THE FUNCTIONS OF COURTS IN THE UNITED STATES, 1950-1980

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Despite increased research into court operations, reliable knowledge about court functions continues to be scant. Case volume has grown, but court dispositions account for a small part of all dispute resolutions. Most matters which reach disposition in court end at some stage of trial court proceedings. Judges also continue to be makers of general public policy. Common law growth has dwindled. But courts contribute much to the content of public policy through their interpretation of statutes and their review of executive and administrative action. Judicial review of the constitutionality of legislation has declined sharply in fields centered on the economy, while expanding in areas of civil liberties.

In *The Growth of American Law* (1950) I undertook to sketch the history of the organization and functions of the state and federal judicial branches in the United States from about 1790 into the 1940's. The most changeful parts of that story concerned the functions of courts—in contributions judges made to the institutional structure of the society, to steadiness or shifts in broadly held values, and to the distribution of practical as well as of legal power among legal agencies and interest groups. This essay returns to the theme of judicial functions, viewed in light of events of the subsequent 30 years.

I. THE STATE OF KNOWLEDGE OF JUDICIAL FUNCTIONS

The history of what people have thought, found out, and published about courts' jobs over the years 1950-1980 is much more readily told than the history of what courts have in fact been doing. The bulk of the published material offers opinions, impressions, or theories about courts' contributions to the social-legal system; ordered collection and analysis of facts about judicial operations account still—as they did in 1950—for a minor part of what is in print. This state of the record makes it imperative to begin not by plunging into an account of

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judicial functions but by taking realistic account of how little we know.

The bulk of the work of trial and appellate courts continues to have little immediate impact on the lives of most people most of the time. The bulk of what courts do focuses on actors directly involved, concerns particulars of narrowly confined behavior, and uses a language of procedural and substantive doctrine familiar to few except legal professionals (Sarat, 1977: 438). Not surprisingly, when interviewers ask people what they know about what courts do, they learn that people generally know little, and that what people think they know is often wrong, or at least considerably askew, relative to what those more knowledgeable see as going on. Individuals show a low level of attention and understanding concerning even those courts most prominent in the mass media—the courts which try serious criminal charges, and the Supreme Court of the United States (Yankelovich *et al.*, 1978: 19, 22, 29, 42). This is not a desirable state of affairs. But, since it exists, we should not look to common opinion to enlarge correct understanding of judicial functions.

However, common opinion should be heard on what common opinion is. As of the 1970's people expressed general, if not buoyant, confidence in courts. The foundations of this confidence seem shaky, since it appears to rest on over-estimation of the extent to which judges mechanically apply established law, and under-estimation or ignorance of the extent of discretion and of debatable outcomes involved in the courts' business (Sarat, 1977: 440). Especially disquieting was evidence that those who had had closest contact with court operations tended to be unhappy about them, whether the respondents had won or lost (Sarat, 1977: 439, 441). Dissatisfaction may have been sharpest with regard to the administration of criminal justice. But on the civil side, too, people saw undesirable costs, delays, and risks of uncertain outcomes. The objections seemed to run mainly to courts' institutional character; people continued to rank judicial office high on scales of occupational prestige. Overall, with due regard both to the shallows and the depths of opinion evidence, it seemed likely that in the 1970's there was probably as much overt or latent "popular dissatisfaction with the administration of justice," centered on the courts, as when Roscoe Pound made that a leading theme of professional concern in 1906 (1906: 395).

For more informed identification and appraisal of judicial functions, 1950-1980, there is a substantial body of published material from professionals—lawyers, judges, political scientists, specialists in public administration, and legal scholars. Even in this domain there is much more opinion and theory than inventory and analysis of observed or recorded operations.

Consideration of court functions became more wide ranging and complex in the 1950-1980 span. Though the data base continued narrow, professional attention to court functions in this period grew a good deal more ambitious in ideas about what to investigate. Three developments stand out.

(1) For years before 1950, there had been small beginnings of inquiry into the work of trial courts. But the principal concern was for the roles of appellate courts—above all, for the judicial review function of the Supreme Court of the United States. After 1950 the appellate level was still a prime focus of study, though now with more regard than earlier for state appellate courts (Kagan *et al.*, 1977: 30; 1978: 961, 963). However, the most marked change in the literature was a decided increase in published discussion of the roles of trial courts, including not only those of general jurisdiction but also those of limited range, such as small claims, traffic, and misdemeanor courts (e.g., Friedman and Percival, 1976: 267; McIntosh, 1981; Wanner, 1975: 293). Given the continued reality that the overwhelming proportion of all matters filed in any court never reached the appellate level, this shift represented a material improvement in allocating professional attention.

(2) The post-1950 literature showed substantial increase in regard for the legal and social contexts within which courts, especially trial courts, operated. This focus was not wholly lacking earlier, but in the last generation commentators developed it with more sophistication than before. At the base of this expanded consideration was the judgment that we could not realistically measure success or failure in judicial functions without taking account of opportunities and constraints of the setting within which judges worked; often we might beg the question if we did not ask whether explanations for quality or defect in performance might not lie in sectors of social or legal operations outside the immediate domain of the courts (Sarat and Cavanagh, 1978: 2-3).[1]

[1] In general on the need to appraise courts in context, see Danzig (1978: Ch. 2, 5); Hays (1978: 4); Manning (1977: 770-774); Rosenberg (1971: 800, 801);

Some dimensions of the broader context lay in the total pattern of legal institutions, of which the judicial branch and its contributions were only part. Useful shorthand characterizations of this legal-institutional context could run in terms of the separation of powers. Constitution makers did not inject major new factors into the courts' situation after 1950. But judges themselves somewhat added to sources of external pressure on the courts. This they did by giving new readings to rights and duties which litigants claimed flowed from constitutional standards of due process and equal protection under the 5th and 14th Amendments or from comparable provisions of state constitutions as well as from declarations more specific to the basic law of the states—for example, affecting the supply of public education and the separation of church and state (Casper and Posner, 1976: 37, 38, 46, 48, 49, 54, 55). On broader fronts, legislatures and executive offices and administrative agencies working within extensive, often ill-defined statutory delegations of rule-making and adjudicative authority, contributed more pressure for responses by judges—on the constitutionality of statute law and administrative legislation, on the proper interpretation of statutes and administrative rules, and on the adequacy of records made to support public or private action taken under claimed authority of statutes or administrative legislation. Legislative, executive, and administrative law making thus enlarged the range and complexity of substantive and procedural law, which multiplied occasions for judicial action and increased opportunities or constraints affecting judges' contributions to legal-social order. Moreover, courts did not ultimately control the resources available to them to do their jobs; provision of judges and supporting or auxiliary facilities, or creation of official alternative agencies to handle disputes, lay with legislators, who held the public purse and the exclusive authority to create new types of legal agencies. Judges, thus, did not operate alone as self-sufficient entities. They functioned within and as part of patterns of offices and procedures—for example, through the work of clerks of court, social workers, probation and parole officers—over much of which they had no direct control (Manning, 1977: 770-772; Rabin, 1979: 7-14; Rosenberg, 1965: 40-46; Stewart, 1975: 1671, n.5).[2]

Ruhnka and Weller (1978: 191-195); Sarat and Grossman (1975: 1201-1202); Sheldon (1974: 171).

[2] Cf. Keeton (1969: 74) on the role of judge and jury.

Post-1950 commentators also paid more attention than had their predecessors to the social context within which judges worked. Ideas about cause and effect were disputed, and hard data were scant. But discussion did go to hypotheses about the relations between the volume and complexity of court business and changes in population, the continued shift of society from rural to urban ways of life, the emergence of divisive conflicts over values (compared with competition of interests within commonly accepted frames of dealing), the impact of growth in scientific and technical knowledge (and its translation into a greater diversity of activities and issues among people), the tensions fostered both by flexibility and rigidity in operations of markets, and the contrasting problems posed according to whether disputing parties were in continuing relationships or met in once-only or fragmented encounters (Danzig, 1978: 57-64; Friesen, 1971: 77, 78; Macaulay, 1979: 64-65; McKenzie, 1971: 119; Sarat and Grossman, 1975: 1208-1210).

(3) In the 1950-1980 span the extended reach of substantive law and the creation of new remedies on behalf of diffuse or otherwise weak interests—largely, though not wholly on bases provided by statute law or administrative legislation—brought a greater degree of concern with contributions of judges to making general public policy. The converse of this development was a sharper focus upon the other principal style of judicial operations—the bulk processing of particular disputes which fell within quite well-defined and established frames of legally declared values, procedures, and remedies.

Policy generalization and the resolution of particular disputes did not exist in absolute division. General public policy took on meaning in proportion as it foreshadowed particular outcomes. Though great bodies of cases were suitable for relatively routine disposition so far as concerned the relevant legal standards or rules, some percentage presented variations or novelties which pressured courts to add to or reshape general doctrine. Granted this qualification, there remained an important distinction between policy making and policy administration by judges. And many commentators agreed that after 1950 the role of judges as policy makers loomed substantially larger, over a wider range of social concerns, than before (Chayes, 1976: 1281; Horowitz, 1977: 7, 10, 12, 13, 19, 23, 31; Rosenberg, 1971: 810; Sarat and Cavanagh, 1978: 36-39, 71-77).

From this perception flowed more pointed attention to two related questions. Was this greater policy making role a

legitimate one, measured by our constitutional tradition as to the proper apportionment of roles among the major legal agencies? Related, but not necessarily the same, was the question, what was the working competence of judges to be generalizers of public policy, in light of experience of the comparative operations of legislatures, executive or administrative officers, and judges? Before 1950 questions of the legitimacy and practical competence of judicial policy making centered typically on judicial review of the constitutionality of legislation. The realist jurisprudence of the 1930's finally won common recognition that judges had long been making policy at common law. But, once they put aside dogma for reality, professionals found no basic concern over the legitimacy or competency of the common-law style of policy making. For they saw this activity as proceeding by cautious incremental steps—in Holmes's classic formulation, proceeding "interstitially"—which meant that at any point of the process the stakes were not disturbingly high, and the doctrinal doors were always open to retreat and amend if later judgment did not validate what had been done.[3] But this comfort could not attend the judicial contributions to general policy that proceeded after 1950 under new views of broad constitutional language or in the course of interpreting the uncertain meaning of statutes or administrative legislation that broke new ground, typically amid the surge of policy battle. In this setting, professional attention brought to questions about the legitimacy and competence of courts as policy makers a sweep and intensity of appraisal different from that of earlier years.

There appeared also some spillover effect from this area of concern to the attention given to judges' work in bulk disposition of disputes within more familiar frames of reference. Problems posed by the bulk business could impact on the quality of work done—the resources available—for the policy making function. But, beyond this point, the sharpened concern that developed in relation to the policy making role encouraged fresh questions about the competence, and in some contexts the legitimacy, of courts in handling the quantitatively far greater body of business which presented either relatively routine issues of law and fact, or at least called only for adjusting policy within "interstitial" bounds.[4] Across the

[3] On "interstitial" law making by judges, see Holmes, J., dissenting, in *Southern Pacific Co.* v. *Jensen* (1917). Cf. Rumble (1968: 232-234) on how "realists" fostered acknowledgement of judicial policy choices.

[4] See Part III, *infra*.

board, then, post-1950 professionals were more concerned than commentators had been before with appraising the propriety and competence of courts' performance.

Despite more attention to the subject, reliable knowledge about court functions continued to be scant. Before 1950 we had almost no reliable, broad-scale studies of the detailed operations of state trial or appellate courts, on the civil or the criminal side, and only a little more examination of the work of federal courts (Hurst, 1950: 172-174, 456-457). After 1950 there was a substantial increase in ordered collection and assessment of facts about the flow of court business. Part II of this essay takes account of the principal new studies. Even so, the new material was so limited that it entitled readers to draw only cautious hypotheses; commentators would far overreach these studies if they drew firm conclusions from this modest stock of data. We can be grateful that operations research increased over the 1950-1980 span. But when we catalog what we have, the continuing deficiencies mount to dismaying totals.

Four limitations marked our knowledge of the activity of courts. (1) As of 1980, published studies dealt with only small parts of this sprawling country—with a handful of metropolitan-area trial courts, a few federal trial and intermediate appellate courts, almost no courts in rural or small-town settings.[5] The National Center for State Courts began country-wide compilations only as of 1975 (National Center for State Courts, 1978). Two exceptions to this limited area coverage serve to highlight the general lack. Since the model set by Professor Frankfurter in the 1920's, there have been close inventories of the business of the United States Supreme Court.[6] And in 1978 four scholars published an inventory of business done by appellate courts in 16 states selected to represent a range of types of social and economic setting (Kagan *et al.*, 1978). (2) Few studies of state courts, done before or after 1950, reached deep back into the 19th century; the only broad-reaching exception was the 16-state inventory of state appellate court business, which stretched

[5] On state trial courts, notably Friedman and Percival (1976), two California counties, one rural, one urban; Laurent (1959), one rural Wisconsin county; McIntosh (1978), St. Louis; Ruhnka and Weller (1978), 15 small claims courts; Wanner (1974; 1975), Baltimore, Cleveland, Milwaukee. On federal courts, notably Baum *et al.* (1978) five circuit courts of appeal; Dolbeare (1969), district courts in 20 large cities; Grossman and Sarat (1974), nationwide totals of cases filed.

[6] For example, see Frankfurter (1929) and *Harvard Law Review* (1975); overall on the Supreme Court, see Casper and Posner (1976) and Goldman and Jahnige (1976).

from 1870 to 1970. Studies of federal courts generally covered longer spans, but mostly within the 20th century. The want of depth in time meant that, particularly for states, we lacked the basis for making long-term generalizations about stability or change in rates of litigation in relation to population or to any other measures of social context.[7] (3) The available information showed substantial variations in the nature of court business, not only among states but also within a given state, in the jurisdiction of courts and the subject matter of dockets. Particular studies were sometimes remiss in not sufficiently identifying distinctive characteristics of the work they inventoried. On both counts the limits of the material made hazardous any gross comparisons or generalizations (Barrett, 1965: 88; Sarat and Cavanagh, 1978: 29, 39, 41, 45). (4) Observers developed no standard classification scheme for tabulating in detail the varying subject matter brought to courts, either on a local, sectional, or national scale. For example, litigation related to automobile accidents probably accounted for a disproportionate share of matters brought to trial or to the threshold of trial, but no published uniform national data offered a basis for measuring the relation of those cases to all trials or trial-ready matters (Frank, 1969: 72; Barrett, 1965: 88).

Commentators after 1950 showed a new range of concern with the legal-institutional and social contexts within which judges operated. But there were few factual studies of the out-of-court context. We knew little about how individuals or organizations came to perceive situations as inviting resort to formal machinery for resolving disputes, or how far they saw alternative processes available in lieu of those offered by courts. There was little available on details of roles of dispute participants and their auxiliaries—little concrete, for example, on lawyers' practices that contributed to delay in handling

[7] Kagan *et al.* (1978) inventoried 16 state appellate courts, 1870-1970; the inventories on the Supreme Court of the United States are most complete since the 1920's; see note 6. Three particular-locality studies which had a long time reach are Friedman and Percival (1976), who studied two California counties, 1890-1970; Laurent (1959), who examined a Wisconsin county, 1855-1954; and McIntosh (1981), who dealt with St. Louis, from 1820 to 1970. Other state trial court studies cited in note 5 had limited time spans: Ruhnka and Weller (1978), 15 small claims courts in six months of 1975; Wanner (1974; 1975), Baltimore, Cleveland, Milwaukee courts in 1965 and 1970. See also Yngvesson and Hennessey (1975: 231-234) for a tabulation of 18 small claims court studies, with one exception all based on data for periods of about 3-12 months. The other federal court studies cited in note 5 deal with longer spans than do some state studies: Baum *et al.* (1978), five circuits, 1895-1975; Dolbeare (1969), federal district courts in 20 large cities, 1960-1967; Grossman and Sarat (1974), general data, 1900-1970.

issues, and little ordered detail concerning techniques and bargaining counters involved in out-of-court settlement of civil matters and plea bargaining on the criminal side (Church *et al.*, 1978: 83, 84; Reed, 1973: 7, 185; Sheldon, 1974: 93, 98, 107-120, 171).

II. BUSINESS OF COURTS CONDUCTED WITHIN ESTABLISHED FRAMES OF PUBLIC POLICY

Case Volume

The volume of cases filed and the number pursued through some further stages of litigation were the elements which most preoccupied professional commentators in the 1950-1980 span. True, there was also increased concern about the extent to which in those years judges became more active in making general policy. But, important as was this development, it centered on relatively few courts and relatively limited parts of the business that occupied judges' energies. In contemporary scrutiny of the courts the policy making role was overshadowed by the attention given to crowded dockets, to measuring and explaining the crowding, and to contriving ways to lessen the burden.[8]

By 1980 we still had relatively little reliable, detailed information about long-term trends in the volume of trial or appellate court business. For the 19th century and the first half of the 20th there were no inventories of matters disposed of at various stages of court handling in the United States as a whole or even in any segments of the country (Kagan *et al.*, 1978: 967; Lempert, 1978: 135; Sarat and Cavanagh, 1978: 29, 39, 41, 45). The limited information at hand pointed to three generalizations.

(1) The absolute volume of cases filed and of cases pressed to stages beyond filing in state trial courts increased from the 19th into the 20th century and especially after 1950, probably throughout most of the United States. This absolute growth went on apparently at a steady though not uniform pace. Growth showed itself most plainly after 1950 in metropolitan sectors; there was little documentation for rural areas.[9] Thanks to structural changes the work load—or at least the opinion load—of many state supreme courts declined from an early-

[8] See, *e.g.*, Hufstedler (1971: 902, 905-906); Rosenberg (1965: 30, 54); Virtue (1962: 48-54).

