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THE ROLE OF THE JUDGE IN PUBLIC LAW LITIGATION †

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Traditionally, adjudication has been understood to be a process for resolving disputes among private parties which have not been privately settled. In this Article, Professor Chayes argues that this conception of adjudication cannot account for much of what is actually happening in federal trial courts. Civil litigation increasingly involves determination of issues of public law, whether statutory or constitutional, and frequently terminates in an ongoing affirmative decree. The litigation focuses not on the fair implications of private interactions, but on the application of regulatory policy to the situation at hand. The lawsuit does not merely clarify the meaning of the law, remitting the parties to private ordering of their affairs, but itself establishes a regime ordering the future interaction of the parties and of absentees as well, subjecting them to continuing judicial oversight. Such a role for courts, and for judges, is unprecedented and raises serious concerns of legitimacy. Notwithstanding these concerns, Professor Chayes' preliminary conclusion is that the involvement of the court and judge in public law litigation is workable, and indeed inevitable if justice is to be done in an increasingly regulated society.

Because of its regulatory base, public law litigation will often, at least as a practical matter, affect the interests of many people. Much significant public law litigation is therefore carried out through the class action mechanism, discussed at length in Developments in the Law — Class Actions, *which follows Professor Chayes' Article. Although this Article is not intended to be a foreword to the Developments Note, both pieces share the perspective that adjudication and civil procedure can usefully be analyzed as elements of a larger system of public regulation. For this reason, the two pieces may profitably be read together.*

HOLMES admonished us in one of his most quoted aphorisms to focus our attention on "what the courts will do in

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This Article is a sketch of work in progress. It comprises a set of preliminary hypotheses, as yet unsupported by much more than impressionistic documentation, which I hope to test, refine, and develop in the course of research over the coming year. The research on which this Article is based is supported by grants from the National Science Foundation and the New World Foundation. I should also record my debt to colleagues who critiqued an earlier draft of this paper presented to a group of them late last year and to the students in my current seminar in Contemporary Procedural Developments.

fact, and nothing more pretentious." [1] Despite this fashionably empirical slogan, the revolution he instigated proceeded comfortably within an accepted intellectual conception of the nature of civil adjudication and of the judge's role in it, a conception that still remains central to the way we teach, practice, and think about the law.[2] But if, for a moment, we take Holmes' advice and look closely at what federal courts and particularly federal trial judges are doing "in fact," what we see will not easily fit our preconception of civil adjudication. We are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model.

In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.[3] The defining features of this conception of civil adjudication are: [4]

(1) The lawsuit is *bipolar*. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.[5]

(2) Litigation is *retrospective*. The controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.[6]

(3) *Right and remedy are interdependent.* The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty — in contract by giving plaintiff the money he

[1] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). *See also* J. GRAY, THE NATURE AND SOURCES OF THE LAW 102–03 (2d ed. 1927); K. LLEWELLYN, THE BRAMBLE BUSH 3 (1930).

[2] *See, e.g.*, L. FULLER, THE PROBLEMS OF JURISPRUDENCE 706 (temp. ed. 1949); H.M. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 662–69 (tent. ed. 1958).

[3] *See* M. COHEN, LAW AND THE SOCIAL ORDER 251–52 (1933).

[4] *See generally* F. JAMES, CIVIL PROCEDURE § 1.2 (1965).

[5] *See, e.g., id.* §§ 1.2, 10.19; C. LANGDELL, A SUMMARY OF EQUITY PLEADING xxiii (1877); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 721 (1968).

[6] *See* L. FULLER, *supra* note 2, at 706; H.M. HART & A. SACKS, *supra* note 2, at 185; CALIFORNIA LAW REV. COMM'N, RECOMMENDATIONS & STUD. 657–58, *quoted in* Advisory Comm. Note to FED. R. EVID. 404 ("Character evidence . . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion.").

would have had absent the breach; in tort by paying the value of the damage caused.[7]

(4) The lawsuit is a *self-contained* episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.[8]

(5) The process is *party-initiated* and *party-controlled.* The case is organized and the issues defined by exchanges between the parties.[9] Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.

This capsule description of what I have called the traditional conception of adjudication is no doubt overdrawn. It was not often, if ever, expressed so severely; [10] indeed, because it was so thoroughly taken for granted, there was little occasion to do so. Although I do not contend that the traditional conception ever conformed fully to what judges were doing in fact,[11] I believe it has been central to our understanding and our analysis of the legal system.

Whatever its historical validity, the traditional model is clearly

[7] *See, e.g.,* Draft Opinion of Taney, C.J., Gordon v. United States, 64 U.S. (2 Wall.) 561 (1864), *printed at* 117 U.S. 697 (1886); G. PATON, A TEXT-BOOK OF JURISPRUDENCE § 110 (3d ed. 1964); J. POMEROY, CODE REMEDIES § 2 (5th ed. 1929); Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 YALE L.J. 16, 28–59 (1913).

[8] *See, e.g.,* R. FIELD & B. KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 103–05 (3d ed. 1973); G. GILMORE, THE DEATH OF CONTRACT 51–52 (1974); C. LANGDELL, *supra* note 5, at xxii.

[9] *See, e.g.,* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 1 (2d ed. 1947); R. FIELD & B. KAPLAN, *supra* note 8, at 12.

[10] *But see* Morgan, *Judicial Notice,* 57 HARV. L. REV. 269, 269–72 (1944); Arnold, *Trial by Combat and the New Deal,* 47 HARV. L. REV. 913, 920–21 (1934).

[11] The characteristic features of the traditional model were strongly marked in the developed common law procedure of the seventeenth and eighteenth centuries, which was inherited by the American colonies and states. It is true that procedure in equity was not constrained by any such rigid structure. It was relatively flexible and pragmatic on the questions of parties, the scope of the controversy, and the forms of relief available. And it was essentially the equitable procedure that was adopted in the reforming codes of the last half of the nineteenth century, both in this country and in England. *See* C. CLARK, *supra* note 9, § 8, at 23; *id.* §§ 56–57. But the common law outlook predominated for almost another hundred years, and, while it did, the codes did little to alter the basic structural characteristics of common law litigation. *See* pp. 1289–96 *infra. See also* Pound, *The Decadence of Equity,* 5 COLUM. L. REV. 20 (1905).

invalid as a description of much current civil litigation in the federal district courts.[12] Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies. The shift in the legal basis of the lawsuit explains many, but not all, facets of what is going on "in fact" in federal trial courts. For this reason, although the label is not wholly satisfactory, I shall call the emerging model "public law litigation."

The characteristic features of the public law model are very different from those of the traditional model. The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders — masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation. School desegregation, employment discrimination, and prisoners' or inmates' rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management — cases in all these fields display in varying degrees the features of public law litigation.

The object of this Article is first to describe somewhat more fully the public law model and its departures from the traditional conception, and second, to suggest some of its consequences for the place of law and courts in the American political and legal system.

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[12] For present purposes, I confine my discussion to civil litigation in the federal courts. There are, I think, corresponding departures from the traditional model in the state courts. There, litigation itself has declined in importance, and the overwhelming bulk of cases is disposed of either administratively, through the mechanism of default (as in consumer credit and landlord-tenant cases), or by manipulation of consent (as in divorce and criminal matters). *See generally* Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y 267 (1976); Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 48, 66–70 (1976).

I. The Received Tradition

The traditional conception of adjudication reflected the late nineteenth century vision of society, which assumed that the major social and economic arrangements would result from the activities of autonomous individuals.[13] In such a setting, the courts could be seen as an adjunct to private ordering, whose primary function was the resolution of disputes about the fair implications of individual interactions.[14] The basic conceptions governing legal liability were "intention" and "fault."[15] Intentional arrangements, not in conflict with more or less universal attitudes like opposition to force or fraud, were entitled to be respected, and other private activities to be protected unless culpable. Government regulatory action was presumptively suspect, and was tested by what was in form a common law action against the offending official in his private person.[16] The predominating influence of the private law model can be seen even in constitutional litigation, which, from its first appearance in *Marbury v. Madison*,[17] was understood as an outgrowth of the judicial duty to decide otherwise-existing private disputes.[18]

Litigation also performed another important function — clarification of the law to guide future private actions.[19] This understanding of the legal system, together with the common law doctrine of stare decisis, focussed professional and scholarly concern on adjudication at the appellate level, for only there did the process reach beyond the immediate parties to achieve a wider import through the elaboration of generally applicable legal rules. So, in the academic debate about the judicial function, the protagonist was the appellate judge (not, interestingly enough, the appellate *court*), and the spotlight of teaching, writing, and analysis was almost exclusively on appellate decisions.[20]

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[13] *See, e.g.*, O. Holmes, The Common Law 77 (M. Howe ed. 1963); Pound, *Do We Need a Philosophy of Law*, 5 Colum. L. Rev. 339, 344–49 (1905).

[14] *See, e.g.*, H.M. Hart & A. Sacks, *supra* note 2, at 185–86; R. Pound, An Introduction to the Philosophy of Law 189 (1922).

[15] *See, e.g.*, L. Fuller, The Morality of Law 167 (1964); O. Holmes, *supra* note 13, Lecture III, at 63–103.

[16] *See, e.g.*, *Ex parte* Young, 209 U.S. 123 (1908); United States v. Lee, 106 U.S. 196 (1882). *See also* Jaffe, *Suits Against Governments and Officers*, 77 Harv. L. Rev. 1209 (1964).

[17] 5 U.S. (1 Cranch) 137, 177 (1803).

