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JUSTICE, BUREAUCRACY, STRUCTURE, AND SIMPLIFICATION*

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To speak to you today is for me a signal honor. For Simon Sobeloff, in whose memory this lecture is given, was both a warm, understanding, and compassionate person and a great judge. His strong principles and incisive intellect earned him the respect of all who came in contact with him, and appointment to positions of importance at city, state, and national levels of government as well as of prominence in community work.

It would be an act of supererogation for me to list those positions for you. I begin, therefore, by noting his full awareness, upon which he remarked in delivering a similar memorial lecture, that "the law is a continuous, changing, moving force for right and justice in society."¹ That awareness found expression in his strong views, well ahead of his time, on unemployment, racial injustice, prisoners' rights and sentencing, among other subjects. I remember him not only for his remarkable opinions, especially in the desegregation area, but also because my contacts with him made very evident that he was more interested in others than in himself and that he was one of those unusual people who was at peace with himself.

It is altogether fitting in view of Simon Sobeloff's role as an activist and a reformer, that we consider the present condition of our system of justice and explore possible methods of improvement. We hear and

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1. Sobeloff, *Federalism and Individual Liberties—Can We Have Both?*, 1965 WASH. U.L.Q. 296, 296.

read a great deal these days about the explosion of litigation and the resultant bureaucracy that has burgeoned in the federal court system in an effort to deal with the caseload.² Less prominently discussed, but of equal importance, are the problems of state courts that have arisen from their greatly increased business.³ These problems manifest at the trial level in the loss of time for judicial pondering and the dilution of judicial responsibility through staff growth, and at the appellate level, in those factors plus the loss of collegiality.⁴

The root causes of this increased pressure on the judiciary are many: the decline of public confidence in institutions, both public and private, the loss of the sense of community which follows megalopolitan growth, the increase in the number of lawyers, the advent of public interest law groups, judicial activism,⁵ and the tendency of legislative bodies to enact laws that increase court business—often needlessly, as a result of their lack of clarity. There is a lessening of confidence in the courts not only, as might be expected, because of the more controversial social policy areas into which they have ventured in recent times,

2. *E.g.*, Remarks of Chief Justice Warren Burger at the Arthur T. Vanderbilt Dinner (Nov. 18, 1982) (available at the offices of the *Maryland Law Review* or the Federal Judicial Center Information Service) [hereinafter cited as Remarks]; see N.Y. Times, Nov. 19, 1982, at B1, col. 1 (discussing the Chief Justice's Arthur T. Vanderbilt Dinner address); Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 275-76 (1982) (criticizing trend of increasing litigation); Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A.J. 1370, 1372 (1982) ("the rule of law, reduced to wholesale justice, could be the ultimate victim"); Board of Educ. v. McCluskey, 102 S. Ct. 3469, 3473 (1982) (per curiam) (Stevens, J., dissenting) (The Court must resist rather than encourage "the rising administrative tide" because of the threat to the quality of the Court's work "presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system.").

3. R. MACCRATE, J. HOPKINS & M. ROSENBERG, *APPELLATE JUSTICE IN NEW YORK* 55-57 (1982) (proper administration of justice in New York threatened by case overload); Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60, 62 (1982) (state courts more likely than federal courts to suffer from overload because of small staffs).

4. See Higginbotham, *Bureaucracy — The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980) (increase in use of magistrates and administrative law judges dilutes article III duties of the federal judiciary); Howard, *Query: Are Heavy Caseloads Changing the Nature of Appellate Justice?*, 66 JUDICATURE 57, 59 (1982) (heavy workload reduces judges to administrators); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248 (1981) (bureaucratization of the Supreme Court reduces its authority); Whitman, *Elevation of Private Rights to the Constitutional Level*, LAW QUADRANGLE NOTES, Winter, 1982, at 26 (1982) (expansion of constitutional protections dilutes society's ability to guarantee them). See also *supra* notes 2, 3; *infra* note 5. But see Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259 (1981) (response to Vining article).

5. Howard, *A Litigation Society*, WILSON QUARTERLY, Summer, 1981, at 98, 106; Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648 (1980); Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4-7 (1982) (relationship between growth of public interest law and judicial activism).

but also because of the time and expense involved in litigation,⁶ and because in many cases judicial decisions do not articulate clearly the basis or bases upon which a particular result has been reached.⁷ Unfortunately, the public sees efforts to stem the tide as a denial of rights to which citizens are entitled.⁸

Because the problem is substantially broader than the framework within which it is discussed in the "judicial bureaucracy" literature, the search for solutions must extend beyond the judicial system itself. We must examine the relationship of courts, state and federal, to each other and to the other branches of government, and the public's perception of those systems.

I will be the first to concede that some of my proposals will seem radical, possibly even heretical, to traditionalists. Some will also appear, at first blush, to exacerbate rather than to relieve the problem. I hope, however, to convince you that it is in the interests of society to restructure the relationship between the branches of government and to simplify the way in which courts go about their work. To do that I shall first examine the problems arising from the present relationships between the judiciary, other branches, and the public. I next will consider the possible solutions, and propose various ways in which to restructure what the legislature and the courts do, and methods for simplification of the work of the courts, trial and appellate.

I. STATEMENT OF THE PROBLEM

The base from which I start is that, although our judicial system is adversarial in concept, justice requires that judges concern themselves with not only the litigants' disputes, but also that problem in relation both to the whole body of the law as well as to law as part of the whole fabric of society. To do less is ultimately to reduce to a hodgepodge of *ad hocery* a system which is intended to establish rules of law as precedents by which citizens are made aware of the limits of individual action, and of resulting rights and obligations.⁹ I speak of judges because that is our immediate focus, but legislators, executives, and administra-

6. Kilpatrick, *Law Judged To Be Guilty As Charged*, Buffalo Evening News, May 4, 1982, at 1C, col. 1; see generally Krivosha, *Improving the Image of the Judiciary*, STATE CT. J., Winter, 1983, at 30.

7. Meyer, *Judging by Fiat*, LITIGATION, Winter, 1983, at 5, 5-6.

8. See Porter, *Our Recourse To Courts Is Shrinking*, N.Y. Daily News, Apr. 14, 1982, at 40, col. 3; Courts: *The Zealots Are Out to Cripple the Third Branch of Government*, Detroit Free Press, Feb. 5, 1982, at A8, col. 1, reprinted in 61 MICH. BAR J. 104, 104 (1982); *Attack On Courts*, 67 A.B.A.J. 812 (1981).

9. See Bok, *Law and Its Discontents: A Critical Look At Our Legal System*, 38 REC. A.B. CITY N.Y. 12, 14-16 (1983) (growth of complexity in litigation diminishes certainty in

tors do not properly fulfill their lawmaking functions unless they too consider problems in the same multifaceted way.

The judiciary's responsibility when exercising its law-making function may be greater than that of the other branches because of its greater accessibility and its responsiveness. No sponsor need be sought, as is necessary for legislation and for some executive or administrative matters, in order to place a given proposition before those who have the authority to act upon it. And those in the audience which must be addressed are very much fewer in number and generally less diverse in interests than is the case with a legislative or regulatory body. The time elapsed from initial presentation to ultimate determination by the courts, though considered by many to be excessive, is by comparison with the pace at which controversial topics move through the legislative or regulatory process, as the hare to the tortoise, if not to the snail.¹⁰ An added incentive for use of the courts is the close surveillance of all that goes on in them by the media, for litigation results in immediate and, in highly controversial matters, widespread and sustained publicity. It is a fair surmise that some actions come into the courts more for the publicity that results than in the belief that the courts would provide a remedy. For example, the litigants in *Honicker v. Hendrie*,¹¹ which sought to close down all nuclear fuel cycle operations because of the harmful effects of the radiation generated, came into the courts more for the publicity that would result, than in the belief that the courts would ban atomic power development, the Supreme Court having held before the action was begun that nuclear power was a matter of legislative policy rather than of court adjudication.¹²

This is not to suggest that there are not parallels in the legislative process to what goes on in the courts, legislators do not create statutes in a vacuum. They will oft-times consider, as do courts, the existing state of the law, and have presented to them, as do courts, in documentary and oral presentations, arguments from groups and organizations

what are the rules of law); see also J. NOONAN, JR., PERSONS AND MASKS OF THE LAW 4-5 (1976) (rules of law formed to shape conduct of society).

10. New York's equitable distribution statutes first were proposed in 1974, but were not adopted until 1980. *Governor's Message on Approving Chapter 281, Laws of 1980*, 1980 N.Y. Laws 1863 (McKinney). See also Note, *New York's Equitable Distribution Law: A Sweeping Reform*, 47 BROOKLYN L. REV. 67, 68 n.2 (1980) (detailing controversy over various statutory proposals).

11. 465 F. Supp. 414 (M.D. Tenn.), *appeal dismissed*, 605 F.2d 556 (6th Cir. 1979) *cert. denied*, 444 U.S. 1072 (1980).

12. *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 558 (1978).

with seriously conflicting interests.¹³

There are important differences, however. Legislators are answerable not only to the voters who put them in office, but also to the discipline of their party's legislative caucus, to the time pressures of schedules which crowd passage of most legislation into the final few days of a legislative session, and, even if not, afford realistic understanding of the problem dealt with by a particular bill to but few of those whose votes enact it, and, finally, to the coercion of compromise in the interest of some, if only partial, success. Legislators therefore are neither as independent nor as disinterested as are judges.¹⁴ Moreover, legislation is essentially a bureaucratic process. Because the body is larger and more diverse in interest than is a collegial judicial body, legislators, as a group, will usually be more dependent upon the staffs of the drafting bureau and of the various committees through which a given piece of legislation passes in the process of legislative consideration and less intensively informed about the issue at hand and its ramifications than will be judges acting as a collegial body.

I am not suggesting that all judicial results are necessarily better than all legislative enactments. Far from it, there are areas in which, as I will suggest, legislative intervention is necessary to give body and form to judicial concepts both to reduce the burden upon the courts and to restore the confidence of litigants—the court's consumers—in court products. What I am suggesting is that there are forces at work in the legislative process that unsettle or leave unsettled the governing law and leave those governed by it nowhere else to turn for guidance or for the correction of patent inequities but to the courts.

One need not search far for examples. Contribution among joint tortfeasors was recommended to the New York legislature by the Commission on the Administration of Justice in 1934,¹⁵ and by the Law Revision Commission in 1936¹⁶ and 1952.¹⁷ Not until after *Dole v. Dow Chemical Company*¹⁸ in 1972, in which the inconsistencies and unfairness of the no contribution rule led our court to overturn the existing rule, did the New York legislature, at the request of the Judicial Con-

13. Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 760-61 (1965).

14. Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439, 448 (1982). *But see* Friendly, *The Gap in Lawmaking — Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 791 (1963) (superior resources and power of the legislature).

15. New York Legislative Document No. 50(D) (1934).

16. Leg. Doc. No. 65(K), *reprinted in* LAW REVISION COMMISSION, REPORT TO THE LEGISLATURE OF NEW YORK OF 1936, at 703-47 (1936).

17. Leg. Doc. No. 65(A), *reprinted in* LAW REVISION COMMISSION, REPORT TO THE LEGISLATURE OF NEW YORK OF 1952, at 21-63 (1952).

18. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

ference,¹⁹ enact the present statute.²⁰ Why, one may ask, should it take forty years to bring about this obviously equitable change? And how many actions were brought during that period in an effort to persuade the courts, as they finally did, not to wait longer for legislation?²¹

The difficulties that legislative omissions, intentional or inadvertent, create for the courts are legion. For example, Circuit Judge Alvin Rubin has counted over sixty federal statutes establishing priority for court consideration of cases and seventy-two recent laws increasing the amount of litigation in federal courts, none of which consider the relation of the various priority statutes to one another or the increase in burden that the courts must meet under the substantive enactments.²² Professor Antonin Scalia, has detailed the problems for the federal courts resulting from Congressional failure to keep the Administrative Procedure Act up to date, and to harmonize recent enactments and amendments of various agency statutes with the APA.²³ Professor Scalia and West Virginia's Chief Justice, Richard Neely, have recounted the increasing pressure upon the courts from ambiguities resulting from compromise in the legislative process and the failure to consider the entire problem upon which a given statute touches.²⁴ Professor Kenneth Culp Davis, in his pioneering book on discretionary justice, discusses the effect of creating administrative agencies with broad discretionary powers and the necessity for confining standards so that those subject to agency control will be dealt with fairly and without excessive recourse to the courts.²⁵ In this vein, Professor Stephen Schlissel and I have attempted to apply Professor Davis' teachings to the amorphous statutory concept of "best interests," by which awards of custody of children are governed.²⁶

19. Twelfth Annual Report of the Judicial Conference to the Legislature on the Civil Practice Law and Rules, *reprinted in* THE JUDICIAL CONFERENCE TWENTIETH ANNUAL REPORT 217-27 (1975).

20. Act of June 7, 1974, ch. 742, 1974 N.Y. Laws 1915 (codified at N.Y. CIV. PRAC. LAW §§ 1401-04 (McKinney 1976)).

21. See Farrell & Wilson, *Dole v. Dow Chemical Co.: A Leading Decision—But Where?*, 39 BROOKLYN L. REV. 330, 330-38 (1972) (New York joining growing list of jurisdictions adopting contribution rule).

22. Rubin, *supra* note 5, at 655, 658. Chief Justice Burger put the figure at 100 statutes enlarging federal jurisdiction by creating new causes of action within the last 15 years. Remarks, *supra* note 2, at 4.

23. Scalia, Vermont Yankee: *The APA, The D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 382, 386.

24. *Id.* at 402; R. NEELY, HOW COURTS GOVERN AMERICA 47-78 (1981). For a critical reception of Neely's thesis, see Hornstein, Book Review, 41 MD. L. REV. 774 (1982).

25. K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

26. Meyer & Schlissel, *Child Custody After Divorce: How Grasp The Nettle* (pts. 1-3), 54 N.Y. ST. B.J. 496 (1982), N.Y. ST. B.J., Jan., 1983, at 32, N.Y. ST. B.J., Feb., 1983, at 36.

The problem does not arise solely out of the legislature's role. The executive branch also hampers the judiciary, commonly by resorting to the courts as a means of escape from political dilemma. For example, witness the Justice Department's recent unsuccessful argument to the Supreme Court that, because the Congress failed explicitly to bar tax exemptions for private schools that discriminate racially, the administrative branch no longer could refuse to exempt those schools despite an eleven-year-old treasury ruling. This situation involved a triple whammy: First, the Congress failed to address explicitly the situation in the original statute. Second, although presented during those eleven years with many opportunities to override the Internal Revenue Service ruling interpreting the statute as barring exemptions to private schools that discriminate, the Congress failed to act. Third, the President, unable to redeem a campaign pledge through legislative change, passed the buck to the courts.²⁷ Although the problems created by the executive branch are fewer than those arising out of the legislative process, or by litigants who use the courts to publicize pet peeves, they are nonetheless a factor of substance given the controversy that rages around many of the social issues of today.

The expanded role thus thrust upon the courts has involved them deeply in matters of social policy traditionally left to other branches of government—matters with which, as presently constituted, the courts are ill-equipped to deal. Their frequently controversial nature renders these decisions less predictable as to result than the purely "legal" issues which traditionally courts have had to consider.²⁸ Moreover, the situation is exacerbated by the reduced time available for consideration and decision, and the courts' tendency, in disposing of such matters to do so more completely than the specific facts of the particular case necessitate. In short, courts speak more as the legislature should than as courts traditionally do. Diverse, if not diametrically opposed, results—as, for example, concerning when and how busing should be used to remedy educational imbalance—are produced in such cases by courts proceeding not only from differing judicial philosophies, but also upon different and generally incomplete and conflicting factual assumptions.

27. Lewis, *Passing the Buck*, N.Y. Times, Oct. 14, 1982, at A31, col. 1. See Rev. Rul. 75-40, Treas. Dec. Int. Rev. 1347 (Feb. 14, 1975), reprinted in STAND. FED. TAX. REP. (CCH) ¶ 3025.045 (1975) (I.R.S. guidelines for determining tax-exempt status); 4 U.S. Tax Week 117 (Jan. 22, 1982) (Treasury Department announcement that issue was province of Congress); *Bob Jones University v. United States*, 51 U.S.L.W. 4593 (U.S. May 24, 1983) (revocation of tax-exempt status of school with discriminatory policies upheld).

28. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973); see *Ferguson v. Skrupa*, 372 U.S. 726, 730-32 (1963) (refusal to tamper with workings of state debt-adjusting statute).

An important factor in any discussion of possible remedies is that the problems to which I have so far referred cannot be dealt with in a vacuum. The evolutionary process by which the courts have progressed from an executive assembly of the king and his councillors²⁹ to the judicial institution as we presently know it has been not only slow but tortuous. There are, in consequence, many factors that we must consider in searching for ways to better our judicial system—factors that adversely affect public confidence in this institution. For example, when claims of apparent merit are excluded or expelled for reasons unrelated to the merits or on bases insufficiently articulated, the public is dissatisfied and parties who deserve protection are harmed. The factors which make it possible for courts to avoid issues are many. Among these are the number of courts to choose from when entering the system, the fragmentation of jurisdiction over problems arising out of the same fact complex, the amorphous concepts by which many rights are controlled (reasonable care, best interests of the child, due process, to name but a few), and the tendency of courts to dispose of matters through expansion of procedural concepts such as jurisdiction or *res judicata*. In disposing of cases substantively, courts often do so without opinion, by an opinion phrased in hyperbole or in result-oriented language, or on the basis of a rule of construction for which there is an equally accepted but diametrically opposed rule. Also of great concern to the public today is the high cost in money and time of processing a claim through the system.

II. POSSIBLE SOLUTIONS

If, as I have suggested, bureaucracy is but one cause of the low regard in which courts are held, the problem cannot be solved solely by restricting the delegation of judicial functions or increasing court personnel, as desirable as these ideas may be. These adjustments, in any event, are of doubtful efficacy: Increasing the number of judges almost invariably generates an increase in the work of the courts of close to the same magnitude that the new judges, working under such a restriction, can accomplish.³⁰ Moreover, these changes do nothing to offset the legal system's single-minded concentration on individual cases at the expense of the development of a general body of rules of governance.

29. In Massachusetts the legislature is still known as the "Great and General Court of Massachusetts" while the highest tribunal is the "Supreme Judicial Court of Massachusetts."

30. R. NEELY, *supra* note 24, at 208-09. *But see* Hufstедler, *The Future of Civil Litigation*, 1980 UTAH L. REV. 753, 762-63 (benefits from increasing size of appellate bench); Mikva, *More Judgeships—But Not All At Once*, 39 WASH. & LEE L. REV. 23, 24-25 (1982) (benefits from increasing number of trial judges).

To restore confidence in the judicial system to its former high level, we must do more than limit the growth of bureaucracy and remove some of the system's Catch-22's. We must also assure the public that justice is being done—by candidly articulating the basis of decisions and by demonstrating that courts do view in broad perspective the issues before them.

In addition to giving the appearance of doing justice, we must in fact do justice. The judicial system serves its purpose to the fullest when it decides controversies on the merits rather than procedurally, decides them at as early a point in the development of the particular type of controversy and in as broad a perspective as is consistent with full and reasoned consideration, and decides them in a writing that sets forth clearly the reasoning upon which it rests.

It is my thesis that the most likely avenues for achievement of those goals lie in restructuring the way in which legislative bodies and the courts function, and in the simplification of court procedures to make the process less costly and the result more predictable.³¹

III. RESTRUCTURING THE JUDICIARY'S LAWMAKING FUNCTION

How courts and legislatures function involves not only what each body does and how it does it, but also what each does not do and what the two bodies see as their relationship to one another. A further complication exists because under our federal system there are at least two levels of legislatures, court systems, and executives with which to reckon. The present structure of the courts themselves and their relation to the other two branches hinder the courts' efficient functioning and the effective redress of the public's problems and concerns. The courts, either on their own or pursuant to enabling legislation, must restructure the manner in which they operate and their relationship with the legislative and executive branches.

A. *Reckoning with Legislative Intent*

Legislative action or failure to act may bear directly upon the burden of the courts in several respects. The vagaries of the English language or the difficulty of foreseeing all of the ramifications involved, or both, frequently leave the legislative intent unclear. Legislation creates new rights that the courts will have to enforce. Uncertainty results

31. Adoption or rejection of any proposal for change involves an assessment of the costs and benefits of the proposal and the balancing of that assessment against the costs and benefits of the existing system. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973). An in-depth cost-benefit analysis of my proposals, however, is beyond the scope of this Article.

when the legislature fails to grapple with a problem, to monitor what the courts have said about existing legislation, or to consider the unsettling effect of later statutes on earlier enacted laws the meaning of which as originally enacted was clear.

Can legislative intent be clarified either by striving for standardized language and syntactical uniformity in statutory drafting, or by formalizing the rules governing the use of legislative history and the preservation and distribution of the materials generally referred to? Professor Laymen Allen has pointed out the importance of normalization of language and syntax in legal drafting as a means of uncovering ambiguities and of making the resulting product more amenable to handling by automatic data processing equipment, and thus reducing the necessity for court interpretation.³² But these are the tools of the professional draftsman, not a means of capsulizing discrete meanings of particular words in a statutory construction act as an aid to judicial interpretation or public understanding or both. As devoutly as it is to be hoped that the drafting of statutes will be entrusted only to professionals and that professional drafting will become a more widely sought-after career, the many sources from which bills enter the legislative hopper, the relatively few states that have a legislative drafting service and the pressures under which in the usual course legislation is ultimately enacted suggest that the wish is still far from realization.³³

To formalize the rules governing the use of legislative history seems an equally chimerical pursuit, particularly in this day of budget deficits which limit the resources necessary to create and to divine the intent of the legislature. Legislative materials, however, to an ever increasing extent have become a factor in judicial decisions involving the interpretation or application of statutes. Statistics show that from the late 1930's to the late 1970's the use of legislative history by the Supreme Court increased from nineteen citations per term to three to four hundred per term.³⁴ Moreover, during this period, the plain meaning rule has lost much of its sacrosanctity,³⁵ encouraging courts to

32. Allen, *Problem of Communication and the Legal System*, N.Y.L.J. Oct. 27, 1967, at 1; see also Allen, *Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of "Legal Right": A Powerful Lens for the Electronic Age*, 48 S. CAL. L. REV. 428 (1974) (attempting to define the right of privacy in terms understandable to a computer); Allen & Engholm, *The Need for Clear Structure in "Plain Language" Legal Drafting*, 13 U. MICH. J.L. REF. 455 (1980) (illustrating the usefulness of modern logic for achieving clarity in legal drafting).

33. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 174 (1975).

34. CARO & BRANN, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 291 (1982) (substantially the same article appears in 22 JURIMETRICS J. 294 (1982)).

35. *E.g.*, *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (statu-

resort to legislative materials of almost any description whenever the construction of a statute is in issue. As any enlightened advocate knows, these materials often convert to a truism A.P. Herbert's jest that "If Parliament does not mean what it says, it must say so."³⁶

The use of legislative intent even if discernible is fraught with many difficulties: The materials usually express not a legislative view, but a legislator's view. They may be manufactured or contrived. Complete legislative histories are more expensive to preserve than most state legislatures can afford. Speeches and reports may not be available to the public or even to lawyers not located at the seat of government.³⁷ Thus, some, such as the California Subcommittee on Legislative Intent, which was created to provide "means by which the Legislature may define and preserve the intent of the Legislature with respect to legislative enactments,"³⁸ have concluded that there should be wider distribution of materials already being processed, but that floor debates should not be printed, statements by the author of the bill should not be used, and the use of other interim legislative materials should not be extended.³⁹ One may well agree with Professor Reed Dickerson that the "realistic approach to legislative history would be to end or severely limit its judicial use" and concentrate rather on improving the quality of the statute itself through wider use of professional draftsmen.⁴⁰

There is, however, at least one area in which legislation other than the statute being construed can affect judicial interpretation materially, an area which is generally overlooked even when there exist statutory construction acts such as the Uniform Law⁴¹ or New York's General

tory language not to be construed at variance with the policy underlying the statute as a whole); *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 436-37, 343 N.E.2d 735, 738-39, 381 N.Y.S.2d 17, 20 (1975) (words are never absolutely certain in meaning); see also Reynolds, *The Court of Appeals of Maryland: Roles, Work and Performance—Part II: Craftsmanship and Decision-Making*, 38 MD. L. REV. 148, 163-67 (1978) (easiest way to misread any document is to read it literally).

36. A. HERBERT, UNCOMMON LAW 192 (1935). Compare *id.* (*Bluff v. Father Gray*) with the Supreme Court's notation in *Maine v. Thiboutot*, 448 U.S. 1 (1980), that "the legislative history does not demonstrate that the plain language was not intended." *Id.* at 8.

37. R. DICKERSON, *supra* note 33, at 174-79, 197-99; see also FINAL REPORT OF THE SUBCOMMITTEE ON LEGISLATIVE INTENT OF THE ASSEMBLY COMMITTEE ON RULES *passim* (California Assembly Interim Committee Reports 1961-1963, Vol. 28, #1, 1963) [hereinafter cited as REPORT].

38. REPORT, *supra* note 37, at 7.

39. *Id.* at 45-46.

40. R. DICKERSON, *supra* note 33, at 174, 195; C. LLEWELLYN, THE COMMON LAW TRADITION 379, 382 (1960). But see Meyer, *Legislative History and Maryland Statutory Construction*, 6 MD. L. REV. 311, 316 (1942) (author's contrary view of 40 years ago).

41. MODEL STATUTORY CONSTRUCTION ACT, 14 U.L.A. 513 (1975). Only Colorado, Iowa, and Wisconsin have adopted the Act.

Construction Law.⁴² I refer to questions such as whether a statute adopted by a superior legislative body (the Congress in relation to state bodies, or the state legislature in relation to lesser governmental units within the state) is intended to preempt the field, whether a criminal or regulatory statute may be enforced in a private civil action, whether the Congress intends a new right to be enforced by state as well as federal courts, and whether a statute creates a new right or is simply declaratory of the common law. It was just such a question and the intricate reasoning which resulted in the court's conclusion that a Los Angeles ordinance had been preempted by state statutes regulating sexual activity⁴³ which caused the establishment of the California Subcommittee already referred to.

The California Subcommittee concluded that preemption was essentially a question of fact and that, therefore, whatever the legislature might say in a construction act would not be binding on a court faced with deciding a particular conflict.⁴⁴ Although it is, of course, true that the legislature cannot limit the power of a future legislature,⁴⁵ a solution exists: an act which parallels the classification devices in criminal statutes that direct without specific statement what the punishment for violation will be. The Congress could establish classifications by which courts could determine whether a federal statute is to be enforced⁴⁶ as it now classifies felonies and misdemeanors as Class A, B, C, D or E, thus incorporating by reference the limits of the sentence that may be imposed. This statute could designate, for example, as Class A, statutes enforceable only in the federal courts, as Class B, statutes which state courts would be permitted but not required to enforce,⁴⁷ and as Class

42. N.Y. GEN. CONSTR. LAW (McKinney 1951).

43. *In re Lane*, 58 Cal.2d 99, 104-05, 372 P.2d 897, 899-900, 22 Cal. Rptr. 857, 859-60 (1962).

44. REPORT, *supra* note 37, at 13.

45. R. DICKERSON, *supra* note 33, at 272-81.

46. In *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473 (1981), the Supreme Court stated the rule to be:

In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. . . . Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Id. at 478. See also Redish & Muench, *Adjudication of Federal Causes of Action in State Courts*, 76 MICH. L. REV., 311-13 (1976); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 204; Hart, *The Relationships Between State and Federal Law*, 54 COLUM. L. REV. 489, 506-08 (1954); Annot., 69 L. Ed. 2d 1136, 1139-40 (1982).

47. See *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) (FELA permits, but does not require,

C, statutes which must be enforced not only by federal courts but also by state courts, unless the particular state court is not jurisdictionally competent to hear claims of the type covered by the statute or *forum non conveniens* grounds exist for its refusing to do so.⁴⁸ In addition, the act should provide that when a statute contains no class designation there no longer shall be a presumption of concurrent jurisdiction. The court would be free to base its decision upon stated criteria such as the policy behind the federal statute, the uniqueness of the right it creates, the needs of the federal system, and the burdens upon the state system. The likelihood that a classification indication would be omitted from a later enacted statute is not very great, because the classification statute itself would serve as a powerful reminder, as it now does in criminal cases. In the unlikely event of an omission, however, the situation would, except for the absence of the presumption of concurrent jurisdiction, be no different than it is at present. Bearing in mind, however, the several situations already noted in which such a classification could be used and the time expended in litigating such issues at present, I conclude that enactment of a statute dealing with those situations will materially lighten the burden of the courts, without any sacrifice of legislative integrity.

B. *Accommodating the Burden of Legislation on the Judiciary*

With respect to legislation (state or federal) which creates new rights, the major problem until recently has been the failure of the legislative body to consider the impact of the new statute on the courts.⁴⁹ There has been much discussion about impact statements, mostly with respect to the federal courts,⁵⁰ since they were first proposed by Chief Justice Warren Burger in 1970 and again in his 1972 Annual Report on the State of the Judiciary.⁵¹ This discussion has pointed up that not only legislation, but also court decisions and administrative rulings increase court work,⁵² that benefits as well as costs must be considered, and that costs include considerations not just of quantity but of quality

state courts to entertain such actions); Sandalow, *supra* note 46, at 207 (absent declaration by Congress, state courts need not entertain federal actions).

48. These exceptions presently are recognized, e.g., *Testa v. Katt*, 330 U.S. 386 (1946); see *Redish & Muench, supra* note 46, at 348-54.

49. See, e.g., Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 5-6 (1976).

50. Olson, *Judicial Impact Statements for State Legislation: Why So Little Interest*, 66 JUDICATURE 147, 147-48 (1982).

51. Burger, *The State of the Federal Judiciary — 1972*, 58 A.B.A.J. 1049, 1050 (1972).

52. Nejelski, *Judicial Impact Statements: Ten Critical Questions We Must Not Overlook*, 66 JUDICATURE 122, 128 (1982).

as well.⁵³ Impact statements would allow the legislature to apply "a sort of Gresham's law in reverse" allowing new good cases to drive out of the court system old bad ones—for example, removing diversity cases from federal courts to make room for newly created federal rights.⁵⁴ Although some commentators and legislators doubt whether the benefits to be derived from such statements are worth the cost of production,⁵⁵ the 1982 experience in New York suggests that they are and that they will become an important tool of judicial administration. New York's legislature has passed legislation authorizing, though not requiring, the Chief Administrator of the Courts to prepare such statements when requested by the legislature.⁵⁶ In addition, the Executive Advisory Commission on the Administration of Justice recommended the creation of a Criminal Justice Policy Council, one function of which would be to submit to the Governor and the legislature statements detailing the consequences proposed legislation would have upon the criminal justice system.⁵⁷

One phase of the problem which, surprisingly in view of the intensive debate in recent years over removal of diversity cases from the federal courts, is not included in the literature, is the impact of federal legislation on state courts and of state legislation on federal courts.⁵⁸ The difficulties involved in such cross-enforcement of rights and obligations concern both the ability of one system to accommodate litiga-

53. *Id.* at 132, 135.

54. Boyum & Krislov, *Judicial Impact Statements: What's Needed, What's Possible*, 66 JUDICATURE 136, 146 n.38 (1982).

55. *E.g.*, Olson, *supra* note 50, at 150.

56. Act of April 2, 1982, ch. 31, N.Y. Laws 43 (McKinney 1982) (codified at N.Y. JUD. LAW § 212(1)(f) (McKinney 1983)).

57. EXECUTIVE ADVISORY COMM'N ON THE ADMINISTRATION OF JUSTICE, RECOMMENDATIONS TO THE GOVERNOR REGARDING ADMINISTRATION OF THE CRIMINAL JUSTICE SYSTEM 28 (1982).

58. In AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1311b (1969), the ALI listed four classes of cases in which federal jurisdiction would be exclusive. In all other actions setting forth a substantial claim under the Constitution, laws, or treaties of the United States, "jurisdiction of the district courts shall be concurrent with the courts of the States." The accompanying commentary indicates that the ALI proposal would impliedly repeal exclusive jurisdiction provisions in a number of statutes, thus increasing the burden of the state courts. *Id.* at 187.

Circuit Judge J. Clifford Wallace has been appointed by Chief Justice Burger to consider future problems of the federal courts. In *Working Paper—Future of the Judiciary*, 94 F.R.D. 225 (1981), Judge Wallace noted that the great bulk of disputes are resolved in state courts and that it would be desirable to help the state system as well as the federal, but concluded that for planning purposes it would be too complicated to consider anything beyond the "one judicial system and the three branches of the federal government." *Id.* at 234-35.

tion generated by the other and its ability, in the sense of expertise, to cope with the issues involved.

