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# THE DUTY TO DECIDE

ALAN W. SCHEFLIN\*

ON SEPTEMBER 17, 1971, Georgetown University dedicated its new 11-million dollar Law Center facility. In fact, it dedicated it twice—once inside the building where assembled dignitaries heard an address by Chief Justice Warren Burger, and once outside in the street where students and spectators listened to lawyer-activists William Kunstler, Arthur Kinoy and Catharine Rorabach. But twice dedicated does not mean twice blessed. And it is surely fitting that a major law school in this country should, in its opportunity to reflect upon itself, be forced to face the contradictions which now threaten the integrity and legitimacy of the law and its processes.

The significance of this extraordinary situation has not been lost on those officials of our government in whose hands we place the vital responsibility of operating the vast and ponderous apparatus for the administration of justice. In a speech recently delivered before the Oregon State Bar Association,<sup>1</sup> then Attorney General John Mitchell opened his talk by observing: "Although largely unnoticed in the press outside of Washington, one of the vital controversies in American history reached a dramatic high point three weeks ago in the Nation's Capital."<sup>2</sup> The Attorney General (who subsequently left office to manage President Nixon's reelection campaign) then attempted to distill the essence of the "debate" between Chief Justice Warren Burger, on the one side, and William Kunstler, on the other. In this brief commentary I will attempt to show that the "debate," as presented by Mitchell, is illusory but that there may very well be an alternative approach to the

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<sup>1</sup> Address by Attorney General Mitchell, *Not Will But Judgment*, delivered before the Oregon State Bar Association, Oct. 8, 1971 [hereinafter Mitchell].

<sup>2</sup> Mitchell 1.

positions of both sides which would truly structure an informed and significant set of opposing viewpoints.

The former Attorney General posed the crux of the debate, which he described as "one of the truly basic questions in our governmental system," in the following terms: "Many young people are going into law because they anticipate using the courts to effect social change. The question is, therefore, is this the best channel that can be used by the energies working for change?"<sup>3</sup> Mitchell concluded that the Chief Justice would answer this question in the negative and, although the views of William Kunstler were never discussed in the remainder of his speech, presumably Mitchell felt that Kunstler would respond in the affirmative.

The late Justice Felix Frankfurter pointed out to us long ago that "answers are not obtained by putting the wrong question and thereby begging the real one."<sup>4</sup> By posing the question the way he did, Mitchell worked a disservice to both thinkers. Yet he nevertheless raised an issue that really does need to be discussed. The presentation of his own views serves to shed some light on questions of importance and immediacy. I will first deal with the former Attorney General's views, then with the views of Chief Justice Burger and then with what I consider to be the "activist" position.

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<sup>3</sup> *Id.* 3.

<sup>4</sup> *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 420 (1947) (dissenting opinion). *See* *Estate of Rogers v. Commissioner*, 320 U.S. 410, 413 (1943).

### Not Will, But Judgment

The title for the Attorney General's address came from Alexander Hamilton who, in *The Federalist Papers*,<sup>5</sup> wrote that the judiciary was "the least dangerous" branch of government since it had no way of enforcing its decrees nor could it take an active part in the complicated governing process. As Hamilton conceived of the courts, they "have neither Force nor Will, but merely judgment." Thus, the hallmark of the proper sphere of a judge's exercise of discretion is "judicial restraint." This quality of judicial restraint consists in the refusal of the judge to "substitute will for judgment"—regardless of whether that will is "the will of activist attorneys before the bar, the will of the judges themselves, or the will of another governmental branch trying to dominate the Court."<sup>6</sup> The alternative to judicial caution would be a decrease in respect for the courts. "Those who may be enchanted with the Court as an instrument of change today would have opposed its actions yesterday and might oppose them again tomorrow."<sup>7</sup>

This is not to say that the courts do not play a role in social change at all. It is not necessary for the courts "to remake the law, young activist attorneys already have worlds to conquer in using courts to enforce the law."<sup>8</sup> The courts are not designed to initiate action but only to respond to the circumstances which are presented to them.

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<sup>5</sup> THE FEDERALIST NO. 78.

<sup>6</sup> Mitchell 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* 6.

As was pointed out by Judge Craven in *Day v. McDavid*.<sup>9</sup>

It is not one of the emoluments of judicial office that the temporary occupants thereof can pick and choose the type, quality or quantity of cases in litigation. The subject-matter of much present-day litigation seeking to vindicate personal rights, promote class action, and to correct asserted environmental evil seems to be limited only by the boundless ingenuity of able lawyers to professionally assert the rights of their clients.

Anyone who holds the erroneous impression that the law is static need only examine any trial or reviewing court docket to be dissuaded of that view.

The heavy flow of social issues into the court machinery for resolution may have by-passed expertise at resolution but, as we noted, the courts are not, nor should they be, free to pick and choose the issues submitted for decision.<sup>10</sup>

Mitchell concluded that the "purpose of the judiciary is to provide a detached and impartial judgment of legal problems presented to the Court, not to effectuate the peoples' will."<sup>11</sup> The judiciary is the only branch of government which is not directly accountable to the people (at least on the federal level and in those states where judges are appointed and not publicly elected). Because of the lack of accountability, judges may be independent but this independence is purchased at a high cost. Often the line is quite thin between independence and tyranny. Judges who step "beyond judgment and substitute their will

for the peoples' will" have clearly crossed over this line.

In essence, the Attorney General was arguing that, because the judiciary is an anti-majoritarian institution, it should not make policy or attempt social change since it cannot be held accountable to the people for whom that policy or change is made. Unlike the other two branches of government, the judiciary does not have to face the voters. As a result, the court is not directly responsible to the ballot box for the decisions it reaches. While this secures a measure of independence, it also does not allow the people for whom the judiciary was fashioned to have a direct input into its decisional process. Because the public will cannot be brought to bear on the courts, judges cannot be subjected to the same type of public control that is exercised over members of the legislative and the executive branches of government. The absence of popular control over decision-makers is basically anti-democratic because it is a denial of self-rule. As an anti-democratic institution, the courts serve a vital function by providing a check on abuse of legislative and executive discretion when that discretion transgresses constitutionally permissible boundaries. In addition, the courts provide an appropriate forum for settling disputes which can be solved by clarifying the not always lucid law on the subject. The courts are more efficient and less ponderous for day to day decision-making than the other two branches of government and thus they furnish a suitable forum for the resolution of individual conflicts.<sup>12</sup>

<sup>9</sup> 119 Ill. App. 2d 62, 254 N.E.2d 800 (1970).

<sup>10</sup> *Id.* at 63-64, 254 N.E.2d at 801.

<sup>11</sup> Mitchell 7.

<sup>12</sup> Good discussions of the limited role that the

But this is a very limited role. It is, at most, "interstitial"<sup>13</sup> legislation with the heavy emphasis on clarification and not innovation. But this is a consequence, according to the former Attorney General, of exercising not will, but judgment.

