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INTRODUCTION

JUDICIAL PROCESS AND THE DECLINE OF TWENTIETH-CENTURY AMERICAN LIBERALISM

In a clear statement of the obvious, a Senate subcommittee charged with improving judicial machinery recently observed, "Throughout the late 1960's and throughout this decade, a litigation explosion has occurred. The result is greatly overburdened courts with significant backlogs of cases at all levels."[1] This heavy caseload of the courts, combined with the growing social and political impact of court decisions, has prompted the most vigorous inquiry into the state of judicial administration and the nature of judicial processes in two generations.[2] Dissatisfied with the current delivery of justice by the judicial system, critics of all stripes have advocated extensive reforms in most areas of the judicial process.

The current concern with judicial processes results from two interrelated developments, one a matter of practical judicial administration, the other a product of more latent, but perhaps more important, changes in the nature of American politics. At its surface, the demand for judicial reform stems from overburdened court dockets, themselves a consequence of a proliferation of litigation. But this explosion of litigation arises from a fundamental shift in the perceived role of the judiciary in American politics and society.

Horror stories of overworked courts and delayed justice fill the folklore of the legal profession. As more and more Americans have sought relief in the courts, the country's

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1 S. REP. NO. 95-781, 95th Cong. 2d Sess. (1978) 1.

2 In an example of the wide-ranging discussion of the need for judicial reform, the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association jointly sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976. The major addresses delivered at the Conference are reprinted in 70 F.R.D. 79 (1976). *See also* ABA, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (1976). For an example of Congressional concern with judicial reform, *see State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong. 1st Sess. (1977).

judicial system at both the state and the federal levels has been strained to the breaking point. Paradoxically, this frequent recourse to the courts has made the delivery of justice its first victim. In many states, litigants must wait three, even four, years to get a jury trial. According to the Administrative Office of United States Courts, in mid-1978 over 16,000 civil cases — or roughly 10 percent of the total pending caseload — had been pending in federal district court for three years or more.[3] Much of pre-trial strategy now revolves around the courts' backlog. Parties are forced to settle not with an eye toward the merits of the case but with a recognition of the diminished value of the claim by the end of long-delayed proceedings.

This increased resort to the courts reflects a number of underlying legal, social, and political changes. Primary among these is the willingness of courts — at all levels — to assume larger roles as social arbiters and policy formulators. Sometimes characterized as the adoption of an "activist" attitude, this shift in the function of courts, particularly in the types of cases decided and in the techniques employed for resolving those cases, has caused the courts to exercise powers and make decisions normally reserved for other political bodies. Thus in Boston, federal District Judge W. Arthur Garrity, in implementing a school desegregation decision, placed the Boston public school system under federal receivership.[4] The federal court thereby assumed the primary responsibility for administering the city's school system, a job previously considered the domain of the city's elected School Committee.

Former federal District Judge Frank M. Johnson's actions in Alabama also show the new willingness of courts operating at the local level to adopt responsibility and authority traditionally exercised by other government branches. Ruling on a challenge to the operation of the state's mental hospitals, Johnson issued a far-reaching decision which required a thorough overhaul of the state's mental institutions.[5] Augmented by a list of eighty-

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3 [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 68 table 22.

4 The courts' supervision of Boston school desegregation began in 1974 and continues in 1979.

5 Wyatt v. Stickney, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *enforcing*, 325 F. Supp. 781 (M.D. Ala. 1971). *See also* Comment, *Wyatt v. Stickney and the Right*

four guidelines, Johnson's order revised the state's commitment laws. More importantly, the Judge announced his willingness to implement mental health reform by judicially diverting funds from nonessential state functions. He warned that lack of funding would be no excuse for failing to meet the standards he had outlined, and he promised to see that the reforms were adequately funded. In doing so, Judge Johnson assumed allocational responsibilities usually exercised by the elected state legislators.

Johnson adopted a similar expansive view of the role of the judiciary in a 1976 landmark decision involving Alabama's prisons.[6] Citing the "massive constitutional infirmities" that existed within the state prison system, Johnson issued a detailed set of forty-four minimum standards which the state must meet or else Johnson would close the prison system completely. In the meantime he prohibited the state penitentiaries from accepting new inmates. Critics charged that the implementation of Johnson's decision would cost the state $60 million, requiring the diversion of state funds from other areas authorized by the legislature.

These decisions of Garrity and Johnson are admittedly extreme examples, but they represent a broader, more pervasive pattern according to which courts have assumed allocational and administrative decisions historically left in the hands of representative assemblies or their agents. As the public — or the members of the bar representing aggrieved parties — has seen the willingness of the courts to move into these areas, it has increased its demand on the courts to entertain cases and supply remedies which would normally lie with other bodies.

The growth of litigation also results from the increased role of government itself in American society.[7] Government agencies, both federal and state, continue to extend their influence over more facets of daily existence. Even the recent moves toward

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of Civilly Committed Mental Patients to Adequate Treatment, 86 HARV. L. REV. 1282 (1973). For a general discussion of Johnson's actions in *Wyatt v. Stickney* and *Pugh v. Locke*, *see* R. KENNEDY, JUDGE FRANK M. JOHNSON, JR. 215-57 (1978).

6 Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

7 For a good recent discussion of some of the political and legal problems created by the growth of government, *see* L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE (1979).

deregulation seem inadequate to offset increased supervision of American business and society by agency administrators employing extensive guidelines. The *Federal Register* must be read almost as frequently as the local daily newspaper. Yet agency action frequently occurs under the authorization of vague legislative pronouncements. Consequently, each new set of regulations, or each new application of them, must be examined against the background of legislative ambiguity. All of this, of course, means added burdens on the courts, which must determine the propriety of each contested agency action. Thus, as the number of agency decisions increases, so does the courts' caseload.

Perhaps the most crucial factor shaping the increased resort to the courts — and the one with the most important long-term consequences — is the growing dissatisfaction and disillusionment with the ability of representative assemblies, at whatever level, to reflect accurately, efficiently, and effectively the desires of the people whom they presume to represent. Over the past decade, public opinion polls have shown a consistent decline in the American public's belief in the efficacy of Congress to solve major problems or protect private rights. Political scientists speculate that widespread disaffection with representative institutions is in large part responsible for low voter turnout in recent elections.[8] In the view of many Americans, their representatives are more the voices of large, organized special interests and less the spokespersons for individual constituents. In short, there is a growing feeling among the public that many of its elected officials and their agents cannot or will not adequately serve the individual interests and needs of the members of society.

No longer believing in the legislature's ability to protect their interests, Americans have turned to the judicial branch for the resolution of these issues. Acting on their own behalf to further their own interests, Americans have saddled the courts with

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8 For a discussion of the problems of legitimacy, declining voter turnout, and voter disaffection, *see, e.g.*, W. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS (1970). *See also* A. HADLEY, THE EMPTY POLLING BOOTH (1978); E. LADD, JR., WHERE HAVE ALL THE VOTERS GONE? (1978); N. NIE, S. VERBA & J. PETROCIK, THE CHANGING AMERICAN VOTER (1978).

questions historically left for legislative determination. It is not surprising, therefore, that courts find themselves bogged down in complex allocational decisionmaking.

This loss of confidence in elected representative bodies which has precipitated an unprecedented recourse to the courts is an important part of a profound change in the nature of American politics. The late 1970s have witnessed the disintegration of the theory of twentieth-century American liberalism. Emerging from the social and intellectual turbulence of the Progressive period, this form of liberalism came of age during the New Deal and showed its complete dominance in the philosophy underlying the politics of the 1950s and 1960s.[9] At its core, twentieth-century liberalism rested upon the efficacy of interest group pluralism in providing political legitimacy and meeting social needs.[10] According to the theory, groups representing all segments of society and voicing the spectrum of individual needs competed in the political realm to secure government favor and protect private rights.

Several important assumptions provided the foundation for this political framework. First, the theory assumed that Americans were agreed upon underlying fundamental democratic values.[11] Because of this consensus, the intense competition among groups posed no threat to political stability. The battles would take place within clearly perceived, commonly shared boundaries. Democratic principles would thus escape ideological challenge from either the right or the left.[12]

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9 The various elements of the liberal framework may be found in discussions in the following: A. BENTLEY, THE PROCESS OF GOVERNMENT (1908); E. HERRING, GROUP REPRESENTATION BEFORE CONGRESS (1929); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951); E. LATHAM, THE GROUP BASIS OF POLITICS (1952); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); R. DAHL, WHO GOVERNS? (1961); N. POLSBY, COMMUNITY POWER AND POLITICAL THEORY (1963); D. RIESMAN, THE LONELY CROWD (1961); R. DAHL & C. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE (1953); V. O. KEY, THE RESPONSIBLE ELECTORATE (1966); S. M. LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS (1959); G. ALMOND & S. VERBA, THE CIVIC CULTURE (1953); T. LOWI, THE END OF LIBERALISM (1969); J. K. GALBRAITH, AMERICAN CAPITALISM (1956).

10 *See, e.g.*, R. DAHL, A PREFACE TO DEMOCATIC THEORY (1956); D. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

11 The classic statement of this view of consensus is found in L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955). *See also* R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION (1948); E. GOLDMAN, THE CRUCIAL DECADE – AND AFTER (1960).

12 The faith in the power of this consensus to triumph over the sort of ideological frenzies which had created Hitler's Germany and Stalin's Russia receives clear expres-

Furthermore, this consensus would ensure that the winning group's victory would be fully recognized by all the participants in the competition. After all, each group assented to the ground rules, which gave both the competition and the victory legitimacy.

Second, the liberalism-pluralism model assumed that the struggle to shape the actions of government took place among relatively equal competitors. According to this premise of "countervailing power,"[13] for example, big labor competed with big business to win the favor of big government. Likewise a mass consumer society imposed significant restraints on the business-related activities of all three of those segments. Similarly, in the purely political realm, well-financed and skilled organizations met each other on equal ground. A Republican President confronted a Democratic Congress led by a strong Senate Majority Leader. Northern liberal Democrats were always subject to checks from midwestern Republicans or conservative southerners.[14] Through the healthy competition of these political groups, a consensus policy would emerge, often taking the form of bipartisanship, as in the foreign policy goals of the late 1950s.[15] The conflicts among groups thus helped generate a new consensus, as American democracy moved in an inexorable march of progress.

Finally, twentieth-century liberalism assumed an ever-expanding set of resources.[16] One way to resolve the struggle among groups was to give each more. In the expanding economy of the post-World War II years, this approach seemed not just possible but even foreordained. America emerged from the war with the world's strongest economy. When they compared their postwar condition with that in the depression,

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sion in A. SCHLESINGER, THE VITAL CENTER (1949). *See also* D. BELL, THE END OF IDEOLOGY (1960).

13 The phrase comes from J. K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1956). *See also* E. LATHAM, THE GROUP BASIS OF POLITICS (1952).

14 *See, e.g.*, C. ALEXANDER, HOLDING THE LINE: THE EISENHOWER ERA 1953-1961 (1975); R. EVANS & R. NOVAK, LYNDON B. JOHNSON AND THE EXERCISE OF POWER (1966); D. BRODER, THE PARTY'S OVER (1972).

15 *See* E. GOLDMAN, THE CRUCIAL DECADE — AND AFTER (1960).

16 *See* W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY (1967).

Americans felt themselves rich. Everyone appeared to be doing better. The rich might be getting richer, but so were many others. In a growing economy, it seemed that the demands of others for a greater share could be met without diminishing that which individual Americans were already receiving.[17] The assumption of limitless resources reinforced the other elements of the liberal framework. By giving each group a little more — though perhaps not all it asked for — conflict could be minimized and the image of consensus reinforced.

In the judicial sphere, twentieth-century liberalism employed the same elements in support of a theory of judicial restraint. As the Hart & Sacks legal process materials[18] of the late 1950s pointed out, the legislature, not the court, was to have the primary responsibility for fashioning general policies affecting society. Never mind that the Warren Court frequently violated this theory.[19] Judicial problems were the fault of a few misguided judges, like Warren, who did not understand the court's proper role. The judiciary as an institution needed little change, in the opinion of law professors, because its institutional arrangements fit well with the reigning principles of liberalism. Courts were to engage in "reasoned elaboration"[20] from "neutral principles,"[21] themselves derived from the underlying political and social consensus.

Lyndon Johnson's Great Society voiced the ultimate expression of twentieth-century American liberalism.[22] His often quoted motto "Come let us reason together" epitomized the functioning of a shared consensus. Because Republicans and

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17 For an historian's account of this period written in the period's prevailing ideology, *see* E. GOLDMAN, THE CRUCIAL DECADE — AND AFTER (1960).

18 H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958).

19 For a critique of the Warren Court because of its failure to follow the prevailing ideology, *see* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

20 *See* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

21 Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961). *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

22 For excellent accounts of the Great Society within the context of the liberal framework, *see* D. KEARNS, LYNDON JOHNSON AND THE AMERICAN DREAM (1976); E. GOLDMAN, THE TRAGEDY OF LYNDON JOHNSON (1968); T. WICKER, JFK AND LBJ (1968); L. JOHNSON, THE VANTAGE POINT (1971).

Democrats — indeed all Americans for that matter — shared basic principles, compromise was always possible. With the right combination of persuasion and cajoling, equally vigorous adversaries could be brought to a common solution. There were no rigid ideological barriers incapable of being overcome. Through his civil rights, health, education, and employment programs, LBJ sought to shepherd the American consensus along the path of progress. He did so not by employing redistributive measures but by assuring each group a larger slice of the pie. And that, of course, required an ever-expanding pie. The Great Society was premised upon the belief that Americans could agree upon solutions to the imperfections in American society and could remove those blemishes by applying increased government resources acquired from an ever-expanding economy of unlimited potential.

Just as the Great Society epitomized the essence of twentieth-century liberalism, so too the Johnson years reflected the very tensions and contradictions which would lead to the decline of that theory. First, the group pluralism model itself came under challenge. Blacks in particular asserted that they had long stood outside the organizing framework. Other groups may have debated the proper role for blacks, civil rights leaders argued, but blacks themselves had never been a part of the group competition. Later in the 1960s, students, angered over the Vietnam War, voiced similar feelings, contending that they were being shut out of the struggle among groups. They took to the streets to express their rejection of the prevailing interest group theory. By the early 1970s, other groups, such as environmental and consumer organizations, joined the assault on interest group pluralism. The theory of countervailing power, they proclaimed, was at best a myth and at worst a clever device employed by large, powerful groups to help themselves retain their power and co-opt potential challengers.

These strident attacks on the effectiveness of group pluralism fractured the semblance of consensus that had dominated the political landscape.[23] The rise of the New Left and the challenge

23 For accounts of the disintegration of the consensus pluralism model, *see, e.g.*, W. O'NEILL, COMING APART (1971); J. HEATH, DECADE OF DISILLUSIONMENT (1975); S. LUBELL, THE HIDDEN CRISIS IN AMERICAN POLITICS (1971).

of George Wallace further caused many Americans to question just how broadly based the supposedly shared principles and interests really were. How could the guardsmen and the students at Kent State be agreed upon what America was all about? As more groups and individuals asserted that they were not parties to the struggles to shape government policy, it became more difficult to believe in any real consensus.

By the mid-1970s, the third central assumption of twentieth-century liberalism, that of limitless resources and an ever-expanding economy, had also come into question. Once again, the Johnson years had first exposed the fatal flaws. In seeking both to prosecute the Vietnam War and to create his Great Society — to have guns and butter — LBJ taxed the economy to its limit, generating a plethora of economic woes, the chief of which was stagflation. His actions showed in stark terms the problematic consequences of attempting a massive expansion of government spending without adopting some policy of redistribution. Resources simply were not infinite; at some point someone had to pay.

Gasoline lines, polluted air and water, and double-digit inflation soon brought home to the American people the consequences of following a philosophy of unlimited resources and uncontrolled growth. Economists began discussing the need for a new mentality, that of "small is beautiful."[24] Recognizing the finite nature of resources, President Carter called upon Americans to make sacrifices. Similar realizations in part motivated the "Proposition 13" attitude, which favored major cuts in government spending and taxing and provided a base for the presidential aspirations of California Governor Jerry Brown. Slowly the country came to the conclusion that the granting of government largesse in one area required the extraction of private costs in other areas, either through heavier taxes or increased inflation. Thus was a central tenet of liberalism undermined.

The quakes along each of these fault lines created ripples that reinforced disturbances in each of the other areas, generating a tidal wave of dissatisfaction with the ascendant theory. The

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24 E. SCHUMACHER, SMALL IS BEAUTIFUL (1973).

recognition of limited resources heightened the level of competition between groups and reduced the likelihood of consensus. Economic difficulties likewise made more bitter the cries of those who felt themselves outside the competing group power structure. In the end the waves of discontent crashed over the model, leaving it in shambles. Nothing has yet been reconstructed from the ruins.[25]

The disintegration of the liberal framework has had a number of important implications for American politics and, concomitantly, for the courts. The demise of any effective operating theory of politics has made government by the legislature difficult if not impossible. The long-term consequence of the fragmentation of consensus has been legislative stalemate. During the Nixon-Ford years, this lack of productive leadership was frequently attributed to institutional conflicts between a Democratic Congress and a Republican President. But the inability of the Carter administration to secure the passage of its legislative program has revealed that the problems run deeper. Without a theory to guide it, at least implicity, Congress has bogged down in debates over energy, foreign policy, and economic matters, leaving even less controversial matters to fall by the wayside. Because of the lack of a clearly perceived consensus — both on how politics should function and on how individual issues should be resolved — measures desired by sizeable components of the electorate remain stymied. And that leaves those people even more disenchanted with the legislative branch.

The lack of consensus and the disbelief in the efficacy of large group pluralism have led to the creation of a multitude of single-issue interest groups. Operating without any overarching view of politics or long-term social stability, these single-interest groups frequently hold political careers and more comprehensive policies hostage to their desires on a given matter. Reject-

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25 Some of the major attempts at constructing a new political and legal framework for post-liberal society include R. UNGER, KNOWLEDGE AND POLITICS (1975); R. UNGER, LAW IN MODERN SOCIETY (1976); J. RAWLS, A THEORY OF JUSTICE (1971); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); F. A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973-1979). *See also* P. STEINFELS, THE NEOCONSERVATIVES (1979).

ing a broader view of consensus or group competition, these organizations tenaciously and effectively pursue their narrow goals and make the creation and implementation of more broadly based programs difficult. Yet this same failure of the legislature to deal with more extensive problems leaves even more people dissatisfied with the performance of representative bodies.

The emergence of single-interest groups also reflects a general tendency toward more combative assertion of individual and group rights. Without a shared understanding of the nature and direction of American politics and society, the incentives for sacrifice toward common goals diminish. Instead, individuals assert their rights more frequently and resolutely. The realization of the limited nature of resources only exacerbates the problem. Even in the face of critical energy problems, Americans have been unwilling to make significant sacrifices. One of President Carter's major goals, quite understandably, has been to build a new consensus, hoping thereby to resolve the stalemate which his programs have encountered and to commit the country to an agenda for the 1980s.

Thus the destruction of America's underlying political theory has led to legislative stalemate, increased public dissatisfaction with the legislature, renewed emphasis on the importance of single issues, and increased assertion of individual rights. All of these have had considerable impact on the nation's judicial system. Taken together, the decline of individual belief in the efficacy of representative decisionmaking and the demise of interest group pluralism as a workable theory of representative government have caused Americans to turn from the legislatures to the courts as the arena for furthering individual interests and group goals.

Although dissatisfaction with the judiciary is frequently expressed, faith in the ability of the courts to resolve difficulties remains higher than confidence in legislative bodies. Even though a judicial decision may take time, aggrieved individuals apparently feel that they will receive a fuller consideration of their desires and that appropriate government action will more likely be taken if they go to the courts than if they turn to the legislatures. Likewise, with the emergence of the class action as

an effective device for litigation, groups who believe that their interests are inadequately served through a representative process dominated by special interests seem to feel that they not only should receive a full hearing of the merits of their complaints but also have the prospect of vigorous prosecution of their cause if the courts find in their favor. Courts, not legislatures, have thus become the primary forum for establishing and vindicating broad social rights and for making allocational decisions about government largesse and power. The decline of twentieth-century liberalism has transformed courts into surrogate legislatures.

Administrative law is the area of legal doctrine that most clearly reflects the changed view of the respective roles of courts, legislatures, and policymaking.[26] As Professor Stewart has observed,[27] administrative law has been transformed from a transmission belt model — the agency merely carries out the will of narrowly-defined legislative intent in particular cases — into an interest representation model. Accordingly, agencies, and courts in reviewing agency action, are to involve the full range of affected interests in administrative decisionmaking. Failure to do so may result in judicial reversal of agency action, or the reviewing court may engage in its own method of balancing competing group interests. Thus by virtue of judicial requirements, the administrative agency has been converted into a *de facto* legislature. The usual pressures affecting legislative decisions have been shifted to the forum of the agency.

Administrative law, however, is not the only area in which traditional legislative techniques have been adopted. In a growing number of cases, the courts themselves have seen the context of litigation as the proper place for invoking that represen-

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26 For a discussion of the changes in this area, *see* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667 (1975), L. DODD & R. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE (1979); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1975); Polsby, *F.C.C. v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion* in THE SUPREME COURT REVIEW 1978 (P. Kurland & G. Casper eds. 1979); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court* in THE SUPREME COURT REVIEW 1978 (P. Kurland & G. Casper eds. 1979).

27 Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667 (1975).

tation and competition of interests normally associated with the legislature. Professor Chayes has pointed out that a new model of litigation is emerging, with the trial judge becoming a policy planner and manager.[28] Under the traditional method of litigation, disputes were bipolar, retrospective, and self-contained. They involved interdependent rights and remedies and were party-initiated and party-controlled. Relief, usually in the form of damages, was most often a one-time remedy.

The developing style of litigation, on the other hand, emphasizes the intervention of all relevant parties and seeks to extend those groups as broadly as possible. Frequently the relief sought is prospective and continuing as in injunctions, thereby disconnecting the right and the remedy. Further, instead of being a one-shot determination, the final decree has become a complex on-going regime of performance and judicial supervision. Finally, with the increased responsibility of the judge for supervising court mandates, the judge has taken control of the case from the parties and has become a personal participant himself. Chayes rightly concludes that litigation has become an explicitly political form and the court a visible arm of the political process.[29] With the decline of an effective theory of legislation, the courts themselves have become legislatures.

This shift in the actual and perceived role of courts gives the primary thrust to the judicial process reform movement. The first response has been an effort to make the judicial system function more efficiently. At federal and state levels, reformers have worked to enact procedural and manpower changes to accommodate the increased demand for judicial services. Last October, for example, Congress created 152 additional federal judgeships to handle the burgeoning caseload.[30] But the House Judiciary Committee, in reporting out the bill, noted that the addition of new judges by itself would not solve the problems facing the federal courts. Rather what is needed is "not simply more manpower, but alternative and innovative approaches to attacking court congestion and delay."[31]

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28 Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976).

29 *Id.* at 1304.

30 Pub. L. No. 95-486, 92 Stat. 1629 (1978).

31 H.R. REP. No. 95-858, 95th Cong. 2d Sess. 2 (1978).

One solution combining both additional manpower and alternative approaches is the increased use of special federal judicial officers. The Bankruptcy Act enacted by the Ninety-fifth Congress,[32] for example, considerably expanded the number and role of federal bankruptcy judges. The Federal Magistrate Act recently passed by Congress also seeks to reduce the workload on federal district judges by enlarging the responsibility of federal magistrates, delegating to them fact-finding and issue-resolving functions normally exercised by the trial judge.[33]

A more fundamental change designed to reduce the caseload of federal courts lies in the proposal to abolish diversity of citizenship jurisdiction in the federal courts. Hotly debated last year, diversity has again sparked vigorous controversy in the Ninety-sixth Congress, where opponents of its abolition have successfully blocked action for this session.[34] The debate over diversity points to a tension that permeates many of the reform efforts directed at easing congestion and expediting litigation in the federal courts: the fear that the effort to achieve efficiency, at least in pure numbers, will override a deeply held belief that the federal courts have a special obligation to remain an open forum for the vindication of citizens' rights.

The general fear that increased efficiency in numbers may result in less justice is in part responsible for the "innovative approaches" prong of judicial reform. The hope is that these new techniques will lessen the load on the trial courts while preserving full judicial process for the protection of rights. An example of such an approach to solving court congestion and delay is the use of various arbitration procedures in lieu of full-scale litigation.[35] Designed to help parties reconcile their differences without requiring extensive judicial intervention, arbitration allows the resolution of conflicts without consuming extensive judicial resources, thereby freeing the courts to hear only more

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32 Pub. L. No. 95-598, 92 Stat. 2549 (1978).

33 For a discussion of the Magistrate Act, *see* Peter G. McCabe, *The Federal Magistrate Act of 1979* in this issue of the JOURNAL.

34 For discussions of diversity jurisdiction, *see* John P. Frank, *The Case for Diversity Jurisdiction* and Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective* in this issue of the JOURNAL.

35 For a discussion of arbitration procedures, *see* Paul I. Perlman, *Final Offer Arbitration: A Pre-trial Settlement Device* in this issue of the JOURNAL.

difficult, more complex cases. Arbitration also enables parties to pursue their claims without the substantial expenses of a full-scale trial.

Another innovative approach suggests the use of specialized courts to hear issues whose resolution would be difficult for lesser experienced, general trial courts. The Court of Claims and the Tax Court present existing models. The proposed "science court" would assist much of today's complex litigation by deciding those components of a case that involve issues of scientific uncertainty.[36] Relying upon the expertise of scientists as judges, such a court would factor out the purely scientific issues from those involving questions of value. These decisions on scientific matters would then be available for use in normal judicial proceedings.

The creation of specialized courts may also be a partial solution to the heavy burden on the federal courts of appeals. Efforts to create a new circuit by dividing the Fifth Circuit failed last year, as Congress decided instead to supply additional judges. Yet the large number of judges in the Fifth and Ninth Circuits has caused major administrative difficulties and has raised the specter of conflicting en banc decisions within circuits, since en banc sittings may no longer involve all the judges in the circuit. Attracted by the idea of specialized tribunals, the Chief Justice has offered a different solution to the appellate courtload: the creation of a separate circuit, the Court of Appeals for the Federal Circuit, whose primary responsibility would be to hear certain questions of federal law.

The effort to improve judicial efficiency through procedural changes and innovative techniques is only one response to the new function of courts. A second approach seeks to make courts more directly like legislatures by making them more accountable and by opening them up to a broader range of interest representation.

Proposals for the merit selection of judges tends to combine these two thrusts.[37] As judges make more general allocational

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36 For a discussion of the science court proposal, *see* Jeffrey N. Martin, *Procedures for Decisionmaking Under Conditions of Scientific Uncertainty: The Science Court Proposal* in this issue of the JOURNAL.

37 *See* the discussions of the issues surrounding merit selection in *Report Card on Judicial Merit Selection,* 37 CONG. Q. WEEKLY REP. 189-94 (1979).

decisions, who those judges are and, concomitantly, how they are chosen become important questions. In the Ninety-fifth Congress reformers sought to require the president to establish procedures and guidelines for the selection of federal district judges, but the legislation conferees finally settled upon made the provisions completely voluntary. Stronger measures have been introduced in the Ninety-sixth Congress. In an effort to use merit selection to increase the representation of women and blacks on the federal bench, the Justice Department earlier this year announced the creation of merit selection commissions in twenty-four states to make recommendations for federal district judgeships. The Department suggested that the commissions include lawyers and non-lawyers, persons of both sexes, and members of minority groups.

Expressing a similar concern with the accountability of federal judges, the Senate Judiciary Committee in the last session of Congress reported out a bill to establish a Council on Judicial Tenure and to create a system for investigating and resolving allegations that the conduct of individual judges is inconsistent with the good behavior required under the Constitution.[38] The legislation would also have established a procedure in addition to impeachment for the retirement of disabled judges and for the efficient removal of judges whose conduct failed to meet the constitutional standard.

Suggestions for reform of class action procedures present another area where the interest representation facet of the court's role as surrogate legislature is important. Suits by classes in the courts have come to replace competition by groups in the legislatures. It is not surprising, therefore, that reformers have sought to improve the use of the class action technique, opening it up to more groups and more claims. A chief object of reformers has been the Supreme Court's statements that class members cannot aggregate claims to reach the appropriate jurisdictional amount. The Justice Department has proposed a massive reworking of class action rules and has suggested the creation of a "consumer class action" where individual claims are small.[39] At the same time,

38 S. REP. No. 95-1035, 95th Cong. 2d Sess. (1978).

39 For a discussion of the Justice Department proposal, *see* Patricia L. Wells, *Re-*

other reformers have worked to draft state class action rules, allowing the state courts to handle what has historically been predominantly a federal device.[40]

Unfortunately, in the debates over judicial reform of whatever type, few scholars or legislators have either perceived or addressed the fact that the courts have now become surrogate legislatures. The central questions — whether the nation's judiciary is to function as a court or as a legislature or as both — have been ignored. Little attention has been given to the serious difficulties such a drastic change in the roles of the branches of government may create.

At one level, the failure to recognize the real nature of the problems confronting the judiciary may mean that a modified form of interest representation will be incorporated into judicial processes without careful scrutiny. There seems little reason to believe, however, that the same drawbacks which plague this technique in its purely legislative context will vanish once the approach is employed by the judiciary. It may be that the use of interest representation will only bring confidence in the courts down to the low level of confidence in the legislatures.

At a deeper level, however, failure to deal explicitly with the function of courts as surrogate legislatures may only compound the difficulties the judicial system faces. Created to provide limited adjudication of narrow individual conflicts, courts are poorly equipped to serve as mini-legislatures; their constitutional and institutional structures remain that of courts. For the courts to function properly as surrogate legislatures there must be changes not just in surface procedure but in the basic constitutional and legal theory upon which the courts exercise their power as well. Any other approach can only undermine the legitimacy of the judiciary.

It may be that such changes in the fundamental theory of American courts are now necessary. Whether they are is not the issue here. Rather, the question is whether the impetus for judicial reform will be considered directly for what it is, an ef-

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forming Federal Class Action Procedure: An Analysis of the Justice Department Proposal in this issue of the JOURNAL.

40 For a model state class action statute, *see* Richard Alpert, *The Uniform Class Actions Act: Some Promise and Some Problems* in this issue of the JOURNAL.

fort to make courts function as legislatures, or whether the reform of judicial processes will continue to adopt the traditional language of American judicial theory while in fact working to transform that theory. The current proposals for judicial reform are welcome attempts at solving truly pressing problems of the judicial system. But they must be seen as only temporary measures, and these cosmetic changes must not obscure the underlying issues. In the end, the legitimacy of the American judiciary is at stake.

Guy Paul Land

COURT REFORM AND ACCESS TO JUSTICE: A LEGISLATIVE PERSPECTIVE

ROBERT W. KASTENMEIER*
MICHAEL J. REMINGTON**

Responding to the increasing caseload of the courts, members of the judicial branch and the bar have dominated the discussion of reforms designed to facilitate the proper functioning of the nation's judicial system. In this article, Congressman Kastenmeier and Mr. Remington present a view from the legislative branch of the essential elements of judicial reform. Arguing that expeditious resolution of disputes is central to the right of access to justice, the authors survey the major legislative proposals before the Ninety-sixth Congress and offer their suggestions for improving the delivery of justice.

> . . . and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite the same degree as the courts.[1]

Introduction

The federal judicial system has in the past served admirably and effectively to meet its constitutional and statutory mandates. The general mandate of this system, and indeed of any court system, is to secure "the just, speedy and inexpensive determination of every action."[2] In this clear statement from the Federal Rules of Civil Procedure, there are three basic themes: time, economy, and quality of justice. Today, the federal judicial system is beset by problems in all three of these areas: delay caused by rising caseloads, complex procedures, irrational organization, and insufficient support services; spiraling costs caused by inflation, overly litigious lawyers, and un-

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1 Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904) (Holmes, J.).

2 FED. R. CIV. P. 1; *see also* FED. R. CRIM. P. 2.

justifiable expenses; and unfair decisions caused by the pressures placed on judges who must cope with the rising torrent of litigation.[3] The problem of delay is not a new theme in the administration of justice, nor is it a problem peculiar to this country.[4] In 1215, King John in the Magna Carta promised that "To no one will we . . . delay right or justice."[5] But in 1839 an English legal commentator complained that this had become an empty promise: "No man, as things now stand can enter into a Chancery suit with any reasonable hope of being alive at its termination, if he has a determined adversary."[6] Jeremy Bentham, one of the great law reformers, referred to delay as one of the "burdens of judicial procedure."[7]

Bentham's statement is of as much validity today in the American judicial system as it was in nineteenth-century England. Several conferences and commissions[8] and a Department of Justice report[9] documented this fact and have discussed its effects on litigation in the federal judicial system. If a litigant who has had his rights abused must wait three or four years for

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3 *See, e.g., Hearings on the State of the Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. (1977) [hereinafter cited as *Hearings on the State of the Judiciary*]; U.S. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 1-4 (1977) [hereinafter cited as NEEDS OF THE FEDERAL COURTS]; Addresses to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, *reprinted in* 70 F.R.D. 79 (1976) [hereinafter cited as Pound Conference]; H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3-4 (1972) [hereinafter cited as FRIENDLY].

4 *See, e.g.,* Damaska, *A Foreign Perspective of the American Judicial System* in STATE COURTS: A BLUEPRINT FOR THE FUTURE 237, 238 (T. J. Fetter ed. 1978); *see* the six-part series of articles written by the French Minister of Justice Alain Peyrefitte, *Pour une justice moderne,* Le Monde, Jan. 9-15, 1979.

5 MAGNA CARTA, ch. 40 (1215).

6 Cited in Lord Bowen, *Progress in the Administration of Justice during the Victorian Period* in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516 (1907).

7 2 THE WORKS OF JEREMY BENTHAM 19 (J. Bowring ed. 1843). About the same time, Alexis de Tocqueville noted in his historical analysis of the *Ancien Regime* in France that "litigation was costly, complicated, and unconscionably protracted." DE TOCQUEVILLE, THE OLD REGIME AND THE FRENCH REVOLUTION 116 (S. Gilbert trans. 1955).

8 *See, e.g.,* A.B.A., Report of Pound Conference Follow-up Task Force, *reprinted in* 74 F.R.D. 159 (1976) [hereinafter cited as Pound Conference Follow-up Report]; Pound Conference, *supra* note 3; U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as HRUSKA COMMISSION]; U.S. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND REPORT].

9 NEEDS OF THE FEDERAL COURTS, *supra* note 3.

relief — as too often is the case in many state and federal courts — that person is denied effective access to justice.[10] What good is the sacred writ of habeas corpus if the petitioner must serve most of his sentence before a determination of his rights? What good are Social Security benefits for the elderly or the disabled, if they must wait years for a judicial determination of their disabilities?

Similarly, justice that costs too much is not effective or just. It does not take an economist to understand that where the amount in controversy is less than the cost of resolving the dispute, there is no effective access to justice. With spiraling legal fees and costs of litigation, not to mention increasing costs related to running American courts which are borne by the taxpayer, the effective resolution of "minor" disputes suffers. In Los Angeles, a major law firm tells clients that it cannot provide quality legal representation in suits involving under $100,000.[11] This may be somewhat exaggerated, but it starkly suggests that our existing system may not be available for individuals with legitimate claims involving relatively small amounts of money.

The sad fact today is that the twin demons of cost and delay are asphyxiating our courts, both state and federal. This has pernicious effects on the quality of justice rendered by these courts. In spite of the fact that courts have established a strong reputation as fair and impartial arbiters, congestion and costs are having a deleterious effect on their work product.[12] Although fairness is not easily quantifiable, it is apparent to even a casual observer that judges are being forced to adjust their work habits to meet the mounting pressures. They render many decisions from the bench, without giving their reasons and without the benefit of oral argument.[13]

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10 On June 30, 1978, 16,054 civil cases had been pending in federal district courts for three years or more. This represents a shocking 10.2% of the total pending civil case load (excluding land condemnation cases) and is a 35.6% increase over the previous year. [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 68 table 22.

11 *Hearings on the Dispute Resolution Act (S. 957) Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 32 (1978) (statement of Ronald Olson).

12 *Hearings on the State of the Judiciary, supra* note 3, at 242-54 (statement of Robert H. Bork).

13 One circuit court of appeals decides over half of its appeals without benefit of

This contraction of quality has not gone unperceived by either the public or those knowledgeable in the law. A recent survey — complimented for the conscientious manner in which it was conducted[14] — concluded that the general public and local leaders are dissatisfied with the performance of our judicial institutions.[15] Only 29 percent of the general public indicated a high degree of confidence in the federal courts;[16] only 23 percent had great faith in the state courts.[17] The survey also found that the more knowledgeable and experienced a person, the more likely that he would have an unfavorable opinion of courts.[18] The seriousness of the problem, in the public's mind, is reflected in the finding that Americans consider efficiency in the courts equally important as pollution, and more important than white collar crimes, ability of schools to provide a good education, and threat of war.[19] The public's high level of concern is matched by a willingness to commit resources to solving the problems. Seventy-four percent of those polled would commit their tax dollars to getting the best possible people to serve as judges; 66 percent want to develop ways to settle minor disputes without going through formal court proceedings; 64 percent would make certain that courts have adequate facilities for those who must use them.[20]

Confronted by this evidence, the political question arises: what is the United States Congress to do about problems affecting our justice system. Initially a general or philosophical approach is needed. Then, a specific legislative agenda can be formulated to complement the theoretical framework.

First, justice is indivisible. Under our constitutional and

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hearing oral arguments. Hayworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257, 281.

14 *See, e.g.*, Friendly, *Judging the Judges*, in STATE COURTS: BLUEPRINT FOR THE FUTURE 70 (T.J. Fetter ed. 1978).

15 *See* the study conducted by prestigious public opinion analysts, Yankelovich, Skelly and White, Inc., *The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders*, in STATE COURTS: BLUEPRINT FOR THE FUTURE 5-69 (T.J. Fetter ed. 1978); *see id.* at 51 table V.1.

16 *Id.*

17 *Id.*

18 *Id.* at 46-49 tables IV.18-IV.23.

19 *Id.* at 32 table IV.1.

20 *Id.* at 56 table IV.1.

federal system, the legislative, executive, and judicial branches of both the state and federal governments must work together to ensure respect for the Constitution and to promote fair and equal application of the laws of the United States.[21]

Second, we are dealing with a total environment. Court-related problems are not merely lawyer problems, or judge problems, or law enforcement problems, they are people problems.[22] Law and government work together on behalf of the citizens and residents of this country. Without their support, democratic institutions lack all authority to act. In this regard, the needs of the poor, powerless, and underprivileged — individuals whose desires have generally been underrepresented in the legislative and executive branches and whose rights often have been vindicated in the anti-majoritarian judicial branch — are of utmost importance.[23]

Third, the crisis in the federal courts is essentially a resource allocation question. We are dealing with a finite resource which must be allocated to those needing it the most in our society. Four responses are available to the legislator and one further response is available to litigants and their legal counsel:

(1) *Expansion* of the resource;
(2) *Substitution* for the scarce resource by redirecting litigation to alternative dispute resolution institutions, such as

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21 U.S. CONST. art. VI, § 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

22 Joiner, *Lawyer Attitudes toward Law and Procedural Reform* in COURT CONGESTION AND DELAY 60 (G. Winters ed. 1971).

23 *See, e.g.*, the admonition of Judge A. Leon Higginbotham, Jr., to the participants at the Pound Conference:

> I wish this conference well. I hope it is successful. But I also hope that the fruits of its success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this — the weak, the poor, the powerless, those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. . . . Let us not forget them. Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

A. L. Higginbotham, The Priority of Human Rights in Court Reform, Pound Conference, *supra* note 3, at 159.

state courts, magistrates, arbitrators, mediators, ombudsmen, or neighborhood justice centers;
(3) *Conservation* of the resource by eliminating inefficiencies or by simplifying procedures and threshold barriers;
(4) *Rationing* the resource by limiting availability to all litigants or by barring access altogether for specific groups of individuals;[24] and
(5) *Avoidance* of the resource entirely.[25]

In using these techniques, members of the House and Senate can strive for a rational, consistent, economical, and comprehensible judicial system. We can be vigilant in avoiding contradictory and overlapping legislation. And we can set priorities and use considered judgment to solve court-related problems and promote access to justice.

In formulating a national program for the delivery of justice, not all efforts should be concentrated on any one of the five techniques, nor should they be focused entirely on the federal judiciary.[26] The state courts play an extremely important role in our justice system. They are closer to the people and their problems; there are fifteen times the number of state judges as federal; the state judges are frequently more flexible and innovative than the article III federal judiciary.[27] Let us now turn

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24 The terminology for the first four types of responses was used by Professor Burt Neuborne who eloquently represented the views of the American Civil Liberties Union during the House Hearings on the State of the Judiciary and Access to Justice. *Hearings on the State of the Judiciary, supra* note 3, at 112-18.

During these same Hearings Judge Shirley Hufstedler seconded Professor Neuborne's analysis by explaining that Congress "must match the demands against the resources, assign priorities based upon an evaluation of those needs, and ration access accordingly." *Id.* at 149. *See generally* Posner, *An Economic Approach to Legal Procedure and Judicial Administration,* 2 J. LEGAL STUD. 339 (1973); Landes, *An Economic Analysis of the Courts,* 14 J. L. & ECON. 61 (1971); Hazard, *Rationing Justice,* 8 J. L. & ECON. 1 (1965).

25 This last technique recognizes that the spectrum of the available processes for dispute resolution stretches all the way from formal adjudication to total avoidance. Sander, *Varieties of Dispute Processing,* 70 F.R.D. 111, 114 (1976).

26 *Hearings on the State of the Judiciary, supra* note 3, at 112, 177 (statements of Burt Neuborne and Robert J. Sheran); *see generally,* Sheran & Isaacman, *State Cases Belong in State Courts,* 12 CREIGHTON L. REV. 1 (1978) [hereinafter cited as *Sheran & Isaacman*].

27 Address of Warren E. Burger to the Second National Conference of the Judiciary (March 19, 1978), Williamsburg, Va., *reprinted in* STATE COURTS: A BLUEPRINT FOR THE FUTURE 284, 285 (T.J. Fetter ed. 1978); Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

to the five available responses to the ubiquitous overload in our judicial system and its insidious effects on that system.

I. EXPANSION

One of the most popular suggestions for reform is expansion of the number of judges. In this context, the Ninety-fifth Congress passed legislation creating 117 new district judgeships and 35 new circuit judgeships.[28] Today, there already are several proposals to create still more new districts and further judgeships.[29]

In its report, the House Judiciary Committee found that the federal judiciary cannot be expanded indeterminably without impairing its high quality.[30] What has been accomplished by a relatively small and intimate group of individuals will not necessarily be accomplished by a large bureaucracy of faceless federal judges. For one thing, it is likely that recruitment of qualified individuals will be made more difficult as the federal judiciary increases in size. Equally important, expansion of the resource does not cure the malady of court overload.[31] Rather, as in the energy area, expansion has its limits as a solution. Lawyers and litigants will seize upon the time of the new judge in town, who will quickly become overloaded. Already, for example, the Department of Justice has asked Congress for more

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28 Pub. L. No. 95-486 § 1(a), § 3(a), 92 Stat. 1629-30, 1632 (1978). This bill was approved by the President on October 29, 1978.

29 *See* H.R. 2505, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1003 (daily ed. Feb. 28, 1979), a bill to create a new judicial district for the southwestern district of California; H.R. 3714, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H2354 (daily ed. Apr. 25, 1979), a bill to create a new judicial district for the southwestern district of New York.

30 *See* H.R. REP. No. 95-858, 95th Cong., 2d Sess. (1978). This argument was first made by Felix Frankfurter in 1928. He observed:

> A powerful judiciary implies a relatively small number of judges. Honorific motives of distinction have drawn even to the lower federal bench lawyers of the highest quality and thereby built up a public confidence comparable to the feelings of Englishmen for their judges. Signs are not wanting that an enlargement of the federal judiciary does not make for maintenance of its great traditions. . . .

Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 515 (1928). It must be admitted that Frankfurter's bald assertion — for the last sixty years uncritically accepted by legal commentators — has never been supported by empirical evidence.

31 *See* H.R. REP. No. 95-893, 95th Cong., 2d Sess. (1978).

prosecutors to pursue cases in the new courts.[32] Thus, a new judgeship — important as it may be to protecting federally created rights and to enforcing federal laws — is a bit like a parking lot built to solve the problem of traffic congestion in an expanding downtown area. Soon the lot will be full.

In addition, creation of a federal judgeship is an irreversible decision. A judge appointed pursuant to article III of the Constitution possesses lifetime tenure and therefore is removable from office only by impeachment. A decreasing caseload is clearly not an adequate reason to abolish a judicial position.[33] Moreover, the federal judiciary is a pyramid, with the district courts forming the base, the circuit courts in the middle and the Supreme Court at the apex. Creation of new judgeships — always at the district and circuit layers and never at the apex — results in funneling more and more cases up the appellate structure and ultimately to the beleaguered Supreme Court.[34] Thus, if something is not done for the High Court, such as providing it with more staff or abolishing its mandatory jurisdiction,[35] its burdens will grow. Already, most *certiorari* petitions are handled by law clerks and are never seen by all the justices. The growing burden on the Court either will cause it to act to control the flood of cases flowing in or will reduce respect for that institution when it is unable to maintain expected levels of excellence.[36]

Large numbers of lower court judges also produce inconsistent and conflicting decisions, ultimately breeding more litigation as astute lawyers ask the appellate courts for resolution of

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32 1980 Authorization Request, U.S. Department of Justice (unpublished).

33 For further discussion of this important consideration, *see Sheran & Isaacman, supra* note 26, at 11.

34 *See* Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971). Judge Hufstedler observes: "A judicial system cannot be expanded horizontally beyond the capacity of the next tier to process the added cases. For that reason, district courts cannot be indefinitely expanded, unless access to the appellate courts is correspondingly curtailed." *Hearings on the State of the Judiciary, supra* note 3, at 149.

35 Abolition of the mandatory jurisdiction of the Supreme Court is advocated by many commentators and commissions. *See, e.g.*, NEEDS OF THE FEDERAL COURTS, *supra* note 3. As the base of the pyramid continues to expand, creation of a National Court of Appeals at the apex becomes a more attractive idea.

36 *See Hearings on the State of the Judiciary, supra* note 3, at 242 (statement of Robert H. Bork).

the conflicts.[37] In brief, it is rather shortsighted of those who constantly advise creating new judgeships as a sole solution to court overload not to come forward with further solutions for the secondary problems which necessarily arise. It is imperative, therefore, that other techniques be applied as well.

II. SUBSTITUTION

The best way to search for alternative techniques within our constitutional and federal system is for Congress to examine the needs of all the residents of this country and then to balance those needs against the inventory of existing resources. Since there already are existing dispute-processing techniques and institutions which have stood the stringent test of time, use of these institutions or techniques as substitution devices immediately comes to mind. Three mechanisms to complement the article III federal judiciary have been suggested: the use of the state court systems to resolve cases falling within their expertise; increased reliance on United States magistrates, with the consent of the parties, to try certain types of criminal and civil cases; and increased reliance on arbitration.[38]

In a discussion of these substitution devices, several conceptual precepts should be kept in mind. First, Congress must be extremely sensitive to the needs of litigants. Shunting of the

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37 *Id.* at 251.

38 President Carter, in his message of February 27, 1979, to Congress, lists these three items as means by which the civil justice system can be improved. 125 CONG. REC. H911-13 (1979). Attorney General Griffin B. Bell and Assistant Attorney General Daniel J. Meador deserve much credit for formulating Administration-backed bills. Their assistance — and that of the President — are much appreciated on Capitol Hill.

A fourth substitution device, not an existing institution, would require the creation of administrative tribunals. The excellent Justice Department report, NEEDS OF THE FEDERAL COURTS, *supra* note 3, at 7-11, concludes that these tribunals could be created to resolve the mass of repetitious factual issues generated by federal regulatory and welfare programs. Specifically mentioned are claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Product Safety Act, and the Truth-in-Lending Act. *Id.* at 9. *See also Hearings on the State of the Judiciary, supra* note 3, at 242 (statement of Robert H. Bork).

For a discussion of the success of administrative tribunals in Europe, *see* Remington, *The Tribunaux Administratifs: Protectors of the French Citizen,* 51 TUL. L. REV. 33, 36-37 (1976). In light of the present Administration's proposal to remove all Social Security factual disability determinations from the federal courts, *see* text accompanying notes 135 to 137 *infra,* further serious thought needs to be given to this proposal.

wrong types of cases to unqualified or insensitive forums amounts to a clear and simple denial of access to justice.[39] Thus, Congress must make a threshold determination that the substitution device is as able as the article III federal court to satisfy its newly delegated functions.[40] In making this determination, standards for awarding high and low priorities must be set. In the highest priority should be placed those cases in which there is a nationally recognized or established social need for resolution of the dispute by a tenured judge, or in the alternative, in which the federal judge possesses unique qualifications to resolve the controversy.[41] This is an easy task. Federal judges perform their most important function in deciding cases that fall within the traditional federal subject matter areas such as copyright, admiralty, and bankruptcy; in protecting the basic civil and constitutional rights of residents of this country; in speedily resolving violations of the federal criminal laws; in interpreting and applying federal laws dealing with labor, antitrust, and securities; and in resolving newly identified rights in an ever changing democratic society such as those which relate to privacy, welfare, occupational safety, consumer affairs, and the environment.[42] In the lowest priority, as aptly observed by Judge Shirley Hufstedler, should be placed

> controversies that are exacerbated rather than resolved by judicial proceedings and those that, though not worsened, do not yield to the remedies that courts can effectively administer. In the context of the federal system, the lowest priority should be assigned to those controversies that can be just as well or better handled by the state court systems.[43]

Second, there should only be a choice of one forum per litigant. The choice of separate and overlapping judicial forums is a luxury our justice system can no longer afford. Third, unless re-

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39 *Hearings on the State of the Judiciary, supra* note 3, at 112 (statement of Burt Neuborne).

40 *Id.* at 149 (statement of Shirley M. Hufstedler).

41 FRIENDLY, *supra* note 3, at 13-14.

42 *Id.* at 197-98.

43 *Hearings on the State of the Judiciary, supra* note 3, at 149 (statement of Shirley M. Hufstedler).

To paraphrase Judge Friendly, presumably there is no disagreement with such statements; the troubles come with the application! *See* FRIENDLY, *supra* note 3, at 14.

quired by federalism or the historical background and present day expertise of the dispute-resolving institution, there should not be arbitrary categorization of the types of cases assigned to the substitute forum. This is necessary to prevent the creation of dual systems of justice and the accidental formation of "poor persons' " courts. Fourth, establishing the criteria and making the decisions are determinations for the legislative branch of government. It is within neither the competence nor the delegated authority of the unelected members of the judicial branch to do so. In this regard, the procedural decisions of the Supreme Court which dramatically shift certain types of cases back to the state courts deserve legislative reconsideration as to whether they have support from our constitutional system of government.[44]

A. *Diversity of Citizenship Jurisdiction*

The framers of the Constitution explicitly rejected arguments that article III should confer direct congressional oversight authority over the state courts.[45] Nonetheless, today the United States Congress has a very direct interest in the quality of justice rendered at the state court level. Under the federal Constitution, state courts share general responsibility with the federal courts for enforcing the Constitution and the laws of the United States made under the Constitution.[46] Islands of concurrent jurisdiction exist between the state and federal systems. Likewise, there are federal funding programs to aid state courts, and there are formal mechanisms for communications between the two systems.[47] The overall federal interest in fair

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44 In reflecting upon the Supreme Court's decisions in Francis v. Henderson, 425 U.S. 536 (1976) and Stone v. Powell, 428 U.S. 465 (1976), Senator Gaylord Nelson commented, "[T]hese decisions represent a significant incursion on the constitutional power and obligation of Congress, under article III of the Constitution to define the jurisdiction of the Federal courts." *See* H.R. 2201, 96th Cong., 1st Sess. (1979) (Kastenmeier). *Cf.* McGowan, *Federal Jurisdiction: Legislative & Judicial Change,* 28 CASE W. RES. L. REV. 517 (1978). *See* 123 CONG. REC. S6026 (daily ed. Apr. 20, 1977).

45 THE FEDERALIST NO. 81 (Hamilton).

46 *See* note 21 *supra.*

47 The National Center for State Courts has received substantial federal financial support. These congressionally appropriated funds are channelled to the state courts through the Law Enforcement Assistance Administration.

Thirty-seven state-federal judicial councils now provide formal channels of com-

and equal justice at the state level is analogous to federal interest in quality health care or education at the state level. From the viewpoint of the citizen-consumer, the distinction between state and federal courts is a difference without meaning. The litigant knows he has a problem which must be solved — sometimes by resorting to litigation. Whether the controversy is managed by a federal or a state judge, the citizen's demand for fair, expeditious, and inexpensive justice is exactly the same.[48] This is critically important now since, in a time of stress in our judicial system, it becomes essential that Congress strike "a proper jurisdictional balance between federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism."[49]

The legislative proposal to abolish federal diversity of citizenship jurisdiction, and further, to abolish the existing amount in controversy requirement in federal question cases, is just such an initiative. This legislation passed the House of Representatives during the Ninety-fifth Congress, and unfortunately, narrowly missed being enacted into law because of the opposition of several key senators.[50] An identical bill, introduced in the House as H.R. 2202, is supported by the Administration and by such diverse organizations as the Judicial Conference of the United States, the state courts, the NAACP Legal Defense Fund, public interest and legal aid groups, as well as many legal scholars. A listing of the twentieth century critics of diversity

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munication between the state and federal courts. With no budgets, no staffs, and no central organizations, these councils nonetheless succeed in discussing questions of mutual concern.

In addition, the Conference of (state) Chief Justices has a committee on state-federal relations and concerns itself with important matters affecting both the state and federal systems.

48 *See Hearings on the State of the Judiciary, supra* note 3, at 178 (statement of Robert J. Sheran).

49 ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS ix (1969) (statement of Chief Justice Earl Warren).

50 H.R. 9622, 95th Cong., 2d Sess. (1978), passed the House on the suspension calendar on February 28, 1978, by a vote of 266-133. For a history of this legislation, *see Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. 15 (1978) (statement of Robert Kastenmeier) [hereinafter cited as *Senate Hearings on Federal Diversity of Citizenship Jurisdiction*]. *See Scott Blocks a Bill in Committee with Rare Solo Filibuster,* Washington Star, Sept. 29, 1978, at A-3, col. 5.

jurisdiction, implicit supporters of this legislation, reads like a lawyer's Hall of Fame: Roscoe Pound,[51] Louis D. Brandeis, Charles William Eliot,[52] Felix Frankfurter,[53] Robert H. Jackson,[54] Henry Friendly, Charles Alan Wright, Warren E. Burger, Earl Warren, Robert H. Bork, and Griffin B. Bell.[55] The strongest opposition has been generated by well organized trial attorneys through their bar associations.[56] Their views, somewhat slow in being enunciated during the last Congress, are now clearly and vigorously stated. Basically, the bar likes forum shopping. The practicing plaintiff's bar perceives the federal forum as being the source of higher verdicts; the defendant's bar sometimes uses, by removal to federal court, the choice of forum to delay the outcome of litigation. Thus, any legislative attempt to modify diversity meets vociferous opposition from those who believe that they have a vested interest in

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51 As early as 1906, Pound described diversity jurisdiction as "archaic." Address on the Causes of Popular Dissatisfaction with the Administration of Justice to the American Bar Association at its Annual Meeting in St. Paul, Minn., 1906, *reprinted in* 35 F.R.D. 273 (1964). When Pound gave his famous speech in 1906, members of the organized bar were so enraged that they accused him of attempting "to destroy that which the wisdom of centuries has evolved." There even were concerted attempts to bar the printing of the speech. J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 362 (1950).

52 Pound, Brandeis, and Eliot were members of a committee that questioned diversity jurisdiction in 1914. Friendly, *Marching Into the Third Century,* 16 THE JUDGES' J. 6, 8 (1977).

53 *See* Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring).

54 R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 37 (1955).

55 The views of Friendly, Wright, Burger, Bork, and Bell are reprinted in *Hearings on the State of the Judiciary, supra* note 3, and in *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. (1977) [hereinafter cited as *1977 House Hearings on Diversity of Citizenship Jurisdiction*].

56 *See 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 68-83, 230-46 (statements of Robert G. Begam and John P. Frank); *Senate Hearings on Federal Diversity of Citizenship Jurisdiction, supra* note 50, at 28-44, 138-48, 161-70 (statements of John P. Frank, Robert G. Begam, and Stephen A. Trimble).

It is interesting to note that the Association of Trial Lawyers of America has even retained a prestigious Washington, D.C., public relations firm to represent the interests of its members on this legislation, as it did for no-fault legislation.

To date, only one bar association (The Chicago Council of Lawyers) is on record as favoring the abolition of diversity jurisdiction.

For a general outline of the views of those opposing the abolition of diversity, *see* Frank, *The Case for Diversity Jurisdiction,* 16 HARV. J. LEGIS. __ (1979).

maintaining for their own advantage, the widest choice of forum.[57] Put differently with the same meaning by a famous sociologist, "At the same time that we like to change, we are attached to what we like and we cannot separate ourselves from it without difficulty."[58]

In spite of the organized opposition of the bar, it is clear that the diversity jurisdiction of the federal courts is an idea whose time has passed.[59] The conditions that existed when diversity was created in 1789 are vastly changed today. An analysis of present facts, statistics, and theories by those in the legislative branch lends overwhelming support to the proposition that diversity ought to be abolished. There is little firm evidence to contradict the premise upon which the abolition of diversity is based: that state law questions ought to be resolved in the state courts and that questions arising under federal laws, treaties, or Constitution ought to be resolved in federal court.[60] As con-

57 13 C. A. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 (1975). Among the backers of diversity are many successful attorneys who make "balance-the-budget" or "states' rights" speeches by night but want to try their cases by day in the federal courts. C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE FEDERAL COURTS 86-87 (1969).

58 E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 254 (trans. G. Simpson 1933). In a similar fashion, a well-known economist observes, "People have an enduring tendency to protect what they have. . . ." J. K. GALBRAITH, THE AGE OF UNCERTAINTY 11 (1977).

59 *See* H.R. REP. NO. 95-893, 95th Cong., 2d Sess. (1978) which states, "the original reasons for diversity jurisdiction have long since disappeared." Judge Elmo Hunter, Chairman of the important Court Administration Committee of the Judicial Conference of the United States, agrees: "Whatever justification that existed for its existence has disappeared." Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 U. MO. KAN. CITY L. REV. 347, 356 (1978).

60 Supporters of diversity also contend that there is an enormous educational value in having two systems in interchange. *See 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 233 (statement of John P. Frank). This argument is insubstantial; with the proliferation of federal statutes and the growth of federal common law, federal judges are not in any danger of becoming narrow technicians nor do lawyers have to wait for the fortuitous circumstance of a diversity case to get into federal court. Moreover, the political goal of the system is not to educate personal injury and corporate lawyers; it is to resolve cases in an expeditious, consistent, and fair manner. Another argument is that diversity jurisdiction is the equivalent of a social welfare program. *See* Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEX. L. REV. 1 (1964). This is totally specious. Diversity jurisdiction, whose benefits flow primarily to attorneys on contingent fees and to major corporations, can hardly be characterized as having anything to do with the social welfare. Even assuming that a minimal case could be made in this regard, with the Proposition 13 and balance-the-budget era upon us, a "social welfare" program of this sort should be the first to go. It certainly should not supplant more meaningful programs.

For rebuttal of other frivolous arguments offered by the bar in support of diversity jurisdiction, *see* FRIENDLY, *supra* note 3, at 146-49.

cluded in the House Report, the proposal frees the federal courts from the shackles of congestion to do the job they do best:

> adjudicating disputes in traditional federal subject matter areas such as copyright, patents, trademarks, commerce, bankruptcy, antitrust, and admiralty; rendering speedy criminal justice for those accused of crimes; protecting the basic civil and constitutional liberties of all citizens; and resolving vital and often recently identified rights (and sometimes rights not yet identified by the legislative branch) which relate to welfare, occupational safety, the environment, consumerism, and privacy.[61]

The legislation is not, as some have argued,[62] merely a means to alleviate congestion in the federal courts. While it removes nearly 32,000 cases from the federal forum,[63] it does much more. It is an improvement of the American legal system. Three characteristics of a democratic legal system are that judicial decisions are rendered in a consistent manner, litigants are accorded equal application of the laws, and, to the extent possible, the system is comprehensible to ordinary citizens. The concurrent diversity of citizenship jurisdiction of the federal and state courts satisfies none of these principles. On the contrary, it contributes — especially when manipulated by intelligent lawyers — to inconsistent decision making, unequal protection of the laws, and an incomprehensible judicial system.[64]

The abolition of diversity jurisdiction will alleviate these prob-

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61 H.R. REP. No. 95-893, 95th Cong., 2d Sess. (1978).

62 *Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 96th Cong., 1st Sess. (1979) (statements of Robert G. Begam, Edward W. Mullinix, and John C. Shepherd) [hereinafter cited as *1979 House Hearings on Diversity Jurisdiction/Magistrates Reform*].

63 [1978] DIR. ADMIN. OFF. U.S. CT. REP. A-16 table C2.

64 *1979 House Hearings on Diversity Jurisdiction/Magistrates Reform, supra* note 62. (statement of Thomas D. Rowe, Jr.). For a more in-depth analysis of this proposition, *see* Professor Rowe's excellent article, Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms,* 92 HARV. L. REV. 963 (1979).

It is not surprising that many lawyers support a legal doctrine which leads to technicalities, inconsistencies, and irrationalities in the legal system. One respected author has identified these items as part of the "continuous growth of the technical element in the law, and hence of its character as a specialists' domain." MAX WEBER ON LAW, ECONOMY AND SOCIETY 321 (M. Rheinstein ed. 1954).

lems by reducing the possibility of conflicts between the state and federal courts.[65] Further, elimination of diversity accords state court systems a respected and well-deserved role in the American judicial system. This is not, however, a states' rights issue. The independence of the state courts and their distinctive role in our national judicial system is long-standing and virtually indestructible at this point. The proposition that the "National Government will fare best if the States and their institutions are left to perform their separate functions in their separate ways" does "not mean a blind deference to *States' Rights* any more than it means *centralization of control* over every important issue in our National Government and its courts."[66] The state and federal courts must work together in search of a common objective — fair, speedy, and cost-effective access to justice for all individuals. This was the goal of the framers and it must be our goal today.

There is no reason to believe that the state courts cannot resolve fairly these state law questions.[67] The state judicial systems, as characterized by the Conference of Chief Justices, are ready, willing, and able to accept the diversity cases presently filed in the federal courts based solely on the fortuitous circumstance of out-of-state citizenship.[68] A recent study conducted by the National Center for State Courts confirms that state courts have the manpower to handle a heavier case load.[69] If this were otherwise, one would have to think twice about this significant legislation. Even assuming, but not

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65 C. McGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE FEDERAL COURTS 83 (1969).

66 Younger v. Harris, 401 U.S. 37, 44 (1971). *See also* Texas v. White 74 U.S. (7 Wall.) 700 (1868).

67 In Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court held that the federal courts must apply the substantive law of the states in diversity cases. However, the federal courts in such cases are not allowed authoritatively to determine state law; only the state courts can do this. For further discussion of the Erie doctrine and its corrosive effects on the federal and state courts, *see* Letter from Henry J. Friendly to Robert W. Kastenmeier (November 4, 1978), *reprinted in 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 377. *See 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 142 (statement of Edward T. Gignoux). *See also* Employers Liab. Assurance Corp. v. Travelers Ins. Co., 411 F.2d 862, 865-66 (2d Cir. 1969).

68 Resolution of the Conference of Chief Justices (Aug. 3, 1977), *reprinted in Hearings on the State of the Judiciary, supra* note 3, at 519.

69 Flango & Blair, *The Relative Impact of Diversity Cases on State Trial Courts*, 2 ST. COURT J. 20 (1978).

admitting, that some of the state courts are not as capable of providing the same quality of justice as their federal counterparts, or that there are longer delays in some state courts in urban areas, the solution is not to allow over 30,000 diversity cases to be filed in the federal courts, but rather to commit time and resources to improving the quality of state-administered justice.

Irrespective of the abolition of diversity jurisdiction, another proposition warrants attention. Serious thought should be given to creation of a national program of assistance to state courts, possibly along the lines of an independent Legal Services Corporation. This program would grant monies to state court systems so that they could maintain and improve the quality of their justice at the same rate as the federal courts. In the interim, there must be continued coordination and cooperation between the federal and state judiciaries in areas of mutual concern. Neither of these propositions means that the federal government should get into the job of regulating state-administered justice. Rather, it signifies that the appropriate congressional role is to allow the states to advance the initiative, as has been done,[70] and then to examine the idea. It also means that the state and federal governments have concomitant obligations to provide high quality justice to all.

The Ninety-fifth Congress did act to provide aid to the states in this regard. The Senate passed legislation designed to give states seed money to experiment with the resolution of minor disputes.[71] The legislation also provided for the creation of a dispute resolution resource center within the Department of Justice to coordinate information about the resolution of minor disputes and to disseminate that information to interested individuals and states. Unfortunately, this proposal narrowly missed passage by the House on its suspension calendar.[72] The

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70 Report to the Conference of Chief Justices from the Task Force on a State Court Improvement Act (February 1, 1979) (unpublished). *See also Hearings on the State of the Judiciary, supra* note 3, at 181-82 (statement of Robert J. Sheran).

71 S. 957, 95th Cong., 2d Sess. (1978) (referred to as the Dispute Resolution Act) passed the Senate on June 29, 1978. For an explanation of this legislation *see Hearings on the Dispute Resolution Act (S. 957) Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) (statements of Edward M. Kennedy and Daniel J. Meador).

72 S. 957, as amended, failed under suspension of the rules consideration by a vote of

House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, however, did put its stamp of approval on the legislation, as did the House Committee on Interstate and Foreign Commerce.[73] Similar legislation has been reintroduced during the Ninety-sixth Congress, has passed the Senate, and thus far has received favorable treatment in the House.[74]

B. *Magistrates Reform*

A second substitution measure also relies on an existing institution: the United States magistrate. Virtually every common-law judicial system has subordinate judicial officers who act to meet the ebb and flow of societal demands made upon judicial institutions.[75] The United States magistrate is such an officer.

The federal magistrates system was created by enabling legislation in 1968.[76] It built upon the existing foundation of the United States commissioner system which had been in existence since 1793.[77] The 1968 Act, an effort to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice,"[78] created a new tier of judicial of-

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224-166 (a two-thirds majority being needed). 124 CONG. REC. H12,607 (daily ed. Oct. 12, 1978).

73 The Subcommittee on Courts, Civil Liberties and the Administration of Justice reported out an amended version of the bill on September 19, 1978; the Committee on Interstate and Foreign Commerce reported an almost identical version on September 28, 1978. H.R. REP. No. 95-1654, 95th Cong., 2d Sess. pt. 1 (1978).

74 H.R. 2863, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1328 (daily ed. Mar. 13, 1979) (Kastenmeier, for himself, *et al.*); H.R. 3719, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H2354 (daily ed. Apr. 25, 1979); S. 423, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S1429 (daily ed. Feb. 9, 1979). S. 423, a bill identical to S. 957 as passed by the Senate in 1978, cleared the Senate on April 5th, 1979. The House Judiciary Committee and the House Interstate and Foreign Commerce Committee have reported favorably amended versions of this bill. *See* H.R. REP. No. 96-492, Pt. I, 96th Cong., 1st Sess. (1979).

75 Jacob, *Models from Common Law Countries* in STATE COURTS: BLUEPRINT FOR THE FUTURE 211 (T. J. Fetter ed. 1978); Silberman, *Masters and Magistrates, Part I: The English Model,* 50 N.Y.U.L. REV. 1070, 1072 (1975).

76 Pub. L. No. 90-578, 82 Stat. 1107-08 (1968) (codified as amended at 28 U.S.C. § 636 (1976)).

77 Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334, provided that designated individuals "learned in the law" could assist United States courts in taking bail in criminal cases. In 1817 these individuals were officially designated as commissioners. Act of March 1, 1817, ch. 20, 3 Stat. 350.

78 H.R. REP. No. 1629, 90th Cong. 2d Sess. 11 (1968).

ficers by transferring to the magistrate the criminal justice responsibilities of the old commissioners, by granting increased duties in the criminal area, and by expanding judicial responsibilities in the civil area.[79]

The Federal Magistrates Act of 1968, which was implemented in all districts in 1971, worked for four years before being examined by Congress. One of the flaws in the original legislation had been that the powers of the magistrates were not precisely delineated. The result was uneven usage of these judicial officers throughout the federal judicial system.[80] In addition, a number of courts restrictively construed the role of magistrates.[81] Consequently, in 1976 Congress amended the existing law[82] to "clarify and further define the additional duties which may be assigned a United States Magistrate in the discretion of a judge of the district court."[83] Although the 1976 reform clearly broadened the powers of magistrates, it still left the appointment and utilization of these individuals to judges of the district court. Furthermore, in spite of the fact that additional duties were clarified, the 1976 amendments manifested congressional intent that continued experimentation with the use of magistrates ought to be allowed. This had two results: first, continued unevenness in quality, and second, disparity in the use of magistrates.[84] It also made more legislation "inevitable."[85]

Thus, in 1977 the Department of Justice, and its newly created Office for Improvements in the Administration of Justice, stepped into the breach and formulated a proposal to

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79 For a detailed history of the 1968 legislation, *see* Spaniol, *The Federal Magistrates Act: History and Development,* 1974 ARIZ. ST. L. J. 565.

80 Silberman, *Masters and Magistrates, Part II: The American Analogue,* 50 N.Y.U. L. REV. 1297, 1299-1302 (1975).

81 *See, e.g.,* Wingo v. Wedding, 418 U.S. 461 (1974); Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972): TPO, Inc. v. McMillan, 460 F.2d 348 (7th Cir. 1972).

82 28 U.S.C. § 636 (1976).

83 H.R. REP. No. 94-1609, 94th Cong., 2d Sess. 1 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162. The House report specifically states that the restrictive decisions in Wingo v. Wedding, Ingram v. Richardson, and TPO, Inc. v. McMillan, *supra,* would be overridden by passage of the bill. *Id.* at 6165.

84 *See* H.R. REP. No. 95-1364, 95th Cong., 2d Sess. 6 (1978).

85 Report on the Magistrate System in the Southern District of New York, Association of the Bar of the City of New York — Federal Bar Council 2 (1977), *reprinted in 1977 House Hearings on Diversity of Citizenship Jurisdiction, supra* note 55, at 387.

solve these problems. The gist of the Department's proposal is still intact in the legislation that has passed the Congress.[86] The purpose of the proposed legislation is to amend the current jurisdictional provisions for United States magistrates in order to clarify and expand their jurisdiction to try civil cases — which is now done in over forty districts by local rule — and to dispose of criminal misdemeanors.[87] All of this expanded jurisdiction is based on the parties' free and voluntary consent to the exercise of case-dispositive power by the magistrate.[88] This legislative initiative also provides for higher standards of magistrate competence and explicit procedures for magistrate selection. It additionally contains a statutory bar to the assignment of certain categories of cases to magistrates.[89]

There are several reasons for this sound legislation. It solves the problems of continued disparity of quality, unevenness of usage, and ambiguity concerning the extent of trial powers. It further adds needed flexibility to the federal judicial system. The legislation provides a supplementary judicial power to meet the varying demands made on the federal judicial system and the multitudinous needs of litigants in that system. If the latter wish to consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of solving their civil and criminal controversies, they may do so.

The magistrates reform legislation is interwoven with the omnibus judgeship legislation and the abolition of diversity bill to

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86 *See* H.R. 1046, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H187 (daily ed. Jan. 18, 1979) (Kastenmeier, for himself, Rodino, Danielson, Mazzoli, Santini, McClory, and Railsback); S. 237, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S645 (daily ed. Jan. 25, 1979) (DeConcini). *See also* H. CONF. REP. No. 96-444, 96th Cong., 2d Sess. (1979); 125 CONG. REC. H8129 (daily ed. Sept. 19, 1979). For a more detailed discussion of the pending legislation, *see* McCabe, *The Federal Magistrate Act of 1979,* 16 HARV. J. LEGIS. ——— (1979).

87 The current jurisdictional provisions for United States magistrates are 28 U.S.C. § 636 (1976) for civil cases and 18 U.S.C. § 3401 (1976) for criminal cases.

88 In the civil area, the House legislation contains a blind consent provision to ensure that a party is not coerced, subtly or directly, into consenting to trial by a magistrate. In this regard, *see* DeCosta v. Columbia Broadcasting Sys., 520 F.2d 499, 507 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). For criminal cases, the bill preserves the existing requirement that there be consent for trial of petty offenses before a magistrate. For the entire criminal jurisdiction of the magistrate, "a knowing and intelligent waiver" is necessary. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). This is a critical stage of the proceedings requiring the presence of counsel.

89 This provision guards against so-called "poor people's" courts.

form three compatible segments of a large tapestry of court reform. The magistrates package "addresses itself to a different exigency than that focused upon by the diversity and judgeship bills."[90] As observed in the report of the House Judiciary Committee on the magistrates legislation:

> there is an increasing need for flexibility in the Federal judicial system, which is called upon to act in a rapidly changing society. By redefining and by increasing the case-dispositive jurisdiction of an existing judicial officer — the U.S. Magistrate — the legislation provides the district court with a tool to meet the varying demands on its docket. Because of magistrates' limited tenure and the method of their appointment, magistrate supply and expertise can be designed to complement a particular Article III bench. Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, only in cases where they are felt by all participants to be competent.[91]

This first step in the agenda to improve the administration of justice, recently enacted into law, builds upon the integral and important role that magistrates already play in the federal judicial system.[92] There is no reason to believe that the use of magistrates should not be continued and, indeed, encouraged.[93]

C. *Arbitration*

The Carter Administration has drafted legislation to encourage the use of arbitration techniques in the district courts.[94] As

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90 H.R. REP. No. 96-287, 96th Cong., 1st Sess. 20 (1979).

91 *Id.* The report language borrows heavily from a statement made by Assistant Attorney General Daniel J. Meador:

> The significant feature of this, as indeed with all other features of the magistrate system, as projected, is its flexibility. By enacting this bill, and by continuing the magistrate system otherwise, Congress would not lock the judiciary into any particular arrangement for meeting the ebb and flow of business.

1977 House Hearings on Diversity of Citizenship Jurisdiction, supra note 55, at 188.

92 Rodino, *Magistrates Reform — A Way to Aid Congested Courts,* TRIAL MAGAZINE, Nov. 1977, at 32.

93 H.R. REP. No. 96-287, 96th Cong., 1st Sess. 5 (1979). Several courts have expressed approval of the expanded role of magistrates. *See, e.g.,* Sick v. City of Buffalo, 574 F.2d 689 (2d Cir. 1978); DeCosta v. Columbia Broadcasting Sys., 520 F.2d 499 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); United States v. Eastmount Shipping Corp., 62 F.R.D. 439 (S.D.N.Y. 1974).

94 *See* H.R. 2699, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1145 (daily ed. Mar. 7, 1979).

explained by the President, "[T]he arbitration proposal would provide an innovative means for resolving speedily, fairly, and at reduced cost certain types of civil cases in which the main dispute is over the amount of money that one person owes another."[95] The legislation is modeled on the successful use of arbitration procedures by the courts of several states, including Arizona, California, Michigan, New York, Ohio, and Pennsylvania.[96] Moreover, during the past two years, three federal district courts by local rule have implemented arbitration on a test basis.[97] A preliminary report has been filed and the results are encouraging.[98]

The proposed legislation, which, in contrast to the diversity and magistrates proposals, has not yet been scrutinized or refined by the House of Representatives, would allow any district court to adopt court-annexed arbitration. The legislative proposal specifically provides that the district court may not refer to compulsory arbitration certain types of cases more appropriately brought before a tenured judge. In particular, a court may not divert cases that involve allegations of civil rights violations, constitutional torts, fraud against the government, or official immunity.[99]

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95 Message of President Jimmy Carter to the Congress of the United States (February 27, 1979), 125 CONG. REC. H911 (daily ed. Feb. 27, 1979). One respected commentator from within the Administration has questioned the wisdom of increased reliance on arbitration. He argues that arbitration is likely to be directed against "relatively small claims" involving the rights of the poor and powerless. The result may well be that federal statutes will lose their bite, favoring the very institutions against which the statutes were designed to protect. Address by Wade H. McCree, Jr., to the 1977 Law Alumni Banquet, Georgetown University Law Center (April 30, 1977), *reprinted in Hearings on the State of the Judiciary, supra* note 3, at 785, 788-91.

96 125 CONG. REC. H933 (daily ed. Mar. 7, 1979) (remarks of Peter W. Rodino, Jr.). *See, e.g.*, PA. STAT. ANN. tit. 5 § 21 (1963). For a discussion of general arbitration procedures, *see* Perlman, *Final Offer Arbitration: A Pre-Trial Settlement Device*, 16 HARV. J. LEGIS. __ (1979).

97 The districts involved are the district of Connecticut (rule effective April 1, 1978), the eastern district of Pennsylvania (rule effective February 1, 1978), and the northern district of California (rule effective April 1, 1978).

98 Preliminary Report on Court Annexed Arbitration in Three Federal District Courts, U.S. Department of Justice (January 19, 1979) (unpublished).

99 The procedure envisioned in the draft bill consists of referral of certain types of civil cases to a panel of arbitrators for an early hearing. The general categories consist of actions brought for monetary damages not in excess of $100,000 (or such lower amount as the district court may establish), and which are based upon a negotiable instrument or a contract or are for personal injury or property damages. The proposal

It is not yet apparent how the organized bar will react to the proposed legislation. A signal puff of smoke has risen from the respected Association of the Bar of the City of New York, which has urged Congress to disapprove the bill.[100] The American Bar Association, in spite of a concerted effort to obtain a favorable resolution and in the face of the recommendation of the Association's Report of the Pound Conference Task Force to support arbitration techniques in the federal and state courts, has failed specifically to endorse the legislation.[101]

As written, the arbitration bill could create a number of problems for the administration of justice and would overlap and partially conflict with the diversity and magistrates bills. By allowing district courts to establish by local rule various schemes of court-annexed arbitration, the bill ultimately would breed inconsistency and disparity of treatment within the federal judicial system. The resolution of disputes should not be a game of roulette dependent on where the cause of action arises. Giving such broad discretion to the local district courts to work out their own arbitration procedures could also result in a serious abdication by Congress of its constitutionally allocated responsibility over the structure and jurisdiction of the federal courts. Redelegation of that authority back to the courts should be done only in exceptional circumstances and only upon a showing that local needs and conditions require flexible procedures.[102] During its hearing process, the House Subcommit-

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further provides that the arbitration hearing should be held promptly and that it should be less formal than a court trial. Soon after the conclusion of the hearing, the arbitrators file a written award. In 20 to 30 days, the award is entered as the judgment in the case unless either party files a demand for a trial de novo in the district court. If that petition is filed, the case is replaced on the district court's docket.

However, the legislation contains a disincentive for a trial de novo in the district court, since the party who requests the trial de novo may be taxed the costs of arbitration. The rationale for this is not readily apparent; its political and constitutional ramifications will have to be closely examined by the legislative branch.

100 Report by the Committee on Federal Courts of the Association of the Bar of the City of New York on Proposed Legislation to Provide for Compulsory Non-Binding Arbitration of Certain Cases in Federal Courts (March 1978) (unpublished).

101 *See* Pound Conference Follow-Up Report, *supra* note 8, at 12-16. At the August 1978 meeting of the ABA, a resolution of the Judicial Administration Division to support the legislation in principle was defeated.

102 A similar suggestion was made by a respected professor in reference to diversity of citizenship jurisdiction. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977). This idea was considered by the House Judiciary

tee on Courts, Civil Liberties and the Administration of Justice will have to analyze this component of the arbitration bill carefully.

The arbitration proposal must likewise be considered in light of the pending diversity and magistrates legislation. For example, many of the tort cases slotted for arbitration are diversity cases that will no longer be tried in federal courts if Congress abolishes diversity jurisdiction. In the magistrates area, the House Committee on the Judiciary spent much time and energy in debate and finally set forth a detailed scheme to ensure that United States magistrates will be qualified to handle their increased consensual jurisdiction.[103] The arbitration legislation, which is largely non-consensual, provides no such standards and procedures for merit selection of arbitrators. In a similar vein, the proposal is silent on whether the pool of available arbitrators should reflect a cross-section of American society. These aspects must be made parallel to the magistrates legislation.

In summary, the arbitration legislation is a good idea that deserves to be examined seriously through the congressional hearing process. Although the bill needs some corrective surgery during the amendment stages, if this is done and if the idea is implemented fairly and consistently under the direction of qualified individuals, this third substitution device can provide a means to a speedier and less costly resolution of disputes.[104]

III. CONSERVATION

In a time of stress and competition for a scarce resource,

Committee and rejected. *See* 124 CONG. REC. H1559 (daily ed. Feb. 28, 1978) (remarks of Robert F. Drinan).

103 *See* H.R. 1046, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H187 (daily ed. Jan. 18, 1979); H. REP. NO. 95-1364, 95th Cong., 2d Sess. (1978).

104 *See* Rosenberg & Schulbin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania,* 74 HARV. L. REV. 448 (1961); Fuller, *Collective Bargaining and the Arbitrator,* 1963 WIS. L. REV. 3.

The proposition that arbitration can work equitable results hardly needs support: "It is equitable . . . to agree to arbitration rather than go to court — for the umpire in an arbitration looks to equity, whereas the juryman sees only the law. Indeed, arbitration was devised to the end that equity might have full sway." 1 THE RHETORIC OF ARISTOTLE 77-78 (L. Cooper trans. 1932).

there must be conservation. Everyone knows that an automobile will get better mileage if its engine is kept in tune. Similarly, the judicial system will perform more efficiently if its participants — judges, jurors, witnesses, lawyers, and litigants — are treated with a modicum of support. A mere oiling of the wheels of justice, a tightening of a nut and bolt here and there, while not solving fundamental problems, can nonetheless be very useful. Many conservation, or housekeeping measures can keep the judicial system up-to-date with changes in society.[105]

By way of illustration, the Ninety-fifth Congress enacted legislation which raised witness fees,[106] increased juror fees, protected jurors' employment, redefined the section on hardship exemption from jury service,[107] provided flexibility to courts in the area of marshals' transportation expenses,[108] and created several new places of holding court and modified several division and district dividing lines.[109] The significance of these bills has gone largely unnoticed. There is a rush among commentators to discuss more comprehensive pieces of legislation. This is understandable but unfortunate. The Jury Improvements Act of 1978,[110] for example, actually was a very important legislative endeavor. Individuals who serve on juries exercise an awesome responsibility in the American justice system. Juries decide the fate of their fellow men — their property, their freedom, and sometimes their lives.[111] Yet, until recently, not much attention has been accorded to the individuals who are called to jury service.[112]

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105 Roscoe Pound emphasized the importance of conservation by stating: "The controlling ideas [of court organization] should be unification, flexibility, conservation of judicial power and responsibility." R. POUND, ORGANIZATION OF COURTS 275 (1940).

106 Act of Oct. 27, 1978, Pub. L. No. 95-535, 92 Stat. 2033.

107 Act of Nov. 2, 1978, Pub. L. No. 95-572, 92 Stat. 2453.

108 Act of Oct. 24, 1978, Pub. L. No. 95-503, 92 Stat. 1704.

109 Act of Oct. 2, 1978, Pub. L. No. 95-408, 92 Stat. 883; H.R. REP. NO. 95-1554, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 3923; Act of Nov. 2, 1978, Pub. L. No. 95-573, 92 Stat. 2454; H.R. REP. NO. 95-1763, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7000.

110 Pub. L. No. 95-572, 92 Stat. 2453.

111 *See, e.g.*, Ervin, *Jury Reform Needs More Thought*, 53 A.B.A.J. 133, 134 (1967). *See also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Duncan v. Louisiana, 391 U.S. 151 (1968).

112 Not until 1948 did Congress make any attempt to enact qualification standards for federal jurors. Twenty years later, Congress finally passed the Jury Selection and

The federal justice system cannot bear the weight of dissatisfied citizen-participants who are either under-compensated for their service to the government or who are harassed by employers hostile to the idea of jury service. By the same token, the system cannot afford to lose the support of employers, especially those with small businesses and a handful of key employees, who will suffer severe economic hardship if they lose an employee for a long period of time. The legislation passed by the Ninety-fifth Congress successfully balances these competing concerns. It provides needed lubrication to the squeaky gears of the federal jury system.[113] Similar legislation provided needed relief for witnesses and United States marshals.[114]

A. *The Court Improvements Act of 1979*

A court conservation or improvements package for the Ninety-sixth Congress has been prepared by the Administration, with assistance by members and staffs of the House and Senate Judiciary Committees.[115] In brief, this legislation modifies the statutory provisions affecting the selection and length of service of the chief judges in the district and circuit courts, clarifies the procedures that circuit courts must follow when sitting on appeals, increases the responsibilities of circuit

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Service Act of 1968 which, for the first time, imposed federal juror qualification standards and selection procedures. *See* S. REP. No. 891, 90th Cong., 1st Sess. 9-12 (1967).

It is interesting to note that during the Ninety-fifth Congress, the Subcommittee on Courts, Civil Liberties and the Administration of Justice received more correspondence from ordinary citizens on issues relating to juror service than any other court reform measure. For a sampling of these letters, *see Hearings on Judicial Housekeeping Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 331-64 (1978).

113 For an explanation of this legislation, *see* H.R. REP. No. 95-1652, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5477.

114 *See* H.R. REP. No. 95-1651, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 6397; H.R. REP. No. 95-1653, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5494.

115 This legislation has taken the form of H.R. 2848, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1327 (daily ed. Mar. 13, 1979) (Kastenmeier) and S. 677, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S2869 (daily ed. Mar. 15, 1979) (Kennedy). Senator Kennedy's bill contains a proposal to merge the Court of Claims and the Court of Customs and Patent Appeals into a new twelfth circuit court of appeals: the Court of Appeals for the Federal Circuit. In the House of Representatives this has been introduced in a separate bill, H.R. 3806, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H2459 (daily ed. Apr. 30, 1979) (Rodino).

councils and broadens their membership, contains a section on retirement and pensions of federal judges, liberalizes the powers of federal courts to transfer cases to the proper court to cure want of jurisdiction, and lastly, resolves existing ambiguities in the law relating to interest on judgments and prejudgment interest.[116]

Indisputably, these proposed modifications, all of which must now begin the arduous trek through the legislative process, merely tinker with the system; nonetheless, they are extremely important to those assigned the responsibility of administering justice on a day-to-day basis. As a consequence, the lawmaker must give these proposals close scrutiny, and if they are meritorious, they must not be allowed to fall into the "dead bill" file.

B. *Standing and Other Threshold Issues*

The federal courts themselves have been negligent in conserving their own manpower. Some judges have been quite inefficient in allocating the limited resources that are provided. Jury venires wait for indeterminate periods of time,[117] court calendars are poorly maintained, and archaic management techniques are used. There have been improvements in this area, but there is still much to be accomplished. An area of particular concern to the Congress, partly because the problem is created by the judges themselves and partly because the rights of citizen-litigants are implicated, is that of standing.

There are two basic elements in the concept of standing. The first is rooted in the "case and controversy" requirement of the Constitution and cannot be modified by legislative action.[118] The second involves what is referred to as "prudential" rules of standing: that is, rules developed by the federal courts to control the number and types of cases filed in the courts. Congress clearly has the authority — and, indeed, the obligation — to clarify or remove these arbitrary barriers.[119]

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116 *Id.*

117 *See, e.g.*, Higginbotham, *Use of Jurors*, 62 F.R.D. 211 (1973).

118 *See* Flast v. Cohen, 392 U.S. 83, 91-106 (1968); *see also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72-81 (1978).

119 *See* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-12 (1972).

At present, challenges to standing often are combined with justiciability defenses to delay a hearing on the merits of a case. This clearly is not efficient nor is it fair. Further, restrictive and inconsistent decisions on standing often result in a tremendous waste of judicial resources while lower court judges are left to decipher confusing commands from the higher courts. Mr. Justice Brennan has voiced concern that recent Supreme Court decisions in the area of standing have created "an obstacle course of confusing standardless rules to be fathomed by courts and litigants, without functionally aiding in the clear, adverse presentation of the constitutional questions presented."[120]

With this in mind, Congress should act once and for all to confront the delicate issue of standing and remove inappropriate judicially constructed barriers to the federal judicial system. Clarity and consistency ought to be the ultimate goals. This would render the courts more efficient by reducing the amount of time expended in resolving threshold issues; at the same time, it undoubtedly will increase their overall workload by raising the number of lawsuits filed in federal court. On balance, however, considering the other reforms discussed herein, the federal courts will not be unduly burdened by liberal standing legislation.[121]

Likewise, judicial resources could be conserved if artificial barriers to class actions were removed. The Department of Justice's efforts to draft a comprehensive class action statute should be applauded.[122]

C. *Mandatory Jurisdiction of the Supreme Court*

The nine justices who sit on the Supreme Court are mere mortals with limited time and resources. Abolition of the obligatory

120 Kremens v. Bartley, 431 U.S. 119, 140 (1977) (Brennan, J., dissenting) (citations omitted).

121 Legislative proposals to broaden standing are pending in both the House and the Senate. *See* H.R. 1047, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H187 (daily ed. Jan. 18, 1979) (Kastenmeier, for himself, Harris, and Railsback); S. 680, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S2869 (daily ed. Mar. 15, 1979) (Metzenbaum, for himself, Kennedy, and Ribicoff). *See generally Hearings on the Citizens' Right to Standing in Federal Courts Act of 1978 (S. 3005) Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary and the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (1978).

