:00 p.m.

We open this meeting of judges, lawyers and scholars here at the scene of Roscoe Pound's 1906 speech, in order to remind ourselves of what he said and to underscore the sobering reality that progress is slow and that much remains to be done. On that occasion Pound gave to our profession and to the country the first truly comprehensive critical analysis of American justice and of problems that had accumulated in the first 130 years of our independence. In that span of time our country had grown from three million people in a largely rural society on the eastern seaboard to 85 million people spread over a continent with rapidly expanding cities built around a dynamic industrial economy.

The conference we open tonight is significant because it is the first time that the Chief Justices of the highest state courts, the leaders of the federal courts, leaders of the organized bar, legal scholars and thoughtful members of other disciplines have joined forces to take a hard look at how our system of justice is working, to consider whether it can cope with the demands of the future, and to begin a process of inquiry into needed change. But this meeting will be judged not on its unique composition but on what it stimulates for the years ahead.

If we are to justify taking two days' time of more than 200 leaders of the Law, it will be useful to make clear what we are not here to do. That is a task easier, perhaps, than to say with precision what we hope to accomplish. We are not here to deal primarily with specifics and details relating, for example, to juvenile justice, sentencing and corrections, judicial administration, details of procedure, training of lawyers and judges, regulation of the profession -- important as all those are. Those subjects are receiving increasing attention by various commissions and committees. We are primarily concerned with fundamentals.

Since Pound spoke here 70 years ago, there have been countless conferences, seminars, and studies on every aspect of the administration of justice. A review of those gatherings demonstrates, however, that, as Pound said, we have been "tinkering where comprehensive reform is needed." Although we have indeed been tinkering, we have also been doing a good deal more than in some earlier periods, when, as Pound said, our profession thought it was making progress by eliminating "all Latin and Law-French terms from the law books." Any suggestion that nothing has been done in these 70 years would be very wrong. A great deal was done, and much of it was due to what he set in motion here.

We have been making both minor and major improvements from time to time -- all of them valuable in their setting -- but we have not really faced up to whether there are other mechanisms and procedures better adapted

to meet the needs of society and of individuals. And, even if what we now have is presently tolerable, we must ask whether it will be adequate to cope with what will come in the next 25 or 50 years, given the dynamic expansion of litigation in the past ten years, the growth of the country, and the increasing complexity of both. When a city or state grows from three to four million, that does more than increase human problems by one-third for there is a geometric progression at work, as states like Florida and California have discovered. Such increases bring tensions in labor management relations, in schools, in zoning and housing problems, in civil rights claims, and in a host of other areas. We must consider fundamental questions about changes in our society that will create even more demands on the judicial systems.

Because the world has experienced more changes in these 70 years than in the preceding 700, we must be prepared to lift our sights even higher than Pound had in mind, for the year 2000 will be on us swiftly and the new demands in the next 25 years will be some unknown multiple of those we have experienced in the past 25. Many nations, most agencies of our own government, and private industry have long had studies underway to prepare them to cope with the future. One writer calls this "systematic anticipation," and he notes that the judiciary is lagging in this process and needs the help of other disciplines.[1/] So I submit that as long as we are inquiring and probing,

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1/ Perloff, The Future of the United States Government (1971).

not proposing or deciding, we do it boldly, not timidly -- candidly, not apologetically.

I.

As we begin, it may be beneficial to consider the conditions that Pound and his generation confronted in 1906, to see how they and later generations responded to those conditions. An examination of their successes and failures will help us decide how we should begin to prepare for the next 25 years and beyond.

At the turn of the century Pound and others were attempting to bring rationality and order to the economic and social chaos caused by the industrial revolution and the consequent growth of urbanization and by the waves of immigration that transformed this country in the second half of the 19th century. As lawyers and scholars, their major concern was fashioning better means by which people could have their disputes resolved because it was apparent to them as they entered the 20th century that the institutions of the 19th were not adequate.

Many years after the St. Paul meeting of 1906, Herbert Harley characterized Pound's speech as a "map to the territory, with the roads plainly shown, but no vehicular conveniences provided." Pound knew, as we know, that no one speech, no one conference, would solve the problems, and after 1906 he and a few others set out to create the "vehicles" necessary to get from where they were to where they wanted to go. Pound was not satisfied with anything less than fundamental changes.

Our task then, once we review what has gone before, is to re-examine the "map" Pound drew, to assess the direction of the roads he laid out, and to consider whether we need, not only to tighten "nuts and bolts" but to begin work on the design of some new -- even radically new -- "vehicles" to get us where we want to go in the years ahead.

It may be worth more than a footnote, and help us to gain perspective, to remember that when Pound spoke here most of the audience came from the downtown hotels by horse and buggy and some perhaps by horsecars. Where the parking meters now stand were hitching posts. The horses and buggies are gone, and men like Henry Ford, Louis Chevrolet, and the Wright Brothers have altered our lives drastically. Yet we see that, fundamentally, the methods of settling disputes remain essentially what they were in that day.

Perhaps what we need are some imaginative Wright Brothers of the Law to invent, and Henry Fords of the Law to perfect new machinery.

In considering new approaches we must not be deluded by the kind of pleasant but erroneous assumption held by Pound, that America was entering a period of relative tranquility in which it could concentrate on providing efficient means to remedy old wrongs and create a better, fairer society. Of course, he did not foresee the terrible destruction of World War I, or the upheavals that would follow it, spawning more wars and disorders down to this day. And although Pound was sensitive to the legitimate complaints of the great mass of working people, he had not yet grasped fully the needs of racial minorities nor the changes that would be stimulated when those rights gained recognition. But Pound clearly saw the need to fashion systems of dispute settlement to meet the conditions of 1906, in which working and middle income citizens were more and more crowded into the large cities and were increasingly frustrated by the tensions, the demands, the physical and emotional abrasiveness of a new way of life far removed from life in a small town or on a farm.

Pound understood that the old tests based on 19th century notions of liberty of contract did not meet the needs of people for compensation for on-the-job injuries and for protection against such things as tainted food and exploitation of child labor. Added to all this was the growing crime rate and advent of the automobile, bringing with it a whole new set of social and economic consequences -- all having an impact on the courts.

Pound recognized that no one would ever be fully satisfied with law or with any system of justice. That dissatisfaction, as he said, was "as old as law" itself, but he felt much of it was justified, for the courts seemed powerless to give relief to the victims of harsh new conditions of industrial and big city life. Courts of that day tended to discourage some of the legislative actions giving relief.

Pound focused on the court system, which he called "archaic," and on court procedures, which he said were "behind the times" and wasteful of judicial time. He condemned "the sporting theory of justice . . . so rooted in the profession in America that most of us take it for a fundamental legal tenet." What he meant by the sporting theory was that lawyers, instead of searching for truth and justice, tended to seek private advantage, forgetting they were officers of the court with a monopoly on legal services that mandated duties to the public as well as to clients. This is a balance difficult to achieve and now almost forgotten in our intensely competitive society.

Implicit in this criticism was a call for the leaders of the profession to use their talents to deal with it. Remember that in 1906 the ABA was a small, conservative organization, there was no American Judicature Society, no American Law Institute, no Institute of Judicial Administration. Only a few lawyers and judges and a handful of legal scholars were willing to examine the deficiencies of the court systems in relation to peoples' needs.

Since 1906 an array of dynamic organizations devoted to improving justice has come into being. We realize that no one speech or conference can change things overnight, but the long range reaction of the legal community to Pound's speech suggests that speeches and conferences can indeed lead to action in a free society. When he spoke here / we know that the American Bar Association "establishment" greeted his St. Paul address without enthusiasm, and although the next year the Association created a special committee to investigate the complaints he made, the report of that committee was never / adopted. Yet the influence of what he said is illustrated in our using the title of his speech to describe this Conference.

The American Judicature Society was organized in 1913 largely due to Pound's influence, and it is perhaps the classic example of the value of enlisting non-lawyers in the search for better justice. Experience has shown, however, that it is not easy to make use of other disciplines except by constant emphasis that specialists in public and business administration and the social sciences can help us. In the ultimate sense the mission of courts is social and economic justice according to standards established by law. Occasionally people are put off by the adjectives "social" and "economic" but those words are clearly implied in the term "equal justice" and they are a natural and inseparable part of the fabric of every organized society. Whether we use or do not use those adjectives, that kind of justice was the objective of the Declaration of Independence in 1776 and the Constitution in 1787.

Another measure of the change in attitudes of our profession is shown in the American Bar Association's transition from an elite group that reacted with hostility to Pound in 1906 into a progressive body composed of 210,000 representative lawyers. One mark of that metamorphosis is that two of the leading figures in the ABA later produced the justly-famous Vanderbilt-Parker "Minimum Standards of Judicial Administration" that have guided judges for over 35 years. An ABA Commission has now brought those standards up-to-date. In 1955, Attorney General Herbert Brownell convened the National Conference on Court Congestion and Delay, and his successor, Attorney General William P. Rogers, reconvened that conference in 1958. The Association's "Model State Judiciary Article" in the 1960's continued this evolution.

The ABA was one of the moving forces in the 1971 National Conference of the Judiciary in Williamsburg, Virginia, where the National Center for State Courts was conceived and very soon brought into operation. It was the chief instrument in 1969 in developing the Institute for Court Management which has stimulated a great expansion in the use of court administrators in both state and federal courts.

No review of the new organizations can fail to mention the change in attitudes of leaders of the bench and bar. Chief Justice Taft took the lead in creating what is now the Judicial Conference of the United States, one of the three sponsors of this conference, and the momentum of his efforts is still felt to this day. The presence here of representatives of the Supreme Courts of 50 States, their counterparts of the Federal system, and

other leaders demonstrates that those who now hold positions of responsibility acknowledged an obligation to focus the attention of the profession and the public on the major problems facing the administration of justice and to press for solutions.

In 1906 there was profound concern over processes of judicial selection and what we now call the "merit selection system," first adopted for some of the Missouri courts in 1940, is used in many states with modifications to fit local conditions. Later this week, Mr. Justice Finch, the president of the National Center for State Courts, will discuss this subject.

If there have been disappointments with some of the new developments, a major one was the failure of small claims courts to fulfill their early promise. These courts appeared in some midwestern states soon after Pound spoke, and by the 1920's they were used in many large American cities. Probably our profession's tendency toward formalism, that Pound criticized in 1906, was too much for small claims judges to resist. They have gradually drifted away from the simplified processes essential for speedy and inexpensive disposition.

The explosive growth of appellate court caseloads in the last decade has placed vastly increased burdens on the intermediate and highest courts in both the state and federal systems. Here we now have the benefit of thoughtful analysis from several major studies in the past five years, starting with that chaired by Professor Paul Freund of Harvard.

That commitee's report on the Supreme Court caseload had precisely the intended effect of stimulating debate and other inquiries, including that of the Advisory Council on Appellate Justice, chaired by Professor Maurice Rosenberg of Columbia, and more recently of the Commission on Revision of the Federal Court Appellate System, headed by Senator Hruska, whose proposals now rest with Congress.

These studies will have value only if the Congress can be persuaded to act. To illustrate, the caseload of the United States Courts of Appeals has more than doubled since 1968 but no additional appellate judges have been provided.

Pending in Congress is a 4-year-old request for 65 desperately needed District and Circuit judges, based on studies the Administrative Office of the United States Courts made at the request of the Congress. The Senate has approved 52 new judgeships, but we will have no additional judges until the House acts, although there is a near crisis situation, particularly in the Courts of Appeals. This leads me to suggest that it may be time to consider whether providing an adequate number of judges can be better dealt with in some other way. In Florida, for example, the Governor of the State is authorized by its legislature to create a new judgeship by executive order based on precise criteria of population, caseloads, and other relevant factors prescribed in a statutory formula. Were a similar measure adopted on the federal level, the need for judgeships would not be caught up in the complexities of elections and other irrelevant considerations, when both the executive and legislative branches are preoccupied with matters totally foreign to the needs of the courts.

The 70 years since Pound criticized the "sporting theory of justice" have seen some major advances aimed at simplifying procedure at both the trial and appellate levels. Some state courts developed pre-trial procedures in the 1920's. The adoption in 1938 of the Federal Rules of Civil Procedure was a major step toward a pervasive simplification of procedure, since the federal rules were soon adopted in many of the states that had not already acted. Here, my native Minnesota loyalties prompt me to remind you that one of the most distinguished lawyers ever to come out of Minnesota, William D. Mitchell, who was Solicitor General and later Attorney General of the United States, chaired the committee that drafted the Federal Rules of Civil Procedure. Now, after more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and overused. The whole subject is due for a critical reexamination.

Other improvements that can fairly be called "tinkering" were developed -- the merger of law and equity, and the requirement that federal courts apply state law in diversity of citizenship cases. I must add that the diversity jurisdiction itself, which Pound characterized in 1914 as a cause of "much delay, expense, and uncertainty," still plagues us, despite the numerous studies, including that of the American Law Institute, which advocate that diversity jurisdiction of federal courts be curtailed or abolished. Also worth noting is the use of six-member

juries in civil cases, a practice first introduced by Chief Judge Boyd and his colleagues here in Minnesota and subsequently adopted almost universally by the federal courts.[2/] This has saved much time and money with no adverse effect on litigation.

II.

After the event it is easy enough to regard some of this progress as "petty tinkering," but without it the administration of justice might well have collapsed by now. It is far easier to do what we lawyers often do -- praise our system as the best ever devised and denounce anyone with the temerity to suggest that we consider, not only periodic adjustment, but major and systemic changes. The inertia of some lawyers, judges, and legislators is such that nothing less than a collapse of the system will bring them to consider change.

There are others, however, with a passion for reform which can be a valuable asset, but like all passions it needs to be regulated and channeled if we are to avoid hasty and ill-considered change. We sometimes develop an alleged "reform" and then turn to new fields and assume that the first effort has no flaws. It might be helpful when we enact "reforms" to give them a short term -- five or ten years -- after which they would be subjected to audit and critical analysis. My colleagues, Justices Black and Douglas -- not in jest but in complete seriousness -- said many years ago that new regulatory agencies and new government programs should be dismantled

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2/ Another example of continuing a wasteful and judicially costly, but unnecessary, procedure is found in the three-judge district courts. They were useful and even necessary up to perhaps 20 years ago. They are not necessary today.

after a fixed period -- ten years or so -- and not reinstated unless a compelling need were shown. Coming from two architects of the massive changes of the 1930's, the Black-Douglas admonition should carry weight.

Whatever risks may be involved in our probing and talking, we must be prepared to take them. There is nothing dangerous about studying and considering basic change, if the alterations will preserve old values and "deliver" justice at the lowest possible cost in the shortest feasible time. I do not, for example, think it subversive to ask why England, the fountainhead of all our legal institutions, found it prudent and helpful 40 years ago to abandon jury trials for most civil cases. Since the beginning of the Republic we have tried a great variety of important civil cases without juries and if, as some American lawyers ardently advocate, it is sound to consider adopting British concepts of pretrial disclosure of all prosecution evidence in criminal cases, I hardly think we endanger the Republic if we also make thoughtful inquiries into England's civil and appellate procedures and their ideas of finality of judgments, short of three or four appeals and retrials.

When we make changes, their operation must be monitored to be sure they are working as we intended. One example will make this point: the 1964 Criminal Justice Act and the 1966 Bail Reform Act were major developments responding to need in the federal system, but we cannot assume that such important programs were perfect on "the first try." Each of these Acts was one that most informed people would call "good" legislation. Now, a decade and more of actual experience shows that the interaction of these two improvements created

vexing problems not anticipated. Lawyers supplied to an indigent defendant at public expense do, as they should, what privately paid lawyers do for clients, which means satisfying the clients' lawful requests. Inevitably, the first request is "get me out." Here the Bail Reform Act comes into play and the odds are that the accused will be released pending trial, in all but a rare case involving a murder charge.

It now appears, especially in larger cities, that crimes are committed by persons while released pending trial on federal charges. It is not uncommon for an accused, when finally tried, to have other indictments pending. If the matter is disposed of by a guilty plea, after conviction on one charge, there is some evidence of a tendency to dismiss or defer other charges and to impose a single sentence. In high crime rate communities, law abiding citizens must be forgiven if they ask whether such practices are giving rise to a belief that a criminal can commit two, or even three, crimes and pay the price for only one. That this reaction may not withstand careful analysis does not alter the disturbing reality of public opinion engendered by the evening newscast reporting homicides and other serious crimes.

This phenomenon is related to the actual operation of the Bail Reform Act in which likelihood of flight is the only test in most cases, and no consideration is given to possible danger to the community. Here, we cannot be sure of the answers because we do not know all the facts.

The facts we need can be found only by a careful study in one or more sample jurisdictions to probe, case by case, name by name, and determine how many arrests have been made of persons who were released pending trial on a prior charge.[3/] Only then will we know whether the Bail Reform Act needs reexamination and amendment.

It is a very serious matter when whole communities become emotionally aroused -- as they are these days -- by a constant pattern of serious crimes. We should not be heard to complain at the loss of public confidence in our legal institutions if people come to think that government is impotent to protect its citizens. One danger is that loss of belief in governmental institutions may lead to what is euphemistically called "self-help," and too much self-help can lead to a disintegration of the social structure. A civilized society should not have "vigilantes."

The possibility that these two important and needed changes have not worked out in practice, as we had hoped, underscores the need to keep new programs as well as old ones under surveillance.

3/ In October, November and December the Washington, D. C. Police Department reported that of all the persons arrested on charges for serious crimes, 569 were at the time of arrest on release pending trial on a prior indictment. In the same period 402 persons arrested were, at the time, at liberty on parole, probation or conditional release from a penitentiary. Under the District of Columbia Code, §§ 23-1322-25, judges may take danger to the community into account.

If Pound was correct in his analysis that excessive contentiousness was an impediment to fair administration of justice, I doubt that anyone could prove it is less so today. Correct or not, there is a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense. There is a willingness of some of the participants to elevate procedural maneuvering above the search for truth and this, as Pound said, sends out "to the whole community a false notion of the purpose and end of law." And he saw this as a large factor in the American cynicism about the law and the urge to want to "beat the law."

When Pound challenged the exaggerated contentiousness of the adversary system, the aggressive spirit of some American lawyers -- that Pound said was perverting the adversary idea into a sporting contest -- asserted itself in attacks on Pound. Some of these lawyer critics spoke as though the courts were the private property of lawyers, rather than instruments for the benefit of people.

Those few critics of Pound did not seem to know -- or perhaps care -- that England, the cradle in which the adversary system was nurtured, had worked out ways to control the damaging excesses of the contentious spirit. Anyone who has observed both the American and British courts at close range knows that there is no more vigorous

advocacy or fairer justice than in British courts, and at the same time they maintain strict regulation of lawyers' professional conduct, as we do not. When juries are used, England's courts manage to do without spending days and weeks selecting a jury. Even the most ardent opponents of stricter regulation of lawyers are beginning to have some doubts, for example, about whether the jury selection process, which is provided as a means to insure fair, impartial jurors, should be used as a means to select jurors favorable to one side or the other.

I believe the American lawyers, by and large, are the equal of any in the world, but a handful of members of any profession can inflict harm out of proportion to their number, on both the public and on the image of their profession.

Other conditions that caused dissatisfaction in 1906 are still with us. Jurors, witnesses and litigants continue to have their time squandered. They are often shuffled about courthouses in confusion that results from poor management within the courts. The delays and high costs in resolving civil disputes continue to frighten away potential litigants, and those who persist and ultimately gain a verdict often see up to half of the recovery absorbed by fees and expenses. Inordinate delay in criminal trials and our propensity for multiple trials and appeals shock lawyers, judges, and social scientists of other countries.

There is nothing incompatible between efficiency and justice. Inefficient courts cause delay and expense, and diminish the value of the judgment. Small litigants, who cannot manipulate the system, are often exploited -- to use the words of Moorfield Story, a former president of the ABA[4/] -- by the litigant "with the longest purse." Every person in this conference knows how the "long purse" has been used to produce long delay and a depreciated settlement. Efficiency -- like the trial itself -- is not an end in itself; it has as its objective the very purpose of the whole system -- to do justice. Inefficiency drains the value of even a just result by either delay or excessive cost, or both.

It is time, therefore, to ask ourselves whether the tools of procedure, the methods of judicial process that developed slowly through the evolution of the common law and fitted to a rural, agrarian society, are entirely suited, without change, to the complex modern society of the late 20th and the 21st centuries.

III.

Only when we see that some of the causes of the dissatisfaction of 1906 are still with us, and when we contemplate the enormous array of new problems that have accumulated, and those yet to come, do the dimensions of our problems emerge.

The topics selected for this conference may raise in some minds the idea that our objective is to reduce access to the courts. Of

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4/ And one of the founders of the NAACP.

course, that is not the objective, for what we seek is the most satisfactory, the speediest, and the least expensive means of meeting the legitimate needs of the people in resolving disputes. We must therefore open our minds to consideration of means and forums that have not been tried before. Even if what we have now has been tolerable for the first three-quarters of this century, there are grave questions whether it will do for the final quarter or for the next century.

To illustrate, but by no means to limit, let me suggest some areas of concern to all Americans, whatever place they occupy in our society. In these areas we must probe for fundamental changes and major overhaul rather than simply "tinkering."

FIRST: Ways must be found to resolve minor disputes fairly and more swiftly than any present judicial mechanisms make possible. The late Edmund Cahn, of New York University, reminded us that few things rankle in the human breast like a sense of injustice. With few exceptions, it is no longer economically feasible to employ lawyers and conventional litigation processes for many "minor" or small claims, and what is "minor" is a subjective and variable factor. This means that there are few truly effective remedies for usury, for shoddy merchandise, shoddy services on a TV, a washing machine, a refrigerator, or a poor roofing job on a home. This also means lawyers must reexamine what constitutes

practice of law, for if lawyers refuse minor cases on economic grounds they ought not insist that only lawyers may deal with such cases.

It is time to consider a new concept that has been approached from time to time and has a background in other countries. To illustrate rather than propose, we could consider the value of a tribunal consisting of three representative citizens, or two non-lawyer citizens and one specially trained lawyer or para-legal, and vest in them final unreviewable authority to decide certain kinds of minor claims. Flexibility and informality should be the keynote in such tribunals and they should be available at a neighborhood or community level and during some evening hours.

Japan, for example, has only a fraction of the lawyers and judges we have per 100,000 population. In Japan, formal litigation is far less than in the United States, due to a long history of informal "community" and private processes for resolving disputes without litigation and, hence, without lawyers, judges and the attendant expense and delays. In Japan people do not boast at cocktail parties about their lawsuits -- they are unhappy when they finally resort to the courts and they try to keep it a secret.

SECOND: As the work of the courts increases, delays and costs will rise and the well-developed forms of arbitration should have wider use. Lawyers, judges and social scientists of other countries cannot understand our failure to make greater use of the arbitration process to settle disputes. I submit that a reappraisal of the values of the arbitration process is in order to determine whether, like the Administrative Procedures Act, arbitration can divert litigation into other channels.

THIRD: Ways must be found to simplify and reduce the cost of land title searches and related expenses of home purchasing and financing, in order to help offset the great rise in land and construction costs that have created barriers to home ownership. With the developments in recent years, I can think of few things that are more likely "candidates" for modern computer technology than maintenance of land records and the process of examining land titles. Having spent some time in my early years of law practice in the musty, but cool vaults of courthouses, manually and painstakingly charting out multiple transactions in a chain of title, and having now seen something of what a computer can do, I am persuaded that this is one area in which the legal profession should take the lead for a change that will reduce the cost of examining titles to a fraction of the present figures and release lawyers for other useful tasks.

FOURTH: Ways must be found to simplify and reduce the cost of transmitting property at death. Probate procedures can be simplified without diminishing certainty of title. As a native Minnesotan,

I yield again to the temptation to note that a wholesome step has been taken by the Minnesota Legislature in the form of a modern probate code, and although I must not let my loyalties lead me to say Minnesota has spoken the "last word" or that it has the "perfect" probate code, it has taken a significant step forward, typical of this progressive state.

FIFTH: Ways must be found to give appropriate weight to ecological and environmental factors without foreclosing development of needed public works and industrial expansion by inordinate delays in litigation. The accommodation of conflicting values demands swift resolution of these cases, so as to avoid the waste involved in suspending execution of large projects to which vast public or private resources are committed. This country has appropriately committed itself to protecting our environment, but we must also build needed schools, homes, and roads, and in the process provide jobs.

SIXTH: New ways must be found to provide reasonable compensation for injuries resulting from negligence of hospitals and doctors, without the distortion in the cost of medical and hospital care witnessed in the past few years. This is a high priority.

SEVENTH: New ways must be found to compensate people for injuries from negligence of others without having the process take years to complete and consume up to half the damages awarded. The workmen's

compensation statutes may be a useful guide in developing new processes and essential standards.

EIGHTH: It is time to explore new ways to deal with such family problems as marriage, child custody and adoptions. We must see whether it is feasible to have relationships of such intimacy and sensitivity dealt with outside the formality and potentially traumatic atmosphere of courts.

NINTH: One of the innovations of the past half century was the development of modernized and simplified rules of civil procedure. Increasingly in the past 20 years, however, responsible lawyers have pointed to abuses of the pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that "the case must be tried twice." The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands.

The Judicial Conference of the United States has a Standing Committee on Rules and an Advisory Committee on Civil Rules. I will request the Judicial Conference Standing Committee on Rules to conduct hearings on any proposals the legal profession considers appropriate. We must make every effort to provide all necessary legal services at the lowest reasonable cost, and when procedures become obsolete and increase the expense, they should be corrected.

This conference will not settle or solve problems, but we hope it will unsettle some of our assumptions that are no longer valid. Our objective is to stimulate future studies and conferences to treat in depth the unsatisfied needs we hope to identify in these next few days.

Ever since Magna Carta, common law lawyers have recognized that the law is a generative mechanism sharing with Nature the capacity for growth and adaptation. The changes in seven and a half centuries since then demonstrate that change is a fundamental law of life, and even our need for stability and continuity must yield to that immutable law. What is important is that lawyers fulfill their historic function as the healers of society's conflicts and fulfill their responsibility to preside over orderly evolution. It is now up to us to demonstrate whether we will be able to adapt the basically sound mechanisms of our system of law to new conditions.

[Dean Pound's Speech to the ABA at its 1906 Annual Meeting in St. Paul, Minnesota, on "The Causes of Popular Dissatisfaction with the Administration of Justice" was published in 29 ABA Reports p. 395 (1906); an abridged version was republished in 1971. See 57 ABA Journal p. 348 (1971).]

FOR RELEASE UPON DELIVERY
FRIDAY, APRIL 9, 1976

ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE

8:00 P.M.
FRIDAY, APRIL 9, 1976
ST. PAUL RADISSON HOTEL
ST. PAUL, MINNESOTA

Mr. Chief Justice:

To summarize the views expressed on Topic One is to add my voice to what is now a thrice told tale. The organizers of this conference have taken a leaf from the oldest truth in education, or perhaps their model is appellate review. Anyway they obviously believe in the value of repetition.