A partial solution of the expertise problem has grown out of the Supreme Court's holding that in a diversity case a federal court may not reject the rule of law declared by a state court "merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."⁵⁹ The reaction of a number of states has been to provide for certification of the issue involved by the federal court to the state's highest court in order to obtain a clear ruling.⁶⁰

This common sense approach has led to some grumbling by federal appellate courts in circuits including states that do not have such a statute about the impossible position in which they find themselves,⁶¹ and has even produced the suggestion that similar certification be employed on a state-to-state basis when one state under its conflict of law rules is obliged to apply the law of another.⁶² It has not, however, been seen as a method of value in lightening the burden of state courts obligated to enforce federal law.

State courts can be expected to have a working knowledge, not only of federal constitutional principles, but also of federal statutes of everyday applicability, such as the wiretap provisions of the Federal Communications Act.⁶³ The same is not true, however, as to many of the other statutes which the present presumption of concurrent jurisdiction thrusts into the state courts,⁶⁴ such as the Securities Act of 1933,⁶⁵ the Fair Labor Standards Act,⁶⁶ the Federal Employer's Liability Act,⁶⁷ and the Jones Act.⁶⁸ If diversity jurisdiction is to be retained, then seri-

59. *West v. AT&T*, 311 U.S. 223, 236-37 (1940).

60. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 12-601 (1980); FLA. STAT. ANN. § 25.031 (1974). Eight other states are listed by the Supreme Court in *Lehman Bros. v. Schein*, 416 U.S. 386, 390 n.7 (1974) as having similar procedures as of 1974.

61. *See, e.g.*, *Modave v. Long Island Jewish Medical Center*, 501 F.2d 1065, 1067, 1075, 1079 (2d Cir. 1974).

62. THIRD BRANCH, Dec., 1982, at 4-5 (1982). A few states allow state-to-state certification of questions of law. *See, e.g.*, MD. R. P. 896.

63. *See, e.g.*, 47 U.S.C. § 605 (1976) (wiretap provisions of the Federal Communications Act).

64. Illustrative of the confusion that sometimes results is *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 133-34, 89 N.E.2d 712, 716-17 (1949) (confusing absence of concurrent jurisdiction with state court duty to enforce federal law).

65. 15 U.S.C. § 77v(a) (1976).

66. 29 U.S.C. § 216(b) (Supp. 1981).

67. 45 U.S.C. § 56 (1976).

68. 46 U.S.C. § 688 (1976). The recommendation of the Conference of Chief Judges that the latter two statutes be in the federal courts exclusively was rejected by the American Law Institute because jurisdiction should not be changed "unless all claims created by fed-

ous thought should be given by the Congress to a statute which, instead of leaving the solution to individual states, would provide uniformly for federal court certification of legal issues to the highest court of the state whose law is involved by imposing the obligation upon all state courts to respond to a question so certified.⁶⁹ The statute should, however, balance the burdens upon the two systems by providing reciprocally for certification by state to federal appeals courts of questions arising under federal statutes which are of less-than-general application.

Although cross-certification relieves some of the pressure upon the courts, the more complete solution would be to reduce in number or eliminate entirely the cross-enforcement situations out of which these problems arise. On the federal level, the abolition of diversity jurisdiction would relieve federal courts of roughly twenty-five percent of all cases handled.⁷⁰ This realignment, however, would impose a heavy burden on the courts of many states. For example, had there been no diversity jurisdiction the case load of New York trial courts would have been increased by 3,665 cases in 1982, which would have required the addition of at least four general jurisdiction judges.⁷¹ Thus, state courts, at least in the states adversely affected, as a simple matter of

eral statutes are to be so treated." AMERICAN LAW INSTITUTE, *supra* note 58, at 186 (plain intent of Congress to give injured workers a convenient forum).

69. There should be little question concerning Congressional authority to require states to respond to certified questions, because it will "in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Certifying cases to state courts also would obviate problems arising from intercourt deference with respect to the state law. *See Note, Intercircuit Deference in Diversity Cases: Respect For Expertise or Judicial Ventriloquism?*, 57 ST. JOHN'S L. REV. 62, 84-87 (1982) (erroneous predictions of state law followed by deference to these decisions by other circuits).

70. In 1982, annual filings numbered 50,555. REPORT OF THE ADMINISTRATOR OF THE UNITED STATES COURTS FOR 1981-1982 Table 1 (1983).

71. The projected increase in the number of judges in New York is taken from Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, STATE CT. J., Summer, 1978, at 20, 23. The latter study was based on 1976 fiscal year statistics of the federal courts. Because diversity cases increased between 1976 and 1982, the four-judge addition noted in the text may be too low. Moreover, it does not consider the ripple effect on appeals that four additional trial judges would produce, at least at the intermediate Appellate Division level. *Cf.* Flango & Elsner, *The Latest State Court Caseload Data*, STATE CT. J., Winter, 1983, at 16, 22 (Table 4) (reporting a 49 percent increase in New York Appellate Division business from 1977 to 1981). *But see* Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Its Effect on State and Federal Courts*, 48 N.D.L. REV. 1, 14-15 (1972) (transfer of half of diversity cases would increase state court work by 1%); Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 326-27 (1977) (transferring diversity cases to state jurisdiction would add little volume to those courts' caseload); Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 194-95 (1969).

self-preservation are opposed to the abolition of federal court diversity jurisdiction.

Limiting the obligation of state courts to enforce federal rights would dissipate the basis for this opposition. Although, statistics on the volume of such cases in state courts are not available, the number is "undoubtedly large."⁷² I say limit, rather than eliminate, because in states in which the federal district court is not very accessible and the volume of federal rights cases not great, the state authorities should have the option to continue enforcement under selected federal statutes. This suggestion requires further study, but it holds real promise as a means to rectify the present unequal burden on state courts. Some states, however, because they would not be adversely affected by transfer of diversity cases, would be willing to absorb them without transferring out any federal law matters.

C. *Restructuring Judicial Law-making Authority in the Absence of Controlling Legislation, or in the Face of Inept Legislation*

So far I have discussed proposals for coping with the burden legislation imposes on courts, in part by reducing or reallocating it, and in part by clarifying and improving the legislative product. But comprehensive reform of our legal system requires establishment of a mechanism for creating needed laws, or for making needed changes in existing laws, when the legislature has failed to do so. The unique law-making qualities of the judiciary have been discussed above; the restructuring necessary to employ them to best advantage forms the topic of this section.

One improvement through restructuring, seldom availed of, is legislative monitoring of judicial opinions.⁷³ Court decisions often flag problem areas. For example, they expressly identify particular problems requiring legislative action, or manifest difficulty in interpreting or sustaining the constitutionality of a statute as written, or conclude that the legislature's purpose in enacting the statute, or its history, requires a reading in other than literal fashion, as, for example, that the word "may" be read as "shall." If brought to the attention of a legislator interested in the particular field, or if germane to a topic currently

72. Hart, *supra* note 46, at 507 n.55; *see also* Sandalow, *supra* note 46, at 207 nn.83-84. Sandalow suggests that Congressional power enables that body to allocate burdens between state and federal courts. *Id.*

73. *See* Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921) (proposing a permanent committee to mediate between the judiciary and the legislature); Ruud, *A Legislative Audit of Judicial Opinions — A Proposal*, 32 TEX. L. REV. 539, 539-40 (1954); Friendly, *supra* note 14, at 802-05.

being studied by a body such as New York's Law Revision Commission, these opinions could provoke change. In most states, however, there has been no systematic review of judicial decisions for such indications.⁷⁴ I am happy to note that New York's legislature recently has instituted such an audit and I suggest that the device warrants more widespread use.

Sometimes, despite repeated indications (judicial or extra-judicial) of the need for change, the legislature fails to respond. Although courts occasionally have been willing to step in and change "an old and unsatisfactory court-made rule,"⁷⁵ they generally have done so only when the proposed change did not require elaborate research. In situations which did, because not equipped for such research and because it is often outside the techniques of the adversary system, the courts have felt constrained not to change even court-made rules. When enforcing an obsolete but controlling statute, courts similarly have been unwilling to delay the effective date of the decree in anticipation of legislative change.⁷⁶

Yet when legislative or executive foot dragging has resulted in constitutional deprivations, the courts' supposed lack of expertise and the limitations of the adversary system have not stood in the way of court-sponsored changes in areas such as reapportionment, school desegregation, prisoners' rights, or abortion.⁷⁷ Of course, the importance of the rights at stake may provide a stronger incentive for judicial action than does the correction of statutory omissions or inequities. Nevertheless, in such cases the courts are doing what in other situations they proclaim themselves ill-equipped to do.

74. See Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 286 (1963) (legislators oblivious to courts' calls for legislative action). Mr. Justice Stevens would deal with the problem of statutory ambiguity by excluding such matters from the courts altogether and assigning the task of correction to a legislative committee. Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 176, 183 (1982). Without the spotlight of litigation and resulting judicial decision the focus of such a committee may be skewed, but the suggestion certainly merits further study.

75. See, e.g., *Woods v. Lancet*, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951) (rule denying recovery to child injured while a viable fetus); *Bing v. Thunig*, 2 N.Y.2d 656, 667, 143 N.E.2d 3, 9, 163 N.Y.S.2d 3, 11 (1957) (immunity for hospitals for torts of employees); *Buckley v. City of New York* 56 N.Y.2d 300, 305, 437 N.E.2d 1088, 1090, 452 N.Y.S.2d 331, 333 (1982) (fellow-servant rule).

76. See, e.g., *Hellerstein v. Assessor*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 358 (1975) (delaying enforcement of 200-year old real property tax statute requiring assessments at full value). This practice, however, may not be an effective way of spurring corrective action by the legislature. See, e.g., *Colt Indus. v. Finance Adm'r of City of New York*, 54 N.Y.2d 533, 430 N.E.2d 1290, 446 N.Y.S.2d 237 (1982); *Slewett v. Board of Assessors*, 54 N.Y.2d 547, 430 N.E.2d 1294, 446 N.Y.S.2d 241 (1982).

77. Swygert, *supra* note 14, at 449-58.

To me this inconsistency suggests that the legislative-judicial relationship can be restructured in statutory as well as constitutional situations. Expansion of the role of the courts beyond that permitted by notions of legislative primacy and myopic concentration on the factual matrix of a particular litigation can conform the legal system (legislative, executive, and judicial) more nearly to the needs of those who are governed by it. I am not suggesting wholesale abandonment of either concept. Rather what I propose is that courts be authorized, when appropriate, to look beyond the particular litigants and to make substantive law of equal effect with, or in modification of, statute and to change court-made rules that could have been, but were not, changed by the legislature, subject, however, as to either, to legislative veto or recall.

This proposal is not so foreign to existing concepts as it may seem at first blush. Not every statute is intended to pre-empt the common law,⁷⁸ nor is judicial revision of legislatively enacted rules of procedure (subject in turn to legislative veto or change) unknown to our legal system.⁷⁹ Obviously, reforms on a substantive level will raise separation of powers arguments,⁸⁰ but I am concerned more with the "what" than the "how" of restructuring. I respond, therefore, only by suggesting that, because the legislature would have the ultimate say, there should be no constitutional problem and hopefully not too great a political problem in restructuring the legislative-judicial relationship as suggested.⁸¹

For the same reason, a process of court origination or revision subject to legislative change or veto is not less democratic than the present system. The deference courts give to legislative action or inaction is

78. *E.g.*, *Fleury v. Edwards*, 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964). *In re Sullivan Co.*, 289 N.Y. 110, 44 N.E.2d 387 (1942) (statutory designation of real estate salesmen as "employees" for licensing purposes does not change common-law definition of "employee" for purposes of unemployment insurance).