122 *See* S.3475, 95th Cong., 2d Sess. (1978), 124 CONG. REC. S14,501 (daily ed. Aug. 25, 1978) (DeConcini, for himself, and Kennedy). The Department has not yet forwarded a class action bill to the Ninety-sixth Congress. For a discussion of this pro-

jurisdiction of the Supreme Court,[123] another reform embraced by the Administration, would allow the justices to conserve their finite resources by giving them more discretion over their docket. This proposal is a logical extension of the Judges' Bill of 1925 which has worked well.[124] Today, the Supreme Court is trusted to resolve many issues of critical importance to our society; it surely can be trusted to decide which cases are most in need of review.[125]

This is good legislation for two reasons. The present statutory scheme, by mandating jurisdiction of certain controversies in the High Court, permits litigants to bring cases before the Court by right. Necessarily, the members of the Court are required to devote their time to deciding cases of lesser consequence. This takes them away from other cases of national importance.[126]

Moreover, abolition of the Court's mandatory jurisdiction would help avoid the vexatious problem of resolving appeals by summary disposition, and then, of determining the precedential value of summary dispositions. The Court has observed, "our summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity."[127] Abolishing mandatory jurisdiction is a

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posal, *see* Wells, *Reforming Federal Class Action Procedure: An Analysis of the Justice Department Proposal,* 16 HARV. J. LEGIS. _____ (1979).

123 *See* H.R. 2700, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1145 (daily ed. Mar. 7, 1979) (Rodino); S. 450, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S1666 (daily ed. Feb. 22, 1979) (DeConcini). The proposed legislation eliminates the jurisdiction of the Supreme Court to review, by way of appeal, those classes of federal court cases specified in 28 U.S.C. §§ 1252, 1254(2), 1257(1)(2). These cases would be reviewable in the future only by the writ of certiorari. The legislation also repeals three specialized types of direct appeals to the Supreme Court, making these cases reviewable also only by certiorari.

The proposed legislation follows the recommendations of the Freund Committee. FREUND REPORT, *supra* note 8, at 25-38. *See also* NEEDS OF THE FEDERAL COURTS, *supra* note 3, at 11-13.

124 The Supreme Court's jurisdiction has remained substantially unaltered since the 1925 Act. *See* 28 U.S.C., ch. 81 (1976).

125 NEEDS OF THE FEDERAL COURTS, *supra* note 3, at 13.

126 *Hearings on Supreme Court Jurisdiction Act of 1978 (S. 3100) Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. 3 (1978) (statement of Daniel J. Meador).

127 Letter from the Justices of the United States Supreme Court to Senator Dennis DeConcini (June 22, 1978), *reprinted in id.* at 40. An analysis of the case law of the Supreme Court confirms this proposition. In Edelman v. Jordan, 415 U.S. 651 (1974),

needed reform which would conserve the time and resources of confused lawyers and litigants, as well as state and federal judges, and would have the further salutary effect of saving time for the nine judges on the Supreme Court.[128]

D. *Civil Rights of Institutionalized Persons*

A final court conservation measure is included in the legislation to provide the Attorney General of the United States with standing to initiate civil actions to redress systematic deprivations of rights of institutionalized persons when those rights are protected by the Constitution or laws of the United States.[129] The bill's primary purpose, of course, is to provide a mechanism to vindicate the rights of institutionalized persons. Another equally important legislative goal is to stimulate the development and implementation of effective administrative techniques for the resolution of grievances in correctional institutions. The proposed legislation empowers a district judge to continue a case for a limited period of time when an effective alternative mechanism exists and use of it by a prisoner prior to litigating a civil rights complaint would be appropriate and in the interest of justice.

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the Court held that a summary disposition carries less precedential value than an opinion on the merits. Then, one year later, in Hicks v. Miranda, 422 U.S. 332 (1975), the Court proclaimed that a dismissal of a mandatory case for lack of a substantial federal question is a decision on the merits whose precedential value is unclear. Shortly thereafter, in Mandel v. Bradley, 432 U.S. 173 (1977), the Court attempted to clarify the situation by holding that a summary affirmance merely rejects the contentions offered for reversal and is not binding beyond the arguments specifically rejected. This latter opinion helps a little. It, however, requires inquisitive counsel to scour the legal pleadings rather than the Court's opinion to decipher the exact holding.

128 S. 450, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S1666 (daily ed. Feb. 22, 1979), passed the United States Senate on April 9, 1979. 125 CONG. REC. S4138-57 (daily ed. April 9, 1979). Its future in the House, however, is in doubt because of the Helms amendment to restrict the judicial authority and power of the United States Supreme Court to review state court decisions on the issue of voluntary school prayer. Any proposal to eliminate the appellate jurisdiction of the Supreme Court with respect to constitutional controversies is likely, in turn, to raise serious constitutional questions about the extent of Congress' power to establish the appellate jurisdiction of the Supreme Court. It additionally raises important questions of public policy.

For further discussion of this issue, *see* note 163 and accompanying text *infra*.

129 This legislation is embodied in H.R. 10, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H126 (daily ed. Jan. 15, 1979) (Kastenmeier); and S. 10, 96th Cong., 1st Sess. (1979), 125 CONG. REC. S33 (daily ed. Jan. 15, 1979) (Bayh).

For two unrelated reasons, passage of this legislation would result in conservation of limited judicial resources. First, increased reliance on administrative grievance procedures coupled with the court's ability to order a continuance while the parties pursue administrative remedies will result in the resolution of many disputes outside the judicial system. A second factor to consider is the contribution that the Department of Justice makes to the effective and expeditious resolution of "pattern and practice" institutional civil rights cases. As noted in the House Report, "The Department's ability to streamline complex litigation results in a notable conservation of judicial resources."[130]

IV. RATIONING

Learned Hand put it best in an often quoted, but little examined, phrase: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[131] Although this edict was directed at legal aid lawyers, it clearly was intended for the entire legal profession, and more importantly, for the three branches of government.

Before examining the concept of rationing and its applicability to the three branches, several points must be made. First, Hand's commandment retains its validity today in a time of intense pressure for the increasingly finite resource of federal judicial time. As a reminder, it should be carved in stone on a House or Senate office building or a federal courthouse.

This article seeks to show that legislative resort to the techniques of expansion, substitution, and conservation will make rationing unnecessary, and indeed, unthinkable. There is no other choice. In a democratic state "justice is indiscriminately due to all, without regard to numbers, wealth, or rank."[132] Justice is not readily divisible and therefore cannot be rationed fairly.

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130 H.R. REP. No. 96-80, 96th Cong., 1st Sess. 16 (1979).

131 Hand, *Thou Shalt Not Ration Justice,* 9 BRIEF CASE 3, 5 (Apr. 1951) (excerpt from the speech of Judge Hand on the occasion of the 75th Anniversary Dinner of the Legal Aid Society of New York).

132 Georgia v. Brailsford, 3 U.S. (3 Dall.) 483, 484 (1794) (Jay, J.).

Some commentators have argued[133] — and others undoubtedly will join them — that the substitution devices discussed above, especially the abolition of diversity jurisdiction, are rationing in disguise.[134] This is not so. The device of substitution refers disputes to a dispute settlement technique or institution which has proven that it can function expeditiously, fairly, and inexpensively. Before deciding to substitute, the legislator must carefully and conscientiously consider whether the new procedure or institution is able to fulfill its delegated functions. If this is not done or if the decision to substitute is made with foreknowledge that an inferior quality of justice will result, then rationing has occurred. Likewise, if a cause of action is removed from the federal judicial system and no substitution device is provided in return, then rationing has transpired and Hand's commandment has been violated.

In the Ninety-sixth Congress, one can identify only one legislative proposal to ration judicial time. Title IV of the draft bill to amend the Social Security Act[135] abolishes the existing jurisdiction of the federal district courts to review final decisions of the Secretary of Health, Education and Welfare denying application for disability benefits. Under present law, district court review of the Secretary's decisions is limited to a determination whether his findings are supported by substantial evidence.[136] Unsurprisingly, this is a time-consuming task for federal judges and magistrates. The Social Security legislation, which is supported by the Administration, does not provide an alternative forum, such as a specialized disability review tribunal. It merely relies on existing mechanisms within HEW which are not reputed to work very well. Vague promises have been made to

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133 During the House Hearings on the State of the Judiciary, two witnesses characterized the abolition of diversity jurisdiction as a rationing device. *Hearings on the State of the Judiciary, supra* note 3, at 112-14, 116, 121, 124, 127, 149, 152 (statements of Burt Neuborne and Shirley M. Hufstedler). Both of these respected commentators support the elimination of diversity.

134 *See* Frank, *The Case for Diversity Jurisdiction,* 16 HARV. J. LEGIS. ____ (1979); *1979 House Hearings on Diversity Jurisdiction/Magistrates Reform, supra* note 62.

135 H.R. 2854, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1328 (daily ed. Mar. 13, 1979).

136 The cases on this point are legion. *See, e.g.,* Richardson v. Perales, 402 U.S. 389 (1971).

improve the existing system. Fortunately, the House subcommittee responsible for the legislation quickly dealt with the controversial title IV by striking it in its entirety.[137] Thus, an attempt to ration was shortlived.

The legislative branch has not always been so wise and has occasionally violated Judge Hand's commandment. For example, Congress enacted expansive legislation which provides that decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments administered by the Veterans Administration shall be final and conclusive.[138] No other official nor any court of the United States has power or jurisdiction to review any such decision.[139]

Congress clearly acted within its constitutional prerogative in enacting legislation barring claimants to veterans' benefits from the federal courts.[140] Nonetheless, rationing has occurred and legislative proposals to remedy this draconian treatment of a certain category of controversies ought to be considered by the Ninety-sixth Congress.[141]

The judicial branch also has engaged in rationing. It is extremely disturbing that a recent series of judicial pronouncements cutting off access to the federal courts appears to have been prompted by rising caseloads. A vigorous dissenting opinion by Mr. Justice Douglas suggested this possibility:

> The mounting caseloads of the Federal courts are well known. But cases such as this one reflect festering sores in our society. . . . I would lower technical barriers and let courts serve that ancient need. They can in time be curbed by legislative or constitutional restraints if an emergency arises. We are today far from facing an emergency.[142]

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137 *See* H.R. 3236, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1736 (daily ed. Mar. 27, 1979) which is a clean version of the bill reported to the full Ways and Means Committee by the Subcommittee on Social Security.

138 38 U.S.C. § 211(a) (1976).

139 *Id.* For a detailed discussion of this legislation, *see* H.R. REP. No. 91-1166, 91st Cong., 1st Sess. (1970). *See also* De Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972).

140 It is within the Congress' power to issue such a command; when rights of an individual against the United States are created, Congress is under no obligation to provide a remedy through the courts. United States v. Babcock, 250 U.S. 328 (1919).

141 *See* H.R. 159, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H161 (daily ed. Jan. 18, 1979) (Brodhead).

142 Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).

This thesis was seconded by Mr. Justice Brennan who, in scathing criticism of several recent Supreme Court decisions,[143] observed:

> federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered. Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated and systematic violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism.[144]

These are serious allegations which heighten concern on Capitol Hill because they are levelled by two highly respected jurists and also because the salvos were fired from within the Supreme Court itself.

During the Ninety-fifth Congress the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice held extensive oversight hearings on the state of the judiciary and access to justice. The scope of the inquiry, as revealed in the title of the hearings, was necessarily broadened to include not only the subject of court-related problems and the proposals to solve them but also the subject of accessibility of citizens to the federal judicial system. In this latter regard, one of the openly enunciated goals of the hearings was to examine the accusations of Justices Douglas and Brennan.[145]

While no witness during this inquiry was able to identify explicitly a uniform pattern, it became clear that during the past decade a number of significant decisions have made it more difficult to get a federal court to vindicate federal constitutional and statutory rights.[146] Aggrieved persons prepared to litigate issues on the merits have been barred from the federal court-

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143 In footnotes, Mr. Justice Brennan specifically mentions the following cases: Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Paul v. Davis. 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); and Hicks v. Miranda, 422 U.S. 332 (1975).

144 Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 502 (1977).

145 *Hearings on the State of the Judiciary, supra* note 3, at 5 (statement of Robert W. Kastenmeier).

146 *Id.* at 10, 11-19, 112-17, 167-69, 255-60 (statements of Ralph Nader, Burt Neuborne, William Cunningham, Steven Steinglass, and Dennis Sweeney).

house doors by sometimes novel, shifting, and progressively more stringent threshold rulings.[147] It is likely that endemic court congestion has been at the root of these decisions.

It is outside the scope of this article and beyond the expertise of its authors to examine a decade of Supreme Court case law. That is an endeavor best left to academicians.[148] Several political observations are in order, however. From a policy perspective, what must be stated is that the primary obligation of the federal judicial system is to provide a forum to resolve on the merits the cases for which it is best equipped: not resolving state law questions which arise under federal diversity of citizenship jurisdiction, but adjudicating serious claims which arise under the Constitution, laws, or treaties of the United States.[149] Since most of the restrictive decisions of the Supreme Court have affected federal rights, Congress, in return for aiding the federal courts by abolishing diversity jurisdiction and by enacting the other reforms discussed herein, should enact legislation designed to reopen courthouse doors that have been slammed shut.

V. AVOIDANCE

By definition, it takes the actions of two parties to create a dispute. Avoidance occurs when one of the disputants limits his relationship with the other so that the dispute is suppressed or no longer remains salient.[150] It is helpful for the policymaker to keep in mind that available dispute processing alternatives create a spectrum ranging from adjudication at one end to avoidance at the other, with mediation, conciliation, om-

147 Goldberg & Schwartz, Supreme Court Denial of Citizen Access to Federal Court to Challenge Unconstitutional or other Unlawful Actions: The Record of the Burger Court (a Statement of the Board of Governors of the Society of American Law Teachers) at ii (1978).

148 *Id. See also* Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection,* 5 HOFSTRA L. REV. 545 (1977); Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976); McGowan, *Federal Jurisdiction: Legislative and Judicial Change,* 28 CASE W. RES. L. REV. 517 (1978); Rathjen & Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policy Making,* 23 AM. J. POL. SCI. 360 (1979).

149 *See* FRIENDLY, *supra* note 3, at 197-98; Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977).

150 Felstiner, *Influences of Social Organization on Dispute Processing,* 9 LAW & SOC'Y REV. 63, 70 (1974).

budsmen, and negotiation in the middle.[151] There is, indeed, a wide expanse between settling a dispute with a formal hearing at the United States Supreme Court with its nine black-robed justices and abandoning it by turning the other cheek.

From a legislative perspective, avoidance is usually not of much concern because it is so amorphous. It is not easily caged by statutory language nor is there adequate empirical evidence measuring its exact dimensions in our society. Nonetheless, its existence cannot be questioned. Examples abound: consumers switch their trade from one businessman to another because of the purchase of a defective product; workers quit jobs because of race or sex discrimination; neighbors visit less or even sell their houses because of barking dogs, raucous parties, or unkept lawns.[152] For many people with low incomes, the formal judicial system is beyond reach. Their economic status forces them to avoid costly adjudication.

Avoidance in a modern, democratic society like the United States, to paraphrase Durkheim, is like a person's temperature: If it is too high or low, there is cause for concern.[153] The lawmaker should recognize that there are enormous social costs if people are obliged, either because of high legal costs or extended court delays, to solve many disputes by avoidance or self-help.[154] Similarly, it is not cost-effective or functional for all disputes to be resolved through formal pleadings before a tenured judge. More importantly, if the poor and oppressed — those who often must resort to the legal system to obtain even the basic necessities of life — lack access to a dispute resolving institution, the promise of equal justice under law rings hollow.[155] Creation of the private, independent Legal Services

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151 Sander, *Varieties of Dispute Processing,* in 70 F.R.D. 111, 114 (1976); W. GELLHORN, WHEN AMERICANS COMPLAIN (1966).

152 *See, e.g., Hearings on the Dispute Resolution Act, supra* note 71. It should be recognized that twentieth-century life in the United States is increasingly unneighborly and depersonalized. Consumers deal with national chains, workers toil on large assembly lines, and neighbors do not know each other. The importance of avoidance as an individual statement is lessened if the other side of the dispute does not get the message.

153 *Cf.* K.C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 27 (1971).

154 Felstiner, *supra* note 150, at 76; Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95 (1974).

155 *Legal Services Corporation Act: Hearings on H.R. 3719 Before the Subcomm. on*

Corporation,[156] assigned the responsibility of administering a legal services program, was a necessary legislative initiative to reduce implicitly mandated avoidance of the legal system by almost nineteen million Americans.[157] Although much more needs to be done, the importance of this initiative cannot be overemphasized.

In seeking a national program for the delivery of justice, the Department of Justice has recognized many of these factors. Through the Law Enforcement Assistance Administration, it funded experimental neighborhood justice centers in Atlanta, Kansas City, and Los Angeles. The twin goals of these centers are to provide an alternative to the local courts for settlement of many kinds of disputes that normally are shut out of the formal court system,[158] and further, to gather information about alternative dispute resolution techniques. Within the next few months, an independent evaluation will determine the most successful elements of this program.

Independent of this, Congress has developed legislation to create a dispute resolution resource center within the Department of Justice. The center would serve as a central clearinghouse for information on dispute processing techniques. In addition, the center would grant seed money to states, municipalities, counties, and private organizations to experiment with various dispute resolution procedures. This legislation recognizes that "for the majority of Americans, mechanisms for the resolution of minor disputes are largely unavailable, inaccessible, ineffective, expensive, or unfair";[159] that the inadequacy of dispute resolution mechanisms is against the general welfare of the people; and that neighborhood, local, or community-based dispute resolution mechanisms can provide means for expeditiously, inexpensively, and voluntarily resolving

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Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 48 (1977) (statement of Thomas Ehrlich).

156 Pub. L. No. 93-355, 88 Stat. 378 (1974); Pub. L. No. 95-222, 91 Stat. 1619 (1977).

157 H.R. REP. No. 95-310, 95th Cong., 1st Sess. 4 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4503, 4506; S. REP. No. 95-172, 95th Cong., 1st Sess. 3 (1977).

158 Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 8 (1978); *see* Pound Conference Follow-Up Report, *supra* note 8, at 9-12.

159 H.R. 2863, 96th Cong., 1st Sess. (1979), 125 CONG. REC. H1328 (daily ed. Mar. 13, 1979).

disputes.[160] These findings are steps in the right direction. If this legislation is enacted, after several years of experimentation, more will be known about the feasibility of providing alternative forums for the fair and expeditious resolution of disputes, where the alternative institutions should be located, and who should organize and control them.[161]

Conclusion

In spite of the fact that article III of the Constitution vests the judicial power of the United States "in one Supreme Court" and in "inferior" lower federal courts, the framers of the Constitution specifically authorized Congress to organize the Supreme Court, to establish the lower courts, and to distribute jurisdiction among them. In addition, article I vests in the legislative branch power to constitute tribunals inferior to the Supreme Court. And, the Supremacy Clause of the Constitution, by mandating that state courts share with their federal counterparts responsibility for enforcing the Constitution and the laws of the United States, gives Congress a very real interest in the quality of state-administered justice. These grants of authority have provided Congress with the significant responsibility of overseeing the functioning of the federal courts, as well as taking more than a passing interest in state justice systems. The genius of the founding fathers is that they balanced this broad legislative power by granting independence to the federal courts and tenure "during good behavior" to the judges who sit on these courts. In essence, the framers made it exceedingly difficult to change the basic judicial system or to remove federal judges.[162]

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160 *Id.* Who controls the dispute resolution mechanism is an issue of great concern. The House bill recognizes the importance of community-based justice and citizen empowerment. *See Hearings on the Dispute Resolution Act*, *supra* note 71, at 131 (statement of Raymond Shonholtz); Hofrichter, *Justice Centers Raise Basic Questions*, 2 NEW DIRECTIONS IN LEGAL SERVICES 168 (1977).

161 For further discussion of developments in dispute processing outside the courts, *see* JOHNSON, KANTOR & SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL COURTS (1977); *see also* notes 70 to 74 and accompanying text *supra*.

162 A discussion of judicial tenure or discipline legislation, important as it may be, is outside the scope of this article. Even the best judges cannot be expected to overcome the inadequacies of an irrational and inconsistent judicial structure:

From a policy standpoint this is a two-sided coin. First and foremost, it prevents the executive and legislative branches from encroaching upon the power of the judiciary. In this regard, the sanctity of the judicial branch is constantly protected. The rule of law stands firm and rule by fiat becomes an impossibility. On the other hand, it makes it abundantly more difficult to aid the courts legislatively when their dockets become congested and their machinery needs fine-tuning. In this context, distance from the political branches works to the judiciary's detriment. Essentially, what is a strength in our democratic system of government — provision for an independent, anti-majoritarian check to the excesses of the executive and legislative branches, as well as abuses committed by private parties — becomes a weakness when it comes time to provide the judiciary with the necessary tools to accomplish its assigned functions.

In the end, issues relating to court reform and access to justice are political questions.[163] This proposition gives rise to a second set of problems. Where is the political constituency for court reform and access to justice? How is the legislator to measure support or opposition to a particular proposal? Who

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> It has been suggested that no court system can work with bad judges and that good judges can make any system work. Without challenging this piece of "conventional wisdom," it must also be added that a good court structure will maximize the quality and quantity of judicial output, minimize administrative complexities and costs, and promote confidence in the judicial system.

CITIZEN'S STUDY COMMITTEE ON JUDICIAL ORGANIZATION, REPORT TO [WISCONSIN] GOVERNOR PATRICK J. LUCEY 65 (1973).

163 The Senate's recent action in attaching a school prayer amendment to S. 450 (the bill to eliminate the mandatory jurisdiction of the Supreme Court) is a stark reminder of this basic point. For further discussion of S. 450, *see* notes 123 to 128 and accompanying text *supra*. The prayer (Helms) amendment first had been attached to the Department of Education bill. Then, the Senate leadership, having decided that this action "endangered" the education package, looked for a "more appropriate vehicle" to which the school prayer issue could be linked. They ultimately found a widely supported and relatively non-controversial bill to provide needed relief to the Supreme Court of the United States. 125 CONG. REC. S4138-57 (daily ed. April 9, 1979). Their choice was clear; they would "endanger" this latter legislative proposal to save the education bill.

Politically, this action has two ramifications. First, a policy decision has been made that creating the Department of Education is more important than improving the operation of the United States Supreme Court. Second, a Senate precedent is established allowing alteration of the jurisdiction of the Supreme Court in other controversial areas (e.g., desegregation, abortion, obscenity) in an effort to control the substantive outcome of a case. *Id.* (remarks of Edward M. Kennedy and Charles McC. Mathias, Jr.).

does he turn to for political advice? In this regard, members of the legal profession form an intelligent, articulate, interested, and vocal political community. They not only speak for themselves individually, but they also often organize into associations and then speak with a more unified voice. Nonetheless, they hardly ever voice the concerns of the common man, who is rarely heard from. In the long run, lawyers tend to look after their own interests. A personal injury attorney will protest vehemently against no-fault insurance or abolition of diversity jurisdiction. Similarly, a tax lawyer will not support legislative proposals to end forum shopping in tax cases.[164]

What is fatally lacking for the policymaker is an overview of the entire system and the needs of all its participants. To solve the serious problems posed by delay, costs, and unfairness, this is what is needed. The Department of Justice's Office for the Improvements in the Administration of Justice, under the able leadership of Daniel J. Meador, has filled a gaping chasm in this area. So have several conferences and commissions which have met and issued reports during the past decade. So, although they represent specialized interest groups, have the Judicial Conference of the United States, the Conference of (State) Chief Justices, and the American Bar Association.

Aid from these groups only partially relieves the crushing burdens on Congress. We live in a rapidly growing and ever-changing society. Inexorably, life in the modern, technological state gives rise to new problems and societal tensions. A short list of subjects which concern the citizenry in 1979 makes this patently clear: industrial pollution, electronic surveillance, bank privacy, occupational safety, consumer credit protection, consumer product safety, freedom of information, and resource preservation. None of these items was of political or judicial concern over fifty years ago. Since 1969, Congress has passed

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164 Almost two centuries ago, Alexis de Tocqueville observed: "It must therefore be expected that personal interest will become more than ever the principal if not the sole spring of men's actions." 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123-24 (Reeve trans., Bowen & Bradley rev. ed. 1976). Likewise, judges cannot be counted upon to deal with the issues raised by substantial revision of the federal system. P. CARRINGTON, G. MEADOR, M. ROSENBERG, JUSTICE ON APPEAL 224 (1976).

over fifty substantive statutory schemes that confer jurisdiction on the federal courts. The Ninety-sixth Congress will not change the trend of giving the federal judiciary more and more to do: codification of the criminal laws, appellate review of sentences, and protection of insurance and medical records are possibilities for enactment.[165] Similar pressures are placed on the state courts to protect the environment, to provide equal treatment for all citizens, to enforce the criminal laws, to conserve energy, to guarantee the rights of consumers, to protect institutionalized persons, and to provide fair, expeditious, and inexpensive dispute resolution procedures.

The twentieth-century industrial state daily brings to mind the reality that most of our resources are finite. Allocation of finite commodities has become a problem for the legislative and executive branches. If it is not done properly, waste occurs and the Proposition 13 reaction results. Special interests emerge recommending that everybody's interests but their own be curtailed. These suggestions tend to cancel each other out, leaving the legislative branch in a near-paralyzed position.[166]

To the extent that the practicing bar is warned about changing a legal system with which it feels so comfortable, a parting word is necessary. We live in a world where change is

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165 The Ninety-fifth Congress continued the trend of providing federal court remedies and judicial review in a wide variety of federal statutes to meet the varying needs of American society. Thirteen public laws authorized the United States to enforce statutory schemes through civil actions. *See, e.g.,* Pub. L. No. 95-213, § 104, 91 Stat. 1494 (1977) (Foreign Corrupt Practices Act); Pub. L. No. 95-339, § 105, 92 Stat. 460 (1978) (New York City Loan Guarantee Act); Pub. L. No. 95-372, §§ 208, 302, 312, 92 Stat. 1824 (1978) (Ethics in Government Act). In addition, the Ninety-fifth Congress enacted six laws creating private causes of action. *See, e.g.,* Pub. L. No. 95-511, § 103, 92 Stat. 1783 (1978) (Foreign Intelligence Surveillance Act), which regulates the use of electronic surveillance within the United States for foreign intelligence purposes. The legislation requires the Chief Justice of the United States to designate seven district court judges from seven circuits to constitute a court which has jurisdiction to hear applications for and grant orders approving foreign intelligence electronic surveillance. The Chief Justice also must appoint three circuit or district judges to constitute a court of review. Then, the Supreme Court acts as the final appellate arbiter.

One federal judge has characterized Congress' passion for judicial review as a love affair which is heating up rather than cooling down. McGowan, *Congress and the Courts,* 62 A.B.A.J. 1588, 1589 (1976). It appears that this love affair has turned into a stable relationship with long-term ramifications.

166 The controversy over the proposed abolition of diversity of citizenship jurisdiction provides a dramatic illustration of this.

To the extent that the practicing bar is worried about changing a legal system with which it feels so comfortable, a parting word is necessary. We live in a world where change is nature's mighty law; in fact, "change is one of the few things men can be certain of."[167] The role of law in our society always has been to organize, redirect, and legitimate changes that started outside the law. Life in the United States has been in constant flux since the end of World War II, and indeed, since the last major judicial reforms were consummated in the 1920s. It is a tribute to the existing judicial system, and to the lawyers who toil in it, that it has worked as well as it has. As Professor Hurst has observed, "Any institution whose job it is to deal directly, in as rational a way as possible, with the ceaseless flux, is to be counted one of the truly basic instruments of civilized living."[168]

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167 J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 19 (1950).
168 *Id.*

THE FEDERAL MAGISTRATE ACT OF 1979

PETER G. MCCABE*

One solution to the congestion in the trial courts is to assign authority for minor matters or, if the parties agree, major cases to other judicial officers. In this article, Mr. McCabe considers recent legislation expanding the authority of federal magistrates. He examines the background of federal magistrate legislation, outlines the scope of their new duties, and concludes that the increased use of magistrates will facilitate the delivery of prompt and effective justice in the federal trial courts.

Introduction

Legislation has been recently approved in the Ninety-sixth Congress "to improve access to the Federal courts by enlarging the civil and criminal jurisdiction of United States magistrates."[1] The Federal Magistrate Act of 1979, signed into law on October 10, 1979, provides a method for litigants to dispose of their cases voluntarily in the federal courts in a less formal, less expensive, and less time-consuming manner.[2] It establishes "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary."[3]

The legislation, initiated in 1977 by the Department of Justice, contains three principal provisions: (1) it provides specific authority for a magistrate to try and dispose of any civil case pending in the United States district court of his appoint-

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1 H.R. 1046, 96th Cong., 1st Sess., 125 CONG. REC. H187 (daily ed. Jan. 18, 1979) (introduced by Rep. Robert W. Kastenmeier (D - Wisc.)) and S. 237, 96th Cong., 1st Sess., 125 CONG. REC. S625 (daily ed. Jan. 25, 1979) (introduced by Sen. Dennis DeConcini (D - Ariz.)). S. 237 passed the Senate by voice vote on May 2, 1979, and H.R. 1046 was approved by the Senate on June 26, 1979, by a vote of 374-24. The bills were subsequently considered by a conference committee of the two Houses. S. Rep. No. 96-322, 96th Cong., 1st Sess. (1979) [hereinafter referred to as "Conference Report"].

2 H.R. REP. No. 95-1364, 95th Cong., 2d Sess. 5 (1978) [hereinafter cited as 1978 HOUSE REPORT]. The President signed the Conference Committee version of the bills into law on October 10, 1979. Federal Magistrate Act of 1979, P.L. 96-82.

3 *Id.*

ment, upon the designation of the judges of the court and upon the mutual consent of the parties to the litigation; (2) it expands the authority of magistrates to dispose of minor criminal cases by including all federal misdemeanors within their jurisdiction; and (3) it requires stricter standards and procedures for the appointment of magistrates by federal district court judges.

The Administration's bill received the endorsement, of *inter alia,* the Judicial Conference of the United States and the American Bar Association,[4] and it was approved convincingly by both Houses of the Ninety-fifth Congress.[5] It did not become law last year, however, because a disagreement over a controversial amendment to eliminate diversity jurisdiction in the federal courts could not be resolved through conference in the closing days of the session.[6] The bills which were passed by the Ninety-sixth Congress were essentially the same as those which had been approved by the two Houses of the Ninety-fifth Congress.[7]

To appreciate fully the scope and effect of the Federal Magistrate Act of 1979, it must be viewed in historical perspective. Accordingly, this Article will first review both the development and present state of the United States magistrate system. Section Two will then analyze and compare the principal provisions of the House and Senate versions of the Federal Magistrate Act of 1979 and discuss the constitutional foundation and policy justifications underlying the revisions in the federal magistrate system. This analysis will show that the Federal Magistrate Act of 1979 is a logical and beneficial extension of the magistrate system.

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4 [1977] JUDICIAL CONFERENCE OF THE U.S. REP. 62; [1978] JUDICIAL CONFERENCE OF THE U.S. REP. 16 [hereinafter cited as JUDICIAL CONFERENCE]. The Judicial Conference, however, did not endorse the civil appellate provisions of the bill in their entirety. *See also Hearings on Diversity of Citizenship Jurisdiction and Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,* 95th Cong., 1st Sess. 86 (1977) (statement of Joseph Tydings for the American Bar Association) [hereinafter cited as *1977 House Hearings*].

5 S. 1613, 95th Cong., 1st Sess., passed the Senate by voice vote on July 26, 1977, and passed the House of Representatives in amended form by a vote of 323-49 on October 4, 1978.

6 36 CONG. Q. 3353 (1978).

7 The 1979 House bill recently approved (H.R. 1046) is virtually identical to the version of S. 1613 passed by the House in 1978. The Senate bill approved in 1979 (S. 237) is similar to the version of S. 1613 passed by the Senate in 1977, but it adopts, in whole or in part, several of the amendments approved by the House in the last Congress. It attempted, thus, to reach a consensus with the House.

I. THE FEDERAL MAGISTRATE SYSTEM

A. *Predecessors and Development*

The Federal Magistrates Act of 1968 established the magistrate system in order to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice."[8] While the Act created United States magistrates as a new and upgraded lower tier of federal judicial officers, it built largely upon the 175-year-old foundation of the United States commissioner system by granting each United States magistrate — at a minimum — "all powers and duties conferred or imposed upon United States commissioners" by law or by the Federal Rules of Criminal Procedure.[9]

1. United States Commissioners

In the Judiciary Act of 1789 the First Congress specified that bail for a person accused of committing a federal crime could be set either by a judge of the United States or by a state judge or magistrate.[10] In 1793 the Congress provided for the appointment by the federal circuit courts of "discreet persons learned in the law" to take bail for the courts in federal criminal cases.[11] In 1812 the circuit courts received the authority to appoint these persons to take bail and affidavits in criminal cases and to receive fees for these services, as allowed by state law.[12]

The statute referred to these "discreet persons" as "commissioners" as early as 1817, when Congress authorized them to take affidavits and bail in civil cases and to exercise all the powers of a federal judge for the taking of depositions.[13] During the last century, the Congress extended other miscellaneous duties to the commissioners,[14] and in 1878 it specifically pro-

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8 H.R. REP. No. 1629, 90th Cong., 2d Sess. 11 (1968) *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 4252 [hereinafter cited as 1968 HOUSE REPORT].

9 28 U.S.C. § 636(a)(1) (1976).

10 Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.

11 Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334.

12 Act of February 20, 1812, ch. 25, §§ 1, 2, 2 Stat. 679-82.

13 Act of March 1, 1817, ch. 30, 3 Stat. 350.

14 *See* United States v. Maresca, 266 F. 713, 719-20 (S.D.N.Y. 1920), *cert. denied*, 257 U.S. 657 (1921); Goldsmith, *The Role and Jurisdiction of the United States Commissioner in the Federal Judicial Structure*, 1 LINCOLN L. REV. 89 (1966), *reprinted in Hearings on the Federal Magistrate Act Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess. 318, 348 (1966) [hereinafter cited as *1966 Senate Hearings*].

vided for the appointment of commissioners of the circuit courts to exercise powers expressly conferred by law.[15]

In 1896 the Congress replaced the century-old system of circuit court-appointed commissioners with a new system of United States commissioners, clothed with the same powers and duties as their predecessors, but appointed by the district courts[16] and compensated for their services under a uniform federal fee schedule.[17] The United States commissioners received four-year terms of office, but they were subject to removal by the district court at any time.[18]

In 1940 the Congress extended general jurisdiction to try all petty offenses committed on property under the exclusive or concurrent jurisdiction of the federal government to those United States commissioners specially designated by their appointing district courts to exercise such jurisdiction.[19] A commissioner, however, could not proceed with the trial of a petty offense until he had first apprised the defendant of his right to elect a trial in the district court and had obtained a written consent by the defendant to be tried before the commissioner. The statute provided for appeal from the judgment of the commissioner to the district court, and it authorized the Supreme Court to prescribe rules of procedure and practice for both the trial of petty offenses and the taking of appeals.[20]

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15 Title XIII, ch. 6, § 627, 2 Rev. Stat. 109, (1878). One such circuit court-appointed commissioner position was specifically authorized by statute for Yellowstone National Park in 1894. Act of May 7, 1894, ch. 72, §§ 5, 7, 28 Stat. 74. The incumbent was given limited jurisdiction to try and sentence persons accused of petty offenses committed within the park, in addition to the general duties exercised by other circuit court commissioners. An appeal from a judgment of conviction by the park commissioner in a petty offense case was provided to the United States District Court for Wyoming. The park commissioner was provided with a fixed salary for his services "in addition to the fees allowed by the law to commissioners of the circuit courts" for the conduct of various proceedings in federal cases. Over the next half-century, several national park commissioner positions were established by statute and were accorded similar jurisdiction. *See, e.g.,* Act of April 20, 1904, 33 Stat. 188, 189; Act of March 3, 1911, 36 Stat. 1086; Act of August 22, 1914, 38 Stat. 700-01; Act of June 30, 1916, 39 Stat. 245, 246; Act of August 21, 1916, 39 Stat. 523; Act of June 2, 1920, 41 Stat. 733; Act of April 25, 1928, 45 Stat. 460; Act of March 2, 1929, 45 Stat. 1538.

16 Act of May 28, 1896, ch. 252, §§ 19, 21, 29 Stat. 184.

17 *Id.*

18 *Id.*

19 Act of October 9, 1940, ch. 785, 54 Stat. 1058-1059.

20 *Id.* A detailed review of the petty offense jurisdiction of United States commissioners is found in Goldsmith, *The Role and Jurisdiction of the United States Commissioner in the Federal Judicial Structure,* 1 LINCOLN L. REV. 89 (1966), *reprinted in 1966 Senate Hearings, supra* note 14, at 318.

In 1946 the Congress enacted a simplified fee schedule for United States commissioners and provided for certain essential office expenses for the commissioners.[21] Congress also made additional refinements in administrative arrangements for certain commissioners[22] but left the basic jurisdiction of the United States commissioners essentially unchanged.

2. The Federal Magistrates Act of 1968

Several proposals after 1940 advocated reform of the office of United States commissioner,[23] but it was 1965 before the Congress conducted an extensive and exhaustive examination of the commissioner system.[24]

The Senate Judiciary Subcommittee on Improvements in Judicial Machinery held exploratory hearings at which the witnesses generally agreed that the commissioner system needed fundamental reform.[25] Reformers cited the following principal defects: (1) the lack of a requirement of bar membership for appointment as a commissioner; (2) the unchecked freedom of the district courts to appoint and remove commissioners at will; (3) the part-time status of virtually all the commissioners; (4) the lack of guidance given to commissioners in the conduct of proceedings; (5) the basic impropriety of a fee system for compensating judicial officers; (6) the inadequacy of the existing compensation levels; and (7) the insufficiency of support services provided to the commissioners.[26]

The hearings elicited two conflicting proposals for overhaul of

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21 Act of August 1, 1946, § 60 Stat. 752.

22 Congress authorized the Director of the Administrative Office to pay office and clerical expenses of the United States Commissioners who are required to devote their full time to official duties. Act of August 13, 1954, 68 Stat. 703. Further, the schedule of fees for United States Commissioners was increased to an annual statutory maximum of $10,500. Pub. L. No. 85-276, 85th Cong., 1st Sess., Sept. 2, 1957.

23 *See* Spaniol, *The Federal Magistrate Act: History and Development,* 4 ARIZ. ST. L. REV. 565, 566-68 (1974).

24 *Hearings on the U.S. Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 89th Cong., 1st & 2d Sess. pt. I, at 1 (1965-66) [hereinafter cited as the *1965-66 Senate Hearings*].

25 Primary attention was focused at the hearings on the personal qualifications of the United States commissioners, the method of appointing and compensating them, the need to establish uniformity in procedures among commissioners, their function with regard to preliminary examinations and other pretrial proceedings, and the desirability of expanding the jurisdiction of the commissioners. *Id.* at 43-45.

26 The principal defects in the commissioner system were also set out in the 1968 HOUSE REPORT, *supra* note 8, at 13-14.

the commissioner system: The first advocated eliminating or downgrading the office of commissioner and transfering the duties of the commissioners to district judges, while the second suggested materially upgrading the position of commissioner. The first alternative commanded little support[27] and was rejected as both inefficient and impractical.[28] The witnesses overwhelmingly favored the latter approach, and in April 1966 the Subcommittee completed an initial draft of a bill to create an upgraded system of judicial officers patterned after the existing statutory arrangements for referees in bankruptcy.[29]

The bill created the new office of United States magistrate to emphasize the judicial nature of the position and to denote a break with the commissioner system.[30] The magistrates received an eight-year term of office,[31] with removal only for cause.[32] A salary scale identical to that established for referees in bankruptcy replaced the long-standing fee system of compensation. The bill increased the criminal trial jurisdiction of magistrates over that of the commissioners and authorized the new officers to assist the judges of the district courts in handling a wide range of proceedings in civil and criminal cases.[33]

Following hearings in the Eighty-ninth Congress[34] and incorporation of several modifications suggested by the

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27 *See 1966 Senate Hearings, supra* note 14, at 256 (staff memorandum), *reprinted in 1977 House Hearings, supra* note 4, at 99. *See also 1966 Senate Hearings, supra* note 14, at 58 (testimony of Judge Theodore Levin).

28 *1966 Senate Hearings, supra* note 14, at 30-31; 1968 HOUSE REPORT, *supra* note 8, at 14.

29 *See* the Referees Salary and Expense Act of 1946, 60 Stat. 323. *See also* Staff Memorandum, Statutory Provisions Regarding Referees in Bankruptcy, in *1966 Senate Hearings, supra* note 14, at 279-81. The Subcommittee's draft was circulated among federal judges, commissioners, attorneys, law professors, and other interested parties. *1966 Senate Hearings, supra* note 14, at 2. Following consideration of the various comments received, Senator Tydings introduced a modified bill in June 1966. S. 3475, 89th Cong., 2d Sess., 112 CONG. REC. 12,445 (1966).

30 *1966 Senate Hearings, supra* note 14, at 34 (staff memorandum), *reprinted in 1977 House Hearings, supra* note 4, at 99.

31 The legislation was subsequently modified to provide an 8-year term for full-time magistrates and a 4-year term for part-time magistrates. 28 U.S.C. § 631(e) (1976).

32 Removal under the Act may only be for incompetency, misconduct, neglect of duty, or physical or mental disability; a magistrate is entitled to a specification of the charges and a hearing before removal. 28 U.S.C. § 631(h) (1976).

33 Act of October 17, 1968, Pub. L. No. 90-578, § 101, 82 Stat. 1113 (current version at 28 U.S.C. § 636(b) (1976)).

34 *1966 Senate Hearings, supra* note 14.

Judicial Conference of the United States, several Congressmen introduced a similar magistrate bill in the opening days of the Ninetieth Congress.[35] The Senate Judiciary Committee reported out the bill favorably, citing its potential for the more efficient disposition of judicial business through the referral of appropriate matters to a lower tier of judicial officers.[36] The bill passed the Congress[37] and the President signed it into law on October 17, 1968.

The jurisdictional section of the Federal Magistrates Act of 1968[38] provided United States magistrates with authority to perform three basic categories of judicial duties: (1) all the powers and duties formerly exercised by the United States commissioners (largely initial proceedings in federal criminal cases);[39] (2) the trial and disposition of minor criminal offenses; and (3) "additional duties" to assist the judges of the district courts, including (a) service as a special master in appropriate civil cases; (b) the conduct of pretrial and discovery proceedings in civil and criminal cases; (c) preliminary review

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35 S. 945, 90th Cong., 1st Sess. (1967).

36 S. REP. No. 371, 90th Cong., 1st Sess. 9 (1967) [hereinafter cited as 1967 SENATE REPORT].

37 Passed in the Senate on June 29, 1967, 113 CONG. REC. 17,980, 17,987 (1967); passed with amendments in the House on September 26, 1968, 114 CONG. REC. 28,358, 28,365 (1968). The Senate concurred in the House amendments on October 3, 1968, 114 CONG. REC. 29,402, 29,408 (1968).

38 Pub. L. No. 90-578, § 101, 82 Stat. 1113 (1968) (codified as amended at 28 U.S.C. § 636 (1976)).

39 The duties of the commissioners which were transferred to the magistrates include acceptance of complaints, arrest warrants, or summonses (FED. R. CRIM. P. 4); issuance of search warrants (FED. R. CRIM. P. 41); conduct of initial appearance proceedings for defendants informing them of their rights, admitting them to bail, and imposing conditions of release (FED. R. CRIM. P. 5); appointment of attorneys for indigent defendants (18 U.S.C. § 3006A (1976)); conduct of preliminary examination proceedings (FED. R. CRIM. P. 5.1 and 18 U.S.C. § 3060 (1976)); conduct of removal hearings (FED. R. CRIM. P. 40); setting bail for material witnesses (18 U.S.C. § 3149 (1976)); conduct of extradition proceedings (18 U.S.C. § 3184 (1976)); holding to security of the peace and for good behavior (18 U.S.C. § 3043 (1976)); discharge of indigent prisoners or persons imprisoned for debt under process of execution issued by a federal court (18 U.S.C. § 3569 (1976) and 28 U.S.C. § 2007 (1976)); issuance of attachments or orders to enforce obedience to an Internal Revenue Service summons to produce records or give testimony (26 U.S.C. § 7604(b) (1976)); instituting proceedings against persons violating certain civil rights statutes (42 U.S.C. § 1987 (1976)); settling or certifying the nonpayment of seamen's wages (46 U.S.C. § 604 (1976)); and enforcing awards of foreign consuls in differences between captains and crews of vessels of the consul's nation (22 U.S.C. § 258(a) (1976)). Magistrates were also given the same authority as commissioners to administer oaths and affirmations. (28 U.S.C. § 636(a)(2) (1976)).

of prisoner habeas corpus petitions; and (d) such additional duties as are not inconsistent with the Constitution and laws of the United States.[40]

The legislative history of the bill emphasized that the "additional duties" that could be delegated by the judges to magistrates under 28 U.S.C. § 636(b) were not limited to the specific functions listed in that section of the statute: "The mention of the three categories was intended to illustrate the general character of duties assignable to magistrates under the act, rather than to constitute an exclusive specification of duties so assignable."[41]

3. Implementation of the Magistrate System

The Federal Magistrates Act gave the Judicial Conference of the United States[42] responsibility for overseeing the administration of the magistrate system. Its duties included determining the number, type, location, and salary of each United States magistrate position.[43]

The magistrate system was promptly established in five pilot districts in 1969. The following year the Administrative Office of the United States Courts conducted nationwide surveys to determine the needs of all the district courts for magistrate services. Following consideration of the surveys, the Judicial Conference authorized the district courts to appoint 82 full-time magistrates, 449 part-time magistrates, and 11 "combined" magistrates — positions in which part-

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40 28 U.S.C. § 636 (1976).

41 1968 HOUSE REPORT, *supra* note 8, at 19; 1967 SENATE REPORT, *supra* note 36, at 25.

42 The Judicial Conference of the United States consists of the Chief Justice of the United States, the Chief Judges of the 11 circuits, the Chief Judge of the Court of Claims, the Chief Judge of the Court of Customs and Patent Appeals, and a district judge from each circuit chosen for a term of three years by the judges of the circuit at an annual Judicial Conference of the Circuit. The Judicial Conference of the United States meets at least once every year to resolve administrative problems affecting all the circuits and to make recommendations to Congress concerning legislation affecting the federal judicial system. *See* 28 U.S.C. § 331 (1976).

43 28 U.S.C. § 633 (1976). For administrative regulations governing the operation of the Magistrate system, *see Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates,* by order of the Supreme Court, January 27, 1971; [1977] JUDICIAL CONFERENCE, *supra* note 4, at 27-28; [1972] JUDICIAL CONFERENCE, *supra* note 4, at 67-68; [1969] JUDICIAL CONFERENCE, *supra* note 4, at 32, 79 (conflict of interest rules for part-time magistrates); *Spaniol, supra* note 23, at 572 (educational programs acquainting judges with the use of magistrates).

time bankruptcy judges or clerks or deputy clerks of the court serve concurrently as part-time magistrates.[44] By July 1971, the 542 magistrate positions had replaced more than 700 United States commissioner positions.

4. Jurisdictional Uncertainty

Serious jurisdictional questions arose very early in the development of the new magistrate system. The additional duties provision of the statute — despite careful consideration by the Congress and the incorporation of numerous suggestions for improvement — was inartfully and imprecisely drawn. Accordingly, the various courts of appeals soon differed as to the specific types of judicial proceedings which district judges could appropriately delegate to magistrates under the provisions of 28 U.S.C. § 636(b).[45]

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44 [1970] JUDICIAL CONFERENCE, *supra* note 4, at 30, 67-70 (1970).

45 Several circuit court decisions invalidated references of a wide range of duties to magistrates under 28 U.S.C. § 636(b) (1976). *See, e.g.*, TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972) (determination of a motion to dismiss a civil case); Wedding v. Wingo, 483 F.2d 1131 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974); Rainha v. Cassidy, 454 F.2d 207 (1st Cir. 1972) (conduct of an evidentiary hearing in a habeas corpus case); Dye v. Cowan, 472 F.2d 1206 (6th Cir. 1972) (grant of a certificate of probable cause in a habeas corpus case); Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972) (preparation of a report and recommended disposition in an appeal from denial of benefits under the social security law by the Secretary of HEW). One court of appeals also expressed serious reservations about a district judge's delegating to a magistrate a hearing on a preliminary injunction, Devcon Corp. v. Woodhill Chem. Sales Corp., 455 F.2d 830 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1973), or a motion to dismiss, Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972). Except for dicta in one case, TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972), however, the circuit court decisions invalidating references to magistrates were based on purely statutory, rather than constitutional, grounds. Nevertheless, several of the decisions expressed a policy concern over the potential abdication by district judge of judicial responsibilities in delegating decision-making to magistrates, *see* TPO, Inc. v. McMillen, 460 F.2d 348, 359 (7th Cir. 1972); Ingram v. Richardson, 471 F.2d 1268, 1270 (6th Cir. 1972); Reed v. Board of Election Comm'rs, 459 F.2d 121, 123 (1st Cir. 1972). *See also* Comment, *An Expanding Civil Role for United States Magistrates*, 26 AM. U. L. REV. 66, 83-84 (1976); Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. CHI. L. REV. 584, 587-88 (1973); *Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., 225-26 (1977) (Federal Bar Association memorandum on the constitutionality of the proposed Magistrate Act of 1977, S. 1613) [hereinafter cited as *1977 Senate Hearings*]. *See also* Mathews v. Weber, 423 U.S. 261, 269-70 (1976); C.A.B. v. Carefree Travel, Inc., 513 F.2d 375, 379-80 (2d Cir. 1975); Flowers v. Crouch-Walker Corp., 507 F.2d 1378, 1380 (7th Cir. 1974).

Other decisions of the courts of appeals, however, upheld an equally wide variety of references to magistrates under the pertinent statute. *See, e.g.*, Campbell v. United States District Court for the Northern District of California, 501 F.2d 196 (9th Cir.),

Despite the appellate court differences, most district courts progressively expanded the responsibilities of magistrates,[46] particularly the conduct of pretrial proceedings in civil and criminal cases and the review of prisoner petitions.[47] In several districts the judges delegated to magistrates the function of presiding over evidentiary hearings in habeas corpus cases, despite the questionable authority for that practice under 28 U.S.C. § 636(b) (3).

In June 1974, the Supreme Court acted for the first time on a jurisdictional issue affecting magistrates and resolved the inter-circuit conflict which had developed regarding the authority of magistrates in habeas corpus cases.[48] In *Wingo v. Wedding,* the Court held by a 7-2 vote that under the Habeas Corpus Act[50] and section 636(b)(3) of the Magistrates Act a district judge lacked authority to designate a magistrate to conduct an evidentiary hearing in a habeas corpus action.[51]

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cert. denied, 419 U.S. 879 (1974) (motion to suppress evidence in a criminal case); Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir.), *vacated on other grounds,* 409 U.S. 56 (1972) (motion to dismiss a civil case); Remington Arms Co., Inc. v. United States, 461 F.2d 1268 (2d Cir. 1972) (motion for summary judgment in a civil case); Henderson v. Brierley, 468 F.2d 1193 (3d Cir. 1972) (record review and recommended disposition of a habeas corpus case); Noorlander v. Ciccone, 489 F.2d 642 (8th Cir. 1973); Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972); Asparro v. United States, 352 F. Supp. 1085 (D. Conn. 1973) (evidentiary hearings in habeas corpus cases); Yascavage v. Weinberger, 379 F. Supp. 1297 (M.D. Pa. 1974) (report and recommendation for disposition of a social security appeal). Special master references to magistrates were also approved in individual cases, in accordance with the strictures of FED. R. CIV. P. 53(b). Loral Corp. v. McDonnell Douglas Corp., 558 F.2d 1130 (2d Cir. 1977); Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), *cert. denied sub nom.* Andrade v. Hauck, 424 U.S. 917 (1976); Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir.), *vacated on other grounds,* 409 U.S. 56 (1972). Several courts also spoke approvingly of the assistance which magistrates had provided to the district courts in expediting litigation. Givens v. W.T. Grant Co., 457 F.2d at 613 n.1; Kliban v. United States, 65 F.R.D. 6-7 (D. Conn. 1974); United States v. Eastmount Shipping Corp., 62 F.R.D. 437, 438-49 (S.D.N.Y. 1974); Asparro v. United States, 352 F. Supp. 1085-86 (D. Conn. 1973).

46 S. REP. No. 94-625, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as 1976 SENATE REPORT]. *See also* [1974] DIR. AD. OFF. U.S. CTS. ANN. REP. 150-51; [1975] DIR. AD. OFF. U.S. CTS. ANN. REP. 149.

47 [1974] DIR. AD. OFF. U.S. CTS. ANN. REP. 146.

48 *Compare* Noorlander v. Ciccone, 489 F.2d 642 (8th Cir. 1973); Wedding v. Wingo, 483 F.2d 1131 (6th Cir. 1973), *aff'd,* 418 U.S. 461 (1974); Rainha v. Cassidy, 454 F.2d 207 (1st Cir. 1972).

49 418 U.S. 461 (1974).

50 28 U.S.C. § 2243 (1976).

51 *Compare* Yascavage v. Weinberger, 379 F. Supp. 1297 (M.D. Pa. 1974) *with* Ingram v. Richardson, 471 F.2d 1268 (6th Cir. 1972). A second inter-circuit conflict was resolved in January 1976 when the Supreme Court ruled unanimously that a preliminary review and submission of a report and recommended disposition by a magistrate in a social security appeal was a reference falling "well within the range of

5. The 1976 Jurisdictional Amendments to the Magistrates Act

The Supreme Court decision in *Wingo v. Wedding* provided the necessary impetus for legislative reformulation of the additional duties section of the Magistrates Act. Chief Justice Warren Burger pointed the way in his vigorous dissent in the case by expressly inviting Congress to enact new legislation.[52]

A critical Government Accounting Office report on the operation of the federal magistrate system[53] and a favorable privately funded study by a delegation of district judges and magistrates on the role of masters in the English judicial system[54] strengthened the reform movement in 1974. The increasing caseload backlog in the district courts[55] and the implementation of the Speedy Trial Act[56] also played a part in leading to subcommittee hearings[57] and congressional approval

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duties Congress empowered the district courts to assign" to magistrates. Mathews v. Weber, 423 U.S. 261, 270 (1976).

52 418 U.S. 461, 487 (1974) (Burger, C.J., dissenting).

53 COMP. GEN. OF THE U.S., No. B-133322, THE U.S. MAGISTRATES: HOW THEIR SERVICES HAVE ASSISTED ADMINISTRATION OF SEVERAL DISTRICT COURTS; MORE IMPROVEMENTS NEEDED 19-20 (1974) (recommending in part (1) that the Judicial Conference take the lead in encouraging district judges to make greater use of magistrates under the existing law; (2) that the Congress further define the "additional duties" jurisdiction of magistrates; and (3) that the Congress expand the criminal trial jurisdiction of magistrates to include most misdemeanors).

54 R. KIRKS, C. METZNER, J. KING, J. HATCHETT, S. SCHREIBER & I. SENSENICH, REPORT OF THE COMMITTEE TO STUDY THE ROLE OF MASTERS IN THE ENGLISH JUDICIAL SYSTEM (Federal Judicial Center 1974) (praising the effectiveness of the English procedures and expressing confidence that the federal district courts could duplicate the successful English experience through new legislation and better use of United States magistrates). In the Queen's Bench Division of the High Court of Justice, masters handle all preliminary matters and dispose of the great majority of civil cases filed in the court, without the need for action by a judge. *See* Silberman, *Masters and Magistrates, Part I: The English Model,* 50 N.Y.U.L. REV. 1070, 1079-1104 (1975) [hereinafter cited as *Silberman, Part I*].

55 *Compare* the annual reports of the Director, Administrative Office of the U.S. Courts, for the years 1972 (pages I-1 and I-2), 1973 (pages I-3 and I-4), and 1974 (pages I-2 and I-3). Beyond normal across-the-board increases in business, moreover, the Congress had passed a series of laws creating new federal causes of action and giving greater access to the federal courts. *See, e.g.,* Freedom of Information Act (1967), 5 U.S.C. § 552 (1976); Occupational Health and Safety Act (1970), 29 U.S.C. §§ 651-678 (1976); Equal Employment Opportunity Act (Title VII) (1972), 42 U.S.C. § 2000e (1976); Consumer Credit Protection Act (1968), 15 U.S.C. §§ 1601-1691f (1976) (as amended); Fair Credit Reporting Act (1970), 15 U.S.C. §§ 1681a-1681t (1976); and the Consumer Product Safety Act (1972), 15 U.S.C. §§ 2051-2081 (1976).

56 18 U.S.C. § 3161 (1976) (imposing strict deadlines and requirements for the conduct of proceedings in federal criminal cases which heightened existing docket pressures and necessitated adjustments in district court procedures and scheduling).

57 *Jurisdiction of United States Magistrates: Hearings on S. 1283 Before the Sub-*

in 1976 of a measure expanding the pretrial jurisdiction of magistrates. The Senate Judiciary Committee Report on the legislation emphasized that "it is not feasible for every judicial act, at every stage of the proceedings, to be performed by 'a judge of the court.' "[58]

The bill passed the Senate in February 1976. The House approved the legislation in amended form in September 1976, and the Senate concurred in the House amendments. The bill was signed into law on October 21, 1976.[59]

The 1976 legislation dealt only with the additional duties jurisdiction of magistrates and focused on the assistance which magistrates could provide to district judges in the conduct of pretrial proceedings in civil and criminal cases. The measure expressly superseded the Supreme Court decision in *Wingo v. Wedding*[60] by authorizing the delegation of evidentiary hearings in habeas corpus cases to magistrates. It also overruled the circuit court decisions which had invalidated various references to magistrates under the 1968 Act.[61] Primarily, however, the 1976 law affirmed the broad range of duties which were already being performed by magistrates in many district courts. Nevertheless, by clarifying the additional duties provision of the Federal Magistrates Act, by removing decisional law restrictions in some circuits, and by adding specific procedural provisions, the 1976 legislation placed the jurisdiction of magistrates on a much firmer and more uniform basis nationally.

The 1976 statute presently governs magisterial jurisdiction. It authorizes judges of the district courts to delegate judicial duties to magistrates under four separate provisions under 28 U.S.C § 636(b). First, a magistrate may hear and determine any pretrial matter in a civil or criminal case upon reference from a judge, except for eight enumerated case-dispositive motions ap-

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comm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*].

58 1976 SENATE REPORT, *supra* note 46, at 6.

59 Pub. L. No. 94-577, 94th Cong., 28 U.S.C. §§ 631-639, 3401-3402 (1976).

60 1976 SENATE REPORT, *supra* note 46, at 3; H.R. REP. No. 94-1609, 94th Cong., 2d Sess. 5 (1976) [hereinafter cited as 1976 HOUSE REPORT].

61 1976 SENATE REPORT, *supra* note 46, at 3-4; 1976 HOUSE REPORT, *supra* note 60, at 5-6.

62 These eight are motions for injunctive relief, for judgment on the pleadings, for

pearing in (b)(1)(A).[62] An aggrieved litigant may appeal a magistrate's ruling under provisions of local rules of court to a district judge, who must accept the magistrate's decision unless he finds that decision clearly erroneous or contrary to law. Second, a magistrate may hear a case-dispositive motion or a prisoner case for a district judge and file recommended findings of fact and a recommended disposition of the matter to the judge. A party may file exceptions to the magistrate's report within ten days, and the judge must determine *de novo* those portions of the magistrate's report to which exception is taken.[63] Third, a magistrate may be appointed by a judge as a special master in an exceptional case without the consent of the parties.[64] Where the parties to the litigation consent, however, a magistrate may serve as a special master in any civil case filed in the district court. Finally, a magistrate may continue to perform "any other duty not inconsistent with the Constitution and laws of the United States." In analyzing this provision the Senate and House reports on the bill emphasize that judicial innovation in the use of the magistrates will free judges for careful performance of their vital and traditional adjudicatory duties, resulting in quality justice and greater efficiency in the operation of the courts.[65]

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summary judgment to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to dismiss an action involuntarily.

63 "The use of the words '*de novo* determination' is not intended to require the judge actually to conduct a new hearing on contested issues. Normally, the judge, on application, will consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate. In some specific instances, however, it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings." 1976 HOUSE REPORT, *supra* note 60, at 3.

64 In authorizing a magistrate to be appointed as a special master under FED. R. CIV. P. 53, the revised subsection b(2) merely carried forward the provision of the prior law including the requirement that "some exceptional condition must exist" in order to justify the reference where there is not consent by the parties. The House and Senate reports stated the view that experience in the use of magistrates as special masters serve to occasion a reppraisal of the restrictions imposed in LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). 1976 HOUSE REPORT, *supra* note 60, at 12. 1976 SENATE REPORT, supra note 46, at 10.

65 1976 SENATE REPORT, *supra* note 46, at 11; 1976 HOUSE REPORT, *supra* note 60, at 12.

B. *The Current Federal Magistrate System*

The magistrate system is an extremely successful addition to the federal courts, achieving the stated goal of the Congress of "culling from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers."[66] The Act has introduced a more efficient division of labor and functions among judicial officers in the federal trial courts by relieving judges from having to hear various pretrial motions and proceedings. The delegation gives the judges more time to preside at the trial of cases, to hear critical motions, and to write opinions.

Statistics document the success of the magistrates system in increasing judicial efficiency. No new federal judgeships were created between 1970 and October 1978.[67] Nevertheless, since the nationwide implementation of the magistrate system in 1971, the district courts have been able to increase substantially their caseload disposition rate (from 315 per-judgeship in the year ended June 30, 1971, to 409 per-judgeship for the year ended June 30, 1978), "thanks in large measure to the increased use and output of United States magistrates."[68]

During the 1978 court reporting year[69] United States magistrates conducted more than 300,000 judicial proceedings nationwide. Their workload, moreover, has been shifting strongly away from the traditional duties formerly handled by commissioners toward the more significant and time-consuming additional duties authorized under 28 U.S.C. § 636(b), thereby relieving the district court judges of the need to perform such duties themselves. The following table shows the reported caseload of magistrates nationwide for 1972 (the first year for which nationwide magistrate statistics are available), for 1976 (the last year prior to the complete revision of 28 U.S.C. § 636(b)), and for 1978 (the most recent year).

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66 1967 SENATE REPORT, *supra* note 36; S. REP. No 95-344, 95th Cong., 1st Sess. 3 (1977) [hereinafter cited as 1977 SENATE REPORT].

67 Pub. L. No. 91-272, § 1(c), (d), 84 Stat. 294-95 (1970); Pub. L. No. 95-486, 92 Stat. 1629 (1978); *see also* S. REP. No. 95-117, 95th Cong., 1st Sess. 7-8 (1977).

68 1977 SENATE REPORT, *supra* note 66, at 3.

69 July 1, 1977 to June 30, 1978.

TABLE 1

PROCEEDINGS CONDUCTED BY UNITED STATES MAGISTRATES[70]

Year ended June 30	1972	1976	1978
A. U.S. Commissioner Duties	120,723	86,084	77,332
Search warrants	7,338	6,068	4,491
Arrest warrants*	36,833	22,531	16,134
Initial appearances & other bail hearings	64,518	48,616	49,574
Preliminary examinations	9,554	7,142	5,384
Removal hearings	2,480	1,727	1,749
B. Criminal Trial Jurisdictions	72,082	103,061	102,547
Petty offenses	62,915	85,088	87,654
Minor offenses above the level of petty offenses	9,167	17,181	14,893
C. "Additional Duties" under 28 U.S.C. § 636(b)	44,717	75,894	124,483
1. Criminal Cases:			
Arraignments	10,799	18,694	21,956
Pretrial conferences	5,279	5,397	4,435
Motions	5,870	7,861	9,806
Grand jury returns	—	—	8,332
Other matters	388	3,644	5,343
2. Civil Cases:			
Prisoner petitions	6,786	8,231	11,620
Pretrial conferences	7,168	17,559	24,093
Motions	6,077	9,583	28,820
Special master references	256	684	699
Civil trials**	—	—	540
Social Security reviews	334	1,480	4,059
Other matters	1,760	2,761	4,780

* Includes summonses issued in lieu of warrants.
** Civil trials not reported separately until 1977.

The volume of duties performed by magistrates as inheritors of the functions formerly handled by the commissioners has diminished over the last several years. This decline can be attributed largely to an overall decline in the number of criminal cases initiated in the federal courts by the Department of Justice[71] and procedural changes brought about by the Speedy Trial Act.[72]

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70 Table adapted from [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 138.
71 *Id.* at 6.
72 18 U.S.C. §§ 3161-3174 (1976). The Speedy Trial Act has led in many cases to a prosecution policy of delaying arrest until after indictment, thereby reducing the number of arrest warrants, initial appearances, and preliminary examinations handled by magistrates. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED

The criminal trial cases handled by magistrates, on the other hand, have increased since 1972. These minor and petty offense cases are filed in the federal courts under three separate authorities: (1) specific federal misdemeanor and petty offense statutes; (2) state misdemeanor and petty offense laws, incorporated as federal law through the Assimilative Crimes Act;[73] and (3) petty offense regulations of the various federal agencies governing lands under their administration, such as the National Park Service [74] and the National Forest Service.[75] The criminal trial cases, therefore, vary in nature.[76] Approximately one-third, or roughly 34,000, of the minor and petty offenses disposed of by magistrates in 1978 could not have been handled by the former United States commissioners. Before the passage of the Federal Magistrates Act of 1968, these cases would either

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STATES COURTS ON THE OPERATION OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 14 (1978).

73 18 U.S.C. § 13 (1976).

74 36 C.F.R., ch. I, § 1.1 (1978).

75 36 C.F.R., ch. II, § 200.1 (1978).

76 The following table sets forth the nature of the minor and petty offense cases disposed of by magistrates during the 1978 reporting year.

MINOR AND PETTY OFFENSE CASES DISPOSED OF BY UNITED STATES MAGISTRATES JULY 1, 1977-JUNE 30, 1978

Petty Offenses (6 months/$500)	87,654
Traffic	58,330
Immigration	13,504
Hunting, fishing & camping	6,314
Postal violations	2,235
Drunk & disorderly conduct	1,841
Food & drug violations	1,037
Other petty offenses	4,393
Minor Offenses other than Petty Offenses (1 year/$1,000)	14,893
Traffic	10,473
Theft	2,124
Food & drug violations	352
Weapons violations	106
Other minor offenses	1,838
Total Cases	102,547

Table adapted from [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 139.

have been heard by district judges or not have been prosecuted in the federal courts.[77]

Virtually all full-time magistrates, as well as a handful of part-time magistrates have also been designated by the district courts to perform a full range of additional duties under 28 U.S.C. § 636(b). Magistrates now assist the judges extensively in expediting civil and criminal litigation in a substantial majority of the district courts covered by the Magistrates Act.[78] The performance of these additional duties has accounted for the greatest increase in the magistrates' workload since 1972. During 1978, for example, magistrates in over half of the district courts conducted 540 civil trials upon the consent of the litigants — 121 jury trials and 419 nonjury trials.[79] These figures do not include the 699 cases in which magistrates served as special masters under rule 53 of the Federal Rules of Civil Procedure.[80]

Even before enactment of the 1976 jurisdictional revisions to the Magistrates Act, United States magistrates had been employed by several district courts to try the issues of civil cases upon the consent of the litigants.[81] Such civil trial delega-

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77 A "minor offense" is defined as any misdemeanor for which the prescribed penalty does not exceed imprisonment for a period of one year and/or a fine of $1,000 with enumerated exceptions. 18 U.S.C. § 3401(f) (1976). Falling into this category, *inter alia,* are all minor offense cases above the level of petty offenses (14,893 in 1978); all immigration cases, the great majority of which are brought under 8 U.S.C. § 1325 (1976) (13,504 in 1978); many migratory bird cases; and almost all postal theft cases and other downgraded felonies.

78 During the reporting year ended June 30, 1978, for example, magistrates in 75 of the 92 districts filed written reports and recommendations for the disposition of prisoner petitions. Magistrates in 54 districts held evidentiary hearings in prisoner cases. Magistrates conducted pretrial conferences in civil cases for the judges in 77 district courts, and in 73 districts they reviewed motions in civil cases. Magistrates in 54 districts served as special masters, and in 48 districts they conducted civil trials upon consent of the parties. They filed reports and recommendations on social security and black lung appeals in 68 districts.

On the criminal side of the dockets, magistrates conducted arraignments following indictment under FED. R. CRIM. P. 10 in 86 of the 92 federal district courts. Grand Jury indictments were returned before magistrates in 67 districts; and magistrates conducted pretrial conferences or omnibus hearings in 45 districts and reviewed motions in criminal cases in 73 districts. [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 9-11.

79 *Id.*

80 *Id.*

81 *1975 Senate Hearings, supra* note 57, at 28.

tions were made under the long-standing tradition, untouched by the 1968 Act,[82] that parties may freely consent to refer cases for decision in the first instance to non-article III officers.[83]

The 1976 amendments to the Magistrates Act clarified the pretrial role of magistrates and broadened the range of cases in which a magistrate could be appointed as a special master. They did not, however, deal with the trial of civil cases by magistrates or their case-dispositive authority.The language of the revised subsection 636(b)(2) authorizes a judge to appoint a magistrate as a master to hear any civil case in which the parties consent to the reference.[84]

Subsection 636(b)(3), which was basically unchanged from the 1968 Act, separately permits a court to delegate to a magistrate "any other duty not inconsistent with the Constitution and laws of the United States." Congress explicitly intended this provision to be supplemental to, and independent of, the special master provision of subsection 636(b)(2).[85]

Although the language of 28 U.S.C. § 636(b)(3) is sufficiently elastic to authorize the referral of a civil case to a magistrate for trial on consent, Congress specified no procedures for ultimate adjudication of the case by the magistrate, for the entry of a final judgment, or for appellate review following trial. To fill the void, some courts have incorporated by reference the appellate procedures and scope of judicial review set forth in rule 53(e).

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82 The civil trial delegations were therefore made under the catch-all provisions of the former § 636(b) of the Federal Magistrates Act or as a special master references under FED. R. CIV. P. 53 which permits assignment of "such additional duties as are not inconsistent with the Constitution and laws of the United States."

83 The question of consensual references of matters to magistrates surfaced in DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). The United States Court of Appeals for the First Circuit therein upheld the reference of a trademark infringement case to a magistrate for determination upon the consent of the parties. The court of appeals found no constitutional impediment to the litigants freely choosing a non-article III officer to resolve their dispute in the first instance and concluded that the legislative history of the Federal Magistrates Act supported a congressional intent to permit consensual references to magistrates. The court phrased the central issue as "not the power of the judge to refer, but the power of the parties to agree to another arbiter, absent overriding constitutional considerations." 520 F.2d at 504.

84 The statutory authority conferred upon judges by § 636(b)(2) was intended to supersede the "exceptional conditions" requirement in FED. R. CIV. P. 53(b) and LaBuy v. Howes Leather Co., Inc., 352 U.S. 249 (1957). 1976 SENATE REPORT, *supra* note 46, at 13.

85 1976 HOUSE REPORT, *supra* note 60, at 12.

For example, the First Circuit Court of Appeals reversed a district court holding on this point in *DeCosta v. Columbia Broadcasting Sys., Inc.*:

> [I]n the present state of the law we would be reluctant to approve even a clearly worded consensual reference to a magistrate which purports to finally bind the parties to his rulings of law. Until Congress, on reviewing the experience under the Federal Magistrates Act, fashions a review procedure for consensual reference for final (or semi-final) determination of all issues of law and fact, it might be better to rely on the formulation contained in Rule 53(e) (4).[86]

Even where the provisions of rule 53 have not been incorporated, however, the decisional law requires that a district judge enter judgment in a case tried before a magistrate on consent of the parties.[87]

The Federal Magistrates Act requires that surveys of conditions in the district courts be made with a view toward creating and maintaining a system of full-time magistrate wherever feasible.[88] In furtherance of this policy the Judicial Conference increased the number of full-time magistrate positions and decreased the number of part-time magistrates over the last seven years.[89] Today, more than 90 percent of the duties performed by magistrates are currently handled by full-time magistrates.[90]

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86 DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 508 (1st Cir. 1975); *see also 1977 Senate Hearings, supra* note 45, at 188-89 (Prof. Silberman), and cases cited in note 153 *infra*.

87 Horton v. State St. Bank & Trust Co., 590 F.2d 403 (1st Cir. 1979); Small v. Olympic Prefabricators, Inc., 588 F.2d 287 (9th Cir. 1978); Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978); Sick v. City of Buffalo, N.Y., 574 F.2d 1330 (5th Cir. 1978).

88 28 U.S.C. § 633(a)(3) (1976). In appraising the justification for additional full-time magistrate positions, the Judicial Conference considers: (1) the overall and per-judgeship workload of the pertinent district court and the comparative need of the judges for the assistance of magistrates; (2) the commitment of the court to the effective and efficient utilization of magistrates; and (3) the availability of sufficient work of the sort which the judges wish to assign to magistrates.

89 The great majority of part-time magistrates now on duty serve at outlying geographic locations and basically perform the same types of functions as the former United States commissioners and park commissioners. Generally, they only issue process, conduct initial appearance proceedings, and dispose of petty and minor offense cases arising at nearby national parks, forests, military bases, and other federal enclaves. Only a few of the 278 part-time magistrates presently assist their district court judges in performing "additional duties" under 28 U.S.C. § 636(b).

90 [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 140. ANNUAL REPORT, *supra* note 78, at

II. The Federal Magistrate Act of 1979

A. *Development of the Legislation*

As one of his initial acts as Attorney General, Griffin B. Bell established within the Department of Justice an Office for Improvements in the Administration of Justice.[91] The first major legislative proposal developed by the new unit was the "Magistrate Act of 1977," designed to provide

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140 (1978). The evolution of the magistrate system into a system of predominantly full-time magistrates is illustrated in the following table:

PERCENTAGE OF MATTERS HANDLED BY FULL-TIME MAGISTRATES

	Total	Full-Time Magistrates	Percent Of Total
A. U.S. Commissioner Duties	77,332	61,698	80%
Search warrants	4,491	3,664	82%
Arrest warrants/summonses	16,134	12,031	75%
Initial appearances	43,147	34,783	81%
Bail reviews	6,427	5,478	85%
Preliminary examinations	5,384	4,337	81%
Removal hearings	1,749	1,405	80%
B. Criminal Trial Jurisdiction	102,547	57,644	56%
Petty offenses	87,654	48,896	56%
Minor Offenses above the Level of Petty Offenses	14,893	8,745	59%
C. "Additional Duties" under 28 U.S.C. § 636(b)			
Criminal Proceedings	49,872	46,535	93%
Arraignments	21,956	20,197	92%
Pretrial Conferences	4,435	4,323	97%
Motions	9,806	9,366	96%
Other Matters	13,675	12,649	92%
Civil Proceedings	74,611	68,460	92%
Prisoner petitions	11,620	10,453	90%
Pretrial Conferences	24,093	22,287	93%
Motions	28,820	26,475	92%
Special Master			
References	694	666	95%
Civil Trials	540	499	92%
Social Security Reviews	4,059	3,796	94%
Other Matters	4,780	4,284	90%

The inordinately low percentage of cases handled by full-time magistrates under the criminal trial jurisdiction provisions results because many of these cases are adjudicated before park commissioners who act as part-time magistrates.

91 The purpose of the Office is to study the present structure and jurisdiction of the federal court system and to prepare legislation on behalf of the Administration to improve the justice system.

litigants in the federal courts with more efficient and inexpensive justice and to reduce the burdens of district judges.[92]

In transmitting the bill to the Congress in May 1977, the Attorney General summarized its basic purposes as improving access to the federal courts for the less advantaged by reducing costly delay and providing for the more flexible use of scarce judical resources.[93] The Attorney General stressed the bill's potential for reducing the backlog in many of the district court dockets. He suggested that magistrates could also be temporarily appointed to accommodate unexpected surges in litigation in particular districts.

The Department of Justice bill was introduced in the Senate and House on May 26, 1977, as S. 1613 and H.R. 7493, respectively.[94] The Senate Judiciary Subcommittee on Improvements in Judicial Machinery, chaired by Senator Dennis DeConcini (D-Ariz.), conducted three days of hearings on S. 1612 and S. 1613.[95] The full Judiciary Committee reported the bill out favorably, emphasizing the benefits of the case-dispositive authority it would confer upon magistrates.[96] S. 1613 passed the Senate unanimously by voice on July 26, 1977,[96] and was

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92 Opposition by the Department of Health, Education, and Welfare and by the Legal Services Corporation to an April draft prompted a White House request for reconsideration of the legislation before submission to Congress. *See* 35 CONG. Q. WK. REP. 833-34 (1977). The objections were apparently directed at provisions that would have removed certain categories of civil cases — especially social welfare cases — from the district courts and delegated them for trial and ultimate adjudication exclusively by United States magistrates. *Id.* The Department of Justice then relaced the objectionable provisions with a section limiting the civil trial jurisdiction of magistrates to cases in which the parties expressly consent to trial by a magistrate.

93 Proposed Magistrates Act of 1977, 123 CONG. REC. S8765 (daily ed. May 26, 1977).

94 At the request of the Judicial Conference, Senator DeConcini concurrently introduced S. 1612, a more limited bill dealing largely with expansion of the misdemeanor trial jurisdiction of magistrates. 123 CONG. REC. S8764 (daily ed. May 26, 1977). S. 1612 was subsequently modified and merged into S. 1613 by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery.

95 *1977 Senate Hearings, supra* note 45, at 4-7; *see also 1977 House Hearings, supra* note 4.

96 1977 SENATE REPORT, *supra* note 66, at 4.

97 123 CONG. REC. S12647 (daily ed. July 22, 1977). In September 1977, the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, whose chairman is Rep. Robert W. Kastenmeier (D - Wis.) and whose ranking minority member is Rep. Tom Railsback (R - Ill.), conducted four days of hearings concurrently on the magistrate bill and on a group of proposals to reduce or eliminate diversity jurisdiction in the federal courts. *1977 House Hearings, supra* note 4.

referred to the House of Representatives.[98] The full House of Representatives amended and passed the legislation on October 4, 1978.[99] Attached to the bill, however, was a controversial floor amendment which would eliminate all diversity jurisdiction in the federal courts.

A conference committee convened during the last week of the Ninety-fifth Congress could not reach agreement on the diversity amendment to S. 1613.[100] The committee thereupon adjourned without reaching the merits of the magistrate provisions.

The Federal Magistrate Act of 1979 embodies many of the same concepts and compromises that were contained in the 1977 bills. The basic provisions of the 1979 Act can therefore best be illuminated by frequent comparisons with the relevant 1977 House and Senate approaches. The three principal provisions of the 1979 Act which will be discussed are as follows: (1) civil trial jurisdiction, (2) criminal trial jurisdiction, and (3) magistrate selection procedures. In addition, the constitutional basis and policy justifications behind the Act's jurisdictional changes will be discussed.

B. *Civil Trial Provisions*

The 1979 Federal Magistrate Act authorizes a magistrate to try and finally decide any civil case — with or without a jury — in the federal district courts under the following conditions: (1) the district court must designate the magistrate to exercise civil trial jurisdiction; and (2) the parties to the litigation must freely consent to have their case tried and disposed of by the magistrate rather than by a judge. The final Act follows both versions of the original bill which explicitly prohibited a judge from attempting to coerce litigants into consenting to trial before a magistrate.[101]

In the area of appeals, the conference committee adopted the approach of the Senate bill. S. 237 provided that an appeal

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98 123 CONG. REC. H7860 (daily ed. July 26, 1977).
99 36 CONG. Q. WK. REP. 2726 (1978).
100 36 CONG. Q. WK. REP. 3353 (1978).
101 S. 237 § 2 and H.R. 1046 § 2, *supra* note 1.

would be taken directly to the circuit court unless the parties affirmatively elected to appeal to the district judge first. If the district judge does indeed try the appeal, further appeal is limited to leave by appeal granted by the Court of Appeals.

The civil trial section of the legislation ratifies practices already in effect in more than half the federal district courts.[102] It however, expands upon current law and practice in three significant respects. First, it provides explicit congressional authorization for the trial of civil cases by magistrates. This measure supplements the broad and vague authority for this practice under the existing law. Second, the bill confers clear case-dispositive jurisdiction to magistrates in civil cases. Finally, the legislation establishes procedures governing civil trials before magistrates and appeals following such trials. These three major changes raise important constitutional and policy issues.

1. Constitutional Considerations

Article III of the Constitution declares that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[103] Justices of the Supreme Court and judges of the lower courts created by the Congress under article III are entitled to hold office during good behavior, and they may not have their salaries diminished while in office.[104] Moreover, article III judges are appointed by the President and confirmed by the Senate.[105]

Congressional critics of the Magistrate Act assert that federal magistrates enjoy none of the article III safeguards, yet would exercise article III civil powers of federal judges upon consent

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102 [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 9.

103 U.S. CONST. art. III, § 1. The judicial power is defined in § 2 of the article as extending (1) to all cases in law and equity arising under the Constitution, laws and treaties of the United States; (2) to cases affecting ambassadors, ministers, and consuls; (3) to cases in admiralty; (4) to controversies between states or between citizens of different states; and (5) to controversies to which the United States is a party.

104 *Id.*

105 U.S. CONST. art. II, § 2.

of the litigants.[106] Critics claim that the Magistrate Act therefore circumvents the independent judiciary guaranteed litigants by article III,[107] and that the magistrates' actions would be jurisdictionally infirm, and open to constitutional challenge.[108] The dissenters feel such a challenge would be sustained since an unconstitutional assertion of article III subject matter jurisdiction can neither be validated by the parties' consent nor by congressional authorization.[109]

The dissenting members' objections are not new; as far back as 1968, Congress considered and found no substance to the same arguments.[110] The fundamental constitutional issues bearing on the new civil jurisdiction are essentially the same as those addressed by Congress when it established the minor offense criminal jurisdiction in the original Act. Congress found that the constitutionality of the minor offense jurisdiction of magistrates rested on three separate propositions:[111] (1) the parties' right to a full and automatic appeal to an article III judge is preserved under the legislation; (2) the magistrate acts as an adjunct under the supervision of the article III district court; and (3) the parties freely consent to a magistrate's jurisdiction over their case by specifically waiving their statutory right to a trial by an article III district court judge in the first instance.

a. Appellate Review by an Article III Court

The proponents and opponents of the Magistrates Act agree that an appeal to an article III court lies in every instance from a decision of a magistrate.[112] This vital safeguard protects magistrates' decisions from jurisdictional attack, even assuming the position of some critics that the magistrate system is *de*

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106 1978 HOUSE REPORT, *supra* note 2, at 37-38 (dissenting views of Reps. Robert F. Drinan and Thomas F. Kindness), 40 (dissenting views of Rep. John F. Seiberling).

107 *Id.*

108 *Id.*

109 *Id.*

110 *See* 1968 HOUSE REPORT, *supra* note 8.

111 *1966 Senate Hearings, supra* note 14, at 246 (staff memorandum), *reprinted in 1977 House Hearings, supra* note 4, at 99; 1968 HOUSE REPORT, *supra* note 8, at 21; 1978 HOUSE REPORT, *supra* note 2, at 11.

112 S. 237, 96th Cong., 1st Sess., and H.R. 1046, 96th Cong., 1st Sess., *supra* note 1.

facto an independent jurisdictional entity from the article III courts.[113] The proponents of the Act in its present form respond to such challenge by drawing an analogy between the magistrate system and both legislative courts[114] and administrative agencies.[115] These bodies hear and resolve controversies before federal officers who clearly do not serve as adjuncts of the article III courts. Congress has delegated the fact-finding and decision-making functions to both tribunals in many areas of law, including some historically subject to common law adjudication.[116] The decisions of these two bodies are often final and unenforceable, subject only to subsequent appeal in an article III court under a standard of review established by Congress.[117]

The constitutional authority underlying these tribunals stems

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113 1978 HOUSE REPORT, *supra* note 2, at 37 (dissenting views of Reps. Robert F. Drinan and Thomas F. Kindness).

114 The Supreme Court enunciated the doctrine of legislative courts in 1828, holding that a court created by the Congress for the Florida Territory, whose judges did not enjoy life tenure or undiminished protection, could adjudicate an admiralty dispute — a case falling within the purview of article III. That court was held to be legitimately established under Congress' power to make "all needful rules and regulations respecting the territory belonging to the United States." American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). Congress has created legislative courts to decide such particularized federal questions as military discipline, 10 U.S.C. § 867 (1976); taxation, 26 U.S.C. § 7441 (1976); foreign affairs, *In re* Ross, 140 U.S. 453, 464-65, 469 (1891); and bankruptcy, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 § 1471 (to be codified in 11 U.S.C.). The judges of the new United States Bankruptcy Courts are not article III judges. They exercise the bankruptcy jurisdiction conferred by statute upon the article III district courts. While the precise status of the new courts has not been the subject of decisional law yet, it appears that the bankruptcy court is a hybrid arrangement — an article I legislative court or a division appended to an article III court.

115 *E.g.*, The Federal Trade Commission, 15 U.S.C. §§ 41-77 (1976); The National Labor Relations Board, 29 U.S.C. §§ 153-169 (1976).

116 In Crowell v. Benson, 285 U.S. 22 (1932), a suit under the Longshoremen's and Harbor Workers' Compensation Act, the Court held that even in cases of "private right" the facts need not necessarily be determined by article III judges in order to maintain the essential attributes of judicial power. *Id.* at 54.

> For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standard to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 396-97 (2d ed. 1973).

117 *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 525-44 (3d ed. 1972).

from the language of article III which permits but does not require Congress to vest the judicial power in any or all of the federal courts,[118] except for a few situations specifying the original jurisdiction of the Supreme Court.[119] While the Supreme Court has not specifically determined whether Congress may vest "inherently" judicial business in tribunals other than article III courts,[120] it has frequently upheld the judicial power of legislative courts and has never found that such power

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118 While article III states that the judicial power of the United States "shall" be vested in the Supreme Court and the inferior federal courts, the Congress is not required to actually vest the entire judicial power in any or all of the federal courts. Palmore v. United States, 411 U.S. 389, 401 (1973). Indeed, at no time has the entire constitutional power under article III been conferred upon any federal court. The district and circuit courts, for example, had no federal question jurisdiction until 1875, C. A. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 5 (3d ed. 1976); Act of March 3, 1875, 18 Stat. 470. State courts have historically exercised exclusive or concurrent jurisdiction over article III civil and criminal cases. WRIGHT, *supra;* Palmore v. United States, 411 U.S. 389, 407 (1973); Testa v. Katt, 330 U.S. 386 (1947). Diversity cases, of course, are the most apparent example of concurrent jurisdiction between the federal courts and the state courts.

Congress has also consistently imposed a jurisdictional monetary amount on diversity cases and some federal question cases. *See, e.g.,* Act of Oct. 20, 1978, Pub. L. No. 95-486 § 1337, 92 Stat. 1629 (to be codified in scattered sections of 5 and 28 U.S.C.). The Ninety-sixth Congress is now considering proposals endorsed by the Judicial Conference which would alternatively (a) abolish diversity jurisdiction entirely; (b) abolish some diversity cases; and (c) raise the jurisdictional monetary amount on diversity cases.

119 The Constitution itself gives original jurisdiction to the Supreme Court for certain types of cases. U.S. CONST. art. III, § 2. Except for the provision in article III, § 2, cl. 2, as to the appellate jurisdiction of the Supreme Court, there is no explicit clause in the Constitution granting Congress unbridled authority to delineate jurisdiction. It is a function, however, which the Congress assumed immediately, and the authority has been upheld consistently. Glidden Co. v. Zdanok, 370 U.S. 530 (1962); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). *See also* Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922); Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Turner v. Bank of North America, 4 U.S. (4 Dall.) 10 (1799). Although the terms are commonly confused, "judicial power," as used in art. III, is distinguishable from "jurisdiction." *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 65-70 (1923). The term "judicial power" has been defined by the Supreme Court as "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." Muskrat v. United States, 219 U.S. 346, 361 (1911). It is the "power to decide 'cases' and 'controversies' in conformity with the law and by the methods established by the usages and principles of law." E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, 161 (13th ed. 1973); *see* Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908). "Jurisdiction," on the other hand, is the authority of a court to exercise judicial power in a specific case. The Constitution vests the judicial power in the courts; however, Congress has considerable power under the Constitution to define the jurisdiction of the courts. E. CORWIN, *supra; see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1807).

120 *See* Glidden v. Zdanok, 370 U.S. 530, 549 (1962).

has been improperly committed to administrative agencies in the first instance.[121]

b. Magistrates as Adjuncts of Article III Courts

A better view of the magistrate system acknowledges it as a subordinate part of the article III court and not a distinct entity. The jurisdiction exercised by United States magistrates is not that of a separate, specialized tribunal; rather, Congress concluded that the jurisdiction exercised by the magistrate is the jurisdiction of the district court itself.[122] In other words, the magistrate performs judicial duties which would otherwise be performed by article III district judges.

The judges of the district court directly control the range of duties and responsibilities of the magistrates whom they appoint, as well as the procedures to be followed by the magistrates.[123] Except for certain duties formerly handled by United States commissioners under direct authority of a statute or federal rule,[124] all jurisdiction exercised by a United States magistrate must be specifically delegated to him by a district judge or court.[125] This relationship was clearly summarized during Senate hearings on the 1968 act:

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121 The Supreme Court has upheld the constitutionality of legislative courts on the theory that they are necessary and proper under article I of the Constitution. *See* Swain v. Pressley, 430 U.S. 372 (1977); Palmore v. United States, 411 U.S. 389 (1973); Williams v. United States, 289 U.S. 553 (1933); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

Moreover, the Supreme Court has never held that judicial power is improperly vested in administrative agencies, although the question has arisen in the following cases: Zakonaite v. Wolf, 226 U.S. 272 (1912); Turner v. Williams, 194 U.S. 279 (1904) (aliens); Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910) (unreasonable obstruction to navigation); Arver v. United States, 245 U.S. 366 (1918) (Selective Service draft law); Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163 (1943); Shields v. Utah Idaho Central R. R., 305 U.S. 177 (1938) (statutory interpretation of railroad regulation); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (coal price-fixing). In Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163, 168 (1943), for example, the Supreme Court explicitly rejected the argument that "by article III, § 1, the judicial power of the United States is vested exclusively in the courts and matters of private right may not be relegated to administrative bodies for trial."

122 1968 HOUSE REPORT, *supra* note 8, at 10. "When a case is tried before a magistrate, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate." *1966 Senate Hearings, supra* note 14, at 256 (staff memorandum).

123 28 U.S.C. § 636(b) (1976). *1966 Senate Hearings, supra* note 14, at 252.

124 For duties formerly handled by U.S. commissioners, *see* note 39, *supra*.

125 28 U.S.C. § 636(b) (1976).