[9] In general: Friedman and Percival (1976: 292); Jacob (1973: 104, 105); Kagan *et al.* (1978: 967); McIntosh (1981); Sarat and Cavanagh (1978: 30); Wanner (1974: 421). On rural areas: Friedman and Percival (1976: 267); Stott *et al.* (1977: 71).

20th-century peak (Kagan *et al.*, 1977: 133-135, 156). Records were clearer for the federal court system and showed a substantial absolute increase of volume, though at sharply differing pace in different decades. Total filings in federal district courts increased only by about 8 percent in the 1950's; indeed, in that span filings of criminal cases decreased from the prior period by 15 percent. However, the 1960's saw unprecedented absolute change: total filings increased by 46 percent, filings of criminal cases by 56 percent, and the proportion of pending cases to total caseload was 43 percent greater in 1970 than in 1960. Substantial growth continued into the 1970's (Friendly, 1973: 15-16; Heydebrand, 1977: 807, 810).

(2) However, absolute increase in cases docketed or moved through succeeding stages of litigation told little about some important dimensions of judicial roles. Absolute increase did not show whether the added load was proportionately greater than changes in the social context over the years. Nor did it tell whether the increased business was so great that courts' performance suffered seriously, measured by criteria of efficiency or fairness or public regard. Some evidence indicated in a general way that the volume of court business grew about in proportion to development of social conditions likely to generate disputes. But the literature on state trial courts established little assured correlation of dockets to particular social trends, such as the growth of cities or of industry. Moreover, to measure state courts' involvement in the whole range of dispute settlement in their communities called for knowing how many disputes there were that were potentially suitable for court disposition. Yet, we had no inventories to show over time how many disputes existed that did not come under official attention (Kagan *et al.*, 1977: 148, 149, 153; 1978: 986; Ladinsky *et al.*, 1979: 2, 6; Lempert, 1978: 19, 135; Sarat and Cavanagh, 1978: 3, 4, 37-44).

(3) Commentators found that the best available base from which to estimate judges' engagement with the total of disputes was the population living within courts' jurisdictions. However imperfect a fit, the number of potentially suable controversies in a community was likely to vary with the number of individuals whose activities might produce disputes. Some data indicated likely increases in the number of cases filed per 1,000 population in some state courts between 1870 or 1890 and 1970. These dockets included a good many proceedings, such as uncontested divorces, which did not involve full-dress combat. This element made it more difficult to gauge the impact of

these caseloads. But even nonadversary or relatively routine dispositions made drafts on court facilities, so that there was some measure of significantly increased volume of business when the ratio of filings rose relative to population (Church *et al.*, 1978: 26; Friedman and Percival, 1976: 292; Kagan *et al.*, 1978: 962, 965, 966, 986, 987; Lempert, 1978: 195, 196; Sarat and Cavanagh, 1978: 30, 31).

Federal trial court business presented a different and sharper picture than that of the state courts. Federal dockets showed increases related not only to population but also to currents of the general economy. More marked, though, was the relation between national public policy and federal trial court workloads. In quantity and importance the prime business of federal courts arose under federal legislation, in contrast to the work of state courts which dealt largely with matters arising out of private relationships or dealings, as well as with disputes connected with state or local government policies. Hence the federal judicial workload related more closely to developments in particular sectors of national public policy than the flow of state court business related to areas of official policy at state or local levels. A tally running from 1950 to 1973 showed substantial relations between total filings in federal courts and the total number of persons employed at all levels of federal, state, and local government; and for 1973 a specific relation between all filings, and filings in which the United States was a party, and federal civilian government employment. The impact of federal civil rights legislation provided the most dramatic instance of the ties between national policy and federal courts' workload. Civil rights actions in federal courts went from 142 in 1950 to 280 in 1960 (a 97 percent increase), and from 280 in 1960 to 3985 in 1970 (a 1323 percent increase) (Friendly, 1973: 17, 26; Goldman *et al.*, 1976: 230; Heydebrand, 1977: 799 n.17, 806, 810).

The increase in volume of court business would take on more meaning were it matched for the 1950-1980 span with the resources which legislators provided the courts. Observers complained that state legislatures consistently failed to provide funds appropriate to the load on the judicial branch, contributing to the lag of judicial performance behind the growth of workloads. Up to 1980 inadequate funding of itself had not produced a crisis situation in the state judiciary. But it was seen as an added cause of congestion and delay from the volume of business (Baar, 1975; 1977: 277; Berkson, 1977: 205-206; Glick and Vines, 1973: 4; Hazard *et al.*, 1972: 1286; Pringle, 1977:

251). However, no tabulation existed to show total expenditure by the states on their courts. Nor was there even a standard classification of the services which should be included to measure provision for the judicial branch—whether, for example, account should be taken not only of salaries of judges and immediately supporting personnel, but also of funds provided for public defenders, or probation or parole officers (Baar, 1977: 273).[10] Circumstances supported the likelihood that the judicial branch was persistently underfunded relative to the growth of its business. Legislative inertia was one element; normally the work of courts was withdrawn from general public attention by its detail and technical character, so that there was little political advantage in pressing to increase judicial budgets. Traditional proprieties forbade judges to lobby for their own supply, or to cultivate a constituency. In most states courts depended heavily on local governments for their financing, competing with other and politically more attractive demands upon the inadequate yield from local property taxes. A potentially offsetting factor in more and more states in the second half of the 20th century was the creation of central administrative offices for the court systems, with legitimate title to assemble data which might make the case for more generous budgets. But in the absence of any national tabulation of expenditures on the judicial branch there was no way to measure the impact of the new offices (Baar, 1977: 272, 274; Berkson, 1977: 205; Hazard *et al.*, 1972: 1286). Political considerations badly stalled Congress's provision of added federal judges to meet the growth of business, and Congress was long unsympathetic to increased appropriations for the federal court system. The funding picture changed for the better only in the 1960's. Appropriations (exclusive of funds for the Supreme Court) went from $38 million in 1957 to $87 million in 1967 to $418 million in 1977. The elaboration of data for the system by the new Administrative Office of the United States Courts and more energetic promotion by the Judicial Conference of the United States were material factors in this improved budget response (Administrative Office, 1957: 263; 1967: 143; 1977: 148; Fish, 1973: 130, 173, 210-214, 223-224, 229).

Concern with growth of court business was matched after 1950 by preoccupation with remedial proposals aimed chiefly at reducing trial courts' workloads. Ideas ran in three main

[10] Also, interview, November 12, 1979, with Timothy Pine, Librarian, American Judicature Society, Chicago; letter, November, 1979, from Lynn Jensen, National Center for State Courts.

currents. Some attention went to conditions outside the courts, which policy makers might try to manipulate to relieve the judges. Thus the 1970's witnessed increased scrutiny of means of handling disputes other than by lawsuits—through mediation or arbitration, or resort to even less formal means provided by private organizations such as trade associations or neighborhood centers (Abel, 1973: 217; Danzig and Lowy, 1975: 675; Felstiner, 1974: 63; Galanter, 1978). Statutory development of new areas of public policy contributed much to the swelling of dockets. Thus some recommendations called for more sparing resort to legislation and more care to simplify its terms to reduce the number of points of law that invited dispute (Frank, 1969: 85, 86, 91-92, 95-105, 107-108, 113, 114, 116, 118-122, 135-136, 139-141; Manning, 1977: 774-781).

A second type of response to growth of the volume of litigation looked to restructuring official machinery for handling disputes. Some argued that the simplest course was to add more judges. But, apart from difficulties of finding qualified individuals, some studies cautioned that a more promising approach was to make more effective use of judges already sitting (Church *et al.*, 1978: 79-80; Frank, 1969: 175-179). To some extent the suggestion of adding personnel was translated into creation of new, specialized tribunals which could divert from trial courts of general jurisdiction much high-volume business. This approach was familiar before 1950 in the organization of separate traffic courts and small claims courts, and the years after 1950 saw greater resort to such bodies (Ruhnka and Weller, 1978: 189, 190, 195; Sarat, 1976: 369-373). Some critics felt that jury trials used up too much trial time, and that judges could relieve delay and congestion by more readiness to take cases away from juries. But there was evidence that more or less use of the jury had no great net effect on the pace or volume of case dispositions (Church *et al.*, 1978: 32). A somewhat analogous diversion technique urged over many years up into the 1970's for the federal courts was abolition or sharp restriction of jurisdiction based on diversity of citizenship. However, up to 1980, proponents never mustered sufficient pressure on Congress to bring this about (Friendly, 1973: 140-152).

A third, and on the record the most promising attack on crowded dockets, looked to the courts' own housekeeping. Commentators called on judges to take more active and firm management of cases, markedly reducing lawyers' ability to set the flow and timing of business. There was evidence that the

most effective element in handling a heavy workload was the determination of judges to move matters to resolution. On the civil side this approach asked judges to use the broad authority new rules of civil procedure gave them to limit the scope of discovery proceedings, to police closely the allowance of continuances, and to make selective use of pretrial hearings and settlement conferences (Church *et al.*, 1978: 39, 45; Frank, 1969: 146-152; Rosenberg, 1965: 31, 36). Experience showed that there was no simple device to reduce caseloads. Mechanical formulas did not produce efficiency. Thus, some critics found mandatory pretrial conferences often wasteful, and on the criminal side statutory mandates for speedy trial were largely ineffective if they allowed defendants to waive the requirement, or if judges were not alert to press the pace (ABA, 1974: 18; Church *et al.*, 1978: 77-79; Rosenberg, 1965: 51, 55, 57).

Altogether, the professional consensus tended to be that many factors entered into the press of trial court business, so that no one device would of itself assure effective handling of the load. Moreover, experience taught that there was no escaping the costs of close follow-up of any measures taken. Research showed little demonstrated result from schemes originally advanced with confident enthusiasm, or revealed that some changes produced unexpected consequences of questionable worth. At bottom there appeared to be no substitute for steady, energetic, intelligent, fair pressure by judges to move matters along. A court's evident readiness to try cases seemed to provide the most effective prod to settling pending suits. Statutes and rules of court which provided for less technical pleadings and for liberal discovery carried the danger of making pretrial stages more costly and risky than a trial; critics found that in the years after 1950 judges did not properly police the use of discovery or show enough willingness to grant summary judgments in order to realize the legitimate savings that easier pleading and discovery made possible. Yet, stronger case management also held possibilities of abuse of official power. Without close supervision judges might make heavy-handed use of required settlement conferences. It appeared that there was need of better defined guidelines if courts were to impose stricter discipline over lawyers' use of liberalized pleading and discovery (ABA, 1974: 18; Church *et al.*, 1978: 76; Frank, 1969: 145-146; Rosenberg, 1965: 31, 40, 41, 43, 46-49, 51, 55, 57).

The record of the volume of state and federal appellate business, 1950-1980, is simpler than that of trial court

workloads. By the 1970's, volume at the appellate stage ceased to be the central concern in many states, and prime attention went to the subject matter with which appellate courts dealt and the nature and quality of public policy they made. This shift in focus, compared with the preoccupation with volume in the trial courts, was due at least as much to changes in court structure as to factors external to the courts (Kagan *et al.*, 1977: 123, 124, 128, 131).

Our best knowledge of the course of state appellate business comes from a study of workloads of the highest courts of 16 states, 1870-1970. This inventory shows that on the whole the quantity of cases disposed of with opinion declined by 1970 from an early-20th-century peak. From 1870 into the mid 20th century, as a state's population grew, the opinion load of its supreme court usually grew also, sometimes quite dramatically, though with considerable variation among states. So long as there were no major changes in court organization, the volume of work handled by the highest courts showed marked increases relative to population. This was the best correlation the data afforded to explain the growth of workload; apart from factors of court organization and population, evidence did not establish close correlation of the course of appellate business in these 16 states with such elements of social context as industrialization, urbanization, per capita income, racial composition, or even developments in substantive statute law. By 1970 the 16 state supreme courts showed quite stable workloads; cases decided with opinion averaged between 107 and 126 per term, and rarely went as high as 200 per term, in contrast to double that figure in earlier years (Kagan *et al.*, 1977: 131, 132; 1978: 962, 965-966, 980-981, 986-989).

Timing indicated that two changes in court organization primarily determined changes in volume of state appellate business from 1950 to 1980. In a growing number of states law makers took away from lawyers and their clients the ability to set the size of workloads by giving the high courts authority to decide for themselves which cases they would hear. In a growing number of states law makers created intermediate appellate courts to bear the brunt of appeals which lawyers decided to take; further review was at the discretion of the top court. The two changes were not necessarily linked. Either alone could bring a substantial reduction in the burden of supreme court work. Together they created an effective sifting process which made the supreme court relatively autonomous

in controlling the extent of its load (Kagan *et al.*, 1977: 128, 130, 131, 154).

Some qualifications are necessary to put this account into proper perspective. Grants of power to state high courts to select their dockets, and creation of intermediate courts of appeal, became familiar features only in the 1960's; just 11 states had intermediate courts of appeal in 1948, but by 1970 there were 23. Usually it was the larger states which set up such intermediate bodies; a broader range of states granted their high courts discretion to select cases to review. These changes tended to come when a state's population increased substantially. Given this timing, the full impact of these structural changes was felt only in the 1970's (Kagan *et al.*, 1977: 128, 130; 1978: 978-979, 980, 981).

These structural changes brought substantial reductions in the opinion load of state supreme courts. But they did not necessarily spell a proportionate reduction in total workload, because judges had to spend time screening petitions for review, and some evidence indicated that they invested more time and effort on the cases they took. A marked increase in the rate of dissents in a high court which received cases through an intermediate court of appeals also suggested greater commitment of effort to the cases taken (Kagan *et al.*, 1977: 131, 132; 1978: 995, 996).

Finally, we must note that not all the factors at work operated to reduce demands made on state supreme courts. Some states continued to provide direct review by the highest court in specified types of cases. States also to some extent assisted appeals by allowing contingent fees to lawyers in tort actions, by providing counsel at the state's expense for indigent appellants, and by meeting costs of some reviews provided under workers' compensation laws. Other familiar elements continued to affect parties' readiness to seek review—costs of lawyers' fees, of printing a record and brief, and of risks of losing; the attitude known to prevail in a given appellate court toward technical errors at trial; the presence or absence of a litigant such as an insurance company which held appellate specialists on retainer (Kagan *et al.*, 1977: 154, 155; 1978: 968; *Yale Law Journal*, 1978: 1204, 1205, 1207).

The structural situation affecting appeals in the federal court system was stable in the 1950-1980 period within the frame familiar since the 1925 Federal Judiciary Act. The circuit courts of appeal handled the bulk of review of district court rulings. Under its discretionary power to grant or deny

petitions for certiorari, the Supreme Court fully controlled the bulk of its docket. Moreover, in practice it continued to convert the areas formally subject to appeals as of right into areas also within the Court's discretionary control; appeals which it regarded as not presenting issues of fresh importance it dismissed in terse *per curiam* opinions as not involving substantial federal questions. There were substantial absolute increases in the dockets of the intermediate courts—for example, from 2355 cases disposed of in 1950 to 8451 in 1974. There was a great relative increase in the number of cases appealed, especially of those that involved the federal government. While district court filings 1960-1972 increased 64 percent, the load of the courts of appeal increased 273 percent; between 1972 and 1977 the load increased another 31 percent, from 14,535 filings to 19,118. But the larger volume of business did not move Congress to make any change in access to the courts of appeal. Cases filed in the Supreme Court by petitions for certiorari or on jurisdictional statements under appeals went from 1181 in 1950 to 3661 in 1974. The 1970's saw a burst of proposals to create an additional intermediate federal court charged with making the bulk of decisions as to which cases would go to the Supreme Court, and also perhaps with resolving some categories of cases it did not choose to pass on to the highest court—notably cases involving conflict among circuits—and with reviewing rulings of administrative agencies. These plans would make decisions of the new court final after a short interval, if the Supreme Court did not intervene to bring the matter before it. These proposals fell into sharp controversy; critics disputed the notion that the increase of petitions for review unduly burdened the Supreme Court, and argued that the role of the new intermediate court might infringe the constitutional position of the high court, or add delay and uncertainty in administering federal law without sufficient offsetting gain. As of 1980, it appeared unlikely that Congress would accept the proposed change in any form (Administrative Office, 1977: 123; Casper and Posner, 1976: 6, 7, 32, 34, 94-108, 117; Friendly, 1973: 16, 31; Goldman and Jahnige, 1976: 133-136).

Case Content and Dispositions

Though professional commentary centered on the volume of business brought to courts, there were other important aspects of judicial operations not revealed simply by counting case filings, backlogs, or judgments entered. Two other matters

stood out in appraisals of the 1950-1980 period. One—suggestive of possible shifts of judicial functions between the 19th and early 20th centuries and the later 20th century—concerned the subject matter of litigation. The other—continuing an old pattern—posed problems of identifying and legitimating the courts' particular contributions to handling disputes.

Case Content and Courts' Relations to Other Institutions: According to the limited data available, lawsuits over contracts and land titles and related matters bulked large or dominated 19th-century dockets. Studies of the course of business in two California trial courts of general jurisdiction, 1890-1970, in a comparable court in St. Louis, 1820-1970, and of 16 state supreme courts, 1870-1970, suggested that in the second half of the 20th century there had been dramatic declines in these fields of litigation, coupled with dramatic rises in the volume of family and tort cases, and a substantial increase in cases in which government—from local to state to national levels—contended with individuals and business corporations (Friedman and Percival, 1976: 267; Kagan *et al.*, 1977: 138-144, 151; McIntosh, 1981).