[18] *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). *See generally* Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1365–68 (1973).

[19] *See, e.g.*, Holmes, *supra* note 1, at 457–58.

[20] *See, e.g.*, K. Llewellyn, The Common Law Tradition 4 (1960).

In practice, the circle was even more narrowly confined to the decisions of the United States Supreme Court, the English high courts (though decreasingly so in recent years), and a few "influential" federal and state appellate judges.[21] As to this tiny handful of decisions subjected to critical scrutiny, the criterion for evaluation was primarily the technical skill of the opinion in disposing of the case adequately within the framework of precedent and other doctrinal materials, so as to achieve an increasingly more systematic and refined articulation of the governing legal rules.

In contrast to the appellate court, to which the motive power in the system was allocated, the functions of the trial judge were curiously neglected in the traditional model.[22] Presumably, the trial judge, like the multitude of private persons who were supposed to order their affairs with reference to appellate pronouncements, would be governed by those decisions in disposing smoothly and expeditiously of the mine-run of cases.[23] But if only by negative implication, the traditional conception of adjudication carried with it a set of strong notions about the role of the trial judge. In general he was passive.[24] He was to decide only those issues identified by the parties, in accordance with the rules established by the appellate courts, or, infrequently, the legislature.

Passivity was not limited to the law aspects of the case. It was strikingly manifested in the limited involvement of the judge in factfinding. Indeed, the sharp distinction that Anglo-American law draws between factfinding and law declaration is itself remarkable. In the developed common law system, these were not only regarded as analytically distinct processes, but each was assigned to a different tribunal for performance. The jury found the facts. The judge was a neutral umpire, charged with little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial.[25]

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[21] Virtually all casebooks illustrate this focus. For example, see R. FIELD & B. KAPLAN, *supra* note 8; L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES & MATERIALS (3d ed. 1968); F. KESSLER & G. GILMORE, CONTRACTS: CASES & MATERIALS (2d ed. 1970).

[22] *See* M. COHEN, *supra* note 3, at 36; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1302 (1952):

> Are the usages followed by trial judges anything more than patterns of behavior? Are they law in any sense? And even if they are law, are they too disparate and detailed ever to have an honored place in the study of jurisprudence?

[23] *See id.* at 1297–301.

[24] *See, e.g.*, Arnold, *supra* note 10, at 918–19; Morgan, *supra* note 10, at 271; Pound, *supra* note 13, at 346, 349. *See also* J. GRAY, *supra* note 1, at 127.

[25] *See* K. LLEWELLYN, *supra* note 1, at 12; Frankel, *The Adversary Judge*, 54

Because the immediate impact of the judgment was confined to the parties, the traditional model was relatively relaxed about the accuracy of its factfinding.[26] If the facts were not assumed as stated in the pleadings or on the view most favorable to one of the parties or determined on the basis of burdens or presumptions, they were remitted to a kind of black box, the jury. True, some of the law of evidence reflects an active suspicion of the jury. And if the evidence adduced would not "rationally" support a finding for one party or the other, the case could be taken from the jury. But the limits of rationality are inevitably commodious. Even law application, unless there was a special verdict (never much favored in this country),[27] was left to the jury's relatively untrammeled discretion. Indeed, one of the virtues of the jury was thought to be its exercise of a rough-hewn equity, deviating from the dictates of the law where justice or changing community mores required.[28]

The emphasis on systematic statement of liability rules involved a corresponding disregard of the problems of relief. There was, to be sure, a good deal of discussion of measure of damages, as a corollary to the analysis of substantive rights and duties. Similarly, the question of the availability of specific performance and other equitable remedies came in for a share of attention. But the discussion was carried forward within the accepted framework that compensatory money damages was the usual form of relief. Prospective relief was highly exceptional in the traditional model and was largely remitted to the discretion of the trial judge.[29]

So in theory. But from another perspective, it seems remarkable that the system — and for the most part its critics as well — could attach so much importance to uniformity and consistency of doctrinal statement in appellate opinions, while at the same time displaying an almost complete lack of curiosity about actual uniformity of decision in the vast bulk of cases heard.[30] The

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TEX. L. REV. 465, 468 (1976). Indeed, the judge who takes too active a role may discover he has created grounds for a new trial. *See generally* J. MAGUIRE, J. WEINSTEIN, J. CHADBOURN & J. MANSFIELD, CASES & MATERIALS ON EVIDENCE 1082–1127 (6th ed. 1973).

[26] *See* Arnold, *supra* note 10, at 920; Morgan, *supra* note 10, at 271–72. *See also* Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 318–19 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945).

[27] *See* F. JAMES, *supra* note 4, § 7.15.

[28] *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES *379–81 (1897); P. DEVLIN, TRIAL BY JURY 164 (1956); O. HOLMES, *supra* note 13, at 97–100; H. KALVEN & H. ZEISEL, THE AMERICAN JURY 8–9 (1966).

[29] *See* G. GILMORE, *supra* note 8, at 14–15.

[30] The few so-called "fact-skeptics," *e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930), were notable exceptions.

realist analysis, which demonstrated the painful inevitability of choice for appellate judges on questions of law,[31] was equally applicable at the trial level. The uncertainties introduced by remitting factfinding and fact characterization to the jury were also ignored. Such factors as differences among potential litigants in practical access to the system or in the availability of litigating resources were not even perceived as problems. Although it was well that particular disputes should be fairly settled, there was comfort in the thought that the consequences of the settlement would be confined to the individuals involved. And since the parties controlled the litigating process, it was not unfair to cast the burden of any malfunction upon them.

Besides its inherent plausibility in the nineteenth century American setting, the traditional model of adjudication answered a number of important political and intellectual needs. The conception of litigation as a private contest between private parties with only minimal judicial intrusion confirmed the general view of government powers as stringently limited. The emphasis on the appellate function, conceived as an exercise in deduction from a few embracing principles themselves induced from the data of the cases,[32] supplied the demand of the new legal academics for an intellectual discipline comparable to that of their faculty colleagues in the sciences, and for a body of teachable materials.[33] For practitioners and judges, the same conception provided a professional methodology that could be self-consciously employed. Most importantly, the formulation operated to legitimate the increasingly visible political consequences of the actions of a judiciary that was not politically accountable in the usual sense.[34]

II. The Public Law Litigation Model

Sometime after 1875, the private law theory of civil adjudication became increasingly precarious in the face of a growing body of legislation designed explicitly to modify and regulate basic social and economic arrangements.[35] At the same time, the

[31] *See*, B. Cardozo, The Growth of the Law 65 (1924).

[32] *See* A. Sutherland, The Law at Harvard 174–75 (1967) (quoting Langdell).

[33] *See* J. Gray, *supra* note 1, at 137; A. Sutherland, *supra* note 32, at 174–75.

[34] *See, e.g.*, M. Cohen, *supra note* 3, at 144; *cf.* J. Gray, *supra* note 1, at 99–100.

[35] *See* J. Hurst, Law and the Conditions of Freedom in Nineteenth Century United States 88–89 (1956); Pound, *supra* note 13, at 344.

The choice of 1875 is approximate. General federal question jurisdiction was first granted in 1871. Act of March 3, 1875, c. 137, § 1, 18 Stat. 470. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), and Munn v. Illinois, 94 U.S. 113 (1877), mark the beginning of the interaction between economic regulation and

scientific and deductive character of judicial lawmaking came under attack, as the political consequences of judicial review of that legislation became urgent.[36]

These developments are well known and have become an accepted part of our political and intellectual history. I want to address in somewhat greater detail the correlative changes that have occurred in the procedural structure of the lawsuit. Most discussion of these procedural developments, while recognizing that change has been far-reaching, proceeds on the assumption that the new devices are no more than piecemeal "reforms" aimed at improving the functional characteristics or the efficiency of litigation conducted essentially in the traditional mode.[37] I suggest, however, that these developments are interrelated as members of a recognizable, if changing, system and that taken together they display a new model of judicial action and the judicial role, both of which depart sharply from received conceptions.

A. The Demise of the Bipolar Structure

Joinder of parties, which was strictly limited at common law, was verbally liberalized under the codes to conform with the approach of equity calling for joinder of all parties having an "interest" in the controversy.[38] The codes, however, did not at first produce much freedom of joinder. Instead, the courts defined the concept of "interest" narrowly to exclude those without an independent legal right to the remedy to be given in the main dispute.[39] The definition itself illustrates the continuing power of the traditional model. The limited interpretation of the joinder provisions ultimately fell before the banners of "rationality" and "efficiency." But the important point is that the narrow joinder rule could be perceived as irrational or inefficient only because of a growing sense that the effects of the litigation were not really confined to the persons at either end of the right-remedy axis.[40]

The familiar story of the attempted liberalization of pleadings under the codes is not dissimilar. Sweeping away the convolutions of the forms of action did not lead to the hoped-for elimination of technicality and formality in pleading. The immediate

the fourteenth amendment. The professional law school in the modern mode is a product of the same decade. *See* A. SUTHERLAND, *supra* note 32, ch. 6, at 162–205.

[36] *See, e.g.*, M. COHEN, *supra* note 3, at 146–47; J. GRAY, *supra* note 1, at 177–78; J. THAYER, LEGAL ESSAYS 27–30 (1908).

[37] *E.g.*, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 591 (1967, 1968).

[38] *See* C. CLARK, *supra* note 9, § 57, at 365; J. POMEROY, *supra* note 7, § 113.

[39] *See* C. CLARK, *supra* note 9, § 57, at 366. For joinder of defendants, see *id.* § 32, at 205.

