

JUDICIAL OVERLOAD: THE REASONS AND THE REMEDIES

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In Utopia,

They have no lawyers among them, for they consider them . . .
people whose profession it is to disguise matters.

Sir Thomas More, *Utopia*, Bk. 2.

Animosity towards lawyers, perennial in our social history long before Watergate, parallels a contradictory and equally persistent belief in judges as problem-solvers for a variety of personal, economic, educational and political ills. An increasing number of litigants are bringing to the courts not only the class of disputes that has been the traditional fare of judicial decision-making, but also an array of issues that were formerly resolved in private meetings, at hospitals, in schools, or at home. The causes of this explosion of lawsuits and the possible buffers to an eventual implosion in our judicial system will be discussed below.¹

I. PUBLIC RESORT TO THE COURTS

A. *The Numerical Rise in Court Caseloads*

The raw data on caseload increases are dramatic but sometimes ambiguous. In 1951, 1,200 new cases were filed in the United States Supreme Court; by 1971, the number had reached 3,600.² A committee of the Federal Judicial Center, citing this threefold increase, concluded that "the conditions essential for the performance of the [Supreme] Court's mission do not exist."³

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1. This article will focus on civil litigation, rather than criminal prosecutions. The latter encompass an array of factors that have no relevance to civil matters, such as the necessity of imposing sentences as a method of deterrence and isolation of offenders.

2. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 5 (1975).

3. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 5 (1972) [hereinafter cited as FREUND REPORT]. The Study Group, headed

Former Chief Justice Earl Warren retorted with uncharacteristic sarcasm to this reading of the statistics, condemning it as "a facile and unevaluated use of numbers, reminiscent of the McCarthy days."⁴ Justice Warren believed that counting the number of petitions submitted during the course of a term gave no satisfactory indication of the actual work involved:

To begin with, about 2000 of those applications, or more than half the total number, were filed in forma pauperis, mainly by prisoners on their own behalf. . . . The overwhelming majority of them are totally and obviously without merit for certiorari purposes, and little time is or need be expended in disposing of such applications

Additionally, it is fair to estimate that more than half of the other portion of the certiorari docket, the paid applications that totalled some 1700 in the 1971 term, were equally without certiorari merit and were doubtless denied with a minimum expenditure of the Justices' time and effort.⁵

Whether the expenditure of effort is minimal or not, the fact remains that the Supreme Court has continued to give plenary review to the same number of cases per year. The average number of opinions for each individual justice is about twelve per term.⁶ Approximately 150 cases were heard on the merits in 1925 and in 1971.⁷

by Professor Paul A. Freund, advocated the establishment of a new National Court of Appeals composed of seven federal circuit judges assigned to three-year staggered terms. *Id.* at 47. The National Court would screen all petitions filed for Supreme Court certiorari review and would retain the power to deny any such applications.

4. Warren, *The Proposed New 'National Court of Appeals'*, 28 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 627, 632 (1973) (discussing the proposal of the FREUND REPORT). It was expected that the proposed National Court of Appeals would pass on to the Supreme Court perhaps 400 to 500 petitions, out of which about 150 would be chosen for plenary review. Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301, 1307 (1974). Thus, 90% of the petitions addressed to the Supreme Court would not survive screening by the National Court of Appeals.

For a discussion of the arguments in favor of a National Court of Appeals, such as the deficiencies of other approaches to reducing the Supreme Court's caseload and the advantages of a National Court performing a screening function, see Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974). These views are countered in, e.g., Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Poe, Schmidt & Whalen, *National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973).

5. Warren, *supra* note 4, at 632-33.

6. *Id.* at 634.

7. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 339 (1975). There has been a decline in signed opinions, however, from 187 in 1935 to 140 in 1971. FREUND REPORT, *supra* note 3, at A7.

The lower courts lack the advantage of declining review. In fiscal year 1960, a total of 3,899 appeals were filed in all eleven federal circuit courts: with 69 authorized judgeships, the average was 57 case appeals per judge. By 1973, the average per judgeship was 161.⁸ The backlog of pending cases in 1975 stood at 12,128 appeals, 658 greater than at the end of the prior year.⁹ The federal district courts fared no better. From 1902 to 1972, the absolute number of cases filed rose nearly 500%.¹⁰ In one year, from 1974-1975, the court caseload increased by 11.7%.¹¹ These figures represent a substantial increase in the actual workload of the lower federal courts.

The New York State courts show a similar trend. Reports of the civil terms of the New York Supreme Court indicate that during the period 1956 to 1975-1976 there was a 116.8% increase in the number of cases received in the state as a whole.¹²

B. *The Judiciary's Impact*

The figures are arresting; however, we can assess their significance only in the context of the judiciary's impact on our personal and national interests. This context not only confirms the importance of protecting the courts from becoming a harried bureaucracy, but also demonstrates the causal relationship between high visibility of court action and increasing public resort to the judiciary as a prime problem-solver.

8. S. REP. NO. 742, 93d Cong., 2d Sess. 2 (1974).

9. [1976] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 153 (Table 1). The data do not indicate the percentage of these cases actually ready for trial or summary disposition.

10. Grossman & Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 LAW & SOC'Y REV. 321, 333 (1975).

11. [1975] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 191. In addition to sheer number of cases, individual lawsuits—particularly in the antitrust area—may take months or even years of judicial time. President Carter, by Executive Order No. 12,022, has established the National Commission for the Review of Antitrust Laws and Procedures, which will focus on ways to facilitate a more rapid resolution of such cases, including creation of a special roster of judges, judicial sanctions against dilatory practices and non-judicial alternatives for disposition. Exec. Order No. 12,022, 42 Fed. Reg. 61,441 (1977).

12. JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, FIRST ANNUAL REPORT 54-55 (1956). Appendix B, Table 5 indicates that 53,274 cases were received in 1956. JUDICIAL CONFERENCE AND OFFICE OF COURT ADMINISTRATION, REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE, NEW YORK LEG. DOC. NO. 90, at 66-67 (1976). Table 25 indicates that 115,514 cases were received during the 1975-1976 period.

Court rulings are only one species in the vast universe of decisions that affect us.¹³ Judicial decisions, however, have the advantage of accessibility. Judges are expected to give a reasoned explanation of the process by which they reach their conclusions. These explanations, most of which are published by the National Reporter System and available for quotation in the press, have an aura of finality, of authoritative disposition of the issues at stake.

The popular view that law is what the courts do, and what judges say it is, is enhanced by the judicial presence in virtually every area of human concern.¹⁴ Professor Archibald Cox has commented that the Supreme Court's school desegregation decision in *Brown v. Board of Education*¹⁵ and its progeny "overturned not only the constitutional precedents built up over three-quarters of a century but the social structure of an entire region."¹⁶

The historic reapportionment decision in *Baker v. Carr*,¹⁷ ruling that plaintiffs were entitled to a trial on their claim that a Tennessee statute "debased" their votes and therefore denied them equal protection of the laws, put the courts into the position of restructuring and supervising America's electoral schemes.¹⁸

Walking a dimly marked line between the rights of the mother and the "potentiality of human life," the Court in *Roe v. Wade*¹⁹ held that the guarantee of privacy contained in the Constitution includes fundamental personal rights such as a woman's decision to have an abortion. The ruling distinguished between the first trimester of pregnancy, when the abortion decision must be left to the medical judgment of the attending physician in consultation

13. It is Congress that has the right to impose taxes, to declare war, to raise and support armies, to regulate commerce. U.S. CONST. art. I. It is the President who commands our armed forces, our foreign relations, our federal bureaucracy. U.S. CONST. art. II. These governmental powers are often outside the judicial orbit. See, e.g., Dorsen, *Separation of Powers and Federalism*, 41 ALB. L. REV. 53, 61-62 (1977). Power is also exercised by private corporations and influences the prices of commodities ranging from steel to steak.

14. Lamb, *Judicial Policy-Making and Information Flow to the Supreme Court*, 29 VAND. L. REV. 45, 46 (1976); cf. Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 MICH. L. REV. 797, 810 (1971) (courts have the tendency to take on the most explosive issues of society).

15. 347 U.S. 483 (1954).

16. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 100 (1976). Less dramatic but also significantly affecting the nation's educational policies was the Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), which held that students facing temporary suspension from a public school retain liberty and property interests that merit protection under the due process clause of the fourteenth amendment. *Id.* at 574-76.

17. 369 U.S. 186 (1962). See also *Westbury v. Sanders*, 376 U.S. 1 (1964).

18. 369 U.S. at 237.

19. 410 U.S. 113, 152-54 (1973).

with his patient, and the middle and last trimesters, where the state's interest in protecting the health of the mother and the viability of the fetus was viewed as greater.²⁰

Litigation appears to be expanding on an ad hoc basis in response to numerous social and economic controversies. The Supreme Court's rulings in criminal law, welfare and juvenile rights continually redefine the individual's relation to the government.²¹ Lower court decisions have also had a substantial impact in diverse fields ranging from prison administration to forestry.²²

20. *Id.* at 163-65.

21. See, e.g., *Kirby v. Illinois*, 406 U.S. 682 (1972) (defendant not entitled to counsel in police station showups that take place prior to indictment); *United States v. Wade*, 388 U.S. 218 (1967) (courtroom identifications of an accused at trial must be excluded if the accused was exhibited to the witness at a post-indictment lineup without counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (prosecution may not use statements by defendant made during custodial interrogation, unless it shows the use of procedural warnings designed to protect against self-incrimination).