> The magistrate's power to perform judicial functions depends entirely upon his connection with the district court which appoints him and retains the right to control and supervise his conduct at all times. Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration in trial procedure, not to a transfer of jurisdiction from the district court to another tribunal (citations omitted).[126]

Both the pertinent statute and case law support the proposition that jurisdiction is constitutionally retained in the district court whenever a magistrate acts.

The adjunct theory also offers an historical rebuttal to criticism that references to magistrates are jurisdictionally infirm. Article III federal courts have traditionally assigned a portion of their judicial power to subordinate officers, such as special masters, referees in bankruptcy, trial commissioners, auditors, assessors, and United States commissioners. This authority to delegate duties — without providing for *de novo* factual review — has its origin deep in English equity practice[127] and has been generally accepted as inherent in the court.[128] In *Ex Parte Peterson,*[129] for example, the Supreme Court declared that:

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.... This power included authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.[130]

The delegation of a wide range of judicial functions is sanctioned by one hundred and fifty years of American practice and,

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126 *1966 Senate Hearings, supra* note 14, at 252.

127 *See* Kaufman, *Masters in the Federal Courts: Rule 53,* 58 COLUM. L. REV. 452 (1958) [hereinafter cited as *Kaufman*]; *Silberman, Part I, supra* note 54, at 1075-79 (regarding the development of the master system in the courts at law, such as the Queen's Bench).

128 *See Kaufman, supra* note 127, at 462.

129 253 U.S. 300 (1920).

130 *Id* at 312. *But see* La Buy v. Howes Leather Co., 352 U.S. 249 (1957) (limitations on the appointment of special masters). *Accord,* TPO, Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972).

in specific circumstances, by the Federal Rules of Civil Procedure.[131] The United States Court of Claims, too, has delegated virtually its entire trial responsibility to trial commissioners, who are not constitutional judicial officers.[132]

The Supreme Court itself, moreover, routinely refers cases within its original jurisdiction to masters to conduct all necessary hearings and to report findings of fact and conclusions of law to the justices.[133] Similarly, judges may refer civil cases pending in the district courts to special masters under authority of rule 53 of the Federal Rules of Civil Procedure. The master may take evidence and conduct hearings,[134] and he must file a report with the court which normally includes his findings of fact and conclusions of law.[135] The trial judge must accept the master's findings of fact in a nonjury case unless they are "clearly erroneous."[136] The parties, however, may stipulate that a master's findings of fact shall be final, and that only questions of law arising on the report may be considered by the judge.[137] In essence, then, a trial judge who has appointed a special master in a nonjury civil case has transformed his role into that of an appellate court, at least with regard to the resolution of factual issues.

Article III courts, however, have not always enjoyed unfettered discretion to appoint subordinates to assist them in disposing of their judicial business. After the federal courts began to use masters and examiners regularly in disposing of litigation, [138] the Federal Equity Rules of 1912 were pro-

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131 FED. R. CIV. P. 53. *See Kaufman, supra* note 127, at 462; Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases,* 40 U. CHI. L. REV. 584, 588-92 (1973) [hereinafter cited as *Adjudicative Role*]; Note, *Masters and Magistrates in the Federal Courts,* 88 HARV. L. REV. 779, 789 (1975) [hereinafter cited as *Masters and Magistrates*].

132 28 U.S.C. § 2503 (1976); CT. CL. R. 13.

133 *See* Arizona v. California, 373 U.S. 546 (1963). The Supreme Court, however, has not held itself bound to the "clearly erroneous" standard. Mississippi v. Arkansas, 415 U.S. 289, 296 n.1 (1974) (Douglas, J., dissenting).

134 The powers of a master may be specified or limited in the order of reference from the court. FED. R. CIV. P. 53(c).

135 FED. R. CIV. P. 53(e)(1).

136 FED. R. CIV. P. 53(e)(2).

137 FED. R. CIV. P. 53(e)(4).

138 *See Kaufman, supra* note 127, at 462; *Masters and Magistrates, supra* note 131, at 789, 795-96.

mulgated in part to cut back on the practice. The Rules declared that the referral of a case to a master should be the exception rather than rule and should be made only upon a showing that some exceptional condition required it.[139] The Federal Rules of Civil Procedure, which became effective in 1938, incorporated the limitations of the equity rules in rule 53(b).

In *LaBuy v. Howes Leather Co.*,[140] the Supreme Court interpreted rule 53(b) narrowly, thereby significantly restricting the potential use of special masters by the district courts. The Court found that the trial judge's referral of an entire case to a master over the parties' objections "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues."[141] The court found the complexity of issues involved, the anticipated length of the trial, and the calendar congestion in the court to be factors insufficient in themselves to constitute an "exceptional condition" under rule 53(b) warranting the referral of the whole case at hand to a master.[142]

Critics of the magistrate system would argue that *LaBuy* suggests that a federal trial judge may not abdicate his judicial responsibilities to a master and must reserve ultimate adjudication of a case for himself.[143] The decision, however, appears to rest on policy grounds and factual considerations, rather than on constitutional principles.[144] For example, the United States Court of Appeals for the Fifth Circuit found that "the ineluctable conclusion is that the 'exceptional condition' limitation results from the deficiencies of the master system rather than from constitutional limitations upon non-Article III judges."[145]

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139 EQUITY R. 59, 226 U.S. 649, 666 (1912).

140 352 U.S. 249 (1957).

141 *Id.* at 256.

142 *Id.* at 259.

143 *See* TPO, Inc. v. McMillen, 460 F.2d 348, 357 (7th Cir. 1972); Ingram v. Richardson, 471 F.2d 1268, 1270 (6th Cir. 1972); *Adjudicative Role, supra* note 131, at 592.

144 *Masters and Magistrates, supra* note 131, at 794; Silberman, *Masters and Magistrates, Part II: the American Analogue*, 50 N.Y.U.L. REV. 1297, 1327-29 (1975) [hereinafter cited as *Silberman, Part II*]; Cruz v. Hauck, 515 F.2d 322, 330 (5th Cir. 1975), *cert. denied sub nom.* Andrade v. Hauck, 424 U.S. 917 (1976). *But see* Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 VA. L. REV. 697, 706 (1974).

145 Cruz v. Hauck, 515 F.2d 322, 330 (5th Cir. 1975), *cert. denied sub nom.* Andrade v. Hauck, 424 U.S. 917 (1976).

Thus, a district judge may still refer fact-finding functions to a special master under rule 53, but the scope of such references is quite limited.[146]

Many of the inherent defects of the master system which influenced the Supreme Court in *LaBuy* — the expense of the procedure to the litigants, the likelihood of delays in the litigation, the use of attorneys appointed on an *ad hoc* basis, a master's lack of experience in judicial work, and the potential conflicts in the master's time and interests — are alleviated considerably when a United States magistrate — a subordinate, salaried, experienced judicial officer of the district court — serves as a master in a civil case. Cases and commentators have therefore suggested that the implementation and successful operation of the federal magistrate system warrants a reinterpretation of the limitations found in rule 53(b) when a magistrate is appointed as a master.[147] The legislative history of the 1976 jurisdictional amendments to the Magistrates Act concurs in this observation, noting that experience shows that magistrates lack many of the defects of earlier masters as discussed in *LaBuy*.[148]

Finally, a court's right to delegate judicial functions is immeasurably enhanced when exercised pursuant to an express grant of authority by the Congress to the subordinate officers in issue.[149] Since the Congress has plenary power to regulate the jurisdiction of the federal courts and to specify the modes by which the federal judicial power will be exercised, a delegation of judicial functions under an express statutory provision, rather than a general historical inherent power or a broad statute, is substantially more likely to withstand jurisdictional

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146 C. A. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2601-15 (1st ed. 1971); *Kaufman, supra* note 127, at 458-59.

147 *See* CAB v. Carefree Travel, Inc., 513 F.2d 375, 379-82 (2d Cir. 1975); *Silberman, Part II, supra* note 144, at 1329, 1365. *Cf.* United States v. Eastmount Shipping Corp., 62 F.R.D. 437, 439-41 (S.D.N.Y. 1974) (Department of Justice regulation enforcing strict adherence to *LaBuy* rule deplored).

148 1976 SENATE REPORT, *supra* note 46, at 10; 1976 HOUSE REPORT, *supra* note 60, at 12.

149 See the discussion in the text accompanying footnotes 145 to 159 and the cases cited therein.

attack.[150] Congressional enactment of the Federal Magistrate Act of 1979 constitutes an endorsement of the adjunct theory.

c. The Effect of Consent of the Parties

Whether the Congress may extend original jurisdiction over article III cases or controversies to United States magistrates under the adjunct, appellate, or plenary power theories is not the determinative constitutional issue, however, because of the consensual reference requirement.[151] The magistrate legislation limits the civil trial jurisdiction of magistrates to those cases which (1) have already been filed in the federal district courts and (2) have been referred to a magistrate upon the *freely given consent* of the litigants and under the sanction of the court itself.[152] In short, the parties retain an absolute right under the new Act to have their civil case tried by an article III judge. They must affirmatively and mutually relinquish that right in order for a magistrate to try the litigation. It is well-settled that once a case lies within the subject matter jurisdiction of a federal court, the parties may, with the approval of the court, waive personal rights or consent to variations in the method of processing their litigation, including referral of the case for hearing by a non-article III adjudicating officer.[153] The courts, of course, limit the parties' discretion in this regard to

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150 *Cf.* Wingo v. Wedding, 418 U.S. 461 (1974), (local rule of federal court allowing magistrate to hear evidence in habeas corpus actions overturned as inconsistent with positive federal statutes); Mathews v. Weber, 423 U.S. 261 (1976) (preliminary magistrate review in Medicare case upheld as one of "additional duties" contemplated by Congress in the Federal Magistrates Act). *See also* the concurring opinion of Justice Clark in Glidden Co. v. Zdanok, 370 U.S. 530, 585-89 (1962).

151 The Federal Bar Association contended before the Senate Judiciary Subcommittee at hearings during the Ninety-fifth Congress that the mutual consent provision of the legislation was essential to preserving its constitutionality. *1977 Senate Hearings, supra* note 45, at 225-28.

152 The original Department of Justice draft proposal established categories of civil cases for mandatory and exclusive disposition by magistrates. Those categories of civil cases over which the proposal would have given case-dispositive authority to magistrates without consent of the litigants include social security reviews, government forfeiture and penalty cases, and individual tort claims against the government of less than $10,000. 35 CONG. Q. WK. REP. 833-34 (1977).

153 *E.g.*, De Costa v. Columbia Broadcasting Sys., Inc., 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976); Kimberly v. Arms, 129 U.S. 512 (1889); Heckers v. Fowler, 69 U.S. 123 (2 Wall.) (1864). The federal courts are courts of limited jurisdic-

matters on which there is no express statutory provision or substantial public policy prohibiting the procedure.[154]

Although the Constitution, for example, guarantees trial by jury in most civil and criminal cases,[155] the right may be knowingly relinquished or altered by the parties in the same manner as other personal or procedural rights.[156] In civil cases, the Federal Rules provide that a litigant must make an affirmative and timely demand in order to obtain a trial by jury of any issues triable of right by a jury.[157] Civil litigants in the federal courts, moreover, may consent to trial of their cases before a jury of six persons, rather than the traditional twelve.[158] The parties may also agree that only certain issues in a civil case will be tried by a jury.[159] With the consent of the parties, the court may order a trial by jury in actions which are not triable of right by a jury;[160] and the court may in its discretion order a trial by jury of any or all issues where a right to jury trial exists even when not actually demanded by a party.[161]

In criminal cases, where the courts are particularly careful in protecting the rights of the defendant, fundamental constitutional rights are waived regularly. In *Shick v. United States*[162] the Supreme Court stated, "when there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."[163] Elsewhere the Supreme Court has held that these privileges in-

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tion, and therefore the parties may not confer subject matter jurisdiction by consent. United States v. Griffen, 303 U.S. 226, 229 (1938).

154 *See Silberman, Part II, supra* note 144, at 1354; *Kaufman, supra* note 127, at 459.

155 U.S. CONST. art. III, § 2; amends. VI, VII.

156 Generally, a party may waive any right or privilege unless there is a constitutional or statutory provision or fundamental public policy consideration which prohibits him from doing so. Schick v. United States, 195 U.S. 65, 72 (1904).

157 FED. R. CIV. P. 38(b); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964).

158 FED. R. CIV. P. 48.

159 FED. R. CIV. P. 38(c).

160 FED. R. CIV. P. 39(c).

161 FED. R. CIV. P. 39(b).

162 Schick v. United States, 195 U.S. 65 (1904).

163 *Id.* at 72.

clude the right to counsel,[164] the right to be present at each stage of a criminal proceeding,[165] the right to a speedy trial,[166] the right to confront and cross-examine witnesses,[167] the right against self-incrimination,[168] and the right to be free from warrantless searches.[169] The parties may waive their right to a trial by jury;[170] and perhaps most significantly, the defendant may choose to plead guilty and give up not only his right to a jury, but his right to a trial itself.[171]

In *Heckers v. Fowler,*[172] the parties agreed, after pleadings had been filed, to refer their civil case to a referee for a hearing and report carrying the same effect as a judgment of the court.[173] The Supreme Court approved the reference and held that the practice was consistent with the organization of the judicial system and congressional enactments.[174] Although the parties might have by right proceeded with a full trial in the district court, the Court upheld their waiver of this right and their consent to have the case ultimately decided by a referee.[175]

In *Kimberly v. Arms,*[176] the Supreme Court upheld the consensual reference of an entire case to a special master and discussed the appropriate scope of review of the officer's findings. Stressing that both parties had consented to the referral of their case, the Court found that the special master's decision could not be set aside in the discretion of the trial court. The element of mutual consent meant that the officer's findings, like those of an independent tribunal, were presumptively correct. The trial court was instructed to review the special master's

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164 Faretta v. California, 422 U.S. 806 (1975); Johnson v. Zerbst, 304 U.S. 458 (1938).

165 *Cf.* Illinois v. Allen, 397 U.S. 337 (1970) (right to be present lost by disruptive behavior).

166 *See* Barker v. Wingo, 407 U.S. 514 (1972).

167 *See* Brookhart v. Janis, 384 U.S. 1 (1966).

168 Garner v. United States, 424 U.S. 648 (1975).

169 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

170 Patton v. United States, 281 U.S. 276 (1930).

171 FED. R. CRIM. P. 11; *see* Boykin v. Alabama, 395 U.S. 238 (1969).

172 69 U.S. (2 Wall.) 123 (1864).

173 *Id.* at 127.

174 *Id.* at 128-29.

175 *Id.*

176 129 U.S. 512 (1889).

report only for manifest error in the evaluation of the evidence or in the application of the law.[177]

Cases subsequent to *Kimberly* have placed several significant restrictions on non-consensual references of civil cases to special masters.[178] Where, however, the parties consent to the reference of a case, or a portion of a case, the pertinent limitations are without substance.[179] For example, the constitutionality of consensual reference of a civil case for adjudication by a United States magistrate was affirmed by the United States Court of Appeals for the First Circuit. In *DeCosta v. Columbia Broadcasting Sys., Inc.*,[180] the parties had stipulated that certain counts be heard and determined by a magistrate. After the magistrate had submitted his findings of fact and conclusions of law, counsel for the defendant objected for the first time that the referral to the magistrate was constitutionally infirm and void *ab initio*. The defendant further argued that even if the referral had been constitutional, it violated the "exceptional conditions" requirement of rule 53.[181]

Both the district court and court of appeals rejected these contentions, holding the reference to be constitutionally and statutorily proper.[182] The Court of Appeals likened the procedure of consensual references to that of arbitration by the parties[183] and further concluded that the reference was neither prohibited by the Federal Magistrates Act nor by the restrictions of rule 53 of the Federal Rules of Civil Procedure:

> It therefore seems clear to us that the Congressional intent was to leave untouched the tradition, as Congress understood it, that parties could, without violation of Article III, freely consent to refer cases to non-Article III officials for decision. We see no suggestion in the committee reports and no reason of policy which would limit consensual

177 *Id.* at 524.
178 *See* notes 139 to 144, *supra.*
179 *See* DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 507 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976); *see also Silberman, Part II, supra* note 144, at 1354.
180 383 F. Supp. 326 (D.R.I. 1974), *rev'd on other grounds,* 520 F.2d 499 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976).
181 383 F. Supp. at 331.
182 *Id.* at 336-37; 520 F.2d at 503, 505-06, 508.
183 520 F.2d at 505-06.

> reference to "some exceptional conditions" as required by rule 53(b) of the Federal Rules of Civil Procedure. As we have indicated above, the factors triggering the decision in *LaBuy* are not present when the parties knowingly and fully agree to a reference to a magistrate.[184]

The conclusions of the 1977 Senate Report on the Magistrate Act were similar. No witness at the Senate hearings questioned the constitutionality of the bill's consensual reference provisions, and near unanimity was found among those who testified as to the overall constitutionality of the bill.[185]

The 1978 House Report ratified the Senate's conclusions and endorsed the idea of three independent bases underlying the constitutionality of the Magistrate Act. The Report specifically noted that no court had found the magistrate statutory scheme to be constitutionally infirm, while many had spoken approvingly of it. With these points in mind, the House Report declared its confidence in the constitutional validity of the proposed legislation.[186]

A dissenting view from the House Report, however, contended that the delegation of the final adjudicatory power of the district court in a civil case would be an unconstitutional abdication of an article III judge's responsibility to adjudicate ultimately cases and controversies — even with the consent of the parties, the supervision of the magistrate by the district court,[187] the preservation of a full right of appeal to an article III court, and the substantial latitude given to the Congress in the exercise of its plenary power over the lower federal

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184 *Id.* at 507. The First Circuit Court of Appeals also discussed the appropriate scope of review in *DeCosta*. The district court in that case had applied the "manifest error" standard of Kimberly v. Arms, 129 U.S. 512 (1889). 383 F. Supp. at 337. The court of appeals, however, found that such standard lacked content, at least as to the legal issues; and in the absence of statutory guidance on the point, it opted to apply the standards found in FED. R. CIV. P. 53 governing the review which a district judge must give to the report of a special master. The court of appeals implied, though, that the very limited scope of review given to arbitration awards might also be appropriate. 520 F.2d at 508.

185 1977 SENATE REPORT, *supra* note 66, at 4.

186 1978 HOUSE REPORT, *supra* note 2, at 11.

187 Under all versions of the legislation, a magistrate would be specially designated by the judges of the court which he serves in order to exercise civil trial jurisdiction. Under § 2(c)(6) of S. 237, moreover, the court could, on its own motion or for good cause shown, vacate a reference of a civil case to a magistrate for trial.

courts.[188] In other words, even though a magistrate may be authorized to find facts and to reach conclusions of law, he can not be authorized to take the ultimate step of authorizing the entry of a final judgment of the article III district court — an act which may be said to be the essence of article III judicial power.[189]

This argument was rejected by both Houses of the Ninety-fifth Congress, and it has been rejected in the recently-enacted legislation. Nevertheless, if there is any validity to the contention that a final judgment of the district court may only be entered upon the order of a judge of that court as a matter of constitutional propriety, the Congress could cure the perceived defect in the legislation by specifying that a "magistrate's judgment" would be entered in all cases following trial by a magistrate, with an appeal from that judgment taken either to a judge of the district court or directly to the court of appeals. Alternatively, the legislation could provide for purposes of direct appeal to the circuit court that a "magistrate's judgment" could be converted into a final judgment of the district court under rule 58 by providing some minimal review by a district judge, such as in the manner in which review is given by a judge to the award of an arbitrator.[190]

2. Policy Considerations

The Federal Magistrate Act of 1979 is styled a bill " to improve access to the federal courts."[191] It would accomplish its intended purpose by giving additional flexibility to the courts and to the litigants to dispose of cases expeditiously. Ultimately it would decrease the expense of litigation and improve the quality of the federal judiciary.

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188 *See* 1978 HOUSE REPORT, *supra* note 2, at 35-42 (dissenting views of Reps. Drinan and Seiberling). It should be pointed out, however, that none of the witnesses at the hearings in either the Senate or the House during the Ninety-fifth Congress expressed any substantial reservations about the constitutionality of the legislation. *See id.* at 10-11, and the various references to the House and Senate hearings at which the constitutionality of the measure was discussed.

189 *See* cases discussed in note 143 *supra.*

190 DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 508 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976), in fact, appears to sanction this approach.

191 1978 HOUSE REPORT, *supra* note 2, at 5.

a. Flexibility and Economies for the Courts

Recent history teaches that the authorization of sufficient district judgeships by the Congress invariably lags behind the actual needs of the courts.[192] Nonetheless, the dissenting views in the 1978 House Report on the legislation contended that the addition of 117 district court judgeships and the establishment of a new bankruptcy court would obviate the need for an expansion of magistrates' jurisdiction.[193] At a minimum, the dissenters suggested, the Congress could postpone consideration of the Act until the full impact of the new judgeships on the docket delay problem could be studied.[194]

The new judgeships will relieve docket pressures on the district courts. If sufficient judges are available, it may not be necessary for them to refer as many matters to magistrates, for the judges would have more time to perform judicial functions themselves.[195]

The Federal Magistrate Act of 1979, however, is not intended to relieve an immediate docket crisis, although that is a benefit flowing from the Act. Rather, the Act provides the federal trial courts with a long-range, standby resource which can supplement the judges in efficient and expeditious disposition of the business of the courts. Accordingly, the desire to provide flexibility, rather than to meet a pending emergency, was the principal motivation behind the bill.[196]

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192 S. REP. NO. 95-117, 95th Cong., 1st Sess. 7-8 (1977); H.R. REP. NO. 95-858, 95th Cong., 2d Sess. 2-3 (1978).

193 1978 HOUSE REPORT, *supra* note 2, at 35-36, 41.

194 *Id.*

195 The Judicial Conference views magistrate positions as supplemental to the judgeships authorized for a district court. Accordingly, it authorizes full-time magistrate positions only if the existing complement of district judges and magistrates is not sufficient to handle all the judicial business in the court with appropriate dispatch. *See* standards set out in note 88, *supra.*

196 The House report on S. 1613 emphasized the point:

> The Magistrate Act of 1978 is a third patch in the large tapestry of improving judicial machinery. The proposed legislation addresses itself to a different exigency than that focused upon by the diversity and judgeship bills. The committee finds that there is an increasing need for flexibility in the Federal judicial system, which is called upon to act in a rapidly changing society. By redefining and by increasing the case-dispositive jurisdiction of an existing judicial officer — the U.S. Magistrate — the legislation provides the district court with a tool to meet the varying demands on its docket. Because of magistrates' limited tenure and the method of their appointment, magistrate

The new district judgeships, moreover, may only meet immediate needs. When the Federal Magistrates Act became law in 1968 there were 342 authorized district judgeships. During the preceding year[197] 104,020 cases had been filed in the district courts (71,499 civil and 32,571 criminal) or 304 per authorized judgeship.[198] During the year which ended on June 30, 1978, there were 399 authorized judgeships and 174,753 cases filed (138,770 civil and 35,983 criminal) or 438 per judgeship.[199] The Omnibus Judgeship Act of 1978[200] has provided 117 new judgeships, bringing the national total to 516. Even had all the new judges been on duty during the preceding year, there would have been 339 cases filed per judgeship nationally, or 35 more cases than were filed per judge in 1968, when the Magistrates Act was approved.

In addition, as the Judicial Conference has noted, the courts cannot cope with the problem of increasing caseloads merely by continually "increasing the number of district judges and the supporting staffs... with the concomitant need for huge additional physical space."[201] Judge Kaufman amplified this theme in 1970:

> Simply creating more judgeships to cope with increased court business is a long, expensive, frustrating, and often inefficient procedure for reducing court congestion.... We do need more judges. But legislatures, sensitive to public displeasure with rising taxes and higher judicial outlays, are going to balk at the millions required to build new courthouses, create more judgeships, and hire the supporting personnel if

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supply and expertise can be designed to complement a particular Article III bench. Because of the consent requirement, magistrates will be used only as the bench, bar and litigants desire, only in cases where they are felt by all participants to be competent. The committee rejects the contention that litigants will be forced to have their cases tried by magistrates.

1978 HOUSE REPORT, *supra* note 2, at 22.

197 July 1, 1967, to June 30, 1968.

198 [1968] DIR. AD. OFF. U.S. CTS. ANN. REP. II-14, II-28.

199 [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 3, 4, 6. Of the 32,571 criminal cases filed in 1968, 1857 were rule 20 transfer cases. The 1978 figures include 8,306 minor offenses, most of which were tried by magistrates (no comparable breakdown is available for the 1968 figures). Even excluding these minor offenses, 323 cases per judgeship were filed in 1978, 19 more than in 1968.

200 28 U.S.C.A. § 133 (Supp. 1979).

201 JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENT TO THE FEDERAL MAGISTRATES ACT 3 (March 7, 1975).

> we attempt to solve all our problems by simply increasing the number of judges. It is like adding more engineers to a railroad still operating with steam instead of diesel engines.[202]

The 1977 Senate Report on the magistrate legislation concurs in these appraisals of the judiciary and notes that the cost of establishing and maintaining a full-time magistrate position is approximately one-half that of a district judgeship. Accordingly, the Act can produce a net savings from the costs for the judgeships that would otherwise be needed if magistrates could not exercise the jurisdiction provided in the bill.[203] A memorandum subsequently prepared by the Administrative Office of the United States Courts and the Department of Justice confirms the Senate appraisal. As of October 20, 1977, the costs for a new district judgeship were estimated to be $308,000 for the first year and $225,000 annually thereafter. The cost of establishing a new full-time magistrate position, on the other hand, was estimated to be $145,000 for the first year and $112,000 annually in succeeding years. Even if a law clerk position and additional court reporter services were provided to each full-time magistrate, as was suggested during the hearings in the Ninety-fifth Congress,[204] the costs of a magistrate position would rise to $176,000 and $142,000 respectively, or a little more than half the costs of establishing and maintaining a new judgeship.[205]

The developing literature about the magistrate system examines the various judicial economies that could be achieved by encouraging consensual references to magistrates in appropriate cases. Specifically, one commentator concluded:

> Use of a system of consensual reference would produce three sorts of benefits. To the extent that the less difficult cases are channelled to the magistrate, district judges will be freed to deal more effectively with the more difficult and important cases. Second, if the magistrates' dockets are kept un-

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202 Kaufman, *The Judicial Crisis, Court Delay and the Para-judge,* 54 JUDICATURE 145, 147-48 (1970).

203 1977 SENATE REPORT, *supra* note 66, at 15.

204 *See 1977 Senate Hearings, supra* note 45, at 130 (testimony of Thomas Ehrlich). The legislation, as approved in 1979, authorizes the Judicial Conference to provide law clerk positions to magistrates on an *ad hoc* basis.

205 Memorandum printed in *1977 House Hearings, supra* note 4, at 497, 502-03.

> congested, the parties, and society as a whole, will receive the benefits of rapid adjudication and more careful consideration of cases by both tribunals [footnote omitted]. Third, a magistrate may be hired for one term only, eliminating presently existing congestion without the need to engage tenured judges who may be unnecessary after the congestion has been relieved.[206]

Thus, the Federal Magistrates Act has freed district judges to perform the work which only they should do as a matter of policy.[207] The availability of sufficient judicial resources — judges and magistrates — to handle the caseload within a given district court is the primary factor that must be considered by a court in determining whether its magistrates should be empowered to try cases upon the consent of the parties. In some districts, for example, the heavy workload of the district judges coupled with the time constraints of the Speedy Trial Act, have virtually precluded the judges from trying civil cases.[208] In other districts, the civil caseload may be under adequate control. The Federal Magistrate Act of 1979 recognizes the variety among the several district courts by providing a permissive grant of trial jurisdiction to magistrates, rather than a mandatory one. Thus, in each district, the judges of the court retain the discretion of permitting civil cases to be tried by magistrates in order to provide the most appropriate division of judicial responsibilities among the officers of the court.

b. Flexibility and Economies for the Litigants

Litigants are also directly benefitted by the legislation. Consensual references of cases to a magistrate for trial will give the parties greater opportunity to resolve their disputes promptly.[209] For example, civil litigants may seek only a compe-

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206 *Adjudicative Role, supra* note 131, at 594-95.

207 *1966 Senate Hearings, supra* note 14, at 318; BURGER, C. J., YEAR END REPORT ON THE JUDICIARY 2 (Jan. 1, 1978).

208 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SECOND REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT OF 1974 4 (1977).

209 The First Circuit Court of Appeals has advised that

> Indeed, on occasion, perhaps when the legal issue is closely balanced and the stakes are not high, or when expedition and expense are dominating factors, parties may prefer prompt decision, through [sic] by a magistrate to a decision by a judge. This avenue ought not to be barred.

tent and speedy resolution of the facts of their dispute by any judicial officer, whether magistrate or judge. Because of the congestion of many district court dockets and the priorities accorded to criminal cases by the Speedy Trial Act, magistrates are frequently able to reach cases for trial considerably sooner than the judges of a court.

Some critics have argued, however, that the so-called speedier resolution advantage will actually be a disadvantage for minority groups. Congresswoman Holtzman feels strongly that the consensual reference provisions will create a dual system of justice.[210] She writes, "It is unlikely that a litigant will hold out for an Article III judge when he or she is poor or denied bail or is suing for badly needed money. . . ."[211]

Mitigating the spectre of a federal poor people's court are three factors. First, there are many other reasons why diverse categories of civil litigants may wish to consent to trial by a magistrate. Parties with *any* type of controversy may be close to settlement of their case and need only an early trial date to dispose of their dispute. Other litigants may have particular confidence in a given magistrate, or they may wish to have the magistrate conduct the trial of the case because he has already familiarized himself with the litigation through supervision of the pretrial and discovery aspects of the case. For reasons of personality, moreover, the parties may mutually prefer to proceed before a magistrate rather than a given judge.

A second mitigating factor is that the legislation attempts to insure that parties are not coerced into consenting to trial before a magistrate, rather than before a judge. Before conference, the Senate bill contained a strong, but general, prohibition on a court's attempting to persuade or induce any party to consent to a reference to a magistrate.[212] The House bill likewise prohibited coercion in general, but also required that

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DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 507 (1st Cir. 1975), *cert. denied,* 423 U.S. not to be barred.

DeCosta v. Columbia Broadcasting Sys., Inc., 520 F.2d 499, 507 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). *See also Adjudicative Role, supra* note 131, at 597-98.

210 1978 HOUSE REPORT, *supra* note 2, at 42.

211 *Id.*

212 S. 237 § 2, *supra* note 1; *see also* H.R. 1046 § 2, *supra* note 1.

the consent procedure be handled by the clerk of the district court without the knowledge of the district judge.[213]

Third, the Federal Magistrate Act of 1979 will preclude a district court from specifying that only particular categories of lawsuits may be tried by a given magistrate.[214] The legislation seeks to establish a generalist role for a magistrate and prevent certain disfavored types of cases from being routinely referred to magistrates. It thus effectively rebuts the prediction of the evolution of "poor people's courts."[215]

In sum, the freely consenting parties will perceive the trial of their civil case by a magistrate as an effective, prompt, and acceptable resolution of their business for many reasons. In reaching a decision each litigant will want to balance the consequences of trial by magistrate with the alternatives of an out-of-court settlement, arbitration, or eventual trial by a district judge.

c. Flexibility in Appellate Procedures

Under current law an appeal from a judgment of conviction by a magistrate in a misdemeanor criminal case is taken to a judge of the district court.[216] The scope of review is the same as that given by the court of appeals to an appeal which is taken from a judgment of conviction by the district court.[217]

In civil cases, however, no explicit provision in the current statute or in the federal rules governs an appeal from a magistrate's final judgment.[218] As a result, the courts of appeals have ruled that under the current law they are without jurisdiction to hear a direct appeal of a civil case tried by a magistrate without some review by a district judge and the en-

213 H.R. 1046 § 2, *supra* note 1; *see* discussion in 1978 HOUSE REPORT, *supra* note 2, at 13-14.

214 1978 HOUSE REPORT, *supra* note 2, at 13. The Senate version of S. 1613 passed in the Ninety-fifth Congress did not specifically address this question. The subsequent Senate bill, S. 237, adopted the House language from the last Congress.

215 *See, e.g., 1977 House Hearings, supra* note 4, at 57-58 (testimony of Thomas Ehrlich), and 182-83 (statement of Daniel J. Meador).

216 18 U.S.C. § 3402 (1976).

217 FED. R. CRIM. P. 8(d).

218 28 U.S.C. § 636(b) (1976), however, does provide specifically for the review of pretrial matters and prisoner cases which are handled by a magistrate. FED. R. CIV. P. 53 governs the review by a judge of special master reports.

try of a final district court judgment upon the order of a judge.[219] The new Act attempts to cure this deficiency in the prior law. Acting in the exercise of its plenary power to shape the jurisdiction, remedial powers, and structure of the lower federal courts, the Congress has given magistrates authority to enter final judgments in civil cases where the parties and the judges of the court agree to the procedure.

A difference of opinion surfaced during the deliberations in the Ninety-fifth Congress regarding the appropriate forum to which an appeal should be taken in a civil case. The original bill introduced on behalf of the Department of Justice in 1977 provided that any appeal from a magistrate would be taken exclusively to a judge of the district court. The standard of review was the same as that used for an appeal from a criminal conviction by a magistrate.[220] Further review of the case by the appropriate court of appeals would be discretionary only and confined to questions of law.[221]

The Department of Justice favored review by a district judge because it had the advantages of reducing the costs of litigating an appeal through elimination of the costly printing of briefs, of travel costs to the nearest seat of the court of appeals, and of the cost of reproducing the record of the trial for the appellate court. Consideration of the appeal by a single judge, rather than

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219 *See* note 87, *supra.* Kendall v. Davis, 569 F.2d 1330 (5th Cir. 1978).

220 18 U.S.C. § 3402 (1976). A judgment of a magistrate is sufficient in a minor offense case in itself, without any action by a judge of the district court. The same form of judgment (AO Form 245) is used for both magistrate judgments and district court judgments. Unlike the magistrates' criminal trial jurisdiction (which has a separate set of rules promulgated pursuant to § 3402, *i.e.,* the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates), the procedural rules for the conduct of proceedings under magistrates' civil trial jurisdiction would undoubtedly be incorporated as amendments to the Federal Rules of Civil Procedure. These amendments would have to take into account, *inter alia,* the procedures for the entry of the magistrate's judgment, and for the taking of an appeal from that judgment to a district court judge (including provisions for the notice of appeal, the record on appeal, briefs, oral argument, appeal bonds, and the applicability of local rules of court). While many of the procedures could be borrowed from the Federal Rules of Appellate Procedure, adjustments would have to be made to ensure that appeals from magistrate decisions are as "expeditious and inexpensive" as possible. *See* S. 237 § 2, *supra* note 1.

221 The legislation contemplates that litigants should be entitled to only one full appeal as a matter of right. *See* 1978 HOUSE REPORT, *supra* note 2, at 15-16; *1977 House Hearings, supra* note 4, at 183-84 (statement of Assistant Attorney General Daniel J. Meador); *1977 Senate Hearings, supra* note 45, at 103-04 (testimony of Professor Leo Levin).

by a panel of three judges, also would better conserve judicial resources. Authorization of a subsequent, purely discretionary review by the court of appeals would give the circuit judges the power to refuse to hear an appeal and enable them to concentrate their efforts on the more significant and difficult cases. Appeal to a district judge, moreover, could help relieve the severe workload crisis in the courts of appeals.[222]

A majority of the witnesses who testified at the Senate hearings on S. 1613, however, favored direct appeal from a magistrate's judgment to the court of appeals because the parties would not generally consent to trial by a magistrate if they were denied their right to automatic and full review.[223] The witnesses also claimed that direct appeal to the circuit would have the advantage of providing a single procedure for the trial and appeal of all civil cases tried in the district court.[224] Since the effect of the parties' stipulation is, in effect, to have a magistrate sit in lieu of a district judge, any appeal from the magistrate's decision to the circuit would be procedurally the same as if the judge himself had tried the case. District judges, moreover, were said to be unlikely to refer cases to a magistrate for trial if they would ultimately have to review them personally.[225]

Senate witnesses also claimed that direct appeal would avoid adding an extra layer of litigation and expense to the judicial process[226] and would dispose of the argument that the parties might not have as much confidence in an appeal from a subordinate officer to his "home town" court as in a direct appeal to a

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222 *See 1977 Senate Hearings, supra* note 45, at 153, 155-56 (testimony of Attorney General Griffin B. Bell), 105-06 (testimony of Professor Leo Levin); *1977 House Hearings, supra* note 4, at 183-84 (statement of Assistant Attorney General Daniel J. Meador).

223 *See 1977 Senate Hearings, supra* note 45, at 75-76 (testimony of Judge Charles M. Metzner), 95 (Magistrate George E. Juba), 97 (Walter Evans), 130-31 (Thomas Ehrlich), 183 (Professor Linda Silberman), 208 (Dennis Sweeney), and 229 (Judge Donald R. Ross).

224 *See 1977 Senate Hearings, supra* note 45, at 183 (testimony of Professor Linda Silberman), 196 (John P. Frank), 222 (Arthur L. Burnett), and 211 (Dennis Sweeney).

225 *See 1977 Senate Hearings, supra* note 45, at 96 (testimony of Judge Otto R. Skopil, Jr.), 115, 126 (Judge Morey L. Sear).

226 *Id.* at 195-96 (testimony of John P. Frank), 115 (Judge Morey L. Sear), 229 (Judge Donald R. Ross). The concept of an extra layer was referred to at the hearings as "fourth tierism." *Id.* at 196.

higher court.[227] Finally, direct appeal arguably would not further burden the courts of appeals since a district judge would have to try the case if the parties did not consent to trial before a magistrate.[228]

The Senate attempted to reconcile these conflicting views by providing alternative appellate routes in civil cases. The Senate bill provided that an appeal from a magistrate's judgment would ordinarily be taken to a single district judge. The parties, however, by mutual consent could agree to have a final judgment of the district court entered on the magistrate's order, with an appeal taken directly to the court of appeals. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice conducted four days of hearings and six days of markup on the bill, and it approved the legislation with the Senate's alternative appeal concept.[229] Thus, the bill which passed both houses of the Ninety-fifth Congress, and the bills which were approved by each house of the Ninety-sixth Congress, all contained provision for alternative appeal routes in civil cases.[230]

The alternative appeal procedures recognize that not all civil cases warrant the same appellate treatment. Where the amount in controversy is not great and there are no difficult questions of law to be resolved, an appeal to the district court would provide effective resolution of the case and avoid the expense and delay of appeal to the circuit.[231] On the other hand, where the litigants anticipate the probability of an eventual appeal to the

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227 *Id.* at 85 (testimony of Judge Miles Lord), 93 (Judge Otto R. Skopil, Jr.), 107 (Professor Leo Levin), 183 (Professor Linda Silberman). The contention that a district judge would not give a thorough and impartial review to a decision of a magistrate in a social security appeal was emphatically rejected by the Supreme Court in Mathews v. Weber, 423 U.S. 261, 273-74 (1976).

228 *Cf. 1977 Senate Hearings, supra* note 45, at 96 (testimony of Judge Otto R. Skopil, Jr.).

229 The House, however, made several changes in the language of the civil sections of the bill concerning court reporters, representation of women and minorities, duties of the court administrative officer, and certain technical changes. *See* 1978 HOUSE REPORT, *supra* note 2, at 9-10.

230 Section 236 of the Bankruptcy Reform Act of 1978 similarly provides for alternate appeal routes. The parties to a case in the bankruptcy court may by mutual consent appeal a final judgment following trial by a bankruptcy judge directly to the appropriate court of appeals, rather than to a judge of the district court or a special panel of bankruptcy judges designated by the circuit. 28 U.S.C.A. § 1293(b) (Supp. 1979).

231 1977 SENATE REPORT, *supra* note 66, at 11.

circuit due to the novelty, complexity, or importance of the issues presented, they may wish to avoid an intermediate step and preserve their right to a full and direct review by the court of appeals[232].

The Judicial Conference of the United States endorsed the provisions of the Senate bill generally, but it specifically recommended that any appeal from a civil trial conducted by a magistrate be taken only to the district court.[233] The Conference was particularly concerned about the introduction of a new concept of direct appeals from magistrates to the courts of appeals which might involve a material alteration in the structure of the federal courts.[234] Since a magistrate is a subordinate officer of the United States district court and is subject to the supervision of the district court, the Conference felt that all his decisions, as a matter of sound judicial organization, should be routed through the district court before any consideration is given to them by the court of appeals.

d. Other Benefits

The enacted legislation will also authorize the trial of civil cases by full-time magistrates only.[235] This limitation insures a higher quality of civil adjudication and prevents the potential conflicts of interests and the appearance of impropriety that might arise if part-time magistrates, who maintain a private practice of law, were permitted over civil trials.[236]

Before conference, the House bill required that civil trials conducted before a magistrate be recorded by a court reporter in the same manner as trials conducted before a judge. The Senate bill contained no such provision. The use of court reporters is a matter of administration which should remain

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232 *Id.* at 12.

233 [1978] JUDICIAL CONFERENCE, *supra* note 4, at 16-17.

234 *Id.*

235 The Senate bill, S. 237, before conference, for example, permitted a part-time magistrate who is not engaged in the practice of law to try civil cases. The legislation, as enacted, would permit a part-time magistrate to try a civil case upon the written request of the parties if the chief judge of the district court certifies that no full-time magistrate is reasonably available.

236 1977 SENATE REPORT, *supra* note 66, at 7; 1978 HOUSE REPORT, *supra* note 2, at 13.

flexible. Moreover, by using the authority of the Court Reporters Act of 1944,[237] the Judicial Conference already regularly provides court reporter services for magistrate civil trials. Therefore, the final result reached by the conference seems appropriate. At the start of the trial, a magistrate must now decide whether a court reporter, recording equipment or other means are best suited to record the trial. Notwithstanding the magistrate's decision, parties have the right to demand a court reporter before trial begins.

C. *Criminal Trial Provisions*

1. Jurisdiction Over Adults

The Federal Magistrate Act of 1979 has expanded the "minor offense" trial jurisdiction of United States magistrates to include all federal misdemeanors.[238] The purpose of the measure is promptly to dispose of a greater number of less-important criminal cases. Among the federal misdemeanors which would be handled by magistrates under the legislation are the unlawful possession of controlled substances,[239] or of untaxed alcohol,[240] and the failure to file a tax return.[241] Magistrates might dispose of approximately 2,500 additional misdemeanors annually under this expanded jurisdiction.[242] The constitutionality of referring criminal offenses above the level of petty offenses to magistrates on the consent of the parties was fully considered and endorsed by the Congress prior to passage of the original

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237 Court reporter services are presently available for United States magistrates for the conduct of proceedings under 28 U.S.C. § 636(b) (1976) and for the conduct of civil trials on consent. If no regular district court reporter, permanent or temporary, is available, a contract reporter is provided under authority of 28 U.S.C. § 753(g) (1976). Contracts are negotiated with local reporters or firms on an annual basis, and reporters agree to be on call for use in magistrate proceedings.

238 Accordingly, the $1,000 fine limitation and the several enumerated exceptions now found in 18 U.S.C. § 3401(f) (1976) would be eliminated. A provision would be added to the current law, however, which would permit a district judge on his own motion, or for good cause shown on motion of the Government, to remove a case for trial by a judge, rather than a magistrate. *See* S. 267 § 7(4); H.R. 1046 § 7(4) for the relevant provisions later adopted by the Conference Committee.

239 21 U.S.C. § 841(b) (1976).

240 26 U.S.C. § 5686 (1976).

241 26 U.S.C. § 7203 (1976).

242 *See 1977 Senate Hearings, supra* note 45, at 73; 1978 HOUSE REPORT, *supra* note 2, at 23-24.

Federal Magistrates Act of 1968.[243] Thus, the expansion of the criminal jurisdiction to embrace all misdemeanors raises no new constitutional or policy issues.[244]

Under the newly-enacted Act, magistrates will also be authorized for the first time to try misdemeanor cases before a jury. This provision increases the range of procedural options available to the parties. Some defendants, for example, may wish to relinquish only the right to trial before a district judge rather than waive both the right to trial before a district judge and the right to trial by a jury. Two witnesses at the 1977 Senate hearings testified from their experience in federal criminal practice that many misdemeanor cases are tried before district judges rather than magistrates only because the defendant insists on his right to a trial by a jury.[245]

Finally, the new Act makes no change in the provision of the current law which specifies that appeals from judgments of conviction by magistrates in minor offense cases are to be taken exclusively to a district judge.[246] Thus, the criminal appellate pro-

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243 *See* text accompanying notes 103 to 190 *supra*. The original Senate bill would have allowed a magistrate to accept felony guilty pleas. The conference rejected this provision since the House had not debated the issue and urged the Chief Justice to convene a Judicial Conference on the issue.

244 The 1977 Senate bill and the 1979 Act as introduced in the Senate would have altered slightly the criminal consent procedures by dispensing with the current, time-consuming requirement that the magistrate obtain consent in writing from each defendant in a petty offense case. The 1979 bill has been amended to eliminate this change.

245 *1977 Senate Hearings, supra* note 45, 164 (Mr. Hewitt), 218 (Mr. Burnett). The 1977 Senate Report recognized this fact:

> The bill, however, also provides that a magistrate may be empowered to try such cases with a jury. This new provision should encourage an even broader use of magistrates in the trial of misdemeanors where the defendant is willing to be tried before a magistrate, but wishes also to avail himself of the right to a trial by jury.

1977 SENATE REPORT, *supra* note 66, at 6.

246 18 U.S.C. § 3402 (1976). One witness at the 1977 Senate hearings suggested, however, that serious consideration be given to providing a direct appeal to the court of appeals in misdemeanor cases. *1977 Senate Hearings, supra* note 45, at 223 (Mr. Burnett). As a practical matter, though, the issue is not a very pressing one, for appeals from magistrate judgments in minor offense cases are rare. During the 1978 reporting year, for example, only 1,006 of 102,547 defendants whose cases were disposed of by United States magistrates appealed to district judges. 83,060 of the 102,547 minor offense defendants were convicted — 14,728 after trial on the merits and 68,332 on pleas of guilty. [1978] DIR. AD. OFF. U.S. CTS. ANN. REP., Tables D-2 at A-54 and M-2 at A-140.

cedure would differ from the alternative appeal procedures governing civil trials by magistrates.[247]

2. Jurisdiction Over Juveniles

The new Federal Magistrate Act avoids any possible evisceration of the basic provisions of the Federal Juvenile Justice and Delinquency Act of 1974.[248] The statute preserves all the personal rights which a juvenile enjoys under the delinquency act, in addition to providing authorization for a magistrate to conduct any proceedings in a petty offense case. The 1979 Act also provides that proceedings against a juvenile in a petty offense case may be commenced by violation notice or complaint. The Act, however, does not dispense with the need for the Attorney General of the United States to certify, after investigation, that the appropriate state court does not have jurisdiction or refuses to exercise jurisdiction over the defendant in a given case, or that the state does not have adequate juvenile programs and services available for him.[249] The juvenile also retains his full rights under the delinquency act to counsel, to guardianship, to specialized detention treatment, and to requests that he be proceeded against as an adult.

It should be expected that in the great majority of petty offense cases a juvenile would choose in writing, upon the advice of counsel, to proceed before a magistrate, rather than before a district judge. A magistrate would then be authorized under the new Act to exercise the powers of the court under the juvenile act and could proceed to consider an adjudication of delinquency. He could not, however, impose any term of commitment or imprisonment.[250] Moreover, the juvenile would retain the right to have his case adjudicated, either as a juvenile or as an adult, by a judge of the district court.[251]

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247 *See* text accompanying notes 112 to 141 *supra.*
248 18 U.S.C. §§ 5031-5042 (1976).
249 Conference Report, *supra* note 1, at 10. *Cf.* S. 237 § 7(5), *supra* note 1.
250 *Id.* This provision has been formally adopted in Title XVIII, 3401H of the Act.
251 *Id.* § 7(2).

Finally, under the new Federal Magistrate Act a magistrate would be authorized to impose sentence and exercise all powers of the court under the Youth Corrections Act.[252] Any period of incarceration imposed by a magistrate under the Act, however, could not exceed the term that could be imposed on an adult convicted of the same offense.[253] This provision explicitly permits a magistrate to utilize the special treatment and supervision options available for youthful offenders under the Act,[254] and it authorizes a sentencing magistrate to set aside a conviction or to order the payment of a fine or restitution as a condition of probation.[255] At the same time, prolonged periods of commitment for treatment, now authorized by the Youth Corrections Act, would be foreclosed, as they have been in the case of juveniles.

D. *Selection of Magistrates*

The important role which United States magistrates play in expediting the business of the federal courts makes it imperative that appointees to magistrate positions be of the highest caliber and integrity. The expansion of magistrates' jurisdiction provided for in the new legislation underscores the importance of having highly competent individuals serve as magistrates.[256] Accordingly, the new legislation makes changes in the qualification standards and selection procedures for United States magistrates.[257]

Magistrate positions are established by the Judicial Conference of the United States, subject to the approval of the Congress through the appropriations process. Currently, individual magistrates are appointed by the concurrence of a majority of

252 18 U.S.C. §§ 5005-5026 (1976).

253 A youthful offender could be committed for treatment for a period of up to six years. 18 U.S.C. § 5107(c) (1976). The pending legislation is designed to prevent the imposition of a term of imprisonment by a magistrate beyond the maximum term that could be imposed on an adult for the same offense.

254 18 U.S.C. § 5010 (1976).

255 18 U.S.C. § 5021 (1976). *See* Durst v. United States, 434 U.S. 542 (1978).

256 9 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, PROCEDURES MANUAL FOR UNITED STATES MAGISTRATES I-8-1 (1978) [hereinafter cited as PROCEDURES MANUAL].

257 1978 HOUSE REPORT, *supra* note 2, at 17-18; 1977 SENATE REPORT, *supra* note 66, at 8-10.

all the active judges of a district court.[258] The two statutory requirements for appointment as United States magistrate under the existing statute are very broad: (1) the appointee must be a member of the bar;[259] and (2) the court must make a determination that the appointee is "competent to perform the duties of the office."[260]

Concern was expressed in the Ninety-fifth Congress that "not all appointees have evidenced the same high quality."[261] The 1977 Senate report cited two primary causes for this uneven quality: (1) the failure of some courts to appreciate the full range of duties that a magistrate could perform;[262] and (2) the limitations which had been imposed in the past on the salaries of magistrates.[263] The report noted, however, that the legislation enacted in 1976 clarifying and expanding magistrate jurisdiction and increasing the statutory limitation on magistrate salaries should help to remedy the situation.[264]

The dissenting views in the 1978 House Report, however, were most critical of the selection process. At least one Congressman expressed grave reservations about enlarging the

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258 28 U.S.C. § 631(a) (1976).

259 The Act provides that a non-lawyer may serve as a part-time magistrate if the court and conference find that no qualified lawyer is available to serve at a specific location. As of January 1979, there were three non-lawyers serving as part-time magistrates. 28 U.S.C. § 631(b)(1) (1976).

260 28 U.S.C. § 631(b)(2) (1976). In addition to the bar membership requirement, the Act provides that: (a) the appointee must not be related by blood or marriage to a judge of the appointing court at the time of appointment (§ 631(b)(4)); (b) the magistrate may hold no other office of employment under the United States, with certain exceptions including service where authorized by the Judicial Conference as a referee in bankruptcy or clerk or deputy clerk of court (§ 631(c)); and (c) no individual may serve as magistrate after having attained the age of seventy years, unless the judges of the appointing court unanimously vote to continue or reappoint an incumbent who reaches seventy years of age (§ 631(d)).

In addition to the statutory requirements, the Judicial Conference requires that prior to appointment, full-time magistrate designees must undergo a background investigation by the Federal Bureau of Investigation and a file check by the Internal Revenue Service. Part-time magistrate designees are given a more limited FBI file check as well as the IRS check. [1969] JUDICIAL CONFERENCE, *supra* note 4, at 80.

261 1977 SENATE REPORT, *supra* note 66, at 9.

262 *Id. See also* 1978 HOUSE REPORT, *supra* note 2, at 17.

263 1977 SENATE REPORT, *supra* note 66, at 9. The original salary for a full-time magistrate could not exceed $22,500. The present salaries for full-time magistrates are $48,500 per annum.

264 *Id.*

"already awesome" powers of article III judges by yielding them the power to appoint magistrates.[265] Two other Congressmen[266] charged that the federal judges had mishandled the present selection process by affording little opportunity for women and minorities to hold positions as magistrates: "Of the more than 160 full-time magistrates, less than a handful is female or minority. This dismal record of equal employment opportunities not covered by Title VII of the Civil Rights Act of 1964, should caution against unrestrained growth in the magistrate system."[267]

The actual appointment statistics, however, now show a considerably different picture. As of April 13, 1979, the 174 full-time magistrates on duty or about to be appointed included fifteen women magistrates and nine "minority" magistrates (including two black women). Moreover, although both Houses of the Ninety-fifth Congress ultimately concluded that the appointment authority should vest in the individual district courts, both of the 1977 bills called for higher magistrate qualification standards and better selection procedures.[268] The bills passed

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265 1978 HOUSE REPORT, *supra* note 2, at 41 (dissenting view of Rep. John F. Seiberling).

266 Reps. Robert F. Drinan and Thomas N. Kindness.

267 1978 HOUSE REPORT, *supra* note 2, at 39.

268 1977 SENATE REPORT, *supra* note 66, at 8-9; 1978 HOUSE REPORT, *supra* note 2, at 17. The Senate report stated its conclusion as follows:

> The vesting of the appointment power in those with the most familiarity with the qualifications of potential applicants and the greatest self-interest in securing competent individuals to serve as magistrates has generally resulted in the selection of well-qualified individuals. The committee believes, therefore, that the determination of the selection and appointment of magistrates should continue to be made by the district judges.

1977 SENATE REPORT, *supra* note 66, at 9. The Senate Report on the Federal Magistrates Act in the Ninetieth Congress analyzed the issue as follows:

> Your committee believes that the enlightened self-interest of district court judges will prompt them to appoint only highly qualified individuals whose legal capabilities will have a direct and measurable effect upon the judges' own workloads, rather than individuals whose only claim to appointment is party loyalty or personal friendship with one or more of the appointing judges. Moreover, since the U.S. magistrates will function under the act as officers of the district court, and since a substantial part of their duties will be the assumption, under the supervision of the district judges, of responsibilities formerly exercised by the judges themselves, your committee feels it is imperative that the district judges have absolute confidence in the individuals who serve them. This end is best achieved by having U.S. magistrates appointed by the district judges for whom they will work.
>
> The principal alternative considered — having magistrates appointed by the

by the two houses differed significantly in approach, however.[269] The Senate concluded that "the establishment of detailed qualification standards and selection procedures should be left to the sound discretion of the Judicial Conference rather than explicit statutory treatment."[270] Accordingly, the Senate bill provided that magistrates be appointed pursuant to binding selection standards and procedures promulgated by the Judicial Conference. The Senate bill would also have provided that appointees be admitted to the practice of law for at least five years (to insure the appointment of seasoned attorneys),[271] and that each individual appointed as a full-time magistrate be certified by the judicial council of the appropriate circuit[272] as qualified to perform the duties of the office.[273] The second requirement was envisioned as providing "a suitable role for groups outside the district courts, such as the circuit councils, in assisting the district courts in their selection of magistrates."[274]

The House bill would also have required a minimum of five years membership in the bar. It would not have required certification by the circuit council, but it would have established by statute a detailed set of procedures for selecting magistrates.[275] Under the original House bill, the district court would have been required to establish a Magistrate Selection Panel, and the

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President, subject to Senate confirmation — would place the appointment power in a source that is both remote from the point at which the responsibilities of the office must be discharged and without the same self-servicing motivation to select candidates who can best assist the district courts.

To further insure that magistrates are selected on the basis of qualification rather than patronage or personal friendship, your committee has built into the method of appointment proposed a final check. Except in the extraordinary case, *i.e.*, when no single nominee for a vacancy has the support of a majority of all the district court judges, appointment will be made only upon the concurrence of an absolute majority of the judges of the appointing court; no single judge may by his personal decision fill a vacancy. This insures, so far as possible, that the support that superior qualifications always can muster will prevail in each appointment.

S. REP. No. 90-371, 90th Cong., 2d Sess. 12 (1967).

269 1978 HOUSE REPORT, *supra* note 2, at 17.

270 1977 SENATE REPORT, *supra* note 66, at 9.

271 *Id.*

272 The active circuit judges comprise the membership of the judicial council of the circuit. 28 U.S.C. § 332(a) (1976).

273 1977 SENATE REPORT, *supra* note 66, at 9.

274 *Id.*

275 1978 HOUSE REPORT, *supra* note 2, at 2-3.

court would have had to select its magistrates from lists prepared by the panel. The bill set forth the procedures for the establishment of the panel, including its size and composition; it prescribed the duties and the procedures for the conduct of the panel's business, stressing the need for consideration of well qualified female and minority applicants; and it provided for the panel's reporting to the court and the court's action on the selection lists. The selection procedures of the bill would have been mandatory, with one narrow exception.[276]

The legislation, as ultimately enacted, established a middle ground between the divergent approaches of the House and Senate bills of the Ninety-fifth Congress. In lieu of the requirement for certification by the circuit council, the 1979 Act incorporated the two most significant requirements of the House bill (public notice of vacancies and the establishment of selection panels),[227] but avoided enshrinement of the details of the procedures in a statute. It required that magistrates be selected

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276 The House-approved version of S. 1613, and the House bill (H.R. 1046) before conference provided that

> A district court which cannot meet the procedural requirement of this paragraph, for good cause shown, may appoint a part-time magistrate pursuant to its own publicized procedure, after having filed with the conference the reasons for not being able to comply with the requirement of this paragraph.

1978 HOUSE REPORT, *supra* note 2, at 3; H.R. 1046 § 3(d), *supra* note 1.

277 The differences between the selection provisions of S. 237 and H.R. 1046 were to a large extent distinctions based on procedural detail. Both bills required a selection panel for full-time magistrate positions. The House bill also required a panel for all part-time magistrate positions, while the Senate version permitted the Conference to require a panel by regulation (the Conference's current guidelines suggest that courts utilize the assistance of a panel for all appointments to positions with salaries equal to one-third or more of that of a full-time magistrate). PROCEDURES MANUAL, *supra* note 256, at I-8-1 exhibit 8.

The House bill set a requirement of five years' membership in the bar for all appointees. The new Senate bill required the Judicial Conference to establish minimum qualifications standards (the Conference currently recommends that all appointees have at least five years' membership in the bar).

Both the Senate and the House bills before conference required public notice of all vacancies, full-time and part-time. The existing Judicial Conference guidelines contain a similar requirement.

The House bill also recommended that the selection panels give "due consideration to qualified women, blacks, hispanics, and other minority individuals." The Senate bill "suggests that the district courts . . . select the best qualified individuals regardless of race, color, sex, religion, or national origin."

See S. 237 §§ 3(b)-(c), *supra* note 1; H.R. 1046 §§ 3(a)-(d), *supra* note 1.

"pursuant to standards and procedures promulgated by the Judicial Conference. . . ."[278]

As with the House bill, the legislation as enacted provided for participation and comment from individuals outside the court in identifying potential magistrate appointees. However, the 1979 Act retained a greater degree of administrative flexibility by delegating to the Judicial Conference the task of implementing the legislative policies regarding the merit selection of magistrates. The conference basically adopted the Senate approach in the final version of the Federal Magistrate Act. It did, however, incorporate the five-year bar membership requirement set out in the House version of the bill.

The crux of the difference between the House and Senate approaches in the Ninety-fifth Congress was the competing tension between the need for retaining administrative flexibility in a body having an intimate knowledge of the requirements of the district courts and the risks inherent in the delegation of rulemaking authority to a body comprised in part of those whom the rules would govern. Recent action of the Judicial Conference and the courts gives evidence that they will accept the task of promoting the merit selection of magistrates. Although the Congress had not previously given the Conference authority to impose binding selection standards and procedures on the district courts,[279] the Conference had already promulgated voluntary guidelines for the district courts.[280] In some respects those guidelines are more demanding than either S. 237 or H.R. 1046. For example, the Conference guidelines call for the selection of all full-time magistrates (and those part-time magistrates receiving a salary of one-third or more of that of a full-time magistrate) pursuant to procedures virtually identical to those in the House bill. The guidelines also recommend that the district court seek the certification of a candidate for a full-

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278 S. 237 § 3(b)(5), *supra* note 1.

279 The Federal Magistrates Act does not currently subject to Conference regulation appointments of magistrates by the district courts. 28 U.S.C. § 631 (1976).

280 JUDICIAL CONFERENCE OF THE UNITED STATES, STANDARDS AND PROCEDURES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE APPOINTMENT OF UNITED STATES MAGISTRATES (1978).

time magistrate position by the circuit council. Thus, the Conference had on its own promulgated recommended procedures that contain most of the requirements of *both* the Senate and House versions of S. 1613. The guidelines do not have the force of law and could be made more flexible once the Conference promulgates binding regulations in their stead. However, the very existence of strong guidelines is significant evidence of the Judicial Conference's commitment to the merit selection of magistrates and justification for the Act's approach toward the selection of United States magistrates.

The Act also provides a final check on the selection and qualifications standards applied to magistrate appointments by requiring that the Director of the Administrative Office of the United States Courts report annually to the Congress the professional backgrounds and qualifications of appointees, the number of cases in which the parties consent to trial by a magistrate, and any appeals that may be taken from the decisions of magistrates.[281] These provisions will serve as a means to ensure continued Congressional oversight of the selection process.

Conclusions

The federal magistrate program, now in its ninth year of nationwide operation, "plays an integral and important role in the Federal judicial system."[282] The success of the program to date has surpassed the high hopes of the Congress in providing an effective forum for the disposition of minor federal criminal cases and providing much-needed assistance to district judges.

The district courts have made imaginative and effective use of magistrates and have delegated to them a progressively wider range and greater number of court proceedings under the existing law. The Federal Magistrate Act of 1979

> respects the views of those who created the magistrates system in 1968 and then upgraded it in 1976. The legislation is, in effect, a logical extention of the congressional will expressed in the 1968 Act and the 1976 amendments. It derives

281 S. 237 § 5, *supra* note 1; H.R. 1046 § 5(a), *supra* note 1.
282 1978 HOUSE REPORT, *supra* note 2, at 8.

> its strength from the increasing use and acceptance of magistrates by judges, practitioners and litigants in the Federal judicial system. And it recognizes that magistrates have already made a significant contribution to aiding the Federal courts to meet their delegated responsibilities and that these judicial officers should continue to play a supportive and flexible role in the Federal judicial system.[283]

Despite some unevenness in quality, magistrates have earned the overwhelming confidence of the judiciary and the bar. The Committee on Federal Courts of the Association of the Bar of the City of New York conducted a recent survey of lawyers who practice regularly in the local district court. The committee found that the magistrates system is "highly effective"[284] and that a "uniform consensus" (91 percent) of the bar believed that the use of magistrates should be continued.[285]

The constitutionality of the Act has also been accepted by the bar[286] and bench.[287] Congress has repeatedly recognized that the constitutionality of the federal magistrate system rests upon three independent pillars: the parties' right to appeal to an article III court, the magistrates serving as adjuncts of the federal District Courts, and the requirement of consent of the parties.[288] These theories will also defend the Federal Magistrate Act of 1979 against constitutional attack.

The Act of 1979 is part of a three-fold approach for improving judicial machinery, which also includes the authorization of needed additional judgeships and the reappraisal of the existing jurisdiction of the federal courts.[289] The legislation emphasizes the important role of the federal magistracy as a complement to the article III bench, serving the needs of the district courts for increased flexibility and for supplemental resources to meet their caseload responsibilities.

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283 *Id.*

284 *1977 House Hearings, supra* note 4, at 407 (statement of the Association of the Bar of the City of New York).

285 *Id.* at 398.

286. *Id.* at 407. The American Bar Association at its 1977 annual meeting adopted a resolution endorsing legislation for the expansion of the jurisdiction of United States magistrates "as a major step in improving the administration of justice in our Federal judicial system." *1977 House Hearings, supra* note 4, at 509-10.

287 *See* [1978] JUDICIAL CONFERENCE, *supra* note 4.

288 *See* text accompanying notes 103 to 190 *supra.*

289 1978 HOUSE REPORT, *supra* note 2, at 21, 22.

The legislation also recognizes the "growing interest in the use of magistrates to improve access to the courts for all groups, especially the less-advantaged," who lack the resources to cope with adjudication expenses and delays.[290] Through the mutual consent of the litigants and the supervision of the district courts, the imaginative use of magistrate services can be of benefit in providing prompt, effective, quality justice in the federal trial courts.

290 1977 SENATE REPORT, *supra* note 66, at 4.

THE CASE FOR DIVERSITY JURISDICTION

JOHN P. FRANK*

Critics of the judicial system in recent years have expressed increasingly strident opposition to federal diversity jurisdiction, while supporters of diversity have just as vigorously fought to retain it. This opposition culminated in a 1978 vote by the House of Representatives on H.R. 9622, a bill to abolish diversity, except in cases 1) between citizens of a state and citizens of foreign nations (so-called alienage cases) 2) between citizens of different states where citizens or subjects of foreign nations are parties 3) in which a foreign state is plaintiff and defendants are citizens of a state or different states. The bill also would have abolished the $10,000 jurisdictional amount requirement in all federal question cases but would have raised it to $25,000 for the surviving categories of diversity cases.

A much more moderate Senate bill, S. 2094, which would only have prevented a plaintiff in a dispute with a citizen from another state from bringing suit in a federal court in the plaintiff's home state and would have changed the jurisdictional amount requirements in the same manner as the House bill, died in the Senate Judiciary Committee after a filibuster led by Senator William Scott (R-Va.) House opponents of diversity later tacked the House bill onto a noncontroversial measure to expand the role of magistrates in federal court proceedings, thereby allowing the House to bring the diversity bill to a conference with the Senate on the magistrates bill. In conference, Senator James Abourezk (D-S.D.) offered the original Senate bill as a compromise, but the committee rejected his proposal. The conference adjourned and the diversity legislation died along with the magistrates measure.

Similar anti-diversity bills, H.R. 130 and H.R. 2202, have been introduced in the House during the Ninety-sixth Congress. The former preserves all of the features of H.R. 9622 except that it would retain the $10,000 jurisdictional amount requirement in remaining diversity cases. H.R. 2202, whose sponsors include Representative Robert Kastenmeier (D-Wisc.), Representative Peter Rodino (D-N.J.) and several other Judiciary Committee members, is virtually identical to H.R. 9622. Because of substantial opposition from large portions of the legal profession, the House Subcommittee on Courts, Civil Liberties and the Administration of Justice has tabled the measure. The Senate has held hearings on the proposal, but the Judiciary Committee has not scheduled action on the bill.

In this article, Mr. Frank outlines the arguments for retaining diversity jurisdiction. Examining the benefits obtained from allowing access to federal courts in these cases, Mr. Frank argues that abolishing diversity jurisdiction is an impermissible response to the problems of a heavy federal caseload.

Introduction

The bill which passed the House of Representatives in 1978 and which is pending again in that body as this article is written

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*B.A., Wisconsin, 1938; M.A., 1940; L.L.B., 1940; J.S.D., Yale, 1947. Mr. Frank is chairman of the Arizona State Bar Committee on Diversity and of the national Committee to Maintain Diversity Jurisdiction.

would abolish the diversity jurisdiction altogether. The bill has the support of the very able and conscientious Representative from Wisconsin, Robert Kastenmeier.[1] It is also supported by the Chief Justice and the Attorney General and has White House backing.

That is a lot of support. There is also a lot of opposition. The ABA Board of Governors was just one vote short of unanimity in opposing this legislation. The American Trial Lawyers Association opposes it strenuously. Fifty state bars or their proper representatives or committees have adopted resolutions of opposition.[2] There is no reason to suppose that any appreciable group of private practitioners in the United States supports the bill. It is of course possible that there may have been disagreement in some of these states; however, the usual report is that the vote was unanimous. Indeed, it is doubtful if in the ten years that this measure has been, in one form or another, before the Congress, as many as two private practitioners have ever appeared in support of it. The position of the private practitioners is solid regardless of the interests they represent.[3]

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1 For Mr. Kastenmeier's position, *see* Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective,* 16 HARV. J. LEGIS. __, __ (1979).

2 The 50 state bars, with necessary qualification, we show overtly opposed to this legislation are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Maine, Massachusetts, Michigan, Minnesota (Ct. Rules Comm. only), Mississippi, Missouri, Montana (President & 2 presidents elect; bar vote pending), Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York (Committee on Federal Courts), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

3 The Committee to Maintain Diversity jurisdiction includes Mr. Albert Jenner of the ABA Board of Governors, a representative of some of the largest interests in the United States as well as many public causes; Mr. William Gossett of Detroit, former ABA President and General Counsel for the Ford Motor Company; Thomas L. Samuel of the Chesapeake and Ohio and Baltimore Railroad (Chessie System); Mr. Charles Clarke of Cleveland for the National Association of Railroad Trial Counsel; Mr. Alston Jennings of Little Rock who has been the national leader of the insurance defense counsel; and Mr. Robert Begam, a former president of ATLA. It includes lawyers from small cities and semi-rural areas such as both George and Georgina Guy of Cheyenne, Wyoming, and Robert J. Fair of Princeton, Indiana. It includes William Prickett, a representative of corporate litigation interests in Wilmington, Delaware, and State Bar Secretary Edward Jones of Des Moines. It reaches from coast to coast; Richard Keatinge of the ABA Board of Governors, who practices in Los Angeles, is a member and so is Richard Donahue of Lowell, Massachusetts, himself a member of the

There have been so many proposals circling about the diversity topic since 1965 that there may be confusion as to what is under discussion. There are, of course, many private practitioners in the American Law Institute and there was approval by the ALI in 1965 and 1968 of proposals to reduce diversity jurisdiction. Those proposals differ in two radical respects from the present legislation. First, until 1977-1978, no one in a responsible position had spoken of abolishing diversity jurisdiction. Second, the ALI proposal was to reduce diversity jurisdiction and to increase the federal question jurisdiction at the same time. The assumption was that the expansion of the federal jurisdiction on the one side would more or less balance the reduction on the other in quantitative case load. The ALI proposal was adopted as a package, reduce here and expand there. The expansion proposals of the ALI draft have long since been abandoned and are not touched in any way by any pending legislation.

Legislation, if it passes, is thus going to deprive the bar of the country which uses it of a resource which it values. There were 34,000 diversity cases in the federal courts last year, and this would put them all out.

There is no substantial reason that is or can be advanced for this proposal except the commendable desire to lighten the load on the federal courts. The difficulty with lightening that load is that necessarily the load must be increased on the state courts. Yet there is no profit in transferring cases from one logjam to another. Diversity jurisdiction must be seen for what it is, a social service of the federal government provided for the people of the United States. A primary function of the legal profession is to settle disputes. The diversity jurisdiction provides an option for settling these disputes. In one sense, it can be compared to the school lunch program or the federal highway program or any other program by which the federal government serves the general public.

Massachusetts Bar Board of Governors. So is Edward Mullinix of Philadelphia particularly representative of the litigation section of the ABA. Professor J. W. Moore has sustained diversity through the debates of the past thirty years, and as a member of the Committee he still does.

What is striking is that the proponents of this legislation as individuals are, for the most part, not advocating the abolition of other social services. This selective retrenchment is the more striking because diversity has been with us since 1789. It is the oldest single federal social service. It comes to us quite literally from the hands of George Washington, James Madison, and Oliver Ellsworth.

Certainly I do not advocate the maintenance of any practice simply because it is old. If diversity has outlived its usefulness, away with it. But when a practice is so well established, and when it is so universally desired by those who utilize it, there ought to be a very strong reason for dropping it. The weight of the argument, I believe, runs the other way.

I. Historical Considerations

The original federal court jurisdiction was almost entirely permissive; the Congress was under no obligation to create federal trial courts at all and could have left all original matters except those in the Supreme Court to the states. And yet the Constitution did permit the creation of federal diversity jurisdiction, and the first Congress did choose to take up the option. It granted jurisdiction for private, civil cases in diversity only.

Why? The need arose from a fear of prejudice against out-of-staters engaged in regional business. I have developed in some detail elsewhere, based on a study of all generally available pre-1787 reports, that this was largely a gloomy anticipation of things to come rather than an experienced evil; but nonetheless, there it was.[4]

The diversity jurisdiction in the first 150 years of its life had its successes and its abuses. The successes were substantial — the disposition of a good amount of important commercial business; the furnishing of the Supreme Court with enough to do to keep it busy and finally more than busy, thus permitting it to develop as a national institution; the nationalizing effect of

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4 Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Prob. 3 (1948).

the entire judicial operation which, to a degree at least, helped unify the country.

But the abuses were serious. First, jurisdictional manipulations furnished an easy device for depriving states of initial opportunities to pass on matters of their own policy. Second, the class biases of federal judges led to gross abuses both to the growing labor movement as an institution and to the rights of injured workers in an expanding industrial economy. Third, the great error of *Swift v. Tyson*[5] and the federal choice of law permitted the abuse of jurisdiction shopping. It invited the manipulation of cases to put them where the results would be controlled by the choice of court.

If these abuses could not have been controlled, the abolition of the whole diversity jurisdiction should have followed. But creative leadership did devise controls, and the abuses were very largely eliminated. The legitimization of federal question litigation in 1875 eliminated much of the purpose of phony diversity intended to raise federal questions. Such decisions as *Hawes v. Oakland*[6] helped check the gross abuse of the manipulated case. More fundamentally, the Johnson Act[7] largely took the federal courts out of the utility regulation field, and the case developments following its policy have greatly minimized the conflict of jurisdictions. In the labor relations field, the Equity Rules of 1912 were some improvement, but not nearly enough; the Norris-LaGuardia Act[8] in 1932 largely ended government by injunction. In the tort cases the rise of industrial compensation, the passage of the Federal Employers Liability Act (FELA)[9] and Jones Act,[10] and the general revitalization of juries by the Supreme Court has almost totally eliminated the earlier abuses. Finally, *Erie R.R. v. Tompkins*,[11] has largely ended the evil of jurisdiction shopping. There will never again, we trust, be another case like *Black & White Taxi-*

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5 16 Pet. (41 U.S.) 1 (1842).
6 104 U.S. 450 (1882).
7 28 U.S.C. § 1342 (1976).
8 18 U.S.C. § 3692 (1976).
9 45 U.S.C. § 51 (1976).
10 46 U.S.C. § 688 (1976).
11 304 U.S. 64 (1938).

cab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.[12]

Nonetheless, these abuses leave a residue which contributes to the present push for great change. The past evils in diversity are not evils of an ancient yesterday. Most of the cures are the product not only of this century but of the years since 1920. These abuses were gross enough to warrant, if necessary, the total abolition of diversity. Able and impartial observers for the years 1890 to 1930 could very reasonably develop severe prejudices against this jurisdiction. Those prejudices have greatly influenced the thinking of the present advocates of change.

But the major premises of that prejudice against diversity deserve careful reexamination. It is possible that the abuses of diversity have been pretty well filed away, and that what is left is a worthy and useful device of public administration. The anti-diversity attitude has become a habit. Those who wish to terminate, suspend, or cut down this valuable federal service would do well to reexamine and restate their major premises in depth. One hears the phrase, "an idea whose time has come." This is an idea whose time has gone.

II. The Values of Diversity

The first great value of diversity is its disposition of something on the order of over 30,000 disputes a year to the general satisfaction of those who need their disposition. In 1977, 12,500 diversity cases terminated without court action, and 17,000 with court action.[13] Of course not all litigants are content with results: doubtless human impulse leaves at least half of them unhappy. Nor are all federal judges wiser or abler or all federal procedures more satisfactory than state procedures. Occasionally a region or area, in which highly political appointments have been made in response to local and sometimes unworthy political impulses, found itself with a wholly inferior bench. Some federal procedures, such as the restriction of cross-examination to the scope of direct, may be inferior to state procedures.

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12 276 U.S. 518 (1928).

13 [1977] Dir. Ad. Off. U.S. Cts. Ann. Rep. A-30.

Hence I recite here no cult of the superman. But, with a high degree of uniformity, the system has been generally satisfactory to those living under it. The litigant who loses rarely feels with much conviction that he would have been better off in a different system. Where political considerations make the federal judges poor, they are likely to make the local judges even worse. There is a general feeling that justice in federal courts is being well administered. There is no widespread, obvious abuse to be corrected.

The second great plus is the educational value of having two systems in interaction. This value is felt at both national and local levels. The success of the federal rules has led to their widespread emulation in the states, and the federally sponsored process of continued revision is keeping the state procedure moving as well. Furthermore, interaction is by no means a one-way street. The present practice encourages the federal system to borrow state improvements and experiments. Many of the recent changes in federal procedure came from the states. For example, a recent change in the federal rule on process stems from progress in Illinois; a change in parties from developments in Michigan; and a recent change in directed verdict procedure from a predecessor rule in Arizona. In Arizona again, pretrial procedures flow back and forth between the systems. The state practices on the time and manner of taking exceptions to jury instructions are working their way into the local federal practice, and certain federal devices of encouraging a businesslike disposition of cases find their way back to the state court.

Those who would drastically cut the diversity jurisdiction do not doubt the validity of the point made here. They think merely that there will be enough federal business left to permit the same effect. The proposition is not demonstrable one way or the other, and I can only say that I do not myself think so. We need the substantial bulk, the regular exposure to concurrent jurisdiction, to get the best effect of the interaction. The federal question cases are more likely to be for specialists in antitrust or FELA or taxes. The inclusion of the full gamut of commercial and tort cases puts the whole litigation bar into federal courts.

Finally, there are elements of prejudice and competence deserving to be taken into account. A native given the practical

alternative of having his suit against an out-of-stater in a particular county of his state system may well conclude that speed, ability, impartiality, or plain convenience will be best served in the federal court. The out-of-state defendant is normally not hurt by this judgment, and the whole cause may benefit from it. There are other prejudices than the merely regional, and a litigant may believe that he escapes some of them in federal court. The suggestion has been made that the litigant, if dissatisfied with his state justice, should improve it, not escape it; but this is visionary. The litigant has a problem which needs solving now, not in the time of the Messiah; and maintaining a concurrent system is one way of developing improvements in each of them.

Not merely did the founding fathers choose this as the one branch of federal jurisdiction in the beginning, but in this century Chief Justice Taft told the American Bar Association that "no single element in our governmental system has done so much to secure capital for the legitimate development of enterprise, throughout the West and South," as diversity jurisdiction.[14] In 1928, Taft energetically reached out over all the country to oppose a proposal like this one.[15]

Moreover, interstate prejudice is not dead now. In his thoughtful and objective article on diversity, Professor David L. Shapiro states that:

> But unlike such benefits as interstate discovery, why should these advantages be available to litigants simply because they are citizens of different states, especially since the federal courts are in such great demand from litigants who may be more deserving? If there is an answer, it may be that the litigant who is truly from out of state, and who thus can take no theoretical or actual responsibility for the shortcomings of state court justice, should not be saddled with these shortcomings if the Constitution authorizes an alternative. There may also be warrant for affording an out-of-state lawyer a procedure with which he is likely to be familiar because it is in force in the federal court in his own state.[16]

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14 A.T. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 127 (1964).
15 *Id.*
16 Shapiro, *Federal Diversity Legislation,* 91 HARV. L. REV. 317, 330 (1977).

III. The Criticism of Diversity Jurisdiction

There are astonishingly few criticisms of diversity jurisdiction, and these are almost entirely unsupported by data or stated experience. First and most fundamental is an act of faith, an accepted and unexamined major premise that "state cases belong in state courts." This assumes a good deal. It assumes that there is such a phenomenon as a "state case," a kind of provincial fracas which should be kept happily local and free of federal contact. Why? The lawyer may file a brief with the NLRB on whether three butchers in a local meat market should be classed with the Retail Clerks or with the Meat Cutters Union; make a complaint that some individual suffered discrimination in employment; and try a million dollar diversity case. What is there in the genius of American government by which some of these dispute-settling functions may be absolutely required to be federal, while the million dollar law suit should not be federally settled even if one or both parties desire it?

Second is the ventriloquist's dummy criticism, the suggestion that requiring federal judges to be mouthpieces for state law will depreciate the quality both of justice and of those willing to participate in declaring it. When *Erie* was decided, many of us worried about it for a time and will recall a general fear during the 1940s that the decision might strangle creativity on the federal side of the bench. By now this is a problem which, if problem it be, is beyond mere nervous fussing. The evil, if any, should be demonstrable. How many federal decisions show an atrophy of creativity for this reason? What are they? What good men have refused the office for this reason? How many? I have been involved in discussions of recruitment for the federal bench in most parts of the United States and have certainly met with representatives directly involved from every region. I have known a number of persons who have declined the opportunity of federal judicial service bench. I have yet to meet or hear of any actual individual who ever considered declining the post because of the burdens of determining state law and I frankly do not believe that such persons exist.

IV. The Effect on the States and the Litigants

Viewing the matter overall, what is the virtue in taking cases off a crowded federal court docket and dumping them on a crowded state court docket? This proposal, I submit, is a kind of jurisdictional variation of the old three-shell game. You will remember that at the carnivals the sleight-of-hand man stood behind three walnut shells, the pea went under one shell, and then it vanished — it was never under the shell you expected it to be under. This jurisdictional proposal has only half the magic of the three-shell game — these 34,000 cases are going to disappear from under the shell of the federal walnut, but there is no doubt as to where they are going — they are simply moving over to a state court shell. Generally speaking, the areas which are behind are behind in both their federal and state court dockets. I see no merit whatsoever in moving a case from a federal court docket where it may have to wait two years for disposition to a state court docket where it may have to wait four.

The practical result of the transfer in terms of what it will do to the litigants themselves is best demonstrated by a comparison of the state and federal statistics. I take the state statistics used here from the publication of the Institute of Judicial Administration called *Calendar Status Study 1974*, the last year available, and the federal information from the 1976 annual report of the Director of the Administrative Office of the United States Courts.[17] A comparison of the areas covered by both sources, state and federal follows. The comparison cannot be perfect because the Institute figures are restricted to personal injury cases and the federal figures cover all jury trials. Moreover, the geographic areas are not precisely identical in both instances. That is to say, the Institute figures are by counties and the federal figures are by judicial districts. Nonetheless, I have chosen illustrations which are essentially identical.

What these figures show is that in Chicago a jury case which

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17 [1976] Dir. Ad. Off. U.S. Cts. Ann. Rep. 134.

would take 37 months to come to trial in the state court takes 11, on the median, to come to trial in the federal court. In Brooklyn the comparison is about 35 months on the state side to 18 months on the federal side. In Manhattan the time is 46 months on the state side as compared to 21 months on the federal side. In Philadelphia, it is 47 months on the state side to 27 months on the federal side. In Boston the state time is 42 months and the federal time is 34. This means that in those crowded districts, diversity cases will be moving from an average wait of 22 months on the federal side to 41 months on the state side.[18]

I fully appreciate that these figures are limited and approximate — they are the best that are available because of the limited statistical resources as to time on state cases. There were more state figures available in 1971 when I wrote on this subject,[19] and I was able then to report as to 11 jurisdictions, adding Jersey City, Detroit, Los Angeles, Minneapolis, Cleveland, and Memphis to those I have already mentioned. On the figures as they existed then, the litigant would be put approximately a year and a third farther behind by having his case forced over from the federal to the state court. In the existing situation, in the five jurisdictions for which there are fairly recent figures, the waiting time is doubled.

Let me put this as incisively as I know how. We are talking about 34,000 cases to be moved. To the extent that these cases do, as is inevitable, accumulate in the same jurisdictions in which the state dockets are heavy, the practical consequence is that this Congress is asked to tell thousands upon thousands of American citizens to wait twice as long as before to have their suits disposed of, when it was already taking far too long.

Conclusion

The argument is made that keeping the diversity cases in federal court with their allegedly mundane and trivial content,

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18 [1976] DIR. AD. OFF. U.S. CTS. ANN. REP. 134. The 1977 annual report reveals that the median time in federal courts increased to 12 months. [1977] DIR. AD. OFF. U.S. CTS. ANN. REP. 163.

19 9 FORUM 157, 161 (1973).

has a two-aspect ill effect. First, it puts dull work into the federal system. Second, it forces the expansion of that system, creating too many judges and thus reducing the useful prestige which comes from having a small bench.

The quick rejoinder is that there is considerably more content to a rough product liabilities case than the general run of social security controversies. But the matter is more fundamental. Population expansion and legislation expansion result in judicial expansion, and we are simply going to have to live with it. The days of one federal judge per state are irretrievably simply gone.

More importantly, there are other values involved. Litigation is too expensive right now for most people to endure the cost. The device of dumping thousands of cases into the state courts is part of the contemplated package of an elite federal judiciary and an elite federal bar. It goes with the proposal to have an extra bar examination, creating a kind of super-qualified federal barrister class to practice in the federal courts.

Nothing we can do, or for that matter should do, is going to make the federal courts into egalitarian, low-cost tribunals for the people. We need not push them, however, in the opposite direction, with a limited bar of anti-trust specialists, tax lawyers, patent lawyers, and so on. From the cost-of-service standpoint, the goal should be to have not as narrow but as broad a federal bar as possible. The barrister system apparently works well for England, but we do not live there.

This is not class legislation; I began by showing that the greatest corporations in America and the loneliest individuals, through their legal representatives, oppose this legislation. Closing the courthouse door is the worst of the solutions to the cost and jam-up problems of the day. The creation of a super-specialist bar may serve the court's interests, but it serves no other community interests.

This legislation conflicts with the most important single maxim which should cover a judicial system: courts are made for people and not people for courts.

JUDICIAL IMPLEMENTATION OF PUBLIC POLICY: THE COURTS AND LEGISLATION FOR THE JUDICIARY

CORNELIUS M. KERWIN*

Advocates of new legislation governing the nation's courts often overlook the important role judges play in implementing the statutes' provisions. In this article Professor Kerwin examines the implementation techniques employed in five major pieces of legislation affecting the federal judiciary. He argues that effective legislation for the judiciary requires a careful balancing between the need for central direction from the statute and the necessity of respecting the traditional autonomy of trial courts.

Introduction

Federal judges do more than handle burgeoning dockets of civil and criminal cases.[1] They perform equally important, if less publicized, tasks in connection with the enactment and implementation of laws governing the judicial system. In what may be termed the legislative phase of the judiciary's involvement, judges and judicial bodies seek to shape the language and scope of legislative proposals. Individual judges testify before congressional committees, giving their views on the merits of pending legislation. These proposals are also subject to close scrutiny by judges through more formal structures created by Congress, such as the Judicial Conference of the United States.[2] Once a law concerning the judicial system is enacted, its provisions must be put into effect, and Congress typically calls upon judges to become actively involved in this second phase, implementation.

The job of implementing congressional legislation requires the judges to balance skillfully various competing interests. On the one hand, they must be guided by standards and policies

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1 For a discussion of the increasing volume of litigation in federal courts and attendant problems, *see generally* Lasker, *The Court Crunch: A View From the Bench*, 76 F.R.D. 245 (1978); Note, *Federal District Courts — Too Much For Too Long: Due Process and the Civil Litigant*, 9 CUM. L. REV. 523 (1978); Clark, *A Commentary on Congestion in the Federal Courts*, 8 ST. MARY'S L. REV. 407 (1978).

2 *See* text accompanying notes 14 to 23 *infra*.

which are explicitly or implicitly contained in the statute. The enactment of laws affecting the administration of justice often reflects Congress' effort to impose national standards where there previously had been considerable variation among district courts. For example, Congress adopted the Criminal Justice Act of 1964[3] to provide legal representation for indigent persons accused of criminal offenses in an effort to remedy the "severe lack of uniformity in the quality of representation."[4]

On the other hand, the judiciary itself will be necessarily concerned with implementing legislation so that it is adaptable to differing local needs. The Criminal Justice Act was designed to permit federal judges to consider "local conditions and philosophies . . . [and] elect the system best suited to their community."[5] The extent to which legislation can be adapted to the character of local conditions, of course, will depend upon the leeway Congress grants the judiciary in its legislative charge; the more discretion judges have in implementing a statute, the easier it will be for them to tailor the law's application to particular circumstances in each district.

This article will examine the federal judiciary's role in implementing several important pieces of legislation concerning the administration of justice. Congress does not frequently pass major laws affecting the operation of the federal courts.[6] The statutes which will be discussed here — the Criminal Justice Act of 1964,[7] the Jury Selection and Service Act of 1968,[8] the

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3 Pub. L. No. 85-455, § 2, 78 Stat. 552 (1964) (current version at 18 U.S.C. § 3006A (1976)).

4 Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 613 (1963).

5 *Criminal Justice Act: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 36 (1963) (memorandum of Attorney General Kennedy).

6 Aside from the legislation discussed in the text, Congress has enacted two other major laws affecting the administration of the federal courts. In 1966 it passed the Bail Reform Act, Pub. L. No. 89-465, § 3(a), 80 Stat. 214 (1966) (current version at 18 U.S.C. §§ 3146-3152 (1976)). The following year Congress adopted the Federal Judicial Center Act, Pub. L. No. 90-219, § 101, 81 Stat. 664 (1967) (current version at 28 U.S.C.A. §§ 620-628 (West Supp. 1979)). *See generally* Baar, *Federal Judicial Administration: Political Strategies in Organizational Change in* JUDICIAL ADMINISTRATION: TEXT AND READINGS 97-109 (R. Wheeler et. al. eds 1977).

7 Pub. L. No. 85-455, *supra* note 3.

8 Pub. L. No. 90-274, 82 Stat. 53 (1968) (current version at 28 U.S.C. §§ 1861-1875 (1976)).

Federal Magistrates Act of 1968,[9] the Circuit Executive Act of 1971,[10] and the Speedy Trial Act of 1974[11] — are five of Congress' most significant efforts in the last fifteen years to influence the operation of the federal courts. Congress relied heavily upon federal judges in formulating the provisions of the first four pieces of legislation, and it granted them substantial discretion in carrying out the specific details of the laws. Congress drastically departed from this pattern with the Speedy Trial Act, however, as the legislation was enacted over the strenuous objections of the federal judiciary.[12] In addition, although Congress provided judges with a significant role in the implementation phase of the Act, it took the unusual step of prescribing strict standards for them to observe. These standards left the judges with relatively little discretion in implementing the Act.