### Law and Social Change

Chief Justice Burger is not a reactionary. If he were, I suspect that he would find his job a lot easier. But it is because he accepts and endorses the inevitable principle of civilization which requires every viable society to perpetually evolve into a higher order and state of perfection that the Chief Justice recognizes his unique responsibility for the way in which social evolution affects the governing institutions of our constitutional democracy. Thus, in his speech at the Georgetown Law Center dedication ceremony,<sup>14</sup> he pointed out that the "basic question before us in the final third of the 20th century is not whether legal institutions will change, but *what* those changes ought to be and *how* we ought to make

them. The duty of disciples of the law is to preside over orderly change."<sup>15</sup>

But the fact that change is inevitable does not bring us any closer to describing what the rate of change should be, what its scope should be, what the proper method of change should be and which governmental or other social institutions should make those changes. These are very important questions, especially considering that the concept of change is inextricably bound up with personal freedom and liberty. To the extent that technological and economic developments affect the rate of change in society, by necessity the method of change and the resulting amount of freedom with reference to that change, will be substantially altered. The following excerpt from Arthur Koestler's brilliant book "Darkness At Noon" becomes even more compelling, if not frightening, when read in conjunction with recent books like Charles Reich's "Greening of America" and Alvin Toffler's "Future Shock," which attempt to evaluate this society's political and cultural maturity:

We seem to be faced with a pendulum movement in history, swinging from absolutism to democracy, from democracy back to absolute dictatorship.

The amount of individual freedom which a people may conquer and keep, depends on the degree of its political maturity. The aforementioned pendulum motion seems to indicate that the political maturing of the masses does not follow a continuous rising curve, as does the growing up of an individual, but that it is governed by more complicated laws.

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judiciary should play in conflict resolution can be found in Howard, *Adjudication Considered As a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. Pub. L. 339 (1969); Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. REV. 3; Fuller, *Adjudication and the Rule of Law*, 1960 AM. SOC. INT. L. PROC. 1.

<sup>13</sup> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

<sup>14</sup> Address by Chief Justice Burger, A Generation of Change, Georgetown Law Center dedication, Sept. 17, 1971 [hereinafter Burger].

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<sup>15</sup> *Id.* 3.

The maturity of the masses lies in the capacity to recognize their own interests. This, however, presupposes a certain understanding of the process of production and distribution of goods. A people's capacity to govern itself democratically is thus proportionate to the degree of its understanding of the structure and functioning of the whole social body.

Now, every technical improvement creates a new complication to the economic apparatus, causes the appearance of new factors and combinations, which the masses cannot penetrate for a time. Every jump of technical progress leaves the relative intellectual development of the masses a step behind, and thus causes a fall in the political-maturity thermometer. It takes sometimes tens of years, sometimes generations, for a people's level of understanding gradually to adapt itself to the changed state of affairs, until it has recovered the same capacity for self-government as it had already possessed at a lower stage of civilization. Hence the political maturity of the masses cannot be measured by an absolute figure, but only relatively, i.e., in proportion to the stage of civilization at that moment.

When the level of mass-consciousness catches up with the objective state of affairs, there follows inevitably the conquest of democracy, either peaceably or by force. Until the next jump of technical civilization—the discovery of the mechanical loom, for example—again sets back the masses in a state of relative immaturity, and renders possible or even necessary the establishment of some form of absolute leadership.<sup>16</sup>

Manipulation of change involves awesome power. The Chief Justice feels that power of this magnitude should be wielded

by only those organs of government which are directly accountable to the people they serve:

This [recent significant changes brought about by litigation] has given rise to the alluring prospect that our world can be changed in the courts. I confess it is an intriguing idea. Federal judges in particular need not be troubled by constituents or elections and can therefore concentrate on problems without regard to public opinion.

. . . .  
Those who would look to judges, and especially tenured federal judges, to innovate and reshape our society will do well to ponder what remedy is available if the world shaped by the judicial process is not to their liking. I suggest that this approval be considered against the background of our traditions and history which began with a revolution instituted to overthrow a government that was beyond recall by the votes of the people.<sup>17</sup>

This heritage of popular control over governmental decision-makers leads the Chief Justice to conclude that it "was never contemplated in our system that judges would make drastic changes by judicial decisions. That is what the legislative function and the rule making function is all about."<sup>18</sup>

There is an additional reason why the Chief Justice believes that social change should not be a judicial function. Even if the courts were accountable to the people, they still would not have the mechanism necessary to enforce their decrees. Under the Constitution, the Executive has the vested power to enforce the law. The

<sup>16</sup> A. KOESTLER, *DARKNESS AT NOON* 167-68 (1961 ed.).

<sup>17</sup> Burger 11-12.

<sup>18</sup> N.Y. Times, July 4, 1971, at 20, col. 1.

courts, except indirectly in some cases through the contempt power, are unable to effectuate their own decrees. Even if judges wanted to innovate, there is little more they can do except issue rulings which could very well go unenforced and unobeyed.<sup>19</sup> In fact, there is substantial evidence to show that even trial judges often do not follow Supreme Court commands.<sup>20</sup> The inability to issue self-executing decrees, or to develop a way in which the courts themselves can enforce their own decisions, serves as a restraint on the role of the judiciary according to Chief Justice Burger. Shortly before his appointment, the Chief Justice accepted an invitation to participate in a seminar which I was teaching with two other colleagues. He had recently decided the famous case involving Adam Clayton Powell's censure and denial of seniority by the House of Representatives.<sup>21</sup> One of the most forceful items in the whole litigation, which was a pivotal point of the case for then Court of Appeals Judge Burger, was the fact that if the case was decided in Powell's favor, and Congress then refused to obey the court, there would be no way for the court to enforce its decree.<sup>22</sup> Since

the court could not compel Congress to reverse its decision and make restitution, it would have been a futile gesture for the court to decide in favor of Powell.

The Chief Justice's explanation of his reason for deciding the *Powell* case the way he did prompted me to ask him whether he would have decided *Brown v. Board of Education*<sup>23</sup> against the plaintiffs on the theory that the court could not compel obedience to its decision. Justice Burger responded that *Brown* was a different case since it involved a state "rising up in insurrection" against the federal government and former President Eisenhower felt strongly that federal power must be supreme. Eisenhower reportedly communicated to the Supreme Court before its decision his willingness to enforce whatever order was issued. He kept his word even though he was unhappy with the Court's ultimate ruling. The *Powell* case, on the other hand, did not involve federal-state relations but rather the separation of powers question on the federal level only, according to Chief Justice Burger. I asked him whether he had any evidence that Congress would have refused to obey a decision striking its action against Powell. He responded that he had no such evidence but that it would have decreased respect for the courts to have judicial orders so publicly disobeyed or ignored. I maintained then, as I do now, that the duty of the Court was to decide the case on the merits and take its chances as to Congressional obedience. In my view, the effect of the Chief Justice's reasoning is to create a sovereign above the law, a result that is

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<sup>19</sup> See Miller & Schefflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus*, pts. 1,2 1967 DUKE L.J. 288-94, 522; Miller, *On the Need for "Impact Analysis" of Supreme Court Decisions*, 53 GEO. L.J. 365 (1965).

<sup>20</sup> Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

<sup>21</sup> *Powell v. McCormack*, 395 F.2d 577 (D.C. Cir. 1968), *rev'd*, 395 U.S. 486 (1969).

<sup>22</sup> Burger explained that his perspective on the case was largely shaped by his belief that there could be no remedy against Congress. See 395 F.2d 577, 605 (D.C. Cir. 1968).

