

PUBLIC CONFIDENCE IN THE JUDICIARY: SOME NOTES AND REFLECTIONS

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To distrust the judiciary marks the beginning of the end of society. Smash the present patterns of the institution, rebuild it on a different basis . . . but don't stop believing in it.

—Honore Balzac, *quoted in* O. KIRCHHEIMER, *POLITICAL JUSTICE* 175 (1961).

I

INTRODUCTION

Discontent, popular and professional, with the operations of American courts and the legal system is not a new phenomenon. In the formative decades of American constitutional history antagonism to law and lawyers was prevalent, in large part because the inherited English common law was considered to be too sophisticated and abstruse for the common man, who was unable to use it as a guide for his conduct.¹ Lawyers were held in such low repute that some states—for example, Indiana—by statute permitted anyone to practice law. During modern times that latent popular disaffection has spread to the legal profession itself, manifested by, among other things, a spate of publications criticizing a lack of “craftsmanship” by Justices of the Supreme Court.² The discontent is based upon both fact and fancy; taken together, its various forms add up to an endemic lack of confidence in the judiciary.

“Public confidence in the judiciary” is a term that is often used but never defined. It is one of those concepts that everyone thinks he understands but which does not have a hard core of solid content upon which all agree. As such, it may be analogized to such other undefined terms as “public policy” or the “public interest”³ or to Justice Potter Stewart’s remarkable burst of candor in the *Jacobellis* case that while he could not define hard-core obscenity, he knew it when he saw it.⁴ Some useful purpose may be served by adhering to the obvious fiction that high-level legal abstractions such as “policy” or “public interest” have a definite meaning (although surely a persuasive case for putting more content into them can be made), and obscenity may be merely in the eyes of the beholder, as Justice Stewart implied; but there can be no excuse for not attempting to supply substance to the concept of public confidence in the judiciary. It is not enough to say that one knows it when he sees it. In this paper, I should like to proffer some preliminary observations on that theme. An effort will

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¹ See P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 102-04 (1965).

² E.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

³ See Miller, *The Public Interest Undefined*, 10 J. PUB. L. 184 (1961).

⁴ *Jacobellis v. Ohio*, 378 U.S. 184 (1963).

be made not to poach on the preserves of the other authors in this symposium on judicial ethics, although of necessity some overlap will be discernible. The main focus will be on the federal bench, although some mention of state courts will be made.

In a widely heralded speech in 1906, Roscoe Pound called attention to the "causes of popular dissatisfaction with the administration of justice."⁵ Pound's address may be considered to be the point of departure for administrative reform of the courts. Delay was the principal factor that he singled out as a cause of discontent, a theme echoed by Chief Justice Warren E. Burger in his first public utterance as Chief Justice. Burger underscored a complaint of millions of Americans in their question, "Why does American justice take so long?" and answered that it is in large part "a lack of up-to-date procedures and standards for administration or management and especially the lack of trained administrators." He also said: "Only by the adoption of sound administrative practices will the courts be able to meet the increased and increasing burdens placed on them. The time has passed when the court system will carry its load 'if each judge does his job.' There must also be organization and system so as to leave the judge to his job of judging." It is evident that Pound's complaint in 1906 requires continuing attention. Leaving a judge "to his job of judging," however, is affected by factors other than the administrative impediments that concern the Chief Justice. To some extent, no doubt highly discontinuous and probably immeasurable, that task is also influenced by "non-judicial" activities of judges. Other matters bear upon the manner in which the complex and intricate art of judging their fellow humans is performed—and in the way in which it is received by its "constituency," the public. There is no higher calling in the American constitutional order than that of sitting in judgment of and assessing liability for the peccadilloes and derelictions of others. That is so even though many of the parties brought before the bench are artificial persons (corporations, for example); in final analysis, the actions of collective organizations are those of identifiable human beings. To pronounce judgment upon them is an awesome duty, requiring attributes of character and personality of the highest order. That some judges—however few in number is beside the point, for even one rotten judicial apple can go far toward spoiling the entire judicial barrel—fall short of the requisite standards of integrity and propriety (nebulous and ill-defined though they may be) creates a large part of the problem of public confidence.

That problem is merely an aspect of a much larger problem of the operations of the entire legal system, and should be viewed in that context. However, what exists in the microcosm of the judiciary is reflective of the macrocosm of the legal system; hence, what is said here about judges and courts may be extrapolated to the entire sweep of American law. It is relevant, nonetheless, to note *en passant* that concentration on *judicial* ethics, important as they are, tends to distort reality.

⁵ Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

American law in the modern era, whatever it may have been in the past, is neither court-dominated nor even court-oriented. This is the age of administration, and American government is ever increasingly influenced and controlled by huge bureaucracies, both public and private.⁶ The ethical problems of law emanate as much or more from *administrative* shortcomings as from the bench (historically in the common law countries, the center of legal power). We have not yet assimilated that fact into the curricula of American law schools, but do it we must, as Dean Levi has said, if legal education is to attain currency with the unceasing demands of a changing society.⁷

"The place of justice is a hallowed place," said Bacon in his essay *Of Judicature*, "and therefore not only the Bench, but the foot pace and precincts and purprise thereof ought to be preserved without scandal and corruption."⁸ No one would dissent from that proposition—the judiciary, in all its activities, must be free from "scandal and corruption." But the problem of public confidence is larger; it mainly involves the lack of a set of standards adequate to enable federal judges to guide their behavior, both on and off the bench. The most that is available for them are the Canons of Judicial Ethics, issued in 1924 by the American Bar Association, plus the constitutional requirement of holding office during "good behavior" and two statutes—one of which makes it a felony for a judge to peddle influence and the other a misdemeanor to practice law while a judge.

That is not enough. Joseph Borkin, author of *The Corrupt Judge*, said in an interview about the ABA's canons: they are simply a compilation of "biblical injunction, custom, common sense, and 'Caesar's wife' admonitions to be above reproach." The ABA has recognized the inadequacy of the canons. Under way at this writing is a serious effort to update and modernize them.⁹ But whether the task of establishing a "code of good conduct" for federal judges should be left to a private association of lawyers is itself a difficult question. If a code is to be developed, the task is either that of Congress, operating, of course, within the boundaries of constitutional restraints, or that of the judiciary itself, acting perhaps through the existing structure of the Judicial Conference of the United States and the Judicial Councils and Conferences of the several circuits.¹⁰ Another difficulty is that norms of conduct of federal judges are enforceable in law only by the extraordinary remedy of impeachment, although the action of the Judicial Council of the Tenth Circuit in Judge Chandler's case may point to increased powers in the Judicial Councils—"may" because the Supreme Court refused to reach the merits of Chandler's petition.¹¹

⁶ See Miller, *Toward the "Techno-Corporate" State? An Essay in American Constitutionalism*, 14 VILL. L. REV. 1 (1968).

⁷ Levi, *Law Schools and the Universities*, 7 J. LEGAL ED. 243 (1965).

⁸ 1 F. BACON, WORKS OF LORD BACON 59 (M. Murphy ed. 1876).

⁹ The ABA's Special Committee on Standards of Judicial Conduct issued a Preliminary Statement and Interim Report in June 1970; this was debated at the annual ABA meeting in August 1970.

¹⁰ The powers of these bodies are set forth in 28 U.S.C. §§ 331-33 (1964).

¹¹ *Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74 (1970) (deny-

Cumbersome and seldom used, impeachment is a technique of last resort, necessarily so if the independence of the judiciary is to be preserved. As Lord Bryce said in *The American Commonwealth*, it is "the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."¹² Impeachment has been invoked a mere eight times for federal judges; in only four cases were convictions obtained. Thomas Jefferson called it a "bungling" way of removing a judge: "experience has already shown," he wrote to Judge Spencer Roane of Virginia, "that the impeachment the Constitution has provided is not even a scarecrow."