The discussion of the judiciary's experience in implementing the five laws is intended to provide a basis for determining the contours of a successful approach to putting into effect laws governing the administration of the federal courts. Judicial reform is a subject of considerable discussion in the Ninety-sixth Congress, with significant proposals affecting almost all aspects of the operation of the nation's courts. From expanding the role of federal magistrates to establishing new arbitration procedures to creating administrative arrangements suitable for handling the new complement of federal judges created by last year's Omnibus Federal Judgeships Act,[12a] these pieces of legislation will have a marked impact upon the federal judiciary. Because of the judiciary's important role in carrying out new procedures, Congress should spend as much time considering how to implement the proposals as it does deliberating over the legislation's policy content.

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9 Pub. L. No. 90-578, 82 Stat. 1108 (1968) (current version at 28 U.S.C. §§ 631-639 (1976)).

10 Pub. L. No. 91-647, 84 Stat. 1907 (1971) (current version at 28 U.S.C. § 332(e)-(f) (1976)).

11 Pub. L. No. 93-619, 88 Stat. 2076 (1974) (current version at 18 U.S.C. §§ 3161-3174 (1976)).

12 *See* text accompanying notes 69 to 81 *infra*.

12a *See generally* 16 HARV. J. LEGIS. ___, ___ (Winter 1979).

I. The Context of Implementation Analysis

A. *Institutional Elements*

A number of specialized structures connected with the federal judiciary play key roles in implementing legislation affecting the courts. Some of them have been established by law and others have evolved informally, but all of them are closely attuned to the needs of the various tribunals within the judiciary. The configuration of these structures, like that of the federal courts, may be characterized as hierarchical. But unlike those of the courts, the operating relationships within the implementation system cannot be easily delineated in terms of absolute power and authority.[13]

At the pinnacle of the hierarchy is the Judicial Conference of the United States.[14] Congress created the Conference in 1922 as a "step toward administrative integration of the inferior federal courts."[15] In addition to handling a variety of important administrative duties,[16] the Conference has come to play an important role in both formulating and implementing legislation. Its committees draft the rules of civil and criminal procedure for consideration by the Supreme Court. After receiving the Court's *pro forma* approval, the rules are sent to Congress for ratification.[17] Congress relies upon the Conference for examination and endorsement or disapproval of all proposed legislation affecting the judicial branch.[18] Moreover, the Conference often assumes the ultimate responsibility for carrying out newly enacted legislation.[19]

The Conference consists of the Chief Justice of the United

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13 Scholars currently working on internal decisionmaking structures and processes of the federal court system owe a considerable debt to the seminal research of Peter Fish. For a discussion of both formal and informal relationships existing within the federal court system, *see generally* P. Fish, The Politics of Federal Judicial Administration (1973). *See* note 6 *supra.*

14 28 U.S.C. § 331 (1976).

15 P. Fish, *supra* note 13, at 30-31.

16 "The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare for assignment of judges to or from circuits or districts where necessary . . ." 28 U.S.C. § 331 (1976).

17 G. Schubert, Judicial Policy-Making 44 (1965).

18 S. Early, Constitutional Courts of the United States 15 (1977).

19 *See, e.g.,* text accompanying notes 84 to 104 *infra.*

States, the chief judge and a selected judge from each of the eleven circuits, and judges from specialized federal tribunals.[20] In addition, an elaborate system of permanent and special committees has evolved within the Conference over the years.[21] The Chief Justice selects members of the federal bench who are not delegates to the Conference to serve on the committees along with the delegates.[22] The committees are organized so that judges with special competence can deal with matters in their area of expertise. Committees sometimes form advisory groups consisting of distinguished members of the bar to enhance their ability to resolve difficult questions.[23] Thus, the committee system provides a mechanism for distributing the burden of the Conference's responsibilities to those who are particularly well qualified to handle them. The committee structure also serves a representation function because it enables a cross-section of circuit and district judges to become involved in governing and managing the federal courts.

The eleven circuit councils can be collectively thought of as the second level of the judiciary's formal involvement in legislative and administrative matters. Congress created the judicial councils in 1939[24] to link the appellate and trial courts to the activities of the Judicial Conference[25] and to supervise the administration of the courts within the circuits.[26] The councils supplement and refine rules of procedure developed by the Conference[27] and convey the district courts' administrative and legislative policy recommendations to the Conference.[28]

20 28 U.S.C. § 331 (1976).

21 The number of committees varies over time. For reports concerning the most recent committee activities, *see generally* [1978] REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES [hereinafter cited as 1978 PROCEEDINGS].

22 P. FISH, *supra* note 13, at 274.

23 G. SCHUBERT, *supra* note 17, at 43.

24 28 U.S.C. § 332 (1976) (originally enacted as Act of Aug. 7, 1939, ch. 501, 31, 63 Stat. 1223).

25 P. FISH, *supra* note 13, at 387.

26 Fish, *The Circuit Councils: The Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 212-23 (1970). Despite the councils' supervisory authority over the district courts, they have not been particularly aggressive in exercising it. *Id.* at 203.

27 *See generally* S. FLANDERS, THE OPERATION OF FEDERAL JUDICIAL COUNCILS, FEDERAL JUDICIAL CENTER (December 1978); J. MCDERMOTT & S. FLANDERS, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT 1-2 (1978) (draft on file with the author).

28 Fish, *supra* note 26, at 212.

Because district judges are bound by statute[29] to follow the councils' directives, the councils occupy an ideal position for supervising implementation of legislation.

At the district court level, Congress has not created any formal administrative bodies analogous to the Judicial Conference or the circuit councils. Instead, a plethora of informal committees[30] has grown up. They exercise considerable discretion[31] and handle the full complement of policy and administrative issues. For example, in the Maryland district court, standing committees have been organized to handle matters ranging from housing of federal prisoners to implementation of the Criminal Justice Act.[32] This collegial approach within districts represents a shift away from the isolated and autonomous fashion which once characterized the way district judges resolved administrative problems.[33]

The judicial structures which are available for implementing legislation can accommodate national, regional, and local concerns. The fact that several of the most important of these structures are provided for by statute indicates that Congress recognized federal judges as a constituency whose input is essential to the successful implementation of legislation affecting the judicial system. This article will examine specific laws to determine precisely how these structures come into play in the legislative process.

B. *Legislative Background*

The statutes being considered here share several characteristics which make them appropriate for comparative study. First, each piece of legislation is designed to enhance the administration of justice by making the dispositional processes either more efficient, or fairer, or both. Second, the judiciary and its various administrative structures play key roles in implementing and

29 28 U.S.C. § 332(d) (1976).

30 For a discussion of these nonstatutory bodies operating at the district court level, *see* S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS 6-8 (1977).

31 *Id.*

32 *Id.* at 95.

33 S. EARLY, *supra* note 18, at 123.

refining the policy objectives of each law. Third, these five laws received far more attention in Congress than is usual for legislation affecting judicial procedure. Unlike most ordinary revisions of the criminal and civil procedures, these statutes required both congressional authorization and funding. Finally, these statutes represent attempts to solve problems which had caused considerable professional concern or public controversy. The widespread interest in the problems underlying passage of the laws necessarily meant that congressional deliberations would be the subject of considerable public scrutiny.

Congress enacted the Criminal Justice Act of 1964 "to provide legal assistance for indigent defendants in criminal cases in the courts of the United States."[34] The Act made funds available to attorneys who represent the poor and standardized the haphazard method used by some courts to screen and appoint lawyers to defend indigent persons.[35] The 1970 amendments to the Act[36] gave districts the option of establishing public defender offices and permitted communities to form nonprofit defense organizations.[37] The amendments placed the responsibility of implementing the legislation with each district court, subject to the circuit council's approval.[38] Thus the Act left the bulk of the procedural and substantive refinement to the judges.

Passage of the Criminal Justice Act came after more than a quarter of a century of lobbying efforts by members of the bench and bar to replace the system by which district judges assigned private attorneys to represent the indigent without compensation. Ever since 1937 the American Bar Association, the Department of Justice, and the Judicial Conference had sponsored or endorsed legislation to provide legal counsel for indigent defendants in the federal courts.[39] These efforts came

34 H. R. REP. No. 864, 88th Cong., 2d Sess. 1, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2990, 2991.

35 Pub. L. No. 85-455, *supra* note 3. For an analysis of the range of practices used prior to the Act by the district court judges to appoint attorneys, *see* Note, *supra* note 4, at 581-96.

36 Pub. L. No. 91-447, 84 Stat. 916 (1970) (amending 18 U.S.C. § 3006A (1968)).

37 18 U.S.C. §§ 3006A(h)(1)-(2) (1976).

38 18 U.S.C. §§ 3006A(a), (h)(1) (1976).

39 H.R. REP. No. 864, 88th Cong., 1st Sess. 2 (1964), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2990, 2991.

to fruition in 1964 largely because of the intensive support the Kennedy Administration provided for the principles embodied in the legislative proposals.[40] Although Congress did not adopt a federal public defender system — a provision which the judiciary assiduously pushed forward in 1964 — until 1970, the judiciary was reasonably satisfied with the legislative compromise which was reached. Even when it was evident that the public defender provision would not be included in the original act, an ad hoc committee of the Judicial Conference which had been formed to study the ramifications of implementing the Act observed: "It is apparent that if the legislation is administered in the manner intended, it will bring about a *sufficient* advancement in the administration of Federal Criminal Justice."[41] The judiciary's satisfaction can also be traced to the significant discretion which Congress accorded it in implementing the law's flexible standards.

Congress passed the Jury Selection and Service Act of 1968[42] to impose a "uniform method for selecting jurors in federal courts"[43] and to eliminate racial and economic barriers to jury service.[44] The Act codified "the policy of random selection of jurors from a fair cross section of the community."[45] It was hailed as a civil rights milestone when enacted.[46] In recent years, the standardization of jury selection practices has been a particular asset in view of the increasing demand for grand and

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40 Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703, 715-25 (1965).

41 JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE AD HOC COMM., H. R. DOC. NO. 62, 89th Cong., 1st Sess. 90 (1965).

42 Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified at 28 U.S.C. §§ 1861-1874 (1976)).

43 H.R. REP. NO. 1076, 90th Cong., 2d Sess. 3, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1792, 1793.

44 *Id.* at 2, [1968] U.S. CODE CONG. & AD. NEWS at 1792.

45 Gerwin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349, 357 (1969). Prior to the Act, a common method of selecting jurors was the "key man" system. "The names of prospective jurors were supplied to the jury commissioner by certain 'key men' who were generally prominent, local citizens and supposedly well connected for selection purposes." *Id.* at 354. This method purportedly ensured selection of qualified jurors. Whether the system did so is open to question. Moreover, it tended to result in the systematic underrepresentation of certain racial and socio-economic groups from federal jury service. *See* Lindquist, *An Analysis of Juror Selection Procedure in the U.S. District Courts*, 41 TEMPLE L.Q. 32 (1967).

46 [1968] U.S. CODE CONG. & AD. NEWS 1808, 1808-09.

petit[47] jurors. Congress charged each district court with the task of formulating and carrying out a plan for "random selection of grand and petit jurors."[48] A supervisory panel, including members of the circuit council, must review the district court's plans.[49]

The Judicial Conference worked closely with Congress in developing the Act. The Conference's Committee on the Operation of the Jury System authored the initial proposal, which served as the primary basis for the final bill.[50] The legislation enjoyed the support of the American Bar Association and the Department of Justice.[51] Although some members of Congress feared that the Act's emphasis on random juror selection would create "a uniformly awkward system, inconvenient to both the citizen and the court,"[52] it became law with relatively little controversy.

The Federal Magistrates Act of 1968 replaced a system of part-time commissioners who, for a scheduled fee, tried misdemeanors committed on federal park lands. The Magistrates Act created a new judicial officer with powers and responsibilities far exceeding those previously exercised by United States Commissioners.[53] Magistrates can try minor criminal cases,[54] conduct suppression hearings,[55] and engage in preliminary reviews of habeas corpus petitions.[56] Congress enacted the legislation to help relieve district courts of some of their civil and criminal workload.[57] Thus magistrates also are authorized to serve as

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47 The magnitude of the management problems associated with juror selection and service is evident from statistics included in [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 7-8, 131-34.

48 28 U.S.C. § 1863(a) (1976).

49 *Id.*

50 H.R. REP. NO. 1076, *supra* note 43, at 2, [1968] U.S. CODE CONG. & AD. NEWS at 1792-93.

51 [1968] U.S. CODE CONG. & AD. NEWS 1793, 1793.

52 Ervin, *Jury Reform Needs More Thought,* 53 A.B.A.J. 132, 135 (1967).

53 Spaniol, *The Federal Magistrates Act: History and Development,* 1974 ARIZ. ST. L.J. 565.

54 28 U.S.C. § 636(a) (1976).

55 28 U.S.C. § 636(b)(1)(B) (1976).

56 *Id.*

57 Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases,* 40 U. CHI. L. REV. 584, 585 (1973).

special masters pursuant to Rule 53 of the Federal Rules of Civil Procedure[58] and to assist judges with pretrial[59] and discovery proceedings.[60] Because the Act was intended to aid the judiciary so directly, Congress designated the Judicial Conference — with input from individual districts and circuit courts — as the ultimate arbiter of the number of magistrates, their location, and their salaries.[61]

The Judicial Conference had been active since 1942 in making recommendations to alter the commissioner system,[62] but Congress did not seriously consider revamping the system until the mid-1960s. The Senate Subcommittee on Improvements in Judicial Machinery, which investigated the system, found "many substantial defects" that made it "unsatisfactory."[63] The magistrate proposal generally was well received by members of Congress and the judiciary. The Judicial Conference approved the report of the Committee on the Administration of the Criminal Law, which endorsed the legislation.[64]

Congress adopted the Circuit Executive Act in 1971 to provide each judicial circuit the option of having an executive assistant to aid the chief judge in managing the circuit's administrative affairs. Testimony at hearings on the legislation indicated that the burden of managing circuit affairs took up a substantial portion of the chief judges' time.[65] Circuit executives were also expected to "strengthen [the councils] as the management linchpins of [the] decentralized judiciary."[66] The Judicial Conference, the ABA, and Chief Justices Warren and

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58 28 U.S.C. § 636(b)(2) (1976).
59 28 U.S.C. § 636(b)(1)(A) (1976).
60 28 U.S.C. § 636(b)(2) (1976).
61 28 U.S.C. § 636(b) (1976).
62 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, UNITED STATES COMMISSIONERS — A REPORT TO THE JUDICIAL CONFERENCE (1942).
63 *Federal Magistrates Act, Hearings on S. 3475 and S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess. 9 (1967).
64 *Id.* at 241, 245.
65 *Hearings on S. 962 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 91st Cong., 1st Sess. 427 (1969) (statement of Newell Ellison).
66 J. EBERSOLE, IMPLEMENTING THE CIRCUIT EXECUTIVE ACT 2 (1971) (on file with the author).

Burger actively pushed for legislation providing circuits with administrative relief.[67] The Act enjoyed widespread support and met with little opposition from the judiciary or members of Congress.[68] It essentially gave each circuit complete discretion in defining the scope of the executive's functions.

The Speedy Trial Act of 1974 sought "to assist in reducing crime and the danger of recividism by requiring speedy trials and by strengthening the supervision over persons released pending trial."[69] Congress adopted the legislation because it feared that neither the recently enacted Rule 50(b) of the Federal Rules of Criminal Procedure nor Supreme Court decisions would sufficiently expedite disposition of criminal cases.[70] The Act placed strict time limits on each stage in the movement of criminal cases from the time of arrest to sentencing.[71] Although these standards will not become operational until July 1979,[72] interim standards[73] have been in effect since enactment. Failure to comply with either set of standards would eventually result in the dismissal of a case against a defendant.[74]

Despite the imposition of the rigorous procedural requirements contained in the Speedy Trial Act, Congress gave a considerable role to the judiciary in implementing the legislation. Since the legislation has been adopted, judges have been involved in a comprehensive program of research and planning.[75] Individual district courts have been responsible for drafting plans which meet the Act's objectives.[76] The circuit councils and the Judicial Conference have had the authority to review and approve the basic plans and any subsequent modifications.[77] But Congress' decision to enact very precise

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67 J. McDERMOTT & S. FLANDERS, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT *supra* note 27, at 1-2.

68 J. EBERSOLE, *supra* note 66, at 9.

69 *Reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7401, 7402.

70 [1974] U.S. CODE CONG. & AD. NEWS at 7404-05.

71 18 U.S.C. § 3161 (1976).

72 18 U.S.C. § 3163(c) (1976). Congress has recently decided to delay enforcement of these standards until 1980.

73 18 U.S.C. § 3161(f) (1976).

74 18 U.S.C. § 3162(a)(1), (2) (1976).

75 Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 720-22 (1976).

76 18 U.S.C. § 3165(a) (1976).

77 18 U.S.C. § 3165(c) (1976).

standards for the judiciary to work with distinguishes the Speedy Trial Act from the other statutes being examined here. The reasons underlying this decision can be traced to the circumstances surrounding the adoption of the Act.

The Supreme Court, with congressional approval, had adopted Rule 50(b) in 1972 "to minimize undue delay and to further prompt disposition of criminal cases."[78] The rule required district courts to study the problem and to develop and explain plans which were consistent with its purpose.[79] Dissatisfied with the disparities in standards which were being developed by individual districts,[80] Congress passed the Speedy Trial Act in an effort to ensure that uniform time limits for each phase of the criminal proceedings would be in effect throughout the country. The Act, however, became law without a consensus among members of the judiciary as to its necessity.

The Judicial Conference of the United States opposed the Act on the grounds that Rule 50(b) and other judiciary-administrative remedies were sufficient. This opposition was apparently never withdrawn, and the reasons for it remain a matter of some concern, as the inflexibility inherent in the statutory scheme presupposes a level of judicial support which may not be present.[81]

II. Implementation: The Judicial Phase

When a statute dealing with the internal affairs of the federal judiciary is transmitted to the courts for implementation, the usual procedure is for the Judicial Conference to take the leading role, seeing to the development of any additional operating programs and guidelines not detailed in the statute. In performing this function, the Conference must balance the demands for central direction, usually explicit in the statute, with the autonomy the trial courts have traditionally exercised in handling their individual caseloads.

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78 Fed. R. Crim. P. 50(b).
79 *Id.*
80 H.R. Rep. No. 93-1508, *supra* note 69, at 12, [1974] U.S. Code Cong. & Ad. News at 7405-06.
81 Frase, *supra* note 75, at 675-76.

The large variety of circumstances and local conditions facing a trial judge dictates that he have a substantial degree of freedom of action to find appropriate solutions for individual cases.[82] Indeed, the discretionary authority of trial judges and the institutional autonomy that has developed with it have been recognized in other studies as major forces in federal judicial administration.[83] Nonetheless, since new statutes raise congressional expectations and since judicial performance is a factor considered by Congress in evaluating the court system, the Judicial Conference must impose some measure of uniformity and restraint on the rest of the system. The resulting balancing of interests by the Conference is evident in the implementation of most of the statutes analyzed here.

A. *The Criminal Justice Act*

Prior to the passage of the Criminal Justice Act, district judges had complete freedom to select methods of providing legal assistance for poor defendants. The various systems used by judges reflected the relationships between these judges and the resident bar.[84] The Act required district judges to develop written criteria for membership on the panel of attorneys that would provide assistance to indigents under the Act. These explicit criteria were a profound departure from a system that had been highly informal,[85] and they had the potential of placing considerable strain on relations among members of the bench and between judges and the private bar. Thus, in its initial work the Judicial Conference determined that district courts should dominate the development of guidelines for implementing the Act.[86] This dominance was accomplished by creating a new

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82 *See generally* H. LEVI, INTRODUCTION TO LEGAL REASONING (1974).

83 *See generally* Flanders, *Modeling the Court Delay*, LAW & POLICY QUARTERLY (forthcoming 1980).

84 *See generally* Note, *The Representation of Indigent Defendants in Federal District Courts*, 76 HARV. L. REV. 579 (1963).

85 The case law of the period was vague and inconsistent about defining the contours of "effective defense assistance." For a penetrating critique of judicial efforts in this regard, *see* Address by Judge David Bazelon, University of Cincinnati Law School Robert Marx Lecture (Dec. 6-7, 1972) (on file with the author).

86 Committee to Implement the Criminal Justice Act, Report on Proceedings of a Special Session of the Judicial Conference of the United States 16 (Jan. 25-26, 1965) (in-

committee, on which district judges held a two-to-one majority, which was responsible solely for implementing the Act.[87]

At the same time, pressures for central direction were also present. For twenty-five years the judges, key figures in the Department of Justice who supported them, and the private bar had lobbied hard for funds to compensate attorneys who represented indigents.[88] Their lobbying efforts emphasized the limitations of voluntary representation systems and the questionable effectiveness of the assistance so provided.[89] When authority was finally granted, it came with residual opposition among congressmen who feared socialism, fraud, and waste.[90] Without central control of fiscal matters, some judges believed they might open themselves to charges of mismanagement in this, their first experience with direct expenditure of public funds for a purpose other than institutional maintenance.[91]

Torn between the demands presented by the traditional independence of district courts in controlling the details of indigent defense assistance and the exigencies of relations with Congress, the Judicial Conference tried to balance the concerns represented by those two interests. The Committee to Implement the Criminal Justice Act[92] announced early in its deliberations that a high priority would be "scrupulous safeguarding against charges of fiscal laxity, favoritism or other abuse to assure public funds are being expended with characteristic judicial responsibility."[93] Soon after, however, the members of the Committee revealed their reluctance to use formal national

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cluded among the papers of Judge Roszel C. Thomsen on file with the U.S. District Court for Maryland in Baltimore) [hereinafter cited as Report of Criminal Justice Committee].

87 The Committee to Implement the Criminal Justice Act was composed of three circuit judges and six district judges.

88 Kutak, *supra* note 40, at 712.

89 *Id.* at 711-25.

90 *Id.* at 715 n.59.

91 Minutes of the Committee to Implement the Criminal Justice Act 2 (Dec. 5, 1964) (included in the papers of Judge Roszel C. Thomsen on file with the U.S. District Court for Maryland in Baltimore) [hereinafter cited as Implementation Minutes].

92 The Committee to Implement the Criminal Justice Act replaced an informal group that had met before passage of the Act. Letter from Chief Justice Warren to Judge Thomsen (Sept. 26, 1964) (on file with the U.S. District Court for Maryland in Baltimore) [hereinafter cited as Warren Letter].

93 Report of Criminal Justice Committee, *supra* note 86, at 16.

regulations: "While we recognize the need for good administrative organization to assist district courts, we think we should defer until we have had enough experience . . . we should not try to be too specific at this time but leave room for freedom of activity . . . and confine ourselves to matters of basic philosophy."[94]

To appease local concerns, the Conference allowed the districts to design the attorney selection and appointment aspects of the defense assistance programs.[95] Since district courts possessed the experience necessary to assess the quality of legal assistance and work out the mechanics of appointing attorneys, formal plans for compliance were drafted with the assistance of "model plans" written by the district judges on the Committee. But, of course, the Act required the Conference to review the plans and give its final approval. Thus, the districts were substantially free to tailor the programs to their specific needs,[96] while the Conference could ensure that ill-conceived appointment practices would not become an impediment to indigents' receiving a proper defense.

Anticipating close oversight by Congress on money matters,[97] the members of the Committee decided that control over actual compensation of the attorneys representing indigents would be retained by the Conference and other national units;[98] district courts would authorize payments to attorneys but would not compensate them directly. Authorizations were to be forwarded to the Administrative Office of United States Courts[99] along with detailed reporting forms so that the staff could check for compliance with Committee expenditure guidelines.[100] The use of the reporting forms, combined with the

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94 Letter from Judge John Hastings to Judge Thomsen (Dec. 29, 1964) (on file with the U.S. District Court for Maryland in Baltimore).

95 Report of Criminal Justice Committee, *supra* note 86, at 1-16.

96 *See* STAFF OF SUBCOMM. ON CONST. REFORM, SENATE COMM. ON THE JUDICIARY, 90th Cong. 2d Sess., THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS (1969) [hereinafter cited as the OAKS REPORT].

97 Implementation Minutes, *supra* note 91, at 2.

98 H.R. DOC. NO. 62, 89th Cong. 1st Sess. 9 (1965) (Letter from Chief Justice Earl Warren).

99 Warren Letter, *supra* note 92.

100 Implementation Minutes, *supra* note 91, at 2.

mailing of all payments from Washington, comprised a comprehensive audit system.

Over time, it became clear that the balance the Conference struck between fiscal restraint and qualitative reform was imperfect and that the methods chosen to implement the national goal of economy and efficiency were preventing the compensation system from accomplishing all the changes district judges considered essential.[101] Rather than eliminate the district judges' discretion in designing assistance programs, the Committee to Implement the Criminal Justice Act and the Judicial Conference sought amendments to the statute which would provide judges with the additional resources necessary to correct fiscal and programmatic deficiencies.[102] The passage of the 1970 amendments to the Act [103] quieted critics who believed that attempts to neutralize potential congressional criticism over expenditures had undercut the quality of defense assistance provided by the statute.[104]

B. *The Magistrates Act*

The process of implementing the Federal Magistrates Act also reflected a balancing approach, but the cross-cutting pressures were more subtle. Although the magistrates assumed many of the judges' more mundane functions, a potential nevertheless existed for conflicts. The magistrates were to undertake duties long in the absolute province of the judges, who quite naturally took an intense interest in exactly what those duties would be. Congress, apparently recognizing this potential problem, established explicit guidelines in the statute, leaving it to the judiciary to define the jurisdiction of the magistrates and the detailed specifications of the job in accordance with the

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101 Many judges believed that the provisions of the Act, or the committees' interpretation of them were too restrictive. Letter from Judge Doyle to Judge John Hastings (Sept. 28, 1967) (included in the papers of Judge Roszel C. Thomsen on file with the U.S. District Court for Maryland in Baltimore).

102 Committee to Implement the Criminal Justice Act, Discussion of Proposed Amendments (Administrative Office of the U.S. Courts) (September 13, 1968).

103 Criminal Justice Act Amendments of 1970, Pub. L. No. 91-447, § 2, 84 Stat. 916 (amending 18 U.S.C. § 3006A (1968)).

104 Woods, *The Criminal Justice Act of 1964: A Study in Administrative Death*, 5 AM. CRIM. L. Q. 56 (1967).

needs of each district court. Nonetheless, it was clear that Congress demanded an economical program as well as one that would be effective.[105]

Congress authorized the Conference to determine the number of magistrates in each district, as well as their salaries,[106] but it permitted each district to define the scope of the magistrate's duties within the context of the statutory grant of authority and jurisdiction.[107] The Judicial Conference found it necessary, however, to impose a measure of uniformity on these definitions. An element of consistency in the qualifications and job descriptions of persons assuming the new positions was important both to assure the prestige and public acceptance of these new officials[108] and to forestall challenges to the authority of magistrates found conducting very different functions in various jurisdictions.[109] Such challenges could have impaired the effectiveness of the magistrates and could have caused Congress to rethink the wisdom of permitting the judiciary to determine the ultimate jurisdiction of each magistrate.[110]

The Judicial Conference created the Committee on Administration of the Magistrates System to coordinate implementation of the Act. The Committee drafted "recommended" standards and procedures for the selection of magistrates and a "model local rule" which outlined how districts might structure magistrates' jurisdictions.[111] General criteria developed by the Committee pertaining to qualifications and jurisdiction became a form of prospective central control which enabled the national and local levels of the system to share in this critical aspect of implementation.[112] In some cases

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105 Spaniol, *supra* note 53, at 573.
106 28 U.S.C. § 633(c) (1976).
107 28 U.S.C. § 636 (1976).
108 Model rules developed by the Committee included "recommended standards and procedures for selecting magistrates." Spaniol, *supra* note 53, at 571.
109 The efforts to standardize jurisdictional assignments did not prevent disagreements among districts and circuits as to the proper role of magistrates. *See* Wingo v. Wedding, 418 U.S. 461 (1974) (post-trial relief).
110 The frequency of such challenges ultimately led federal judges to initiate a successful movement to amend the Act. *See* Spaniol, *supra* note 53, at 578.
111 *Id.* at 571.
112 *Id.* at 572.

the jurisdictional guidelines expressed in the statute were insufficient to prevent litigation on the constitutionality of delegating certain tasks to magistrates.[113] Such litigation prompted the Committee and the Conference to recommend amendments to the existing legislation to provide further guidance.[114] The jurisdiction of federal magistrates has continued to develop in incremental fashion within the general mandates of the original legislation and subsequent Conference guidelines, as district courts seek acceptable ways to use the new judicial officers.

In reviewing the approach taken by the Judicial Conference toward implementation of the Criminal Justice Act and the Magistrates Act, it is clear that the national level of the judicial administration system imposed only those uniform standards explicitly mentioned in the legislation or deemed essential to the maintenance of good relations with Congress. Delegated to the district courts were those elements of implementation that penetrate most deeply into the traditional preserves of trial judges. This approach allowed districts the flexibility to adapt legislation to their particular methods of internal administration, the idiosyncracies of their caseloads, and the local legal environment. Since they exercise little prospective control over the quantity and content of caseloads, the lower courts have come to rely on this flexibility in the management of their work.[115]

C. *The Circuit Executive Act*

The role of the circuit councils in the implementation of these statutes was circumscribed and residual. They reviewed local plans for compliance with the Criminal Justice Act[116] and courts of appeals heard challenges to the authority of magistrates and

113 *See* Mathews v. Weber, 423 U.S. 261 (1976) (preliminary review of the administrative record of social security benefit cases upheld).

114 These recommendations led to the adoption of amendments which expanded the range of duties that can be delegated to magistrates. Pub. L. No. 94-597, 90 Stat. 2729 (1976) (amending 28 U.S.C. § 636(b) (1970)).

115 *See generally* S. FLANDERS, *supra* note 30.

116 *See* P. FISH, *supra* note 13, at 394.

developed recommendations on appropriate jurisdiction;[117] but beyond this, the role of the circuits was minimal.

The Circuit Executive Act was an attempt to revive congressional and judicial commitments to a strong management role for circuit councils.[118] Still, the districts had become accustomed to an environment of substantial administrative discretion.[119] Incremental, cooperative approaches to implementation of the Act's provisions were essential to avoid disruption among the levels of the system.

The Circuit Executive Act authorized the circuit councils to appoint circuit executives. In addition, the councils were empowered to define the scope of the executives' responsibilities within the context of the statutory grant of powers. The Act permitted the executives to develop and enforce organization standards for district courts and personnel recruitment standards.[120] Executives could also revise existing information standards[121] and perform a variety of other administrative functions.[122] Prior to the Act these duties had been the responsibility of district court clerks working under the supervision of district judges.[123] Deciding which of these duties would in fact be assumed by the executives and the manner in which they would be taken from the control of the districts were crucial implementation issues.[124]

Once again the Judicial Conference played an important role in reaching a regional-local balance in the implementation of the legislation. The Conference emphasized the renewed status of the councils rather than focusing on the changes to be wrought by the new official.[125] Indeed, a working paper developed at the Federal Judicial Center during the early stages of implementation treated the executive as little more than an extension of the

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117 Spaniol, *supra* note 53, at 575-77.
118 J. EBERSOLE, *supra* note 66, at 1.
119 S. EARLY, *supra* note 18, at 87-99; P. FISH, *supra* note 13, at 13.
120 J. EBERSOLE, *supra* note 66, at 25.
121 *Id.*
122 28 U.S.C. §§ 332(e) (1)-(10) (1976).
123 J. MCDERMOTT & S. FLANDERS, *supra* note 27, at 167.
124 *Id.* at 163-202.
125 J. EBERSOLE, *supra* note 66, at 4-11.

council.[126] The statute gave the circuits control over the selection of executives and the substance of their responsibilities, but the Conference, acting through a board of certification, provided supervision at a national level by assisting the councils in screening applications and by contributing to statements of general qualifications used by the councils in selecting executives.[127] The Conference protected the interests of the district courts by strongly encouraging the circuit councils to include representatives of district courts in the deliberations which determined the range of duties to be assigned the new officials.[128] An atmosphere of cooperation between the district courts and the councils was institutionalized early[129] and now ensures that the district courts will have significant input on any action under the Act affecting the internal operations of the trial courts.

D. *The Jury Selection and Service Act*

Implementation of the Jury Selection and Service Act was somewhat less complicated since the national objective expressed in the statute did not involve functions requiring gradual development. The Act, which established the goal of "full equality" in the selection and service of jurors,[130] called on every district to develop a formal plan that would assure randomness in the process of assembling the necessary individuals.[131] Circuit councils reviewed the plans and the Judicial Conference supervised compliance at the national level.[132] Since the enactment of the statute, the range of

126 *Id.* at 4.

127 J. MCDERMOTT & S. FLANDERS, *supra* note 27, at 234-236.

128 J. EBERSOLE, *supra* note 66, at 18. While the effectiveness of the circuit executives has been questioned, there is evidence that these new officials, and the judges of the circuit, consult with local circuits before assuming any functions. J. MCDERMOTT & S. FLANDERS, *supra* note 27, at 169-71.

129 The process of consultation can be informal or can occur during the deliberation of circuit councils or circuit conferences. For a discussion of the emerging role of circuit executives in these forums, *see* J. MCDERMOTT & S. FLANDERS, *supra* note 27, at 163-202.

130 H.R. REP. NO. 1076, *supra* note 43, at 3, [1968] U.S. CODE CONG. & AD. NEWS at 1793.

131 28 U.S.C. §§ 1863(a)-(c) (1976).

132 *Id.*

national concern over jury service has expanded to include the expenditures and inconveniences associated with such duties in a period of increasing caseloads. In addressing national issues, the Conference has confined itself to making general recommendations.[133] It seeks to provide assistance to districts with extraordinary problems while still granting "great flexibility to cope with local conditions."[134]

E. *The Speedy Trial Act*

Prior to passage of the Speedy Trial Act, Rule 50(b)[135] had been designed to handle the problem of court backlogs in a manner consistent with established methods of implementation and internal management. Like the Criminal Justice Act, the Magistrates Act, and the Jury Selection and Service Act, Rule 50(b) granted district courts wide discretion to deal with their own backlogs. Under the amended rule, courts received latitude to determine what the problems were and to decide on the appropriate steps to correct them. Each district court was required to submit to the Judicial Conference a formal plan for expeditious movement of criminal cases, thus assuring central oversight, but the Conference imposed no deadlines for disposition of cases or compliance with the rules.

Rule 50(b) thus adopted the flexible constitutional definition of a "speedy trial" rather than attempting to impose absolute time limits on the judicial process. In this respect, Rule 50(b) utilized the approach taken in the Criminal Justice Act, which had made no effort to develop a precise definition of "effective defense assistance." Instead, the Criminal Justice Act had urged district courts to diagnose their own particular problems and to use resources provided by the Act to correct them. The approach taken in the Criminal Justice Act has generally been considered successful in guaranteeing effective counsel to indigents.[136] Congress' dissatisfaction with the results which Rule

133 The Judicial Conference has suggested ongoing training for court personnel engaged in jury selection. *See* [1977] REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES at 16.

134 [1968] U.S. CODE CONG. & AD. NEWS 1798, 1798.

135 FED. R. CRIM. P. 50(b).

136 GENERAL ACCOUNTING OFF., AD. OF THE CRIM. JUST. ACT BY U.S. COURTS AND THE D.C. SUPERIOR COURT, REP. B-179849 at 6 (1974).

50(b) produced prompted it to include very precise standards and deadlines in the Speedy Trial Act.[137] Although other pieces of legislation had required the court to meet compliance deadlines, no statute had combined implementation deadlines with such a specific set of objectives and methods for achieving compliance.

Each district was ordered to convene a planning group[138] empowered to study and recommend policies for a wide range of administrative matters in the district.[139] The membership of these planning groups, specified in the statute, was to consist of the chief judge of the district, a magistrate, a local United States Attorney, the local federal public defender, a probation officer, an experienced defense attorney, and a criminal justice researcher.[140] By designating the persons who would actually conduct implementation of the statute, Congress infringed on an area in which local courts had become accustomed to exercising discretion. Although committee systems flourish at the district court level and many deal with the implementation of new programs,[141] no previous statute had substituted a preordained group of individuals for existing committees in the districts. Further, since existing committees are controlled by the district bench, and only rarely include non-judges,[142] the membership of the planning group diverged dramatically from the personnel traditionally charged with implementation of legislation affecting the judiciary. As if to highlight the change from past practice, Congress also issued unusually stern warnings to the courts about the consequences of ignoring the recommendations of the planning groups or impeding their work.[143]

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137 [1974] U.S. CODE CONG. & AD. NEWS 7401, 7401-02, 7410.
138 18 U.S.C. § 3168(a) (1976).
139 18 U.S.C. § 3168(b) (1976).
140 18 U.S.C. § 3168(a) (1976).
141 S. FLANDERS, *supra* note 30, at 6-8.
142 When the work of the Committee involves the activities of outside groups, representatives of those groups will sometimes be among Committee membership. For an analysis of how this works in a single district, *see* C. Kerwin, Dimensions of Quality: An Analysis of Policies Affecting the Right to Counsel Under the Criminal Justice Act of 1964 at 136 (1978) (unpublished Ph.D. dissertation in the Johns Hopkins University Library).
143 Rep. William Cohen is quoted as saying, "Congress will not countenance ir-

Faced with the extraordinary specificity of the legislation and the direct instructions to local courts regarding implementation, the Judicial Conference chose not to create a new committee to deal with the Speedy Trial Act.[144] The central direction emanating from the statute itself displaced the Judicial Conference and eliminated key roles that had been performed by judicial committees under other statutes. Although the Conference is required by statute to report regularly to Congress on progress made toward full compliance with the Act, even here its role is circumscribed. With other statutes, most notably the Criminal Justice Act, the Judicial Conference was able to speak as the unified voice of the entire judiciary regarding implementation of legislation and suggested amendments.[145] The conference notes its recommendations for changes in the Speedy Trial Act, but suggestions from the planning groups in the district must also be included in the annual report to the Congress.[146] These groups have an independent status under the Act, and reporting their recommendations leads to an overall agenda for amendments that is long, idiosyncratic, detailed, and, at times, internally inconsistent.[147]

Despite the rigid implementation formula the Act imposes, the Judicial Conference reports that there have been major improvements in the administration of justice attributable to the Speedy Trial Act and substantial progress toward meeting its statutory deadlines.[148] Nevertheless, the Conference's assessment research and reports of the court system itself indicate that implementation of the Speedy Trial Act has been substantially more difficult than for any of the other statutes considered here.[149] One nagging difficulty is that the definitional

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responsible or unnecessarily rigid attempts to overlook the recommendations of the planning groups." Misner, *District Court Compliance With the Speedy Trial Act of 1974: The Ninth Circuit Experience,* 1977 ARIZ. ST. L. J. 1, 13 (1977).

144 An existing committee of the Judicial Conference, the Committee on the Administration of the Criminal Law, is currently working on the Speedy Trial Act.

145 OAKS REPORT, *supra* 96, at 221-22.

146 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THIRD REPORT ON THE IMPLEMENTATION OF TITLE I AND TITLE II OF THE SPEEDY TRIAL ACT at A-1 (1978) [hereinafter cited as THIRD REPORT].

147 *Id.*

148 *Id.* at 1.

149 *Id.* generally.

problems have been numerous,[150] and since the standards are a matter of statutory language rather than secondary refinement by the Judicial Conference or other unit of the court system, disputes over proper interpretation must ultimately be resolved by Congress. The detailed statute has required frequent clarification and amendment as the enormous complexity of the federal criminal process confounds the Act's existing definitions.[151]

Additionally, the circuit councils — revitalized by the Circuit Executive Act — have been frustrated in fulfilling their roles under the Act. Charged by the Speedy Trial Act with reviewing district courts' compliance with the Act,[152] the councils have had difficulty ascertaining whether they are to act in administrative or judicial capacities when examining district interpretations of the statute. Because the implementation function at the national level under the Speedy Trial Act is different from the other statutes and because disagreements about proper interpretations of the Act have been numerous, it has been difficult for the circuit judges to separate program implementation responsibilities from formal statutory interpretation.[153]

Finally, the Act has had a ripple effect on other statutes, causing the Judicial Conference to request amendments to the Criminal Justice Act, the Magistrates Act, and the Juror Selection and Service Act.[154] It has, in the process, complicated the administration of the programs established by these acts. The Speedy Trial Act has also had a considerable impact on available resources in the federal court system, leading to requests for additional judgeships, magistrates, court reports, clerks, probation officers, and other support personnel.[155] These general conditions have in turn caused the Conference to forward over fifty recommendations for amendments to the Act.[156] Among them

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150 THIRD REPORT, *supra* note 142, at A-1 to A-7.
151 *Id.*
152 18 U.S.C. § 3165 (1976).
153 Note, *The Interim Provisions of the Speedy Trial Act: An Invitation to Flee*, 46 FORDHAM L. REV. 528, 539 (1977).
154 THIRD REPORT, *supra* note 147, at A-7 to A-8.
155 *See* THIRD REPORT, *supra* note 147.
156 *Id.* at A-7 to A-8.

is the suggestion, emanating from a substantial number of district planning groups, that the Act be repealed or "amend[ed] to incorporate the more flexible standards of the Sixth Amendment."[157]

Conclusion

As one of the three co-equal branches of the national government, the primary function of the federal judiciary is to adjudicate disputes arising between identified parties under the national Constitution and federal and state laws. To accomplish this primary goal, the federal judiciary has established its own highly specialized structures and procedures for system administration. It is not surprising, therefore, that when the judiciary is told by Congress to alter its operation in accordance with public policy goals as expressed by Congress, the judges prefer to carry out their implementation tasks through structures and procedures already established for the broader purposes of court system administration.

Probably few would take issue with the policy goals declared by Congress in the statutes discussed in this article. Although the extent to which each has realized its stated goals varies and is a matter for ongoing empirical research, each seeks to enhance the quality of the administration of justice in the federal courts. However, implementation of the mandates of the Speedy Trial Act has proved to be exceptionally difficult for the federal judiciary. The additional difficulties which have arisen in implementing the act, when compared to the experiences with the other statutes discussed herein, lead to several conclusions about judicial implementation of legislative mandates and the relationship between Congress and the federal courts.

First, it is essential that the judiciary and Congress reach a consensus, if at all possible, when dealing with legislation affecting the judiciary. Federal judges are usually intimately involved in the legislative process, often drafting provisions or contributing heavily to their actual content through the Judicial

157 *Id.* at A-6.

Conference and other structures. While legislation affecting the judiciary may not always be exactly what either the judges or the Congress seek, it is usually a compromise acceptable to each. The experience with the Speedy Trial Act indicates the hazards involved when the legislative process becomes unduly adversarial.

Second, legislation should not be overly specific. In the Criminal Justice Act, the Magistrates Act, and the Circuit Executive Act, the legislation sketched the broad policy outlines and left the preponderance of detail to the discretion of the judiciary. In each of these acts, the judiciary was granted the flexibility to achieve the policy goals mandated by Congress without being forced to disrupt the normal operation of the judicial system in order to do so. The Speedy Trial Act appears to deny the judiciary this flexibility.

Finally, the experiences with the legislation considered herein indicates that implementation of Congressional policy mandates directed at the courts should, to the extent possible, utilize the existing internal administrative structures of the judiciary. The fluid interdependence that characterizes the implementation network within the federal court system enables the Judicial Conference to, in turn, delegate considerable discretion to that level of the system where the impact of a new program is likely to be greatest. The experiences with the Criminal Justice Act and the Magistrates Act indicate that an effective measure of central control can be maintained as a complement to this lower level discretion; the methods utilized in the Speedy Trial Act ignored, regrettably, the approach of these successful implementation efforts.

The Speedy Trial Act was in at least one sense a landmark law — never before had Congress involved itself so deeply in the internal administration and operation of the federal judiciary. Unfortunately, this approach resulted in a legislative process that was uncharacteristically adversarial, a statute that was uncharacteristically specific, and an implementation process controlled by forces other than the established internal patterns of decision making within the federal court system. It is as yet unclear whether the Act is aberrational in its approach or whether it marks the beginning of a new relationship between Congress and the federal courts.

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NOTE

PROCEDURES FOR DECISIONMAKING UNDER CONDITIONS OF SCIENTIFIC UNCERTAINTY: THE SCIENCE COURT PROPOSAL

JEFFREY N. MARTIN*

Courts, agencies, and legislatures are increasingly forced to decide complex policy issues in areas requiring detailed scientific expertise. Yet scientists themselves differ on the answers to these questions, and decisionmakers acknowledge their own lack of expertise. A science court, utilizing primarily scientists and experts, offers one solution. Premised upon the belief that scientific questions may be extracted from questions of value in policy issues involving scientific uncertainty, a science court would explore the purely scientific elements of the debate and would produce an opinion expressing a probability statement about the extent of scientific uncertainty.

In this Note, Mr. Martin articulates the need for a science court and outlines the procedures by which such a court would function. He argues that the science court proposal reflects the importance of political accountability and procedural fairness in scientific decisionmaking.

Introduction

With increasing frequency, courts and administrative agencies are asked to decide scientific issues upon which prominent scientists have reached no consensus. The recent decisions imposing bans upon fluorocarbons, cyclamates, and DDT, for example, involved a number of policy questions that were complicated by scientific uncertainty.[1] Administrators and judges are particularly vulnerable to the criticism that they lack the expertise to resolve controversies imbued with such uncertainty. On the other side, scientists are criticized for their position as both

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* B.A., Lawrence University, 1974; J.D., Harvard Law School, 1978. The author acknowledges the helpful comments of Professor Stephen Breyer, Harvard Law School, and Dr. Arthur Kantrowitz, Chairman of Avco Everett Research Laboratory, Inc.

1 For a discussion of some of the characteristics of controversies involving scientific uncertainty, *see* Mazur, *Disputes Between Experts*, 11 MINERVA 243 (1973); Melkin, *The Political Impact of Technical Expertise*, 5 SOC. STUD. SCI. 34 (1975); Doty, *Can Science Investigation Improve Scientific Advice? The Case of the ABM*, 10 MINERVA 280 (1972).

analysts and advocates in the public decisionmaking process.[2] Scientists report to administrators and judges upon the state of scientific knowledge. But when they do so, controversies over the state of such knowledge may be downplayed while subjective values predominate in a scientist-adviser's attempt to advocate a particular policy choice.[3]

In an effort to improve the process of scientific decisionmaking, the Presidential Advisory Group on Anticipated Advances in Science and Technology has proposed that a "science court" experiment be conducted.[4] This Note assesses the contribution which a science court could make toward resolving scientific issues before administrative agencies and courts. It will be initially assumed, for purposes of discussion, that the science court concept would change decisionmaking procedures rather than function as an independent decisionmaking institution.[5]

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2 There is a substantial body of literature dealing with the scientist's role in public policy making. *See generally* D. PRICE, GOVERNMENT AND SCIENCE (1954); D. PRICE, THE SCIENTIFIC ESTATE (1965); SCIENCE AND SOCIETY (N. Kaplan ed. 1965); SCIENCE AND NATIONAL POLICYMAKING (R. Gilpin & C. Wright eds. 1964); J. S. DUPRE & S. LAKOFF, SCIENCE AND THE NATION: POLICY AND POLITICS (1962); KNOWLEDGE AND POWER: ESSAYS ON SCIENCE AND GOVERNMENT (S. Lakoff ed. 1966); H. L. NIEBURG, IN THE NAME OF SCIENCE (1966); D. SCHOOLER, SCIENCE, SCIENTISTS, AND PUBLIC POLICY (1971); SCIENTISTS AND PUBLIC AFFAIRS (A. Teich ed. 1974).

3 There frequently is no demarcation between reporting facts and policymaking.

4 Task Force of the Presidential Advisory Group on Anticipated Advances in Science and Technology, *The Science Court Experiment: An Interim Report,* 193 SCIENCE 653 (1976) [hereinafter cited as *Task Force Report*]. The Chairman of the Task Force, Dr. Arthur Kantrowitz, Chairman of the Avco Everett Research Laboratory, Inc., has actively advocated the creation of an institution of scientific judgment for more than a decade. *See, e.g.,* Kantrowitz, *Proposal for an Institution for Scientific Judgment,* 153 SCIENCE 763 (1967), *reprinted in* 113 CONG. REC. 15, 256 (1967); Kantrowitz, *Controlling Technology Democratically,* 63 AM. SCIENTIST 505 (1975) [hereinafter cited as *Controlling Technology*]; TIME, Feb. 23, 1976, at 45; Kantrowitz, Letter to the Editor, 194 SCIENCE 6 (1976); Kantrowitz, *The Science Court Experiment: Criticisms and Responses,* BULL. ATOM. SCIENTISTS, April 1977, at 44. The science court proposal was the subject of a colloquium held at Leesburg, Virginia, during September 10-21, 1976, sponsored by the Commerce Department, the National Science Foundation, and the American Association for the Advancement of Science. At the colloquium, a proposed series of experiments to test the efficacy of a science court was endorsed by, among others, the Secretary of Commerce, the Science Adviser to the President, and the Administrator of the Environmental Protection Agency. PROCEEDINGS OF THE COLLOQUIUM ON THE SCIENCE COURT (Department of Commerce, National Technical Information Service PB-261 305 1977) [hereinafter cited as SCIENCE COURT COLLOQUIUM]. *See generally,* Lepowsky, *Science Court on Guard,* 263 NATURE 454 (1976). At the time of this writing, the Task Force has been disbanded and there are no current proposals to conduct a proposed experiment, although there have been negotiations with the National Science Foundation for the purpose of funding such an experiment.

5 There has been considerable confusion in the literature regarding the structural

This Note will first present and analyze the arguments which have been advanced to support the creation of a science court. An attempt will then be made to identify a legal and administrative framework which could be used for isolating those questions of scientific fact amenable to a science court procedure. The most extensive discussion will be devoted to a critical examination of proposed science court procedures. Finally, there will be a discussion of whether science court procedures should be institutionalized in an independent organization[6] rather than used simply as a procedural innovation to existing judicial and administrative practices.

I. SCIENCE COURT PROCEDURES

The term "science court" is actually a misnomer.[7] The Task Force of the Presidential Advisory Group on Anticipated Advances in Science and Technology does not envision the resolution of scientific disputes by a judicial procedure. Instead, the

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form a science court would assume. One interpretation is that the science court is merely an experimental design to conduct a public policy analysis of decisionmaking under conditions of scientific uncertainty. *See Task Force Report,* note 4 *supra;* Markey, *A Forum for Technocracy,* 60 JUDICATURE 365 (1977). A second interpretation is that the science court would be a quasi-independent governmental authority responsible for assisting administrative agencies and the Congress in policymaking situations where there are disputed scientific facts. *See, e.g.,* Callan, Letter to the Editor, 193 SCIENCE 950 (1976). A third interpretation, the one which will be initially used in this paper, is that the science court proposal calls for a series of procedures that could be employed by decisionmakers to gain information about controverted scientific facts. *See* Kushner, Letter to the Editor, 194 SCIENCE 6 (1976), Statement of Margaret Mead, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 30.

6 An "independent organization" would be an organization not incorporated within or used as an adjunct to an administrative agency or the legislative branch. One such organization is the National Academy of Sciences. Through a congressional charter of 1863, the National Academy of Sciences is the official scientific adviser to the Government. 36 U.S.C. §§ 251-254 (1976).

7 The initial term given to the proposal was "institution for scientific judgment." Kantrowitz, *Proposal for an Institution for Scientific Judgment,* 153 SCIENCE 763 (1967). The juridical connotations to the word "court" have caused much consternation to proponents of the proposal who disclaim any intention of depriving courts of their jurisdiction. *See, e.g.,* Markey, *A Forum for Technocracy,* 60 JUDICATURE 365, 367-68 (1977); Kantrowitz, *The Science Court Experiment: Criticisms and Responses,* BULL. ATOM. SCIENTISTS, April 1977, at 44-45. Although proponents of the science court have suggested a number of more fitting names, the term "science court" appears to have become too well entrenched in the media and the public mind toof more fitting names, the term "science court" appears to have become too well entrenched in the media and the public mind to be changed at this late stage in the evolution of the proposal.

Task Force seeks to import selected features of legal courts into the scientific decisionmaking process.[8]

The suggested procedures are to be applied experimentally to a series of cases involving important policy issues. The court is designed primarily to air issues of scientific uncertainty that would otherwise be settled without political accountability or procedural fairness. Since the procedures were developed to improve upon perceived defects in current mechanisms[9] for

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8 The "scientific method" is a system for evaluating observations of nature. Philosophers of science hold widely divergent conceptualizations of that system. A concise definition is offered by Ernest Nagel: "The practice of scientific method is the persistent critique of arguments in the light of tried canons for judging the reliability of the procedures by which evidential data are obtained, and for assessing the probative force of the evidence on which those conclusions are based." E. NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION 13 (1961). *See also* K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 33-86 (1962); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 49-59 (1959); C. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 229-91 (1965). *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). A number of legal commentators have drawn comparisons of the legal and scientific methods of analysis. *See, e.g.*, Mayo & Jones, *Legal Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1964); Lovinger, *Jurimetrics: Science in Law*, in SCIENTISTS IN THE LEGAL SYSTEM 7-25 (1974); Lovinger, *Science and Legal Thinking*, 25 FED. B.J. 153 (1965); Huard, *Law and Science: Marriage, Divorce or Meretricious Relationship?*, 5 SANTA CLARA LAW. 1 (1964); Berns, *Law and Behavioral Sciences*, 28 LAW & CONTEMP. PROB. 1 (1963); Ulmer, *Scientific Method and the Judicial Process*, 7 AM. BEHAVIORAL SCIENTIST 21 (1963); Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604 (1966); Cowan, *Some Problems Common to Jurisprudence and Technology*, 33 GEO. WASH. L. REV. 3 (1964); O. W. Holmes, *Learning and Science*, in COLLECTED LEGAL PAPERS 135 (1920); O. W. Holmes, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 135 (1920); O. W. Holmes, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210 (1920); B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928). From the perspective of the science court, the principal difference between scientific and legal methodology is that a legal judgment is binding upon the parties. Additionally, the scientific method affords no finality to an experiment.

9 A number of different institutions are engaged in the process of deciding scientific issues. The Congress has several committees which frequently must investigate scientific issues. The House Committee on Science and Technology most frequently deals with scientific issues. In the Senate scientific issues come to the attention of the Committee on Commerce, Science and Transportation and the Committee on Human Resources. Assisting the Congress is the Office of Technology Assessment, created by the Technology Assessment Act of 1972, Pub. L. No. 92-484, 86 Stat. 797, to help Congress anticipate and plan for the consequences of technological innovation. *See generally*, Note, *Congress and the Office of Technology Assessment*, 45 GEO. WASH. L. REV. 1123 (1977).

Administrative agencies such as the Nuclear Regulatory Commission, the Food and Drug Administration, the Environmental Protection Agency, the Consumer Products Safety Commission, and the Occupational Safety and Health Administration confront scientific issues in the context of regulatory policy.

In the Executive Branch, the President is assisted by the Office of Science and Technology Policy, established under the National Science and Technology Policy,

resolving scientific issues, the science court proposal is more than a simple experimental design.[10] Its procedures are drawn to give courts and agencies alternatives to their currently employed procedures.[11]

A. *Premises of the Science Court*

The proponents of a science court first assume that it is possible to extricate purely scientific questions from questions of value in policy issues involving scientific uncertainty.[12] Science deals with causal relationships and can therefore be approached in carefully defined terms. In the science court procedure, scientists are accordingly vested with decisionmaking power only within carefully circumscribed spheres of authority. Scientists

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Organization, and Priorities Act of 1976, Pub. L. No. 94-282, 90 Stat. 459 (codified at 42 U.S.C. §§ 6611-6618). The Office of Science and Technology Policy serves the President as a source of scientific, engineering, and technological analysis and judgment. The National Science Foundation initiates and supports fundamental and applied research in all the scientific disciplines. The National Science Foundation also has responsibility for conducting policy analysis and directing the dissemination of scientific information. The National Academy of Sciences was established by Congressional charter in 1863 which requires that "the Academy shall whenever called upon by any department of the Government, investigate, examine and report upon any subject of science or art." 36 U.S.C. § 251 (1976). This advisory obligation is fulfilled mainly through the Academy's National Research Council, which supervises more than 6,000 scientists serving on nearly 9,000 advisory committees. NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING, INSTITUTE OF MEDICINE, NATIONAL RESEARCH COUNCIL: ORGANIZATION AND MEMBERS 10 (1974).

A number of advisory committees have been established pursuant to federal legislation. *E.g.*, Advisory Committee on Reactor Safeguards, 42 U.S.C. § 2039 (1946); Color Additive Advisory Committee, 21 U.S.C. § 376(b)(5)(C) (1970); Technical Electronic Product Radiation Safety Standards Committee, 42 U.S.C. § 263(f)(1)(A); Air Quality Advisory Board 42 U.S.C. § 1857(e) (1955). These advisory committees are in addition to the advisory committees that are formed on an ad hoc basis to assist the Executive and the administrative agencies. *See generally* F. VON HIPPEL & J. PRIMACK, THE POLITICS OF TECHNOLOGY: ACTIVITIES AND RESPONSIBILITIES OF SCIENTISTS IN THE DIRECTION OF TECHNOLOGY (1970); NATIONAL ACADEMY OF SCIENCES, THE SCIENCE COMMITTEE (1972); Morehead, *Federal Advisory Committees and Access to Public Information*, 2 GOV'T PUB. REV. 1 (1975); 4 G.S.A. FED. ADVISORY COMMS. ANN. REP. (1976).

10 *See* notes 5 & 7 *supra*.

11 The *Task Force Report*, *supra* note 4, at 655-56, recommends that a series of experiments be undertaken to refine the recommended procedures.

12 *Task Force Report*, *supra* note 4, at 653. The distinction between fact and value is drawn to demarcate scientific issues from policy decisions. For example, "risk" would be a concept that could be factually determined. Measurement of risk would involve measuring the probability and severity of harm. "Safety," by contrast, could only be determined by the values that are assigned to a risk. *See* W. LOWRANCE, OF ACCEPTABLE RISK, SCIENCE AND THE DETERMINATION OF SAFETY 75-76 (1976).

ideally have responsibility for determining scientific fact,[13] while the executive, the legislature, and the judiciary should incorporate the scientists' factual findings into their resolution of public policy issues.[14]

Science court advocates also assume uncertainties surrounding controverted questions of scientific fact can best be articulated through an adversary procedure.[15] They argue that

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13 A "scientific fact" is defined in the *Task Force Report, supra* note 4, at 656 "to mean a result, or more frequently the anticipated result, of an experiment or an observation of nature." The *Task Force Report, supra* note 4, does not, however, define the term "value" so as to provide a principle for determining whether a statement is one of fact or value.

14 *Task Force Report, supra* note 4, at 653. This functional division of responsibilities between scientists is well summarized by Harold Green: "Where the ultimate decision turns upon scientific questions, scientific fact should dictate the ultimate decision, or at the very least, should define the factual predicate on the basis of which value conflicts are resolved." Green, *The Risk Benefit Calculus in Safety Determinations,* 43 GEO. WASH. L. REV. 791, 807 (1975). Green himself views this functional division as impractical because the existence of scientific uncertainty precludes reliance upon scientists to supply the factual predicates of a policy choice. *Id. See also* Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking,* 48 S. CAL. L. REV. 371, 412 (1974). The position advocated by Green and Gelpe and by Tarlock does not, however, refute the argument made by proponents of the science court. Animating the functional division of scientific and policy making responsibilities is the principle that a democratic system of government requires that all political decisions be made by politically accountable representatives of the public. *See* Clark, *Expert Advice in the Controversy about Supersonic Transport in the United States,* 12 MINERVA 416, 419 (1974): "The 'democratic paradigm' can be stated in the following form: Questions of policy can always be separated from technical questions. Experts should make this distinction explicit and should have no greater voice in the resolution of questions of policy than the ordinary citizen or layman." *See also* Green, *The Resolution of Uncertainty,* 12 NAT. RES. J. 182 (1972); Macrae, *Science and the Formation of Policy in a Democracy,* 11 MINERVA 228 (1973); Tizzard, *Science and Democracy,* in SCIENCE AND PUBLIC POLICY 990 (1961); Buecke, *Science and Technology Policies and the Democratic Process,* in SCIENCE AND TECHNOLOGY POLICIES (1973). *But cf.* Polyani, *The Republic of Science: Its Political and Economic Theory,* 1 MINERVA 54 (1962) (scientists are part of a self-governing community which should only be ruled by its own sense of moral responsibility).

15 *Task Force Report, supra* note 4, at 653. The rationale behind the use of adversary procedures is set forth succinctly by Harvey Brooks:

> Adversary procedures may be especially valuable in bringing out unanalyzed evaluative assumptions or premises which underlie the testimony of experts when they deal with trans-scientific issues. Adversary procedures are also important in circumstances when greater and greater economic, political or professional commitments have been made to a particular line of action, and when such commitments are to be either greatly scaled up or down as a result of a policy decision based on scientific and trans-scientific testimony.

Brooks, *Science and Trans-science,* 10 MINERVA 484, 486 (1972). The *Task Force Report* is not unique in advocating the use of adversary proceedings to resolve scientific conflicts. *See, e.g., Task Force Report, supra* note 4, at 656 (bibliography listing 15 published articles); Rabinowitch, *Back into the Battle?,* SCIENCE AND PUBLIC AFFAIRS, April

under the existing processes, scientists frequently make seriatim presentations of fact or argue past each other rather than clarifying the underlying problem by directly clashing over issues.[16] Although proponents of the science court do not unequivocally support the adversary model of dispute resolution, they believe that juxtaposition of contending viewpoints will help to pare down broad disputes into the essential points of disagreement.[17] In their view, the adversarial process will also assure procedural fairness in the presentation of conflicting scientific viewpoints.

A third premise of the science court proposal is that disputed issues of scientific fact should be resolved in a public forum.[18] A public forum is deemed necessary to promote a reasoned and responsible articulation of conflicting scientific points of view.[19] Absent full public ventilation of disputed scientific issues, proponents agree that scientists could too easily confuse scientific judgments with their personal preferences for policy outcomes.[20] Public scrutiny therefore would provide a check against overreaching interpretations of available data and attain the democratic ideal that only accountable representatives should make policy choices. Without such a specialized procedure there would be little more than cursory judicial review of science issues, since judges have been unwilling to exercise more than minimal oversight of scientific issues which are outside their areas of expertise.

1973, at 19; LOWRANCE, OF ACCEPTABLE RISK, SCIENCE AND THE DETERMINATION OF SAFETY 111-14 (1976); Curlin, *Saving Us From Ourselves: The Interaction of Law and Science-Technology*, 47 DEN. L. J. 651, 658 (1970); Goss, *The Development of New Pharmaceuticals: The Case for Greater Federal Intervention*, 28 FOOD, DRUG, COSM. L. J. 407, 421 (1973); Weinberg, *Science in the Public Forum: Keeping it Honest*, 191 SCIENCE 341 (1976); Gofman, *Nuclear Power and Ecocide: An Adversary View of New Technology*, BULL. ATOM. SCIENTISTS, September 1971, at 28, 30.

16 Proponents of the science court emphasize that controversial scientific issues are characterized by dysfunctional adversarial debate. Kantrowitz, *Controlling Technology Democratically*, 63 AM. SCIENTIST 503 (1975); Statement of Richard Simpson, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 8-10.

17 *Task Force Report, supra* note 4, at 653 ("[s]cientifically sophisticated outsiders are best able to juxtapose the opposing argument, determine whether there are genuine or only apparent disagreements, and suggest further studies which may resolve the differences").

18 *Task Force Report, supra* note 4, at 655.

19 *Id.*

20 *Id.* This conclusion is derived from a criticism of the operation of science advisory committees.

B. *Science Court Procedures*

Developers of the science court formulated its procedures broadly, with the expectation that they would be refined for standardized use through experimental applications to public policy issues.[21] As designed, the science court would proceed through the following stages:[22]

First, a science court administration would be formed to manage the operations of a science court proceeding. This administration would arrange with a governmental agency to conduct a science court proceeding on a bipolar issue pending before the agency. The issue itself must contain scientific questions which can be separated from the value-laden decision. The complexity of the issue must be such that it would permit a scientist-advocate fairly and competently to represent all facets of the controversy in a single proceeding.[23] An arrangement with the regulatory agency would be undertaken to ensure that the science court participants have access to relevant information that is not within the public domain. The science court authority must secure funding from Congress, the regulatory agency, or private sources in an amount sufficient to fund both parties to the proceeding.[24]

Once these procedural prerequisites were met, a chief adversary or "case manager" would be selected by the science court authority for each side of the bipolar issue. The procedure for

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21 *See* note 11 *supra.*

22 The following presentation of science court procedures does not exactly parallel those proposed in the *Task Force Report, supra* note 4. The presentation here also incorporates procedures upon which there appeared to be a consensus at the September 19-21, 1976, Colloquium, SCIENCE COURT COLLOQUIUM, *supra* note 4.

23 The *Task Force Report, supra* note 4, did not suggest procedures for multi-polar disputes. The *Task Force Report* appears to use the term "bi-polar issue" to mean a question with a dichotomous answer. *See, e.g., id.* at 653, "Should fluorocarbons be banned because of their impact on the ozone layer? Is Red Dye #40 safer than Red Dye #2?"

24 The object of securing an independent source of funds for a science court procedure is to insure that participants have equal advocacy capabilities, thereby relieving one party of any strategic advantages other than the skill of his presentation. *Task Force Report, supra* note 4, at 654; Statement of Arthur Kantrowitz, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 12; *cf.* Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism,* 66 YALE L. J. 319, 361 (1957). Estimates of the cost of a science court procedure have ranged from 1 to 10 million dollars for proceedings conducted during the first year of operation. Statement of Joel Primack, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 237.

selection would either be through a request for proposals from interested groups or from a polling of interested groups. The principal difference between the two procedures is that the former would be analogous to a bidding process whereas the latter would be analogous to an election. Under both procedures, the science court authority would screen the nominated case manager for expertise and ability to represent his side of the bipolar issue.[25]

The science court authority would then consult with scientific societies and organizations to produce a list of prospective judges. The authority would screen prospective judges to ensure that they were highly qualified, unbiased experts who were competent to evaluate scientific evidence from a field outside their specialty.[26] Three such judges would be selected. In addition to selection of a panel of judges, the referee would be selected to implement the science court procedures. The referee would either be selected from among the judges or selected in addition to the judges. Since the science court may be confronted with legal challenges and is conducted as an adjudicatory proceeding, it is recommended that a lawyer assist the referee.

The science court authority would issue a detailed set of procedures to guide the science court proceeding.[27] The case managers would examine the suggested procedures, the referee, and the judges. After the case managers agree on (a) the suggested procedures, or on a modification to the procedures, and (b) the referee and the judges, the science court proceeding would begin.[28]

At the actual proceedings, the case managers would formulate a series of statements of scientific facts based upon experimental data, inferences from experimental data, and observa-

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25 The *Task Force Report, supra* note 4, does not indicate whether a case manager would be assisted by other scientists in his presentation.

26 No criteria have been proposed for identifying the point at which a scientist is sufficiently dissociated from his specialty to be considered as a candidate for judge.

27 The initial set of procedures would presumably be closely patterned after those discussed in the *Task Force Report, supra* note 4.

28 An agreement signed by the participants and the host authority would commit the parties to conduct and complete a science court procedure. *Task Force Report, supra* note 4, at 653.

tions of nature. The statements would be ranked in order of importance to the resolution of the issue. They would then be submitted to the judges who would strike out statements of value preference, delivering the revised statement of facts to the case managers, who would accept or challenge each of the statements. Accepted statements would be compiled and published as the first output of the science court. Challenges to statements would be the subject of a mediation procedure, and case managers would attempt to narrow the area of disagreement. Statements agreed to by a mediation procedure would also be compiled and published.

Case managers would then prepare papers articulating their positions on the remaining challenged statements of fact. These papers would be submitted to the judges and to the opposing case manager. All relevant evidence would be admissible in support of the articulated positions. These position papers would be the subject of an adversary challenge in which a case manager would be cross-examined by the opposing case manager and by the three judges. A second mediation procedure would follow the adversary presentation in an attempt to refine further the scope of disagreement.

The judges would then write an opinion on the remaining contested statements of fact. The opinion would be in the form of a probability statement and would explicate fully the extent of scientific uncertainty.[29] The opinion would also identify areas where research is needed to reduce uncertainties. No value-laden policy recommendations are to be included within the opinion. These procedures are designed to give policymakers a set of facts that most accurately reflects the current state of scientific knowledge on the selected issue. While these facts are always vulnerable to subsequent discoveries, they will at least serve as a foundation for analysis.[30]

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29 The *Task Force Report, supra* note 4, at 655 states that "Some or most of these statements will be qualified with statements about probable validity or margin of error."

30 The term used by science court proponents to describe the weight that should be given to a science court opinion is "presumptive validity." Kantrowitz, *Controlling Technology, supra* note 4, at 508; *Task Force Report, supra* note 4, at 653.

II. THE NEED FOR A SCIENCE COURT

The science court will only be of practical value if it improves current procedures for resolving scientific disputes. Proponents of the science court have constructed a sweeping critique of existing procedures, including those of Science Advisory Committees and of the congressional hearing process.[31] According to science court proponents, both of these institutions contain procedural and structural infirmities which impede reasoned consideration of scientific issues. Even assuming the validity of their critique,[32] the conclusion does not ineluctably follow that the recommended science court procedures should be implemented in these institutions. Indeed, proponents of the science court do not cast a blanket condemnation upon existing procedures for resolving questions of scientific fact. To the contrary, they insist that some issues of scientific fact do not warrant the expenditure of resources that would accompany a science court procedure. The need for a science court procedure thus cannot be documented by simply asserting or proving the infirmities of these two institutions.

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31 *See Task Force Report, supra* note 4, at 653; *Controlling Technology, supra* note 4, at 506-07.

32 There are few empirical studies dealing with the limitations of institutional channels for disseminating scientific information and the procedures for resolving scientific controversy. *See, e.g.,* sources cited at note 1 *supra*. *See also* Miser, *The Scientist as Adviser: The Relevance of the Early Operations Research Experience,* 11 MINERVA 95 (1973); Lasagna, *Consensus Among Experts — The Unholy Grail,* 19 PERSPECTIVES BIO. & MED. 537 (1976). A number of congressional committees have undertaken general exploration into the processes of decisionmaking under conditions of scientific uncertainty. *See, e.g., National Policy and Priorities for Science and Technology Act: Joint Hearings on S. 32 Before the Special Subcomm. on the National Science Foundation of the Senate Comm. on Labor and Public Welfare and the Subcomm. on Science, Technology, and Commerce of the Senate Comm. on Commerce and the Senate Comm. on Aeronautical and Space Sciences,* 94th Cong., 1st Sess. (1975); SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 1st Sess., PROCEEDINGS OF THE WHITE HOUSE SCIENCE ADVISORY CONFERENCE (Comm. Print 1975); *National Science Policy and Organization Act of 1975: Hearings on S. 2495 Before the House Comm. on Science and Technology,* 94th Cong., 1st Sess. (1975); *Science and Technology Applications Act of 1974: Joint Hearing Before the Senate Comm. on Commerce and the Senate Comm. on Aeronautical and Space Sciences,* 93d Cong., 2d Sess. (1974); *Federal Policy Plans and Organization for Science and Technology: Hearings Before the House Comm. on Science and Astronautics,* 93d Cong., 2d Sess., pt. II (1974); *Federal Policy Plans and Organizations for Science and Technology: Hearings Before the House Comm. on Science and Astronautics,* 93d Cong., 1st Sess. (1973); *National Science Policy and Priorities Act of 1972: Hearings Before the Subcomm. on Science Research and Development of the House Comm. on Science and Astronautics,* 92d Cong., 2d Sess. (1972).

Much of the advocacy for blanket use of the science court simply reflects an inadequate understanding of the legal regulatory framework within which the two institutions already operate. Minor alterations in regulatory statutes and administrative procedures could often be enough to alleviate those infirmities. Consequently, the use of science court procedures should be limited to a select group of regulatory problems where the issues involve a controversy within the scientific community and are integral to important public decisions which may be framed in bipolar terms.

A. *Science Advisory Committees*

The proposed science court is in large part a response to the perceived failings of science advisory committees.[33] These committees are the principal channel for disseminating scientific information to the government; the President, Executive Department administrative agencies, and the Congress rely on advisory committees to supply scientific and technical information and often to recommend specific policies. An advisory committee may have a semi-permanent assignment to fulfill a continuing regulatory function in an administrative agency, such as the review of drug toxicology in the Federal Food and Drug Administration.[34] Alternatively, it may be assembled on an ad hoc

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33 For a general description of the structure and function of science advisory committees, *see* sources cited at note 9 *supra*. *See also Presidential Advisory Committees: Hearings Before a Subcomm. of the House Comm. on Government Operations,* 91st Cong., 2d Sess. (1970); *Advisory Committees: Hearings on Advisory Committees Before the Legal and Monetary Affairs Subcomm. of the House Government Operations Comm.,* 92d Cong., 1st Sess., (1971); *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Government Operations Comm.,* 91st Cong., 2d Sess., pts. I, II, III (1970); *Oversight Hearings Before the Subcomm. on Budgeting, Management and Expenditures of the Senate Comm. on Government Operations,* 93d Cong., 1st & 2d Sess. (1973-1974); *Hearings Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations,* 94th Cong., 2d Sess. (1976); *Use of Advisory Committees by the Food and Drug Administration: Hearings Before the Intergovernmental Relations Subcomm. of the House Comm. on Government Operations,* 93d Cong., 2d Sess., pts. I, II, III (1974); *Food and Drug Administration Practice and Procedures: Hearings Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare,* 94th Cong., 1st Sess. (1975), H.R. REP. No. 94-787, 94th Cong., 2d Sess. (1976).

34 The Toxicology Advisory Committee is one of the many standing advisory committees used by the FDA. For a description of its duties and the duties of other FDA advisory committees, see 21 C.F.R. § 14.100 (1977).

basis only to prepare a report upon a narrowly defined scientific question, such as the detoxification of nerve gas at the Rocky Mountain Arsenal.[35] Regardless of the purpose for which the science advisory committee is convened, it is responsible for inquiring into the state of scientific knowledge that bears upon a selected policy issue.

It is a complex and difficult task to assemble and evaluate scientific evidence when an issue touches the frontiers of scientific knowledge. That task is further complicated by the manner in which science advisory committees presently operate. Although it is difficult to generalize about the operation of the committees, it appears that a number of sources systematically inject biases into the committees' evaluation of scientific data.

1. Agency and Congressional Deference to Science Advisory Committees

The initial decision to resort to an advisory committee represents a judgment that an issue or a regulatory problem cannot be competently resolved by in-house staff. Accordingly, there is a great tendency to defer to the judgment of a scientific advisory committee.[36] This deference is manifested in the broadly phrased committee directives which in no way limit the fusion of factual and value judgments.

Simple pragmatic concerns are often enough to require the delegation of these broad scientific policymaking powers to advisory committees and to result in deference to their findings. The Food and Drug Administration (FDA), for example, must strike a careful balance between regulating the safety and ef-

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35 The work of this committee is discussed in J. PRIMACK & F. VON HIPPEL, ADVICE AND DISSENT, SCIENTISTS IN THE POLITICAL ARENA 151-53 (1974). Dr. David S. Brown of George Washington University has developed a classification of advisory committee structures, the primary division of which is between committees that meet only once and those that have a continuing function. *See* Brown, *The Management of Advisory Committees: An Assignment for the 70's*, 32 PUB. AD. REV. 334 (1972). *See generally* Wilkinson & Atkinson, *Advisory Committees*, in HISTORICAL WORKING PAPERS ON THE ECONOMIC STABILIZATION PROGRAM 989-1044 (1974).

36 *See generally* Brown, *The Public Advisory Board as an Instrument of Government*, 15 PUB. AD. REV. 196 (1955); H.R. REP. NO. 91-1731, 91st Cong., 2d Sess. 4-5 (1970); *Hearings on H.R. 4383 Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., 16 (1971) (remarks of Rep. Metcalf).

ficacy of new drugs and providing incentives for pharmaceutical companies to undertake costly research and development for product innovation.[37] It has therefore grown accustomed to relying almost exclusively upon the recommendations of its advisory committees in order to expedite the use of summary adjudication procedures.[38]

As a case in point, in 1966 the FDA engaged the National Academy of Sciences-National Research Council (NAS-NRC) to conduct a preliminary review of the efficacy of pre-1962 drugs.[39] The commission came in the wake of 1962 amendments to the federal Food, Drug and Cosmetic Act[40] which required the Food and Drug Administration to conduct premarketing review of new drug applications[41] and approximately 4000

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37 The Food and Drug Administration also must balance carefully the costs of delayed marketing against the benefits of increased assurances of safety. Strict testing requirements and penetrating scientific analysis tip that balance in favor of safety assurances. The prevalent criticism of the FDA is that its scientific review procedures have tipped the balance too much in favor of safety at a suboptimum trade-off in (1) reduced marketing incentives and (2) public health costs resultant from the unavailability of new drugs. *See, e.g.,* Parker, *Regulating Pharmaceutical Innovation: An Economist's View,* 32 FOOD, DRUG, COSM. L. J. 160 (1977); AMERICAN ENTERPRISE INSTITUTE, NEW DRUGS (1976); W. WARDELL & L. LASAGNA, REGULATION AND DRUG DEVELOPMENT (1975); S. PELTZMAN, REGULATION, ECONOMICS AND PHARMACEUTICALS 278 (1976); S. PELTZMAN, REGULATION OF PHARMACEUTICAL INNOVATION (1974); Grabowski, Vernon & Thomas, *The Effects of Regulatory Policy on the Incentives to Innovate,* in IMPACT OF PUBLIC POLICY ON DRUG INNOVATION AND PRICING (1976); Bailey, *Research and Development Costs and Returns: The U.S. Pharmaceutical Industry,* 80 J. POL. ECON. (1972). *But see* Goss, *The Development of New Pharmaceuticals: The Case for Greater Federal Intervention,* 28 FOOD, DRUG, COSM. L. J. 407 (1973).

38 A detailed discussion of the summary judgment procedure can be found in Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study,* 64 CALIF. L. REV. 14 (1976). *See also* Marcus, *The New FDA Hearing Regulation — An Analysis, Summary Judgment,* 53 TEX. L. J. 1518 (1975).

39 Note, *Drug Efficacy and the 1962 Drug Amendments,* 60 GEO. L.J. 185, 208 (1971): "[T]he panelists selected for the study were predominantly physicians affiliated with academic institutions. . . . Commissioner Ley of the FDA remarked that '[n]o other organization could have brought greater objectivity, expertise, or authority to this landmark study.' "

40 21 U.S.C. §§ 301-392 (1976). For a collection of materials and a detailed discussion of the Drug Amendments of 1962, Pub. L. 87-781, 76 Stat. 780 (1962), and their implementation by the FDA, see Note, *Drug Efficacy and the 1962 Drug Amendments,* 60 GEO. L. J. 185 (1971); Harlow, *The FDA's OTC Drug Review: The Development and an Analysis of Some Aspects of the Procedure,* 32 FOOD, DRUG, COSM. L. J. 248 (1977); Hoffman, *New Drugs, Old Drugs, and the NAS-NRC Efficacy Review,* 27 FOOD, DRUG, COSM. L. J. 118 (1971).

41 A "new" drug is one "not generally recognized, among experts . . . as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof. . . ." 21 U.S.C. § 321(p) (1976).

drugs adjudged safe between 1938 and 1966 for substantial evidence[42] of both efficacy and safety. Prior to that Amendment, new drug applications could be approved simply upon a finding of safety.[43]

Working through panels of experts, the NAS-NRC completed the review within a two-year period. Despite the burden of reviewing 16,573 NAS-NRC evaluations, the FDA ultimately rejected approximately 20 percent of the recommendations.[44] Had the FDA not deferred to NAS, but rather inquired into the NAS-NRC evidentiary records and the crudely formulated efficacy standards,[45] implementation of the 1962 Amendments and the diversion of resources to their implementation would have been substantially delayed.[46]

In addition to the pragmatic concerns of legislating large-

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42 The Act defines "substantial evidence" as evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof. 21 U.S.C. § 355(d) (1976).

43 Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938).

44 *Id.* at 210 n.160; *Use of Advisory Committees by the FDA: Hearings Before the Intergovernmental Subcomm. of the Comm. on Governmental Operations,* 93d Cong., 2d Sess. 80 (1974).

45 The categories were defined as follows:

(A) *Effective.*

(B) *Probably Effective.* Additional evidence required to consider effectiveness. Remedy could be additional research or modification of claims or both.

(C) *Possibly Effective.* Little evidence of effectiveness, but possibility of additional evidence should not be ruled out.

(D) *Ineffective.* No acceptable evidence to support claim of effectiveness.

(E) *Effective, but . . .* Effective for claimed indication but not approved form of treatment because better, safer or more conveniently administered drugs available.

(F) *Ineffective as a fixed combination.* Combination drugs for which there is no substantial reason to believe that each ingredient adds to the effectiveness of the combination.

NATIONAL ACADEMY OF SCIENCES, DRUG EFFICACY STUDY, FINAL REPORT TO THE COMMISSIONER OF FOOD AND DRUGS, FOOD AND DRUG ADMINISTRATION, 7 & app. A.3, at 42-43 (1969).

46 *Cf.* Parker, *Regulating Pharmaceutical Innovation: An Economist's View,* 32 FOOD, DRUG, COSM. L. J. 160 (1977). The review undertaken by the NAS-NRC examined only a small sample of the total number of over-the-counter drugs. In 1972, the FDA implemented new regulations to review drugs that had not been included in the 1966-1969 drug efficacy review. 37 Fed. Reg. 85 (1972). *See* Harlow, *The FDA's OTC Drug Review: The Development of and an Analysis of Some Aspects of the Procedure,* 32 FOOD, DRUG, COSM. L. J. 248, 251-74 (1977).

scale programs, Congress is also faced with limited capabilities for defining the scope of an advisory committee's authority. More often than not, congressional decisionmakers are unacquainted with the intricacies of experimental design procedures and consequently allow the committees to stray into subjective policy areas that are tangential or unrelated to the purely scientific purpose for which they were convened.[47] Moreover, the very expansiveness of the inquiry frequently induces the committee to make policy recommendations that profoundly shape or determine policy outcomes.[48] For example, the Toxicology Advisory Committee of the Food and Drug Administration was convened to decide whether an experiment provided "evidence" of the carcinogenicity of Red Dye No. 2.[49] Although the Food and Drug Administration was required to license or refuse to license color additives on the basis of "substantial evidence,"[50] the committee could not agree upon a scientific definition of "evidence." Instead of determining whether there was substantial evidence of carcinogenicity, the Committee simply framed a policy conclusion: the Dye has safety problems. Given such a finding, the Administrator had no real means of

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47 This tendency was repeatedly emphasized in the congressional hearings investigating the use of advisory committees by the Food and Drug Administration. *See* sources cited at note 33 *supra*. *See also Scientists and Bureaucrats: A Clash of Cultures on FDA Advisory Panel,* 191 SCIENCE 1244 (1976).

48 *See, e.g.,* PRESIDENT'S SCIENCE ADVISORY COMMITTEE, REPORT OF PANEL ON CHEMICALS AND HEALTH 138-39 (1973) ("in many instances, surrogate or third party agents have obviously assumed the role of both analysis and judgment in behalf of the public benefit and its collective risk"); Lederberg, *The Freedom and the Control of Science: Notes from the Ivory Tower,* 45 S. CAL. L. REV. 596, 609 (1972); LOWRANCE, OF ACCEPTABLE RISK, SCIENCE AND THE DETERMINATION OF SAFETY 109-111 (1976); BROOKS, THE GOVERNMENT OF SCIENCE 83-89 (1968); Address by Consumer Products Safety Commissioner Lawrence Kucher, National Bureau of Standards Colloquium (November 19, 1976, prepared text at 15-17) (criticism of National Academy of Sciences report on the effect of chlorofluoromethanes on the ozone layer recommending two year delay in regulation). *See* NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, HALOCARBONS: ENVIRONMENTAL EFFECTS OF CHLOROFLUOROMETHANE RELEASE (1976); NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, HALOCARBONS: EFFECTS ON STRATOSPHERIC OZONE (1976).

49 *See Scientists and Bureaucrats: A Clash of Cultures on FDA Advisory Panel,* 191 SCIENCE 1244, 1245-46 (1976) [hereinafter cited as *FDA Advisory Panel*]. The Toxicology Advisory Committee was originally established on December 9, 1974. It is responsible for reviewing and evaluating the safety of chemicals present in foods, drugs, cosmetics, and medical devices. 21 C.F.R. § 14.100(a)(3) (1977).

50 *See* note 42 *supra,* for the definition of substantial evidence applicable to the regulation of food additives.

determining whether the findings were supported by "substantial evidence" or if those findings conformed to his assessment of safety. To opponents of the specialized bodies, this broad discretion simply underlines the impossibility of divorcing science from policy. But to the science court proponents, this intermixture is an occasion for alarm. Scientists need not, in their view, be delegated this policymaking responsibility.[51] While professional scientists cannot be entirely dispassionate in the presentation of scientific evidence, they should not be allowed to make policy determinations where there is no public accountability.[52] Their background in science is adequate to assess the cost and benefits of isolated innovations, but it provides no special expertise in the balancing of costs and benefits of long-term policy. Aware of these problems, Congress has in certain well-defined situations carefully circumscribed the discretion given to advirsory committees by predetermining the policy outcome that will flow from a given scientific fact.

Because the broad directive made review virtually impossible, more specific directives would appear to be appropriate. There is no doubt that politicians are frequently incapable of resolving the cost/benefit problems involved in a scientific issue themselves. Nonetheless, more specific task definition is necessary to prevent the advisory committee from trespassing on the domain of discretionary policy recommendation.[53] For example,

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51 *See* sources cited at notes 13 & 14 *supra.*

52 According to proponents of the science court, the doctrine that scientists will exercise their moral responsibility to act on behalf of the social welfare is both antidemocratic and politically naive. *See Controlling Technology, supra* note 4, at 505-07; *Task Force Report, supra* note 4, at 653. *Cf.* Bazelon, *Coping With Technology Through the Legal Process,* 62 CORNELL L. REV. 817, 819 (1977) ("While their expertise is essential for assessing the costs and benefits of particular innovations, it provides no special qualifications for providing how the balance between costs and benefits should be struck"). *See generally* sources at notes 13 & 14 *supra.*

53 There are limits to the contribution which task specification can make in controlling the discretion of advisory committees. The Food and Drug Administration draws guidelines for the responsibilities of its advisory committees, but complex instructions may not be understood or followed by advisory committees. *Compare* Statement of Alexander Schmidt in *Use of Advisory Committees by the Food and Drug Administration: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations,* 93d Cong., 2d Sess., pt. I 333 (1974) [hereinafter cited as *FDA Advisory Committee Hearings*]:

> FDA's advisory committees have been thoroughly briefed on their roles with respect to drug review, including the necessity to assure that their advice is

the Delaney amendment to the Food, Drug and Cosmetic Act[54] prohibits the use of an additive "if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal."[55] One way or another, scientific evidence triggers a policy outcome, *i.e.*, evidence of carcinogenicity will impose a duty upon the Commissioner of the Food and Drug Administration to ban the use of the additive.

In addition to defining more carefully the task of an advisory committee, the prevailing tendency of advisory committees to fuse facts and values can also be counteracted by a number of administrative innovations. The committees could be instructed to express scientific facts separately from policy recommendations. They could also be required to disclose in detail the specific bases upon which scientific facts are determined. A further measure could require the committee to quantify whenever possible the degree of uncertainty with scientific facts.[56]

Implementation of these guidelines in the advisory committees would parallel the kind of specific statements that science court judges would be expected to issue. The guidelines could potentially result in the more probative identification of scientific uncertainty and a greater public accountability for issues imbued with that uncertainty.

> consistent with the law. They are cognizant that the law requires a showing of substantial evidence of safety and effectiveness based upon adequate and well controlled studies. . . .

with FDA Advisory Panel, supra note 49, at 1245-46: "When the committee was asked to vote on whether the results of the botched study provide 'evidence' of the carcinogenity of Red Dye No. 2 . . . each member gave a personal answer using whatever definition he felt comfortable with."

54 Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1976).

55 *Id.* § 348(c)(3)(A). For the legislative history of the Delaney clause and the Food Additive Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1783 (1958), of which it was a part, see Blank, *The Delaney Clause: Technical Naivete and Scientific Advocacy in the Formulation of Public Health Policies,* 62 CALIF. L. REV. 1084, 1084-96 (1974); Turner, *The Delaney Anticancer Clause: A Model of Environmental Protection Law,* 24 VAND. L. REV. 889 (1971); Oser, *An Assessment of the Delaney Clause After 15 Years,* 29 FOOD, DRUG, COSM. L. J. 201 (1974); Kleinfield, *The Delaney Proviso — Its History and Prospects,* 28 FOOD, DRUG, COSM. L. J. 556 (1973).

56 *See* W. LOWRANCE, OF ACCEPTABLE RISK, SCIENCE AND THE DETERMINATION OF SAFETY 111 (1976).

Even with the adoption of guidelines modeled upon proposed science court procedures, advisory committees would still be likely to exercise substantial policymaking discretion. The task of clarifying values or articulating ingrained or seemingly self-evident assumptions will not easily be accomplished. More difficult still will be the process of arriving at some form of agreement among committee members on the distinction between facts and values. Indeed, the process of agreeing upon specific findings of fact would prove to be quite cumbersome and time-consuming; particularly when routine, uncontroversial evidence is examined, there would be strong pressures toward only a loose adherence to these guidelines. If tedious or pointless discussion or paperwork were required, committee members might simply refuse to follow the instructions. These guidelines could not be employed in a cost-effective manner in all situations where advisory committees are convened to address scientific issues. Only when particularly controversial and politically significant policy issues are at stake would strict adherence to these guidelines seem provident.