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<sup>23</sup> 347 U.S. 483 (1954).

completely antithetical to the rule of law in our constitutional democracy.<sup>24</sup>

Thus, the Chief Justice's position is that for strong reasons of the enforcement of laws and the accountability of lawmakers, change should not be a product of the judicial branch of government. The great recent cases which have had strong social impact, fall into two categories according to Justice Burger:

The first will be application of long available constitutional guarantees to existing situations not previously presented to the court. The second and larger category will be the application by courts of specific statutes, some of recent vintage and some as old as 100 years or more. Thus, for the most part it was legislation flowing from the political process that was the source of the progress we sometimes credit to judges.<sup>25</sup>

Thus, even the socially innovative judicial decisions which young activists point to with pride represent for the Chief Justice the judicial duty of enfolding in concrete terms the popular will as expressed through legislative mandate. In this way, the people can depend upon the courts to maintain the important connection between law and the community.

### Activist Advocacy

Although the dedication ceremony at Georgetown University Law Center was perceived by the former Attorney General as a clash between opposing viewpoints rep-

resented by the Chief Justice and William Kunstler, in actuality there were several speeches given along with Mr. Kunstler's and the viewpoints they represent go much beyond the scope of his own contribution. Attorney General Mitchell's address did not deal in depth with Kunstler's speech nor will my remarks.<sup>26</sup> Rather, I would like to sketch out in this and the next section some of my own observations which I believe are consistent with what the former Attorney General refers to as the "activist" view. In this way I intend to show what I think the crucial issue facing socially conscious young lawyers is in relation to their perception of, and performance in, our court structure.

In a speech entitled "The Necessity of Civility," delivered to the opening session of the American Law Institute on May 18, 1971, Chief Justice Burger decried the increasing disrespect for courts, judges and legal institutions. Civility, according to the Chief Justice, is "an indispensable part—the lubricant—that keeps our adversary system functioning."<sup>27</sup> This civility, without which the trial process is impossible, is on the decline. As harder, more complex and more socially fundamental cases are brought to the courts the adversary system becomes even more necessary to maintain. Chief Justice Burger continued:

Yet all too often, overzealous advocates seem to think that the zeal and effectiveness

<sup>24</sup> See Pound, *Disappearance of the Law*, 2 Ala. Law. 363 (1941).

<sup>25</sup> Burger 11.

<sup>26</sup> William Kunstler informs me that there is a transcript of the counter-dedication speeches, but I was not able to procure a copy in time.

<sup>27</sup> Address by Chief Justice Burger, *The Necessity of Civility* 13, American Law Institute Opening Session, May 18, 1971.



of a lawyer depends on how thoroughly he can disrupt the proceedings or how loud he can shout or how close he comes to insulting all those he encounters—including the judges.

. . . At the drop of a hat—or less—we find adrenalin-fueled lawyers cry out that theirs is a “political trial.” This seems to mean in today’s context—at least to some—that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant.<sup>28</sup>

The Chief Justice then urged law teachers, who have the first and best opportunity to inculcate values in our future legal generations, to teach that “good manners, disciplined behavior and civility . . . [is] the very glue that keeps an organized society from flying apart.”<sup>29</sup> The speech concluded with a strong appeal to bar associations to more rigorously regulate and discipline the legal profession.

In my opinion, Chief Justice Burger has in part failed to live up to his own standards. If he is right about the necessity for civility, and I believe that he is, then the very first attribute of such an attitude should be a willingness to search for causes and to listen to opposing views—to make some attempt to understand the other fellow’s position before criticizing or rejecting it. Indeed, this is the basic premise of the adversary system itself. Nowhere in any of his speeches is any attempt made to understand *why* this court conduct he disapproves of has occurred.<sup>30</sup> It is undeniable

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> I would like to register a caveat at this point. Stories of disruption and obstruction, like Mark

that growing numbers of lawyers are becoming increasingly more disenchanted with the legal system and are now less re-

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Twain’s reported death, are greatly exaggerated. The most overtly publicized “political” trial with disruptive overtones was most certainly The Chicago Conspiracy case and a fair reading of the transcript will not support the view that the lawyers intentionally and systematically engaged in a course of conduct which was designed to obstruct the trial process. Even the conservative American Trial Lawyers Association concluded that the greater responsibility for that shameful spectacle must be borne by Judge Hoffman:

The system can survive. But it will survive only if we recognize the difference between abuse by a judge and comparable, or even greater, abuse by an accused.

Excesses or misconduct during a trial, when confined to the defendants or their counsel, can create serious temporary problems without permanently endangering our basic system of justice. If this is all that happens, such defendants will probably go to jail, leaving the court system relatively unscarred and unharmed. Abuse of the power of the state in a courtroom, or elsewhere—whenever such abuse is unchallenged or unchecked—may leave more permanent residuals. At the end of the trial, the judge, appointed for life, goes home; but the judicial system has been, perhaps irreparably, damaged.

. . . We may need to re-examine our procedures to provide new ones for such trials, but these changes cannot alter the fundamental requirement that the umpire not join the fight.

Editorial, *Aftermath of Chicago*, TRIAL, April/May, 1970 at 46.

According to a subsequent editorial entitled “The Detractors,” “A preliminary study sponsored by the Association of the Bar of the City of New York, funded by the Ford Foundation, after querying 1600 judges, reports in-court misbehavior by lawyers is insignificant.” TRIAL, Sept./Oct., 1971, at 9. Professor Arthur Sutherland of the Harvard Law School is presently completing a history of the American legal profession. He has reportedly commented:

There has been no recent increase in court-

luctant to conceal their emotions.<sup>31</sup> This discontent, in turn, is made public with the result that there may be a societal decrease in respect for the judiciary. According to the Chief Justice, "What the public thinks . . . becomes the measure of public confidence in the courts, and that confidence is indispensable."<sup>32</sup> Yet it is clear that there is a serious crisis of confidence in the law and the judiciary which threatens the reign of the rule of law. It is crucial to understand why this has occurred.

Among both racially and monetarily disenfranchised peoples, the law is something to be feared. The late Senator Robert F. Kennedy lucidly observed:

[T]o the poor man, "legal" has become a synonym for technicalities and obstruction, not for that which is to be respected. The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away.<sup>33</sup>

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room disruptions by trial lawyers in comparison with recent years.

But you've a new breed of lawyers inspired by Ralph Nader . . . getting in there and ruffling the hair of a lot of people, insisting on people getting their rights. I don't believe in being rude to judges, but I do believe in insisting on people's rights.

TRIAL, Sept./Oct. 1971, at 47.

A great deal of the irresponsible overreaction to the Chicago trial, with emphasis placed on court disruption, can be traced to a foolish article by Louis Nizer. Nizer, *What to Do When the Judge Is Put Up Against the Wall*, N.Y. Times, April 5, 1970, § 6 (Magazine), at 30.

<sup>31</sup> See LAW AGAINST THE PEOPLE (R. Lefcourt ed. 1971); RADICAL LAWYERS (J. Black ed. 1971).

<sup>32</sup> Address by Chief Justice Burger, Sept. 10, 1971.

<sup>33</sup> Address by Senator Kennedy, University of Chicago, Law Day, May 1, 1964, cited in P. WALD, LAW AND POVERTY: at 6 n.13 (1965).