I will attempt to describe primary themes, to identify points in common and differences in emphasis and views. The topic itself suggests that courts, or some courts, may be engaged in the resolution of disputes they are not well equipped to resolve, or that other institutions could resolve these kinds of disputes more efficiently and effectively. But the immediate phenomenon of concern is that the number of suits submitted for judicial resolution has increased dramatically. In addition, it is said litigation has become increasingly complex. Taken together all panelists agreed that at some point the torrent and complexity of litigation may prevent courts from devoting to those matters, as to which their exercise of judgment is criticial, the necessary attention and care. Indeed it is suggested that increasingly courts are finding it difficult to act in their best tradition. For example they are not alowing oral argument; they are deciding frequently without opinions. I believe all would agree that the courts exemplify

the reasoning tradition of the application of standards to particular situations and do this in a way, as the Solicitor General said, that there is an accountability which comes at least from explanation.

Because of the volume of suits and their complexity, delays in the administration of justice have occurred. Judge Rifkind said that for some plaintiffs in some kinds of cases, the delaying effect of litigation may be the primary, perhaps the sole, reason for filing suit - simply to delay and impose expense on the other party. As Judge Higginbotham emphasizes in his paper, delay in litigation adversely affects not only the litigants, but also others - witnesses and jurors - who become involved in the system. Delay may allow the commission of further crimes or illegal actions by the defendant. Another consequence of delay and of the expense of complex litigation, Professor Sander wrote, is that potential litigants may be driven to avoidance; that is, to withdraw from situations likely to create disputes that can be resolved only by resort to the courts. Such avoidance may entail heavy social or individual costs. Several speakers emphasized that costs and delays discourage potential plaintiffs from attempting to get redress for legal wrongs.

Contributing to the number and complexity of suits is the change in the use of the courts. It was suggested the traditional model of the judicial process - a dispute between two parties resolved through the adversary system with an allocation of the burden of proof and with the judgment directly affecting only the immediate parties - has, in substantial measure, collapsed. Courts now often are engaged, not in dispute resolution in this traditional sense, but in what Judge Rifkind termed "problem solving." This may be in part the result of the attempt to carry the burden of multiple litigation. Dean Griswold suggested the basically wise provisions for class actions may have been overextended. The tendency, perhaps the necessity, of dealing with disputes en masse and of providing mass remedies can profoundly affect the reality of the substantive law and its evolution. According to one account, this tendency has led, for example, to practical elimination of the reliance element in securities class actions; it has also led, I suggest, to the development of remedies like affirmative action in employment, imposed originally as an evidentiary device to compel compliance with anti-discrimination decrees, but now perhaps a measure of the substantive wrong itself.

The "problem-solving" model of the judicial process was related not only to the mass-parties mass-remedies phenomenon, but also to the kinds of issues courts are called on to resolve. Courts have become, Judge Rifkind said, "jacks of all trades," dealing with extended variants of what Professor Sander termed "polycentric problems," which can implicate wide-ranging social and economic interests not fully or, conceivably, at all represented by the adversaries in court.

Procedural and substantive changes may be essential if the courts are to be effective and efficient. But the question then is the cost of what has been given up and whether other remedies are available. This is of course true of all the remedies suggested.

The vast growth in the dimensions and subjects of governmental concerns is undoubtedly among the chief causes of the increase in the volume of judicial business. The expansion of governmental concern may be in part the product of the decline in private institutions -- the church, the family, and the community were mentioned -- that once imparted values and so controlled conduct. One of the consequences of that decline may have been the increase in the rate of crime, a phenomenon which unquestionably has played a major part in the burden on the courts.

There has been an increasing turning to the courts by the legislature. Not only have new categories of legal obligations been confided to the courts for enforcement, but obligations come surrounded with legislative indefiniteness. The turning to the courts is evidenced in the legislative use of the courts as a means of monitoring the activities of the executive by insisting on judicial review, and through the device of private litigation against government, encouraged by both the courts and the legislature, to attempt to ensure conformity with a vague legislative will or to give new substance to individual rights.

Pound recognized the need for new governmental instrumentalities and social action in his remarks seventy years ago. Pound spoke, as Judge Higginbotham reminded, of the courts' posture, then, in thwarting legislative attempts to remedy social and economic injustice - a posture altered only through the long history of legislative effort and judicial reappraisal. All three panelists emphasized that the situation, whatever the dissatisfaction with the administration of justice may be, is vastly different today; they differ somewhat in their appraisal of the present and indeed of the past. All would recognize, I suppose, that the courts today have not stayed legislative

reform, at least in the areas of concern to Pound; they have not in the same sense created a void equivalent to a no-man's land for social regulation.

But new constitutional rights do ban certain kinds of legislative action; traditional and present doctrines do ban some legislatively attempted remedies. Referring to these rights and doctrines, Judge Higginbotham suggested that Pound in important respects overlooked injustices which should have been recognized as causes of dissatisfaction. Judge Higginbotham described, in particular, the legal development between Pound's time and our own in the fields of race relations and the rights of women and voters. His point was that the courts, in upholding or ratifying state actions and attitudes that denied fundamental rights, participated in creating the conditions that have since taken extended efforts, including those of the judiciary, to remedy. Several speakers emphasized the growth in the use of the courts as mediators between the government and individuals or groups, and observed that the courts now have moved to fill voids created by the default or failure of other governmental institutions -- particularly the failure to respond to the demands of individual rights or to take positive steps to achieve social justice. At this

point one must recognize that concepts are slippery -- one agency's determinations may be viewed by another as default. The question cuts deep. It raises the issue of ultimate responsibility.

Another kind of legislative lapse was described -- the failure to take steps to remove from the courts, through appropriate changes and simplification of the substantive law, categories of disputes where judicial resolution is now unnecessary to the public interest. It was suggested that there has been a comparable failure by the courts to take sufficient steps, when they can, to simplify procedures and also to establish clear substantive rules that, as Dean Griswold said, could be administered elsewhere including in the lawyers' offices where understanding and explanation are essential to the system. Moreover, as Judge Rifkind said "when law is so unpredictable that it ceases to function as a guide to behavior, it is no longer law." Lack of clarity in the scope and application of the law is one of the primary generators of disputes.

In short, the speakers described a spreading judicialization of relationships, the enlargement of the use of governmental power to control and channel private activity;

the concomitant increase in the necessity of creating and enforcing limitations on that power, and the increased use of the courts as the instruments to those ends. We are in what Grant Gilmore has termed a "romantic period" of the law's development, a period of instability about its reach, content, and dimensions. Perhaps it is right to say that the expansion in the law and in use of the courts is a mark of judicial success and that dissatisfaction came not because judicial decision was too often invoked, but, because of delays and expense, it could not be invoked often enough.

Judges, particularly under the rule of constitutional judicial review and the American tradition, are, in a special sense, law makers. They always have been. Access to the courts, in comparison with so much of the rest of government, is relatively easy. The court can be the target or focus for action. Lawyers often find that target a more attractive one than efforts to reach other law making bodies. The courts can be compelled or at least are willing to decide complex issues as a matter of law or right, in circumstances in which the legislature or executive has avoided or deferred decision, perhaps because the legislature or executive has determined that the data for decision are unavailable.

At the same time the judicial remedy may raise expectations and generate dissatisfaction when the expectation is not fulfilled. Indeed dissatisfaction may result even when the expectation is fulfilled in this way. If we move from a consideration of the most effective administration of justice to an inquiry into the sources of dissatisfaction, then I think we have to admit we are in an area where the creation of some remedies, or the way they are created, may spread feelings of dissatisfaction. It is one thing to improve by legislation the social organization of the state; it is another thing to accomplish reform by a constitutional condemnation of prior behavior as violative of the fundamental rights of man. This does not mean the condemnation has not been properly given; it does mean that a powerful weapon has to be used with care.

The conference, I believe, came quickly to a realization there was no one overall cure which should be used to answer the problem of the overcrowding of the courts, and the attendent issues of the costs of litigation, a possible decline in judicial standards, and thus a change in the quality of justice. As part of the answer Judge Rifkind and Professor

Sander focused on an analysis of the nature of the judicial process and an identification of its distinctive features. On the basis of this traditional model, it was suggested that the jurisdiction of courts be preserved for those disputes that they have historically handled best -- the resolution of concrete disputes where the law is unclear. By contrast, where the task is largely ministerial or routine, involving the repetitive application of settled principle, then some other form of dispute resolution mechanism should be substituted. Through this allocation, the courts would retain their primary role as a formulator of positive law.

The second principle to guide reform was that courts should continue as the protector of basic constitutional or human rights. Judge Higginbotham and others placed primary emphasis on this point, noting that individual rights would go unprotected if courts were to be removed from this area. They called for an inquiry as to whether proposed reforms might work to the disadvantage of the poor, the weak, and the powerless. I think it is correct to say that other panelists, commentators, and small group spokesmen expressed agreement with the point. Although doubts were expressed about the competence, resources or remedial powers of courts to run mental hospitals,

schools or welfare departments, there was consensus that courts cannot decline jurisdiction where serious denials of constitutional rights are at issue. The example repeatedly mentioned was Judge Johnson's order in the Wyatt case placing the mental health system of the State of Alabama under the supervision of the federal court.

There is tension among the criteria presented for judicial reform. There is doubt about the courts' competence or authority to become a problem-solver for society and a desire that courts confine themselves to their traditional role. At the same time, there is great reluctance to deny access to the courts, or to deny protection of rights when, as it is said, other institutions have defaulted. The tension is understandable, but the dilemma of what happens when the theory meets an actual situation seems to point to a defect in our governmental structure.

Several speakers addressed the most obvious solution to the problem of court overload -- increasing the number of judges. An immediate need for additional judges was recognized. Professor Johnson described the relatively low investment in judicial resources in this country, compared to other industrialized societies. But the view was expressed

that increasing the number of judges could not be a long-range solution to the problem. It is difficult to find a sufficient number of judges qualified by experience, intelligence, and judgment to perform the demanding task of a judge; increasing the number of judges will affect their prestige, making it more difficult to persuade outstanding lawyers to accept the great responsibility and lower salary of judicial office, even though the point was made, as I recall, that judges were paid more than some physicists. A decline in prestige of judges may also affect the respect in which their decisions are held by the general public.

An effort must be made to achieve greater clarity and simplification in the law. Judge Rifkind commented on the excessive complexity of laws relating to securities, antitrust, and taxation. Much could be done to reduce the caseloads of courts if legislation were more carefully drafted or if the operation of legal rules were simplified. A more mechanical legal rule would also allow disputes to be resolved by a clerk or some other non-judicial mechanism.

Another approach would be to adopt new ways to deal with certain social problems to remove the need for judicial

resolution. Several speakers advocated the no fault approach to personal injury claims and suggested the extension of workmen's compensation laws to cover seamen and railroad workers. At times it was suggested that all negligence cases be removed from the court system, on the stated theory that an alternative was available and that accidents were a necessary risk of our society. Perhaps I may be permitted to remark it was this recognition of the risk as well as a belief in the effect of responsibility which created the law of negligence in the first place. Another possibility, mentioned by Judge Rifkind, is the British practice in handling corporate take-over disputes. The divorce laws, and the attendant laws governing alimony and property settlement, were also identified as possible areas for simplification. Finally, there were areas that do not warrant governmental intervention at all. It was suggested that "decriminalization" should be considered for certain "victimless" crimes, such as drunkenness, prostitution, and gambling. It was questioned whether such behavior is still an appropriate subject for governmental regulation, or at least for regulation by the courts.

Procedural reforms were proposed, including the way the issues in a case might be sorted out and priority given. The increased use of alternate dispute-resolving mechanisms was emphasized. Mediation and conciliation were thought by

Professor Sander to be especially appropriate for disputes that arise in long term relationships. He also suggested the use of ombudsmen. Special emphasis was given to arbitration - a form of adjudication, but more informal. Indeed, there was a suggestion that arbitration clauses in contracts be required. Screening devices were discussed as means to filter out frivolous cases or to encourage settlement at the start of the court process. Some of these devices involve the allocation of litigation costs. Judge Rifkind, for example, mentioned the English practice of imposing the expense of attorneys' fees on the losing party, but noted that our history is opposed to such a rule. Other devices involve the requirement of posting a bond for defendant's costs. Professor Sander described the Massachusetts system for medical malpractice cases under which a plaintiff, before being allowed to proceed further in the court process, must convince a three-man board, composed of a doctor, lawyer and trial judge, that his claim has "prima facie" merit or, failing that, post bond for the defendant's costs. Professor Sander also described the Michigan Mediation System, under which a panel of a judge and two lawyers determine damages in tort cases in which liability is acknowledged. If the plaintiff or defendant refuses to settle

for that figure determined by the panel, he is taxed for costs and attorney's fees unless the judgment is substantially more favorable to him than the panel's estimate. Judge Rifkind suggests that a civil litigant be required initially to show "probable merit" in his claim before the case proceeds to lengthy discovery and trial. He also mentioned the variety of gates traditionally used, although perhaps somewhat battered, to exclude some would-be litigants from the courthouse.

It was recognized that these screening devices are in tension with the notion of free access by aggrieved citizens to the courts. Care must be taken to ensure that a screening device does not work to exclude individuals for adventitious reasons. The importance of judicial resolution, to society as well as the litigant, may have no relationship whatever to the size of the claim. Professor Sander added the further point: The creation of alternative dispute resolution mechanisms may result in an actual increase in the number of disputes to be resolved governmentally. The availability of these mechanisms, including those non-coercive in nature, may serve to "validate" claims. This may induce individuals to invoke the mechanisms even in cases where private negotiation

and compromise would eventually have produced a resolution satisfactory to the parties. The very availability of alternate dispute resolution mechanisms may result in more disputes to be processed, if not by the courts, then at least by governmental institutions. I assume there may be responsibility, which ought to be thought about, for creating less, not more, disputes in our society. There is another side to this, but I do not think the question is an easy one.

Dealing with the particular problems of the federal judiciary, several speakers advocated elimination or reduction of diversity jurisdiction and use of three-judge courts. The Solicitor General proposed a novel system of special or administrative courts to deal with the large volume of repetitive cases that arise under certain federal legislation.

Several speakers agreed that a major part of the solution to the problem of court overload lies in encouraging the legislative and executive to remedy their defaults, which have led to judicial intervention, and to change the manner in which they respond to difficult social and economic problems. In Judge Rifkind's words, "the courts should not be the only place in which justice is administered." The difficulty, however, is that if the government is involved, as it has been

in the recent past, then the courts are likely to be involved. Perhaps what is intended is an emphasis on those solutions which can be carried out ministerially, or on greater reliance on the private sector in response to new rules, or on statutory revision which itself clarifies existing legislation or does away with abuses.

From the description of the points made, the ideas advanced in yesterday's discussion, one point is evident. The discussion, like the topic, touched on an enormous range of phenomena. The phenomena and the problems undoubtedly vary, from the federal system to the states, and among the states. In the description of the problems, we may be giving, as Professor Nader suggested, only a soft look. The data are soft; we should look for better. As Professor Nader knows, however, it is not easy to get the data. The softness may extend to assumptions of judicial success, as well as failure, to public satisfaction as well as dissatisfaction.

Perhaps Dean Pound was right in his suggestion, seventy years ago, that the growth of government action was the inevitable consequence of an advanced and increasingly interdependent society, generating and accelerating the development of what Dean Pound termed "the

collectivist spirit of the age." In many cases, the government has proved to be an instrument of progress, and its intervention has been necessary to the resolution of complex social and economic problems.

I think there would also be agreement, however, that not all aspects of modern society or individual action are best controlled by the government. Many of the great injustices in our history were caused or confirmed by governmental action. The assumption that government by its nature will inevitably be an instrument of good, or that its judgments will always be wise, is not the necessary product of experience. So, too, our history disproves the notion that private institutions cannot also be effective agents of progress and justice. That there are areas where progress is accomplished non-governmentally is a thought that comes easily, if I may be permitted to say this, to the former president of a private university. Diversity and creativity have at least an alternative home in the private sphere. When the President of Columbia University says to this group, not entirely in jest, that he has been sued frequently for doing his duty, he is making this point.

I believe we must recognize that courts can become, not agents of progress, but an obstruction to progress. Judicial entry into an area previously reserved to the legislature may displace the legislature as the primary formulator of social policy. Professor Nader's soft data point bears on the formation of rights and remedies. Change on many fronts must be tentative, experimental qualities that can characterize legislative solutions. Constitutional rules move much more in the realm of the absolute. Moreover, the effect of judicial assumption of these responsibilities can be that the legislature and executive will refrain from serious discussion and decisive action with the risk-taking which responsibility imposes. Where the decisions are difficult, there is always the temptation to avoid confronting them, to let that responsibility pass to others. Even where there is the possibility for legislative and executive resolve, the "freezing effect" of the constitutional rule imposed by the courts may frustrate an effective response by these institutions.

Responsible democratic government has a duty to articulate our goals as a society, although certainly not all the goals for private individual or even for all collective action. In a special way, courts share in that governmental responsibility. The mission of courts involves not only the resolution of disputes

but also the explication of the general principles that inform decision. Those principles are grounded in law, but their meaning is often an evolving one, influenced and shaped by the changing circumstances of their application. The nature of the judicial process requires that courts proceed with care, through articulated reason, in applying these general principles and rules. The process of change is slow, interstitial, in the fashion of an artist creating a great mosiac, as Judge Rifkind described it. These qualities are important, for they are the qualities of a reasoning society, which ours is supposed to be. To demonstrate and exemplify this is an important role for our courts. Change, of course, does not always come this way in the courts. Constitutional law, while it is a great common law, sometimes has more abrupt and decisive turns. Yet, an important reason for the respect in which courts are held is the perceived constancy of the principles which govern them and which they apply.

The present reality, as described by the panelists, is that the courts are now deluged with business. It may well be that courts are no longer able to discharge their traditional function but will be required instead to assume a new role. If so, the loss will be great. Courts are like other important

institutions in American life; they share the commitment to attempt to achieve appropriate excellence. There are times, however, when the nature and processes of institutions must change because their responsibilities must change. This has been the case with other institutions in American life and it may also be the case with the courts. It is possible, after all, to conceive of courts as mini-legislatures. But if courts are to function as mini-legislatures, then they must adapt to the requirements of the political process. Public opinion and political responsibility inevitably become important factors in the decision-making process. This is always the case, but the change will make the courts more vulnerable, and their service to the country will be of a different kind. One has to weigh the costs.

Dean Pound observed the deficiencies in American jurisprudential theory. He created a jurisprudence of interests that took into account the ideal of social engineering. A major difficulty today has been the lack of discussion within society as to the basic problems we face. Our political institutions have often placed a premium on ambiguity in policy formulation, an ambiguity which is itself a cause of our present dissatisfaction.

The responsibility thereby placed on courts to discover and implement social policy is certainly difficult if not intolerable. There is an exigent need for our other institutions -- and not only governmental -- to clarify paramount issues and to develop remedies which work with least social cost. If the courts are to become problem solvers, and not dispute solvers, then perhaps one has to think of new kinds of cooperative inter-relationships among the courts and other agencies, governmental and private, which would be improper or strange if courts maintained their traditional role.

I feel compelled to note that our society presently finds dissatisfaction a powerful motive force. Ironically, it finds a certain satisfaction with dissatisfaction. The panelists have been eloquent on some of the matters to be dissatisfied or at least worried about. There is some reassurance in knowing that we are not complacent, and there is great wisdom in having the opportunity to rethink our direction, although the nature of government often makes that process difficult. There is always the danger that the purpose of reassessment will be misunderstood. It is regrettable that the world is such that proposals for judicial reform must always be followed by the disclaimer that the proposals are not a suggestion that deprivations of human rights be countenanced.

They should not be. Courts must continue to be, as they have been in the past, an indispensable protector of our basic freedoms. They have accomplished much and are highly regarded for that work. But the problems we face as a society are often not susceptible of judicial resolution. To rely on the courts alone, or even primarily, for the solution to our problems may itself be to countenance our eventual default, as a people, in our commitment to the establishment and preservation of equal justice for all.

THE PRIORITY OF HUMAN RIGHTS IN COURT REFORM

ADDRESS OF

JUDGE A. LEON HIGGINBOTHAM, JR.
UNITED STATES DISTRICT CT.
PHILADELPHIA, PENNSYLVANIA

TO

NATIONAL CONFERENCE ON
THE CAUSES OF POPULAR DISSATISFACTION
WITH THE ADMINISTRATION OF JUSTICE

SPONSORED BY

JUDICIAL CONFERENCE OF THE UNITED STATES
CONFERENCE OF CHIEF JUSTICES
AMERICAN BAR ASSOCIATION

THURSDAY MORNING, APRIL 8, 1976

ST. PAUL, MINNESOTA

We must be forever mindful that when Roscoe Pound spoke here in 1906 he was primarily concerned about assuring justice and improving its quality for all of our citizens. He was not interested in any band-aid or cosmetic process which would mask the wounds of injustice that degraded the judicial system. To use his term, he felt that one must probe the "causes" of the dissatisfaction and, to the extent possible, eliminate the wounds while preserving the positive strengths of our judicial body.

I have been asked to analyze the "...appropriate criteria for determining the kinds of disputes which should concern the courts, no doubt placing some emphasis on constitutional issues and questions of human rights." To analyze human rights in the judicial process, one must understand the history of the specific eras in which rights evolve. One must be careful not to assume that solutions proposed in 1906, even by such a thoughtful observer as Dean Pound, will be entirely adequate to meet the challenges, storms and aspirations of a nation which has reached its bicentennial birthday.

I do not believe that this stance is unfaithful to the spirit of that eminent scholar whose address is the inspiration for our own deliberations. While we have already heard

and undoubtedly will have many entirely appropriate suggestions about how we might avoid litigation, in his own time Pound took issue with what he called "the stock saying that litigation ought to be discouraged." As he phrased it, "in discouraging litigation [illegible] of all people in the world we ought to have been those most solicitous for the rights of the poor, no matter how petty the causes in which they are to be vindicated."[1/]

Pound was bemoaning the tendency to discourage litigation rather than to create new forums for it, such as municipal courts, or small claims courts, because "with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed."[2/]

Some rights, however, must be asserted through traditional litigation processes. We can learn something about this from one of Dean Pound's colleagues and contemporaries, Moorfield Storey, Boston advocate, and former American Bar Association President. In 1911, he devoted a lecture series at Yale Law School to The Reform of Legal Procedure, in which he bemoaned "the congestion of the docket, the fact that cases are brought faster than they can be tried, and the inevitable accumulation of work."[3/] Storey's "first remedy" was legislation

to remove some of the causes of litigation, and he advocated especially workmen's compensation systems. Yet Storey knew that there were some rights that had to be secured in the courts, and that is why he acted as counsel for the N.A.A.C.P., an organization he helped found,[4/] in three momentous cases in the Supreme Court--cases that surely spawned more litigation. The cases were Guinn v. U.S., 238 U.S. 347 (1915), outlawing the "grandfather clause," Buchanan v. Warley, 245 U.S. 60 (1917), invalidating a Louisville housing segregation ordinance, and Moore v. Dempsey, 261 U.S. 86 (1923), asserting the right to federal habeas corpus from a state trial conducted in the passion of racism.

I

I think that Chief Justice Burger, one of the moving forces behind this meeting, was quite realistic when, in his address to the American Bar Association two months ago, he said, "It would be a mistake to create great expectations about this conference that cannot be fulfilled in the short term." But the Chief Justice also said, "we are determined that the monumental dimensions of the task and the improbability of immediate results should not keep us from undertaking the inquiry." I agree wholeheartedly. We ought to begin the inquiry, for I am no opponent of judicial reform. Early in

my career on the bench, I had the privilege of assisting the then Chief Judge, now Senior Judge, Thomas Clary in moving the District Court for the Eastern District of Pennsylvania from a master calendar system to an individual calendar system, a change that has materially increased the efficiency of our court and has drastically reduced the average disposition time for cases filed there. Even now, I fear that I weary my colleagues in the Eastern District with nemos suggesting ways in which we might deal more expeditiously with the business of our court. Much can be accomplished by procedural changes, systems analysis and incorporation of sophisticated management techniques.[5/]

Yet in putting Roscoe Pound and the era in which he spoke in adequate perspective, we must be mindful of the possibility that too intense a focus on form can obscure our perception of matters of substance -- "human rights" for instance. I know that when I speak of concern for human rights, many may respond: "But who opposes the judicial protection of human rights?" In the abstract, of course, no one does. In practice, however, it is often another story. Suppose, for example, that someone had sponsored a conference similar to this one on the 25th anniversary of Pound's address. If such a conference had been held in 1931, some of us here today would have been excluded from membership in one of the sponsoring organizations.[6/] Yet such a conference in 1931 would undoubtedly have been composed of honorable persons who would

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have bristled with indignation at any suggestion that they were not concerned about human rights. We know now that 1931 was not the millenium. Neither, I submit, is 1976. There are still, and perhaps always will be, issues outstanding on the human rights agenda. We neglect them at our peril. Thus, I disagree with those who may ultimately feel that my entire analysis is only the creation of a "straw man," followed closely by its systematic destruction. That is not my intention. What I hope to do is point out some dangers on the road to reform, dangers that if ignored could cause, not progress, but retrogression. The engineer who stresses the dangers that menace a rocket's crew, even though their ship has not yet left its launch pad, is not opposed to landing on the moon. But unless those dangers are recognized, the ultimate landing may not be worth the sacrifices endured during the journey.

The quest for meaningful improvements in the way we settle disputes can be an intellectually challenging and perhaps even fascinating adventure--and a priority of the first order--especially for those of us who are required by our calling to plunge ourselves daily into the minutiae of the law. Yet our goal cannot be merely a "reform" that seeks to ease the courts' caseloads. For what does it profit us if, in making things easier for ourselves, we make things more difficult for others? What does it profit us if, in shifting our burdens to other agencies and institutions, we make impossible the burdens on those who must deal with those agencies and institutions? What does it profit us if, in putting our own judicial houses in order, we have no room in them for those who have relied and must continue to rely on the hospitality of the courts for the vindication of their rights? What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice? I do not contend that this will happen. Certainly, it need not. But I do say that we must be aware of the temptation to proceed as though the judicial process involved only parties, not people. If judicial reform benefits only judges, then it isn't worth pursuing. If it holds out only progress for the legal profession, then it isn't worth pursuing It is worth pursuing

only if it helps to reform the promise of America. It is worth pursuing only if it helps to secure those constitutional and statutory rights which, because they should be enjoyed by all our citizens, have made our democracy, despite its faults and failures, a significant model for the world.

The reformers whose contributions we prize today--Pound and Storey, for example--set their attack on inefficient courts and legal institutions within a broader vision of the needs of an America recently traumatized by industrialization, by waves of helpless immigrants and by a pervasive hostility to the rights of large classes of citizens. They realized that courts had to be reformed and new institutions of dispute settlement created in order to remedy the injustices--great and small--that pervaded American society at the turn of the century.

Our starting points must be a review of the era of the early 1900's and a careful appraisal of the quality of justice then available to the mass of our citizens -- particularly the black, the weak, the poor, the consumer, and the laborer -- that configuration of persons which, in 1906, might have

been termed "overloads." We have to make these assessments so that in our quest for reform we do not unwittingly turn the clock back to the dimensions of misery which persisted then. We must never forget that in part the increased judicial workloads and more complex judicial problems of the last several decades have been often the unavoidable accompaniments of a long-overdue expansion of many substantive rights.