Even so, that is all that is now permitted under the statutes and the Constitution. Current attempts to define "good behavior" legislatively are not certain to survive foundering on constitutional shoals.¹³ The guidelines issued in 1969 by the Judicial Conference of the United States in an effort to limit off-bench activity of federal judges have since been rescinded, mainly, it seems, because of the change in Chief Justices in 1969 and because the anxiety occasioned by the revelations that led to the unprecedented Fortas resignation had ebbed. Those guidelines have now been replaced by the operation of an "interim advisory committee" established by the Conference to counsel judges on questions of ethics, including non-judicial activities. In any event, the guidelines (as well as the counsel of the advisory committee) carry no formal suasion. Nor do the ABA canons. Informal sanction no doubt occurs, mainly from the Chief Judges of the circuits and districts, under which judges may be persuaded or encouraged to do their job better.¹⁴ But that is hardly an adequate remedy.

As with any institution, the judiciary unquestionably prefers self-policing over promulgation of externally established norms of behavior. Judges may be counted on to resist strenuously any attempt by Congress to legislate specific rules. There are solid reasons for this, other than a natural reluctance against airing one's dirty laundry in public. For instance, the notion of an independent judiciary is crucial to the American constitutional order. We know too much about other countries, such as Nazi Germany, where the courts became arms of the state, not to place judicial independence high in the scale of values to be preserved. And judges must be independent insofar as the demands of the state are concerned and also from influences external to government. That does not mean that federal judges

ing Judge Chandler's motion for leave to file petition for writ of mandamus or prohibition against the Council).

¹² 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 208 (2d ed. rev. 1891).

¹³ Compare Kurland, *Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969), with Kramer & Barron, *Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary; the Meaning of "During Good Behavior,"* 35 GEO. WASH. L. REV. 455 (1967).

¹⁴ Testimony, as yet unpublished, in hearings held by the Senate Subcommittee on Separation of Powers in 1970 revealed that chief judges so act.

are or should be wholly free to roam at will; they have not been since the Judiciary Act of 1789, for the state can set certain parameters of judicial power. Furthermore, there are arguments, persuasive to some, about the symbolic position of the courts that militate toward keeping their internal operations secret—and thus leaving what policing may be necessary to the judges themselves, acting *in camera*.¹⁵

II

THE CONTEXT, HISTORICAL AND CONTEMPORANEOUS

To pose the question, "Is there a lack of public confidence in the federal judiciary?" is to put the problem in a way that is difficult, perhaps impossible, to answer. It is far too abstract and ambiguous. The manner in which questions are put usually determines their answer; or as Justice Frankfurter said, in law, as elsewhere, correct answers are predicated on asking the correct questions.¹⁶

What, then, are the "correct" questions about public confidence in the judiciary? That in itself is not susceptible of easy reply.¹⁷ There is no such thing as "the" public; rather, a series of publics exist within the American polity. The basic societal unit is the pluralistic social group, not the individual as the myth (and the Constitution) imply. The question of public confidence, accordingly, can be broken down into at least the following components: (a) *which groups* (or the leaders thereof) within the nation hold (b) *how much esteem* (or respect) for (c) the *courts* (trial and appellate, state and federal) through (d) *selected periods of time*? Put that way, certain assumptions may be discerned: that groups vary in their estimation of the performance of the judiciary; that group leaders are the key individuals, not the mass; that certain factors may be identified as accounting for greater or lesser esteem in which courts are held; that there may be a variance between the confidence accorded trial judges as compared with the appellate bench; that an analogous variance may be identified with respect to the state and federal courts; and that the degree of esteem will differ for individuals and groups through time.

These questions and assumptions demand carefully refined analyses based on solid empirical evidence. Little data exist that are sufficient to the need. In the brief compass of this article, therefore, attention will be concentrated mainly on isolating some of the factors that seem to account for confidence in the courts, although of necessity reference will have to be made to the other assumptions and the other segments of the problem as posed. First, however, a brief glance at history and the contemporary social context.

¹⁵ Cf. Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62-70 (1965), criticized in Miller & Schefflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus*, 1967 DUKE L.J. 273, 522.

¹⁶ Estate of Rogers v. Comm'r, 320 U.S. 410, 413 (1943); Priebe & Sons v. United States, 332 U.S. 407, 420 (1947).

¹⁷ Compare F. COHEN, THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 3 (L. Cohen ed. 1960), with Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1964), on the problem of identifying problems.

Speaking very broadly, public confidence in American courts involves a belief in the fairness and impartiality of the tribunal, with the judge dispensing speedy decisions in accordance with "the law" considered, as Holmes said, as a set of external standards applied in a neutral way. So defined, it may be said that a lack of confidence in the judiciary has been at least endemic throughout American Constitutional history. One can go back at least as far as President John Adams's last-gasp appointment of John Marshall to be Chief Justice, and the latter's opinion in *Marbury v. Madison* (in which he should have recused himself) nullifying some "midnight" appointments of the President while simultaneously asserting judicial supremacy, to discover harsh indictments of the Supreme Court of the United States. As is well known, the new President, Thomas Jefferson, got the decision he desired but for the wrong reasons—and was thoroughly incensed. Jefferson was not bemused or deluded by notions of "neutral principles" or an impossible posture of judicial objectivity, as have been some modern commentators. He knew, by experience or intuitively, that the judges' black robes often hid feet of clay; and that it is folly compounded to ask them to do the intellectually impossible. What he wanted was that they act to further values important to him, rather than those important to his political enemies. That sentiment was echoed by, for example, Judge Spencer Roane of Virginia, who called Marshall's decision in *Cohens v. Virginia* "monstrous," mainly, it would appear, because it enhanced national power at the expense of the states.¹⁸ Then, as now, there is but one truly basic principle governing assessment of the courts: that of the "gored ox." In other words, people seem to like or dislike judges and courts in direct proportion to the way in which judicial decisions affect, or appear to affect, values considered of fundamental importance to themselves.¹⁹ For example, *Brown v. Board of Education* and its aftermath for a time greatly enhanced the confidence of black Americans in the Supreme Court, while simultaneously causing many white Americans to criticize it severely. Despite some fervent assertions to the contrary, it was the *impact of Brown*, not the reasoning in the Court's opinion, that irritated white America.

Quite possibly, although this is not susceptible of exact proof because history is an art, not a science, judges were held in less esteem in the past than they are today. One reason for that may be the fact that most law in Anglo-American legal history was judge-made, and law, all too often, was considered by many to be an enemy, not a protector. We tend to forget during modern times of the ostensible

¹⁸ Note, *Judge Spencer Roane of Virginia: Champion of States' Rights—Foe of John Marshall*, 66 HARV. L. REV. 1242 (1963). See also Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Christie, *Objectivity in the Law*, 78 YALE L.J. 1311 (1969). Professors Wechsler and Christie state the conventional wisdom about adjudication; they seem to believe in an idealized model of how judges operate. They ought to pay more attention to what judges *do* than to what judges *say they do*—often two quite different things. Their criticisms of judges, furthermore, tend to be quaint anachronisms, exuding a musty air of having been brought down from the attic of obsolete concepts.

¹⁹ Compare Miller & Scheffin, *supra* note 15, with Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U.L. REV. 290 (1969).

sovereignty of the legislature—enunciated, for example, in the *Steel Seizure Case* in 1952—that legislatures are by and large latter-day institutions insofar as law-making is concerned.²⁰ The movement toward codification, which got major impetus in the late nineteenth century, may be taken as a highlight of a trend toward legislative supremacy. For whatever reason, much but not all law-making was taken from the judges by legislators—who in turn in the twentieth century have ceded much of it to the bureaucracy, with the willing acquiescence of the judges.

Just why the law-making power was taken over by the elected representatives of the people cannot be determined with any exactitude.²¹ One little explored factor may be the fact—at least, it appears to be a fact—that judges, even when elected, tend to come from one stratum of society; or if not that, to reflect the values of one stratum. We live in America, now and in the past, under the myth of a classless society. The rise of new power groups—for example, the unions and the farmers—led them at times to conquer the legislatures. (This nation has always had its classes, no doubt not so rigid and stratified as in other countries, the myth being nurtured by the core of truth of upward social mobility. Intelligent, promising young men and women have long been co-opted by the “upper” or “ruling” class(es) in the United States, that stratum of society not being able to produce by itself the intellectual manpower requisite to fulfillment of its goals.²²) Law, whether created judicially or legislatively, has by and large tended to mirror the values of the dominant ruling groups in America. Historical contract law, for instance, was the legal counterpart of a laissez-faire economy, one in which bargain supposedly prevailed over command in the agreements Americans made. But contracts, Sir Henry Maine’s false aphorism to the contrary notwithstanding, have always displayed a disparity in bargaining power, particularly in the “agreements” under which a man sold his labor during the early stages of the industrial revolution. Legislative attempts, produced by the trend toward equality early noted by Alexis de Tocqueville, and the rise of new social groups, to rectify those disparities were aborted by the judges in a classic confrontation between the aristocratic institution of the courts and the more democratic legislatures. The judges not only invalidated imposition of legislative norms in wage-and-hour matters on constitutional grounds,²³ they also asserted inherent power to issue injunctions to stave off strikes and other exercises of the burgeoning union movement. So, too, with tort law: judge-made doctrines of contributory negligence, assumption of risk, and the fellow-servant rule tended to aid the industrial structure (the business class) at the expense of the workers. These judicial actions may surely be taken to reflect on the confidence that segments

²⁰ See Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237 (1959).