Writing in the N.Y. Times on whether a Black man can get a fair trial in this country, Haywood Burns, director of the National Conference of Black Lawyers, was compelled to answer in the negative.<sup>34</sup> Although many more examples of disquietude among ethnic minorities could be brought forth,<sup>35</sup> the point is not in contention. What is more significant, at least insofar as it affects greater numbers of persons who have more political power, is the fact that even those people for whom the legal system has always been a protector are now disenchanted with its operation. This disenchantment stems not merely from the more highly visible problem of judicial lack of ethics,<sup>36</sup> nor from the increased recognition of the vulnerability of the judiciary as it has been demonstrated by the Chicago Seven trial and its progeny, nor from the Senate debates over the quality of the Nixon appointments to the Supreme Court, nor even from this administration's attempt to weaken the court structure by playing the "courts are coddling the criminal" game in the public arena,<sup>37</sup> but basically from the

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<sup>34</sup> Burns, *Can a Black Man Get a Fair Trial in This Country?*, N.Y. Times, July 12, 1970, § 6 (Magazine), at 5.

<sup>35</sup> In the words of Judge Murphy: "It's a miracle they don't burn down the courthouse. All they see is white people enforcing white laws designed to do them in." Murphy, *D.C. Small Claims Court—The Forgotten Court*, 34 D.C.B.J. 14, 15 (Feb. 1967).

<sup>36</sup> As witnessed by Justice Fortas' resignation from the Supreme Court, Justice Haynesworth's financial involvement in pending cases, and the recent discovery of corruption on the Supreme Court of Illinois and in lower courts in Massachusetts, these are probably not isolated instances though hopefully they are exceptions to the rule of judicial observances of ethical standards.

<sup>37</sup> A new twist on the old argument has recently

simple fact that court delays and lawyers' fees make resort to the judiciary exclusively a rich man's privilege.

Thus, for large classes of people the judiciary is the object of scorn and obloquy because it fails to deliver justice or even impartiality of judgment. For others, the judiciary is not worth respecting because it is too slow, too costly and too uncertain of result. It must be remembered that the greatest number of people having direct contact with the courts do so at the lowest level of the judicial rung. It is in these traffic courts, domestic relations courts, police courts and courts of general sessions that the dispensation of justice occurs on a day to day basis. Just a few hours in these usually dingy surroundings is bound to weaken the fortitude of any staunch believer in the rule of law.<sup>38</sup> In an article appearing in

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been suggested by California's Attorney General, Evelle Younger. In a speech delivered to the California Conference on the Judiciary, January 13, 1972, Younger expressed the view that the criminal justice system is on the verge of collapse and that much reform was necessary to save it. He denied that he was talking about the "courts are handcuffing the police" criticism because he did not share that viewpoint:

I've never joined in the hysterical cry that recent Supreme Court decisions are responsible for the alarming rise in crime.

If the criticism must be given a catchy title, let's call it 'the courts are handcuffing the courts.' That statement reflects my firm conviction that appellate courts in the last 15 years have seriously reduced the effectiveness of criminal trial courts.

Their obsession with procedural matters has turned a criminal trial into a game which is only remotely and incidentally concerned with guilt or innocence.

L.A. Times, Jan. 14, 1972, Part II, at 3, col. 1.

<sup>38</sup> Any assessment of an area where the law has failed as an instrument of justice should

*Readers Digest* entitled "Only Radical Reform Can Save Our Courts,"<sup>39</sup> the following pertinent observations are made:

To be effective, justice must be both fast and fair. It is the pace of justice that has become distorted. Some courts, usually the lower courts that deal with lesser matters in big cities, race through their case loads on an assembly-line basis so that the whole process becomes a farce. Other courts, especially big-city trial courts, fall years behind in their calendars. When a citizen has to wait 2½ to 5 years to be awarded damages, as he does in most large American cities in cases that go before a jury, the wait itself becomes an injustice.

Earl Warren recently recalled that, shortly before he left office, felony cases in the U.S. District Court for the Eastern District of New York were taking 22 months to get to trial. The accused were free on bail during the wait. However, said Warren, "If the defendant were innocent, think of the cloud over his life, and if he were guilty, think what he could do to disrupt society."

Just how badly a court can be run in 1970 immediately strikes even the layman casually visiting the Manhattan division of the New York criminal courts. The court is located in a large, littered building swarming with bewildered defendants and their families, bored prostitutes, tired policemen, sullen clerks, disheveled Legal Aid lawyers and harassed judges. Judge Irving

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begin with the courts. . . . The small claims courts treat the poor man's property like the police courts, and sometimes the juvenile courts, treat his soul.

Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 426, 428.

<sup>39</sup> Main, *Only Radical Reform Can Save Our Courts*, READER'S DIGEST, Nov. 1970, at 106 (condensed from FORTUNE) reprinted in CONG. REC., S. 18218-19 (1970).

Lang, a 41-year-old former narcotics commissioner, rushes from the courtroom into his robing room and says, "Welcome to the busiest court in the world." Some 200 to 300 prisoners a day come before him, and Lang once arraigned 416 persons between 10 a.m. and 5 p.m.—an average of one a minute. "It's difficult to be dignified in a situation like this," he says. But the criminal case load is rising by 20 percent a year in New York City.<sup>40</sup>

The President of the New York Bar Association, after being shown normal operating procedures and the quality of justice in the Criminal Court Building in Manhattan, said, "I am absolutely shocked by what was seen. . . . If the public knew about this they'd never allow it. But the problem is that it is basically the poor, the minorities, who have to suffer these indignities, and their voices are seldom heard."<sup>41</sup> These facts of life of American jurisprudence are not indigenous to New York City. Chief Justice Burger himself has pointed out that "[i]n the supermarket age we are trying to operate the courts with crackerbarrel corner grocer methods and equipment—vintage 1900."<sup>42</sup>

This is a very bleak picture. And it is not made any more appealing by judges arguing, or demanding, that lawyers look away from these failings. Rather, as Judge Skelly Wright observed in a seminal article, "But if the law is to gain respect, it, like everything else, must earn respect. This it has not done."<sup>43</sup> A new generation of law-

yers simply refuses to close its eyes, like the Scales of Justice, to the reality of social conditions and the quality of justice dispensed by the courts.

It is discouraging, if not infuriating, to see that the judicial response to these admittedly difficult and troubling problems is to sweep all criticism of the judiciary under the rug, parade the courts around as the Emperor did with his fabled new clothes, and try to silence all voices raised in opposition. The case of Martin Erdmann serves as an example. Erdmann, a lawyer who has defended thousands of indigent clients over 25 years, expressed his distress over and frustration with the criminal court system and the judges who preside over it. In a March 12, 1971 *Life* magazine article, Erdmann bluntly expressed his view of the politics and corruption presently existing on the bench. Though the *Life* article spent only a few paragraphs on his views, what Erdmann said so outraged the judges of New York's First Department Appellate Division Court that they petitioned the Bar Association for disciplinary proceedings against Erdmann on the basis of his comments. The Bar Association refused to so act. Yet many judges go on trying to censure lawyers rather than solve the real problems. Erdmann's case is, unfortunately, only one of an emerging pattern of judicial repression directed against activist advocacy. A recent article in the *Harvard Civil Rights-Civil Liberties Law Review* commences with the extraordinary but accurate comment: "It has become both professionally and legally dangerous to be a lawyer representing the poor, minorities, and the politically unpopular."<sup>44</sup> Professor

<sup>40</sup> *Id.* at 106-07.

<sup>41</sup> L.A. Times, Feb. 1, 1972, at 15.

<sup>42</sup> Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

<sup>43</sup> Wright, *THE COURTS HAVE FAILED THE POOR*, N.Y. Times, Mar. 9, 1969, § 6 (Magazine), at 26.