2. Science Advisory Committee Biases

The science court proposal also recognizes that the selection of advisory committee members is a further source of bias in committee deliberations.[57] Exclusion of minority viewpoints, such as consumer representatives, may preclude a full discussion of contending interpretations of scientific data and result in an inaccurate estimation of the risks and benefits associated with a decision.[58] An additional source of bias could result from committee members who have publicly articulated their opinions or research and thus have a stake in the committee's eventual report. Previously published or articulated views are more

57 *See* SCIENCE COURT COLLOQUIUM, *supra* note 4, at 144, 235; *Controlling Technology, supra* note 4 at 506; HOUSE COMM. ON GOVERNMENT OPERATIONS, USE OF ADVISORY COMMITTEES BY THE FOOD AND DRUG ADMINISTRATION, H.R. REP. NO. 94-787, 94th Cong., 2d Sess. 5-6 (1976) [hereinafter cited as GOVERNMENT OPERATIONS REPORT]; Thomas & Wolfman, *The Presidency and Policy Formulation: The Task Force Device,* 28 PUB. ADMIN. REV. 462 (1969); Gage & Epstein, *The Federal Advisory Committee System: An Assessment,* 7 ENVT'L L. REP. 50,001, 50,004 (1977) [hereinafter cited as *Advisory Committee Assessment*].

58 *See, e.g., Advisory Committee Assessment, supra* note 57, at 50,004-06.

likely to lead to the presentation of concrete particular positions than to a free flow of information and receptivity to ideas.[59] And there is always the possibility that political or economic pressures may signal that a desired outcome is necessary to legitimize a previous political decision.[60]

Incorporating mediation and adversary procedures for the presentation of scientific evidence within committees could counteract these tendencies. Adversarial presentation of viewpoints might help clarify the extent of uncertainty underlying scientific evidence and the identification of erroneous assumptions and predilections. Controls imposed upon advisory committees by federal statute and agency regulations could also prove less time consuming and less likely to polarize debate. To that end, the federal Conflict of Interest Statute restricts the rendering of advice in any particular matter in which a member, his immediate family, a partner or a business with which he is connected or has an arrangement concerning prospective employment, has a financial interest.[61] Supplementing this safe-

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59 Previous publication, however, need not be the only factor bearing upon bias. It is not necessarily the publication that makes one's position immutable; it is the amount of information one already has on the subject. The more information a person has, the greater chance that he has already formed an opinion, and the less open he is to new information. *See, e.g.,* Spector, *Regulation of Pesticides by the Environmental Protection Agency,* 5 ECOLOGY L.Q. 233, 250-51 (1976); Brooks, *The Scientific Adviser, in* SCIENTISTS AND NATIONAL POLICY-MAKING 92-95 (1964).

60 *See, e.g.,* J. PRIMACK & F. VON HIPPEL, ADVICE AND DISSENT, SCIENTISTS IN THE POLITICAL ARENA, 87-99 (1974) (cyclamate decision); GOVERNMENT OPERATIONS REPORT, *supra* note 57, at 6-7, 25-26, 48-51 (advisory committee complied with FDA decision to approve propranolol). *See also* Weaver, *Report of the Special Committee,* 130 SCIENCE 1390 (1959). The opportunity of regulatory agencies to give subtle direction to an advisory committee should not be considered to be a structural defect of the advisory committee system. The decision to resort to an advisory committee reflects an initial administrative judgment that an agency's regulatory policy would be improved. The procedures under which the advisory committee is instructed to operate also embody regulatory objectives. *Cf.* note 51 *supra.*

61 18 U.S.C. § 208 (1976). The rationale for this provision is developed in H.R. REP. No. 748, 87th Cong., 1st Sess. 6 (1961):

> It is also fundamental to the effectiveness of democratic government that, to the maximum extent possible, the most qualified individuals in the society serve its government. Accordingly, legal protections against conflicts of interest must be so defined as not unnecessarily or unreasonably to impede the recruitment and retention by the government of those men and women who are most qualified to serve it.

The prohibition against financial conflicts therefore, may conflict with the objective of recruiting qualified individuals. The implications of this situation are drawn out in the GOVERNMENT OPERATIONS REPORT, *supra* note 57, at 6: "the pool of experts in drug in-

guard is the general requirement in the Federal Advisory Committee Act that advisory committees have "balanced representation,"[62] and the enactment of regulations designed to ensure a balanced presentation of views and the expression of independent judgment.[63] Rigorous adherence to the letter and spirit of the Federal Advisory Committee Act could thus potentially result in a reduction of subtle pressures exerted by decisionmakers upon advisory committee members.

The effectiveness of such formal checks upon committee biases could nevertheless be readily undermined by the considerable administrative burdens imposed upon committee members.[64] Science advisory committees are faced with strong pressures for reaching consensus decisions. Because they are generally charged with the responsibility of preparing a report,

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vestigation is quite limited so that the same experts may serve both the Government and the industry." *Cf.* Rich, *Private Government and Professional Science,* in SCIENTISTS AND PUBLIC AFFAIRS 27-28 (1974) (National Academy of Sciences Advisory Committees cannot be objective when reviewing a program which could affect the amount of resources that will be committed to the committee's specialty). *See also* Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform,* 92 HARV. L. REV. 552, 571-72 (1979).

62 5 U.S.C. App. I § 10(a)(1) (Supp. III, 1973). The Office of Management and Budget (OMB) has responsibility for the supervision of advisory committees. *Id.* § 7(a). To guide interpretation of the "fair balance" provision, OMB issued a circular containing the following language: "The membership of a committee necessarily depends on its function . . . an effort should be made to include scientists of different points of view and different types of employment (university, industry, etc.)." Notice, *Advisory Committee Management — Administrative Guidelines and Management Controls,* 38 Fed. Reg. 2308, (1973). The final guidelines did not contain this language but instead provided only cursory guidance for implementation of the act. OMB Circular No. A-63, *Advisory Committee Management Guidance,* 39 Fed. Reg. 12,389 (1974). The OMB proposed guidelines gave a flexible reading to the "fair balance requirement" of the Federal Advisory Committee Act. Under the terms of the final circular, agencies may have even greater latitude to tailor the balance of their advisory committees to fit their regulatory objectives.

63 The final OMB guidelines, *supra* note 78, at 12,389, simply require that the agency indicate to OMB how it intends to meet the "fair balance" requirement. A number of administrative agencies have promulgated regulations in conformity with this requirement and with § 8(a) of the Federal Advisory Committee Act 5 U.S.C. App. I § 8(a) (Supp. 1973). *See, e.g.,* 29 C.F.R. § 1912 (1973) (Occupational Safety and Health Administration); 10 C.F.R. § 7 (1975) (Nuclear Regulatory Commission); 16 C.F.R. § 1018 (1976) (Consumer Product Safety Commission); 21 C.F.R. § 14 (1977) (Food and Drug Administration). The "fair balance" requirement of the Federal Advisory Committee Act may have been skirted by concentration on less controversial factors such as sex, geography, and race. *See Advisory Committee Assessment, supra* note 57, at 50,004.

64 *See, e.g.,* Spector, *Regulation of Pesticides by the Environmental Protection Agency,* 5 ECOLOGY L.Q. 251 (1976).

the expeditious discharge of that responsibility is facilitated by avoiding or compromising on points of disagreement.[65] Particularly when decisions rest upon dichotomous choices, such as the carcinogenicity *vel non* of a chemical flame retardant, there are strong pressures to reach an unanimous conclusion. Anomalous evidence or novel scientific explanations may be suppressed or overlooked in the search for a common basis for decision.[66]

Pressures to reach consensus decisions are somewhat reduced by the requirement in the Federal Advisory Committee Act that advisory committee meetings be conducted in public.[67] However, two broad exceptions to the Act permit science advisory committees to deliberate in private. First, there is an exception for advisory committees which are part of an institution under contract with the government to supply advice.[68] The National Academy of Sciences, which fields nearly one half of all

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65 *Id.; see* Brooks, *The Scientific Adviser,* in SCIENTISTS AND NATIONAL POLICY-MAKING 88-89 (1964); Statement of Richard Simpson, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 12.

66 This theory of group dynamics derives from the Asch conformity-conflict experiments. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments,* READINGS IN SOCIAL PSYCHOLOGY 174-182 (E. Maccoby, T. Newcomb & E. Hartley, eds. 1958).

67 5 U.S.C. App. I §§ 9, 10, 11 (Supp. III, 1973). For an extensive discussion of the occasions upon which an advisory committee must be conducted in public, *see* Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years,* 63 GEO. L. J. 725 (1975). *See also Advisory Committee Assessment, supra* note 57; Hickman, *Advisory Committees at FDA — A Legal Perspective,* 29 FOOD, DRUG, COSM. L. J. 395 (1974); Note, *The Federal Advisory Committee Act: A Key to Washington's Back Door,* 20 S.D. L. REV. 380 (1975); Marblestone, *The Coverage of the Federal Advisory Committee Act,* 35 FED. B. J. 119 (1976).

68 The Federal Advisory Act applies to:

> any committee, board, commission, council, conference, panel, task force or other similar group, or any subcommittee or other subgroup thereof . . . which is
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> (A) established by statute or reorganization plan, or
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> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies . . .

5 U.S.C. App. I § 3(2) (Supp. III, 1973). Although ostensibly within the ambit of this broad definition, the legislative history of the Federal Advisory Committee Act has been construed to exclude a committee that has been procured pursuant to a contract to supply advice. *Cf.* Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), *aff'd,* 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 932 (1977). (National Academy of Sciences does not fall within the coverage of the Federal Advisory Committee Act because the legislative history indicates that the Academy would be exempt from its provisions). The Department of Justice maintains that the mere existence of a contractual relation-

executive branch science advisory committees, falls within this exception.[69] Second, science advisory committees which are restricted to providing decisionmakers with scientific facts rather than policy recommendations do not fall within the coverage of the Federal Advisory Committee Act.[70] This latter exemption could conceivably be construed to include committees which operate upon the science court assumption that scientists should only make judgments about scientific facts. Not only may the public be excluded from attending advisory committee meetings, but it may also be denied access to the very information upon which a committee relied to reach its decision. Although a committee may have *de facto* decisionmaking authority in the sense that its recommendations are almost always accepted, it does not have formal authority. These committees therefore are not "agencies" within the meaning of the Freedom of Information Act and are not subject to the Act's disclosure provisions.[71]

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ship with a federal agency is not sufficient to exempt the committee from the Act. *See* Memorandum from C. Richard Boehlert, Deputy Associate General Counsel, Grants, Contracts and General Administration Division, EPA, to Staff Director, Science Advisory Board Secretariat, March 18, 1975, on the Use of Investigative Panels by Advisory Committees of the Science Advisory Board [hereinafter cited as *EPA Memorandum*], *cited in Advisory Committee Assessment, supra* note 57, at 50,002-01.

69 Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977). *See* discussion at note 68 *supra*. *But cf.* H.R. REP. NO. 91-1731, 91st Cong., 2d Sess. 15 (1970):

> A great number of the approximately 500 advisory committees of the National Academy of Sciences and its affiliates should be added to the above 1800 advisory committees as the NAS committees fall within the intent and literal definition of advisory committees under Executive Order 10,007.

Despite the language of the House Report, the *Lombardo* decision holds squarely that the National Academy of Sciences is exempt from the Act. This not only closes Academy meetings from the public but also closes the papers of Academy meetings from the public except the final reports. *Cf.* National Academy of Sciences, NRC Drafting Guidelines for New Public-Access-To-Information Policy (May 7, 1975).

70 The exemption of fact-finding committees has not, at the time of this writing, been litigated. Some administrative agencies have taken this position. *See EPA Memorandum, supra* note 68; *Advisory Committee Assessment, supra* note 57 (Standards Advisory Committee on Coke Oven Emissions of the Department of Labor); 21 C.F.R. § 2.300(b)(6)(1) (Food and Drug Administration regulations). The distinction between an "advisory" committee and one which lacks "recommendatory" authority may be analytically sharp. In practice, the presentation and arrangement of information may be tantamount to a recommendation even if that is not the objective of the committee.

71 Courts have recently held that if an advisory committee is empowered only to make recommendations it is not an "agency" which is subject to the Freedom of Information Act, 5 U.S.C. § 552. *See, e.g.*, Ciba-Geigy Corp. v. Mathews, 428 F. Supp. 523

These exemptions, of course, represent a judgment that the need for secrecy in deliberations concerning matters of scientific fact outweighs the advantages of ventilating those deliberations to the public.[72] Proponents of the science court, however, would restrike that balance.[73] They argue that public oversight is less likely to inhibit deliberations about specialized technical or scientific issues than discussions about public policy issues. When the decisionmaking process is closed to public view, technical judgments about scientific evidence may be less susceptible to critical analysis or subsequent investigation than more readily comprehensible presentations of policy issues. Public scrutiny at the advisory committee stage may therefore be the only effective means for full ventilation of the scientific uncertainties which underlie an advisory committee report.

The use of advisory panels by the Food and Drug Administration in drug efficacy review provides a dramatic illustration of the need for opening science advisory committee deliberations

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(S.D.N.Y. 1977); Wolfe v. Weinberger, 403 F. Supp. 238 (D.D.C. 1975). In addition, it has been held that the reports and summary statements of outside consultants to agencies are exempt from disclosure under the Act. Washington Research Project, Inc. v. Dept. of Health, Education and Welfare, 504 F.2d 238 (D.C.C. 1974).

72 *See generally* Perritt & Wilkinson, *Open Advisory Committees and the Political Process: The Federal Advisory Committee Act After Two Years*, 63 GEO. WASH. L. REV. 725, 729-742 (1975). The Government in the Sunshine Act, 5 U.S.C. 552(b), Pub. L. No. 94-409, 90 Stat. 1241 (1976) foreclosed an emergent construction of the Federal Advisory Committee Act under which advisory committee meetings had been interpreted to be exempt intra-agency memoranda. 5 U.S.C. § 552(b)(1)(A)(5) (1976). *See generally* Sloat, *Government in the Sunshine Act: A Danger of Overexposure*, 14 HARV. J. LEGIS. 620 (1977). *Cf.* Note, *The Federal Advisory Committee Act: A Key to Washington's Back Door*, 20 S.D. L. REV. 380, 390-400 (1975); *Advisory Committee Assessment, supra* note 57, at 50,007-09. The Government in the Sunshine Act did not change the definition of agency to overrule Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), *see* note 69 *supra*, to bring the National Academy of Sciences within the coverage of the Federal Advisory Committee Act.

73 *Task Force Report, supra* note 4, at 653. A number of controversial scientific issues have been debated in public forums. The most visible recent example has been the debate over recombinant DNA research guidelines. *See The Cambridge Experimentation Review Board*, BULL. ATOM. SCIENTISTS, May 1977, at 20; *Recombinant DNA: Chimeras Set Free Under Guard*, 193 SCIENCE 215 (1976). H.E.W., National Institutes of Health, Draft Environmental Impact Statement, 41 Fed. Reg. 38,425 (1976). A collection of information on recombinant DNA is available in the transcript of the Senate hearings held on Sept. 22, 1976, *Hearings on Recombinant DNA Research Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (Dec. 1976); H.E.W., National Institutes of Health, Decision of the Director to Release Guidelines for Research on Recombinant DNA Molecules, 41 Fed. Reg. 27,902-04 (1976). *See generally* Balmer, *Recombinant DNA: Legal Responses to a New Biohazard*, 7 ENVT'L L. 293 (1977).

to the public. There interested companies had only a limited participation in the review conducted by the NAS-NRC. Drug committees were requested to submit all available data to panels which met privately. The names of panel members were in turn not disclosed while the review was in progress and panel recommendations were publicized only after the FDA made necessary revisions.[74] Cross-examination of panel members by drug manufacturers was not permitted even upon legal challenge to the FDA determinations of efficacy.[75] At no point in the decision-making process were there opportunities for assuring that committee members conducted an unbiased review of all relevant scientific evidence.

To assure public deliberation of scientific issues, Congress could amend the Federal Advisory Committee Act to repeal these two exceptions. Legislative amendment would not, however, eliminate propensities for consensus. But since issues confronted by science advisory committees frequently are not the subject of sharp disagreement there is no need to force these issues into an adversary mold. Only in cases where consensus would not readily be reached would some check against committee biases be appropriate. In such a case, science court procedures could be implemented as a form of appellate review of a committee decision. Committee members who might otherwise yield to the administrative pressures of consensus decision-making may then have the opportunity to have a review of their particular scientific arguments. As a consequence, the extent of uncertainty underlying scientific evidence would be more likely to be factored into a policy decision rooted in that evidence.

The Food and Drug Administration has implicitly recognized that disputed scientific issues may be adequately resolved in the sort of adversarial setting envisioned by proponents of the science court. The FDA has issued regulations to establish a Public Board of Inquiry,[76] which would decide matters referred

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74 *See* text accompanying notes 39 to 43 *supra.*

75 *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking,* 60 CALIF. L. REV. 1276, 1317-18 (1972).

76 21 C.F.R. § 13 (1978). An authority somewhat analogous to the science court and the Public Board of Inquiry has been proposed to adjudicate claims by individuals who are damaged by toxic substances. *See* Soble, *A Proposal for the Administrative Com-*

to it by the FDA Commissioner in his discretion or by a person who has a right to and waives a formal evidentiary public hearing.[77] Although the Board functions as an administrative law tribunal, its procedures are closely analogous to those contained in the science court proposal.

Three judges possessing scientific expertise would conduct a scientific inquiry "in order to reach a reasonable decision that is sound from a medical, scientific, and technical standpoint."[78] The Board would supervise informal written and oral presentations of data.[79] Under it, legal questions would be referred to the Chief Counsel for the Food and Drug Administration.[80] After the conclusion of the proceeding, the judges are to deliberate and issue specific findings and a detailed statement of the reasoning on which its conclusions are based.[81]

Although the Board may be used only under special circumstances,[82] its operations could markedly advance the objectives of science court proponents, demonstrating the feasibility of resolving scientific issues in an adversarial forum.

B. *Congressional Determination of Scientific Issues*

Science court advocates also hope to improve the transmission of information to Congress by use of the court procedure. Currently, when scientific evidence is controverted and is acknowledged to be a critical factual predicate of a congressional decision, there are a number of factors which militate against clarifying the evidentiary uncertainty. The congressional hearing is the principal forum in which scientists present statements

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pensation of Victims of Toxic Substance Pollution: A Model Act, 14 HARV. J. LEGIS. 683, 748-51 (1977).

77 21 C.F.R. § 13.1 (1978).

78 21 C.F.R. § 13.30(a) (1978).

79 21 C.F.R. §§ 13.30(c), (d), (e), (f) (1978).

80 21 C.F.R. § 13.30(h) (1978).

81 21 C.F.R. § 13.30(j) (1978).

82 21 C.F.R. § 13.1 (1978). Because of the Food and Drug Administration's practice of using summary adjudications to avoid formal evidentiary hearings, a party must first hurdle the summary adjudication barrier if he is to acquire a hearing right. *See* text accompanying notes 37 to 46 *supra. See generally* Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication,* 64 CALIF. L. REV. 14 (1976). At the date of this writing, no proceedings have been conducted before the Public Board of Inquiry.

and answer questions about the state of scientific knowledge bearing upon a policy issue.[83] To the science court advocate, the congressional hearing is not conducive to the clarification and resolution of politically salient scientific disputes.[84] Since they are concerned with legislative outcomes, hearings, by definition, expand the scope of their inquiries to include a broad spectrum of political, social, and economic issues. Scientists appearing before congressional committees may unavoidably mix statements of scientific knowledge with statements of policy in their testimony.[85] Under the committee procedure, rebuttals to prior testimony are generally made long after testimony is given, if at all. Furthermore, various advocates may selectively emphasize different facts or write from different assumptions in a process which implicates more than scientific concerns. Consequently, conflicting interpretations of scientific evidence may not be perceptible to congressmen presiding over the seriatim presentation of testimony. In addition, direct clash of

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83 For a description of congressional sources of information, *see* SCIENCE POLICY RESEARCH DIVISION, CONGRESSIONAL RESEARCH SERVICE, TECHNICAL INFORMATION FOR CONGRESS REPORT TO SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 92d Cong., 1st Sess. 473-82 (Comm. Print rev. ed. 1972) [hereinafter cited as TECHNICAL INFORMATION]. The congressional hearing may assume a number of forms including: interrogation at unstructured hearings; communications and prepared statements; submitting lists of questions to be answered in writing or in person; bringing together persons of conflicting views to engage in a dialogue; assembling a group of persons with various qualifications to testify in sequence; assembling a panel or roundtable discussion of persons with a variety of views. *Id.* at 510. For a discussion of the congressional committees with jurisdiction over scientific matters, *see* note 9 *supra*. *See also* Bresford, *Lawyers, Science and the Government*, 33 GEO. WASH. L. REV. 181, 194-97 (1964).

84 *See, e.g., Task Force Report, supra* note 4, at 653; *Controlling Technology, supra* note 4, at 506-07.

85 *See, e.g.*, Clark, *Expert Advice in the Controversy about Supersonic Transport in the United States*, 12 MINERVA 416, 421 (1973):

> Description of the anticipated loudness of the SST as being the "same as 50 jumbo jets," and of the effects of a 1 percent reduction in stratosphere ozone as the occasion of "10,000 new cases of skin cancer per year," were not designed to give the lay audience a complete understanding of the technical question; they were calculated to influence a choice of policy.

The collected case studies in TECHNICAL INFORMATION, *supra* note 83, reveal a number of instances where scientists offered testimony that extrapolated from scientific information to policy recommendation. *E.g., id.* at 41:

> In view of the actual field experience with battery AD-X2, which has been piled up in all parts of the country, it is absurd that the Bureau of Standards, with their inadequate laboratory tests, would even dare to ignore the excellent results obtained from a wealth of experience over a period of years.

scientific argumentation, when it does occur, may be incomprehensible to the congressman not trained in the sciences.[86] Even sharply honed, lucid presentation of scientific facts may leave congressmen with the perplexing choice of deciding between equally prestigious groups of scientists.

This difficulty of isolating and analyzing scientific controversies is further compounded by the politicized setting in which confrontations of scientists are staged. The hearing is most often conducted in the wake of heated professional debate over the issue in technical journals, scientific association meetings, local communities, and in the national media.[87] It is therefore not surprising that that by the time Congress is confronted with the issue, allegiances among scientists have already been formed and public sentiments have crystallized.[88] Once the scientist has made up his mind, he may well fuse his scientific and social rationales into one.

Procedures like the science court are therefore designed to avoid this mix by creating a highly structured proceeding to direct Congress' attention to the divergent scientific views which spawned the controversy. Even so, there are countervailing considerations which cast substantial doubt upon the utility of these procedures in the congressional hearing. Assuming that consideration of scientific issues may be divorced from purely political concerns, it is possible that such separate determination might cause others to infer that scientific issues should be entitled to more weight in the final balancing of costs and benefits. For example, a separate determination of the relationship between supersonic transport and the incidence of skin cancer resulting from depletion of the ozone layer could overshadow other environmental issues as well as economic, mili-

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86 Few congressmen have scientific understanding and it is unrealistic to expect them to comprehend conceptual arguments dealing with matters at the frontiers of scientific knowledge. *See, e.g., The Nature of Radioactive Fallout and its Effect on Man: Hearings Before the Joint Comm. on Atomic Energy,* 85th Cong., 1st Sess. (1957) (incorrect interpretation of radioactive fallout); Reiser, *Smoking and Health,* in KNOWLEDGE AND POWER 293, 300-07 (1966) (misunderstanding of concept of causality).

87 *See* sources cited at note 78 *supra.* The recent Congressional effort to establish guidelines for DNA research exemplifies this process.

88 *See* TECHNICAL INFORMATION, *supra* note 83, at 507-08 (sensationalism and congressional decision process); Green, *The Resolution of Uncertainty,* 12 NAT. RES. J. 182, 185 (1972).

tary, and technical concerns.[89] In cases involving scientific issues tangential to the larger controversy, separate procedures for the consideration of scientific issues would be an unwarranted expenditure of resources.[90] Indeed, if production of the SST depended solely upon military and economic considerations, a science court procedure to consider its attendant risk of increased incidence of skin cancer would contribute little to deciding the issue. Congressional resort to science court procedures in such events would be of little use when the scientific issue could determine the political outcome.

In search of alternative procedures, Congress has already created a variation on formal court procedures. The Office of Technology Assessment was designed specifically to provide Congress with information about the consequences of technological innovation.[91] The Office is responsible for conducting

89 *Cf.* Bazelon, *Coping With Technology Through Law*, 62 CORNELL L. REV. 817, 825; Kantrowitz, *The Science Court Experiment: Criticisms and Responses*, BULL. ATOM. SCIENTISTS, April 1977, at 43, 46. The risk of overvaluing the scientific component assumes an inability to assign weights to values less easily quantified. *See generally* Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 625-33 (1973); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 75-105 (1972); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1361-65, 1368-76, 1381-83, 1389-93 (1971). *See also* Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L. J. 1315 (1974).

90 In the SST controversy, the economic and military issues of deployment were accorded more attention, if not more weight, in the congressional debate. *See* Clark, *Expert Advice in the Controversy About the Supersonic Transport in the United States*, 12 MINERVA 416 (1974); Casper, *Technology Policy and Democracy*, 194 SCIENCE 29 (1976).

91 For a brief description of the function of the Office of Technology Assessment *see* note 9 *supra*. The statutory responsibilities of the Office of Technology Assessment are to:

> (1) identify existing or probable impacts of technology or technological programs;
> (2) where possible, ascertain cause-and-effect relationships;
> (3) identify alternative technological methods of implementing specific programs;
> (4) identify alternative programs for achieving requisite goals;
> (5) make estimates and comparisons of the impacts of alternative methods and programs;
> (6) present findings of completed analyses to the appropriate legislative authorities;
> (7) identify areas where additional research or data collection is required to provide adequate support for the assessments and estimates described in paragraph (1) through (5) of this subsection. . . .

Technology Assessment Act of 1972, Pub. L. No. 94-484, 86 Stat. 797 § 3(c). A substantial amount of literature on the general subject of technology assessment is compiled in TECHNICAL INFORMATION, *supra* note 83, at 781-845.

studies on selected topics in order to recommend a policy choice that would yield the optimum long-term ratio of benefits to costs.[92] The analysis of scientific facts is merely one stage in a process of forecasting political, social, and economic consequences of technology.[93] Time and resource constraints, however, foreclose searching inquiry of scientific facts. Furthermore, scientific facts are susceptible to entanglement with value judgments since the end product of technology assessment is by definition a policy recommendation.[94]

In cases such as this, political issues are simply too pervasive to be divorced entirely from the review of scientific opinions. And the drawbacks of extensive costs and elaborate procedures are likely to add little to the resolution. Despite these obvious limitations of science court procedures in most instances of con-

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92 *See* HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 91st Cong., 1st Sess., REPORT OF THE NATIONAL ACADEMY OF SCIENCES, TECHNOLOGY: PROCESSES OF ASSESSMENT AND CHOICE 20 (Comm. Print 1969):

> The fact is that, with respect to major technological applications, we lack criteria to guide the choice between efficient resource allocation, ordinarily achieved best through some form of market mechanism (improved as necessary to compensate for external costs and benefits), and other objectives, usually achievable only through non-market mechanisms for expressing value preferences. Because we have a great many values other than economic efficiency, and no transactions in them that confront buyers and sellers, the idea of attempting to compute 'net social benefits and costs' makes sense only as a very rough first approach.

There are a number of widely divergent views upon how technology assessment should be defined. *See, e.g.,* Katz, *Decision-Making in the Production of Power,* SCIENTIFIC AMERICAN, Sept. 1971, at 191-92; Daddario, *Technology Assessment — A Legislative View,* 36 GEO. WASH. L. REV. 1044, 1046 (1968); Green, *Technology Assessment and the Law: Introduction and Perspective,* 36 GEO. WASH. L. REV. 1033, 1035 (1968).

93 Although scientific facts underlie each stage of a technology assessment, scientific facts would be independently examined only to "ascertain cause-and-effect relationships" and to "identify areas where additional research or data collection is required." Technology Assessment Act of 1972, Pub. L. No. 94-484, 86 Stat. 797, §§ 3(c)(2), (7). For an illustration of the minor role to be played in technology assessment by purely scientific inquiry, *see, e.g.,* Oppenheimer & Lambright, *Technology Assessment and Weather Modification,* 45 S. CAL. L. REV. 570, 577-78 (1972). *See also* Coates, Examples of Technology Assessments for the Federal Government, (Staff Discussion Paper 208, George Washington University 1970).

94 This criticism has been voiced repeatedly by Professor Harold Green. *See* Green, *Limitations on Implementation of Technology Assessment,* 14 ATOM. ENERGY L.J. 59, 64 (1972); Green, *The Role of Law and Lawyers in Technology Assessment,* 13 ATOM. ENERGY L.J. 246, 255-56 (1971); Green, *Technology Assessment and the Law: Introduction and Perspective,* 36 GEO. WASH. L. REV. 1033, 1041-42 (1968). *See generally* COMMISSION ON INFORMATION AND FACILITIES, THE OFFICE OF TECHNOLOGY ASSESSMENT: A STUDY OF ITS ORGANIZATIONAL EFFECTIVENESS, H.R. DOC. No. 538, 94th Cong., 2d Sess. (1976).

gressional decisionmaking, congressional committees can nevertheless selectively adapt some of the proposed science court procedures. Committee staff can prepare reports itemizing controverted scientific issues and summarizing opposing viewpoints. Congress can in turn elicit information from scientists through means other than the unstructured hearing; a witness may be asked to prepare written responses to designated questions or simply to participate in a debate with a scientist who holds a contrary scientific judgment. Only in a select case of politically significant, narrowly focused scientific issues would an improvement in decisionmaking appear likely to result from a *full-scale* science court proceeding.

C. *Judicial Resolution of Scientific Facts*

The science court proponents do not purport to substitute science court procedures for those applied by the judiciary. Nevertheless, the judicial courts offer substantial insight into ways of policing congressional and administrative activities. The manner in which courts have traditionally resolved questions of scientific uncertainty in itself affords a useful guideline to science court procedures.

Most judges and most commentators acknowledge the incompetence of judges to decide matters of scientific uncertainty. Yet judicial requirements still often mandate a clear agency delineation of scientific fact before a decision can be reached.[95] When confronted with scientific issues, courts will

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95 *See, e.g.*, Bazelon, *Coping With Technology Through the Legal Process*, 62 CORNELL L.J. 817 (1977) (judges are, for the most part, technically illiterate) [hereinafter cited as *Coping with Technology*]. Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL REVIEW 375, 390 (1974) [hereinafter cited as *Courts and Rulemaking*]; Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1977) [hereinafter cited as *Environmental Decisionmaking*]; Whitney, *Technical and Scientific Evidence in Administrative Adjudication*, 45 CIN. L.J. 37 (1976). The Supreme Court, in declining to exercise its original jurisdiction in a suit brought by the State of Ohio against companies incorporated in Michigan, Delaware, and Canada to abate an alleged nuisance observed:

> . . . [T]his Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. . . . We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention

generally not overturn an agency determination.[96] Instead, a court will require that the agency decision comply with certain procedural requirements in reaching its factual determination.[97]

The extent to which reviewing courts defer to agency findings varies with the complexity of scientific fact.[98] In *Amoco Oil v. Environmental Protection Agency,*[99] the Circuit Court of Appeals for the District of Columbia framed a distinction between general factual issues and factual issues at the frontiers of

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to those controversies for which this Court is a proper and necessary forum.

Ohio v. Wyandotte Chemical Corp., 401 U.S. 493, 505 (1971) (alternative holding). *See also* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 1197, 1212-13 (1978), Federal Power Commission v. Florida Power and Light Co., 404 U.S. 453, 463 (1971); Weyerhauser Co. v. Costle, 590 F.2d 1011, 1026-27 (D.C. Cir. 1978).

96 A reviewing court will generally not make an independent finding of fact. According to Judge Bazelon:

> Where administrative decisions on scientific issues are concerned, it makes no sense to rely upon the courts to evaluate the agency's scientific and technological determinations; and there is perhaps even less reason for the courts to substitute their own value preferences for those of the agency, to which the legislature has presumably delegated the decisional power and responsibility.

Coping With Technology, supra note 95, at 822. In a series of cases in the Circuit Court of Appeals for the District of Columbia, the line between scrutiny of agency procedures and scrutiny of scientific facts is blurred, if not obliterated. *See, e.g.,* Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 547 F.2d 633 (D.C. Cir. 1976); Environmental Defense Fund, Inc. v. EPA, 510 F.2d 1292 (D.C. Cir. 1975); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); International Harvester v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). *Cf.* text accompanying notes 98 to 115 *infra.*

97 The procedures to be followed in agency rulemaking proceedings are specified in the Administrative Procedure Act, 5 U.S.C. § 553 (1976). For a general description of the required proceedings, *see Courts and Rulemaking, supra* note 95, at 380. *See generally* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues,* 71 MICH. L. REV. 111 (1972); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking,* 60 CALIF. L. REV. 1276 (1972); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 921 (1965).

98 Both judges and commentators have recognized the necessity of scaling judicial review to the complexity of the underlying facts. *See, e.g., Courts and Rulemaking, supra* note 95, at 383 n.34 ("Courts should require the agency to operate the three-step procedure of § 553 in a manner sensitive to the empirical complexities at stake"); Comment, *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard,* 84 YALE L. J. 1750 (1975).

99 501 F.2d 722 (D.C. Cir. 1974).

scientific knowledge. In rulemaking proceedings, the former must be explained in sufficient detail to permit the court to ascertain the "fundamental rationality" of the regulations, whereas the latter must only be explained by "adequate reasons and explanations."[100] The less probative mode of review for facts at the frontiers of scientific knowledge is firmly grounded in logic: an agency cannot be expected to elucidate that which is uncertain. Thus, while courts have not abdicated their responsibility to review, they have, of necessity, simply scaled their review to fit the level of scientific complexity.[101]

Recent judicial opinions indicate that courts have also developed other methods to facilitate judicial control over scientific controversies. The first of these methods is the doctrine that a risk of harm, although not capable of scientific verification, may be sufficient to trigger judicial sanctions. In *Ethyl Corporation v. Environmental Protection Agency,*[102] the Circuit Court of Appeals for the District of Columbia upheld the issuance of regulations[103] pursuant to the Clean Air Act[104] to reduce the content of lead in gasoline. Under the Clean Air Act, the Administrator was authorized to promulgate regulations that would control any "fuel additive . . . if any emission products of such fuel additive will endanger the public health or welfare. . . ."[105] The court ruled that the Administrator of EPA

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100 *Id.* at 741. In *Amoco,* the Circuit Court of Appeals for the District of Columbia upheld the issuance of regulations which prohibit the use of leaded gasoline in automobiles fitted with catalytic convertors. *See generally* Note, *Environmental Defense Fund v. EPA,* 25 CATH. U. L. REV. 178, 186 (1975).

101 *See* sources cited at note 98 *supra.* The choice to undertake a less penetrating review of scientific facts is, of course, variant with the technical skill of the judge. To increase judicial capabilities for penetrating agency determination of scientific facts, Judge Leventhal has proposed that courts resort to the use of "scientific law clerks." *Environmental Decisionmaking, supra* note 95, at 550, 553. *But cf.* Webster, *The Use of Economics Experts as Witnesses in Antitrust Litigation,* 17 THE RECORD 456 (1962); Kaysen, *An Economist as the Judge's Law Clerk in Sherman Act Cases,* 12 ABA ANTITRUST SECTION 43 (1958); Webster & Hazeland, *The Economist in Chambers and in Court, id.* at 50. An alternative suggestion is to educate judges in technical matters. Smith, *Does the Environment Need a Court?,* 57 JUDICATURE 150, 153 (1973); Smith, *The Environment and the Judiciary,* 3 ENVT'L AFF. 627, 639-40 (1974).

102 514 F.2d 492 (8th Cir. 1975).

103 The final regulations promulgated by EPA are found at 38 Fed. Reg. 33,734 (1974), 40 C.F.R. §§ 80.1-.26 (1975).

104 Clean Air Act § 211(c)(1)(A), 42 U.S.C. § 1857(f)-6c(c)(1)(B) (1976).

105 42 U.S.C. § 1857 (f)-6(c)(1) (1976).

was authorized to determine the significance of a risk from "inconclusive but suggestive results of numerous studies," even though no single scientific study supported his determination.[106]

In *Reserve Mining Co. v. Environmental Protection Agency,*[107] the Eighth Circuit Court of Appeals enjoined the discharge of taconite tailings into Lake Superior because of the asbestos fibers contained in the tailing presented a risk of cancer. The court anchored its conception of risk in the language of the Federal Water Pollution Control Act,[108] which enjoined conduct "endangering the public health or welfare."[109] The court acknowledged that the carcinogenicity of asbestos was unproved[110] but held that a "reasonable medical concern" was a sufficient basis upon which to predicate injunctive relief.[111] The existence of scientific uncertainty did not preclude courts from resolving conflicts between parties. On the contrary, the courts elevated uncertainty itself into a legally cognizable fact on which to base a judicial decision.

The courts have also fashioned a second method to alleviate the difficulty of proving harm under conditions of scientific uncertainty by shifting the allocation of the burden of proof. In both *Ethyl* and *Reserve Mining,* proof that a *risk* of harm exists cannot be refuted by the argument that the harm *itself* cannot be proven.[112] The burden of proving the absence of risk thus is

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106 514 F.2d at 505-06.

107 514 F.2d at 492. For a history of the lengthy *Reserve* litigation *see* Note, *Reserve Mining — The Standard of Proof Required to Enjoin an Environmental Hazard to the Public Health,* 59 MINN. L. REV. 893, 894 n.3 (1975); Note, *Projected Environmental Harm: Judicial Acceptance of a Concept of Uncertain Risk,* 53 J. URB. L. 497, 519 n.119 (1976); Note, *Reserve Mining Co. v. Environmental Protection Agency: Scientific Uncertainty and Environmental Threats to Human Health,* UTAH L. REV. 581, 581 n.6 (1975).

108 33 U.S.C. § 1160(g)(1) (1976).

109 33 U.S.C. § 1160(d)(1) (1976). Since the initiation of the *Reserve Mining* litigation, the FWPCA has been amended extensively. *See* 33 U.S.C. §§ 1251 (1976). Under the amended Act, the Administrator of the EPA must find "imminent and substantial danger to the environment," rather than the "will endanger" standard of the old Act. *See* 33 U.S.C. §§ 1321(b)(2)(A), 1362(13), 1364 (1976).

110 514 F.2d at 529.

111 *Id.*

112 For extensive discussion of the relationship between the concept of an uncertain risk and the burden of proof, *see* Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking,* 48 S. CAL. L. REV. 371 (1974). *See also* Krier, *Environmental Litigation and the Burden of Proof,* in LAW AND THE ENVIRONMENT 105,

placed upon the party responsible for the alleged harm. When scientific evidence is available and more accessible to the party creating the risk, full explication of scientific facts is accomplished by shifting the burden of proof onto it. However, when there is a high degree of scientific uncertainty concerning the inferences to be drawn from scientific evidence, shifting the burden of proof may be tantamount to enactment of a general principle of resource distribution. Since a party in this situation causing alleged harm cannot prove the absence of a causal relationship, a shift in the burden of proof will effectively shift resources from that party to the allegedly harmed party.[113]

This result can generally be avoided. It should be apparent to the party causing the alleged harm that it is futile to prove a negative, the absence of a risk of harm. Instead, the point of controversy should be drawn to the quantum of proof needed to establish the existence of a risk. To resolve controversies of this nature, courts will be required to develop criteria for determining when an agency has made a sufficient *prima facie* case to establish a risk of injury. Although courts may not decide questions of scientific fact, they will thus be drawn into scientific disputes at a different level of analysis. The problem with judicial review of evidence involving scientific uncertainty is therefore not whether a court will review scientific disputes *but*

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107 (M. Baldwin & J. Page eds. 1970); Note, *Environmental Defense Fund v. EPA*, 25 CATH. U. L. REV. 178, 184-91 (1975); Comment, *Reserve Mining Co. v. Environmental Protection Agency: Scientific Uncertainty and Environmental Threats to Human Health*, 1975 UTAH L. REV. 581, 588, 591-92 (1975). Judge Leventhal suggests that courts may increasingly resort to shifting the burden of proof to deal with conditions of scientific uncertainty. *Environmental Decisionmaking, supra* note 95, at 536.

113 This argument is adumbrated by Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking*, 48 S. CAL. L. REV. 371, 415-16 (1974):

> When the issue is treated as whether an activity will cause injury to human health or to man's ability to use a resource and there is only evidence of a risk of future injury, it is likely that the activity will be allowed regardless of where the burden of going forward lies, so shifting that burden does not solve the problem. On the other hand, if the burden of persuasion were shifted and those undertaking an activity had to establish as part of their prima facie case that there will be no injury; i.e., that there is no risk, the result would be an irrational curtailment of resource use.

Cf. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2-6 (1960); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587 (1969). Gelpe and Tarlock argue that when information is unknown and unobtainable, the court should undertake a risk-benefit analysis. *Id.* at 425-26.

how courts will conduct that review within the limits of their expertise.

As previously discussed, judicial review of administrative findings of scientific fact is limited to scrutiny of the adequacy of the agency's investigation.[114] In reviewing administrative action, courts should require agencies to articulate the reasons for their decision to insure that an agency has carefully considered available evidence.[115] This requirement could be refined for scientific matters where courts need special assistance to determine whether a risk of harm has been fully considered and adequately proven. To demonstrate adequate investigation of the evidence bearing upon a risk of harm, agencies could be required to (1) identify the existence of controverted scientific issues; (2) estimate the extent of scientific uncertainty in the hypothesized causal relationship; and (3) explain the manner in which those issues were factored into the agency decision.[116] This description would parallel the statement of facts that a science court is designed to generate.[117] The articulation of scientific uncertainty would also provide a court with a systematic portrayal of those scientific facts which would otherwise be part of an administrative record comprised of an eclectic mix of facts and policy recommendations. By insisting that agencies comply with this requirement, a court would receive

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114 *See* text accompanying note 96 *supra.*

115 The requirement that an agency issue a reasoned decision has its source in the Administrative Procedure Act, 5 U.S.C. § 553 (1976). If an agency undertakes a rulemaking proceeding, it is required to "incorporate in its rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (1976). *Cf.* 5 U.S.C. § 557(c) (1976) (adjudication). For a discussion of the reasoned decision requirement in rulemaking, *see Courts and Rulemaking, supra* note 95. The "basis and purpose" statement required by the Administrative Procedure Act must be sufficiently detailed to allow searching judicial scrutiny of how and why the regulations actually were adopted. Amoco v. EPA, 501 F.2d 722, 741 (D.C. Cir. 1974). *See, e.g.,* Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 390-401 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 629-47 (D.C. Cir. 1973); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 849-55 (D.C. Cir. 1972); City of Chicago v. FPC, 458 F.2d 731, 741-45 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); Automotive Parts and Accessories Ass'n. v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). *See generally* K. DAVIS, ADMINISTRATIVE LAW § 16 (1958 & 1970 Supp.).

116 A related approach is advocated by Whitney, *Technical and Scientific Evidence in Administrative Adjudication,* 45 U. CIN. L. REV. 37, 50-55 (1976) (comprehensive agency impact statement).

117 *See* text accompanying note 19 *supra.*

manageable and comprehensive information about scientific uncertainty and hence permit an evaluation of the risk.

Utilization of this three-step requirement could also effect a partial synthesis of the divergent approaches to judicial review of scientific issues taken by Judge Leventhal and Chief Judge Bazelon of the Circuit Court of Appeals of the District of Columbia. Judge Leventhal has advocated that a reviewing court take a "hard look" at the "underlying decisions of the agency to satisfy itself that the agency has exercised a reasoned discretion."[118] The "hard look" approach requires that the judge penetrate the factual findings and technical conclusions of the agency.[119] Judge Bazelon takes a more restrained approach to the review of scientific and technical issues. To Judge Bazelon, the court should "establish a decisionmaking process that assures a reasoned decision that can be held up to the scrutiny of the scientific community and the public."[120] An agency description of fact, which satisfies the three-step requirement could only be assembled through a reasoned decisionmaking process. To formulate such a factual description, an agency would investigate all relevant evidence pertaining to scientific uncertainty. There would be no reason for the court independently to assess that evidence. Similarly, such a factual description would provide a reviewing court with the kind of information that would permit it to take a "hard look" at the agency's calculation of risk without having to decide scientific issues that are beyond its competence.[121]

Courts have not yet gone so far as to specify the structure and contents of a reasoned decision.[122] Indeed there exists considerable debate about the wisdom of judicially fashioning agency procedures.[123] Nevertheless, the judicially imposed requirement

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118 *Environmental Decisionmaking, supra* note 95, at 511.

119 *Id.*

120 Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir. 1975) (concurring opinion).

121 *See* opinions cited in *Coping With Technology, supra* note 95, at 822 n.19.

122 *See generally* cases cited at note 115 *supra.*

123 *See, e.g.,* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking,* 60 CALIF. L. REV. 1276, 1331-32 (1972); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform,* 118 U. PA. L. REV. 485, 536-37 (1970); Boyer, *Alternatives to Administrative Trial-Type Hear-*

of a "reasoned decision" could help judges comprehend administrative decisionmaking under conditions of scientific uncertainty and mirror the requirement of concise factual findings which science court procedures are designed to impose. Indeed, if the science court fails to materialize as an independent institution, such judicially induced innovations might be an alternative means for dealing with many of the problems addressed by the complexity of scientific issues in contemporary adjudication; mechanisms derived from the science court proposal could provide a procedural device for producing that data.

D. *Capabilities of Institutions for Resolving Scientific Issues*

As argued previously, the numerous forms in which science is debated can often more effectively resolve scientific disputes without resort to *all* of the proposed science court procedures. These procedures for resolving scientific disputes, however, must generally be tailored to the regulatory and adjudicative functions of different institutions. Yet, in cases where scientific evidence is critical to the design of administrative and legislative policy, systemic disabilities often prevent the clarification of scientific uncertainty that is necessary to provide decisionmakers with the best available information about the costs and benefits of policy choices. When such disabilities recur, it may therefore be reasonable to apply the full panoply of science court procedures to assist in the classification of scientific issues. A fundamental regulatory challenge is to determine that class of issues for which full-scale science court procedures would represent a cost-effective means of acquiring useful information for decisionmakers.

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ings for Resolving Complex Scientific, Economic and Social Issues, 71 MICH. L. REV. 111 (1972); *Courts and Rulemaking, supra* note 95, at 385-89. Requiring all agencies to issue science court opinions would entail an expenditure of agency resources that might otherwise be used on substantive programs. Moreover, the remedy of remanding the agency decision for further consideration does not ensure that the agency will on remand make a more substantial attempt to come to grips with the problem of scientific uncertainty. *See generally* Fuchs, *Agency Development of Policy Through Rulemaking,* 59 NW. U. L. REV. 781 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 721 (1965); Note, *The Federal Regulatory Agencies: A Need for Rules of Decision,* 50 VA. L. REV. 652 (1964).

II. Formulation of Issues Appropriate for Science Court Procedures

A. *Factors for Selecting Science Court Issues*

Limitations of existing institutions provide a basis for defining those cases where science court procedures would be appropriate to resolve questions of scientific fact. Five criteria are critical to the invocation of science court procedures once a scientific controversy becomes sufficiently intense. First, the selected issue should be the subject of scientific controversy. Subjecting routinized, uncomplicated issues to the administratively detailed and lengthy process of a science court procedure would be a waste of resources.[124] If there are no sharply defined disputes, but only slight differences of opinion within one view, the court procedure is unnecessary. In such an event, written positions or committee discussions would likely be enough to outline the underlying disagreements; the adversarial process would probably contribute to the process only minimally at considerable expense. Therefore, full-scale science court procedures would be appropriate only when there are prominent scientists on opposing sides of the scientific issue;[125] rational bases for drawing conflicting inferences from experimental evidence; and experiments which have been the subject of methodological or substantive challenges or which yield conflicting results. Only after these criteria have been satisfied will contending positions have become sufficiently crystallized to warrant the potentially lengthy and costly full-scale science court procedures. In such identifiable controversies, there would be relatively well-defined points of contention and scientists prepared publicly to advocate their interpretation of available evidence.

Second, the selected issue must be politically salient; that is, it (1) must be decisive for all or a part of a policy choice; and (2)

124 To justify a decision to convene a science court, the court must be cost-effective relative to other procedures for deciding scientific facts and must be convened to decide an issue that otherwise would be decided in a manner that would conflict with norms of political accountability and procedural fairness.

125 Science Court Colloquium, *supra* note 4, at 215. A number of recent scientific disputes would fit this criteria, *e.g.*, the recombinant DNA research guidelines. *See* note 73 *supra*.

must involve substantial resource expenditures. Because full-scale science court procedures are likely to be costly they should apply only when political and economic stakes are high and the benefits of more comprehensive information outweigh the costs of a lengthy decisionmaking process.[126]

Third, the selected issue must be manageable in a narrowly focused proceeding. Science court advocates have drawn a distinction between bipolar and multipolar issues and have recommended that science court procedures be applied only to bipolar issues.[127] In practice, this distinction is meaningless. Any multipolar issue can be phrased in bipolar terms, and any bipolar issue can be expanded or atomized into multipolar issues. The question "Would SST flights increase the incidence of skin cancer?" is bipolar only in that it anticipates a dichotomous answer: either yes, it increases the incidence of cancer, or no, it doesn't. This answer, however, depends on the presentation of multipolar issues. Which among a number of causes best accounts for the effect of the SST upon the ozone layer? Which among a number of causal explanations best accounts for the effect of the thinning of the ozone layer upon human skin? The bipolar-multipolar distinction should therefore be viewed as an attempt to restrict science court procedures to issues which can be managed in a single proceeding.[128]

For example, the case of nuclear power licensing has many scientific issues that are politically salient. However, it would not be administratively practicable to address all of them in a single science court proceeding.[129] Each issue should be treated

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126 In economic terms, the marginal cost of procuring additional information should be at least equal to the marginal benefits to be derived from making decisions on the basis of that information. Economic efficiency, however, is not the only criterion by which the need for a science court can be justified. *See* text accompanying note 23 *supra.*

127 *Task Force Report, supra* note 4, at 653-54.

128 *Id.* at 654: "it will be valuable to choose an issue in which two case managers can fairly represent all facets of the controversy."

129 The nuclear power controversy is one such example. *See* Statement of John Holdren, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 170-79. *See also* Casper, *Technology Policy and Democracy,* 194 SCIENCE 29 (1976) (ABM debate); Nelkin, *Thoughts on Proposed Science Court,* NEWSLETTER ON SCIENCE, TECHNOLOGY AND HUMAN VALUES, Jan. 18, 1977, at 22-23. However, discrete nuclear power plant issues could be easily managed in a separate proceeding. *Cf.* Note, *The Use of Generic*

separately in order to obtain available scientific evidence, the degree of scientific uncertainty which is associated with that evidence, and the inferences which may reasonably be drawn from that evidence. Conceivably, several science court proceedings could be conducted at the same time to deal with the relatively discrete scientific issues which are raised in a power plant licensing. Of course, the process of isolating scientific issues should not be undertaken at the cost of overlooking the interrelationships of issues which may be the subject of separate science court procedures.

Science court procedure might also be appropriate to provide a foundation for assessing the other political, economic, and social issues.[130] Even in complex policy problems, there are often sufficiently specialized and narrowly defined questions of a technical nature in which factual determinations can be made. At the very least, parties in a science court can outline the identifiable impact of certain events as well as possible alternatives for the attainment of similar scientific results. To illustrate, once scientific proof is mustered on the effect of a dam upon an endangered species, consideration of whether to construct a dam becomes appropriate.[131]

Express statutory directives requiring particular scientific findings before subsequent policy decisions are made would be one means for ensuring manageable proceedings. A number of current statutory provisions direct agencies to consult an independent advisory committee before undertaking actions.[132] In a

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Rulemaking to Resolve Environmental Issues in Nuclear Power Plant Licensing, 61 VA. L. REV. 869 (1975); Lieberman, *Generic Hearings: Preparation for the Future*, 16 ATOM. ENERGY L.J. 141 (1974).

130 *See* W. LOWRANCE, OF ACCEPTABLE RISK, SCIENCE AND THE DETERMINATION OF SAFETY 98 (1976): "The components of summary decisions can often be 'factored out' and appraised independently before the larger decisions are made. The safety of several things can often be compared without reference to cost, efficacy, or other variables." *See also* note 14 *supra*.

131 This example is drawn from the Sixth Circuit decision upholding an injunction issued against the construction of a dam in the designated critical habitat of the snail darter. Tennessee Valley Authority v. Hill, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978).

132 *E.g.*, 21 U.S.C. § 360(c)(b)(1) (1976) (Medical Devices Advisory Committee) 21 U.S.C. § 346(a)(3) (1976) (Pesticide Chemicals Advisory Committee drawn from members selected by the National Academy of Sciences); 42 U.S.C. § 263f(f)(1)(A) (1976) (Technical Electronic Product Radiation Safety Standards Committee); 21

related type of statutory provision, Congress has required several agencies to promulgate standards and policies on the basis of the latest scientific knowledge.[133] Under a third type of statutory provision, Congress has directed that certain scientific findings will trigger specific policy outcomes. Under the Delaney amendment,[134] for example, Congress already imposes an absolute prohibition on food additives that are found to induce cancer.[135] Accordingly, the statute is designed to focus attention — at least initially — on scientific criteria rather than economic, political and social issues. The Food and Drug Administration is not permitted to balance risks and benefits so that "objective" findings may more easily be made. Each of these statutory provisions reflects a judgment that scientific issues can be effectively managed independent of the larger political process. Under these provisions, science court procedures could be readily manageable and could yield outcomes that would be incorporated into public decisionmaking.

U.S.C. § 376(b)(5)(D) (1976) (Color Additives Advisory Committee); 42 U.S.C. § 1857f-1(c) (1976) (National Academy of Sciences investigation of automobile emission control technology); 42 U.S.C. § 1857(e) (1976) (Air Quality Advisory Board); 10 C.F.R. § 2039 (1957) (Advisory Committee on Reactor Safeguards); 15 U.S.C. § 2077 (1976) (Product Safety Advisory Council); 7 U.S.C. § 136d(d) (1976) (National Academy of Sciences Advisory Committee to decide "relevant questions of scientific fact"); 33 U.S.C. § 1375 (1976) (Effluent Standards and Water Quality Information Advisory Committee). Although this list of advisory committees is not exhaustive, it does indicate that there are a number of institutional settings in which science court procedures could be implemented. As noted in the text accompanying notes 68 & 69 *supra*, the National Academy of Sciences is exempt from the Federal Advisory Committee Act and has discretionary authority to manage its own procedures. Additionally, a number of administrative agencies have adopted regulations for the conduct of advisory committees. *See* note 63 *supra*. One further restraint upon the advisory committees is that the enabling legislation for most of them specifies the manner in which they are to perform their responsibilities. Consequently, legislative action and agency regulations would be necessary to implement science court procedures within most of these statutory advisory committees. However, regulatory agencies could independently undertake to implement science court procedures in committees not subject to these restrictions. Administrative agencies also could form advisory committees that would follow science court procedures. *Cf.* Statement of Russell Train, SCIENCE COURT COLLOQUIUM, *supra* note 4, at 68 (EPA interested in using science court procedures).

133 *E.g.*, National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c) (1976) (jurisdiction may be conferred upon group with "special expertise" with respect to any environmental impact involved); 42 U.S.C. §§ 1857c-3, 4 (1976) (primary and secondary air ambient standards must reflect "the latest scientific knowledge"); 29 U.S.C. § 655(b)(5) (1976) (available scientific data).

134 *See* text accompanying notes 54 to 55 *supra*.

135 *See* sources cited in note 55 *supra*.

Fourth, there must be sufficient evidence available on a scientific issue to avoid indulging in overly speculative deliberation. Data must enable scientist-judges to have a reasonable basis for judging the merits of a disputed scientific fact.[136] Indeed, as defined in the *Presidential Task Force Report,* a fact must be a result, or more frequently the anticipated result, of an experiment or an observation of nature.[137] The requirement of sufficient evidence should not mean, however, that there must be extensive experimental research to warrant the invocation of science court procedures. In one case, for example, the Administrator of the Food and Drug Administration drew the inference from *one* controversial experiment that the dye presented a risk of cancer and decided to ban the dye.[138] A single experiment could therefore be a basis for resorting to science court procedures.[139]

Fifth, scientific issues must be considered before resources have already been committed to a policy outcome. If incremental decisions have left a decisionmaker with no practicable alternative but to proceed with a course of action, the science court procedures would serve no useful purpose.[140] Premature discussion of a scientific issue could skew a decision based on facts that were subsequently disproved between the time of science court consideration and the time of policy choice.[141]

B. *Separation of the Scientific Factual Issue from the Value Judgment*[142]

The cornerstone of the science court proposal is that rational,

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136 Requiring a reasonable basis for assigning a probability estimate may inhibit participants from overemphasizing the inference that could be drawn from scientific evidence. *See Coping With Technology, supra* note 95, at 827.

137 *Task Force Report, supra* note 4, at 656.

138 *See* text accompanying notes 49 to 50 *supra. See also* Kirschman, *Toxicology — The Exact Use of an Inexact Science,* 31 FOOD, DRUG, COSM. L.J. 455, 461-62 (1976).

139 *E.g.,* Oser, *An Assessment of the Delaney Clause After 15 Years,* 29 FOOD, DRUG, COSM. L.J. 201, 203 (1974) (cyclamate experiment); Byerley, *So Are They All — All Honorable Men: A Review of the DES Revocation Cases to Date,* 29 FOOD, DRUG, COSM. L.J. 460, 462 (1974) (DES experiment).

140 *See generally* Lindblom, *The Science of "Muddling Through,"* in READINGS ON MODERN ORGANIZATIONS 154 (A. Etzioni ed. 1969).

141 *E.g.,* Casper, *Technology Policy and Democracy,* 194 SCIENCE 29 (1976) (ABM and SST scientific issues were not perceived at the outset of public debate).

142 The discussion which follows suggests a number of improvements upon the pro-

politically responsible decisionmaking is achieved by attempting to separate facts from values in the consideration of scientific evidence. Facts and values are analytically distinct, but in the real world, the distinction is often elusive. A scientist's perception of evidence is indelibly colored by accumulated evidence, training, inherited traits, and social milieu. This amalgam of influences in turn frequently leads to the interpretation of evidence in accordance with preconceived expectations.[143] Therefore, science court procedures can be counted on only to minimize the making of policy judgments by unaccountable scientists.[144]

Accepting this as a premise, the science court procedures do not adequately specify how factual issues are to be extracted from value-laden policy questions. In the proposed procedures, a decisionmaker (*e.g.*, the administrator of a regulatory agency) is expected to refer a value-laden issue to an institution responsible for conducting science court procedures.[145] Case managers are then assigned the task of identifying scientific facts pertinent to the underlying scientific issue.[146]

Relying upon a decisionmaker to formulate a suitable value-laden question is obviously problematic. The question itself gives no guidance as to the appropriate scope of inquiry into scientific facts. As in the context of science advisory committees, broad directives will simply give unaccountable scientists greater leeway to contemplate policy issues when scientific issues are under debate.[147] The functional division of fact and value may itself be somewhat impractical; the existence of scientific uncertainty may preclude total reliance upon science

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posed science court procedures. Two recent legal articles have also critically examined these procedures. *See* Martin, *The Proposed Science Court*, 75 MICH. L. REV. 1058 (1977); Talbott, *"Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact"?* 8 ENVT'L L. 827 (1978).

143 *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); Hobermas, *Science and Technology as Ideology*, in TOWARDS A RATIONAL SOCIETY (1971); Barnes, *Internal and External Factors in the History of Science*, in SCIENTIFIC KNOWLEDGE AND SOCIOLOGICAL THEORY (1974).

144 *See Controlling Technology*, *supra* note 4; *Task Force Report*, *supra* note 4. *See also* note 14 *supra*.

145 *See* text accompanying notes 23 & 24 *supra*.

146 *See* text accompanying note 10 *supra*.

147 *See* text accompanying notes 47 to 52 *supra*.

to supply the factual foundation of a policy choice. Nonetheless, it is of paramount importance that there be some procedure for screening the question submitted by the agency to insure that it (1) forecloses scientists from considering extra-scientific issues; (2) does not imply the existence or nonexistence of pertinent controverted facts; (3) encompasses the range of scientific evidence needed to answer the scientific issue; and (4) permits identification of the underlying scientific issue or issues.

A screening procedure should be designed to identify the component scientific issues which are implicit in a value-laden question. Consider the following hypothetical question posed by Commissioner Kushner of the Consumer Products Safety Commission: "Should smoke detectors incorporating the radioactive element Americium be banned for sale to consumers for use in their homes because of an unreasonable risk of harmful radiation effects?"[148] Some component scientific issues of this value-laden question are the following:

- How much Americium is likely to be incorporated in such a device?
- What are the characteristics of its radiation?
- What level of radiation from the device is a consumer likely to encounter under reasonably foreseeable circumstances?
- How does this compare to the level and nature of radiation the consumer is normally subjected to from other sources?
- What is known about the potential harmful effects of this incremental increased exposure to radiation?"[149]

This list of scientific components is not exhaustive but is illustrative of the problem of translating value-laden questions into scientific issues. A related problem is that of identifying the component parts of the scientific issues. In answering "What is known about the potential harmful effects of this incremental increased exposure to radiation?" relevant sub-issues might include:

- What experimental evidence is available?

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148 Address by Lawrence Kushner, National Bureau of Standards Colloquium (November 19, 1976), prepared text at 3.

149 *Id.*

- What assumptions were made in these experiments?
- How valid are the assumptions?
- What methods of control were employed?
- How valid and accurate are these methods of control?
- What inferences might be drawn from this experimental evidence in light of the assumptions and methodology?

If mediation and adversary proceedings in the science court are to avoid the kind of unstructured inquiry that prevails among science advisory committees, a blueprint of pertinent scientific issues must be drawn in advance of those procedures. If the issues on both sides bear little relation to one another, the adversary process cannot be expected to clarify issues and the science court should not be utilized. For narrowly defined technical questions, such as an inquiry conducted within the confines of the Delaney amendment, the compilation of a blueprint would likely be unnecessary. With fewer points for the injection of value judgments, procedural guidelines could be relaxed.[150] When that is not the case, however, the case managers should collaborate to define the relevant factual issues and assure that there is a sufficiently direct clash of contending arguments to be practicable in a science court procedure.

It is, of course, possible that case managers anticipating an adversary proceeding may seek to structure and choose those issues that would substantiate their positions or simply overlook many pertinent issues. Because of that possibility, arguably third parties should be encouraged to prepare and submit lists of pertinent issues and sub-issues to ensure the inclusion of all relevant scientific viewpoints. This innovation, modeled on notice and comment rulemaking in administrative agencies,[151]

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150 It is unrealistic to expect that all values may be distilled from a proceeding that will focus on a scientific aspect of a controversial public policy issue. The objective would be to strike a balance between procedures that contribute to value neutrality and those that contribute to administrative flexibility.

151 The basic framework of notice and comment rulemaking is the Administrative Procedure Act, 5 U.S.C. § 553 (1976). The notice and comment procedures vary among regulatory agencies. *See generally* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1278 (1972); *Courts and Rulemaking, supra* note 95; Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

would help to defuse the argument that science court managers are vested with authoritarian powers[152] to the neglect of many important interests outside their personal purview.

The participation of third parties would, however, pose substantial problems of manageability. Benefits of the science court must therefore be qualified by the realization that exploration of scientific issues alone will by definition facilitate a more open discussion of unresolved scientific issues at the expense of other relevant concerns. By limiting the court to a narrow purpose, the procedures by nature — if not in fact — preclude encroachment into broad policy value judgments and special determinations.

In a world in which there is no unitary public interest, the science court thus represents only one imperfect — but plausible — way of bringing abstruse scientific views within the domain of judicial and public review. While it would be ideal to include all possible views, considerations of manageability and cost call instead for reliance simply upon the parties to present opposing viewpoints. To do otherwise would detract substantially from the science court's design to provide a more simplified separate setting for the discussion of scientific issues. The participation of potential third parties should therefore be allowed, if at all, only for the submission of written statements

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152 A number of commentators have been critical of the science court on the ground that an elite group of scientists would be rendering judgments that would be dispositive of the larger value-laden issues involved. Callan, *The Science Court,* 193 SCIENCE 950-51 (1976); Kantrowitz, *The Science Court Experiment: Criticisms and Responses,* BULL. ATOM. SCIENTISTS, May 1977, at 48-49. This criticism overlooks the science court objective of avoiding the ultimate policy choices. To the extent that existing institutions leave policymaking in the hands of scientists, the criticism is a hollow one. A more refined criticism is that the authoritarian tendencies of the science court reside in the exclusion of other scientists from the process. *See* Abrams & Berry, *Mediation: A Better Alternative to Science Courts,* BULL. ATOM. SCIENTISTS, April 1977, at 50-53. The administrative law solution to this problem has been to permit public participation in administrative proceedings. *See generally* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1967 (1975); Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process,* 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings,* 81 YALE L.J. 359 (1972); Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 HARV. L. REV. 1815 (1975). A limited opportunity for interested scientists to place their own views before the science court could be accomplished by permitting scientists to submit prepared documents on the selected issues.

and evidentiary materials to case managers before the managers must submit the issue lists.

To minimize the problems of party bias further, however, a party relatively neutral to the proceeding, a "referee," should assemble and edit all issue lists. The referee should have the responsibility for striking out or rephrasing issues that embody *prima facie* value judgments as well as drafting the blueprint of issues that will be taken up by the science court. To guard against the risk of error, the blueprint should be issued in draft form to case managers and be made subject to their approval.

As proposed, the science court procedures require case managers to rank scientific issues in order of their importance to the policy decision.[153] This suggestion would seem clearly to contravene the objective of separating factual from value judgments and is therefore suspect. While it is unreasonable to assume that scientific issues can be so narrowly defined as to foreclose any allusion to policy considerations, particular efforts should be eliminated and the policymaker alone should be left to weigh the different factual findings.[154]

IV. Science Court Procedures

A. *Selection and Function of the Judge*

Highly qualified judges and unbiased experts who are competent to evaluate scientific evidence from outside their specialties would ideally preside over the science court.[155] The recommendation that scientific experts make findings of fact is not novel. Scientists have long been used in that capacity at the Nuclear Regulatory Commission reactor licensing hearings. These Atomic Safety and Licensing Boards, which conduct reactor licensing proceedings, are comprised of two technically qualified persons and a chairman skilled in administrative

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153 *See* text accompanying note 28 *supra.*

154 *Cf.* Statement of John Holdren, Science Court Colloquium, *supra* note 4, at 171-73. The decisionmaker may not be scientifically competent to assemble the component factual statements in a manner that would assist his policy choices. Consequently, there is a premium upon using language that can be readily understood by a decisionmaker.

155 *See* text accompanying note 26 *supra.*

law.[156] Like the science court judges, judges in the NRC are included to provide skilled technical minds necessary to probe complex scientific questions.[157] No one could, as many have regarding specialized courts, object that science court judges lack breadth of social vision;[158] to the contrary, science court judges would be instructed to stay within their carefully circumscribed spheres of expertise.

The proposed selection of judges from outside the disputed scientific field is designed to facilitate impartiality. No guidelines have been established, however, to determine when a scientist is sufficiently dissociated from his specialty to be an appropriate candidate for judge. The provision presumably anticipates the use of judges who research in the general area of science, rather than the specific field. For example, a cellular chemist rather than an atmospheric chemist might be selected to judge a proceeding dealing with the effect of SST flight upon the ozone layer. While the chemist will not be intimately acquainted with the field, his professional knowledge of scientific

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156 The statutory provision establishing these boards does not even specifically require a lawyer, but provides that one member "shall be qualified in the conduct of administrative proceedings." 42 U.S.C. § 2241(a) (1976). *See generally* Shapar, *Impact of Science and Technology on Law,* 28 FED. B. J. 291 (1968).

157 *Controlling Technology, supra* note 4, at 507; *Task Force Report, supra* note 4, at 653. *See generally The Adversary Proceedings: Is It Compatible With Technology? A Panel Discussion,* SCOPE, March 1977, at 25-37. *But see* Holdren, *The Nuclear Power Controversy and the Limitations of Decision-Making by Experts,* BULL. ATOM. SCIENTISTS, March 1976, at 20-22 (expertise does not contribute to decisionmaking when relevant evidence is uncertain and unavailable); *cf.* Gelpe & Tarlock, *The Uses of Scientific Information in Environmental Decisionmaking,* 48 S. CAL. L. REV. 371, 419-25 (1974). *See* sources cited at note 1 *supra.*

158 *See, e.g.,* Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary,* 37 A.B.A.J. 425 (1951). The concern over the narrow judicial horizons that may accompany expertise was the object of considerable debate in the context of a proposed environmental court. *See* Kiechel, *Environmental Court Vel Non,* 3 ENVT'L REP. (BNA) 50,013 (1973); Oakes, *Developments in Environmental Law,* 3 ENVT'L REP. (BNA) 50,001 (1973); Mines & Nathanson, *Preliminary Analysis of Environmental Court Proposal Suggested in the Federal Water Pollution Control Act Amendments of 1972,* in REPORT OF THE PRESIDENT, ACTING THROUGH THE ATTORNEY GENERAL, ON THE FEASIBILITY OF ESTABLISHING AN ENVIRONMENTAL COURT SYSTEM C-1, C-16 to 17 (1973); Whitney, *The Case for Creating a Special Environmental Court System,* 14 WM. & MARY L. REV. 473, 477-82 (1973); Whitney, *The Case for Creating a Special Environmental Court System — A Further Comment,* 15 WM. & MARY L. REV. 33, 41-49 (1974); Smith, *The Environment and the Judiciary: A Need for Co-Operation or Reform?* 3 ENV. 627, 635-36 (1974); Note, *The Environmental Court Proposal: Requiem, Analysis, and Counterproposal,* 123 U. PA. L. REV. 676 (1975). *Cf.* H. FRIENDLY, FEDERAL JURISDICTION 156-57 (1973).

reasoning will have a sufficient bearing on the issue to allow for some expertise. In any event, the chemist will provide a more educated perspective than the nonscientist judge whose ignorance in the field may mean an unduly cursory review of the scientific determinations. While judges from related fields will necessarily sacrifice some measure of expertise, their selection will likely result in the countervailing benefits of balance and fairness. So long as they are sophisticated in science, the participating judges should be quite capable of following the course of argument and perceiving if and when there are genuine issues which cannot be resolved. The provision will also facilitate the inclusion of scientists from different types of employment. By permitting persons "outside their field," the court can utilize scientists from the university, industry, and other sources interchangeably. These factors aside, scientists in the same field should be permissible under the court scheme as well. In certain cases, there would certainly be no reason to exclude "scientist-judges" in the field concerned so long as they are not familiar with the *particular* evidence under discussion. By allowing judges to preside over areas "outside their specialty," the science court need not foreclose the opportunity to use qualified specialists in the same field. It should nevertheless always guard against the risk that judges are predisposed toward the selected issue.

Once the issues are presented, the judges are to be responsible for reviewing the written and oral presentation of participants in the science court procedure. The judges need not define relevant evidence rigidly; all relevant evidence on the scientific issues could be admissible. By analogy to Rule 401 of the Federal Rules of Evidence the judge would have discretion to admit evidence tending to make the existence of a scientific fact more or less probable than it would be without the evidence.[159] This rule would presumably be flexibly applied in an effort to narrow and sharpen the range of controversy over scientific facts. At the very minimum, the judge should exclude evidence tending to cause "unfair prejudice, confusion of the

159 FED. R. EVID. 401.

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[160] In the interests of manageability, the judge would have to exercise *considerable* control, however, in order to preclude the injection of policy/value problems in the presentation of evidence.

Since judges would be assembled on an ad hoc basis to deal with specific issues, there would be a need for administrative oversight and management of the proceeding through the various stages. One answer to this need is the appointment of a "referee."[161] Though the science court procedures have yet to specify the functions to be performed by the referee, administrative responsibilities could be coupled with the responsibility for drawing up the blueprint of scientific issues. The science court proceeding could be conducted relatively expeditiously if the inexperienced participants could turn to the same person for procedural guidance and review of factual statements. It has been suggested that this referee be a scientist accompanied by counsel.[162] Such a proposal appears particularly appropriate as a means of expediting the proceedings fairly and systematically. With a scientist for referee, the judge could potentially turn to the referee for help in evaluating evidence and overseeing the course of the proceedings.

B. *Techniques for Conducting the Hearing*

1. The Role of the Case Manager

In a science court proceeding, scientists competent to represent all facets of a scientific issue are to be given responsibility for presenting a statement of facts which best represents the

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160 FED. R. EVID. 403.

161 *See* text accompanying note 27 *supra*. The rationale behind having a referee is to provide the administrative assistance necessary for conducting a proceeding which has been assembled on an ad hoc basis and is participated in by scientists who are unlikely to have had prior legal experience. *Cf.* note 156 *supra* (Atomic Safety and Licensing Boards containing a person qualified in the conduct of administrative proceedings).

162 *See,* Martin, *The Proposed "Science Court,"* 75 MICH. L. REV. 1058, 1077 (1977). It has, for example, been suggested that the judgment problems that surface at the interface between law and science give rise to a new profession trained in both law and science. Katan, *The Case for Legal Technology,* 68 NEW SCIENTIST 732 (1975).

current state of scientific knowledge on an issue.[163] The principle behind resorting to scientist-advocates is that scientists are most qualified to marshal and present scientific evidence and to probe the weak points of opposing presentations.[164]

According to science court proponents, traditional reliance upon expert witnesses does not contribute to the sharpening of scientific issues. Instead such reliance contributes to the confluence of factual and value judgments.[165]

The frequent attempt to acquire more expert witnesses on one side than the other reflects the perception that proof of a proposition is made more likely because more experts support it.[166] For the same reason, opposing parties highly value academic credentials and may therefore submerge core factual disputes in the battle of numbers and credentials.[167] The ability of parties to muster experts on any side of a scientific issue may be cause for questioning the validity and reliability of the scientific decision.

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163 *Task Force Report, supra* note 4, at 654, describes the style to which the factual statements are to conform:

> Factual statements must conform to the definition given earlier — they must be results or anticipated results of experiments or observations of nature. This definition excludes statements such as 'if X occurs, then Y *may* occur.' Such a statement is valid even if the probability of the occurrence of Y is infinitesimally small, so the experiment required to refute the statement is possible. An acceptable version of the statement must specify a finite probability which could be refuted by a possible experiment.

164 *Task Force Report, supra* note 4, at 653. *Cf.* Curlin, *Saving Us From Ourselves: The Interaction of Law and Science-Technology,* 47 DEN. L.J. 651, 658 (1970); Spector, *Regulation of Pesticides by the Environmental Protection Agency,* 5 ECOLOGY L.Q. 233, 251 (1976) (conflict not endemic to adversary presentation); Cavanaugh, *How Do We Decide?,* MECHANICAL ENGINEERING, August 1976, at 34, 36; Brooks, *Science and Trans-Science,* 10 MINERVA 484 (1972).

165 *See* note 85 *supra. See also* Mazur, *Disputes Between Experts,* 11 MINERVA 243 (1973). There are, however, a number of different methods by which agencies and courts may call upon experts. An independent expert is frequently used in order to avoid the difficulty of evaluating the testimony of conflicting experts. *See generally* Korn, *Law, Fact and Science in the Courts,* 66 COLUM. L. REV. 1080 (1966); Griffin, *Impartial Medical Testimony: A Trial Lawyer in Favor,* 34 TEMP. L.Q. 402 (1961); Levy, *Impartial Medical Testimony — Revisited,* 34 TEMP. L.Q. 416 (1961); Polsky, *Expert Testimony: Problems in Jurisprudence,* 34 TEMP. L.Q. 357 (1961); Van Dusen, *The Impartial Medical Expert System: The Judicial Point of View,* 34 TEMP. L.Q. 386 (1961). *See also* sources cited at note 101 *supra.*

166 *See, e.g.,* Van Dusen, *Impartial Medical Expert System: The Judicial Point of View,* 34 TEMP. L.Q. 386, 387-88 (1961); Clark, *Expert Advice in the Controversy About Supersonic Transport in the United States,* 12 MINERVA 416, 428 (1974).

167 *See, e.g.,* Clark, *Expert Advice in the Controversy About Supersonic Transport in the United States,* 12 MINERVA 416, 426-28 (1974).

Traditional methods for eliciting testimony from scientists also militate against a lucid exposition of disputed scientific facts. Written direct testimony is common in administrative proceedings and is generally not controversial. But cross-examination of scientist witnesses often fails to illuminate underlying factual disputes. The benefits of cross-examination in science court proceedings may be minimal since the cross-examiner often lacks the technical skills necessary to penetrate the complexities of scientific evidence, methodology, and explanation.[168] Correlatively, the trier of fact may be equally incompetent to penetrate that technical information.[169]

A case manager, however, would possess the requisite expertise, and thus would be able to penetrate scientific data. The science court proposal recommends two alternative methods of selecting case managers. Case managers could be selected through a bidding process in which the organization adjudged most likely to represent one side of an argument is given the responsibility of selecting a case manager. Alternatively, a case manager could be selected by a nomination process.[170]

The bidding process would have the advantage of increasing the likelihood that an organization with the greatest intensity of interest in an issue would be responsible for managing a case. The nomination process, on the other hand, would place a premium upon the selection of case managers who would be backed by a consensus of interested members of the scientific community. Since the weight to be given decisions of a science court may be substantially dependent upon the broad support of scientists, it would be preferable to select case managers from a consensual nominating procedure. The case managers would then be most representative of the scientific community. Case

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168 *See, e.g.*, Guttmacher, *Problems Faced by the Impartial Expert Witness in Court: The American View*, 34 TEMP. L.Q. 369, 371-72 (1961).

169 For an illustration of this problem in the judicial setting, *see, e.g.*, Bazelon, *Psychiatrists and the Adversary Process*, SCIENTIFIC AM., June 1974, at 18-23; Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975); Note, *The Courts, Social Science, and School Desegregation*, 39 LAW & CONTEMP. PROB. 217 (1975). This problem of limited technical competence would be less severe in an administrative agency with a large in-house staff of experts.

170 *See Task Force Report, supra* note 4, at 654. *See also* text accompanying note 25 *supra*.

managers would be responsible for channeling subsequent proceedings into an institutional adversarial contest.[171] Such a contest is designed to bring to the surface assumptions or premises which underlie the testimony and presentations of experts before the science court. Accordingly, the dispute resolution procedures of mediation, cross-examination, and impartial judgment are called upon to reduce and clarify the range of disagreement.[172] To reinforce this process of clarification, the proposed science court procedures are designed to be applied only to bipolar issues.[173]

Admittedly, this bipolar perception of scientific conflict does not adequately depict the subtle gradations that characterize scientific opinions. Assuming *arguendo* the existence of a truly bipolar issue, scientists are likely to align themselves at opposite ends of the bipolar continuum. For example, if scientists were unanimous in their belief that five million miles of SST

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171 The adversarial features of the science court have been criticized for a variety of reasons which have been borrowed from general criticisms of the judicial process. *See, e.g.,* Abrams & Berry, *Mediation: A Better Alternative to Science Courts,* BULL. ATOM. SCIENTISTS, April 1977, at 50, 51 (blindness to individual differences is sacrifice of truth for the sake of dispute resolution; premium on winning; cannot adapt to polycentric controversies); Nelkin, *Thoughts on the Proposed Science Court,* NEWSLETTER ON SCIENCE, TECHNOLOGY AND HUMAN VALUES, Jan. 1977, at 20, 26 (avoids focus on sensitive value questions); Lipson, *Letter to the Editor,* 194 SCIENCE 890 (1976) (overestimates power of adversary system to find truth); Green, *The Adversary Proceeding: Is It Compatible With Technology? — A Panel Discussion,* SCOPE, Mar. 1977, at 25, 30-32 (does not result in truth; wasteful); L. MAYO, SCIENTIFIC METHOD, ADVERSARIAL SYSTEM AND TECHNOLOGY ASSESSMENT (Monograph Number 5, George Washington University Program of Policy Studies and Technology 1970); Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 MICH. L. REV. 111 (1972) (adversarial proceedings are not suited to polycentric problems). Much of the attack upon the adversary system employed in the science court procedures is misdirected because the science court is a hybrid procedure; it includes both mediation and adversary practice. The focus of criticism should instead be whether the mediation stages would be sufficient to inhibit the perceived inadequacies of the adversary system.

172 The opening words of the *Task Force Report, supra* note 4, at 653 illustrate the conflict orientation that underlies the science court procedures:

> There are many cases in which technical experts disagree on scientific facts that are relevant to important public decisions. Nuclear power, disturbances to the ozone layer, and food additives are recent examples. As a result, there is a pressing need to find better methods for resolving factual disputes to provide a sounder basis for public decisions.

173 *Task Force Report, supra* note 4, at 653-54. The *Task Force Report* looks only to the initiation of an experiment with the procedures. It does not rule out the science court formed to consider a multipolar issue.

flights would deplete the ozone layer by ten percent and increase the incidence of skin cancer by twenty to twenty thousand cases per year, the only variable would be the number of resultant cases of skin cancer. Similarly, if the estimates of scientists are ranged from twenty to twenty thousand, it would be impossible to select a case manager that (1) was a member of a group of scientists on "one side of a bipolar issue" and (2) would adequately represent the views of any group of scientists.

To take one further step, if there were no correlation between a scientist's estimate and his personal preference on the larger issue of SST constructions, case managers both pro and con could submit similar estimations.

The final level of complexity is illuminated once multipolar issues are introduced. If there were no agreement upon the relationship between SST flight, ozone depletion, and skin cancer, and if the distribution of opinions on these issues were as hypothesized, there would be no basis for selecting case managers on any scientific issue. Moreover, the number of possible different viewpoints would increase logarithmically with the number of issues and the number of scientists.

Fortunately, because there is a finite number of experiments and a limited number of plausible explanations, scientists are unlikely to be randomly distributed between end points of a bipolar issue or among the different dimensions of a multipolar issue. This discussion of hypothetical cases indicates that the science court authority should have certain guidelines to assist in the selection of a case manager.

First, case managers should be selected on the basis of their opinions regarding scientific issues rather than their opinions regarding the value-laden policy issue. This selection criterion would impose a greater administrative burden upon the science court authority by requiring it to inquire into the prior scientific judgments of a nominated case manager. In most cases, however, this burden would be minimal. A scientist's publications are generally accessible and his viewpoints may have been publicly expressed at professional meetings.

Second, the science court authority should have some means of assessing the distribution of scientists' opinions on a selected scientific issue. If a number of causal explanations have been

advanced on a subject, there would have to be some means for insuring that all representative views were put forward by the scientist case managers — at least where different explanations lead to different scientific and, ultimately, policy implications. This task is analogous to that performed by a district court judge in his certification of a class action. The judge must determine that the representative's claim is typical of the class and that the class representative would adequately represent the class.[174]

In the class action context, the judge must insure that absentee interests are reasonably coextensive with the claim the representative is asserting.[175] The judge must also insure that the absentee interests are not impaired by the advocacy of the class representatives.[176] To that end the courts frequently create a subclass possessing independent advocacy interests compromised or neglected if the dominant class representative were the sole spokesman.[177] The subclass representative in such a suit is restricted to presenting its own proof on issues inadequately represented by the class representative.[178]

Where there are many different scientific positions taken on an issue, the subclass device could be used to accommodate different scientific judgments. A case manager could be charged with responsibility for presenting typical claims. Assistant case managers could have the opportunity to present separate arguments. To return to the SST hypothetical, a case manager could

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174 FED. R. CIV. P. 23(a) "Prerequisite to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

175 For discussion of the application of the "typicality" requirement, *see* Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (4) of Federal Rule 23,* 23 B.U.L. REV. 406 (1973); Note, *Developments — Class Actions,* 89 HARV. L. REV. 1318, 1458-62 (1976).

176 The "adequate representation" requirement has received extensive commentary in the literature. *See* Note, *Developments — Class Actions,* 89 HARV. L. REV. 1318, 1471-98 (1976). *See* sources cited in *id.,* at 1471 n.91.

177 FED. R. CIV. P. 23c(4): "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of the rule shall then be construed and applied accordingly." *See generally* sources cited at note 176 *supra.*

178 *See* Note, *Developments — Class Actions,* 89 HARV. L. REV. 1138, 1479-82 (1976).

present the SST-ozone-skin cancer hypothesis while an assistant case manager would be confined to an alternative hypothesis to explain the increased incidence of skin cancer.

Third, there must be a means for balancing adequate representation against efficient management of proceeding. The referee should oversee the case managers and the line-up of experts on each side in order to assure that resources are relatively equal. The referees should also be responsible for strictly limiting the scope of participation of assistant case managers. Assistant case managers could be restricted to submitting written reports and experimental data. The case manager could have general responsibility for presenting all of the issues in mediation and cross-examination.

2. Mediation and Cross-Examination

After case managers have received a blueprint of the scientific issues to be considered, they would address these issues by formulating a series of statements proposing findings of scientific fact.[179] The statements must satisfy the scientific criterion of falsifiability; that is, they must contain criteria by which they may be proven false.[180] After a referee has screened the statements for value judgments and falsifiability, the statements would be exchanged between case managers. Case managers would then review opposing statements and decide whether the statements are acceptable, acceptable with reservations, or not acceptable. All accepted statements would be published.[181] The case managers would then subject the remaining statements to the following process: mediation; reformulation and resubmission of statements; adversarial cross-examination; and a final mediation.[182]

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179 *See* text accompanying note 28 *supra*. *See also* note 163 *supra*.

180 *Id.* The falsifiability criterion is intended as a line demarcating not only overly speculative inferences but also metaphysical explanations. *See* K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 36 (1963); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 112-35 (1959); C. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 39 (1965).

181 *See* text accompanying note 28 *supra*.

182 *Id.*

The mediation procedures[183] are designed to obviate tendencies toward polarization of argumentation. The exchange of statements and the process of commenting upon exchanged statements is intended to encourage cooperative efforts to narrow the range of disagreement over scientific issues. The law court problems creating overzealous litigants that interpose all available objections and unduly delay resolution of disputes are accordingly unlikely to be inherited by a science court.

Cross-examination would only be conducted to probe scientific evidence; no examination would be permitted on the "testimonial capacities" of the witnesses.[184] Indeed, since the court procedure is designed to separate out fact from policy decisions, the critical emphasis should be upon the accuracy of the data rather than the nature or number of witnesses involved. By publicly examining each other's views, case managers can seek to reduce overstatement, expose faulty reasoning, and draw out the implications of an argument.[185]

Historically, cross-examination of expert witnesses has been the subject of much critical commentary for its potential to delay, obfuscate, and polarize.[186] Science court proponents

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183 The term "mediation" does not accurately characterize the process by which parties selectively identify points of agreement and disagreement. "Mediation is conventionally defined as the intervention of a third party to settled disputes without use of coercive force. . . . The paradigmatic act of mediation is the articulation of a compromise mutually acceptable to the desires of the parties." Note, *Developments — Class Actions,* 89 HARV. L. REV. 1318, 1383-87 (1976). *See also* Fuller, *Collective Bargaining and the Arbitrator,* 1963 WISC. L. REV. 3 (1963); Fuller, *Mediation — Its Forms and Functions,* 44 S. CAL. L. REV. 305 (1970). The science court procedures would be more closely akin to an adversarial negotiation since the case managers could have equally plausible explanations from an agreed set of facts. This situation has been termed "epistemic ambiguity." Unlike private law mediation, science court mediation is not designed to yield compromise. In fact, the cross-examination is designed in part to provide a check upon pressures to reach consensus. C. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 396 (1965). For a discussion of the concept in relation to decisionmaking under conditions of scientific uncertainty, *see* Note, *Epistemic Ambiguity and the Calculus of Risk: Ethyl Corporation v. Environmental Protection Agency,* 21 S. D. L. REV. 425, 438-51 (1976). The "rules" to be agreed upon are an established set of scientific facts. However, the subsequent adjudicative stage of the proceeding is designed to clarify differences. Those differences would give third parties an indication of the variance from the agreed set of facts.

184 *Task Force Report, supra* note 4, at 655. The witnesses' testimonial capacities involve such matters as his perception of the event or facts in question, his memory and his sincerity.

185 *Id.* at 654.

186 Whitney, *Technical and Scientific Evidence in Administrative Adjudication,* 45

nonetheless not only advocate the use of this controversial adversarial tool but would also place it in the hands of those not skilled in forensics. A number of techniques could be used to guard against the abuses of cross-examination. The refinement of scientific issues through written statements and mediation procedures would yield a narrowly drawn list of issues to be probed. Cross-examination could thus be restricted to a prearranged agenda of issues. A panel or round table format rather than a direct confrontation of examiner and witness could structure the cross-examination. The conduct and type of questions asked by a cross-examiner could further be governed by the discretion of the judges rather than formal evidentiary rules. In short, the adversarial connotations of the term "cross-examination" could be greatly alleviated by a procedure tailored to the capabilities of scientists and the methodology of science.

3. Participation of Affected Parties

A science court opinion on the state of science knowledge could have a profound effect upon parties with an interest in the larger policy issue. To a party watching from the sidelines, the science court proceeding may seem little more than an authorization for expert adjudication of private interests. For example, the drug manufacturer who listens to experts debate the scientific merits of his product may assert a claim to be included in the proceeding. That claim may have persuasive force if it appears that the manufacturer could muster additional expertise and evidence on a scientific issue.

Participation of affected parties, however, would impose severe manageability problems upon an already cumbersome, protracted form of proceeding when the issue is highly abstract and the policy implications of any given factual finding cannot be predicted with reasonable certainty. Indeed, private participation may result in the duplication of argument and may

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CIN. L. REV. 37, 51 (1976); Hamburger, *Functions of Orality in Austrian and American Civil Procedure*, 20 BUFFALO L. REV. 9, 36 (1970); Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964). *But cf.* Spector, *Regulation of Pesticides by the Environmental Protection Agency*, 5 ECOLOGY L.Q. 223, 245 (1976) (formal cross-examination procedures can be made more flexible).

present intractible problems of coordinating the presentation. More importantly, private participation could detract from the purpose of the science court to present expert views on scientific evidence. Private interest advocacy would unavoidably focus attention upon the political and economic consequences of a science court opinion rather than the critical problems underlying the scientific controversy.

Setting aside considerations of equity and manageability, the most problematic question is whether science court procedures would deprive affected parties of statutory participation rights. The science court setting would determine whether the affected party would have a statutorily conferred right to participate in a science court procedure. If the science court is triggered by a statutory provision authorizing an administration to convene it,[187] a claim for private participation might fly in the face of the statutory language and congressional intent. Depending on congressional drafting, a science court procedure could be conducted without any private participation.