This material might indicate an important shift in relations of courts to different institutional sectors of the society. From the late 18th into mid 20th century the country committed to the private market a major share in fashioning social order. Public policy relied largely on the market to allocate scarcer economic resources, to determine the distribution of wealth and income and the power that went with them, and to chart the paths by which technological and scientific change would reshape the economy and the political and moral order. Sustained market operations required a social setting in which individuals and firms could act on reasonably assured expectations of other people's behavior affecting commitments of assets. Contract and property law appeared to contribute materially to such a climate of reliance. Thus where market relations came into dispute, the salience of contract and property suits in 19th-century dockets suggested that courts were playing a substantial role in supporting market functions. But state court calendars past mid 20th century showed a relative rise to prominence of disputes involving matters that did not arise or were not defined within a market frame of reference. Some of this shift of emphasis concerned private relations presenting issues in tort or family law. Some of it derived from state or local government actions on behalf of

commonwealth values, such as care for public health and safety, or for the physical or biological environment; much in the growth of 20th-century statute and administrative law challenged the central roles the 19th century had assigned to the private market. It was not implausible to read the apparent change in the distribution of subject matter of litigation to mean that the functions of state courts were shifting from prime emphasis on supporting the institution of the market to supporting certain nonmarket institutions.[11]

However, there are a number of reasons for doubting that the available evidence establishes so material a change in state courts' social functions. First, though in the later 20th century state courts might be giving a smaller proportion of their time to contract and property matters than they did earlier, of itself this reallocation of working hours did not prove that they were dealing with a smaller percentage of contract or property disputes arising in the community than they once did (Lempert, 1978: 94, 101). Second, a decline in the number of contract cases handled by some courts of general jurisdiction did not prove that as many or more contract disputes might not be going to other courts, notably to courts of more limited jurisdiction such as small claims courts. Debt collection continued to be the staple business of many such bodies. Moreover, contrary to the California and St. Louis studies, in a tabulation of civil cases in state courts of general jurisdiction in Baltimore, Cleveland, and Milwaukee for 1965 and 1970, suits to collect debts, for money damages for breach of contract, and to enforce liens headed the list along with divorce-related matters (Ruhnka and Weller, 1978: 189, 190; Sarat, 1976: 356; Sarat and Cavanagh, 1978: 39, 42; Wanner, 1974: 428, 430, 438; Yngvesson and Hennessey, 1975). Third, declines in contract or property suits might in considerable measure reflect private improvement of market machinery (as by better credit information), improved legal procedures apart from those of the courts (such as reliable land title recording systems), or increase in the proportion of business dealings within valued patterns of continuing relations which lawsuits would threaten beyond the immediate gains possible by litigation (Kagan *et al.*, 1977: 138, 139, 140, 142; Macaulay, 1963: 55; Sarat and Cavanagh, 1978: 64-68). Finally, there was some overlap among functional categories in the matter of auto accident claims, which accounted for much of the reallocation of courts' time

[11] Cf. Hurst (1977: 48-56) on the functional roles of law relative to other social institutions.

away from contract and property disputes. This factor did not seem to amount altogether to a net shift away from judicial involvement with the institution of the market. Mass use of automobiles and trucks was so integral to the 20th-century economy that some at least minimally acceptable way of dealing with the incidence of loss from motor vehicle accidents had functional relations to a market system (Frank, 1969: 71-84).

Such qualifications do not mean that the 1950-1980 period did not show substantial changes in the content of dockets, with likely impact on how state courts allocated their limited resources in aid of various institutional sectors of society. Tort and family issues among private parties did loom relatively larger than before, as did contests between individuals and business organizations on the one hand and government on the other over government's interventions in affairs, largely on behalf of nonmarket interests. But these reallocations of judicial working attention did not of themselves prove that state courts as a whole were not still as much involved in assisting the existence and operation of the private market as they had been earlier.

The subject matter of state court business in the second half of the 20th century showed an important aspect of full continuity with earlier experience. Nineteenth-century litigation involved only limited sectors of the society in any bulk. This relative marginality of the litigious process also characterized the years after 1950, though changing social contexts brought some changes in kinds of situations that produced lawsuits. Thus, aside from fairly routine debt collections or consumer actions for defective products, relatively few cases involved substantial dealings of banks, manufacturers, or commercial firms, or relationships shaped by modern high technology or science. Little litigation brought to court churches, educational institutions, or other nonmarket secular organizations. Despite the far extended reach of 20th-century legal interventions in the economy, lawsuits—even in federal courts where this kind of contest seemed more prominent—touched only limited parts of the dense, diverse activity of the business world. Contests with government in state trial courts were most apt to center on limited-impact controversies over particular application of land use controls (including zoning) or over local government regulations of trade; few suits dealt with more broad-reaching issues under state expenditures or state programs for highways, schools, resource conservation, or public health and safety (Dolbeare,

1967: 41, 44, 95, 96, 98, 99, 104, 105, 107, 113, 114, 115, 118; Jacob, 1973: 49-50, 92, 121, 123, 128; Kagan *et al.*, 1977: 153).

The limits of the subject matter chiefly litigated took on another kind of meaning if one noted the kinds of parties most often involved, or not involved in lawsuits. People of small means were not often plaintiffs other than in tort or family matters; even in small claims courts most plaintiffs were business organizations, and most individuals appeared as defendants. On the other hand, available data showed no great number of suits in which an observer could identify upper-middle-class individuals or business firms of substantial size on both sides of disputes, either in state or federal courts. Conspicuously infrequent were lawsuits between members of the largest business organizations. Where business firms appeared on dockets, it was most likely as plaintiffs in ordinary suits to collect debts or as defendants in actions to recover money damages for personal injuries or defective products or services. Of course, by the nature of their routine business, insurance companies were in court more often than other business organizations. Where government was a party, as plaintiff or defendant, in federal or in state courts, individuals or business firms were likely to turn up on the other side in about equal proportions. Individuals and rather rarely firms were present as defendants in criminal proceedings. Individual land owners or business firms could be found as initiating parties in suits to contest government regulations of dealings in market. In all of these aspects the array of litigating parties differed little after 1950 from that of earlier decades. Thus in the 19th-century period covered by the Friedman-Percival study, merchants no more appeared suing fellow merchants than they did in the 20th-century dockets (Danzig and Lowy, 1975: 682, 683; Dolbeare, 1967: 41, 44; 1969: 382, 400; Galanter, 1974: 95; Ladinsky *et al.*, 1979: 6; Lempert, 1978: 112, 113; Ruhnka and Weller, 1978: 190, 192, 194, 195; Wanner, 1974: 428, 430, 438). Contrary to some predictions, the available data showed only a small percentage of post-1950 cases involving groups as litigants or as friends of the court. Such group involvement as there was in litigation usually appeared only when cases went to appeal; even then, before the United States Supreme Court in nonmarket-type disputes of a political or social cast, most litigants were individuals pursuing or defending their own immediate interests (Dolbeare, 1967: 39, 40; Glick, 1971: 143; Hakman, 1969: 245).

The available data on parties to litigation and the revelation in the dockets of the marked absence of some types of potential litigants suggest some hypotheses in explanation. But the literature includes little confirming material; overall, the information is not at hand from which to include in a history of judicial functions a recital of the interests, attitudes, and resources which have moved people or organizations from potential suitors to actual suitors (Engel and Steele, 1979: 9, 10, 13, 14; Lempert, 1978: 95, 96). From what little we know, several explanations seem likely for the absence of sizeable numbers of legal actions in which individuals or firms of substantial or large means appear on both sides of lawsuits. Such potential suitors can afford, and are likely to make extensive use of skilled professional help to channel their affairs so as to prevent trouble. Similarly, when trouble emerges, they are likely to be equipped to make sophisticated choices of alternatives to litigation to resolve difficulties through bargaining, mediation, or arbitration. Apart from these influences of resources available, they are likely to find their own interests deeply engaged in maintaining continuing relations with their potential opponents in litigation, so that the structure of the situation directs them away from the courts. Moreover, the larger the business firm and the more dependent its interests on long-term confident, harmonious relations with a network of others in the community—investors, credit sources, suppliers, customers, elected officials—the more likely it will shun the publicity that may attend lawsuits (Black, 1973; Danzig and Lowy, 1975: 682, 683, 685; Lempert, 1978: 112, 113; Macaulay, 1963; Sarat and Cavanagh, 1978: 65, 68). Data on the behavior and attitudes of plaintiffs other than business organizations in a New York City small claims court offer by contrast some support for these inferences regarding approaches to litigation of individuals or firms involved in substantial, continuing market relations. Follow-up on a random sample of such small claims cases dismissed when the plaintiff failed to appear at the scheduled trial date showed that some had filed suit simply to vent a sense of grievance, and that some reached settlements out of court which they felt had been helpfully pressured by the filing of suit. Resources affected outcomes even at this level. Individuals represented by attorneys where no attorney appeared on the other side tended to fare better, though if a party had prior experience in the small claims court, the presence of an attorney on either side did not seem decisive. Post-filing attrition in cases where

the parties did not settle was more likely when the defendant was more experienced than the plaintiff in using the court, and where the defendant but not the plaintiff had an attorney. With an arbitration alternative available, litigants who did not have a substantial history of prior relations with each other, or an anticipation of continuing relations, were likely to take the route of litigation rather than arbitration (Sarat, 1976: 346-351, 370-372). The patterns regarding the courts' relations both to larger and smaller disputes indicated that judicial functions were determined not alone by economic calculations of gain and cost but also by factors growing out of social-economic class distinctions. Personal injury litigation presented some qualification on the influence of class structure; here, too, possession of a different degree of sophistication and greater command of resources might lead middle- or upper-middle-class plaintiffs or defendants in tort to pursue disputes out of court in a somewhat different manner than would less advantaged plaintiffs. But common vulnerability to pain and suffering and the omnipresence of insurance companies were elements that might make social class less determinative in this than in other fields as to the character of parties who litigated.[12]

There was a particular emphasis in distribution of business in federal courts, compared with that in the states. An inventory of some federal trial court dockets, 1950-1974, showed that the most marked growth was in number of suits arising under federal statutes, with increased involvement of the federal government as a party on one side or the other of litigation. This was a relative change from the 19th century when litigation involving wholly private disputes brought under diversity of citizenship jurisdiction occupied a substantial proportion of federal dockets. The shift largely responded to new legislation of the latter half of the 20th century, with less marked change in older categories. Government was involved now more often in response to prisoner petitions, following doctrinal changes worked by the Supreme Court. But civil rights legislation and statutes on behalf of environmental protection and consumer interests also brought new business to federal trial courts (Baude, 1977: 761-762; Heydebrand, 1977: 799, 807, 810). In like fashion the dockets of the Second, Fifth, and Ninth circuit courts of appeals, 1895-1975, showed movement from prominence of private disputes to disputes

[12] Cf. Frank (1969: 72) and Kagan *et al.* (1978: 988) on the general relative rise in tort actions at trial and appellate levels.

involving government activity, typically with government as a party (Baum *et al.*, 1978: 26). These inventories indicated that implementing policy goals set by Congress had become a high-priority function of federal courts in years when analogous business under state legislation occupied relatively less time and energy of state courts.

Patterns of Case Dispositions

For the period 1950-1980, patterns of disposition of the bulk of matters brought to court showed substantial continuity with earlier experience in two respects that held somewhat contradictory implications for the importance of judges. First, as in prior years, what trial courts did stood unchallenged in a large proportion of cases as the final judicial word in suits pressed to some stage of court consideration. Trial courts were important, along with appellate courts. But, second—again, as in prior years—only a small percentage of matters potentially open to judicial handling came to court at all, and only a small percentage of those that came to court evoked clearly identifiable intervention by judges to decide the outcome. In these aspects judicial operations in the second half of the 20th century went on in ways not materially different from what our limited information tells us went on in the 19th century and the early part of the 20th (Hurst, 1950: 171-178). What did change after 1950 was development of a more sharply identified and deeper concern with the public policy significance of these operating characteristics than had marked earlier years. The new degree of troubled attention to these aspects of courts' roles centered on questions both of efficiency and of justice.

Finality and Trial Courts: Spot checks for years after 1950 indicate that almost all matters in which state judges played an active role had their final disposition in court at the trial level. Once again, generalization or charting of trends run up against the limits of available data. Not only did states often not collect some items of information at all, but they followed no uniform design such as would allow for firm cumulation or comparison of data across state lines. The first report of court caseload statistics for the whole country by the National Center for State Courts, as of 1975, observed that its national totals for cases filed, disposed of, and pending in general jurisdiction courts "should be viewed with caution. . . . [T]he data shown for some states [as reported by them] do not include all of the cases handled in the court. In addition, variations in reporting

periods, court organization, subjectmatter jurisdiction, definitions, and unit of count must also be considered" (1979: 39; see also Dolbeare, 1969: 393, 396, 397, 400). Thus the data do not permit some estimates which one would much like to have—notably of the likely higher percentage of appeals taken where difficult questions of law as distinguished from questions of fact were involved, or where the stakes were great in terms of money damages, heavy penal sentences, or interruption of sizeable private or public operations by injunction.[13]

However, when they are available, gross figures show that in state courts appeals disposed of were probably always much less than one percent of the total cases disposed of in all reporting trial courts. Thus in the early 1970's the Florida Supreme Court was disposing of about 1,000 cases per year, and the state's intermediate appellate courts of about another 3,000 cases, compared with total dispositions of some 500,000 cases by all trial courts in the state. In 1975 all Illinois appellate courts disposed of 4705 cases, compared with 1,123,342 matters disposed of in all general jurisdiction courts. The Wisconsin Supreme Court in 1975 disposed of 725 cases, compared with 301,936 matters disposed of in all general jurisdiction courts. In 1975 all reported cases disposed of in all appellate courts in 46 reporting states totalled 96,750, compared with 6,272,137 cases disposed of in general jurisdiction courts (Glick and Vines, 1973: 131; NCSC, 1979: 13, 14, 41, Tables 1, 2, 22). Measured by finality, what went on in state trial courts was plainly of the highest importance for the impact on the lives of most people whose lives were touched by court proceedings.

That only a small number of cases were appealed from state trial courts did not mean that state appellate courts did not experience difficult increases in workload; they did. The information is lacking for assured generalizations about trends, either among particular states or nationwide. Available information suggests that there was probably no great increase in the rate of appeals taken in the states. But there were typically rapid and large absolute increases in state appellate caseloads from the end of the 1960's nationwide, especially in urban areas. Thus the pattern remained one in which the norm was finality at the trial level, but absolute increases in the volume of business in appellate dockets (Meador, 1974: 7-8).

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[13] Cf. Chayes (1976: 1281) on extended-impact lawsuits apparently increasing in federal courts with Sarat and Cavanagh (1978: 73) (data not available to measure absolute or relative frequency of types of cases noted by Chayes).

Available information allows more precise assessment of the degree of finality at the trial level in the federal court system. An inventory for the 1950's and 1960's shows that in civil cases where federal district courts rendered what the Administrative Office of the Federal Courts classified as "contested judgments," there was a fairly stable rate of appeal, from 20 percent in 1951 to a high of 24 percent in 1970. This range was substantially higher than the figures for state courts, in large part because regard for "contested judgments" limits the count to matters of higher dispute and often higher stakes than many proceedings of more limited impact and more routine character included in the gross data available for the state courts. Thus in 1960, 18 percent of all civil terminations in federal district courts were by "contested judgments"; in 1970, 38 percent. Obviously, a count which included all matters otherwise disposed of with some intervention of federal judges would show much lower percentages of appeals. The federal record, 1960-1970, showed more marked change on the criminal side. In cases in which the defendant was found guilty after trial, 14 percent went to appeal in 1951. The appeal rate from then to 1960 stayed within a range never higher than 22 percent, but in 1970, 54 percent of such cases went to appeal. The dramatic change probably derived in part from the impact of the Criminal Justice Act of 1964, providing free legal services to indigent appellants. The combined federal civil and criminal rates of appeal were not as striking, ranging from 19 percent in 1951 to 28 percent in 1970. Taken overall, the federal court data show that the substantial growth in the civil load of circuit courts of appeal was not from growth in the rate of appeals, however, but from increase in the number of appealable decisions; civil contested judgments were 8831 in 1960 and 27,918 in 1970, or a 216 percent increase. On the other hand, the number of criminal appeals increased substantially more than the number of defendants found guilty after trial, resulting in a higher rate of appeal in the criminal dockets; 2483 criminal defendants were found guilty after trial in 1960, and 4559 in 1970, or an increase of 84 percent, compared with the increase in rate of criminal appeals from 21 percent in 1960 to 54 percent in 1970 (Goldman, 1973: 212, 213; see also Jacob, 1965: 168-169). The Supreme Court of the United States wielded its discretionary docket control with a strong hand, so that a low—and declining—percentage of cases dealt with by United States courts of appeal reached the high court for decision on the merits. Thus in 1950, of 2355 cases disposed of by courts of

appeal after hearing or submission, petitions for certiorari were filed in 663 (28.2 percent), and granted in 67 (10.1 percent). In 1960 the percent of petitions granted was 14.6 percent, but in the early 1970's the number of granted petitions was sharply lower, ranging from 5.4 percent in 1970 to 6.3 percent in 1974. Appeals as of right did not form a material addition to the Court's burden. Nor did many cases go from state supreme courts to the United States Supreme Court; of 5904 cases tabulated in a study of 16 state supreme courts, 1870-1970, only 124 (2 percent) were the subjects of appeal or petition for certiorari to the United States Supreme Court, and only a handful of these cases gave rise to Supreme Court opinions (Casper and Posner, 1976: 59, Table 3.16; Dolbeare, 1969: 391, 393; Kagan *et al.*, 1977: 121).