[40] *See id.* at 366–67.

response was the construction of cause-of-action rules that turned out to be almost as intricate as the forms themselves.[41] The power of the right-remedy connection was at work here too, but so also was the late nineteenth century impulse toward systemization, which tended to focus attention on accurate statement of legal theory.[42] The proponents of "efficiency" argued for a more informal and flexible approach, to the end that the courts should not have to rehear the same complex of events. This argument ultimately shifted the focus of the lawsuit from legal theory to factual context — the "transaction or occurrence" from which the action arose.[43] This in turn made it easier to view the set of events in dispute as giving rise to a range of legal consequences all of which ought to be considered together.[44]

This more open-ended view of the subject matter of the litigation fed back upon party questions and especially intervention. Here, too, the sharp constraints dictated by the right-remedy nexus give way.[45] And if the right to participate in litigation is no longer determined by one's claim to relief at the hands of another party or one's potential liability to satisfy the claim, it becomes hard to draw the line determining those who may participate so as to eliminate anyone who is or might be significantly (a weasel word) affected by the outcome — and the latest revision of the Federal Rules of Civil Procedure has more or less abandoned the attempt.[46]

The question of the right to intervene is inevitably linked to the question of standing to initiate litigation in the first place. The standing issue could hardly arise at common law or under early code pleading rules, that is, under the traditional model. There the question of plaintiff's standing merged with the legal merits: On the facts pleaded, does this particular plaintiff have a right to the particular relief sought from the particular defendant from whom he is seeking it?[47] With the erosion of the tight

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[41] *See id.* § 19, at 129–30; J. POMEROY, *supra* note 7, §§ 412–13. The law review literature is voluminous, see, *e.g.*, McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925), and works cited in C. CLARK, *supra* note 9, § 19, at 141–42 nn.176–79, 144 n.185.

[42] *See, e.g.*, C. LANGDELL, *Preface* to CASES ON CONTRACTS, *quoted in* A. SUTHERLAND, *supra* note 32, at 174–75.

[43] *See, e.g.*, FED. R. CIV. P. 13, 14, 15, 20, 24.

[44] The transaction or occurrence thus became the basis for defining the unit that ought to be litigated as one "case." *Compare* RESTATEMENT OF JUDGMENTS § 61 (1942) (cause of action approach) *with* RESTATEMENT (SECOND) OF JUDGMENTS § 61 (Tent. Draft No. 1, 1973) (transaction or occurrence).

[45] *See* Shapiro, *supra* note 5, at 722.

[46] *See* FED. R. CIV. P. 24(a)(2), 24(b). *See also* Kaplan, *supra* note 37, at 400–07.

[47] *See* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 426 (1974).

structural integration of the lawsuit, the pressure to expand the circle of potential plaintiffs has been inexorable.[48] Today, the Supreme Court is struggling manfully, but with questionable success, to establish a formula for delimiting who may sue that stops short of "anybody who might be significantly affected by the situation he seeks to litigate." [49]

"Anybody" — even "almost anybody" — can be a lot of people, particularly where the matters in issue are not relatively individualized private transactions or encounters. Thus, the stage is set for the class action, which is discussed at length in the remainder of this issue.[50] Whatever the resolution of the current controversies surrounding class actions, I think it unlikely that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication. The class suit is a reflection of our growing awareness that a host of important public and private interactions — perhaps the most important in defining the conditions and opportunities of life for most people — are conducted on a routine or bureaucratized basis and can no longer be visualized as bilateral transactions between private individuals. From another angle, the class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests, at least in very important aspects.

The emergence of the group as the real subject or object of the litigation not only transforms the party problem, but raises far-reaching new questions.[51] How far can the group be extended and homogenized? To what extent and by what methods will we permit the presentation of views diverging from that of the group representative? When the judgment treads on numerous — perhaps innumerable — absentees, can the traditional doctrines of finality and preclusion hold? And in the absence of a particular client, capable of concretely defining his own interest, can we rely on the assumptions of the adversary system as a guide to the conduct and duty of the lawyer?

These questions are brought into sharp focus by the class

[48] *See, e.g.*, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Association of Data Processing Serv. Org's., Inc. v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

[49] *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Sierra Club v. Morton, 405 U.S. 727 (1972). *See generally* Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–47 (1975).

[50] *See Developments in the Law — Class Actions, infra* at 1318 [hereinafter cited as *Developments*].

[51] Some of these questions, as they arise in the class action context, are addressed in *id.* at 1479–82 (sub-classing); *id.* at 1394–1402 (res judicata); *id.* at 1577–1623 (professional responsibility).

action device. But it would be a mistake to think that they are confined to that procedural setting. The class action is only one mechanism for presenting group interests for adjudication, and the same basic questions will arise in a number of more familiar litigating contexts. Indeed, it may not be too much to say that they are pervasive in the new model.

B. The Triumph of Equity

One of the most striking procedural developments of this century is the increasing importance of equitable relief.[52] It is perhaps too soon to reverse the traditional maxim to read that money damages will be awarded only when no suitable form of specific relief can be devised. But surely, the old sense of equitable remedies as "extraordinary" has faded.[53]

I am not concerned here with specific performance — the compelled transfer of a piece of land or a unique thing. This remedy is structurally little different from traditional money-damages. It is a one-time, one-way transfer requiring for its enforcement no continuing involvement of the court. Injunctive relief, however, is different in kind, even when it takes the form of a simple negative order. Such an order is a presently operative prohibition, enforceable by contempt, and it is a much greater constraint on activity than the risk of future liability implicit in the damage remedy.[54] Moreover, the injunction is continuing. Over time, the parties may resort to the court for enforcement or modification of the original order in light of changing circumstances.[55] Finally, by issuing the injunction, the court takes public responsibility for any consequences of its decree that may adversely affect strangers to the action.

Beyond these differences, the prospective character of the relief introduces large elements of contingency and prediction into the proceedings. Instead of a dispute retrospectively oriented toward the consequences of a closed set of events, the court has a controversy about future probabilities. Equitable doctrine, naturally enough, given the intrusiveness of the injunction and the contingent nature of the harm, calls for a balancing of the

[52] *See Developments in the Law — Injunctions*, 78 HARV. L. REV. 994, 996 (1965).

[53] *See* R. FIELD & B. KAPLAN, *supra* note 8, at 307–08. Even in contract law, which should be the heartland of the belief that money cures all ills, there is apparently increasing resort to equitable relief. *See* G. GILMORE, *supra* note 8, at 83 & 140 n.222.

[54] For example, even an erroneously issued injunction must be obeyed at the risk of contempt. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 314 (1967).

[55] *See generally Developments in the Law — Injunctions*, *supra* note 52, at 1080–86.

interests of the parties. And if the immediate parties' interests were to be weighed and evaluated, it was not too difficult to proceed to a consideration of other interests that might be affected by the order.[56]

The comparative evaluation of the competing interests of plaintiff and defendant required by the remedial approach of equity often discloses alternatives to a winner-takes-all decision. An arrangement might be fashioned that could safeguard at least partially the interests of both parties, and perhaps even of others as well. And to the extent such an arrangement is possible, equity seems to require it.[57] Negative orders directed to one of the parties — even though pregnant with affirmative implications [58] — are often not adequate to this end. And so the historic power of equity to order affirmative action gradually freed itself from the encrustation of nineteenth century restraints.[59] The result has often been a decree embodying an affirmative regime to govern the range of activities in litigation and having the force of law for those represented before the court.[60]

At this point, right and remedy are pretty thoroughly disconnected.[61] The form of relief does not flow ineluctably from

[56] *See, e.g.*, Richards's Appeal, 57 Pa. 105, 112 (1868) (because iron is a "prime necessity," iron works may not be enjoined as a nuisance); McCann v. Chasm Power Co., 211 N.Y. 301, 305, 105 N.E. 416, 417 (1914):

> A court of equity can never be justified in making an inequitable decree. If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies.

[57] *See, e.g.*, Reserve Mining Co. v. EPA, 514 F.2d 492, 535–36 (8th Cir. 1975) (balancing social and economic harm to employees of defendant and area surrounding defendant's plant against environmental damage caused by defendant; *held,* no injunction will issue even though defendant clearly in violation of anti-pollution laws); *Developments in the Law — Injunctions, supra* note 52, at 1006–08.

[58] *See, e.g.*, Lumley v. Wagner, 1 De G.M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852).

[59] The injunction was characteristically seen as a prohibitive or protective remedy rather than an affirmative one, *see e.g.*, F. MAITLAND, EQUITY 318 (1949); 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1337, at 934 (5th ed. 1941); *id.* § 1338, at 935. For the traditional power of the Chancellor to grant affirmative relief, see Penn v. Lord Baltimore, 1 Vesey Senior *444, 27 Eng. Rep. 1132 (Ch. 1750); The Salton Sea Cases, 172 F. 792, 820 (9th Cir. 1909).

[60] Some such approach to relief is to be found in railroad and corporate reorganizations. *See, e.g.*, Arnold, *supra* note 10, at 930–31. However, the new model envisions such relief in a wide range of situations.