<sup>44</sup> Comment, *Controlling Lawyers By Bar As-*

Monroe Freedman of the George Washington University Law School, himself a victim of this repression,<sup>45</sup> has recently written about the deplorable conduct of the Committee on Admissions and Grievances in the District of Columbia which, in its zeal to hastily and summarily censure several left-wing lawyers, not only failed to obey its own rules, but actually put aside cases that had been pending for months including one complaint against a member of the Bar who had made a practice of defecating in the courthouse stairwell.<sup>46</sup> A new tactic now being employed by some judges is to refuse to let certain famous activist lawyers appear in their courts.<sup>47</sup> Last year, U.S. District Court Judge Jesse Curtis refused to allow Michael Tigar to appear in his court unless Tigar was willing to swear that he had not advised his clients in another case (the Seattle Seven case) to disrupt the trial. Tigar, at the time a member of the U.C.L.A. law faculty, refused to answer the question because it was an unwarranted interference with the attorney-client privilege. Curtis then said Tigar was "professionally unfit to appear in my court in this case." On appeal, Curtis was reversed and the Supreme Court let stand the appellate order directing Curtis to allow Tigar to ap-

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sociation and Courts, 5 HARV. CIV. RTS.-CIV. LIB. L. REV. 301 (1970).

<sup>45</sup> See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, n.1 (1966).

<sup>46</sup> Freedman, *Threat to Dissent: Repressing the Lawyer*, Civil Liberties, Sept. 1971, at 1, col. 1.

<sup>47</sup> See my prediction that this would occur. Comment, *Controlling Lawyers By Bar Association and Courts*, 5 HARV. CIV. RTS.-CIV. LIB. L. REV. 301, 392 n.450 (1970).

pear as counsel.<sup>48</sup> In another incident, U.S. District Judge George Templar, this past January, refused to allow William Kunstler to appear as counsel for the Gay Liberation Front, on the grounds that Kunstler is notorious and is constantly "deriding the judiciary."<sup>49</sup>

It should be clear that the following two postulates pose the problem: (1) the courts

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<sup>48</sup> *Curtis v. Munoz*, 40 U.S.L.W. 3346 (U.S. Jan. 24, 1972).

<sup>49</sup> L.A. Times, Jan. 28, 1972, at 2. The following account of the incident appears in THE ADVOCATE (Los Angeles) (Feb. 1972):

"Well, this court finds you are an out-of-state attorney and not eligible to practice in Kansas," Judge Templar replied, "the court finds that your attitude towards the courts and judges is one of utter disdain. I will not let you appear in this case."

The judge added that he could not close his eyes to Kunstler's "well-known attitude towards the judiciary. In the last 30 days, you have said that the courts are 'vile creatures'."

Kunstler denied having made such a remark, adding, "You are doing a terrible thing."

"You are famous, notorious," the judge continued, "for exploiting and arousing antipathy for the courts all over the country."

"If I have been critical of the courts," Kunstler replied, "your action today is an example of why I have made such statements. You have diminished my respect for the courts."

The judge told Kunstler his ruling was final, and he could appeal it to a higher court if he wished.

Kunstler stepped back from the bench and sat down at the counsel table. Judge Templar then informed him that only attorneys directly involved in the case could sit there.

Kunstler responded, "I don't even want to sit in your courtroom and face you after this decision."

The lawyer rose, walked to the spectators' section, and sat down. The judge called a five-minute recess.

are in bad shape in terms of internal efficiency and the external appearance of being able to deliver justice, and (2) those persons who are best able to see and understand this fact, and perhaps do something about it, are being silenced by the very persons whose responsibility it is to correct these deficiencies. The late Justice Hugo Black observed: "We sit at the top of a judicial system accused by some of nearing the point of collapse."<sup>50</sup> It is not my point here to blame only the judges, or anyone else, for the crisis in the administration of justice which we all must admit now exists. Ralph Nader has very cogently pointed out that "possibly the greatest failure of the law schools—a failure of the faculty—was not to articulate a theory and practice of a just deployment of legal manpower."<sup>51</sup> Perhaps if the law schools had not failed in this responsibility, we would not be in the predicament we are in now. But surely it is in an attempt to redress the imbalance that a good deal of the present tension can be traced. Because of the general failure of the legal profession as an entity to meet its responsibilities to the poor and the unpopular, there has been created a normal pattern of principles and procedures which activist lawyers are now challenging. In other words, the failure of the Bar to press for social justice and equality resulted in a lack of pressure on judges to make law responsive to human needs. Activist lawyers are now seeking to restore the balance by representing those interests which the legal

profession generally failed to service. Former Chief Justice Earl Warren hit the mark exactly when he pointed out that

. . . the Bar can and should play a vital part in bringing the spirit of justice and the accomplishment of it into every court room in our land.

In all candor, I cannot say that in my view the organized Bar of the Nation has, on the whole, discharged that obligation in praiseworthy fashion. Throughout the McCarthy era, and for years following that shameful period, while the federal courts were struggling to make the Bill of Rights and the Civil War Amendments meaningful in our society, the organized Bar of the Nation did precious little to assist. On the contrary, it occupied itself with trying to establish to the world that the Supreme Court of the United States was the hand maiden of Communism and the greatest friend the Soviets had in America. There were exceptions, of course, on the part of some courageous and responsible lawyers, and some local bar associations including notably this one. But these *were* exceptions. And their voices were muted in the national councils. I suggest that is not good enough. It is not good enough for a profession that prides itself in the role of its members as officers of the court and defenders of the Constitution.

This default on the part of the organized bar has, in my view, produced predictable consequences. In large measure, because of the neglect of the Bar, many anachronistic practices of another day, which degrade people because of color, are still the vogue in many jurisdictions. I should like to show to you that this is so, particularly with respect to practices that should be of special concern to lawyers. I do so because I believe that, whether these practices exist in our own communities or not, we should be concerned with, and can be helpful in,

<sup>50</sup> *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 429 (1971) (Black, J., dissenting).

<sup>51</sup> Nader, *Law Schools and Law Firms*, THE NEW REPUBLIC, Oct. 11, 1969, at 21.

eliminating them, root and branch, from all the courtrooms of America.<sup>52</sup>

One premise should be clear: in the words of Justice Douglas, speaking particularly about the Supreme Court, though his words apply to all courts, "This Court of course does not sit to cure social ills that beset the country."<sup>53</sup> Activist attorneys do not believe the contrary. But this is not to say that the court plays no role in effecting social change. I said at the beginning of this paper that former Attorney General Mitchell had posed the wrong question in analyzing the disagreement between Chief Justice Burger and William Kunstler. In viewing their differences as a disagreement over the "best channel" to accomplish social change through law, Mitchell missed the point. The Chief Justice certainly believes that the legislature is charged with the responsibility for social evolution and that the courts must take their guidance from the legislative mandate. According to this view, the legislature is not simply the *best* channel for social change; it is the *only appropriate* channel.

The activist position does not disagree with the Burger-Mitchell view that the legislature is best structured to achieve more meaningful social change. The question is not, as Mitchell believes, whether the legis-

lature is best able to engineer creative social progress since all sides agree that it is. The question is rather what is the proper role and function of the courts when they are faced with social issues? It is in reference to this latter question that opposite viewpoints emerge and a true debate between Burger and Kunstler (representing the activist position) emerges. And the debate becomes most important in those areas where it is clear that the legislature, either because of disinterest, political pressure, lack of awareness or governmental deference has not acted or will not act. The question then is not whether decisions are best made by the legislature, but rather whether decisions are best not made at all. It is in this context that the Chief Justice, accepting a passive role for the courts, would decline to act. Activist advocacy, however, recognizes a social responsibility of judges which creates a duty to decide cases, even though the cases will have strong social impact.