There was another dimension to the finality of dispositions made at the trial court level. The bulk of cases reviewed were affirmed on appeal. A study of the work of 16 state supreme courts, 1870-1970, showed a mean reversal rate of 38.5 percent of all cases appealed over the whole span; the rate was higher (45.2 percent) for 1870-1900, but was stable at 37.5 percent for 1905-1935 and 1940-1970. Whether or not state law gave the top court discretion to select cases for review appeared to affect the reversal rate, with indications that the high courts were more likely to accept cases for review where their preliminary appraisal was that the lower court had probably erred. Thus where appeals could be had as of right, the reversal rate was 36.8 percent, or somewhat, but significantly, less than the aggregate reversal rate; but for cases heard at the high court's discretion the reversal rate was 50 percent, suggesting that the court's possession of discretionary control of its docket materially supplemented the private decisions of litigants in weeding out nonmeritorious appeals. On the other hand, neither the presence of an intermediate court of appeal nor the size of the high court's caseload appeared to influence reversal rates (*Yale Law Journal*, 1978: 1200, 1201, 1212). The picture from the federal courts was more mixed. Though there were variations from one year to another—without a pronounced overall trend for the years after 1950—federal courts of appeal reversed lower tribunals in markedly lower percentages than in the state record. Thus the overall reversal rate in the federal courts of appeal was 24.7 percent for the fiscal year 1958, 21.6 percent for 1968, and 17.3 percent in 1978; reversal rates in the subcategories of civil, criminal, bankruptcy, and administrative agency review varied somewhat within these aggregate rates,

with reversals in criminal cases generally on the low side (1958, 20.8 percent; 1968, 16 percent; 1978, 10.7 percent) (Administrative Office, 1958: 148; 1968: 175). Given the broad discretionary control of the United States Supreme Court over its review docket, and the peculiarly difficult issues usually brought to it, not surprisingly its rate of reversal consistently ran far higher than the rates either for federal courts of appeal or for state supreme courts. Thus in 1956 the Supreme Court reversed in 61.1 percent of the cases it decided, in 1964 in 69.7 percent, and in 1974 in 59.8 percent (Casper and Posner, 1976: 69).

The Marginality of Court Involvement: To put the operations of courts in proper perspective, it would be desirable to measure those matters which enter the judicial system (at least to that minimal extent marked by the initial filing of a proceeding) against the whole quantity of disputes or adjustments in the community which might potentially lend themselves to judicial handling. But no census of such potential business exists, for either the past or the present. There are no standard tests to identify what should be counted. Identification of particular items would involve a good deal of subjective judgment by those counting, and the costs would be too high to make a sustained census politically acceptable (Lempert, 1978: 95, 96). Hence, we must make do with professional opinion evidence. Such commentary has been unanimous that after 1950, as before, only a small percentage of matters which were potential business for courts ever came to courts, even to the extent of the filing of the first papers necessary to launch a court proceeding (Friedman and Percival, 1976: 278, 283, 292, 296-297; Galanter, 1979: 3, 4; Jacob, 1965: 149, 151, 166).

This pattern characterized areas which in the years after 1950 supplied large parts of the business that did come to court. Of all situations resulting in personal injuries which might produce claims in tort, probably only about one-fifth resulted in claims filed in court. Complainants carried about five percent of those claims to trial stage, and two to three percent ended in a decision by judge or jury. With a more liberal definition of "claims" and a broader data base, a corrected figure might well put the percent of claims filed down in the range of two or three percent of potential demands, with consequent decrease in the percent carried to trial or decision (Keeton, 1969: 59; Zeisel *et al.*, 1959: 105). In everyday contract relationships two-thirds of problems which consumers experienced with products

they bought came to no action for redress; of matters which shaped up to some definition as disputes, very few came into even the first stages of handling by courts (ABA, 1976: 175; Best and Andreasen, 1977: 727-729; Ladinsky *et al.*, 1979: 6, 68-69). Problems falling within the field of crimnal law showed high attrition at successive stages before trial. Half of the attrition was from citizens' failure to report to the police. In only about 25 percent of instances in which an individual thought himself a victim of crime did the police label the occurrence a crime. In only five percent of matters brought to them did the police make an arrest. In one tabulation of 2077 "crimes," 120 resulted in arrests; of these accused individuals, 70 never came to trial; of the 50 tried, 26 were convicted and given what observers viewed as "proper" sentences, and 24 received what observers judged to be "lenient" handling. Most misdemeanor and felony cases dealt with in court ended with a plea of guilty without trial; the bulk of traffic and ordinance violations ended by forfeiture of bail or imposition of a fine. Though figures varied somewhat by localities, most observers estimated that 90 percent of all criminal cases in court were resolved by pleas of guilty without trial. In most criminal proceedings the judge's only substantial involvement was at the sentencing stage (Barrett, 1965: 108-110; Jacob, 1973: 31, 41, 109, 111; H. Jones, 1965: 139).

The marginality of court involvement could be documented more surely regarding judicial review of actions of administrative agencies, where administrative records could provide a reliable frame of reference. The pyramid of proceedings involved in administration of federal tax laws in 1974 vividly made the point:

Civil cases in the federal tax area decided by the United States Supreme Court	4
Civil cases decided by courts of appeal	363
Civil cases docketed in trial courts	9,932
Civil cases received by appellate division, Internal Revenue Service	18,569
Returns examined	2,030,655
Federal tax returns filed	121,609,260

[Source: Commissioner of Internal Revenue, Annual Report, 1974][14]

Across the board, courts came into play only in minimal percentages of the totals of action taken by administrators, though these actions might bear heavily on the affairs of great

[14] See comments on figures by H. Miller (1975: 233).

numbers of people. Most administrative action was informal—for example, carried out through inspections, investigations, or negotiations—or was otherwise of low visibility; much of it, as that regarding social services clients, involved individuals whose ignorance or lack of skill, experience, or means rendered them unable or unwilling to carry the administrators to court (Breyer and Stewart, 1979: 525; Handler, 1979: 69-72; Rabin, 1979: 260, 265).

Policy Concerns Related to Patterns of Case Content and Dispositions

Whether the nature of court business showed important change (as some observers argued it did, as to the subject matter of litigation) or substantial continuities (as regarding the typical finality of trial court dispositions and the marginal numbers of matters brought to court compared with those potentially open to judicial handling), one element clearly changed in the 1950-1980 span. The new factor was a heightened concern with policy implications of the roles of courts suggested by the limited data we had on the nature of their operations. Professional commentary was concerned, in the first place, simply to identify what contributions courts were making to adjustments of relations and resolution of disputes. In the second place, observers were concerned with the quality of judicial performance, measured by criteria of efficiency and of justice.

What Do Courts Contribute? In the small percent of disputes resolved by contest in court, the trial judge's contribution was fairly clear, manifest in the judgment rendered. If the judge both tried the facts and determined the applicable law, plainly he was a prime factor in the outcome; he was only somewhat less so where he shared the task with a jury. In either situation we should not exaggerate his part, for both judge and the combination of judge and jury worked within the frame of a record fashioned for better or worse by the skill and energy of lawyers within the means made available by their clients.[15]

A study of the flow of civil business in two California trial courts of general jurisdiction, one in an urban and one in a rural area, 1890-1970, offers evidence that over that span there was a marked decline in the number of instances in which the court resolved true differences of fact or law between

[15] Cf. H. Jones (1965: 135-139) on "judge-lawyer relations in an adversary system of litigation."

contesting parties, and a marked rise in the number of instances where the court had no disputed question of law or fact to decide, but only processed or approved outcomes to which the parties had been able to agree or which they consented to accept. Various indicators pointed to the decline of judges' active involvement in resolving disputes. Thus in the urban county the proportion of uncontested judgments rose from 47.5 percent in 1890 to 71.9 percent in 1970, and in the rural county from 65 percent in 1890 to 86.7 percent in 1970. In both counties the number of cases brought to formal trial declined substantially. In the urban county in 1890 the parties tried more than one of every three cases filed, but in 1970 less than one in six; in the rural county the figure fell from one in four in 1890 to one in nine in 1970. The decline in the rate of trials was not steady, but showed variations at particular times. When sizeable numbers of automobile accident cases first appeared in the urban county, in 1930, they were brought to trial more often than they were settled out of court; in 1970 less than one in ten came to trial. Some further indication of decline in judges' active roles in dispute settlement was the overall decline of nonjury cases in which the court wrote a formal opinion or made formal findings of fact or law; in 1890 in both counties judges entered opinions or findings in over 70 percent of nonjury trials, but in 1970 in 34 percent of such cases in the urban county and 29 percent in the rural one (Friedman and Percival, 1976: 268, 270, 286-289).

The same study showed marked shifts in the subject matter brought to the two California trial courts between 1890 and 1970, with a substantial decrease in the number of contract and property matters, and a substantial increase in tort and family law cases (Friedman and Percival, 1976: 280).[16] The family cases were primarily uncontested divorces, in which the court's formal action typically was to approve arrangements earlier agreed on between the parties. The tort cases arose mainly from automobile accidents, and experience was that most were settled by the defendant's insurance company before trial. One might hypothesize that decline in judges' activity in resolving disputed matters derived from shifts of court business to types of cases more likely to induce out-of-court settlement. However, the data showed that sizeable percentages of contract and property cases were not contested over the whole span of 1890-1970. Subject matter shifts spelled

[16] See earlier discussion, 417-418.

differences in the ways judges used their time on what came to court, but they did not prove differences in the extent to which different types of cases involved different degrees of judicial activity in resolving actual disputes (Friedman and Percival, 1976: 280, 284).

Information for a variety of courts around the country showed a steady, high predominance of criminal cases resolved by pleas of guilty, without a contest at trial. Though figures varied by locality, observers estimated that typically 90 percent of all criminal cases—felonies as well as misdemeanors—were settled by guilty pleas; in addition, some number of felony charges were dropped or reduced. In this, the bulk of criminal case dispositions, judges played no formal role in resolving disputed matters of fact or law. In most cases, especially those involving ordinary offenses presenting no very difficult issues of fact or law and unlikely to elicit the most severe penalties, guilty pleas were negotiated among the accused and his lawyers, the prosecutor, and in some degree the judge. This phenomenon of plea bargaining apparently was a material factor in criminal justice administration by the late 19th century. Its prominence in the second half of the 20th century thus represented simply an accentuation of a relatively old trend. In the 20th century probably the trend was fostered by increased volume of criminal court business, and by greater potential complexity of criminal trials as the law of evidence grew more complex, as jury selection became more exacting, and as judge-made law enlarged the constitutional rights of the accused (Jacob, 1973: 24, 31, 66, 104, 105, 111; Krislov, 1979: 577).[17]

To show that judges did not play an active, formal role in settling disputed points of fact or law in a high percentage of civil and criminal matters does not prove that judges did not play substantial roles in less formal ways. Again, assured generalizations are balked by lack of reliable information; for the most part opinion evidence must do. Professional commentary indicated a great range of informal judicial activity affecting resolution of matters brought before courts without contests at trial. On the civil side, by court rules or practice the years after 1950 seemed to show stronger encouragement by judges to litigants or potential litigants to resort to mediation or conciliation or arbitration (Church *et al.*, 1978: 39, 76, 79-80; Lempert, 1978: 102, 103; Sarat and Cavanagh, 1978: 68). We have no broad-scale inventories to tell the degree of success of such

[17] On the historical development of plea bargaining: Friedman (1979: 248, 251, 255-256); Langbein (1979: 265); Mather (1979: 283-284).

efforts. A study of the small claims court in Manhattan for 1974, considering parties' decisions to use or to forego a proffered alternative of arbitration, suggested that varied factors other than encouragement from the court or its staff affected how many suitors chose to arbitrate. Adjudication by the court was favored by suitors who had no history or anticipation of valued continuing relations with the other party, by those among whom there had been little attempt at settlement before suit was filed, by individuals who held positive attitudes toward the judicial process as such, and by individuals represented by an attorney (Sarat, 1976: 349-351, 370, 371).

Some observers would have judges require that parties go through a stage of attempt at conciliation before they might go to trial, at least where their past involvement in a pattern of continuing relations gave some reason to hope that conciliation might work. Others felt that experience taught that broad mandates for pretrial conference procedures were inefficient and might produce unexpected by-products; thus there was some evidence that required pretrial conferences noticeably increased average amounts obtained by plaintiffs in later trials (Rosenberg, 1965: 51, 55, 57).[18] The clear consensus in professional commentary was that mechanical formulas were no substitute for quality of judgment, close attention, and informed discretion by trial judges in sifting out civil matters which might profitably yield settlement without trial, or at least proceed through trial with issues in good focus and with reasonable expedition (ABA, 1974: 5, 17; Church *et al.*, 1978: 83, 84; Frank, 1969: 135-136, 143-152; Levi, 1976: 217; Rifkind, 1976: 107; Rosenberg, 1971, 816-818).

Compounding the difficulties of closely assessing the judge's role was the fact that judges might influence the course of a dispute in other ways than by direct pressure for a settlement on the one hand, or by presiding over a final trial on the other. Thus by his disposition of motions before trial, the judge might resolve material legal differences in ways that helped fix the lawyers' estimates of likely outcomes and thereby sometimes might enhance the prospects of settlement (Church *et al.*, 1978: 39, 76; Lempert, 1978: 104).

In that great bulk of criminal cases ended by pleas of guilty without trial the imposition of sentence was the plain, formal evidence of the judge's contribution (H. Jones, 1965: 139). But here, as on the civil side, professional commentary was

[18] Cf. Sander (1976: 127, 130) for the range of mandatory or recommended pretrial procedures.

concerned to identify judges' shares, such as they might be, in bringing about the accused's decision to plead guilty. Of course one might rate the mere background presence of the court—including the ultimate authority to impose sentence—as always involving the judge, by creating an inducement to the accused to make some concessions in his own stance of resisting the government. But this would define the situation so broadly as to yield no usefully focused appraisal of the court's role. The concern of those who probed what lay back of the overwhelming predominance of guilty pleas went to appraising how far judges played a more active part (Krislov, 1979: 573, 574).

There were almost no studies which tried to measure and count judges' activity in plea bargaining. In the states the opinion of most professional observers was that the prime actors were typically the public prosecutor and defense counsel or the defendants (Callan, 1979: 328-329; Feeley, 1979a: 463, 465; Glick and Vines, 1973: 74; Heumann and Loftin, 1979: 425; Jacob, 1965: 156-158; Morris, 1974: 55-57; Rubinstein and White, 1979: 367, 370). In metropolitan courts processing large volumes of minor offenses, plea bargaining among these participants went on in a form which clouded the reality. But negotiated pleas were nonetheless the norm, though simplified. In minor offenses that fell into patterned types, the participants tended to develop sentencing patterns below the maximum penalties formally declared in the statutes; prosecution and defense formally bargained for an outcome less than the statutory maximum, but in effect agreed summarily on a lower, standardized sentence for the standardized offense (Feeley, 1979: 465).

There was weighty opinion that trial judges should not be directly involved in plea bargaining. Rather, they should be limited to reviewing a settlement provisionally reached by the parties, to determine whether the terms were clear and understood by the accused and acceptable within applicable statutory standards of sentence. This was the standard set by the American Bar Association's Advisory Committee on the Criminal Trial and by the United States National Advisory Commission on Criminal Justice Standards and Goals (Heinz and Kerstetter, 1979: 350). But there was evidence that judges were often involved in fairly explicit negotiations over pleas. In some jurisdictions where declared practice was opposed to plea bargaining, there was evidence that, nonetheless, expectations as to the sentencing patterns of the local judges promoted

pleas of guilty by accused individuals who feared they would be punished more severely if they went to trial and were convicted. If, as sometimes happened, public prosecutors forbade their subordinates to engage in plea bargaining, experience was that the probable result was that judges dealt directly in chambers with defense counsel over the terms of sentence (Heumann and Loftin, 1979: 425-426, 428; Rubinstein and White, 1979: 372). Indeed, the sentencing discretion vested in judges under most penal statutes to some extent inescapably implicated judges in shaping the practical course and impact of guilty pleas (Callan, 1979: 330; Jacob, 1965: 158).[19]

Most of such studies as existed on plea bargaining dealt only with state courts. Rule 11 of the Federal Rules of Criminal Procedure as it stood through the 1970's stated that federal trial judges should not be directly involved in negotiating pleas, but should limit themselves to a reviewing function. However, a 1970's study based on records as well as observations and interviews in federal courts in ten districts indicated that federal judges were not quite as passive as the declared policy might imply. Particularly in dealing with white-collar crimes—difficult to prove without cooperation of some of the participants—judges recognized that the operational needs of the system called on them to be ready to do their part in seeing that negotiated agreements between prosecution and defense were performed and the accused's expectations met (Hagan and Bernstein, 1979: 469-470, 473, 476).[20]

The Quality of Judicial Performance; A New Emphasis: Professional commentary was troubled over the quality of work done by courts as early as mid-19th century, with the launching of the Field Code to simplify court procedures. Roscoe Pound's 1906 address to the American Bar Association diagnosed causes of popular dissatisfaction with the administration of justice in terms that centered on the performance of the courts and made the subject one of more open attention than before. His themes were carried further and underwritten by factual studies in the 1920's and 1930's with the first surveys of urban criminal justice administration and of urban trial courts' handling of civil business (Friedman, 1973: 340-343; Hurst, 1950: 171-176, 362). But professional commentary in the 1950-1980

[19] Cf. Heinz and Kerstetter (1979: 355-362) on the judge as a participant in a Dade County, Florida, experiment with pretrial settlement conferences to shape plea negotiations.

[20] Cf. Goldman and Jahnige (1976: 26, 36, 90, 123, 126).

span grew relatively more in bulk and in sharpness of tone. This period showed a heightened sensitivity to issues both of efficiency and of justice implicated in the courts' contributions to legal order. Concern with efficiency centered on the money, institutional, and human costs of handling large volumes of filed cases, and of failing to handle the uncounted numbers of matters that never entered the litigious process but warranted some kind of help to grievants. Concern with justice centered on the extent to which courts properly addressed the particular merits of particular disputes or processed them with mechanical routine, and the extent to which the litigious process disfavored small claims, however meritorious, or worked to the prejudice of individuals of small means (*e.g.*, Engel and Steele, 1979; Galanter, 1974:95; Jacob, 1965: 201-205).