A second type of statutory provision however, could confer private hearing rights once the agency determined that a threshold level of proof has been reached. The 1962 Amendment to the Food, Drug and Cosmetic Act[188] by the FDA already works in this way; under the Act substantial evidence of safety and efficacy of a new drug prompts formal evidentiary hearings when the FDA has refused to permit marketing of the drug.[189] The FDA has routinely refused permission to market

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187 *See, e.g.,* statutes cited at note 132 *supra.*

188 *See* notes 54 to 55 *supra.*

189 The FDA may reject new drug applications on the basis of lack of "substantial evidence" of effectiveness. *See* note 42 *supra* (definition of substantial evidence). The FDA has promulgated regulations defining "substantial evidence." 21 C.F.R. § 3.4.111 (1975). *See generally* Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study,* 64 CALIF. L. REV. 14, 20-30 (1976). The substantial evidence requirement, as defined by the above regulations, is integrated within the procedure by which the FDA may reject a new drug application. 21 U.S.C. § 355(e) (1976) provides for withdrawal of approval previously granted:

> The Secretary shall, after due notice and opportunity for hearing to the applicant, withdraw approval of an application with respect to any drug under this section if the Secretary finds . . . (3) on the basis of new information before him with respect to such drug, evaluated together with the evidence available to him when the application was approved that there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have

on the basis that a science advisory committee report contained information implying there was no substantial evidence of safety and effectiveness.[190] If the FDA concludes that the substantial evidence threshold has not been crossed, statutory hearing rights will not be allowed.[191]

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under the conditions or use prescribed, recommended, or suggested in the labeling thereof. . . .

The "due notice and opportunity for hearing" provision has been interpreted to give the manufacturer the right to participate in the formal, trial-type proceeding described in 5 U.S.C. §§ 554, 556, 557 (1976). These provisions of the Administrative Procedure Act require an impartial tribunal, opportunity for introduction of oral testimony and cross-examination of adverse witnesses, and decision based on the record of the proceeding. 5 U.S.C. §§ 556(b), (d), (e) (1976). If the agency does not preside, the provisions require agency review of the initial decision, with opportunity for additional submissions, and a final decision based on formal findings. *Id.* §§ 557(b), (c). For the FDA regulations governing formal adjudicatory procedure, *see* 21 C.F.R. §§ 12.1-.159 (1979). *See* Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 CALIF. L. REV. 14, 19 (1976). The FDA may avoid a formal, trial-type hearing by interpreting the substantial evidence requirement and regulations to have been used to exclude evidence submitted by the manufacturer thus leaving no material issue of fact that would provide the basis for a formal trial-type hearing. This procedure was upheld by the Supreme Court's decision in Weinberger v. Hyneson, Westcott & Dunning, Inc., 412 U.S. 609 (1973). *See generally* Note, *Summary Judgment*, 53 TEX. L. REV. 1518 (1974); Anderson, *An Overview of Recent Regulatory Developments — The Case for Evidentiary Hearings*, 31 FOOD, DRUG, COSM. L.J. 159, 162 (1976); Harlow, *The FDA's OTC Drug Review: The Development and an Analysis of Some Aspects of the Procedure*, 32 FOOD, DRUG, COSM. L.J. 248, 271-2 (1977).

190 *See* Phelps, *After Panalba, Whither?*, 26 FOOD, DRUG, COSM. L.J. 186 (1971); Hoffman, *New Drugs, Old Drugs, and the NAS-NRC Efficacy Review*, 26 FOOD, DRUG, COSM. L.J. 118 (1971); Graham, *Review of the 1970 NAS GRAS Pilot Survey (Phase I) and the 1971 NAS Comprehensive Survey (Phase II)*, 31 FOOD, DRUG, COSM. L.J. 26 (1976).

191 The Commissioner's determination is subject to judicial review. In Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973), the Supreme Court overturned the FDA's judgment that the manufacturer's submitted evidence did not meet the substantial evidence standard. *See also* E.R. Squibb & Sons, Inc. v. Weinberger, 453 F.2d 1382 (3rd Cir. 1973); Cooper Laboratories, Inc. v. Commissioner, FDA, 501 F.2d 772 (D.C. Cir. 1974) (reviewing court must ascertain "whether the Commissioner's findings accurately reflect the study in question and if they do, whether the deficiencies he finds conclusively render the study inadequate or uncontrolled in light of pertinent regulations." *Id.* at 777 n.14). According to the criteria for resorting to a science court, *see* text accompanying notes 124 to 141 *supra*, it is unlikely that a science court would operate below a threshold level of "substantial evidence," as defined in the Food, Drug and Cosmetic Act. There would be a controversy over material facts in each case where a science court procedure would be used. Justice Powell's opinion in *Hynson* raises some doubts about the event to which the FDA may constitutionally rely upon the judgment of experts:

> There is also a genuine issue of procedural due process where, as in this case, the Commissioner construes his regulations to deny a hearing as to the efficacy of a drug established and used by the medical profession for two decades, and where its effectiveness is supported by a significant volume of clinical data and the informed opinions of experts whose qualifications are not questioned.

412 U.S. at 638-39. These same doubts were voiced by participants at the SCIENCE

Since the science court would operate below the substantial evidence threshold level, it would not intrude upon statutory hearing rights. Hearing rights could only arise *after* the science court procedures had concluded.

But if the science court is convened at a stage where a statute requires a hearing, commencement could result in a denial of that right.[192] Although a group of scientist-advocates may provide the affected party with a functionally superior form of advocacy, the affected party would be denied his statutorily conferred entitlement to participate. For example, if the science court were convened after the FDA refused market approval of drugs that crossed the substantial evidence threshold, the manufacturer would be entitled to a formal evidentiary hearing.[193] The science court procedures would directly clash with and have to be supplanted by procedures mandated by statute and regulation.

It should be apparent that no general principles can determine whether science court procedures would conflict with statutorily conferred participation rights. In each regulatory setting, the pertinent statutes would have to be consulted to determine whether science court procedures could legally be implemented.

C. *The Science Court Opinion*

The science court procedure would conclude with judicial deliberation followed by the issuance of a written opinion.[194] The

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COURT COLLOQUIUM, *supra* note 4. Where a science court procedure could produce a statement of facts that would result in a narrowly focused harm upon a party, there would appear to be a strong constitutional argument for allowing some kind of participation by the affected party. *See generally* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

192 For a general discussion of the statutes which require formal, trial-type hearings in rulemaking proceedings, *see* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276 (1972).

193 *See* note 189 *supra*. The FDA formal evidentiary hearing could not be conducted along the lines suggested for the science court. *See* 21 C.F.R. § 12 (1979) (Formal evidentiary hearing); *But cf.* 21 C.F.R. § 13 (1979) (Public Board of Inquiry); text accompanying notes 76 to 82 *supra;* 21 C.F.R. § 14 (1979) (Public Hearing before a Public Advisory Committee). The requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1976) would not be met by the surrogate participation of other parties. *See generally* sources cited at note 151 *supra*.

194 *See* text accompanying note 29 *supra*.

"opinion" would be a description of the state of scientific knowledge bearing upon the selected issue and would address any remaining challenged statements of fact. If the science court mediation process functioned as intended, case managers would already have agreed with many of the initial component scientific issues and subissues.

The opinion would attempt to assign probability estimates to the challenged statements.[195] Since the assigned probability must be premised on a sound basis of fact, the science court participants may be dissuaded from overemphasizing the inferences to be drawn from scientific evidence. For example, a possible statement could be: "There is a ninety percent certainty that a five percent depletion of the ozone layer would result in a two to ten percent increase in the incidence of skin cancer." To guard against overreaching interpretations of evidence, judges would also be required to explain their reasons for estimating a probability. Because of the proposed procedures, some judges "outside their field" may not be entirely capable of assessing this possibility or may not have the time personally to evaluate all of the submitted data. In such an event, there may need to be a "support staff" of experts who also can assist in the evaluation.

Where no rational basis exists for assigning a probability, judges should be required to identify the points of disagreement. Additionally, judges should be dissuaded from compromising divergent arguments to arrive at a consensus statement. Decisionmakers should be given a statement of facts that accurately depicts the range of scientific uncertainty. If scientific information provides no real basis for weighing value choices, the decisionmaker must be informed that only policy issues are relevant.[196] Similarly, by permitting individual judges to disagree with the estimates and reasons given by the other judges, the unresolved scientific uncertainty could be revealed.

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195 This statement would actually be a "second-order" probability statement; it would specify the probability of a probability. *See* Fisher, *Scientists and Statements*, in KNOWLEDGE AND POWER, 339 (1966).

196 *See, e.g.*, Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues*, 71 MICH. L. REV. 111, 138-39 (1972); L. TRIBE, CHANNELING TECHNOLOGY THROUGH LAW 22 (1973) (decisionmaker should decide who must bear the "risk of uncertainty").

The science court procedures would also include judicial recommendations for further research and thus bear on whether a decision should be made contingent upon the results of proposed experiments.[197] While for scientists probability statements and identification of uncertainty would be indicia of the need for further research, for decisionmakers the recommendation would justify postponing a decision.[198] The science court opinion should indicate that the judgment as to future research stems from the existence of scientific uncertainty rather than a need to allocate resources to that area of science or to postpone a decision. This requirement would minimize the risk that science court decisions would undermine the objective of leaving policy decisions in the hands of accountable officials.

The written opinion would not merely identify uncertainties, but would also discuss the permissible inferences that could be drawn from the submitted evidence.[199] Such inferences would require the judges to tread a fine line between scientific explanation and value judgment. Assuming the opinion is closely modeled on the blueprint of issues, judges would be restrained from drawing attenuated or politically motivated inferences. A seriatim presentation of findings could also inhibit judges from straying into policy recommendation as they might with a unified summary. Moreover, such a presentation could prevent a science court proceeding from becoming a politicized contest since individual findings would preclude a public perception of winners and losers.[200]

Once issued, the science court opinion would presumably be translated by a decisionmaker into a policy choice. One science court advocate has suggested that the opinion would have "presumptive validity."[201] To the lawyer, however, it is not clear

197 *Task Force Report, supra* note 4, at 655.

198 Reiser, *Smoking and Health: The Congress and Casuality,* in KNOWLEDGE AND POWER 293 (1966).

199 *Task Force Report, supra* note 4, at 655. *But cf. Coping With Technology, supra* note 95, at 827:

> It is not entirely clear to me that all disputes among experts either could or should be "resolved." Experts usually disagree not so much about the objectively verifiable facts, but about the inferences that can be drawn from those facts. And they disagree precisely because it is impossible to say with certainty which of those inferences are "correct."

200 *See generally* sources at note 171 *supra.*

201 *Task Force Report, supra* note 4, at 653.

whether this term would imply a legally binding finding or a simple recommendation of fact. A decisionmaker would no doubt be inclined to give substantial weight to such a painstakingly prepared finding; but even proponents of the science court recognize that the findings are only entitled to great weight and are not binding on the decisionmaker.[202] The scientific method *per se* affords no finality to an experiment; there is consequently no reason to afford its effects such finality.

There are intensely practical reasons for not attributing binding legal effect to the opinions of a science court. Science court opinions could stifle subsequent research on hypotheses which appear improbable at the time of adjudication.[203] Furthermore, binding legal sanctions might easily result in the freezing of scientific knowledge at the time of the opinion. Provisions must be sufficiently flexible to allow for modification of the science court findings in the light of subsequent changes or revelations. Lack of counsel and full-fledged cross-examination are also likely to preclude a binding effect on due process grounds. There additionally would be difficult problems on appeal. Given the findings of the science tribunal, how is the lay judge expected to penetrate these findings on appeal? If the effect were indeed binding, the appellate judges would again be faced with the untenable situation of needing expert analysis in order to oversee the decision.

The isolation of scientific issues from a value-laden policy question could also contribute to the overvaluing of quantitatively measurable variables.[204] "Soft values" such as aesthetic beauty and community sentiment could be dwarfed by the finality of science court findings. If the findings were legally binding, the decisionmaker might also simply sidestep the finding by placing more emphasis on political, economic, or alternative bases. Indeed, if the findings of science courts had a binding effect, the decisionmakers would be left with virtually no discre-

202 *Id.* at 655.

203 Research would not necessarily be impeded. It is equally likely that research efforts will be intensified as a result of the heightened visibility of previous experimentation. Additionally, the probability statements issued by a judge by definition imply a probability of alternative explanation. The science court opinions, set in an evolving discipline, could only capture the state of knowledge at any one time and would be so formulated by the judges. *Task Force Report, supra* note 4, at 655.

204 *See* note 89 *supra.*

tion. Therefore, the science court opinion should retain only presumptive validity, to be discounted by other variables which affect the policy choice.

V. Institutional Role of a Science Court

Despite its name, the science court proposal is not an attempt to create an article I or an article III court.[205] Rather, the science court is designed as an advisory procedure. This procedure could be incorporated into existing institutions for scientific decisionmaking and could also be utilized by an independent institution responsible only for determining scientific issues.

The preceding discussion has illustrated that science advisory committees, the Congress, and the Judiciary could each benefit from selective incorporation of science court procedures. Since existing procedures for resolving controverted scientific facts are so limited, the science court proposal could make a substantial contribution to scientific decisionmaking even if the panoply of procedures are not used. In this respect, the science court is a modest proposal. For science advisory committees, the science court proposal highlights the importance of task specification, problem definition, and unbiased presentation of scientific information. These same considerations are equally applicable to the structure of the congressional hearing. Although the science court procedures would not serve as an adjunct to the judiciary or supplant judicial procedures, the science court statement of facts could be used as a component of reasoned decisionmaking. Ideally, it could force agencies to come to grips with scientific uncertainty and ease the task of judicial review of scientific decisionmaking.

The feasibility of selectively incorporating the proposed science court procedures into existing institutions should not, however, minimize the potentially significant contribution to

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205 For a discussion of the doctrine of legislative courts, *see generally* Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133 (1962); Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930); Watson, *The Concept of the Legislative Court*, 10 GEO. WASH. L. REV. 344 (1934); Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation?*, 71 YALE L.J. 979 (1962).

public decisionmaking which could be made by the creation of a science court institution. As has been argued in this Note, full-scale science court procedures would be appropriate for issues (1) which are the subject of scientific controversy; (2) which are politically salient; (3) which are manageable in a narrowly focused proceeding; (4) which are considered before resources have already been committed to a policy outcome; and (5) for which there is sufficient scientific evidence. Only in this select class of politically salient controversial scientific disputes would the full-scale science court procedures appear to be of utility. The class would be further limited by statutorily conferred participation rights in private parties. The considerable complexities involved in issue formulation, presentations of scientific fact, and the issuance of opinions nonetheless render it likely that such a procedure could be regularly used by administrative agencies or by Congress. Administrative agencies, the Congress, and the Executive could each submit scientific issues for advisory judgments. The opinions and statements produced by the science court would provide decisionmakers with the best available information of the state of scientific knowledge in a given area. With more accurate calculations of uncertainty, there is an increased likelihood that decisionmakers will make more efficient resource allocation choices. Moreover, instead of burdening the courts or agencies with groundless scientific speculation, the institutionalized court would offer a forum in which comparatively expert information may be obtained fairly, simply, and systematically. As a permanent forum, this institution would open up areas of scientific decisionmaking which before have been subject to virtually no public review.

The administrative demands generated by a science court would require the attention of some form of permanent staff. Because of the need for specialized judges and case managers in specific areas of science, a science court could not practicably retain a permanent staff of scientists. However, if full-scale science court procedures were only convened on an *ad hoc* basis, the start-up costs and administrative confusion that would result in each case would markedly limit its use. It therefore seems necessary to retain a permanent administrative staff for an institutionalized science court. Although science court pro-

ponents have no intention of fashioning a large bureaucracy, an institutional science court would at least require a staff which would be capable of organizing procedures for the screening of issues, the selection of judges, and the nomination of case managers. In addition, specially trained referees would be needed to oversee the submissions of third parties to case managers, draft "blue prints" of statements submitted by case managers, direct the participation of third parties, and assure that opinions proposed by science court judges stay within their prescribed authority.

A science court institution, in order to marshal the scientific evidence necessary to address the issues that are referred to it, may also need to be vested with some sort of compulsory process or subpoena power.[206] Although a more prevalent problem may be the sheer overabundance of data,[207] in certain cases necessary information may be inaccessible because it is classified, proprietary, or otherwise suppressed.[208] To avoid intrusion into ongoing research, release of trade secrets, invasions of privacy or interference with national security interests, it is imperative that there be precise limitations upon the type of information that may be acquired. The Freedom of Information Act[209] and the Privacy Act[210] contain useful guidelines for such limitations. A small legal staff would in turn appear to be necessary to exercise any subpoena power, which, of course, would be subject to judicial review.

An independent institution such as that recommended here, even if of modest scale, would require a grant of congressional authorization and appropriation. It is certainly premature at this point to speculate upon the needed amount of appropriations for the various activities which would be funded. If such

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206 It has been suggested as a fundamental regulatory principle that disclosure regulations and procedures are necessary for the cost-effective allocation of resources where present decisionmaking processes are impaired by the lack of accurate information. *See* Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform,* 92 HARV. L. REV. 552, 579-80, 603 (1978).

207 *See, e.g.,* Talbot, *"Science Court": A Possible Way to Obtain Scientific Certainty for Decisions Based on Scientific "Fact"?,* 8 ENV. L. 827, 836 (1978).

208 This list of inaccessible information is part of a larger classification of accessibility proposed by Holdren at the SCIENCE COURT COLLOQUIUM, *supra* note 4, at 174-76.

209 5 U.S.C. § 552 (1976).

210 5 U.S.C. § 552 (1976).

funds were not forthcoming, however, it might nevertheless be desirable experimentally to establish a science court authority within an existing independent science organization such as the National Academy of Sciences. Regardless of the ultimate institutional form of a science court, the teachings of the scientific method should demonstrate that a promising novel proposal such as this should at least be given a try.

The science court proposal may not progress beyond the initiation of a few small scale experiments. At a minimum, however, the principles that animate this idea deserve consideration for their contribution to the identification of structural and procedural infirmities in the institutions that decide scientific issues. The proposal illuminates the importance of political accountability and procedural fairness in scientific decisionmaking.

NOTE

FINAL OFFER ARBITRATION: A PRE-TRIAL SETTLEMENT DEVICE

PAUL I. PERLMAN*

Final offer arbitration has been used successfully in labor contract disputes to speed along negotiation and to encourage settlement. Mr. Perlman suggests that this same arbitration procedure can be applied to the civil case docket to rid the courts of backlog and congestion. He proposes and analyzes a pre-trial final-offer-arbitration procedure that will provide an incentive for settlement in appropriate civil cases.

Introduction

The twin problems of court congestion and delay are already notorious and are only growing worse. In the United States district courts, for example, the backlog of civil cases has increased steadily over the last eighteen years. In each of these years the number of civil cases filed has exceeded the total number of cases resolved or settled.[1] In addition, the number of civil cases going to trial has increased to the extent that over 30 percent more civil trials were held in 1978 than in 1968.[2] The state courts are confronting a comparable problem of backlog and congestion.[3]

These inflated case loads have been accompanied by long delays in bringing cases to trial. In the United States district courts in 1978, thirteen months typically elapsed before a civil case could be brought to trial.[4] In fact, more than one out of every four pending cases have been pending for more than two years.[5]

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1 [1978] DIR. AD. OFF. U.S. CTS. ANN. REP. 58 table 15 [hereinafter cited as AD. OFF. U.S. CTS.]. By June 30, 1978, there were 166,462 cases pending, more than the number resolved or settled during the previous 12-month period. *Id.*

2 *Id.* at 127, table 60.

3 *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 4-5 (1976).

4 AD. OFF. U.S. CTS., *supra* note 1, at 129, table 62.

5 *Id.* at 68, table 22.

Myriad solutions have been proposed to reduce court congestion and shorten delay. Chief Justice Warren Burger has suggested a reduction in the size of juries in civil cases as one answer to the problem.[6] Some have proposed an increase in the number of judges and courts,[7] while others emphasize the need to make the administration of the courts more efficient.[8]

Such solutions, however, have not adequately focused on the possibility of using pre-trial procedures to reduce the trial docket. A comprehensive solution would attempt to reserve judicial resources for those cases arising out of disputes which cannot be settled by the parties alone. If more disputes were settled by the parties without costly and time-consuming trials, the courts would be more accessible to those who have truly unresolvable differences, and justice would be swifter. This Note proposes one method of encouraging realistic negotiation and settlement for certain civil cases through a system of pre-trial final offer arbitration (FOA).[9]

I. The Development Of Final Offer Arbitration

A. *Theoretical and Actual Advantages*

FOA first developed as a mechanism for the resolution of contract disputes involving public sector employees, especially those employees providing such essential services as firefighting and law enforcement.[10] There are many variations

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6 Burger, *The State of the Federal Judiciary,* 57 A.B.A.J. 855, 858 (1971); Devitt, *Federal Civil Jury Trials Should Be Abolished,* 60 A.B.A.J. 570, 571 (1974).

7 In 1978 Congress accepted these proposals by creating over 150 new federal district court and circuit court judgeships. Omnibus Judgeship Act, Pub. L. No. 95-486, 92 Stat. 1629 (1978) (to be codified in scattered sections of 28 U.S.C.).

8 *See* ALI-ABA Civil Trial Manual 9-20 (student ed. 1974).

9 FOA is also referred to as "either-or," "last best offer," and "one-or-the-other" arbitration.

10 FOA is used for public-safety-employee contract disputes (interest disputes) in the following states: Massachusetts, *see* text accompanying notes 43 to 54 *infra;* Michigan, *see* text accompanying notes 35 to 42 *infra;* and Wisconsin, *see* text accompanying notes 27 to 34 *infra. See generally* P. Feuille, Final Offer Arbitration (1975) [hereinafter cited as Final Offer Arbitration]. Eugene, Ore., has an ordinance which provides for FOA for all contract disputes with city employees. *See* text accompanying notes 21 to 26 *infra.* Indianapolis, Ind., has used FOA on an ad hoc basis in the public sector. *See* Final Offer Arbitration, *supra,* at 26. A Minnesota FOA statute was amended in 1973 to provide conventional arbitration before the FOA procedure had ever been used. *See id.* at 27. In Jan. 1979, New York decided to experiment with a "last-offer binding

of FOA,[11] but the following are basic features. Each party to a dispute submits a proposal for settlement to an arbitrator. A hearing is held at which each party argues for acceptance of its proposal. The arbitrator then is bound to choose one proposal or the other as the final decision. He is not free to compromise or to substitute a proposal of his own making.

FOA's value for a congested court system and its advantage over conventional binding arbitration lie in its strong incentive to bargain. In conventional arbitration, parties inflate their demands in the belief that the arbitrator's decision will be a compromise.[12] In contrast, FOA limits the arbitrator's choice to one of the parties' offers. Therefore, each party must make its offer reasonable or else it will lose totally when the opposing party's reasonable offer is selected. In their efforts to present the most reasonable offer, the parties will gravitate toward a median position. If such a median exists, i.e. if the dispute is resolvable without third party intervention, the parties will settle.[13] Only disputes with truly unresolvable differences will remain for third party resolution.

This theoretical advantage of FOA's incentive to bargain has been confirmed by empirical studies. A study covering the years from 1970 to 1972 reviewed the outcomes of thirty-eight conventional arbitration and factfinding awards in firefighter contract disputes in six states. On wage issues, a compromise position was adopted by the third party in 82.6 percent of these

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arbitration" system in contract disputes with the Civil Service Employees Ass'n, the state's largest public-employees union. N.Y. Times, Jan. 17, 1979, at A1, col. 2.

Iowa has also adopted FOA but it permits the parties to avoid arbitration by designing their own impasse procedures. In addition, the pressure of FOA is relaxed by the presence of factfinder's recommendations and by the process of "issue-by-issue" selection. *See* FINAL OFFER ARBITRATION, *supra*, at 28. As an hypothesis, one might suggest that under the Iowa statute no greater percentage of negotiated settlements would occur. *See* notes 40 to 42, 99 to 100 and accompanying text *infra*. Unfortunately, no comparative data is available to test that hypothesis.

11 FOA for industrial interest disputes first received attention in the literature in Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, INDUS. REL., Feb. 1966, at 38, 45. FOA has some antecedents in the procedures of the British wage councils. *See* Grodin, *Either-or Arbitration for Public Employee Disputes*, INDUS. REL., May 1972, at 260, 263.

12 Nels, *Final Offer Arbitration: Some Problems*, 30 ARB. J. 50, 51 (1975); Feuille, *Final Offer Arbitration and Negotiation Incentives*, 32 ARB. J. 203, 204 (1977).

13 *See National Emergency Disputes, 1971-1972: Hearings on S. 560 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st & 2d

cases.[14] Since the costs and risks of not negotiating are much higher in FOA than in conventional arbitration, one would expect a higher percentage of negotiated settlements if an FOA system is established. Just such a result occurred when Michigan changed from conventional arbitration to FOA for public safety employees on January 1, 1973. Under conventional arbitration, 39 percent of all disputes submitted to arbitration were settled by the parties before award. But in the first year and a half after the adoption of FOA, the number of suits that ended in settlement jumped to 64 percent.[15] The Michigan experience offers compelling evidence that FOA contains strong incentives for settlement.

B. *Experience with FOA*

President Nixon first brought FOA to the public's attention when he proposed it as an alternative means of settling labor disputes in the transportation industry.[16] If it appeared that the parties were unable to reach settlement in these disputes, the President would have three options, including the option of referring the dispute to FOA.[17] Although President Nixon's

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Sess. 672 (1971-72) [hereinafter cited as *Senate Hearings*] (statement of James D. Hodgson, Sec'y of Labor):

> So we attempt to build into this process with our bill a device that clearly will make the party who conducts himself the most reasonably be the party who is ultimately rewarded. . . . [W]e stimulate all along the line from the onset of bargaining the concept of reasonableness.
>
> We bring the parties closer together, and it is my belief that this concept will result in most of the decisions . . . being brought into a posture . . . where an agreement can be reached. . . . But if indeed, you do as you are suggesting, allow what amounts to arbitration of positions, rather than selection, then you reward those who maintain a distant and remote position. So my recommendation is strongly that we stay away from anything that smacks of arbitration, of compromise, of a determination by a third party neutral of what he thinks is the best solution, and leave it up to this third party neutral to select which of the offers before him is the correct one.

14 Wheeler, *Is Compromise the Rule in Fire-Fighter Arbitration?*, 29 ARB. J. 176, 179 (1974).

15 J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER & B. DENNIS, FINAL-OFFER ARBITRATION 54, table 3-3 (1975) [hereinafter cited as STERN].

16 N.Y. Times, Feb. 28, 1970, at 1, col. 8.

17 Foster, *Final Offer Selection in National Emergency Disputes*, 27 ARB. J. 85, 86 (1972). The remaining two options would have permitted the President to extend the cooling-off period for 30 days or to appoint a board to determine the feasibility of partial operation of the industry. *Id.* These options would be used in attempting to prevent or to minimize the disruption of a strike while the parties bargained, rather than in attempting to compel a settlement through FOA.

proposal was not accepted by Congress, its provisions set a framework for subsequent FOA proposals.

Under the President's proposal, the parties submit a final offer to a three-member arbitration panel. Following oral argument, the panel chooses the package of one party, utilizing five criteria.[18] The fifth criterion permits the panel to take into account "any other factors normally considered in the determination of wages, hours and conditions of employment."[19] The effect of this "catch-all" clause is to allow discretion to the panel in making its decision. To the extent that the fifth criterion reduces the ability of the parties to anticipate the panel's reaction to particular proposals, it diminishes the pressure to compromise. Since this sort of pressure is at the heart of FOA, the fifth criterion would have seriously reduced the effectiveness of the proposal.[20]

FOA received its first practical test in Eugene, Oregon. In September 1971, that city passed an ordinance providing for FOA in all interest disputes with city employees.[21] The process set out in the ordinance requires the parties to submit final offers to a three-member arbitration panel, consisting of one neutral and two partisan arbitrators.[22] The panel holds a hearing on the proposals and then makes a "package selection" by adopting one of the offers without alteration. The ordinance enumerates four specific criteria to guide the arbitrators.[23]

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18 *Id.* at 88. The first four criteria are as follows: 1) past contracts; 2) wages of fellow employees doing comparable work; 3) wages in the same industry and in industry in general; and 4) security and tenure of employment. *Id.*

19 *Id.* at 89.

20 *See* text accompanying note 102 *infra.*

21 Eugene, Ore., Ordinance Pertaining to Collective Bargaining Procedures & Processes for Recognition, Negotiations & Settlement of Disputes (Sept. 14, 1971) (amended 1976), *reprinted in* GOV'T EMPL. REL. REP. (BNA) (No. 423) G-1 (Oct. 18, 1971) [hereinafter cited as Eugene Ordinance].

Much of the impetus for the ordinance was provided by a desire to insure that city employee contracts would be signed before the start of the fiscal year. Long & Feuille, *Final-Offer Arbitration: Sudden Death in Eugene,* 27 INDUS. & LAB. REL. REV. 186, 191 (1974). To achieve that purpose, the ordinance set forth a fairly strict timetable providing for initial party notification of intent to negotiate, a period of preliminary discussions, a period for mediation assistance from the state, and, eventually, FOA. *Id.* at 191-92; Eugene Ordinance, *supra,* § 2(3)-(7).

22 Eugene Ordinance, *supra* note 21, § 2(7)(a)-(b). Each party appoints one partisan arbitrator. These two members of the panel are then charged with the task of choosing a professional arbitrator as the third member. *Id.*

23 *Id.* § 2(7)(f)-(h).

Unlike President Nixon's proposal, a "catch-all" criterion is not included.

During each of the first two years under the ordinance, three contracts were negotiated.[24] Both supporters and critics of FOA read the results to support their view. Opponents of the ordinance are quick to point out that in five of the six contract disputes, the arbitration procedure was invoked. Therefore, FOA did not live up to its promise of inducing settlement prior to arbitration. However, proponents respond by noting that in only one of the six disputes was the arbitration panel forced to make a decision on the entire scope of issues, and by stressing that in three of the six cases no award was necessary on any issue.[25]

In the following two years, six more contracts were negotiated in Eugene. In five of the six cases, a contract was negotiated without referring the dispute to arbitration. In the sixth case, arbitration was invoked but a negotiated settlement was reached during the arbitration proceeding.[26] Thus, the

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24 Long & Feuille, *supra* note 21, at 193-95. The first dispute concerned the 1971-72 contract between the firefighters and the city. Each side submitted two offers. The city's first offer was accepted since the neutral arbitrator objected to a manning requirement included in both union offers.

The second dispute concerned the 1971-72 contract between the police and the city. Again, each side submitted two offers. Adverse public reaction to the size of the union's demand, however, led to further negotiations. After returning to the bargaining table, the parties agreed on a wage increase only slightly higher than the city's offers.

The third dispute involved a local of the American Federation of State, County & Municipal Employees (AFSCME). To avoid arbitration, the parties settled all issues except the issue of union security. That issue was resolved in the local's favor through binding factfinding. This factfinding was equivalent to FOA since there were only two possible positions on the issue.

In the fourth dispute, the 1972-73 firefighters contract, the parties agreed on all issues except the form of the pay package. One of the city's offers was accepted in arbitration because the forms of payment in the other offers were uncommon in the relevant labor market.

The fifth dispute was the 1972-74 contract between the police and the city. The dispute was resolved through bargaining without invoking arbitration.

The sixth and final dispute involved the 1972-73 contract between the AFSCME local and the city. All issues were resolved without arbitration except the size of the pay raise, on which both parties submitted two offers. After the neutral arbitrator informed the parties, through the partisan arbitrators, that he was leaning toward the city's second offer, the parties resumed negotiations and settled. *Id.*

25 *Id.* at 197.

26 Feuille, *supra* note 12, at 208.

trend in the period from 1972 to 1976 was one of more negotiated settlements and fewer arbitration awards.

Soon after the passage of the Eugene ordinance, Wisconsin adopted FOA in disputes with public safety employees.[27] If the Wisconsin Employment Relation Commission certifies that an impasse in negotiations exists, the dispute goes to FOA.[28] Each side must submit a final offer at the time the petition for arbitration is made. This offer is not actually final, because "[e]ither party may amend its final offer within 5 days of the hearing."[29] A single arbitrator chooses one party's offer without modification, following a hearing on the merits of the proposals. In arriving at a decision, the arbitrator must give weight to eight enumerated criteria, including a "catch-all" clause.[30]

The experience in Wisconsin under FOA has been significantly different from that under the Michigan statute[31] and the Eugene ordinance.[32] In Wisconsin, the percentage of negotiated settlements dropped after FOA was adopted.[33] This unexpected result may be explained in one of two ways. First, parties may have wanted to experiment with FOA, at the time a novel procedure in Wisconsin, to test its advantages and disadvantages. This problem should disappear with time. Second, FOA went into effect in Wisconsin shortly after the end of President Nixon's wage-price freeze. Parties in a contract

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27 Ch. 247, 1971 Wis. Laws 772 (codified as WIS. STAT. § 111.77 (1971)). The Wisconsin statute followed ten years under a system of factfinding for the same employees. STERN, *supra* note 15, at 77-78.

28 The parties may avoid FOA by agreeing to submit the dispute to conventional arbitration. WIS. STAT. § 111.77(5) (1971).

29 WIS. STAT. § 111.77(4)(b) (1971). *See* text accompanying notes 94 to 95 *infra*. There was some confusion about the precise meaning of "within 5 days of the date of the hearing." *See* STERN, *supra* note 15, at 84-85. The five-day rule was dropped in 1975 so that once an impasse is certified, neither party may amend its final offer without the other party's permission. Chapter 259, 1975 Wis. Laws 866 (codified as WIS. STAT. § 111.77 (1975)).

30 WIS. STAT. § 111.77(6) (1971).

31 *See* note 15 and accompanying text *supra*.

32 *See* notes 24 to 26 and accompanying text *supra*.

33 From 1968 to 1971, using factfinding, 70% of all contract disputes were settled without third-party assistance. During 1973 and 1974, 64% of the contracts were settled without third-party intervention. For a more detailed statistical analysis of the Wisconsin results, *see* STERN, *supra* note 15, at 88, 90.

dispute at the time were unable to predict how far wages would rise and may have been unwilling to make concessions.[34]

In 1972 Wisconsin's neighbor, Michigan, also adopted FOA for public-safety-employee contract disputes.[35] A three-person arbitration panel[36] identifies all disputed economic issues and directs the parties to submit a final offer on each of those issues.[37] Within thirty days after a hearing on the issues, the panel must choose one final offer for each individual economic issue.[38] In this "issue-by-issue" selection process, the arbitrators are guided by eight statutory criteria, including a "catch-all" criterion.[39]

The "issue-by-issue" selection component of the Michigan statute distinguishes it from the Eugene ordinance and the Wisconsin statute.[40] There is some evidence that "issue-by-issue" selection has been used by arbitration panels in Michigan to compromise between the parties' positions, much as is done in conventional arbitration.[41] Such compromise, like the use of a "catch-all" criterion, operates indirectly to reduce FOA's

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34 STERN, *supra* note 15, at 101.

35 Pub. Act No. 127, 1972 Mich. Pub. Acts 211 (codified as MICH. COMP. LAWS ANN. § 423.238 (1978)). FOA is preceded by mediation or factfinding. FOA may be requested by either party. MICH. COMP. LAWS ANN. § 423.233 (1978).

36 The Michigan statute follows the Eugene, Ore., ordinance, note 22 *supra*, in using two partisan arbitrators, one appointed by each party, and one neutral arbitrator. The neutral arbitrator is drawn from a list of three names provided by the Michigan Employee Relations Commission. Each party may strike one name, leaving the remaining person appointed. *Id.* §§ 423.234-.235.

37 *Id.* § 423.238.

38 *Id.* Conventional arbitration decisions are rendered with respect to noneconomic issues.

39 *Id.* § 423.239.

40 "Issue-by-issue" selection was included in the statute as a compromise between Michigan's House of Representatives and Senate. The House was pleased with the results of conventional arbitration. The Senate felt that FOA would give the parties more incentive to negotiate their own settlement. "Issue-by-issue" selection retained some of the arbitrators' flexibility to fashion a compromise award, while at the same time increasing the pressure to bargain. STERN, *supra* note 15, at 41-42; *see* notes 99 to 100 and accompanying text *infra*.

41 Dearborn, Mich., and the Dearborn firefighters took their contract dispute to FOA in 1974. A wide range of economic issues was defined by the arbitration panel and the parties were directed to submit final offers for each issue. The union requested a 10% wage increase while the city offered to pay 5.5%. The union's pay offer was accepted, but the panel accepted the city's offers on many of the fringe benefits, citing the substantial pay increase that had been awarded. It is possible that the panel accepted the city's fringe benefit offers even where the union's offers were more reasonable as a

strong incentive to negotiate. Nevertheless, despite the disincentives created by the "issue-by-issue" selection component, Michigan's experience has shown that FOA is highly successful in encouraging settlements.[42]

In Massachusetts, a three-part procedure was established in 1973 to resolve interest disputes involving firefighters and policemen.[43] The Massachusetts system used the successive steps of mediation, factfinding and FOA to write contracts for these public safety employees.[44] If the negotiations between two parties reached an impasse, and mediation and factfinding failed to break the deadlock, FOA was employed. However, on June 27, 1977, the statute was amended in a way which significantly diluted the final offer component of the procedure.[45]

Under the 1973 statute, a three-person arbitration panel[46] held a hearing at which evidence on the issues was developed.

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means of presenting a compromise package. Seplowitz, *Final Offer Arbitration: The Last Word in Public Sector Labor Disputes,* 10 COLUM. J.L. & SOC. PROB. 525, 535-38 (1974).

In late 1973, a contract dispute between Dearborn and its policemen was referred to FOA. The panel accepted the union's wage offer but split its decisions on fringe benefits between the city and the union. However, there was not as much evidence of compromise as in the firefighters' FOA decision, probably because the offers on wage issues were close together. *Id.* at 539-41.

42 *See* text accompanying note 15 *supra.*

43 An Act Relative to Collective Bargaining by Public Employees, ch. 1078, § 4, 1973 Mass. Acts 1124, *reprinted in* MASS. ANN. LAWS ch. 150E, § 9 app., at 320 (Michie/Law. Co-op. 1976). The procedures established by this statute were in effect from July 1, 1974, through June 30, 1977.

44 The statute set out a complex timetable replete with numerous petitions to the Massachusetts Board of Conciliation and Arbitration and certifications of impasse by that Board at almost every successive step in the process. Ch. 1078, § 4, 1973 Mass. Acts 1124, *supra* note 43.

45 Ch. 347, §§ 2, 8, 1977 Mass. Acts _____, *reprinted in* MASS. ANN. LAWS ch. 150E, § 9 app., at 32 (Michie/Law. Co-op. Supp. 1978). The arbitration panel's options are no longer limited to accepting either party's offer. The major change made by the amendment allows the arbitrators to choose the factfinder's recommendations and thus to disregard the offers of the parties. *Id.* On November 15, 1977, the statute was further amended to give a joint labor-management committee, appointed by the governor, the discretion to alter the form of arbitration in any dispute over which it has jurisdiction. Ch. 730, §§ 1, 2, 1977 Mass. Acts _____, *reprinted in* MASS. ANN. LAWS ch. 150E, § 9 app., at 34 (Michie/Law. Co-op. Supp. 1978).

46 The panel's membership was developed in the same manner as under the Michigan and Eugene, Ore., statutes. Ch. 1078, § 4, 1973 Mass. Acts 1124, *supra* note 43; *see* notes 22 and 36 *supra.* The 1977 amendment permits the parties to utilize a single arbitrator if both sides agree. Ch. 347, § 2, 1977 Mass. Acts _____, *supra* note 45.

At the conclusion of the hearing, each party submitted its last best offer on the total contract package. In choosing one of the parties' offers without modification, the arbitration panel considered ten factors, including a "catch-all" provision.[47] The panel had ten days following the conclusion of the hearing to reach a decision, but the panel could remand the dispute to the parties for further collective bargaining for up to three weeks.

In practice, the statute was not a notable success. Part of the problem was that the mediation and factfinding stages were not successful in encouraging settlements. During the first year of operation, 1975, nearly one third of the contract disputes covered by the statute were not settled until after FOA was invoked.[48] Nor did Massachusetts' variant of FOA prove to be highly effective in inducing settlements before the arbitrator was forced to make an award. During the first two years under this procedure, only one third of the cases resolved at the FOA stage were resolved by settlement prior to an award.[49]

The failure of FOA to encourage a large percentage of disputants to settle can be explained in several ways. First, the available data is from the first two years of operation. As in the Wisconsin experience, the parties in Massachusetts may have been experimenting to see how they would fare under the new procedure. In fact, the parties often made only token efforts to bargain.[50]

Second, factfinding recommendations often predetermined the arbitration decisions. One party often adopted the factfinder's recommendations as its final offer. In most cases, this

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47 Ch. 1078, § 4, 1973 Mass. Acts 1124, *supra* note 43. The amended version retains the same factors but the types of data which can be used to determine the financial ability of the municipality are enumerated with greater specificity. Ch. 347, § 2, 1977 Mass. Acts _____, *supra* note 45.

48 Mass. Dep't of Labor and Industries, Interim Rep't of the Governor's Task Force on Ch. 150E and Impasse Proc., Pub. No. 9357-16-150-12-76-CR, app. 1 (Sept. 20, 1976) (on file at the *Harvard Journal on Legislation*) [hereinafter cited as Task Force Rep't]. Two disputes from fiscal year 1975 were still in factfinding when the report was published. The 1976 data presents a sketchy picture of the Massachusetts procedure since many cases were still in mediation or factfinding at the time of the report. *Id.*

49 Task Force Rep't, *supra* note 48, app. 2.

50 Note, *Final Offer Arbitration in Massachusetts,* 12 NEW ENGLAND L. REV. 693, 710 nn.107 & 110 (1977).

offer was accepted by the arbitrator.[51] This pattern discourages bargaining after factfinding, since the party adopting the factfinder's recommendations will refuse to bargain further.[52]

Third, the factfinding stage is part of a more general problem. The Massachusetts statute included pre-arbitration procedures which were so extensive that the deadline for making final concessions was remote. Parties did not feel the pressure to bargain until the last stage in the process, FOA, was reached.[53]

Finally, even at the FOA stage, the Massachusetts statute did not encourage the parties to make an early commitment to final concessions. A final offer did not have to be submitted until the arbitration hearing was ended. The arbitrator could mediate during the hearing and could refer the dispute back to the parties for further bargaining. If the statute had required parties to submit final offers before the arbitration hearing and had prohibited the arbitrator from mediating, parties would have had to compromise, to the extent possible, at an earlier time.[54]

The public-employee relations sector is not the only context in which FOA has been used. Since 1974, Major League Baseball has used a system of FOA to settle salary disputes.[55] Under this system, either the player or the club may request arbitration but only the player may refuse to participate.[56] Prior to a hearing, the club and the player each submit a single salary proposal

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51 Holden, *Final-Offer Arbitration in Massachusetts: One Year Later,* 31 ARB. J. 26, 29-30 (1976).

52 *Id.* at 31. However, the adoption of a factfinder's recommendation could *increase* negotitated settlement: the parties may settle on the recommendation if they think the arbitrators are likely to do so anyway.

53 *See* text accompanying note 93 *infra.*

54 *See* 12 NEW ENGLAND L. REV., *supra* note 50, at 710, 714; text accompanying note 93 *infra.*

55 *See* FINAL OFFER ARBITRATION, *supra* note 10, at 22; Staudohar, *Player Salary Issues in Major League Baseball,* ARB. J., Dec. 1978, at 17, 19.

56 Basic Agreement beteeen the Am. League of Prof. Baseball Clubs and the Nat'l League of Prof. Baseball Clubs and Major League Baseball Players Ass'n, 1976-79, art. V, § E(6) (on file at the *Harvard Journal on Legislation*) [hereinafter cited as 1976-79 Basic Agreement]. At first glance, it may appear to be unfair for the player to be able to withdraw from arbitration while the club does not have a similar right. *See* OFFICIAL BASEBALL GUIDE FOR 1976 291-92 (J. Marcin, C. Roewe, L. Wigge & L. Vickrey ed.) (statement of F. Cashen, general manager of the Baltimore Orioles). However, the Players Association opposed giving club owners this right, believing that the right would give the owners undue advantage over potential free agents. In order to be a free agent, a player must play for one year without a contract. If a club owner could initiate

for the coming season. Immediately after the hearing, the arbitrator must choose one of the two proposals.[57] The arbitrator writes no opinion and the amount of the arbitration award is confidential.[58] In reaching a decision, the arbitrator may consider a list of enumerated criteria and assign whatever weight to them that he deems appropriate.[59]

Baseball's experience with FOA has been positive: since 1974 the procedure has more than halved the number of disputes that go to arbitration because the parties are unable to settle.[60] It is significant, however, that the clubs have won a large percentage of the arbitrations.[61] Perhaps one reason for this is that the clubs have gained experience in predicting which offer the arbitrator will consider to be the most reasonable. By contrast, it is unlikely that any one player or his representative has participated in more than a few salary arbitrations.[62] It is probable that players and their counsel are still learning how to gauge accurately an arbitrator's reaction.[63] Therefore, no matter how successful FOA proves to be, the fairness of the procedure

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arbitration without the player's consent, then the player could never achieve free agent status. Letter from Peter Rose, Assoc. Counsel for Major League Baseball Players Ass'n, to the author (June 2, 1978) (on file at the *Harvard Journal on Legislation*).

57 1976-79 Basic Agreement, *supra* note 56, § E(5).

58 *Id.*

59 *Id.* § E(12). At the same time, the arbitrator is prohibited from considering certain criteria, such as the financial position of the parties. *Id.*

60 *See* Staudohar, *supra* note 55, at 20.

61 In 1974, the clubs won 12 of the 23 cases arbitrated; in 1975, 9 of the 15 cases; and in 1978, 7 of the 9 cases. Letter from Peter Rose, *supra* note 56. *See* Staudohar, *supra* note 55, at 20. During the 1976 and 1977 seasons, FOA was supplanted by a more voluntary arbitration procedure. 1976-79 Basic Agreement, *supra* note 56, § E(1).

62 However, Players Association counsel are generally more experienced with FOA than players' individual counsel and have more skillfully represented players at arbitration hearings. *See* Seitz, *Footnotes to Baseball Salary Arbitration,* 29 ARB. J. 98, 99 (1974).

63 *Id.* There is some evidence that players are catching up to the owners in their ability to utilize FOA effectively. In 1979, players won 8 of 12 salary arbitrations. N.Y. Times, Mar. 13, 1979, at C17, col. 3. There are two possible reasons for this change. First, the players' counsel may be growing more experienced with the procedure. Second, since only players with less than 6 years of major league service were eligible to use FOA in 1978 and 1979, 1976-69 Basic Agreement, *supra* note 56, § E(1), the high salary demands of veteran players were not arbitrated. The 8 players who won in 1978 demanded an average salary of $67,750, *see* N.Y. Times, Mar. 13, 1979, at C17, col. 3, which was surely less than the average baseball salary for 1979. (1978's average was $99,876. Telephone conversation with representative of Major League Baseball Players Ass'n, Mar. 19, 1979.) Therefore, in arbitrations involving younger and, on the average, lower-salaried players, the arbitrator will tend to side with the players.

depends on representation by sophisticated and experienced counsel.[64]

II. Final Offer Arbitration as a Prerequisite to Trial in Civil Action

A. *Civil Actions Suitable for FOA*

In order to apply FOA to the civil case load, it is necessary to consider which cases would benefit from the incentives to bargain inherent in FOA. Obviously, FOA can operate to reduce the burden on the adjudicatory system only in those disputes which can be resolved by negotiation and compromise.

Intuition suggests, and experience in the public sector has shown, that FOA will not work well in disputes which have a "yes" or "no" answer. When there are only two possible positions, and any resolution must include acceptance of one or the other, the parties have nothing to negotiate. The incentives of FOA will not encourage negotiation, for indeed there is no room for compromise.[65]

FOA will be successful in civil actions where there are a number of possible final outcomes located somewhere along a continuum, as there are in wage disputes. In such cases, each party, faced with the prospect of having the other party's offer accepted, will make successive offers in an effort to compromise. By trying to estimate what the arbitrator will think is reasonable, the parties will make offers that will converge toward a median. If the offers come close enough, the parties will settle.[66]

FOA is also well suited for "polycentric" problems,[67] which may be illustrated by Professor Lon Fuller's example of a be-

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64 *See* text accompanying note 103 *infra.*

65 *See* Long & Feuille, *supra* note 21, at 203. *See, e.g.,* the Eugene, Ore., experience, note 24 *supra.* In the first and third contracts decided under the Eugene ordinance, FOA was ineffective in producing a negotiated resolution. In the first contract the union wanted a manning requirement and the city did not. In the third contract the union wanted an agency shop and the city wanted maintenance of membership. There was no middle ground and no opportunity for compromise.

66 *See* text accompanying notes 12 to 13 *supra.*

67 For a description of "polycentric" problems, *see* M. Polanyi, The Logic of Liberty: Reflections & Rejoinders 170-84 (1951).

quest of paintings to be left to two museums "in equal shares."[68] A polycentric problem involves a large number of interrelated issues. When the proposed resolution to one issue is changed, all other issues are affected. Not only must a judge decide which party will prevail on each particular issue, but he must also be careful to ensure that, in the bequest, for example, his particular decisions have produced equitable "packages." Polycentric problems are not easily resolved by the adjudicative process.[69] The museums would be better able than would a court to divide the paintings in a manner that would maximize the satisfaction of each museum.[70] FOA would provide an incentive for the parties to reach an equitable division on their own.

FOA would be helpful, then, in resolving those disputes which will result in the choice of an amount which lies on a continuum.[71] A number of civil actions, including medical malpractice cases, personal injury actions, intentional torts involving mental distress and punitive damages, quantum meruit and quantum valebat contract disputes, eminent domain proceedings, and property settlements, are suitable for FOA.

Medical malpractice and personal injury cases have numerous elements of damage which are inexact and are therefore found along a continuum. Pain and suffering, typically a large part of the damages claimed in these cases,[72] are not susceptible to determination by a mathematical formula.[73] A multitude of factors serve to make personal injury damage judgments subjective: such factors include the percentage of disability, the loss of

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68 Fuller, *Collective Bargaining & the Arbitrator*, 1963 WIS. L. REV. 3, 32.

69 *Id.* at 34. A court would have a difficult time dividing the property in this bequest. The paintings could be divided into two collections of equal monetary value. However, the most beneficial distribution might not result because the collections might not be unified by period, schools of art, or other aesthetic considerations. Nor would a monetary division take into account the gaps in the museums' collections. Fashioning a division which satisfactorily balances every important factor requires innumerable trade-offs and party decisions.

70 *Id.* at 32-33.

71 However, FOA might not always be successful in these sorts of disputes if multiple parties are involved, since negotiations would be difficult to conduct.

72 *See* Comment, *A Quantum Study of Pain & Suffering Awards for All Personal Injuries in the Louisiana Appellate Courts (1972-1975)*, 21 LOY. L. REV. 691 (1975).

73 Duguay v. Gelinas, 104 N.H. 182, 182 A.2d 451 (1962).

future pay, future medical expenses, and the prospects of recuperation.[74]

Damages for intentional torts with components of mental distress, emotional anguish, and punitive damages are also subjectively determined. For example, actions for intentional infliction of emotional distress and wrongful invasion of privacy do not require that the plaintiff suffer actual physical injury.[75] Rather, the plaintiff need prove only psychic harm for which no certain means of assessment exist. In determining punitive damages, factors like the wealth and the motivation of the defendant are taken into account.[76] The result is anything but a sum certain.

In contract disputes where quantum meruit or quantum valebat is the measure of damages, the money judgment is the reasonable value of services rendered or goods received.[77] Yet, "reasonable value" is not easily translated into dollars and cents. Professor Arthur Corbin gives the example of A, who finds B's house on fire and his cattle starving.[78] What is the reasonable value of A's service if A puts out the fire and feeds B's cattle? Certainly, there is no market quotation for the reasonable value of feeding starving cattle and saving a burning house.

When the government exercises its power of eminent domain, the landowner must receive "just compensation."[79] What compensation is just is a vexatious question. "Fair market value" is the usual measure.[80] Factfinding bodies seeking to establish the fair market value of a piece of property rely on such evidence as sales of similar property, the capitalization of income (when business property is involved), and replacement cost less

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74 *See generally* F. HARPER & F. JAMES, THE LAW OF TORTS §§ 25.8-.9 (1956).

75 State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (intentional infliction of emotional distress); Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945) (wrongful invasion of privacy); *see* Fairfield v. American Photo. Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (privacy). *See generally* W. PROSSER, LAW OF TORTS § 117, at 815 (4th ed. 1971) (privacy).

76 *See, e.g.*, Jones v. Fisher, 42 Wis. 2d 209, 166 N.W.2d 175 (1969).

77 A. CORBIN, CONTRACTS § 20 (one vol. ed. 1952).

78 *Id.* § 19.

79 U.S. CONST. amend. V.

80 C. HAAR, LAND-USE PLANNING 706 (3d ed. 1977).

depreciation (when man-made structures are involved).[81] The mere multiplicity of methods implies that a number of figures could result, none of which is inherently correct.

Polycentric problems typically arise in civil suits involving divorce property settlements or the division of estates. As Professor Fuller's example[82] makes clear, a court is not as effective or efficient a mechanism for the resolution of polycentric problems as are the parties themselves. The parties have the advantage of being sensitive to their individual needs and tastes. Therefore, they are more able than a court to divide property into packages that will provide maximum satisfaction to each party. It makes no sense to use judicial resources when negotiation will be more effective and more efficient.

This list of civil actions, in which FOA will promote settlements, is suggestive, not exhaustive. FOA can be profitably used as a pre-trial settlement device in all civil actions involving disputes which will result in the choice of a polycentric package or in the choice of an amount which lies on a continuum. FOA will be successful in these actions because they present disputes in which there is room for compromise.

B. *The FOA Proposal*

For those civil actions in which polycentric problems are presented or in which relief along a continuum is sought, a pretrial FOA procedure should contain the following elements:

Filing. The plaintiff files a complaint in the proper court. If the case is suitable for FOA, it is assigned to an arbitrator. If either party refuses to participate in the FOA procedure, a judgment of dismissal or default, as appropriate, is rendered. If, however, both parties refuse to participate, the case is returned to the civil courts.

Hearing on Entitlement or Liability. As soon as possible after assignment, the arbitrator holds a hearing to resolve all issues bearing on the plaintiff's right to the requested relief. At the hearing the parties to the suit may present oral testimony

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81 *Id.* at 706-08.

82 *See* notes 68 to 70 and accompanying text *supra.*

and evidence relevant to the question of entitlement or liability. If the arbitrator determines that the plaintiff has no right to relief, the arbitration proceeding ends. The plaintiff may then proceed to a trial de novo in court if he so chooses.[83] If the arbitrator determines that the plaintiff is entitled to a recovery, the parties have thirty days within which to negotiate a settlement on the amount of relief.

Hearing on Amount of Relief. If no settlement on the amount of relief is reached, the arbitrator schedules an arbitration hearing to begin within seven days. Prior to the hearing, each party submits its final offer to the arbitrator. A party's final offer must be identical to the last offer actually presented during negotiations. In polycentric problems, each party may submit one additional offer, which must be open to inspection by the opposing parties.

At the arbitration hearing, the parties may present testimony and evidence bearing on the issue of relief and on the reasonableness of the final offers under consideration. During the hearing, and at any time prior to the announcement of the arbitrator's decision, the parties may continue to negotiate and may agree on a settlement.

The Decision. Within twenty-one days of the conclusion of the hearing, the arbitrator shall render a decision. That decision shall consist of one party's offer exactly as presented, without alteration or compromise. Common law and statutory measures of relief will guide the arbitrator's decision.[84]

Acceptance of the Decision. If both parties accept the arbitrator's decision, the costs of arbitration (excluding counsel fees) are paid by the party whose final offer was *not* accepted by the arbitrator. If either party rejects the arbitrator's decision

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83 If the plaintiff presses his case in civil court, the costs of arbitration are combined with court costs generally. If the plaintiff withdraws the complaint he pays the costs of arbitration.

84 Since arbitrators will be deciding questions of entitlement and relief according to rules of law, they must possess legal qualifications of the same order as judges. The process of qualifying arbitrators may be analogized to the process qualifying standing masters under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 53(a). However, certain individual state constitutions may prohibit the use of non-judicial personnel to perform judicial functions and the use of judicial personnel to perform non-judicial functions. *See, e.g.,* Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

the action will be tried de novo. The costs of arbitration (excluding counsel fees) are combined with other court costs to which the normal rules of assigning costs are applied.

Trial De Novo. If a trial de novo is to be held, the judgments and findings of the arbitrator are admissible as evidence. The arbitrator may not, however, testify at trial. The jury is instructed that the report of the arbitrator is not conclusive, but is to be assigned whatever weight the jury deems appropriate.

C. *Analysis of the Proposal*

1. Filing and Initial Hearing

Before referring a case to an arbitrator, the court must determine whether the case contains issues that are appropriate for pre-trial FOA. If the action is one in which the relief requested would be a definite figure once liability is established, as may be the case in a suit for payment of a promissory note, FOA cannot be effective in encouraging the parties to negotiate a damage settlement. This sort of action should not be referred to FOA. If, on the other hand, significant elements[85] of the relief pursued are on a continuum or are polycentric in nature, assignment to arbitration would be in order.[86] This initial screening process will not burden the courts. The determination can be made on the basis of an examination of the pleadings, in most cases, by a clerk of the courts.

A bifurcated arbitration procedure, with one hearing to determine entitlement or liability and a second hearing to determine relief, is essential to the proposed pretrial FOA procedure. In the public sector, parties can negotiate on the contract before a hearing is held. They have a common goal — to negotiate a contract — and all the information necessary to negotiate meaningfully is available to them before the hearing. If negotiations are held before entitlement or liability is determined, the parties may negotiate from different premises. The plaintiff would

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85 On occasion, the relief requested will consist of sum-certain elements and continuum elements. Such a case is still appropriate for arbitration as the sum-certain amount will become a constant found in the offers of both parties.

86 For a discussion of the cases in which FOA would be advantageous, *see* text accompanying notes 65 to 82 *supra.*

negotiate under the assumption that the defendant was liable. The defendant might not admit any liability and thus would refuse to make an offer. Only after liability is determined by the arbitrator in an initial hearing can the parties realistically negotiate a settlement.[87]

2. Single Arbitrator

Unlike the final offer procedures used in the public sector in Michigan and Eugene, Oregon, the proposed pre-trial FOA procedure relies on a single arbitrator.[88] There are two reasons for the single arbitrator: lower cost and less coercion.

A pre-trial settlement procedure should not impose unnecessary costs on the parties or on society. A three-member arbitration panel composed of two partisan and one neutral arbitrator is an unnecessary cost. Studies of conventional arbitration have shown that the use of a three-member panel, rather than a single arbitrator, can lengthen the arbitration process substantially.[89] This additional cost is not justified, since the partisan arbitrators will presumably side with their own party's position in every case.[90] A single arbitrator can ably choose between two proposals by himself.

A second advantage of a single arbitrator is that some of the "backroom" coercion associated with a three-member panel can be avoided. In the second and sixth contract disputes in Eugene,[91] the parties settled only after the neutral arbitrator let it be known that he was leaning towards acceptance of the city's offer.[92] In effect, one party is told that the arbitrator has

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87 The entitlement or liability hearing may be formal or informal. Even if the hearing is as formal as a bench trial, substantial savings in resources will be realized through the absence of a jury. *See* Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1058-59 (1964) (estimates that bench trials require 40% less time than jury trials).

88 In origin, the three-member panel, with the two partisan and one neutral arbitrator, may be a relic from conventional arbitration. There, every party appreciates a friend on the board who can influence the neutral arbitrator's discretion as he shapes the final award. *See* Note, *Final Offer Selection: Two Canadian Case Studies & an American Degression*, 13 OSGOODE HALL L.J. 851, 874 (1975).

89 *Id.* at 874-75.

90 *Id.* at 874. Stern has suggested that some neutral arbitrators on three-member panels make the final decision and then present it for signature to the partisan arbitrators. STERN, *supra* note 15, at 18.

91 For a summary of these contract disputes, *see* note 24 *supra*.

92 *See* Long & Feuille, *supra* note 21, at 195, 197.

decided not to accept its offer. Then that party is expected to agree to the other party's offer, or a similar one, and to pretend that the agreement is voluntary. This procedure smacks of coercion beyond the bounds of fairness. There is nothing unfair about forcing parties to negotiate realistically, but the parties to a dispute should not be forced into the position of publicly appearing to have voluntarily agreed to a proposal that they do not want.

3. Number and Timing of Offers

Under the proposed pre-trial FOA procedure, the last offer of each party during the thirty-day negotiation period is the final offer for that party.[93] No other offer may be submitted to the arbitrator and no amendments to the offer may be made. In this way, each party will know that it must present the other side with a reasonable proposal during negotiations. Although the parties may begin negotiations by making excessive demands and by posturing for effect, they must present reasonable offers as the end of the thirty-day period draws near. If they do not make concessions, they risk having an unreasonable final offer submitted to the arbitrator as their final offer.

Michigan and Eugene, Oregon, both allow some form of amendment or second final offer.[94] To the extent that the parties know their final negotiating position is not the final offer, they will refrain from making final concessions. In Eugene and Michigan, a significant number of cases were settled only after FOA had been invoked and the arbitration award was imminent.[95] Each party gave its best offer only when faced with the arbitrator's comparison of its offer with the other party's.

The provision of the Eugene ordinance that allows each party to submit both a final offer and an alternative offer would be

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93 The idea that the final negotiating position should be the final offer for each party was first advanced in Stevens, *supra* note 11, at 45-46.

94 MICH. COMP. LAWS ANN. § 423.238 (1978) (panel may allow amendment of offers during the course of the hearing); Eugene Ordinance, *supra* note 21, § 2(6). Wisconsin formerly had a similar provision. *See* note 29 *supra*.

95 *See* notes 24 to 26 and accompanying text *supra* (Eugene); STERN, *supra* note 15, at 59 (Michigan).

very useful for polycentric problems,[96] and it is included in the proposal. In disputes where the bargaining concerns a figure on a continuum, the parties may "hold out" on making their best offer. However, it is not as likely that the parties will "hold out" in disputes involving polycentric problems, because it is difficult to say which is the best of the many reasonable offers that are possible. Parties may negotiate in good faith and still differ with respect to a suitable settlement. With four packages on the table, the arbitrator will have more flexibility to choose a satisfactory package; yet, there will not be so much flexibility that the advantages over regular arbitration will be lost.

4. Package Selection

The arbitrator must choose one party's offer in its entirety. Of course, where the only item in dispute is the amount of money damages, the question of whether to have package or "issue-by-issue" selection is, for the most part, moot.[97] Each party's offer will consist of a dollar amount.[98]

In polycentric cases, package selection increases the incentive to bargain and results in consistent packages. Each party must present a package that is fair to both sides. The two disputes in Dearborn, Michigan, demonstrate that when "issue-by-issue" selection is permitted an arbitrator will create a compromise decision.[99] Knowing this, the parties will sense that the costs of not coming to agreement are lowered.[100] Consequently, the incentive to bargain is reduced, and fewer disputes are settled by negotiation.

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96 *See* Nels, *supra* note 12, at 56.

97 Where money damages are the result of distinct elements, *e.g.*, medical expenses, loss of consortium, and pain and suffering, it would be possible to have "issue-by-issue" selection. Such a method, however, would be undesirable for the reasons presented. *See* notes 99 to 100 and accompanying text *infra*.

98 There is greater complexity where the damage judgment has compensatory and punitive components. The tax consequence for each may be different and may affect a party's willingness to accept a given settlement. *See generally* [1979] STAND. FED. TAX REP. (CCH) ¶ 680.

99 For a summary of these disputes, *see* note 41 *supra*.

100 In "issue-by-issue" selection, each party may decide to insist on specific unreasonable demands. It may not hurt to leave these demands in a final offer, because the arbitrator can decide negatively on some demands without affecting others. In fact, one side may want to lose many small issues, so that the arbitrator will compromise by accepting the party's offer on one important issue.

5. Specific Criteria

Each party must have a similar assessment of the reasonableness of a proposal. If they do not, the parties will be unable or unwilling to bargain. Similar assessments are possible only if both parties know what criteria the arbitrator will use in making his decision. Therefore, the success of FOA depends on the presence of specific criteria known to each side,[101] and on the absence of the "catch-all" clause found in numerous FOA provisions.[102]

The proposed pre-trial FOA procedure calls for the use of common law and statutory measures of damages as a guide to determining a reasonable offer. Admittedly, these rules are somewhat imprecise. However, these rules are more familiar to the parties' counsel than any special criteria created solely for FOA could be. Therefore, the advantages of specific criteria can best be realized by incorporating common law and statutory measures into the proposal's damage criteria.

This analysis highlights the need for experienced negotiators on each side. As the Assembly Advisory Council on Public Employee Relations in California found:

> [F]inal-offer-selection assumes that the parties are sophisticated enough to evaluate their positions realistically against the standards which arbitrators are likely to use in making their choices. If this assumption is not sound, the procedure is not likely to have significant motivational impact at the bargaining table because the parties will not have enough experience to be apprehensive.[103]

6. Costs and Admission of Evidence

If the proposed pre-trial FOA procedure is to be effective in reducing court congestion and backlog, it is necessary to do

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101 If the criteria of decision are nonspecific, it might be thought that the parties would be encouraged to settle since they may fear an arbitrary decision. However, there is a strong chance that nonspecific criteria would backfire. Each party, using its own criteria, may feel that its offer is more reasonable and may refuse to make further concessions.

102 *See* text accompanying notes 19, 30, 39, and 47 *supra.*

103 Final Report of the Assembly Adv. Council on Pub. Empl. Rel. in Cal. 226 (Mar. 15, 1973), *quoted in* Zack, *Final Offer Selection — Panacea or Pandora's Box?*, 19 N.Y.L.F. 567, 577 (1974); *see* Seitz, *supra* note 62, at 100.

more than merely to insure that the incentive to bargain be maintained without dilution. Parties must be discouraged from bypassing FOA initially and from moving automatically to a trial de novo after the arbitrator's decision is rendered.

Under the proposed procedure, parties whose case has been referred to arbitration can evade FOA only when both sides refuse to employ the system. It is unlikely that the parties will agree to forego FOA. Both parties will refuse to participate only if each party perceives its chances of success as being better before a judge or jury than before an arbitrator. Many factors come into play in estimating the chances of success, not the least of which is the emotional appeal or the legal strength of a case. Intuitively, it would only be in a rare case that both parties would see no advantage in FOA. The proposed procedure should work naturally to discourage the parties from bypassing arbitration.

It is less likely that the parties will be as easily encouraged to accept the arbitrator's decision as final. Costs, however, should not be imposed to discourage someone from going to trial if he believes he has a legitimate claim.[104] Under the proposed pre-trial FOA procedure, the loser at arbitration must bear the costs of arbitration. The only additional costs to a party who wishes to exercise his right to a trial de novo is the possible court cost if he loses at trial. He bears that risk anyway in bringing a suit or in being sued, whether or not the final offer proposal goes into effect. The proposed procedure imposes no financial penalty on a party who exercises his right to a trial.

The proposed procedure relies not on costs but on the ad-

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104 A pre-trial mediation plan now in effect in Wayne County, Mich., shows how costs can be used as a deterrent to trial. Parties in automobile accident cases where liability is probable must submit to a pre-trial mediation panel. The panel renders an evaluation of the damages in the suit. Either party may appeal the decision of the panel to a court trial. At trial, if the appealing party does not improve his position by 10% over the panel's recommendation, he is responsible for paying court costs, including $350 per day for the opponent's counsel. Miller, *Mediation in Michigan*, 56 JUDICATURE 290, 291 (1973).

Under the Michigan plan, a party would not exercise his right to a jury trial if he had limited funds or was unsure of improving his position by 10%. The smaller the amount at stake in the case, the more of a deterrent a possible imposition of court costs and attorney's fees will be. Therefore, the deterrent would frequently discourage an appeal regardless of the strength of the potential appellant's claim.

missibility of the arbitrator's decisions on entitlement or liability and on relief to give the arbitration procedure respect and effect. When introduced at trial, the arbitrator's report serves as nonpartisan expert testimony.[105] The report is relevant to the merits of the action being tried and deserves to be considered by the jury.[106] Since the arbitrator's report will undoubtedly have some effect on the jury, the loser at arbitration will not be able to entertain wild hopes that the trial will end in a much more advantageous result.[107] The use of this deterrent, which is relevant to the merits of the case, is preferable to the use of the extraneous and potentially unfair deterrent of cost.

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105 If the arbitrator determines that there is no liability, the plaintiff has the right to have a trial de novo. The arbitrator's recommendation of "no liability" will be admissible as evidence. If the arbitrator determines that there is liability and proceeds to choose the offer of one party, his recommendation of that dollar amount of damages and his finding of liability will be admissible in any subsequent trial de novo. In both situations the arbitrator's report should contain not only findings of fact and law, but also his reasoning in making these findings.

106 The arbitrator is not permitted to testify because his testimony may become an overriding factor in the jury's mind. It may very well be urged by some that preventing the arbitrator from testifying while allowing his testimony to be admitted into evidence violates the parties' right to due process, because there is no opportunity for cross-examination. *See* McKay, *The Right of Confrontation,* 1959 WASH. U.L.Q. 122, 128-30; *cf.* United States v. Medico, 557 F.2d 309, 314 n.4 (2d Cir.) (dictum) (question of admissibility of hearsay in civil and criminal cases depends on "due process considerations of fairness"), *cert. denied,* 434 U.S. 986 (1977).

A medical-malpractice-panel procedure in Florida (not final offer) currently makes similar provision for admission. FLA. STAT. ANN. §§ 768.44, .47 (West Supp. 1979). This aspect of the procedure has not yet been challenged in the courts.

New York's malpractice-panel statute prohibits the judge on the panel from testifying, although the attorney and physician on the panel may testify. N.Y. JUD. LAW § 148-a (McKinney Supp. 1978-79). There has been no definitive ruling on the constitutionality of allowing the attorney and physician to testify. *But see* Abrams v. Brooklyn Hosp., 91 Misc. 2d 380, 382, 398 N.Y.S.2d 114, 116 (Sup. Ct. 1977) (dictum).

If the proposed statute were successfully challenged, the proposal could be modified. The proposal could allow each party to depose the arbitrator and the deposition could be admitted into evidence. This would preserve each party's right to cross-examine the witness, but would prevent the arbitrator's presence at trial from becoming an overpowering influence. For further discussion of the constitutionality of the admission of the arbitrator's report, *see* text accompanying notes 127 to 134 *infra.*

107 *See Senate Hearings, supra* note 13, at 475-76 (statement of George Smetana, Counsel for Sears, Roebuck & Co.):

> There is no reason that the parties cannot work the problems out. If we know it must be worked out, it can be done. The only reason it is not done is because there is always someone else who can do it and from whom the parties feel they can get a better deal.
>
> If we stop believing we will get a better deal from the next tribunal, we will sit down and reach agreement.

The admissibility of the arbitrator's decision also increases the incentive to make

D. *Constitutionality*

1. The Need for a Trial De Novo

The proposed pre-trial FOA procedure permits parties who are unsatisfied with the arbitrator's decision to obtain a trial de novo in the civil courts. The parties must be given this option in order to protect their right to a jury trial. The trial de novo protects this right because, as a procedure, a trial de novo is almost identical to a jury trial.[108]

The seventh amendment of the United States Constitution provides that in cases at common law, where the value in controversy exceeds twenty dollars, "the right of trial by jury shall be preserved."[109] Although the seventh amendment has not been applied to the states through the due process clause of the fourteenth amendment,[110] most states have a similar constitutional guarantee.[111] The Supreme Court has interpreted the seventh amendment to apply to all actions involving "rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty.[112] Many of the tort, contract, and property actions that are suitable for FOA[113] involve rights protected by the seventh amendment and its counterparts in state constitutions.[114]

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reasonable offers since it would be important to win the arbitrator's decision on relief. Settlement will be encouraged as offers are made more reasonable. In the long run, then, the admission of the arbitrator's decision not only protects the finality of that decision but also enhances the chances for settlement.

108 The proposed trial de novo differs from a jury trial in two respects: first, added time and expense; and, second, the admission of the arbitrator's report. For a discussion of the constitutional significance of these differences, *see* text accompanying notes 119 to 134 *infra.*

109 U.S. CONST. amend VII.

110 *See* Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974); Walker v. Sauvinet, 92 U.S. 90 (1876); Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La.) (reviewing the history of the application of the Bill of Rights to the states and concluding that the seventh amendment has not been so applied), *aff'd mem. sub nom.* Hill v. McKeithen, 409 U.S. 943 (1972).

111 *See, e.g.,* N.Y. CONST. art I, § 2; CAL. CONST. art. I, § 7; ILL. CONST. art. I, § 13; MASS. CONST. pt. 1, art. XV.

112 Pernell v. Southall Realty, 416 U.S. 363, 375 (1974) (right to recover possession of real property).

113 *See* text accompanying notes 65 to 82 *supra.*

114 *Cf.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 458 (1977) (seventh amendment not applicable to "public rights").

Even if it would be constitutionally possible to establish an arbitration procedure for some civil actions without providing for a trial de novo, there are good reasons not to do so. The right to jury trial has been fundamental throughout Anglo-American legal history. Speaking of new ways to try crimes without juries, Blackstone said:

> And, however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*,) yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern.[115]

It would certainly be "convenient" for the arbitrator's decision to be absolutely final and unappealable. However, the value of a judicial system is determined, in large part, by the public's perception of its legitimacy. To stretch the federal and state constitutions to allow an unappealable arbitration procedure would not be in keeping with the spirit of these constitutions or with the expectations that the public has developed over two hundred years. If the public expectations are contradicted, the legitimacy of the judicial system will suffer.

Legitimacy of the judicial system depends not only on public expectations. When a judgment is rendered in a civil suit, the losing party is apt to be displeased. Where a jury has rendered the decision, the displeasure is likely to be directed at the members of the jury, all private citizens, rather than at the judicial system itself.[116] In effect, the jury serves to shield the judicial system from criticism that is inevitable in any adversary system. Furthermore, when six or twelve laymen decide a case in lieu of a judge, the public will perceive the decision to be freer of corruption than if a single politically appointed or elected judge decides the case. One man is easier to "buy off" than six

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115 4 W. BLACKSTONE, COMMENTARIES 350 (emphasis on original).

116 Kalven, *supra* note 87, at 1062; Janata, *The Pros and Cons of Jury Trials*, 11 FORUM 590, 596-97 (1975).

or twelve.[117] Finally, service on a jury enhances the image of the judicial system in the minds of those who serve as jurors.[118] Therefore, regardless of the requirements of the right to jury trial, a trial de novo is needed to protect the legitimacy of the judicial system.

2. Burdens on the Right to Jury Trial

a. FOA as a Prerequisite to the Jury Trial

Although the proposed pre-trial procedure meets the constitutional mandate to preserve the availabilty of jury trials, it does so only after litigants have completed the FOA process. Such a prerequisite is not, however, constitutionally impermissible. In reviewing a compulsory arbitration procedure for small claims from which the parties could appeal to a trial de novo, the Pennsylvania Supreme Court found no infringement of the right to jury trial.[119] The court held that the right to jury trial does not guarantee that a jury will hear a case in the first instance, but rather that a jury will have an opportunity to make its findings of fact before a final determination of the parties' rights is made.[120]

Burdens or restrictions on the right to jury trial are constitutional as long as they are reasonable.[121] In Florida, where a

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117 Kalven, *supra* note 87, at 1062; *see* Janata, *supra* note 116, at 597.

118 Allen, *Attitude Change Following Jury Duty*, 2 JUST. SYS. J. 246 (1977). Allen polled 158 jurors in Oakland County, Mich., before and after they served on jury duty. They were asked to indicate their agreement or disagreement with a list of statements by responding on a 1 to 5 scale. Two of the statements were: "Everybody has an equal chance in the courts" and "The average guy really doesn't get a 'fair shake' in the courts." Responses to these questions before and after indicated that there was greater agreement with the first statement and greater disagreement with the second statement after the respondents had sat on one or more juries. The magnitude of the changed opinion was so great that it was determined that there was less than a .001 probability that the results were due to chance and not to the jurors' experience in serving on a jury.

119 *In re* Smith, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* Smith v. Weisler, 350 U.S. 858 (1955).

120 *Id.; see* Capital Fraction Co. v. Hof, 174 U.S. 1, 19, 23 (1899).

121 174 U.S. at 23; *see* Bayer v. Ras, 71 Misc. 2d 464, 336 N.Y.S.2d 261 (Monroe County Ct. 1972) (procedure for obtaining trial de novo must not be so burdensome as to impede right to jury trial); *cf.* Florida Welding & Erection Serv., Inc. v. American Mutual Ins. Co., 285 So. 2d 386 (Fla. Sup. Ct. 1973) (receiving exhaustion of administrative remedies). The reasonableness and constitutionality of restrictions may

party must submit a medical malpractice case to a pre-trial mediation panel,[122] a circuit court had ruled that any burden on the right to "timely access to the courts" is a violation of the right to a trial by jury.[123] The Florida Supreme Court reversed, stating that "[a]lthough courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law.[124] A concurring judge, writing in the same case, compared the mediation panel to a pre-trial settlement conference, a procedure common in many jurisdictions.[125] Other judicial proceedings, used prior to trial, also impose additional costs and delay on litigants but have not been held unconstitutional.[126] The use of an FOA procedure as a prerequisite to the jury trial should not be held unconstitutional, because a party will not be subjected to either unreasonable costs or lengthy time delays.

b. Admission of the Arbitrator's Report at Trial

A litigant's right to a jury trial may be violated not only by delay and expense, but also by the introduction of evidence that will destroy the independent judgment of the jury. According to an Ohio Court of Common Pleas in *Simon v. St. Elizabeth Medical Center,*[127] the admission into evidence of the arbitrator's decision would greatly diminish the chances that a loser at arbitration could win at trial and would discourage litigants from proceeding to a jury trial. The court concluded that such deterrence would violate the party's right to a jury trial.[128]

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differ from case to case. A court may reject restrictions when a plaintiff has sued to enforce a fundamental right like privacy; however, it may uphold the same restrictions when a plaintiff has sued for money damages for medical malpractice. *See* Halpern v. Gozan, 85 Misc. 2d 753, 757-58, 381 N.Y.S.2d 744, 747-48 (Sup. Ct. 1976).

122 FLA. STAT. ANN. §§ 768.44, .47 (West Supp. 1979).

123 Carter v. Sparkman, 43 Fla. Supp. 107, 109 (Cir. Ct. 1975), *rev'd,* 335 So. 2d 802 (Fla. Sup. Ct. 1976), *cert. denied,* 429 U.S. 1041 (1977).

124 335 So. 2d 802, 805.

125 *Id.* at 807 (England, J., concurring).

126 *See, e.g., Ex parte* Peterson, 253 U.S. 300 (1920) (preliminary hearing).

127 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Common Pleas 1976) (dictum).

128 3 Ohio Op. 3d at 168, 355 N.E.2d at 908. The court's reasoning seems to be dictum because the court held that the case before it was not covered by the act

Although some commentators doubt that juries can put the source of a piece of evidence out of mind when evaluating that evidence's probative worth,[129] a number of courts and commentators agree that an arbitrator's report will not be so overpowering as to make the jury trial a sham.[130] In *Halpern v. Gozan,*[131] a New York court heralded the independence of the jury in reaching a determination in a case that had been previously decided by a medical malpractice panel. The court found that "[juries] accept with obvious pride the admonitions of the trial court that they are the 'sole judges of the facts'."[132] The Nebraska Supreme Court, faced with the contention that a jury "could not or would not evaluate a medical review panel's recommendation with objectivity," replied that "[o]ur present experience with expert witnesses certainly indicates otherwise."[133]

A number of reasons justify this confidence in the independence of the jury. The jury will have the benefit of the judge's instructions, informing the jury that they are the final arbiters of the facts and that the arbitrator's decision is to be accorded whatever weight *they* deem proper.[134] In addition, the jury will have available the arbitrator's report, including the grounds for his decision. The jury can examine the arbitrator's reasoning in evaluating the worth of his decision. Finally, the jury is unlikely to defer to an arbitrator on the ground of special

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establishing the arbitration procedure. 3 Ohio Op. 3d at 169, 355 N.E.2d at 909.

129 *See* Comment, *Recent Medical Malpractice Legislation — A First Checkup,* 50 TUL. L. REV. 655, 681 (1976) ("[T]he prejudicial effect of an admissible, adverse panel report could be virtually impossible to overcome . . ."); Note, *Ohio's Rx for the Medical Malpractice Crisis: the Patient Pays,* 45 U. CIN. L. REV. 90, 102 (1976) ("jury may give undue weight to the findings").

130 *See, e.g.,* Meeker v. Lehigh Valley R.R., 236 U.S. 412, 430 (1915); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (Sup. Ct. in banc); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comisky v. Arlen, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976), *aff'd mem.,* 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977); 7 J. WIGMORE, EVIDENCE § 1920, at 18 (Chadbourn rev. 1978) (claim the expert testimony will usurp the power of the jury is "empty rhetoric"); 11 MOORE'S FEDERAL PRACTICE § 704.10, at VII-66 (2d ed. 1976) (opinion testimony on ultimate issues will not supplant trier of fact because trier can decide weight to be given testimony).

131 85 Misc. 2d 753, 381 N.Y.S.2d 774 (Sup. Ct. 1976).

132 *Id.* at 759, 381 N.Y.S.2d at 748.

133 199 Neb. at 109, 256 N.W.2d at 666.

134 *See* 11 MOORE'S FEDERAL PRACTICE, *supra* note 130.

competence, as juries are equally competent to decide the factual issues typically involved in the cases that will be referred to FOA. Therefore, the independence of the jury will not be undermined by admission of the arbitrator's report.

Conclusion

The courts become more crowded each year. Crowding can be alleviated by implementing a mechanism designed to bring parties together in a voluntary settlement. FOA has shown promise in the public sector as such a device. The proposed pre-trial FOA procedure for use in certain civil suits will induce negotiation and settlement of disputes. If more cases can be settled outside of court, the courts will be available to those who can truly not settle their disputes by themselves.

Admittedly there may be some factors in a particular judicial system that will render the proposed procedure ineffective. However, there is little to lose and much to gain by testing new methods of dispute resolution. The crisis in the courts requires that affirmative steps be taken to relieve court congestion. The lesson of history is that the problem will not solve itself.

NOTE

REFORMING FEDERAL CLASS ACTION PROCEDURE: AN ANALYSIS OF THE JUSTICE DEPARTMENT PROPOSAL

PATRICIA L. WELLS*

Justice Department officials are considering a proposal to restructure completely the procedure for actions now brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Constituting a major change in present class action practice, the plan would create two new types of class actions, consumer "public actions" and class compensatory actions.

In this Note, Ms. Wells outlines the proposed procedure, focusing upon its novel and controversial aspects. She highlights those areas which present troublesome policy or procedural problems, and suggests methods for alleviating those difficulties.

Introduction

Ever since their creation by amendment of the Federal Rules of Civil Procedure in 1966, Rule 23(b)(3) class actions[1] have been the subject, or perhaps the victim, of a torrent of commentary. The controversy centers on the large class/small claims suit typified by the "consumer" cases.[2]

Critics have assailed the "23(b)(3)" class action, often in in-

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1 FED. R. CIV. P. 23(b)(3). *See Advisory Committee's Notes on Amendments to the Federal Rules of Civil Procedure,* 39 F.R.D. 69, 98 (1966) [hereinafter cited as *Advisory Committee Notes*]. For a complete history of the class action revision, *see Developments in the Law — Class Actions,* 89 HARV. L. REV. 1318 (1976) [hereinafter cited as *Developments*].

For 23(b)(3) class actions to go forward, the court must find that the suit meets the prerequisites of FED. R. CIV. P. 23(a) and, in addition, "that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

Class actions for damages are usually considered to be appropriate only under Rule 23(b)(3). *See Advisory Committee Notes, supra,* at 102; MANUAL FOR COMPLEX LITIGATION § 1.43 at 41 (4th ed. 1978).

2 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), epitomizes such suits. *Eisen* involved a potential class of six million purchasers of odd lots of stock, represented by an individual whose claim was only seventy dollars.

temperate terms.[3] They charge that Rule 23(b)(3), by providing a forum for what should be nonviable claims,[4] has created "Frankenstein monsters."[5] They claim that 23(b)(3) actions are often enormous entities which are difficult to manage and control, and which create intolerable burdens on federal courts.[6] Furthermore, the critics say, the true beneficiaries of these class actions are not members of the class but the class attorneys, who often receive the lion's share of large classwide settlements.[7] Lastly, they fear that by suing on behalf of a class, plaintiffs may threaten defendants with the specter of enormous liability and thereby force settlement of meritless claims.[8]

In reply, class action proponents point out that defendants actually pay less ultimately in settlement than the amount which they illegally gained.[9] Proponents hail the provision of a forum for small claimants who, absent the class action device, could not sue because the cost of bringing a suit would exceed the individual claim.[10] Thus 23(b)(3) class actions are important because they deter and correct wrongdoing by facilitating such private enforcement of the law.[11]

Supporters of class actions have their own criticisms of the current law of class actions, however. They decry Supreme

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3 *See, e.g.,* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972); Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?,* 70 F.R.D. 199 (1976); Labowitz, *Class Actions in the Federal System and in California: Shattering the Impossible Dream,* 23 BUFFALO L. REV. 601 (1974); Simon, *Class Actions — Useful Tool or Engine of Destruction,* 55 F.R.D. 375 (1973).

4 Simon, *supra* note 3, at 376.

5 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting) (remanding to district court for class certification hearing).

6 *E.g.,* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 3; Labowitz, *supra* note 3; Simon, *supra* note 3.

7 *E.g.,* Kirkham, *supra* note 3, at 206; Simon, *supra* note 3, at 378.

8 *E.g.,* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 3, at 15; Simon, *supra* note 3, at 380, 389.

9 *E.g.,* DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II),* 1976 AM. B. FOUNDATION RES. J. 1273, 1329; Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. CHI. L. REV. 448 (1972).

10 1 H. Newberg, NEWBERG ON CLASS ACTIONS ix (1977); Blecher, *Is the Class Action Doing the Job? (Plaintiff's Viewpoint),* 55 F.R.D. 365 (1973); Homburger, *Private Suits in the Public Interest in the United States of America,* 23 BUFFALO L. REV. 343 (1973); Note, *To Right Mass Wrongs: A Federal Consumer Class Action Act,* 13 HARV. J. LEGIS. 776 (1976).

11 *E.g.,* Blecher, *supra* note 10; DuVal, *supra* note 9.

Court decisions which they believe have unjustifiably limited the availability of class actions to persons injured by "grand acts of fraud instead of small ones."[12] The greatest single limitation was imposed by *Snyder v. Harris,*[13] which prohibits the aggregation of the claims of separate plaintiffs in order to meet the jurisdictional amount requirement. In addition, *Zahn v. International Paper Co.*[14] requires that each member of the plaintiff class have damages greater than the jurisdictional amount. Taken together, *Snyder* and *Zahn* bar suits involving individual damages of less than $10,000 except where the jurisdictional amount requirement has been waived by statute. A third major decision on class actions, *Eisen v. Carlisle & Jacquelin,*[15] requires that the representative plaintiff send individual notice to each member of the class who can be identified with reasonable effort, at the representative's own expense. The cost of the notice required by *Eisen* generally prevents a small claimant from representing a large class. Finally, *Alyeska Pipeline Co. v. Wilderness Society,*[16] forbids the award of attorney's fees absent express statutory authorization. *Alyeska* discourages class action where there is no such authorization, since the attorney's fees, if paid at all, would deplete any recovery.

Hence, many members of the bench and bar perceive a class action "problem"[17] that requires amendment of Rule 23.[18] In fact, some have proposed that a "consumer" class action be

12 In Re Memorex Security Cases, 61 F.R.D. 88, 103 (N.D. Cal. 1973).
13 394 U.S. 332 (1969).
14 414 U.S. 291 (1973).
15 417 U.S. 156 (1974).
16 421 U.S. 240 (1975).
17 The few empirical studies indicate that the "problem" may be caused more by poor public relations than by actual difficulties. *See* DuVal, *supra* note 9; Kennedy, *Securities Class and Derivative Actions in the United States District Court for the Northern District of Texas: An Empirical Study,* 14 HOUS. L. REV. 769 (1977); Note, *The Rule 23(b)(3) Class Action: An Empirical Study,* 62 GEO. L.J. 1123 (1974) [hereinafter cited as *Senate Commerce Study*].
18 *See Responses to the Rule 23 Questionnaires of the Advisory Committee on Civil Rules, reprinted in* 5 CLASS ACT REP. 3, 10 (1978) (indicating areas of dissatisfaction) [hereinafter cited as *Rule 23 Questionnaire Responses*]; DuVal, *supra* note 9, at 1353; Labowitz, *supra* note 3, at 660; *cf.* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the Class-Action "Problem,"* 92 HARV. L. REV. 664 (1979) (arguing that courts are progressing in their handling of Rule 23 class actions and that the Rule should not be amended).

created by legislation to overcome the effects of the Supreme Court decisions.[19]

A Justice Department proposal, introduced in the last session of the Ninety-fifth Congress,[20] answers the call for a "consumer" class action and restructures class actions for damages in an attempt to meet most of the criticisms of 23(b)(3) class actions.[21]

The proposed legislation repeals Rule 23(b)(3) outright,[22] and replaces it with two new forms of action.[23] The substitution of two actions for one reflects the controlling premises of the legislation: that there are two types of class actions now litigated under Rule 23(b)(3), and that each should be defined separately and managed differently.[24] The first type of class action is the damage action in which individual economic injury is small and the suit's primary purpose is to prevent unjust enrichment and deter illegal conduct rather than to compensate individuals for minor economic harm. In the second type of class action, individual economic injury is more substantial and the

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19 *E.g.*, Note, *supra* note 10.

20 The proposal was embodied in S. 3475, 95th Cong., 2d Sess. (1978) (introduced by Senators Kennedy and DeConcini). The Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee held hearings on the bill on November 24-25, 1978. Although the bill has not been reintroduced in the Ninety-sixth Congress, the Justice Department continues to study the proposal and new legislation is expected to be submitted during this Congress.

For the purposes of this Note, references to the "proposal" and to the "bill" will be to the version contained in S. 3475.