Roscoe Pound spoke but just three years after the Wright Brothers had taken their maiden flight at Kitty Hawk; he spoke at a time when the population of the country was predominantly rural; he was describing a world which knew neither the atomic bomb nor the benefits of harnessing nuclear energy. Sulfa drugs, penicillin, and antibiotics were undreamt of marvels. In reality, he spoke to a nation where the rights of the powerless were not the preeminent concerns of either the legal process or the legal profession. There were no major governmental agencies to protect the consumer, the aged, the pensioner, the investor, or the workingman.

In 1900, all expenditures of the federal government amounted to less than half a billion dollars. The Department of Justice spent 1.3 percent of that sum, less than seven million dollars. By 1975, total federal expenditures had increased seven-hundred fold, to approximately 325 billion dollars. In 1975, the Justice Department's expenditures alone exceeded two billion dollars, four times the total sum expended by every branch of the federal government in 1900. In the light of this massive expansion of government and its functions,[8] we should not be surprised that the business of the courts has increased, for they are called on to monitor the pervasive relationships between government and citizens that this expansion has created.

II

If we are to place the era of which Pound spoke in proper perspective, if we are to see its true relationship to the challenges we face today, we must analyze how the courts, and sometimes society at large, dealt with fundamental issues of human rights. As we look back to 70 years ago, and compare that time with our own, George Santayana's celebrated comment on the uses of history becomes particularly relevant: "Those who cannot remember the past are condemned to repeat it."[9] A focus on six groups of individuals will shed some light on our inquiry:

racial minorities, women, the voter, working people, the victims of crime, and victims of court insensitivity.

I submit that over the past 70 years, the greatest legacy of our legal and judicial institutions has been their role in helping to secure the rights of these people, to see to it that they received the justice that is the due of every person in this country. I submit moreover that our greatest obligation in preparing for the next 70 years and beyond is to protect that legacy and to make its principles the basis on which we fashion new methods of dispute settlement and develop new procedures within the courts.

Race and the Legal Process

While I recognize that extraordinary progress has been made since Pound spoke, and without intending to offend anyone, it is appropriate that we focus on race relations as they existed in 1906 -- a time when blacks had been residents in this country for almost three centuries, though mostly as slaves.[10] Every presidential commission[11] and almost every Supreme Court opinion[12] dealing with racial matters have noted the fact that in this country there has often been racial injustice for blacks. Three incidents are sufficient to highlight that human rights issue. They explain why, when the pendulum of recognition of the aspirations of black Americans began to swing in the 1950s, it had to swing as far as it did.

When in 1896 in Plessy v. Ferguson[14] the United States Supreme Court sanctioned a strange doctrine that, among the multitude of peoples, ethnicities and groups in this country, blacks (and basically only blacks) could be isolated by the state in human affairs, Justice John Harlan dissented eloquently on the grounds that "the common government of all [should] not permit the seeds of race hate to be planted under the sanction of law."[15] But soon after that sanctioning of racist law, one state was spending ten times as much for the education of each white child as it was for the education of each black child, and many were spending twice to three times as much for the education of each white child.[16]

The racial disparity and discrimination that existed in education was sanctioned by the legal process in almost every other area that today would be categorized as a human right -- in housing, employment, voting, and personal relations.

The ultimate irony of the decade in which Brown spoke is perhaps best exemplified by Berea College v. Kentucky[17], when the Supreme Court in 1908 upheld the validity of a 1904 Kentucky statute which prohibited a private college from teaching white and Negro pupils in the same institution. Berea College was established in the Kentucky mountains in 1854 by a small band of Christians who began their charter with the words, "God hath made of one blood all nations that dwell upon the face of the earth." After the Civil War it admitted students without racial discrimination, and by 1904 it had 174 Negro and 753 white students. It was a private institution supported by those who subscribed to its religious tenets, and it neither sought nor received any state aid or assistance. Yet the Supreme Court held that a state could prohibit any private institution from promoting the cause of Christ through integrated education. What a tragic ruling! A nation loudly pronounces its faith in freedom of religion, yet sanctions a state's denial of the day to day application of religious concepts if practiced in an integrated religious setting. Justice Harlan wrote another eloquent dissent in Berea College; tragically, Justice Holmes, for all his prescience and ability, concurred in the majority's repressive opinion.

The human rights level of this country in that decade was strikingly illustrated when a most moderate colored leader, Booker T. Washington, had an informal lunch with President Theodore Roosevelt. 18/

The Memphis Scimitar said,

> "The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White House." 19/

Senator Benjamin Tillman of South Carolina said:

> "Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places." 20/

Georgia's governor was sure that "no Southerner can respect any white man who would eat with a Negro." 21/

The sequellae of judicial obliviousness and legal antagonism to the human rights of blacks is perhaps most dramatically exemplified by the response which a United States Senator, who was also a lawyer, gave to the 1944 suggestion of Dr. Studebaker, of the U. S. Office of Education, that the colleges and universities of the south should open their doors for the matriculation of Negro students. Senator Theodore Bilbo gave his "full and complete endorsement" to the Jackson (Mississippi) Daily News' editorial comment that the Washington officials should "go straight to hell." He emphasized that:

> [The editor] is right when he says that the South won't do it and that not in this generation and never in the future while Anglo-Saxon blood flows in our veins will the people of the South open the doors of their colleges and universities for Negro students. I repeat that [the editor] is right. We will tell our Negro-loving Yankee friends to go straight to hell. 21/

He concluded by stressing that:

> History clearly shows that the white race is the custodian of the gospel of Jesus Christ and that the white man is entrusted with the spreading of that gospel.
>
> * * *
>
> We people of the South must draw the color line tighter and tighter, and any white man or woman who dares to cross that color line should be promptly and forever ostracized. No compromise on this great question should be tolerated, no matter who the guilty parties are, whether in the church, in public office, or in the private walks of life. Ostracize them if they cross the color line and treat them as a Negro or as his equal should be treated....
>
> * * *
>
> [I]t is imperative that we face squarely and frankly the conditions which confront us. We must not sit idly by, but we must ever be on guard to protect the southern ideals, customs, and traditions that we love and believe in so firmly and completely. There are some issues that we may differ upon, but on racial integrity, white supremacy, and love for the Southland we will stand together until we pass on to another world. 22/

Thus, during World War II, almost 50 years after Plessy and almost 40 years after Pound's address, while thousands of black soldiers were dying on battlefields throughout the world to seek victory for democracy against Hitler's Aryanism, the mold of racism was still firm at home, to such an extent that neither civil rights legislation nor anti-lynching laws could be enacted.

Other defenders of Jim Crow spoke in voices less shrill than Bilbo's, but their hatred and their racism were just as intense. Instead of linking, as Bilbo did, the gospel of Jesus Christ with white supremacy, his successors used more sophisticated terms like "interposition" and "nullification" and demonstrated a willingness to sit in school house doors forever to assure segregation forever.

I have cited these instances because they are a part of America's history. I recognize that some former proponents of segregation are now semi-devotees of civil rights for all. Much progress has been made, and today's challenges span all regions and sectors of our country. I do not mention this earlier era to antagonize, but rather to reemphasize that today's complexities owe their existence in significant part to the legal process of yesterday, which was often inadequate and uncommitted to assuring equal justice for all.

What I have said about blacks as an example applies with much the same force to other segments of the population which seven decades ago were powerless.

The Status of Women

Some persons question the appropriateness of courts adjudicating whether girls can play Little League baseball or whether women should be assigned police patrol work or whether females should be admitted to all-male educational institutions. They urge that these troublesome disputes be kept out of court, for "after all, men are men and women are women. God made them that way. Why should the courts get involved?" More often than not, such short-sighted concerns for judicial tranquillity and uncluttered courts fail to recognize the dehumanization which the bench, the professional bar associations, the law schools and even the legal profession as a whole sanctioned or tolerated for so long. They fail to recognize as well that while there is an essential place for non-judicial forums in resolving disputes, the cutting edge of the move to remedy the results of this dehumanization must have a sharp judicial component.

Is it without significance that when Roscoe Pound spoke, women could not be admitted to the esteemed law school whose dean he later became, and that it took almost a half century after Pound's 1906 speech for Harvard Law School to reach that stage

of enlightment where it deemed women worthy to enter the portals of the law school which produced Justices Story, Holmes, Brandeis, Frankfurter, Brennan and Rehnquist?

The sad fact is that in 1906 the appearance of women attorneys in the courts was almost as rare as astronauts landing on the moon. Their second-class status even in our profession was sanctioned by the courts and the entire legal process. The United States Supreme Court in decades past has sanctioned patent deprivations of opportunity for women. Thus Myra Bradwell was denied admission to the bar of the State of Illinois in 1872 solely because she was a woman. Except for Chief Justice Chase, all of the Justices felt that the denial of her admission to the bar did not violate her federal constitutional rights. Justice Bradley felt compelled to add a concurring opinion:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her

> husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. ... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. State of Illinois, 83 U.S. 442, 446 (1873).

In 1906 women did not have a federal constitutional right to vote, and many were precluded even from serving on juries.

There has been progress. In 1872, the Justices of the Supreme Court considered women "naturally timid," "delicate," and "evidently unfit" for many of the occupations of civil life. In 1974, the Court categorized past deprivations of women as either "overt discrimination" or "the socialization process of a male-dominated culture."[25/] If we are serious about lowering the barriers which previously confronted women, necessarily the courts' backlogs and burdens will be steadily increased and court reform must be cognizant of this fact.

Voting: A Fundamental Right

As I have said, when Roscoe Pound spoke, women did not enjoy a federal constitutional right to vote. Not until 1920 did the Nineteenth Amendment remove that particular badge of inferiority from approximately one-half the nation's adult population.

The franchise was restricted in other ways, too. I have already discussed some of the grievances of black Americans in the early decades of this century. The deprivation of voting rights was often another. Theoretically, the Fifteenth Amendment had secured the right of suffrage to black Americans. In many parts of the country, however, they were practically disenfranchised--through literacy tests, poll taxes, grandfather clauses[26] and the like. Though there was some erosion of the obstacles to the exercise by blacks of their Fifteenth Amendment rights[27], those obstacles remained substantially intact in many areas until the passage and enforcement of the Voting Rights Act of 1965[28] at last allowed black victims of voting discrimination some voice in the determination of their own political destiny.

Moreover, in 1906, the apportionment of several state legislatures had already taken the form that would endure, with steadily increasing imbalances in voting power, until the "one-person, one-vote" decisions of the 1960's.[29] These latter decisions, as we all know, transformed the political face of the nation,[30] but not without severe criticism by some who thought the judiciary was intervening in an area beyond its competence. Justice Frankfurter, dissenting in Baker v. Carr, supra, said the case was "unfit for federal judicial action," and termed the decision itself "a massive repudiation of the experience of our whole past." The second Justice Harlan, dissenting in Reynolds v. Sims, supra, argued that it and other reapportionment decisions "give support to a current mistaken view * * * that every major social ill in this country can find its cure in some constitutional 'principle,' and that this court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."[31] I agree with the suggestion that the Constitution is not a panacea for every social ill. The dissenters were certainly right when they warned that judicial review of state reapportionment plans would be fraught with difficulty.

Nevertheless, I cannot accept their conclusion, for it leads to judicial paralysis in matters involving critical rights. Chief Justice Warren's majority opinion in Reynolds announced a principle that no conference on judicial reform can afford to ignore: "a denial of constitutionally protected rights demands judicial protection." In spite of the problems inherent in complying with the mandate of the reapportionment decisions, it is incontestable that these decisions were responsible for a fundamentally more equitable redistribution of political power in our country, one that was long overdue. Our democracy and our people are the beneficiaries.

The Situation of Working People

Sixty years ago, Roscoe Pound was witnessing the breakdown of the common law system, a system which for its efficient functioning relied primarily on the initiative of individuals, who were expected to look out for themselves and to vindicate their own rights. As Pound put it in his 1906 address:

> In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Public suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interest, common-law methods of relief have failed." 32/

The courts of that time, however, were still trying to apply common-law concepts to the social and economic problems of the "modern industrial society" that Pound saw emerging. The effort was not universally acclaimed, leading Pound to say that "[a]t the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation." In fact, he concluded, "the courts have been put in a false position of doing nothing and obstructing everything." 33/

A few familiar examples will illustrate the obstructionism that, in Pound's view, courts were compelled to indulge in because of their fidelity to obsolete common-law concepts. In Lochner v. New York, 198 U. S. 45 (1905), the Supreme Court invalidated a New York maximum hours law because it interfered with the freedom of bakers to enter into contracts with their employers. In Adair v. United States, 208 U.S. 161 (1908), the court held that Congress could not prohibit employers from discriminating against their workers for the union organizing activities of the latter. And in Coppage v. Kansas, 236 U. S. 1 (1915), the Court ruled, again on hallowed "freedom of contract" grounds, that a state could not outlaw "yellow dog" labor contracts. To the Court's credit, it did not strike down every social welfare measure presented to it. In Muller v. Oregon[34], it upheld a maximum hours law for women, though on grounds that some women might find offensive today.

Lochner, Adair, and Coppage were not the end of the story, of course. Eventually, all were expressly overruled as the Supreme Court itself adjusted to emerging social and economic realities.[35]

I am well aware that some believe that the impotence the workingman experienced in the early decades of this century has been replaced by the omnipotence of organized labor today.

I will not join that debate; rather, I wish to emphasize that many of the gains and successes of working men and/or organized labor today are directly attributable to rights which have been recognized or expanded by the courts of previous generations. Thus, are we to now say that the system which has made the courts accessible to and supportive of the working man should not now be involved in striking a balance for other groups which have not had full entry into the system?

Victims of Crime

In his 1906 address, Pound did not identify or discuss as a major problem any dissatisfaction with the criminal justice system. He apparently felt no need to focus on that system for that specific audience.[36] This conference, of course, has such a focus, a much needed one, and we will,

I am sure, hear a good deal about it tomorrow, from some of the remaining speakers. But I submit that it is too narrow a focus unless it embraces the victim of crime as well as the person whom the system calls the perpetrator. Of course, we should be concerned about the Fourth, Fifth and Sixth Amendment rights of the criminal defendant, but we should also be concerned about the fundamental civil right of the ordinary citizen to be secure in his or her person and property. Of course, we ought to be concerned about the humaneness of our prison systems, but we ought also to be concerned about the humaneness of our urban environments and the safety of our streets. When the streets are not safe, when every citizen carries an extra burden of

fear, his environment is not humane. Of course, a criminal defendant has a right to bail, but we should not allow unlimited delays in trial which prolong bail indefinitely. Of course, a defendant has a right to the effective assistance of counsel, but that should not mean that he may postpone trial indefinitely while waiting for a specific counsel of his choice. Please do not mistake my meaning. I am not suggesting that the guarantees of the Bill of Rights be suspended. But I do submit that while criminal defendants have a constitutional right to a speedy trial, society at large also has a vital stake in the prompt disposition of criminal charges against a defendant. Securing the prompt disposition of such charges must be a top priority in any reform of the judicial process. While progress is being made under statutes designed to assure defendants a "speedy and fair trial," much remains to be done. There will be problems in the transition. It will not be easy. Courts may have to assume more burdens, but it is difficult, if not impossible, to justify why individuals should be out on bail on serious crimes for months and sometimes years before final trial disposition.

In the context of this conference, the courts bear a heavy responsibility to organize themselves for the fair but expeditious processing of criminal cases. To a major extent the disposition of serious crimes is not a function which can be delegated to agencies other than the courts. Thus, in terms of our concern for human rights, we must work simultaneously on improving the

processes of the criminal justice system for both the victims and the defendants and on preserving the court's capacity to deal with other fundamental human rights as well.

Victims of Court Insensitivity

There is another point which deserves to be stressed in any discussion about reform of the criminal and civil justice systems. We have to be concerned about innocent victims of the justice system itself, about those who are not part of the courthouse bureaucracy. Go into the courts in most urban communities and you will often observe either outrageous insensitivity to, or woeful systems planning for, witnesses who respond to subpoenas. It is not unheard of for a witness to appear eleven or twelve times as a case is continued again and again, either because the court cannot reach it or because some counsel is not available. In civil cases, parties sometimes wait five years for an adjudication of their rights. Court personnel sometimes treat citizens with a curtness that some of the less enlightened prison wardens would not display to the convicted felons in their custody. In this context of insensitivity to, and of non-support for, the participants in the litigation process, we have to ask whether some of the sacred rights we espouse are really designed for justice and the benefit of the parties and the public, or do these processes exist more for the basic convenience of judges and lawyers. It is not clear to me whether some of the many continuances that are granted by the courts are caused by a desire to let every person have his own counsel, or, instead, are these

delays unintentional placations of the bar which permit some lawyers, who have more clients and cases than they can now adequately handle, to increase their backlog so that the date of ultimate trial is indefinitely postponed. It is not at all clear to me whether an oligopoly is now developing within the bar whereby the entire judicial system is designed, or at least has been modified, to accommodate the schedules of the busiest and most successful lawyers rather than to function within reasonable time frames for the prompt and fair disposition of their clients' cases.

Permit me to mention just one well-documented instance that reveals how the judicial system, and even judges, can be insensitive to the dignity of the citizens who are caught up in the legal process. A black women was testifying in her own behalf in a habeas corpus proceeding. "The state solicitor persisted in addressing all Negro witnesses by their first names" [37/] and when he addressed the petitioner as Mary, she refused to answer, insisting that the prosecutor address her as "Miss Hamilton." The trial judge directed her to answer, but again she refused. The trial judge then cited her for contempt. On appeal, the highest court in the state affirmed, because the record showed that the witness's name was "Mary Hamilton," not "Miss Mary Hamilton." Happily, the Supreme Court of the United States granted certiorari and summarily reversed the judgment of contempt. Hamilton v. Alabama, 376 U.S.650 (1964), rev'g 275 Ala. 574, 156 So. 2d 926 (1963). Some might

say that this case exemplifies an unjustifiable waste of legal talent and judicial effort in order to determine whether the appellation "Miss" should be used in cross-examination. I disagree. At the core of this case was a person begging that a system which is supposed to dispense justice treat her with dignity and the kind of sensitivity that courts automatically accord to persons of power and prestige.

3. IN VIEW OF OUR HISTORY, ARE COURTS FUNCTIONING BEYOND THEIR COMPETENCE IN THE HUMAN RIGHTS AREA, AND WHAT ARE THE ALTERNATIVES?

While I have stressed that we should be particularly cautious about any reforms which may cause a diminution of basic and fundamental human rights, I am no opponent of good order. I have supported every judicial reform measure that promised to contribute to the orderly functioning of our courts without sacrificing the rights of our citizens. I submit, however, that order is not an absolute. It cannot be, for human affairs, and especially the affairs that come before us in the judicial process, are often inherently disorderly. In some cases, passions not only run deep, they erupt into violence.

I have in mind not just the felony dockets of local criminal courts, but also landmark human rights decisions where the Supreme Court of the United States rejected arguments that such cases were, for a variety of technical reasons, not the proper business of the federal courts.

In Screws v. United States, 325 U.S. 91 (1945), for example, a black man who had been charged with the theft of a tire was beaten to death by the sheriff of Baker County, Georgia, and two other law enforcement officers. In Monroe v. Pape, 365 U.S. 167 (1961), police officers of a Northern city had broken into the petitioners' home, routed them from bed, and forced them to stand naked in the living room while they ransacked every room in the house. In the background of United States v.

Price, 383 U.S. 787 (1966), was the murder of three civil rights workers, Michael Schwerner, James Chaney and Andrew Goodman. Griffin v. Breckenridge, 403 U.S. 88 (1971), involved a group of black citizens who, while driving along a highway in Mississippi, were mistaken by whites for civil rights workers. They were forced to stop, ordered out of their vehicle, and beaten with iron clubs.

Should these matters have been in the federal courts? I think so, for if the Supreme Court had not been willing to expand an overly narrow construction of the federal civil rights acts, where would these particular victims, and others like them, have gotten justice?

A basic reason for the necessity of having the courts available to vindicate the rights of our citizens is that other institutions in our society, institutions designed to either vindicate or protect those rights, have either failed to do so or have broken down completely. We should never be complacent about the accomplishments of the judicial system. I certainly am not, and I believe that one of the profound contributions this conference can make to the nation is to shatter any illusions we might entertain about living in the best of all possible judicial worlds. Nevertheless, I am convinced that the courts, when their achievements and their efficiency are compared with those of other institutions in our society, have not been abysmal failures. The short and simple reason for the assumption by the courts of tasks that are allegedly "beyond their competence" is

the failure of supposedly competent institutions to perform those tasks effectively or with adequate protection of the rights of the clients of those institutions. I agree that in the best of all possible judicial worlds, judges should not be asked to run railroads or to function as school superintendents or to serve as chief executive officers of state prison systems. But if supposedly competent businessmen so manage a railroad that it collapses into bankruptcy, or if supposedly professional educators countenance or are powerless to deal with de jure segregation in the school systems they are charged to administer, or supposedly competent corrections personnel preside over a prison system that is riddled with constitutional violations, then judges have no choice but to intervene. The courts, I submit, are not reaching out for these responsibilities; they come to the courts by default. And so long as other institutions in society default on their responsibilities, the courts will have what I consider an absolutely necessary role to play in the vindication of individual and collective rights.

It was Alexis de Toqueville who first said that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[38] In his 1906 address Dean Pound said much the same thing: "the subjects which our constitutional polity commits to the courts are largely matters of economics, politics, and sociology, upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation."[39] We may not agree with Roscoe Pound that great matters of economics, politics, and sociology are always tried

as incidents of private litigation," but they are surely "made into legal questions." The fate of the New Deal, largely a matter of economics, remained uncertain until the decision of the Supreme Court in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The people's right of access, through a grand jury, to information in the control of the executive branch of government, a political issue of the utmost seriousness, was a matter of speculation until the Supreme Court enforced a subpoena on the President in United States v. Nixon, 418 U.S. 683 (1974). The destiny of black people in America, a matter of sociology as well as of justice, was unclear until the Supreme Court found segregated schooling inherently unequal in Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny. There is, of course, no guarantee that even a definitive pronouncement by the courts will put to rest all dispute over an issue of public policy. Witness the continuing controversy over abortion.

Nevertheless, I still submit that our constitutional polity could barely function at all if the courts were not available to vindicate the rights of our citizens and thus define the limits of public and private action within that polity.

We are all familiar with the famed Footnote Four of Chief Justice Stone's opinion in United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938). Even though it deals with the standard to be employed in reviewing legislative

enactments and even though it suggests more than it proclaims, that footnote has rightly been read as a manifesto of judicial sensitivity to the rights of those who are powerless to vindicate their rights. Since the Carolene Products decision, the courts have done much to redeem the promise of Footnote Four, and I suggest that we can fruitfully apply its teaching in this conference as well. We will be dealing, of course, with proposals for reform of dispute resolution and for the reform of judicial administration, not legislative enactments. Some have suggested that a "judicial impact" statement be prepared before statutes creating new legal rights are enacted, so judicial resources can be provided to protect them. I suggest, by the same token, that we prepare, at least mentally, another kind of impact statement, one that weighs the effect of the reforms that might be proposed to us on what Footnote Four termed "discrete and insular minorities," and subject those reforms that might work to the disadvantage of the poor, the weak, and the powerless to what Chief Justice Stone would call "a more searching judicial inquiry."

You may have noticed that I have not defined what I mean by the term "human rights." The omission is deliberate. I doubt that, even if I tried, I could formulate a definition of "human rights" that would adequately differentiate my perception of fundamental "human rights" from the multitude of varied interests that, at one time or another, have been called "human rights."[40/] I do think we ought to be concerned about what has been rightly termed a trivialization of the constitution.

For instance, some would argue, though I would not, that a high school football player has an absolute "human right" to wear long hair, regardless of his team's regulations or his coach's notion of discipline. Others would argue, though I would not, that prisoners have an absolute "human right" to snacks between meals. Cases involving these issues, I submit, seek the vindication of rights that are merely asserted, not real. Such cases, I am afraid, misuse a noble instrument, designed for a noble purpose, the protection of fundamental rights.

I should also point out that I do not include in the concept of "fundamental" human rights the interests that are at stake in automobile negligence cases, or longshoremen's suits, or medical malpractice actions. I am confident that we can develop means by which justice could be assured in these areas of tort law without the courts playing a central role and without destroying the fabric of our society. In all candor, I often wonder whether the loudest protests against no-fault auto insurance and against the removal of negligence cases from the courts stem from concern about the plight of accident victims or whether they originate in a concern about possible diminution of what are sometimes phenomenal windfalls in the form of counsel fees.

I believe that the victims of defective products, medical malpractice and automobile negligence can often receive greater protection in alternate systems of dispute resolution than they can in the courts. During my twelve years' experience on the bench, I have seen far many more

sp[illegible]s claims and frivolous defenses in personal injury cases than I have in civil rights cases. If we are going to apply a scalpel to our dockets, let us begin with these cases, which could be handled with fairness and greater efficiency in other forums.

I believe, however, that in the universe of human rights, the constellation of rights that I have discussed today are grouped at or near the center. I refer, of course, to the right to be free from racial or sexual discrimination, the right to vote, the right to basic protection from overpowering forces of the industrial age, the right to be secure in one's person and property, and the right to be treated with courtesy and consideration by a system that purports to be one of justice, not merely of law. If my references to astronomy lead some of you to think that I am too far out, let me also say that I believe that there is a hierarchy of human rights, and that the rights I have discussed cluster at or near the top of that hierarchy. Finally, I believe that all of us can agree that the rights I have discussed are indeed fundamental "human rights."

Conclusion

As I close, I hope that I have not gone too far. I know that I have resurrected some grievances that are 70 years old, and whose roots lie even further back in American history. I know that I have spoken stridently about them, and stridency is always susceptible of misunderstanding. I did not come here intending to offend anyone, but perhaps I have. Perhaps I have spoken too stridently for 1976, perhaps too stridently in light of the genuine progress this nation has made in the past 70 years, perhaps too stridently in the overall perspective of this country's history. But the grievances that I have mentioned were, and continue to be, harsh and discordant experiences in the lives of the victims, and their harshness has been caused in part by an insensitive legal and judicial process.

As I said at the outset, I wish this conference well. I hope it is successful. But I also hope that the fruits of its success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this -- the weak, the poor, the powerless -- those who, whether they like it or not, are inevitably involved in the process and the system that

we are privileged to preside over. By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just. We have enough victims in our society. In so many instances, they are victims of the conduct of others that violates the law. Let us not forget them. Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

FOOTNOTES

* While I accept total responsibility for all views expressed here, I wish to note that in many respects this paper has been jointly authored through the able assistance of my law clerk, Thomas M. Gannon, S.J., whose contribution I am pleased to acknowledge

1/ R. Pound, The Spirit of The Common Law (1921) at 134.

2/ R. Pound, supra at 132.

3/ M. Storey, The Reform of Legal Procedure (1912) at 50.

4/ Moorfield Storey was the first president of the NAACP. For its history, see L. Hughes, Fight for Freedom: The Story of the NAACP (Berkeley ed. 1962).