The Quality of Judicial Performance; Finality of Trial Courts: The fact that most disputes which went to trial ended with the trial court's disposition did not in itself stir substantial criticism either before or after 1950. Most cases did not present sufficiently novel points of law or complexities of fact to warrant spending either public or private resources on further judicial handling; the point was to seek good quality at the trial court level in the first place (Jacob, 1965: 169-170; Kagan *et al.*, 1978: 968; *Yale Law Journal*, 1978: 1191). If one moved from appraisal in terms of efficiency to concern for justice, the most substantial issue was posed by economic inequality which might in practice deny the economically weaker party means to appeal. However, economic inequality posed problems much broader than those specific to the operation of the courts, and in this light does not enter peculiarly into the history of the judicial branch. Economic inequality did come to a particular focus on the courts where government brought its power to bear on individuals through criminal prosecutions. Here in the post-1950 period the United States Supreme Court responded to the issue by ruling that due process of law required states to provide counsel for indigent defendants at trial and to meet the costs of supplying the record essential to appeal, though the Court later qualified its position by ruling that the state was not required to supply counsel for an indigent prisoner seeking to invoke discretionary review of his claims.[21] So, too, where the state's law made recourse to court the only means for adjusting a basic human relationship, the due process standard

[21] *Griffin* v. *Illinois* (1956). But cf. *Ross* v. *Moffitt* (1974) regarding discretionary review.

forbade the state to deny an indigent access to court to obtain a divorce because the indigent could not pay court fees and costs. On the other hand, the Court pulled back from requiring states to provide indigents the means to pursue civil claims generally. Measured by the explanation offered in the divorce case its rationale for denying other civil aid was not clear. Law of course barred forcible self help. Thus against an unyielding opponent a claimant had no recourse other than to go to court; the state here would seem to have as much a monopoly of means of redress as in the case of divorce. Obviously the Court simply did not choose to involve itself broadly in redressing inequalities of wealth and income.[22]

This section deals with the finality of trial court dispositions in the great bulk of cases which did not create demands on either trial or appellate courts to contribute to making new public policy; the latter part of this essay deals with that situation. Where broad policy making was not in issue, apart from the problem of economic inequality, the finality of most trial court dispositions was troublesome only from the standpoint of possible errors committed in assessing the particular facts of particular focused controversies within quite well-established frameworks of law. In this respect the tasks of appellate courts continued in the 1950-1980 period to be the same as they had been traditionally: to clarify state law where lower courts fell into disagreement, and to exercise some superintendence of the conduct of trials by appraising claims that specific incidents at trial—specific acts or omissions of judges below—represented unfairness or error in the detailed handling of the courts' business (Glick, 1971; 31, 34, 38, 42, 61, 75; Kagan *et al.*, 1978: 998-999; *Yale Law Journal*, 1978: 1191). Complaints regarding performance of the appellate functions here came back to concern over the volume of work. Professional commentary in the first half of the 20th century worried that undue delays in state supreme courts materially hampered discharge of their superintendent role, that the courts wasted time on many trivial cases, and did not have enough time for hearing argument and deliberating. There were other criticisms—that too many appellate opinions relied mechanically on precedents or gave scant policy guidance to the bar or the lower courts—but these are relevant more to the

[22] *Boddie* v. *Connecticut* (1971). But cf. *Ortwein* v. *Schwab* (1973), wherein the state was not required to provide means for pursuing civil claims, as for welfare payments; *United States* v. *Kras* (1973), which held that *Boddie* did not exempt indigents from fees in voluntary bankruptcy proceedings, since an indigent has other options in law. See, generally, Tribe (1978: 1008-1100).

policy making than to the superintending tasks of higher courts. After 1950, and with gathering impetus after 1960, the situation improved, as more and more states gave their highest courts broad discretionary control of their dockets and provided intermediate courts of appeal to shoulder the more narrowly focused superintending responsibilities. These changes by no means eliminated all workload problems, because state supreme courts still had to invest time and effort in screening a high volume of petitions for review. But as of 1980 there was more confidence than had obtained in the prior generation that appellate machinery was structured for improved performance of the superintendence function. So far as that was so, the changes materially enhanced acceptance of the finality that marked most trial court dispositions (Kagan *et al.*, 1978: 987-1001).

Rates of appeal from federal district courts to federal courts of appeal were substantially higher than for state courts, so that finality of trial court dispositions—though the norm—did not loom as dramatically in the federal system. The contrast was most sharp on the criminal side, where by 1979, 54 percent of cases went to appeal. Overall, however, the question of legitimacy posed by a high measure of final dispositions in the lower levels of the federal system was the same as that confronted in the states before the structural changes which a growing number of states made in the 1960's. The federal courts of appeal confronted such increase in the volume of matters brought to them that an experienced federal judge found them by the early 1970's to be "in a state of crisis" (Friendly, 1973: 31; see above, 425-426). The root of the problem lay less in growth in the rate of appeals—save on the criminal side—than in increase in the number of appealable decisions. Only Congress could reorder this situation, and only by some sharp reductions or reshaping of basic federal jurisdiction. As of 1980, no substantial action had come from Congress (Friendly, 1973: 32-38; Goldman and Jahnige, 1976: 106-108; see above, 418-419). The implications of a high appellate caseload for the federal courts of appeal bear relatively more on the policy making than on the superintendence task, compared with the situation of state appellate courts. The workload of the United States Supreme Court is relevant almost entirely to the quality of performance of the policy making function, and will be considered hence in the latter part of this essay. Despite arguments of the need for creating a new federal intermediate court to relieve the high court of much of its

burden of screening cases for review, on the whole the full discretion which the Supreme Court enjoyed in controlling the cases it would hear on the merits gave it the requisite practical capacity to fulfill such superintending role as it felt desirable to play (see discussion above, 418-420).

The Quality of Judicial Performance; The Marginality of Court Involvement: That private suitors and public authorities appeared to bring very few matters potentially suable even to the stage of filing the first papers for a court proceeding was the fact which evoked more troubled professional comment than any other aspect of the general run of judicial operations. The years after 1950 showed more intense discussion of this feature than appeared in earlier times. Records offer no clear-cut explanation for the new emphasis. Much of the concern centered on the meaning of court operations for poor people or people of small means or for racial or ethnic minorities. In this light the new focus on limits of litigation perhaps derived from the 1960's "war on poverty" and the rise of racial tensions with the accompanying enlargement of federal civil rights legislation. The Vietnam war protest movement sharpened questions about the political and moral legitimacy of the legal order. Such elements probably heightened troubled perception of inequalities of wealth, income, and social-economic status which mocked the society's ideal of equal justice under law.

As is typical of the state of knowledge about the extent or limits of courts' effects on people's lives, here again we encounter hypotheses and opinions and little fact-based study. However, hypotheses and opinions do flesh out the history a bit by suggesting lines of fact gathering that might be helpful.

Professional observers found that some positive virtues might reside in the fact that very small percentages of disputes or matters for adjustment potentially suitable for court handling ever came to even first points of entry into the litigious process, and that very small percentages that entered the process ever proceeded to some disposition involving substantial judicial participation. Three justifications for this pattern appealed to professional commentators: (1) satisfaction of the parties, (2) contributions to pluralist bargaining among competing interests, and (3) fulfillment of administrative necessities of the legal system.

Circumstances offered some evidence that parties avoided litigation because they found other means of resolution more satisfactory or at least more acceptable than fully submitting

themselves to what the judge might do. In years after 1950, as before, people complained of the money, time, and emotional costs of suing or of carrying a suit through to the end; the new element after 1950 was that delays and other burdens from increasing volume of business sharpened perceptions of such costs. Thus on the civil side mediation, conciliation, arbitration, and bargaining for out-of-court settlements had strong appeal, especially where the parties had enjoyed mutual gains from past continuing relations and had reasonable expectation of gains from continuing the relationship (Hufstedler, 1971: 901; Rosenberg, 1965: 30, 46, 54; Sander, 1976: 114, 118-126). Cost-benefit analysis reached also into situations where there was no continuing relationship to conserve, or even where the goal was to end a relationship. Thus, there was evidence that individuals suing in small claims court over isolated transactions valued the relatively ready availability of the court's processes because they promoted defendants' willingness to bargain out a settlement (Sarat, 1976: 346, 370, 372). After the 1960's the rapid spread of no-fault divorce legislation signified an opinion in favor of avoiding adversary-style involvement with courts because alternative approaches promised better to satisfy the relevant interests (Sarat and Cavanagh, 1978: 50-52). On the criminal side, the presence of a substantial number of guilty pleas, even absent plea bargaining between accused and prosecutor, suggested that some individuals found it preferable thus to avoid the risks and costs of contest (Krislov, 1979: 580). Some experience after 1950 was that when prosecutors instructed their staffs to stop all plea bargaining, defendants and their counsel moved the bargaining into the judge's chambers over the determination of sentence. The persistence of the effort, and the fact that judges did not rebuke it altogether as an impropriety, indicated that both parties found some satisfaction in blunting a fully adversary stance. The gain to the accused was plain enough. The defendant's acceptance of a negotiated sentence might reassure the judge of the legitimacy of the criminal process and give him some relief from the stress of sentencing (Krislov, 1979: 577-578).

Custom and choice made bargaining among competing interests a norm of this society, as much in the latter part of the 20th century as for 200 years before. The possibility of litigation, or litigation launched but not carried to final disposition by the court, could serve the bargaining process for resolving disputes between the organized community and

private individuals, business firms, or groups. Thus filing and to some extent pursuing a lawsuit might buy time for those opposing a government project and eventuate in adjustments rendering the program at least acceptable to the objectors without prolonging costs of division. Threat or even partial prosecution of litigation could give leverage to political or racial minorities or to limited economic interests somewhat to reduce their vulnerability at the polls or before legislative bodies or bureaucracies (Dolbeare, 1967: 95, 97, 107, 118; 1969: 393, 397, 398-400). Such cases might be taken to be only another form of the first category, of avoidance of court involvement because parties find other processes more satisfactory to their mutual interests. But such situations bear enough on the pluralist values of our political tradition to warrant separate notice.

Finally, professional observers argued that functional needs of the judicial system were served by the fact that most matters potentially open to handling by judges were not brought to judges or not pressed to a point making heavy demands on judicial resources. Public interest was remote from the particular stakes involved in the great bulk of potentially suable civil matters. Usually the public interest lay only in providing regular, peaceful means of adjusting differences. Costs paid by litigating parties made only small contributions to the total cost of maintaining a judicial establishment. Thus it was in the public interest that these resources not be spent on trivialities or on affairs in which the parties' own stakes were too small to offer economic or political warrant for the public outlay. In a measure the increased attention given to providing small claims courts in the later 20th century manifested this kind of calculus. So, too, did the mounting demands of professional commentators that legal order be structured to encourage alternatives to litigation through techniques of mediation, conciliation, or arbitration (Levi, 1976: 218, 219; Sander, 1976: 118-126; Yngvesson and Hennessey, 1975). Analogous appraisal of the working capacity of the system might enter even where public interest was more immediately involved in the parties' differences. The spread of no-fault divorce legislation evidenced a judgment that on grounds of system efficiency courts should not spend limited resources on types of proceedings which were purely formal where there was no contest on the basic issue of dissolving a marriage (Sarat and Cavanagh, 1978: 50-52).

The administration of the criminal law showed similar consensus that over sizeable areas of business potentially open

to involving judges in contests it was legitimate in the interests of administrative efficiency that only a small portion of matters ever came into the courtroom. In a substantial measure many penal charges involved types of offenses long familiar, often repeated, and presenting relatively simple facts or little contest over facts. This was the appraisal back of the continued phenomenon after 1950 of the disposition of almost all minor traffic or ordinance violations by forfeit of bail or by fine. A like calculus underlay common acceptance of the fact that the police and the prosecutor's office decided not to press into court the bulk of possible criminal complaints that came to their attention (Dill, 1975: 670, 672; Goldstein, 1977: 39, 97-98, 106-110; Jacob, 1973: 31, 66, 92, 111; Krislov, 1979: 578-580; Virtue, 1962: 48-54, 375). Even where more serious offenses were in issue, concern not merely for efficiency but for the survival of the trial courts bulwarked like arguments to legitimize terminating most serious misdemeanor and felony cases by negotiated pleas of guilty without contest in court. Thus in the judgment of an experienced Los Angeles trial judge, an increase of only five percent in not guilty pleas at arraignment or before judges administering a master calendar would flood the trial courts to the point of breakdown (Barrett, 1965: 110). Another knowledgeable observer estimated that an increase of ten percent in the number of contests in felony cases in criminal courts of general jurisdiction would require a 30 percent increase in the total facilities provided, including defense counsel, prosecutors, courtrooms, and judges and their auxiliaries. Such testimony to the functional need for plea bargaining and other screening techniques was impressive. But for want of broad, fact-based inquiries, we do not know with assurance how far caseloads contributed to the predominance of guilty pleas in dispositions of criminal charges (Barrett, 1965: 120; Krislov, 1979: 579-580). Some studies suggest that caseload offered little explanation of disposition patterns (Feeley, 1979b: Ch.8; Heumann, 1975; Nardulli, 1979:89).

Such were the principal positive justifications found to lie behind the fact that courts were involved in only a small margin of civil and criminal matters that might be brought to them. At the center of various criticisms of this pattern was concern that the pattern reflected a great amount of coercion of the wills of those who might have sought intervention by a court, but who never entered a defense, never filed suit, or, being in court, never carried through to obtain substantial consideration of their claims by a judge. With his will coerced,

the individual might suffer erroneous treatment of the merits of his position, or at least—the merits apart—might never obtain a fair hearing (Downie, 1971; Galanter, 1974; Krislov, 1979: 574-576, 579).

There were no grounds for criticizing the legal system, or the judicial branch in particular, where persons with means to sue or to defend refrained from suing or defending simply because they calculated that the stakes were not worth the cost. Thus most consumer complaints over defective goods or services never moved into litigation or into any less formal procedure of adjudication, because relative to what he had at stake the grievant found it not worth his while to pursue the matter beyond complaint to his supplier. Even if highly informal, simplified grievance procedures were available, always there would be many complaints not worth pressing beyond the immediate parties (ABA, 1976: 175, 202; Best and Andreasen, 1974: 704, 712-720; Ladinsky *et al.*, 1979: 6, 68-69). Similarly, many individuals who might bring complaints of criminal offenses to the police or the prosecutor found it not worth their while in terms of their own stakes to report the offense or, having reported it, to continue urging that the authorities do something (Goldstein, 1977: 39; Jacob, 1973: 31). Commentators troubled by the social as well as individual costs that might be involved in matters never brought to court worried mainly about the number of such instances which traced simply to the individual's lack of money to bring suit or to defend and—closely related—his lack of knowledge or sophistication about the possibilities of invoking a court's attention. Many consumers with legitimate complaints never launched any kind of proceeding for redress because they were poor and ignorant of what remedies might be available (Best and Andreasen, 1977: 707; Sarat, 1976: 349-351, 370). Many victims of crime did not invoke the police or prosecutor because out of their experience they felt that their poverty or their race or ethnic background meant that the authorities would give them no satisfactory or worthwhile response (Danzig and Lowy, 1975: 685; Downie, 1971; Goldstein, 1977: 104-106).

Critics raised points of valid concern on such scores. But, again, injustice or exclusion from sharing in the benefits of legal order that derived from gross inequalities in wealth or income or from racial or ethnic discrimination raised issues not peculiar to the history of the judicial branch. They were parts of a total social context within which courts operated. The

experience of the years after 1950, as of those before, taught that no readjustments of the judicial system alone would answer such problems; basic answers lay in access to education, housing, jobs, medical care. However, if one accepts this as a realistic assessment of the whole situation, critics of the overall patterns for handling disputes in the society had a valid point. There might be not much effective to do in overcoming barriers raised by inequality of means to people's effective access to redress available from courts. But legislatures and private organizations could conceivably do a great deal to provide less costly alternatives to civil litigation or criminal prosecutions. In the 1950-1980 span, some change did occur, in a new emphasis in professional commentary on exploring alternatives available through official and private channels of conciliation, mediation, and arbitration; through preventive measures by administrative agencies (e.g., more effective use of inspections and licensing); and through civil forfeitures or publicity sanctions instead of criminal penalties (Danzig and Lowy, 1975: 682, 683, 685; Ladinsky *et al.*, 1979: 68-69).

So far as resort was had to courts—alternative adjustment or dispute handling procedures apart—professional commentary in the later 20th century showed other kinds of concern for the quality of the human results that lay back of the great bulk of civil cases ended by default of plaintiffs or defendants and of criminal cases disposed of by guilty pleas without contest. Again, coerced will was the central point. The costs of delay weighed heavily on tort plaintiffs in automobile accident cases. Plaintiffs and defendants' insurers settled most cases without contest at trial. But studies of this field agreed that a great deal of practical compulsion brought plaintiffs to settle for amounts that fell far short of fair redress (Rosenberg, 1965: 34-38). In small claims courts the large numbers of default judgments for money obtained by business firms, hospitals, and other organized litigants against individual defendants probably included many instances in which no hearing was had for what often might be meritorious defenses (Caplowitz, 1974; Galanter, 1974; Jacob, 1973: 49-50, 92; Rubenstein, 1976: 72-74, 82-84; Wanner, 1975: 299). Observers worried that for want of presentation of adequate information or representation of all affected interests, judges' supervision of the terms of property settlements in uncontested divorces was often only nominal (Sarat and Cavanagh, 1978: 51-52). In the handling of criminal dockets, late 20th-century commentators were dismayed at the

extent to which harried courts disposed of guilty pleas—whether negotiated or not—in a mass-production atmosphere which routinized the whole process and meant that judges had little or no time to treat defendants as individuals (Barrett, 1965: 109-111, 120; Dill, 1975: 670-672; Jacob, 1973: 101-103). Behind plea bargains they feared lay a tendency of officialdom, including judges, to reverse presumptions of innocence and presume guilty of some offense all who came to court without mounting a stout defense; as critics appraised the bulk handling of criminal offenses, including the more serious ones, the normal focus of attention of prosecutor, counsel, and court was not on issues of innocence or guilt, but on treatment or sentence. They feared that in the plea bargaining process an accused experienced in meeting criminal charges was likely to fare better than he deserved, and the inexperienced defendant of little means was likely to get harsher treatment than was efficient or equitable (Dill, 1975: 670-672; Jacob, 1973: 102-103; Virtue, 1962: 375).