²¹ On the question of the “problem of proof” of social science propositions, see E. NAGEL, *THE STRUCTURE OF SCIENCE* (1961); Miller, *Corporate Gigantism and Technological Imperatives*, 18 J. PUB. L. 256 (1969).

²² See J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE* (1968); G. DOMHOFF, *WHO RULES AMERICA?* (1967).

²³ The early classic account may be found in J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924).

of the public have in the basic impartiality of judges. Such legislative reactions as workmen's compensation laws and the Norris-LaGuardia Act evidence that lack of confidence. The former removed industrial accidents from the courts and placed jurisdiction over them in administrative boards; and the latter sharply curtailed judicial power to issue injunctions in labor disputes.²⁴

Historically, American judges have always been under attack by some groups—and simultaneously defended by others. Through time, moreover, one person (for example, newspaper columnist David Lawrence) or one group (for example, what Justice Jackson once called a little cult of judicial activists) display contradictory attitudes: in the 1930s Lawrence was a staunch defender of the “nine old men” during President Roosevelt's “court-packing” fight, but the years of the tenure of Chief Justice Warren made him one of the Supreme Court's most vociferous and bitter critics; Jackson's “little cult” are those who tended to attack the Court during the 1930s but who applauded the activism of the Warren Court.²⁵ Those, of course, are merely two examples of the principle of the gored ox in operation, restated only to indicate some of the historical perspective necessary for the present inquiry. Another bit of evidence to buttress the point is the way the businessman no longer considers the Supreme Court as ultimate guardian of his interests; instead he (and other groups), have, as Grant McConnell has shown in his *Private Power and American Democracy*, co-opted both Congress and the bureaucracy.

Two other factors merit mention: the judiciary today is required to act at a time when polarization is occurring over a number of fundamental goals of the American people, and second, it must operate during a period of the most rapid social change in history. These obviously overlap. The judicial system, a product of the relatively static feudal society, performs best in a period of social quiescence. Put in constitutional terms, this means, as Yves Simon has said, that due process of law—the core concept of the American legal order—really works only when there is no basic conflict over goals and values.²⁶ When, as today, there is such a controversy—for example, in the position of the Negro in America—serious difficulties arise. In other words, the judicial process (and the adversary system) are predicated on underlying agreement on base values or goals, the task of the process and the system being that of settling the details of reaching those ends. Said in still another (military) way, the process assumes acquiescence on strategy, and makes provision for ironing out disagreements on tactics to achieve accepted strategic ends.

²⁴ There is a current movement to re-judicialize unfair labor practice cases by removing trial of them from the National Labor Relations Board and placing them under the jurisdiction of the federal district courts. S. 3671, 91st Cong., 1st Sess. (1970) (introduced by Senator Tower, R. Texas). This may be considered to reveal a lack of confidence in the NLRB on the part of Senator Tower and his constituency. See *Hearings on Congressional Oversight of Administrative Agencies (National Labor Relations Board) Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1970).

²⁵ R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1954).

²⁶ Y. SIMON, *PHILOSOPHY OF A DEMOCRATIC GOVERNMENT* 123 (1951); see Miller, *An Affirmative Thrust to Due Process of Law?*, 30 *Geo. Wash. L. Rev.* 399 (1962).

Modern America is characterized, *malheureusement*, both by polarizing attitudes toward societal goals and by social change that is awesome and rapid almost beyond measure. The consequence is not only a crisis in authority, now truistic in the United States, but also that the legal system is subjected to almost unbearable tensions. Law and courts (and other institutions) are asked to do much more than in the past. Justice in the sense of fairness and decency of treatment must be meted out to individuals and groups which by and large have never had a fair shake of the dice—Negroes, for example, and those caught in the grip of administration of the criminal law. Further, social change is to a major extent caused by the scientific-technological revolution. We are now able to observe the impact of Whitehead's insight that the most important invention of the nineteenth century was the invention of the art of invention. The result is that the main lines of public policy are now determined and will continue so to be, more by scientific and technological developments not now known than by existing political and legal doctrines.²⁷ What this means is clear: Law and courts must be avowedly "instrumental" as well as "interdictory"—a large order, for neither legal institutions nor the profession itself is prepared for the task.²⁸

III

SOME FACTORS BEARING ON PUBLIC CONFIDENCE IN THE JUDICIARY

The foregoing introduction, it is hoped, will serve to give some perspective to a discussion of some of the factors involved in the people's confidence in judges and also to adumbrate several matters more fully explored below. A preliminary identification and evaluation, such as the present article, of the characteristics of public confidence must perforce be sketched in broad strokes and be intuitive rather than empirical. Social scientists and lawyers have simply not been interested in producing data sufficient to validate hypotheses or to reach firm conclusions.²⁹ Why that is so would itself be an interesting question; the United States, the most legalistic of nations, has at best a primitive knowledge about the sociology of law. What passes for scholarship in legal circles has been and still is, with some notable exceptions, mainly concerned with chopping logic with judges and parsing their opinions—not unnecessary, to be sure, but far from being productive of the information needed for a full understanding of law and the legal system. Tentatively, however, the following questions may be posed as a means of emphasizing the need for empirical data as well as indicating the perimeter of the problem. In addition, the discussion following each question will suggest a possible remedy for judicial (and other) shortcomings and at

²⁷ Compare D. PRICE, *THE SCIENTIFIC ESTATE* (1965), with R. LAPP, *THE NEW PRIESTHOOD: THE SCIENTIFIC ELITE AND THE USE OF POWER* (1965).

²⁸ See Miller & Scheffin, *supra* note 15; Miller, *Public Law and the Obsolescence of the Lawyer*, 19 U. FLA. L. REV. 514 (1967).

²⁹ But see S. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* (1970); Dolbear, *The Public Views the Supreme Court*, in *LAW AND POLITICS IN THE SUPREME COURT* (Jacob ed. 1967).

times will also indicate examples where judicial jurisdiction or the actions of judges have been curtailed in the past (and possibly in the future).

1. *To what extent do non-judicial activities of judges contribute to a diminution of public confidence in the judiciary?* This question, of course, assumes that the norm is a high degree of confidence in American courts, an assumption which, as has been noted above, may be more fancy than fact. Nevertheless, degrees of esteem or prestige or confidence may be postulated, and it is in that sense that the question is asked.

However immeasurable it may be, little doubt exists that a few highly publicized off-bench actions of judges have contributed to muddying the ideal image of the courts. The point is so well known that it requires little documentation. One need refer only to such matters as: (a) receiving outside income, whether from investments (as in the case of Judge Clement F. Haynsworth) or from lectureships (former Justice Fortas) or from association with non-profit corporations (Justice William O. Douglas); much of this becomes known only in exceptional circumstances (for example, the revelation that Chief Justice Taft was the beneficiary of a \$10,000 annual annuity from Andrew Carnegie, who wished to give financial help to former Presidents—or so he said in his will; Taft's case is the closest factual analogy to the Wolfson annuity that led to the resignation of Justice Fortas); (b) performing other official acts, such as being a close presidential adviser (Taft, Frankfurter, Vinson, Fortas, and Brandeis, to name but five)³⁰ or acting as a representative of the Chief Executive in negotiating a treaty (Chief Justice Jay) or heading presidential commissions (Justice Roberts on the Pearl Harbor investigation and Chief Justice Warren on the assassination of President Kennedy are examples) or acting as prosecutor in the Nuremberg war crimes trials, as did Justice Jackson; for Jay, Roberts, Warren, and Jackson the acts were well known and widely publicized but the presidential advisers by and large operated in secret (at most, their activity was known to only a few, with the range and extent of it often becoming known only long after death of the judges); (c) making public speeches on controversial matters (examples include Judge Henry J. Friendly's call for change in the privilege of self-incrimination and Judge Skelly Wright's New York University address on *de facto* segregation);³¹ (d) acting as executor of estates or directors of banks or corporations; (e) helping to legislate rules of procedure;³² (f) acting as "silent head" of the Zionist movement

³⁰ Cf. Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship*, 83 HARV. L. REV. 366 (1969).