### The Social Responsibility of Judges

The majesty of the law lies in its neutrality. The demand for obedience to law, which is an absolute essential for the existence of the rule of law, can rest on only two opposing bases: force or legitimacy.<sup>54</sup> Consequently, there are two techniques for maintaining a law-obedient society—"one is to penalize intransigence so severely that potential law-breakers are deterred by fear. The other is to foster in them a sense of 'political obligation,' with a view to obtaining their uncoerced obedience and sup-

<sup>52</sup> Warren, *Unfulfilled Ideals*, 1 HUMAN RIGHTS 24, 27-28 (1970). Chief Justice Warren is particularly concerned in this article with courtroom procedures and rules which deny fundamental human rights. The article was adapted from an address to the Association of the Bar of the City of New York, April 9, 1970.

<sup>53</sup> *Williams v. Schaffer*, 385 U.S. 1037, 1041 (1967) (denial of cert.) (Douglas, J., dissenting).

<sup>54</sup> See Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 188-89 (1972).

port."<sup>55</sup> Each technique leads to a different culture—either a police state or “a society where law is responsive to human needs.”<sup>56</sup> In order for the courts to play a role in a society where law is responsive to human needs, the legitimacy of the judiciary will have to be maintained. In concrete terms, this means that the courts must be viewed by the society as being fair, impartial and neutral, treating all persons who appear in the courts equally and without prejudice. That the courts are not so perceived today follows from the previous discussion. The judicial attitude which makes detachment a virtue is largely to blame for the lack of fairness in judicial rules and treatment of persons brought before the bench.

It is the central thesis of this article that the judicial office carries with it, as part of the oath of entrance, the requirement that the judge must be responsible legally, morally and socially for the decisions he reaches and cannot hide behind the veil of neutrality to absolve himself from the social impact of his rulings. As a corollary, the lawyer has an obligation, well-recognized today by the “activist” attorneys, to increase the social consciousness of judges.

That judges have resisted becoming immersed in what Alexander Pekelis has termed “the travail of society,”<sup>57</sup> is an understatement.

The business of deciding other men's

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<sup>55</sup> Lusky, *Minority Rights and the Public Interest*, 52 *YALE L.J.* 1, 3 (1942).

<sup>56</sup> W. DOUGLAS, *POINTS OF REBELLION* 92 (1970).

<sup>57</sup> A. PEKELIS, *The Case for a Jurisprudence of Welfare*, in *LAW AND SOCIAL ACTION* 1, 40 (M. Konvitz ed. 1950).

disputes has never been a comfortable one; those charged with judicial functions have in all ages sought means of minimizing their personal responsibility for the decision rendered. The modern judge is likely to depict himself as an inert conduit through which the force of statutes and precedents is communicated. During periods when a general belief in witchcraft and magic exists, another means is open to the judge for obscuring or eliminating his personal responsibility for the decision rendered. This consists in converting the trial into a ritualistic appeal to the supernatural, in which the judge acts as a mere umpire to see that the proper forms are observed and to announce the decision when it has been determined. The modes of trial in early English law which illustrate this conception are trial by battle, by ordeal, and by oath of compurgation. It is disputed whether the conception of procedure, and of the judge's function, embodied in these modes of trial is a general characteristic of primitive justice, or arises only during periods when, for one reason or another, the judge's position has become insecure, either toward those below him or toward the king above him. Apparently in some cases “supernatural” modes of trial originally used only in cases where actual evidence was lacking, were later extended to all cases. Another point of obscurity is the extent to which these modes of trial were manipulated by the judge to produce the result he considered proper “on the merits.”<sup>58</sup>

The process of separating the judge from his rulings has a dual purpose, as is suggested above. In the first place, the judge is personally protected from any aspect of his decision with which he would not like to be associated. “The law is the law and my duty is to declare it and not make it”

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<sup>58</sup> L. FULLER AND R. BRAUCHER, *BASIC CONTRACT LAW* 157 (1964).



isolates the judge from the law and thereby removes his own personal involvement in the decisional process. In this regard, the judge claims a protection similar to the lawyer's claim of neutrality—"do not judge me by my client: my duty as an advocate is to present a position, even if I disagree with that position."<sup>59</sup> Since the obligations of counsel and judge are quite different, these two claims of neutrality are not identical. The theory behind both, that the judge and the lawyer are not personally responsible for their conduct, is, however, the same. Secondly, it allows the judge to exercise control over the outcome of the trial without creating the appearance of a loss of his neutrality.

The duality of court and judge has been recently argued by J. Edward Thornton in an article entitled "The Freedom of Judges."<sup>60</sup> Quoting an early federal case which stated that "A court is not a judge, nor a judge a court,"<sup>61</sup> Thornton concludes that a judge never decides a case, only the court decides cases. Under this view a trial judge does not rule on questions of evidence. When he says "sustained" or "overruled" it is not the judge's ruling but rather "it is the ruling of the court presided over by the judge."<sup>62</sup> While there are some important reasons to adhere to the distinction between judge and court,<sup>63</sup> this distinction

cannot be used as a basis for arguing that the judge is not to be held accountable for the decisions he reaches.

The Burger-Mitchell position advocating judicial restraint is based primarily on the undemocratic nature of the judiciary. It is theorized that the courts are not directly answerable to the people and should therefore not make policy for them. But this view ignores an important consideration. The underlying function of the judiciary *requires* it to be undemocratic—the courts must protect the minority against the majority and protect the majority against itself.

The California Supreme Court recently ruled that the death penalty violated the California Constitution. Governor Ronald Reagan angrily commented that "the court is setting itself up above the people and their legislature."<sup>64</sup> But this is not a valid criticism of the court because, as an editorial commentator has pointed out, "that is what courts are for—to restrain the people, and legislatures, and even governors from taking actions that contradict principles declared in constitutions, which are the basic legal compacts of the society."<sup>65</sup> The 6-1 California decision was written by Chief Justice Donald Wright, the only member of the court appointed by Reagan. The court took great pains to emphasize that its decision was not an act of judicial usurpation of the legislative function:

<sup>59</sup> See Wasserstrom, *Lawyers and Revolution*, 30 U. PITT. L. REV. 125 (1968).

<sup>60</sup> Thornton, *The Freedom of Judges*, 2 CUMBER.-SAM. L. REV. 145, 147-51 (1971).

<sup>61</sup> *United States v. Clark*, 25 F. Cas. 441, 442 (No. 14804) (C.C.D. Mass. 1813). See *Todd v. United States*, 158 U.S. 278, 284 (1895).

<sup>62</sup> Thornton, *supra* note 60, at 151.

<sup>63</sup> See Miller & Schefflin, *The Power of the Su-*

*preme Court in the Age of the Positive State*, *supra* note 19.

<sup>64</sup> L.A. Times, Feb. 19, 1972, at 1.

<sup>65</sup> D.J.R. Bruckner, *What Are Courts For, If Not to Rule on the Constitution?*, L.A. Times Feb. 23, 1972, pt. II, at 7.