As with affairs that never came into court at all, so with those that in some degree entered court processes, experience taught that difficulties would not be solved only by rearranging the structure of the courts. Thus issues of justice that centered on defaulting debtors in small claims courts pointed to problems of too ready availability of credit, as well as to questions of the fairness or honesty of terms of credit (Caplovitz, 1974; Sarat and Cavanagh, 1978: 56-58). The pressures on auto accident plaintiffs to make unsatisfactory settlements probably would respond to nothing less than a basic restructuring of tort and insurance law (Levi, 1976: 218). The daunting volume of proceedings flooding the criminal courts would also probably yield only to substantial reordering of substantive public policy, to reduce the number of situations treated as criminal, to mandate fewer high penalties requiring long terms in jail, to increase resort to civil forfeitures simply enforced, and to invest more social resources in preventive measures (Barrett, 1965: 123; Dill, 1975: 671; Levi, 1976: 218). To the extent that professional commentary turned in such directions, it pointed to the need to view the courts in relation to the whole social context in which they worked.

III. JUDGES AS MAKERS OF GENERAL PUBLIC POLICY

Policy Generalization Compared with Particular Case Dispositions

Declarations of general public policy and dispositions of particular disputes within established doctrine do not lie on opposite sides of an absolute line of distinction between types of court operations. General policy may and has regularly emerged through accumulation of particular judgments (Cardozo, 1924: 64-70, 77-80).

But there is a distinction which reflects realities of what courts do. Most judicial interventions in affairs proceed within quite well-fixed frames of legal doctrine and deal chiefly with finding facts which bring that doctrine into play. In immediate impact such judicial actions are relevant mainly if not wholly to the litigants; the general society's interest is simply that judges should properly apply existing law. But some matters brought to court do not fit established patterns of public policy, and indeed may be brought there precisely because they do not find ready answers in law already declared. Such cases call on judges to exercise choice of values on the basis of standards or rules contained in constitutions, statutes, delegated legislation, or common law. Though such law suits may require that judges make particular fact findings, the social importance of such litigation lies mainly in what it produces in new definitions or ranking of values to be backed by law (Cardozo, 1924: 163-167; Horowitz, 1977: 22, 23, 33-36).

Attention to courts' policy making roles focuses mainly on what appellate courts do. There are structural and procedural reasons for such emphasis. Trial judges work more under the constraint of precedent. This constraint derives from the terms of legitimacy of their office. In the division of labor among legal agencies their prime business is to apply existing law; because they hold the last word within the judicial system, appellate courts possess a properly wider range of discretion in making policy choices. The constraint of precedent derives also from the press of work. Being on the first line of judicial attention to problems, trial courts are much occupied with procedural issues regarding building a trial record and finding facts. The volume of such matters presented to them day in and day out does not ordinarily leave much time or energy for considering new lines of policy. Further, these factors foster in trial judges a career-oriented, journeyman's concentration on the immediacies of turning out particular dispositions in proper

form—an attitude toward the job which does not encourage ambition to be law makers (Dolbeare, 1967: 80, 105, 107, 113, 117, 122, 123; Horowitz, 1977: 20; Jacob, 1973: 66, 92, 104, 105, 109, 111).

In contrast, the structure and procedures of appellate courts offer more scope for fashioning general doctrine. History conferred some law making legitimacy on appellate courts, through the massive 19th-century construction of common law doctrine and the development of the function of judicial review of the constitutionality of legislative and executive action. That appellate courts were multi-member bodies in contrast to the norm of the single trial judge encouraged collegial exploration of public policy. That high courts had the last word, for the judicial system, on matters brought to them tended to emphasize their responsibility for the content of policy (Kagan *et al.*, 1977: 121, 124; Sheldon, 1974: 63-64, 85, 107-120; *Yale Law Journal*, 1978: 1191, 1194).[23]

This pattern held more clearly for state than for federal courts in the later 20th century. Aside from cases brought in federal court only because the litigants were from different states—in which the subject matter involved the same kinds of policy areas as those typically dealt with in state courts—federal judges often confronted issues under general standards of the federal constitution or under broadly framed and innovative federal legislation. The sweep of problems arising in this kind of frame often put on judges of federal trial or intermediate appellate courts the need to make value judgments in translating constitutional or statutory generalities into particular content. The United States Supreme Court might always have the final say. But most cases never reached that court, so that substantial additions to policy could be made at the lower levels of the federal hierarchy. Of course, there were variations in the subject matter brought to federal and to state courts, reflecting the different concerns of the different sovereigns. Within some areas in which state policy was to the fore, state trial courts might play a larger policy role; this was probably true of the surveillance which state judges exercised over local government activities (Casper and Posner, 1976: 24, 75-89; Dolbeare, 1969: 377, 380, 381, 391, 393, 396-400; Goldman and Jahnige, 1976: 114, 115; Heydebrand, 1977: 769, 798, 799, 806, 810).

These features of judicial operations were familiar in the 19th century and in the first half of the 20th. They continued to mark the years after 1950 without substantial change. More in

[23] But cf. Glick (1971: 34, 38, 42, 61, 75) on how state appellate courts differ in degree of policy making consciousness.

question was the relative extent of policy making in the 1950-1980 span compared with earlier times. It appeared that most commentators believed that there was a significant quantitative increase in the extent to which judges made their own additions to the content of law after 1950 (Chayes, 1976: 1289-1302; Horowitz, 1977: Ch. 1; Levi, 1976: 213-216). Some of the observers rated this increase so high as to amount to judicial preemption of law making in important areas of affairs (Glazer, 1975: 41, 104; Hufstedler, 1971: 901; Rifkind, 1976: 103, 104).

Estimates of marked increase in judicial policy making were triggered chiefly by the Supreme Court's extension of constitutional standards of due process and equal protection into areas of nonmarket values, and by the federal courts' implementation of federal legislation designed to improve the legal position of racial and ethnic minorities, of women, of the poor, and of those on trial or convicted under penal statutes (Chayes, 1976: 1284, 1302; Glick and Vines, 1973: 95, 96; Rifkind, 1976: 107, 110; Tribe, 1978: ch. 16). That activity in these fields prompted assessments of increased judicial policy making warrants some skepticism about the extent of the phenomenon. For one thing, we should never forget that we have no detailed inventories of the general flow of past court activities; generalizations about increased judicial policy making were at bottom matters of opinion, not backed by reliable tallies (Glick, 1971: 34, 38, 42, 61, 75; Horowitz, 1977: 20; Sarat and Cavanagh, 1978: 29, 39, 41, 45, 71, 73; Sheldon, 1974: 93, 98, 107-120, 128, 160. Outside the civil rights and social welfare categories opened up by federal legislative and judicial activity in the 1960's and 1970's, and especially in domains dealt with chiefly by state law, areas of new policy generalization by judges were relatively limited (Dolbeare, 1967: 41, 44, 65, 70, 75, 115, 124; 1969: 396, 397, 400-401).[24] The overall course of national and state policy in the late 20th century continued to show marked growth in statute law and law made by executive or administrative agencies under statutory delegation. Lest we exaggerate courts' roles, we need keep alert to the increasing output of these other legal actors. Measured by impact on the day-to-day lives of most people, most important new policy content resided in wide-reaching tax laws (Surrey, 1969: 674-683, 698-704), in broad programs of public spending and public services, and in

[24] Cf. Edwards (1977: 90, 91) on the prominence of contributions of federal judges to substance of federal employment discrimination legislation, and Heydebrand (1977: 765-772) on the myriad factors within and outside federal court structure limiting extent of policy initiatives of federal judges.

expanding regulations of the market aimed at protecting workers and consumers and the environment (Macaulay, 1979: 62-65). Only limited and episodically selected aspects of these reaches of statute and administrative law came into litigation at all, let alone afforded much scope for judges to write their own policy judgments into law (Rabin, 1979: 7-14; Stewart, 1975: 1779, 1804).

Issues of Legitimacy and Competence

Commentary on judges' policy making activity after 1950 ran in terms of issues both of propriety (legitimacy) and of efficiency (competence) familiar in earlier discussion of judges' roles. What was new was a heightened sensitivity to these issues, in proportion as judges undertook to define and rank values with a degree of innovation and discretionary choice usually associated with the legislative process.[25]

Professional and lay opinion—when it attended to the matter at all—continued to hold that the legitimate judicial function was only to decide cases or controversies. This idea embraced three key elements. First, courts do not initiate activity, but respond only to initiatives of litigants. Second, adjudication should proceed with opportunities for contending parties to present their competing positions to impartial judges. Third, the court's judgment or decree should rest only on already established legal doctrine which the court applies, formally binding only the suitors to an outcome in favor of one party or the other. The principal concern in years after 1950 centered on the third element, with special attention to how far judges did in fact limit themselves to deciding on the basis of established doctrine. Corollary to this center of attention was a greater sensitivity to courts' definitions of the circumstances that gave parties standing to present legal issues; in proportion as decisions after 1950 relaxed standing requirements they opened broader avenues on which judges might move to make new policy (Fuller, 1978; Sarat and Cavanagh, 1978: 12-13; Stewart, 1975: 1670, 1723, 1725, 1728, 1730-1738).

At its core the limitation of courts to making particular disposition of cases or controversies embodied separation of powers values. But there were related prudential reasons for the limitation. Experience taught that courts did not possess unlimited competence for making public policy; various

[25] E.g., Ely (1973: 922, 926-927, 935-937, 948-949), and Tribe (1978: 926-933) for a discussion of the policy discretion exercised by the Supreme Court in its abortion decisions.

elements of the case or controversy concept tended to hold judges to the kinds of jobs they could do best. So far as courts after 1950 engaged in making broad new policy, professional commentary renewed earlier concern with judges' means and capability for exploring matters of fact and of fact-meshed values in situations involving specialized knowledge and a great diversity of affected interests. There was concern, too, with their ability to cope with complicated, ongoing interactions among affected interests that did not lend themselves readily to final resolution in light simply of past events (Sarat and Cavanagh, 1978: 14, 15, 28; Tribe, 1978: 53-56).

In sum, experience after 1950—and reflections on that experience—maintained continuity with earlier experience and reactions that created issues of the legitimacy and competence of judges as makers of general public policy. This marked continuity indicated that these were time-tested considerations warranting respect.

Areas of Judicial Policy Making

Common Law: Compared with the range of affairs covered by statute and administrative law in the late 20th century, matters governed wholly by judge-made (common) law continued to be relatively limited, as they had tended to be since the opening of the century. But through the 19th century the common law had been a domain of judicial policy making on a scale grander than is measured by Holmes's characterization of judges' contributions as "interstitial."[26] Thus it is not surprising to find that—within the relatively limited reach of contemporary common law—courts continued to make some notable additions to substantive public policy.

The most marked judicial innovations were in tort law regarding actions for damages for personal injuries. Legislatures were notoriously inert or indifferent toward reforming tort law. Probably this sluggishness inclined judges to move more boldly in this area than in that of commercial law, which received more legislative attention (Keeton, 1969: 54; Oberst, 1960: 390). From the late 1950's the record showed overruling of tort law decisions on a scale unusual compared with prior periods. Thus courts abolished doctrines conferring immunity from tort liability on governmental units and

[26] Compare Holmes, J., dissenting, in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) saying that judges legislate "only interstitially," with Llewellyn (1960: 62-74) describing judicial doctrinal development in the "grand style."

charitable organizations, barring suits by family members against each other, limiting damages for negligently inflicted mental suffering, and barring a wife's recovery from a negligent third party for loss of consortium. Legislation was not wholly absent from the tort field, but the relative contributions of judges to reshaping the law bulked large (Kalven, 1972: 20; Keeton, 1969: 3-8). Particularly revealing of the extent of conscious policy choice exercised was the expansion of liability for negligently inflicted emotional distress. Post-1950 decisions consolidated earlier rulings rejecting a requirement that the plaintiff have suffered some physical impact. But courts then divided, showing varying degrees of caution about the extent of broadened liability. Most required that the plaintiff have been within a zone of foreseeable personal injury. But the California court ruled for liability where the defendant might have foreseen the danger of emotional shock to one neither suffering physical impact nor in apparent danger of suffering it (Henderson, 1976: 517, 519; Kalven, 1972: 14, 18, 21, 22).

Courts also expanded redress for tort plaintiffs through less overt changes. Some expansion went on by adjusting or elaborating segments of existing doctrine; in such activity judges undertook a greater share of the burden of adjusting tort law to changed circumstances or changed perceptions of values than did legislatures. Some expansion in favor of tort plaintiffs went on in practice through the trend shown after 1950 to allow to go to juries cases that in the 1930's would have been judged to present insufficient evidence of negligence. Given jurors' tendencies to hold for tort plaintiffs in personal injury suits, this trend meant a material shift toward expanded tort liability. Analogous was the tendency of juries, within the considerable discretion judges allowed them, to reach compromise verdicts when they confronted persuasive evidence of contributory negligence which the law said should be an absolute barrier to relief. Thus to a substantial degree juries accomplished substitution of a rule of apportioning damages, but with dangerous leeway for arbitrary action; the hazard pointed to the desirability of such legislative intervention as a growing number of states provided a defined rule of comparative negligence (Keeton, 1969: 74, 76).

Statute law—notably the Uniform Commercial Code and such consumer protection legislation as the federal Magnuson-Moss Warranty Act—provided the frame for the most identifiable changes in contract law. But judge-made doctrine stood out in the area of products liability, though it

accomplished change by shifting from contract to tort principles. Development moved through three stages. The first revolution in doctrine was to eliminate the requirement of privity of contract, to allow an action by the ultimate consumer against a manufacturer for negligence. Coupled with flexible use of *res ipsa loquitur*, this change by the 1950's produced substantial doctrinal protection for consumers. The second revolution helped the consumer beyond the protection given by liability based on negligence by borrowing from doctrines of implied warranty and eliminating both "vertical" and "horizontal" privity requirements, to create strict liability which in substance rested not on contract but on tort principles. This change the courts brought about in the 1960's. After the late '60s cases extended strict liability for defective products to cover injured bystanders (that is, individuals other than users). This last extension completely severed this new reach of products liability doctrine from its inherited connections to warranty and consumer interests. The change made all the more clear how far judges had moved into making their own determinations of equitable allocation of benefits and costs. In effect the courts fastened on the business enterprise as a proper target for the law's efforts to deter hazardous activity, able to pass the loss into wide channels of distribution (Kalven, 1972: 45, 49, 51-57).

Judge-made law regarding relations among land owners, tenants, and third parties was another area of substantial judicial innovation. California gave a new lead to doctrine on occupiers' legal responsibilities by abrogating the older scheme which assigned liability according to a catalog of duties owed different kinds of entrants on the land. Instead, the California court declared that a general negligence principle applied, in effect enlarging the instances in which the court should send the case to the jury. The California court also eliminated the anomalous distinction under prior law by which an occupier owed a greater duty to a business visitor than to a social guest (Henderson, 1976: 513; Kalven, 1972: 5, 8, 11). Probably another judicial reaction to longstanding legislative inertia was the trend of decisions from the middle 1960's enlarging the substantive rights of tenants. Courts now found an implied warranty of habitability of leased premises and enlarged the tenant's remedies by setting out conditions within which the tenant might withhold rent (Donahue, 1974: 261, 263; Meyers, 1975: 880-883; Moskowitz, 1974: 1445, 1503-1504).

Reallocation of gains and costs among affected interests through changes in tort or property law aroused concern among some commentators. Their worry went not so much to the separation-of-powers legitimacy of such judicial activity as to the judges' competence to make wise assessments of competing equities and of the likely incidence of changed doctrine. The extension of liability of manufacturers for defective products brought costs of uncertainty as to the bounds of the new responsibilities (Kalven, 1972: 51-57). Some observers were skeptical about enlarging tenants' rights against landlords, fearing that more extensive liabilities would harm more than it would help the intended low-income beneficiaries either by encouraging owners to take property off the rental market or to improve it to the point where it would command higher rents than the former tenants could pay (Donahue, 1974: 261, 263; Meyers, 1975: 903). Whatever the merits of these reactions, such responses did point up how boldly judges were asserting power to define and rank values among competing interests.

Under Statutes: Statute law continued to loom large in the whole body of the law in the late 20th century, as it had since the innovative decade of 1905-1915. It made itself felt by direct impact and by providing the base and framework within which executive and administrative agencies added substance to public policy. Greater legislative activity meant a relatively diminished role for judges as policy makers, compared with the buoyant decades of common law growth of the 19th century. But the expansion of legislation also opened new roles for courts in adding to the working content of legal doctrine. Three types of situations stood out in which the course of statute law invited judges to help create general law.

Legislators had the authority and capability to create drastically new premises of public policy, warranting executive and administrative officers and judges in developing detailed content for the new doctrine. The course of statute law after 1950 provided salient examples. Thus the National Environmental Protection Act (1969) required that official agencies provide environmental impact statements to justify actions that might affect the physical, biological, or social setting. Federal judges quickly built a substantial body of law supporting interested parties in obtaining court help in enforcing the filing of impact statements, and assuring compliance with the procedural requirements of the statute.

On the other hand, judges showed caution about intervening far in matters they might lack competence to handle, and hence generally refused to review extensively the substantive merits of proposed agency action. If a court found that a filed impact statement met statutory procedural requirements, typically it left to the agency whether or not to proceed with the project (Henderson, 1976: 500, 501).