³¹ Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671 (1968); Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285 (1965). The Madison Lectures, given at New York University Law School by Chief Justice Warren and Justices Black, Brennan, Clark, Douglas, Fortas, and Marshall, are published annually in *New York University Law Review* 1960 to present. The Madison Lecturers often commented on matters in controversy or that easily could come before the Court.

³² 383 U.S. 1032 (1966) (Black and Douglas, JJ., dissenting to the newly promulgated federal rules of civil procedure).

in the United States (Justice Brandeis);³³ (g) assisting the military services in renovation of their court-martial systems (Judges Mathew McGuire and Alexander Holtzoff); (h) legal adviser to the United States Military Governor of Germany in 1945 (Judge Joseph W. Madden of the Court of Claims); (i) Supreme Court Justices attending, garbed in their judicial robes, a joint session of Congress and hearing (and applauding) President Johnson's call for legislation sure to be litigated on constitutional grounds (the Voting Rights Act of 1965); (j) serving as arbitrator in the Bering Sea controversy (the first Justice Harlan); and (k) discussing with others cases pending decision (the most notorious known example of this was Justice Murphy's habit of talking over cases with his good friend, Edward Kemp).³⁴

Enough now is known about non-judicial activities of judges that the Judicial Conference of the United States and the American Bar Association are actively engaged in trying to draft new norms of a much more specific nature.³⁵ How successful this effort will be is problematical. The commitment to and history of an independent judiciary militates strongly against any formal sanctions being invoked. There is, furthermore, substantial disagreement over limiting anything except the most egregious extra-judicial actions.³⁶ Different rules may well be advisable for each of the several types listed above. The general principle, however, should be clear and unmistakable: Judges should be judges. Period. Justice must be done by our courts, in the words of the old aphorism, and "it must also be seen to be done." To the extent that off-bench activities contribute to the public's believing that justice is not in fact done, they should be curtailed. The point is *not* whether justice is in fact done; that is important, but only half the picture. Also necessary is a belief—read confidence—that judges are rendering justice. It is to be noted that, of course, the word "justice" is one of multiple referents; often the necessary careful distinction is not made between justice as the output of a court, whatever that substantive result may be, and justice in the sense of that output adhering to some other external norm. In the latter meaning, the term is highly abstract, seldom defined, and may often refer to natural law concepts in a way similar to that which the Supreme Court puts content into due process of law. As we have defined public confidence above, it refers to justice as the outputs of courts that coincide, at least roughly, with those fundamental principles of decency that Supreme Court Justices so often invoke but seldom analyze.³⁷

Not all commentators believe in the purist notion of judicial activity. Justice

³³ See E. RABINOWITZ, *JUSTICE LOUIS D. BRANDEIS, THE ZIONIST CHAPTER OF HIS LIFE* (1968).

³⁴ See J. HOWARD, *MR. JUSTICE MURPHY; A POLITICAL BIOGRAPHY* (1968).

³⁵ The ABA took no action at its August 1970 meeting on the revised Canons.

³⁶ I should make it clear that I am not arguing that the bench generally is suspect. Perhaps we get those judges that we, as a people, deserve, just as we likely get the type of government we deserve. The hard-rock principle of an independent judiciary is stated with force and fervor by Justices Black and Douglas in *Chandler*, *supra* note 11.

³⁷ See, e.g., the classic debate between Black and Frankfurter, JJ., in *Adamson v. California*, 332 U.S. 46 (1947).

Abe Fortas, during the hearings on his nomination to be Chief Justice, defended his counsel to the President by citing a number of examples where others had acted in rather similar fashion. (Left unstated by the former Justice is how past conduct of others which may in itself have gone beyond propriety can justify present activity. The question is otherwise: Whether *both* Fortas's and other judges' actions fell short of the desirable standards of probity.³⁸) Perhaps the most eloquent defense of extra-judicial assignments by judges came from the late Judge John J. Parker:

I am not one of those who thinks that a man ceases to be a man and a citizen when he becomes a judge and would have him retire from life as though he were entering a monastery. . . . To him much has been entrusted by the people. They have a right to expect much of him, not only in the performance of his judicial duty, but also in the way of intellectual leadership. A judge will be a better judge if he is a good citizen and takes his full part in bettering the life of the community in which he lives. While he should not enter into political contests, there is no reason why he should not make his voice heard and his influence felt in any movement for the betterment of the race or the improvement of the community. In the work of bar associations, on the boards of educational, charitable and religious organizations, on public occasions where his wisdom and guidance are needed by the people, there is no reason why he should not play a full part of a leader in our democracy.³⁹

Judge Parker also defended acceptance of what he called "unusual tasks" by judges, saying that "when a call comes for a judge to do something for his country, which no one but a judge can do so well, he should not hesitate to undertake it." In accordance with that position, Parker justified the extra-judicial activities of Jay, Harlan, Roberts, and Jackson mentioned above.

Surely, however, Judge Parker assumed the answer in the way that he stated the question. Surely, too, there is enough qualified brainpower in this nation of 200 million people not to have to call upon judges to perform extracurricular jobs. However important those tasks may be and however laudatory the motives of the participants, such a practice subtly erodes the indispensable confidence of people in the impartiality and integrity of the judiciary. Those off-bench actions of judges listed above, unavoidably, *are* political actions; it demeans the judiciary and diminishes its dignity for it to be used as a source of manpower for political trouble-shooting.

It follows, if that be valid, that the other types of nonjudicial activities are improper a fortiori. Under no circumstances can they be justified. Justice Douglas's dissenting opinion in the *Chandler* case states a different view; to him, "Federal judges are entitled, like other people, to the full freedom of the First Amendment."⁴⁰

³⁸ As a former law professor, Fortas would hardly have accepted in the classroom such an argument as he put forth in his attempt to justify his continuing to be personal counsellor to the President after becoming a Justice.

³⁹ Parker, *The Judicial Office of the United States*, 23 N.Y.U.L.Q. REV. 225 (1948).

⁴⁰ What Justice Douglas also left unsaid was that the first amendment is not an absolute—at least in the eyes of the majority of the Court—and that certain people having a special status may find their "full freedom" curtailed at times. Perhaps the as yet unsettled analogy is the extent to which members

That is an interesting sentiment, faintly reminiscent, albeit in a different way, of Holmes's famous utterance about the right of Boston policemen to strike, but hardly dispositive of the question. Justice Douglas's chief point is the value he places on an independent judiciary; but certainly that independence is not lessened if judges are held to high standards of conduct in their off-bench activities. Independence of the judiciary, that is to say, can only refer to the ability of judges to operate *in their official duties* on the bench without fear or favor; and being called to account, if they are judges of lower courts, by the appellate review process, or if they are Supreme Court Justices, by constitutional amendment (or by statute in the growing number of cases that involve interpretation of statutes). Accountability, of course, is also effected by impeachment—and apparently—by the informal suasion of chief judges.⁴¹ Justice Black's fear, stated in his dissenting opinion in *Chandler*, that "the hope for an independent judiciary will prove to have been no more than an evanescent dream" may be dismissed as mere hyperbole, insofar as it refers to extra-judicial activities of judges. Black and Douglas consider the act of the Judicial Council of the Tenth Circuit concerning Judge Chandler to be unconstitutional; in other words, they believe that judges cannot formally police themselves, even when aided by statute.⁴² The majority of the Court thought otherwise and thus apparently made it possible for the judiciary to govern itself—"apparently" because the majority opinion by Chief Justice Burger is noteworthy for being circumspect.

