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DEVisING PROCEDURES THAT ARE CIVIL TO PROMOTE JUSTICE THAT IS CIVILIZED†

*Maurice Rosenberg**

I. INTRODUCTION

DISCUSSING procedure and process in this era is not likely to set our blood to pounding. It seems a thin gruel to serve in times like these when we have so many meat-and-potatoes evils to worry about—so many flaming substantive issues to quench: air we can see but not breathe; water we can smell but not drink; cities crumbling; students rumbling; crime raging; wars waging; drug abuse expanding; and brotherhood contracting.

Yet, in my book, procedure is important. Hastily, may I say that I am not by that comment inserting a sly plug for the casebook that Arthur Miller foregoes using in his Civil Procedure course at Michigan, or that Ben Kaplan eschews in his Civil Procedure offering at Harvard.¹

In a democracy, process is king to a very large extent, and this is especially so in the judicial branch. Even though substantive laws command attention, procedural rules ensure respect. Why is this true? One powerful reason is that when people end up in court, their case typically is not a matter of right against wrong, but of right against right. Decent process makes the painful task of deciding which party will prevail bearable and helps make the decision itself acceptable.

To put my position plainly, I believe that the road to court-made justice is paved with good procedures. Later on we shall have a look at what I mean by "good." For now, it is enough to note that procedures cannot be "good" or "bad" in isolation, without relation to their context. They must be viewed as part of an enlightened system of judicial administration, criminal and noncriminal. They must fit into a whole. The law may in some sense be a seamless web, but in the administration of justice separations are necessary and must be

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1. M. ROSENBERG, J. WEINSTEIN & H. SMIT, *ELEMENTS OF CIVIL PROCEDURE* (2d ed. 1970). *But cf.* J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE, CASES & MATERIALS* (1968), and R. FIELD & B. KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* (temp. 2d ed. 1968).

No plug, indeed!—Ed.

recognized. Some lines must demarcate the spheres of courts and some must demarcate the spheres of other agencies of justice, such as legislatures, official boards, or even private entities. One of today's problems is that the seams are not showing clearly enough. To devise better court procedures, we must at some point determine what special role courts—in contrast to other agencies—can most usefully play in delivering justice to the people. This definitional process will help us know which quarrels and conflicts courts ought to countenance and which they should leave to other social instrumentalities.

II. PROMOTING QUALITY JUSTICE—JUDICIAL ADMINISTRATION

Procedural rules have to be seen not only as performing their particular functions, but also in the context of the judicial process as a whole. In the round, they are one unit in the system designed to promote quality justice through that process—an element in the science of judicial administration. When we examine the state of judicial administration in this country, we encounter the paradox that the science is alive and well but the patient is failing. "Crisis" is the word most commonly used to describe the status of our judicial system.

Nonetheless, foreign judges and scholars throng here to study our methods of judicial administration. Some might think these pilgrimages akin to visiting a morgue to learn health habits. But in my opinion the visitors are right to make them. In this nation we have invested more energy, attention, concern, and resources than has any other place on earth in an effort to upgrade judicial administration. That the investment has left us far short of perfection is an obvious understatement and a fact that is no secret abroad. Then why do our friends keep visiting?

My speculation is that the jurists who come here from France, Germany, Italy, Japan, and other nations, west and east, appreciate our realism and devotion more than our achievements. While their court problems differ in kind, their interest runs parallel to ours. Like us, they need new information and methods to improve their courts and are prepared to go outside the traditional domain of lawyerly knowledge for help, as we are doing here.

Last May a contingent of Italian jurists made an extended visit to judicial-administration centers in this country, equipped with a comprehensive "Program of Study and Research" and with introductions arranged by our State Department. Their agenda disclosed a wide range of up-to-date interests. The visiting judges

wanted to know what our specialists in court systems could tell them about a sophisticated list of judicial-administration items. They wanted to learn all they could about the adaptability of management-science principles to courts; about cost-benefit analysis; about advanced data collection techniques, including the effective uses of interviews and questionnaires; and about new types of hardware for storing and processing data. They asked about new methods of making systematic studies of procedural rules in operation and about many other sophisticated developments in judicial administration, management, and evaluation.

The Italians' questions contrast interestingly with the program proposed in July by an American Bar Association Task Force on Standards of Judicial Administration (Task Force).² After canvassing several principles it regarded as accepted and correct, and after ticking off some notable failings in the administration of justice in federal and state courts, the Task Force reported:

The greatest need and opportunity for fresh effort in judicial administration concerns the quality of justice itself. Standards and techniques concerning court organization, procedure and management are not enough, for they do not deal directly with the quality of justice as it reaches each individual citizen who becomes involved with the courts as a litigant, complainant, witness, juror or public observer. In our opinion a major effort is required to improve the quality of the administration of justice and to establish standards to advance this goal.³

It is clear enough that the Task Force effort is designed to go beyond organization, procedure, and management for courts. How far beyond ought it go, and into what areas?

The reference to "quality of justice as it reaches each individual citizen" is not to be thought of as a call for standards that will assure perfect, neverfail, hand-crafted justice in each and every case. The Lorelei and Sirens are waiting to wreck the ships of reformers who set their courses by the loveliest stars instead of by those that will bring them to port. We shall be self-defeatingly quixotic if we try to devise a system of Rolls Royce judicial treatment to deliver perfect justice in each of millions upon millions of cases. We need the highest quality we can possibly achieve in our system, our procedures, our management methods and personnel, and in the judges who preside in our courts. This focus on the apparatus of justice is not indicative of lack of solicitude for each litigant as a singular and worthy person

2. ABA TASK FORCE ON STANDARDS OF JUDICIAL ADMINISTRATION, REPORT (1970).

3. *Id.* at 3.

entitled to our deepest concern. On the contrary, it is concern for the individual that compels a view of the conditions of justice in breadth and depth.