"Our duty to confront and resolve constitutional questions, regardless of their difficulty or magnitude, is at the very core of our judicial responsibility," the court said. "It is a mandate of the most imperative nature."

The court said the cruel or unusual punishment clause operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority.

"It is the function of the court to examine legislative acts in light of such constitutional mandates to ensure that the promise of the Declaration of Rights is a reality to the individual," it pointed out.

Were it otherwise, the court added, the Legislature would ever be the sole judge of the permissible means and extent of punishment and the constitutional ban would be "superfluous."<sup>66</sup>

One might criticize the logic of the court's opinion but not its duty to decide the case.

Activist lawyers argue that the judiciary plays a vital role in our governmental scheme primarily because it is not accountable to the people. Its job is to see to it that the society does not deviate from the basic principles upon which it was founded. In our society, the Declaration of Independence and the Constitution furnish the written record of our commitment as a people to principles of human dignity and liberty developed over centuries as necessary for our self-preservation and individual integ-

ity.<sup>67</sup> We have placed into the hands of our judges the primary duty to protect us from our own transgressions and to further those social commitments we made when the ground rules for our existence as a nation were devised. Judges are faced with a dual responsibility: they must protect the minority from encroachment by the majority and they must protect the majority from deviating from the great goals which serve as the cornerstones of our Republic. This first responsibility was well-articulated by the late Justice Black: "Under our constitutional system, courts stand against any winds that blow, as a refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."<sup>68</sup> The second

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highly outspoken critic of the courts in the criminal justice area, made the following evaluation of the court's decision:

"This action by the 'San Francisco Court,'" said the chief in his statement, "showed a total disregard for the innocent victims of homicide and welfare of not only policemen and prison guards but also of the average citizen who frequently finds himself barricaded in his own home because of the realistic fear of criminal violence.

"Murderers sentenced to life imprisonment are eligible for parole, back on the streets, after seven years," he said. "The decision of the 'San Francisco Court' is bound to result in the slaughter of many California citizens by an army of murderers who have been waiting for years in Death Row for such an unrealistic judicial judgment."

L.A. Times, Feb. 19, 1972, pt. I, at 26.

<sup>67</sup> See E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955).

<sup>68</sup> Quoted in an editorial, *Hugo Black Retires . . .*, L.A. Times, Sept. 21, 1971, pt. II, at 6, col. 1. The quote is from an "early" opinion which was not identified. I have not been able to track it down.

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<sup>66</sup> L.A. Times, Feb. 19, 1972, pt. I, at 24. Los Angeles Chief of Police Edward M. Davis, a

responsibility was well recognized by District Court Judge George B. Harris when he was asked to rule on the constitutionality of the use of "strip cells" in California prisons:

Usually the administrative responsibility of correctional institutions rests peculiarly within the province of the officials themselves, without attempted intrusion or intervention on the part of the courts. . . .

However, when, as it appears in the case at bar, the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene—and intervene promptly—to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.<sup>69</sup>

The necessary first step for any judge to implement these judicial responsibilities is to familiarize himself fully with the totality of his role. Too often judges simply turn their backs to the social conditions that led people to appear in court and the social implications of court rulings as they affect the lives of the people of the community. A case in point is Judge Charles Halleck of the Superior Court of the District of Columbia.<sup>70</sup> Judge Halleck was a prosecutor, naval officer, member of the staff of the Senate Internal Security Committee and son of a conservative Congressman. When he was appointed to the bench he openly expressed antipathy for youths with long hair and for activist attorneys. He fre-

quently gave longer jail terms than most of his colleagues and often spoke of "criminal anarchy" in the District of Columbia. Then he began to spend time with the people he was sentencing and with the lawyers he was scolding. He voluntarily spent several nights at various penal facilities in the area to get a first hand look at the effect of what he was doing when he sentenced criminal offenders. The consequences of "getting to see the other side" has dramatically changed him and he is now more sensitive to the needs and social pressures affecting the persons who appear before him. In short, he has come to have a deeper and more fundamental understanding of his role. By informing himself more fully of the larger dimensions of his job, he is now prepared to bring greater judgment, compassion and feeling to his duties. Nor is he unique.<sup>71</sup> Where judicial attention is paid to the social matrix within which the judge operates, greater judicial responsibility and better decision-making is likely to result.<sup>72</sup> Judge Donald Lay of the Eighth Circuit recently pointed this out in the area of prison reform:

Obviously the sweeping reforms necessary to enable our penal institutions to achieve their correctional aims cannot all be accomplished by judicial fiat. But a more active interest in and need for the judiciary to find new and more effective means of bringing about these changes are gradually becoming more evident.

There will be some who will be alarmed

<sup>69</sup> *Jordan v. Fitzharris*, 257 F. Supp. 674, 680 (N.D. Calif. 1966).

<sup>70</sup> See *Washington Post*, Nov. 9, 1970, at A1, col. 1.

<sup>71</sup> See R. Hammer, *Role Playing: A Judge Is a Con, A Con Is a Judge*, N.Y. Times, Sept. 14, 1969, § 6 (magazine), at —.

<sup>72</sup> See *Wall Street Journal*, Dec. 14, 1970, at 1, col. 1. This article is about Federal District Court Judge Alfonso J. Zirpoli.

by this role of the judiciary decrying it as "social activism" or as serving to "open new floodgates" to further burden the judiciary. Such criticism ignores one of the fundamental roles intended for the judiciary in administering the criminal law. To say that the judge has no experience or training to effectively implement this policy is to ignore his judgmental responsibility under the law itself. Whether a man is to be sentenced for one year or ten years, whether he should be placed on probation or not depends on the court's judgment of factors relating to his rehabilitative adjustment.

This role of the judiciary does portend a new age of judicial concern instigated by the recognition that a large segment of our society has been needlessly neglected behind prison walls. Our system of criminal justice, while it demands punishment of the offender, seeks his correction as well. The responsibility to individualize this desired end must be borne by the judiciary. In deference to the inaction of others we have ignored our responsibility too long.<sup>73</sup>

It is the function of the activist attorney to bring social issues to the forefront in litigation. This role recognizes the importance of the technique that began with the so-called Brandeis Brief.<sup>74</sup> It is in this way

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<sup>73</sup> Lay, *A Judicial Mandate*, TRIAL, Nov./Dec. 1971, at 14, 18. Compare Clements and Ferguson, *Judicial Responsibility for Prisoners: The Process That Is Due*, 4 CREIGHTON L. REV. 47 (1970): "It is the thesis of this article that, since it is the courts who consign persons to prisons and jails, they should also assume primary responsibility for the consequences of such confinement." *Id.*

<sup>74</sup> Louis Brandeis, acting as counsel for the state in *Mueller v. Oregon*, 208 U.S. 412 (1908), filed a brief with extensive social science information to justify the legislative wisdom of a statute he was defending.

that the attorney can hope to prevent the judge from avoiding his duty to decide.

The argument I am making for judicial responsibility has often been recognized by the courts. But it has not been consistently adhered to nor has it been forcefully argued by counsel. It is called the "judicial integrity doctrine" and it has its contemporary origin in the criminal law area in the oft-quoted dissent of Justice Brandeis to *Olmstead v. United States*:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.<sup>75</sup>

The government cannot be allowed to be a law-violator and at the same time demand obedience to law. Nor can the government be a law-violator and at the same time ask the courts to sanction the violation. As Justice Frankfurter observed for the Court in *McNabb v. United States*:

Plainly, a conviction resting on evidence

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<sup>75</sup> 277 U.S. 438, 485 (1928).

secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law.