Overlapping this first category—statutory creation of new premises of public policy—was the situation in which legislators broke new ground but did so in terms so general or so lacking in clarity as practically to invite or require substantial supplementation by accretion of case law. The Occupational Safety and Health Act of 1970 set a new frame of law regarding the well-being of workers in firms affecting interstate commerce. But in mandating new directions of policy, Congress left open so many questions as to make certain that administrative practice and judicial construction must supply much of whatever reality the new policy might achieve. Congress's striking innovations in civil rights legislation in the 1960's and 1970's likewise provided bases for substantial development of judge-made law within new statutory frames. Congress deserved credit for impressive declarations against discrimination in employment under Title VII of the Civil Rights Act of 1964 and its strengthening amendments in 1972. But the federal courts were primarily responsible for most gains thereafter achieved in promoting equal employment opportunities. Judicial advances took the forms both of extending substantive law and of providing a bold range of remedies by injunction, by orders to employers to disseminate job information to targeted groups, to keep detailed records to insure nondiscriminatory hiring, to hire individual victims of discrimination and provide back pay for them, to provide pre-test tutoring for job applicants, to expand apprenticeship and training opportunities, and to pursue affirmative action programs in hiring (Edwards, 1977: 90, 91; J. Jones, 1976: 3, 4, 33, 45-49, 51; Peck, 1976: 835, 836, 839, 843, 844).

The legislative process often works with narrow pragmatism under constraints of time and circumstances. Thus different statutes may deal with overlapping subject matter by different rules or remedies without explicitly codifying or reconciling the whole. Such situations create opportunity and need for judges to use statutory texts, legislative history, and principles implicit in the legislative action to fashion workable relations among intersecting areas of statute law. Thus the

Supreme Court upheld rulings by the National Labor Relations Board that a union was obligated to give fair representation to workers' interests without discrimination according to race, and that breach of this obligation was an unfair labor practice in violation of the National Labor Relations Act. On the other hand, the Court decided that though an activity was covered by a collective bargaining agreement, and subject to its arbitration procedure, a complainant was not barred from pursuing a grievance under Title VII of the Civil Rights Act. But the Court sustained the National Labor Relations Board when it dismissed a complaint against an employer which charged that he violated the National Labor Relations Act when he discharged employees who bypassed the collective bargaining grievance procedure and took direct action by picketing on account of alleged racial discrimination in employment practices. Likewise the Court ruled that the employer committed no violation of the labor act in discharging employees for insisting that the employer bargain collectively with the dissidents, in face of the exclusive bargaining status of a duly certified union. National policy gives high priority to principles of nondiscrimination, and the National Labor Relations Act should be appropriately construed in light of that policy. Yet, the Court found the processes provided by that Act did not allow evading the normal collective bargaining procedures which it sanctioned (Bettman and Rosenbaum, 1977: 182-194; J. Jones, 1976: 27-30).

In such respects courts' policy making under statutes was not different in quality and raised no different issues of legitimacy or competence in the span of 1950-1980 than in earlier times. If the situation was different after 1950, the difference was one of quantity and not quality. The continued increase in the relative place of statute law in the body of the law meant that there was accompanying increase in demands made on judges to supplement the legislators' handiwork (Levi, 1976: 214-216).

Judicial Review of the Constitutionality of Legislation: Especially from about 1880 to the mid-1930's, judicial review of the constitutionality of legislation provided the most visible and dramatic exercises of policy making discretion by judges. Here was a domain in which the 1950-1980 years saw greater qualitative and quantitative change in judicial roles than marked the handling either of common law or of statutory interpretation. Change had a sharply different character,

depending on whether challenged legislation impinged mainly on conduct of business in the private market or on economic resource allocation by political process on the one hand, or whether, on the other, it bore primarily on values centered outside the economy.

From early years standard doctrine generally declared that legislation regulating private market behavior should enjoy the benefit of a presumption of constitutionality. But in practice from the 1890's up to 1935 the Supreme Court often paid little substantial heed to the presumption and at times came close to repudiating it. However, the Court's response to the constitutional crisis of 1936-1937 was to reinstitute the presumption in full force as to national or state legislation regulating the private market. In the 1950-1980 span the Court fully confirmed this approach. Indeed, it did so to the extent that it appeared almost impossible for a challenger to persuade the Court that legislators could have no reasonable basis for legislation of that character consistent with constitutional grants of legislative power or constitutional standards of due process and equal protection. The Supreme Court practically withdrew itself from the function of judicial review affecting statutory regulation of private market dealing (Tribe, 1978: 233-239, 434-455, 994-1000).

Decisions after 1950 also showed that the Court applied a strong presumption of constitutionality on behalf of legislation, the prime impact of which was to allocate limited economic resources in nonmarket contexts. Thus it applied the presumption vigorously on behalf of legislation to conserve publicly owned natural resources and in support of statutes appropriating public funds for education and for welfare assistance to the poor.[27] So, too, it applied the presumption in favor of statutes enacting fees for public services, including access to civil courts, even as against indigents unable to meet the payments; to this proposition it made only limited exceptions where the legal service or facility was the claimant's sole recourse, as in access to divorce proceedings or provision of a transcript of record essential in appealing a criminal conviction.[28] Though the point had only glancing

[27] *Kleppe* v. *New Mexico* (1976) regarding property of the United States; *San Antonio Independent School District* v. *Rodriguez* (1973) regarding public school funds; *Dandridge* v. *Williams* (1970) regarding public welfare payments.

[28] In support of exaction of fees: *United States* v. *Kras* (1973) (access to voluntary bankruptcy proceedings). Requiring exemption from fees for indigents for access to sole means of recourse: *Boddie* v. *Connecticut* (1971) (divorce); *Griffin* v. *Illinois* (1956) (free transcript necessary for criminal appeal).

acknowledgment in Court opinions, in the background appeared a marked disinclination of the Supreme Court of the late 20th century to involve itself by judicial veto in legislative determinations concerning the distribution of wealth or income.

Though as of 1980 the presumption of constitutionality stood clear and firm as the Supreme Court's norm of approach to legislation centered on the economy, there were reasons for caution against viewing the judicial veto in this area as wholly a matter of the past. Two main qualifications appear. First is the treatment of retroactive state legislation challenged under the contract clause. Within its rather narrow field the contract clause might be taken to raise a presumption against the validity of state legislation which abrogates or readjusts the economic terms of bargains parties have previously set for themselves, where the prime object of the new statute appears to be to reallocate benefits or costs of the transaction among the contracting parties. Thus the court did not appear to apply the presumption of constitutionality to a state statute which retroactively changed terms of a public authority's issue of bonds (*United States Trust Co*. v. *New Jersey*, 1976; Tribe, 1978: 470-473). The second area in which the Court may qualify the presumption of constitutionality is that of allocation of policy roles under the federal system. The Court applied the presumption of constitutionality generally on behalf of Congress's exercise of its granted powers. But in 1976 the court breathed new life into what had seemed a thoroughly dormant 10th Amendment, by invalidating Congress's extension of federal minimum wage and maximum hour provisions to state and local government employees. The Court left its rationale so cloudy that the decision was relevant more as a general caution than as a particular guide. But, focused as the issue was on state provision of public services, nothing explicit in the Court's opinion denied the continued vitality of the presumption of constitutionality, as against 10th Amendment claims, in favor of federal regulation of private market behavior (*National League of Cities* v. *Usery*, 1976; Tribe, 1978: 308-318). The other main aspect of federalism relevant to this discussion is the Court's treatment of state statutes challenged as wrongful intrusions on national market freedom protected by the implications of the commerce clause. In years after 1950, as before, a state statute overtly discriminating against out-of-state business did not enjoy the benefit of a presumption in its favor; to the contrary, it would probably be ruled invalid on its

face. When discrimination was not overtly declared but was claimed to lie in the practical operation of the legislation, a *prima facie* showing to such effect by the challenger seemed likely to cast on the supporter a burden of going forward with strong justification. But when the objection was simply that a nondiscriminatory state regulation put some heavy practical burden on doing interstate business, the ordinary presumption of constitutionality appeared generally to apply in favor of the legislation. Thus commerce clause issues deviated from the prevailing limitation of judicial review only if a serious question of discrimination appeared.[29]

Another caution needs be stated in appraising the approach to judicial review after 1950: The United States Supreme Court is not necessarily representative of the country's judiciary as a whole. True, after 1950 as before, the Supreme Court's approach to judicial review continued generally to set the pattern for action of lower federal courts and of state courts. But there are practical and doctrinal qualifications on this proposition.

In practice, courts below the level of the Supreme Court may engage in judicial review in a fashion which does not meet the high Court's standard, and yet what they do may stand unrebuked because an aggrieved party lacks the means or does not find it to his interest to seek a further hearing. Especially in state courts in the 1950-1980 span, there were instances in which judges invalidated economic regulatory legislation without according the presumption of constitutionality the force the Supreme Court would give it.[30] As a matter of doctrine, in applying provisions of state constitutions, state courts are not bound by United States Supreme Court models of judicial review, and this is not less true though the state constitutional provision is the analogue of federal due process or equal protection standards. Thus, under the state constitution a state court is free to review the validity of state economic regulatory legislation by a measure less favorable to the statute than would apply under the Federal Constitution. As of 1980 the possibilities of such independent state judicial activity were little realized. But cautious lawyers would not

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[29] *Boston Stock Exchange* v. *State Tax Commission* (1977) regarding overt discrimination; *Dean Milk Co.* v. *City of Madison* (1951) regarding *de facto* discrimination; see Tribe (1978: 335, 341, 354-359).

[30] See, e.g., *People ex rel. Orcott* v. *Instantwhip Denver, Inc.* (1971); *Maryland State Board of Barber Examiners* v. *Kuhn* (1973); *Town of Caledonia* v. *Racine Limestone Co., Inc.* (1954).

ignore the possibility of divergent approaches under the national and the state constitutions.[31]

In absolute contrast to the Supreme Court's withdrawal from its once substantial reviewing role over legislation regulating private markets was its enlargement of reviewing discretion regarding legislation dealing with or affecting values not tied primarily to allocation of economic resources. The beginnings of this different approach lay in the 1930's. But the years after 1950 saw major increase in the extent to which the Court asserted its own definitions and ranking of values outside the economic realm. This change of direction seems largely responsible for that commentary after 1950 which appraised judges as dominating determinations of public policy to an extent some commentators thought novel and often disturbing. There was some exaggeration in such responses. Expansion of the judicial review function in areas of policy not focused on the economy was important. But it involved only some sectors of a wide-ranging legal order and should not be read as setting a tone for the whole. With this caution in mind, we can better appraise the respects in which the Supreme Court entered new areas of value definition.

A statute which makes race a criterion of legal position, at least where doing so is to the apparent disadvantage of a racially identified group, does not enjoy the presumption of constitutionality. Rather, its supporter carries a heavy burden of showing overriding public-interest justification for it in the face of the equal protection standard embodied in the Fifth and Fourteenth Amendments. This departure from the norm of the presumption of constitutionality the Court found warranted by the specific history of the Fourteenth Amendment, carried by the logic of policy into the due process clause of the Fifth. But the Court showed caution about extending the exception. A statute not in terms discriminating according to race may operate in fact with disproportionate adverse impact against a racial group. But such a showing does not suffice to prove the statute unconstitutional. The challenger must press further to show a purpose to discriminate, manifest from legislative history or from a pattern of legislative behavior. This qualification implied some unease in the Court about the range to which it was extending its reviewing role. A group might be especially disadvantaged by the operation of a statute because its members were too poor to meet costs of compliance, so that the impress of poverty might be inextricably mingled in the

[31] See, e.g., *Larson* v. *Lesser* (Fla. 1958); *S. Bloom, Inc.* v. *Makin* (1975); *Hartford Accident and Indemnity Co.* v. *Ingram* (1976).

situation. In 1970 the Court applied the presumption of constitutionality in behalf of legislation providing public welfare payments. In other rulings of the 1970's it further showed that it was not prepared to shift the burden of persuasion to the supporter of a statute simply because in terms or in effect the statute might bear differently on individuals because of their lack of wealth. This trend of decision was the more significant because it retreated from some rulings of the 1950's and 1960's which looked toward making indigency a generally suspect criterion for the reach of legislation. The 1970's current revealed the Court as then more wary of involving itself in creating legal or political pressures for redistributing wealth in the interest of more equality; ordinarily, patterns of distribution of wealth or income were to be legislative business.[32]

A statute which on its face or in its operation limits freedom of speech, press, petition, or assembly does not enjoy the presumption of constitutionality; rather, the supporter of such a statute must sustain a heavy burden of justifying it. It is because legislatures are supposed to act representatively and with reason that the Court ordinarily applies a presumption in favor of what they do. If a statute invades opportunities or means for representation of views or for exploring and deliberating in matters of fact and choice of values, it imperils the premises on which the legitimacy of legislative process rests. Hence the Court found it proper to shift the burden of persuasion to the proponent of such a statute. But the Court did not stop with this special protection of political and policy making processes. Decisions of the later 20th century enlarged such protection of communications processes to embrace the arts and in some degree commercial advertising. These extensions might be justified as corollaries of protecting public policy making processes; regulations limiting communication in other spheres might have spillover effects in encouraging encroachment on the political process, and hence should be subject to skeptical scrutiny. Altogether, the special protections the Court was prepared to throw about First Amendment values developed with an elaboration and with qualifications which defy short summary. We should note,

[32] On race, see, e.g., *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation* (1977) for disproportionate impact; *McLaughlin* v. *Florida* (1964) for explicit racial criterion; Tribe (1978: 1012-1013, 1028-1032). On lack of wealth and legislative control of use of public funds: *San Antonio Independent School District* v. *Rodriguez* (1973) for school funds; *Dandridge* v. *Williams* (1970) for welfare payments; Tribe (1978: 537, 1118-1124).

however, that the Court applied the ordinary presumption of constitutionality to two types of legislation which explicitly restricted communication—regulations of activities of the Communist Party and regulations directed against obscenity. The extensions of special protection to the arts generally and to commercial advertising and the denial of special protection in the fields of obscenity and Communist Party activity again highlighted the range the Court was prepared to allow itself in making value choices in exercising judicial review.[33]

On the whole, if the Court had let matters stand within this framework, we should have fairly well-defined and limited extensions of the judicial review function—justified in one sector by the particular history of the Fourteenth Amendment, and in others by the policy logic of protecting the representative and rational bases of legitimacy of legislative process. However, the Court did not let matters stand so. It put on the supporters the burden of justifying legislation in a range of matters concerning the family and sex relations—notably, regulation of distribution or use of contraceptives and of abortion—and veered toward a like rejection of the presumption of constitutionality as to statutes which made gender a basis for determining individuals' legal positions. As of 1980 judicial opinions left unclear the Court's warrant for extending the reach of its reviewing function in these areas which did not involve altering terms of political process or values sanctioned by some particular constitutional history. The temper of this third category of extensions of judicial review seemed uncomfortably close to that of the now repudiated period of the early 20th century when the Court gave leeway to its own policy preferences against legislation regulating private markets. One might try to justify these extensions by limiting them to a category of constitutionally preferred values put on the intrinsic dignity and worth of individuals; some members of the Court intimated such a limiting justification by emphasizing special protection for values of individual "privacy." But there was no escaping that such an explanation still left the Court with a broad, ill-defined discretion to impose its members' value preferences.[34]

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[33] See, e.g., *Virginia State Board of Pharmacy* v. *Virginia Consumer Council* (1976) on commercial advertising; *New York Times* v. *Sullivan* (1964) on the press; *Joseph Burstyn, Inc.* v. *Wilson* (1962) on the arts; Tribe (1978: 576-594). But cf. *Miller* v. *California* (1973) on obscenity; *Dennis* v. *United States* (1951) on the Communist Party; Tribe (1978: 613-617, 659-662).

[34] See, e.g., *Whalen* v. *Roe* (1977) on privacy; *Roe* v. *Wade* (1973) on abortion; *Eisenstadt* v. *Baird* (1972); and *Griswold* v. *Connecticut* (1965) on contraceptives; Tribe (1978: 886-889, 921-933).

We should not put these extensions of the reviewing function out of perspective. It continued true to 1980 that relatively little statute law fell before judicial rulings, or even came within the enlarged definitions of constitutionally preferred values. Areas which the Court put under strict scrutiny were humanly and socially important. But we should compare their limited scope with the pervasive impact on people's lives of late-20th-century taxing, spending, and monetary programs; legal regulation of myriad aspects of market operations; legal provisions of types not raising preferred-value questions concerning public health and safety and care of the environment; and provision of education and of facilities supporting family and individual life, such as social security. In this light the total record hardly supports a conclusion that recent legal history had seen judicialization of public policy in the name of constitutional limits on legislative power.

Judicial Review of Executive and Administrative Action: A familiar function of courts was to review the legality of actions of executive officers. In the 20th century this role took on greater dimensions as legislators delegated law making and law enforcement powers over a widening range of affairs to new types of executive or administrative agencies. Three kinds of issues might be involved. Judges were asked to pass on the constitutionality of statutory delegations and of agency action, on whether agency action conformed to the governing statutes, and on the sufficiency of the record made as a basis for agency rules or particular orders entered by agencies. The increase of this judicial business was already marked by 1950; the years thereafter saw the continued importance of such activity.

Courts' scrutiny of the conduct of police and public prosecutors was the oldest, most familiar type of judicial review of executive action. This surveillance took on broader scope by mid 20th century and thereafter, as the Supreme Court added new content to Bill of Rights protections of individuals confronting criminal law enforcement. The extended reach of such judicial review provoked controversies between those who emphasized civil liberties and those who emphasized a strong hand against crime. But, sharp as these clashes sometimes were, they did not involve the central concern of this essay, for these developments constituted no drastic change in judicial functions. Whether the Court read Bill of Rights guarantees more or less expansively, applying

them to conventional law enforcement was well within traditional allocations of tasks to the courts under the separation of powers (Fellman, 1976: vi, 21, 23-24, 236-237, 338-340; Tribe, 1978: 1107-1108).

