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THE JUSTICE CONUNDRUM

MARSHALL J. BREGER†

THERE can be little doubt that the American justice system is failing to meet the needs of the ordinary citizen. Courts are clogged and overloaded.¹ Delays in litigation are no longer the exception, but rather the norm. Not only for the poor, but even for large corporations, the decision to litigate has become a function of cost, not injury.²

These complaints are not new. Indeed, some suggest that the problem is cyclical.³ Although few would argue that the grass is nec-

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This essay is an expanded version of a lecture on the Litigious Society given before the Heritage Foundation in March, 1983. A version of this paper was also delivered to a colloquium sponsored by the Administrative Assistant to Chief Justice Burger, Mark Cannon, who provided significant encouragement to this essay.

1. For an example of Chief Justice Burger's long-term criticism of judicial overload, see Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983). The Chief Justice has asserted that crowded dockets are "perhaps the most important . . . problem facing the judiciary." *Id.* at 442-45. See also Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1983) (the endurance of the Supreme Court is being taxed to its limits by the number and complexity of cases currently decided); Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 178 (1983) ("The Supreme Court is now processing more litigation than ever before."). See generally H. ZEISEL, H. KALVEN & B. BUCHOLZ, *DELAY IN COURT* (2d ed. 1978); Cooke, *Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611 (1981). For a statistical analysis of judicial overload, see note 11 *infra*.

2. For a discussion of the costs of litigation and corporate responses to these costs, see note 55 *infra*.

3. One commentator, for instance, has observed that "[n]either the discontent with the relationship between types of dispute and adjudication style nor the concern with reorganizing the judicial management of minor conflict is new. Indeed, the contemporary movement displays parallels with reforms proposed and instituted between 1900 and 1930." Harrington, *Delegalization Reform Movements: An Historical Analysis*, in 1 THE POLITICS OF INFORMAL JUSTICE 35-36 (R. Abel ed. 1982) [hereinafter cited as 1 INFORMAL JUSTICE].

For commentary on American litigiousness during an earlier era, see H. ST. J. DE CRÉVECOEUR, *SKETCHES OF EIGHTEENTH CENTURY AMERICA* 76-78 (Bourdin, Gabriel & Williams eds. 1925) (since organized religion did not play a major role in frontier life, Americans depended upon the law to regulate daily life). See also A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284 (H. Reeve trans. 1899) ("Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate. . . .").

essarily greener in other countries or cultures,⁴ criticism of the United State's system of justice must be taken seriously and proposed solutions investigated fully.

The most frequent and alarming of these complaints against the civil justice system alleges the failure of its formal dispute resolution mechanisms to deal adequately with the increasing incidence of litigation. The litigation explosion⁵ has been styled as a threat to capitalism,⁶ a national disease,⁷ and a pollutant of our traditional social values.⁸ A recent book on the subject by Jethro Lieberman suggests that the American legal system has become awash in an orgy of litigation,⁹ and, indeed, this is the conventional wisdom.¹⁰ All available

4. The problem of litigiousness is not limited to the United States. Complaints have also been made regarding the incidence of litigation in, for example, Israel and Canada. See Shetreet, *The Overburdening of the Supreme Court of Israel: The Problems, The Effects and the Remedies*, in ISRAELI REPORTS TO THE TENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 56, 79 (S. Goldstein ed. 1978) ("[T]he per capita rate of civil cases filed in Israel in all courts is one of the highest in the world.").

For selected comparative statistical figures showing the increasing caseloads of the courts of Canada, England, the United States, and Israel, see Shetreet, *The Limits of Expeditious Justice*, in EXPEDITIOUS JUSTICE 1 (Papers of the Canadian Institute for the Administration of Justice 1979).

5. See Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975). This commentator suggests that "as implausible as it may appear, exponential extrapolation of increases over the last decade suggests that by the early 21st century the federal appellate courts alone will decide approximately 1 million cases each year. That bench would include over 5,000 active judges, and the Federal Reporter would expand by more than 1,000 volumes each year." *Id.* But see D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER, & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT S-17 (U. of Wisc. 1983) (referring to Marc Galanter's view that alarming reports on the rate of litigation in the U.S. are "based more on popular myth than careful analysis of the data").

6. See Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar.-Apr. 1978, at 15.

Capitalism and democracy, in common, stand for competition for the allegiance of the public as either consumers or voters. The legal process, on the other hand, is fundamentally antithetical to *both* because the competition is for the ear of a government official who will determine the superior claim among litigants . . . in terms of priority of rights.

Id. at 16.

7. See Manning, *Hypertexis: Our National Disease*, 71 NW. U.L. REV. 767 (1971). Manning defines the legal explosion as "America's national disease—the pathological condition caused by an overactive law-making gland." *Id.* at 767.

8. Ehrlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976 (Magazine), at 17 (increased recourse to the courts is costly, and frequently fails to solve social problems).

9. J. LIEBERMAN, THE LITIGIOUS SOCIETY, 3-8 (1981).

10. The rate of litigation is popularly attributed to the litigious nature of Americans. Indeed, the number of lawyers per capita in the United States suggests that American society is structured to resolve disputes through litigation. See, e.g., Schwartz, *Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1270 (1980) (indicating there is one lawyer for every 440 persons in the U.S., and predicting there will be one lawyer for every 270 persons in California by 1984). In contrast, there is only one lawyer for every 10,989 persons in Japan. Abel, *Toward a Political Economy of*

statistics point towards a real and serious increase in the litigation incidence rate.¹¹

The litigation explosion threatens to overwhelm the capacity of our judicial institutions to respond adequately to the needs of our society. An understanding of this crisis can be achieved only through the questioning of a number of principles central to our justice system. This essay will explore the contours of these questions and evaluate various responses to the litigation crisis. By their nature, the solutions suggested can be only tentative.

Lawyers, 1981 WIS. L. REV. 1117, 1123 n.24 (citing Galanter, *Mega-Law and Mega-Lawyring in the Contemporary United States*, reprinted in *SOCIOLOGY OF THE PROFESSIONS* 176 n.20 (R. Dingwall & P. Lewis eds. 1983)).

11. See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS (Sept. 30, 1982) [hereinafter cited as STATISTICS, 1982]; DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR U.S. (1974-1980) [hereinafter cited as MANAGEMENT STATISTICS, 1974 etc.]

In 1982, 245,656 cases were filed in U.S. district courts, a 13% increase over cases filed in 1981, a 53% increase over those filed in 1975 and an astonishing 93% increase over those filed in 1970. Civil filings increased 14.5% in 1982 over 1981; criminal filings in the same period increased 5.8%. STATISTICS, 1982; MANAGEMENT STATISTICS 1974.

The increase in the number of filings in the circuit courts of appeals has recently slowed, but a dramatic increase is evident over the past two decades. In 1982, 27,768 cases were filed, an increase of only 2.5% over the 27,101 cases filed in 1981. STATISTICS, 1982. However, the 1982 filings represent a 138% increase over the number of 1970 filings. MANAGEMENT STATISTICS, 1974.

In contrast, the workload data for New York State courts, indicates that the rise in civil litigation has been very low. Compare SECOND ANN. REPORT OF CHIEF ADMINISTRATOR OF COURT (1980) with THIRD ANN. REPORT OF CHIEF ADMINISTRATOR OF COURT (1981). Increased criminal caseloads account largely for New York State court congestion. In the first forty weeks of 1981, filing of criminal indictments was 20 percent over that of the corresponding period in 1980. In 1980, over two million indictments, actions, and proceedings were filed in New York State trial courts. Cooke, *Community Dispute Resolution Centers Program Inaugurated*, 54 N.Y. ST. B.J. 150 (1982).

The crisis in the California courts is deepening as well. "[T]he system . . . may be heading for collapse unless something is done to ease the staggering caseloads in the civil courtrooms. . . . [J]udges in [Los Angeles County] face a 72,000 case backlog, which is growing at about 1,000 cases each month." Pressman & Morrow, *The 72,000 Case Overload*, L.A. LAW., Sept. 1981, at 18.

The congestion in the courts is attributed not only to a rise in case filings but also to the delay in case dispositions. During 1982, the overall pending caseload in the U.S. courts of appeals dropped 1.8%, although five circuits did experience increased caseloads. The Second Circuit sustained the most significant increase, with a pending caseload in 1982 that was 15.8% over that of 1981. MANAGEMENT STATISTICS, 1981, at 1. In the federal district courts, the number of civil cases pending reached an all-time high figure of 211,964 on Sept. 30, 1982. This represents an increase of 8.4% over the 195,525 cases pending as of Sept. 30, 1981. *Id.* at 6.

The number of civil cases pending in the long term (3 years or more) in the circuit and district courts fell 3.4% between June 30 and September 30, 1982. *Id.* at 10. However, lengthy and complex litigation remains a phenomenon of deep concern. See Riley, *When the Case Has a Long Fuse*, NAT'L L.J., Sept. 12, 1983, at 1, 10-11.

I. SOURCES OF THE LITIGATION EXPLOSION

A. *Do We As a Society Really Want People to Exercise Their Legal Rights?*²

A cornerstone of liberal capitalism is a concept entitled "the rule of law" through which the individual citizen is ensured equal application of the laws, and protected from arbitrary state encroachment into private affairs. Many have heralded the success of the rule of law's formalist procedural protections.¹² Others, in particular critical legal theorists, have rejected its validity.¹³ These critical theorists assert that liberal capitalism, through "the rule of law," is incapable of achieving the goal of protecting citizens from governmental encroach-

12. See, e.g., E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975). This noted British historian observed as follows:

[T]here is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath [the] law. But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.

Id. at 267.

The centrality of the rule of law, of course, is a prime concern of conservative political theorists. See, e.g., F. HAYEK, *THE ROAD TO SERFDOM* (1944).

Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

Id. at 72 (footnote omitted).

13. For discussion of the critical legal theorists' views, see Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History*, 53 N.Y.U. L. REV. 241 (1978); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). See also Gordon, *New Developments in Legal Theory*, in D. KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281-93 (1982). Critical legal theory is characterized by a "preoccupation with law as a force for the destruction of those human values we hold most sacred in a civilization—of individual dignity, equality, and community. . . . [L]aw is seen primarily as a vehicle for the manipulation by the powerful in society of the power of the powerless. . . ." Teachout, *supra* at 244-45. A self-confessed intellectual "trashing" of the rule of law has been seen as a good in itself. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230-31 (1981) ("The goal of trashing . . . is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship"). A fundamental consequence of such demystification, however, is a rejection of that "simple empirical truth that where there is genuine respect for the rule of law and the principles that underlie it, brutality and oppression cannot survive." Teachout, *supra*, at 280. One sometimes wonders if this obsessive delight in demystification is anything more than "doing bad things to daddy" as Duncan Kennedy admits in an analogous context. Kennedy, *Thoughts About Corporate Law Practice* 30 (Root Room Talk, Feb. 1980).

ment, and that the concept of neutral principles is used to manipulate legal relations so as to favor one social group over another rather than to ensure full exercise of legal rights.¹⁴

Litigation to enforce or vindicate public rights and entitlements is particularly relevant to this dispute. Although equal access to justice is an essential part of "the rule of law's" promise of neutral application of legal standards, our government has been unable to provide effective access to the justice system for all citizens. This fact remains true despite government subsidy of legal services.¹⁵ Similarly, while our governmental structure provides all citizens with a variety of constitutional and statutory rights, the state might not be able to provide these rights if, in fact, all citizens with access to the system demand them. This condition is manifested by, and accommodated through, "innovations" such as plea bargaining. All persons have a right to put the state to its proof in a criminal proceeding.¹⁶ Yet, if all defendants chose to do so rather than to plea bargain, the criminal justice system would collapse. Thus, in a functional sense, the right to a jury trial is predicated on the expectation that few will utilize it.¹⁷ A similar situation exists regarding the right to a fair hearing in social wel-

14. See, e.g., Spitzer, *Dialectics of Formal and Informal Control*, in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 3, at 167, 174-78.