[61] The logical outcome of this development was the declaratory judgment, first authorized at the federal level in 1934. *See* 28 U.S.C. §§ 2201–02 (1970) (enacted as Act of June 14, 1934, ch. 512, 48 Stat. 955). The traditional objection to this procedure was that it permitted the decision of legal issues "in the abstract," that is, without the constraint implicit in the availability of an established remedy. *See* Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289–90 (1928). *See also* Draft

the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted. The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accomodates the range of interests involved.[62]

The interests of absentees, recognized to some extent by equity's balancing of the public interest in individual suits for injunction, become more pressing as social and economic activity is increasingly organized through large aggregates of people. An order nominally addressed to an individual litigant — the labor injunction is an early example — has obvious and visible impact on persons not individually before the court. Nor must the form of the action be equitable: A suit against an individual to collect a tax, if it results in a determination of the constitutional invalidity of the taxing statute, has the same result for absentees as a grant or denial of an injunction. Statutory construction, for example of welfare [63] or housing legislation,[64] may have a similar extended impact, again even if the relief is not equitable in form. Officials will almost inevitably act in accordance with the judicial interpretation in the countless similar situations cast up by a sprawling bureaucratic program.[65] We may call this a stare decisis effect, but it is quite different from the traditional image of autonomous adjustment of individual private transactions in response to judicial decisions. In cases of this kind, the fundamental

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Opinion of Taney, C.J., Gordon v. United States, 64 U.S. (2 Wall.) 561 (1864), *printed at* 117 U.S. 697 (1886).

[62] For example, see Steel Industry Consent Decrees, *reprinted in* BNA FAIR EMPL. PRAC. MANUAL 431:125 (1974). Earlier examples from the antitrust field include the motion picture and ASCAP cases, United States v. Paramount Pictures, Inc., 165 F. Supp. 643 (S.D.N.Y. 1958) (motion for injunction), 333 F. Supp. 1100 (S.D.N.Y. 1971) (motion for court approval of proposed acquisition), and United States v. ASCAP, 341 F.2d 1003 (2d Cir.), *cert. denied*, 382 U.S. 877 (1965).

[63] *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[64] *E.g.*, Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973); Escalera v. New York City Housing Auth., 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970).

[65] Several courts have refused to certify as class actions suits challenging government policy because if the plaintiff were successful, the government would certainly change its behavior in all instances. *See, e.g.*, Vulcan Soc'y v. Civil Service Comm'n, 490 F.2d 387, 399 (2d Cir. 1973); Galvin v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973); McDonald v. McLucas, 371 F. Supp. 831, 833–34 (S.D.N.Y. 1974); Tyson v. New York City Housing Auth., 369 F. Supp. 513, 516 (S.D.N.Y. 1974). *But see* Percy v. Brennan, 8 CCH EMPL. PRAC. DEC. ¶ 9,799, at 6,347 (S.D.N.Y. 1974).

conception of litigation as a mechanism for private dispute settlement is no longer viable. The argument is about whether or how a government policy or program shall be carried out.

Recognition of the policy functions of litigation feeds the already intense pressure against limitations on standing, as well as against the other traditional limitations on justiciability — political question,[66] ripeness,[67] mootness [68] and the like. At the same time, the breadth of interests that may be affected by public law litigation raises questions about the adequacy of the representation afforded by a plaintiff whose interest is narrowly traditional.[69]

Again, as in private litigation, the screw gets another turn when simple prohibitory orders are inadequate to provide relief. If a mental patient complains that he has been denied a right to treatment, it will not do to order the superintendent to "cease to deny" it. So with segregation in education, discrimination in hiring, apportionment of legislative districts, environmental management. And the list could be extended. If judicial intervention is invoked on the basis of congressional enactment, the going assumption is that the statute embodies an affirmative regulatory objective. Even when the suit is premised on constitutional provisions, traditionally regarded as constraining government power, there is an increasing tendency to treat them as embodying affirmative values, to be fostered and encouraged by judicial action.[70] In either case, if litigation discloses that the relevant

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[66] *E.g.*, Baker v. Carr, 369 U.S. 186 (1962).

[67] *E.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

[68] *E.g.*, Roe v. Wade, 410 U.S. 113 (1973); Sosna v. Iowa, 419 U.S. 393, 398 (1975).

[69] For example, the plaintiffs in Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), a suit ultimately leading to the restructuring of state mental health facilities in Alabama under a "right to treatment" rationale, were originally disgruntled employees seeking to resist cuts in the mental health budget. *See* Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975). *See also* Sierra Club v. Morton, 405 U.S. 727, 759 (1972) (Blackmun, J., dissenting) (non-traditional plaintiff should have standing because " . . . any resident of the Mineral King area . . . is an unlikely adversary for this Disney-governmental project [since he] will be inclined to regard the situation as one that should benefit him economically").

[70] *Compare* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 5 (6th ed. 1890), *with* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 76–98 (1976). *See also* Monaghan, *The Supreme Court, 1974 Term —Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19 (1975) (". . . body of constitutionally inspired implementing rules whose only sources are constitutional provisions framed as limitations on government").

purposes or values have been frustrated, the relief that seems to be called for is often an affirmative program to implement them. And courts, recognizing the undeniable presence of competing interests, many of them unrepresented by the litigants, are increasingly faced with the difficult problem of shaping relief to give due weight to the concerns of the unrepresented.[71]

C. The Changing Character of Factfinding

The traditional model of adjudication was primarily concerned with assessing the consequences for the parties of specific past instances of conduct. This retrospective orientation is often inapposite in public law litigation, where the lawsuit generally seeks to enjoin future or threatened action,[72] or to modify a course of conduct presently in train or a condition presently existing.[73] In the former situation, the question whether threatened action will materialize, in what circumstances, and with what consequences can, in the nature of things, be answered only by an educated guess. In the latter case, the inquiry is only secondarily concerned with how the condition came about, and even less with the subjective attitudes of the actors, since positive regulatory goals are ordinarily defined without reference to such matters. Indeed, in dealing with the actions of large political or corporate aggregates, notions of will, intention, or fault increasingly become only metaphors.

In the remedial phases of public law litigation, factfinding is even more clearly prospective. As emphasized above, the contours of relief are not derived logically from the substantive wrong adjudged, as in the traditional model. The elaboration of a decree is largely a discretionary process within which the trial judge is called upon to assess and appraise the consequences of alternative programs that might correct the substantive fault. In both the liability and remedial phases, the relevant inquiry is

[71] The Norwalk, Connecticut school litigation illustrates the type of competing interests that often emerge in public law litigation. In that litigation black and Puerto Rican parents — who had been included in the class certified — split over the desirability of continuing an integration plan that bussed only minority pupils. *See* Norwalk CORE v. Norwalk Bd. of Educ., 298 F. Supp. 203 (denial of temporary restraining order), 298 F. Supp. 208 (D. Conn. 1968) (denial of application by black and Puerto Rican parents and students to intervene as defendants); 298 F. Supp. 210 (1969) (certification); 298 F. Supp. 213 (1969) (merits), *aff'd*, 423 F.2d 121 (2d Cir. 1970) (*held*, no violation).

[72] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (plaintiff sought injunction to restrain approval of planned commercial development of Mineral King Valley).

[73] *See, e.g.*, COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 560 F.2d 542 (3d Cir. 1975), *rev'd*, 96 S.Ct. 598 (1976).

largely the same: How can the policies of a public law best be served in a concrete case? [74]

In public law litigation, then, factfinding is principally concerned with "legislative" rather than "adjudicative" fact. And "fact evaluation" is perhaps a more accurate term than "fact-finding." The whole process begins to look like the traditional description of legislation: Attention is drawn to a "mischief," [75] existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act.

Given these consequences, the casual attitude of the traditional model toward factfinding is no longer tolerable. The extended impact of the judgment demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that more explictly recognizes the complex and continuous interplay between fact evaluation and legal consequence. The major response to the new requirements has been to place the responsibility for factfinding increasingly on the trial judge. The shift was in large part accomplished as a function of the growth of equitable business in the federal courts, for historically the chancellor was trier of fact in suits in equity. But on the "law side" also, despite the Supreme Court's expansion of the federal right to jury trial, there has been a pronounced decline in the exercise of the right, apart, perhaps, from personal injury cases.[76]

The courts, it seems, continue to rely primarily on the litigants to produce and develop factual materials, but a number of factors make it impossible to leave the organization of the trial exclusively in their hands. With the diffusion of the party structure, fact issues are no longer sharply drawn in a confrontation be-

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[74] For characteristic examples of this approach to fact evaluation at both the liability and remedial stages, see Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) (employment discrimination), and COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1975), *rev'd*, 96 S. Ct. 598 (1976).

[75] *See* Heydon's Case, 3 Co. Rep. 7a, 76 Eng. Rep. 637, 638 (1584).

[76] Some indication of the decline in the number of jury trials in civil cases can be derived from data of the Administrative Office of the United States Courts. In 1960, for example, 3,035 of 6,988 civil trials were jury trials. *See* 1960 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS ANN. REP. 103. In 1974, although the total number of civil trials had almost doubled to 10,972, jury trials remained at 3,569. 1974 *id.* at 318.

tween two adversaries, one asserting the affirmative and the other the negative. The litigation is often extraordinarily complex and extended in time, with a continuous and intricate interplay between factual and legal elements. It is hardly feasible and, absent a jury, unnecessary to set aside a contiguous block of time for a "trial stage" at which all significant factual issues will be presented. The scope of the fact investigation and the sheer volume of factual material that can be exhumed by the discovery process pose enormous problems of organization and assimilation. All these factors thrust the trial judge into an active role in shaping, organizing and facilitating the litigation.[77] We may not yet have reached the investigative judge of the continental systems,[78] but we have left the passive arbiter of the traditional model a long way behind.

D. The Decree

The centerpiece of the emerging public law model is the decree. It differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it *is* the centerpiece. The decree seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered. It provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute.