79. For example, those parts of New York's Civil Practice Law and Rules that were designated as Rules, until May 19, 1978, were revisable by the Judicial Conference subject to legislative veto or change, N.Y. CIV. PRAC. R. 102 (McKinney 1972). Section 229 of the New York Judiciary Laws, referred to in Rule 102, has been repealed, N.Y. JUD. LAW § 229, repealed by Act of May 19, 1978, ch. 156, § 6, N.Y. Laws 323, 340 (McKinney 1978).

80. See generally *Green, Separation of Governmental Powers*, 29 YALE L.J. 369 (1920). Green argues that each branch

may properly be used to carry out any measures for which it is adapted, and it is for the law making power to decide to what extent to use it The doctrine is not that no two of them may include any common ground, but that none of them may pass without its own boundaries and intrude upon territory belonging solely to another.

Id. at 375.

81. Cf. *Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203, 224 (1979).

predicated upon assumptions many of which are little more than fiction: that legislatures act in the interest of the majority, that most legislators who vote upon a given bill have studied it carefully and are knowledgeable concerning its provisions, and that legislators are aware of court decisions and have acted or have failed to act on the basis of that knowledge.⁸² In reality, what presently blocks the legislative origination of substantive laws or revision of ambiguous or obsolete statutes is usually either inertia or the political pressures of one or more powerful groups rather than the considered decision of the majority.⁸³ The same political pressure, of course, can produce legislative change or a veto of a court-originated or court-revised rule, but doing so will be more difficult once a court has spelled out the need for the rule or revision than if, as at present, the pressure is applied behind the scenes.⁸⁴

One open question is whether so far as statutory revision is concerned the statute should have obtained any particular age before it can be judicially revised. Professor Jack Davies, who is also a longtime member of the Minnesota legislature, has proposed a twenty-year period⁸⁵ and noted an earlier proposal, similar though limited to procedural statutes, that used a six-year period.⁸⁶ I tend to agree with Professor Calabresi that the matter should not be viewed simply as one of passage of time.⁸⁷ Other factors include the subject matter involved, its relation to constitutional problems,⁸⁸ the effect of the proposed change upon otherwise stable legal relationships, and the degree of inequity for which it is designed to correct. I would not, however, impose any absolute limitation, whether as to time or as to subject matter.⁸⁹ I

82. See, e.g., R. NEELY, *supra* note 24, at 47-57 (most bills not voted upon, and most legislative decisions made by a few powerful legislators); Swygert, *supra* note 14, at 448 (legislators preoccupied with political consequences). The Supreme Court has characterized it as "at best treacherous" to find in legislative silence the acceptance of decisional law. *Boys Market v. Clerks Union*, 398 U.S. 235, 241 (1970) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). *But cf.* *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980) (respect for congressional silence). In *Thiboutot*, the Court noted: "That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983." *Id.*

83. See Peck, *supra* note 74, at 281-82; see also R. NEELY, *supra* note 24, at 23-57.

84. Peck, *supra* note 74, at 286, 293-94.

85. Davies, *supra* note 81.

86. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 40 (1958).

87. Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247, 253 (1979).

88. *Id.*

89. Professor Davies would exclude a number of fields of law, including taxation. Davies, *supra* note 81, at 204 n.7. But as *Hellerstein v. Assessor*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 358 (1975), illustrates, the problems to which his judicial modification statute is addressed do not exclude the tax field. See *supra* note 76.

would rely instead upon making the judiciary aware of these factors and the self restraint which the judiciary traditionally has exhibited (and which the legislature's ultimate primacy under this process will reinforce⁹⁰) as sufficient insurance against too quick or too liberal use by the judiciary of this power.

D. *Removing Limitations to Law-making Inherent in the Judiciary*

In addition to constitutional and political limitations, practical constraints inherent in the judicial decision-making process must be overcome before the proposed power can be effectively employed. For example, judicially declared rules of strict products liability can shift loss distribution,⁹¹ but loss distribution through fixation of a limit on the amount recoverable has not been considered an appropriate judicial technique and loss distribution through no-fault insurance requires administrative machinery that only the legislature can provide.

The judicial short-coming most often suggested is that courts lack the ability to obtain the empirical data upon which origination or revision of governing rules must be based. As to that objection there are several answers. First, it is far from apparent that the assumption that empirical data is more available to the legislature than to the courts in all situations is correct. For some problems data will be non-existent or not readily available, whether to the legislature or the judiciary; for others the legislative committee may lack the facilities or the funds necessary to collect the data.

Second, and more important, information may be as available to the courts as to a legislative committee, through the efforts of a body such as the American Law Institute. A good example is section 402A of the Restatement Second of Torts (outlining strict products liability) which is regularly referred to by the courts as though it were a statute. Or, as *Roe v. Wade*⁹² illustrates, courts can be informed through the presentation in the particular case of Brandeis briefs.

Two additional approaches would provide courts with even more direct access to information. The judge can engage, personally or

90. As Professors Levin and Amsterdam put it, the possibility of legislative overruling forces the courts to consider the legislative as well as the judicial point of view. Levin & Amsterdam, *supra* note 86, at 41.

91. See Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

92. 410 U.S. 113 (1973). For a discussion of the problems resulting from the use of Brandeis briefs, see Miller & Barron, *The Supreme Court, The Adversary System, And the Flow of Information To The Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

through his law clerks, in independent, original, or (as Justice Blackmun did in *Roe v. Wade*) additional research. This approach, however, may involve unfairness to a litigant who has not had an opportunity to examine or to respond to the new material thus weakening the development, not only of the particular litigation, but also of the resulting general principles.

A second, and to me more promising, proposal was suggested over sixty years ago by Judge (later Justice) Cardozo: the creation of a public "factfinding agency which will substitute exact knowledge of factual conditions for conjecture and impression."⁹³ That possibility has been the subject of much scholarly discussion in recent times, about as much of it questioning the use of such an agency⁹⁴ as favoring such use.⁹⁵ The need for such an agency's information is highlighted by two recent cases, and that creation of an agency is the appropriate mechanism is suggested by the reaction these cases provoked. I agree with Judge Charles Wyzanski, who later came to believe that he had gone too far in appointing an economist as his law clerk while the complex *United Shoe Machinery Corporation*⁹⁶ case was before him.⁹⁷ In addition, I sympathize with the Supreme Court's disapproval of the Eighth Circuit's employment of a university professor to assist its understanding of the record in an Investment Companies Act case. The Court objected because there was no "statute, rule or decision authorizing the procedure."⁹⁸ Although the Court's comment is inconsistent with its own action in *Roe v. Wade* (where, unlike the Eighth Circuit,⁹⁹ it failed to make its additional research available to the parties), it suggests that data might validly be obtained from an agency formally created by enabling legislation or rule.

More difficult questions concern the types of cases in which such

93. B. CARDOZO, *THE GROWTH OF THE LAW* 117 (1924).

94. See, e.g., Jasanoff & Nelkin, *Science, Technology and The Limits of Judicial Competence*, 68 A.B.A.J. 1094 (1982); Wellington, *The Nature of Judicial Review*, 36 REC. A.B. CITY N.Y. 360, 381 (1981).

95. See, e.g., Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931 (1980); Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1979); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 546-55 (1974); Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 HARV. L. REV. 489 (1981); Rosenberg, *Anything Legislatures Can Do, Courts Can Do Better?* 62 A.B.A.J. 587 (1976). See also C. LLEWELLYN, *supra* note 40, at 323-32 (discussing the advantages and disadvantages of the use of experts by appellate courts).

96. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

97. Leventhal, *supra* note 95, at 552-53.

98. *E.I. DuPont de Nemours & Co. v Collins*, 432 U.S. 46, 57 (1977).

99. See *Collins v. SEC*, 532 F.2d 584, 605 n.40 (8th Cir. 1976).

an agency should be used, how the cost should be borne, and whether notice to nonparties who may be affected, as well as parties to the litigation, should be required. As for use, the nature of the issue and the need for "legislative" facts to relate the issue to the interests of society should be determinative. Largely, the agency would be used in the cases in which courts now base decision upon judicially noticed facts or unsupported factual assumptions. Though its use should not be excluded per se from any particular area of the law, even those in which regulation by statute or rule exist, judicial respect for the differences in function between legislators and judges and the possibility of ensuing legislative veto or change will play an important part in determining the cases in which it is in fact put to use. In any event, availability of the public agency data in any given case should not proscribe presentation by the litigants of data developed by them.

The cost of development of the public agency data normally should be borne by the public. Otherwise, litigants may be dissuaded from bringing valid actions by the potential but unknown costs that might be incurred. Moreover, in the long run informed judicial law-making will inure to the public's benefit.

As for notice to nonparties, litigation in which such data is likely to be used generally will attract public attention more readily than does legislative consideration of the same issue. Moreover, those pressure groups that currently monitor pending legislation and regulation can be expected to keep abreast of what the agency has been asked to undertake. There should be, therefore, little need for additional notice, except perhaps publication of a broadside announcement similar to that presently issued by legislative committees and administrative agencies.

IV. RESTRUCTURING WITHIN THE JUDICIARY

So far we have been considering restructuring as respects what are presently regarded as legislative functions. There is restructuring to be done within the judiciary itself as well. The primary concerns are: which court decides, what issues courts decide, and when and how they decide them.

A. *Which Court*

Like others, I decry the historically fragmented and hierarchical structure of many state courts which can cause a person with a legitimate claim who chooses the wrong point of entry to the system to forfeit his claim. Rather than having eleven different trial courts, as presently exists in New York, there should be but one point of entry:

one court sitting in divisions relating to civil, criminal, family, and estate matters. A multi-court structure differentiating entry by the amount involved, or, in the case of courts of claims, by who is being sued, serves no useful purpose. Within the designated divisions, however, the use of separate calendars, or perhaps referees or magistrates, may be justified with respect to claims below a given sum or the processing of lesser crimes and offenses.

Whether there should be specialization of judges, as distinct from courts, is a more difficult problem. Noting the British division of its courts into Criminal, Family, Chancery, and Civil with only occasional assignment of judges from one division to the other, Chief Justice Burger recently suggested that we study, though not necessarily adopt, such a procedure.¹⁰⁰ I share the view of those who fear that specialization continued for long periods tends to develop into parochialism which ultimately stultifies growth of the law in the specialized area.¹⁰¹ I recommend, therefore, that judges rotate through the divisions at specified and relatively short (say, two or three year) intervals.¹⁰²

I do not suggest that there can be no successful specialized court. The Tax Court of the United States certainly proves otherwise, although the option of litigating a tax case in the general jurisdiction courts,¹⁰³ and the fact that tax law cuts across so many other fields of law may provide a partial explanation for its success. But the use of specialized courts should be limited to areas of law that are highly complex and in which the need for uniformity is great. The law will be better served in most areas if specialization is left to the lawyers who in presenting their respective sides of an issue must make it intelligible to a generalist judge.