We must never forget that it is a mass-phenomenon problem we are at grips with—one immensely complex and stubborn. Part of the reason we have had so much difficulty in gaining ground on it is our eagerness to find once-for-all, perfect, and plain solutions. But solutions that seem obvious also seem not to work. For example, why not just add more judges? The answer, sad to say, is that creating new judgeships has not resulted in keeping the courts abreast of their workload. Senator Joseph D. Tydings called attention to this bleak truth when he pointed out that

[b]etween 1951 and 1966 we continued to add new judges to the federal district courts, but the total backlog in those courts increased by more than 15 percent.

. . . In recent years despite a 25 percent increase in judicial manpower, the federal courts were able to step up the disposition of cases by only three percent.⁴

We can be confident that the Task Force is aware of these troublesome facts and will not take the simplistic “add-judges” approach to improved standards. I hope the Task Force is also aware of other fool’s-gold of this sort, and goes at its work with determined, imaginative, and persistent devotion.

Past efforts to improve judicial administration by fell swoops and bold strokes have uncovered some tried and true pitfalls. One of the best ways to fail is to approach the problem as if the whole venture consisted of finding a set of vaccines for a set of judicial ailments. A good example of that approach is a pamphlet entitled *Ten Cures for Court Congestion*,⁵ a famous list of unsuccessful prescriptions concocted in the 1950’s. Apodictic imperatives of that kind are losers. They look good on the front cover of the brochures, but they do not work. They have to be put to one side, along with various other sure-cure panaceas and three-minute recipes for happy courts.

To the same limbo must be consigned the bagful of tinkering and patchings that includes split trials, interest from the day of injury, inducements to waive jury trials, statements of readiness or of super-readiness, and other gimmicks aimed especially at personal-injury litigation. When the Titanic is sinking, there is no use in bailing water with thimbles.

4. Tydings, *Modernizing Our Courts*, 4 GEORGIA ST. B.J. 84, 85-86 (1967).

5. ABA SPECIAL COMM. ON COURT CONGESTION, *TEN CURES FOR COURT CONGESTION* (1959).

The first hope is to attain some perspective on our problems: the glutted calendars and mobbed courtrooms; the unconscionable delays, alternating with rush-rush-rush; the mistreatment of jurors and witnesses; the excessive expense; the tarnished image of justice for millions of Americans. These are chiefly ills of big-city courts—New York and Chicago being uninspiring examples. Other countries have big cities, too—Tokyo, London, Rome. Yet they seem not to be afflicted as badly as we are in their efforts to deliver civilized justice through courts. Why?

Comparative studies may be instructive. But the help we need will not, in my opinion, come in the form of importing specific rules or practices from the British or Italian systems. Rather, it will come from the opportunity the comparisons give to hold up a mirror to our own pluralistic system, free from the distorting effects of viewing the too familiar from too close up. Thus, in these lectures, my colleagues will draw upon their experiences as eminent comparatists to stimulate our capacity for self-appraisal. My focus, on the other hand, will be upon insights, real or imagined, gained by empirical studies in the "field," where one can systematically observe procedural rules and practices in action and attempt to gauge their impact.

In a world that is ever more oriented to empirical inquiry—fact-happy, statistics-conscious, and science-minded—the law has joined the procession belatedly. Yet join it has. Now, lawmakers commonly hold hearings, call upon experts, study statistical tables and charts, and so forth, before they enact new laws. They usually look before they legislate.

Less popular has been the procedure of looking after they legislate. Until recently, it was very rare for a legislative body to employ evaluation research or impact studies to find out whether the injection of new law had made any difference. This oversight is traceable to an odd conceit of the law that can be summed up in terms familiar to every law student. The three commandments of legal reform are

- (1) Identify the "evil to be remedied."
- (2) Pass a law to remedy it.
- (3) Go on to the next evil.

Law reform has had a strong addiction to the motto of Satchel Paige, the baseball pitcher and sage extraordinaire, who used to advise: "Never look back. They might be gaining on you." That is fine advice for aging ballplayers, but poor practice for lawmakers.

Happily, the new look in law is intent on finding out how rules function in fact and not only in thinking about how they ought to.⁶

III. PUTTING "QUALITY OF JUSTICE" IN FOCUS

If we all agree that we want standards of quality in justice, how shall we go about setting them? Is "quality justice" definable, or is it like Justice Stewart's dictum about hard-core pornography—something I can't define, "But I know it when I see it . . ."?⁷

Is quality justice like beauty—relative, and existing only in the eyes of the beholders? If so, are the beholders all those whom we encompass anonymously in our minds when we proclaim that justice must not only be done but must be seen to be done? That would encompass litigants, lawyers, jurors, witnesses, spectators, and the larger public that becomes aware of the case and its course. To measure quality from that standpoint would require public-opinion and attitude surveys about the law, courts, judges, lawyers, and the whole judicial panoply. Surveys of that sort are interesting and instructive, but, given the fleeting character of what is deemed to be good and beautiful in the public fancy, one would not want to hitch the quality of justice to the passing bandwagon of popular fad.

There *must* be intrinsic elements in justice of good quality. It is these we must identify if we can, rather than depending upon public attitudes or opinions about the system and its parts.

Our system does contain recognized categories and clusters of values that might be regarded as standards or criteria of quality justice. Category A is the due process cluster—the constitutional imperatives that have evolved as guarantors of basic decency in our civil-litigation process: fair notice, opportunity to be heard, and trial by a tribunal that is both impartial and jurisdictionally related to the litigants or their dispute. In addition, we might include in this category the Supreme Court's doctrine in *Hickman v. Taylor*⁸: "Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation."⁹

Category B is made up of values that are not elements of ordered liberty in the due process sense, but nonetheless are basic and traditional. One basic value is that litigants shall have easy access to courts. Reflecting the strength of this value are several related practices: filing costs are low, legal fees are often contingent, and the loser need

6. Rosenberg, *The New Looks in Law*, 52 MARQ. L. REV. 539 (1969).

7. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart, concurring).