. . . .  
 . . . We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here.<sup>76</sup>

It is a judicial cop-out for the judge to defer decision-making on the grounds that the legislature is better equipped to reach more secure conclusions. Obviously there are certain cases that are beyond the purview of the courts because of the separation of powers doctrine and other concepts of judicial restraint (standing, mootness, political question doctrines, etc.). Broadly speaking, deference to the legislative will is most justifiable when questions of distributive justice, as opposed to corrective justice, are pressed upon the courts.

But the judicial decision to abstain from social decision-making is determined by the temper of the times as well as by legal doctrine. And judges must be sensitive to the times. In the words of Justice Douglas:

The fact that we are in a period of history when enormous extrajudicial sanctions are imposed on those who assert their First Amendment rights in unpopular causes emphasizes the wisdom of *Dom-browski v. Pfister*, 380 U.S. 479. There we recognized that in times of repression,

when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.<sup>77</sup>

It is usually during those periods of time when the most pressure is put on the courts to refrain from acting that the need for judicial protection is most necessary. Those who would silence the courts do so to silence the people. It is in such times that "all that is necessary for the triumph of evil is that good men do nothing." It is not necessary to argue that judges should change society. We can accept Thoreau's argument that we are not placed on earth to make this a better world, but we are placed here not to be the cause of injustice to another.<sup>78</sup> In other words, for judges who do not believe that courts should take an affirmative role in social progress, we may still demand of them that they do not, through inaction, become the cause of, or contribute to, the law used in a dehumanizing way. For judges who feel that even this goes too far, I would respond with Justice Frankfurter that the "timid judge, like a biased judge, is intrinsically a lawless judge."<sup>79</sup> Thus, I applaud Judge Israel Augustine of New Orleans who said that unless the local jails ceased being "medieval and archaic" he would resign rather than send prisoners to them.<sup>80</sup> And I applaud

<sup>76</sup> 318 U.S. 332, 345, 347 (1943).

<sup>77</sup> *Younger v. Harris*, 401 U.S. 37, 58 (1971) (dissenting opinion).

<sup>78</sup> THOREAU, *CIVIL DISOBEDIENCE* (1849).

<sup>79</sup> *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (concurring opinion).

<sup>80</sup> Quoted in Bagdikian, *The Drive for Inmates'*

activist advocacy which brings home to the judiciary the social dimensions of the processes of law.

Ultimately, the dispute referred to by former Attorney General Mitchell is about expectations. Chief Justice Burger's position is forthright. In an interview last year with Fred Graham of the *New York Times*, Chief Justice Burger was asked whether he thought that the large enrollment increase in law schools (attributed to students feeling inspired to use the courts as a method of accomplishing change in the system through law) would result in disappointment of the hopes of students. He responded:

I am beginning to have an uneasy feeling that this may be another one of the situations in this era that we are living in of creating expectations that are beyond fulfillment.

Young people who decide to go into the law primarily on the theory that they can change the world by litigation in the courts, I think, may be in for some disappointments. It is not the right way to make the decision to go into the law, and that is not the route by which basic changes in the country like ours should be made. That is a legislative and policy process, part of the political process. And there is a very limited role for courts in this respect. But if they see that as lawyers they may exert great influence on the whole system, then they may not be disappointed.<sup>81</sup>

I see a different set of expectations. I see the expectation that government, taken individually as well as collectively, will de-

liver on the promise of the Bill of Rights and on the promise of the Constitution. I am waiting for the carved marble words over the entrance to the Supreme Court "EQUAL JUSTICE UNDER LAW" to become a social reality. I am waiting for the courts to recognize that that motto applies to them. I am waiting for the courts to recognize that Equal Justice Under Law is a mandate—an affirmative obligation on the judiciary. As Chief Justice Earl Warren has noted:

It is not enough merely to open the courthouse doors to everyone. The proceedings therein must also be open on equal terms to all who enter; otherwise the word 'justice' is a sterile one which cannot command the respect we claim for it.<sup>82</sup>

The actualization of this ideal requires an activist role for the judiciary—if by activist we mean a perception of, and sensitivity to, the unequal distribution of wealth, power, liberty, justice and freedom in our society. I am not asking the courts to remake society. That is obviously not their job, nor is it in the realm of their capacity. Rather, I am asking for a more limited kind of activism—the refusal to be complicitous in the use of the law to perpetuate injustice. I am asking for the fulfillment of the expectations that grow from our commitment to the Bill of Rights and a just society under law. In an address to French attorneys visiting this country under the auspices of the Department of Justice, Professor Monroe Freedman spoke very movingly of these expectations:

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*Rights*, reprinted in 118 CONG. REC. S. 2038 (daily ed.) Feb. 17, 1972.

<sup>81</sup> *N.Y. Times*, July 4, 1971, at 20, col. 6.

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<sup>82</sup> Warren, *Unfulfilled Ideals*, 1 HUMAN RIGHTS 24, 35 (1970).

At home and at school our students were taught that this is a land of equal opportunity, but they looked around them and found that many lead lives of discrimination and despair. They were taught that this is a land of material wealth and social progress, but they looked around them and found that a very substantial part of the population was hungry and living in intolerable circumstances. They were also taught to fight clean and to fight for the right, expressed at Nuremburg as avoiding commission of crimes against peace, crimes of war, and crimes against humanity, but they came to see in Vietnam a war in which we are committing the crimes against peace, the war crimes, and the crimes against humanity. As one young man said to me, it is like watching World War II all over again, except that this time we get to be the Nazis.<sup>83</sup>

I do not believe that fairness and neutrality means blindness and detachment. What is just depends upon what is fair. What is fair depends upon what is. The judiciary cannot turn their eyes away from what is, decide cases on the basis of what was, and say that the will of the law has been done. Recognizing, as we all must, that the brunt of legal reform and social change cannot be placed in the halls of justice, we can nevertheless demand of our judges that they closely heed the closing words of Chief Justice Burger's address at Georgetown:

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<sup>83</sup> Freedman, *The Litigating Attorney and Social Reform* 7. This speech is reprinted in slightly altered form in *GEORGE WASHINGTON UNIVERSITY MAGAZINE*, Spring 1970, at 21.

My charge to you as you begin a new era in your history . . . in this magnificent structure and as you enter a generation of change is to keep your ideals and your processes of legal education geared to the substance of life in the terms of Holmes who urged that we take part in the action and passion of our times or have it be judged that we have not lived.<sup>84</sup>

Activist advocacy requires that the lawyer view his role in the judicial system as a catalyst for social betterment. The lawyer must continually prod the judge to open his eyes to social conditions and to see to it that his court does not become a conduit for the continuation of legal injustice. Activist advocacy requires that the judge be confronted with his own complicity and not be allowed to deny responsibility for his failure or refusal to advance the cause of social evolution. In short, the activist advocate is charged with the responsibility of helping the judge make the law responsive to human needs.

Chief Justice Burger said of law students that they "need to learn the antiseptic smell of the jail and the less than antiseptic smell of the slums."<sup>85</sup> Apart from his being wrong about the "antiseptic" smell of the jails, is it expecting too much to ask that those into whose hands we place the responsibility of deciding the fate of men learn the same?

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<sup>84</sup> Burger 16.

<sup>85</sup> *Id.* 14.