5/ I have developed these views in "Effective Use of Modern Technology," in JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY (W. Swindler, ed.) 140 (1971) and "The Trial Backlog and Computer Analysis," 44 F.R.D. 104 (1968).

Fortunately, court management personnel are coming to realize that courts need not only managerial principles but also need to know how to apply those principles in the courts' special milieu. See, for example, E. Friesen, E. Gallas & N. Gallas, MANAGING THE COURTS (1971), and consult the JUSTICE SYSTEM JOURNAL, published by the Fellows of the Institute for Court Management. See also R. Wheeler and H. Whitcomb, PERSPECTIVES ON JUDICIAL ADMINISTRATION: TEXTS AND READINGS (forthcoming, 1977).

6/ "[D]iscrimination against Negro lawyers by the American Bar Association...led to the formation of the colored National Bar Association. In 1943 the American Bar Association elected a Negro, Justice James S. Watson of New York, the first to be admitted since 1912 when three Negroes, who were not known to be Negroes, were accepted. The same year the Federal Bar Association of New York, New Jersey, and Connecticut opened its membership to Negro attorneys and condemned the 'undemocratic attitude and policy' of the American Bar Association for discriminating against Negro members. In the actual practice of law so great are the limitations in the South that the majority of Negro lawyers have settled in the North." M. DAVIE, NEGROES IN AMERICAN SOCIETY 118 (1949).

The late Judge Raymond Pace Alexander spoke in 1941 in behalf of the necessity of a black bar association -- the National Bar Association -- as follows:

> Just so long as we are compelled to recognize racial attitudes in America, and the positive refusal to admit the Negro lawyer to membership in the Bar Associations of the South or even to permit them to use the libraries, just so long as the Negro lawyer is

> restricted in his membership in local Bar Associations in the North, and particularly, so long as the American Bar Association for all practical purposes refuses to admit Negroes to membership, then so long must there be an organization such as the National Bar Association. Certainly all of us shall welcome the day when racial animosities and class lines shall be so obliterated that separate Bar Associations, other separate professional associations as well as separate schools will be anachronisms.

Alexander, "The National Bar Association-- Its Aims and Purposes," 1 Nat'l B. J. 2(1941). See also Reflections, 1 BALSA REPORTS 8 (1973) (reprint of excerpts from Judge Alexander's speech).

Cf. J. Auerbach, Unequal Justice (1975).

7/ The Interstate Commerce Commission was already functioning, of course, but its primary task seems to have been the regulation of railroad rates. The principal consumer-oriented federal agencies -- the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Drug Administration come immediately to mind -- did not yet exist.

8/ It should be noted that funding for the federal courts has not kept pace with the increase in expenditures for the rest of the federal government. In 1900, the cost of the courts was one-half of one percent of the over-all federal budget. In 1975, total expenditures for the federal judiciary had declined to about one-thirteenth of one percent of the entire federal budget.

9/

G. Santayana, The Life of Reason (1905) at 284.

10. I have written in greater detail on the early practices in Higginbotham, "Racism and the Early American Legal Process, 1619-1896," 407 ANNALS 1 (1973), "Race, Racism and American Law," 122 University of Pennsylvania Law Review, 1044 (1974); "To the Scale and Standing of Men," Journal of Negro History, Vol. LX, No. 3, July, 1975; "The Impact of the Declaration of Independence,"; The Crisis, November, 1975. For general background see R. Bardolph, The Civil Rights Record (1970); D. A. Bell, Race, Racism and American Law (1973) 1975 Supp.; M. F. Berry, Black Resistance/White Law (1971); J. Blassingame, Black New Orleans (1973); J. Blassingame, The Slave Community (1972); S. Elkins, Slavery (1959); P. S. Foner, The Voice of Black America, Vol. I and II (1975); J. H. Franklin, From Slavery to Freedom (4th ed. 1974); G. Fredrickson, The Black Image in the White Mind (1971); L. Green, The Negro in Colonial New England (1942); W. Jordan, White Over Black (1968); G. Myrdal, An American Dilemma (1944); B. Quarles, The Negro in the Making of America (rev. ed. 1969); K. Stampp, The Peculiar Institution (1956); C. Woodson & C. Wesley, The Negro in Our History (11th ed. 1966); C. V. Woodward, Origins of the New South (1951) ; C. V. Woodward, The Strange Career of Jim Crow (3rd ed. 1974). For the best bibliography, see A. Hornsby, The Black Almanac 169 (1972). For an anthology, see Civil Rights and the American Negro (A. Blaustein & R. Zangrando eds. 1968).

10. (cont'd.)

The United States Commission on Civil Rights in 1961 filed a series of key documents, Vols. 1 through 5, on voting, education, employment, housing, justice. A classic report which should be particularly pertinent to lawyers is the United States Commission on Civil Rights, 1965, A Report on Equal Protection in the South. See particularly pages 182-188, the separate statement of Commissioner Erwin N. Griswold. A superb analysis can be found in the ANNALS, Blacks and the Law, May, 1973; note particularly the article of Judge William H. Hastie, "Toward an Equalitarian Legal Order, 1930-1950," at 18.

11/ The first commission on civil rights appointed by any president was established by Harry Truman, pursuant to Executive Order 9808. In 1947, the President's Committee on Civil Rights filed a report, "To Secure These Rights," which stated:

"Our American heritage of freedom and equality has given us prestige among the nations of the world and a strong feeling of national pride at home. There is much reason for that pride. But pride is no substitute for steady and honest performance, and the record shows that at varying times in American history the gulf between ideals and practice has been wide. We have had human slavery. We have had religious persecution. We have had mob rule. We still have their ideological remnants in the unwarrantable 'pride and prejudice' of some of our people and practices. From our work as a Committee, we have learned much that has shocked us, and much that has made us feel ashamed. But we have seen nothing to shake our conviction that the civil rights of the American people - all of them - can be strenthened quickly and effectively by the normal processes of democratic, constitutional government. That strengthening, we believe, will make our daily life more and more consonant with the spirit of the American heritage of freedom. But it will require as much courage, as much imagination, as much perseverance as anything which we have ever done together. The members of this Committee reaffirm their

faith in the American heritage and in its promise." Id. at 9-10 (emphasis added).

See also Report of the National Advisory Commission on Civil Disorders (Washington, D.C.: U.S. Government Printing Office, 1968); National Commission on the Causes and Prevention of Violence, Final Report, "To Establish Justice, To Ensure Domestic Tranquillity," xxi, 8, 10, 13-15 (1969); 1 National Commission on the Causes and Prevention of Violence, Staff Report, "Violence in America: Historical and Comparative Perspectives" 38-41 (1968). Cf. Milton S. Eisenhower, The President is Calling 2-4 and Ch. 23 (1974).

12/ Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 10 L. Ed. 1060 (1842); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857); Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L. Ed. 835 (1883); Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256 (1896); Berea College v. Kentucky, 211 U.S. 45, 29 S. Ct. 33, 53 L.Ed. 81 (1908); Hodges v. United States, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65 (1906); James v. Bowman, 190 U.S. 127, 23 S. Ct. 678, 47 L.Ed. 979 (1903); Baldwin v. Franks, 120 U.S. 678, 7 S. Ct. 656, 32 L.Ed. 766 (1887); United States v. Harris, 106 U.S. 629, 1 S. Ct. 601, 27 L.Ed.

290 (1883); United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876); United States v. Reese, 92 U.S. 214, 23 L.Ed. 563 (1876); United States v. Powell, 151 F. 648 (C.C.N.D. Ala. 1907), aff'd per curiam, 212 U.S. 564, 29 S. Ct. 690, 53 L.Ed. 653 (1909). The following cases indicate the past problem of racial injustice and efforts to eliminate it:

(1) Voting. South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (implementation of 1965 voting rights act); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); Grovey v. Townsend, 295 U.S. 45,55 S.Ct. 622, 79 L.Ed. 1292 (1935); Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); Anderson v. Martin, 375 U.S. 399, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); cf. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (one man-one vote); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663 (1962). See also Burke Marshall, Federalism and Civil Rights (1964).

(2) Education. Milliken v. Bradley, 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L.ED.2d 554 (1971); Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950); Sweatt v. Painter, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); Cooper v. Aaron, 358

U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958); Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); Cumming v. County Board of Education, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262 (1899).

(3) Housing. Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926); Richmond v. Deans, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128 (1930); Harmon v. Tyler, 273 U.S. 668, 47 S.Ct. 471, 71 L.ED. 831 (1927); Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

(4) Employment. Franks v. Bowman Transportation Co., Inc., 44 U.S.L.W. 4356 (U.S., March 24, 1976); Griggs v. Duke Power Co., 401 U. S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971); Steele v. Louisville & N.R. R.., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

(5) Public Accommodations. Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L. Ed.2d 290 (1964); Heart of Atlanta

Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

(6) Prohibition of racial violence. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); United States v. Johnson, 390 U.S. 563,88 S.Ct. 1231, 20 L.Ed.2d 132 (1968); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

13/ 163 U.S. 537.

14/ The Justices of the Supreme Court were not alone in their blindness to the realities of racism. Charles Warren's authoritative The Supreme Court in United States History, published in 1922, does not even mention Plessy v. Ferguson.

15/ 163 U.S. at 560.

16/ D.A. Bell, supra at 452; Higginbotham, 122 U. of Pa. L. Rev. at 1060-61.

17/ 211 U.S. 45 (1908).

18/ See generally G. SINKLER, THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS, FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT (1972). Even the false rumor that a black had been present at an official White House function was sufficient to drive President

Cleveland to frenzy, and thus he responded: "It so happens that I have never in my official position, either when sleeping, waking, alive or dead, on my head or my heels, dined, lunched, supped, or invited to a wedding reception, any colored man, woman, or child." G. Sinkler, supra at 270.

19/ L. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (Meridian ed. 1967) at 206-07.

20/ Id. at 207.

21/ Id.

22/ The Development of Segregationist Thought 139 (I. Newby ed. 1968) (quoting 90 Cong. Rec. A1799 (1944)).

23/ Id. 143-145 (quoting 90 CONG. REC. A1801 (1944)).

24/ See C.V. Woodward, The Strange Career of Jim Crow (3rd rev. ed. 1974) at 7:

"The origin of the term 'Jim Crow' applied to Negroes is lost in obscurity. Thomas D. Rice wrote a song and dance called 'Jim Crow' in 1832, and the term had become an adjective by 1838. The first example of 'Jim Crow Law' listed by the Dictionary of American English is dated 1904." Jim Crow laws sanctioned "a racial ostracism that extended to churches and

schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." Id.

24a/ Of course, law schools such as Yale, Michigan, and the University of Pennsylvania admitted women as law students decades earlier, and their alumnae have made many profound contributions to improving the legal process.

25/ Kahn v. Shevin, 416 U.S. 351, 353 (1974).

26/ The grandfather clauses, at least, were struck down by the Supreme Court within a decade of Pound's address. Guinn v. United States, 238 U.S. 347 (1915).

27/ See, e.g., Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); and Nixon v. Herndon, 273 U.S. 536 (1924).

28/ 42 U.S.C. §§1973 et seq.

29/ See e.g., Reynolds v. Sims, 377 U.S. 533 (1964) (Alabama); Baker v. Carr, 369 U.S. 186 (1962) (Tennessee).

30/ For example, the combined impact of the reapportionment decisions and the Voting Rights Act of 1965 significantly

increased the number of black elected officials in seven southern states. See U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After (Jan. 1975), reproduced in D. Bell, supra (1975 supp.) at 2:

"There is no available estimate of the number of black elected officials in the seven States before passage of the Voting Rights Act. Certainly it was a small number, well under 100 black officials. By February 1968, 156 blacks had been elected to various offices in the seven States. This total included 14 State legislators, 81 county officials, and 61 municipal officials....

"More recent statistics show greater progress in electing black officials. By April 1974, the total number of black elected officials in the seven States had increased to 963. This total included 1 Member of the United States Congress, 36 State legislators, 429 county officials, and 497 municipal officials....

"In all of the covered Southern States there are now some blacks in the State legislature and in at least some counties of each State there are blacks on county governing boards. Although the number of offices held by blacks is rather small in comparison to the total number of offices in these States, the rapid increase in the number of black elected officials

is one of the most significant changes in political life in the seven States since passage of the Voting Rights Act."

30a. 369 U. S. at 330, 267.

31. 377 U. S. at 624-25.

31a. 377 U. S. at 566.

32. Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am. L. Rev. 729, 737 (1906) (hereinafter "Address").

33. Address at 737-38.

34. 208 U. S. 412 (1908).

35. See Bunting v. Oregon, 243 U.S. 426 (1917), overruling Lochner; Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941), overruling Adair; and Lincoln Fed. Labor Union v. Northwestern Iron & Met. Co., 335 U.S. 525 (1949), overruling Coppage.

36. Even the most casual perusal of Pound's other writings reveals his own continuing advocacy of reform of the criminal justice system as well. See, e.g., Pound, "Do We Need a Philosophy of Law?," 5 Colum. L. Rev. 339, 347 (1905); R. Pound and F. Frankfurter eds., Criminal Justice in Cleveland (1922); and R. Pound, Criminal Justice in America (1930).

37. Petitioner's Brief for Certiorari at 4, Hamilton v. Alabama, 376 U. S. 650 (1964).

38. A. de Toqueville, I Democracy in America (P. Bradley ed. 1945) at 290.

39. Address at 740.

40. See McDougal, Lasswell and Chen, "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," 22 Am. U. L. Rev. 919 (1975). See also McDougal, Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, 14 Va. J. Int'l L. 387 (1974); McDougal, Lasswell & Chen, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, 63 Am. J. Int'l L. 237, 264-69 (1969); Universal Declaration of Human Rights, adopted Dec. 10, 1948, G. A. Res. 217, U. N. Doc. A/810 at 71 (1948) [hereinafter cited as Universal Declaration]. A collection of the more important global human rights prescriptions is conveniently offered in United Nations, Human Rights: A Compilation of International Instruments of the United Nations, U. N. Doc. ST/HR/1 (1973). Other useful collections include: Basic Documents on Human Rights (I. Brownlie ed. 1971); Basic Documents on International Protection of Human Rights (L. Sohn & T. Buergenthal eds. 1973).

Speech by Robert H. Bork
Solicitor General of the United States
Before the National Conference on the
Causes of Popular Dissatisfaction with
the Administration of Justice
St. Paul, Minnesota
April 8, 1976

I have been asked to say a few words about an embryonic project within the Department of Justice which, we have the temerity to believe, may be relevant to your deliberations. It is only fair, if painful, to say that our effort has been embryonic rather longer than nature usually provides for that stage of development, but it is also true that we have begun to progress, and that we hope soon to have substantive proposals developed sufficiently to solicit comments. What I have to say today, however, represents my own thought and not that of the departmental committee I chair. Most particularly, it does not represent the views of the Attorney General or the Deputy Attorney General, gentlemen who have enough opinions of their own to answer for without this additional burden. Before a departmental position is taken, quite obviously, the Attorney General and the Deputy will have to be persuaded of the self-evident correctness of what I am about to say to you.

Your topic today concerns the types of disputes best assigned to courts and the types better assigned to another forum. The question appears to assume that we have been using courts to resolve disputes for which they are not suited and that assumption is certainly justified. Yet candor, if not prudence, requires me at least to remark in passing that ~~a good deal~~ some of the judiciary's problems in this respect are self-inflicted. The truth is that the

more appropriate forum for many disputes now resolved by the judiciary is the democratic political process. Courts have upon occasion strained language and doctrine to extend their powers of review in an effort to ensure fairness in the manifold relationships of government and individuals. The intention is commendable but the result is often an unjustified shrinkage of the area of majority rule and, more to the point today, the acquisition by the judiciary of problems which they lack the criteria and the information to handle. We should not forget, then, that part of the solution to the problem posed lies entirely within the control of the courts.

But the topic I will address, and the topic that will be addressed by the committee the Attorney General has asked me to chair within the Department of Justice, constitutes a different slice of your concerns here. It is the allocation of types of disputes between different Article III courts and between Article III courts and other kinds of tribunals. We were brought to study that by the observation that there is, and for some years has been, a slow crisis building in the administration of justice by the federal court system. The cause of the crisis is simply overload, an overload so serious that the integrity of the federal system is threatened, an overload so little recognized that the bleak significance of plain, not to say obtrusive, symptoms ~~are~~ in not fully credited by the bar and, apparently, not by Congress.

Increasing population and commercial and industrial growth would in any event cause a rise in the federal caseload, but such causes would hardly have produced figures such as those

with which we are all too familiar. I will not repeat the statistics in detail but it is apparent that caseload has not merely risen dramatically but that the real acceleration began in the 1960's. In the period of twenty years from 1940 to 1960 the increase was just under 77 percent, but in the next fifteen years, it was just over 106 percent and it continues to rise.

The reason for increases so large seems apparent. We, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state. The tasks government undertakes grow steadily more numerous and always more complex. All of the branches of government are changed by the pressure of decision making but perhaps none more than the federal judiciary.

The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model. The symptoms are everywhere.

As caseloads rise, courts try to compensate. Time for oral argument is steadily cut back and is now often so short in the courts of appeals as to destroy most of its value. Some courts of appeals eliminate oral argument altogether in many cases. The statistics are not entirely clear but perhaps 30 percent or more of the cases are decided without any oral argument whatever.

The practice of delivering written opinions is also declining and now seems to be omitted in about 34 percent of decided cases at the court of appeals level. Some of the opinions shown as per curiam are actually only summary affirmances.

These trends are disturbing for they may erode the integrity of the law and of the decisional process. The intuitive wisdom of Anglo-American law has insisted upon oral argument and written opinions for very good reason. Judges, who are properly not subject to any other discipline, are made to confront the arguments and to be seen doing so. They are required to explain their result and thus to demonstrate that it is supported by law and not by whim or personal sympathy.

There is more. Courts are adding more judges, more clerks, more administrative personnel, moving faster and faster. They are in imminent danger of losing the quality of collegiality, losing time for conference, time for deliberation, time for the slow maturation of principle.

As a society we are attempting to apply law and judicial processes to more and more aspects of life in a self-defeating effort to guarantee every minor right people think they ought ideally to possess. Simultaneously, we are complicating trial and pretrial procedures in what must ultimately be an impossible effort to make every trial perfect. The two trends, I think, are flatly incompatible. We are seeking to handcraft every case. At the same time we are thrusting a workload upon the courts that forces them towards an assembly line model.

Assembly line processes cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist view of the law, wisdom, mature and dispassionate reflection, and -- especially important for the perceived legitimacy of judicial authority -- careful and reasoned explanation of their decisions.

It is for these reasons that the Department of Justice decided to study the problem and to suggest solutions. It seems to me, though my supposition has not yet been laid before my colleagues at the Department, that the remedy lies in a thoroughgoing overhaul of federal jurisdiction rather than tinkering with such things as the jurisdiction of magistrates or continually adding federal judges.

I recognize that more judges are desperately needed now but it is not the preferred solution. A powerful judiciary, as Felix Frankfurter once said, is necessarily a small judiciary. Large numbers dilute prestige, a major attraction of a career on the bency, and make it harder to recruit first-rate lawyers. Large numbers damage collegiality, lessen esprit, and diminish the possibility of interaction throughout the judicial corps. The likelihood not only of inter-circuit but of intra-circuit and inter-district conflicts rises, with all the costs of increased confusion and litigation that entails. However essential it is today, and it is essential, in the long-run continual increases in the size of the federal judiciary may prove a calamitous answer to the problem.

We are forced, I think, to the conclusion that only a reallocation of disputes among types of tribunals offers any long-run hope for the federal judicial system. Some of what I have to say will be familiar; some, I hope, will not. Taken together, these suggestions add up to a proposal for a drastic reduction of the jurisdiction of Article III courts.

(A)

Quite possibly, as some of the speakers this morning suggested, we rely upon formal adjudicative processes too much. Possibly, as a society, we rely upon law too much. But these are matters beyond the scope of our study and our efforts. We are accepting the adjudicative process in something like its present form as a given, at least for federal law in the foreseeable future, and asking what can be done within that framework.

The criteria to be used in reallocating disputes to other tribunals are the questions whether the present allocation is necessary to serve some important value and whether the courts now deciding cases are better qualified, have greater expertise, than the alternative forum.

Let me begin with the Supreme Court, where, I am sorry to say, I have, at least so far, least to suggest. The pressures upon that Court are reaching intolerable levels and it is imperative that something be done to relieve them. The most recent proposal is the creation of a National Court of Appeals. Some of the support for this proposal, however, rests upon an ambiguity. The Commission that proposed it did not intend to lighten the workload of the Supreme Court. They intended to double the system's capacity to make final appellate decisions of national scope. Their promise is that too many important inter-circuit conflicts go unresolved because the Supreme Court cannot address them. Judgment in such matters is necessarily somewhat impressionistic and I can only say that I am not aware of a serious problem in this respect, certainly not a problem of the dimensions that would justify a major structural change in the federal court system. The solution is disproportionate to the problem.

Others, including some Justices of the Court, are attracted to the idea of the new court as a means of lightening the Supreme Court's burden. I am not at all sure it would. The Supreme Court would have to make additional decisions. Besides deciding whether a petition for certiorari presented a case meriting

review, the Supreme Court would have to decide whether the issue was appropriate for it or for the National Court of Appeals. That is no simple decision, particularly since it is often difficult, at the jurisdictional stage, to know precisely upon what a case may ultimately turn upon or what implications the decision will have. To know those things is effectively to have decided the case.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme Court, to ensure that an issue had not been definitely resolved, or even dicta pronounced, in a manner contrary to its own views. The necessity of granting plenary review of a decision of the national court might arise frequently, particularly if the judicial philosophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate tiers of federal adjudication, and the result might be to increase rather than decrease the burden upon the Supreme Court.

If I am highly dubious about the idean of a National Court of Appeals, I confess that I am also not sure what can be done to relieve the Supreme Court. But it is clear that the abolition of mandatory appeals would be a substantial contribution. Whatever their merits once, three-judge district courts are simply no longer necessary and they waste judicial manpower at the trial level. Virtually all the supposed benefits of three-judge courts are obtainable under current law when a court of appeals stays an injunction issued by a single district judge. Courts of appeals, which are also likely to represent a broader cross-section of the

nation, are quick to stay inunctions issued in highly controversial cases.

Cases on direct appeal from three-judge district courts typically make up about 3 percent of the Supreme Court's docket but, despite summary disposition of the majority, they routinely constitute the astonishingly high figure of 22 percent of all cases argued orally. Furthermore, the cases reach the Court directly from a trial court without an intermediate opportunity to sift the record and focus the issues. They thus consume a proportion of the Court's time and energy disproportionate to their members. They should be abolished.*

If we turn our attention to the courts of appeals and the district courts there are more obvious targets for reform. The first one is the old chestnut, diversity jurisdiction.

In 1975 there were 30,631 diversity cases pending in the federal courts, or 21.5 percent of the total docket. That figure may be discounted in certain ways, although we are not sure how large the discount should be. It is possible, for example, that diversity cases take up less judicial time on the average than do other types of cases. It is also possible that they are settled out of court in greater proportions. We do not know and those matters will have to be investigated. But on any view of the question, diversity jurisdiction comprises a large segment of the

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* 28 U.S.C. §§1252 and 1254(2) should also be repealed. They provide mandatory appeals and would be used much more if three-judge courts were abolished.

.../

federal docket. If it can be abolished without serious costs to the administration of justice, the benefits to the federal system would be substantial.

The historic argument for diversity jurisdiction --the potential bias of local courts -- derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. It may be safe to assume that this rationale has now been so weakened that it no longer supports the practice. [There are proposals to leave with the out-of-state party the discretion to choose the federal forum, but that option would probably undercut the reform. To say that is not to admit the existence of regional bias but rather to recognize that federal courts have other attractions to litigants, a fact shown when local plaintiffs choose the federal court.] It would probably be better to limit the option for the federal forum to those cases in which the out-of-state party can make at least a colorable showing of local prejudice.

Federal courts have no expertise in the application of state law and are particularly disadvantaged when a diversity suit requires the decision of a point not settled by the state courts. Nor would abolition of diversity jurisdiction harm the state courts. 1½% increase in their dockets.

An argument that must be taken seriously, because of the source from which it emanates, is that diversity cases serve the useful purpose of reminding federal courts they are courts and not simply constitutional tribunals. The idea appears to be that immersion in common law and statutory issues of the sort provided by tort and contract actions conditions the judge's thought so that

he does not emerge as a free-hand policy maker when he approaches constitutional issues. The answer seems to me to be that federal question jurisdiction keeps judges close enought to nitty-gritty to keep them versed in close reasoning and that any incremental discipline provided by automobile accident cases is too small to justify the costs to the system.

But it is my third suggestion that I regard as in some ways most interesting and most important for the future. An increasingly regulated welfare state generates an enormous amount of litigation. The programs may have great social importance but the issues presented are in large measure legal trivia. Nevertheless, we have thoughtlessly moved this mass of litigation into the federal courts, without regard to whether it belongs there or what we are doing to those courts.

We ought to consider an entirely new set of tribunals that would take over completely litigation in a variety of areas where an Article III court is realistically not required. Criteria for making that judgment would include: (1) the disposition of cases in the category turns upon the resolution of factual issues; and (2) the category of cases consumes a large amount of Article III judicial resources. I am trying to describe cases that can be handled as justly by a person resembling an administrative law judge as an Article III judge.

The categories of cases I have in mind might include those rising under the Social Securities laws, the National Environmental Policy Act, many prisoners' suits, the Clean Air Act, the Water Pollution Control Act, the Consumer Products Safety

Act, the Truth in Lending Act, the Federal Employers' Liability Act, and the Food Stamp Act. Other examples can be found. I suspect that cases under the Mine Safety Act and the Occupational Safety and Health Act would qualify. It should be noted that some of the regulatory schemes, though not legally complex, produce masses of paperwork that require an extraordinary amount of judicial time in each case. Often the assessment of such materials can be done by someone far less qualified than a judge.

If these categories of cases were removed from the federal district courts, their dockets would be relieved of well over 20,000 cases, and, because our figures are incomplete, perhaps well over 30,000 cases or more. If diversity jurisdiction were also abolished, it appears that district court dockets could be lightened by over 40 percent. More important, the future growth of those dockets could be made manageable if Congress would place factual disputes arising under new regulatory and welfare legislation in these tribunals.

Because of constitutional questions, I am at the moment unsure whether these new tribunals could be Article I courts or whether they would have to be specialized Article III courts. Let me assume for the moment that they could be Article I courts, which, for various reasons, might be preferable. In that case, the system envisaged would work roughly like this.

There would be a trial division from which appeals would be funneled to an appellate administrative court, and the litigation would end there. There would be no access to an

Article III court unless an important question of statutory construction or constitutional law was raised, and only the legal question could be certified to the Article III court.*

Note that this plan avoids one of the major pitfalls in proposals for specialized courts, for these tribunals would not be specialized by a single subject matter. In the range of types of cases they would handle, they would have many of the advantages of generalist courts. They could, moreover, provide significant advantages for litigants by speeding decision and cutting the expense of litigation. Many classes of cases could be handled informally, without counsel, unless the claimant desired an attorney, giving some of the advantages of small claims court. This would vary. Some cases might require rigorous procedural and evidentiary rules as well as the assistance of counsel, but that degree of rigor could perhaps be dispensed with in the ordinary Social Security disability case.