In the area of welfare and juvenile rights, see, e.g., *Smith v. Organization of Foster Families*, 431 U.S. 816 (1976) (New York procedures for removal of foster children from foster homes do not violate due process and equal protection clauses of the fourteenth amendment); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (due process does not require jury trial for juveniles); *Wyman v. James*, 400 U.S. 309 (1971) (welfare caseworker's home visitation, required as a condition for public assistance under New York AFDC program, was not an unreasonable search under the fourth and fourteenth amendments); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (state termination of public assistance payments without affording recipients the opportunity of a hearing violates the due process clause); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (imposition of residency requirements as a condition of welfare eligibility violates the equal protection clause); *In re Gault*, 387 U.S. 1 (1967) (at the adjudicatory stage when proceedings may result in commitment to a state institution, juveniles have the right to notice of charges, right to counsel, right to confront witnesses, and the privilege against self-incrimination).

22. A federal district court in *James v. Wallace*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd and mod. sub nom. Newman v. State*, 559 F.2d 283 (5th Cir. 1977), declared Alabama's entire prison system violative of the eighth amendment's prohibition against cruel and unusual punishment and ordered prison officials to commence immediate upgrading of inhuman living conditions at the institutions. See also *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970), *relief ordered sub nom. Hamilton v. Landrieu*, 351 F. Supp. 549 (E.D. La. 1972) (conditions in Orleans Parish Prison constitute cruel and unusual punishment; upgrading of conditions ordered); *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971), *contempt motion granted*, 358 F. Supp. 338 (E.D. Ark. 1973), *contempt citation revoked*, 361 F. Supp. 1235 (E.D. Ark. 1973) (conditions in Arkansas jail deprived persons of civil rights; standards promulgated). Courts have ordered that bilingual education must be provided to Mexican-American children, *Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974), and that the federal forestry service may not clear-cut timber in a national forest, *West Va. Div. of Isaac Walton League of America, Inc. v. Butz*, 367 F. Supp. 422 (W.D. W. Va. 1973), *aff'd*, 522 F.2d 945 (4th Cir. 1975). The United States Department of Agriculture was ordered to spend appropriated money and draft regulations needed to establish a Womens, Infants, Childrens (WIC) program, which would provide nutritious meals and regular medical screenings to low-income pregnant mothers and to children up to the age of five. The program served up to 550,000 children and mothers each month. *Dotson v. Butz* (D.D.C. 1973) (unreported), noted in COUNCIL FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 187-88* (1976).

C. *Some Novel Areas of Judicial Consideration*

Litigation presents infinite possibilities for pouring old wine into new bottles. A few examples are illustrative.

The United States District Court in Connecticut was recently asked to adjudicate charges that some male faculty members at Yale University have subjected female students to sexual harassment and intimidation, and that Yale's refusal to institute mechanisms to investigate such harassment denies equal educational opportunity, therefore violating Title IX of the Education Amendments of 1972.²³ Plaintiffs in *Alexander v. Yale University*²⁴ brought suit on behalf of a class composed of four present and former undergraduate women and a male teacher. The action was unusual because of its premise that the sexual conduct of professors at a private educational institution, albeit an institution receiving federal financial assistance, may subject the university to the jurisdiction of the federal courts.²⁵

The unique aspect of the lawsuit, however, was its initiation. The complaint stated that traditional approaches, such as conferences with the administration, had failed. The institution of new procedures tailored to the problem, usually a rather painless method of dealing with student grievances, was rejected by the University. Self-help through class boycotts was apparently not attempted. Instead, reliance was placed on the judiciary to frame orders requiring the University to establish appropriate administrative mechanisms and to take appropriate disciplinary action against two named professors.

A recent Kansas lawsuit pitted parents as plaintiffs against their daughter and her future mother-in-law. Plaintiffs, alleging that they were aggrieved because their names were included on their twenty-year-old daughter's wedding invitations without their consent, sued for \$10,000 in damages and a court order directing defendants to notify everyone receiving an invitation that the parents' name should not have been included. "I wanted to teach

23. 20 U.S.C. § 1681 (1976).

24. No. 77-277 (D. Conn., filed July 6, 1977).

25. The female plaintiffs alleged that they were subject to a "discriminatory atmosphere adverse to their educational development created by the practice of such sexual harassment." The basis for joinder of the male professor as plaintiff was that "the atmosphere of distrust of male professors engendered by the reputation of certain male professors for sexually harassing women students" created a barrier to their own teaching. (Complaint at 3, 8-9).

them a lesson," the father explained. "Right is right, wrong is wrong, and love comes third, if that's what it is."²⁶

Judicial aid was also sought by a man who had been excommunicated by the Reformed Mennonite Church, and as a result was being "shunned" by all the members of the church, including his wife and children.²⁷ Although the lower court had ruled that the first amendment's guarantee of free exercise of religion precluded interference with the church's tenets and practices, the appellate court reversed and directed that plaintiff was entitled to an opportunity to proceed with his action in equity. Plaintiff claimed that his family would not speak to him or have any contact with him, and that other members of the church would not conduct any business with him. The court found that since the state had an interest in protecting the marriage relationship and preventing "tortious" interference in business matters, judicial regulation of the church's "shunning" policies was permissible.²⁸

That the judiciary has been summoned into such diverse and far-ranging areas illustrates the source of its constantly increasing caseload. However, it also indicates the connection between the visibility of court decisions and the public's choice of judges as the most effective recourse in social and economic disputes.

D. *Effect of the Workload on Judicial Administration and Litigants*

In describing the judicial process, Cardozo noted that some judges view their duty as nothing more than matching the colors

26. N.Y. Times, Sept. 2, 1977, § A, at 12, cols. 5-6. In another novel suit, judicial assistance was invoked by an unmarried person for support payments and property rights previously associated solely with marital obligations. In *Marvin v. Marvin*, 18 Cal. 3d 660, 665, 557 P.2d 106, 110, 134 Cal. Rptr. 815, 819 (1976), the California Supreme Court held that singer Michelle Triola could bring claims for such rights against actor Lee Marvin, with whom she had lived for seven years. The court found that express contracts between unmarried persons should be enforced by the courts, unless the contract is explicitly based on meretricious sexual services. Even if there is no express contract, the courts should determine whether the parties' conduct gives rise to an implied contract, agreement of partnership, or joint venture. In explaining its broadening of marital rights under the common law, the court adopted the presumption that the parties had intended to deal fairly with each other, and noted further: "The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have . . . been so widely abandoned . . ." *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

27. *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 102 (1975).

28. *Id.* at 334-35, 341 A.2d 107-08. For other cases involving inroads into the affairs of religious groups, see, e.g., *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696 (1976), *rev'g* 60 Ill. 2d 477, 328 N.E.2d 268 (1973); *Holiman v. Dovers*, 236 Ark. 211, 366 S.W.2d 197 (1963); *Brown v. Mt. Olive Baptist Church*, 255 Iowa 857, 124 N.W.2d 445 (1963).

of an array of sample cases spread out on their desks. The sample closest in shade would supply the rule. "But, of course, no system of living law can be evolved by such a process. . . . It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."²⁹ It is the act of deliberation, essential in distinguishing the judiciary from a bureaucracy of case-processors, that is threatened by the rise in caseloads.³⁰

Almost a third of the cases in the federal appellate courts are presently being decided without the opportunity for oral argument, and approximately the same percentage are delivered without opinion.³¹ In an extensive survey of attorneys, respondents were emphatic in affirming the importance of oral argument as a part of the effective representation of their clients.³² The lack of an opinion in numerous cases deprives litigants in similar controversies of the benefit of the court's guidance, and may indeed proliferate disputes that would otherwise have been settled by a full interpretation of the legal question at issue.³³

The increasing volume in itself has caused the former Chief Judge of the Second Circuit, Henry J. Friendly, to state that "the inferior federal courts, and indeed the Supreme Court as well, are faced with the prospect of a breakdown,"³⁴ and that "[t]he [federal] courts of appeals are already in a state of crisis."³⁵ A simplistic but nonetheless sobering extrapolation from the federal data suggests that by the commencement of the 21st century, the federal appeals courts will decide one million cases per year, there will be over 5,000 federal judges, and the federal reporter system will expand by more than 1,000 volumes per year.³⁶ More refined predictions should be based on a sophisticated subject-by-subject analysis.³⁷ Nevertheless, the data signal a continual overall increase in cases filed.

29. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20-21 (1921).

30. See REPORT OF THE DEPARTMENT OF JUSTICE COMMITTEE ON REVISIONS OF THE FEDERAL JUDICIAL SYSTEM, *THE NEEDS OF THE FEDERAL COURTS* 4 (1977) [hereinafter cited as REP. ON REV. FED. JUD. SYS.].

31. *Id.* at 3.

32. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE—A PRELIMINARY REPORT* 56-57 (1975) [hereinafter cited as COMM'N ON REV. PRELIM. REP.].

33. See, e.g., CURTIE & GOODMAN, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 13 (1975).

34. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 3 (1973).

35. *Id.* at 31.