8. 329 U.S. 495 (1947).

9. 329 U.S. at 507.

not reimburse the winner for his litigation expenses. Other basic policies are implicit in the principles favoring an opportunity for vigorous cross-examination of adverse witnesses and insisting that the first-round loser shall have a chance at review by a collegial court. Still another policy reflecting basic values in this category is the heavy stress on the desirability of deciding cases on their merits rather than upon procedural missteps.

Category C encompasses the human equation: judges and lawyers of probity, capacity, and merit. The Task Force will surely be interested in these human factors in quality justice, for the American Bar Association has long urged selection of judges on merit and has recently produced a new Code of Professional Responsibility¹⁰ that gives hope of improving the breed of lawyers in the place where it counts most—the realm of their professional conduct.

Category D consists of those subtle factors or elements the presence or absence of which in various degrees might affect our confidence that a fair tribunal would reach a correct decision. They are relevant for assessing whether some trials are “better” or “worse” than others; not on the score of due process or the traditional values (all of which are hypothesized to be present in both groups), but with regard to characteristics soon to be suggested.

Category E consists of energy-conserving criteria that do not enter directly into the adjudication; they concern efficiency.

Where is improvement in quality likely to be made? Quite clearly, the due process standards that appear in Category A are beyond both the Task Force's power and desire to change. Rather, a Standards Commission will probably affirm in the strongest terms its devotion to the short list of constitutional and Supreme Court commands.

As to the basic and traditional aspects of common-law litigation embraced in Category B, again the strong likelihood is that no one will urge that any be dropped or curtailed. Easy access to courts, low costs, cross-examination, and the other practices in group B are not, as I see it, in danger of extinction in the name of improving quality.

Category C—the human equation—is a logical area in which to attempt to improve the quality of justice. The Task Force will undoubtedly look closely at the personal element in the judicial system, since high quality judges are a *sine qua non* of high quality justice.¹¹ In terms other than quantitative the human factors are

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS (1970).

11. Rosenberg, *Frank Talk on Improving the Administration of Justice*, 47 TEXAS L. REV. 1029, 1031 (1969).

most difficult to evaluate in isolation. Rather than analyzing them separately at this point,¹² we can, in my opinion, gain some insights into these human traits by looking at the elements in Categories D and E—those that relate to “trial quality” and functional efficiency. Most of what is proposed here concerning these elements is the residue of my experience with the Columbia Project for Effective Justice (Project)¹³ in the eight-year period beginning with the Project’s inception in 1956. There is no need to douse you with a barrelful of detailed statistics about the field studies the Project made on the operation of procedural rules and practices. Any references to particulars in the comments that follow will serve only to raise general questions and develop a few working hypotheses. These hypotheses will then become the take-off point for entering into a discussion of how the administration of justice might be improved by devising better processes, broadly defined.

In the first place, a number of these reflections on “quality of justice” rest upon a tiresome amount of hand-to-hand wrestling with the definition of that phrase in New Jersey. The wrestling was done in connection with an official controlled experiment to determine the effectiveness of compulsory pretrial conferences in negligence cases.¹⁴ The genesis of the experiment can be recounted briefly.

In 1948, New Jersey, under the judicial leadership of Arthur T. Vanderbilt and his distinguished lieutenant William J. Brennan, Jr., broke new ground by making pretrial conferences mandatory in all civil actions.¹⁵ Their overriding purpose was, in Justice Brennan’s words, “to further the disposition of the cases according to right and justice on the merits.”¹⁶

In the classic New Jersey form, the dynamics of pretrial conferences are quite simple. When a case is well along the path to trial, the judge calls the lawyers to a private meeting at which he works with them to sharpen and condense the issues and mold the case in a way that will help improve its presentation at trial. Some judges maintain that the procedure is also useful in encouraging pretrial settlements, but for the rule makers the primary purpose was improved quality rather than greater efficiency.

In 1959, the trial bar of the state had mounted a vigorous cam-

12. See text accompanying notes 37-43 *infra*.

13. See M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964).

14. See *id.*

15. See Brennan, *Pre-Trial Procedure in New Jersey—A Demonstration*, 28 N.Y. ST. B. BULL. 442 (1956).

16. *Id.* at 449.

paigned to abolish pretrial conferences in accident cases on the ground that they accomplished nothing and wasted time. Chief Justice Joseph Weintraub, Vanderbilt's successor, asked the Project to study the mandatory pretrial conference system in negligence cases and to report its findings. Since his court had the power to make and revise rules, we were able to persuade it to install an official controlled experiment. The major objective was to learn whether the mandatory conference improved the quality of justice in cases subject to it. We also were interested to learn whether the procedure substantially reduced the courts' time outlay in disposing of personal-injury suits.

To install the experiment, the Supreme Court of New Jersey suspended the mandatory pretrial rule for a six-month period in seven test counties. Instead of compelling a pretrial conference in every case, the court required one in every second case, chosen at random. In scientific parlance, the former group of cases then served as a control group and the nonmandatory cases as an experimental group.

A total of 3,000 cases went through the experimental program in 1960. We waited two years until they had run their full courses to either settlement or trial and beyond. By obtaining answers to detailed questionnaires from the judges, lawyers, and clerks involved in the cases, careful reports were amassed on important variables. The data were then coded, compiled, and analyzed. Three major sets of findings emerged, two of which can be disposed of with brief mention. In the first place, the mandatory pretrial conference procedure produced a loss in judge time, not a saving, so that it could not be justified as an efficiency-promoting device. Second, to our surprise, it developed that the mandatory pretrial system had the effect of increasing the size of the plaintiffs' recoveries. This result, no one had expected. Influenced by the rather dramatic evidence that the mandatory pretrial conference was not an efficient procedure as conducted by their judges—who spent about twenty per cent of their pretrial time on it with no saving in trial time—the New Jersey supreme court in 1964 made pretrial optional instead of obligatory in the largest class of civil cases.¹⁷

The issue that concerns us primarily, however, is not efficiency but whether the mandatory procedure improved the quality of justice. The literature is virtually silent on how this question is to be answered systematically, probably because before the improvement of research methodology lawyers had no occasion to think about

17. N.J.R. CIV. PRAC. 4.29-1(a) (1969), *as amended*, N.J.R. CIV. PRAC. 4.25-2(a) (1969).

or attempt to state quality criteria in any serious or systematic fashion. Justice Cardozo did not even advert to the subject in *The Nature of the Judicial Process*.¹⁸ Intuition and speculation were thought to be all that one needed to discern how well the judicial system was functioning, if one even deemed it necessary to go outside the system's own quality control mechanisms of corrective motions and appeals—the built-in procedures for correcting errors in the litigation process.