Which court decides also involves the relationship between federal and state courts, at least as concerns criminal cases. I refer, of course, to the oversight which federal courts exercise as to state court compliance with constitutional requirements under the federal habeas corpus statute.¹⁰⁴ Controversy over use of the writ and efforts to limit the cases in which it can be used is not new. Thirty years ago the Conference of Chief Justices adopted a resolution condemning the practice as it then

100. Remarks, *supra* note 2; see also Middleton, *Specialty Courts*, 69 A.B.A.J. 23 (1982) (discussing Burger address).

101. See, e.g., Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A.J. 425 (1951); Higgenbotham, *supra* note 4, at 268.

102. See Jordan, *Should Litigants Have A Choice Between Specialized Courts and Courts of General Jurisdiction?*, 66 JUDICATURE 14, 27 (1982).

103. *Id.* at 18.

104. 28 U.S.C. § 2254 (1976).

existed¹⁰⁵ and the intervening years since 1952 have seen manifold expansion in use of the writ from just under 900 in 1960 to over 8,000 in 1982.¹⁰⁶ Something is clearly awry with a system that carries a criminal case through one state trial, two state appellate courts, a denial by the Supreme Court of certiorari, and sometimes a second trip by way of post-conviction remedy through the same three state courts before being considered on habeas corpus by a federal district court and reviewed on federal appeal, only to be thrown back, sometimes as much as a decade later when critical witnesses may be dead or otherwise unavailable, to the state trial court for retrial because the federal court has found what it believes to be error of federal constitutional proportion.¹⁰⁷ A public reaction of incredulity and a state court reaction of resentment and friction are natural concomitants of such a system.

The solution lies in preventing error at the trial level. Such federal court nullification, Justice Robert Jackson noted in 1952, "might not be so demoralizing if state judges could anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them. But they cannot."¹⁰⁸ Although that statement was correct when made, advancement in computer science makes it no longer so. Currently in fund-raising stages is an Institute of Judicial Administration project—in the formation of

105. *Conference of Chief Justices—1952*, STATE GOV'T, Nov., 1952, at 249, 249-50, reprinted in *Brown v. Allen*, 344 U.S. 443, 539 n.13 (1953) (Jackson, J., concurring); see also Desmond, *Federal Habeas Corpus Review of State Court Convictions — Proposals For Reform*, 9 UTAH L. REV. 18 (1964) (1964 Law Day address).

106. The exact figures are 872 in 1960 and 8,059 in 1982. ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, Table C-2 (1982).

107. The history of *Fay v. Noia*, 372 U.S. 391 (1963), is illustrative of habeas corpus dilemmas. Three defendants, Noia, Caminito, and Bonino, were convicted in New York of first degree murder, largely on the basis of confessions. Noia did not appeal, but the other two did. The convictions of Caminito and Bonino were affirmed by the Appellate Division in *People v. Caminito*, 265 A.D. 960, 38 N.Y.S.2d 1019 (1942), and in *People v. Bonino*, 265 A.D. 960, 38 N.Y.S.2d 1019 (1942), and by the Court of Appeals, 291 N.Y. 541, 50 N.E.2d 654 (1943). A motion by Caminito for reargument was denied in *People v. Caminito*, 297 N.Y. 882, 79 N.E.2d 277 (1948), and a motion by Bonino for reargument was denied in *People v. Bonino*, 296 N.Y. 1004, 73 N.E.2d 579 (1954), cert. denied, 333 U.S. 849 (1948). Federal habeas corpus was denied Caminito in *Caminito v. Murphy*, 127 F. Supp. 689 (N.D.N.Y. 1955), rev'd, 222 F.2d 698 (2d Cir. 1955), cert. denied 350 U.S. 896 (1955). A motion for reargument was granted to Bonino in *People v. Bonino*, 309 N.Y. 950, 132 N.E.2d 320 (1956), and a new trial ordered in *People v. Bonino*, 1 N.Y.2d 752, 135 N.E.2d 51, 152 N.Y.S.2d 298 (1956). A new trial was granted to Noia in *People v. Noia*, 3 Misc. 2d 447, 158 N.Y.S.2d 683 (Co. Ct.), rev'd, 4 A.D.2d 698, 163 N.Y.S.2d 796 (1957), aff'd and coram nobis denied, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799 (1958), cert. denied, 357 U.S. 905 (1958). Federal habeas corpus was then denied in *Noia v. Fay*, 183 F. Supp. 222 (S.D.N.Y. 1960), rev'd, 300 F.2d 345, aff'd 372 U.S. 391 (1963).

108. *Brown v. Allen*, 344 U.S. 443, 534 (1953) (Jackson, J., concurring in result).

which I am happy to have played a part—which, through computer analysis of past habeas corpus decisions of the federal courts, will identify the factors that have resulted in the overturning of state court convictions by federal habeas corpus. Once the common errors are known, a means can be devised for preventing the errors before they occur, by scanning individual state cases in a manner not violative of the defendant's constitutional rights, in order to assure that none of the factors is present, or that if any is, proper corrective steps are taken. If, as I confidently believe it will be, the project is successful, current efforts to restructure the oversight of state courts through use of federal habeas corpus will become unnecessary. And most importantly, the time savings for the federal and state court systems will, I predict, be measured in terms of judge years.

B. *What Issues*

I turn now from which court decides to what issues are to be decided. Because my proposals here will increase rather than decrease the work of the courts, I remind you that I am discussing not just bureaucratic justice but public confidence in the judicial system as well. Increasing confidence by increasing the utility of the courts will undoubtedly increase their workload, but the additional work should be more than absorbed by the reduction of work through increased efficiency. The overall result then should be a reduction.

I do not suggest that every case be decided on the merits. There are sound reasons for prescribing procedures and some issue-avoiding techniques are fully justified—lack of standing, mootness, exhaustion of remedies, and prior action pending, among others. But there are other concepts that almost transparently are misused in order to avoid reaching the merits of a case. The old adage that hard cases make bad law applies not only with respect to how the merits of a case are decided but also to how courts avoid having to reach the merits.

And the greatest and most overworked of these issue-dodging tactics is jurisdiction. Two examples illustrate the contours of this problem. Suppose a statute directs that an action be commenced by service in a particular manner or on a particular person. One perhaps can justify as a matter of legal logic a holding that the action has not been properly begun if service is made in a different manner or upon a different person, even though the manner used was more likely than the statutory method to give notice¹⁰⁹ or the person served in fact delivered

109. *E.g.*, Bruno v. Ackerson, 51 A.D.2d 1051, 381 N.Y.S.2d 522, *aff'd on mem. below*, 39 N.Y.2d 718, 349 N.E.2d 865, 384 N.Y.S.2d 765 (1976) (service by personal delivery to re-

the paper to the person who by statute was required to be served.¹¹⁰ But I doubt that many nonlawyers would agree that such rulings make sense. Consider a ruling that the omission *by the court* from an order to show cause of a date by which service by mail is to be made deprives the court of jurisdiction, even though a copy of the order was in fact mailed on the day the order to show cause was signed.¹¹¹ This ruling is hard to justify by legal or any other logic, and its recent application to a zoning case¹¹² indicates that it was not an aberration. To make matters worse, in neither case was there any indication that the legislature intended the requirement as an absolute; it is jurisdictional, therefore, only because the court says it is.

I do not suggest that every such rhadamanthine ruling restricting access to the courts is motivated solely by a desire to reduce judicial workload. Nor do I overlook the indications that a more modern view may be somewhere on the horizon.¹¹³ Just last year, for example, in what was characterized as a holding "unparalleled in the U.S. and . . . an experiment," the West Virginia Supreme Court abandoned its earlier holdings and determined that time limitations under worker's compensation statutes are procedural and not jurisdictional.¹¹⁴

The solution is for the legislature to be more explicit in specifying what shall be a *sine qua non* of entry to the court system. But the diversity of sponsorship of legislation and the absence of explicit language from most statutes, at least up to the present, suggests that specification in each proposed statute that should include it is not too likely. The answer, in my view, is the same kind of construction statute already

spondent's wife at respondent's residence jurisdictionally defective when order to show cause required that it be affixed to the outer door of the residence).

110. *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328 (1968) (summons delivered to receptionist who later delivered it to proper person); *see also* *Bayer v. Board of Educ.*, 58 Misc. 2d 259, 295 N.Y.S.2d 131 (Sup. Ct. 1968) (notice of claim delivered to Superintendent of Schools instead of Board of Education).

111. *O'Daniel v. Hayduk*, 59 A.D.2d 706, 398 N.Y.S.2d 357, *aff'd on mem. below*, 42 N.Y.2d 1062, 369 N.E.2d 1187, 399 N.Y.S.2d 654 (1977) (proceedings to invalidate petitions designating appellants as candidates for public office).

112. *Paukovits v. Zoning Bd. of Appeals*, 76 A.D.2d 928, 432 N.Y.S.2d 859 (1980), *mo. lv. appeal denied*, 53 N.Y.2d 602 (1981).

113. My own court, in the context of a false imprisonment action, has commented upon "the elastic and versatile definition and use of the term 'jurisdiction,' " lack of which "is fatal to the validity of any act of the tribunal" but which sometimes "results in valid process or mandate because the issuing court . . . was not wholly without competence to adjudicate something in the action before it." *Nuernberger v. State*, 41 N.Y.2d 111, 117, 359 N.E.2d 412, 416, 390 N.Y.S.2d 904, 908 (1976).

114. *Bailey v. State Workmen's Comp. Comm'r*, 296 S.E.2d 901, 908 (W. Va. 1982) (Neely, J.). The holding is limited to compensation statutes and would not affect other statutory time limitations.

discussed in another connection. Such a statute would make the entrance requirements contained in any statute thereafter enacted procedural rather than jurisdictional unless the particular statute expressly stated otherwise, but also would authorize courts to condition the correction of procedural omissions by what fairness to the opposing party required.¹¹⁵ As Professors Frankfurter and Landis long ago warned, "[s]o-called jurisdictional questions [cannot be] treated in isolation from the purpose of the legal system"¹¹⁶ A general statute of the type I suggest is the best hope for bringing the mechanism of the law into line with the ends the law subserves, and doing so will increase public confidence in the courts.

C. *When Should Courts Decide Issues?*

Courts sometimes are prevented from acting by doctrines of justiciability, such as the requirements of an actual controversy¹¹⁷ or full utilization of administrative procedures,¹¹⁸ even when to do so would provide stability and predictability to the law and efficiency to the judicial system, without seriously compromising the goals these doctrines serve. Evidence that these doctrines need not be absolute can be found in those states with constitutional provisions for advisory opinions as an aid to the legislative process.¹¹⁹ And with the advent of social policy litigation the rule, even in jurisdictions without such a constitutional provision, has lost a great deal of its force, for in deciding such questions courts have gone far beyond the specific issues of the particular controversy to settle collateral but important issues.¹²⁰

115. Statutes along similar lines already exist with respect to particular and limited types of claims, for example, a wrongful death claim by a personal representative against the state. *E.g.*, N.Y. Ct. Cl. Act, § 10(6) (McKinney Supp. 1982) (permitting application for leave to file a late claim in an action against the state); N.Y. GEN. MUN. LAW §50-e(5) (McKinney 1977) (permitting application for leave to serve a late notice in a claim of negligence or malfeasance against a public officer). Even statutes of this type are not impervious to narrow construction. *See Jones v. State*, 51 N.Y.2d 943, 416 N.E.2d 1050, 435 N.Y.S.2d 715 (1980) (dismissing wrongful death claim for not conforming to statutory requisites).

116. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 2 (1927).

117. *E.g.*, *In re Workmen's Comp. Fund*, 224 N.Y. 13, 119 N.E. 1027 (1918).

118. *E.g.*, *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 385 N.E.2d 560, 412 N.Y.S.2d 821 (1978).

119. *E.g.*, MASS. CONST. pt. 2, ch. 3, art. II; ME. CONST. art. VI, § 3; N.H. CONST. pt. 2, art. 74. *See Hudson, Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970, 977 (1924) (history of state constitutional provisions for advisory opinions).

120. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (constitutional privilege to criticize public officials); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (constitutionality of segregated schools); *Roe v. Wade*, 410 U.S. 113 (1973) (anti-abortion laws); *Doe v. Bolton*, 410 U.S. 179 (1973) (same). For articles in support of judicial activism, see *Miller & Barron, supra* note 92; *Leflar, Appellate Judicial Innovation*, 27 OKLA. L. REV. 321 (1974);

In my view the function can properly be expanded without harm to, indeed through reduction of workload with material benefit to, the judicial system. I speak of situations, for example, in which the only issue is the retroactivity of a new statute. For instance, in 1966 the New York legislature enacted the Divorce Reform Law,¹²¹ but failed to state specifically whether the section authorizing a conversion divorce when the parties had lived apart for two years after a separation decree applied retroactively. It took four years for that question to reach our court in *Gleason v. Gleason*.¹²² Yet the question is a purely legal one of legislative intent, and in no way depends upon anything the parties said or did. Why should there not be provision that at least on issues of real and substantial importance to the many persons who may be governed by a new statute if applied retroactively, any litigant who can establish that the issue is part of a bona fide controversy may request the state's highest court to consider that issue separately as an original matter? Or if one balks at having the highest court of the state act as a court of original instance, why not permit the first *nisi prius* court presented with the issue to certify it to the state's highest court as not dependent upon any adversarial determination of fact yet of pervading importance in the application of a particular statute? Provision for notice to other litigants similarly situated so that they can file amicus briefs is probably unnecessary but out of an excess of caution should be made. But I see no other problem involved in the adoption of such a procedure.¹²³ On the contrary, substantial benefits should accrue from it, not only to the judicial system through removal of cases presenting duplicative issues, but also to persons whose rights and duties will be clarified without the unnecessary delay which the advisory opinion rule now imposes.

D. *How Should Courts Decide Issues?*

I come finally to what I believe to be the most important phase of court restructuring—how issues should be decided. It is the most important because unless litigants—the immediate consumers of the courts' products—and the public generally can perceive that the courts

Weinstein, *Rendering Advisory Opinions — Do We, Should We?*, 54 JUDICATURE 140 (1970); compare these articles with Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924) (outlining the dangers of advisory opinions).

121. 1966 N.Y. Laws 265; see N.Y. DOM. REL. LAW § 170(5) (McKinney 1977) (current version).

122. 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970) (New York legislature found to have intended that the law should be applied retroactively).

123. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (pre-enforcement review of regulations promulgated under the Federal Food, Drug, and Cosmetic Act permitted).

are acting both efficiently and impartially, their confidence in the judicial system is bound to be adversely affected. Yet discretion plays so large a part in what courts do, and courts are so addicted to boilerplate legalese that often neither the litigants nor the public can see what impelled the court to its decision.

Let me illustrate with respect to discretion by referring to child custody awards for which the governing standard is said to be "the best interests of the child." The concept is so indeterminate that it is possible to justify almost any conclusion.¹²⁴ Because there generally is no requirement that the deciding judge spell out the reasons for his determination, personal predilections and the pressure of court business may play disproportionate parts in the ultimate decision. These factors upset the balance of the negotiations between the parties, and enhance the probability of litigation, appeal, and later requests for modification.

The solution, I suggest, is to reduce the play of discretion and to increase understanding, and thus intelligent review, of the decisional process by spelling out in legislation the factors to be considered, and by requiring that the trial judge's decision state with respect to each such factor what part it played in the custody award made, or why, if it was not considered, it was not deemed relevant.¹²⁵ Such a system now exists in Michigan.¹²⁶ Although such a statute would increase the work necessary to decide a particular case, the clearer guidelines available should reduce the number of custody matters litigated and, in any event, will greatly improve the lot of children of divorce.

The form and method of the decision is of importance even when the issues involve legal principles rather than discretion. An oft-recited aphorism tells us that courts must not only do justice but also must appear to do justice. Yet a very large part of judicial business is disposed of in boilerplate phrases that give no real clue to the basis of the court's decision. The adverse impact of such opinions is far-reaching: The losing litigant suffers because he may not understand the reason for the holding or may be unable to demonstrate a basis for review; the law deteriorates because developing legal principles become muddled,

124. Professor Lon Fuller has concluded that the standard is "not applying law or legal rules at all, but is exercising administrative discretion which by its nature cannot be rule-bound." L. FULLER, *INTERACTION BETWEEN LAW AND ITS SOCIAL CONTEXT* 11 (unbound class material for Sociology of Law, Summer 1971, University of California at Berkeley), quoted in Mnookin, *Child Custody Adjudication: Judicial Functions In the Face of Indeterminacy*, *LAW & CONTEMP. PROBS.* Summer, 1975, at 226, 255.

125. The proposal is more fully developed in Meyer & Schlissel, *supra* note 26, at 35-36.

126. *MICH. COMP. LAWS* § 722.23 (Supp. 1982); *accord* *N.D. CENT. CODE ANN.* § 14-09-06.2 (1981); *see also* *OR. REV. STAT. ANN.* § 107.137 (1981); *FLA. STAT. ANN.* § 61.13 (West Supp. 1983).

which produces instability and necessitates the wasteful expenditure of additional judicial time; and the public is disserved, because its future actions will be confused by the uncertainty an insufficiently articulated principle generates.

Although as a former trial judge now sitting on a busy appellate court, I recognize that the problem arises more from the sheer volume of material which passes before the courts than anything else, I share with your own Professor William Reynolds a strong belief that ways must be found to better the situation. One way, as he points out,¹²⁷ is to improve the quality of the briefs upon which judges are all too dependent. For example, a common problem on appeals from administrative agency rulings is confusion between weight of the evidence and substantiality of the evidence to support it. As a first step, we could devise templates for various types of appeals, analogous to the official forms of pleadings we now use, that will provide guidelines for the lawyer (and there are many) who handles an appeal in a field in which he is not an expert.

Another way of improving judicial decisions would be to expand the now well known annual surveys of the law to include a section, similar to the Reynolds article I refer to, on the craftsmanship of decisions.¹²⁸ Such surveys would have a salutary effect, for judges are not impervious to constructive criticism.

In final analysis the problem is one of both time and methodology. Hopefully, additional time can be made available through some of the suggestions already made. As for methodology, a great deal more study is required before consensus can be reached on a standard style of opinion, candid and articulate but reasonably concise, by which the result reached and the reasoning on which it is based will be made plain for all to see.¹²⁹

127. Reynolds, *supra* note 35, at 184-85; see also Traynor, *Badlands In An Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 159 (1960). Traynor argued: "Too often both sides set forth issues that float upon the surface of a problem and yield no clue to the ones beneath. An element of chance then enters the solution, for even the most painstaking court may fail to uncover what the adversaries failed to reveal." *Id.*

128. Reynolds, *supra* note 35. See also, 1 J. WIGMORE, EVIDENCE § 8a, at 241ff (Chadwick rev. ed. 1978); Smith, *The Current Opinions of the Supreme Court of Arkansas, A Study in Craftsmanship*, 1 ARK. L. REV. 89 (1947).

129. See Rubin, *Views From the Lower Court*, 23 UCLA L. REV. 448, 451 (1976). Rubin noted: "The ad hoc, 'railway ticket' decision—good only for this day and station—is a betrayal of the appellate function." *Id.*; Rubin, *supra* note 5, at 655; Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor, With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 42-58 (1982).

IV. SIMPLIFICATION

So far we have been concerned with who among the various branches of government does what about legal issues. Of importance to consider also is whether the burdens on the courts can be reduced and their work simplified by limiting use of the system or speeding up the flow of matters through it. Because removal of matters from the judicial system has been extensively covered in the literature,¹³⁰ I limit my comments to the savings of time that can be accomplished by increasing the efficiency with which matters are handled.

A. *At the Trial Level*

A number of such time-saving changes in mechanism though long available have yet to be adopted by many states. Some have not been widely accepted because they are controversial in nature and adversely affect the interests of a large segment of the bar. One such concerns whether the *voir dire* of prospective jurors during the selection process should be conducted by the judge, by counsel, or by both. Court-conducted *voir dire* is the rule in the federal courts and in some states, but has not been adopted in most.¹³¹ The fact that 40 percent of the trial

130. Simplifying the judicial process requires an economic perspective of the situation. For example, courts, traditionally viewed as protectors of the poor, should not be closed to "minor" disputes. Litigation costs, apart from attorney's fees, are relatively low. Thus, litigants gain more individually by using the courts than society gains collectively. J. LIEBERMAN, SUMMARY OF PROCEEDINGS, THE NATIONAL CONFERENCE, ST. LOUIS, COUNCIL ON THE ROLE OF THE COURTS 3-5 (May 7-9, 1982) (available at the offices of the *Maryland Law Review*). Added factors in any economic analysis are that business litigants can deduct litigation expenses for tax purposes, see Gnaizda, *Rent-A-Judge: Secret Justice For The Privileged Few*, 66 JUDICATURE 6, 13 (1982), and that interest payable by a losing litigant is neither at as high a rate nor for as long a period as he will earn at today's high market rates while the litigation is pending, Monek, *Court Delay: Some Causes and Remedies*, 69 A.B.A.J. 12 (1983).

Many commentators have proposed a variety of alternative dispute resolution methods. See Gnaizda, *supra* (rent-a-judge); Coulson, *Rent-A-Judge: Private Settlement For the Public Good*, 66 JUDICATURE 7 (1982) (same); Cooke, *Arbitration of Civil Cases in State Called Success*, N.Y.L.J., March 16, 1983, at 1, col. 1 (lawyer arbitration); Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A.J. 64 (1983) (reviewing experience in the federal district court in eastern Pennsylvania); Middleton, *Help, Not Hassle*, 60 A.B.A.J. 19 (1974) (dispute resolution centers); Report of Chief Judge Cooke, N.Y.L.J., March 17, 1983, at 1, col. 2 (same); Kohn, *Bar Council Seeks Method to Settle Complex Disputes*, N.Y.L.J., Dec. 13, 1982, at 1, col. 2 (trial lawyer panel).

The litigant's cost-benefit equation would be changed if the important costs of litigation, for fees of lawyers and experts, were required to be paid by the losing party. See Rosenberg, Rient & Rowe, *Expenses: The Roadblock To Justice*, JUDGES' J., Summer, 1981, at 16.