36. BARTON, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

37. CURTIE & GOODMAN, *supra* note 33, at 63; see HAGER, *Access to Justice: Whether Courts are Best Place to Settle Many Disputes*, 35 CONG. Q. WEEKLY REP. 1229, 1234

In turn, meritorious litigants may be effectively barred from Supreme Court review or indeed from any judicial scrutiny at all. Although the number of cases granted plenary review by the United States Supreme Court has remained virtually the same for many decades,³⁸ the number of litigants seeking such review has consistently escalated. The fact that the Court is hearing a smaller proportion of the cases presented to it each year has several possible explanations. One is that there were cases decided unnecessarily in the past, or that there are now such different conditions that a smaller percentage of cases must be decided by a national tribunal in order to avoid conflict among the circuits.³⁹ Another is that, as indicated by former Chief Justice Warren, a substantial proportion of the cases currently rejected are frivolous.⁴⁰ However, there is considerable support for the conclusion that there may be vital issues meriting attention that are not being decided by the Supreme Court.⁴¹

At the federal district court level, more than 90% of all civil cases are terminated before trial.⁴² The delay caused by the massive workload leads to settlements in many cases as witnesses move away or forget the events; as monetary pressures mount, the delay gives bargaining advantages to litigants who benefit from the lapse of time.⁴³ Moreover, such delay may affect the quality of decisions because of the deterioration of evidence before the court.⁴⁴

(1977). The statistics fail to reflect the character of the cases involved, and the qualitative burden they impose on the courts. For example, in the Supreme Court of the United States, there are a vastly increased number of cases involving "the most sensitive issues of human conflict," but fewer actions involving patents, utility rates, and corporate reorganizations—cases that typically have long and complex records. FREUND REPORT, *supra* note 3, at 6.

38. See text accompanying notes 6-7 *supra*.

39. COMM'N ON REV. PRELIM. REP., *supra* note 32, at 14.

40. See text accompanying notes 4-5 *supra*.

41. See COMM'N ON REV. PRELIM. REP., *supra* note 32. The Commission on Revision of the Federal Court Appellate System notes that "[e]xtrapolation suggests that if we examined all of the cases denied plenary review in a single term of the Supreme Court, we would find, at a conservative estimate, 35 conflicts that had gone unresolved for at least two years." *Id.* at 26-27.

42. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 1 (1976).

43. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 544 (1969); see Kelner, *Settlement of Personal Injury Cases*, 6 TRIAL L.Q. 36, 37 (1968). In 1973 the federal courts had an overall median time interval from filing to disposition of 21 months for certain categories of cases. [1973] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 143.

44. Carrington, *supra* note 43.

II. SOURCES OF INCREASED LITIGATION

Professor Grant Gilmore, in his remarkable work, *The Ages of American Law*, reminds us that "[t]he importance of the role which the courts have played in determining social and economic policy has varied throughout our history."⁴⁵ He found that before the Civil War, federal and state legislatures were inactive and the courts were the predominant problem-solvers. In the post-Civil War period, the legislatures evinced new life, and began establishing administrative agencies such as the Interstate Commerce Commission. During the New Deal, which evolved its own unique regulatory program, it was widely rumored that the judiciary's Golden Age was over.⁴⁶ The post-World War II era, however, has set that rumor to rest.

An exploration of the causes of the judiciary's expanding workload is essential in formulating solutions for the problems that have resulted.

A. *Population Increases*

Reporting on the sources of the Supreme Court's growing caseload, the Freund Committee of the Federal Judicial Center noted that "[t]he population of the nation will have grown from 132 million in 1940 to 210.2 million at the end of 1972."⁴⁷ Other commentators, including former Solicitor General Bork, have found no relation between population increases and the caseload crisis.⁴⁸ It has been noted that in 1960-1974 the population rose 17%, while the number of federal court cases filed rose 60%.⁴⁹

Moreover, the population factor is likely to be even less significant in the near future. Although the number of persons in the country is still increasing, the rate of population growth has shown a dramatic downturn in the past decade, at one point falling below replacement level.⁵⁰ While there has been a modest reversal

45. G. GILMORE, *THE AGES OF AMERICAN LAW* 15 (1977).

46. *Id.*

47. FREUND REPORT, *supra* note 3, at 3.

48. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232-33 (1976).

49. Erlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976, § 6 (Magazine), at 17.

50. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PUB. NO. 706, *ESTIMATES OF THE POPULATION OF THE UNITED STATES AND COMPONENTS OF CHANGE 1940 TO 1976*, at 1 (1977).

of this trend recently, there is no basis for a prediction that the explosive growth rates of the 1960's will be resumed.

B. *Passage of New Legislation*

As the areas covered by legislation expand, new questions are presented for judicial consideration. Environmental safety and consumer rights are relatively recent examples. However, the presumption that larger numbers of federal laws are being promulgated now than in past years is, like many plausible theories, unfounded in fact. During the 1957-58 sessions, the 85th Congress enacted 1,854 measures. In 1963-64, the 88th Congress issued 1,026. The total in 1973-74 for the 93rd Congress was 772.⁵¹

The key factor is not the volume of new laws, but their potential for creating lawsuits. In the United States District Courts, actions filed under new provisions of the Social Security Law increased 77.1% from 1975 to 1976.⁵² It has been estimated that the Mine Safety Act could generate more than 20,000 full jury trials each year.⁵³ The Freedom of Information Act,⁵⁴ Consumer Credit Protection Act,⁵⁵ Fair Credit Reporting Act,⁵⁶ Consumer Product Safety Act,⁵⁷ and Speedy Trial Act of 1974⁵⁸ are among the recently promulgated federal statutes that will continue to have a significant impact on the work of the courts.⁵⁹

Undoubtedly, it is in the public interest to devise legislation that meets widespread problems unsolvable by other means. This does not obviate the need to consider the litigation consequences when such legislation is drafted. Possible procedures for facilitating this consideration will be discussed in Section III.

51. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 444 (1975). However, even if the number of laws passed does not dramatically increase each year, the cumulative effect of prior laws remains.

52. [1977] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 173 (Table 17). The major filings were "black lung" cases caused by prolonged exposure to coal dust, brought under the Black Lung Benefit Act of 1972, 30 U.S.C. § 901 (1976). *Id.* at 172.

53. REP. ON REV. FED. JUD. SYS., *supra* note 30, at 8.

54. 5 U.S.C. § 552 (1976).

55. 15 U.S.C. § 1601 (1976).

56. 15 U.S.C. § 1681 (1976).

57. 15 U.S.C. § 2051 (1976).

58. 18 U.S.C. § 3161 (1976).

59. Kaufman, *supra* note 42, at 5 n.12.

C. *The Growth of Legal Services and of Public Awareness of Legal Remedies*

In 1965, as part of the War on Poverty, the federal government initiated a program to provide legal services for the poor. Originally established within the Office of Economic Opportunity (OEO), the program was nearly dismantled by the Nixon administration in 1973.⁶⁰ It is now under the jurisdiction of the Legal Services Corporation,⁶¹ which is funded through public appropriations but composed of independent private corporations that operate as grantees of the federal government.⁶² The Corporation currently provides financial support to approximately 300 legal assistance programs serving clients in nearly 700 offices, employing over 3,000 attorneys and 1,000 paralegals.⁶³ By 1971, its program attorneys had taken more than 200 appeals to the United States Supreme Court and had won 89.⁶⁴ It had undertaken a short-term effort to provide the equivalent of at least two lawyers for each 10,000 poor citizens nationwide, and was funded for the fiscal year 1977 at \$125 million,⁶⁵ as compared with \$22 million in 1967.⁶⁶

The growth of nonprofit public interest law centers, which have concentrated on litigation of public policy questions, has accelerated within the last ten years. The spectrum of issues addressed by these centers includes environmental and consumer protection, land and energy use, occupational safety, tax reform, health care, media access, employment and welfare benefits, and corporate responsibility.⁶⁷ Ralph Nader's book, *Unsafe at Any Speed*,⁶⁸ other consumer-oriented reports, the work of the Sierra Club and the Environmental Defense Fund, and the activities of other public interest groups have all had a substantial influence

60. See Note, *Legal Services-Past and Present*, 59 CORNELL L. REV. 960, 961, 965-67 (1974).

61. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, § 1001, 88 Stat. 378 (1974).

62. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 52.

63. 2 PIV. L. REP. (CCH) ¶ 8010 (May 1977).

64. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 50. Program attorneys have established important precedents in such areas as property law, e.g., *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968); and welfare law, *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro* the Supreme Court invalidated residency as a test for welfare eligibility, *id.* at 638, a decision which resulted in payment of \$140-200 million annually to welfare recipients. Note, *supra* note 60, at 970 n.52 (citing 3 LAW IN ACTION 1 (Oct.-Nov. 1968)).

65. 2 PIV. L. REP. ¶ 8010 (May 1977).

66. Note, *supra* note 60, at 968.

67. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 80.

68. R. NADER, *UNSAFE AT ANY SPEED* (2d ed. 1972).

on public awareness of legal rights.⁶⁹ Also, the National Association for the Advancement of Colored People, the NAACP Legal Defense Fund, the American Civil Liberties Union, and the American Jewish Congress, which had long been active in representing individuals challenging official action on constitutional grounds, have been joined by new organizations established to serve other minorities.⁷⁰

Commentators have interpreted these developments as a sign of "rights consciousness," which has been defined as "new demands for participation in the political process and for sharing in the various forms of governmentally created economic benefits These [demands] have increased the resort to the courts for resolution of major public policy issues."⁷¹

Although other observers discount rights consciousness as a factor in the increased resort to the courts, their arguments are not persuasive. One writer asserts that "the high rate of settlements and the low rate of appeals in the United States suggest it should not be regarded as having a population with great interest in securing moral victories through official vindication."⁷² In order to evaluate the settlement and appeal figures, however, it is necessary to differentiate between suits involving two giant corporations, cases brought by plaintiffs who lack the funds and the time to wait indefinitely for a final disposition, and a myriad of other categories. Each kind of lawsuit presents substantially different factors that tend to increase or decrease the advantages of settlement.