The Project turned to these ready-made yardsticks to learn how well the trial results stood up under formal attack launched by a motion for a new trial or by appeal. We compared the control group with the experimental group. Without going into great detail, I must tell you that the effort was totally unrewarding. You can doubtless guess why. Of the 3,000 cases, only twenty-seven were appealed, twelve from the experimental group and fifteen from the control group. These figures were too skimpy for statistical dependability. And it would have been completely out of the question to pay serious attention to the comparative number of *successful* appeals in the two groups as a test of underlying quality of trial results because there were fewer than a handful of reversals. A similar problem of scarcity impaired the usefulness of the data on motions for new trials.

Therefore, we had to abandon the system's built-in quality yardsticks. We set out to construct new indicia that might be more useful in measuring the influence of pretrial on the quality of the trials. We turned to a set of factors we thought would tell us in a significant way whether the obligatory conference was making any difference by focusing on a simple question: Was it producing better trials?¹⁹ "Better" in the sense we used it did not refer to the decisions reached, but to the process. Was the contest good, fair, and informed? Was the case well and truly presented?

To evaluate the trials, we asked the clerks, judges, and lawyers to rate them along the following lines. Were the issues drawn clearly and sharply? Was each lawyer well-prepared? Did the contending parties' opposing versions of the facts emerge plainly before the jury? Were there puzzling gaps or distracting redundancies in the evidence? Did either attorney appear to the judge or his adversary to be a victim of tactical surprise? Were unexpected witnesses called, or unanticipated documents produced? Was there the full mutual knowledge of the relevant evidence that was extolled as essential to proper litigation in the *Hickman* case?

18. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

19. M. ROSENBERG, *supra* note 13, at 31-32.

We also sent teams of observers to court to record independently their observations of the judges at work in the pretrial conferences. After analyzing the data from the more than 100,000 pages of records that resulted, we were able to report perceptible evidence that the cases subjected to mandatory pretrial conferences resulted in trials that registered higher scores judged by our indicators of quality. We did not put this finding as a firmly established fact—the data were not clear enough for that—but rather as a well-based hypothesis that further research would be likely to confirm.

Fairly appraised, the New Jersey experiment did not score an immediate major triumph, either methodologically or substantively. It did not produce a procedural Salk vaccine, did not isolate the virus of delay, or unlock the mystery of judicial ineffectiveness at pretrial. Its most dramatic finding was negative: New Jersey's mandatory, universal pretrials did not step up judicial efficiency in negligence cases. All that effort seems an expensive way of finding out that the oyster has no pearl. But if you will take a longer view of procedural field studies of this kind, and if you will permit a change in the metaphor, you will see some doughnut around the hole.

For one thing, these studies permit us to say with more assurance that pretrial and other highly touted court cures and nostrums simply do not improve efficiency. Finding this out is valuable because it cuts down traffic on the primrose path. That again may seem a perverse kind of progress until you consider what my colleague, Harry W. Jones, has pointed out:

Physicists and biochemists often say that scientific knowledge gains fully as much from experiments that invalidate research hypotheses as from experiments that verify them. Perhaps the same is true of law's experiments in the control of social behavior.²⁰

Those who hope to improve court procedures by sustained efforts must face the prospect that many of their favorite hypotheses will be disproved by careful studies in the field. However, from the ashes of these seeming failures better hypotheses and more useful insights will undoubtedly arise.

I leave to my colleagues to say whether the criteria of quality by which they would measure effectiveness in the English and Italian civil-justice systems have anything in common with those mentioned here. Obviously, to the extent that their systems' basic values diverge from ours, the aims of good process may also part company. But whether their indicia would be similar or different, the proposition

20. H. JONES, *THE EFFICACY OF LAW* 13 (1968).

that to evaluate the quality of justice one must state the desired indicia of performance seems to me as applicable to cross-cultural procedural research as to the science or pseudo-science of intensive empirical research in the field.

IV. PROMOTING QUALITY JUSTICE: THINKING NEW THOUGHTS

The problem of promoting quality justice calls upon us for more imaginative responses than continuing to do the same things we have done for generations and merely adding deftness and efficiency. New thoughts are in order, some of which will be unthinkable, or at least unutterable, as I shall probably now demonstrate.

The more charitable among you may regard the proposals that follow as "thinking aloud." Others will take them to be "more aloud than thinking"; and the rest will just shrug them off as a gabble of pipe dreams. Exposing you to these underdone ideas has two aims. One is to show that although it is not hard to find faults with our civil-justice system, it is very hard to find solutions. The other is to invite you to join me in a group grope toward some possible new approaches to our society's duty to deliver a civilized brand of civil justice.

Like others today, the custodians of the administration of justice have a problem of priorities. They must reallocate to courts the disputes that courts are best suited for and that are, in a sense, best suited for them. They also face the problem of deciding whether the rewards and motivations now being offered to key actors in the judicial system are sensible and effective. Finally, they have problems of communication, both with regard to the citizenry and with regard to those who perform functions within the system.