The decree is also an order of the court, signed by the judge and issued under his responsibility (itself a shift from the classical money judgment).[79] But it cannot be supposed that the judge, at least in a case of any complexity, composes it out of his own head. How then is the relief formulated?

The reports provide little guidance on this question. Let me nonetheless suggest a prototype that I think finds some support in the available materials. The court will ask the parties to agree on an order or it will ask one party to prepare a draft.[80] In the

[77] *See generally* MANUAL FOR COMPLEX LITIGATION (1973).

[78] *See generally* Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443 (1958).

[79] The judgment in a common law action was not an order to the defendant to pay but a recital that "'it is considered that plaintiff do recover so much from the defendant.'" R. FIELD & B. KAPLAN, *supra* note 8, at 104 n.j.

[80] *See Developments in the Law — Injunctions*, *supra* note 52, at 1067. Often the court will ask the defendants to help draft the initial decree since they may be the only persons who can combine the needed technical background and detailed knowledge of the institution to be changed. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826

first case, a negotiation is stipulated. In the second, the dynamic leads almost inevitably in that direction. The draftsman understands that his proposed decree will be subject to comment and objection by the other side and that it must be approved by the court. He is therefore likely to submit it to his opponents in advance to see whether differences cannot be resolved. Even if the court itself should prepare the initial draft of the order, some form of negotiation will almost inevitably ensue upon submission of the draft to the parties for comment.

The negotiating process ought to minimize the need for judicial resolution of remedial issues. Each party recognizes that it must make some response to the demands of the other party, for issues left unresolved will be submitted to the court, a recourse that is always chancy and may result in a solution less acceptable than might be reached by horse-trading. Moreover, it will generally be advantageous to the demanding party to reach a solution through accomodation rather than through a judicial fiat that may be performed "in a literally compliant but substantively grudging and unsatisfactory way." [81] Thus, the formulation of the decree in public law litigation introduces a good deal of party control over the practical outcome. Indeed, relief by way of order after a determination on the merits tends to converge with relief through a consent decree or voluntary settlement. And this in turn mitigates a major theoretical objection to affirmative relief — the danger of intruding on an elaborate and organic network of interparty relationships.[82]

Nevertheless it cannot be supposed that this process will relieve the court entirely of responsibility for fashioning the remedy. The parties may fail to agree. Or the agreement reached may fail to comport with the requirements of substantive law as the judge sees them. Or the interests of absentees may be inadequately accommodated.[83] In these situations, the judge will

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(5th Cir. 1975) *petition for cert. filed*, 44 U.S.L.W. 3450 (U.S. Jan. 15, 1976) (job discrimination); Butterworth v. Dempsey, 229 F. Supp. 754, 765 (D. Conn.), *aff'd sub nom.* Pinney v. Butterworth, 378 U.S. 564 (1964) (reapportionment); Wyatt v. Stickney, 344 F. Supp. 373, 374–75, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mental health); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 288 (E.D. Pa. 1972) (mental health); Mapp v. Board of Educ., 203 F. Supp. 843, 845 (E.D. Tenn. 1962), *modified*, 319 F.2d 571 (6th Cir. 1963) (school desegregation); Note, *Reapportionment*, 79 HARV. L. REV. 1226, 1267 (1966).

[81] Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 676 (1976). *See generally id.* at 672–80.

[82] *See* L. Fuller, The Forms and Limits of Adjudication 32–33 (unpublished manuscript on file with the Harvard Law School Library).

[83] In the Atlanta school desegregation case, Calhoun v. Cook, 362 F. Supp.

not, as in the traditional model, be able to derive his responses directly from the liability determination, since, as we have seen, the substantive law will point out only the general direction to be pursued and a few salient landmarks to be sought out or avoided. How then is the judge to prescribe an appropriate remedy?

If the parties are simply in disagreement, it seems plausible to suppose that the judge's choice among proposals advanced by the *quondam* negotiators will be governed by his appraisal of their good faith in seeking a way to implement the constitutional or statutory command as he has construed it. The interest in a decree that will be voluntarily obeyed can be promoted by enforcing a regime of good faith bargaining among the parties.[84] Without detailed knowledge of the negotiations, however, any attempt to enforce such a regime can rest on little more than an uneasy base of intuition and impression. Where a proposed decree is agreed among the parties, but is inadequate because the interests shared by the litigants do not span the range that the court thinks must be taken into account, resubmission for further negotiation may not cure this fundamental defect. Here too, the judge will be unable to fill the gap without a detailed understanding of the issues at stake in the bargaining among the parties.

For these reasons, the judge will often find himself a personal participant in the negotiations on relief.[85] But this course has obvious disadvantages, not least in its inroads on the judge's time and his pretentions to disinterestedness. To avoid these problems, judges have increasingly resorted to outside help [86] —

1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975), representatives of black children, the Atlanta School Board, and a Biracial Committee appointed by the court reached agreement on a plan to implement integration in Atlanta schools. The district court affirmed this agreement, 362 F. Supp. at 1251–52, apparently relying on the wide acceptance of the decree among the plaintiff class and the fact that the plaintiff class representatives had actively participated in its negotiation and drafting. The adequacy of the decree was, however, challenged on an appeal because its provisions for pairing white students with black schools and for bussing were alleged to be inadequate. 522 F.2d at 718. The Fifth Circuit, noting that blacks controlled the school administration and that there was little further chance for segregation, *id.* at 719, rejected this challenge. *See also* note 71 *supra*.

[84] This approach appears to have been followed by Judge Gordon in implementing school desegregation in Louisville. *See* Louisville Courier-Journal, Jan. 31, 1975, at A1, col. 1 (Gordon put burden on county school board that objected to previously approved plan to come up with another, under threat to impose his own otherwise).

[85] In Louisville Judge Gordon personally drafted the decree with the aid of school officials and the plaintiff's attorney. No formal hearings were held. Instead, the judge formulated the decree in an informal working conference. *See* Louisville Courier-Journal, July 23, 1975, at A2, col. 2.

[86] For example, special masters appointed by the district court drafted the

masters, amici, experts, panels, advisory committees[87] — for information and evaluation of proposals for relief. These outside sources commonly find themselves exercising mediating and even adjudicatory functions among the parties.[88] They may put forward their own remedial suggestions,[89] whether at the request of the judge or otherwise.

Once an ongoing remedial regime is established, the same procedure may be repeated in connection with the implementation and enforcement of the decree.[90] Compliance problems may be brought to the court for resolution and, if necessary, further remediation. Again, the court will often have no alternative but to resort to its own sources of information and evaluation.[91]

Boston School Desegregation decree. *See* Draft Report of the Masters, Morgan v. Kerrigan, Civ. No. 72-911-G (D. Mass. March 21, 1975).

[87] *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (advisory committees, amici); Hart v. Community School Bd., 383 F. Supp. 699, 767 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975) (masters); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (same); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 288 (E.D. Pa. 1972) (same); Knight v. Board of Educ., 48 F.R.D. 115 (E.D.N.Y. 1969) (same); Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975) (Biracial Committee).

The Securities Exchange Commission often participates in review of settlements in class actions and derivative suits by filing an amicus brief or appearing at the approval hearing. *See, e.g.*, Schimmel v. Goldman, 57 F.R.D. 481 (S.D.N.Y. 1973); Norman v. McKee, 290 F. Supp. 29 (N.D. Cal. 1968). *But see* Josephson *v. Campbell* [1967-69 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,347 (S.D.N.Y. 1969) (SEC notified of hearing, but did not appear).

See also Developments, infra at 1536-76.

[88] *See* Note, *supra* note 69, at 1344.

[89] *See, e.g.*, Draft Report of the Masters, Morgan v. Kerrigan, Civ. No. 72-911-G (D. Mass. March 21, 1975); Wyatt v. Stickney, 344 F. Supp. 373, 375 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (outside experts).

[90] In Calhoun v. Cook, 362 F. Supp. 1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975), the district court ordered a Biracial Committee, originally formed to assist in drafting the decree, to oversee its implementation as well:

> It is further directed that all disagreements between the parties over implementation of the plan, if any, be first presented to the Biracial Committee, or a subcommittee designated for such purpose, during said three-year period at a quarterly or special meeting for such purpose. No issue will be considered by the court until such procedure is followed and the Biracial Committee certifies to the court that it is unable to resolve the dispute.

362 F. Supp. at 1252. *See also* United States v. Allegheny-Ludlum Indus., Inc., 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir. 1975); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). *See generally* Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974); Note, *supra* note 69, at 1338-40.

[91] *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 378, 344 F. Supp. 387, 392 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (outside experts provide

I suggested above that a judicial decree establishing an ongoing affirmative regime of conduct is *pro tanto* a legislative act. But in actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.

E. A Morphology of Public Law Litigation

The public law litigation model portrayed in this paper reverses many of the crucial characteristics and assumptions of the traditional concept of adjudication:

(1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.

(2) The party structure is not rigidly bilateral but sprawling and amorphous.

(3) The fact inquiry is not historical and adjudicative but predictive and legislative.

(4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.

(5) The remedy is not imposed but negotiated.

(6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.

(7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.

(8) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

In fact, one might say that, from the perspective of the traditional model, the proceeding is recognizable as a lawsuit only because it takes place in a courtroom before an official called a judge.

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information); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 288 (E.D. Pa. 1972); Gates v. Collier, 501 F.2d 1291, 1321 (5th Cir. 1974), *aff'g* 349 F. Supp. 881 (N.D. Miss. 1972) (court appoints monitors); Stroman v. Griffin, 331 F. Supp. 226, 230 (S.D. Ga. 1971) (surprise visit by judge).