The observers who discount rights consciousness cite a Detroit study that polled citizens involved in civil disputes regarding their goals. The study found that only a tiny minority of those questioned (0% of landlord-tenant problems, 2% of neighborhood problems, 4% of overcharged purchasers problems, 9% of public organization problems, and 31% of discrimination problems) reported that "they sought 'justice or recognition of their rights.'"⁷³

69. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 59-60, 63. The Environmental Defense Fund (EDF) is illustrative of recently formed organizations which have expanded public awareness of legal alternatives to environmental problems. The EDF was established by a group of scientists who in 1967 had obtained a court ordered ban on the use of DDT in part of New York State. Today, the EDF is funded through the National Audubon Society and annual membership dues. *Id.* at 63-65.

70. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 30-40, 67.

71. Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 596 (1973).

72. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 106 (1974).

73. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401, 413 (1975) (Table 1).

It is true that respondents in the Detroit study did not formulate their goals in abstract terms. They cited practical gains to be achieved by a lawsuit; however, awareness of rights need not include rhetoric or joining a group movement. An individual's belief that he is not helpless in controlling his own life is also a kind of rights consciousness.

The areas of increased caseloads are perhaps the best indication of public awareness of legal remedies. In sheer number of cases, commercial matters continue to represent a far larger share of the judicial docket than civil rights questions. In 1974, 19,426 contract cases were commenced—18.8% of the total filings—while 8,443 civil rights actions were brought—representing 8.2% of the total.⁷⁴ Between 1961 and 1974, however, the number of contract actions rose by 18.9%, while the number of civil rights cases rose by a startling 2,752.4%.⁷⁵ This statistic alone clearly indicates a widespread increase in citizen consciousness of civil rights.

D. *Availability of Attorneys' Fees*

The availability of more attorneys to carry on public interest litigation has been accompanied by another significant development: judicial award of attorneys' fees to plaintiffs' counsel in such litigation. Although the Supreme Court in *Alyeska Pipeline Service Company v. Wilderness Society*⁷⁶ precluded the lower federal courts from awarding attorneys' fees in the absence of statutory authorization, a number of federal statutes provide for these awards. Some laws, such as the Voting Rights Act,⁷⁷ the Fair Labor Standards Act,⁷⁸ the Clayton Act,⁷⁹ and the Interstate Commerce Act,⁸⁰

74. [1974] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 205-07. These figures do not reflect the time such cases require for disposition; antitrust cases, which were only 1.2% of the total civil filings in 1974, *id.*, may require a substantial quantity of judicial time unless settled prior to trial. See note 11 *supra*.

75. [1974] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 205 (Table 41). The increase in such actions has been influenced by the enactment of such legislation as the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of 18, 20, & 42 U.S.C.); the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 28 & 42 U.S.C.); and the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 5 & 42 U.S.C.). For example, in fiscal year 1965 the impact of recently enacted legislation is clear, filings having increased 58% over the prior year. Since the Civil Rights Acts of the early 1960's, the growth in civil rights actions has been steady. Filings rose from 3,985 in 1970 to 12,329 in 1976. [1976] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 128-29.

76. 421 U.S. 240 (1975).

77. 42 U.S.C. § 19731 (e) (Supp. V 1975).

78. 29 U.S.C. § 216b (1976).

79. 15 U.S.C. § 15 (1976).

80. 49 U.S.C. § 16 (2) (1976).

mandate a reasonable award of counsel fees to the "prevailing party."⁸¹ Other laws, such as the Civil Rights Act of 1964,⁸² the Securities Act of 1933,⁸³ and the Securities Exchange Act of 1934,⁸⁴ authorize the award of such fees in the court's discretion.

The amounts awarded have occasionally been \$375,000 or more in a single suit.⁸⁵ These fee awards are a factor in the increase of litigation because they may in turn finance the commencement of new lawsuits by counsel engaged in public interest litigation.

E. *Judicial Expansion of Constitutional Rights*

Some of the myriad areas in which the courts have interpreted legislation and reshaped constitutional doctrines were discussed above. The judiciary has intervened in the day-to-day operation of hospitals, prisons, and at least in one instance a school district.⁸⁶ During the sixteen terms that Chief Justice Warren presided over the United States Supreme Court, it expressly overruled its prior decisions on thirty-one occasions; there had been only twenty-seven such express changes in doctrine in the previous 163 years.⁸⁷ This does not take into account the importance or vintage of the decisions overruled, nor possible *sub silentio* reversals in position in prior terms. Nevertheless, it indicates the Court's view of its responsibilities prior to the appointment of Chief Justice Warren

81. See, e.g., Agricultural Fair Practice Act of 1967, 7 U.S.C. § 2305 (1976); Packers and Stockyard Act, 7 U.S.C. § 210 (f) (1976); Perishable Agricultural Commodities Act, 7 U.S.C. § 449g (b) (1976). The "prevailing party" requirement itself may be productive of litigation. If plaintiff wins in the District and Circuit Courts, but the Supreme Court denies certiorari on the grounds of mootness, has the plaintiff "prevailed"?

82. 42 U.S.C. §§ 2000 (a)-3 (b), e-5 (k) (1976).

83. 15 U.S.C. § 77k (e) (1976).

84. 15 U.S.C. §§ 78i (e), r (a) (1976).

85. See, e.g., *Beazer v. New York City Transit Auth.*, 558 F.2d 97, 100 (2d Cir. 1977); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974). In *Grinnell* the court reversed an initial fee award of \$1.5 million. On remand, the District Court awarded \$870,607. On subsequent appeal, the Second Circuit held that appellee should receive a total fee of \$333,073.25. *City of Detroit v. Grinnell*, 560 F.2d 1093, 1103 (2d Cir. 1977). See also *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (permitting an \$800,000 attorney's fee award).

86. N.Y. Times, April 24, 1977, § 1 at 1, col. 2. Professor Burt Neuborne's analysis in Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1106 (1977), differentiates between federal and state judges with respect to their receptivity to constitutional litigation. Citing both historical and institutional factors, he notes that lawyers seeking "expansive definition and vigorous application of federal constitutional rights" have turned to the federal judiciary while their opponents have sought to channel such challenges into the state courts. *Id.*

87. Holland, *American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old*, 51 IND. L.J. 1025, 1027 n.8 (1976).

Burger.⁸⁸ Commentators have noted that the increased caseload of the federal courts is attributable in part to such changes in constitutional analysis.⁸⁹

The work of the courts is affected by these shifts in constitutional interpretation in two ways: directly, by creation of new substantive and procedural rights that can be the basis for commencement of lawsuits, and indirectly, by enhancement of the public perception of the courts as the "most responsive and effective agencies of change during the past generation,"⁹⁰ which in turn may stimulate litigation.

The direct impact needs no underlining. The indirect effect relates to the structure and performance of the other branches of government. Professor Cox has observed that because of the size and diversified functions of the legislature and the executive, judicial intervention often becomes the only available source of relief. He notes further that "modern government is simply too large and too remote, and too few issues are fought out in elections, for a citizen to feel much more sense of participation in the legislative process than the judicial."⁹¹ The courts act as a smaller unit in which the power of individuals to effect change can be clearly understood, and offer the accessibility that bureaucracies and legislatures appear to lack.

F. *Sociological Factors*

Law is a social phenomenon. Increasing resort to the law reflects changes in social trends and institutions, which can to some degree be isolated and quantified.⁹²

88. See *id.* The Supreme Court under Chief Justice Burger has also reinterpreted rights in several areas. For example, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court invalidated a provision of the Fair Labor Standards Act, thus limiting the reach of the commerce clause. The Court has modified the application of the equal protection clause, see, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974); the due process clause, see, e.g., *Paul v. Davis*, 424 U.S. 693 (1976), *Mathews v. Eldridge*, 424 U.S. 319 (1976); and specific guarantees in the Bill of Rights, see, e.g., *Hudgens v. NLRB*, 424 U.S. 507 (1976) (first amendment); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-98 (1977); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977).

89. See, e.g., FREUND REPORT, *supra* note 3, at 2. The ratio of cases decided by the Supreme Court shifted to approximately two-to-one in favor of civil liberties over economic issues during the last half-dozen terms of the Warren Court. Between World War II and the 1962 term, and since the beginning of the Burger Court, the Supreme Court has decided on the merits an equal number of cases raising economic issues as those raising social or political issues. G. SCHUBERT, *JUDICIAL POLICY MAKING* 178 (rev. ed. 1974).