2. *How, if at all, does delay in the courts lead to lessened confidence in their operations?* The question, of course, refers to the operations of *courts*, rather than of *judges*; but the two are inseparable. That the American system of justice (in the sense of producing decisions, without regard to their substantive content) is little better than in the days when Pound spoke (1906) has already been mentioned. Chief Justice Burger's concern reflects a deplorable situation, both in criminal and civil matters. It is common knowledge that persons accused of crimes are often not brought to trial for months, sometimes years; this, it would seem, is one of the motivations behind the "preventive detention" part of the newly enacted crime control bill for the District of Columbia.⁴³ Often, furthermore, the accused is per-

of the military services, "like other people," are entitled to "the full freedom of the first amendment." Judges accept certain limitations on their freedom when they ascend to the bench. It could scarcely be otherwise. Not even Justice Douglas, I would surmise, would go so far as to say that judges have a first amendment right to take part in public partisan political activities. If judges do not like being limited, they can always resign; after all, the 13th amendment is still on the books.

⁴¹ *Hearings of the Subcomm. on Separation of Powers, supra* note 14.

⁴² Of course it is true that 28 U.S.C. § 332 is ambiguous, and the legislative history inconclusive as to its meaning; but as with many statutes, it is subject to growth and extension through interpretation. Cf. Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 VA. L. REV. 23 (1956).

⁴³ In a peculiar bit of logic, Congress, in its infinite wisdom, has concluded that if because of crowded dockets, suspected criminals cannot quickly be brought to trial, then at times they should be incarcerated until trial. In other words, Congress by not increasing the number of courts or streamlining the system, makes it impossible to get a speedy trial; and then decrees that suspects should be jailed until the slow pace of criminal law enforcement reaches the particular defendant's case. This may make sense to the

mitted to "cop a plea" as a way of speeding up the dispensation of "justice" and getting dockets cleared, for as the Chief Justice noted in his "state of the judiciary" speech in August 1970, the only way in which the system works at all is because most defendants confess. A diminution of just ten per cent in the number of confessions would, according to Burger, throw the courts into complete confusion.⁴⁴ In civil litigation, the situation is far worse. In some states, tort cases are three or four years in arrears, and suits in contract are hopelessly bogged down. Conditions in the settlement of estates, as in the New York surrogate courts, are also critically deficient.

Delay, of course, is not necessarily attributable to judges alone, although the lazy judge is not uncommon, and there are some who seem to be unable to reach decisions after a trial has been held, possibly because the issues and evidence are so complex. The bar must also bear much of the deserved opprobrium heaped upon courts; lawyers constantly requesting, and being granted, continuances do not engender respect for the profession. Legislatures, too, may be faulted, principally because they have failed to keep abreast of rapid growths in population and increasing demands placed upon the judicial system.

Whatever the cause, however, there can be little doubt that public confidence is diminished by delay in the administration of justice. The remedy, in general, is clear: Speed the process. That justice delayed is justice denied is not an empty truism; as with all such propositions, it is solidly based on fact. How to accelerate the flow of decisions is a much harder problem. Increasing the number of courts would help, as would improving the performance of the profession.

If something like that is not done, a further diminution in the tasks of courts may well eventuate. Already much of commercial law has been removed, *sub silentio*, from the judiciary, the businessman not being able to wait for the tortuous path of litigation to end. Resort to the courts is practically unknown in international business; in domestic commerce, arbitration is ever more the norm. In other words, private judiciaries have been created to dispense justice in the disputes of businessmen. Furthermore, we seem to be on the verge of placing automobile accident cases, perhaps the bulk of tort litigation, in the hands of some sort of administrative tribunal. The analogy here is workmen's compensation, which for different reasons was de-judicialized several decades ago.

3. *To what extent does the competence of judges to handle complex social problems contribute to a lack of confidence?* This question shades off into the fourth (on the nature of the adversary system), but will be discussed separately. The problem is mainly one of comparative expertise. Are other tribunals (that is, administrative agencies) more competent in handling the immensely intricate problems of the modern day?

legislative (and bureaucratic) mind, but it seems so wildly nonsensical (and probably unconstitutional) that it must have come from Kafka or perhaps Orwell.

⁴⁴The Chief Justice's "state of the judiciary" message was made before the annual ABA meeting in August 1970 (mimeo.).

Three decades ago the answer, for many issues, was clear, admitted even by Supreme Court Justices:⁴⁵ the personnel of the agencies were said to be more competent. A large part of what has been given the generic label of administrative law in American law schools, particularly "scope of review," "standing," and the "substantial evidence" rule, is testimony to a desire, at times avid, on the part of judges to dodge ruling on complicated questions over which the bureaucracy had first—and, as it has turned out, usually the last—opportunity to decide. James M. Landis's lectures, *The Administrative Process*, published in 1938, were a benchmark of the intellectual approbation accorded to administrators. Congress established and delegated power to the agencies; and judges without reluctance recognized their own lack of technical expertise. That some evidence exists tending to show a present-day reversal of that posture of excessive deference to the putative competence of the expert does not mean that people generally, or litigants specifically, have any more confidence in judges than was shown in the past when the massive transfer of power to the bureaucracy occurred. The most that can be concluded is that there is also an increasing lack of public confidence in the bureaucracy; people turn to the courts, and even to Congress, as the only institutions extant that *may* be able to curb the bureaucrats.⁴⁶ The businessman, it should be noted, tends to try to trigger Congress, not the federal courts, when he is dissatisfied with decisions reached within the public administration—a phenomenon that has been little noted by administrative law scholars, but which should be, simply because it has resulted in Congress becoming, in part, a "super court of appeals." That is valid even for Supreme Court decisions, which because of the rise of administration tend to be statutory and thus "reviewable" by Congress, as the recently enacted "newspaper preservation act" indicates.⁴⁷

Is there a remedy for the lack of competence in judges? It is difficult to discover one. If the judges themselves admit personal incapacity to understand complicated questions—as did Chief Justice Taft, who said that he never wanted to decide "radio" questions, and Justice Frankfurter, who in *Roman & Nichols* expressly stated a belief in the superior ability of administrators⁴⁸—it is likely that they will be believed. When, they (or Congress, for that matter) try to retrieve power ceded to the

⁴⁵ E.g., *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 580-82 (1940) and 311 U.S. 570, 575-77 (1941). See K. DAVIS, *ADMINISTRATIVE LAW TREATISE passim* (1958, Supp. 1965) for an exhaustive listing of the cases. See also F. FRANKFURTER, *SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION* (1954); *General Bronze Corp. v. Ward Products Corp.*, 262 F. Supp. 936, 937 (M.D.N.Y. 1966) (Foley, J., speaking of the "senselessness of federal judges untrained in the patent art to pretend otherwise").

⁴⁶ Compare K. DAVIS, *DISCRETIONARY JUSTICE* (1968) with T. LOWI, *THE END OF LIBERALISM* (1969).

⁴⁷ Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (*U.S. Code Congressional and Administrative News*, Aug. 20, 1970). Passed in the summer of 1970, this statute permits newspapers to be excluded at times from operation of the antitrust laws. It is one more instance—two or three dozen can be counted in recent decades—where Congress overrules the Supreme Court. At times the businessman goes directly to Congress from the administrative agency, without even bothering to try to get judicial review of an agency decision; for example, when the FCC a few years ago proposed to put into administrative rule the "code of ethics" on commercials of the National Association of Broadcasters.

⁴⁸ *Rowan & Nichols*, *supra* note 45.

bureaucracy, it will be difficult and perhaps impossible. One thing that could be done would be to improve the way in which the adversary system operates; discussion of that will be deferred to Question 4, below. An obvious suggestion would be to upgrade the quality of our judges, state and federal, trial and appellate. But, here again, major difficulties obtrude.