Section 2 of S. 3475 expresses the provisions of the new procedure by adding chapter 176 to title 28 U.S.C. All references to particular sections of the proposal, unless otherwise indicated, will be to sections in the new chapter 176, as found in S. 3475 § 2.

21 OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, U.S. DEP'T OF JUSTICE, PROPOSED REVISIONS IN FEDERAL CLASS DAMAGE PROCEDURES, S. 3475 BILL COMMENTARY (1978) (prepared under the supervision of Assistant Attorney General Daniel J. Meador) [hereinafter cited as BILL COMMENTARY].

22 S. 3475 § 3(a).

23 BILL COMMENTARY, *supra* note 21, at 9. It is the author's conclusion that the remaining provisions of Rule 23 would have no force or effect upon the newly created forms of action, although the bill is silent on this point. The basis for this conclusion is that virtually every aspect of Rule 23 has been superseded by a new, and usually more specific, provision in the bill. *Compare* FED. R. CIV. P. 23(a) *with* §§ 3001, 3011 (prerequisites); FED. R. CIV. P. 23(c)(2), 23(c)(3) *with* §§ 3007, 3013, 3023 (notice, res judicata); FED. R. CIV. P. 23(c)(4), 23(d) *with* §§ 3021-25, 3027 (management); FED. R. CIV. P. 23(e) *with* § 3026 (settlement). Thus, the substance of Rule 23 is eliminated with regard to the new actions and remains applicable only to class suits brought under Rule 23(b)(1) or Rule 23(b)(2).

24 BILL COMMENTARY, *supra* note 21, at 9.

primary purpose of bringing the suit is to compensate the injured individuals.[25]

For suits of the first type, the Justice Department proposal creates a "public action," brought in the name of the United States. A public action can be brought by the United States Attorney General or by a private plaintiff, called a "relator," with the consent of the Attorney General.[26] For the second category of suits, the proposal utilizes a "class compensatory action," which is more similar to current 23(b)(3) class actions.[27] The suggested legislation also contains minutely detailed provisions to aid judicial management of the new actions it creates.[28]

This Note will first examine the new "public action" provisions of the legislation, focusing in detail upon several potential trouble spots under the language of the existing draft bill. Next the Note will consider the second form of action created by the proposal, class compensatory actions. After presenting an overview of the procedures for those actions, the Note will recommend ways for improving the compensatory action technique.

I. Public Actions

A. *Provisions of the Proposal*

The most significant feature of the proposed legislation is the creation of an entirely new action, a "public action," involving a large number of claimants, each injured in an amount so small as to preclude individual suits. Public actions are designed primarily to deter violations of federal law and to force wrongdoers to disgorge ill-gotten gains, rather than to compensate victims.[29]

A public action is not a "class" action, since it is brought in the name of the United States[30] and there is no class.[31] Public actions are instituted by the Attorney General of the United

25 *Id.*
26 §§ 3001-3007; Bill Commentary, *supra* note 21, at 9.
27 §§ 3011-3014; Bill Commentary, *supra* note 21, at 10.
28 Bill Commentary, *supra* note 21, at 11.
29 Meador, *Proposed Recision of Class Damage Procedures,* 65 A.B.A.J. 48, 49 (1979).
30 § 3001 (c).
31 *Compare* Fed. R. Civ. P. 23.

States, or "on relation"[32] by a private party ("relator") who has been injured in an amount less than $300.[33] A relator who begins a public action must serve the United States with a copy of the complaint and "all relevant information or material" he has about the suit.[34] After he has served the complaint, the relator may not withdraw from the suit without the Attorney General's consent.[35]

Upon receiving a copy of the complaint from the relator, the Attorney General has until the date of the preliminary hearing[36] to choose one of four courses of action: (1) assuming control of the suit,[37] and thereby eliminating the relator from the action;[38] (2) doing nothing and permitting the relator to proceed with the action;[39] (3) referring the case to a state attorney general who the Attorney General determines will adequately represent the interests of the United States;[40] or (4) submitting to the court a statement of reasons why the public interest would not be served by allowing the action to continue as a public action.[41] This last option *requires* that the suit be dismissed, unless the

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32 Actions upon relation exist in England and at the state level, in the form of extraordinary writs, such as mandamus or quo warranto. Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, 25 BUFFALO L. REV. 643, 647 (1976); 76 C.J.S. RELATOR (1952). In such actions, a relator (or the attorney general, if the right to sue lies solely in the attorney general) is permitted to institute a suit in the name of the people. 59 AM. JUR. 2D PARTIES § 7 (1971). Actions upon relation are available only when public rights are implicated, most often in cases involving public nuisances, ultra vires actions by corporations, repeated commissions of a statutory offense, or title to public office. J. EDWARDS, THE LAW OFFICERS OF THE CROWN 286 (1964); 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2325 (1976).

33 § 3001(c).

34 § 3002(a). A complaint in a public action must be more detailed than is normally required in a civil action under FED. R. CIV. P. 8 and must include the facts which demonstrate that the prerequisites for a public action have been fulfilled. § 3001(d).

35 § 3002(a).

36 The hearing must be held within 120 days of the filing of the complaint, with certain exceptions. § 3004(a).

37 § 3002(b)(1).

38 The relator may be allowed to participate at the Attorney General's discretion, but only to the extent that the Attorney General designates. § 3002(c).

39 § 3002(b)(2).

40 § 3002(b)(3). The state Attorney General is then entitled to make any of the other three decisions granted to the U.S. Attorney General, including a statement that the action is not in the public interest.

41 § 3002(b)(4).

relator can convince the court that the public interest would be served by allowing the suit to continue.[42]

Public actions are limited to commercial suits, more specifically, suits against a "person whose conduct in the manufacture, rental, distribution, or sale of realty, goods or services, including securities, gives rise to a civil private right of action for damages under a statute of the United States."[43] Neither noncommercial suits nor state claims may be pursued as public actions. Moreover, to be maintained as a public action, a suit must satisfy four additional criteria: (1) at least 200 persons must have been injured, each in an amount not exceeding $300;[44] (2) the combined injury must be more than $60,000;[45] (3) the injuries must arise out of the same transaction or occurrence or series of transactions or occurrences;[46] and (4) there must be a substantial question of law or fact common to the injured persons.[47]

The federal district courts have exclusive jurisdiction of public actions.[48] Their jurisdiction, however, does not extend to crossclaims, counterclaims, pendent claims based on state law, or actions removed from state courts which do not meet the normal requirements of a public action.[49]

The bill permits only limited discovery in preparation for a preliminary hearing.[50] Unless the Attorney General has already assumed control of the suit, the relator conducts the discovery, but he must notify the Attorney General of each step.[51]

At the preliminary hearing, the court must determine whether the prerequisites for a public action have been

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42 *Id.*
43 § 3001(a).
44 § 3001(a)(1).
45 § 3001(a)(2).
46 § 3001(a)(3). The same standard is used in other contexts to determine whether claims can be heard together effectively. *E.g.*, FED. R. CIV. P. 13 (counterclaims and crossclaims); FED. R. CIV. P. 14 (third-party practice).
47 § 3001(a)(4).
48 § 3001(b).
49 *Id.*
50 § 3003. Discovery may include interrogatories, ten depositions per side, and requests for production of documents.
51 § 3003(c).

fulfilled,[52] and whether there are "sufficiently serious questions going to the merits to make them fair grounds for litigation."[53] If the action is brought by a relator, the court decides whether the relator and the relator's counsel can adequately protect the interests of the United States.[54] If the action fails any of these tests, the court must dismiss the suit as a public action.[55] If, however, the suit qualifies as a public action, the court enters an order describing the scope of the action.[56] Notice of the injured persons is not required, since there is no class.

The proposal takes a novel approach to judgments against the defendant. Damages, which are referred to as a "public recovery," are determined in the aggregate:[57] either aggregate gain to the defendant or aggregate damage incurred by those injured in an amount less than $300.[58] Such damages are calculated by "any reasonable means," and separate proof of individual damage is not necessary.[59] The total amount of damages is then paid into a newly created Public Recovery Fund in the Administrative Office of United States Courts,[60] whose director administers notice and distribution of the funds to those injured by defendant's action.[61] Notice may be issued by any means "reasonably likely to inform persons eligible to file a claim."[62] Distribution of funds may be achieved by requiring those injured to file simple claim forms or pursuant to some other procedure, such as direct payment to those whose claims may be calculated from business records.[63] If the total amount

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52 § 3004(b)(1). *See* text accompanying notes 43 to 47, *supra.*

53 § 3004(b)(2). This test was taken from a portion of a preliminary injunction test developed by the Second Circuit. BILL COMMENTARY, *supra* note 21, at 31.

54 § 3004(b)(4). In mandating overt consideration of the attorney's competence, the bill departs from Rule 23(a)(4), which looks only to the representative party to determine adequacy of representation. "Adequacy" in a public action is based on an affidavit filed by the attorney stating "the extent of counsel's experience with public actions and class or complex litigation." § 3022(a)(1).

55 § 3004(c).

56 § 3004(d).

57 § 3006(c).

58 § 3006(b).

59 § 3006(c).

60 § 3007(a).

61 § 3007(b).

62 *Id.*

63 BILL COMMENTARY, *supra* note 21, at 43.

is not claimed, the remainder escheats to the United States Treasury.[64]

If a private relator brings a successful public action, the defendant must pay, in addition to the public recovery, the relator's costs and expenses.[65] A relator is also entitled to an incentive fee of not more than $10,000, which may not be paid directly or indirectly to the relator's attorney.[66] The court may also award attorney's fees,[67] but only if a statute expressly authorizes such awards.[68] In addition, the court, in making an award of attorney's fees, is bound by a very detailed formula.[69]

The court must approve any settlement of a public action.[70] If a relator is conducting the litigation, he must give notice of a proposed settlement to the United States, whose consent is a prerequisite to the court's approval of the settlement.[71]

B. *Areas of Controversy*

Several features of the public action are likely to result in difficulties, or at least controversy. The following sections discuss these trouble spots in the new public action device.

1. Attorney General Discretion

When a complaint is filed by a relator, the Attorney General has the option to declare the suit not in the public interest, whereupon the bill provides the suit *shall* be dismissed.[72] The "public interest" is a nebulous concept and one behind which improper motivations might easily be concealed. The bill con-

64 § 3007(a).
65 § 3005(a)(1).
66 § 3005(a)(2).
67 § 3005(a)(1).
68 § 3027..
69 *Id.* An example of the measure's detail in this regard is its provision of specific multipliers for risk which vary with the type of case and the stage of litigation during which the services of the attorney were rendered. § 3027(c).
70 § 3026(a).
71 § 3026(b). An interesting situation would arise if the United States withheld consent, since forcing a supposedly satisfied relator to negotiate further could be unrealistic or counterproductive. The United States should perhaps be compelled to take control of the suit if the relator demonstrates a lack of enthusiasm for additional bargaining.
72 § 3002(b)(4).

tains no guiding principles to circumscribe the Attorney General's determination.[73] Since the Justice Department is vulnerable to political pressure,[74] the possibility exists that the Attorney General will abuse its power. For example, a private party who has suffered injury might be precluded from bringing a public action against a politically powerful defendant.[75]

The resulting harm is twofold. First, denying a relator and other injured persons a public action deprives them of their cause of action entirely, since any other suit would be foreclosed by excessive cost or procedural barriers. Second, this unfettered discretion undercuts the purpose of public actions, which is to encourage private enforcement of federal laws.[76] The role of private enforcement as a necessary supplement to government action has consistently been recognized by both Congress[77] and the Supreme Court, particularly in the antitrust[78] and securities[79] fields. In the consumer area, the insufficiency of governmental enforcement has prompted recurring calls for consumer class actions.[80] The viability of public actions should therefore not be entrusted to the control of the Justice Department, the same agency that needed help from private parties in enforcing the law in the first place.

Some limitation on the Attorney General's discretion is

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73 The bill only requires the Attorney General to "promulgate regulations governing the exercise of his authority under this section." § 3002(b). Although regulations would serve to narrow discretion in the future, *see* Harper v. Levi, 520 F.2d 53, 69 n.128 (D.C. Cir. 1975), there is nothing in the bill to prevent or even discourage the Attorney General from writing open-ended criteria which would allow ad hoc decisions.

74 The phenomenon of "agency capture" is not restricted to regulatory agencies. *See* Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669 (1975).

75 One hopes the case of John Mitchell was an aberration, but the possibility of another like it exists. In addition to the problem of the changing identities of the Attorney General, there is the problem of determining who within the vast reaches of the Justice Department will actually make the decision. *See also* 117 CONG. REC. 3916-17 (1971). (Association of the Bar of the City of New York, in commenting on consumer legislation, expressed fear that the Justice Department might be subject to pressure not to certify suits against influential defendants).

76 BILL COMMENTARY, *supra* note 21, at 22-25.

77 *E.g.,* H.R. REP. No. 95-339, 95th Cong., 1st Sess. 15 (1977) ("overwhelming need" for self-help remedies).

78 *E.g.,* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969).

79 *E.g.,* J.I. Case v. Borak, 377 U.S. 426, 432 (1964).

80 *E.g.,* Note, *supra* note 10. *See also* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, CONSUMER CLASS ACTIONS 7-10 (1977).

necessary. The bill itself provides the first possible restriction, by giving the relator an opportunity to convince the court that the Attorney General's decision was in error.[81] The relator's success in such an endeavor, however, seems unlikely. By requiring the court to dismiss the action upon the Attorney General's finding that the suit is not in the public interest, the bill appears to create a strong presumption for dismissal, which a relator would find difficult to overcome. Furthermore, the court tests the Attorney General's decision using the same standard, *i.e.*, whether the public interest would be served.[82] This determination is fraught with nonjudicial, distinctly political considerations, and the court can therefore be expected to defer to the Attorney General in most cases. Because of this predictable deference to the courts on the issue of public interest, it seems almost impossible to overturn the Attorney General's decision under the provisions of the bill.

Judicial review under the Administrative Procedure Act (APA)[83] might conceivably be sufficient to restrain the Attorney General's discretion. APA review, however, is also inadequate, for two reasons. First, APA review may not be available in this context,[84] despite the presumption in case law in favor of judicial review of agency action.[85] The decision of the Attorney General that a public action is not in the public interest is probably immune from review, either because it is "committed by law to agency discretion,"[86] or because the "public interest" is a political perception that involves the "expertise" of the executive branch.[87]

Second, even if review were available, the courts must affirm

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81 The action must be dismissed "unless the relator demonstrates to the court's satisfaction that the public interest would be served by allowing the action to continue as a public action." § 3002(b)(4).

82 *See id.*

83 5 U.S.C. §§ 701-706 (1976).

84 The proposed bill does not mention the application of the APA.

85 Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

86 5 U.S.C. § 701(a) (1976) (an exception to the general availability of judicial review provided by § 702 to any person "adversely affected" by agency action).

87 *See* Pullman, Inc. v. Volpe, 337 F. Supp. 432 (E.D. Pa. 1971) (agency decision should not be reviewed if it involves the particular knowledge of the agency rather than an essentially legal determination).

the Attorney General's finding unless the decision was "arbitrary, capricious [or] an abuse of discretion."[88] This highly deferential standard permits decisions to stand which have merely a rational basis[89] and forbids a court from substituting its judgment for that of the agency.[90] This standard is simply too lax to protect a relator. In effect, such review under the APA provides the same inadequate protection against abuse as the provisions for review under the bill. Functionally, the deferential standard of APA review does not differ from the presumption which would operate against the relator at the preliminary hearing.

Consequently, the Attorney General's unfettered discretion should be circumscribed through the language of the actual legislation. One possibility is to confine a determination that the public interest would not be served to those instances in which a public action would interfere with an ongoing investigation.[91] In such situations, the argument for the need for private enforcement of the law has less force.

A second possibility is to abandon the ephemeral "public interest" inquiry, and to limit an unfavorable determination to those cases in which there is no "reasonable cause to believe that a charge is true."[92] The proposal already provides, however, that the action shall be dismissed if the court determines that there are no sufficiently serious questions going to the merits. Furthermore, neither of these alternatives precludes the possibility of arbitrariness on the part of the Attorney General.

The best solution is to eliminate the Attorney General's option to declare the suit against the public interest and thereby force the dismissal of the action. The Attorney General's remaining options would be either to assume control of the suit or to allow it to go forward upon relation. No statement would be submit-

88 5 U.S.C. § 706(2)(A) (1976).

89 Dunlop v. Bachowski, 421 U.S. 560, 572-73 (1975).

90 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

91 Under the proposed bill, the Attorney General may ask for a delay in the preliminary hearing for this reason. § 3004(a).

92 This is the standard used by the Equal Employment Opportunity Commission in determining whether to proceed on a charge by an employee. 29 C.F.R. § 1601.19b (1978).

ted to the court. If the Attorney General chose not to assume control, the relator would present the case to the court at the preliminary hearing free from presumptions arising out of a statement against the action by the Attorney General. The court could then determine whether the suit could be maintained solely on the basis of the statutory prerequisites, the presence of sufficiently serious questions going to the merits,[93] and the adequacy of representation of the relator and counsel.[94] The nonspecific notion of "the public interest" would be eliminated.[95] The procedural safeguards of the bill, including the Attorney General's veto power over settlement,[96] and the active management role required of the court furnish ample protection against frivolous suits, or those which in some other way actually frustrate the "public interest."

If the court decides the suit is maintainable as a public action, the Attorney General should be allowed to intervene as of right.[97] As an intervenor of right, the Attorney General could present to the court any pertinent policy arguments as to why the suit should not proceed. This procedure would protect the interests of the United States without resorting to unrestrained discretion which could be exercised for political ends.

2. Limited Scope of Public Actions

One of the intriguing and not fully explained aspects of the Justice Department plan is the limitation of public action to commercial suits, excluding civil rights, employment, and social welfare.[98] Henceforth, class actions for damages in these areas

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93 § 3004(b)(2).

94 § 3004(b)(4).

95 Title VII practice provides a model for such a procedure. To bring a private suit under Title VII, a complaint must first be filed with the Equal Employment Opportunity Commission (EEOC). The EEOC may implement compliance procedures, take no action or, if it finds that there is no reasonable cause to believe that the charge is true, dismiss the complaint. If no action is taken or if the complaint is dismissed, the complainant is notified and may sue individually. 42 U.S.C. §§ 2000e-2000e-17 (1976).

96 § 3026(b).

97 *See* FED. R. CIV. P. 24(a)(1); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1920 (1972). In this respect, the procedure would imitate that of citizen suits under the Clean Air Act, 42 U.S.C. § 7604(c)(2) (1976) (allowing Administrator to intervene as of right).

98 The bill specifically states that public actions would not be permitted under

could not be brought unless each person's claim exceeds $300.[99] The commentary prepared by the drafters of the bill does not adequately explain this omission, stating only that commercial activity is most likely to give rise to public actions, and that the United States would seldom be a defendant in such a context.[100]

Such reasoning is unpersuasive. First, the bill already contemplates public actions against the United States.[101] The court is allowed to make any appropriate orders to ensure the independence of counsel opposing the government. Thus, although conflicts inherent in a public action against the United States are substantial, they would be manageable. Moreover, the possibility of procedural difficulties is not a sufficient justification for denying public action in *all* employment and civil rights cases. Rather, manageability can be decided on a case-by-case basis.

Second, although situations in which damages are small may be rare in constitutional and labor areas, they do exist.[102] These cases involve to no lesser extent than commercial cases the dual goals of deterrence and prevention of unjust enrichment. Moreover, if damages to each person exceed $300, civil rights, social welfare benefits, and labor suits are maintainable as class compensatory actions.[103] Deleting the provision which limits public actions to commercial suits would have the salutary effect of permitting all class damage suits to be handled uniformly, regardless of the underlying substantive law involved.

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statutes pertaining to labor conditions or discrimination in employment. § 3001(a). Civil rights actions, such as those under §§ 1981 and 1983, are excluded by definition. Veterans' benefits suits, as another example, would be limited to those concerning insurance coverage.

99 Presumably, suits involving implied rights of action would be maintainable as public actions, but it is possible to interpret the language of the bill otherwise. Given the emphasis of the drafters on deterrence and enforcement of public policy, implied rights of action could well form an essential component of public action litigation. *See, e.g.*, J.I. Case v. Borak, 377 U.S. 426 (1965). The availability of public actions in such suits should be explicit.

100 *See* BILL COMMENTARY, *supra* note 21, at 13.

101 § 3001(e).

102 *E.g.*, Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972) (§ 1981 suit by motorists fined by magistrates who, in violation of a Supreme Court ruling, kept part of the fines as compensation; class consisted of 50,000 persons who had been fined an average of twenty-two dollars); Conner v. Highway Truck Driver & Helpers, 68 F.R.D. 370 (E.D. Pa. 1975) (illegally collected union dues averaging two dollars a month).

103 § 3011(a).

The drafters may have excluded employment, benefits, and civil rights damage suits because they felt such cases ordinarily involve injunctive or declaratory relief and are therefore properly certifiable as 23(b)(2) rather than (b)(3) class actions.[104] Courts have allowed such certification even where damages are claimed if the damages are merely incidental or ancillary to the injunctive or declaratory relief.[105] Rule 23(b)(2) does not cover suits where damages are the exclusive or predominant relief sought, however; for those, only 23(b)(3) certification is proper.[106] In addition, it should be noted that the reason courts certify class actions seeking damages in addition to an injunction under 23(b)(2) is to avoid Rule 23(b)(3) and its overburdensome notice requirements.[107] Since the class compensatory component of the proposal eliminates the unnecessarily cumbersome aspects of 23(b)(3) suits, particularly notice, the need for this procedural shuffling is obviated.

Another issue raised by the limited scope of public actions is its effect on counterclaims.[108] The bill is ambiguous in this regard, but it seems to provide either that counterclaims are excluded entirely, or that they are permitted only if they meet the requirements of a public action.[109] If the latter is the correct view, only counterclaims against at least 200 persons and involving at least $60,000 are permitted. Thus, under the bill, either no counterclaims at all are permitted or, in practical terms, very few could be maintained. At the very least, the bill should be redrafted to clarify this point.

One problem with the bill's counterclaim provision is that it conflicts with the compulsory counterclaim rule, which requires a defendant to assert any counterclaim arising out of the same transaction or occurrence to avoid forfeiting the right to the

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104 FED. R. CIV. P. 23(b)(2) provides for class actions where "final injunctive or corresponding declaratory relief" is appropriate.

105 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1775 (1972).

106 *Id.*

107 *See* MANUAL FOR COMPLEX LITIGATION § 23.31[3] (4th ed. 1978) (recommending avoidance of 23(b)(3) certification where possible) and cases cited therein; Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 253 (3d Cir. 1975).

108 § 3001(b) states: "jurisdiction shall not extend to cross-claims, counterclaims, pendent claims based on State law, or actions removed from the State courts which do not meet the requirements of subsection (a) [prerequisites of public actions]."

109 *See id.*

claim.[110] A simple statement in the bill that the compulsory counterclaim rule shall not apply to public actions should solve the problem.

A more serious difficulty is that the provision deprives the defendant of the opportunity to reduce overall monetary liability through counterclaims. This denial seems harsh and will probably be challenged as a further dilution of defendant's due process rights in class action procedures. The problem can be easily alleviated by leaving the entertainment of counterclaims to the court's discretion, since the proposed bill equips the court with management techniques adequate to handle many situations. As always, the bottom line is fairness; the bill empowers the court to make all orders "reasonably necessary to the efficient and fair management" of the case.[111] Public actions, like class actions,[112] can be subdivided;[113] *i.e.*, that portion of a public action involving a counterclaim, which could be asserted in the aggregate,[114] could be split off into a separate action. Hence the bill's exclusion of counterclaims should be eliminated to enable the court in a public action to manage the case in a manner consistent with fundamental fairness.[115]

3. Preliminary Hearing

The proposed public action procedure contemplates a preliminary hearing at which the court determines whether the suit fulfills the requirements of a public action and presents "sufficiently serious" issues to warrant litigation. Such a hearing presents both practical and legal problems.

On the practical side, the goal of the preliminary hearing is to provide an expedited proceeding[116] in which the court can weed

110 FED. R. CIV. P. 13(a).
111 § 3028(b).
112 *See* FED. R. CIV. P. 23(d).
113 § 3028(b).
114 Since liability and damages in a public action are calculated on an aggregate basis, *see* text accompanying notes 57 to 58 *supra*, counterclaims could be similarly estimated.
115 There is one additional complication to counterclaims in public actions which formally are brought in the name of the United States: would counterclaims be governed by the rules of counterclaims against the United States or against ordinary plaintiffs?
116 A preliminary hearing must be scheduled within 120 days of the filing of a public action. § 3004(a).

out frivolous suits.[117] As a screening device to protect defendants from harassment suits, the preliminary hearing should effectively serve its purpose. As an expeditious and streamlined process, however, the hearing will probably fail. From both the defendant's and the relator's points of view, the preliminary hearing is crucial. If a public action is certified, the defendant is faced with a large class of potential claimants who have already demonstrated the existence of serious issues going to the merits, and the pressure on the defendant to settle is inexorable.[118] If, on the other hand, the relator fails to clear the preliminary hurdles, he will be remitted to an individual suit, which is useless for small claims. As a consequence, both sides will concentrate their resources on the preliminary hearing, realizing that the outcome is in practical effect determinative of the suit. The "preliminary" and "streamlined" nature of the hearing will necessarily disappear.

Unfortunately, there seems to be no solution to the problem of coercive pressure on a defendant to settle; any procedure which screens out frivolous suits necessarily lends greater legitimacy to those which remain. While the suggested procedure does not wholly solve the problem, the nature of the preliminary hearing does give defendants greater assurances that such pressures will be felt only in cases in which the class has a bona fide complaint. Suits that pass the preliminary hearing stage have demonstrated the existence of serious questions going to the merits and thus are likely to exert even greater pressure on defendants to settle than do those brought under present Rule 23, in which the merits ostensibly are not relevant.[119] The preliminary examination of the merits, however, should stop a greater number of frivolous suits at the early stages.

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117 *See* BILL COMMENTARY, *supra* note 21, at 30-31.

118 *See* Simon, *supra* note 3 (certification under present rules exerts coercive pressure on defendant). Class action allegations in the complaint may exert coercive pressure on the defendant even prior to certification. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 3.

119 *See* MANUAL FOR COMPLEX LITIGATION § 1.40 (4th ed. 1978); Miller v. Mackey International, 452 F.2d 424 (5th Cir. 1974) (certification hearing intended to determine only whether the requirements of Rule 23 have been met and not whether plaintiff has stated a cause of action or is likely to prevail on the merits).

The legal issue with respect to preliminary hearings under the plan is whether an examination of the merits at such an early stage in the litigation is permissible. In *Eisen,*[120] the Supreme Court rejected a preliminary examination of the merits in certifying a class under Rule 23(b)(3). The Court perceived a statutory barrier under Rule 23[121] rather than a constitutional barrier; consequently, *Eisen's* holding does not bar the preliminary examination of the merits that is specifically authorized by the Justice Department bill. The *Eisen* Court noted, however, that a preliminary hearing could result in substantial prejudice to a defendant, since the trappings of a civil trial would not be applicable.[122]

The situation in *Eisen* is distinguishable from that in a public action, however. The Court in *Eisen* was bothered by the likelihood that a determination on the merits prior to certification would enable a plaintiff to enjoy the benefits of a class suit without having demonstrated that a class action could be maintained.[123] That is, a plaintiff who has passed a preliminary merits examination might thereby gain enough bargaining power to obtain a settlement from a defendant unwilling to risk litigating maintainability, because of the attendant rise in the settlement price if the plaintiff won on the latter issue as well. Such a possibility disappears in a public action because the preliminary examination of the merits and the decision on maintainability occur simultaneously at the preliminary hearing. Thus, any suit which passes the preliminary examination of the merits will have already proved maintainability.

In any event, the Court's concern is unwarranted for several reasons and *Eisen* therefore should not cast doubt on the validity of a preliminary examination of the merits in public actions. First, the need for a preliminary examination of the merits in a class action was originally advanced by Judge Weinstein in

120 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

121 The Court stated: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." 417 U.S. at 177.

122 *Id.* at 178.

123 417 U.S. at 177-78.

Dolgow v. Anderson[124] in order to protect the defendant, the theory being that the coercive effect of certification of a class should not be permitted unless the class representative demonstrated a substantial possibility of prevailing.[125] Protection of the defendant is one of the purposes of implementing preliminary examination of the merits in public actions. Second, the degree of prejudice resulting from a preliminary hearing would be no more severe than that engendered by other pretrial motions going to the merits, such as summary judgment.[126] Probably the most convincing evidence of the unrealistic nature of the Court's fears is the fact that it is the defense bar which has advocated preliminary merits-screening of class actions.[127]

4. Calculation of Damages

Under the proposed bill, damages in public actions are determined on an aggregate basis and are paid into a public fund. This process of "fluid class recovery"[128] is not novel,[129] but its

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124 43 F.R.D. 472 (E.D.N.Y. 1968), *rev'd and remanded,* 438 F.2d 825 (2d Cir. 1970).

125 *See Developments, supra* note 1, at 1424-27, indicating that certification of a class *without* examination of the merits can prejudice the defendant because the court proceeds on the basis of presumptions about the characteristics of the class which may be unfounded.

126 The lack of perceived prejudice in other preliminary motions directed at the merits has been attributed to the fact that such motions are authorized by the Federal Rules of Civil Procedure. *Developments, supra* note 1, at 1419 n.157. If this is the correct explanation, then a preliminary hearing in a public action authorized by a statutory provision should likewise be acceptable.

127 *E.g.,* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 3, at 25-28.

One additional aspect of preliminary hearings should be mentioned. Notice is neither required nor contemplated prior to a finding of liability. However, a decision on the merits, which might include a negative determination at the preliminary hearing on the "serious question" standard, bars a future suit by anyone injured less than $300 in the same transaction or occurrence. § 3032(a). Although notice would rarely be necessary, the court should be allowed to exercise discretion similar to that available under Rule 23(d)(2) in order to insure fairness to absent parties.

128 Judge Tyler developed the term and the concept in his district court decision on remand of Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264 (S.D.N.Y. 1971), *rev'd,* 479 F.2d 1005 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974). The proposed bill does not use the term, but applies the concept by providing that the unclaimed money will revert to the United States after three years.

129 *See* West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971) (unclaimed funds used to establish health programs); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967) (amount gleaned by defendant from overcharging applied to lowering of cab fares for period of time).

legality has been hotly debated.[130] The issue is whether either the nature of suits for damages or the concept of due process necessitates individualized recovery and precludes determination of damages on a group basis. Members of the defense bar have been vehemently opposed to the classwide damages,[131] so the damage provisions of the bill can be expected to suffer heavy attack from the business community.

Legal support for the attack on classwide recovery is tenuous. Opponents often rely on *Hawaii v. Standard Oil Co.*,[132] a case in which Hawaii's attorney general, as *parens patriae,* sought to recover for aggregate damage to the state's economy resulting from antitrust violations. The Supreme Court rejected the suit as not cognizable under the Clayton Act,[133] which is limited to compensation for injury to business or property.[134] Opponents of class actions have construed *Hawaii v. Standard Oil* to mean that the concept of classwide damages is antithetical to any statute aimed at compensation.[135] In fact, the Court was concerned only with the narrow issue of whether the Clayton Act covers suits for damage to the general economy, and decided that question in the negative. Far from repudiating classwide damages, the Court specifically stated that in some instances a state could properly represent a class of consumers injured by antitrust violations.[136] Furthermore, this line of attack on classwide damages is inapposite to the public action statute, the goal of which is *not* primarily compensation, but rather deterrence of wrongdoing.

Members of the defense bar have also contended that classwide recovery violates due process. One critic has stated:

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130 *See, e.g.,* Simon, *supra* note 3; Shuck, *Class Actions Maintainable,* in N.Y. PRACTISING L. INST., CLASS ACTIONS (1973), for views opposing class recovery. For the proponents' views, *see, e.g.,* Comment, *supra* note 9; 3 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 4620 (1977).

131 *See* Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases,* 47 N.Y.U. L. REV. 477 (1972); Simon, *supra* note 3.

132 405 U.S. 251 (1972). *But see, e.g., In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

133 15 U.S.C. §§ 12-31 (1976).

134 15 U.S.C. § 15 (1976).

135 Examples of this line of argument can be found in Malina, *supra* note 131, at 493, and Simon, *supra* note 3, at 383-84. However, this argument is erroneous: the Clayton Act provides for treble damages and thus, on its face, is not limited to compensation.

136 405 U.S. at 266 (dictum).

"Litigating defendants, of course, should be entitled to dispute each and every claim to their money and to obtain an adjudication of each plaintiff's right to recover."[137] Such formulations similarly find no basis in law. For years, the Supreme Court has permitted the reasonable estimation of damages based on inferential proof in the commercial context.[138] Even proof of damages by sampling has been utilized.[139] Courts have consistently sanctioned recovery based on calculation of classwide injury without individual proof of damages.[140] Congress has also "squarely rejected" arguments that fluid recovery violates due process,[141] or that "our constitutional requirements are so rigid" that they necessitate a parade of plaintiffs, each contesting an individual claim.[142]

In addition to the legal justifications for classwide recovery, there are important public policy reasons for adopting such an approach. Particularly in a case like a public action, where there are many "plaintiffs," individual proof would waste time and judicial resources and would render the suit unmanageable. Defendants cannot be permitted to argue that individual proof of damages is their inalienable right and then use the resulting complexity and unmanageability of suits involving large numbers of plaintiffs to justify eliminating such suits entirely.[143] To countenance such an argument would permit the enormity of the wrong itself to frustrate the compensation of those who have been injured. The result has been correctly

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137 Malina, *supra* note 131, at 482-83.

138 *E.g.*, Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946).

139 *E.g.*, *In re* Arizona Bakery Products, 1976-2 TRADE CAS. (CCH) ¶ 61,120 (D. Ariz. 1976) (damages based on statistical study showing quantity of bakery products purchased by households of various sizes; claim proved by stating number in household and number of years residency in Arizona); Eovaldi v. First Nat'l Bank of Chicago, 41 F.R.D. 334 (N.D. Ill. 1976) (class computation of damages and individual recovery determined on the basis of formula derived from sample of credit card holders).

140 *E.g.*, Milberg v. Lawrence Cedarhurst Federal Sav. & Loan Ass'n, 68 F.R.D. 49 (E.D.N.Y. 1975) (Mishler, C.J.) (proof of damages ascertainable from defendants' records); Partain v. First Nat'l Bank of Montgomery, 59 F.R.D. 56 (M.D. Ala. 1973) (Johnson, C.J.) (checks mailed directly to class members, claim form not required).

141 H.R. REP. No. 95-339, 95th Cong., 1st Sess. 33 (1977).

142 H.R. Rep. No. 94-449, Pt. 1, 94th Cong., 1st Sess. 15 (1976). This bill specifically permits fluid class recovery. Pub. L. No. 94-435, § 301, 90 Stat. 1395 (1976) (codified at 15 U.S.C. § 15(d) (1976)).

143 *See* discussion of separate trials of liability and damages, text accompanying notes 213 to 221 *infra*.

characterized as a "perversion of fundamental principles of justice."[144] The alternative to some form of classwide damage calculation — retention of the profits by the adjudicated wrongdoer — is simply unacceptable.[145] As the Seventh Circuit has stated, while individual recovery is preferable because it permits direct recovery by the person injured, "[g]iven a choice between no compensation for [victims of illegal activity] and an approximate measure of damages, we choose the latter."[146]

5. Attorney's Fees

In the class action context, attorney's fees are the subject of two conflicting policy arguments. Plaintiff-oriented commentators stress the need to award attorney's fees to provide an incentive for suits which vindicate the public interest.[147] Defendants, on the other hand, point to the likelihood of abuse where awards of large attorney's fees consume a major portion of the class recovery.[148] In an attempt to answer the latter criticism, the proposed bill binds the court to a very detailed formula for determining the proper amount of the award.[149]

Unfortunately, the bill neglects to address the first criticism. The possibility of being paid either through a statutory award or from the class recovery provides an incentive for attorneys to bring actions in which the claimants themselves could not afford to finance the litigation. However, the bill permits an award of

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144 H.R. REP. No. 95-339, *supra* note 141, at 34.

145 H.R. REP. No. 94-449, *supra* note 142, at 17.

146 Stewart v. General Motors Corp., 542 F.2d 445, 453 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). It is true that the Supreme Court has never specifically upheld fluid class recovery. It specifically reserved the issue in *Eisen*. However, classwide calculation in these other contexts is closely analogous. Fluid class recovery itself has been supported by commentators, *e.g.*, Homberger, *supra* note 10, at 371-73 (1973), and has been adopted by the National Conference of Commissioners on Uniform State Laws as part of the Uniform Class Action Act. Comment, *Manageability under the Proposed Uniform Class Actions Act*, 31 SW. L.J. 715 (1977).

147 *See, e.g.*, Note, *supra* note 10, at 824-26; Morrissey, *The Emergence of State Courts as Appropriate Forums for Class Suits*, 21 TRIAL LAWYERS GUIDE 425, 426-27 (1978).

148 *See, e.g.*, Simon, *supra* note 3; Labowitz, *supra* note 3, at 644-48.

149 § 3027. Some might say that the bill provides too much attention and is too constricting on the courts. Guidance for awarding attorney's fees is already provided by the

attorney's fees from the recovery only when authorized by the underlying statute.[150] In addition, it explicitly forbids the passing of the incentive fee awarded to the relator either directly or indirectly to the attorney.[151] A relator who by definition has no more than a $300 stake is unlikely to possess other resources sufficient to compensate an attorney. By following the holding of *Alyeska Pipeline Service Co. v. Wilderness Society,*[152] that plaintiffs can recover attorney's fees only when a statute so provides, the bill perpetuates one of the major stumbling blocks to litigation involving small claims.[153]

This approach to attorney's fees undermines the bill's purpose of facilitating private enforcement of public policy. An attorney who represents a relator in a public action is not merely serving as a private attorney general, as was the case in *Alyeska,* but is in fact suing on behalf of the United States.[154] Therefore, the case for an award of attorney's fees in a public action is even stronger than in other class suits involving small claims, because the attorney in a public action vindicates the public interest.

In order to effectuate its purposes, the legislation should provide incentives for the attorney as well as the relator. The draft contains sufficient procedural safeguards, such as evaluation of counsel's adequacy, the preliminary hearing, and close supervision of settlement, and restrictions on the award of fees[155] to prevent abuses by unscrupulous attorneys. Because of the overtly policy-oriented nature of a public action, therefore, attorney's fees should be awarded, either from the public fund or

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MANUAL FOR COMPLEX LITIGATION § 1.47 (4th ed. 1978). *See* Miller, *supra* note 18, at nn.103-10.

150 § 3027. The court may also direct that the award be paid by a party, rather than out of the fund. *Id.*

151 § 3005(a)(2).

152 421 U.S. 240 (1975) (prohibits the award of attorney's fees to a "private attorney general" except when authorized by statute).

153 *See* Note, *supra* note 10, at 824-25; Note, *A Giant Step Backwards:* Alyeska Pipeline Service Co. v. Wilderness Society *and Its Effect on Public Interest Litigation,* 35 MD. L. REV. 675, 692-94 (1976).

154 Indeed, at the preliminary hearing, the attorney must satisfy the court that he will "adequately protect the interests of the United States." § 3004(b)(4).

155 § 3027.

as additional costs from the defendant, in any successful public action brought upon relation, regardless of the underlying statute.

III. Class Compensatory Actions

A. *Provisions of the Proposal*

The second form of action created by the proposal is a class compensatory action, the primary goal of which, as its name indicates, is to compensate the victims of wrongdoing.[156] Although class compensatory actions encompass most of the class actions for damages presently brought under Rule 23(b)(3) and resemble Rule 23 suits in many respects, there are some differences.

Class compensatory actions are limited to private rights of action arising under federal statutes but, unlike public actions, are not otherwise restricted in subject matter.[157] Consequently, they include civil rights, employment, and benefits cases.[158] No class compensatory action may be based on diversity jurisdiction, however. The other prerequisites of a class compensatory action are as follows: (1) at least forty persons must have been injured, each in an amount exceeding $300;[159] (2) the injuries must arise out of the same transaction or occurrence or series of transactions or occurrences;[160] and (3) the action must present a substantial question of law or fact common to the injured parties.[161] The federal district courts have exclusive jurisdiction over these suits.[162]

A class compensatory action progresses in much the same way as a public action except for the absence of the Attorney

156 *See* Meador, *supra* note 29, at 49.

157 § 3011(a).

158 *See* discussion on limited subject matter of public actions, text accompanying notes 98 to 107 *supra*.

159 § 3011(a)(1). No aggregate minimum damage is imposed. Because it defines a class compensatory action as one in which the conduct in question "creates liability" for more than forty persons, the bill provides for a defendant class. The discussion here, however, is limited to plaintiff classes for the sake of uniformity.

160 § 3011(a)(2).

161 § 3011(a)(3).

162 § 3011(b).

General's involvement. After limited discovery[163] a preliminary hearing is conducted.[164] The court makes a preliminary determination at the hearing as to whether the prerequisites have been satisfied,[165] whether there are "sufficiently serious questions going to the merits" to allow the action to proceed,[166] and whether "the representative party *and* his counsel will adequately protect" the interests of the class.[167] Both the attorney and the representative party are required to file affidavits with the court, the attorney delineating past experience in similar cases,[168] the party explaining which of his interests are in common with or are antagonistic to those of the class.[169] If the suit fails any of these tests, it must be dismissed.[170] Otherwise, the court must enter an order describing the scope of the action.[171]

If the class compensatory action continues, the court must define the class, either as (1) all injured persons except those who, upon receiving notice, request exclusion by a specified date; or (2) only those injured persons who, upon receiving notice, request to be included by a specified date.[172] In the vernacular of class actions, these methods are known respectively as "opt-out" and "opt-in."[173] In making the choice between an opt-out and an opt-in class, the court must consider the feasibility of individual suits, giving regard to such factors as the magnitude of individual claims and the "resources, experience and sophistication" of absent injured persons.[174] If the injured persons have incurred substantial damages and have a high degree of sophistication, the opt-in method would be indicated.[175]

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163 § 3012. Discovery may include interrogatories, ten depositions per side, and requests for production of documents.
164 § 3013(a).
165 § 3013(b)(1).
166 § 3013(b)(2). The same test is used with public actions. *See* § 3004(b)(2).
167 § 3013(b)(3) (emphasis added).
168 § 3022(a)(1).
169 § 3022(a)(2).
170 § 3013(c).
171 § 3013(d).
172 § 3013(c).
173 *See, e.g.*, Labowitz, *supra* note 3, at 649-50.
174 § 3013(e). The bill does not explain what the court should do other than "consider" the feasibility of individual suits. *See* text accompanying notes 210 to 211 *infra*.
175 Meador, *supra* note 29, at 50.

After the choice of opt-in or opt-out is made, class members must receive notice. The particular means of notification lies within the court's discretion, but such notice must assure adequacy of representation and fairness for persons included in the class.[176] Individual notice is not required.[177]

At trial, the amount of injury to each person may be proved "by any method permitted or required by law."[178] In order to expedite the proceedings, issues of liability may be tried separately from issues of damages.[179] If found liable, the defendant bears the cost of identifying persons likely to have been injured[180] and of notifying those persons of the finding of liability.[181]

Class compensatory actions, like public actions, may not be settled without approval of the court after a hearing and an entry of judgment containing the terms of the settlement.[182] If a settlement is reached before the required determinations have been made at the preliminary hearing, the court must include in its judgment findings as to the scope of the action.[183] Notice of a proposed settlement and hearing must be sent to class members.[184] The manner of notice is again within the court's

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176 § 3013(e).

177 S. 3475 § 3(a) repeals 23(c)(2), and renders *Eisen* inapplicable.

178 § 3014(a). It is unclear whether the reference to proof of "each" person's damage precludes computation of damages on a classwide basis. If so, the language should be changed. The arguments advanced in support of classwide recovery in public actions, *see* notes 128 to 145 and accompanying text *supra,* apply with equal force to class compensatory actions, in which individual damages fall on the high side of the $300 dividing line.

179 § 3014(b).

180 § 3014(c)(1). This situation differs from that involved in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), in which the Court held that a defendant cannot be forced to pay for pre-judgment identification of class members. *See* Note, *Allocation of Identification Costs in Class Actions,* 91 HARV. L. REV. 703 (1978).

181 § 3014(c)(2). If liability has been tried separately, the court can proceed with the damage issues with the assurance that class members, who may present individual issues, have been notified.

182 § 3026(a). *Compare* FED. R. CIV. P. 23(e), which requires only "approval of the court, and notice . . . [to] be given to all members of the class in such manner as the court directs."

183 § 3026(a). These findings include a description of the transaction which gave rise to the suit and the substantial common question of law or fact involved in the action. *Id.* Section 3026(a) should prevent precertification settlements in which the named party receives a large sum without providing any benefit to the class. *See* MANUAL FOR COMPLEX LITIGATION § 1.46 (4th ed. 1978).

184 § 3026(c).

discretion, so long as it assures adequacy of representation and fairness.[185]

Whenever a class compensatory action or a public action is filed, the court must notify the judicial panel on multidistrict litigation.[186] That panel is then required, consistent with the interests of justice, to transfer and consolidate for all purposes all civil actions which arise out of the same transaction or occurrence and which present a substantial common question.[187] By expanding the use of consolidation,[188] the legislation is intended to facilitate the expeditious handling of multiple suits involving the same set of circumstances.

B. *Changes in Class Action Procedure*

The new compensatory class action provisions make significant changes in damage class action procedures. The following sections highlight those changes and explore potential problems created by the current language of the proposal.

1. Effect on Management of Class Actions[189]

The proposal defines the requisite injury in strictly arithmetic terms: at least forty persons, each injured in an amount exceeding $300.[190] If a suit has these characteristics, it automatically falls within the jurisdiction of the federal courts, making the jurisdictional amount requirement irrelevant. The bill thus circumvents *Snyder*[191] and *Zahn*,[192] which barred aggregation and required each person to be injured in excess of $10,000 in 23(b)(3) class actions. The new legislation will therefore be welcomed by consumer advocates who have attacked *Snyder* and *Zahn* for foreclosing small claimants from federal courts.

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185 *Id.*
186 § 3021.
187 *Id.*
188 The provision is a significant advance from the present multidistrict transfer under 28 U.S.C. § 1407 (1976), which is limited to consolidation for pretrial purposes only.
189 This discussion of manageability is equally applicable to public actions.
190 § 3011(a)(1).
191 394 U.S. 332 (1969).
192 414 U.S. 291 (1973).

The practical effect of this change may be slight, however, because the jurisdictional amount is already waived in many federal question cases.[193]

The draft bill also eliminates the inquiry necessary under Rule 23 as to whether those injured are so numerous as to make joinder impracticable,[194] and whether the representative's claims are "typical" of the class.[195] Instead, the claims must arise out of the same transaction or occurrence and must present a substantial common question of law or fact.[196] Moreover, the difficult questions of whether common questions "predominate" over individual questions and whether a class action is a "superior" method of adjudication do not have to be answered under the bill.[197] The new test, which is somewhat easier to apply, requires a court to determine whether the common question is sufficiently serious to warrant litigation.[198] Such changes inure to the advantage of the defendant as well as the plaintiff class, since the elimination of some prerequisites and the more precise definition of others should reduce the amount of resources spent on determining the prerequisites. Thus the suits should be more manageable and some of the "Frankenstein monster" aspect should be eliminated. On the other hand, a defendant will have fewer opportunities to defeat the class action on procedural grounds.

The court must also decide whether the named representative and his counsel will adequately protect the interests of the class.[199] Counsel are required to file affidavits setting forth their experience in complex litigation.[200] While this provision is commendably realistic and specific, it may have one undesirable result. A court's blind application of a requirement of prior experience in complex litigation could easily exclude younger attorneys, who are more likely to be women or members of

193 *E.g.*, 28 U.S.C. § 1337 (1976) (commerce and antitrust); 28 U.S.C. § 1343 (1976) (civil rights).
194 FED. R. CIV. P. 23(a)(1).
195 FED. R. CIV. P. 23(a)(3).
196 § 3011(a)(2), (3).
197 FED. R. CIV. P. 23(b)(3).
198 § 3013(b)(2).
199 § 3013(b)(3).
200 § 3022(a)(1).

minority groups, from practice in the class action field. Of course, such a result is not inevitable; the court should keep in mind that adequacy of representation sufficient to secure due process is the goal.

2. Opt-in Procedure

In allowing the court to choose between an opt-out and an opt-in procedure,[201] the class compensatory action differs from current practice under Rule 23(b)(3), which is limited to an opt-out mechanism.

The opt-in procedure has been advocated by the defense bar for some time,[202] on the ground that it enables the defendant to determine both earlier and with greater precision the range of potential liability.[203] But the opt-in procedure is also a very effective means of diminishing the size of a class,[204] because an affirmative act by an individual is always less likely than mere inaction[205] and hence presents certain dangers. Requiring class members to insert themselves into the suit will result inevitably in smaller classes, unrelated to the magnitude of the harm done or the merits of the case.[206] In addition to its unfairness, unnecessary reduction of class size negates the perceived benefits of class actions as efficient and economic means of litigation, since those who fail to opt in could bring their own suits,

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201 § 3013(e).

202 *E.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 3, at 31-32. *See also Senate Commerce Study, supra* note 17, at 1149-50 (opt-in favored by defendant's attorneys in survey, but not by plaintiff's attorneys).

In a recent survey of judges, the majority of those responding also favored an opt-in mechanism. *See Rule 23 Questionnaire Responses, supra* note 18.

203 Labowitz, *supra* note 3, at 649-51.

204 *See, e.g.*, Korn v. Franchard, 50 F.R.D. 57 (S.D.N.Y. 1970), *rev'd* 456 F.2d 1206 (2d Cir. 1972) (trial court denied class certification after only 233 of 1000 class members responded to notice); City and County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971) (only two of 126 class members opted in). *See also Senate Commerce Study, supra* note 17, at 1150.

205 To validate this assertion, one need only look to the performance of federal judges in responding to a questionnaire distributed by the Advisory Committee. Only 148 of 504 district court judges and 24 of 141 circuit judges took the time to return the forms. Ironically, the responses as noted above, favored the opt-in procedure. *Rule 23 Questionnaire Responses, supra* note 18.

206 For this reason, a researcher who conducted one of the few empirical studies of class actions concluded that the opt-in procedure would be unacceptable. DuVal, *supra* note 9, at 1349-52.

thereby multiplying cases where one would do.[207] Thus, even defendants should be wary of the overuse of opt-in, because it deprives them the broad res judicata effect which class actions can accomplish.[208]

Within limits, however, an opt-in technique may be desirable. When the named plaintiff attempts to represent a class that demonstrates little cohesiveness in its interests or that presents potential conflicts in interest, using a single suit may actually be inefficient and unmanageable, and may inadequately protect the various interests involved. The draft legislation bases the choice between opt-out or opt-in solely on the feasibility of individual suits, based on the size of claims and the sophistication of class members.[209] It fails to explain how this single criterion is to be used, however.

The intention of the drafters was that "[o]nly individuals with large stakes . . . or unusual claims or defenses should be required to opt-in."[210] If absent class members have a substantial amount at stake and are "sophisticated in business affairs,"[211] they may not need the opt-in provision, since they could be adequately protected by individual notice with an opportunity to opt out. In any event, if infeasibility of individual suits were the controlling consideration, only suits with small individual claims would be allowed.[212] Instead, the court should also be allowed to consider the extent of common issues among the class and judicial economy and fairness to both class and nonclass parties.

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207 *See Advisory Committee Notes, supra* note 1. Class actions are intended to "achieve economies of time, effort and expense and promote uniformity of decision as to persons similarly situated." *Id.* at 102.

208 *See* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974).

209 § 3013(e).

210 BILL COMMENTARY, *supra* note 21, at 49-50.

211 § 3013(e)(2). Perhaps the most perplexing problem with the opt-in process is the one recently noted by Professor Miller: the impossibility of determining the financial status and sophistication of absent class members. A whole new field of litigation can be imagined, which would only increase the time consumed by class actions. *See* Miller, *supra* note 18.

212 *See* Shelter Realty v. Allied Maintenance Corp., 75 F.R.D. 34, 38 (S.D.N.Y. 1977): "This imports a kind of death knell conception from the context of appealability, where its life has been troubled enough, to the area of maintainability, where the idea has at most minimal weight."

3. Separate Trials of Liability and Damages

If "the issue of damages cannot be resolved expeditiously,"[213] the proposed bill authorizes the court first to try the issues of liability separately.[214] In attempting to improve the manageability of complex class actions, courts have often used "bifurcated" trials: one trial for the common issue of liability and another later proceeding for individual questions of damages.[215] The proposed bill, however, represents the first codification of this practice.

The defense bar has attacked bifurcation,[216] claiming that separate trials of liability and damages violate the right to a jury trial under the seventh amendment. The case most relevant to this contention is *Gasoline Products Co. v. Champlin Refining Co.*,[217] which involved an appellate court's reversal of a lower court judgment, the reversal necessitating a retrial of the issue of damages. The Supreme Court held that a retrial on the damage issue alone would violate the seventh amendment, "unless it appears that the issue to be retried is so distinct and separate from the others that a trial of it alone may be had without injustice."[218] Thus, *Gasoline Products* stands for the proposition that if liability and damages are inextricably intertwined, they may not be tried separately,[219] but it does not render every separation of the two issues unconstitutional.

Bifurcation should be permissible in class compensatory ac-

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213 § 3014(b).

214 *Id.*

215 *See* MANUAL FOR COMPLEX LITIGATION § 1.43 (4th ed. 1978), recommending this procedure.

216 *See* Simon, *supra* note 3. Defendants typically have attempted to defeat class certification on the ground that individual questions of damages predominate over the common issue of liability. FED. R. CIV. P. 23(b)(3). The courts' use of bifurcated trials often eliminated this argument. *See, e.g.*, Aamco Automatic Transmissions, Inc. v. Taylor, 67 F.R.D. 440 (E.D. Pa. 1975); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

217 283 U.S. 494 (1931).

218 *Id.* at 500. The reversal was based on erroneous jury instructions concerning damages for a counterclaim. The Court held that the entire counterclaim issue had to be retried, since the original general verdict did not establish certain facts necessary for the computation of damages.

219 To the same effect is United Air Lines, Inc. v. Weiner, 286 F.2d 302 (9th Cir.), *cert. denied*, 366 U.S. 924 (1961).

tions. First, the proposed bill itself contains a caveat that bifurcated trials may not be utilized if doing so would violate a party's constitutional rights,[220] an effort to keep the new procedure within constitutional bounds. Second, when a court in a class compensatory action plans to use bifurcated trials, it can avoid the *Gasoline Products* problem by taking care to separate the issues of liability and damages, using special verdicts if necessary. Since courts have employed separate trials of liability and damages with success for quite some time,[221] the careful use of bifurcated trials in class compensatory actions should withstand constitutional challenge.

4. Discretionary Notice

The proposed bill repeals Rule 23(c)(2), which requires individual notice to absent class members in damage actions, and directs the court instead to give notice "reasonably necessary to assure adequacy of representation and fairness."[222] In this way, the bill replaces the rigid notice imposed by *Eisen v. Carlisle & Jacquelin,*[223] which interpreted Rule 23(c)(2) to require individual notice to all class members in 23(b)(3) class actions.

Although the *Eisen* holding was based on statutory interpretation,[224] the Court gave the case constitutional overtones by discussing *Mullane v. Central Hanover Bank and Trust Co.*[225] In truth, however, *Mullane* does not support the proposition that individual notice is constitutionally compelled and it should not be so interpreted.[226] As noted in *Eisen,* the *Mullane* Court did hold that "publication notice could not satisfy due process where the names and addresses of the beneficiaries were known,"[227] but it also tailored its notice requirements to

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220 While this may appear to be an unnecessary proviso, it no doubt was included in response to defendants' constitutional contentions.

221 *See, e.g.,* Nix v. Grand Lodge of Int'l Ass'n of Machinists and Aero. Workers, 479 F.2d 382 (5th Cir.), *cert. denied,* 414 U.S. 1024 (1973); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970).

222 § 3013(e); S. 3475 § 3(a).

223 417 U.S. 156 (1973).

224 *Id.* at 173; *Developments, supra* note 1, at 1402-16.

225 339 U.S. 306 (1950).

226 *See* Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Rule 23,* 123 U. PA. L. REV. 1217 (1975).

227 Eisen v. Carlisle & Jacquelin, 417 U.S. at 174.

the case at hand. *Mullane* involved beneficiaries of a trust, persons with tangible, vested interests in a fund, and a proceeding in which all questions respecting the management of those vested interests would be settled permanently. Even in this context, however, the Court did *not* order individual notice for those beneficiaries whose interests were "either ephemeral or future."[228] Hence, whether notice is constitutionally required under *Mullane* seems to depend on the strength of the individual's property interest. The only "property interest" of claimants in a class action is their right to bring individual suits. That right may be meaningless if a claimant is unable or unwilling to sue, due to the burdens inherent in litigation. *Mullane*'s constitutionally mandated notice to those persons with vested rights does not apply to such claimants, who are more closely analogous to the beneficiaries with future interests.

Besides *Mullane* itself, there are other indications that individual notice is not a constitutional requirement. Individual notice is not required in 23(b)(1) or 23(b)(2) class actions, despite the res judicata effect on absent class members, regardless of whether damages are involved.[229] Furthermore, discretionary notice has been incorporated into some state class action statutes adopted since *Eisen*[230] and has been approved by Congress in other legislation.[231] The final justification for discretionary notice is the "cryptic and abstract"[232] due process clause itself, which, as the *Mullane* Court said, must not be so construed as to "place impossible or impractical obstacles in the way" of vindication of rights.[233] Particularly in cases where individual stakes are small, the expense of individual notice may destroy the viability of the only feasible means of pursuing the

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228 Mullane v. Central Hanover Bank and Trust Co., 339 U.S. at 317.

229 Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir. 1975), *appeal dismissed*, 424 U.S. 737 (1976). *See also* MANUAL FOR COMPLEX LITIGATION § 1.45 (4th ed. 1978).

230 *See, e.g.*, N.Y. CIV. PRAC. LAW, § 904(d) (McKinney 1976); ILL. REV. STAT., Civil Practice Act § 57.2 - .7 (1977). *See also* Uniform Class Actions Act, *supra* note 146, § 7 (individual notice only to those injured in excess of $100).

231 H.R. REP. No. 95-339, *supra* note 141, at 32: "Expensive and stringent notice requirement will only frustrate this strong public interest [in enforcement and deterrence]."

232 Mullane v. Central Hanover Bank & Trust, 339 U.S. at 313.

233 *Id.* at 313-14.

claims.[234] To say that due process requires a measure which precludes vindication of the right being protected is nonsense.

The discretion in providing notice contemplated by the proposed bill is therefore essential.[235] When unitary and undifferentiated issues are presented, and are actively litigated by competent counsel, notice may not be necessary, since all interests will be adequately protected. When a person's claim is small, individual notice of pending litigation may serve no practical purpose[236] and may even be counterproductive.[237] By permitting the court a degree of flexibility in requiring notice, the bill facilitates management of class actions while protecting the due process rights of absent class members.

5. Diversity Class Actions

An indirect but significant effect of the proposed bill is the elimination of diversity jurisdiction for class actions for damages.[238] Though this result could hardly have been unintentional, its rationale has not been explained by the bill's proponents.[239] While diversity jurisdiction may be in the waning

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234 This possibility has engendered much of the criticism of the *Eisen* decision. *E.g.*, Note, *Finding a Forum for the Class Action: Issues of Federalism Posed by Recent Limitations on Use of Federal Courts*, 28 SYRACUSE L. REV. 1009, 1020-36 (1977) [hereinafter cited as *Finding a Forum*]; Morrissey, *supra* note 147; Note, *supra* note 10.

235 Since notice to potential claimants in a public action is also discretionary, § 3007(b), the arguments here asserted are applicable to public actions as well. Discretion in a public action lies with the Director of the Administrative Office of United States Courts. *Id.* One problem with this aspect of the bill is that no role in notice is envisioned for the court or the participating attorneys, who are likely to be more familiar than the Director with the case and with expeditious means of providing notice. General guidelines for notice should be provided by the court with the assistance of the attorneys; the bill should provide expressly for such input.

236 The *Advisory Committee Notes*, *supra* note 1, state: "In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." *Id.* at 106.

237 *See* the poignant responses to class notification in the antibiotics cases, recounted in Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 321-22 (1973).

238 This is a result of the limitation of class compensatory actions to rights of action arising under federal statutes, § 3011, and the repeal of Rule 23(b)(3), § 3023, S. 3475 § 3(a). Although diversity suits for damages might be brought under Rule 23(b)(1) or (b)(2), the proper certification of such a suit is under current Rule 23(b)(3), which would be repeated by the bill.

239 The only acknowledgment of the issue is the statement that "Actions based solely on state law may not be litigated in federal courts under either of the proposed new procedures." Meador, *supra* note 29, at 49.

months of its existence,[240] this is a backhanded way of dealing with the issue. Congress should address directly the question of whether class actions should be the first diversity suits to be banished. The better policy is to take the opposite approach: among diversity suits, class actions are the most deserving of the federal forum.

The elimination of diversity jurisdiction in class actions cannot be justified on the ground that it relieves the burden of federal courts, since diversity class actions have little palpable effect on the caseload.[241] The reason for this limited impact is obvious. Since aggregation of claims in order to satisfy the jurisdictional amount requirement[242] is not permitted,[243] the only diversity class actions maintained in federal court are those in which each class member's claim exceeds $10,000.[244] As a result of this high threshold on damages, there are few diversity class actions.

Generally, the only cases that can pass the threshold are mass disaster cases.[245] As Professor Miller has urged, such suits are particularly well-suited to the federal forum, because they involve multistate plaintiffs, national policy, and national remedies.[246]

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240 S. 2389 and H.R. 9622 were introduced in the Ninety-fifth Congress to end diversity jurisdiction (except in alienage and statutory interpleader cases). A similar measure is pending before the Ninety-sixth Congress. *Federal Diversity of Citizenship Jurisdiction: Hearings on S.2094, S.2389, and H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978). *See* H.R. 2202, 96th Cong., 1st Sess. (1979).

241 In statistical year 1977, only 104 of 3,153 class actions filed in federal courts were diversity actions. [1977] DIR. AD. OFF. U.S. CTS. ANN. REP., table 32.

242 28 U.S.C. § 1332 (1976).

243 Snyder v. Harris, 394 U.S. 332 (1969); Zahn v. International Paper Co., 414 U.S. 291 (1973).

244 If diversity jurisdiction were *not* eliminated, the removal of the jurisdictional amount requirement in class compensatory actions would create an additional category of diversity class actions in which individual claims range between $300 and $10,000. Since such suits have been foreclosed since at least the *Zahn* decision, they are unaffected by the current bill and are not the focus of the present discussion.

245 Within subject-matter categories for class actions, diversity suits outnumbered federal question cases by the most substantial margin in the tort area. [1977] DIR. AD. OFF. U.S. CTS. ANN. REP., table 32.

246 Miller, *supra* note 18, at 118-23. For example, airplane crashes or fires typically involve plaintiffs from several states. *E.g., In re* Paris Air Crash of March 3, 1974, 69 F.R.D. 310 (C.D. Cal. 1975) (airplane crash in which 360 persons were killed). A suit by employees suffering from long-term exposure to asbestos fibers in the work place may

In the future, potential plaintiffs in mass disaster suits could attempt to sue under the remaining provisions of Rule 23.[247] In a recent suit involving the victims of a fire,[248] for example, a class was certified under Rule 23(b)(1)(B),[249] because the total damages claimed were several times the defendant's net worth. The court reasoned that a class action was necessary to insure equal treatment for all litigants. Such a solution is inadequate, because it is limited to those cases where the suit will bankrupt the defendant. Class actions for damages are currently properly certified under Rule 23(b)(3)[250] and, in the interests of fairness, mass disaster suits should be handled in a uniform manner. Moreover, such procedural shuffling might not even be available to plaintiffs in a circuit such as the Ninth Circuit, which has a per se rule against certification under (b)(1) or (b)(2) in mass disaster cases.[251]

The theoretical availability of a suit at the state level is similarly an inadequate substitute for a diversity class action in federal court. If the victims are not from the same state, there may be no means at all of adjudicating their rights as a group.[252]

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implicate federal health and safety standards. *See* Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974). Widespread harm in a products liability case may necessitate remedies that extend beyond a single state's borders. *See* Note, *DES and a Proposed Theory of Liability,* 46 FORDHAM L. REV. 963 (1977) (tort suits involving cancer in offspring of women exposed to DES while pregnant). For a national remedy in a nontort context, *see* West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). Despite their importance, these suits could not be maintained as class compensatory actions.

247 FED. R. CIV. P. 23(b)(1), the so-called "common fund" or "true" class actions, and FED. R. CIV. P. 23(b)(2), for declaratory or injunctive relief. This technique is suggested in the MANUAL FOR COMPLEX LITIGATION § 1.43 (4th ed. 1978) to avoid complexity.

248 Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977) (fire at the Beverly Hills Supper Club in which 164 persons were killed).

249 Classes may be certified in situations in which individual suits would "as a practical matter be dispositive of the interests" of absent members. FED. R. CIV. P. 23(b)(1)(B).

250 Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 (9th Cir. 1976); Goldman v. First Nat'l Bank of Chicago, 56 F.R.D. 587 (N.D. Ill. 1972). *See* MANUAL FOR COMPLEX LITIGATION, § 1.43 (4th ed. 1978).

251 *See, e.g.,* McDonnell-Douglas Corp. v. United States Dist. Ct., Central District of Cal., 523 F.2d 1083 (9th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976); Vincent v. Hughes Air West, Inc., 557 F.2d 759, 767 (9th Cir. 1977) ("It is now settled in this circuit . . . that a class action brought on behalf of the next-of-kin of aircrash victims and certified under Rule 23(b)(1) or (2) is not proper").

252 *E.g., Finding a Forum, supra* note 233, at 1020-36.

Some states will not assert jurisdiction over nonresident members of a class, whereas federal courts generally do. Even if the victims of a disaster are all residents of the same state, a suitable class procedure may not be available, since the class action statutes of about half of the states are more restrictive than the federal version.[253]

The importance of litigating the rights of disaster victims as a group was well stated by a federal district court in Kentucky in a recent case: "In no event, however, should this litigation become an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest."[254] Despite the admonition of the Advisory Committee that mass torts are "ordinarily not appropriate" for class action treatment,[255] federal courts, in the words of one judge, "have achieved efficiency, speed, and justice by certifying classes of large numbers of claimants in 'mass accidents' and air disaster litigation."[256] Federal judges should be allowed to continue these efforts;[257] the greater procedural efficiency and degree of experience in complex litigation available in a federal forum as compared to most state courts should not be denied to mass disaster victims. Indeed, with its consolidation provision and additional management techniques, the proposed bill actually facilitates the handling of complex cases. Therefore, even if Congress chooses to eliminate diversity jurisdiction in federal courts,[258] an exception should be made for mass disaster cases

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253 *Id.* at 1020-21.

254 Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977).

255 *Advisory Committee Notes, supra* note 1, at 103. Several commentators have argued that the Advisory Committee is wrong on this point. *E.g.*, Miller, supra note 18; Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383 (1977); Comment, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615 (1972).

256 Becker, *The Class Action Conflict*, 75 F.R.D. 167, 187 (1977).

257 In a recent survey, 67% of 148 district court judges agreed that class actions are capable of disposing efficiently of mass accident claims. *Rule 23 Questionnaire Responses, supra* note 18.

258 As mentioned earlier, those diversity class actions currently precluded from federal courts are not affected by the bill. Since as a whole they do not present so compelling a case for federal litigation as do mass disaster cases, it is not recommended that their status be changed. Mass disaster cases could be permitted simply by retaining the current jurisdictional amount requirement under the *Zahn* rule, but allowing diversity suits in class compensatory actions.

due to their importance, complexity, and peculiarly national impact.[259]

Conclusion

The draft class action proposal accomplishes important public policy goals of deterrence of wrongdoing and prevention of unjust enrichment through its provisions for public actions. In addition to enhancing private enforcement of federal laws, the new technique attempts with some success to pacify both sides in the ongoing battle over class actions. On the whole, it prescribes innovative but sound approaches to complex litigation. In overcoming *Snyder* and *Eisen,* it responds to class action proponents' calls for a forum for small claimants. By instituting merits-screening at a preliminary hearing and close supervision of attorney's fees, the legislation will curb the abuses which defendants attack: coercing settlements through frivolous suits and obtaining unnecessarily large attorney's fees. In addition, the proposed bill provides the court with important improvements in management techniques: cohesive and useable definitions and qualifications of class actions, classwide recovery, opt-in procedure, bifurcated trials of damages and liability, and discretionary notice.

The proposal does present some problems, however; and certain changes should be made. The court should make a determination on the maintainability of a public action free from any presumption against the relator engendered by a statement from the Attorney General that the suit is not in the public interest. In order to protect the interests of the United States, the Attorney General should be permitted to intervene as of right. The current draft limits the scope of public actions unnecessarily. Restriction of public actions to commercial suits should be eliminated and entertainment of counterclaims should be at the court's discretion. To provide an incentive to attorneys to pursue public actions, attorney's fees ought to be awarded in any successful action brought by a relator.

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259 An alternative would be to create a private right of action for mass disasters which, for example, implicate federal drug policy or involve interstate transportation. In that way, the primary tort claims could be tried under pendent jurisdiction.

In its treatment of class compensatory action provisions, the proposal should be more specific concerning the court's choice of the opt-in procedure. The bill should mandate consideration of such factors as the cohesiveness of the class and judicial efficiency, in addition to the size of individual claims. It should also be amended in order to retain mass disaster class actions under federal jurisdiction.

With the changes here suggested, the bill represents a commendable and practical step forward in alleviating problems inherent in large class actions for damages. Congress should enact legislation such as the bill, which improves manageability of class suits, helps to prevent abuse, and facilitates deterrence of wrongdoing by providing a forum for the vindication of small claims.

THE UNIFORM CLASS ACTIONS ACT: SOME PROMISE AND SOME PROBLEMS

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Class actions provide an important partial solution to the problems of vindicating individual rights in an age of crowded court dockets. Although the fedral courts have traditionally been the primary site of class action litigation, recent Supreme Court decisions have narrowed the availability of class actions in federal court, making more pronounced the need for effective state class action procedures.

In this Article, Mr. Alpert examines the proposed Uniform Class Actions Act, encouraging states without advanced class action procedures to adopt the Act's more liberal provisions. In addition, Mr. Alpert explores the Act's deficiencies and offers proposed amendments to serve better the Act's goal of redressing wrongs through the class procedure.

Introduction

The class action procedural device has had immense impact on the practice of law and the administration of civil justice.[1] The procedure, like any other, lends itself to abuse;[2] but its proper use advances many important policies. It facilitates judicial administration by achieving economies of time and preventing multiplicity of suits;[3] it furthers legislative policy by enhancing statutory remedies, thus deterring fraud and other statutory violations,[4] and it aids administrative enforcement by compen-

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1 *See* Becker, *The Class Action Conflict: A 1976 Report,* 75 F.R.D. 89, 167 (1977).

2 Two major abuses of the procedure have been awards of excessive attorney's fees and use of the class action to secure favorable settlement for the named plaintiff. Both problems result from inadequate court supervision and have prompted federal courts to take a more active role in supervising the conduct of class suits. On attorney's fees, *see, e.g.,* City of Detroit v. Grinnell Corp., 495 F.2d 488 (2d Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973); notes 296 to 300 and accompanying text *infra.* On settlements, *see* McArthur v. Southern Airways, Inc., 556 F.2d 298 (5th Cir. 1977); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); notes 258 to 264 and accompanying text *infra.*

3 *E.g., Advisory Committee's Notes to Amended Rule 23,* 39 F.R.D. 98, 102 (1966); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975); Thompson v. Board of Ed., 71 F.R.D. 398, 414 (W.D. Mich. 1976).

4 *E.g.,* Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975) (dicta); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968); Falven & Rosenfeld, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 686 (1941) (deter mass wrongs and fraud).

sating for the inadequacy of administrative remedies.[5] More importantly, the class action procedure helps make the law and the legal system more responsive to the individual and to formerly neglected issues. The class action provides a forum for persons such as the small claimant,[6] the uninformed, unrepresented, incompetent, and those deterred from voicing complaints,[7] who would otherwise be unable to use the legal system to remedy wrongs done to them. It also directs attention to what may be essential, though often ignored, issues in litigation — the magnitude of the injury or deprivation[8] and the need for group legal remedies.[9] In general, the class action has thus enhanced the vitality of modern jurisprudence by serving as a tool with which to redress broad deprivations of constitutional rights and civil liberties.[10]

Until recently, the federal courts have been the primary site of class action litigation. This was due in part to the 1966 amendment of Fed. R. Civ. P. 23 (Rule 23), which modernized the procedure, and in part to the federal courts' receptivity to suits seeking to uphold individual rights and liberties.[11] Recent

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5 *E.g.*, Dolgow v. Anderson, 43 F.R.D. 472, 481 (E.D.N.Y. 1968); Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

6 *E.g.*, American Pipe & Construction Co. v. Utah, 414 U.S. 538, 551-52 (1974); Windham v. American Brands, Inc., 539 F.2d 1016, 1020 (4th Cir. 1976); Samuel v. University of Pittsburgh, 538 F.2d 990, 997 (3rd Cir. 1976); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975).

7 Morgan v. Sielaff, 546 F.2d 218, 222 (7th Cir. 1976) (poverty, lack of counsel, ignorance); Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974) (poverty, ignorance); Adderly v. Wainwright, 46 F.R.D. 97, 99 (M.D. Fla. 1968) (functional illiteracy); Ste. Marie v. Eastern R.R. Ass'n, 72 F.R.D. 443, 491 (S.D.N.Y. 1976) (employees of defendant reluctant to file own suits).

8 *See* Watson v. Branch County Bank, 380 F. Supp. 945, 957 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975); Ratner v. Chemical Bank, 54 F.R.D. 412 (S.D.N.Y. 1972).

9 Rodgers v. United States Steel Corp., 508 F.2d 152, 162-63 (3d Cir.), *cert. denied*, 420 U.S. 969 (1975); Watson v. Branch County Bank, 380 F. Supp. 945, 957 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975); *cf.* United Transp. Union v. State Bar, 401 U.S. 576 (1971) (injunction against union unconstitutional because it prohibited group activity enabling members to meet costs of legal representation and to secure meaningful access to courts).

10 Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir. 1975); *In re* Sugar Indus. 1976-2 TRADE CAS. (CCH) ¶ 61,215 (E.D. Pa. 1976); Miller, *Problems in Administering Judicial Relief in Class Actions under Rule 23(b)(3)*, 54 F.R.D. 501, 513 (1972); *see* Circle v. Jim Walter Homes, Inc., 535 F.2d 583, 589 (10th Cir. 1976).

11 *See* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 1000a-1008 (1977); *but see* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class*

United States Supreme Court decisions, however, have restricted federal court access for injured parties;[12] the Court has refused to allow diversity class actions in federal court unless each class member satisfies the jurisdictional amount requirement ($10,000) of 28 U.S.C. § 1331.[13] It also has interpreted Rule 23(c)(2)[14] literally, so that personal notice to each class member identifiable through reasonable efforts is required for all Rule 23(b)(3)[15] class actions, regardless of expense to the plaintiff. At the same time, the Court has prohibited any shifting to the defendant[16] of the costs of notice, including the cost of identifying the class members,[17] at least initially,[18] so that the would-be class representative must be able to afford these costs. The Court further has limited the availability of interlocutory appeals of class denials[19] and has placed signifi-

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Action Problem," 92 HARV. L. REV. 664 (1979) (federal class action caseload results from changes in substantive law, not from 1966 amendment to Rule 23).

12 *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498, 502-03 (1977); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545 (1977); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); *Developments in the Law-Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); *see also Hearings on State of Judiciary and Access to Justice Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

13 Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969).

14 The notice requirements of FED. R. CIV. P. 23(c)(2) specifically apply only to damage class actions under Rule 23(b)(3).

15 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Notice is not required either by Rule 23 or by requirements of due process in class actions under Rule 23(b)(1) or (b)(2) essentially for declaratory and injunctive relief. *See* notes 138 to 139 and accompanying text *infra*.

16 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Exceptions to the prohibition may arise when the party opposing the class has a fiduciary or similar duty to the class members. *See* 417 U.S. 156, 178; Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (S.D.N.Y. 1968).

17 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

18 It is generally recognized, however, that notice costs are taxable against an unsuccessful defendant. Bertozzi v. King Louie International, Inc., 420 F. Supp. 1166, 1181 n.9 (D.R.I. 1976); Chevalier v. Baird Savs. & Loan Ass'n, 72 F.R.D. 140, 151 (E.D. Pa. 1976); Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973).

19 *See* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), and Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978), companion cases in which the Court refused to allow interlocutory appeals of class denials under the "death knell" doctrine, *i.e.*, where the claims involved are so small that the case will not be prosecuted if class status is refused, or under 28 U.S.C. § 1292(a)(1) where the class denial in a suit

cant restrictions on class representation.[20] Although recent Supreme Court decisions have not entirely foreclosed the class action procedure to interested parties,[21] the current Court clearly believes that federal class action relief, like all federal relief, is limited.[22]

These restrictions on the availability of the class action procedure have been matched by restrictions on the relief available from federal courts. The Supreme Court's recent decision that the eleventh amendment bars a federal court award for retroactive relief against a state[23] requires that any action for such relief be brought in state court.

Similarly, the Court's extension of the *Younger v. Harris*[24] abstention doctrine to constitutional challenges to state civil statutes[25] and the restriction of federal injunctive relief in con-

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seeking injunctive relief will so narrow the scope of injunctive relief as to deny plaintiff any recovery. *See* notes 245 to 246 and accompanying text *infra.*

20 *See* East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977) (a putative representative with an unmeritorious individual claim may not represent a class).

21 For example, the $10,000 amount in controversy requirement for federal diversity suits may not be a requirement for 23(b)(2) class actions, at least in actions to redress racial discrimination. 28 U.S.C. § 1343 (1976). Even where an amount in controversy is required, plaintiffs may be able to aggregate their claims if they have a common, undivided interest. Brandt v. Owens-Illinois, Inc., 62 F.R.D. 160 (S.D.N.Y. 1974).

Furthermore, not all recent Supreme Court class action decisions have restricted the use of the procedure; several have significantly advanced class action viability. For example, the Court has held that in cases where the alleged harm would ordinarily dissipate during the time required for full adjudication, the resolution of the controversy as to the named plaintiff does not moot the claim of the class. *See* Sosna v. Iowa, 419 U.S. 393 (1975) (challenge to one-year residency requirement for divorce); Gerstein v. Pugh, 420 U.S. 103 (1975) (challenge to pretrial detention procedures). The Court has also held that where class status has been denied because of failure to demonstrate that joinder would be impracticable, the commencement of the original action tolls the statute of limitations for all purported class members who make timely motion to intervene after denial of certification. American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), *rehearing denied,* 415 U.S. 952 (1974); *cf.,* United Airlines v. McDonald, 432 U.S. 385 (1977), *rehearing denied,* 434 U.S. 989 (1977) (post judgment intervention to obtain appellate review of denial of class certification.)

22 *See* Coopers & Lybrand v. Livesay, 437 U.S. 340 (1978); Snyder v. Harris, 394 U.S. 332, 339-42 (1969).

23 Edelman v. Jordan, 415 U.S. 651 (1974).

24 401 U.S. 31 (1971).

25 *See* Trainer v. Hernandez, 431 U.S. 434 (1977) (civil prosecution for welfare fraud); Judice v. Vail, 430 U.S. 327 (1977) (civil contempt for refusal to obey court order requiring payment of debt); Huffman v. Pursue, Ltd., 420 U.S. 582 (1975) (civil prosecution of nuisance).

stitutional challenges to state or local government conduct[26] make state class action procedures critical for checking the excesses of state and local government. The unavailability of attorney's fees to the prevailing party who vindicates the public interest[27] is also sure to divert many "public interest" class actions from federal courts. And the Court's refusal to permit ultimate consumers to recover damages for violation of the federal antitrust laws[28] will have a similar effect.

As a result of these restrictions, the need for viable state class action procedures has become more pronounced. State response to this need has been varied; while some states have encouraged class actions as a matter of public policy,[29] others have limited the availability of class action procedures.[30] Also varied are the states' class action procedures themselves; some are based on the Field Code version,[31] some on the pre-1966 Rule 23,[32] and some on the current Rule 23.[33] A few states have also recognized the increasing need for better class action procedures by responding with new provisions which expand the scope and ease the requirements of class actions.[34]

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26 *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

27 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). *Alyeska* bars attorney's fees under the "private attorney general" theory but is no bar to fee awards under other circumstances. For cases allowing fee awards, *see, e.g., id.* at 258-60 & 270 n.46; National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975) (when there is a "common fund"); Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975); Fairly v. Patterson, 493 F.2d 598 (5th Cir. 1974) (where defendant acts in "bad faith"); Hall v. Cole, 412 U.S. 1 (1973) (when there is a "common benefit"); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); 42 U.S.C. § 2000e-5k (title VII) (1975) (where statute specifically permits attorney's fees).

28 Illinois Brick v. State of Illinois, 431 U.S. 720 (1977) (only direct purchasers can sue under § 4 of the Clayton Act).

29 *See* Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971); Riley v. New Rapids Carpet Center, 61 N.J. 218, 294 A.2d 7 (1972).

30 Arkansas, for example, allows class actions only where there is a "joint" right shared by all class members. *See* Ross v. Arkansas Communities, Inc., 529 S.W.2d 876 (Ark. 1975).

31 *E.g.*, CONN. GEN. STAT. §§ 57-105 (1979); S.C. CODE §§ 10-205 (1979).

32 *E.g.*, GA. CODE ANN. §§ 81A-123 (Supp. 1967); ME. R. CIV. P. 23 (1968).

33 *See generally* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 1200-1290 (1977); Homberger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971); Starrs, *The Consumer Class Actions*, 49 B.U. L. REV. 211, 407 (1969).

34 A classic example is New York, which recently reversed its restrictive view of class suits by adopting N.Y. CIV. PRAC. LAW §§ 901-909 (McKinney 1978). *See* Hall v. Colburn Corp., 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970); 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 1220(b) (1977). *See also* N.J. COURT RULE, 4:32 (1969); MASS. R. CIV. P. 23 (1976).

It is in this context that the National Conference of Commissioners on Uniform State Laws, in August 1976, approved and recommended for enactment the Uniform Class Actions Act (Act).[35] The Act is designed to make the legal system more responsive to those with small claims or limited means, to facilitate the proper handling of multistate class actions, and to foster uniformity among states. Its primary purpose is to encourage the handling of class actions in state courts in response to the narrowing of the opportunities in federal courts.[36] States which desire to encourage class relief or "modernize" their procedure may adopt the Act as a pattern of class action procedure. Alternatively, they may turn to Rule 23, which, although subject to some criticism,[37] has proved workable[38] and has generally expedited class relief.[39] States could also adopt a combination of the better features of Rule 23 and the Act, or be guided fur-

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35 UNIFORM CLASS ACTIONS ACT OR RULE [hereinafter cited as UCAA]. The proposal is denominated "Act" in the alternative because some jurisdictions can adopt it by rule of court, while others must or will take the legislative approach.

36 UCAA, Prefatory Note, 3-4; Vestal, *Uniform Class Actions*, 63 A.B.A.J. 837 (1977). (Professor Vestal was the principal drafter of the Act.) Other stated purposes are uniformity, handling multistate class actions, and making the judicial system more responsive to those with small claims or limited means. UCAA, Prefatory Note, 4.

37 *See* Miller v. Mackey International, 515 F.2d 241, 244 (5th Cir. 1975) (Bell, J., concurring) (opt-in procedure preferable in 23(b)(3) damage actions); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974) (23(b)(3) action unduly burdens courts, encourages barratry); LaMar v. H&B Novelty Co., 489 F.2d 461, 465-67 (9th Cir. 1973) (restrictions on Rule 23 necessary to deny "massive class actions"); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMM. ON RULE 23 (1972) (urging return to opt-in procedure); Handler, *The Shift From Substantive to Procedural Innovations in Antitrust*, 71 COLUM. L. REV. 1 (1971); Simon, *Class Actions — Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1973).

38 STAFF OF SENATE COMM. ON COMMERCE, 93RD CONG., 2D SESS., CLASS ACTIONS STUDY (Comm. Print 1974), analyzed in Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L. J. 1123 (1974); Bernstein, *Judicial Economy and Class Actions*, 7 J. LEGAL STUD. 349 (1978); DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I) and (II)*, 1976 A.B.F. RES. J. 1021, 1273 (1976); Wolfrom, *The Antibiotics Class Actions*, 1976 A.B.F. RES. J. 251 (1976); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON CLASS ACTIONS (1973).

39 On the potential benefits of class suits *see In re* Antibiotics Antitrust Acts, 410 F. Supp. 669, 706 (D. Minn. 1975); Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's Viewpoint)*, 55 F.R.D. 365 (1973); Lebedoff, *Operation Money Back*, 4 CLASS ACT. REP. 147 (1975); Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACT. REP. 47 (1973); *but see* Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

ther by other states' innovative efforts. One state has already adopted the Act,[40] and others are presently considering it.[41]

This Article explores the nature and availability of class actions under the Act.[42] Because of the narrowing of federal court opportunities, the Article is designed to encourage those states without advanced class action procedures to adopt the Act's more liberal provisions for the redress of wrongs through the class procedure. The analysis will also indicate the Act's deficiencies to lay a foundation for proposed corrections and changes in the Act designed better to serve these purposes. In the course of the analysis, frequent reference to Rule 23 will be made. Such reference is not meant to constitute a systematic comparison between the Act and Rule 23; it would simply be impossible to discuss class actions properly without referring to the wealth of experience from federal practice.

After a brief examination of the Act's major divergences from Rule 23 and current federal practice, the sections of the Act will be analyzed within a four-part functional framework: prerequisites to a proper class action; procedures for establishing and handling the class action; rights and obligations of class members and of the party opposing the class; and relief. Following the analysis is a re-drafted version of the Act which incorporates the suggestions made in this Article.

I. THE ACT AND RULE 23: A BRIEF COMPARISON

The drafters of the Act had ten years of experience under the current Rule 23 to guide them. They could simply have adopted Rule 23 verbatim, or with only minor modifications, but they properly viewed Rule 23's generality and silence on procedures

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40 North Dakota adopted the Act in 1976, effective in 1977. N.D. CENT. CODE R. CIV. P. 23 (1977). Pennsylvania also passed the Act in a modified form in 1977. 1977 PA. LEGIS. SERV. R. CIV. P. 1701-1716, at 261. *See* Vestal, *Uniform Class Actions,* 63 A.B.A.J. 837, 840 (1977).

41 The UCAA is under consideration in Montana, Iowa, Oklahoma, Maryland, Ohio, California, Connecticut, and the District of Columbia. *See* Vestal, *Uniform Class Actions,* 63 A.B.A.J. 837, 840 (1977).

42 For other analyses of the Act, *see* Vestal, *Uniform Class Actions,* 63 A.B.A.J. 837 (1977); Note, Class Actions and the Uniform Class Actions Act: Functions and Structure, 11 LOY. L.A.L. REV. 335 (1978).

as inappropriate for state courts. To remedy this insufficiency, the drafters of the Act attempted to set forth more explicit guidelines for the certification and control of class actions in state courts.[43] After five revisions, they produced an Act which neither facilitates[44] nor restricts[45] class relief to the extent advocated by proponents or opponents of the class action device. Instead, it represents an intermediate rule, at times more liberal and at times more restrictive than Rule 23.

The Act includes four major improvements over Rule 23 and current federal practice. Section 7 introduces more flexibility in notice procedure by allowing the court to take steps to minimize the expense of notice[46] and by modifying the Rule 23(c)(2) requirement that individual notice be given at the representative's expense to each class member with a damage claim who can be identified through reasonable efforts.[47] Section 15 gives the court unprecedented express authority to distribute the portion of the class award remaining after all possible class members have been identified and located; more specifically, the court may order the funds to escheat to the state[48] or be returned to the defendant and used as the court directs.[49] Section 4(c) allows appeals of all denials of class certification, thereby providing greater protection of absent class members' interests and facilitating earlier disposition of the full controversy. And section 16 in turn permits the court to award attorney's fees to a successful plaintiff who, in an action for declaratory or injunctive relief, has vindicated an important public policy.[50]

The most ill-advised provision of the Act is the apparent requirement of section 7 that notice in some form be given in all

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43 Vestal, *Uniform Class Actions,* 63 A.B.A.J. 837 (1977); *see* UCAA, Prefatory Note, 4.

44 *See* Moore, *Uniform Class Actions: Does It Go Far Enough?,* 63 A.B.A.J. 842 (1977).

45 *See* Sher, *Uniform Class Actions: A Critical View,* 63 A.B.A.J. 840 (1977).

46 UCAA § 7(g).

47 UCAA § 7(d).

48 UCAA § 15(c)(5).

49 UCAA § 15(c)(5), (7).

50 UCAA § 7(d).

class actions, including those for only equitable relief.[51] While the notice procedures of section 7 are quite flexible, the blanket notice requirement, not in Rule 23, is likely to deter worthwhile class actions for equitable relief.[52]

A second very poor provision is the listing in § 3(a) of thirteen non-exclusive factors the court must consider and "give appropriate weight to" in ruling on class status, a standard so vague as to permit the adoption of the most restrictive class action procedure.

II. Prerequisites to a Proper Class Action

A proper class action procedure must yield some efficiency in litigating claims, yet not sacrifice fundamental fairness to absentees. Efficiency[53] at a minimum requires sufficient numbers of absentees who cannot be joined in the action as a practical matter and some common link among their and the representative's claims. In addition, to insure that the court's resources will not be unduly burdened, class actions should be limited to cases where the efficiencies are not tenuous, such as where separate individual actions may produce incompatible results,[54] where the defendant has acted on grounds generally applicable to the class,[55] or where the class members' claims are sufficiently similar and the action not too unwieldy.

Fundamental fairness to absentees can be provided only where the representative, through counsel, will fairly and adequately protect their interests. There must be both adequately competent counsel conducting the litigation on behalf of the

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51 UCAA § 7(a), (d), (e).

52 *See* notes 139 to 150 and accompanying text *infra*.