15. Dooley and Houseman, *Refine, Don't Destroy Legal Services*, 69 A.B.A. J. 607 (1983) (The author urges that the Reagan administration's proposed elimination of funding for legal services will leave the poor without the ability to enforce their rights). See also M. FRANKEL, *PARTISAN JUSTICE* 124-25 (1980) (the national legal services programs should be expanded to include the middle class).

16. See U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." *Id.* See also *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("trial by jury in criminal cases is fundamental to the American scheme of justice").

17. The United States Supreme Court has recognized that plea bargaining plays a crucial role in the management of the criminal justice system, noting that "[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part. . . ." *Santobello v. United States*, 404 U.S. 257, 261 (1971). The Court declared that plea bargaining should be encouraged because "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* at 260.

It has been argued that the government utilizes plea bargaining to coerce defendants into not demanding a trial and to permit faster disposition of cases. See Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13-21 (1978). Similarly, it has been suggested that "jury trial[s] . . . have become so cumbersome and expensive that our society refuses to provide [them]. Rather than reconsider our overly elaborate trial procedure, we press most criminal defendants to forego even the more expeditious form of trial that defendants once were freely afforded as a matter of right." Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 41 (1979). Some theorists are even more critical: "[I]nducement of a guilty plea is not merely a way of shortening the criminal process. Instead, pressures to plead guilty have been used to secure convictions that could not otherwise be obtained. . . . Clearly, plea bargaining . . . raises difficult ethical and constitutional issues." Finkelstein, *A Statis-*

fare entitlement disputes.¹⁸ Efforts by welfare activists during the "war on poverty" to demand the full panoply of procedural rights¹⁹ resulted in such pressure on the welfare system that certain entitlements were eventually retrenched.²⁰

The fact that all citizens with a grievance do not pursue their disputes through the formal system of justice, and many others choose not to exercise every right available, is not as patently offensive as some would have us believe. We tend to forget that procedural rights not only inhibit bureaucrats from taking advantage of citizens, but also inhibit governmental exercise of discretionary compassion. Many European welfare theorists are skeptical about the American procedural rights approach for this very reason.²¹ More pointedly, Alexander Solzhenitsyn, in his wholesale critique of the litigious and

tical Analysis of Guilty Plea Practices in the Federal Courts, 89 HARV. L. REV. 293, 309 (1975).

18. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural due process requires notice and evidentiary hearing prior to termination of government benefits).

19. See L. JACKSON & W. JOHNSON, PROTEST BY THE POOR 114 (1974); RABAGLIAL & BIRNBAUM, ORGANIZATIONS OF WELFARE CLIENTS, COMMUNITY DEVELOPMENT IN THE MOBILIZATION FOR YOUTH EXPERIENCE 102-36 (Weissman ed. 1969).

20. In response to the overwhelming increase in requests during the 1960's by militant welfare recipients for fair hearings on special grant entitlements, local and state governments eliminated the discretionary special grant system, replacing it with a universal flat grant system with lower allotments than those possible under an individualized need-based allocation. See F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEEDED, HOW THEY FAIL 303-07 (1977). In addition, the right to a fair hearing established by *Goldberg v. Kelly*, may have induced more rigorous initial eligibility determinations. See J. HANDLER, PROTECTING THE SOCIAL SERVICE CLIENT 69-70 (1979). See also Brill, *The Uses and Abuses of Legal Assistance*, 31 PUB. INTEREST 38, 43-44 (1973) (even a decision which was intended to favor welfare recipients may backfire; defeat of the 1-year residency requirement for California welfare benefits triggered cut-backs which actually decreased the number of welfare recipients). But see Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C.L. REV. 1133, 1139 (1976) ("Probably the very presence of the mechanism for review [mandated by *Goldberg v. Kelly*] makes administrators making eligibility determinations more careful during their original review of the facts and somewhat less likely to construe close cases against the recipient").

In landlord-tenant relations, although lawyers were successful in using hitherto untapped formal procedures to the advantage of their tenant-clients, these substantive gains were limited by the hostility of the Housing Court judiciary. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in 1 THE POLITICS OF INFORMAL JUSTICE, *supra* note 3, at 119, 145-48. Enforcement of housing codes has not grown in effectiveness; limited funds have nullified the ability of the courts to order effective remedies to enforce housing standards; procedural rules have limited the capacity of the Housing and Development Administration to use the Housing Court against landlords; and the rules for serving landlords in enforcement actions are more rigid than those for serving tenants, therefore benefiting landlords. *Id.* at 157.

21. Various British welfare theorists take the view that a focus on rights can prevent "a flexibility of response to varying situations of human need." SUPPLEMENTARY BENEFITS COMMISSION, HANDBOOK 1 (1971), cited in T. H. MARSHALL, *Afthought in the Right to Welfare*, in THE RIGHT TO WELFARE 95 (1981).

formalist character of Western society, points out that "[E]very conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required. . . ."22

Interactions between individuals may also fall prey to overformalization. If each "squeaky wheel" must be lubricated by way of a lawsuit, human intercourse will be turned into legal intercourse. Such formalization of social interaction, while providing due process protections for the few, can only destroy the rich fabric of human relationships for the many. There is clearly much truth in Philip Lewis' suggestion that parties may, on occasion, be better off fixing a leaky roof themselves than suing their landlord to effectuate the repair.²³ In economic parlance, "externalities" of seeking redress may counsel against a punctilious vindication of every jot and tittle due. The prudent course of action is, at times, inaction. As Judge Learned Hand astutely observed, one should "dread a lawsuit beyond

22. A. Solzhenitsyn, *A World Split Apart*, in SOLZHENITSYN AT HARVARD 3 (R. Berman ed. 1980). Solzhenitsyn continues,

[A] society with no other scale but the legal one is . . . less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses."

Id. at 7-8. See also Shenker, *Solzhenitsyn, in Harvard Speech, Terms West Weak & Cowardly*, N.Y. Times, June 9, 1978, at A8, col. 1.

23. See Lewis, *Unmet Legal Needs*, in P. MORRIS, R. WHITE & P. LEWIS, SOCIAL NEEDS AND LEGAL ACTION 73, 79 (1973). Lewis suggests that the definition of a situation as a legal problem directs the disputants to a judicial solution, even where it might be more sensible to "take practical steps to avoid material damage regardless of . . . legal responsibilities." *Id.*

See also Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 81 (1974) ("lumping it" means to withdraw from a dispute rather than attempting to resolve it. Typically, individuals involved in a dispute with a large organization tend to "lump it" due to the discrepancy in size and power). See also Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695 (1975).

Exit is another form of "lumping it." See A. HIRSCHMAN, EXIT, VOICE AND LOYALTY 15-16 (1970) (exit is the economic response of a dissatisfied customer in shifting from the unsatisfactory product to another).

The problem, of course, is that there is some empirical evidence that low-income persons have a higher proclivity to "lump it." See D. CAPLOVITZ, THE POOR PAY MORE (1963). Caplovitz reported that, in his survey of consumer activity in low-income New York neighborhoods, half of the families who stated that they had been cheated had done nothing about it; 40% tried to deal with the merchant themselves; and only 9% sought professional help. *Id.* at 171-74. See also Miller & Sarat, *Grievances Claims and Disputes: Assessing the Adversary Culture* 15 L. & SOC'Y REV. 525 (1980-81). Miller and Sarat have found that one-fourth of those with consumer complaints of \$1000 or more do not make claims. *Id.* at 561.

almost anything else short of sickness and death."²⁴

The logic of the judicialization of our culture is a social condition of "total redress"²⁵ in which no injury is permitted to stand unaddressed by the government or the courts. While this condition may be beneficial to individual desires, it may create intolerable strains on the gossamer threads of communal solidarity. Courts cannot "fill the void created by the decline of church, family and neighborhood unit."²⁶ For a social order to survive, citizens must possess some "other-regarding" concerns. They must focus on their societal duties as well as their societal rights. More specifically, they must be sensitive to the effect of their claims of right on the social fabric. This communally oriented internal brake on litigation has seemingly been lost. Presently, the only brake on the public's craving to take every disagreement to court is cost.²⁷

B. *Has the Rising Number of Attorneys Spurred the Litigation Explosion?*

There is a story about a small-town lawyer who was struggling to make ends meet. One day a new lawyer hung out his shingle. A friend remonstrated to him that there was not sufficient business for one, let alone two attorneys. Some time later this friend returned to town and found that both attorneys were thriving.²⁸ The moral of the story is that litigation begets litigation and that the number of attorneys in a nation may have considerable effect on the amount of litigation.

Although demand is not a direct correlative of supply, it is fair to suggest that the growth of the profession contributes significantly to the growth in the demand for attorneys. Specifically, increased sup-

24. L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 LECTURES ON LEGAL TOPICS 89, 105 (Association of the Bar of the City of New York, 1926).

25. J. LIEBERMAN, *supra* note 9, at 31 ("total redress stands for the proposition that no moral society can permit any injury to stand unredressed").

26. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). *See also* Kline, *Law Reform and the Courts: More Power to the People, or to the Profession?*, 53 CAL. ST. B.J., 14, 18 (1978) (as traditional institutions such as family, church and school lose authority, courts become centers of dispute resolution even though courts are ill-suited to addressing many human problems); Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, 244 ATL. 25, 26 (1979) ("the atomization of society has triggered" the legal explosion).

27. Kurland, *Government by Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307, 319 (1979) ("[w]here the costs [of litigation] are nominal or nonexistent, you may well expect that very large numbers of persons are willing to make the investment. The increased authority of the judiciary is a direct response to the requests of a new line of consumers for the judicial product. . .").

28. I am indebted to Roger Cramton for first bringing this anecdote to my attention.

ply affects lawyer use in at least two ways. First, it is affected by the ease with which potential clients can find lawyers.²⁹ Where a large number of lawyers exist in a community, it is more likely that laypersons will know attorneys personally and, thus, will have easier access to legal counsel and resources should legal problems arise.

Second, the impact of an increase in the number of attorneys in a given community will likely be visible in the general social culture. In a city like Washington, D.C., where one out of every eighteen persons is a lawyer,³⁰ the extent to which law has permeated the cultural atmosphere is painfully clear. One thinks of the by now famous *New Yorker* cartoon depicting a Washington cocktail party where the social-climbing guest quizzically asks, "You mean you're not a lawyer?"