A. *Reallocation of Disputes to Nonjudicial Disposition*

A comprehensive reinvestigation of the question which human disputes belong in the courts and which ones do not is long overdue. One reason for this undertaking is practical necessity. Our courts are simply and plainly being engulfed by a tidal wave of litigation, criminal and civil. The steep upward climb in the incidence of crime and the heavier per case demands resulting from newly defined procedural safeguards in criminal cases are major factors in this engulfment. The engulfment, in turn, may result in a feedback that actually augments the rise in crime. Judge Carl McGowan, among others, has pointed out:

. . . I have never believed that the volume of crime is significantly responsive to what the courts do doctrinally, but I have come to think that crime rises as the time increases from initial arrest to final disposition; and delay is currently the greatest weakness in the administration of criminal justice.²¹

This hypothesis holds deep significance for the administration of civil justice. It warns that along with fairness, impartiality, and openness, celerity is a fourth dimension of quality criminal justice.

For reasons of humaneness as well as efficacy, criminal prosecutions must enjoy an absolute priority. As long as accused persons are penned up in jails and some are clamoring for the speedy trials that the Constitution guarantees them, we are unswervingly obligated to take drastic measures. We must engineer a massive expansion of our court systems; or arrange for the release of those detained too long without a trial; or else bring about the decriminalization of some categories of behavior now subject to penal law.

What is perfectly clear is that we cannot and must not use our court facilities to deal with civil lawsuits if the consequence is to force persons criminally accused to languish behind bars awaiting trial. It is in this sense that criminal cases must be accorded absolute priority. An instance of this priority treatment has already occurred in New York City where last year the state courts ordered a temporary cessation of the trials of civil cases to permit the judges to devote their time and energy to criminal trials.²² We shall undoubtedly be seeing more of this necessary expedient if the crisis in criminal justice continues.

Criminal cases have no place other than the courts to go so long as the offending conduct is defined as criminal. Of course, our definitions of criminal conduct could be changed. Various offenses against sumptuary, social, and sex behavior norms—drinking, drugging, gambling, prostituting, and so forth—could go the way of minor offenses and simply exit from the courts. They could instead be heard, with appropriate procedural safeguards, by public officials other than judges in surroundings other than courtrooms.

However, there is also a civil side to the problem of court suffocation. Our system has long encouraged going to court and this has been a healthy tradition. Now we have to face the fact that the past quarter of a century has seen a quantum leap in the use of the judicial process to remedy civil injustices. We clearly shall have to

21. C. MCGOWAN, *THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES* 99 (1967).

22. *N.Y. Times*, Oct. 18, 1970, at 1, col. 5.

put up unfamiliar barriers to discourage or restrict litigating if we are to avoid a complete breakdown in the justice system.

The signs are multiplying that some classes of civil disputes will have to be excluded from the courts, entirely or in major proportions. Leading the candidates for exclusion are the high-volume auto injury cases. Condemnation, probate, and ordinary divorce matters are other logical contenders for out-of-court treatment.

However, the problem of the courts goes beyond quantitative difficulties. Apart from coping with the volume, a compelling reason for looking closely at the nature of controversies the courts hear is to assure continued confidence in our judicial system. I refer here to qualitative problems that, in my opinion, have two dimensions. One is the danger of politicizing the courts; the other, of augmenting social instability through excessive use of the judicial process. United States Court of Appeals Judges Carl McGowan and Shirley M. Hufstedler²³ have recently addressed this subject and have placed me greatly in their debt for some of the discussion that follows.

Policy issues of high consequence and high tension have always come before American courts and always will. The growing menace today is the unrestrained tendency to take into the courts the most explosive issues in the society—and to present them with explosive forms of advocacy. There is a reason for this boom in resort to the judicial process. Courts have been, no doubt about it, the most responsive and the most effective agencies of change during the past generation. As a result, highly charged political and social issues, among many others, increasingly have been brought to the courts, not as a last resort, but as a first resort. The common attitude is that courts can do anything—and will—and that a rule one does not care for is not law unless a court says so—and the United States Supreme Court at that.

For example, a short while ago the *Columbia Spectator* urged that recently announced tax-related guidelines for campus political activity “have no legal status” because the Internal Revenue Service’s rulings and the “laws behind them can only be tested in court, and such a test has never been made.”²⁴ (Of course, this argument should not lead you to believe that if the courts happen to sustain the guide-

23. C. MCGOWAN, *supra* note 21, at 75-82; Hufstedler, *Dissent on Trial*, 43 OHIO BAR 1086 (1970).

24. *Columbia Spectator*, Oct. 1, 1970, at 2, col. 1.

lines, tranquil acceptance of them will erupt on Morningside Heights; the *Spectator* was careful to add that "even if the courts were to uphold . . . the guidelines, the laws backing them can be replaced, evaded or broken."²⁵)

The editorial brings to mind the waggish thumbnail "Restatement of the Total Law" of three countries. In England, everything is permitted that is not expressly forbidden. In Russia, everything is forbidden that is not expressly permitted. And in France (and the *Spectator's* editorial office), it makes no difference whether something is permitted or forbidden; you do what you feel like.

One of the consequences of overworking the idea that there is no law except as courts declare it is an erosion of confidence in other branches of government and, to a large extent, in the law-making process of the society. Let me quote Judge McGowan again:

. . . the seeming miracles being wrought in the courts on behalf of the disadvantaged are, in turn, stimulating new and ingenious assertions of legal right and injury by those of a more exalted economic status. Government at all levels finds its policies and actions increasingly challenged from every side by appeals for judicial intervention.

There are searching questions to be asked as to whether this development is wholly healthy, at least to the extent that it reflects cynicism about the responsiveness of legislative or executive policy to the political processes. It may be easier to file a lawsuit than to run for office, but it is not necessarily a better way to run the country. The judicial pendulum swings, and mine is a generation before whom our law professors incessantly paraded the then mischiefs of government by judiciary.²⁶

For Judge McGowan, there is reason to heed Justice Stone's admonition that "[c]ourts are not the only agency of government that must be assumed to have capacity to govern."²⁷

It would be bad enough if the sole result of all this resorting to the courts were to undermine confidence in the representative branches of government in favor of the judicial branch. But paradoxically the courts themselves suffer an erosion in popular respect as they now begin to wield great powers in arenas they once declined to enter. Many judges of compassion and broad outlook recognize that if they sail into the eye of every social hurricane they will serve not only as lighthouses for the hopeful, but also as lightning rods for the frustrated.