90. Rosenberg, *supra* note 14, at 810.

91. A. Cox, *supra* note 16, at 116.

92. For an illuminating and provocative discussion of this subject, see D. BLACK, *THE BEHAVIOR OF LAW* (1976).

Law varies inversely with other forms of social control: there is more "law"—including litigation, legislation, and regulation—when other modes of social control diminish.⁹³ As a long term trend the role of law has increased as the kinship group, the close-knit community and the religious nucleus have shown signs of dissolution.⁹⁴ Studies of cultures in such diverse areas as Mexico, Taiwan, Ethiopia, Israel and Wales, as well as modern American society, illustrate this correlation.⁹⁵ In addition, a relationship can be found between law and cultural distance. Litigation is less likely at the extremes, where there is little or no cultural diversity, or where such diversity is so enormous that there is no contact at all between the various societal segments.⁹⁶ In Chinese-American communities, disputes between Chinese and non-Chinese are more likely to end in litigation than controversies between fellow Chinese;⁹⁷ the same is true in Italian neighborhoods.⁹⁸ However, as the homogeneity of such neighborhood enclaves disappear and elements of a common culture pervade our various subcultures, litigation increases.⁹⁹

The function of this analysis is to note the changes in social pattern that relate to the increase in lawsuits, not to posit conclusions about the value or lack of value in such changes. For example,

93. See *id.* at 6-7, 106-10.

94. Black, *Mobilization of Law*, 2 J. OF LEGAL STUD. 125, 147 (1973).

95. See D. BLACK, *supra* note 92, 6-7, 106-10; Gallin, *Conflict Resolution in Changing Chinese Society: A Taiwanese Study*, in POLITICAL ANTHROPOLOGY 265-74 (M. Swartz, V. Turner & A. Tuden eds. 1966); Lowenstein, *Ethiopia*, in AFRICAN PENAL SYSTEM 35, 49 (A. Milner ed. 1969); Nader & Metzger, *Conflict Resolution in Two Mexican Communities*, 65 AM. ANTHROPOLOGIST 584, 589-91 (1963); Peters, *Aspects of the Social Control of Moral Ambiguities: A Comparative Analysis of Two Culturally Disparate Modes of Social Control*, in THE ALLOCATION OF RESPONSIBILITY 109-62 (M. Gluckman ed. 1972); Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471 (1954). There also appears to be a direct correlation between the degree of organization in a society—including not only the development of governmental bureaucracies but also the growth of private groups and corporations—and the incidence of litigation. D. BLACK, *supra* note 92, at 91. Organizations and groups initiate more lawsuits than individuals, although many of these may be debt collections, and the more organized the body the more this holds true; corporations bring more litigation than voluntary organizations. A group is more likely to bring a lawsuit against an individual than vice versa, and is more likely to win. Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347, 348-60 (1975); Wanner, *The Public Ordering of Private Relations. Part Two: Winning Civil Court Cases*, 9 LAW & SOC'Y REV. 293, 300 (1975) (Table V). In three large cities in the United States half of the plaintiffs in civil litigation are organizations, but two-thirds of the defendants are individuals. Wanner, *The Public Ordering of Private Relations. Part One: Initiating Civil Cases in Urban Trial Courts*, 8 LAW & SOC'Y REV. 421, 423-38 (1974).

96. D. BLACK, *supra* note 92, at 74-80.

97. See Grace, *Justice, Chinese Style*, 75 CASE & COM. 50, 51 (Jan.-Feb. 1970).

98. G. SUTTLES, *THE SOCIAL ORDER OF THE SLUM: ETHNICITY AND TERRITORY IN THE INNER CITY* 101-02 (1968).

99. See D. BLACK, *supra* note 92, at 76-78.

in certain agrarian societies where sons own little or nothing until the death of the father, the authority of the father is greater than in a modern society where sons become independent at an earlier age.¹⁰⁰ The older pattern may be viewed as desirable because it promoted stability and certainty, or undesirable because it permitted tyranny. The lack of consensus in values is in itself a reflection of the decrease of social control other than law. A judicial solution needs no agreement; it presumes an adversarial context, and the policeman is waiting in the wings if enforcement is required.

The causes of increased litigation thus include sociological factors such as the decline in traditional modes of social control and the growth of rights consciousness, legislative and judicial expansion of access to the courts, and economic incentives such as the award of attorneys' fees.

III. FUTURE TRENDS AND POSSIBLE SOLUTIONS

A. *The Provision of Legal Services to the Public and Its Relation to Caseload Increases*

The state of the judicial docket is related in part to the capacity and programs of the organizations providing legal representation to lower and middle income groups. With the expansion of such programs, a further increase in litigation is foreseeable.

Public interest law groups,¹⁰¹ serving environmentalists, consumers, racial and ethnic minorities, and the poor, received contributions estimated at \$130.4 million in the period from 1972 to 1975.¹⁰² However, continued funding for public law centers may be in jeopardy. Foundations are gradually withdrawing from financing older groups, and have not manifested substantial interest in funding new organizations.¹⁰³

The prognosis for prepaid group legal services, to which members or subscribers pay a fixed fee and may subsequently request

100. *Id.* at 32.

101. The definition of what constitutes a public interest law group is set forth in COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 6-7.

102. *Id.* at 90.

103. *Id.* at 238-40; see Lenny, *The Case for Funding Citizen Participation in the Administrative Process*, 28 AD. L. REV. 483, 485 (1976). However, the funding of public interest centers has increased overall, from \$25.8 million in 1972 to \$40.1 million in 1975. Rogovin, *Public Interest Law: The Next Horizon*, 63 A.B.A.J. 334, 338 (1977).

contractually specified legal assistance, is more expansive. In California there are at least 350 such plans, based on a "closed" panel of attorneys from which beneficiaries must choose. There are an estimated 2,000 to 3,000 programs throughout the country.¹⁰⁴ "Open" plans are also in operation, such as the Maryland Credit Union League Legal Services Plan. The Maryland plan, launched in 1973, is available to 600,000 members who are charged thirty dollars semi-annually. Members may select any licensed attorney, with cash allowances towards the cost of such counsel.¹⁰⁵ More than 1,000,000 persons already belong to some form of group or prepaid program.¹⁰⁶

The judicial framework for the development of prepaid plans was created in a series of Supreme Court decisions beginning with *NAACP v. Button*,¹⁰⁷ which applied first amendment protection to the use of litigation as a means of group advocacy. In its most recent decision on the subject, *United Transportation Union v. State Bar of Michigan*,¹⁰⁸ the Court applied this principle to a union program designed to assist workers in filing damage suits under the Federal Employers Liability Act.¹⁰⁹ The union had secured agreements from all counsel that charges would not exceed twenty-five percent of the recovery including all expenses, which protected the members from excessive legal fees.¹¹⁰

Federal legislation has also implemented the expansion of prepaid plans. The Labor Management Relations Act was recently amended to permit employers to contribute to a jointly adminis-

104. Hatt, *Legal Insurance in the United States, 1973-1974* ANN. SURVEY AM. L. 213, 215 (1974).

105. Dunne, *Prepaid Legal Services Have Arrived*, 4 HOFSTRA L. REV. 1, 40 (1975). A plan sponsored by the Shreveport Bar Association of Louisiana was the first "open" plan and the first program to be sponsored by a bar association. Begun in 1971, the program provides limited coverage for 600 union members and their dependents. Twenty percent of the eligible members now annually use the services of the plan. *Id.* at 14-15.

106. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 325.

107. 371 U.S. 415 (1963). The decision distinguished such group advocacy from barratry, which is the encouragement of litigation solely in order to create a profit for an attorney. This activity is prohibited under common law. *Id.* at 439-43.

108. 401 U.S. 576 (1971).

109. 45 U.S.C. §§ 51-60 (1970).

110. 401 U.S. at 577-78. Prior to the *United Transportation Union* decision, the Supreme Court extended protection to group legal plans by sanctioning the hiring of staff attorneys by a union to represent its members. *U.M.W. District 12 v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967). In *Brotherhood of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1 (1964), the Court ruled that a state court injunction against a union's practice of recommending specific lawyers to represent its members in railroad personal injury litigation denied the members rights guaranteed by the first and fourteenth amendments. *Id.* at 8.

tered trust fund to "defray the costs of legal services."¹¹¹ The funds contributed cannot be used to sue a union or an employer.¹¹² The Employees Retirement Income Security Program¹¹³ establishes standards for employee benefit plans, including prepaid legal services, and requires reporting and disclosure of specified data, such as source of financing, eligibility and participation requirements, and circumstances that may result in disqualification.

State law, by contrast, is far from uniform, with court interpretations and statutory provisions in many jurisdictions restricting implementation of prepaid legal plans.¹¹⁴ Twenty-three state insurance departments have issued no formal opinions on whether prepaid plans constitute insurance. Five state insurance departments have held that insurance provisions apply, seven held the contrary, and six provide for partial regulation.¹¹⁵

It seems probable, however, that public demand will facilitate rapid growth of such systems to deliver legal services. In 1975, the Staff Director of the American Bar Association's Special Committee on Prepaid Legal Services predicted that twenty-five percent of the American public will use this approach within the next five years.¹¹⁶

111. 29 U.S.C. § 186 (c) (8) (1976), as amended by Act of August 15, 1973, Pub. L. No. 93-95, 87 Stat. 314.

112. *Id.* (second proviso).

113. 29 U.S.C. §§ 1001-1381 (1976); see, e.g., 29 U.S.C. §§ 1002 (1), 1021 (a) (1), 1022 (a) (1), 1023, 1024 (1976).