One is the way in which judges are chosen. Whether elected or appointed, they tend to be drawn from those close to the politicians then in office (those politicians may, of course, be mere surrogates for those who wield real power in the American polity). Federal judges other than Supreme Court nominees must be cleared by the Senator(s) of the state from which they come, a system that has grown extra-constitutionally and that permits the Senate, through its power to consent to nominations, to exercise much control over who gets on the bench. At times nominations are so blatantly partisan or are of such inferior lawyers that they cannot be stomached even by the Senate, an institution that has never been known to be overly squeamish. In any event, Democrats appoint Democrats for the most part and Republicans are adept at finding qualified Republicans, all the while talking about the rule of law! Within each party, of course, there is a wide spectrum of philosophy and opinion; but it is no accident that judges seem to represent, speaking very generally and with some obvious exceptions, a "conservative" viewpoint. Perhaps this is because the profession itself is largely conservative or that law is, in essence, a conserving force within society or—possibly—because the American Bar Association, which tends to be a pillar of baroque orthodoxy, has become a part of the appointing process.⁴⁹ Even so, there are wide variances between judges, as Justice Douglas observed in *Chandler*: "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community." Justice Douglas's views will be adverted to again below; at present, the point is the simple but hard fact that judges vary in their handling of cases and (what Douglas did not say) in their intellectual capacity. More, they are distinctly not renaissance men, and by no criterion can be expected to have expertise in all of the issues that come before them for decision.

⁴⁹ In the summer of 1970 the Attorney General announced that, contrary to the past, the ABA would be used to screen prospective Supreme Court nominees as well as judges for lower courts. *N.Y. Times*, July 15, 1970, at 16, col. 8. This informal system of making the bar a part of the appointing process tends, among other things, to break down the line between public and private in the American constitutional order. *Cf.* Miller, *supra* note 6. It may seriously be doubted that lawyers alone should have that power and responsibility; if screening of nominees is to be done, surely it would be better if the reviewing body were made up of a representative sampling of the citizenry, not just the fat-cats of the ABA. Once it is openly recognized that judges do make law (see text at Point No. 6, below), certainly others than members of the legal guild have an interest in who makes the laws.

Better quality judges would, in short, be a boon, but one should not expect that their appointment would be a panacea (even if they can be identified and get by the political process of elevation to the bench).

But if judges cannot be widely competent, perhaps the judicial institution can be altered to provide them with a higher grade of assistance. At the present time, judges must rely on antiquated machinery and inadequate "internal" personnel to provide them with the data necessary for decision. "External" personnel—*i.e.*, the lawyers—aside, the system which allows a judge to have merely a law clerk or two—and then usually neophytes whose main claim to expertise is law review experience at some relatively adequate law school—is so obviously short of what is needed that only that built-in inertia that is epidemic within the legal profession could tolerate it. Judge Charles Wyzanski recognized this several years ago in the *United Shoe* case,⁵⁰ an antitrust decision, when he named economist Carl Kaysen to be his temporary "law" clerk to advise him on the economics of the problem—an experiment that, to my knowledge, has not been repeated. Justice Frank Murphy, whose intellectual talents were minor at best and who was a reluctant member of the High Bench, solved his problem by keeping law clerks for as long as five years and, as noted above, by talking over pending cases with his lawyer-friend, Edward Kemp.⁵¹ The former practice has much in its favor, but the latter strays far over the boundary of propriety. Perhaps law clerks should be drawn from lawyers with at least ten years of practice or from the academic community. Moreover, they could well be augmented by behavioral science experts.

Such a "solution" is not very promising. Possibly it would be preferable, as Professor Louis Schwartz has argued,⁵² to recognize that judges cannot be expert in everything, but that they, as social generalists, can be considered to have special talents in the ordering of priorities and values within the community. But if so, this would mean that the bureaucracy would be firmly in command and that the sporadic judicial decision overturning the public administration is not likely to make much difference in the way that the bureaucrats operate. In other words, the day-to-day routine governing power in the United States is now in the hands of the executive-administrative branch, and neither the judiciary nor Congress seem able to do much to alter the pattern. Nor is there much evidence of a real desire to do so—by judges, by members of Congress, by lawyers, by important interest groups, or by the people generally.

4. *Does the adversary system contribute to a diminution of confidence in the judiciary?* During the 1930s much was made by the legal realists of "trial by combat" in American courts, a theme echoed by Eldridge Cleaver in *Soul on Ice*:

⁵⁰ *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953). See C. KAYSEN, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION; AN ECONOMIC ANALYSIS OF AN ANTI-TRUST CASE* (1956).

⁵¹ Discussed in HOWARD, *supra* note 34.

⁵² Schwartz, *Legal Restriction of Competition in the Regulated Industries, An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

"In a culture that secretly subscribes to the piratical ethic of 'every man for himself'—the social Darwinism of 'survival of the fittest' being far from dead, manifesting itself in our rattrace political system of competing parties, in our dog-eat-dog economic system of profit and loss, and in our adversary system of justice wherein truth is secondary to the skill and connections of the advocate—the logical culmination of this ethic, on a person-to-person level, is that the weak are seen as the natural and just prey of the strong."⁵³ Whether or not one subscribes to that sentiment, there can be little question about certain basic shortcomings of the adversary system of dispensing justice in American courts; they include (a) the lack of judicial expertise discussed above; (b) a similar shortcoming in the bar generally; this is manifested *inter alia* by a failure of lawyers properly to argue cases (antitrust is one example); the "external" personnel of the judiciary, on the whole, are badly educated and indifferent practitioners; (c) the hit-and-miss character of litigation, which must await the coming of a proper plaintiff before the system can get into operation; (d) the high cost of litigation, which subtly but obviously tips the scales of justice in favor of those with wealth sufficient to bear those costs; (e) an inability of judges to forecast the impact of their decisions, to weigh, as Holmes said, considerations of social advantage; (f) the tendency of judges to go outside the briefs, record, and argument of counsel to inform themselves about the case at bar; and (g) intellectual adherence to the long-exploded theory of judicial decision-making, often attributed to Blackstone—the so-called "declaratory" theory under which the judge ostensibly has no creative role.

Much of this has been discussed elsewhere,⁵⁴ so that no present elaboration is required, and the last factor will constitute Proposition 6 in this listing. It is not to be denied that the adversary system rewards those who can retain the most competent counsel; and further that litigation often is simply too expensive for any except the rich or the government to pursue. My conclusion, admittedly intuitive, is that this contributes in large degree to lessening confidence in the judiciary, a situation not enhanced by the continuing failure of bench and bar to do much to improve such obvious inadequacies.

Is there a remedy? In general terms, yes: the entire system requires thorough study and revamping, so as to make it a more useful and (dare I use the term?) just instrument. This will not be done by merely pecking around at the edges, such as rewriting procedural rules, important though those reforms may be; it will be accomplished only when there is a commitment to complete re-examination. First, however, there must be wide recognition that a problem exists, and by no means is it certain that lawyers or judges or laymen would agree on that. The adversary system is a product of the pre-scientific age, of feudal days, and is best suited for the settlement of the penny-ante disputes of *meum* and *tuum* that once were the main concern of private law. Today, however, law is either all public law or is dominated by public

⁵³ E. CLEAVER, *SOUL ON ICE* 85 (paperback ed. 1968).

⁵⁴ Miller & Scheffin, *supra* note 15; Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199.

law—a fact that American legal theorists have, with some notable exceptions, ignored—and the system is employed in contexts and situations far different from that for which it was originally designed or developed. So, change there should be, deep and thoroughgoing—but let no one be sanguine that it will occur.

5. *To what extent do “dual standards of justice” lead to diminished respect for the judiciary?* Carved deeply on the facade of the Supreme Court building in Washington is the phrase “Equal Justice Under Law,” a concept written into the Constitution in the equal protection clause of the fourteenth amendment (which, by a process of reverse incorporation is at times applied against the national as well as state governments).⁵⁵ How valid is it? To some, even to pose the question is heretical. But the history of American law furnishes a number of examples in which equality is more mythical than real. Some have been mentioned above—the manner in which tort law during the nineteenth century tended to favor the businessman at the expense of the workers (which led to workmen’s compensation, a system by which the legislatures deprived courts of their jurisdiction) and second, the way in which judges were so notoriously anti-labor in issuing injunctions and also in striking down social legislation that numerous statutes were enacted, statutes finally upheld in the constitutional revolution of the 1930s. Such a history is not likely to make the unions revere the courts. Judges are not fungible, as Justice Douglas said; he could have gone on to state that law, when it comes to litigation, is far from certain and that judges are accorded a far greater degree of discretion than what Jerome Frank called the “basic myth” allows.⁵⁶ The art of judging is that of making choices from between inconsistent principles or standards. In exercising that “sovereign prerogative of choice” judges are distinctly not guided by adherence to “neutral principles,” nor are they wholly objective. Being human, they tend to pursue a set of values deemed important to themselves and to the peer group(s) with whom they identify.⁵⁷

Nowhere is this better seen than in the way in which Negroes are treated in the administration of the criminal law. Wolfgang and Cohen, in their recent careful study, *Crime and Race*, conclude: “In striking ways, the administration of justice appears to fail in affording equality of treatment, so fundamental to a democratic society.”⁵⁸ Blacks tend to be treated more harshly than whites by the police (although other non-whites, such as Mexican-Americans, also receive like treatment, as do disadvantaged whites); blacks are more often convicted after indictment, get harsher penalties (including the death sentence), and receive fewer commutations of sentence, or releases on parole, particularly when inter-racial crimes are concerned. On the other hand, Negro crimes committed on other Negroes are often treated with marked

⁵⁵ *Bolling v. Sharpe*, 348 U.S. 886 (1954) is a leading case.