The profession has attempted to use its control of admission to the bar, residency requirements, and perhaps disciplinary procedures to control supply. Through the state legislatures, some state bar associations have sought control over the number and size of law schools.³¹ In addition, these associations have used unauthorized-practice laws to control demand by preventing leakage to collateral occupations, "cooling-out" real estate brokers, title insurers and accountants³² from work which the profession dominates as exclusively "law-jobs." These efforts, once classic examples of monopoly power, have proven less successful in recent years as courts have accommodated the critique of professionalism embodied in the consumer movement. Still, the ferocity of the profession's concern for supply and demand considerations suggests the importance attached to control of the market for legal services.³³

29. See generally Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 L. & SOC'Y REV. 401, 404 (1975) ("[w]hether any given situation becomes defined as a 'legal' problem, or . . . makes its way to an attorney, is a consequence of the social organization of the legal system and the organization of the larger society—including . . . the available legal machinery and the channels for bringing perceived injustices to legal agencies"). See also Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309 (1969).

30. See Winter, *Legal Surplus Spurs Move to Shut a School*, 68 A.B.A. J. 898 (1982) (citing U.S. census and ABA membership statistics).

31. Some California legislators have urged that one of the state's law schools be closed due to the lawyer glut. See, e.g., Winter, *supra* note 30. Similar positions have been taken in Kentucky. *Id.* See also PRICHARD COMMITTEE ON HIGHER EDUC. IN KENTUCKY'S FUTURE, IN PURSUIT OF EXCELLENCE (1981).

32. See NATIONAL CONFERENCE OF LAWYERS AND CERTIFIED PUBLIC ACCOUNTS, *LAWYERS AND CERTIFIED PUBLIC ACCOUNTANTS: A STUDY OF INTER-PROFESSIONAL RELATIONS* 69 (1981).

33. One example of the ABA's concern for demand creation can be seen at the 1982 ABA Convention where the House of Delegates voted to support two legislative proposals which would subsidize lawyers' fees and encourage the bringing of lawsuits. The proposals included making personal legal fees deductible and the broadening of the Equal Access to Justice Act which requires court-awarded attorney fees for indi-

While restricting supply conventionally serves to increase demand for existing attorneys, supply control does not increase macro-demand, i.e., the demand for new attorneys. As suggested, however, an increase in supply may have this effect. In recent years there has been a veritable explosion in supply. In 1977, there were more than 460,000 lawyers in the United States,³⁴ and over 121,000 individuals enrolled in ABA approved law schools.³⁵ Indeed, between 1969 and 1979, the number of lawyers admitted to practice equalled the number of attorneys practicing in 1969.³⁶

Observers such as Derek Bok have linked the increase in the size of the profession with the increased cost and complexity of litigation.³⁷ President Bok suggests that this complexity leads to a variety of inefficiencies by virtue of which lawyers have become stumbling blocks to the increase of the nation's productive capacity rather than facilitators in the resolution of economic and social problems. It is from this claim that President Bok derives perhaps his most controversial thesis—that the increase in lawyers since World War II has caused “a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit.”³⁸ In short, lawyers, like the

viduals and small businesses that successfully sue federal government agencies. See Taylor, *ABA Issue: Public Good vs. Its Own*, N.Y. Times, Aug. 13, 1982, at 26, col. 4.

34. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES 419 (1978). See generally Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 AM. B. FOUND. RESEARCH J. 51, 54. There are presently more than 500,000 lawyers in the United States. The Bureau of Census put the figure at 547,000 for 1980. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE; STATISTICAL ABSTRACT OF THE UNITED STATES 402 (1981).

35. White, *Law School Enrollment Up Slightly but Leveling*, 65 A.B.A. J. 577 (1979).

36. See Schwartz, *Reorganization of the Legal Profession*, 58 TEX. L. REV. 1269, 1270 (1980).

37. See Harvard University, *The President's Report* 6-7 (1981-82) reprinted in Bok, *A Flawed System*, HARV. MAG. May-June, 1983, at 38, 41 [hereinafter cited as *President's Report*].

38. *Id.* at 6. President Bok treats many of the issues considered in this essay, albeit from a somewhat different perspective. Although the broad sweep of President Bok's analysis clearly points in the right direction, a problem arises in his attempt to pinpoint the cause of the current crisis. He suggests a variety of factors which really collapse into three explanatory causes. First, he blames capitalism, writing,

At bottom, ours is a society built on individualism, competition, and success. These values bring great personal freedom and mobilize powerful energies. At the same time, they arouse great temptations to shoulder aside one's competitors, to cut corners, to ignore the interests of others in the struggle to succeed. . . . As society demands higher standards of fairness and decency, the rules of the game tend to multiply and the umpire's burden grows constantly heavier.

President's Report, *supra* note 37, at 8-9.

This attitude betrays Holmes' view of the law as designed to curb excesses of the “bad man” who without fear of legal sanctions will no doubt engage in greater and

bourgeoisie in Marxist analysis, are seen as an encumbrance on the productive sector, if not a parasitic element whose middleman function in no way contributes to the economy.

This notion of the attorney as a problem-creator differs radically from the historical view of the lawyer as a problem-solver who promotes the productive function by navigating clients through legal and political difficulties. Indeed, legal realists such as Roscoe Pound viewed the attorney's ability to provide mechanisms for resolving social conflict as a socially valuable role to be encouraged.³⁹

Our concern, of course, is not Shakespeare's. We need not, like him, urge "the first thing let's do we'll kill all the lawyers."⁴⁰ Indeed, attempts to abolish the professional lawyer class after the American, Soviet, and Chinese revolutions consistently failed as an attorney class over time reclaimed its predominant role in the dispute resolution process.⁴¹ In order to restore lawyers to their traditional function as

greater prevarications. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Even more disturbing, President Bok's view conflates individualism with a propensity to illegality—an astonishing proposition.

Coupled with this penchant for collectivity is the view that collective solutions to legal problems are far superior to individual solutions, if only because of efficiency considerations. Thus, President Bok argues implacably for a redirection of our legal system away from the resolution of individual disputes and towards the disposition of social concerns and controversies. *President's Report, supra* note 37, at 11-12. While less strident in this claim than many, he criticizes the tendency of adjudicatory mechanisms "to concentrate on the immediate case at hand while paying less heed to the effects on a wider public." *Id.* at 9. He suggests efforts to reduce the complexity of the law by simplifying procedures and creating, where possible, "bright line" substantive rules. *Id.* at 14-15. While such efforts are worthy, they are the job of legislatures, not of the courts. Lawyers ought to be involved in these enterprises, but not in the context of client representation. President Bok's failure to distinguish between the attorney's function as agent of his client and the attorney's social function as commentator on the legal system is a key error. One cannot easily fulfill both functions at the same time.

39. See R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 23-28 (1953). Dean Pound, in expounding on the various roles of the lawyer, wrote that the lawyer as advisor "has a function of prevention of or forstalling controversy, preventing needless resort to the courts, and keeping enterprises and undertakings to the straight paths prescribed by law." *Id.* at 27-28. As to litigation, he wrote, "[A] skilled advocate saves the time of the courts and so public time and expense." *Id.* at 26.

40. W. SHAKESPEARE, *The Second Part of King Henry the Sixth*, Act IV, Scene II.

41. For a historical review of the role of lawyers in the U.S.S.R., see Hazard, *The Lawyer Under Socialism*, 1946 WIS. L. REV. 90. Immediately after the Russian Revolution, the organized bar was abolished. *Id.* at 92. By 1917, laymen were permitted to serve as counsel for their peers, and by 1918, the bar was reestablished as a state organization. Under this scheme, lawyers were salaried civil servants. *Id.* at 92-93. The experiment failed, and from 1920 until 1922, only laypeople were permitted to perform the function of attorneys. The position of the lawyer as a professional was reestablished by legislation in 1922-23. This reestablishment coincided with enactment of the New Economic Policy which was based on organization and control of state owned enterprises, functions which required the talent of lawyers. *Id.* at 94-96. Hazard observed that, although many individual lawyers were purged in the years

problem-solvers, society must not extirpate lawyers but, rather, limit their necessity. Are there ways to diminish the power of lawyers in American society so as to unleash the social creativity of the country unhampered by legalistic impediments? The answer to this challenge lies in an exploration of the role of legalism in American culture.

C. *Have Changes in Our Legal Culture Affected the Character and Extent of Litigation?*

One explanation of the increase in litigation is that it reflects changes in our overall legal culture which, in turn, mirror changes in our social culture. Predominant among the social and legal developments which have affected the incidence of litigation are the shift toward no-fault legal systems, the emergence of a belief in an individual's entitlement to fulfillment, the breakdown of traditional social institutions, and the development of social attitudes which foster the use of litigation to promote a variety of unrelated goals.

In spirit, if not in fact, we have assumed a no-fault approach to injury. Americans sue because they believe that the good life is owed to them. Unfortunate happenstances are blamed not on fate, but on the improper intervention of both man and state. This attitude is supplemented by a rhetoric of rights and entitlements created by the constitutional framework of our American democracy which fosters recourse to law to satisfy social claims made on the state.

The rejection of the concept of fault has been styled a shift to-

following the revolution, the function of the legal profession survived. *Id.* at 91-92. See also H. BERMAN, *JUSTICE IN THE U.S.S.R.* 13-65 (rev. ed. 1963); R. CONQUEST, *JUSTICE AND THE LEGAL SYSTEM IN THE U.S.S.R.* 13-21 (1969); S. KUCHENOV, *THE ORIGINS OF SOVIET ADMINISTRATION OF JUSTICE* 449 (1970).

For a discussion of the role of lawyers in the People's Republic of China, see V.H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND IN THE U.S.* (1978). When the Communists seized power in 1949, they retained many lawyers, but emphasized political ideology rather than legal skills in training new personnel to fill legal positions. *Id.* at 22-23. At criminal trials, persons were expected to defend themselves or rely on friends or relatives. *Id.* at 71. Recently, however, an increased need for lawyers and legalization has been recognized. See Butterfield, *Three Economic Experts Get Key Peking Jobs*, N.Y. Times, July 2, 1979, at 1, col. 5. The new criminal code, drafted in 1979, provides a criminal defendant with the right to a lawyer, and requires the court to appoint one at the defendant's request. *Id.* at A8. See also Cohen, *Continuity and Change in China: Some "Law Day" Thoughts*, 24 S.C.L. REV. 3 (1972); Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 HARV. INT'L L.J. 261 (1973); Butterfield, *China is Codifying Legal System and Plans to Insure Open Trials*, N.Y. Times, Jan. 15, 1979, at 1, col. 3.

The antipathy to lawyers in post-revolutionary America is traced in M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY* 32-58 (1976); 1 A. H. CHROUST, *THE RISE OF THE LEGAL PROFESSION* 65 (1965); 2 A. H. CHROUST, *THE RISE OF THE LEGAL PROFESSION* 3-99 (1965); C. WARREN, *HISTORY OF THE AMERICAN BAR* 214-24 (1911); Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts*, 14 AM. J. LEGAL HIST. 283 (1970).

wards a fiduciary society in which contract and tort rules are infused with a concern for the results of a defendant's actions and, perhaps *sotto voce*, a concern for whether anything could have been done to prevent injurious results to others.⁴² An ironic consequence of our cultural shift is the replacement of moral responsibility with legal liability for any damages suffered.