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* If necessary to the constitutionality of the plan, certiorari jurisdiction over factual decisions could be lodged in the Article III courts of appeals. Alternatively, the special tribunals could be organized as Article III courts of limited jurisdiction.

PEACEMAKING IN AN ADVERSARY SOCIETY
National Conference on The Causes of Popular
Dissatisfaction With the Administration of Justice
St. Paul, Minnesota
Thursday, April 8, 1976

William J. McGill

It is an honor and a privilege to address this distinguished audience commemorating the 70th anniversary of Roscoe Pound's classic paper on the causes of popular dissatisfaction with the administration of justice, but I am also a bit intimidated by the honor.

A national conference of jurists and eminent scholars of the law chosen especially for their competence in considering the philosophical underpinnings of American justice offers no easy forum to an untarnished legal virgin.

Robert Benchley, when he was a student at Harvard, once tried to answer a difficult examination question on the fishing industry of Nova Scotia by offering his analysis from the point of view of the fish. Perhaps then I might bring you a fish-eye's view, or better yet a worm's eye view, of popular dissatisfaction. The most obvious qualification I can offer is that during my eight years of service as a university president, I have been sued repeatedly for engaging in what I have taken to be the simple performance of my duty. The years, of course, have been difficult and turbulent, but it is indicative of the current conditions

of life for university presidents that I find myself casting an eye warily around the room looking for legal problems beyond those of which I am already aware. I see my old friend and former colleague, the Attorney General. To the best of my current knowledge he has no formal interest in Columbia or me -- at least not yet.

Seriously, tonight I want to speak to you about conflict, its origins and its psychology, as well as the informal and intuitive approaches we have discovered in our efforts to resolve conflicts. One cannot raise this topic without commenting upon the stunning growth of adversary struggle in American life during the years since World War II. Our mass media of communication regularly genuflect to an almost infinite variety of conflicts. This, of course, is not a new problem. Conflict sells newspapers and even in 1906 Dean Pound called attention to our unusual legal contentiousness. Nevertheless, under the influence of modern communication and present day standards of redress of grievances, we seem to be moving toward an even purer form of adversary society than Mr. Pound anticipated. The emerging social order may well be one in which policy at all levels is forged from the clash of narrowly based constituency groups, each pressing for its own special advantage without regard for the others or for the national interest. Recent visitors to the People's Republic of China have noted the striking differences between modern China and modern America in this respect.

The Chinese are organized and at least superficially harmonious whereas in the United States institutions must be operated in a continuing swirl of confrontations, complaints, investigations, legal actions, strikes, criticism in the newspapers, and other pressures.

I am certainly no apostle of Maoism. Public dispute is a trivial price to pay for the benefits of a free society, but frankly I am concerned about the effects of these growing psychological stresses on the people of the United States. A deepening cynicism and almost paranoid suspicion of established institutions seems to have gripped young people of college age in the aftermath of the Vietnam War and the Watergate scandals. Fortunately the courts have emerged from this troubled period with enhanced respect, but the burden of conflict resolution which the courts are now expected to bear has also increased geometrically. It raises serious doubts about our ability to deal with public discord on a scale projected by the recent growth of adversary conflict in the United States.

Dean Pound pointed to social change as one of the critical factors in such discord, and social change we have had in abundance. It is instructive to consider what we have been attempting to do since 1906.

We have built the most powerful industrial economy on earth superimposed upon the social values and legal concepts of an agrarian

society rooted in the individualism of the frontier. This ambiguity has produced an extraordinary array of conflicts, the most remarkable, in my view, being our almost total inability to control the traffic in guns. The omnipresence of lethal weapons in our cities has simply devastated the quality of urban life, and yet every effort we have made to do something about it has dissolved in a welter of public discord.

During the years since 1906 we have also sought to build an American ethos bridging the diverse origins of our citizenry. Our origins range over nearly all the nations and religions of Europe and the Middle East, few of them noted for living together peacefully. Add to this the even more diverse cultures of Africa, the Caribbean, the Orient, native American Indians, and one begins to comprehend the potential for discord in a society where nationality and status have always been linked despite the Constitution. For much of the early part of this century we adhered to the principle that our common language and customs created an assimilation process which would wipe out racial and national differences in a few generations. No one really believes that now. The last two decades have witnessed a remarkable growth of ethnic preoccupation and racial consciousness in our national life, producing new forms of nationalistic, religious and racial pluralism. It has been a marvellous time for the growth of freedom, but not exactly

a peaceful time. Apart from increased stresses due to predictable contentions among sensitive groups within the society, this new pluralism has also managed to project a host of militant conflicts elsewhere in the world into our daily lives. Thus the IRA plants bombs in British Airline offices in New York City, and the JDL fights the Arab world in Los Angeles. Neither struggle makes a great deal of sense here.

The years since 1906 have also seen a breakdown of religiously derived moral precepts and traditional European manners as models for the conduct to be expected in ordinary social commerce. They have been replaced by a new confrontational style of public interchange aimed at gaining the attention of the mass media. It has generated numerous excesses with which the courts have had to deal.

One of the most striking lessons of the 1960's has been our discovery that the democratic traditions of Western civilization, traditions built upon the ideals of tolerance and restraint, were far more vulnerable than we ever thought them to be. The courts have never deviated from their commitment to basic human rights, but many of our citizens, once freed from the constraints of supraordinate systems of manners, have sought to reinvent their rights in selfserving ways. Tolerance is taken to be acceptance of evil, and restraint is seen as a form of cowardice.

In the years since 1960 we have learned a great deal about the

unmeasured range and depth of human emotions evoked in times of crisis. The crises of the 1960's have taught us how easy it is for a stable society to become deeply divided on emotional issues with each side finding easy recourse to zealotry.

None of this passion is particularly suitable for discharge in the courts, but its volatility has forced the public authorities to intervene in order to keep the peace. The more fundamental question as to the origin and analysis of these powerful emotional processes remains largely unresolved. It does appear to me that the adversary contention among constituency groups so characteristic of modern American life is forcing the courts increasingly to address problems that properly belong in the realm of psychological theory with resolution to be sought in education, or institutionalized forms of conflict resolution.

As we ponder this more fundamental question it is well to try to reconstruct the future as it must have appeared to Roscoe Pound in 1906. Who would have imagined, for example, at the turn of the 19th Century that today we would be confronting a world filled with terror, violence, and hysterical dogmatism from which we ourselves are hardly immune. The cool rationalists of the Victorian era would have rejected such a prospect. A great period of scientific progress seemed to lie just over the horizon at the close of the 19th Century. That promise has been

abundantly realized in modern physics, chemistry, biology, engineering, and medicine. But science has also put extremely sophisticated weaponry into the hands of small bands of emotionally unstable terrorists who have not hesitated to hold the rest of us hostage.

The 20th Century was to have been an era characterized by an uninterrupted growth of civilization made possible by the elimination of hunger and disease. It was to have been guided by rapid expansion of education which would free the mass of the world's people from their historic bondage in ignorance and poverty. We have managed to take a number of important steps toward these humane objectives. Man has conquered disease. He has learned how to bring water to the deserts and to enrich the soil so that it produces food in abundance. Man has walked on the Moon. But we have also discovered that improved education in the 20th Century has not diminished our contentiousness nor has it armed us effectively against simplistic dogma. We are ruled today more by passion and paranoia and less by the sophisticated skepticism of the rational mind than were our 19th Century antecedents.

We have not managed to eliminate racial antagonisms in the world and we have not succeeded in eradicating hunger or poverty. Instead we have succeeded in concentrating industrial growth and material consumption among a few nations which have been willing to share their resources only to the extent of bargaining for political advantage among

the starving peopls of the Earth.

It is not a very distinguished record whether we consider it as a failure in the fulfillment of a potential clearly evident at the end of the last century, or whether we think of that failure in terms of the performance of the political and educational leaders of our own times.

Not long ago we believed naively in our own immunity from the emotional passions that afflicted other societies. Not long ago we believed naively in international government under our leadership as a vehicle for the construction of stable societies elsewhere. We are a sadder and wiser people today, after Vietnam, after the student counter-culture, after the riots, the burnings, and the assassinations of the 1960's, but we can take no pride in our newfound wisdom. There is something fundamental in the human spirit, some strange distortion of thought and emotionality, which continues to elude us. In the past century, a high proportion of the best minds have been attracted to science while humanism has been allowed to regress too readily into ideology. C. P. Snow noted this divisive trend in his famous essay on two cultures in the modern university. What is apparent now is that the persistent isolation and weakness of the analytic study of man has created a danger to the future integrity of our way of life.

Somehow the basic problem is not the ability of scientists and humanists to communicate with one another as Snow suggested. It is

that the power and beauty of modern science have so dominated this century that the study of man and his conflicts have been allowed to become the province of the less gifted. The situation is not unlike the period of intellectual dominance by the Christian Church in Europe before the 14th Century. Nearly all the truly gifted minds of that era were attracted to the church and the most powerful thinkers were churchmen. Nontheological thought languished. You and I will have to do our best to see that a serious nondogmatic, nonideological study of man and the human condition receives a fresh burst of intellectual energy in the years ahead.

The clash of purposes and wills manifest in even the simplest social unit demonstrates how profoundly difficult are our aspirations for an orderly society unless we find effective ways to understand and resolve conflicts. The union of a man and a woman, that simplest of all social units with all the power of biological attraction to sustain it, is held together by exceedingly fragile threads. They rupture easily under the continuous stress of frustration produced by little more than the requirements of living together. As societies undergo numerical enlargement there seems to develop a sense of isolation not found in the smallest social units. In the midst of all their internal struggling a family or a small town manifest a far greater degree of mutual identity and communiality of purpose than is visible in large and complex

societies. Thus a process of social fragmentation grows easily in the medium provided by expanding numbers of people.

During the last 70 years, uncounted opportunities for progress have been lost in the United States because our people seem to have passed too quickly from a naive conception of how we might all live together harmoniously to an equally unreal conception that only confrontation and pressure are effective for securing sought-after objectives in a mass society.

In 1924 Nicholas Murray Butler remarked that if people were dominated by a philosophy which "looks upon a nation, like an individual, as subject to moral law and moral obligations, then that nation will not seek to aggrandize itself at the expense of its neighbors but will endeavor to live with them in peace and steadily developing international relations of every sort." I am sure that Butler and his colleagues must have felt confident that they knew the moral laws and moral obligations which ought to guide such policies. They had no way of foreseeing the fearful divisions arising in our time as the dilemmas posed by the artificial connection between race and poverty in our country, and the problems generated by our attempts at international peace-keeping in conflict with the aspirations of the Third World, have made us less selfassured about our own moral rectitude. None of us, neither Butler

nor any of the rest of us, have understood much about the deeper origins of human conflict.

Conflict is as natural to the human condition as breathing. Its roots lie deep in the human personality and even deeper in our genes. Studies of animal behavior are rich with examples of stylized and stereotyped conflict related to species survival and to the balance among species. The clinical literature in psychiatry is equally abundant with analyses of aggression and hostility as mechanisms for survival in a hostile environment.

What is principally lacking in our present day understanding of conflict is an effective intellectual link between these biologically oriented and individualized reaction patterns, and the phenomena of group conflict, crowd behavior, mass psychology and related problems. Most of the really interesting examples of conflict in recent times, the civil rights movement, for example, with its offshoots in the women's movement, religious liberation, homosexual rights and a host of other efforts, involve closely related forms of group struggle. Each of them makes use of sensitizing techniques, consciousness raising, that seem remarkably similar to group therapy. Yet these techniques were devised for use in furthering political objectives, and we still understand very little about their psychological inner workings.

I am forced to admit that as a psychologist I was totally untrained

for nearly everything I eventually learned in dealing with group conflict. I was drafted into administrative service in the University of California in 1968 during a period of deep unrest caused by the anti-war movement and the student counterculture. I was then a pleasant enough academic diplomat but completely unprepared for the anxiety, gross hostility, and occasional physical strife in which I have been forced to do my work. I had to learn about group conflict and the techniques of conflict resolution the hard way. There were no books and no teachers. I was on my own.

I remember one occasion in San Diego when students were parading outside my office as I arrived for work one morning. I watched them for a short while listening to their chants and reading their signs. Then I said to the Dean of Students standing beside me that I wanted to enter. He said "Go right in, sir", and I certainly tried but the pickets bunched their bodies together, pushed and shoved so that I could not even find the handle on the door. After a few legal preliminaries, the Dean gave an instruction to the campus security people who then charged into the line shouldered the pickets aside, wrenched the door open, and literally threw me inside. The door closed behind me. The picket line reformed and the chanting resumed. I called the President of the University in Berkeley to report, telling him there was a small demonstration outside my office but that all was well. An hour later

a call came down from Berkeley to ask whether the pickets had left. I said no and now there was a problem. They were between me and the men's room, and the morning was wearing on. There was a brief pause while the President considered the problem. "Bill," he said, "you are on your own."

Those were days of such burning intensity in the academic life that just to have lived through them successfully seems now to have been a remarkable accomplishment. The presidents of our universities together with their wisest faculty colleagues had to guide thousands of hysterical young people as well as numbers of equally hysterical faculty and perhaps even a few hysterical Regents and Trustees safely through ill-thought-out expressions of hostility to the war and increasingly bitter feelings of hostility toward our government which we, of course, were constituted to uphold. The radicals were trying to move in to take control of it all, and we had to find ways to freeze them out. Black students were angry with everyone and were probing for exactly the right avenues to power.

We lived from day to day with the fear that a misguided public reaction or an authoritarian public official might drive all these disparate angry factions together producing a brutal explosion, such as the one that eventually happened at Kent State. In the end most of us learned how to prevent it and the years spent in that searing ordeal

taught us a great deal.

In California I learned that the chief campus officer must be a visible presence on campus. He must be seen arguing for what he stands for and believes. He can control dangerous situations simply by moving into them, demonstrating the injustice that is created when an angry crowd seeks to impose its will.

I learned that the emotional atmosphere on campus is an undulating phenomenon rather like the temperature of the air. It is stimulated by external factors, events elsewhere, reports in the press, rumors, and agitation. But mainly it is a climate of emotional reactivity generated by people meeting and talking to one another under conditions of stress. The tendency to form crowds, to be receptive to manipulation by demagogues, and to be stimulated by the anger of others is directly a function of this emotional temperature. Conflicts of an endlessly bewildering variety ensue when the temperature is high.

I also learned that an aroused crowd will not hesitate to surround and belabor a single individual standing all alone. Somehow they feel themselves to be so powerless and the institution I represent to be so powerful that they cannot see any injustice in what they are doing. It is my task to stand there and make them understand the injustice. When that is done with students nearly all of them will understand, but an administrator cannot achieve this objective by hiding in his office. I

have no fears now about moving in angry crowds. There was a remarkable therapeutic quality in those early experiences.

Most important over the last eight years I have learned the psychological aspects of the art of negotiation. Group conflict is almost always curiously disciplined. Eventually one learns how to control disputes and how to use the moral authority of the President's Office in order to settle them amicably. Most human problems are capable of solution by means other than head-on conflict. Eventually one learns to see through to the deeper motives underlying expressed positions. If you can learn what the other fellow really wants, perhaps you might then work out a way to get it without giving up something that cannot be yielded.

Every person experienced in dealing with conflict knows that the exploration of this territory can be extremely hazardous. You cannot be naive. You cannot be rigid. You cannot show fear or anxiety. You cannot grow weary. You must search and probe endlessly and you must be genuinely inventive in formulating workable solutions. You must communicate strength and sensitivity. Strength and toughness are required in order to tell the contending parties just how far they can expect to go. But the psychology of conflict resolution is not all toughness. Sensitivity and compassion must appear in the final stages of every negotiation. This combination of strength and sensitivity generates

moral leadership, and imparts special significance to the solutions you propose.

These are some of the things I have learned in an intuitive way about the psychology of group conflict. It does seem to me that the rational majesty of the law ought to be preserved from direct involvement with these sometimes ugly, oftentimes comic paraphernalia of peacemaking. Instead we need to build up clinical knowledge derived from those who, like your speaker, have been forced to learn the art. We must also create academic centers for the study of conflict and conflict resolution with all their intricate relation to psychology and the social sciences. These centers would be most likely to flourish in our law schools. Certainly our law schools offer the most suitable vehicles for suggesting the forms in which societal peacemaking may be institutionalized.

All this is part of the systematic study of man for which I have called. If we can apply the methods and train the people to resolve the emotional conflicts with which our society abounds, there may then be a more realistic prospect for success in the international political realm. At least there would be a basis of psychological and sociological theory to replace the ideological dogma on which so much current international effort at tension reduction seems to be rationalized.

In his Sermon on the Mount, Jesus blessed the peacemakers.

He was not blessing the nervous polyannas who profess peace and run away from conflict. He was thinking of those tireless, determined, and inventive people who take on the most difficult conflicts and work ceaselessly toward their solution with the idea that in so doing they are performing God's work. It is sad to think that with all the terror and violence in the world, there are so few like Dean Pound, and like many in this audience, who are able to serve as our peacemakers.

We in the academic life are going to have to do something about that problem in the next seventy years.

Remarks of Charles R. Halpern, Executive Director
Council for Public Interest Law

at

National Conference on "The Causes of Popular Dissatisfaction With the Administration of Justice"

April 9, 1976

In Dean Pound's speech enumerating the Causes of Popular Dissatisfaction with the Administration of Justice, he observed that the "main reliance of our common law system has been individual initiative." By way of examples, he noted that suits brought by taxpayers were the "chief security for the efficiency and honesty of public officers..." and that private suits were relied on to keep "public service companies to their duty in treating all alike at reasonable price...." In summary, he stated that "the individual is supposed at common law to be able to look out for himself and to need no administrative protection." Dean Pound concluded, however, that the "whole scheme of individual initiative is breaking down" and being replaced by a "collectivist" desire to develop governmental administrative mechanisms to safeguard the public interest.

In the decades since Dean Pound spoke, there have been striking changes in the relative importance of "individual initiative", on the one hand, and administrative regulation, on the other, as devices to secure the public good. The rise of administrative regulation, accelerated in the 1930's,

was undoubtedly a reflection of the "collectivist" sentiment which Dean Pound noted in 1906--an effort to develop new governmental institutions to replace "individual initiative" as a system for controlling the behavior of great institutions.

I suggest that this reliance on administrative regulation is now waning and that we have entered a new stage--a stage in which "individual initiative", exercised through the legal process, has a crucial importance that has not been adequately recognized within the legal system. In drawing a road map for legal reform, "individual initiative" must be given broader scope. Few people still share the "collectivist" enthusiasm for exclusive reliance on administrative regulation. We must think in new ways about a hybrid system, involving both governmental action and citizen initiative.

Without doubt, the landmark judicial recognition of the new role of "individual initiative" was the decision by the Chief Justice, then a Judge on the Court of Appeals for the District of Columbia Circuit, in the celebrated Church of Christ case. */ That case involved an effort by black citizens in Mississippi to demand an end to racist broadcasting by a federally-licensed television station. The Federal Communications Commission took the position that the issue fell within its regulatory responsibility and that there was no need for citizen involvement. In rejecting the

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*/ Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

FCC's view, Judge Burger recognized the crucial role of individual initiative. Stating that "consumers are generally among the best vindicators of the public interest," he held that the agency could not properly exclude representatives of legitimate listener interests from its proceedings.

The intervening years have seen a growing number of citizen groups taking initiative to demand compliance with law from large institutions--both governmental and private. The reasons why citizen initiative at this time has come to be so significant are complex. At bottom, there is an indisputable lack of confidence in the performance of large institutions, including administrative agencies. Recent revelations of crimes in high places, in the Justice Department as well as corporate board rooms, have, undoubtedly, fueled these doubts. Even prior to these disclosures, though, there was a growing sense that the great institutions of society were out of control. This has led to citizen efforts to reassert influence over these institutions. Citizens have taken action to participate in the decision-making processes that affect their lives. They have pressed governmental agencies to act in the public interest and enforce the law; where necessary, they have sought judicial remedies for institutional lawlessness.

An example will illustrate the point. In the 1960's, scientific information indicated that DDT, a pesticide that persists in the environment for a long period after its application, was being over-used in American agriculture.

The Department of Agriculture, which had regulatory responsibility, was licensing this pesticide for various uses without taking into account the data indicating damage to the environment and hazards to human health--despite statutory requirements that it do so. The concerned citizens who tried to move the Department of Agriculture to act were unsuccessful. */ It was only after they turned to the courts and obtained an order requiring the agency to act in compliance with the law that the administrative proceedings which led to the banning of DDT for most purposes began. We need not consider here whether the Department's inaction was due to bureaucratic inertia, excessive influence by the industry which was supposed to be regulated, a lack of adequate concern for environmental considerations, or other factors. The fact remains that individual initiative, through the court system, was the key to obtaining effective action and compliance with the congressional mandate.

The challenge to the legal system in this collectivist age is to facilitate and encourage individual initiative through the courts to assure that constitutional and statutory rights are respected, that government agencies do their job, and that corporations function within the law. But at the present time citizen access to the legal system is too often blocked by the high cost of legal representation, by restrictive legal doctrines and by the

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*/ See Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

disadvantages, inherent in the legal process, faced by ordinary citizens when they litigate against large, financially strong adversaries. Legal institutions and legal doctrines must be modified in order to address these problems. At a time of great public disillusionment with the performance of public and private institutions, the availability of the courts as a channel for redress is critically important.

I recognize that this places me at odds with a significant number of prior speakers, who have been exploring ways to reduce the caseload of judges, to find alternatives to the courts, and to reverse the "explosive" growth of class actions. However, as I understand our charge today, we are to discuss ways in which the interests of justice can be better served. In my view the interests of justice can be best served by assuring that the courts are open to citizens exercising "individual initiative" to demand compliance with the law, and that the courts provide a setting in which the financial strength of litigants is not dispositive.

Obviously, there are certain matters which can and should be resolved in a forum that is cheaper, quicker, and more informal than the courts. But the indentification of such matters should not blind us to the importance of opening the courts to a range of important cases which are too frequently kept out of the courts by restrictive legal doctrines and the high costs of litigation.

As you all know, several recent Supreme Court decisions have gone in the direction of limiting citizen access to the

courts and making citizen suits even more financially difficult. For example, recent decisions on standing have sharply restricted access to the courts. Barriers to citizen action have been further raised in the Court's interpretation of Rule 23 on class actions. The Court's class action decisions have severely diminished the utility of that mechanism, which was designed to make redress of small individual grievances economically feasible. And, in holding in the Alyeska Pipeline case that federal courts lack the power to award attorneys' fees to citizens suing as "private attorneys general," the Court has created a financial roadblock for citizen action.

I submit that the trend reflected in these decisions--a trend toward making legal recourse less accessible to ordinary citizens--is likely to increase popular dissatisfaction the administration of justice.

I think it is essential to reverse that trend.

I urge consideration of the following concrete suggestions to make the courts a more potent instrument for justice and a more hospitable forum for individual initiatives in the public interest:

Reallocating the Costs of Litigation

The largest barrier to citizens who want to use the courts to vindicate rights and enforce legal and constitutional duties is the high cost of litigation, particularly the high cost of attorneys' fees. There are few citizens

or groups who can afford the enormous costs of carrying major litigation. In the past few years there have been significant programs established to help deal with this problem. The Legal Services Corporation, which underwrites legal services for the poor, is one example. Foundation-funded public interest law firms, which have protected the rights of environmentalists, consumers, racial minorities, and others, are another. In assessing the impact of these new participants in the adversary process, Judge Harold Leventhal of the Court of Appeals for the D. C. Circuit stated recently:

> Public interest representatives have identified issues and caused agencies and courts to look squarely at problems that would otherwise have been swept aside and passed unnoticed. They have made complaints, adduced and marshalled evidence, offered different insights and viewpoints, and presented scientific, historical and legal research. They have, in my view, been of significant service to the entire decisional process. */

But funding for these public interest law programs has, to date, been grossly inadequate to meet the need, and even this funding is of uncertain duration. The foundations who have most actively supported public interest law have indicated that their support cannot be expected to continue indefinitely. The legal system itself must develop internal mechanisms to underwrite the cost of citizen litigation. An important device toward this end, which has a significant common law history and specific statutory endorsements, is the award of attorneys' fees to private litigants whose lawsuits

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*/ Statement of Judge Harold Leventhal at Hearings on S.2715 before the Senate Judiciary Subcommittee on Administrative Practice and Procedure, February 6, 1976.

confer substantial public benefits. The "private attorney general" is the heir to the individual suing to enforce the law about whom Dean Pound spoke. The courts and the legislatures should be extending the availability of fee awards in cases involving a public benefit--not limiting it--so that we move toward a system in which the costs of litigation are reallocated to enable and encourage citizens to undertake legal action to enforce constitutional and statutory rights. This fee-award concept now has its counterpart at the administrative level, in the Federal Trade Commission's program to reimburse the costs of citizen participation in rulemaking proceedings, an approach that Congress is now considering expanding to other agencies and to adjudicatory proceedings as well.

Making it Easier to Aggregate Small Claims for Litigation Purposes

Rule 23 of the Federal Rules of Civil Procedure represents a pioneering effort to provide a judicial forum for aggrieved citizens whose individual claims against a single defendant are too small to justify the expense of litigation. Suppose, for example, that 10,000 defectively designed refrigerators are manufactured and sold. No individual purchaser has a sufficient economic interest to file suit against the manufacturer. The class action was designed to permit an effective judicial remedy for cases of that nature.

The purpose of the class action was described by Justice Douglas:

> I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it....
>
> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth. */

Recent Supreme Court decisions have made class actions very difficult to bring, and some recommendations offered at this conference would further decrease the utility of the class action. This would undoubtedly be a comforting development for prospective defendants, but it would be a serious blow to citizens and a set-back to those who want the courts to be an open and accessible forum for resolution of grievances.

In a recent speech, Justice Stanley Mosk of the California Supreme Court suggested that citizen groups should "join hands...in a mutual effort to save the class action." Further he suggested:

> If the courts are too far committed to the ultimate demise of such proceedings, then appropriate action through Congress and state legislatures may be indicated.

This observation is a wholesome reminder that access to the courts is a matter of concern to all the people, and not ultimately a matter to be resolved internally within the legal profession.

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*/ Eisen v. Carlisle and Jacquelin, (1974) 417 U.S. 156 185-86 (Douglas, J., dissenting) [footnote omitted].

Reducing the Disparity Between Rich and Poor Litigants

In making the courts a more just forum for citizen litigation, we must also keep in mind that access to the courts is only the beginning. The courts must also make an active effort to minimize the disparities in litigating capacities between the rich and poor--by accomodating the diverse interests at stake in complex litigation through liberal admission of amici curiae; by becoming involved in the discovery process to prevent harrassment of litigants with scarce resources; by appointing expert witnesses to equalize access to technical data; and by experimenting with flexible mechanisms to assure that decrees are effectively implemented.

Conclusion

I believe that individual initiative through the courts to assure that corporations, government agencies and other powerful institutions behave in compliance with the law is critical and must be facilitated. This is not to say that every dispute or citizen grievance should be brought to court, or that citizens should look to the judiciary for relief of all their problems, including those that are more properly placed before the political branches of the government.