But that is surely too sensational in tone. All of the procedural mechanisms outlined above were historically familiar in equity practice. It is not surprising that they should be adopted and strengthened as the importance of equity has grown in modern times.

We have yet to ask how pervasive is the new model. Is it, as was traditional equity, a supplementary weapon in the judicial armory, destined at best for a subordinate role? Is it a temporary, add-on phenomenon, more extensive perhaps, but not more significant than the railroad reorganization functions that the courts assumed (or were given) in other times?[92] Or can we say that the new form has already or is likely to become the dominant form of litigation in the federal courts, either in terms of judicial resources applied to such cases, or in its impact on society and on attitudes toward the judicial role and function?

The question is not wholly quantitative, but certainly it has a quantitative dimension. A crude index for the new model in federal civil litigation is the well-known shift from diversity to federal question cases in the federal courts. Since most of the features I have discussed derive from the fact that public law provides the basis of the action, it seems plausible that litigation in the new model would increase concomitantly with the predominance of federal question jurisdiction. But the quantitative analysis is in patent need of much further development.[93]

[92] From 1870 to 1933, federal judges, acting through equitable receivers, reorganized over 1,000 railroads. *See* Rodgers & Groom, *Reorganization of Railroad Corporations Under Section 77 of the Bankruptcy Act*, 33 COLUM. L. REV. 571, 571 (1933). *See generally* Chamberlain, *New-Fashioned Receivership*, 10 HARV. L. REV. 139 (1896); Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A Survey*, 7 LAW & CONTEMP. PROB. 377 (1940).

[93] The Annual Report of the Administrative Office of the United States Courts for 1974 shows 72% of the cases filed in the district courts were federal question cases or involved the United States as a party, as opposed to 53% in 1940, when the series began. *See* 1974 ANN. REP. at 389–90; 1940 *id.* at 72–75. Even these crude figures are subject to speculative refinement. The proportion of federal cases is even larger, 81% in 1974, if personal injury cases are eliminated from the tally. This, I believe, is permissible since the impulse that accounts for the volume of personal injury litigation is not the demand of the parties for an adjudication under law, but the plaintiff's desire for access to a jury where the governing legal rules are at odds with popular sentiment. Among the federal question cases apart from personal injury, the tax cases are the only large group that look like traditional adjudications, 3.6% in 1974. These cases are governed by a detailed code, and a unique relationship has grown among the administrative enforcement agency (exercising detailed rulemaking powers), a highly specialized bar, an expert and well-staffed congressional committee, and the courts (including a specialized court). These factors, and the nature of the taxpayer's claim, which looks very much like an old-fashioned individual claim of right, seem to give traditional adjudication continuing vitality both as a mode of resolving disputes and of

On the other hand, qualitatively — that is, in terms of the importance and interest of the cases and their impact on the public perception of the legal system — it seems abundantly clear that public law litigation is of massive and growing significance. The cases that are the focus of professional debate, law review and academic comment, and journalistic attention are overwhelmingly, I think, new model cases. It could hardly be otherwise, since, by hypothesis, these cases involve currently agitated questions of public policy, and their immediate consequences are to a considerable extent generalized.

I would, I think, go further and argue that just as the traditional concept reflected and related to a system in which social and economic arrangements were remitted to autonomous private action, so the new model reflects and relates to a regulatory system where these arrangements are the product of positive enactment. In such a system, enforcement and application of law is necessarily implementation of regulatory policy. Litigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.

III. A First Appraisal

A. Trial Balance

One response to the positive law model of litigation would be to condemn it as an intolerable hodge-podge of legislative, administrative, executive, and judicial functions addressed to problems that are by their nature inappropriate for judicial resolution. Professor Lon Fuller has argued that when such functions are given to the judiciary they are parasitic, in the sense that they can be effectively carried out only by drawing on the legitimacy and moral force that courts have developed through the performance of their inherent function, adjudication according to the traditional conception.[94] A certain limited amount of such parasitism can be accommodated, but too much undermines the very legitimacy on which it depends, because the nontraditional activities of the judiciary are at odds with the conditions that ensure the moral force of its decisions.

From one perspective, the Burger Court may be seen to be embarked on some such program for the restoration of the traditional forms of adjudication. Its decisions on standing,[95] class

contributing to the lawmaking process. These two categories aside, I would guess that much of the rest of the business of the federal district courts displays many of the features of public law litigation. But much statistical analysis remains to be done.

[94] *See generally* L. Fuller, *supra* note 82, at 94–101.

[95] *E.g.*, Warth v. Seldin, 422 U.S. 490 (1975).

actions,[96] and public interest attorneys' fees,[97] among others, achieve a certain coherence in this light. On the other hand, it is hard to believe that the Court is actuated by concern for jurisprudential orthodoxy. One suspects that at bottom its procedural stance betokens a lack of sympathy with the substantive results and with the idea of the district courts as a vehicle of social and economic reform. The Court's distaste for reformist outcomes is barely veiled — or so the dissenters thought — in two recent cases, *Warth v. Seldin*,[98] challenging exclusionary zoning in the suburbs of Rochester, and *Rizzo v. Goode*,[99] attacking police brutality in the city of Philadelphia. But these cases also illustrate some of the difficulties of retrenchment, if, as I believe, the new form of litigation is integrally related to the predominantly public law character of the modern legal system.

In *Warth*, with an attention to the intricacies of pleading that would have gladdened the heart of Baron Parke, the Court last year denied standing to a variety of plaintiffs to attack zoning practices detailed in the complaint.[100] But, because such practices, like others that are the subject matter of public law litigation, are characteristic, rather than occasional, it is never hard to find an adequately Hohfeldian plaintiff to raise the issues. And this year the Court will have to confront the merits of exclusionary zoning in the suburbs of Chicago at the behest of a plaintiff whose standing appears to be impeccable, even by *Warth*'s standards.[101]

In the second and more disturbing sally, *Rizzo v. Goode*,[102] the Court overturned a decree mandating a procedure for handling citizen complaints against the Philadelphia police department. The case is a textbook example of public law litigation.[103] It was brought as a class action under the Civil Rights Act of 1871 [104] by a number of individuals and a broad coalition of community organizations.[105] Evidence was taken as to over 40 incidents of

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[96] *E.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Zahn v. International Paper Co., 414 U.S. 291 (1973).

[97] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[98] *See* 422 U.S. 490, 518 (1975) (Douglas, J., dissenting); *id.* at 520 (Brennan, J., dissenting).

[99] *See* 96 S. Ct. 598, 610, 612 (1976) (Blackmun, J., dissenting).

[100] *See* 422 U.S. at 502–18. *See generally The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 189–95 (1975).

[101] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1975) (No. 75-616).

[102] 96 S. Ct. 598 (1976).

[103] The district court opinion is reported as COPPAR v. Rizzo, 357 F. Supp. 1289 (E.D. Pa. 1973), *aff'd sub nom.* Goode v. Rizzo, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 96 S. Ct. 598 (1976).

[104] 42 U.S.C. § 1983 (1970).

[105] *See* 96 S. Ct. at 601 n.1.

alleged police brutality, 19 of which, the Court was willing to accept, rose to the level of deprivation of constitutional rights.[106] District Judge Fullam found that these could not be dismissed as "rare or isolated instances" [107] and ordered city police officials to draft a complaint procedure consistent with "generally recognized minimum standards." [108] Such a procedure, negotiated by plaintiffs and the police department,[109] went into effect pending appeal, and was widely greeted with satisfaction.[110]

Nevertheless, the Supreme Court struck it down. On the merits, the Court said that despite the 19 cases of proven police brutality before the district court, nothing by way of affirmative policy or condonation had been brought home to the official defendants.[111] Rejecting the plaintiff's argument that the Civil Rights Act provided relief from official disregard of persistent police abuses aimed at the plaintiff class,[112] the Court appeared to adopt the view that the record disclosed only 19 claims by individual minority victims against individual policemen, each apparently to be enforced in a separate suit.[113] On relief, the Court held that the decree infringed the " 'latitude' " necessary for a local administration " 'in the "dispatch of its own internal affairs." ' " [114] At one point the opinion even seems to say that only if one of the individual plaintiffs could show that he was personally threatened with repeated acts of unconstitutional police violence would injunctive relief of any kind be appropriate.[115]

The Court's substantive prescription is, of course, an illusory redress for endemic low level police violence, which, as Judge Fullam noted, is "fairly typical . . . of police departments in major urban areas." [116] The decision is at odds with pattern and practice cases in employment discrimination, housing, school segregation, and other fields inferring official complicity from a statistically small set of similar actions together with official inac-

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[106] *See* 96 S. Ct. at 602–03. The district judge found three violations in the *Goode* case and two in the *COPPAR* case, but the Supreme Court was willing to concede *arguendo* that 14 additional incidents in *COPPAR*, as to which no express findings were made by the district court, constituted constitutional violations, *id.* at 603.

[107] 357 F. Supp. at 1319.

[108] *Id.* at 1321.

[109] 96 S. Ct. at 601.

[110] *See id.* at 610 (Blackmun, J., dissenting).

[111] *Id.* at 604, 606.

[112] *Id.* at 606.

[113] *Id.* at 605–07.

[114] *Id.* at 608.

[115] *Id.* at 604–05.