⁵⁶ J. FRANK, *LAW AND THE MODERN MIND* (1931). To Frank, the basic myth was the Blackstone theory.

⁵⁷ Cf. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

⁵⁸ M. WOLFGANG & B. COHEN, *CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS* 100 (1970).

indulgence, as John Dollard pointed out in his classic account of social life in a small southern town:

[T]here are different standards of justice for the two castes. While persons are held much more strictly to the formal legal code; Negroes are dealt with more indulgently. It is not a question of different formal codes for Negro and whites, but rather of differences in severity and rigor of application of the code that does exist. This is true only under one condition, however—when Negro crimes are committed on Negroes; when they are done on whites, the penalties assessed may rather be excessively strict. . . . Indeed, this differential application of the white law is often referred to as a merit by Southern white persons; one will be asked to notice that they are lenient and indulgent with Negroes and that Negroes are not nearly so severely punished as whites would be for the same crimes. It is clear that this differential application of the law amounts to a condoning of Negro violence and gives immunity to Negroes to commit small or large crimes so long as they are on Negroes.⁵⁹

Differences in treatment lead to negative attitudes toward the law and the legal system, which are held in either silent contempt or outright derision.

Can a black get a fair trial in the United States? The question is seriously posed. Haywood Burns, national director of the newly formed National Conference of Black Lawyers, answers it flatly: "If by fair one means free of bias, the answer has to be generally NO." Burns asserts that the law discriminates against blacks (and poor people). His principal concern, of course, is with Negroes: "It is folly to say that ours is a government of laws, not men. Laws are made, interpreted and applied by men—and in America's case by men in a racist society. Ultimately, there is the simple and obvious truth that the judicial system is run by people, mostly by white people and that most white people are racially biased."⁶⁰ Whether or not one agrees with that, it cannot be gainsaid that ours is a Jim Crow society—sixteen years after *Brown v. Board of Education* and more than a century after the Emancipation Proclamation. (It should be remembered, of course, that the original Constitution made express provision for human slavery.) The conclusions of the Kerner Commission⁶¹ that America is moving toward two nations—one white and one black—may be said to have been anticipated in the manner in which the legal system has operated in the past and still operates throughout the country. This, it should be emphasized, is *not* a regional (southern) phenomenon; it is nation-wide. "Daily," maintains Burns, "in courts throughout the country, black and poor defendants suffer the humiliations of a legal system which refuses to accord them full recognition of their dignity as human beings."

I happen to believe that Burns's assertions are valid—and not only in the criminal

⁵⁹ J. DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 279-80 (1937).

⁶⁰ Burns, *Can a Black Man Get a Fair Trial in This Country?*, N.Y. Times, July 12, 1970, at 5 (Magazine). See Mapes, *Unequal Justice: A Growing Disparity in Criminal Sentences Troubles Legal Experts*, Wall St. J., Sept. 9, 1970, at 1, col. 1.

⁶¹ See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

law, but in such other areas as creditors' rights, landlord-tenant law, commercial transactions, and in the way in which administrative agencies, state and federal, deal with the poor and non-white. Kingman Brewster was on the mark, in my judgment, when he said: "I am appalled and ashamed that things should have come to such a pass that I am skeptical of the ability of black revolutionaries to achieve a fair trial anywhere in the United States."⁶² More important, however, than whether Burns and Brewster are correct, in the sense that hard evidence can be produced to validate their positions, is the fact that many non-whites and poor people think that dual systems of justice prevail in the United States. Surely the ineluctable consequence is diminished respect for law and for the judiciary. Perhaps I should make it clear that the position taken is general, not specific; I am not passing judgment on, for example, the trial of the Black Panthers in New Haven. What I am saying is this: Given the totality of impacts of the legal system on members of the black (and other underprivileged) communities, it is at least an open question, and probably a working hypothesis, that justice in the sense of fairness and equity of treatment is simply often not available to those segments of American society. The situation may be changing, at least in part, as a result of recent legislation—such as the Office of Economic Opportunity programs—but the very fact such legislation could be enacted is impressive testimony of the proposition advanced.

The picture is not all gloomy. For example, during recent years the Supreme Court has attempted to make the scales of justice balance more evenly; and civil rights legislation, state and federal, is on the books. But the Court, the myth to the contrary, is a relatively feeble instrument of governance,⁶³ and it is by no means certain that the civil servants in the bureaucracy, as well as their counterparts in the private bureaucracies of business and labor, have any deep-felt commitment to putting legislative norms of legal equality into operational reality. As another example, blacks and others are at times using the courts in efforts to further their own goals—"working within the system," in current jargon, to turn American society around. Environmentalists, for instance, are employing law (and inventing new legal theories) to try to get courts and agencies to act against the polluters⁶⁴—a monumental task, to be sure, but one necessary to try even through ultimate victory is difficult to foresee.

These are exceptions, however. The growing belief, particularly among blacks, that the system's rules discriminate against them is ever more the pattern. It is a dangerous view, one with ominous portents for the United States. As someone said at the time of the trial of the "Chicago Seven," "Who wants to live in a country where he is forced to choose between Abbie Hoffman and Judge Julius Hoffman?" That choice is no choice at all, and if that is all we have, then we are in for it—and

⁶² Quoted in Burns, *supra* note 60.

⁶³ See Miller & Schefflin, *supra* note 15; and compare BICKEL, *supra* note 2.

⁶⁴ See, e.g., Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

we had better realize it soon. There is no easy or simple way out of such a morass.

The problem is complicated by the backlash of the know-nothings against the courts, especially the Supreme Court and former Chief Justice Earl Warren. Whether from ignorance, the extent of which is boundless, or from partisan political motives, the majority of the Justices of the Warren Court have been accused of such "derelictions" as "coddling criminals" and "protecting subversives"—in other words, of applying some dual standard of justice. Similar reactions were evident concerning racial segregation and the school prayer cases. One Congressman accused the Court of "legislating—they never adjudicate—with one eye on the Kremlin and the other on the National Association for the Advancement of Colored People."⁶⁵ The know-nothings have received powerful intellectual support from a little cult of law and political science professors, most of whom are apparently disciples of the late Justice Frankfurter, who decry the product of the Warren Court as being "unprincipled" or not in accord with the law "as it has been received and understood." That these professorial attacks on the High Bench are aimed more at the reasoning of the Justices than, as with the know-nothings, the results, is beside the point. Both believe that the Court acted improperly—and as such, both may be said to lack confidence in at least that important segment of the judiciary. That neither group contributes to a fuller understanding of constitutional adjudication is also irrelevant. They do not, save to serve as examples of what should *not* be done in commenting on judicial activity.

A further aspect of the problem of dual standards of justice exists—that of selective enforcement of the law by officials in the executive-administrative branch. Surely it does not contribute to respect for law and its administrators to see, for instance, an 1899 anti-pollution statute systematically ignored by the bureaucracy, while simultaneously other statutes are at times harshly enforced by other agencies—as in the case of midnight searches of the homes of people on welfare. An aspect of selective enforcement is the manner in which some groups can trigger Congress to overrule the courts of agencies, as in the above mentioned Newspaper Preservation Act of 1970. As Professor Stephen R. Barnett put it in *The New Republic* (July 18, 1970, at 11, 12), that statute presents "a nice lesson in law and order. When powerful publishers break the law—a criminal law at that—they are not even compelled to obey it in the future. They telephone their congressmen, hire some lobbyists, and get Congress to change the law for them." Can there be any wonder when others sneer at law and law enforcement?