But constitutional rights cannot be left to the vagaries of the political process; and legislative mandates cannot be left to administrative agencies to bend as they see fit,

free of the check of judicial review. There is an indispensable judicial role in both classes of cases. Recent progress of many citizens--racial minorities, the mentally impaired, voters aggrieved by legislative malapportionment, environmental protection groups, consumers--would not have been possible but for the availability of judicial remedies. These remedies should be expanded and citizen access improved.

Varieties of Dispute Processing

by

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Last year, in an article entitled "Behind the Legal Explosion", published in the Stanford Law Review,[1] Professor John Barton pointed out that if federal appellate cases continued to grow for the next 40 years at the same rate at which they have grown during the last decade, then by the year 2010 we can expect to have well over one million federal appellate cases each year, requiring five thousand federal appellate judges to decide them and one thousand new volumes of the Federal Reporter each year to report the decisions. Since the number of cases initiated in the federal system each year is approximately ten times the number of decided appeals, one can readily extrapolate Professor Barton's projections to the trial level. And if one keeps in mind that in the State of California alone about four times as many actions are commenced each year as are commenced in the entire federal system, one begins to get some sense of the magnitude of the total problem.[2]

But I believe that one should view these dire predictions with a healthy skepticism. Litigation rates, like population rates, cannot be assumed to grow ineluctably, unaffected by a variety of social factors.[3] Nor should it be assumed that there will be no human intervention that could dramatically affect the accuracy of Professor Barton's projections.

Thus one concern to which we ought to address ourselves here is how we might escape from the specter projected by Professor Barton. This might be accomplished in various ways. First, we can try to prevent disputes[4] from arising in the first place, through appropriate changes in the substantive law, such as the

adoption of a no-fault principle for automobile injuries or the removal of a criminal sanction for certain conduct.[5] A less obvious substantive law issue that may have a bearing on the extent of litigation that arises is whether we opt for a discretionary rule or for one that aims to fix more or less firmly the consequences that will follow upon certain facts. For example, if a statute says that marital property on divorce will be divided in the court's discretion there is likely to be far more litigation than if the rule is, as in the community property states, that such property will normally be divided 50-50. I wonder whether legislatures and law revision commissions are sufficiently aware of this aspect of their work.

Another method of minimizing disputes is through greater emphasis on preventive law.[6] Of course lawyers have traditionally devoted a large part of their time to anticipating various eventualities and seeking, through skilful drafting and planning, to provide for them in advance. But so far this approach has been resorted to primarily by the well-to-do. I suspect that with the advent of prepaid legal services this type of practice will be utilized more widely, resulting in a probable diminution of litigation.

A second way of reducing the judicial caseload is to explore alternative ways of resolving disputes outside the courts, and it is to this topic that I wish to devote my primary attention. By and large we lawyers and law teachers have been far too single-minded when it comes to dispute resolution. Of course, as pointed out earlier, good lawyers have always tried to prevent disputes

from coming about, but when that was not possible, we have tended to assume that the courts are the natural and obvious dispute resolvers. In point of fact there is a rich variety of different processes, which, I would submit, singly or in combination, may provide far more "effective" conflict resolution.[7]

Let me turn now to the two questions with which I wish to concern myself:

> 1) What are the significant characteristics of various alternative dispute resolution mechanisms (such as adjudication by courts, arbitration, mediation, negotiation, and various blends of these and other devices)?
>
> 2) How can these characteristics be utilized so that, given the variety of disputes that presently arise, we can begin to develop some rational criteria for allocating various types of disputes to different dispute resolution processes?

One consequence of an answer to these questions is that we will have a better sense of what cases ought to be left in the courts for resolution, and which should be "processed"[8] in some other way. But since this inquiry essentially addresses itself to developing the most effective method of handling disputes it should be noted in passing that one by-product may be not only to divert some matters now handled by the courts into other processes but also that it will make available those processes for grievances that are presently not being aired at all. We know very little about why some individuals complain and others do not, or about the social and psychological costs of remaining silent.[9] It is important to realize, however, that by establishing

new dispute resolution mechanisms, or improving existing ones, we may be encouraging the ventilation of grievances that are now being suppressed. Whether that will be good (in terms of supplying a constructive outlet for suppressed anger and frustration) or whether it will simply waste scarce societal resources (by validating grievances that might otherwise have remained dormant) we do not know. The important thing to note is that there is a clear trade-off: the price of an improved scheme of dispute processing may well be a vast increase in the number of disputes being processed.

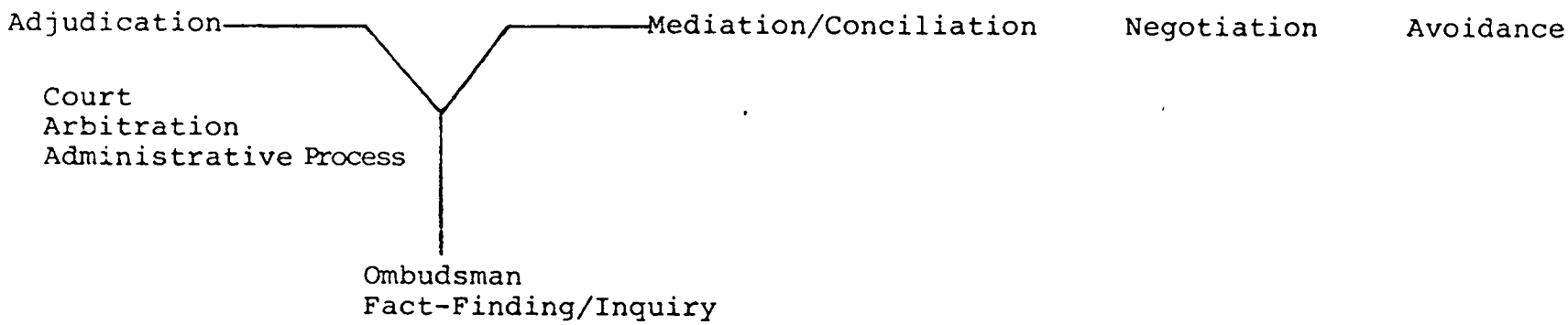
The Range of Available Alternatives

There seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society.[10/] Much as the police have been looked to to "solve" racial, school and neighborly disputes, so, too, the courts have been expected to fill the void created by the decline of church and family. Not only has there been a waning of traditional dispute resolution mechanisms, but with the complexity of modern society, many new potential sources of controversy have emerged as a result of the immense growth of government at all levels,[11/] and the rising expectations that have been created.

Quite obviously, the courts cannot continue to respond effectively to these accelerating demands. It becomes essential therefore to examine other alternatives.

The chart on the ensuing page attempts to depict a spectrum

of some of the available processes arranged on a scale of decreasing external involvement.[12] At the extreme left is adjudication, the one process that so instinctively comes to the legal mind that I suspect if we asked a random group of law students how a particular dispute might be resolved, they would invariably say "file a complaint in the appropriate court." Professor Lon Fuller, one of the few scholars who has devoted attention to an analysis of the adjudicatory process, has defined adjudication as "a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor."[13] Although he places primary emphasis on process, I would like for present purposes to stress a number of other aspects--the use of a third party with coercive power, the usually "win or lose" nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties. Although mediation or conciliation[14] also involves the use of a third party facilitator (and is distinguished in that regard from pure negotiation) a mediator or conciliator usually has no coercive power and the process in which he engages also differs from adjudication in the other two respects just mentioned. Professor Fuller puts this point well when he refers to "the central quality of mediation, namely, its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions


Adjudication
Court
Arbitration
Administrative Process
Ombudsman
Fact-Finding/Inquiry
Mediation/Conciliation
Negotiation
Avoidance

toward one another."[15/]

Of course quite a variety of procedures fit under the label of adjudication. Aside from the familiar judicial model, there is arbitration, and the administrative process. Even within any one of these, there are significant variations. Obviously there are substantial differences between the Small Claims Court and the Supreme Court. Within arbitration, too, although the version used in labor relations is generally very similar to a judicial proceeding in that there is a written opinion and an attempt to rationalize the result by reference to general principles, in some forms of commercial arbitration the judgment resembles a Solomonic pronouncement and written opinions are often not utilized. Another significant variant is whether the parties have any choice in selecting the adjudicator, as they typically do in arbitration. Usually a decision rendered by a person in whose selection the parties have played some part will, all things being equal, be less subject to later criticism by the parties.

There are important distinctions, too, concerning the way in which the case came to arbitration. There may be a statute (as in New York and Pennsylvania) requiring certain types of cases to be initially submitted to arbitration (so-called compulsory arbitration). More commonly arbitration is stipulated as the exclusive dispute resolution mechanism in a contract entered into by the parties (as is true of the typical collective bargaining agreement and some modern medical care agreements). In this situation the substantive legal rules are usually also set forth in the parties' agreement, thus giving the parties control not

only over the process and the adjudicator but also over the governing principles.

As is noted on the chart, if we focus on the indicated distinctions between adjudication and mediation, there are a number of familiar hybrid processes. An inquiry, for example, in many respects resembles the typical adjudication, but the inquiring officer (or fact finder as he is sometimes called) normally has no coercive power; indeed, according to Professor Fuller's definition, many inquiries would not be adjudication at all since the parties have no right to any agreed-upon form of presentation and participation.

But a fact finding proceeding may be a potent tool for inducing settlement. Particularly if the fact finder commands the respect of the parties, his independent appraisal of their respective positions will often be difficult to reject. This is especially true of the Ombudsman who normally derives his power solely from the force of his position.[16/] These considerations have particular applicability where there is a disparity of bargaining power between the disputants (e.g., citizen and government, consumer and manufacturer, student and university). Although there may often be a reluctance in these situations to give a third person power to render a binding decision, the weaker party may often accomplish the same result through the use of a skilled fact finder.

There are of course a number of other dispute resolution mechanisms which one might consider. Most of these (e.g., voting, coin tossing, self-help) are not of central concern here because

of their limited utility or acceptability. But one other mechanism deserves brief mention. Professor William Felstiner recently pointed out that in a "technologically complex rich society" avoidance becomes an increasingly common form of handling controversy. He describes avoidance as "withdrawal from or contraction of the dispute-producing relationship" (e.g., a child leaving home, a tenant moving to another apartment, or a businessman terminating a commercial relationship). He contends that such conduct is far more tolerable in modern society than in a "technologically simple poor society" because in the former setting the disputing individuals are far less interdependent.[17] But, as was pointed out in a cogent response by Professors Danzig and Lowy, there are heavy personal and societal costs for such a method of handling conflicts,[18] and this strongly argues for the development of some effective alternative mechanism. Moreover, even if we disregarded altogether the disputes that are presently being handled by avoidance--clearly an undesirable approach for the reasons indicated--we must still come back to face the rising number of cases that do presently come to court and see whether more effective ways of resolving some of these disputes can be developed.

The preceding brief appraisal of the various primary processes is misleading in its simplicity, for of course rarely do the processes occur in isolation. Often adjudication involves an element of conciliation. Professor Stewart Macaulay describes an interesting example of such a situation in his analysis of the Wisconsin Department of Motor Vehicles' activities in monitoring

the relationship between automobile franchisors and franchisees. Although the Department's only formal responsibility was whether to hold hearings with a view to possible revocation of the franchise, in fact the intervention of the Department served a mediative role by compelling each party to consider seriously the contentions of the other party, and hence led to settlement in a great number of cases.[19] Similarly, as already pointed out fact finding may very closely resemble adjudication. Moreover when we look at the way the various processes occur in particular institutions, there is often an elaborate interplay of the individual mechanisms. For example, a grievance under a collective bargaining agreement is usually first sought to be negotiated. If the parties cannot settle the case they go to arbitration, but the arbitrator may first seek to mediate the case. Finally there may be an attempt to review the arbitrator's decision in the courts.

Criteria

Let us now look at some criteria that may help us to determine how particular types of disputes might best be resolved.

1. Nature of Dispute

Lon Fuller has written at some length about "polycentric" problems that are not well suited to an adjudicatory approach since they are not amenable to an all-or-nothing solution. He cites as an example a testator who leaves a collection of paintings in equal parts to two museums.[20] Obviously here a negotiated or mediated solution that seeks to accommodate the desires of

the two museums is far better than any externally imposed solution. Similar considerations may apply to other allocational tasks where no clear guidelines are provided.

At the other extreme is a highly repetitive and routinized task involving application of established principles to a large number of individual cases. Here adjudication may be appropriate, but in a form more efficient than litigation (e.g., an administrative agency). Particularly once the courts have established the basic principles in such areas, a speedier and less cumbersome procedure than litigation should be utilized.

In the field of divorce, for example, although we still cling to the myth that consent divorce is unacceptable, we are gradually coming closer and closer to that reality. Under no-fault statutes the issue typically is whether the parties have lived apart for a stipulated period or whether there has been a breakdown of the marriage. The former question is clearly one that a clerk can determine. And although an issue like breakdown appears at first to be a typically justiciable question, it has become apparent that short of conducting a very probing inquest of the marriage of the kind that would be very time consuming and that would most likely transgress one's sense of the proper limits of the state's right to intervene in the privacy of married life, there is no ready alternative but to take the word of the principal parties to the marriage. Indeed, if the parties disagree over whether the marriage has broken down, that in itself is prima facie evidence of breakdown.[21/] Thus here is one sphere of litigation that could readily be relegated to a ministerial

official, as has long been the case in Japan and more recently has been accomplished in England.

With respect to many problems, there is a need for developing a flexible mechanism that serves to sort out the large general question from the repetitive application of settled principle. I do not believe that a court is the most effective way to perform this kind of sifting task. In Sweden, in the consumer field, there is a Public Complaints Board which receives individual consumer grievances. Initially the Board performs simply a mediative function, utilizing standards set up by the relevant trade organizations. If initial settlement is impossible, the Board issues a non-binding recommendation to both parties, which often leads to subsequent settlement. Failing that, the grievant can sue in the newly established Small Claims Court. But another aspect of its activities is to seek to discern certain recurring issues and problems that should be dealt with by legislation or regulation.[22/]

Perhaps a word should also be said about courts undertaking some of the complex and unorthodox tasks that they have recently been called upon to undertake. Without going into the question of legitimacy, I am not persuaded that the courts have sufficient competence, resources or remedial power to run mental hospitals, schools or welfare departments. Yet where serious constitutional denials are at issue, they can hardly decline jurisdiction. This seems to me an area where one can make no headway without talking about very specific cases and exploring in detail alternative dispute resolution mechanisms. Clearly additional research needs to be done on this subject.[23/]

2. Relationship Between Disputants

A different situation is presented when disputes arise between individuals who are in a long-term relationship than is the case with respect to an isolated dispute. In the former situation, there is more potential for having the parties, at least initially, seek to work out their own solution, for such a solution is likely to be far more acceptable (and hence durable). Thus negotiation, or if necessary, mediation, appears to be a preferable approach in the first instance. Another advantage of such an approach is that it facilitates a probing of conflicts in the underlying relationship, rather than simply dealing with each surface symptom as an isolated event.

Consider, for example, a case such as might be heard in the recently established mediation session of the Dorchester (Massachusetts) District Court. A white woman (Mrs. W.) has filed a criminal complaint for assault against her black neighbor (Mrs. B.). The facts, as they emerge at the mediation session, are that Mrs. W. has for some time gratuitously taken care of Mrs. B.'s two young children so that Mrs. B. can go to work. On the day in question one of the B. children for the second time in a row broke the expensive eye glasses of one of the W. children, and had been generally out of control. Mrs. W., having reached the end of her rope, struck the child. When Mrs. B. heard about this, she marched over to Mrs. W. and hit her. Mrs. W. thereupon filed a criminal complaint.

Fortunately the Dorchester District Court, like a number of other courts around the country,[24/] has a program under which,

if the clerk or judge deems the case appropriate, and the two parties are willing, the case can be referred to a panel of three trained mediators drawn from the local community. The panel will attempt to let each of the disputants fully state her side of the story, and then, through skillful probing, will seek to elicit points of tension in the underlying relationship (here, the increasing sense of exploitation felt by Mrs. W. as an arrangement deemed temporary became long-term). Finally, the mediators will attempt to work out an agreement which seeks to alleviate the long-run tensions as well as resolve the immediate controversy (here, for example, that Mrs. B. might agree to work with the social service component of the mediation project to try to find some alternative child care arrangement, and that she would pay five dollars per month to reimburse Mrs. W. for the broken glasses). Such a solution (unlike the aborted criminal adjudication) would most likely be acceptable to both parties; more significantly, it would have a therapeutic effect on the long-term relationship between these two individuals because it would permit them to ventilate their feelings, and then help them to restructure their future relationship in a way that met the expectations of both parties. In addition it would teach them how they might themselves resolve future conflicts. Thus there is a strong likelihood that future disputes would be avoided, or at least minimized.

Of course it might be suggested that a court could also induce such a settlement. But quite aside from the unlikelihood of a busy court being able to create a climate that encourages the disputants to ventilate their underlying grievances, there

is a world of difference between a coerced or semi-coerced settlement of the kind that so often results in court and a voluntary agreement arrived at by the parties.

A similar approach would appear to be feasible in a number of other areas. The grievance procedure under the typical collective bargaining agreement is based on a similar premise, in that it usually provides first for attempts to settle the dispute at the lower levels, and only then calls for an adjudicatory proceeding (arbitration) at the end of the line if the prior steps do not lead to settlement. However one difficulty is that, perhaps for reasons of economy, there is usually no mediator at the lower levels. Hence, if the parties have become too entrenched in their respective positions, there is little effective communication between them, and the early stages of the grievance procedure are often simply rote steps to be gone through before getting to arbitration. And while the arbitrator can then seek to play a mediational role, as is done by some arbitrators provided the parties give their consent,[25] there is an obvious difficulty if the mediator-arbitrator is unsuccessful in his mediational role and then seeks to assume the role of impartial judge.[26] For effective mediation may require gaining confidential information from the parties which they may be reluctant to give if they know that it may be used against them in the adjudicatory phase. And even if they do give it, it may then jeopardize the arbitrator's sense of objectivity. In addition it will be difficult for him to take a disinterested view of the case--and even more so to <u>appear</u> to do so--after he has once expressed his views concerning

a reasonable settlement.

Another long-term (at least sometimes) relationship that may be amenable to this type of dispute resolution mechanism is the family. Japan has long had a successful system of family conciliation tribunals, and although one must be necessarily wary in looking to entirely different cultures, it may well be that as our courts are beginning to play less and less of a role in divorce, as a result of the pervasive adoption of no-fault statutes, a need arises for some new flexible instrument--clearly not a court--that will concern itself with the resolution of family conflicts.

To be sure we have had a traditional aversion to judicial involvement in the going family, except where it is compelled by considerations of health or safety.[27/] But I wonder whether that policy is not traceable to the coercive quality of the typical adjudicative intervention, rather than to a notion that the family must inevitably be left to struggle with its own internal conflicts. Of course in a sense we have developed a mediative solution for most family conflict--social work and family therapy. Still where there is a breakdown of the family as a result of death or divorce, the courts have customarily become involved and it is here that alternative dispute resolution devices--particularly mediation--need to be further explored.[28/]

In the field of corrections, an interesting new program was recently begun at the Karl Holton facility in Stockton, California by the California Youth Authority working in collaboration with the Center for Correctional Justice and the Institute

of Mediation and Conflict Resolution. Instead of utilizing the usual authority-dominated grievance procedure, the drafters opted for what they called "the mediation approach."[29/] It consists at the first level of a five person committee, one of whom (a middle management official) acts as Chairman, the other four being voting members--two inmates and two staff members. Review of the decision--or of the opposing views in case there is a tie --by the director of the facility or his delegate is then provided for, and finally recourse can be had to an outside independent three-person review board set up under the auspices of the American Arbitration Association. The decision of this board is only advisory, but the director of the facility must promptly indicate whether he will comply with it, and if not, to state his reasons for not doing so. Thus while the ultimate power of decision remains in the person in charge, aggrieved individuals are given maximum opportunity first to air their views freely in a mediational context and then, if that fails, to have their views presented for evaluation by a disinterested outsider.

Initial experience under this process is revealing. In contradistinction to the polarization that might have been expected at the initial level where two inmates are pitted against two officials, in only 10 out of the first 212 cases did the first step grievance committee result in a 2-2 tie. In all other cases a majority decision resulted. Moreover recent research suggests that the presence of a viable grievance mechanism is a significant factor in preventing prison riots.[30/]

Such an internalized grievance procedure, with limited last

resort recourse to outside agencies, would appear to hold great promise for many disputes within an ongoing institution, such as a school, a welfare department, or a housing development. In view of the multifaceted nature of this type of grievance process, one might hope that if a case following such a procedure subsequently came to court, the court would give great, if not conclusive, weight to the prior determinations.

3. Amount in Dispute

Although, generally speaking, we have acted to date in a fairly hit-or-miss fashion in determining what problems should be resolved by a particular dispute resolution mechanism, amount in controversy has been an item consistently looked to to determine the amount of process that is "due". The Small Claims Court movement has taken as its premise that small cases are simple cases and that therefore a pared-down judicial procedure was what was called for. Next to the juvenile court, there has probably been no legal institution that was more ballyhooed as a great legal innovation. Yet the evidence now seems overwhelming that the Small Claims Court has failed its original purpose; that the individuals for whom it was designed have turned out to be its victims.[31] Small wonder when one considers the lack of rational connection between amount in controversy and appropriate process. Quite obviously a small case may be complex, just as a large case may be simple. The need, according to a persuasive recent study, is for a preliminary investigative-conciliational stage (which could well be administered by a lay individual or paraprofessional) with ultimate recourse to the court. This individual

could readily screen out those cases which need not take a court's time (e.g., where there is no dispute about liability but the defendant has no funds), and preserve the adjudicatory process for those cases where the issues have been properly joined and there is a genuine dispute of fact or law. Obviously such a screening mechanism is not limited in its utility to the Small Claims Court.[32]

4. Cost

There is a dearth of reliable data comparing the costs of different dispute resolution processes. Undoubtedly this is due in part to the difficulty of determining what are the appropriate ingredients of such a computation. It may be relatively easy to determine the costs of an ad hoc arbitration (though even there one must deal with such intangibles as the costs connected with the selection of the arbitrator(s)). But determining the comparable cost of a court proceeding would appear to pose very difficult issues of cost accounting.[33] Even more difficult to calculate are the intangible "costs" of inadequate (in the sense of incomplete and unsatisfactory) dispute resolution. Still, until better data become available one can probably proceed safely on the assumption that costs rise as procedural formalities increase.

The lack of adequate cost data is particularly unfortunate with respect to essentially comparable processes, such as litigation and arbitration. Assuming for the moment that arbitration would produce results as acceptable as litigation--a premise that is even more difficult to verify--would cost considerations[34]

justify the transfer of entire categories of civil litigation to arbitration, as has been done in some jurisdictions for cases involving less than a set amount of money? One difficulty in this connection is that we have always considered access to the courts as an essential right of citizenship for which no significant charge should be imposed, while the parties generally bear the cost of arbitration. Thus although I believe, on the basis of my own arbitration experience, that that process is, by and large, as effective as and cheaper than litigation, lawyers tend not to make extensive use of it (outside of special areas such as labor and commercial law), in part because it is always cheaper for the clients to have society rather than the litigants pay the judges.[35/] Perhaps if arbitration is to be made compulsory in certain types of cases because we believe it to be more efficient, then it should follow that society should assume the costs, unless that would defeat the goal of using costs to discourage appeals.[36/] I will have more to say about this subject later.

5. Speed

The deficiency of sophisticated data concerning the costs of different dispute resolution processes also extends to the factor of speed.[37/] Although it is generally assumed--rightly, I believe--that arbitration is speedier than litigation, I am not aware of any studies that have reached such a conclusion on the basis of a controlled experiment that seeks to take account of such factors as the possibly differing complexity of the two classes of cases, the larger number of "judges" in the arbitration group, and the possibly greater cooperation of the litigants

in the arbitration setting.

Implications

1. At one time perhaps the courts were the principal public dispute processors. But that time is long gone. With the development of administrative law, the delegation of certain problems to specialized bodies for initial resolution has become a commonplace. Within the judicial sphere, too, we have developed specialized courts to handle family problems and tax problems, among others.

These were essentially substantive diversions, that is, resort to agencies having substantive expertise. Perhaps the time is now ripe for greater resort to an alternate primary process. As I have indicated earlier, such a step would be particularly appropriate in situations involving disputing individuals who are engaged in a long-term relationship. The process ought to consist initially of a mediational phase, and then, if necessary, of an adjudicative one.[38/] Problems that would appear to be particularly amenable to such a two-stage process are disputes between neighbors, family members, supplier and distributor, landlord and tenant.[39/] Where there is an authority relationship between the parties (such as exists between prisoner and warden or school and student) special problems may be presented, but, as indicated earlier, such relationships, too, are, with some adjustments, amenable to a sequential mediation-adjudication solution.[40/]

Receptivity to such an alternate primary process imposes special obligations on the Bar. Although we know relatively little

about the participation of lawyers in conciliational processes, it is possible that there will be a lesser role for lawyers in this new world. Perhaps this simply calls for more diverse training in the law schools, but in the first instance it also poses a test to the Bar of its capacity to support innovative experimentation despite a temporary adverse economic impact for the profession.[41]

As regards the nature of the adjudicative tribunal, we should give strong consideration to greater use of arbitration, particularly where we are dealing with specialized issues or issues whose confines have been fairly well charted out by a contract between the parties, by governing legislation or by prior court decision.[42]

2. Although others more competent will be addressing themselves more directly to criminal adjudication, I am impressed by the experimental work that has been undertaken under the auspices of the Law Enforcement Assistance Administration (LEAA) to divert certain types of minor criminal offenses (e.g., ones like the case earlier described between Mrs. B. and Mrs. W.) to a mediational proceeding. Such a process readily fits under the general rubric described in the immediately preceding section; but it can also be seen in the larger context of a movement towards a community "moot", offering informal and supportive services to community members.[43] Such institutions of course have a rich anthropological heritage.[44] Whether, in our alienated and divisive society, these institutions are hopelessly out of place, or whether they represent the last hope of a regained sense of community, remains

to be seen.[45]

3. While the mediation-arbitration model earlier referred to is one useful format for processing certain types of cases, another device that bears further utilization is what might be called the screening-adjudication model. I have already made reference to this in connection with the discussion of Small Claims Courts, and in a sense it might be argued that what I am describing is but another name for pretrial. But, as indicated earlier, there is a considerable difference between judicial suggestion that the case ought to be settled for $X, and a quick preliminary "costing out" or "screening out" by a separate body.[46]

One interesting example is the Massachusetts statute recently enacted for medical malpractice cases,[47] under which the plaintiff must first go before a three person Board made up of a doctor, lawyer and trial judge. If the Board finds that the case does not have prima facie merit the plaintiff must put up a bond for the defendant's costs before he can go forward in court. Whether this statute has its intended effect may well turn on the adequacy of the bond, which normally is specified at the figure of $2000.[48] Perhaps we need to give much more serious consideration to whether we should not go much further in taxing the loser with the full costs, including attorneys' fees.[49] Of course this is a complex question, and one needs to be careful to strike a proper balance between not giving a litigant a free ride on the system and barring legitimate claims on financial grounds. But it seems fairly clear that we have not yet hit the optimal note in making the system more cost-responsive, so that a litigant will carefully

weigh whether he should go onto the next phase of the dispute processing system.