114. Gasperini, *Prepaid Legal Services: The Long View*, 61 A.B.A.J. 1348, 1348 (1975).

115. Dunne, *supra* note 105, at 35-36. Whether prepaid legal insurance is within the ambit of the insurance laws of New York, the insurance center of the country, is critical since New York law defines what types of insurance may be sold. *Id.* at 36 (citing N.Y. Ins. LAW § 46 (McKinney 1966)). In a recent New York case, *Feldstein v. Attorney General*, 36 N.Y.2d 199, 326 N.E.2d 288, 366 N.Y.S.2d 613 (1975), the court concluded that two particular prepaid plans did not involve "insurance" within the meaning of state law. The case did not decide whether future plans would be subject to insurance department regulation. Another problem which prepaid legal plans may face is the extent to which the federal antitrust laws apply to such plans and restrict the use of certain payment schemes. It is arguable that a list of proscribed fees followed by a number of plan attorneys who are otherwise independent constitutes price-fixing. See Decker, *The Federal Finger of the Antitrust Division*, in A.B.A., NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES: TRANSCRIPT OF PROCEEDINGS 123 (1974); Dunne, *supra* note 105, at 33-35.

116. Gasperini, *supra* note 114, at 1351. The American Bar Association's survey of the public, based on a sample of 2,064, showed that 6.2% of the respondents would join a prepayment plan costing as much as \$12.00 per month, and 23.6% would be interested in a program charging \$3.00 per month. B. CURRAN & F. SPALDING, *THE LEGAL NEEDS OF THE PUBLIC* 91 (1974). However, participants at a New York State Bar Association meeting on Bar-sponsored legal services plans indicated that the public has shown little interest in such programs. "[People] sometimes think that the hook-up with a bar association is just another case of lawyers pushing themselves and their business on the public," one speaker explained. 179 N.Y.L.J., Jan. 20, 1978, at 4, col. 6. Attorneys surveyed by associations in the states of Washington and California indicated "overwhelming . . . approval of bar association sponsorship of state-wide programs of open panel legal insurance. . . ."

The National Science Foundation has estimated that prepaid programs will employ between twenty and thirty thousand lawyers by 1985.¹¹⁷

Because of the advantages accruing to participants, the trend to increased public reliance on prepaid legal services is unlikely to be reversed, despite its potential effect on judicial administration. Indeed, any arbitrary limitation on publicly or privately sponsored legal service groups would be far too draconian, and would deprive some individuals of legal protection on grounds unrelated to the merits of their cases.

B. *Judicial Limitations on Standing or Legal Grounds to Sue*

The judiciary has established a variety of obstacles to its own portals. In recent years, the Supreme Court has effectively limited or foreclosed court access to a number of litigants on the ground that they lacked standing. The overloaded state of the docket is one important factor inclining the courts towards strict standing doctrines.¹¹⁸

For example, in a challenge to a town zoning ordinance that had allegedly prevented low and moderate income persons from living in the locality, plaintiffs included individuals living in adjacent areas, who claimed that they could not find adequate housing in the town, taxpayers of a nearby city, who alleged that the town's exclusionary zoning compelled more low income people to live in the city and increased the city's tax burden, and a home builders' association, which claimed that the zoning ordinance prevented its members from building low or moderate-income housing

Hatt, *supra* note 104, at 215. It should be noted that the Federal Trade Commission has launched a nationwide investigation of alleged restrictions imposed by bar associations on innovative methods of delivering legal services. 178 N.Y.L.J., Dec. 28, 1977, at 1, col. 2.

117. COUNCIL FOR PUBLIC INTEREST LAW, *supra* note 22, at 325-26.

118. D. CURRIE, *FEDERAL JURISDICTION IN A NUTSHELL* 12 (1976). In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), involving the analogous area of exhaustion of administrative remedies, Justice Burger stated pointedly in dissent:

This Court has not yet required one in appellant's position to utilize available state administrative remedies as a prerequisite to obtaining federal relief; but experience has demonstrated that such a requirement is imperative if the critical overburdening of federal courts at all levels is to be alleviated. That burden has now become "a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should." . . . The devastating impact overcrowded dockets have on the quality of justice received by all litigants makes it essential that courts be reserved for the resolution of disputes for which no other adequate forum is available.

Id. at 522-23.

there.¹¹⁹ The Court rejected the challenge, holding that none of the plaintiffs could demonstrate that nullification of the ordinance would directly ameliorate their injury.¹²⁰

The Supreme Court has also held that low income persons and welfare rights organizations have no standing to attack the tax-exempt status of hospitals that limit treatment of indigent patients to emergency room services only.¹²¹

In another case a taxpayer was precluded from challenging the secrecy of the Central Intelligence Agency budget as violative of the constitutional requirement¹²² that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."¹²³ Plaintiff was found to have suffered no actionable injury as a consequence of the budget secrecy.¹²⁴ The Court commented that the federal judiciary could not be used as a "forum in which to air . . . generalized grievances about the conduct of government or the allocation of power within the Federal System."¹²⁵

Such standing doctrines have been denounced as veiled attacks on substantive rights and remedies granted by the United States Constitution and by statute.¹²⁶ Moreover, these doctrines, although recently expanded, are not novel; they have not yet stemmed the rising caseload, and thus cannot be looked to as the sole solution to the judicial dilemma.

C. *Enlargement of Court Resources*

Since the factors that channel disputes into a judicial forum continue unabated, the appointment of more judges is an obvious response. This solution is, however, not a panacea. The costs involved are high. In the federal courts \$250,000 may be necessary to make a single judgeship operational, and \$200,000 per year may

119. Warth v. Seldin, 422 U.S. 490 (1975).

120. *Id.* at 503-07.

121. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976).

122. U.S. CONST. art. I, § 9, cl. 7.

123. United States v. Richardson, 418 U.S. 166, 168 (1974); *cf.* Flast v. Cohen, 392 U.S. 83 (1968) (to establish standing in a taxpayer's suit challenging the constitutionality of a federal spending program, taxpayers must demonstrate a logical connection between their status and the type of legislation attacked, and must establish a nexus between that status and the nature of the constitutional infringement alleged).

124. 418 U.S. at 176-78.

125. 418 U.S. at 174 (quoting Flast v. Cohen, 392 U.S. 83, 114 (1968) (Stewart, J., concurring)); *cf.* Frothingham v. Mellon, 262 U.S. 447 (1923) (a taxpayer does not have standing to restrain the enforcement of a congressional act authorizing appropriations).

126. Hager, *supra* note 37, at 1231-32.

be incurred for continuing expenses.¹²⁷ Further, the addition of judges does not guarantee a proportional increase in the disposition rate of pending matters. The number of federal judgeships rose twenty-five percent between 1959 and 1961, while disposition of cases increased only three percent.¹²⁸ These percentages also demonstrate that the implications of the case overload problem reach far beyond one-dimensional solutions, such as the addition of personnel.

Indefinite expansion of the judiciary would, moreover, erode collegiality, which has been termed "an essential element in the collective evolution of sound legal principles."¹²⁹ The number of conflicting decisions, resulting from failure to exchange information and views, would increase. Ironically, the confusion caused by such conflicts produces still more litigation.¹³⁰ Lack of opportunity for discussion among judges also increases the possibility that personal animosity will be injected into differences of opinion on the issues. Such animosity has been found to affect the quality of judicial performance.¹³¹

These are arguments against open-ended enlargement of the size of the judiciary, not against additional appointments of well-qualified candidates. However, these considerations demand the development of alternative approaches that would restructure the role of the judiciary.

D. *Diversion of Disputes*

1. *The existing approaches.* Resolution of controversies outside the formal court system is conducted in a variety of settings by

127. Clark, *Parajudges and the Administration of Justice*, 24 VAND. L. REV. 1167, 1172 (1972).

128. Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 125 n.74 (1971).

129. REP. ON REV. FED. JUD. SYS., *supra* note 30, at 6.

130. *Id.* at 7. It also has been suggested that more circuit courts be added to the federal system. Again, this alternative would increase the possibility of intercircuit conflicts and thus additional litigation, as well as public confusion over applicable legal requirements. For an exposition of the arguments pro and con, see, e.g., Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 586-87 (1969); *Commission Recommends Splitting Fifth and Ninth Circuits to Create Two New Federal Appellate Circuits*, 60 A.B.A.J. 209 (1974); Currie & Goodman, *supra* note 33, at 25 n.86; Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974).

131. See H. FRIENDLY, *supra* note 34, at 46. Considerations of collegiality and the possibility of conflicting decisions are of course irrelevant to the hiring of more support and administrative personnel for the courts. The efficiency of the judiciary depends in part on the availability of sufficient support staff.

religious tribunals, neighborhood agencies, mediators and arbitrators. The Rabbinical Court of Justice of the Associated Synagogues of Massachusetts provides this type of alternative.¹³² Another example is an innovative neighborhood mediation center in Harlem, under the auspices of the Institute for Mediation and Conflict Resolution, which receives referrals of matters such as domestic disputes and harassment complaints.¹³³ The mediators are local residents who have undergone four months of training. The advantages offered to those availing themselves of the program are that no court record is compiled, and the ultimate judgment is that of the local community.¹³⁴

Another approach to diversion is a requirement that disputes be arbitrated before they are eligible for judicial scrutiny, preserving the right to proceed in court if either side is dissatisfied with the arbitration award. Such a requirement has been suggested by a Justice Department study for money damage suits of \$50,000 or less filed in the federal district courts.¹³⁵ Compulsory arbitration for small claims is used in Pennsylvania, where each county is authorized by court rule to establish arbitration panels composed of three lawyers. Every award entered has the effect of a court judgment.¹³⁶ During the first twenty-two months of the program, the municipal courts were spared between 2,500 and 4,000 trials of small cases.¹³⁷

132. Leigh-Wai Doo, *Dispute Settlement in Chinese-American Communities*, 21 AM. J. COMP. L. 627, 627 n.1 (1973).

133. The Institute is located in New York City, at 49 E. 68th Street, and is manned by a staff of six to seven persons.

134. N.Y. Times, May 28, 1975, § 1, at 45, col. 8; see Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675, 686-87 n.9 (1975); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 87-88 (1974).