25. *Id.*

26. C. McGOWAN, *supra* note 21, at 104.

27. *United States v. Butler*, 297 U.S. 1, 87 (1936) (Justice Stone, dissenting).

If irate losers cannot vent their disappointment in their votes for legislators, they will turn upon the judges and the courts whenever they get the chance. Thus, the judge who decided that cross-busing was constitutionally necessary to achieve racially balanced schools recently was turned out of office in Los Angeles when he stood for re-election.²⁸ Think of what would happen at the polls in large sections of the country if the judges who decided close questions in church-state relations were forced to stand for election. As questions that judges once defined as political are increasingly redefined by them as judicial, the popular reaction will be to redefine the judge's role as political, with unhappy consequences.

Perhaps the social forces at large in this country today have made inevitable the weakening of doctrines that Judge Hufstедler has referred to as the "litigation avoiders and stoppers."²⁹ Among these are the concepts of justiciability, standing, immunity, and abstention. These doctrines no longer inhibit the courts from proceeding to decision with the braking power they once exerted. The result has been the greater politicization of the judicial process and an "increase by several atmospheres of the pressure on the courts,"³⁰ with greater pressures still to come. Wrongly or rightly, the voters regard the courts with less confidence if they think that the courts are making political decisions they ought not to be making.

Erosion of confidence is proceeding for still another reason: the tendency toward constitutional overkill. Many lawyers regard every case as a challenge to their ability to concoct a constitutional issue, however far they must reach for it. It is not, in my opinion, a good thing to tell the people of the country that the Constitution and the Supreme Court will set right every dissatisfaction they have with the way things are going. I am afraid that constant stretching and pulling at the words of the Constitution to bring about good changes has given some people the idea that contracting and pushing at its words is a good way to bring about bad changes.

A group of upright and outraged citizens in Boston has lately begun a suit to restrain CBS from showing the television program *Wild, Wild West* because of its asserted overuse of violence and horror. My personal sympathies are with the citizens. Does the Constitution have anything more than the free speech principle to help settle the dispute? According to press quotes of the plaintiffs' filed papers, they want to close down the *Wild, Wild West* by getting

28. N.Y. Times, Nov. 5, 1970, at 1, col. 5.

29. Hufstедler, *supra* note 23, at 1088.

30. *Id.* at 1088.

a judgment declaring that "'child viewers of television programs containing violence and horror are being deprived of their constitutional right to be free from mental harm caused by such programs without due process of law.'" ³¹ Does that stretch the constitutional argument a bit thin? Never mind. What's the Constitution for, if you can't use it when you have a cause you care about deeply?

Try to explain that the use of constitutional categories may impose excessive rigidity in dealing with many issues that require flexibility. Try to point out that the Constitution cannot be used promiscuously without paying the usual penalty for promiscuity in loss of reputation. I have nothing to recommend about the constitutional-overkill tendency beyond noting the danger. It merely underlines the point that we lawyers have been too intent on using the adversary litigation model as the universal process for resolving disputes. This is explainable as advocates' conceit, but it has led us to neglect other and better alternatives.

One alternative to taking every controversy imaginable to court is to submit selected classes of civil controversies to tribunals other than courts. Arbitration of labor disputes and commercial disputes on an agreed and voluntary basis is an obvious model. Compulsory arbitration of sued claims of 3,000 dollars or less has recently been introduced in New York ³² after many years of tryout in Pennsylvania. ³³ Both states give litigants the option of returning to the courts if dissatisfied with the arbitration, but that option could be annulled by appropriate measures. This process may find more widespread acceptance; yet in long-range terms, it is not very satisfying to substitute one adversarial model for another.

A more hopeful approach would be to de-escalate the combative character of large volumes of conflict-prone occurrences by providing for "compensation without litigation." Examples would include the statutes that authorize administrative boards to indemnify victims of violent crimes; ³⁴ and the slowly spreading programs of "no-fault" automobile injury reparation. ³⁵ And much more drastic departures from the adversary model are conceivable. For example, why not create a Department of Economic Justice to dispense quickly remedies in cash or in kind to complaining customers who have been

31. N.Y. Times, Nov. 13, 1970, at 75, col. 1.

32. N.Y. JUDICIARY LAW § 213(8) (McKinney Supp. 1970).

33. PA. STAT. tit. 5, § 30 (1963).

34. E.g., CAL. WELF. & INSTNS. CODE § 11211 (West 1966); N.Y. EXEC. LAW §§ 620-35 (McKinney Supp. 1970).

35. E.g., MASS. ANN. LAWS ch. 90, § 34M (Supp. 1970).

unable to get satisfaction from the merchant or manufacturer responsible for the defective product?

Today, in our bondage to the adversary litigation process, we operate with costly clumsiness. When a person is on welfare and his seventy-five-dollar television tube has prematurely failed and we want to express our concern for his rights and assure him that they will be vindicated, we proceed from rigid habit. We refer him to a lawyer in a neighborhood office who invests many hours of work in investigating, telephoning, corresponding, and, perhaps, litigating against an adversary whose lawyers do likewise, and, being much better paid, doubtless invest even more adversarial energy. The lawyers and litigants sometimes wind up in court where they then consume judicial energies bought with public money. In the end, it must often happen that the claim and litigation costs far, far exceed the amount in dispute.

Why not try a totally different model? On a pilot project basis, I propose that in a number of cities public funds or private financing be obtained to underwrite experimentally a system of delivering justice that would not start with combat and high friction costs. Its main features would be simple. When the customer presents his grievance, his statement will be taken down, he will sign his name, and on the spot will be given the relief due him, up to a limit of, say, 200 dollars or so, in cash or in kind.