[116] 357 F. Supp. at 1319.

tion in response.[117] Likewise, it is hard to credit the Court's position on relief, except on the assumption that no substantive violation has occurred. From reapportionment and desegregation to mental institutions and prisons, federal judicial decrees, often sanctioned by the Court, have constrained the "latitude" normally reserved for state and local officials precisely to secure constitutional rights against exercises of official discretion. The pressure of this doctrinal environment, in large part beyond the power of the Court to alter quickly, seems to me to be more than the anomalies of *Rizzo v. Goode* can withstand over the long run. One may further question whether even a conscious effort to limit judicial review of executive and administrative action can be effective except at the margin. The now-obligatory reference to deToqueville,[118] as well as the current suspicion of administrative agencies [119] and the congressional propensity for private enforcement of regulatory programs,[120] betoken a cultural commitment to judicial oversight that is not likely to yield very far to a temporary majority on the Court.

In any event, I think, we have invested excessive time and energy in the effort to define — on the basis of the inherent nature of adjudication, the implications of a constitutional text, or the functional characteristics of courts — what the precise scope of judicial activity ought to be. Separation of powers comes in for a good deal of veneration in our political and judicial rhetoric, but it has always been hard to classify all government activity into three, and only three, neat and mutually exclusive categories. In practice, all governmental officials, including judges, have exercised a large and messy admixture of powers, and that is as it must be. That is not to say that institutional characteristics are irrelevant in assigning governmental tasks or that judges should unreservedly be thrust directly into political battles. But such considerations should be taken as cautionary, not decisive; for despite its well rehearsed inadequacies, the judiciary may have some important institutional advantages for the tasks it is assuming:

First, and perhaps most important, is that the process is presided over by a judge. His professional tradition insulates him from narrow political pressures, but, given the operation of the federal appointive power and the demands of contemporary law

[117] *See, e.g.*, Keyes v. School Dist., 413 U.S. 189 (1973); cases cited in Rizzo v. Goode, 96 S. Ct. 611 n.2 (Blackmun, J., dissenting).

[118] *E.g.*, Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972).

[119] *Compare* J. LANDIS, THE ADMINISTRATIVE PROCESS 10–16, 46–50 (1938), *with* Stewart, *supra* note 49, at 1676–88.

[120] *E.g.*, 15 U.S.C.A. § 1640 (West Supp. 1976) (Truth in Lending Act); 42 U.S.C. § 1857h–2 (1970) (Clean Air Act).

practice, he is likely to have some experience of the political process and acquaintance with a fairly broad range of public policy problems. Moreover, he is governed by a professional ideal of reflective and dispassionate analysis of the problem before him and is likely to have had some experience in putting this ideal into practice.

Second, the public law model permits ad hoc applications of broad national policy in situations of limited scope. The solutions can be tailored to the needs of the particular situation and flexibly administered or modified as experience develops with the regime established in the particular case.[121]

Third, the procedure permits a relatively high degree of participation by representatives of those who will be directly affected by the decision, without establishing a *liberum veto*.

Fourth, the court, although traditionally thought less competent than legislatures or administrative agencies in gathering and assessing information,[122] may have unsuspected advantages in this regard. Even the diffused adversarial structure of public law litigation furnishes strong incentives for the parties to produce information. If the party structure is sufficiently representative of the interests at stake, a considerable range of relevant information will be forthcoming. And, because of the limited scope of the proceeding, the information required can be effectively focused and specified. Information produced will not only be subject to adversary review, but as we have seen, the judge can engage his own experts to assist in evaluating the evidence. Moreover, the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies.

Fifth, the judicial process is an effective mechanism for registering and responding to grievances generated by the operation of public programs in a regulatory state. Unlike an administrative bureaucracy or a legislature, the judiciary *must* respond to the complaints of the aggrieved. It is also rather well situated to perform the task of balancing the importance of competing policy interests in a specific situation. The legislature, perhaps, could balance, but it cannot address specific situations. The bureaucracy deals with specific situations, but only from a position of commitment to particular policy interests.

Sixth, the judiciary has the advantage of being non-bureaucratic. It is effective in tapping energies and resources outside

[121] Thus, the court often establishes implementation committees to facilitate modification of relief as that seems necessary. *See, e.g.*, cases cited at note 90 *supra*.

[122] *See, e.g.*, Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 228–29 (1971). *But see* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 240 (1973).

itself and outside the government in the exploration of the situation and the assessment of remedies. It does not work through a rigid, multilayered hierarchy of numerous officials, but through a smallish, representative task force, assembled ad hoc, and easily dismantled when the problem is finally resolved.

The foregoing enumeration is admittedly one-sided. It surely does not warrant unqualified endorsement of the public law litigation model in its present form. For one thing, the returns are not all in, and those we have show varying degrees of success. Legislative apportionment, although bitterly opposed as an arena of judicial intervention, seems to have worked out reasonably well. School segregation, on the other hand, seemed obviously appropriate for judicial reform under the Constitution, but the results are at best mixed. And some heralded efforts at management of state institutions may turn out to be pretty thoroughgoing failures. What experience we have with administrative resistance to intrusive court decrees is not particularly encouraging.[123]

There are also counter-instances and counter-arguments for each of the advantages of the public law model suggested above. Can the disinterestedness of the judge be sustained, for example, when he is more visibly a part of the political process? Will the consciously negotiated character of the relief ultimately erode the sense that what is being applied is law? Can the relatively unspecialized trial judge, even with the aid of the new authority and techniques being developed in public law litigation, respond adequately to the demands for legislative and predictive fact-finding in the new model? [124] Against the asserted "responsiveness" of the courts, it may be argued that the insensitivity of other agencies represents a political judgment that should be left undisturbed. And although the courts may be well situated to balance competing policy interests in the particular case, if as is often true the decree calls for a substantial commitment of resources, the court has little basis for evaluating competing claims on the public purse. Each of these considerations needs exploration in much more detail — although I would hope that the discussion would proceed on the basis of what has been happening in the cases rather than a priori.

[123] *See, e.g.*, A. STONE, MENTAL HEALTH AND THE LAW 94 (1975); Note, *supra* note 69, at 1352–60.

[124] *See generally* Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975); *The Courts, Social Science, and School Desegregation*, 39 LAW & CONTEMP. PROB. 217 (1975).

B. The Problem of Interest Representation

One issue, because it is the center of much current theoretical discussion, deserves somewhat fuller treatment, even in this preliminary effort. Public law litigation, because of its widespread impact, seems to call for adequate representation in the proceedings of the range of interests that will be affected by them. At the stage of relief in particular, if the decree is to be quasi-negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance, not only from the point of view of the affected interests but from that of the system itself. As noted above, the tendency, supported by both the language and the rationale of the Federal Rules of Civil Procedure, is to regard anyone whose interests may be significantly affected by the litigation to be presumptively entitled to participate in the suit on demand. In a public law system, persons are usually "affected" by litigation in terms of an "interest" that they share with many others similarly situated, whether organized or unorganized, that is to say, as members of an "interest group." Participation of those affected by the decision has a reassuringly democratic ring, but when participation is mediated by group representatives, often self-appointed, it gives a certain pause.

Professor Richard Stewart, in a recent article, perceptively develops these misgivings about the theory and practice of interest representation.[125] Some of his objections are properly confined to the administrative agency context that was the focus of his discussion. One of these takes as its point of departure the now familiar notion of agency "capture" by the regulated interest.[126] If the agency is locked in a symbiotic relation with those it regulates, what basis is there, he asks, to suppose that merely formal representation of divergent interests will significantly affect the substance of administrative determinations? [127] The premise of "capture" does not apply in anything like the same degree, however, in the contemporary judicial setting. It may well be that, as in other eras, judges have a congenital preference for the established order. But the traditional independence and prestige of the federal judiciary, the range of subject matter with which it deals, its frequent involvement with substantive programs such as anti-discrimination laws or environmental regulation that cut across industry lines, and the relatively random pattern in which cases

[125] Stewart, *supra* note 49.

[126] *See id.* at 1684–88.

[127] *See id.* at 1760–70.

are presented for decision, all operate to insulate the judge from the cruder forms of "capture." [128]

Professor Stewart's main thrust, however, is that in a proceeding with broad public impacts, whether judicial or administrative, there are no very reliable criteria for identifying the affected interests, apart from the decibel level of the protest.[129] The fundamental objection, of course, is not to the participation of those who perceive themselves as affected and can make a plausible showing on that point. True, one may question whether those who do volunteer will adequately represent the larger groups for which they purport to speak. But intervention doctrine, class action rules looking toward adequate representation and subclassification,[130] and the judge's ability to draw on outside points of view all speak to this matter. There is a problem of the complexity of the proceedings if all affected parties are to be heard, but here too the judicial system has a potential for flexibility and administrative finesse that is being gradually mobilized.

The real problem that emerges from Professor Stewart's analysis is the inevitable incompleteness of the interest representation. What about those who do not volunteer — most often the weak, the poor, the unorganized? A first response is that these groups are unlikely to be better off in any other process to which the policy issue might be remitted for decision.[131] On this score, neither the judiciary nor the administrative agencies, it seems to me, need entertain feelings of inferiority to the typical bureaucratic decision or local governing board action, or even to the operation of "de-regulated" private activity. And to retreat to the notion that the legislature itself — Congress! — is in some mystical way adequately representative of all the interests at stake, particularly on issues of policy implementation and application, is to impose democratic theory by brute force on observed institutional behavior.