Legal historians point out that no-fault principles are rooted in medieval legal systems.⁴³ If a farmer's ox gored a neighbor's cattle, the courts did not inquire into the extent to which the ox's owner maintained strong fences. If the ox caused damage, its owner paid restitution. This early articulation of strict liability faded in the 17th and 18th centuries as concepts of fault and the requirement of negligence entered tort principles. By the 19th century, tort recovery depended, in large part, not on the fact of injury, but on the fault of the defendant.⁴⁴ Tort became as much a moral as a legal theory.

This century, however, has seen a continuous and, in large part, successful assault on the citadel of fault.⁴⁵ The theory of product liability has developed strict liability principles, jettisoning fault for theories which assess where the risk of loss can best fall.⁴⁶ The growth in medical malpractice cases based on principles like *res ipsa loquiter* and failure to provide informed consent undercut fault principles. Indeed, some countries have discarded fault principles completely for a wide variety of injuries in favor of no-fault compensation schemes.⁴⁷

42. See J. LIEBERMAN, *supra* note 9. "The course the law has taken may be denoted as a movement from *contract to fiduciary*. . . . In moving away from a 'pure' contract regime, society constrains freedom of action by imposing a fiduciary duty on those whose actions affect others". *Id.* at 20. In other words, while in the past society favored binding persons to contracts they freely negotiated, now society requires one to assume a fiduciary status when his actions affect others. *Id.* at 20-21.

Evidence of this societal shift may be found in the unconscionability provision of the Uniform Commercial Code. U.C.C. § 2-302(1) provides as follows:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (1979). In a "pure" contract-based society, even unconscionable contracts would be enforced, so long as they were freely negotiated. A fiduciary society, on the other hand, affords more protection and provides some escape hatches from poor contracts.

43. F. HARPER & F. JAMES, *THE LAW OF TORTS* § 12.3 at 749 (1956).

44. W. PROSSER, *LAW OF TORTS* § 4 at 17-18 (4th ed. 1971).

45. See generally, Prosser, *Fall of the Citadel*, 32 AM. TRIAL LAW. J. 1 (1968); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

46. See RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

47. See Accident Compensation Act 1972, 1973 N.Z. REPR. STAT. §§ 4(b), 4(c), 5(1). The Act provides for compensation for work-related injuries such as hernias and industrial deafness as well as for diseases arising out of employment. *Id.* In

The erosion of fault principles has been joined with a second feature of modern life to contribute to the litigation explosion. This feature can only be described as a belief in an individual's entitlement to fulfillment and happiness. The pursuit of happiness is a natural human goal. Its articulation as a claim which a citizen can make on the state, however, is a peculiarly American phenomenon. From its enlightenment roots,⁴⁸ the American belief that citizens had a claim to self-realization in their affairs has become transmitted into a philosophy that one not only has a right to attempt to secure one's happiness, but that one has a right to *succeed* in that quest. This focus on results rather than opportunity has given rise to a barrage of litigation, the essence of which is the claim that one has failed to secure one's due. Thus, children have sued parents for poor parenting⁴⁹ and parishioners have claimed damages from ministers for alleged negligent ministering.⁵⁰ The government is sued continuously for failing to provide or assure the rights which citizens of past generations merely wished to be free to seek.

While the growth in litigation stems in part from changing attitudes toward rights and responsibilities, it also reflects the increasing precariousness of our social structure. The increase in litigation thus suggests the diminished role of mediating institutions such as religious, family and ethnic associations in aiding to resolve social conflict and individual disputes. For, as Lieberman observes,

The litigious impulse lies deeper than greed. A lawsuit is a

addition, the Act provides for lost earnings, funeral expenses and aid to dependents. *Id.* For discussion of the New Zealand System, see Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MOD. L. REV. 361 (1974); Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 AM. J. COMP. L. 1 (1977); Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 21 AM. J. COMP. L. 1 (1973); Palmer & Lemons, *Toward the Disappearance of Tort Law—New Zealand's New Compensation Plan*, 1972 U. ILL. L.F. 693.

48. The development of this principle of the Enlightenment is discussed in H. JONES, *THE PURSUIT OF HAPPINESS* (1966).

49. *See, e.g., Parental Malpractice?* 64 A.B.A. J. 961 (1978) (a 25 year old male sued his parents for neglect, seeking medical expenses and punitive damages).

50. *See, e.g., Radecki v. Schuckhardt*, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1976) (husbands could not recover for alienation of their wives' affection which they claimed resulted from defendants' convincing the wives to follow certain religious tenets; recovery would only be allowed if defendants intended to bring destruction to the marriages); *Bradesku v. Antion*, 21 Ohio App. 2d 67, 255 N.E.2d 265 (1969) (husband, remarried after divorce, could not recover from church for alienation of his second wife's affections when she left him after accepting the church's view that a divorced man commits adultery when he remarries); *Bear v. Reformed Mennonite Church*, 421 Pa. 330, 341 A.2d 105 (1975) (plaintiff, who had been excommunicated by his church, could recover against church for church's insistence that other members of the church, including plaintiff's wife and children, must boycott plaintiff's business or themselves face excommunication).

signal that something has gone wrong. It may be a little thing—like the refusal of a person to abide by a promise. Or it may be a major failure; the impotence of political institutions, the disequilibrium of an economy, the decay of social organizations, the collapse of corporate competence, the decline of communal feeling.⁵¹

It is difficult to treat an effect spawned by such a welter of complex causes.

Some commentators justify the increasing volume of litigation by arguing that easy access to courts is a necessary mechanism by which aggrieved citizens can secure redress for grievances. They see the litigation explosion in products liability, medical malpractice, and environmental protection as a “second-best” solution for deterring improprieties. A free market of litigation, they urge, will cause parties to be sensitive to the other-regarding consequences of their conduct. Corporate planners in particular, they hope, will invest more funds in safety research to avoid the financial consequences of litigation.⁵²

Litigation can be seen as a means for these dispossessed groups to achieve a level of influence over governmental conduct. For many interest groups, the costs associated with traditional legislative and administrative lobbying effectively preclude them from utilizing these means to influence public policy.⁵³ This use of litigation, however, cuts against efforts to control the litigation explosion. Social change

51. J. LIEBERMAN, *supra* note 9, at 7. In tracing his position on the changes in judicial attitudes, Lieberman describes five areas of the law where litigation has exploded: products liability; medical malpractice; environmental protection; public institutions; and suits against the government (government immunity). *Id.* at 33-161. These areas are disparate and it is difficult to use them as the basis for a general theory of litigiousness. Perhaps Lieberman's failure to do so reflects the elusiveness of the quest.

52. *See, e.g., id.* at 64-65 (increase in product liability suits has caused corporations to invest in safety engineering as means of avoiding exorbitant costs of litigation).

53. For example, the Honorable David Bazelon has commented that “[i]f the so-called ‘litigation crisis’ is due in any significant part to the increase in social expectations of the disadvantaged and to society's growing sensitivity to such issues, and I believe it is, then in my opinion the increase in litigation is a healthy one.” *Legal Times*, Aug. 1, 1983, at 9, col. 1 (quoting excerpts from Judge Bazelon's commencement speech at the University of Washington Law School).

Even if this counterintuitive position is correct, it still fails to belie the point that the present growth in litigation may have deleterious consequences for our social structure and our court system. *See e.g., J. LIEBERMAN, supra* note 9, at 186. Lieberman suggests that “[a] society that is law saturated inclines toward the belief that in the absence of declared law anything goes. . . . [Litigation does] much to sow mistrust, and its limited successes may blind us to the need for reforms that lie outside the ceaseless cycle of plaintiff and defendant.” *Id.*

litigation is often complex and time-consuming to both litigants and the courts. This effort to define courtrooms as extensions of legislatures twists our conventional understanding of the lawsuit. Our paradigm of the legal process should not legitimate lawyers' use of delay, publicity, or interest group pressure as tactical considerations in the litigation process. While it is only realistic to recognize that litigation is one tactic available to pressure groups, it should not necessarily be viewed as the "window of opportunity" it now is.

II. CAN INFORMAL DISPUTE RESOLUTION PREVENT EXCESSIVE LITIGATION?

There has been increased interest in the use of informal dispute resolution techniques as a way of avoiding the cost and delay associated with formal adjudication. Many states now require arbitration prior to lawsuit.⁵⁴ Some companies have chosen arbitration or mediation rather than incur the expense of going to court.⁵⁵ Judges, in

54. Pennsylvania requires arbitration for most civil cases where damages claimed do not exceed \$20,000. 42 PA. CONS. STAT. ANN. §§ 7361(a), 7361(b) (Purdon 1981). See Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961); Sherman, *Analysis of Pennsylvania's Arbitration Act of 1980*, 43 U. PITT. L. REV. 363 (1982). In New York, compulsory arbitration has been instituted in some counties. N.Y. ADMIN. CODE tit. 22, § 28 (1980). In each superior court with 10 or more judges, California requires arbitration where the amount in controversy is less than \$15,000. In any superior court with less than 10 judges, cases are submitted to arbitration at the judge's discretion. In Los Angeles and San Bernardino counties, arbitration is compulsory where the amount in controversy does not exceed \$25. CAL. CIV. PROC. CODE §§ 1141.10-.32 (West 1982). California's experience with compulsory arbitration is reviewed in D. HENSLER, A LIPSON & E. ROLPH, *JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR* 24-103 (1981).

In certain categories of cases, the United States Department of Justice has experimented with compulsory arbitration by panels comprised of three attorneys. In Connecticut, Federal Court arbitration is mandatory when the claim arises under the Federal Tort Claims Act, if the action is for breach of contract, personal injury, property damage or police misconduct, or if the parties consent and damages do not exceed \$100,000. D. CONN. R. 28. The Eastern District of Pennsylvania mandates arbitration for the same types of cases as Connecticut, but utilizes a \$50,000 damage ceiling. E.D. PA. R. 8. The Northern District of California adds to the Connecticut list actions arising under the Longshoremen's and Harbor Workers Act (33 U.S.C. §§ 901-950) and the Miller Act (40 U.S.C. § 270(b)). N.D. CAL. R. 500. A \$100,000 damage limitation is imposed. *Id.*

In his analysis of procedural informality in North America and Western Europe, Bryant Garth observed that "compulsory arbitration of claims involving relatively large amounts of money is not new in the United States . . . but in the last few years there has been a remarkable burst of enthusiasm for such reforms. The growing concern about limited public resources . . . has also prompted compulsory arbitration programs." Garth, *The Movement Toward Procedural Informality in North America and Western Europe: A Critical Survey*, in 2 THE POLITICS OF INFORMAL JUSTICE 183, 200 (R. Abel ed. 1982) [hereinafter cited as 2 INFORMAL JUSTICE].