135. N.Y. Times, Dec. 11, 1977, § 1, at 51, col. 1. Disputes would be referred to a panel of three arbitrators. Federal judges in Connecticut and the Eastern District of Pennsylvania have tentatively agreed to test the plan. *Id.* The New York County Lawyer's Association has criticized similar pending legislation, H.R. Rep. No. 9778, 95th Cong., 1st Sess. (1977), for establishing minimal qualifications and pay for arbitrators and for requiring mandatory rather than voluntary arbitration. COMMITTEE ON FEDERAL LEGISLATION, NEW YORK COUNTY LAWYER'S ASSOCIATION, REPORT ON PROPOSED LEGISLATION TO ENCOURAGE ARBITRATION OF CIVIL CASES IN UNITED STATES DISTRICT COURTS 1, 2 (1977). The Association has also argued, *inter alia*, that a provision of the bill that provides parties with a right to a trial *de novo* would defeat the advantage of expedition sought by the legislation. *Id.* at 3.

136. PA. STAT. ANN. tit. 5, §§ 30, 51 (Purdon 1963). The statute provides for appeal to courts of general jurisdiction. PA. STAT. ANN. tit. 5, § 71 (Purdon 1963).

137. Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448, 462 (1961) (reporting the results of an empirical study conducted by the Columbia University Project for Effective Justice). However, all

Assistance in resolving labor disputes is available from the Federal Mediation and Conciliation Service. The industries that have used the Service range from copper mining to clothing, the sole criterion being whether the dispute threatens to cause substantial interruption of interstate commerce.¹³⁸ Voluntary arbitration is provided by the American Arbitration Association and other groups for both labor and commercial controversies.¹³⁹

Settlement of civil disputes depends on the parties' cooperation or their initial agreement to negotiate the dispute. This may not always be forthcoming. Nonetheless, it can safely be predicted that systems of nonjudicial dispute resolution will continue to expand. The Justice Department's formal agenda, released in May 1977, lists the creation of Neighborhood Justice Centers as an additional initiative.¹⁴⁰

While the informal approaches that have evolved are novel and can absorb some of the controversies that might otherwise have been channelled to the judiciary, a substantial number of disputes terminable only by compulsory process will remain. As we have seen, even mandatory arbitration is often only a screening device, since the judiciary again becomes the ultimate resort if either party refuses to accept the award.

2. *A suggested remedy.* There is an exit from this hall of mirrors. A significant inroad could be made on the caseload by the creation of new administrative tribunals of general jurisdiction that would address the repetitious factual issues inherent in the litiga-

leading studies of the Pennsylvania procedure have noted that it has inherent limitations that could preclude its usefulness for larger cases. Comment, *Arbitration and Award*, 113 U. PA. L. REV. 1117, 1119 (1965). For a summary and analysis of other small claims courts and arbitration procedures, see E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 39-56 (1977) [hereinafter cited as *SURVEY OF DIVERSION ALTERNATIVES*].

138. 29 U.S.C. §§ 171-173 (1976). In fiscal year 1974, the Service was involved in resolving 18,809 dispute cases, 8,479 of which involved a joint meeting between the parties. 27 FED. MED. & CON. SERV. ANN. REP. 27 (1974).

139. See, e.g., S. LAZARUS, *RESOLVING BUSINESS DISPUTES* 23-24 (1965); Mentschikoff, *Commercial Arbitration*, in M. BERNSTEIN, *PRIVATE DISPUTE SETTLEMENT* 8-14 (1968). Other channels of dispute settlement include public and private ombudsmen, COMMISSION ON A NATIONAL INSTITUTE OF JUSTICE, A.B.A., *QUEST FOR JUSTICE* 40 (1975), and compulsory arbitration, W. GERSHENFELD, H. GLASBECK, B. HEPPLER, J. LOWENBERG & K. WALKER, *COMPULSORY ARBITRATION* (1976). See generally *SURVEY OF DIVERSION ALTERNATIVES*, *supra* note 137.

140. Hager, *supra* note 37, at 1234. The Law Enforcement Assistance Administration (LEAA) of the Department of Justice is setting up three experimental Neighborhood Justice Centers in Atlanta, Kansas City, and Los Angeles, each funded at about \$200,000 for eighteen months. A minimal full-time staff will supervise part-time mediators recruited from the community. The LEAA will spend more money to evaluate the results of the three Neighborhood Justice Centers than it will to run them, in the hope that standards can be developed for use by others. 64 A.B.A.J. 29 (1978).

tion of claims under a pool of specified regulatory and social services legislation. Such legislation governs our environment, our energy needs, our safety and health. Concerns such as these need particular attention, and if they are thrust on overworked federal and state courts in competition with the criminal and civil matters already being litigated there, they will not receive it. The large expected annual increase in jury trials, which is anticipated in the federal district courts as a result of the Mine Safety Act, is only one example.¹⁴¹

As a Department of Justice study has pointed out: "Although [federal] . . . courts are uniquely qualified to protect individual processes of government . . . they are not unique in their ability to adjudicate relatively unsophisticated, repetitious factual issues. Many other kinds of tribunals perform that function as accurately and well."¹⁴²

The advantages of the administrative tribunals are threefold:

a) Unlike existing administrative agencies,¹⁴³ they would not be confined to one specialized subject matter. This jurisdiction would facilitate a high degree of flexibility. If there were a decline in litigation in some fields, the administrative law judges could turn their attention to other peak areas. Unlike the courts, the agencies could handle some cases without counsel and without formal procedures, while others could be structured with formal evidentiary requirements, depending on the technical nature of the issues and the needs of the parties.¹⁴⁴ And, unlike arbitration, which involves many different models developed ad hoc and may lead to de novo review by a trial level court, the administrative tribunals would be created by statute and their decisions would be

141. See text accompanying note 53 *supra*.

142. REP. ON REV. FED. JUD. SYS., *supra* note 30, at 8 (urging establishment of new federal administrative tribunals).

143. The United States Government has at least 60 agencies, and many more quasi-official agencies, boards and panels. 1977/78 UNITED STATES GOVERNMENT MANUAL 456-95. "Agencies have long exercised adjudicatory authority analytically similar to that exercised by courts." B. SCHWARTZ, ADMINISTRATIVE LAW § 4 (1976). There are at least 800 administrative law judges serving with 22 federal agencies. Miller, *Annual Report of the Section of Administrative Law (1972-1973)*, 25 AB. L. REV. 369, 371 (1973). The typical method of review of agency determinations is by courts of appeals. B. SCHWARTZ, *supra* at § 144. Some administrative decisions, such as cases decided under the Social Security Act, 42 U.S.C. § 405 (g) (1976), are reviewed by single district court judges. *Id.* For an incisive analysis of the alternative methods of judicial review of federal administrative action, see Currie & Goodman, *supra* note 33.

144. REP. ON REV. FED. JUD. SYS., *supra* note 30, at 9-10. The Supreme Court's decision in *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977), indicates that Congress has considerable latitude in fashioning administrative proceedings to implement rights created solely by statute.

appealed directly to the federal or state appellate courts that presently review agency action.

These tribunals would handle cases involving carefully defined and recurring factual questions. If either party in a suit claimed that substantial constitutional issues were presented, and this claim were sustained in a review—perhaps by a committee composed of representatives of the administrative tribunal and of the court that would ordinarily hear the matter—the case could be transferred to the appropriate court for determination.

b) Hearing officers would develop a high degree of proficiency in administrative law questions, but would still retain a broad outlook on the competing values and considerations relevant to their decisions. The varied caseloads would also be an inducement in recruiting candidates of high quality.

c) The courts, which have a more inflexible structure and more formal procedural requirements, would be left with a substantially smaller workload. It has been estimated, for example, that 20,000 to 30,000 cases per year, resulting from federal legislative programs, could be handled by administrative tribunals instead of by federal courts.¹⁴⁵

E. *Creation of More Specialized Courts*

Specialized federal courts include the Court of Claims, which has exclusive jurisdiction in disputes involving claims of \$10,000 or more and certain other claims against the United States;¹⁴⁶ the Tax Court, which has nonexclusive jurisdiction to determine challenges to tax assessments;¹⁴⁷ and the Court of Customs and Patent Appeals, which hears appeals from certain decisions of the Board of Appeals and the Board of Interference Examiners of the Patent and Trademark Office.¹⁴⁸ It has been suggested that special environmental courts be established, because environmental litigation involves

145. *Id.* These tribunals would also handle commercial disputes that arise from federal legislation and involve repetitious factual issues.

146. 28 U.S.C. §§ 1491-1506 (1976); *see* 28 U.S.C. § 1346 (a) (2) (1976).