131. See Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339-40 & 340 n.13 (1982) (discussing differing *voir dire* methods in state and federal courts).

time in New York criminal cases is devoted to the jury selection process prompted New York's Executive Advisory Commission on the Administration of Justice to recommend adoption of a court-controlled selection, supplemented by counsel inquiry in the court's discretion.¹³² When criminal cases constitute as large a portion of the work of the courts as they do today, and jury selection so great a proportion of such cases, the time for more widespread adoption of such a system seems near at hand.

Another simplifying mechanism that deserves more widespread use is piggybacking. First used in California almost seventy years ago¹³³ and revived ten years ago by United States District Judge Manuel Real of Los Angeles¹³⁴ in a case involving a *Bruton* problem,¹³⁵ it involved the selection of two juries to sit simultaneously for the joint trial of so much of the cases against two defendants as was common to both, followed by separate trials, seriatim, of the remaining issues before the particular jury selected as to that defendant. With careful planning by the trial judge, the time saved through elimination of unnecessary duplication should substantially outweigh the possibility of error its use creates. Although some appellate courts have criticized its use because it imposes upon the trial judge the burden of segregating issues during the separate phases of the trial, none have found it constitutionally deficient or prejudicial in actual application.¹³⁶

132. EXECUTIVE ADVISORY COMM'N ON THE ADMINISTRATION OF JUSTICE, RECOMMENDATIONS TO GOVERNOR HUGH L. CAREY REGARDING PROPOSALS FOR JURY SELECTION REFORM 5,6 (1982).

133. *People v. Ho Kim You*, 24 Cal. App. 455, 141 P. 950 (1914).

134. *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973); see *Judge Real Tries Dual Jury System*, THIRD BRANCH, Oct. 1971, at 4.

135. *Bruton v. United States*, 391 U.S. 123 (1968). A *Bruton* problem involves a co-defendant's confession reaching the jury when that confession would implicate the defendant and constitute prejudicial error. The Court in *Bruton* held that the confrontation clause prohibits the introduction of such a statement, but that the prosecution ought not to be denied the benefit of the use of the confession to prove the confessor's guilt if alternative ways can be found that do not infringe on the defendant's right to confrontation. Before piggybacking, prosecutors avoided the *Bruton* problem by holding separate trials.

136. Compare *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972) (Judge Real's use of dual juries upheld, but holding not to be read as an endorsement of the "experiment"), *cert. denied*, 409 U.S. 1127 (1973) and *United States v. Rimar*, 558 F.2d 1277 (6th Cir.) (simultaneous prosecution of four defendants before two juries held not so confusing as to deprive defendants of a fair trial), *cert. denied*, 434 U.S. 984 (1977) and *People v. Brooks*, 92 Mich. App. 393, 285 N.W.2d 307 (1979) (dual jury procedure effectively avoids the problem of pitting one defendant against the other, each trying to save himself at the detriment of the other) with *People v. Church*, 102 Ill. App. 3d 155, 429 N.E.2d 577 (1981) (where defense counsel preferred dual jury system to severance, procedure upheld, although the court did not find the solution to be particularly attractive) and *State v. Watson*, 397 So.2d 1337 (La.) (system upheld, but future use delayed until procedural guidelines are developed to reduce

Other time-saving devices at trial level include more frequent use of general orders and rules. The importance of rules in expediting administrative dispositions formerly made only after adjudicatory hearing is now well recognized.¹³⁷ General orders and rules similarly can be used by courts to expedite cases—usually those involving social policy issues—having common aspects that would require repeated presentation and adjudication.

An example of the use of a general order in such a case is an en banc order issued by the district judges of the United States District Court for the Western District of Missouri.¹³⁸ Confronted with three major cases for review of student discipline in tax-supported schools, the judges gave the attorneys for a large number of public and private agencies and institutions the opportunity to file briefs and argue orally, and then issued their General Order on Judicial Standards of Procedure and Substance. The order adopted a memorandum which stated the principles governing the relationship between courts and education, the lawful missions of tax-supported higher education, the obligations of students generally, and the nature of student discipline as compared to criminal law. The memorandum also established provisional procedural and jurisdictional standards and provisional substantive stan-

the possibility of juror speculation as to the justification of the dual jury system), *cert. denied*, 454 U.S. 903 (1981) and *State v. Corsi*, 86 N.J. 172, 430 A.2d 210 (1981) (although no reversible error found below, the use of dual juries is condemned because of the substantial risks of prejudice to defendant's right to a fair trial) and *Scarborough v. State*, 50 Md. App. 276, 437 A.2d 672 (1981) (quoting *Corsi*). See also *United States v. Lewis*, 537 F. Supp. 151 (D.D.C. 1982) (where hearsay statements made by codefendant are inadmissible against defendants, but where strong federal policy favors joinder, empaneling of two juries is ordered); *Gaynes, Two Juries/One Trial Panacea of Judicial Economy or Personification of Murphy's Law*, 5 AM. J. TRIAL ADVOC. 285 (1981) (citing the logistical problems presented in having two juries in one courtroom); *Morris & Savitt, Bruton Revisited: One Trial/Two Juries*, 12 THE PROSECUTOR 92 (1976) (citing the time and cost-saving advantages of the two jury system); Note, 2 FORDHAM URB. L.J. 407 (1974) (suggesting that guidelines be promulgated before the two-jury system is endorsed); *Trial Management . . . Jury Bifurcation*, 66 A.B.A.J. 787 (1980) (where multiparty case involves claims under the laws of two states, the empaneling of two juries can substantially reduce court time and costs of litigation); *Schwartzwald, Novel Criminal Procedure: 1 Trial, 2 Triers of Fact*, N.Y.L.J., May 10, 1983, at 1, col. 2 (jury trial of one defendant, bench trial of other or others).

Piggybacking would permit federal courts to try an offense "committed in the course of committing or in intermediate flight from the commission of any other offense over which federal jurisdiction exists," NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 2d (b) (1970), or enable a court, at one time, to dispose of both the criminal and civil aspects of a criminal act.

137. *Federal Power Comm'n v. Texaco*, 377 U.S. 33, 39 (1964); *American Trucking Ass'n v. United States*, 602 F.2d 444, 450 (D.C. Cir.), *cert. denied*, 444 U.S. 991 (1979); see *Scalia, supra* note 23, at 376.

138. *In The United States District Court for the Western District of Missouri En Banc - General Order on Judicial Standards of Procedure and Substance*, 45 F.R.D. 133 (1968).

dards, subject to de novo review in the individual cases. Although preparation of the order involved considerable work, I believe there was an overall saving. Even if not, bearing in mind the better presentations of the several cases affecting the same issue and the probability of clearer and less diverse decisions, I suggest that the device deserves more frequent use than it has received.

B. *At the Appellate Level*

Savings are possible on the appellate level as well. The Supreme Court's experience with *Gillette v. Miner*¹³⁹ illustrates that a good deal of court time, to say nothing of the time of the lawyers and expense of the parties, can be saved by screening cases carefully to identify jurisdictional defects as they enter the system. *Gillette* raised the important constitutional question of whether a state court class action can extend to class members outside the state in which the action is brought. Not until argument and receipt of briefs from a number of amici as well as the parties, however, did the Court realize that the judgment appealed from was not final. Dismissal for want of jurisdiction promptly followed.

The Supreme Court is not the only court in which such things occur, nor is there an absolutely foolproof system for spotting every jurisdictionally defective case. But my court's sua sponte dismissal process resulted in 1982 in the dismissal, withdrawal, or transfer before records and briefs were filed of 214 appeals, and during that year only fifteen appeals were dismissed after argument,¹⁴⁰ which clearly indicates that such a system does weed out all but the most abstruse cases and can save a great deal of time.

The most frequently used device in recent years to expedite appellate court consideration of the merits of cases within its jurisdiction has been submission of cases without oral argument.¹⁴¹ There are many, however, who feel that oral argument is an essential of the appellate process. For them, and even for those who would limit oral argument to more important or more complex cases, there is available a tech-

139. 103 S. Ct. 484 (1982). For details, see Mann, *The High Court: Not Infallible and Not Final*, AM. LAW., February 1983, at 53, col. 2.

140. 1982 ANNUAL REPORT OF THE CLERK OF THE COURT, Appendices 1 and 16 [hereinafter cited as CLERK'S REPORT].

141. See, e.g., 22 N.Y.C.R.R. § 500.2(b). The value of the system is indicated by the fact that in 1982 it accounted for disposition of 229 appeals, of which 73% (168) were affirmances, 22% (51) were reversals and 5% (10) were modifications. CLERK'S REPORT, *supra* note 140, at Appendix 14(d). See, e.g., *Welch v. Mr. Christmas*, 57 N.Y.2d 143, 440 N.E.2d 1317, 454 N.Y.S.2d 971 (1982).

nique that should significantly enhance the value of oral argument without taking more time. I refer to the pre-calendar notes supplied by some California District Courts of Appeal to counsel.¹⁴² An outgrowth of the preparatory work required of a "hot" court, the notes analyze the authorities bearing upon each contention involved in the appeal in context of the facts, indicate the areas in which further argument is desired, and may even include the court's tentative conclusion subject to change at argument. Counsel are expected to respond in oral presentation. The device should substantially reduce argument time and benefit the parties because, by pointing up the issues that trouble the court, fewer questions from the court are required and counsel are alerted to, and able to answer directly, questions they otherwise may have overlooked or may be ill prepared to answer.

Objection to the process, and particularly to the tentative decision, may be made that the court in effect is prejudging the case. I would respond that a "hot" bench judge cannot prepare to listen to argument without having formulated tentative views about the case, that it is to counsels' advantage to know what those views are and to be able to point up fallacies or inconsistencies in them before the court reaches its final decision rather than to have to do so on motion for reargument, and that oral argument not infrequently is sufficiently cogent to persuade the court that its tentative view is incorrect.

V. CONCLUSION

Lord Devlin has written that "[i]t does not matter after all where the law comes from; . . . whether it is made by Parliament or by the judges or even by ministers; what matters is the law of England."¹⁴³ But whether by legislator, judge, or minister, it is essential if the process is to meet the needs of the public it purportedly serves that the law be viewed as a whole. That end can best be achieved, without untoward infringement of legislative primacy, by according the courts a greater role in the revision of both decisional and statutory laws and providing them with the tools to carry out that expanded role. There must also be clearer legislative specification of the content of governing concepts such as discretion, preemption, and jurisdiction. For their part, courts must be more explicit and more candid in stating the what and the why of what they do. What is required is a restructuring not only of the

142. Thompson, *Technique To Save A Vanishing Resource*, 1:1 STATE COURT APPELLATE PROJECT NEWSLETTER 1 (1976); Saeta, *Tentative Opinions: Letting A Little Sunshine Into Appellate Decision Making*, JUDGES' J., Summer, 1981, at 20.

143. P. DEVLIN, *SAMPLES OF LAWMAKING* 120 (1962).

relationship between state courts and state legislative bodies, but also of the state courts themselves and of the relationship between those courts and federal courts and the Congress. By such steps as the restructuring and simplification of method I have discussed with you, close coordination between the various parts of our legal system should be achieved. That should result in more predictable and more understandable guidelines for those whose rights and obligations are governed by the system. Only then will the confidence of the public in it be fully restored.