From the public viewpoint, the system could have advantages not only of economy but also of effectiveness. Through a national network of offices, the Department of Economic Justice would learn quickly if a manufacturer has been making defective television tubes or components on a grand scale; or thousands of unsafe brake linings; or too many permeable raincoats. Then it would be able to take the legal action appropriate to the situation—including wholesale (and hence, economically worthwhile) suits to recover amounts it had already paid out administratively, along with costs, interest, and other economic sanctions; or cease and desist orders; or sterner sanctions if appropriate. This system would offer an efficient way of coordinating complaints and consolidating claims that have a common basis. It would also permit quality control of a more effective kind than isolated court suits do.

Similar procedures could also be applied against major merchandising enterprises, such as mail-order houses, national chain stores, or large department stores. Wholesale bad practices could be more readily exposed and eliminated, instead of, as is now true, being lost to sight through diffusion.

The consumer will realize these benefits: an instant remedy instead of the long drawn-out litigation process we now offer; clear proof that society is concerned that he be dealt with fairly, which is the fundamental message we want to convey; and the feeling that society trusts him, since it takes his word that his claim is valid.

Some will say that the plan is naive and that consumers will cheat on a massive scale by presenting dishonest claims. An antidote might be to use the type of spot checks that income tax collection services use—apparently with good results. The complaining consumer will be told: “We trust you and will pay you, or repair or replace your defective product. To guard against cheating by those who might put in false claims, we will run random spot checks on applicants, investigating some claims intensively. If the follow-up uncovers fraud, we will deal with the culprit accordingly.”

An experimental program could be set up and tried out in a half-dozen cities with a ceiling for each claim of, for instance, 100, 200, or 250 dollars, and with a floor of twenty-five dollars. If the plan worked well or could be modified to work well, it could be extended to nonconsumer cases and to nonwelfare customers. As a matter of fact, the experiment itself could make room for testing those types and other types of cases in which economic justice could be delivered *sans* litigation, *sans* lawyers, *sans* courts, *sans* everything—except a prompt remedy and effective enforcement. If successful, the program would warrant public funding out of appropriately gathered revenues.

A principle of the type underlying the Department of Economic Justice proposal was put forward in a different way recently by Judge Macklin Fleming of California. He argued for what he termed “routinization” of the handling of stereotyped disputes as a defense for the litigation explosion:

Courts, executives, and legislatures can pool their efforts to encourage the development of institutions and techniques capable of handling routine business in an inexpensive and expeditious way outside the arena of adversary litigation.³⁶

Judge Fleming had in mind divorce and decedents' estates matters, both of which seem well-suited to other than lawsuit disposition unless special circumstances arise. Other classes of conflict-prone matters that should be shunted from the courts can readily be conceived.

³⁶ Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109, 111 (1970).

Of course, neither the hypothesized Department of Economic Justice, nor administrative agencies, nor arbitration boards, nor any other official substitute for court-made dispositions, will be trouble-free. Still, the effort to de-adversarialize and de-judicialize matters that do not absolutely require the full panoply of court processes must be made, problems or no.

The sum of all these proposals can be put bluntly. We lawyers must rid ourselves of the habit of mind that holds that in conflict management, happiness is a thing called "certiorari granted" or "probable jurisdiction noted." We have to reconcile ourselves—indeed, we have to dedicate ourselves—to the proposition that courts cannot do everything to correct society's flaws. We have to withdraw from the judicial process some of the disputes that now threaten the administration of justice—quantitatively, qualitatively, and explosively.

B. *Changing Rewards and Motivations*

The problem of court delay has resisted man's valiant attempts to conquer it as far back as one would care to look. It does not appear to be as complicated a problem as many that human ingenuity has solved over the ages. There must be more to the delay problem than pathological obstinacy of a logical kind. What can it be?

One hypothesis is that we have built into the system incidental and unintended rewards and motivations that induce the main actors, who could stamp out most delay if they so desired, to decline to do so. They are not necessarily acting irresponsibly or unprofessionally in withholding their cooperation. It has been pointed out that "[p]art of the difficulty in getting rid of court congestion appears to be . . . [that] it is not simply an accidental defect of the law, but is rooted in some of the legal system's most cherished characteristics."³⁷

Whether sought after or unbidden, wayward incentives manage to find their way into the court processes and induce actions directly opposed to the goals and objectives the system is designed to achieve. Unforeseen self-interest is often the operative determinant. A piquant example of this type of incentive emerged from the New Jersey pretrial conference experiment. In cases not scheduled for mandatory pretrial, either lawyer was allowed to opt for a conference. Aside from impairing the scientific purity of the experiment, this option developed an odd little datum—if you recall that a side effect of mandatory pretrial is to increase the plaintiffs' recoveries by substantial

37. Sykes, *Cases, Courts and Congestion*, in *LAW IN CULTURE AND SOCIETY* 327, 328 (L. Nader ed. 1969).

amounts. In the first few hundred cases in which the option was exercised by only one side, it was the defendants' attorneys who opted seven times out of ten. We puzzled over why this should be, because we could not see any particular advantage to defendants (insurance companies) in having a pretrial conference in most cases. Then our attention was drawn to an item in the *New Jersey Bar Journal* presenting the script of a fictitious one-act play. Its plot showed that an eminent law firm, seemingly representing liability insurers, liked pretrial conferences because it was paid on a piece-work basis for each one attended and the price was right!³⁸

A careful study of the system of judicial administration in each of the states will reveal, I am confident, hidden incentives that induce actions directly opposed to improved judicial effectiveness. To find the hidden motivators will take skill, patience, and imagination. But the task is well worth the effort. If we once come to understand why lawyers at times act perversely and contrary to the best interests of the administration of justice, we can try to revise the incentives and rewards so they will help advance, rather than oppose, the judicial system's aspirations.