147. 26 U.S.C. §§ 6213 (a), 7442 (1976). The payment of the tax is not a prerequisite to commencing such a proceeding. *See, e.g.,* *Granquist v. Hackleman*, 264 F.2d 9, 14-15 (9th Cir. 1959). Tax court decisions are reviewable by the United States courts of appeals. 26 U.S.C. § 7482 (a) (1976).

148. 28 U.S.C. § 1542 (1976). The Court of Customs and Patent Appeals also has jurisdiction to review certain decisions of the United States Customs Courts, the Commissioner of Patents, and the United States Tariff Commission. 28 U.S.C. §§ 1541-1543 (1976).

technical expertise "of at least comparable magnitude and complexity as that required in tax litigation."¹⁴⁹

Arguments for the maintenance of such courts, particularly the tax courts, include the advantage of judges with greater exposure to technical issues. This advantage creates less inconsistency in resolving common problems, greater speed in dispositions, and a decreased burden on nonspecialized courts.¹⁵⁰

Those who oppose the creation of additional specialized courts in new areas have pointed to two kinds of problems. There is a danger of polarization of judicial appointments around a single set of issues.¹⁵¹ Moreover, there may be a loss of the perspective and concomitant thoroughness of analysis that is presently facilitated by the broad range of filings.¹⁵² The jurisdiction of the specialized court may itself be the subject of new litigation.¹⁵³

Additional and persuasive criticisms can be made regarding an environmental court. Environmental problems cut across a number of areas in the law, such as products liability, employment rights, and land use regulation. The difficulty of defining the perimeters of the court's jurisdiction would therefore be particularly acute. Moreover, judges located in a centralized environmental court would have less direct knowledge of local situations and settings. Agencies that have been involved in environmental litigation have reported that courts of general jurisdiction have in fact adequately handled the scientific issues that have arisen.¹⁵⁴

While the establishment of additional tribunals is essential to resolution of the caseload crisis, such tribunals should—as urged above—be administrative rather than judicial, and should have competence to determine a broad range of commercial, consumer, health, social security and other controversies.

149. Whitney, *The Case for Creating a Special Environment Court System*, 14 WM. & MARY L. REV. 473, 482 (1973). Whitney's proposal that environmental courts be established, see Note, *The Environmental Court Proposal: Requiem, Analysis, and Counter-proposal*, 123 U. PA. L. REV. 676, 692 (1975), suggests that special masters should play an expanded role in evaluating the scientific material in environmental litigation.

150. FREUND REPORT, *supra* note 3, at 11; Whitney, *supra* note 149, at 476; see Currie & Goodman, *supra* note 33, at 63; Friendly, *supra* note 4, at 639.

151. FREUND REPORT, *supra* note 3, at 11.

152. *Id.*

153. See Currie & Goodman, *supra* note 33, at 73.

154. REPORT OF THE PRESIDENT, ACTING THROUGH THE ATTORNEY GENERAL, ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM ch. VI, at 15-16 (1973). Agencies such as the Atomic Energy Commission and the Environmental Protection Agency supported this view in response to an inquiry circulated by the Attorney General. *Id.*

F. *Legislative Amendments to Federal Jurisdiction*

An extremely effective approach, which requires no new courts for its implementation, is the elimination of federal diversity jurisdiction. Diversity cases are brought in the federal courts when the litigants are citizens of different states; however, federal courts must apply state substantive law in deciding these controversies. More than 30,000 diversity cases—one-fifth of the total filings—were brought in the federal district courts during the 1975 fiscal year, and they accounted for sixty-eight percent of all civil jury trials. Appeals from diversity actions constituted more than ten percent of the courts of appeals' caseload.¹⁵⁵

Although diversity jurisdiction can be invoked by local residents, its origin is principally found in the widespread feeling that state courts or legislatures might be biased against nonresidents.¹⁵⁶ Yet, greater mobility and communication between localities have lessened this possible bias. Moreover, federal judges have no special competence in interpreting state law issues, especially when the point in question has not yet been definitively determined by the state courts. Because of the multiplicity of state forums available to absorb the cases, curtailment of diversity jurisdiction would increase the civil business of state courts of general jurisdiction by only 0.27 to 1.5%.¹⁵⁷

Additional measures could also be taken by the legislature, without detriment to the rights of litigants. Retention of cases under such statutes as the Federal Employers' Liability Act¹⁵⁸ has

155. REF. ON REV. FED. JUD. SYS., *supra* note 30, at 14.

156. A.L.I., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 101 (1969). For a discussion of other factors relevant to the origin of the diversity jurisdiction, see D. CURRIE, THE FEDERAL COURTS 437-38 (1975).

157. Burdick, *Diversity Jurisdiction Under the American Law Institute Proposals: Its Purpose and Effect on State and Federal Courts*, 48 N. DAK. L. REV. 1, 14-15 (1971). There is an increasing body of literature addressing the diversity issue. A number of commentators advocate removing most, if not all, diversity cases from the federal courts. See, e.g., H. FRIENDLY, *supra* note 34, at 139-52; Bork, *supra* note 48, at 236-37; Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A.J. 443 (1976); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4-6 (1968). But see, e.g., Frank, *Let's Keep Diversity Jurisdiction*, 9 FORUM 157 (1973); Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963). One recent commentator argues that each federal district court should be given "limited freedom to retain, curtail or virtually eliminate diversity jurisdiction within its borders." Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 319 (1977).

158. 45 U.S.C. §§ 51-60 (1970). FELA provides a cause of action for employees injured by railroad employers engaged in interstate commerce. Actions brought under the Act may be maintained in federal district or state courts. 45 U.S.C. § 56 (1970).

been described as "sheer antiquarianism."¹⁵⁹ Similarly, the requirement that the National Labor Relations Board petition the courts of appeals to enforce Board orders has been criticized as an unnecessary administrative step; Board orders could be made self-enforcing, unless the aggrieved party immediately initiates a review proceeding.¹⁶⁰ It has been estimated that this change in National Labor Relations Board procedure would reduce the Labor Board caseload in the federal appeals courts by one-half.¹⁶¹

G. *Litigation Impact Statement*

The forces that have propelled the judiciary into its present central role as society's dispute-solver are, as indicated in Section II, elusive and complex. Increased public awareness of legal remedies, greater availability of attorneys to the not-so-wealthy, judicial expansion of individual rights, and changes in social institutions are all factors. However, the single factor that can be most objectively measured and evaluated is the passage of litigation-generating legislation. It is therefore of crucial importance to fashion a remedy that takes this reality into account.

Proposed legislation should, at the time that it is discharged from committee for consideration by Congress or a state legislature, be accompanied by a litigation impact statement assessing the effect of the bill's passage on judicial administration.¹⁶² Such an assessment should address four questions. First, what is the necessity of new legislation; is there a widespread economic or social problem that cannot be met under existing law? Second, what is the volume of litigation that can be predicted as a result of the proposed statute, including both broad challenges to its constitutionality and meaning, and suits authorized by its provisions? Third, has the legislature

159. Friendly, *supra* note 4, at 640.

160. See H. FRIENDLY, *supra* note 34, at 174-75; 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 237-67 (1970).

161. See, e.g., H. FRIENDLY, *supra* note 34, at 174-75.

162. Unlike the environmental impact statements required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2) (c) (1970), such litigation impact appraisals may not form the basis for lawsuits seeking to block enforcement of the underlying statute. The legislation requiring litigation impact assessments should contain a statement to this effect. The purpose of requiring impact statements would be to compel Congress and state legislatures to ameliorate the effect of new statutes on judicial administration, not to foster roadblocks to legislative problem-solving. On the current obstacles to enacting legislation, see M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* 476-506 (2d ed. 1973); W. KEEFE & M. MOGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* (1964).

fully explored the possibility of enforcing the statute administratively rather than judicially? Finally, has the legislative proposal been drafted so as to eliminate technical problems that could be the object of a lawsuit, such as vagueness, and all other litigation-generating provisions that are not important to its goals?

Because the success of this four-step requirement will depend in part on the ability to predict the litigation potential of legislation, it would necessitate a sophisticated study of the kinds of cases that arise out of new legislation, and that presently engage a substantial portion of the judiciary's time.

CONCLUSION

Neither creation of new judicial doctrines, such as additional limits on standing, nor the development of further specialized courts dealing with only one subject matter are appropriate methods of meeting the problem of mushrooming caseloads. Appointment of more judges to existing courts is only one remedy in the composite solution advocated herein. Elimination of diversity jurisdiction, and further diversion of disputes to mediation and arbitration for voluntary agreement or at least for screening purposes, are also essential. Finally, the establishment of administrative tribunals with jurisdiction over repetitious factual issues arising from a pool of specified statutes and the requirement of a litigation impact statement to accompany legislation that may create new causes of action should be undertaken at both federal and state levels.

Some of these solutions concern problem-solving outside the litigation context and have the advantage of drawing on consensus rather than relying on compulsion. Ultimately, our capacity to develop such solutions must be strengthened. As Eugen Ehrlich reminds us, "[t]he order of human society is based upon the fact that, in general, legal duties are being performed, not upon the fact that failure to perform gives rise to a cause of action."¹⁶³

163. E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF THE LAW* 23 (1936). Eugen Ehrlich was a distinguished Austrian jurist and professor of law.