Another interesting experiment along these lines is the so-called Michigan Mediation System.[50/] Here a three-person panel made up of a member of the plaintiff's bar (selected by the bar association), a member of the defendant's bar, and a trial judge sit together as a panel for a period of two weeks to hear primarily tort cases in which the liability is acknowledged but there is dispute about the damages. The panel first reads such documentary evidence as there is and then discusses each case with the lawyers for the parties for about half an hour; no oral evidence is allowed. The Board then indicates what it believes the case is worth. If the case is not settled for this sum, then the plaintiff must receive at least 110% of this sum in order to avoid being taxed for the costs of trial (at a stipulated sum set so as to include a figure for attorneys' fees); the defendant must pay a similar fee if he does not settle and the recovery is more than 90% of the amount set by the mediation panel.

This approach, though promising, was criticized by the Chairman of the recently established Litigation Management and Economics Committee of the ABA Section on Litigation on the ground that it comes too late in the process, after "considerable pre-trial and discovery expense has already been incurred." He suggests instead a program of mandatory arbitration for certain classes of cases, such as those involving claims of $25,000 or less. To avoid an overly rigid application of arbitration to cases for which another dispute resolving mechanism might be more

suitable, he proposes that the mandatory feature would be waived upon a showing that another process would offer a more "fair and efficient adjudication of the controversy." "Conversely, arbitration could be required in those cases exceeding the jurisdicational limit of mandatory arbitration upon a showing that arbitration would be a more fair and efficient method of resolving the controversy."[51/] This is an innovative and promising suggestion that deserves careful study.

4. What I am thus advocating is a flexible and diverse panoply of dispute resolution process, with particular types of cases being assigned to differing processes (or combinations of processes), according to some of the criteria previously mentioned. Conceivably such allocation might be accomplished for a particular class of cases at the outset by the legislature; that in effect is what was done by the Massachusetts legislature for malpractice cases. Alternatively one might envision by the year 2000, not simply a court house but a Dispute Resolution Center, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case. The room directory in the lobby of such a Center might look as follows:

Screening Clerk	Room 1
Mediation	Room 2
Arbitration	Room 3
Fact Finding	Room 4
Malpractice Screening Panel	Room 5
Superior Court	Room 6

Of one thing we can be certain: once such an eclectic method of dispute resolution is accepted there will be ample opportunity

for everyone to play a part. Thus a court might decide of its own to refer a certain type of problem to a more suitable tribunal.[52] Or a legislature might, in framing certain substantive rights, build in an appropriate dispute resolution process.[53] Institutions such as prisons, schools, or mental hospitals also could get into the act by establishing indigenous dispute resolution processes. Here the grievance mechanism contained in the typical collective bargaining agreement stands as an enduring example of a successful model. Finally, once these patterns begin to take hold, the law schools, too, should diversify their almost exclusive preoccupation on the judicial process and begin to expose students to the broad range of dispute resolution processes.[54]

5. I would be less than candid if I were to leave this idyllic picture without at least brief reference to some of the substantial impediments to reform in this area. To begin with there is always the deadening drag of status quoism. But I have reference to more specific problems. First, particularly in the criminal field, cries of "denial of due process" will undoubtedly be heard if an informal mediational process is sought to be substituted for the strict protections of the adversary process.[55] In response to this objection it must be asserted candidly that many thoughtful commentators appear agreed that we may have over-judicialized the system, with concommitant adverse effects on its efficiency as well as its accessibility to powerless litigants.[56] This is not the place to explore that difficult issue, but we clearly need to address ourselves more fully to that question.

A related concern is the one that will be voiced by Judge

Higginbotham concerning the need to retain the courts as the ultimate agency capable of effectively protecting the rights of the disadvantaged. This is a legitimate concern which I believe to be consistent with the goals I have advocated. I am not maintaining that cases asserting novel constitutional claims ought to be diverted to mediation or arbitration. On the contrary, the goal is to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities.

Finally, we are robbed of much-needed flexibility by the constitutional requirement of jury trial. For present purposes this normally means that cases initially referred to binding arbitration (or some other nonjudicial process) must have the consent of both parties or else that a de novo trial must be permitted. Obviously we can live with such restrictions and still achieve considerable constructive change, especially if, as in Pennsylvania, the price of the de novo appeal from arbitration is to require the appellant to assume the cost of the arbitration. But one is bound to wonder whether, as an original matter, the requirement of jury trial still makes sense in the run-of-the-mill civil case, particularly if one keeps in mind the attendant increase in cost and time.[57/] In view of the desperate state of some of our civil calendars, it seems to me that the burden of persuasion should shift to those who maintain that the high costs are justified by unique advantages afforded by jury trials. Here again we must try to shun the endless abstract discussions of pros and cons, and seek instead to explore whether there are specific types of cases

in which juries make more or less sense, so that we might opt ultimately for a constitutional amendment that would permit greater flexibility to the legislature on this question.

Conclusion

It seems appropriate to end this fragmentary appraisal on a modest note. These are no panaceas; only promising avenues to explore. And there is so much we do not know. Among other things, we need far better data than are presently available in many states on what is in fact going on in the courts so that we can develop some sophisticated notion of where the main trouble spots are and what types of cases are prime candidates for alternative resolution.[58/] We need more evaluation of the comparative efficacy and cost of different dispute resolution mechanisms. And we need more data on the role played by some of the key individuals in the process (e.g., lawyers). Do they exacerbate the adversary aspects of the case and drag out the proceedings (as many family law clients believe), or do they serve to control otherwise overly litigious clients (as trial lawyers often assert)? What is the optimal state of a country's grievance machinery so that festering grievances can be readily ventilated without unduly flooding the system and creating unreasonable expectations of relief?

Above all, however, we need to accumulate and disseminate the presently available learning concerning promising alternative resolution mechanisms, and encourage continued experimentation and research. In this connection we must continue to forge links with those from other disciplines who share our concerns. Their

differing orientation and background often give them a novel perspective on the legal system.

I would like to close with a final suggestion. In preparing for this conference I encountered a number of compendious tomes embodying the proceedings of similar prior gatherings. I was struck with the recurring nature of many of the issues we are discussing, and wondered how we might avoid the unhappy fate that seems to have befallen many of the ideas thrown out at some of these earlier meetings. No doubt the organizers of this conference feel confident that we are more determined to avoid a similar fate, and for all I know, looking about at this impressive aggregation of concerned and able citizens, they are right. Still, it seems to me that at the conclusion of this meeting the organizers of this conference might designate a small group of dedicated individuals who would take it upon themselves to monitor the progress of some of the promising ideas that will be case adrift here. Perhaps this group might even issue a Pound Conference Impact Statement at periodic intervals to remind us of our accomplishments as well as our remaining goals. In this way we may all be able to continue to contribute to the solutions of the many grave problems that presently beset the courts and that presumably brought us here.

FOOTNOTES

* I am indebted to a number of colleagues and friends for helpful comments on earlier versions of this paper.

1/ J. Barton, Behind the Legal Explosion, 24 Stanf.L.Rev. 567 (1975).

2/ For the federal data, see Annual Report, Administrative Office of the U.S. Courts; for California, see Annual Report of the Administrative Office, 1975, p.82.

3/ See, e.g., A. Sarat & J. Grossman, Litigation in The Federal Courts: A Comparative Perspective, 9 Law & Soc.Rev. 321 (1975); A. Sarat & J. Grossman, Courts and Conflict Resolution: Problems in the Mobilization of Adjudication, 69 Am. Pol.Sci.Rev. 1200 (1975).

4/ For present purposes I use the word "dispute" to describe a matured controversy, as distinguished, for example, from a "grievance" which may be inchoate and unexpressed.

5/ See generally E. Johnson & V. Kantor, Outside the Courts: A survey of Diversion Alternatives in Civil Cases, to be published by the National Center for State Courts; M. Rosenberg, Devising Procedures that are Civil to Promote Justice that is Civilized, 69 Mich.L.Rev. 797 (1971).

6/ See L. Brown & E. Dauer, Preventive Law--A Synopsis of Practice and Theory, in The Lawyer's Handbook (rev. ed. 1975 Am. Bar Ass'n); see also the same authors' forthcoming casebook on preventive law to be published by Foundation Press.

7/ I would suggest the following criteria for determining the effectiveness of a dispute resolution mechanism: cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important.

8/ The term "dispute processing" rather than "dispute settlement" is borrowed from W. Felstiner, Influences of Social Organization on Dispute Processing, 9 Law & Soc.Rev. 63 n.1 (1974).

9/ The Berkeley Complaint Management Project, under the direction of Professor Laura Nader, is presently pursuing some of these questions; a book entitled "How Americans Complain" is contemplated. A similar inquiry is being undertaken by the Center for the Study of Responsive Law in Washington, D.C.

10/ See, e.g., A. Stone, Mental Health and Law--A System in Transition (Dept. H.E.W. 1975).

11/ In the federal system, the area of largest civil litigation growth has been that involving new statutory causes of action (e.g., civil rights actions, social security claims, etc.). See, e.g., Annual Report, Administrative Office of the U.S. Courts, 1974, p.390.

12/ I have selected this factor as one that seems to me rather critical, but there are obviously other aspects in which the various processes differ and which must be considered (e.g., method and cost of selection of third party, qualifications and tenure of third party, formality of proceedings, role of advocates, number of disputants, etc.). Some of these are referred to interstitially in the ensuing discussion. Another factor that is often said to play a differing part in the various processes is the relevance of norms. But see M. Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv.L.Rev. 637 (1976), suggesting that dispute settlement negotiation closely resembles adjudication in its frequent recourse to norms. See also A. Sarat & J. Grossman, Courts and Conflict Resolution: Problems in the Mobilization of Adjudication, 69 Am.Pol.Sci.Rev. 1200 (1975).

13/ L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc.L.Rev. 1, 19. See also L. Fuller, The Forms and Limits of Adjudication (unpub. mimeo.).

14/ For present purposes the terms mediation and conciliation will be used interchangably, although in some settings conciliation refers to the more unstructured process of facilitating communication between the parties, while mediation is reserved for a more formal process of meeting first with both parties and then with each of them separately, etc.

15/ L. Fuller, Mediation--Its Forms and Functions, 44 So.Calif. L.Rev. 305, 325 (1971).

16/ See W. Gellhorn, When Americans Complain (1966); P. Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Colum.L. Rev. 845 (1975); B. Frank, Ombudsman Survey (ABA Sec. Ad. Law). New Jersey has recently established a broad-scale Department of the Public Advocate, containing a Division of Rate Counsel, a Division of Mental Health Advocacy, a Division of Public Interest Advocacy, and a Division of Citizen Complaint and Dispute Settlement. N.J. Stat. Ann. §52:27E (Supp. 1975).

In addition to these public investigating officials, there are of course a host of private complaint processors employed by individual companies, by trade organizations or by the media.

17/ See W. Felstiner, note 8 supra. Of course, as Felstiner notes, there are exceptions to this generalization. For example

there may be enclaves having the characteristics of the simple society within the complex society, and sometimes overriding personal factors determine whether or not avoidance will be utilized in specific situations.

18/ See Danzig and M. Lowy, Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner, 9 Law & Soc. Rev. 675 (1975). See also L. Nader, Powerlessness in Zapotec and U.S. Societies (mimeo.).

19/ See S. Macaulay, Law and the Balance of Power (1966).

20/ L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc.L.Rev. 32-33.

21/ See. C. Foote, R. Levy & F. Sander, Cases and Materials on Family Law 1101-1109 (2d ed. 1976).

22/ See D. King, Consumer Protection Experiments in Sweden (1974). Cf. E. Steele, The Dilemma of Consumer Fraud: Prosecute or Mediate, 61 A.B.A.J. 1230 (1975).

The Swedish Public Complaints Board is one of five innovative dispute resolution mechanisms that is currently being studied by the Access to Justice Project, based at The Center for the Study of Comparative Procedure at the University of Florence, Italy, under the co-direction of Professor Mauro Cappelletti and Professor Earl Johnson of the USC Law Center in Los Angeles. The Access to Justice Project will soon be publishing a number of documents detailing dispute resolution mechanisms in a number of countries (including the United States), as well as various theoretical studies.

23/ See Professor Abram Chayes' forthcoming article on the new public law model of litigation, to appear in the April 1976 issue of the Harvard Law Review. One possible solution is for the court to utilize auxiliary mechanisms to aid its efforts. But see Rizzo v. Goode, 96 S.Ct. 598 (1976) rejecting such a solution.

24/ For a comprehensive survey of these efforts, see, D. Aaronson, B. Hoff, P. Jaszi, N. Kithrie & D. Saari, The New Justice--Alternatives to Conventional Criminal Adjudication (Instit. for Advanced Studies in Justice, American University, Dec. 1975). See also Stulberg, op.cit. infra note 25, for a description and evaluation of the American Arbitration Association's somewhat comparable 4-A ("Arbitration-As-An-Alternative") project, and R. Nimmer, Diversion: The Search for Alternative Forms of Prosecution (Am. Bar. Found. 1974).

25/ See, e.g., J. Stulberg, A Civil Alternative to Criminal Prosecution, 39 Albany L.Rev. 359, 367 (1975); Exploring Alternatives to the Strike, Monthly Labor Rev., Sept. 1973, p.33 (discussion of mediation-arbitration).

26/ See L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc.L.Rev. 23-30. See also Code of Professional Responsibility for Arbitrators of Labor-Management Disputes §2F.

27/ See C. Foote, R. Levy & F. Sander, Cases and Materials on Family Law, Chapters 1A and 6B (2d ed. 1976).

28/ See, e.g., S. Roberts, A Family Matter, 38 Mod.L.Rev. 700 (1975), discussing an English case in which various sums were contributed by a man, his brother and his parents towards the purchase of a common household. After they had lived there for 13 years, the mother died, leaving her estate to her sons in equal shares. A dispute then arose between the two brothers as to their respective shares. The writer opines that formal adjudication does not appear to be the best way to settle this kind of dispute.

29/ See J.M. Keating, Arbitration of Inmate Grievances, 30 Arb. J. 177 (1975). For a discussion of some other models in this setting, see Note, Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority, 81 Yale L.J. 726 (1972). See also J.M. Keating, V. McArthur, M. Lewis, K. Sebelius and L. Singer, Toward a Greater Measure of Justice: Grievance Mechanisms in Correctional Institutions (Center for Correctional Justice, Washington, D.C., 1975); Seen But Not Heard: A Survey of Grievance Mechanisms in Juvenile Correctional Institutions (Center for Correctional Justice, Washington, D.C.).

30/ See R. Wilsnack, Explaining Collective Violence in Prisons: Problems and Possibilities, to be published in A. Cohen, G. Cole and R. Bailey, Prison Violence.

31/ B. Ingvesson & P. Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 Law & Soc.Rev. 219 (1975).

32/ A somewhat similar function is performed by law students as part of the Night Prosecutor Program in Columbus, Ohio. See Citizen Dispute Settlement (LEAA 1975).

33/ A rudimentary beginning towards cost comparisons was provided in the evaluation report of the Philadelphia 4-A ("Arbitration-As-An-Alternative") project. See note 24 supra. The evaluators found a "direct" cost of $83.60 per project case as compared with a "direct" cost of $141 for each court case. But as the evaluators note, there are many questions about such a comparison. To begin with, the figures depend upon the volume of cases, and with respect to court cases assume an average rather than a marginal cost allocation. And there is no attempt to control for the possibly differing complexity of the two classes of cases. See B. Anno and B. Hoff, Refunding Evaluation Report on the Municipal Court of Philadelphia's 4-A Project, Blackstone Associates, Washington, D.C., Feb. 25, 1975.

34/ Other conceivable objections to such a proposal (e.g., denial of the right to a jury trial) are considered below.

35/ Several Boston lawyers have told me this when I asked them why they did not use arbitration to a greater extent in connection with separation agreements.

36/ This appears to be the practice in Pennsylvania. See National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Resource Materials, pp. 91-93.

37/ See, e.g., the Blackstone Associates report, note 33 supra, indicating disposition of 88% of project cases in an average time of 49 days, whereas that was the shortest time in which the court disposed of any case. See also Resource Materials, note 36 supra.

38/ In some past experiments, such as the 4-A project, the initial phase is denominated arbitration. But conciliation always represents an important initial step in that operation, see, e.g., Stulberg, op. cit. supra note 25, and the question then becomes whether the mediation and arbitration should be performed by the same person. I have earlier indicated my doubts about such a coalescence of functions. In addition, the use of separate personnel, though perhaps more expensive and time-consuming, makes possible the use of individuals with different backgrounds and orientations in the two processes.

39/ For some other examples, see L. Nader and L. Singer, Law in the Future--What Are the Choices? Paper prepared for Conference Sponsored by California Bar, Sept. 12, 1975.

40/ Conversely where the relationship is one of pure bargaining, but it is desired to have limited adjudicative intervention in case agreement cannot be reached, the final offer arbitration device sometimes utilized in public sector employment is available. See, e.g., Massachusetts Acts, 1973, ch. 1078. Under this process the arbitrator is limited in his decision to a choice between the last offer of the two parties. The obvious purpose is to engender good faith bargaining. See, e.g., Industrial Relations, Oct. 1975, for a number of articles seeking to evaluate the practice.

41/ This assertion is based on the assumption that some of this new mediational work will displace work previously done by lawyers. But as pointed out earlier, much of it may simply substitute for what is now being handled by avoidance.

42/ Compare H. Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, to be published in the 28th Proceedings of the National Academy of Arbitrators by BNA, suggesting an uncertain command by labor arbitrators of the federal law of employment discrimination. See also D. Feller, The Impact of External Law Upon Labor Arbitration, paper delivered at National Conference on the Future of Labor Arbitration in America, to be published by the American Arbitration Association.

43/ See R. Danzig, Towards the Creation of a Complementary, Decentralized System of Criminal Justice, 26 Stanf.L.Rev. 1 (1973); Comment, Community Courts: An Alternative to Conventional Criminal Adjudication, 24 Amer.L.Rev. 1253 (1975); J. Jaffe, So Sue Me! The Story of a Community Court (1972).

44/ See, e.g., Law in Culture and Society (L. Nader ed. 1969); J. Gibbs, The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes, 33 Africa 1 (1963), reprinted in Rough Justice: Perspectives on Lower Criminal Courts (J. Robertson ed. 1974).

45/ For an optimistic answer to this question, see D. Smith, Book Review, 87 Harv.L.Rev. 1874 (1974). It is interesting to note that with the notable exception of the Jewish Community Board, whose work is the subject of the cited review, and a few other institutions, most of the experiments to date have involved alternatives to the criminal courts. Is this the result of some conceptual notion, or, as I suspect, because, according to the reputed response of Willie Sutton, the famed bank robber when asked why he robbed banks, "that's where the money is"?

46/ See V. Aubert, Courts and Conflict Resolution, 11 J. Conflict Resolution 40, 44 (1967), suggesting that failure realistically to appraise a legal claim is one major reason for taking it to court rather than settling it. Other reasons given are irrational behavior on the part of litigants (e.g., undue pride or stubbornness) or the indivisibility of the claim in issue (e.g., child custody).

47/ Massachusetts Laws, 1975, ch.362.

48/ There may also be serious question about the constitutionality of this provision, because of the participation of lay individuals in an essentially judicial function and the possible prejudice that may result from an apparently highly informal and abbreviated preliminary proceeding. See also the discussion of the right to jury trial infra.

49/ For a thoughtful and modest proposal along these lines see P. Mause, Winner Takes All: A Re-examination of the Indemnity System, 56 Iowa L.Rev. 26 (1967). Once litigation involves a substantial economic cost for the loser, it is possible to create effective incentives for the settlement of cases. Such a system is presently in effect in England. It permits the defendant at any time to "pay into court" a proposed settlement sum; if the plaintiff refuses the offer and fails to recover more after trial, he forfeits his costs from the point of the offer into court. See M. Zander, Payment Into Court, New Law Journal, July 1975, p.638. Some American states have similar provisions, but with costs not encompassing attorneys' fees, they do not have much bite. The English system of self-evaluation by the defendant may be compared with the Michigan Mediation system discussed in the text, infra. The Michigan System seems fairer but more costly since it calls for an independent evaluation of the plaintiff's claim.

50/ S. Miller, Mediation in Michigan, 56 Judicature 290 (1973).

51/ See R. Olson, An Examination of the Judicial Process: A Discussion of Modifications and Alternatives to Our System of Dispute Resolution, to be published in the Summer 1976 issue of Litigation, the journal of the ABA Section on Litigation. The concept of "more fair and efficient adjudication of the controversy" is borrowed from Federal Rule 23(b).

Mr. Olson's Committee is presently undertaking a nationwide survey, through interviews with judges, court administrators and experienced practitioners, of innovative approaches to reducing the time and expense of litigation as well as of promising alternative dispute resolution mechanisms.

52/ See, e.g., Kamm v. California City Dev. Co., 509 F.2d 205 (9th Cir. 1975)(trial court in land fraud class action was justified in dismissing class action on basis of agreement that defendant would utilize arbitration to process potential multiple claims against it). But cf. Rizzo v. Goode, 96 S.Ct. 598 (1976)(improper for district court to order creation of program by City of Philadelphia Police Dept. for processing recurring complaints of police misconduct).

53/ Consider, for example, the provision of the Magnuson-Moss Warranty Act which requires the FTC to promulgate rules establishing procedures for informal dispute settlement mechanisms which must be exhausted before any law suit can be commenced under the Act. See Public Law 93-637, and the implementing regulations adopted by the FTC, 40 Fed. Reg. 60190 (Dec. 31, 1975). Compare the suggestion that each statute creating substantive rights contain a judicial impact statement.

54/ This presents an excellent opportunity for law students who seek to do creative field work, e.g., by helping a telephone company to set up a grievance mechanism, or studying the operation of the local ombudsman.

55/ Cf. L. Rubenstein, Procedural Due Process and the Limits of the Adversary System, 11 Civ. Rights-Civ. Lib.L.Rev. 48 (1976).

56/ See E. Johnson and V. Kantor, op. cit. supra note 5, Chapter VI. See also H. Friendly, "Some Kind of Hearing", 123 U.Pa.L.Rev. 1267 (1975).

57/ See, e.g., M. Redish, Seventh Amendment Right to Jury Trial: A Study of the Irrationality of Rational Decision Making, 70 Nw. L.Rev. 486 (1975).

58/ Apart from deficiencies in particular states, interstate comparisons are particularly hampered by the lack of comparability among the data.

For Distribution to Participants
April 1, 1976

ARE WE ASKING TOO MUCH OF OUR COURTS?

Simon H. Rifkind

Remarks

at

National Conference on the Causes
of Popular Dissatisfaction with
the Administration of Justice:

Commemorating the 70th Anniversary
of Roscoe Pound's Address to the
American Bar Association in
St. Paul, Minnesota.

April 8, 1976

When Roscoe Pound spoke in this city seventy years ago, he chose as his title, "The Causes of Popular Dissatisfaction with the Administration of Justice."[1] When this conference was convened, it was taken for granted that the same title could appropriately be used. Everyone knows that dissatisfaction with the administration of justice continues today. That should not surprise us -- Pound termed such dissatisfaction as "old as the law."

However, our ability to borrow Pound's title for our deliberations should not mislead us into the belief that we are looking at the same landscape that he had under observation. I venture the opinion that much of today's dissatisfaction springs not from failure but from conspicuous judicial

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1. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am. L. Rev. 729 (1906).

success. The courts have been displaying a spectacular performance; it enjoys a constant "Standing Room Only" attendance. The cause of complaint is that the queues are getting too long. Many litigants are clamoring for attention.

In consequence, there is a growing -- and justified -- apprehension that

(1) Quantitatively, the courts are carrying too heavy a burden -- and probably a burden beyond the capability of mitigation by merely increasing the number of judges.

(2) Qualitatively, the courts are being asked to solve problems for which they are not institutionally equipped, or not as well equipped as other available agencies.

I do not perceive the role of the panelists -- and certainly it is not my role -- to invent or reveal the solutions to the problems facing the administration of justice. Rather, this is a place from which, as I perceive it, we are to be

encouraged and stimulated to probe deeply -- to question and to explore, and to create instruments for further probing and exploration. If we are successful, we shall have formulated an agenda for reform which will occupy our attention during the next decade.

Looking back at Pound's experience, I do not stretch my prophetic capacity too far when I suggest that we shall be fortunate if within the decade we uncover the answers. It will probably take even longer to put them into practice. In these sessions, let us hope that we can at least achieve orientation in a specified direction.

We can begin by seeking to determine whether the causes for dissatisfaction with the administration of justice have changed during the past seven decades. I believe that they have.

Pound grouped the causes of dissatisfaction with the administration of justice under four headings -- those common to any legal system, those lying in the peculiarities of the Anglo-American legal system, those lying in our judicial organization and procedure, and those lying in the environment of our judicial administration.

The cause of dissatisfaction which is most important today is a combination of Pound's second and fourth categories -- the peculiarities of the Anglo-American legal system, as they find expression in the environment of our judicial administration.

Over the centuries, courts having their roots in the Anglo-American tradition have evolved a rather superior talent in dispute resolution. To that end, the adversary process has been tuned to a high degree of sophistication and refinement. That process, traditionally, is seen at its

best in the two party contest in a controversy capable of resolution by the finding of facts and the application of law.

American judicial history reveals a pattern of the progressive shattering of the archetypical mold I have described. And certainly during the period that has elapsed since Pound spoke, our courts have, increasingly, been solicited to become the problem-solvers of our society: Shall we prosecute a war, or make peace? What is life; when does death begin? How should we operate prisons and hospitals? No problem seems to be beyond the desire of the American people to entrust to the courts. The reasons for this derive both from the character of the American legal system, and from the social and political environment in which our courts function.

It is quite easy to document support for the proposition that the courts have, indeed, become the handymen of our society. The American public today perceives courts as jacks-

of-all-trades, available to furnish the answer to whatever may trouble us: Shall we build nuclear power plants, and if so, where? Shall the Concorde fly to our shores? How do we tailor dismissal and lay-off programs during the depression, without undoing all of the progress achieved during prosperity by anti-discrimination statutes? All these are now the continuous grist of the judicial mills.

Thus, it is not surprising to learn that a lawsuit was recently filed in the Southern District of New York seeking to prevent the United States Postal Service from issuing a commemorative stamp honoring Alexander Graham Bell -- on the grounds that someone else invented the telephone.[2]

It is equally easy to compile reports -- both state and federal -- attesting to the backbreaking burden which the courts are carrying. Students of the subject report that case

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2. See "Suit to Bar Stamp Denies Bell Invented Telephone", New York Times, February 27, 1976, page 35, column 3.

loads in both the federal and state courts are increasing at a pace far beyond the growth in population.

As far as I know, this aggravated condition is conspicuously a problem unique to this country. It is rooted partly in the litigious character of our citizenry, partly in the relative ease of access to the courts, and partly in the peculiar character of the American judge which readily distinguishes him from his European or Asiatic counterpart. Indeed, it distinguishes him from all judges who do not practice in the Anglo-American tradition. The American judge is a lawmaker, a commentator, an innovator to an extent not known in the countries which lack a legal system having roots in the common law. Personally, I have never heard a German, French, or Swiss lawyer speak of judge-made law.