The marked developments in the scope of judicial review arose over the terms of judicial intervention in executive and administrative law making and enforcement outside the bounds of conventional criminal law. This activity of courts related to agency rules or orders regulating behavior in private markets or dealing with the organization and administration of such nonmarket institutions as schools, hospitals, or prisons. The entry of government into wider sectors of affairs created opportunities and, to some extent, obligations for judges to extend their roles; and, to some extent, they did so.

Doctrinally, the basic development in judicial review of agency operations was the fact that the Supreme Court substantially enlarged definitions of parties recognized as having legal standing to challenge official action or inaction. Broader definitions of standing also meant broader opportunities for litigants to challenge the constitutionality of statutes.[35] But enlargement of standing carried the widest potential for increasing judges' policy roles so far as this enlargement applied to challenging executive or administrative activities, since the great reach of these most often involved people in contests (Jaffe, 1965: 461, 502).

Article III of the Federal Constitution limits federal courts to acting upon cases or controversies. Grants of judicial power under state constitutions imply a similar limitation. There is thus a constitutional core to the idea of standing. But the Supreme Court's development of standing doctrine after 1950 tended to narrow this constitutional element. Sometimes the Court indicated that it required a showing that challenged official action spelled some detriment in fact to the would-be litigant. More broadly, though, the decisions made the nub of the matter that the litigant should show a concern specifically enough focused on interests he in fact held, to enlist him as a reliably vigorous proponent of his position (Jaffe, 1965: 496-497, 499; Stewart, 1975: 1725; Tribe, 1978: 80). Moreover, the Court held to a narrow definition of constitutionally required standing only so long as legislators had not themselves granted the right to contest agency action in court. Thus by 1980 standing might rest on (1) a claim of present or threatened official

[35] See, e.g., *Eisenstadt* v. *Baird* (1972) on surrogate standing to challenge constitutionality of a statute; Tribe (1978: 103-112).

infringement of an interest protected at common law, chiefly in areas of private action legally legitimated under the law of contract, property, or tort; (2) a specific statutory provision entitling designated persons to seek judicial review of official action; (3) a claim that by its terms or by its language read in light of legislative history and familiar rules of construction a statute recognized a given interest as socially legitimate and entitled to legal protection, though without specifying a judicial remedy. The third category was broad enough to include standing in individuals not within the terms of a challenged statute or agency action, but possessing a sufficiently focused interest in fact in the matter to make them reliable surrogate spokesmen for those directly governed by the law in issue (Jaffe, 1965: 508-510, 517, 522; Stewart, 1975: 1569).[36]

Under the head of standing doctrine the Supreme Court developed and applied various prudential rules hedging access to the federal courts, apart from any sense of constitutional limitation. Thus, considerations of ripeness, mootness, collusion among litigants, inadequacy of the record, or the presence of serious questions as to the interpretation of a challenged statute might lead judges to decline to exercise jurisdiction which the Constitution allowed them. These prudential limits on exercising jurisdiction to review the constitutionality of official action were especially calculated to allow judges to avoid being drawn into purely ideological contests or into situations characterized by such mingling of diverse, competing interests and unpredictable consequences as to invite resort to the bargaining style of the legislative process rather than the more focused approach of litigation (Stewart, 1975: 1734, 1738, 1739; Tribe, 1978: 53-56, 69-71, 112-113).[37]

Developments enlarging the doctrinal base for judicial review of official action were largely the products of federal judges. There is no detailed inventory available to allow assured comparison with state courts' handling of these matters within their own constitutional spheres. But there is no reason to think that they did not on the whole follow the federal lead (Jaffe, 1965: 461; Stewart, 1975: 1669).

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[36] Commentators differed over the relation to the total pattern of standing doctrine of Section 10a of the federal Administrative Procedure Act, allowing review of agency action by persons "suffering legal wrong . . . or adversely affected or aggrieved by agency action within the meaning of a relevant statute." See Stewart (1975: 1726). But, in any case, it seems that this APA provision did not mandate narrow concepts of standing.

[37] See, e.g., *Rescue Army* v. *Municipal Court of Los Angeles* (1947).

The outcome of the Supreme Court's treatment of the constitutional and prudential aspects of standing doctrine was that by 1980 the Court had "largely eliminated the doctrine of standing as a barrier to challenging agency action in court, and . . . [had] accorded a wide variety of affected interests the right not only to participate in, but to force the initiation of, formal proceedings" before agencies (Stewart, 1975: 1670, 1723). This development proceeded case by case, without achieving a tightly knit, comprehensive pattern of doctrine. But the course of judicial policy in this sector coincided with the growth of concern in the late 20th century over whether all major affected interests were enjoying fair representation in making statutes and in creating agency rules or orders. The reach of law into wider ranges of affairs accentuated this worry over fair representation (Lowi, 1969; Stewart, 1975: 1711, 1712, 1723-1748, 1752, 1759). Judges' marked willingness to open their doors wider to litigants through expanded ideas of standing seems probably a response to heightened sensitivity to questions of whether affected interests were getting a fair chance to be heard in law making processes generally. Courts offered a traditional means in this system for less advantaged individuals and groups to exercise leverage on society; liberalized definitions of standing to sue to challenge official action accorded with that tradition (Tocqueville, 1945: 325).

Litigants might challenge the substantive authority of an executive or administrative agency to make law (whether by rule or by accretion of particular decisions) at three levels: (1) that by failing to fix adequate guidelines the legislature had made an invalid delegation of powers to the agency, in violation of the separation of powers; (2) that the agency had acted in excess of the authority the legislature intended to give it (the claim that action was *ultra vires*); (3) that the law made by the agency violated constitutional standards, notably those of due process or equal protection.

The second and third of these types of challenge presented no unusual problems of judicial function. To interpret a statute was accepted business for judges. The discretionary calls they might make in appraising statutory text, legislative history, and administrative construction were of familiar dimensions and occasioned no greater special comment after 1950 than before (Jaffe, 1965: 521).[38] It was long settled that the substance of

[38] See, e.g., Katcher (1976: 443, 446, 449, 453) for a consideration of what are "securities" under SEC-administered statutes and the scope of civil remedies under those acts as applied to liability under SEC Rule 10b-5.

agency law making must meet substantive constitutional standards, and this doctrine continued operative within the frame of the presumption of constitutionality as the Court administered the presumption in the late 20th century.[39]

The validity of legislative delegations of power was the issue potentially most distinctive to judicial review of agency action. However, long before 1950 judges set standards for allowable delegation that were generally broad and sympathetic to the practical need of legislators to enlist supplementary help from executive and administrative officers in giving workable content to policy. The years after 1950 saw continuation of this tradition, so that strictures against undue delegation weighed no more heavily on agency law making than they had before (Rabin, 1979: 4, 11-12; Stewart, 1975: 1679, 1695; Tribe, 1978: 286-290). However, in the 1950-1980 period, constitutional cautions against sweeping delegations of power showed they could have effect by indirection, through judges' restrictive interpretation of statutory grants. So, where an agency claimed that it held delegated power affecting constitutionally sensitive areas of individual liberty, such as the right to travel or entitlement to procedures affording fair notice and hearing in security clearance programs, the Supreme Court was inclined to construe the relevant statute narrowly and disinclined to sustain the agency on the basis simply of an implied delegation (*Greene* v. *McElroy*, 1959; *Kent* v. *Dulles*, 1958; Stewart, 1975: 1681, 1697; Tribe, 1978: 288-289).

The most common type of judicial review in this field was that where the prime question was whether the agency had made a record sufficient to support necessary findings of fact and of fact-meshed values to sustain a particular order. The years after 1950 showed some change in the formulae by which courts measured the proper extent of their reviewing function in this respect. In one aspect judges now substantially reduced their role. Older decisions had asserted that a court might engage in *de novo* appraisal of the evidence as to "jurisdictional" facts grounding agency authority; after 1950, decisions moved away from this distinction, toward a generally limited scope of review. Beyond this point it was hard to state with precision the tests that reviewing judges would apply. Some decisions required that the record made by the agency provide substantial grounds for its action; some said that the courts might interfere only if the agency action appeared to be

[39] Cf. *Pacific States Box & Basket Co*. v. *White* (1935) with *Village of Belle Terre* v. *Boraas* (1974).

arbitrary or capricious (Breyer and Stewart, 1979: 31-35; Handler, 1978: 11, 12). There were cases in which judges questionably extended their role by their own weighting of the evidence, but this did not appear ever to become the general approach (Jaffe, 1965: 603). It was probably illusory to find much practical difference in the operating impact of such formulae. In the end the norm in the years after 1950 was that reviewing judges ordinarily showed marked reluctance to upset particular findings of an agency (Jaffe, 1965: 565-567, 575, 600, 603, 604; Rabin, 1979: 11-13).

So long as controversy centered only on the sufficiency of a record to support a particular agency order, the prevailing tendency thus was for judges to defer to agency findings. But the 1950-1980 period saw two other developments tending to enlarge judicial intervention regarding general programs and procedures of agencies.

Expanding its definitions of situations in which it found individuals' "liberty" or "property" at stake, the Supreme Court extended the scope of procedural due process and equal protection guarantees applicable to recipients of government services (students, welfare clients, hospital patients) or those subject to official institutional restraints (prisoners). The consequences were most prominent in federal court orders, often in class actions, mandating provision of expanded services or of hearing or regulatory procedures by which judges asserted substantial authority to restructure the affected institutions. Since by hypothesis such interventions by the courts were to require that agencies make good defaults or misdeeds contravening general constitutional standards, there appeared here markedly less deference to agency judgments, though judges acknowledged that their decrees must pay heed to institutional experience and functional needs (Chayes, 1976: 1291, 1295, 1297, 1300-1304; Handler, 1975: ch. 1, 2; A. Miller, 1979: 667-674; Stewart, 1975: 1717-1722, 1748, 1752).

Another kind of dissatisfaction or distrust of agency activity—less focused than the concerns opened by the Supreme Court's expansion of due process and equal protection values—tended to extend judicial review of the agencies in the 1960's and 1970's. Professional, academic, and political commentary showed increased worry over the extent to which agency activity served particular interests—especially those of the regulated sector—and did not give fair hearing or response to other interests—most likely of a more diffuse character, such as those of consumers or members of the

general community—which lacked means or sophistication to press their positions effectively on agency policy makers. Judicial review of the agencies tended to enlarge in two respects relevant to this temper of distrust.

Courts put more emphasis on asking that there be reasoned consistency in agency decisions. Hence some rulings required that an agency express its reasons for the particular policy choices it made under the broad delegation of powers given by its governing statute. Other rulings required that agency policy choices be consistent over time, or at least that departures from previously established policies be persuasively justified, especially where change would upset substantial expectations grounded on earlier agency positions. Both types of rulings tended toward insistence that an agency normally adhere to its own regulations. We should not exaggerate the likely impact of such review doctrine; courts in fact often tolerated considerable inconsistency in agency policy in the name of flexible adaptation to particular circumstances. In any event, judges' insistence on reasoned explanations and consistency bore more on the procedures of agencies than on the substance of what they did. Nonetheless to the extent that judges thus extended their scrutiny they probably had some cautionary impact on agency behavior (Breyer and Stewart, 1979: 34-35; Rabin, 1979: 14; Stewart, 1975: 1680, 1698-1702).

A related type of expansion of judicial review looked more to the future by imposing broader procedural demands on agency policy making. The core of this emphasis was not on preventing particular substantive intrusions of agencies on private interests, but on increasing the likelihood of more inclusive consideration or representation of affected interests. This increased emphasis on procedures was the sum of a number of components. Supreme Court decisions extended definitions of constitutionally protected "liberty" and "property" as bases for recognizing due process claims to a hearing by interests affected by agency action. Broader representation was also a product of broader definitions of standing. The federal courts enlarged rights of affected parties to participate in agency proceedings, by opportunities to be heard and to contribute to making a record in agency rule making activity and to insist that at least a documentary record of comment and criticism be created as a grounding for new rules. Though the Supreme Court made some criticism of lower federal courts for undue zeal in expanding procedural rights demands on agencies beyond clear warrant in the

governing statutes, the overall impact of these various elements was to promote greater sensitivity to the issue of representativeness as critical to the legitimacy of delegated law making (Breyer and Stewart, 1979: 32, 34-35, 60; Byse, 1978: 1829; Jaffe, 1965: 521; Stewart, 1978: 1805, 1811, 1813-1814, 1820).

Measured against the whole spectrum of agency activity and factors other than judicial review affecting what agencies did, the role of judicial review seems quite limited. The most difficult issues confronting agencies were less likely to be straightforward findings of fact—which, however troublesome, courts were accustomed to handle—than choices among clouded implications of facts and among competing values. In these domains of choice and judgment statutes typically gave agency officers such breadth of discretion as to discourage if not preclude extensive judicial intervention. Moreover, judges—so dependent on the varying talents and resources of contending counsel and their clients—often lacked the technical knowledge or the staff resources to cope with the many factors operating in complex regulatory situations or to sustain attention over the long term to implementing decrees or adjusting their terms to changing experience (Handler, 1978: 24-25; Jaffe, 1965: 521, 565-567; Stewart, 1975: 1778-1779, 1804, 1808).

Reacting to such difficulties in scrutinizing the substance of agency action, in the later 20th century judges turned more toward reviewing the sufficiency of agency procedures. But where a challenger won in court on a point of procedure, his victory typically meant that the matter went back to the agency for substantive disposition (Breyer and Stewart, 1979: 34-35; Handler, 1978: 24-25). Moreover, even the improvements that occurred after 1950 in agency procedures seemed mainly products of the general legal context—of lawyers' traditions about acceptable styles of notice, hearing, and impartial weighing of evidence, for example—and of legislative investigations and the implementation of legislative concern with agency processes, culminating in the federal Administrative Procedure Act of 1946 (Breyer and Stewart, 1979: 26, 28, 31; Rabin, 1979: 4, 7-14).

In any event, much important agency action was in practice beyond the effective reach of litigation, if only because of the costs that offset benefits of suing. Probably 90 percent of agency actions bearing on individuals or business firms were lawfully of low-visibility, informal character, not conducted in ways that would produce a record allowing for judicial review—

as, for example, the processing of income tax returns or Social Security payments, or inspection of meat and poultry or of the safety of working conditions in factories (Breyer and Stewart, 1979: 525).

In the most contentious aspects of their work, agencies operated under pressures of legislative hearings—especially on budgets—sometimes in competition or tension with other agencies of overlapping jurisdiction, subject to the demands of more or less well-organized groups speaking for various political, social, or economic interests. Further, an agency which existed for some years developed its own institutional traditions as to its ends, its means, and its techniques of survival, and these traditions constituted major determinants of its conduct (Stewart, 1975: 1671).

Particular judicial rulings could produce particular repercussions on agency policy or procedures, and sometimes did so. But, relying as the courts did on the initiatives, will, and resources of individuals or groups specially affected, judicial review was likely to be episodic and unsystematic rather than comprehensive and ordered in its contacts with the full range of agencies' activities. It seemed closer to reality to say that public policy in this great realm of late 20th-century legal order was less judicialized than it was fashioned by delegated executive or administrative authority (Rabin, 1979: 7-14).

CASES CITED

Boddie v. *Connecticut*, 401 U.S. 371, 1971.
Boston Stock Exchange v. *State Tax Commission*, 429 U.S. 318, 1977.
Dandridge v. *Williams*, 397 U.S. 471, 1970.
Dean Milk Co. v. *City of Madison*, 340 U.S. 349, 1951.
Dennis v. *United States*, 341 U.S. 494, 1951.
Eisenstadt v. *Baird*, 405 U.S. 438, 1972.
Greene v. *McElroy*, 360 U.S. 474, 1959.
Griffin v. *Illinois*, 351 U.S. 12, 1956.
Griswold v. *Connecticut*, 381 U.S. 479, 1965.
Hartford Accident and Indemnity Co. v. *Ingram*, 290 N.C. 457, 226 S.E.2d 498, 1976.
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495, 1962.
Kent v. *Dulles*, 357 U.S. 116, 1958.
Kleppe v. *New Mexico*, 426 U.S. 529, 1976.
Larson v. *Lesser*, 106 So. 2d 188, Fla. 1958.
Maryland State Board of Barber Examiners v. *Kuhn*, 270 Md. 496, 312 A.2d 216, 1973.
McLaughlin v. *Florida*, 379 U.S. 184, 1964.
Miller v. *California*, 413 U.S. 15, 1973.
National League of Cities v. *Usery*, 426 U.S. 833, 1976.
New York Times v. *Sullivan*, 376 U.S. 254, 1964.
Ortwein v. *Schwab*, 410 U.S. 656, 1973.
Pacific States Box & Basket Co. v. *White*, 296 U.S. 176, 185, 1935.

People ex rel. Orcutt v. *Instantwhip Denver, Inc.*, 176 Colo. 396, 490 P.2d 941, 1971.
Rescue Army v. *Municipal Court of Los Angeles*, 331 U.S. 549, 571, 1947.
Roe v. *Wade*, 410 U.S. 113, 1973.
Ross v. *Moffitt*, 417 U.S. 600, 1974.
S. Bloom, Inc. v. *Makin*, 61 Ill. 2d 70, 329 N.E.2d 213, 1975.
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1, 1973.
Southern Pacific Co. v. *Jensen*, 244 U.S. 205, 221, 1917.
Town of Caledonia v. *Racine Limestone Co., Inc.*, 266 Wis. 475, 63 N.W.2d 697, 1954.
United States v. *Kras.*, 409 U.S. 434, 1973.
Village of Arlington Heights v. *Metropolitan Housing Development Corporation*, 429 U.S. 252, 1977.
Village of Belle Terre v. *Boraas*, 416 U.S. 1, 1974.
Virginia State Board of Pharmacy v. *Virginia Consumer Council*, 425 U.S. 748, 1976.
Whalen v. *Roe*, 429 U.S. 589, 1977.

For references cited in this article, see p. 883.