C. *Improving Communications*

Changing incentives will not be enough, however, unless we find effective ways to communicate the law's messages to its—for want of a better word—customers. Communications science has been one of the most neglected of society's resources in past efforts to improve the administration of justice.

An example of this communications gap came to my attention in the mid-1950's. In New York it had been noticed that about sixteen per cent of all suits brought against persons covered by automobile liability insurance were started without any advance claim, phone call, letter, or warning. The plaintiff's lawyer simply served a summons upon the insured, who forwarded the summons to his insurance company, which thus learned that a claim was pending against its insured. Investigation disclosed that the plaintiff's bar followed the "summons-first-notice" practice because by thus starting suit the lawyer was protected against his claimant's change of heart or change of lawyer. The filing of the suit gave the plaintiff's lawyer a statutory lien on any recovery thereafter realized by the plaintiff, even though he defected to another lawyer.

38. *A Pretrial Conference*, 3 N.J. Sr. B.J. 363 (1960).

To remedy this situation and to avoid promiscuous suing by the plaintiff's bar, motivated in the way just described, the legislature amended the statute to provide that a lien would exist in favor of the plaintiff's lawyer even if he did not start suit but merely wrote a claim letter. Records over the next few years showed that the percentage of "summons-first-notice" suits started did not decline to any appreciable extent. In 1959, at a meeting of the Plaintiffs Trial Lawyers Association, I distributed questionnaires to a chamber full of Association members, reported the statistics, and asked why they continued using the "summons-first-notice" practice in view of the statutory change that had been made in order to safeguard their retainer liens by writing instead of suing. To my question the overwhelming response was, "*What change in what law?*"

The message had not gotten through. The change in motivation had, therefore, not taken effect. The evil sought to be avoided accordingly persisted.

The point is that "good" procedures cannot work effectively, and cannot, therefore, be good unless they are communicated to those who are supposed to be made aware of them. In this country perhaps our most notorious communications failure involves the jury, both in criminal and in civil cases. We rhapsodize about the jurors as the shields of our liberty, yet we treat them like imbeciles while the evidence goes in and then like jurisprudential sponges who can soak up years of law from a single droning lecture at the end of trial. When that moment of truth arrives, the jurors "are instructed in the law . . . in language they are not likely to understand because it is usually copied from appellate court opinions and directed not so much at the jurors as at the judges who may later review the case on appeal."³⁹

Oddly enough, jurors themselves often let us know that there are particular instructions that give them more trouble than others—those about which they send back messages asking the judge for further clarification—but we usually pay no attention. Has anyone in this state kept track of the requests for re-instruction by Michigan juries as clues for determining which are the most incomprehensible charges the judge delivers? To do so would be a useful task for the law review editors or free-lance researchers.

Of course, even better than getting rid of the static in communications to the jury would be getting rid of the jury itself in most

39. D. KARLEN, JUDICIAL ADMINISTRATION: THE AMERICAN EXPERIENCE 35 (1970).

civil cases, as the English have done. The jury system may be, as Sir John Barry remarked, "a good nursery for the bar,"⁴⁰ but one would think that in these times there are more productive educational toys for young advocates to play with.

V. CONCLUSION

The pluralistic American system of civil justice remains the wonder of the world of judicial administration. It is riddled with archaic rigidities and indefensible paradoxes. It is often sluggish and irrational. As an instrument for resolving disputes, its greatest redeeming feature is that it stands alongside our system of criminal justice, where its warts seem beauty marks by contrast. It will improve; it must.

Removing from courts matters that can be disposed of in other ways, devising productive motivations and incentives, and implementing improved communications are approaches that may help improve the quality of justice. In addition, we need improvement in three vital areas: men, machinery, and management.

Men—the judges, their aides, and other human resources—are at the top of the list of needed improvements. The judges must be properly selected, qualified, and trained. They must be upright—they must deserve to be called "Honorable." In populous states and crowded cities it is impossible for the chief judges to administrate by day and adjudicate by night, or vice versa. There should be a division of labor to permit a judge for a period of time to serve exclusively as an administrator; later he would return to adjudicating.

Machinery—the physical resources of courts—must be provided in civilized abundance. My guess is that we spend less on our courts than on peanut butter. The balance should be struck so that we have not only the bricks and mortar, but also the equipment—well-designed courtrooms and space-work layouts—and the essential instruments for storing and retrieving information about workload and performance.

Management—by professionally trained career personnel—is not a fancy frill, but a necessity. A recent survey of five federal district courts, which was commissioned by the Federal Judicial Center, reported that even after exemplary new methods are developed in judicial administration in federal courts, "there is not an effective . . . management system for implementing [the] known good prac-

40. Barry, *Compensation Without Litigation*, 37 *AUSTL. L.J.* 339, 343 (1964).

tices."⁴¹ This gap is presently being filled. The means of updating court methods, techniques, and administration are being studied and taught by a group of profession-minded organizations that includes, in addition to the Federal Judicial Center, the American Judicature Society, the National College of State Trial Judges, the Institute of Judicial Administration, and the new Institute for Court Management.

The courts must not be required to do more than courts can do, quantitatively or qualitatively. Avoiding overuse requires determining what types of controversies shall be retained in the court system, and then devising for them sensible, efficient, fair rules of procedure that can be studied and tested in action. Not all cases deserve the same type of court attention and not all procedures should apply across the board to all types of cases.

With the proper mix of cases, men, mechanisms, modernization capacity, and management, we can turn more intelligently to the Task Force's proposed major effort. We can improve the quality of justice for individuals by establishing a system that will be more humane, compassionate, and civilized than today's because it will be fitted with the men and means to function as it should—and not be abused by profligate overuse.

41. NORTH AM. ROCKWELL INFORMATION SYSTEMS CO., SUMMARY OF A MANAGEMENT AND SYSTEMS SURVEY OF THE U.S. COURTS 3 (1969).