55. A 1975 estimate revealed that the average cost of simply reading and taking notes on documents in civil litigation, using 10,000 ten page documents and the re-

particular, have hailed this step as a vehicle for unclogging court caseloads.⁵⁶

The strategy of informal dispute resolution is extensively analyzed from a critical perspective in a two volume work edited by Richard Abel, entitled *The Politics of Informal Justice*.⁵⁷ The case-studies in Abel's collection come from all parts of the globe. He provides wide-ranging essays regarding conciliation mechanisms in India⁵⁸ and Japan.⁵⁹ Considerable space and rhetorical attention are paid to forms of popular justice in revolutionary Chile,⁶⁰ Portugal⁶¹ and Mozambique.⁶² Much attention is given in this study to the legal aid and advice scheme existing in prefascist Germany⁶³ as well as to the

sulting 5,000 pages of transcript, would be \$300,000. Halverson, *Coping with the Fruits of Discovery in the Complex Case—The Systems Approach to Litigation Support*, 44 ANTI-TRUST L.J. 39, 39-40 n.2 (1975). The high costs of litigation have resulted in a movement by large corporations to budget litigation costs by monitoring the activities and costs of outside counsel. See *Reading the Riot Act to Outside Counsel*, BUSINESS W., Feb. 22, 1982, at 39. Other corporations have simply increased the amount of litigation handled by in-house counsel. See Lynch, *The Growth of In-House Counsel*, 65 A.B.A. J. 1403 (1979); *Companies Expanding Legal Staffs as the Cost of Outside Work Soars*, Wall St. J., Mar. 1, 1982, at 25, col. 3. It has been estimated that in-house attorneys cost 35 to 50% less than outside attorneys. *Id.* But see Carlson, *A Few Stand Firm Against In-House Trend*, Legal Times, May 17, 1982, at 1, col. 1 (at least 20 of the current Fortune 500 Corporations have no in-house legal counsel; some have estimated the use of outside counsel to be less expensive).

The litigation audit has been proposed as a means for corporations to anticipate potential suits and reduce the costs of future case dispositions. See Gonser & Wilhelm, *A New Direction in Preventive Law: The Litigation Audit*, 68 A.B.A. J. 446 (1982). In the audit, corporate counsel interview managers to discuss the litigation process, and particularly, preservation of rights. *Id.* at 448. Data sources are then reviewed to determine how best to handle corporate records. *Id.* A more robust form of preventive audit has been described in Chayes, Greenwald & Wing, *Managing Your Lawyers*, HARV. BUS. REV. Jan.-Feb. 1983, at 84. In this form of audit, outside counsel reviews company procedures to minimize litigation risks and reduce total legal costs. *Id.* at 87-88.

For a discussion of corporations' use of environmental mediation, see note 114, *infra*.

56. See Cooke, *Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611, 617-25 (1981).

57. THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982).

58. Meschievitz & Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in 2 INFORMAL JUSTICE, *supra* note 54, at 47-77.

59. Haley, *The Politics of Informal Justice: The Japanese Experience, 1922-1942*, in 2 INFORMAL JUSTICE, *supra* note 54, at 125-47.

60. Spence, *Institutionalizing Neighborhood Courts: Two Chilean Experiences*, in 2 INFORMAL JUSTICE, *supra* note 54, at 215-49.

61. De Sousa Santos, *Law and Revolution in Portugal: The Experiences of Popular Justice after the 25th of April 1974*, in 2 INFORMAL JUSTICE, *supra* note 54, at 251-80.

62. Isaacman & Isaacman, *A Socialist Legal System in the Making: Mozambique before and after Independence*, in 2 INFORMAL JUSTICE, *supra* note 54, at 281-323.

63. Reifner, *Individualistic and Collective Legalization: The Theory and Practice of Legal Advice for Workers in Prefascist Germany*, in 2 INFORMAL JUSTICE, *supra* note 54, at 81-123.

summary justice issued under the Argentine generals.⁶⁴ Surprisingly, no case study of informal institutions in Europe is provided, although Bryant Garth's excellent theoretical essay describes much of the existing literature.⁶⁵

American legal scholarship has been consistently ahistorical and incomparative, and thus the plethora of comparative analysis has refreshing features. Its relevance to the American experience, however, is unclear unless one accepts Abel's quasi-Marxist theoretical structure. He argues,

State informal justice under advanced capitalism is a very difficult phenomenon to understand and evaluate because it is constructed out of contradictions. . . . It appears to be simultaneously more and less coercive than formal law, to represent both an expansion of the state apparatus and a contraction. For the same reason it is peculiarly resistant to criticism: When accused of being manipulative it can show its noncoercive face; when charged with abandoning the disadvantaged it can point to ways in which informal justice extends state paternalism. It is essential to unravel these contradictions if we are to grasp the full significance of recent legal innovations.⁶⁶

It is difficult to accept Abel's argument that informalism "extend[s] the ambit of state control"⁶⁷ by seeking "to review behavior that presently escapes state control."⁶⁸ This charge, limited presumably to state-organized informal dispute resolution procedures such as small claims courts and neighborhood justice centers, reflects an excessively formalistic analysis of the justice system. It is meaningless to suggest that "[s]tate informal control does not informalize state control but rather undermines extrastate modes of informal control"⁶⁹ unless one can point to specific examples of existing nonstate control

64. Ietswaart, *The Discourse of Summary Justice and the Discourse of Popular Justice: An Analysis of Legal Rhetoric in Argentina*, in 2 *INFORMAL JUSTICE*, *supra* note 54, at 149-79.

65. Garth, *The Movement toward Procedural Informalism in North America and Western Europe: A Critical Survey*, in 2 *INFORMAL JUSTICE*, *supra* note 54, at 183-211.

66. Abel, *The Contradictions of Informal Justice*, in 1 *INFORMAL JUSTICE*, *supra* note 3, at 307. Commentary on the Abel collection has recognized that it "moves the work on dispute processing into the political arena," taking a "jaundiced view" of "the values inherent in informal judicial arrangements." P. J. WILKINSON, *BIBLIOGRAPHY IN SOCIO-LEGAL STUDIES* NO. 1, Supp., preface (Centre for Socio-Legal Studies, Oxford 1982).

67. Abel, *The Contradictions of Informal Justice*, in 1 *Informal Justice*, *supra* note 3, at 270.

68. *Id.* at 272.

69. *Id.* at 277.

mechanisms that once thrived but were debilitated by the extension of state-sanctioned informalism. Abel points to "gossip, boycott, self help [and] refusal of reciprocity"⁷⁰ as examples of extrastate informality threatened by the creation of state-organized informal justice. Only a formalist analysis which focuses solely on the zero-sum nature of state-pluralist relationships would agree that small claims courts threaten the existence of private enterprises such as the Better Business Bureau,⁷¹ AUTOCAP,⁷² the Automotive Consumer Action Program sponsored by the National Association of Auto Dealers, and religious courts.⁷³ Furthermore, a thorough survey of dispute resolution alternatives should be conducted before accepting the argument that these extrastate institutions are either thriving or sufficient to serve the average person's need for dispute resolution fora.

More critically, most nonstate dispute resolution fora rely ultimately on state-sanctioned authority to uphold their judgments. Certainly this holds true for private religious courts, which are often put forward as models of consensual dispute resolution for the good society to emulate. Although parties sign consent forms agreeing to be bound by the religious tribunal's decision, victorious parties often turn to the secular courts to enforce religious court judgments.⁷⁴ Even utopian communities ultimately rely on state authority to back up informal group sanction.⁷⁵ However strong the group sanction, it would be foolish to assume that the possibility of recourse to state

70. *Id.*

71. For a discussion of the Better Business Bureau, see Steele, *Fraud, Disputes and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1119 (1975) (Bureau, created as a formal law enforcement institution, has evolved into an informal dispute managing institution). See also Eaton, *The Better Business Bureau: "The Voice of the People in the Marketplace,"* in NO ACCESS TO LAW 233 (L. Nader ed. 1980).

72. For a discussion of the AUTOCAP program, see Greenberg & Stanton, *Business Groups, Consumer Problems: The Contradiction of Trade Association Complaint Handling*, in NO ACCESS TO LAW 193, 198-201 (L. Nader ed. 1980) (see particularly, 198-201, 207-208, & 210-211). Most dealers use AUTOCAP to settle sales and service disputes, while importers and American Motors use the arbitration system for product-related disputes. Ford, and Chrysler have set up their own arbitration programs. See *Detroit's Tonic for Lemon Buyers*, BUS. WK. April 4, 1983, at 54-55. See also *In re General Motors Corp.*, No. 9145, slip op. at 15-16 (F.T.C. Nov. 16, 1983) (consent decree outlining General Motors' plan to set up an arbitration system in conjunction with the Better Business Bureau).

73. For a discussion of religious courts, see Kirsh, *Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court*, 9 OSGOODE HALL L.J. 335 (1971); Note, *Rabbinical Courts, Modern Day Solomons*, 6 COLUM. J.L. & SOC. PROBS. 49 (1970). See also J. YAFFE, *SO SUE ME!* (1972).

74. See, e.g., *Kozlowsky v. Seville Syndicate, Inc.*, 64 Misc. 2d 109, 314 N.Y.S.2d 439 (N.Y. Sup. Ct. 1970) (review of rabbi's resolution of dispute among owners of corporation).

75. The legal problems of dispute resolution in 19th century American utopias are described in C. WEISBROD, *THE BOUNDARIES OF UTOPIA* 115-22 (1980). Analo-

authority does not add an extra wallop.⁷⁶ Thus, Abel's sharp distinction between private and public informal dispute mechanisms appears overdrawn.

One radical critique of the informalist movement is the suggestion that its concern for conciliation (on the civil side) and social integration (on the criminal side) leads to a further extension of state power into the lifestyles and social habits of disputants. Abel argues that this concern tends to shift the focus of the state from what persons do, to what they are. This counterintuitive position is based on the view that any activity rooted in state bureaucracy is necessarily dangerous to the personal well-being of citizens. Thus, social welfare efforts designed to resolve neighborhood disputes without recourse to formal legal processes are attacked as a mechanism by which the state gains control over informal neighborhood problems.⁷⁷ As minor criminal complaints are diverted into informal courts, the state is said to make judgments about a defendant's sobriety or work habits. Thus, informality in the criminal context places the state in the rehabilitation or behavior modification business. To this extent, informality in criminal justice raises problems similar to those found in probation and parole procedures that require the state to judge defendants' personal lifestyles, not their criminal conduct.

In addition to asserting that informalism is primarily a way to extend state control, Abel argues that informal institutions serve to "divert attention from structural conflict" in society.⁷⁸ First, he charges that informalist solutions individualize grievances,⁷⁹ inhibiting the aggregation of complaints which will give, so it is intimated, increased structural power to the claims of the individual. Further, he asserts that informal institutions divert "citizen attention from problems that are relatively insoluble, and therefore, dangerous—because they pit the individual against the state or capital—to problems that are relatively soluble and certainly less dangerous."⁸⁰

gous contemporary problems in Israeli kibbutzim are analyzed in Weisman, *The Kibbutz: Israel's Collective Settlement*, 1 ISRAEL L. REV. 99, 123-24 (1966).

76. Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 L. & SOC'Y REV. 63, 86-87 (1975). Danzig and Lowy claim that non-coercive private "community moots" will work because "a complainant has nothing to lose by turning first to it." *Id.* It is hard, however, to accept this view because it ignores the problem of opportunity costs.

77. See Abel, *The Contradictions of Informal Justice*, in 1 INFORMAL JUSTICE, *supra* note 3, at 267, 270-79.

78. *Id.* at 290.

79. *Id.* at 289.

80. *Id.* at 287. Professor Abel further suggests that informal dispute resolution institutions "neutralize conflict," *id.* at 280, 292; "frustrate intangible goods," *id.* at 293; "confirm and strengthen the status quo;" *id.* at 300; and "are an attempt to

These views are predicated on the belief that only through collective action can one create a just political and social order. To that end, activity which prevents the development of such a collectivist perspective must be vigorously opposed, no matter how well it succeeds in dealing with the problems of individuals.

There is, of course, little truth embodied in this caricature of the concern for the human face of justice—a concern which radicals like Gabel⁸¹ complain has been lost in the “reified”⁸² relations of liberal capitalism. Would Abel rather that no group in society show concern for neighborhood disputes over noise at night or garbage strewn on lawns? Is an effort to channel fighting neighbors into a constructive settlement rather than a court fight an enterprise to be condemned? It is difficult to dismiss, as state imperialism, efforts by liberal capitalism to prevent human frustration and criminal “labelling” for minor infractions.

A more serious threat to human liberty comes from the extremes of the left and right, not from liberal capitalism. Thus, Heleen Ietswaart, in her study of Argentine popular justice, included in the Abel collection, argues that criminal activity, which in a proto-fascist state takes the form of subversion, is “essentially a life-style, a permanent mental state, determined by certain objectives, convictions and values.”⁸³ Right-wing summary justice, the author points out, bears close similarities to “popular justice” in left-wing countries.⁸⁴ Both

revive faith in the beneficence of the state.” *Id.* at 305. Some of the difficulties which arise from Abel’s approach are highlighted by his contention that informality also constitutes a diversion of state resources from solutions to these problems. *Id.* at 287. Given Abel’s analysis, the state would never choose to do otherwise. The state is the handmaiden of capital and, therefore, opposed to the needs of the “oppressed.”

81. Gabel, *Reification in Legal Reasoning*, in 3 RESEARCH IN LAW AND SOCIOLOGY 25 (R. Simon & S. Spitzer ed. 1980). See also Spitzer, *The Dialectics of Formal and Informal Control*, in 1 INFORMAL JUSTICE, *supra* note 3, at 167.

82. For a discussion of reification, see Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in 1 INFORMAL JUSTICE, *supra* note 3, at 207, 243. See also G. LUKAS, HISTORY AND CLASS CONSCIOUSNESS 83-110 (1971).

The problem with much of this Marxist analysis is its seeming necessity for global interpretations. Such formalism requires all developments in court organization to be related (ultimately) to some aspect of the class struggle. Thus, Hofrichter attempts to explain the “reemergence of ‘informal,’ decentralized alternatives to courts” as being “related to contradictions within and threats to continued capitalist expansion, particularly the difficulties of coordinating labor power and containing the political threat posed by labor and surplus populations (the underemployed, unemployed and unemployable).” Hofrichter, *supra*, at 208-09.

83. Ietswaart, *The Discourse of Summary Justice and the Discourse of Popular Justice: An Analysis of Legal Rhetoric in Argentina*, in 2 INFORMAL JUSTICE, *supra* note 54, at 149, 170.

84. *Id.* at 153-54.

are attempts "to democratize the administration of justice, in the sense of increasing participation or involvement by more sectors of the population."⁸⁵ Because the well behaved, participatory citizen is the only citizen whose existence is recognized, the critical citizen is left voiceless, and, effectively exiled.⁸⁶

The Marxist critique scores one point, however, by suggesting that there is little evidence of public demand for mediation and arbitration schemes.⁸⁷ These critics argue that such programs, unless fueled by court referrals "must engage in extensive public relations activities to attract a sizable caseload."⁸⁸ It is in this putative lack of public demand that Marxists see a conspiracy to extend state power through the official fostering of informal dispute resolution schemes.

The more likely reason for the paucity of demand, however, is the lack of public recognition of avenues for opening up the justice process. It is this lack of awareness that is responsible for the small public outcry about court delay and backlog. Given the expense and complexity of the existing civil justice system, the ordinary citizen is likely to give up and learn to "lump it" rather than pursue the possibility of securing justice through an alternative dispute resolution system. As a result of this attitude, the process of developing alternative dispute resolution mechanisms in a legalistic society is a task for the long haul.

The Abel critique of informality as a bourgeois reformist notion is part of the critical legal scholars' attack on the legal institutions of liberal capitalism.⁸⁹ The critical approach is designed to underscore the "formalism" of the rule of law in modern society. Such formalism, it is argued, leads to myths about the neutrality of law, and denies the substantial effects of legal processes on the distribution of wealth and power in society.⁹⁰ Ironically, the Abel critique of informality is in large measure a "formalist" analysis open to similar at-

85. *Id.* at 154.

86. *Id.* at 171.

87. Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in 1 *INFORMAL JUSTICE*, *supra* note 3, at 236-37.

88. *Id.* at 237.

89. Most of the essays in the Abel collection were written by members of the Conference on Critical Legal Studies, although the "volumes are not an official publication of the Conference." See Abel, *Introduction*, in 1 *INFORMAL JUSTICE*, *supra* note 3, at 2 n.1. The Conference on Critical Legal Studies is "an organization of several hundred law teachers, social scientists, students and legal workers committed to exploring the relationship between legal theory and practice and the struggle for creation of a more humane and just society." *Id.* See also note 13 *supra*.

For a similar evaluation of both traditional formal rules of law and the informal approach, see J. AUERBACH, *JUSTICE WITHOUT LAW* (1983).

90. See generally Spitzer, *The Dialectics of Formal and Informal Control*, in 1 *INFOR-*

tack. The critique ignores the social reality of the pluralist character of American legal institutions. It rejects the empirical reality that individuals who have grievances would prefer to have their specific problems resolved before the structural problems of the community are addressed. Moreover, the resolution of the problems of individuals need not interfere with efforts to produce structural changes in society. To set priorities between such concerns is itself a formalist enterprise.

The most penetrating effort to capture the tensions inherent in the informalist vision is found in Bryant Garth's contribution to the Abel volume.⁹¹ Garth's analysis of the movement toward procedural informalism, while sympathetic towards welfare state entitlements, lacks the ideological fervor of the Abel collection's Marxist contributions. Garth focuses on three aspects of informalism: the belief that it will help make rights more effective; the use of informal modes as agencies of conciliation; and the need for informal modes as a diversion mechanism from the formal legal system.⁹² Garth recognizes the conceptual tensions between these goals, noting that "the ideology of conciliation . . . appears hostile to the goal of making rights effective."⁹³ Diversion as well, he suggests, exhibits "the darker implications of conciliation."⁹⁴ Thus, Garth charges that the "primary goal of diversion clearly is not the enforcement of rights,"⁹⁵ but is rather a concerted effort to funnel the poor and dispossessed into a second class system of justice.⁹⁶

MAL JUSTICE, *supra* note 3, at 175. Informalism is seen as alien to "repressive tolerance." H. MARCUSE, *ONE DIMENSIONAL MAN* 119-20 (1964).

91. Garth, *The Movement toward Procedural Informalism in North America and Western Europe: A Critical Survey*, in 2 *INFORMAL JUSTICE*, *supra* note 55, at 183.

92. *Id.* at 183-85.

93. *Id.* at 196.

94. *Id.* at 198. Garth contends that diversion may push out of the formal system too many of the wrong kinds of cases. *Id.* For example, Garth points out that in welfare rights cases the politically weak plaintiffs have depended more on the courts than on the legislators for protection. *Id.* Moreover, diversion not only prevents these cases from getting into court but, like conciliation, may also provide an inadequate substitute. *Id.* As Garth notes in discussing conciliation,

The question, then, must be the accuracy of the conciliator's view of the law and who is likely to benefit from inaccuracy. Since only the organizational litigant will probably know its rights—from experience in previous controversies, information disseminated through trade associations, or the advice of company counsel—and it is doubtful that the community paraprofessional conciliators can acquire sufficient legal (or technical) knowledge about welfare state rights, one can predict a definite bias against the supposed beneficiaries of welfare state laws.

Id.

95. *Id.* at 200.

96. *Id.* at 200-01. *But see* Cappelletti and Garth, *Access to Justice as a Focus of*

Whatever the etiology of the informalist impetus, it is perfectly clear that the informal mechanisms advance certain very legitimate interests. It is true that the bulk of the diversion tribunals created under the informalist rubric are consumer or poverty oriented, including consumer complaint boards, small claims courts and neighborhood justice centers.⁹⁷ In the last five years, however, large corporations and the government have increased their use of informal mechanisms in an effort to reduce the length of complex commercial litigation.⁹⁸ While the structure of these informal efforts may differ from small claims courts, they share a common focal point: the derogation of formal adversary procedures in an effort to secure functional efficiency and substantive justice.

Still, Garth's analysis poses in bas-relief the central question for modalities of informality. Do we want to provide satisfaction or vindication to aggrieved claimants? Clearly, as a society we do not want to preclude persons from vindicating their rights under law. The proverbial six-pence verdict in British libel cases underscores the notion that persons may wish to pursue their legal rights at significant personal cost. Such decisions to litigate remain a personal choice consonant with judicial restrictions of frivolous lawsuits. At the same time, we need not encourage, nor subsidize, socially counterproductive behavior. Diversion and conciliation techniques provide opportunities to resolve the social problems of those who focus on their grievances rather than their abstract claims. However costly to lawyers, such a focus cannot but yield a more harmonious social and legal order.

The Abel collection's critical legal thinkers were too busy "demystifying" proposals for informal dispute resolution as methods of enlarging the state's power over citizens to focus on their theoretical trump card—the tension between informalism and the already (to them) suspect "rule of law." Since informal dispute resolution mechanisms do not require consistency between cases, restrict the admission of evidence, or provide protection against judicial bias in the decision making process, the possibility exists that informalism could breed ad hoc justice based on arbitrary determinations rather than rules of general applicability. Hardly anywhere in the Abel collection is this problem recognized, let alone explored—perhaps because argu-

Research, 1 WINDSOR Y.B. OF ACCESS TO JUST. ix (1981) (observing that the procedural dimension of a right to access can be modified to include less expensive, less formal procedures, rather than access only to lawyers and formal courts.)

97. See, e.g., Wahrhaftig, *An Overview of Community-Oriented Citizen Dispute Resolution Programs in the United States*, in 1 INFORMAL JUSTICE, *supra* note 3, at 75.

98. For a discussion of informal dispute resolution mechanisms used by corporations, see notes 113-19 and accompanying text *infra*.

ing this point would require the critical theorists to recognize value in the rule of law with its attendant concern for neutrality, due process, and systemic fairness.