These peculiarities, of course, may explain why judges and their work product play so conspicuous a role in American

history, whereas they are almost invisible in the history of non-common law countries.

That also may explain the public readiness to look to judges -- more than the legislature or executive -- for solutions to public problems.

The brief description I have given of the American judge also explains why, as Judges Friendly and Leventhal have noted recently,[3] the burden is not capable of relief by addition

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3. Judge Friendly wrote in his Federal Jurisdiction: A General View (1973) that

> there must come a point when an increase in the number of judges makes judging, even at the trial level, less prestigious and less attractive. Prestige is a very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits. Yet the largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on the federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice.

Id. at 29-30. Judge Leventhal, in reviewing the book, expressed his agreement. See Harold Leventhal, Review of Federal Jurisdiction: A General View (by Henry J. Friendly) (1973), 75 Col. L. Rev. 1009 (1975).

of judges alone. Men and women capable of performing the judicial function -- American style -- are of limited supply. That rare combination of character, learning, experience, temperament, sagacity, and energy which compose an adequate judge does not occur in nature in abundance.

Moreover, if the judicial office is to attract people possessed of the qualities I have enumerated, it must be endowed with considerable prestige. The greater the number, the less the prestige. The less the prestige, the less the public respect, an essential ingredient of a satisfactory judicial system.

Judges and lawyers may be tempted to congratulate themselves upon the explosion of judicial business, and in fact to term it a sign of "public satisfaction with the administration of justice"[4] -- and public dissatisfaction with the political branches of the government.

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4. A recent public opinion poll found that 26 percent of adult Americans had "a great deal of confidence" in the U.S. Supreme Court -- but that only 13 percent had a "great deal of confidence" in Congress or the Executive Branch. The Harris Survey, "Record Lows in Public Confidence", released October 6, 1975.

But we would, of course, be myopic to engage in such self-adulation. The volume of business which the courts are being asked to carry is beyond their capacity. The result is long delays in the judicial process, and public dissatisfaction with the denial of justice that these delays import.

It is clear to me that one item on our agenda for the future must include efforts to lighten the workload of the courts if we are to eliminate public dissatisfaction with the administration of justice.

The effort may well start with recognition of the truth of Chief Justice Stone's remark:

> "Courts are not the only agency of government that must be assumed to have capacity to govern."[5]

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5. United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

At this point, allow me to lay to rest some apprehension that I have heard expressed about the investigation launched by this conference. A large percentage of the increase in the business which has come into our courts in recent years has related to the protection of civil rights. That circumstance has generated a fear that this conference is conspiring to promote a counterrevolution; in the guise of an inquiry into whether the courts are being asked to do too much, and to do that for which they are ill-equipped, it is suggested we are seeking to erect an impassible barrier against the growing recognition of the rights of the accused, the voter, the consumer, the stockholder, the victims of racial and sexual discrimination; and indeed to reverse the generation-long movement for expansion of their rights.

Let me at once disengage myself from any such enterprise. The exploration of the Constitution, and discovery therein, progressively, of more commands for the humanization of

our society have by no means run their course. Some scholars have suggested "that the judicial power is approaching the limits of its utility for major strategic innovation."[6] However, new rights -- newly acknowledged and only recently enjoyed -- will inevitably supply the pressure for judicial innovation to continue. If that momentum is to proceed without the artificial impediment of overladen courts, we must relieve the courts of burdens that do not require their special expertise.

Innovations of the future, whether the work-product of judges or legislators, will inevitably have to pass through courthouse strainers and filters. If these are clogged and stuffed, the passage is bound to be more sluggish, less reflective, and probably less sagacious.

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6. Charles L. Black, Jr., Review of The Role of the Supreme Court in American Government (by Archibald Cox) (1976), New York Times Book Review, February 29, 1976 at 23.

What I suggest is that the direction of our search should be guided by our view of our courts as institutions of last resort. We should require them to do nothing which other, less irreplaceable institutions can do as well, and, as far as possible, preserve the courts for doing that which cannot be done elsewhere.

How do we find that line? It is not easy to find the applicable criteria for determining what does and does not belong in the courts. Clear it is, however, that we should search for them in the living experience of our courts rather than in purely intellectual models. But, I suspect that every investigator of this question has, consciously or unconsciously, an image in contemplation of the indispensable functions of the court and its major characteristics.

Several characteristics may be noted. First, our courts have traditionally been dependent on the adversary

process -- a system of organized contentiousness, which theoretically guarantees all interested parties an opportunity to be heard and makes the function of the courts the resolution of a specific dispute rather than, as some would urge,[7] a search for ultimate truth. Second, and related to the adversary process, is the notion of an impartial judge, disinterested in the disputes before him. Third, that impartial judge is bound to decide those disputes with reference to an existing (and developing) body of law, rather than to his own ipse dixits. Fourth, the judge, especially in our courts of original jurisdiction, must make that decision by himself; his authority cannot be delegated as easily as in the executive or legislative branches. Fifth,

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7. See, e.g., Marvin E. Frankel, "The Search for Truth: An Umpireal View," 123 U. Pa. L. Rev. 103 (1975); Contra, Simon H. Rifkind, "The Lawyer's Role and Responsibility in Modern Society," 30 Rec. of Ass'n of Bar of N.Y. 534 (Nov. 1975).

a relative ease of access to the judiciary prevails in this country which makes it easier for an aggrieved citizen to be heard in the courts than before the legislature or the executive. And sixth -- largely as a product of some of the stated characteristics -- the judicial process in the United States has become a relatively slow, cumbersome, and expensive process, whether for the resolution of disputes or the solution of problems.

Against this background, I suggest that we begin our attempt at the identification of criteria for inclusion and exclusion in this heartland of the problem: Shall the courts continue to be not only the dispute-resolvers, but also the problem-solvers of our society?

Heretofore, the accepted model of an American court was that of an institution devoted to the resolution of disputes. It was the dispute which divided the parties. The object of the judicial intervention was to bring that dispute

to an end by determining whether the plaintiff or the defendant prevailed. Many disputes, of course, did not run the whole gamut. They were abandoned, compromised or disposed of by means short of trial.

The adversary process is a well honed tool for use in such a contest. One of its greatest assets was a convention -- the convention that one or the other party had the burden of proof with respect to particular issues. It is the allocation of the burden of proof which makes it possible to resolve all disputes and to leave none in limbo. If the party which bears the burden of proof fails, the other side prevails. One of the virtues of this system lies in the fact that the decision directly affects only the parties to the dispute. While indirectly it affects other similar disputes by the force of precedent or by the principle of stare decisis, that is not the same as the force of a judgment. The reason for the difference is that the new case may differ in one or more of its

facts, that it is entitled to a trial, to a new evaluation and perhaps to a slightly or greatly revised formulation of the principle enunciated in the first. Each new decision is thus a small tile in a great mosaic, the design of which changes subtly and gradually and thus avoids the disasters which frequently overtake those who drive principles to the extreme end of their logical conclusions. I believe that this is at the heart of Justice Holmes' advice that experience, rather than logic, is the life of the law.[8]

Problem-solving is an enterprise of a different sort altogether. The problem-solver finds no refuge in the burden of proof. He does not confine his edict to the parties before him. The consequences of his pronouncement of a solution cannot be confined to tile-sized changes. He frequently administers avulsive changes. Problem-solving is, thus, a chancy

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8. Oliver Wendell Holmes, The Common Law (1881).

business requiring, in a democracy, not only wisdom and inventiveness but a keen perception of the political implications. Moreover, it imposes a duty upon the problem-solver to hear all those who have a significant interest in the problem. Very frequently the problem-solver tends to become a champion of a cause and not a neutral decider. His reward comes from popular acclaim, not from law review commendation. Despite this chasm which divides the problem-solver from the dispute-resolver, there is a growing tendency to confuse the two.

On the campuses, voices are heard which look benignly upon those areas of our jurisprudence wherein courts have become problem-solvers. It is projected as the wave of the future. Indeed, new words have been coined to describe the new judicial role. Courts have become mini-legislatures. Judges now preside at proceedings in which there is no clear alignment of parties but at which all who have a so-called significant interest may

have their say, and indeed they should since the decree will directly affect them by judgment and not by precedent. Judges, being human, are not averse to their enlarged role and expanded responsibility. It is exhilirating to administer relief to a universe of victims, and if some are unknown and unknowable, then to distribute largesse to the deserving by application of the cy pres doctrine in the fashion of Haroun Al-Rashid.[9] A gifted judge finds it a rewarding and self-fulfilling experience to write a prescription for the rehabilitation and pacification of a large strife-torn community.[10]

Recent history has recorded a number of brilliant judicial exploits in this area. Nevertheless, several questions perturb me.

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9. See Note, "Damage Distribution in Class Actions: The Cy Pres Remedy," 39 U. Chi. L. Rev. 448 (1972); Michael Malina, "Fluid Class Recovery as a Consumer Remedy in Antitrust Cases," 47 N.Y. U.L. Rev. 477 (1972); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), modified 333 F. Supp. 291 (S.D.N.Y. 1971), mandamus denied sub. nom. Pfizer v. Lord, 449 F.2d 119 (2d Cir. 1971); Bebchick v. Public Utilities Commission, 318 F.2d 187 (D.C. Cir. 1963), cert. denied, 373 U.S. 913 (1963).

10. See, e.g., Judge Weinstein's sweeping order relating to school desegregation in Coney Island in Hart v. Community School Board, 383 F. Supp. 699 (E.D. N.Y. 1974), appeal dismissed for lack of appealable order, 497 F.2d 1027 (2d Cir. 1974), 383 F. Supp. 769 (E.D.N.Y. 1974), aff'd, 512 F.2d 37 (2d Cir. 1975).

The first is the ancient question: Quo warranto? By what authority do judges turn courts into mini-legislatures? Confessedly, scholars may differ with respect to the answer.

The second question is less open to dispute. Is there anything in the traditional modes of judge selection which suggests the presence of aptitude for this kind of activity?

If we assume that among all the judges can be found the talents for this exacting role, is there any means of selection in the assignment of judges which can designate the peculiarly gifted judge for these particular problems in litigation?

Our country faces a great energy problem, a problem relating to the decay of our cities; enormous demographic changes are generating a series of problems which have proved especially intractable. The rising crime rate has all the earmarks of a revolutionary change in the patterns of our social behavior. The whole educational establishment is

shaking with tremors of dissatisfaction and change. We have witnessed a sexual revolution, an enormous turnaround in public attitude in reference to the environment; one could go on and on.

Do we really believe that judges have any special aptitude which makes them suitable custodians of the responsibility for the solution of these problems? Is there anything in the judicial machinery which makes it a peculiarly suitable instrument for the study and resolution of such problems?

Indeed, it is traditional for Executive Commissions and Legislative Committees, assigned to a problem-solving mission, to reject the judicial format, to dispense with the rules of evidence, to shun the adversary process. This suggests that experience does not find these courtroom procedures helpful in problem-solving.

It is one thing for judges to decide bi-party controversies and, in so doing, pronounce principles which may have

an effect on the solution of the underlying problem, sometimes favorable and sometimes unfavorable. It is another for the courts to be burdened with the responsibility for the solution of the problems.

Our reflection, it seems to me, ought to address itself to the question whether the tether which holds the court to its classical role is getting too long so that the court is straying into the territory which more appropriately belongs to the Legislature, the Executive Commission, the Legislative Committee, or even to the academic self-selected task force.

To avoid the misconception that I am suggesting denial of access to the courts to whose who feel that they have been denied statutory or constitutional rights, I should sharpen my point by explicit definition. So much depends on the perspective. In my perspective I see a great difference between the two roles. On one side, I see a court which tries to determine:

was Jones unlawfully excluded from the University of State X, and which, having answered the question in the affirmative, fashions a decree designed to bring an end to the denial of the plaintiff's rights. On the other side, I see a court which, bidden or unbidden, undertakes to solve the problem of unequal education in State X.

In short, I am not at all sure that the courts have either the manpower, the talent, the tools or the authority to do the second.

If investigation should reveal that my doubts are to be resolved unfavorably to such an expanded problem-solving role for the courts, should we not speak plainly and avoid the unhappiness of disappointed expectations in an era already well endowed with great expectations destined never to be realized?

The characteristics I have attributed to the courts suggest the exploration of additional ways in which the business

now overloading the courts might be lessened. There are two main routes we can take toward this goal -- substantive and procedural.

The use of the substantive route is dependent upon determinations of social policy which, in a democracy, are not made in the courts. Along the substantive route, I invite inspection of three types of judicial business, currently in the courts, which may be withdrawn: activities which do not warrant any government intervention; disputes which might better be resolved by another branch of government; and controversies which, ideally, should be resolved by another branch of government, but which have come into the courts because of a default of the other branches.

This inspection has to be animated by an awareness that our judicial resources are in very limited supply; that they are stretched thin; that their use in less appropriate

situations is a denial of their use in more appropriate situations; that the conservation of the judicial resources has become an imperative necessity.

One guiding test for identifying cases in the first category -- those which do not warrant use of the courts or any other government intervention -- is whether the adversary system is the best means for their disposition.

The country is dotted with probate courts, a very large part of whose work is uncontested. Why employ judges as filing clerks? The British have developed a form of probate which deserves our emulation. In essence, wills are filed as deeds are in this country -- and there are no court proceedings unless there is a disagreement among claimants. There is no need to impose the adversary system on persons who are not adversaries.

The uncontested divorce is theoretically not quite in the identical position. Many jurisdictions still look

askance at divorce on demand, and require scrutiny. Why need that scrutiny be judicial? In many other jurisdictions, the judicial intervention is of trivial proportions. Perhaps it can be abolished, and judicial resources better applied.

The legislative branch might also be invited to re-examine the possibility of decriminalization of behavior now looked upon with tolerance in many jurisdictions. These include victimless crimes, such as drunkenness, prostitution, and gambling. If society in fact tolerates this behavior, then in a sense there is no adversity between the government prosecutor and the defendant.

There are several types of disputes now resolved in the courts which arguably might better be resolved by another branch of government.

The greatest consumer of judicial resources and energy is the personal injury lawsuit. Recent activity

in the field of no-fault auto-insurance suggests that the nation is ready -- or can be made ready -- to treat the use of the automobile as involving widespread risks which can best be treated as a generalized cost of getting about in our society. The establishment of universal auto insurance and the dejudicialization of all personal injuries attributable to automobiles would change the character and climate of our courts The question is simply one of timeliness: are the legislatures ready for it?

Years ago, it was realized that there was a better way to deal with industrial accidents than the judicial allocation of fault. The Workmen's Compensation laws recognized that injuries to workmen should be borne as a cost of operations, and their burden spread by insurance. These laws have spared the courts an enormous burden. However, some employees -- notably seamen and railroad workers -- are

excluded from the coverage of Workmen's Compensation. If the workmen's compensation principle were extended to them, a further burden would be removed from the courts. These are politically sensitive areas. But no one concerned with the burden on the courts can afford to overlook them.

Also included in the category of disputes which might better be resolved by another branch of government are cases in which the courts are used not because the parties desire a judicial decision, but rather as an instrument of delay; as a negotiating tactic. In many contested tender offers, it is an open secret that neither side expects judicial resolution of a controversy. Instead the court is used as a filibustering agent, as a bargaining tool -- to slow down the process until the offering price is raised, or other forces intervene. I am informed that in Britain, corporate take-overs rarely if ever make their

way into the courts; they are instead handled by an administrative agency.

In all fairness to the legislatures, we must recognize that there are some disputes which the legislatures wisely assigned to a forum other than the courts -- but into which the courts have stepped, even when that other forum was doing a capable job. A conspicuous example was the recent decision of the Second Circuit in Green v. Santa Fe Industries, Inc.[11] The court held that use of the Delaware short-form merger -- under which shareholders of 90% of the stock of a corporation could acquire the 10% minority interest -- could result in a securities fraud claim under Rule 10b-5. State law attempted to limit the minority shareholders' remedy to appraisal rights. The opinion, on its surface, is a technical application of the federal securities laws. But I venture that the opinion's

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11. No. 75-7256 (2d Cir., Feb. 18, 1976).

effect is to bring into the courts a whole group of disputes which the legislature thought could be treated adequately elsewhere.

A final area in which we may explore substantive changes of the business of the courts are those disputes which, ideally should be resolved by other branches of government but which come into the courts through the inaction or irresponsibility of those other branches.

In lay terms, it has been said that the courts of today are running schools and prison systems, prescribing curricula, formulating budgets, and regulating the environment. But the lay version conceals more than it reveals. In virtually all of the cases in which courts have entered areas that are more properly -- and can be more effectively -- dealt with in the other branches, the courts have done so by reason

of the default of the legislatures and executives. Baker v. Carr[12] illustrates the point. There are many examples. In Wyatt v. Stickney,[13] Judge Frank M. Johnson of the Middle District of Alabama placed virtually the entire mental health system of the State of Alabama under the supervision of the Federal Court. But that decision was not motivated by the judge's desire to become a mental hospital administrator; it was compelled by the inaction of the state executive and legislature. If a judge must inspect the operating conditions of a prison, a hospital, or a welfare office to determine whether constitutional, statutory, or common law rights are being invaded, what else can he do but perform his duty? And if he finds that rights are being abridged, what else can he do but seek to correct the abuses?

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12. 369 U.S. 186 (1962).

13. 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), enforcing 325 F. Supp, 781, 334 F. Supp. 1341 (M.D. Ala. 1971), aff'd in part, remanded in part, decision reserved in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

Solving the problem of what should be done when these types of cases come into the courts may be the most difficult task we face. They may represent the growing tip of the caseload of the courts in the future. The solution most certainly is not to close the courthouse door, but preferably to change the manner in which the legislature and executive respond to difficult social and politicial problems, so that very few will need to bring them to the courthouse door. The courts should not be the only place in which justice is administered.

We must also explore the procedural route to lessening the burdens on the courts. This route is, of course, one which has often been used both to keep certain business out of the courts and to guide other business through the courts. We have used a variety of gates to exclude some would-be litigators from the courthouse. Their names are well-known: personal jurisdiction, subject-matter

jurisdiction, case and controversy, standing, primary jurisdiction, exhaustion of remedies, amount in controversy.

What more can we do to keep out the worthless, the trivial, and those litigations which, by a definition not yet formulated, ought not to be in the courts?

Here, I confess that I am adrift on a sea of questions. It is possible to increase the price of admission to the courthouse; but that goes against our tradition of freedom of access to the courts without distinction by reason of wealth. We might increase the risks of litigation by following the English in imposing the expense of attorneys' fees on the losing party. Again, our history is opposed to it. In some cases, we might require posting a bond for costs. That has been tried, with modest success.

The difficulty with these proposals is that they may achieve exclusion for adventitious reasons.

It would seem to me that the higher threshold in front of the courthouse door should be built on the probable merit of the claim. That suggests the question whether it would be prudent to borrow from our criminal practice and require a civil litigant to show "probable merit" before he cranks into action the prodigious machinery of the judicial process.

Illustrative of this is the attempt, not fully refined, in the field of medical mal practice to screen claims by the use of mixed panels, including doctors. This is but one experiment in a field open to much trial.

There is no denying that judicial machinery can be used and is used for illegitimate purposes: to harass by discovery, to extort, to filibuster.

Further exploration might reveal whether such a showing of merit would favorably affect the judicial burden.

One stage at which a requirement of showing probable merit might be useful is the point at which discovery is to begin. I believe it is fair to say that currently the power for the most massive invasion into private papers and private information is available to anyone willing to take the trouble to file a civil complaint. A foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the Fourth Amendment.

Unless my experience is unique, I hazard the opinion that such discovery proceeds with no attempt at serious regulation. If the threshold for admission to discovery were lifted so as to require a showing of probable merit, the flow of several classes of litigation would tend to diminish. Many actions are instituted on the basis of a hope that discovery

will reveal a claim. To some extent, this is the result of the liberalized requirements of pleading, heralded at the beginning of this century, which reduced the requirements of the petition and left for discovery the opportunity to define the facts and issues. The theory was that this would prevent pleading from being a "game of skill" and prevent trials from becoming "sporting matches."[14] The practice -- in many areas of the law -- has been to make discovery the "sporting match" and an endurance contest. Is this a luxury which an overtaxed judicial system can afford?

The federal system has long recognized that a claim may be too small to warrant the attention of its courts. The

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14. See Conley v. Gibson, 355 U.S. 41 (1957).

states have not enjoyed this luxury. They have struggled with inferior courts and small claims courts. Is it possible to define a class of controversies, modest in amount, not very significant in principle, which need resolution for the peace and harmony of the community, but which do not need the courts? If so, can provision be made for the lay arbitration of such "neighborhood disputes." Refusal to have recourse to such extra-judicial tribunals might be so burdened as to make the arbitration almost compulsory.

Conversely, is it possible that some cases are too big for judicial action, and procedural limitations on the size of a case should be imposed?

By "too big", I mean that the trial format as we know it cannot accomodate itself to the requirements of the

case. This incongruence may arise from excess in any number of dimensions. It may involve too many parties, or raise an excessive diversity of issues, or take too long to try.

In United States v. IBM,[15] now on trial in the Southern District of New York, the trial judge announced at the beginning that he expected to devote one year to trial and one year to decision. The government announced it would call 100 witnesses, and IBM said it would call 400. After nine months of trial and 25 government witnesses, the end is nowhere in sight. This is not a solitary example.[16]

I venture the guess that these dinosaur cases

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15. 69 Civ. 200 (S.D.N.Y.)

16. In United States v. Arkansas Fuel Oil Corp., 1960 Trade Cas. ¶ 69,619 (N.D. Okla. 1960), I was one of 84 lawyers deployed around 40 large tables. What might have been turned into a shambles was saved by a judge of extraordinarily high quality and by the willingness of the defendants to allow a committee of four to manage the case for them. In United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945, per Learned Hand), the complaint named 63 defendants.

could have been translated into trials of normal magnitude if there were no choice. A trial is a medium of communication, and every such medium -- whether it be a newspaper, a broadcast, or a play -- has learned to accomodate itself to an effective size. Trials are no exception.

No matter how able the judge, are we wise to assign such enormous cases to the courts? Should the number of parties, instead, be limited so that a judge can simultaneously carry in his mind the position and interests of each of them? What are the outer limits of size in numbers and duration? Is it "cranial capacity"? Must the record be so confined that it can be contained within a single cranium; that if it needs a computerized memory, it is no longer suitable for a judge or a jury? In United States v. Dardi,[17] a stock-manipulation case, the jury served 11 months. Does that constitute a trial?

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17. 330 F.2d 316 (2d Cir. 1963), cert. den., 379 U.S. 845, 379 U.S. 869 (1964). On appeal, the defendants argued, unsuccessfully, that the length of the trial alone constituted a denial of a fair trial. 330 F.2d at 329.

Cases of this dimension do not belong in the courts in their present form. We must either reduce them to a manageable size for the courts, or fashion another forum in our government to handle them.

We may also be able to find procedural devices which save time by changing the manner in which courts try cases. For example, many major patent cases these days have become involved in a three-faceted trial: (1) the validity of the patent and its infringement; (2) fraud on the patent office in its procurement, and (3) antitrust implications in the exploitation of the patent. A large number of cases become entangled in this tri-lateral complexity. If instead, the patent and infringement issues were tried first, the need to try the other issues might be eliminated, or the trial of those issues might be greatly simplified. Even

if the court had to try three separate cases, it might take less time and effort than when the three issues are consolidated for one trial. Courts have taken similar steps in the past. For example, in 1947, the Supreme Court held in Bruce's Juices, Inc. v. American Can Co.[18] that a buyer, sued on an account, may not raise as a defense that the seller engaged in price discrimination in violation of the Robinson-Patman Act. The result was hardly compelled by the substantive law; it was, instead, the adoption of a procedural rule for allocating judicial resources.

Whatever procedural or substantive changes are made to alleviate the burden on the courts, there is one step that clearly must be taken. We must provide better

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18. 330 U.S. 731 (1947).

methods for predicting the workload of the courts. In 1972, Chief Justice Burger suggested the preparation of a judicial impact statement when legislation is under consideration.[19] Congress has yet to act on this recommendation. Impact statements are indeed necessary -- both so that Congress can think twice about enacting legislation which will have an impact on the courts disproportionate to its social utility, and so that judges can be appointed in anticipation of the increased caseload -- not years after the burden has become backbreaking. When any large housing project is planned, it is recognized that water mains and sewage lines must be installed to meet the new demand before the residents are in occupancy. Our legislatures should do the same in planning judicial services.

I would take the suggestion one step further. Judicial impact statements should not be limited to assess-

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19. Warren Burger, "The State of the Federal Judiciary-1972", 58 A.B.A.J. 1049, 1050 (1972).

ing the effect of new legislation. Judicial decisions also have a tremendous impact on the workload of the courts. For example, the courts' increasing receptivity to civil rights actions under Section 1983 has added as many cases to the courts' caseload as any legislation enacted during the past several years. The Judiciary Committees of the Congress must not only monitor new legislation to determine its likely impact on the courts; they must also monitor the courts themselves to determine the impact of precedent-setting decisions on judicial caseloads.

The specific suggestions I have made are intended to be no more than illustrative; they are intended to suggest the areas of inquiry which I believe that we should pursue.

I believe that there are two common threads which connect them.

First, as Judge Bazelon has noted, "no matter how

much we expand our judicial resources, the courts cannot be the primary agency we rely upon to solve our problems."[20] Other institutions, in the other branches of government and outside of the government, must be evaluated to determine whether they can assume greater responsibility. The role of the courts should be restricted to doing that which commands their special expertise, and to seeing that the other institutions do the jobs that they are supposed to do. There will continue to be dissatisfaction with the administration of justice as long as we promote the notion that the courts are the only place in which justice is administered.

Second, we must move in the direction of simplification of the law. Nothing else will, in my opinion, materially ease the judicial burden. I believe it is a truism that the law is becoming excessively complex, excessively sophisticated,

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20. David L. Bazelon, "New Gods for Old: Efficient Courts in a Democratic Society", 46 N.Y.U.L. Rev. 653, 654 (1971).

unduly mysterious. We all know that to be so in the field of taxes. After 50 years of practice, I would no more have the audacity to formulate my own tax return than I would engage in open heart surgery. I believe the same excessive complexities have entered the field of the securities laws, antitrust laws and many other areas of the law. This process of complication not only overburdens the courts, but makes the law less certain, more unpredictable. When law is so unpredictable that it ceases to function as a guide to behavior, it is no longer law. We have recognized this in the criminal law by stating that we will not punish persons for disobeying laws which are unduly vague.[21] In the civil law, we are forced to apply even vague laws to resolve disputes between private litigants, but the process carries an enormous cost in judicial energy and an even greater cost in lessened respect

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21. See generally Note, "The Void-for Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67 (1960).

for both the courts and the law. If we do not stop this process of complication, we shall have to evolve into marsupials, so that each of us will then be able to carry in his pouch not the ancient vade mecum but a live and active lawyer in order to keep him out of trouble.

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