Moreover, a number of techniques are available to the judge to increase the breadth of interests represented in a suit, if that seems desirable. He can, for example, refuse to proceed until new parties are brought in, as in the old equity procedure, where the categories of necessary and proper parties converged.[132] In class actions, the judge may order such "notice as may be required for the protection of members of the class or otherwise for the fair

[128] Compare the role of the trial judge with that of the administrative official described in *id.* at 1684–88.

[129] *See id.* at 1760–70.

[130] *See Developments, infra* at 1475–89.

[131] *See* Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 230 n.75 (1976).

[132] *See, e.g.*, J. STORY, EQUITY PLEADINGS § 72, at 83 (3d ed. 1844).

conduct of the action," [133] including "sampling notice" designed to apprise the judge of significant divisions of interest among the putative class, not brought to light by its representatives.[134] And that notice is supposed to be reasonably calculated to inform absentees of their potential interest in the litigation, which is more than can be said of notification of administrative proceedings in the Federal Register. The judge can also appoint guardians *ad litem* for unrepresented interests. And as we have seen, he can and does employ experts and amici to inform himself on aspects of the case not adequately developed by the parties. Finally, the judge can elicit the views of public officials at all levels.[135]

There is also a basis for thinking that the judge may have some success in identifying unrepresented interests that ought to be involved. The diversity of his work load may induce a certain breadth of perspective, in contrast to the specialized administrator. Courts have been somewhat more successful than some agencies in deriving policy guidance from opaque statutory provisions, a guidance that may help inform the choice of interests to be represented. The relatively defined focus even of public law litigation and its often local setting may help in identifying and defining affected interests.

The foregoing is at best a fragmentary and impressionistic response to the Stewart analysis. Moreover, most of it relates to the *potential* of the judicial system. A critical question for research is whether this potential is or can be exploited to produce a party structure that is adequately representative in light of the consequences of public law litigation without introducing so much complexity that the procedure falls of its own weight.

Even if one could be reasonably confident of the capacity of the court to construct ad hoc a kind of mini-legislature for the situation in litigation, I take it an even more fundamental query remains. In reaching a decision, what weight is to be assigned to the interests represented? A part of the answer may be found in the suggestion that the decision, or at least the remedy, involves a species of negotiation among the parties. But on this issue, the argument is familiar and powerful that Congress, whatever its

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[133] FED. R. CIV. P. 23 (d)(2).

[134] *See Developments, infra* at 1415, 1441–42 & n.254.

[135] For example, the Justice Department frequently participates in civil rights suits, *e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Lemon v. Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967). The Securities Exchange Commission frequently intervenes to review the adequacy of judgments reached under the securities laws. *See* cases cited at note 87 *supra*.

makeup, is the institution authoritatively empowered in our system to balance incommensurable political values and interests. Here we confront, finally, the question of the legitimacy of judicial action in public law litigation.

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Despite the foregoing reservations, I am inclined, perhaps actuated by the outcome-oriented motives I ascribed earlier to the Supreme Court, to urge a hospitable reception for the developments I have described and a willingness to accept a good deal of disorderly, pragmatic institutional overlap. After all, the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy. And, despite its new role, the judiciary is unlikely to displace its institutional rivals for governing power or even to achieve a dominant share of the market. In the circumstances, I would concentrate not on turning the clock back (or off), but on improving the performance of public law litigation, both by practical attention to the difficulties noted in this Article and by a more systematic professional understanding of what is being done.

IV. Some Thoughts on Legitimacy

Among the most important functions served by the traditional conception of adjudication was that of accommodating the reality of judicial power to the theory of representative government. The issue became urgent in the latter part of the 19th century as the pace of social and economic change increased and the courts, under the rubric of the fourteenth amendment, were repeatedly thrust into the charged political arena.

The two principal parties to the debate and their positions have grown familiar to the point of caricature. The "Classical" view [136] saw the courts as performing the objective — even "scientific" — function of deducing legal consequences from agreed first principles.[137] The Realists, after challenging and eventually undermining their predecessors' "pretentions" to objectivity, substituted a more pliable view of judicial method: "reasoned elaboration" [138] or "the inner morality of law" [139] or adherence to "neu-

[136] The reference is to work in progress — tentatively entitled *The Rise and Fall of Classical Legal Thought* — of my colleague, Professor Duncan Kennedy, to whom I am indebted for much in this paper.

[137] *See* note 32 *supra*.

[138] H.M. Hart & A. Sacks, *supra* note 2, at 161.

[139] L. Fuller, *supra* note 15, at 42–43.

tral principles." [140] But both schools accepted the traditional conception of adjudication and the premise that the limits of proper judicial action inhered in and could be derived from it.[141]

As the traditional model has been displaced in recent years, therefore, questions of judicial legitimacy and accountability have reasserted themselves. Only the general direction of a response to these questions can be sketched in an Article of this compass. In so doing, we shift from more-or-less pragmatic consideration of how public law litigation works to the level of political theory: How to reconcile adjudication in the new model with the majoritarian premises of American political life.

For cases brought under an Act of Congress rather than the Constitution, the problem, formally at least, is not difficult. The courts can be said to be engaged in carrying out the legislative will, and the legitimacy of judicial action can be understood to rest on a delegation from the people's representatives. The judiciary is also, at least in theory, accountable: If Congress is dissatisfied with the execution of its charge, it can act to modify or withdraw the delegation.

But this formalistic analysis does not begin to capture the complexities of the way the legislature operates and of its relations with the courts. In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. Whether this be legislative abdication or not, the result is to leave a wide measure of discretion to the judicial delegate. The corrective power of Congress is also stringently limited in practice. Only a very few judicial aberrations will cross the threshold of political urgency needed to precipitate congressional action. In any case, a comprehensive defense of the legitimacy of public law litigation must account for its operation in the constitutional as well as the statutory field, and in truth the reality of contemporary judicial action does not differ much between them.

The fundamental ground of traditional reservations about constitutional adjudication is that the courts may be called upon to act counter to the popular will as expressed in legislation. In this respect, constitutional litigation in the new mode differs to some extent from the characteristic activity of the courts under

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[140] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959).

[141] *See id.*:

> No legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned elaboration that I have suggested is intrinsic to judicial action.

See also L. FULLER, *supra* note 15; Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

the due process clause in the early part of the century. In the economic due process cases the courts acted to frustrate legislatures "speak[ing] the present will of the dominant forces in the state," [142] and, beyond that, to withdraw altogether vast realms of policy from the reach of legislative action. Public law litigation is at once more and less intrusive: more, because it may command affirmative action of political officers; less, because it is ordinarily limited to adjusting the *manner* in which state and federal policy on education, prisons, mental institutions, and the like is carried forward. Its target is generally administrative rather than legislative action, action that is thus derivative rather than a direct expression of the legislative mandate. Moreover, one may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers. Unlike the numerical minorities that the courts protected under the banner of economic due process, these have no alternative access to the levers of power in the system.

These observations will, no doubt, fail to dispel the uneasiness that American political and legal thinkers have always felt at the power of courts to frustrate, or to order, action by elected officials. For it cannot be denied that public law litigation explicitly rejects many of the constraints of judicial method and procedure in which we have characteristically sought respite from the unease. Now, I do not deny that the law, like other creative and performing arts, encompasses a recognizable (and teachable) technique; and this technique plays an important part in the development of the medium and in the criticism and evaluation of its practitioners. But in the law, as elsewhere, technical virtuosity has never been a guarantee of acceptable performance.

Moreover, an amalgam of less tangible institutional factors will continue to operate to shape judicial performance in the public law system as in the past: general expectations as to the competence and conscientiousness of federal judges; professional traditions of conduct and performance; the accepted, often tacit, canons and leeways of office. These are amorphous. They mark no sharp boundaries. Their flexibility and vagueness can be abused. But other kinds of constraint are no less vulnerable; and the historical experience is that egregious violation has invariably activated a countervailing response.

More fundamentally, our transformed appreciation of the whole process of making, implementing, and modifying law in a public law system points to sources other than professional method and role for the legitimacy of the new model lawsuit. As we now

[142] A. BICKEL, THE LEAST DANGEROUS BRANCH 147 (1962).

begin to see it, that process is plastic and fluid. Popular participation in it is not alone through the vote or by representation in the legislature. And judicial participation is not by way of sweeping and immutable statements of *the* law, but in the form of a continuous and rather tentative dialogue with other political elements — Congress and the executive, administrative agencies, the profession and the academics, the press and wider publics. Bentham's "judge and company" has become a conglomerate. In such a setting, the ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy.[143]

In my view, judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society. I confess some difficulty in seeing how this is to be accomplished by erecting the barriers of the traditional conception to turn aside, for example, attacks on exclusionary zoning and police violence, two of the ugliest remaining manifestations of official racism in American life. In practice, if not in words, the American legal tradition has always acknowledged the importance of substantive results for the legitimacy and accountability of judicial action. Otherwise it could not praise *Marbury v. Madison*[144] as creative judicial statesmanship while condemning *Lochner v. New York*[145] as abuse of power. Perhaps the most important consequence of the inevitably exposed position of the judiciary in our contemporary regulatory state is that it will force us to confront more explicitly the qualities of wisdom, viability, responsiveness to human needs — the justice — of judicial decisions.

If we must accept that the artificial reason of the law gives no very certain guidance in these matters, we will be no worse off than other professions — and their professors.

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[143] *See, e.g.*, A. Cox, *supra* note 70, at 29–30, 99–118; Bickel, The *Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47–51 (1961).

[144] 5 U.S. (1 Cranch) 137 (1803).

[145] 198 U.S. 45 (1905).