It is possible, however, to reconcile concern for the rule of law with the movement towards informalism by focusing on the various roles which formality plays in ensuring fairness in different dispute resolution contexts. For example, a rationally organized judicial system would require punctilious formality when loss of liberty is at stake but less stringent procedural protections to resolve traffic tickets.

The difference in attitude between the traditional proponents of "the rule of law" and informalists may reflect values which flow from two competing paradigmatic functions of law.⁹⁹ One paradigm focuses on the role of law as providing "a generalized normative ordering" for society.¹⁰⁰ A second approach focuses on the role of law as providing a mechanism for the resolution of particular cases.¹⁰¹ This distinction affects the approach to the work that courts do. When the purpose of law is seen as generating abstract norms and values, one is concerned with using courts for symbolic purposes. In this context one may be prepared to divert ordinary day-to-day dispute processing to non-judicial fora. Often, this rejection of adjudication suggests informal and nonadversarial approaches to dispute resolution. The alternative perspective would demand an expansion of the area of disputes which are adjudicated and an expansion of the formal attributes of such adjudications.

III. ARE THERE ANY INTERMEDIATE STEPS THAT CAN BE TAKEN ABSENT RADICAL REVISION OF THE PRESENT SYSTEM?

While theoretical discussion of the social goals furthered by our traditional legal system is important, and serious consideration must be given to proposals for a long-term major overhaul of the existing system, modest reforms are currently available to provide short-term relief to alleviate the litigation explosion. Many of these reforms revolve around an effort to divert appropriate cases to informal fora. At the same time, we must seek ways of streamlining the formal judicial system without undermining the administration of justice. Fi-

99. See Engel & Steele, *Civil Cases and Society: Process and Order in the Civil Justice System*, 1979 AM. BAR FOUND. RESEARCH J. 295. Engle and Steele describe these two approaches as organic and mechanistic paradigms. *Id.* at 334-40.

100. *Id.* at 334. For a general discussion of the organic paradigm of law, see *id.* at 338-39.

101. *Id.* at 337-38.

nally, we need to critically reevaluate the role of lawyers in American society.

One feature of informality ignored in the Abel collection is the problem of deformatizing the formal litigation device—the lawsuit. The state of the formal litigation market is the base from which the success of all informal dispute resolution techniques must be judged.

To a great extent, informality yields expeditiousness. Various efficiency devices have been trumpeted to cure the delay inherent in much formal litigation, including increased use of pre-trial conferences,¹⁰² discovery management,¹⁰³ and the use of telephone conference calls to replace courthouse proceedings.¹⁰⁴ All these changes,

102. *See, e.g.*, FED. R. CIV. P. 16. Rule 16 was amended in August, 1983 to facilitate case management by fostering the scheduling of conferences, preferably with active involvement of the judiciary. *See generally* S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS 17 (Federal Judicial Center 1977) (to the extent the court can assume early control over the pace of litigation, delay can be mitigated).

103. *See, e.g.*, FED. R. CIV. P. 26. Rule 26 was amended in August, 1983 to improve judges' control over discovery abuses by allowing them to become more involved in the discovery process and, when necessary, by allowing them to actually manage the discovery process. For example, judges could reduce the amount of discovery concerning certain matters by restricting the number of permissible depositions and interrogatories, or by restricting the scope of a production request. *Id.* *See also* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 787; Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1979). *But see* J. LEVINE, DISCOVERY 115-22 (1982) (providing a comparative analysis of the American and English discovery practice, and rejecting the view that discovery rules have been frequently used to the disadvantage of justice). Levine concludes that in summary, this examination of the incessant allegations of abuse of American federal discovery has established two positions. First, there has not been pervasive, general abuse of discovery in the quantitative sense of overuse. Second, there are adequate powers in general under F.R.C.P. to check any attempted abuse in (a) the quantity or quality of discovery used or (b) resistance to discovery.

Id. at 121. Moreover, Levine proposes reforms to *expand* discovery. *Id.* at 113.

The United States Supreme Court, like Levine, does not seem inclined to restrict discovery. In *Herbert v. Lando*, the Court rejected the defendant publisher's assertion that he had a privilege against discovery of his editorial process. The Court stated that "the deposition discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. . . . [There] are ample powers [in] the district judge to prevent abuse. . . ." *Herbert v. Lando*, 441 U.S. 153, 177 (1979). *See also* Grady, *Finding Our Way Through the Discovery Jungle*, 21 JUDGES J. 4 (1982). Judge Grady, a United States District Judge for the Northern District of Illinois, suggests that obstruction and delay in the discovery process are problems, but they are very small ones in the total scheme of things. *Id.* at 6. Judge Grady believes that excessive discovery is the problem: "The real discovery 'abuse' is not resistance or delay, but *unnecessary* discovery." *Id.*

104. *See* 1980 Amendments to Fed. R. Civ. P., 77 F.R.D. 613, 628 (1978). Rule 37(b)(7) under the 1980 amendments authorizes the taking of telephone depositions by order of the court. *Id.* at 626. For a discussion of telephone depositions *See* Dombroff, *For Depositions, Let Your Fingers Do the Walking*, *Legal Times*, Aug. 17, 1981, at 12, col. 1.

however, are essentially cosmetic.

Serious changes in the existing system will come only if judges are prepared to take the necessary action to make delay costly and expedition rewarding. This means that judges must take their sanction power under the discovery rules seriously¹⁰⁵ and use screening devices such as Rule Eleven¹⁰⁶ of the Federal Rules of Civil Procedure and fee-shifting provisions¹⁰⁷ to prevent and penalize frivolous

105. See generally C. Ellington, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE (1979); Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978). See also FED. R. CIV. P. 26(g). The 1983 amendment to this rule require attorneys to certify that discovery requests, responses and objections are

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Id. This amendment underscores the judicial sanctioning authority by providing sanctions for failure to certify as required, or for certification made in violation of the rule. *Id.*

106. FED. R. CIV. P. 11. Rule 11 provides in pertinent part as follows:

Every pleading, *motion*, and *other paper* of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

See also Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1970). Risinger notes the scarce invocation of Rule Eleven, "Since the Rule was promulgated in 1938, there have been only 23 reported cases where one party attempted to have all or part of the opposing party's pleading stricken." *Id.* at 34. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1979) ("In his representation of a client, a lawyer shall not . . . (k)nowingly advance a claim or defense that is unwarranted. . . .").

107. See *Roadway Express v. Piper*, 447 U.S. 752 (1980). In *Roadway Express*, the Court recognized the inherent power of a federal court to award attorney's fees for bad faith actions. Some states have enshrined this right in statute. See, e.g., CAL. CIV. PROC. CODE § 128.5 (West 1982). Section 128.5 provides, in part, as follows:

Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good

and unnecessary litigation.

Such efforts are admittedly more difficult for the judge than shunting litigation off to specialized tribunals and pressing for informal diversion. Change may disrupt the cozy ecoculture of the courtroom where the lifestyle requirements of the judge are often placed ahead of the needs of the litigants and other participants in the system. Furthermore, efficient use of court time will require as much self-discipline by the judiciary as it will demand social control of attorneys and court personnel. Given these factors, changes in this area are easy to suggest and yet hard to effectuate.

The judicial branch must also reevaluate our basic model of an "imperial judiciary."¹⁰⁸ Courts must return to their primary purpose of adjudicating disputes, leaving articulation of the community's moral conscience to its proper repository—the legislature. While it is unlikely that "institutional reform litigation" encompasses a large proportion of the judicial docket, it symbolizes an infectious state of mind. Such hubris leads courts consistently to expand their authority beyond their institutional competence.¹⁰⁹ The result of such mischievous forays bedevil the judiciary for years afterward.

faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.

Id. See also ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd 1968). Section 41 provides as follows:

Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial.

Id.

108. See D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 4-6 (1977); Glazer, *Towards an Imperial Judiciary?*, 41 *Pub. Interest* 104 (1975); Kurland, *Government by Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307 (1979).

109. For a discussion of the unsuitability of courts to supervise the implementation of institutional change required by a judicial decree, see Berger, *Away from the Courthouse and into the Field: The Odyssey of a Special Master*, 78 *COLUM. L. REV.* 707 (1978). Berger observes as follows:

While the ordinary trial is a splendid vehicle for enabling a judge to assign rights and duties, it is neither democratic, in the sense that all viewpoints will be fully aired, nor very sensitive to the nuances of attitude that shade public opinion. To impose systematic change without itself becoming a legislative forum, the court should have access to whatever facts and opinions may help it to mold the remedial decree.

Id. at 738. The author concluded that a special master can effectively fulfill the fact-gathering function for the court. *Id.* But see Note, *Implementation Problems in Institutional Reform Litigation*, 91 *HARV. L. REV.* 428, 440-45 (1977) (although courts monitor compliance with decrees through retention of jurisdiction and through the appointment of formal monitors and masters, these efforts usually fail to provide the court with adequate information for enforcement).

For a discussion of the use of special masters and other court-appointed agents,

Some commentators have urged reform of the formal judicial system through the creation of statutory courts to deal with such repetitive entitlement appeals as social security disability and environmental cases. In their view, administrative courts could also be developed to handle appeals in specialized areas such as labor and antitrust laws.¹¹⁰ While questions have been raised regarding the constitutional character of specialized courts in the bankruptcy context,¹¹¹ the ultimate value of such courts, especially where factual issues predominate, is clear. Even so, we must remember that such courts will not solve the problem of the litigation explosion. They will merely shift the caseload to less visible (or less powerful) forums. Nonetheless, while specialized courts may not choke off the flow of litigation, they may allow the litigation explosion to be handled more efficiently without serious costs in fairness or loss of systemic integrity.¹¹²

In addition to improving efficiency in the formal dispute resolution process, extensive efforts should be made to divert complex and significant cases into informal dispute resolution arenas. As should be

see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 826-37 (1978).

For a favorable view of active judicial control over institutional change, see Note *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1378-79 (1975).

110. See Griswold, *Helping the Supreme Court by Reducing the Flow of Cases*, 67 JUDICATURE 58 (1983). The author points out that we already have a number of specialized courts. *Id.* at 65. For example, the United States Court of Military Appeals has jurisdiction to review the decisions of the several tribunals of military justice, and there is no right of review by the Supreme Court except where review is sought by habeas corpus, which rarely happens. *Id.* The Temporary Emergency Court of Appeals also has exclusive jurisdiction to review the decisions of any district court in the United States in the field of energy law. *Id.* at 65-66. The author suggests that a similar court should be established to decide conflicts among the United States Courts of Appeals. *Id.* at 65. The author further suggests that we should have more national courts of appeals with topical jurisdiction, such as the United States Court of Tax Appeals, and that we could also have courts of appeals with exclusive jurisdiction over labor cases, the Interstate Commerce Commission, the Federal Trade Commission and antitrust. *Id.* at 66. See also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 587-96 (1969) (urging the division of large circuits into permanent specialized panels based on the subject matter of cases).

111. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

112. In a similar vein, the 1977 Pound Conference on judicial overload was replete with suggestions to shift some of the federal caseload to state courts by abolishing jurisdiction in diversity cases. See THE POUND CONFERENCE (A.L. Levin & R. Wheeler eds. 1979). The conference commemorated the 71st anniversary of Roscoe Pound's address to the American Bar Association at its 1906 Annual Meeting in St. Paul Minnesota on "The Causes of Popular Dissatisfaction with the Administration of Justice." The original Pound address is reprinted at 35 F.R.D. 273 (1964).

obvious, mediation and arbitration are not dispute resolution approaches for the poor alone. The growth in use of private judges to resolve corporate disputes in California;¹¹³ the increased use of mediation to resolve environmental conflicts;¹¹⁴ and the use of mini-trials,¹¹⁵ summary jury procedures,¹¹⁶ and other mechanisms in complex commercial litigation exemplify the extension of summary procedures into contexts other than one involving the poor.

In that regard, we may draw wisdom from TRW, a major aircraft manufacturer that has made considerable use of diversion techniques. TRW participated in the first mini-trial in 1977. The action was a patent infringement suit in which it was a defendant.¹¹⁷ After three years of pre-trial work and the exchange of over 100,000 docu-

113. See CAL. CIV. PROC. CODE §§ 638-645 (West 1976). Under the California scheme, litigation before the court can be referred to retired judges for trial on the consent of the parties. See Christensen, *Private Justice: California's General Reference Procedure*, 1982 AM. B. FOUND. RESEARCH J. 79; see also Hill, *Rent-a-Judge*, Wall St. J., Aug. 6, 1980, at 1, col. 1. If the parties agree, they can hire a retired judge for \$500 or more per day for a "quick, quiet trial;" often the parties can get a decision in a matter of months rather than years. In addition, all that needs to be made public is the petition to seek a private trial and the judgment. *Id.* Hill notes that "private judging is catching [for those who can afford it] because attorneys don't feel that the public courts have the time or competence to dispense good quality justice." *Id.* Under this system, the parties can select a judge who has a distinguished record in the area of law in question, thus insuring that the judge can deal competently with the issues involved. *Id.*

114. Environmental mediation between corporations and local community groups, federal agencies and public interest organizations is a rapidly expanding legal field. See A. TALBOTT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* 7-24 (1983) (discussing the resolution of issues connected with the construction of a nuclear power facility at Storm King Mountain, New York, and the resolution of controversy connected with the approval of a hydroelectric power facility in Swan Lake, Maine). For a further discussion of the use of mediation techniques in the environmental context, see note 119 and accompanying text *infra*.

115. The mini-trial is gaining popularity as a cost-cutting alternative to large scale litigation. It fosters expeditious settlement through informal, nonbinding hearings. For a discussion of the use of a mini-trial in a multi-million dollar patent infringement suit, see Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 501 (1978) (mini-trial procedure was organized over a period of several months; presentation lasted 2 days, after which settlement was reached within 1/2 hour); Nilsson, *A Litigation Settling Experiment*, 65 A.B.A. J. 1818 (1979) (use of mini-trial saved \$500,000 to \$1,000,000 by avoiding trial); Solomon, *A Businesslike Way to Resolve Legal Disputes*, FORTUNE, Feb. 26, 1979, at 80. See also Johnson, Masri & Oliver, *Mini-Trial Successfully Resolves NASA-TRW Dispute*, Legal Times, Sept. 6, 1982, at 13 (mini-trial allowed amicable and speedy settlement of highly technical government contract disputes).

116. Under the shortened jury procedure each side takes one hour to present its case. *Jury Trials Can Save Time and Money*, BUSINESS WK., July 20, 1981, at 166. "No witnesses can be called, but each side is permitted to make an opening statement, submit a summary of the evidence that would be used in a full trial . . . and deliver a closing statement." *Id.* The jurors are drawn from the regular prospective jury list. *Id.* Use of this procedure in Cleveland has resulted in a 90% settlement rate. *Id.*

117. For a discussion of the mini-trial, see note 115 *supra*.

ments, the parties, who had refused a proposal for traditional arbitration, agreed to an experimental "mini-trial." That concept allowed for six weeks of expedited discovery, followed by an exchange of briefs and a two-day trial attended by top management.¹¹⁸ Each side presented its case before a retired federal judge who served as moderator and agreed to issue a non-binding opinion should the parties fail to settle. In TRW's case that did not prove necessary; management settled within a half-hour after the close of the hearing, saving several million dollars in legal fees.¹¹⁹

Similar efforts to foreshorten or forswear litigation by use of experimental mediation techniques have occurred in the environmental area. In a recent dispute with environmentalists over the siting of a uranium milling and mining plant in Saquache County, Colorado, mediation saved perhaps seventy to seventy-five percent of the funds it might have expended in traditional litigation leaving both sides satisfied with the mediation process.¹²⁰

The success of these mediation alternatives has led to a variety of experimental efforts to reduce formal litigation. One district court required the parties in a complex antitrust case to secure an outside observer to prepare daily summaries of the trial testimony and evidence so as to expedite the trial, and, collaterally, to facilitate settlement.¹²¹ At least two corporations, one profit,¹²² the other non-

118. Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 502-06 (1978).

119. TRW has used the mini-trial concept in contract disputes as well. In a dispute between the National Aeronautical Space Agency (NASA) and Space Communications Agency regarding the production of a tracking and data relay satellite system in which TRW was the principal subcontractor, a "minitrial" procedure was used with great success. See Johnson, Masri & Oliver, *Mini-trial Successfully Resolves NASA-TRW Dispute*, Legal Times, Sept. 6, 1982, at 13. In that trial, no judge or neutral party was used because of the complex technical character of the dispute. Even so, a successful settlement was reached. *Id.* at 17. The authors felt that the fact that top management was involved in the discussions was a key feature in the successful resolution, as was the fact that sufficient discovery occurred such that the parties were able to make a realistic assessment of their situation. *Id.*

120. For a discussion of the Homestake Mediation, see Watson & Danielson, *Environmental Mediation*, 15 NAT. RESOURCES LAW. 687, 712-14 (1983) (reviewing and assessing the Homestake mediation from both company and conservationist perspectives); Lempert, *Lawyers Sans Armor Resolve Environmental Clash*, Legal Times, May 24, 1982, at 1, col. 2. See also Suskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 1-4 (1981).

121. See *Southern Pac. Communications Co. v. American Tel. & Tel.*, 556 F. Supp. 825, 1098-99 (D.D.C. 1982).

122. EnDispute, A Washington, D.C. corporation begun in 1982 provides services such as designing mini-trials, providing a roster of mediators for "private trials," and offering consultation to attorneys pursuing alternatives to litigation. See Pollock, *The Alternate Route*, AM. LAW, Sept. 1983, at 70; T. Lewin, *Settling Disputes Without Litigation*, N.Y. Times, Nov. 1, 1982 at D1, col. 1.

profit,¹²³ have been spawned to foster commercial use of these litigation-shortening devices. Indeed, even the federal government has begun to introduce mediation techniques into the administrative rulemaking process in an effort to reduce the amount of "after the fact" litigation over new rules by involving interested parties in the early stages of the rulemaking process.¹²⁴

The expansion of legal-related jobs in modern technological society is cause for social concern.¹²⁵ While one cannot preclude the participation of lawyers in legislative advocacy, public-policy formation, or business planning, one should seek to prevent functional monopolization of these fields by attorneys. We must not forget that other cultures, even capitalist cultures, rarely require lawyers in these activities. The professional monopoly should be vindicated only where it is necessary to the effective fulfillment of a client's business. For instance, much probate and real estate work for the middle class can be adequately performed by real estate brokers, title agents and bank trust officers.¹²⁶

Some might claim that this contraction of the professional monopoly will escalate, rather than reduce, the litigation explosion. This view is based on the premise that different players in the sport of litigation will result in more litigation. This possibility should not be ignored. Nonetheless, a benefit from any breakdown in the professional monopoly will likely be a shift to informalizing disputes—at least as regards cases involving simple issues of fact.

Other approaches to the litigation explosion warrant exploration. Efforts should be made to simplify laws so as to remove the need

123. The Center for Public Resources, located in New York City, is a clearinghouse for information on alternatives for the resolution of business disputes. Since 1982, they have provided prominent retired judges and attorneys to serve as factfinders, mediators, or consultants in private trials and mini-trials. 68 A.B.A. J. 1065 (1982).

124. See ACUS Recommendation No. 82-4, 47 Fed. Reg. 30,701-10 (1982) (procedure for rulemaking by negotiation); Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Simon, *U.S. Tries Alternatives to Litigation*, Nat'l L.J., June 27, 1983, at 1 (noting mediation experiments by Merit Systems Protection Board and regulatory negotiation procedures by the EPA and FAA).

125. For a discussion of the recent proliferation of lawyers, see notes 28-41 and accompanying text, *supra*.

126. In the estate planning field, bank trust departments have been constrained in the range of their services although "in certain areas, such as the drafting of language for use in wills and trusts, trust institutions have at least as much expertise as members of the legal profession." Johnson, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 703 (1982). See also Hyrne, *Unauthorized Practice in Estate Planning and Administration: A Mild and Temperate Dissent*, 29 U. FLA. L. REV. 647, 656-58 (1977). See generally Berl, *Estate Planning—Whose Sacred Domain?*, 9 INST. ON EST. PLAN. ¶ 1800-06 (1975).

for complex legal interpretation. For example, minor changes in probate law could remove all but the most complex estates from judicial purview. The morass of government regulation should be scourged with an Occam's razor honed to select the simpler regulatory alternatives.

Opportunities for resolving disputes without the need for an adversary proceeding should be pursued. In England, Citizen's Advice Bureaux advise laypersons in dealing with rules and regulations spawned by the welfare state. Staffed by non-lawyers, they refer persons to legal aid attorneys where necessary. Often, however, the lay staff can resolve disputes between citizens and the bureaucracy without the need of legal intervention.¹²⁷ In contrast, the typical American response to complaints by the citizenry has been increased government subsidy of lawyers. This appeal for more legions of lawyers is misplaced. The need for intermediate solutions such as the Citizens Advice Bureaux is clear. Their existence would diminish some of the need for professional legal intervention in social disputes.

Some have questioned the effect of efficiency measures such as those described in this article in terms of fairness, suggesting that justice has been subordinated to efficiency goals,¹²⁸ leading to a "second-class justice" for parties to informal dispute resolution.¹²⁹ These concerns are clearly not without foundation. On the other hand, efficiency does not always undermine justice. Indeed, as this essay suggests, justice delayed is often justice denied. Finding the balance between efficiency and fairness values is the conundrum of modern judicial administration and the challenge which those concerned with justice in our complex society must meet.

127. For a critical discussion of the Citizens Advice Bureaux programs, see Burwin, *Citizen's Advice Bureaux—There Is Such a Thing as Cheap Legal Advice*, 14 BRACON L.J. 60 (1981); Sloviter, *Let's Look at Citizen's Advice Bureaux*, 65 A.B.A. J. 567 (1979). There are 750 Bureaux in England. *Id.*

128. Shetreet, *The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts*, 13 U. BRIT. COLUM. L. REV. 52, 68 (1979).

129. See notes 91-96 and accompanying text *supra*.