6. *Do misconceptions of the public on the nature of the judicial process result in less confidence in the courts?* In other words, is there symbolic value in adherence to the Blackstone declaratory theory of adjudication, which, as Professor Paul Mishkin has said, may be "in part myth" but "which can be sacrificed only at sub-

⁶⁵ Pollak, *W.B.R.: Some Reflections*, 71 *YALE L.J.* 1451, 1455 n.17 (1962).

stantial cost?"⁶⁶ That cost, to Mishkin, is public disrespect for and lack of confidence in the Justices of the Supreme Court. That is to say, if it became generally believed that the Justices are not rigidly bound by these external principles called law, but can and do read some of their own valuations into their decisions, would that blackened image of the judiciary contribute to lessened esteem?

These three ways of asking the same question all founder on the same rock: The well-nigh complete lack of verified empirical data upon which one can base conclusions about the role of the declaratory theory. I have discussed the matter elsewhere, so that there is no present need to repeat what was said there—save to quote conclusions gleaned from a questionnaire sent to experts on the Supreme Court:

The results of the survey, admittedly sparse and by no means unanimous, seem to indicate that experts hold the following *beliefs* about the Supreme Court and the symbolic value of the declaratory theory: (1) the American people generally have little or no knowledge about how the Court operates; (2) they probably do not care and would not take the trouble to find out; and (3) they are probably more interested in *what* the Court has done in a substantive sense, rather than how it accomplishes the result.⁶⁷

As a working hypothesis, then, the American people tend to accord a high degree of respect to courts when there is agreement with the results that are reached in decisions. The reasoning of judges, mainly appellate, is important principally to a small coterie of commentators on judicial activity—they who look for neatly phrased and logically coherent explications of the results. They articulate a desire for an *elegantia juris*, seeking aesthetic satisfaction in what they consider to be properly written opinions. As such, they fail to see that judicial decisions must, in any ideal model, be both logically consistent *and* sociologically non-arbitrary.

With the spread of mass higher education and dissemination of the teachings of the legal realists, more and more laymen are beginning to understand, at least partially, some of the heretofore locked-up mysteries of the nature of the judicial process. They also realize the shortcomings of the human mind, both on and off the bench. While not asking the impossible of judges, they do request that judges take part, as Alexander Pikelis once put it, in "the travail of society"⁶⁸—to be, that is, avowedly instrumental as well as interdictory in their decision-making, to espouse a set of values fit for a polity that considers itself democratic in the age of science and technology. Knowing more about courts, they ask more of judges, possibly because, as in the segregation cases, they are the only public officials not deeply immersed (outwardly at least) in the political process. To continue to insist upon calling a judge a neutral automaton, when all human experience refutes that notion, is to be wilfully blind. If judges are to take a more important part in the governance of

⁶⁶ Mishkin, *supra* note 15.

⁶⁷ Miller & Scheffin, *supra* note 15.

⁶⁸ A. Pikelis, *The Case for a Jurisprudence of Welfare*, in *LAW AND SOCIAL ACTION* 1, 40 (M. Konvitz ed. 1950).

America—a proposition which, although fraught with danger, may be vital to the protection of constitutional liberties—then there must be frank and open recognition of the facts of adjudication. The secrecy that has in large part surrounded the internal operations of courts should be eliminated. Good government is open government: Is there any reason why the spirit of the “freedom of information” act should not be rigidly applied to all organs of government, including courts? Once it is conceded that judges can and do make law—and that, indeed, they cannot avoid doing so—then a compelling case can be made for opening up their activities to the full scrutiny of the public.⁶⁹ After all, if the Swiss Supreme Court can conduct its affairs openly, why not the American—even though it is doubtless more important in a comparative way?

The mass media generally have not been of help in explaining how courts operate. In the main, they have contented themselves with reporting the bare facts of what courts do, and what others say about judges, not with analyzing and explicating their role in American government. Accordingly, the media have contributed little to a greater understanding of adjudication so necessary in a democratic polity. American scholars have not done much more. They have failed to see the burgeoning need of helping, in small part, to attain the rule of law which might be accomplished by writing for the layman (as Dean E. N. Griswold once advocated)⁷⁰ about the legal process generally or by subjecting present and proposed public policies to thorough analysis and criticism.⁷¹

IV

CONCLUSIONS

American judges are custodians of law, insofar as any such exist in the nation; as Chief Justice Marshall said in *Marbury*, it is “emphatically the province” of the judiciary to say what the law is. But if that be so (and it is at most a half-truth), then the ancient question, *Quis Custodiet Ipsos Custodes?*, immediately arises. Who, indeed, should put the judiciary’s house in order?

The question, as with all such matters, is not simply answered. Several alternatives may be suggested, no one of which seems entirely adequate: (a) the judges themselves, in a self-policing effort; (b) Congress, either directly or by setting up some agency to do it; and (c) the legal profession, acting through bar associations and with the assistance of the academic branch of lawyerdom. Perhaps it will take

⁶⁹ Justice Frankfurter, in an off-bench statement, asserted: “The fact is that pitifully little of significance has been contributed by judges regarding the nature of their endeavor, and I might add, that which is written by those who are not judges is too often a confident caricature rather than a seer’s version of the judicial process of the Supreme Court.” F. FRANKFURTER, *OF LAW AND MEN* 32 (Elman ed. 1956). Even lawyers, according to Chief Justice Roger Traynor, are not knowledgeable about how appellate judges reach decisions. See Traynor, *Badlands in an Appellate Judge’s Realm of Reason*, 7 UTAH L. REV. 158 (1960).

⁷⁰ Griswold, *Some Thoughts About Legal Education Today*, 11 HARV. L.S. BULL. 4 (1959).

⁷¹ See Miller, *The Law School as a Center for Policy Analysis* (forthcoming).

a cooperative endeavor of all together, with a further leg-up from the Executive (at least in the appointing process). The principle of an independent judiciary is too fundamental to be lightly dealt with. But complete independence, free from all checks, has never been true. Trial judges are subject to review and all judges are subject to legislative review, save in constitutional matters—and in those instances amendment is possible. No doubt the answer, if and when it comes, will be after long discussion, hammered out on the anvil of political compromise. Whether it will be adequate cannot be predicted.

This essay has posed some of the questions involved when considering the concept of public confidence in the judiciary. Enough has perhaps been said to show that a problem does exist, one that is difficult to state with precision because it has many facets and because its exact dimensions are unknown.⁷² It will not be easily resolved, for it is a segment of a larger lack of confidence in the American institutions of authority, both public and private.

A final note: much of what has been said in this paper is not based on compilations of factual data, simply because none are available. A great need exists for scholars, legal and otherwise, to make empirical studies of the questions posed in Section III and simultaneously to give rigorous thought to possible ways and means to rectify observed shortcomings in the judiciary. In so doing, much of the mythology enveloping the bench should be dissipated: if we are governed (at least in part) by judges, surely we are entitled, pursuant to democratic theory, to know not only who governs but how they do it. Greater knowledge *could* lead to greater confidence. That, I admit, is an article of personal faith. I cannot prove it; I simply believe it.⁷³

⁷² Since the text was written I have read Judge Skelly Wright's *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, and find much in it with which I can agree.

⁷³ Another question that bears upon the confidence some members of the public have in the judiciary concerns the extent to which it is thought that the courts are too lenient on suspected criminals. Many people so believe; they also believe that there is a direct correlation between judicial cognizance of the constitutional rights of criminal defendants and the rising crime rate in the United States. Whether that belief is valid has not been documented by empirical proof. See Miller, *Some Pervasive Myths About the United States Supreme Court*, 10 ST. LOUIS U.L.J. 153, 181-83 (1965). Its validity, however, is not the point; rather, it is that it is believed to be true. An analogue of this might be the way in which the judicial system may have been used for "political" trials, as in the case of Dr. Benjamin Spock. Cf. O. KIRCHHEIMER, *POLITICAL JURISPRUDENCE* (2d ed. 1970). Again, there are some who believe that the system is being used for "political" ends, a proposition that is at once controversial and unproved, simply because no data exist to show what motivates prosecutors, including the Attorney General of the United States.