53 Efficiency justifies use of the class suit where absentees are in the nature of indispensable parties and their interests may be affected directly by the judgment. *See* Note, *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1321-22 (1976). Additionally, efficiency results where one class suit can dispose of many similar claims. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 149, 280 (1950); Note, *Developments in the Law — Class Actions, supra,* at 1318, 1322.

54 *See, e.g.*, Berman v. Narragansett Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970) (limited fund); United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10 (D. Nev. 1975) (superior water rights).

55 *See, e.g., Advisory Committee's Note to Amended Rule 23*, 39 F.R.D. 98, 102 (1966).

class,[56] and no antagonistic interests between the representative and the absentees.[57] Because of the importance of this requirement and its due process implications,[58] the court has a duty to supervise continuously the representation of the class.[59]

The principles of efficiency and fairness are embodied generally in sections 1, 2(b), 3(a), and 3(b) of the Act, which are roughly analogous to the provisions of Rule 23(a) and (b).[60] However, there are some significant differences between the Act and Rule 23, and a number of deficiencies in the drafting of the Act which may allow courts to be too restrictive in pursuing these principles.

A. *Omission of Rule 23's "Typicality" Requirement*

One major difference between the Act and Rule 23 is that the Act does not require that the claims or defenses of the representative be "typical" of the class's claims or defenses, as Rule

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56 Several federal courts have held that non-lawyers cannot serve *pro se* in class action suits. Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975); Martin v. Middendorf, 420 F. Supp. 779 (D.D.C. 1976); Schattery v. Winters, 72 F.R.D. 141, 143 (S.D.N.Y. 1976); Jeffrey v. Malcolm, 353 F. Supp. 345, 347 (S.D.N.Y. 1973). Otherwise, the diligence and skill of counsel in prosecuting the action are the most relevant factors. *See, e.g.,* Fendler v. Westgate-Cal. Corp., 527 F.2d 1168, 1170 (9th Cir. 1975) (failure to comply with court order); Anderson v. Moorer, 372 F.2d 747 (5th Cir. 1967) (poor quality of work); Lau v. Standard Oil Co. of Cal., 70 F.R.D. 526 (N.D. Cal. 1975) (3-year delay, limited discovery, specious summary judgment motions); Shields v. Valley Nat'l Bank, 56 F.R.D. 408 (D. Ariz. 1971) (failure to follow rules).

57 *See, e.g.,* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Ridgeway v. IBEW, 74 F.R.D. 597 (N.D. Ill. 1972). Some courts have applied too strict a standard of representation, precluding potentially large numbers of plaintiffs from proceeding as a class when any differences existed in the class. *See* Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated for mootness,* 409 U.S. 815 (1972) (some class members may not desire due process rights of notice and hearing before utility service is terminated); Ward v. Lutrell, 292 F. Supp. 165 (E.D. La. 1968) (some women in state may desire retention of challenged statute limiting women's working hours). Avoiding unnecessary restriction of class suits is particularly important in actions solely for equitable relief where legal principles necessarily affecting absentees are at stake. *But cf.* Harris v. Pan Am. World Airways, 74 F.R.D. 24, 42 (N.D. Cal. 1977) (scrutiny of adequacy of representation more important in title VII injunction suits with incidental monetary relief because of lack of notice and opt-out right).

58 *See* Hansberry v. Lee, 311 U.S. 32 (1940); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853).

59 *See, e.g.,* Handwerger v. Ginsberg, 519 F.2d 1339, 1342 (2d Cir. 1975); Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973); Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 701 (W.D. La. 1976).

60 FED. R. CIV. P. 23(a), (b).

23(a)(3) does.[61] This omission comes in the wake of considerable criticism of the "typicality" requirement and marks a significant improvement over federal practice. Ever since the amendment of Rule 23, several courts and commentators have argued that the typicality requirement adds little or nothing of significance to the other requirements of Rule 23(a).[62] The existence of the requirement, however, has led a number of courts to apply Rule 23 more restrictively. Some courts have insisted that the representative prove that other class members actually shared the grievance or suffered the injury in order to get the class certified preliminarily.[63] Such an interpretation unduly limits the availability of class relief[64] and in effect denies viable class action at the outset for failing to provide what amounts to proof on the merits.

By eliminating the "typicality" requirement, the Act is thus likely to aid the class representative in avoiding unnecessary limitations on the bringing of a class suit. It will no longer be appropriate for courts to refuse to certify class suits simply where the representative is raising related claims of class members not directly shared by the representative,[65] where the

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61 FED. R. CIV. P. 23(a)(3).

62 *See, e.g.*, Chevalier v. Baird Savs. & Loan Ass'n, 72 F.R.D. 140, 144 (E.D. Pa. 1976); Women's Comm. v. National Broadcasting Co., 71 F.R.D. 666, 670 (S.D.N.Y. 1976); Fox v. Prudent Resources Tr., 69 F.R.D. 74, 78 (E.D. Pa. 1975); 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2 (2d ed. 1978).

63 *See, e.g.*, Wright v. Stone Container Corp., 524 F.2d 1058, 1062 (8th Cir. 1975); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270 (10th Cir. 1975); Hadnott v. Laird, 463 F.2d 304 (D.C. Cir. 1972); Steffin v. First Charter Financial Corp., 77 F.R.D. 498 (C.D. Cal. 1978); Larkin v. United Steel Workers, 409 F. Supp. 1137, 1138 (W.D. Pa. 1976); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971). There is tension between this interpretation and the Rule 23 principle that a court may not inquire into the mertis of the class suit in determining class status. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Miller v. Mackey Int'l, Inc., 452 F.2d 424 (5th Cir. 1971). Furthermore, inquiring too closely whether there is a "commonly held feeling of discrimination," 77 F.R.D. at 500, or other injury, not only will require extensive judicial inquiry, but is contrary to the basic policies that class actions provide a forum for those otherwise unable or reluctant to assert their individual rights, enforce statutory rights, and aid administrative enforcement. *See* notes 5 to 7 and accompanying text *supra*.

64 *See* Senter v. General Motors Corp., 532 F.2d 511, 523 n.28 (6th Cir. 1976); Women's Comm. v. National Broadcasting Co., 71 F.R.D. 666, 670 (S.D.N.Y. 1976); *see also* Rivera v. Freeman, 469 F.2d 1159 (9th Cir. 1972); Lamphere v. Brown Univ., 71 F.R.D. 641, 641-47 (D.R.I. 1976).

65 *Compare* Payne v. Travenol Labs., Inc., 565 F.2d 895 (5th Cir. 1978) (challenge permitted to college degree requirement for job for which representative not otherwise

representative may not have an entirely meritorious claim,[66] or where the representative does not have a cause of action against each defendant in a defendant class action.[66a] Denying class certification on such grounds furthers neither efficiency nor fairness to absentees. If, under the facts, the representative's claim is truly unrepresentative, neither commonality nor adequate representation will be present.[67] On the other hand, class claims which meet the numerosity, commonality, and

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qualified); Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3rd Cir. 1976); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247-48 (3rd Cir. 1975) *with* Bailey v. Patterson, 369 U.S. 31 (1962); Johnson v. American Credit Co., 581 F.2d 526 (5th Cir. 1978) (consumer due process, different grounds for pre-judgment attachment); Jacobs v. Martin Sweets Co., 550 F.2d 264 (6th Cir. 1977) (employee terminated for pregnancy cannot challenge exclusion of pregnancy from employee medical benefits); Castro v. Beecher, 459 F.2d 725, 729-31 (1st Cir. 1972); Williams v. TVA, 415 F. Supp. 454, 459 (M.D. Tenn. 1976); Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973).

66 *Compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 754 n.7 (1976); McBride v. Delta Airlines, 551 F.2d 113 (6th Cir. 1977); Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3rd Cir. 1975) (meritorious claim not required); Roberts v. Union Co., 487 F.2d 387 (6th Cir. 1976); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied,* 409 U.S. 982 (1972) *with* Vervaecke v. Childs, Heider & Co., 578 F.2d 713 (8th Cert. 1978); Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973); Jenkins v. Blue Cross Mutual Hosp. Ins. Co., 522 F.2d 1235, 1240 (7th Cir. 1975); Kota v. Little, 351 F. Supp. 1059 (E.D.N.C. 1971); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971) (meritorious claim required). *See also* East Texas Motor Freight Sys's, Inc. v. Rodriguez, 431 U.S. 395 (1977), where the Supreme Court held that purported representatives in a title VII race discrimination suit who were unsuccessful on the merits of their individual claims after the class was denied cannot appeal the class denial since they are not members of the class of discriminatees. *See* Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978); Walker v. World Tire Corp., Inc., 563 F.2d 918 (8th Cir. 1977). *But see* 578 F.2d at 989 (Godbold, dissenting). If that is the holding of *Rodriguez,* then the Supreme Court confused the issues of class membership and individual discrimination in fact. Where a company has a policy or practice of discriminating against a minority group, every employee belonging to that minority is a class member with a similar grievance. However, the individual effects of that discrimination may not reach each minority member, at least in a legally compensable fashion, because of a variety of factors, such as lack of qualification for promotion to the restricted job, poor job performance, or only a limited number of job openings and promotions during the relevant period. That a class member or representative is not ultimately entitled to monetary relief, *i.e.,* does not have a specific, legally compensable claim for damages, does not make that person any less a member of the class against which discrimination is directed. *See* Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Briggs v. Brown & Williamson Tobacco Corp., 414 F. Supp. 371, 378 (E.D. Va. 1976).

66a *Compare* LaMar v. H & B Novelty Co., 489 F.2d 461 (9th Cir. 1973) (must have claim) *with* Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974) (need not have claim); *see* Richardson v. Ramirez, 418 U.S. 24, 39 (1974).

67 *See* Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973).

representation requirements will be sufficiently coincident to provide both efficiency and adequate protection, and the court should certify the class. Requiring class interests to be more closely aligned could easily inhibit broad equitable relief; particularly in civil rights class actions in which the same claims often are presented in varying factual circumstances, requiring near identity of interests would virtually foreclose bringing of the suit.

B. *Vagueness of Standards for Consideration of Class Prerequisites*

Even without a typicality requirement, the Act still erects unnecessary obstacles to the maintenance of class actions. The most significant problem with sections 1 through 3 of the Act appears to lie in section 3(a), which sets forth thirteen factors that the court "shall consider and give appropriate weight to" in deciding whether the class action should proceed. The lengthy list of factors, essentially tracking Rule 23(b), was apparently designed to eliminate the different treatment of class actions for damages versus those for equitable relief which has resulted under federal practice.

The drafters' design to simplify is laudable; however, the wide disparity in types and purposes of class actions renders absolute uniformity impossible and actually undesirable when determining what classes should proceed. The mere fact that suits range from those for equitable relief to those involving small monetary claims for deterrence and large monetary claim actions for compensation makes different treatment quite logical.[68]

By seeking uniformity for all class actions, section 3(a) may thus fail, create significant problems, or both. The list as drafted may prompt both counsel and the court to spend considerable and often unnecessary time evaluating each listed factor. Moreover, the list may be treated as restrictive rather than as descriptive and thus prompt a myopic approach to class certification. If the provision is designed to give a list of possible

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68 *See* UCAA § 8(a)(2), which allows class members to opt-out of the action unless an affirmative finding is made under any of the first three factors in § 3(a).

alternative factors to be applied to the facts of each case, the implication is that class actions of varying types and purposes may be treated differently with the pursuit of absolute uniformity doomed from the start. If, on the other hand, the provision is construed to make the court give the same "appropriate" weight to each of the factors, a court would be free to, indeed must, deny a class action unless all factors, from (1) through (13), are met. Under such a reading, section 3 would preclude class action treatment for all but the "true"[69] class action, in which a joint or common interest exists among class members.[70] Indeed, this reading would produce the very restriction on class actions now used by many state courts to limit class action availability. Since this result is inherently inconsistent with the Act's purpose of facilitating state court class actions, the drafters could not have intended section 3(a) to require uniform treatment for *all* class actions or to apply each of the section 3(a) factors to every class action suit.

The danger of section 3(a) therefore lies in its failure to give any guidance whatsoever for determining what weight is "appropriate." Giving a factor "appropriate" weight need not mean that it be met absolutely. But the vague standard may allow the courts to "weigh" the factors as they see fit; they can make class certification difficult to obtain, or they can make it comparatively easy to obtain. Thus section 3(a) would hinder the Act's attempt to encourage state court class actions in response to the narrowing of federal court opportunities.[71] To remedy

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69 The "true" class action refers to actions where joint rights are involved. The pre-1966 federal Rule 23 divided class actions into "true," "hybrid," and "suprious," with a different binding effect for each type. Only the "true" class action bound all class members. The "hybrid" action bound all class members but only as to specific property, much like an in rem or quasi in rem action. The "spurious" action was merely a permissive joinder device. Because of the critical difference in binding effect and the monstrous difficulties in applying the categories, the 1966 amendment to Rule 23 dropped the terms and eliminated the limitations on binding effect except for the right to opt-out in damage class actions under Rule 23(b)(3). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 23.01 (2d ed. 1978); *Advisory Committee's Note to Amended Rule 23*, 39 F.R.D. 98, 98-99 (1966).

70 *See* note 69 *supra*. This would be possible because the first factor, "whether a joint or common interest exists among class members," will permit only a "true" class suit. UCAA § 3(a)(1).

71 *See* note 36 and accompanying text *supra*.

this potentially serious problem, the Act should indicate that subsections (a)(1) through (a)(5) of section 3 offer alternatives, so that satisfaction of only one of these factors would suffice. This approach is consistent with Rule 23[72] and recent simplified state class action rules, which recognize the viability of different types of class actions.

Beyond the factors considered as a whole, factor (13) in particular presents a serious problem. Section 3(a)(13) of the Act requires the court to determine "whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class."[73] With this provision the Act apparently permits the court to deny class status where distribution of damages to individual class members is difficult or impossible or the case is expensive or complex and hard to manage. The Act thus reflects the worst of those federal class action decisions which deny class actions solely where members could not be identified, where they could not prove their individual damages, or where the cost of damage distribution would approach or exceed recovery.[74] Moreover, this provision also conflicts with section 15 of the Act, which allows calculation of aggregate damages and a form of fluid recovery. If, as section 15 allows, a court can assess damages against a defendant when class members may not be able to recover individually, consideration of the size of the class members' claims and the prospect of providing individual relief should not be relevant. Perhaps more importantly, this thirteenth factor is undesirable inasmuch as it apparently allows the court to consider the "value" of non-monetary interests — surely a dangerous prece-

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72 Only one of the requirements of Rule 23(b) must be satisfied (in addition to the requirements of Rule 23(a)) to maintain a class action in federal court. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 163 (1974); *see, e.g.*, MASS. R. CIV. P. 23(b); N.Y. CIV. PRAC. LAW § 901 (McKinney 1976).

73 UCAA § 3(a)(13).

74 *See, e.g., In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); Hackett v. General Host Corp., 1972 TRADE CAS. (CCH) ¶ 73,879 (E.D. Pa. 1970); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970).

dent for judicial evaluation of the interests of classes of people, such as aggrieved low income groups and minorities seeking relief. Thus section 3(a)(13) appears to be inconsistent with Act's purpose of making the legal system more responsive to those with small claims or limited means,[75] and should be deleted from the Act.

C. *Ambiguity of the Adequacy-of-Representation Prerequisite*

Section 3(b) may also create unnecessary restrictions on the institution of class actions. The adequacy of representation requirement in section 3(b) specifies that three topics should be considered: (1) whether the attorney is qualified and competent, (2) whether the representative has a conflict of interest in maintaining the class action, and (3) whether the representative has or can acquire adequate financial resources to assure protection of the class members' interests. The thrust of the first two topics coincide with the basic elements of adequacy of representation, included in Rule 23, and the protection of class members necessary to satisfy due process.[76]

The second element of section 3(b), however, is ambiguous and may therefore be insufficient to protect absentees' interests. Under Rule 23, the conflict-of-interest element in "adequacy of representation" is frequently directed at a conflict *between* the representative and the absent class members. In such a case, the representative's forceful and single-minded advocacy of his claim may harm rather than benefit the absentees.[77] The conflict element may equally be read to pertain to a conflict *in* the representative, where the representative has

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75 *See* note 7 *supra.*

76 *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Gibson v. Local 40, Internat'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259, 1264 (9th Cir. 1976); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3rd Cir.), *cert. denied,* 421 U.S. 1011 (1975).

77 *See, e.g.,* Hansberry v. Lee, 311 U.S. 32 (1940); Phillips v. Klassen, 502 F.2d 362 (D.C. Cir.), *cert. denied,* 419 U.S. 996 (1974) (voiding forced retirement would require some class members to return to work involuntarily); Albertson's Inc., v. Amalgamated Sugar Co., 62 F.R.D. 43 (D. Utah, 1973), *aff'd,* 503 F.2d 459 (10th Cir. 1974); Chestnut Fleet Rentals, Inc. v. Hertz Corp., 72 F.R.D. 541, 545 (E.D. Pa. 1976); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1114 (N.D. Ga. 1976); Free World Foreign Cars, Inc. v. Alfa Romeo, 55 F.R.D. 26 (S.D.N.Y. 1972).

a greater interest in obtaining attorney's fees than in seriously pursuing recovery on the claim, or where the representative may not pursue class relief diligently because it harms his personal interests.[78] Because this second element of section 3(b) appears to apply only to the second type of conflict, it is too narrow; it should be interpreted to include both types of conflicts.

More disturbing, however, is the fact that language in section 3(b)(2) could also be construed to preclude certification of a class if *any* conflict exists — no matter how minor. Such a reading would be unfortunate, since there rarely is complete identity of interests among class members. As long as the existing or potential conflicts are not sufficiently substantial to interfere with the protection of class members' interests, the class action should be permitted to proceed. Indeed, most federal courts have adopted this view, holding that only those conflicts going to the subject matter of the suit will be sufficient to render the representation inadequate;[79] speculative conflicts are generally rejected by federal courts as insufficient to deny class status.[80] In order to avoid unnecessary class denials, section 3(b)(2) should be redrafted to require that only "significant" or "substantial" conflicts of interest be considered by the court when determining whether to certify class actions.[81]

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78 *See, e.g.,* Brick v. C.P.C. Int'l, Inc., 547 F.2d 185 (2d Cir. 1976); Turoff v. May Co., 531 F.2d 1357 (6th Cir. 1976); Shields v. First Nat'l Bank, 56 F.R.D. 442 (D. Ariz. 1972); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970); Kochler v. Ogilvie, 53 F.R.D. 98 (N.D. Ill. 1972), *aff'd per curiam,* 405 U.S. 906; Taylor v. Marine Corp., 328 F. Supp. 382 (E.D. Wis. 1971). *See, e.g.,* Weathersby v. Fireside Thrift, CCH Cons. Cr. Guide ¶ 98, 640 (N.D. Cal. 1975) (representative will diminish own recovery by pursuing class action); Rollins v. Sears, Roebuck & Co., 71 F.R.D. 540, 545 (E.D. La. 1976) (counterclaim filed against representative exceeding claim).

79 *See, e.g.,* Sperry Rand Corp. v. Larson, 554 F.2d 868, 874 (8th Cir. 1977); Blackie v. Barrack, 524 F.2d 891, 908-10 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976); Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 334, 342 (D. Minn. 1971); Redmond v. Commerce Trust Co., 144 F.2d 140 (8th Cir. 1944). *Contra,* Newberry v. Washington Post Co., 71 F.R.D. 25 (D.D.C. 1976).

80 *See, e.g.,* Bryan v. Amrep Corp., 429 F. Supp. 313 (S.D.N.Y. 1977); State Teachers Retirement Bd. v. Fluor Corp., 73 F.R.D. 569, 571 (S.D.N.Y. 1976); Armstrong v. O'Connell, 416 F. Supp. 1325, 1341 (E.D. Wis. 1976); Haas v. Pittsburg Nat'l Bank, 72 F.R.D. 174, 177 n.3 (W.D. Pa. 1976). *Contra,* Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot,* 409 U.S. 815 (1972); Ward v. Lutrell, 292 F. Supp. 165 (E.D. La. 1968).

81 Different courts, admittedly, may define "significant" in different ways. This Article does not purport to set out the parameters of those considerations.

D. *Dangers of Required Financial Disclosures*

In conjunction with the adequate representation requirement, section 17 requires class counsel and the representative to file with the court prior to the certification hearing (1) a statement describing, by source and amount, the paid or promised contribution by third persons toward the expenses of prosecuting the action or for services rendered or to be rendered in connection with the action; and (2) a copy of any written agreement or summary of oral agreement between the representative(s) and counsel concerning financial arrangement or fees or by the representative or counsel to share "these amounts,"[82] with any other third person.

The disclosures, to the extent they are designed to prevent collusion, maintenance, fee splitting with the representative, or similar unethical conduct, are laudable in principle but are unlikely to have positive results. The paucity of those problems in federal class actions suggests that the abuses are more imagined than real.[83] If anything, the court's continual supervision throughout the class action is likely to reduce the need for the disclosure in class suits as opposed to individual suits. Since the disclosure will not protect the rights of class members to any measurable extent, the requirement appears to be little more than a provision designed only to grant the court some "peace of mind" as to the propriety of the class action.

The disclosures to determine whether adequate funds are available to prosecute the action are more troubling, for they may have serious adverse implications on the encouragement of class suits. Under section 17, the court will be required to examine available funds and projected costs before deciding whether the litigation expenses can be reasonably defrayed by the representative. Any such determination at the early stage mandated by section 3(a) virtually forces the court to divine the course and costs of the proceeding and the manner of proof. And unless the inquiry is limited to notice costs, it will be either

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82 Presumably, "these amounts" refers to potential fee awards.

83 *E.g.*, DeMilia v. Cybernetics Int'l Corp., 15 Fed. R. Serv. 2d 1385 (S.D.N.Y. 1972); Mersay v. First Republic Corp., 43 F.R.D. 465, 470 (S.D.N.Y. 1968).

an inappropriate inquiry into the merits[84] or a mere *pro forma* evaluation by the court. Instead of facilitating adequate representation, the disclosure requirement is thus more likely to discriminate in favor of wealthy plaintiffs[85] who bring class suits, at the expense of the poor, legal aid programs, and public interest groups who bring suit. It is also peculiar that the disclosures, avowedly designed to allow the court to compare financial resources with potential costs, contain no requirement for disclosure of the financial resources of the representative or counsel. If the court indeed intends to make a legitimate analysis of the funds actually available, such information would be necessary.

It seems far better for the court to gauge adequacy of representation by the manner in which the counsel conducts the proceedings, not the amount of dollars available to him. The court always has the power to de-certify a class action if it is not satisfied that the representative is pursuing the action in the interest of the class, for financial reasons or otherwise.[86] And rarely has a court found it necessary to consider the availability of financial resources, since such information constitutes nothing more than a rough or inaccurate barometer of adequate representation.

The pre-certification requirement of disclosure of sources and third party contributions also poses serious constitutional problems. As now drafted, the Act requires disclosure of the names of financial supporters and the membership of funding sources

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84 *See, e.g.,* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Doctor v. Seaboard Coast Line R. R., 540 F.2d 699 (4th Cir. 1976); Miller v. Mackey Internat'l, Inc., 452 F.2d 424 (5th Cir. 1971). Neither the Act nor Rule 23 contains any provision prohibiting inquiry into the merits at or prior to the certification hearing. Prohibition of such inquiry should nonetheless be inferred from the lack of authorization in the Act or Rule 23 and the fact that both the Act and Rule 23(c)(1) require that the certification hearing be held as early as practicable. Early certification avoids the possible prejudice of "one-way intervention" which occurs when absentees are permitted to wait for a favorable outcome before deciding the advisability of intervention.

85 Many federal courts have certified class actions brought by indigents without inquiring into the financial resources available to prosecute the action. *See, e.g.,* Roberts v. Cameron-Brown Co., 72 F.R.D. 483, 486 n.1 (S.D. Ga. 1975); McDermott v. Hollander, 60 F.R.D. 643 (E.D. La. 1973).

86 UCAA § 5(a). *See* Guse v. J.C. Penny Co., 409 F. Supp. 28, 31-32 (E.D. Wis. 1976) (dicta); *In re* Sugar Industry, 73 F.R.D. 322 (E.D. Pa. 1976) (dicta).

of organizational plaintiffs.[87] The Act thus risks a real confrontation with the rights of free association and privacy protected by the first and fourteenth amendments. At the very least, any required disclosures should be *in camera* to protect the privacy of the representative, financial supporters, and organizational members.

A further problem with all of the section 17 disclosures is that they may allow the party opposing the class to harass the class representative through discovery of the representative's arrangement with counsel and the class's financial resources.[88] Many of the federal courts faced with a motion to compel such discovery have denied the request as irrelevant, even under the broad discovery standards of the federal rules.[89] Instead, they have held that the ability to finance notice costs — usually the largest expense and best indicator of financial commitment — can be determined simply by asking counsel whether sufficient funds exist, and counsel's "ethics" are irrelevant unless there is some obvious and significant impropriety.

Even assuming disclosure reveals some inadequacy or impropriety, there is still no reason to mandate class denial. The

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87 *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958) (requiring disclosure of membership list violates first amendment right of association). *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) for discussion of cases which deemphasize the rights of speech and association in light of countervailing concerns.

88 While neither § 17 nor any other provision of the UCAA permits discovery of such matters, relying solely on disclosure by the representative and counsel, the relevancy of financial resources to class certification may lead to discovery rights. *See* § 3(b)(3). A number of federal courts have permitted discovery of plaintiff's financial resources. *See* Guse v. J.C. Penny Co., 409 F. Supp. 28 (E.D. Wis. 1976) (discovery allowed of legal service program's resources, but class simultaneously certified); Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121 (D. Conn. 1974); *see aslo* cases cited in note 253 *infra.*

89 On discovery concerning plaintiffs' resources, *see* Sanderson v. Winner, 507 F.2d 477 (10th Cir. 1974), *cert. denied,* 421 U.S. 914 (1975); *In re* Toilet Seat, 1977-1 TRADE CAS. (CCH) ¶ 61,299 (E.D. Mich. 1977); Norman v. Ares Equity Corp., 72 F.R.D. 502 (S.D.N.Y. 1976); Demilia v. Cybernetics Internat'l Corp., 15 Fed. R. Serv. 2d 1385 (S.D.N.Y. 1972), *but see* Amherst Leasing Corp. v. Emhart Corp., 65 F.R.D. 121 (D. Conn. 1974); Stavrides v. Mellon Nat'l Bank, 60 F.R.D. 634 (W.D. Pa. 1973). On discovery concerning plaintiffs' financial arrangements with council, *see* Sanderson, *supra; In re* Nissan Motor Corp., 22 Fed. R. Serv. 2d 63 (S.D. Fla. 1975); Bogosian v. Gulf Oil Corp., 337 F. Supp. 1228 (E.D. Pa. 1971); Giordani v. Hoffman, 278 F. Supp. 886 (E.D. Pa. 1968); Foremost Promotions, Inc. v. Pabst Brewing Co., 15 F.R.D. 128 (N.D. Ill. 1953); *but see* Lowenschuss v. Bluhdorn, 72 F.R.D. 498 (S.D.N.Y. 1976) ("limited discovery" permitted).

Act recognizes this and so does not contemplate denial of class status because of inadequate financial resources[90] or maintenance.[91] Subsection (b) provides that if the court finds insufficient resources to prosecute the action, it "may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class."[92] The Comment further explains that the court can take action under sections 9(a)(5) or (6), which authorize the court to make any order to assure that the class action proceeds with adequate class representation and competent attorneys. Such remedial provisions, instead of class denial, seem proper, since the viability of the class action itself need not be affected by any unethical conduct of counsel or by the representative's insufficient resources.

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90 *See, In re* Piper Aircraft Distrib. Sys., 1976-2 TRADE CAS. (CCH) ¶ 61,223 (W.D. Mo. 1976); Van-S-Aviation Corp. v. Louisiana Aircraft Inc., 1976-1 TRADE CAS. (CCH) ¶ 60,759 (S.D. Fla. 1974).

91 *See* Norman v. Arcs Equities Corp., 72 F.R.D. 502 (S.D.N.Y. 1976); Carlisle v. L.T.V. Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972).

92 This provision is bound to stir considerable controversy. It authorizes both court-supervised solicitation of funds for litigation and court-supervised maintenance. The legality is now fairly clear, since it is controlled by the court and does not involve the overreaching and deception of face-to-face solicitation of claims. *Compare In re* Primus, 436 U.S. 412 (1978) (lawyer's solicitation for civil rights suit upon invitation to speak protected by first and fourteenth amendments) *with* Ohralik v. Ohio State Bar, 98 S. Ct. 1912 (1978) (lawyer's solicitation of clients for automobile tort suit motivated by pecuniary gain and not protected by first amendment). *See* Norris v. Colonial Com. Corp., 77 F.R.D. 672 (S.D. Ohio 1977) (post-certification solicitation of contribution approved); Coles v. Marsh, 560 F.2d 186 (3rd Cir. 1977), *cert. denied,* 434 U.S. 985 (1978) (solicitation of contributions is proper unless record of specific abuses produced); Rodgers v. United States Steel Corp., 508 F.2d 152, 162 (3rd Cir.), *cert. denied,* 423 U.S. 832 (1975) (dictum) (communications by representative with class members not abusive and probably protected by first amendment). The latter authorization would appear to be contrary to the ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 5-103(B) (1975), which prohibits attorneys from advancing or guaranteeing the costs of litigation unless the client remains ultimately liable for such expenses. This ethical rule is intended to protect the integrity of the legal profession from suits where the attorney is the real party. However, the ABA itself recognizes broad exceptions to the ethical prescription. *See* ABA INFORMAL OPINION 1361 (1976) (legal services program may pay the full cost of litigation in class action without expectation of reimbursement if client is charged no fee). The "maintenance" provision of § 17, since it is based on a real plaintiff and adequate court supervision, would not lead to unethical conduct to which the ABA proscription is directed, and probably will not be considered unethical. *See generally* Note, *Class Actions and the Uniform Class Actions Act: Function and Structure,* 11 LOY. L.A.L. REV. 335, 356-59 (1978).

The impropriety or insufficiency should result only in the disqualification of counsel or addition of representatives, more funds, or both, to avoid prejudicing innocent class members.[93]

III. Procedures for Establishing and Handling the Class Action

To facilitate court management of class action suits, an established procedure is necessary to determine whether the purported class action satisfies the prerequisites set out in sections 1 through 3 and deserves to proceed as a bona fide class action. Because of the extensive relief typically at stake in a class action, the procedure should result in a sufficiently specific and clear order which apprises all parties of the parameters of the suit. At the same time, the procedures should give adequate latitude to encompass the wide variety of class actions and their individual problems. Throughout the suit, the court must have ample authority to handle these problems and protect absentees' interest.

The UCAA's procedures are well suited to accomplish these purposes. Section 2(a) of the Act requires the court to determine by hearing and order whether the suit should be maintained as a class action. The section requires the hearing to be held "as soon as practicable" after the commencement of the suit; but it allows the court to defer the hearing if it deems it appropriate to do so. This section essentially adopts the proven class certification procedure of the federal courts under Rule 23(c)(1).[94] The mandatory nature of the certification hearing is

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93 *See* Kramer v. Scientific Cont. Corp., 534 F.2d 1085 (3rd Cir. 1976) (law firm partner of representative disqualified as counsel); Halverson v. Convenient Food Mart, 458 F.2d 927 (7th Cir. 1972); Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972); du-Pont Glore Forgan, Inc. v. AT&T, 69 F.R.D. 481 (S.D.N.Y. 1975); Kronenberg v. Hotel Governor Clinton, Inc., 281 F. Supp. 622 (S.D.N.Y. 1968). *But see* Shields v. First Nat'l Bank, 56 F.R.D. 442 (D. Ariz. 1972) (disqualification rejected, class denied); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972); *cf.* Glenn v. Arkansas Best Corp., 525 F.2d 1216 (5th Cir. 1975) (question of disqualification relates to adequacy of representation and class status; denial of motion to disqualify counsel not appealable in class action only); Handwerger v. Ginsberg, 519 F.2d 1339 (2d Cir. 1975).

94 Fed. R. Civ. P. 23(c)(1) provides: "(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

not a significant change from the discretionary nature of the Rule 23 hearing. Because most federal courts prefer to certify on the basis of some evidentiary showing rather than on mere pleadings, they hold a certification hearing anyway to allow full exposition of the issues before a ruling occurs.[95] Moreover, federal experience demonstrates that early certification is valuable. Establishing the parameters of the class action at an early stage saves judicial resources by facilitating settlement negotiations and by avoiding subsequent mootness and multiplicity of suits.[96] Early certification is also important to permit absent class members to receive notice[97] and exercise their right to opt-out,[98] where appropriate, at an early stage of the litigation. It also avoids the problems caused by certification after a full trial, particularly the problem of "one-way intervention," which in effect permitted class members to take advantage of a favorable judgment without bearing the risk of an adverse judgment on the merits.[99] As federal courts have recognized, the authority to defer the class ruling in appropriate cases is valuable where, for example, more discovery is needed, prejudice may result, or government investigation, motions, or other litigation on the same subject is pending.[100]

Once the court decides to certify or not to certify a class under section 2(a), it must issue an order to that effect. Like preferred federal practice under Rule 23,[101] section 4(a) properly provides

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95 *See, e.g.,* Doctor v. Seaboard Coast Line R.R., 540 F.2d 699, 707 (4th Cir. 1976); Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974); Huff v. N.D. Cass Co., 485 F.2d 710, 731 (5th Cir. 1973).

96 *See, e.g.,* Jimenez v. Weinberger, 523 F.2d 689, 700 (7th Cir.), *rev'd on other grounds,* 417 U.S. 628 (1975).

97 *See* notes 150 to 194 and accompanying text *infra.*

98 *See* notes 113 to 128 and accompanying text *infra.*

99 *See* Jimenez v. Weinberger, 523 F.2d 689, 689, 700 and n.16 (7th Cir. 1975), *rev'd on other grounds,* 417 U.S. 628 (1975).

100 *See, e.g.,* Jimenez v. Weinberger, 523 F.2d 689, 697 (7th Cir. 1975); Rogers v. United States Steel Corp., 508 F.2d 152, 161 (3rd Cir. 1975); Allen v. Likens, 20 Fed. R. Serv. 2d 430 (8th Cir. 1975); Katz v. Carte Blanche Corp., 496 F.2d 747 (3rd Cir. 1974), *cert. denied,* 419 U.S. 885 (1975); Jiron v. Sperry Rand Corp., 423 F. Supp. 155, 167 (D. Utah 1975).

101 *See, e.g.,* Indianapolis Bd. of School Comm'rs v. Jacobs, 420 U.S. 128 (1975); Dore v. Kleppe, 522 F.2d 1369, 1375 (5th Cir. 1975); Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 411 (2d Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); *In re* Four Seasons, 502 F.2d 834 (10th Cir.), *cert denied,* 419 U.S. 1034 (1974).

that the court shall, among other things, supply a description of the class, in order to help define the parameters of the action and to determine who is to receive notice and the opportunity to opt-out in appropriate cases. Section 4(b) supplements this, and also follows federal practice by requiring that judicial findings of fact and conclusions of law, and the reasons therefor, be included in the certification order.[102] These provisions constitute a response to the appellate courts' widely acknowledged need for trial courts' findings and explanations to facilitate review of appeals of the certification order.[103]

Section 5(a) allows the court to amend the certification order at any time before it enters judgment on the merits. This important procedure corresponds to Rule 23(c)(1) and federal case law, which treat the certification order as conditional.[104] To treat the order otherwise, as a final determination, would in effect require the court and the parties to conduct full discovery

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102 *See, e.g.,* Gibson v. Local 40, Internat'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259, 1263 n.2 (9th Cir. 1976); Ballard v. Blue Shield of Southern W. Va., Inc., 543 F.2d 1075, 1080 (4th Cir. 1976); United States v. United States Steel Corp., 520 F.2d 1043, 1051 (5th Cir. 1975); Wilcox v. Commerce Bank, 474 F.2d 363, 345 (10th Cir. 1973); Dolgow v. Anderson, 438 F.2d 825 (2d Cir. 1970).

103 *E.g.,* Gibson v. Local 40, Internat'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259, 1263 n.2 (9th Cir. 1976); Clark v. Wateline, 513 F.2d 994, 1000 (9th Cir. 1975).

104 Guerine v. J. & W. Investment, Inc., 544 F.2d 863 (5th Cir. 1977); Zenith Labs., Inc. v. Carter-Wallace, Inc., 530 F.2d 508, 512 (3rd Cir. 1976); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 269 (10th Cir. 1975); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966). Under Rule 23 practice, the certification order can be amended at any time, *e.g., In re* Scientific Cont. Corp., 71 F.R.D. 491, 503 n.12 (S.D.N.Y. 1976) (after discovery). *See* Taylor v. Safeway Stores, Inc., *supra;* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 531 (W.D. La. 1976) (during or after trial on the merits); *e.g.,* Eovaldi v. First Nat'l Bank, 71 F.R.D. 334, 335 (N.D. Ill. 1976); Hairston v. McLean v. Trucking Co., 62 F.R.D. 642, 664 (M.D.N.C. 1974), *vacated and remanded on other grounds,* 520 F.2d 226 (4th Cir. 1976) (after decision on the merits). The amendment to the certification order can be a change in the class definition, *e.g.,* Sagers v. Yellow Freight Systems, Inc., 529 F.2d 721, 735 n.27 (5th Cir. 1976); Taylor v. Safeway Stores, Inc., *supra;* Lorber v. Beebe, 407 F. Supp. 279, 295-96 (S.D.N.Y. 1975), or de-certification if it appears the requirements of Rule 23 are not met, *e.g.,* Guerine v. J. & W. Investment, Inc., 544 F.2d 863 (5th Cir. 1977); Clark v. Cameron-Brown Co., 72 F.R.D. 48, 53-54 (M.D.N.C. 1976); Spector v. City of New York, 71 F.R.D. 550, 552 (S.D.N.Y. 1976); Gerstle v. Continental Airlines, 50 F.R.D. 213, 218-19 (D. Colo. 1970); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (N.D. Ind. 1966). The certification order can also be amended if the law changes in some material respect, *e.g.,* McCleary Tire Service, Inc. v. Texaco, Inc., 1976-2 TRADE CAS. (CCH) ¶ 61,121 (E.D. Pa. 1976).

on the merits and virtually try the case before any certification order; the result would be directly contrary to the policies advanced by an early certification order.[105] It also would preclude the court from exercising its authority to mold the class action during the litigation in order to minimize problems that arise.

Sections 2(c) and 9 of the Act provide the court with the necessary authority to handle these problems. Specifically, section 2(c) adopts the provisions of Rule 23(c)(4)[106] authorizing the court (1) to certify a class for a particular claim or issue; (2) to certify a class action to seek various forms and combinations of relief, depending on the circumstances of the case and the likelihood that efficiency and fairness will result, and (3) to employ subclasses if necessary. Such authorization is important in providing the court with flexibility to handle the problems and conflicts of complex class litigation without having to deny the class altogether. It allows the court, for example, to safeguard adequate representation;[107] and to deal competently with management problems,[108] individual questions,[109] evaluation of a settlement,[110] or possibly prohibitive notice costs.[111] Without such tools, the court would be handicapped severely in supervising otherwise proper class actions.

Similarly, section 9 confers powers on the state courts to shape and control the class litigation process. This section,

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105 *See* notes 95 to 100 and accompanying text *supra.*

106 FED. R. CIV. P. 23(c)(4) provides: "(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

107 *E.g.,* Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas, 511 F.2d 1073 (10th Cir. 1975); Airline Stewards Local 550 v. American Airlines, 490 F.2d 636, 640 (7th Cir. 1973), *cert. denied.* 416 U.S. 993 (1974).

108 *E.g.,* Windham v. American Brands, Inc., 539 F.2d 1016, 1022 (4th Cir. 1976), *cert. denied,* 435 U.S. 968 (1978); Samuel v. University of Pittsburgh, 538 F.2d 991, 996 (3rd Cir. 1976); *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 181 (1974) (Douglas, J., dissenting in part).

109 *E.g.,* Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied,* 429 U.S. 816 (1976); Lorber v. Beebe, 407 F. Supp. 279, 294 (S.D.N.Y. 1975); Elkind v. Liggett & Myers, Inc., 66 F.R.D. 36, 40-41 (S.D.N.Y. 1975).

110 *E.g.,* Mandajano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 836 (9th Cir. 1976); Meat Cutters Local 340 v. Safeway Stores, Inc., 52 F.R.D. 373, 376 (D. Kan. 1971).

111 *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 180 (1974) (Douglas, J., dissenting in part).

which roughly corresponds to Rule 23(d), grants the court extensive but appropriate authority to issue orders to regulate the conduct of class actions to avoid repetition and to protect the absentees' interests.[112] Subsection (a)(4) is the only unusual provision of section 9; it allows the court to invite the state attorney general to participate with respect to the question of adequacy of representation. Because there is no counterpart in federal practice and the comments to the Act provide no elucidation, neither the intent nor the operation of this subsection is clear. While an entirely disinterested attorney general perhaps could aid the court in reviewing the adequacy of representation, a less neutral attorney general could potentially prevent this review by "politicizing" suits, for example, against large or powerful interests or against a government agency.

Given this potential for real harm, the benefits of section 9(a)(4) appear minimal. The federal courts have fared well enough to date in passing on adequacy of representation to make this provision unnecessary.

IV. Rights and Obligations of Class Members and the Party Opposing the Class

In order to fulfill its purpose of providing a legal forum for those unable or unlikely to seek relief, the class action procedure should not unduly deter class members from participating in any benefits of the suit. Ideally, the rights of the parties opposing the class must not be trampled; yet, neither should those rights be so exalted as to dwarf the opportunities of plaintiff class members to benefit from bringing the suit.

The Act generally tracks a commendable course through these often conflicting rights and obligations. With a few notable deficiencies regarding class actions for equitable relief, the basic provisions on binding judgments and notice will benefit class members without harming the opposing party. The

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112 *See, e.g.*, Neely v. United States, 546 F.2d 1059, 1070 (3rd Cir. 1976); Blackie v. Barrack, 524 F.2d 891, 906 n.22 (9th Cir. 1975), *cert. denied*, 424 U.S. 816 (1976); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3rd Cir. 1973); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972); Multi-District Litigation Panel, Manual for Complex Litigation § 1.43 (1976 ed.).

provisions on the statute of limitations, counterclaims, discovery, costs, appeals, dismissals, and compromises are also well-conceived, with a few exceptions. Each of them will be discussed in the following sections.

A. *Binding the Absentees*

Section 13 of the Act states the crucial principle of current Rule 23 class action practice that class members are bound by a judgment whether favorable or adverse, unless they exclude themselves from the action. Section 8 amplifies section 13 by providing for the types of class actions in which exclusion is permitted and establishing the procedures for "opting-out."

This "opt-out" provision is one of the key differences between the current Rule 23 class action and the pre-1966 Rule 23 with its permissive joinder or "opt-in" provision.[113] Though subjected to severe criticism by members to the defendant bar and some judges,[114] the "opt-out" provision has served as a primary basis for the expansion of class relief in the past decade.[115] Absent the critical opt-out provision, the impact of damages class actions would be severely restricted, since many class members would be denied relief if they did not understand the notice and

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113 *See generally Advisory Committee's Note to Amend Rule 23*, 39 F.R.D. 98 (1966); 3B MOORE'S FEDERAL PRACTICE § 23.01 (2d ed. 1978).

114 *See* AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 (1972); ABA SECTION ON CORPORATION, BANKING & BUSINESS LAW, RECOMMENDATION REGARDING CONSUMER CLASS ACTIONS FOR MONETARY RELIEF (1973); SPECIAL COMM. ON CONSUMER LEGISLATION, REPORT AND RECOMMENDATIONS OF ABA SECTION OF ANTITRUST LAWS ON CONSUMER PROTECTION LEGISLATION PROPOSALS (1970). Generally, such commentators take the position that class actions should provide relief only to those with sufficient interest to invoke the legal process affirmatively. *E.g.*, Scher, *Uniform Class Actions: A Critical View*, 63 A.B.A.J. 840, 841 (1977).

115 STAFF OF SENATE COMM. ON COMMERCE, 93RD CONG., 2D SESS., CLASS ACTION STUDY (Comm. Print 1974), *analyzed in* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON CLASS ACTIONS (1973); DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I) and (II)*, 1976 A.B.F. RES. J. 1021, 1223; Lebedoff, *Operation Money Back*, 4 CLASS ACT. REP. 147 (1975); Moore, *The Potential Function of the Modern Class Suit*, 2 CLASS ACT. REP. 47 (1973); Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); Wolfman, *The Antibiotics Class Actions*, 1976 A.B.F. RES. J. 251; Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L. J. 1123 (1974); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

so failed to opt-in.[116] Use of the opt-in method would also be inconsistent with, if not contradictory to, the commonly recognized policies behind class actions.

For these reasons the opt-out method is advisably employed by the Act, but it is well to note the parameters of its operation. Under section 8(a), a class member cannot exclude himself if the nature of the action is such that his rights would be directly affected by the judgment. This corresponds to the practice in Rule 23(b)(1) class actions, where no right to opt-out exists. Since class members in such class actions are essentially indispensable parties, permitting them to opt-out would destroy the value of the class action to both class members and the defendant. In Rule 23(b)(2)-type actions, however, such as civil rights actions for equitable relief, section 8(a) allows class members to opt-out. This procedure is contrary to Rule 23,[117] and it should be changed to correspond to Rule 23's procedure. While, as a theoretical principle, it may be preferable to permit non-indispensable parties to opt-out, there are good reasons for not

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116 *See, e.g.,* Payne v. Travenol Labs., Inc., 74 F.R.D. 14 (N.D. Miss. 1976) (court may include in class those purportedly opting-out but whose responses evidence lack of understanding of notice and their rights); STAFF OF SENATE COMM. ON COMMERCE, 93RD CONG., 2D SESS., CLASS ACTION STUDY 18-19 (Comm. Print 1974); Miller, *Problems of Giving Notice in Class Actions,* 58 F.R.D. 299 (1972) (noting class members' misunderstanding of notice); Vestel, *Uniform Class Actions,* 63 A.B.A.J. 837, 838 (1977) ("decisions made by many class members are not based on an understanding of the alternatives offered"). *E.g.,* Windham v. American Brands, Inc., 539 F.2d 1016 (4th Cir. 1976) (antitrust laws); Samuel v. University of Pittsburgh, 538 F.2d 991, 994-95 (3rd Cir. 1976); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 686 (1941).

117 FED. R. CIV. P. 23(c)(3); *see, e.g.,* Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975); La Chipin v. Illiniois-Owens, Inc., 513 F.2d 286, 288 n.7 (5th Cir. 1975). A few courts have allowed opt-outs in (b)(2) actions under the court's Rule 23(d) authority, principally where monetary recovery also is involved, *see, e.g.,* Women's Comm. v. National Broadcasting Co., 71 F.R.D. 666 (S.D.N.Y. 1976). However, the better procedure in such cases is to consider the claims for declaratory/injunctive relief under 23(b)(2), with no opt-out right, and the monetary claims separately under 23(b)(3), *see* Airline Stewards Local 550 v. American Airlines, 490 F.2d 636 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); Bertozzi v. King Louie Int'l, Inc., 420 F. Supp. 1166, 1180-81 (E.D. La. 1976); Paddison v. Fidelity Bank, 7 EMPL. PRAC. DEC. (CCH) ¶ 9308 (E.D. Pa. 1973); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1775; *see also, e.g.,* Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976) (monetary claims can be bifurcated for later treatement as (b)(2) or (b)(3) class actions or by intervention or individually); Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 733-34 (5th Cir. 1976); Rich v. Martin Marietta Corp., 52 F.2d 333, 341-42 (10th Cir. 1975).

permitting such behavior in (b)(2)-type actions. First, because the class in such an action is sufficiently cohesive and united in interest, inasmuch as the defendant has acted similarly to the class as a whole and the requested equitable relief applies to the whole class, treatment as a unit is fair.[118] Second, if applied, the opt-out procedure may operate against both plaintiffs' interests and basic policies behind class actions. If opting-out is permitted, a defendant may abuse his relationship of superiority to the plaintiffs (*e.g.*, employer-employee relationship) to coerce class members into opting-out,[119] and thereby undermine the important policies of protecting potential class members from multiple actions[120] and facilitating enforcement of class judgments.[121] This danger is particularly serious where the action seeks to vindicate important statutory or constitutional policies, as most class actions for equitable relief do. As discussed below,[122] an opt-out procedure also requires notice to those with that right, and notice costs can be a serious deterrent to important class actions.

Third, permitting self-exclusion from such actions may be against the defendant's interest as well. A class member who has opted-out would be free to bring a subsequent action against the defendant in a different forum or before a different judge, if the class action is unsuccessful. Thus, the *res judicata* effect of

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118 *See, e.g.*, Laronoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878 (5th Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 256-57 (3rd Cir. 1975).

119 Gardner v. Gold Strike Stamp Co., 1971 TRADE CAS. (CCH) ¶ 73,461 (D. Utah 1970); *see* Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970) (employer secured affidavits from all black employees disclaiming authority to opt-out); *cf.* Haynes v. Logan Furniture Mart, 503 F.2d 1161, 1164-65 (7th Cir. 1974) (class members reluctant to bring individual suit against their creditor); Ste. Marie v. Eastern R.R. Ass'n, 72 F.R.D. 443, 449 (S.D.N.Y. 1976).

120 *See, e.g.*, Morgan v. Sielaff, 546 F.2d 218, 222 (7th Cir. 1976) (avoids multiplicity of suit); Workman v. Mitchell, 502 F.2d 1201, 1207 (9th Cir. 1974) (certifying class on appeal to protect class members); Kilfoyle v. Heyison, 417 F. Supp. 239, 243 (W.D. Pa. 1976) (class certifiction necessary "to protect the members of the class").

121 *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 854 (5th Cir. 1975) (violation of judgment provides new claim to class members); Class v. Norton, 505 F.2d 123 (2d Cir. 1974) (class judgment enforceable by contempt motion by class members); Jones v. Wittenburg, 73 F.R.D. 82 (N.D. Ohio 1976) (class judgment enforceable by contempt citation); Mendoza v. Larine, 72 F.R.D. 520, 523 (S.D.N.Y. 1976) (protects class by ensuring that order runs to class as a whole).

122 *See* notes 138 to 150 *infra*.

a class action judgment favorable to the defendant would be diminished,[123] and the defendant might be ordered to act in varying ways toward essentially the same class of employees, beneficiaries, members, or citizens. Such an order would be both difficult, if not impossible, to follow and not in accord with the optimum allocation of judicial resources. For these reasons, and the fact that class members in such homogeneous suits have less need for individual adjudication, section 8(a) should accord with federal practice on this point.

Section 8(a) also prohibits a class member from opting-out where a counterclaim is filed against him or against a member of his class or subclass. Unlike the "opting-out" provision for equitable relief class actions, this prohibition is worthwhile, for it effectively precludes a defendant from attempting to limit his exposure by filing counterclaims to intimidate class members into opting-out.[124] Of course, it is possible that by denying the right to opt-out, section 8(a) will encourage the court to deny the class for lack of adequate representation,[125] since class members do not have the option of protecting their interests by opting-out. However, the court's authority to use subclasses, under section 2(a)(3); to certify the class with respect to particular claims or issues,[126] under section 2(c)(1); and to issue orders assuring adequacy of representation, under section 9(a)(5), should be sufficient for a receptive court to handle this

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123. *See* Napier v. Gertrude, 542 F.2d 825, 827 (10th Cir. 1976) (class action provides res judicata benefit to defendant of favorable judgment on merits); *cf.* Argo v. Hills, 425 F. Supp. 151, 159 (E.D.N.Y. 1977) (class certified upon defendant's request); Anderson v. Butz, 428 F. Supp. 245, 247 (E.D. Cal. 1975) (class enlarged to nationwide scope at defendant's request); United States v. Texas, 430 F. Supp. 920 (S.D. Tex. 1977) (voting rights action not barred where prior action on merits favorable to defendant was not class action, thus binding only individual plaintiffs); Black Voters v. McDonough, 421 F. Supp. 165 (D. Mass. 1976). Of course, the same result of any subsequent suit is subject to stare decisis.

124 *See* Gardner v. Gold Strike Stamp Co., 1971 TRADE CAS. (CCH) ¶ 73,461 (D. Utah 1970); Note, *Donson v. American Bakeries Co.*, 87 HARV. L. REV. 470, 474 (1973); *cf.* Hawkins v. Holiday Inns, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,310 (W.D. Tenn. 1977) (discovery from absent class members).

125 Courts frequently minimize the importance of assertive conflicts of interest where class members have the option of informed consent or exclusion. *See* note 187 *infra.*

126 *See* Partian v. First Nat'l Bank, 59 F.R.D. 56, 59 (M.D. Ala. 1973); Rollins v. Sears, Roebuck & Co., 71 F.R.D. 540, 544 (E.D. La. 1976).

problem short of denying the class. Thus, section 8(a)'s refusal to allow opting-out in response to counterclaims seems to be the better position. Rule 23, in contrast, provides no special rules on opting-out where counterclaims are asserted.

In another departure from Rule 23, section 8(d) prohibits a member of a defendant class from opting-out. Section 8(d)'s prohibition is in large part necessary to offset section 8(a), which permits a class member in a (b)(2)-type action to opt-out and thus potentially circumscribe defendant class actions or defeat certification of the class seeking relief. Section 8(d) goes even further by also facilitating defendant (b)(3)-type class actions, a rarity under Rule 23, where the defendant class member can opt-out.[127] Even with section 8(d), however, the viability of state court defendant (b)(3)-type class actions will depend to a great extent on whether the state rejects the strict nonconstitutional standing requirement imposed by various federal courts. Under that requirement, the representative must have a claim against each defendant in the class.[128]

Where opting-out is permitted, section 8(b) states that any class member who wishes to opt-out must file an election to be excluded "in the manner and in the time specified in the notice." This requirement may be too rigid. While compliance with the court's directives regarding the time of opting-out is important to settle the parameters of the class, there is rarely any prejudice to either party or to other class members by allowing flexibility in the required manner of opting-out. It is

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127 *Cf.*, United States v. Trucking Employers, Inc., 72 F.R.D. 101, 105 (D.D.C. 1976) (generally no right to opt-out in proper defendant class actions).

128 Alaniz v. California Processors, Inc., 73 F.R.D. 269, 275-76 (N.D. Cal. 1976); Chevalier v. Baird Savs. & Loan Ass'n, 66 F.R.D. 105 (E.D. Pa. 1975) (standing necessary against each defendant class member); Kronisch v. Howard Savs. Inst., 133 N.J. Super. 124, 335 A.2d 587 (1975); Gibbs v. Titleman, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107 (3rd Cir.), *cert. denied*, 419 U.S. 1039 (1974); *see also*, Richardson v. Ramirez, 418 U.S. 24, 39 (1974); Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); La Mar v. H&B Novelty Co., 489 F.2d 461, 465 (9th Cir. 1973). A large exception exists where the defendant class members are "juridically related." *See* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 276 (N.D. Cal. 1976) (employers and unions by industry-wide collective bargaining agreement); Hopson v. Schilling, 418 F. Supp. 1223, 1238 (N.D. Ind. 1975) (township trustees); Samuel v. University of Pittsburgh, 54 F.R.D. 435, 437-40 (W.D. Pa. 1972) (state universities).

therefore preferable not to restrict the court's discretion to rule on requests for exclusion.[129] Indeed, it is for these reasons that federal courts generally require strict compliance as to time of opting-out[130] but recognize flexibility as to the manner of opting-out.[131]

Section 13 states the conditions which must be met for a judgment in a class action to bind class members who cannot or do not "opt-out": certification and notice. Certification is important to avoid prejudice to the defendant and to define the parameters of the action. For these reasons, federal decisions generally require certification as a prerequisite for a binding class judgment.[132] It nonetheless would be useful to view this actual certification requirement flexibly, since the court's failure to follow the certification procedure precisely should not prejudice the class members, at least where the parties and the court are assuming that there is a class. A number of federal courts of appeal have permitted such flexibility in appropriate cases.[133] And flexibility seems equally appropriate for notice. When required for fundamental fairness, notice appropriately should be a prerequisite to a binding judgment; however, since that is not always the case,[134] it would be inappropriate to condi-

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129 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1787 ("considerable flexibility is desirable").

130 *See* Sanders v. John Noreen & Co., 524 F.2d 1064, 1074-75 (7th Cir. 1975), *vacated,* 425 U.S. 929 (1976); Manhattan-Ward, Inc. v. Grinnell Corp., 490 F.2d 1183, 1185 (2d Cir. 1974); *In re* Int'l House of Pancakes, 536 F.2d 261, 263 (8th Cir. 1976); *In re* Four Seasons, 502 F.2d 834 (10th Cir.), *cert. denied,* 419 U.S. 1034 (1974).

131 *See* McCubbrey v. Boise-Cascade Home & Land Corp., 71 F.R.D. 62, 69 (N.D. Cal. 1976) (filing individual action is reasonable request for exclusion); Bonner v. Texas City Indep. School Dist., 305 F. Supp 600 (W.D. Tex. 1969) (trial testimony expressing disapproval of suit).

132 *See* Indianapolis Bd. of School Comm'rs v. Jacobs, 420 U.S. 108 (1975); Bradley v. Housing Auth., 513 F.2d 626 (10th Cir. 1975); Davis v. Romney, 490 F.2d 1360, 1366 (3rd Cir. 1974); Carracter v. Morgan, 491 F.2d 458, 459 (4th Cir. 1973).

133 *See, e.g.,* Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511, 521-22 (6th Cir. 1976); Bing v. Roadway Express, Inc., 485 F.2d 441, 446-47 (5th Cir. 1973); Lau v. Nichols, 483 F.2d 791, 793 n.4 (9th Cir. 1973), *rev'd on other grounds,* 414 U.S. 503 (1974); Castro v. Beecher, 459 F.2d 725, 731 (1st Cir. 1972).

134 *See* notes 139 to 146 and accompanying text *infra.*

tion a binding judgment in every class action on the giving of notice.

As to that binding judgment, section 13, like Rule 23(c)(3), requires the judgment to name or describe the members of the class bound by its terms.[135] Again, such a requirement is appropriate to insure the *res judicata* effect on the plaintiff class members and the defendant, as well as for the benefit of subsequent courts which enforce the judgment or pass on a new action raising similar issues on behalf of a similar class of people. Requiring the court only to "name *or* describe" recognizes properly that class action judgments are binding on whole classes even though the class members may not be known by name at time of judgment.

B. *Notice of the Action*

In certain types of class actions, some form of pre-judgment notice to class members of the pendency of the suit may be required to satisfy due process.[136] Where class members have the right to exclude themselves from the class, as in Rule 23(b)(3) actions,[137] pre-judgment notice is critical to inform them of this right. However, in class actions for equitable relief, the federal courts have almost uniformly held that notice is not required to

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135 Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402, 411 (2d Cir. 1975) (judgment binds those within class definitions); Newman v. Prior, 518 F.2d 97, 99 (4th Cir. 1975); *In re* Four Seasons, 502 F.2d 834 (10th Cir.), *cert. denied,* 419 U.S. 1034 (1974).

136 In Eisen v. Carlisle & Jacquelin, 417 U.S. 146 (1974), the Court interpreted the language of Rule 23(c)(2), which requires notice in damage-type class actions under Rule 23(b)(3). The Court did no more than implicitly indicate that due process may play some role in notice in such actions, since it merely cited the Advisory Committee's citation of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), for the committee's notice requirement in (b)(3) actions. The Court did not engage in any independent discussion of *Mullane* or due process principles. *See also* Sanders v. Levy, 558 F.2d. 636, 648 (2d Cir. 1976) (en banc), *rev'd on other grounds sub nom.,* Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978) (citing *Eisen* for the proposition that Rule 23(c)(2) "reflect[s] . . . constitutional principles of due process"); *In re* Nissan Motor Corp., 552 F.2d 1088, 1097-1100 (5th Cir. 1977).

137 *See* UCAA § 8(a); FED. R. CIV. P. 23(c)(3).

satisfy due process,[138] and Rule 23 does not require notice.[139]

The notice requirements set out in section 7 of the Act, however, diverge significantly from those mandated by federal practice. While damages class actions are encouraged through more flexible notice provisions, equitable relief class actions are subjected to a far stricter notice standard than under Rule 23. Section 7(a) inhibits proper equitable relief class actions by requiring some form of notice for all class actions, including those solely for equitable relief. The rationale for this section 7(a) requirement may be either a desire for uniformity among all class actions or a concern for due process principles.[140] Neither is ap-

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138 *E.g.*, Alexander v. Aero Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 255-57 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), *cert. granted sub nom.*, Califano v. Elliot, 99 S. Ct. 75 (1978), *aff'd sub nom.*, Califano v. Yamasaki, 99 S. Ct. 2545 (1979); Larionoff v. United States, 533 F.2d 1167, 1185-86 (D.C. Cir. 1976); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878-79 (5th Cir. 1975); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Bijeol v. Benson, 513 F.2d 968 n.3 (7th Cir. 1975); Hammond v. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); *see* Sosna v. Iowa, 419 U.S. 393, 397 n.4 (1975). *But see* Watson v. HEW, 562 F.2d 386, 390 (6th Cir. 1977) (dicta); Shrader v. Selective Service Sys., 470 F.2d 73 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); Zeilstra v. Tarr, 466 F.2d 111 (6th Cir. 1972); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974); McCarthy v. Director of Selective Service, 332 F. Supp. 1032 (E.D. Wis. 1970), *aff'd per curiam*, 460 F.2d 1089 (7th Cir. 1972); Pasquier v. Tarr, 318 F. Supp. 1350 (E.D. La. 1970), *aff'd per curiam*, 444 F.2d 116 (5th Cir. 1971). However, *Schrader, Zielstra, McCarthy,* and *Pasquier* are of limited precedential value because of their unique political context (fatherhood deferment from draft during Vietnam War) and "confused procedural history." Wetzel v. Liberty Mut. Life Ins. Co., 508 F.2d at 255 n.36; Watson v. Branch County Bank, 380 F. Supp. 945, 960 n.11 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975). The Ninth Circuit recently has said that in injunctive relief class actions notice may be required in particular cases where the representation is adequate for Rule 23(a)(4) purposes but might not be adequate to satisfy due process. *See* Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), *supra;* Souza v. Scalone, 563 F.2d 385 (9th Cir. 1977).

139 FED. R. CIV. P. 23(c)(2), containing the notice requirement of Rule 23, reads: "(2) in any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exluce him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." By its terms, it applies only to damage class actions under Rule 23(b)(3). Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974).

140 A third possible justification for this § 7(a) notice requirement is to inform class members in many equitable relief class actions of their right to opt-out under § 8(a). The

propriate, especially given the serious difficulties this requirement will create for equitable relief class actions. Federal experience reveals that notice in such actions is not required by due process either as an abstract legal principle or as a practical necessity.[141] And uniformity of procedure should not be exalted to the detriment of substantive rights.[142] There are several reasons why due process does not mandate notice for such actions. First, because such actions involve generally homogeneous classes (*i.e.*, without conflicts of interest), the requirements, of adequate representation sufficently protect class members' interests to satisfy due process.[143] Second, there is no need for notice where class members neither have a right ot opt-out of the class[144] nor generally have any interest in controlling separate litigation.[145] Third, under both Rule 23(d)(2)[146] and

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problems posed by the right to opt-out in such actions are discussed in the text accompanying notes 184 to 186 *infra*. If this right be permitted, obviously notice should be given in such cases. Nonetheless, opting-out does not provide an acceptable reason for requiring notice in all class actions, since the right to opt-out is not permitted by § 8(a) in some equitable relief class actions.

141 *See* note 138 and accompanying text *supra*.

142 *See* notes 69 to 72 and accompanying text *supra*.

143 Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976); Wetzel v. Liberty Mutual Life Ins. Co., 508 F.2d 239, 256-57 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975).

144 UCAA § 8(a) permits opting-out in a broader class of cases than does Rule 23(c)(3). *See* notes 113 to 117 and accompanying text *supra; see also* note 140 *supra*.

145 Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976); Redhail v. Zablocki, 418 F. Supp. 1061, 1067 (E.D. Wis. 1976), *aff'd*, 434 U.S. 374 (1978).

146 Rule 23(d) states:

> *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise to come into the action; (3) imposing conditions on the representative parties or on interventors; (4) requiring that pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matter the orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

UCAA § 9(a)(2), the court has authority to order notice whenever necessary to protect class members' interests.[147]

Unfortunately, section 7(a)'s broad notice requirement mandates costs that will be significant and unnecessary deterrents to the filing of class actions for equitable relief.[148] It will therefore undermine both the advantage of class actions, to vindicate the rights of a large class of people,[149] and the purpose of the Act, to facilitate those class actions no longer permitted in federal court.[150]

Section 7(d) places additional burdens on class actions for equitable relief by requiring *individual* pre-judgment notice to all class members identifiable through reasonable efforts whose potential monetary recovery is estimated to exceed $100. Because the section 7 notice requirements apply to all class actions, section 7(d) apparently requires individual notice where there is any potential $100 recovery, including restitutionary (equitable) relief incidental to injunctive relief as well as regular damage awards. If this be the case, section 7 is again likely to deter class actions by placing another unnecessary burden on

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147 Redhail v. Zablocki, 418 F. Supp. 1061 (E.D. Wis. 1976), *aff'd,* 434 U.S. 374 (1978); Watson v. Branch County Bank, 380 F. Supp. 945, 960 (W.D. Mich. 1974), *rev'd on other grounds,* 516 F.2d 902 (6th Cir. 1975). *See also* Larionoff v. United States, 533 F.2d 1167, 1185-86 (D.C. Cir. 1976) (dicta); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 255-57 (3rd Cir.), *cert. denied,* 421 U.S. 1011 (1975) (dicta); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 878-79 (5th Cir. 1975) (dicta); Grogan v. American Brands, Inc., 70 F.R.D. 579, 584 (M.D.N.C. 1976) (where court was aware of dissent from some class members); Hopson v. Schilling, 418 F. Supp. 1223, 1241, (N.D. Ind. 1975); Women's Comm. v. National Broadcasting Co., 71 F.R.D. 666 (S.D.N.Y. 1976) (where individual monetary recovery was involved); Lewis v. Philip Morris, Inc., 419 F. Supp. 345, 352 (E.D. Va. 1976), *vacated on other grounds,* 577 F.2d 1135 (1978) (where large class existed with distinct subclasses). This discretionary notice, however, is disfavored. Wetzel v. Liberty Mutual Ins. Co., 508 F.2d at 256-57; Larionoff v. United States, 533 F.2d at 1186; Mazer v. Weinberger, 385 F. Supp. 1321, 1327 (E.D. Pa. 1974); Redhail v. Zablocki, 418 F. Supp. at 1067-68; Bertozzi v. King Louie Int'l, Inc., 420 F. Supp. 1166, 1181 (E.D. La. 1976).

148 Watson v. Branch County Bank, 380 F. Supp. 945, 959 (W.D. Mich. 1974), *rev'd on other grounds,* 516 F.2d 902 (6th Cir. 1975); Redhail v. Zablocki, 418 F. Supp. 1061, 1067 (E.D. Wis. 1976); *see* N.Y. CIV. PRAC. § 904(a).

149 *See* Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975); Jones v. Diamond, 519 F.2d 1090, 1097 (5th Cir. 1975); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971); Jenkins v. United Gas Corp., 400 F.2d 58 (5th Cir. 1968); Watson v. Branch County Bank, 380 F. Supp. 945, 957 (W.D. Mich. 1974), *rev'd on other grounds,* 516 F.2d 902 (6th Cir. 1975).

150 *See* notes 35 to 36 and accompanying text *supra.*

the class representative. Individual notice before liability is found is simply superfluous where opting-out is useless because a favorable class judgment will require a comprehensive change in the private defendant's practices or government defendant's laws. Even individual post-liability notice is of no real value in cases where the class members' individual monetary recoveries can be calculated without any individual testimony or submissions of proof, as in a public benefits underpayment class action. Indeed, pre-judgment notice is not required under Rule 23 for suits brought only incidentally for monetary relief for these very reasons.[151]

These additional burdens on equitable relief class actions cannot be ignored. Although the notice costs sometimes can be minimized with the defendant's cooperation,[152] notice, whether individual or otherwise, is frequently quite expensive.[153] And these cost problems are sure to be even more troublesome in light of the recent Supreme Court ruling in *Edelman v. Jordan.*[154] By construing the eleventh amendment as barring

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151 *See* Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3rd Cir.), *cert. denied,* 421 U.S. 1011 (1975); Robinson v. Union Carbide Corp., 544 F.2d 1258, 1260 (5th Cir. 1977); Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), *rev'd on other grounds,* 429 U.S. 125 (1976); Hordory v. Ohio Bureau of Employment Services, 408 F. Supp. 1016, 1020 (N.D. Ohio 1976), *rev'd on other grounds,* 431 U.S. 471 (1977) (unemployment insurance benefits); Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975) (public assistance benefits). *But see* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974) (discretionary notice); Women's Comm. v. National Broadcasting Co., 71 F.R.D. 666 (S.D.N.Y. 1976); Grogg v. General Motors Corp., 72 F.R.D. 523 (S.D.N.Y. 1976).

152 *See* notes 170 to 172 and accompanying text *infra.*

153 *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (cost of individual notice $225,000). For individual notice, the costs of postage, supplies, printing, and stuffing will run no less than 25¢ per class member. Notice to a class of 100,000 will require an outlay of at least $25,000; even with a more modest size class of 10,000, notice will cost $2500. These figures do not include the cost of identifying the class members, a considerable expense of its own. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (cost of identification $16,000) and note 160 *infra.* For example, in a public benefits class action, class members can be identified by searching the state agency's records. When the records are in a computer, a computer program may have to be devised to identify the class members. The records also may not be in one central location, as in a state-wide class action involving numerous local agencies or offices. These costs of searching records, therefore, can be enormous. *See* text following note 192 *infra.*

Even non-individual notice is costly where the class is large or dispersed. Publication costs in newspapers of general circulation often run higher than $10,000, depending on frequency of publication.

154 415 U.S. 651 (1974).

federal courts from awarding retroactive relief against state defendants, *Edelman* is likely to invite class actions in the state courts against states or their subdivisions for restitutionary relief (*e.g.*, backpay, public benefits, and overcharge payments) incidental to injunctive relief. Section 7's notice requirement, however, will pose an obstacle to those actions.[155]

In contrast to its adverse effect on equitable relief class actions, however, section 7 will facilitate class actions for damages in state court. Unlike Rule 23(c)(2), which mandates that individual notice be given in (b)(3) class actions to "all class members who can be identified through reasonable efforts,"[156] sections 7(c), (d), (e), and (g) authorize a flexible approach to notice.

As *Eisen v. Carlisle & Jacquelin*[157] demonstrates, this federal notice requirement often is an insurmountable obstacle to plaintiffs, prompting defendants to argue, at considerable expense, that plaintiff class members are reasonably identifiable and must be notified individually.[158] And the recent Supreme Court decision in *Oppenheimer Fund, Inc. v. Sanders*[159] imposes on the plaintiff the additional obligation of paying for the cost of identifying class members, alone a significant expense.[160]

Section 7(d) imposes an individual notice requirement,[161] but not so widely as Rule 23(c)(2). Individual notice is required only for those class members whose potential monetary recovery or liability is estimated to exceed $100. While the $100 floor may create some procedural problems, such as ascertaining the amount of each class member's potential recovery to determine

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155 Section 7(d) imposes an individual notice requirement.

156 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

157 *Id.*

158 *See id.*

159 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

160 *See In re* Franklin Nat'l Bank, 574 F.2d 662 (2d Cir. 1978) (searching records of 661 brokerage houses, banks, and other institutions is not unreasonable effort); *In re* Nissan Motor Corp., 552 F.2d 1088 (5th Cir. 1977) ("reasonable efforts" a function of anticipated results rather than costs; $15,000 cost of identifying class members is not unreasonable).

161 Section 7(d) adds the requirement that the class members' "whereabouts" be ascertainable. This does not make § 7(d) different from Rule 23(c)(2), since personal notice obviously cannot be given to those whose identities are known but whose "whereabouts" are not.

who gets individual notice, it will facilitate the maintenance of the so-called *"de minimis"* class actions, which, by definition involve damage claims for less than $100.

In contrast, a number of federal courts in such cases have simply refused to certify a class under Rule 23 on the grounds that a class action is not "superior" where costs of identification and notice approach or exceed possible recovery.[162]

Personal notice to class members with such small claims, however, serves little purpose and should not be required by due process or class action procedure. Small claimants rarely will have any interest in taking an active role in the class litigation or filing their own suits. Not only are they likely to be unaware of the existence of their claims, but the small size of the claim will be quite insufficient to prompt any active role. Indeed, one of the major premises of the opt-out class action is to protect such interests that would otherwise never be advanced.[163] Under these circumstances, the section 7(e) requirement that small claimants be given notice "reasonably calculated to apprise [them] of the pendency of the action," which is not limited to individual notice, satisfies the flexible due process standard for notice.[164] Several state courts already have arrived at the conclusion that individual notice is not required by due process for small claimants.[165]

Section 7(d)'s requirement that individual notice be given to class members whose potential liability is estimated to exceed $100 is unlikely to deter class actions. Since absent class members cannot be liable for costs,[166] the requirement applies

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162 *In re* Hotel Telephone Charges, 500 F.2d 86, 91 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1016-17 (2d Cir. 1973), *vacated,* 417 U.S. 156 (1974); United Egg Producers v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1974); Gerlach v. Allstate Ins. Co., 338 F. Supp. 642, 646 (S.D. Fla. 1972); Lawson v. Brown, 349 F. Supp. 203, 209 (W.D. Va. 1972); Denver v. American Oil Co., 53 F.R.D. 620, 628 (D. Colo. 1971).

163 *See* notes 6 to 7 and accompanying text *supra.*

164 *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Note, *Class Actions and the Uniform Class Actions Act: Function and Structure,* 11 LOY. L.A.L. REV. 335, 342-44 (1978).

165 Gant v. City of Lincoln, 193 Neb. 108, 225 N.W.2d 549 (1975); Cartt v. Superior Court, 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975).

166 UCAA § 14; *see* notes 235 to 241 and accompanying text *infra.*

only to two groups: defendant class members[167] and class members against whom a counterclaim for more than $100 is filed.[168] In both cases notice should be given anyway to satisfy due process and typically is given under Rule 23.

Section 7(e) fosters class actions by specifically authorizing the court to use imaginative techniques, such as posting the notice in public or other places or distributing it through unions, to notify the class members. Although several federal courts have employed such methods,[169] the specific authorization for the state courts is valuable.

Section 7(g) also improves on Rule 23 by authorizing the court to order the defendant to help minimize the expense of notice to the plaintiff class.[170] The drafters' Comment to Section 7 states that the defendant may be required to include the notice in his regular mailing (if any) to the class members. In federal practice, some courts have ordered the defendant to assist in this way,[171] while others have deferred to the defendants' objections.[172] Since the factors in section 7(c) focus on the class members and the cost to the representative, rather than on prejudice to the defendant, defendants' objections in this regard will probably be overruled.

Another useful provision is section 7(f), which provides that where the defendant asserts a counterclaim the court may allocate the cost of notice between the parties. It is only proper

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167 *See* Hopson v. Schilling, 418 F. Supp. 1223, 1241 (N.D. Ind. 1976); United States v. Trucking Employers, Inc., 72 F.R.D. 101 (D.D.C. 1976); Watson v. Branch County Bank, 380 F. Supp. 945, 959 (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975) (dicta).

168 *See In re* Sugar Industry, 73 F.R.D. 322, 349 (E.D. Pa. 1976); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 490 (S.D.N.Y. 1973); Serpa v. Jolly King Restaurants, Inc., 1974-2 TRADE CAS. (CCH) ¶ 75,301 (S.D. Cal. 1974).

169 *See* Rota v. Brotherhood of Ry., Airline & Steamship Clerks, 64 F.R.D. 699, 707-08 (N.D. Ill. 1974) (notice in union newsletter); Eley v. Morris, 390 F. Supp. 913, 918 (N.D. Ga. 1975) (notice posted in employment centers).

170 *See* Popkin v. Wheelabrator-Frye, Inc., 1974-75 FED. SEC. L. DEC. (CCH) ¶ 95,068 (S.D.N.Y. 1975) (defendant should minimize notice costs).

171 Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1977) (permitted as part of regular correspondence); Zachary v. Chase Manhattan Bank, 59 F.R.D. 532 (S.D.N.Y. 1971) (permitted in periodic billing statement); Partian v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973); Gates v. Dalton, 67 F.R.D. 621 (E.D.N.Y. 1975).

172 Dennis v. Saks & Co., 1975-2 TRADE CAS. (CCH) ¶ 60,396 (S.D.N.Y. 1975) (rejecting use of billing statement); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

that the defendant who uses the class action as an efficient method of adjudicating his claims against class members should bear part of the financial responsibility of notifying the class.[173] There is generally no prejudice to the defendant in such a case because the Act makes all counterclaims permissive[174] and thus allows the defendant to avoid such sharing of the notice costs by pursuing the claims against class members in separate litigation. Rule 23 is silent on the question of notice cost allocation where counterclaims are asserted, and no federal court has passed on it.

Where no counterclaim is asserted, section 7(f) unfortunately retains the federal requirement for (b)(3) class actions enunciated in *Eisen*[175] and re-affirmed in *Oppenheimer Fund v. Sanders*[176] that the class representative must initially bear the full cost of notice, including the cost of identifying class members. Again, the deterrent effect of such a requirement is a problem, particularly with respect to class actions for equitable relief, where deterrence based on cost is contrary to desirably broad enforcement of injunctive remedies.[177] Some states have recognized this problem and have permitted allocation of notice costs between the parties.[178] In fact, section 8 of the fourth draft of the Act allowed a preliminary mini-hearing to determine the allocation of notice costs.[179] Such an allocation by the

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173 For further discussion, *see* note 170 and text *supra; see also In re* Franklin Nat'l Bank, 73 F.R.D. 25, 27 (E.D.N.Y. 1976).

174 UCAA § 11(f). *See* note 212 and accompanying text *infra.*

175 Elsen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

176 437 U.S. 340 (1978).

177 Watson v. Branch County Bank 380 F. Supp. 945 (W.D. Mich. 1974), *rev'd on other grounds,* 516 F.2d 992 (6th Cir. 1975).

178 *See, e.g.,* N.Y. CIV. PRAC. LAW § 904(d)(I) (McKinney 1976); N.J. COURT RULE (1969) 4:32-2(b); CAL. CIVIL CODE § 1791 (West 1973).

179 That section read:

> If a counterclaim is asserted against a plaintiff class, the cost of notification shall be divided equally between plaintiff and defendant unless the court, in the interest of justice, orders otherwise. If there is no counterclaim, the plaintiff shall bear the expense of notification unless the court orders otherwise. The court may, in the interest of justice, require that the defendant bear the expense of notification, or may require each of them to bear a part of the expense in proportion to the likelihood that each will prevail upon the merits. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned. The court may order steps to be taken by a party in order to minimize the expense of notification

court, whether based on a hearing, on the likelihood of success,[180] or otherwise, should be permitted by the Act.

Section 7(b), which specifies the contents of notice, properly requires disclosure of any information reasonably necessary to inform class members and to enable them to make appropriate decisions.[181] This does not significantly differ from Rule 23's basic requirement,[182] and the only controversial aspects of the provision are specified in section 7(b)(3) and section 7(b)(4).[183] The former requires a description of the possible financial consequences of the action on the class, while the latter requires a general description of any counterclaims asserted against the class. The danger exists that such disclosures will frighten class members into excluding themselves from the action.[184] However, the danger should not be serious if the notice is clear and precise. The "financial consequences" should furthermore be described so that class members are aware that they cannot be liable for costs of litigation to be paid to a successful defendant.[185] If there are any counterclaims, the notice should specifically clarify that they are not resolved and explain that they are for less than the class member's potential recovery if such is indeed the case. The provisions appear otherwise unobjectionable, since the description of claims or counterclaims against defendant class members should be included in the notice anyway, in order to inform class members of the nature of the action, as section 7(b)(1) requires.[186] Similarly, if the ac-

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180 *See* Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565 (S.D.N.Y. 1972), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

181 *See* UCAA § 7(b).

182 Sections 7(a)(2), (5), and (6) parallel Rule 23(c)(2)(A), (B), and (C). Rule 23(c)(2) is otherwise silent on notice contents, but judicial preference is for notice containing the information reasonably necessary to inform a class member and enable him to make a decision. *In re* Nissan Motor Corp., 552 F.2d 1088, 1105 (5th Cir. 1977); *see generally* 2 H.NEWBERG, NEWBERG ON CLASS ACTIONS § 2475 (1977).

183 *See* note 136 *supra*.

184 *See* Gardner v. Gold Strike Stamp Co., 1971 TRADE CAS. (CCH) ¶ 73,461 (D. Utah 1970); Hawkins v. Holiday Inns, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,310 (W.D. Tenn. 1977); Note, *Donson v. American Bakeries Co.*, 87 HARV. L. REV. 470, 474 (1973). Under the Act, this danger does not exist because § 8(a) does not permit exclusion where a counterclaim is asserted against the class member or his class or subclass.

185 UCAA § 14(a).

186 *See, e.g., In re* Sugar Industry, 73 F.R.D. 322, 349 (E.D. Pa. 1976) (counterclaims); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485, 490

tion forecloses other options for class members, the notice should include that information.[187] Section 7(b)(4) does not require disclosure of any counterclaims against particular class members as individuals. If the counterclaims are allowed by the court pursuant to section 11(a),[188] those class members against whom the counterclaims are asserted should be notified of the potential liability. Of course, care must be taken to include that disclosure only in the notice sent to the appropriate class members. Otherwise, those class members free from counterclaims will be misled about their options and may opt-out against their best interests.

There is one notice requirement which is at most only implied in section 7(c)'s reference to "effective communication," but which should be made explicit in the Act: notice should be understandable to the average class member, both in language[189] and in length.[190] Otherwise, class members' rights

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(S.D.N.Y. 1973); Serpa v. Jolly King Restaurants, Inc., 1974-2 TRADE CAS. (CCH) ¶ 75,301 (S.D. Cal. 1974); Hopson v. Schilling, 418 F. Supp. 1223, 1241 (N.D. Ind. 1976) (defendant class members); United States v. Trucking Employers, Inc., 72 F.R.D. 101 (D.D.C. 1976).

187 *See* Agostine v. Sidcon Corp., 69 F.R.D. 437 (E.D. Pa. 1975) (truth in lending, class member may recover more in individual suit); Rollins v. Sears, Roebuck & Co., 71 F.R.D. 540, 545 n.4 (E.D. La. 1976); Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116 (D. Hawaii 1976); Chevalier v. Baird Savs. & Loan Ass'n, 72 F.R.D. 140, 153 (E.D. Pa. 1976).

188 *See* notes 210 to 214 *infra,* discussing the shortcomings of allowing counterclaims against individual class members.

189 The concept of a "readable" class notice is starting to gain adherents in the federal courts. *See In re* Nissan Motor Corp., 552 F.2d 1088, 1104 (5th Cir. 1977); MULTI-DISTRICT LITIGATION PANEL, MANUAL FOR COMPLEX LITIGATION § 1.45 (1976 ed.); Chevalier v. Baird Savs. & Loan Ass'n, 72 F.R.D. 140, 153 n.35 (E.D. Pa. 1976); Vickers v. Home Fed. Savs. & Loan Ass'n, 386 N.Y.S.2d 291, 87 Misc. 880 (1976); Miller, *Problems of Giving Notice in Class Actions,* 58 F.R.D. 299, 321-22 (1972); *cf.* McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. 62, 67 (N.D. Cal. 1976). *But cf.* United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co., 447 F.2d 647 (7th Cir. 1971) (notice of settlement sufficient if adequate to alert cautious shareholder); Milstein v. Werner, 57 F.R.D. 515 (S.D.N.Y. 1972) (notice of settlement sufficient if reasonably clear to minimally sophisticated layman).

190 *See In re* Nissan Motor Corp., 552 F.2d 1088, 1104 (5th Cir. 1977) (overly detailed notice is confusing); *cf. In re* Four Seasons, 525 F.2d 500, 503 (10th Cir. 1975) (notice of settlement need not include all information which may be relevant); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 798-99 (10th Cir. 1971) (need not include every material fact or procedural step); Greenspun v. Bogan, 492 F.2d 375, 382 (1st Cir. 1974). However, there is a clear tension between conciseness, simplicity and clarity, and full disclosure. *See* Milstein v. Werner, 57 F.R.D. 515 (S.D.N.Y. 1972) (readability should not be secured at cost of accuracy and completeness).

will be impeded.[191] Absent an appropriate amendment to section 7, courts can and should impose this requirement under the authority provided them by section 9(a).[192]

A significant omission in section 7 is a statement of who pays for the cost of identifying class members if the information is contained in the defendant's records. Such costs can be large, especially in the present era of computerized records.[193] Since the identification of class members was generally not considered part of the cost of notifying class members,[194] at least until the Supreme Court in *Oppenheimer Fund* recently settled the issue to the contrary under Rule 23, and the variety of state discovery rules may or may not allow a court to allocate the expense, express treatment of the subject in section 7 would be helpful. The most appropriate method is to give the court the discretion to allocate expenses to the defendant possessing the information, at least when the defendant insists upon individual notice and the court concludes that class members can be identified through reasonable efforts only after the defendant's records are restructured.

The Act also provides in section 5(b) that a second notice may be given to class members if the certification order is amended. This notice is entirely discretionary, and section 5(b) sets out no criteria for determining when notice might be advisable or even

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191 *In re* Nissan Motor Corp., 552 F.2d 1088, 1104 (5th Cir. 1977); *see* Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006-08 (3rd Cir. 1976) (notice of settlement, class members have first amendment right to receive important information).

192 UCAA § 9(a).

193 Oppenheimer Fund, Inc. v. Sanders, 436 U.S. 340, 344 (1978). *See* notes 153 and 160 *supra.*

194 *See* Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 137-39 (7th Cir. 1974); Chevalier v. Baird Savs. & Loan Ass'n, 72 F.R.D. 140 (E.D. Pa. 1976); *In re* Franklin Nat'l Bank, 73 F.R.D. 25, 29-30 (E.D.N.Y. 1976); City of New York v. Darling-Delaware, Inc., 1975-1 TRADE CAS. (CCH) ¶ 60,182 (S.D.N.Y. 1976); Hawkins v. Holiday Inns., Inc., 1975-1 TRADE CAS. (CCH) ¶ 60,153 (W.D. Tenn. 1975); Foster v. Maryland State Savs. & Loans Ass'n, 1974-2 TRADE CAS. (CCH) ¶ 75,277 (D.D.C. 1974); Herbst v. IT&T, 65 F.R.D. 13, 19-20 (D. Conn. 1972); Lamb v. United Sec. Life Co., 59 F.R.D. 25, 43 (S.D. Iowa 1972); Blank v. Talley Indus., Inc. 54 F.R.D. 627 (S.D.N.Y. 1972); Ostapowicz v. Johnson Bronze Co., 54 F.R.D. 465, 467 (W.D. Pa. 1972); Battle v. Municipal Hous. Auth., 53 F.R.D. 423, 426 (S.D.N.Y. 1971); Contract Buyer's League v. F & F Investment Co., 48 F.R.D. 7, 17 (N.D. Ill. 1969). *But see In re* Nissan Motor Corp., 562 F.2d 1088 (5th Cir. 1977); *In re* Sugar Indus., 1976-2 TRADE CAS. (CCH) ¶ 61,125 (E.D. Pa. 1976) (identification consists merely of combining lists); *In re* United States Fin., 69 F.R.D. 25, 46-47 (S.D. Cal. 1975).

necessary. But to avoid the cost and confusion of unnecessary notices to class members,[195] the provision should be redrafted to include some criteria to guide the court. Such a redrafted provision should permit notice of the amendment only where the court determines that it is important for the protection of the class members' interests; and notice should be given only to the class members adversely affected by the amendment.[196] More precise guidelines also can help avoid possible misuse of the provision by a defendant who can burden the plaintiff class by seeking an amendment of the certification order and placing the cost of notice on plaintiffs under section 7(f).[197] To preclude such conduct, section 5(b) should provide that the cost of any notice be borne by the party seeking and obtaining the amendment. This approach would be consistent with other provisions in the Act, which permit the judge to apportion the cost of notice[198] between the parties if justice requires.

C. *Statute of Limitations*

Section 18 follows the general rule of *American Pipe & Construction Co. v. Utah,*[199] in providing that the statute of limitations is tolled for all class members upon the filing of the class complaint. Such a provision is necessary to avoid superfluous and multiple interventions and filings by class members which would undermine the economy of the class action procedure and conflict with the passive status of the absent class members.[200] The tolling does not prejudice the defendant, for he is put on notice of the scope of possible claims by the filing of the class

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195 *See* Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir. 1974).

196 This latter requirement was contained in § 6(b) of the fourth draft of the UCAA. That section read: "(b) If notice of certification has been given pursuant to Section 8, the court shall order notice be given as it directs to any class member adversely affected by the amendment of the order of certification."

197 *See* note 122 and accompanying text *supra.*

198 Section 7(f) allows the apportionment of notice costs where counterclaims are asserted. *See* note 122 and accompanying text *supra.* Section 12(e) requires that the cost of notice of dismissal be paid by the party seeking dismissal. *See* notes 261 to 262 and accompanying text *infra. See also In re* Franklin Nat'l Bank, 73 F.R.D. 25, 27 (E.D.N.Y. 1976).

199 414 U.S. 538 (1974).

200 *See* United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977); American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553-54 (1974).

complaint.[201] Under section 18, the statute of limitations resumes running for a class member upon the filing of an election of exclusion by the class member (*i.e.,* when he opts-out), upon the elimination of the class member from the class definition in the certification order,[202] upon denial of class status,[203] or upon dismissal of the action without prejudice. *American Pipe* dealt solely with intervenors after class denial for lack of numerosity,[204] but most of the lower federal courts have read the decision expansively.[205] The Act is in accord with those lower courts.

It should be noted that the section resolves an issue that has divided the federal courts: whether the statute of limitations is tolled for would-be class members who file their own actions, rather than intervene, either after exclusion or after class denial.[206] Again consistent with the policies set out in *American Pipe,* section 18 indicates that the statute is tolled from the filing of the class complaint until exclusion or class denial regardless of the form of the would-be class member's response.

An issue left unresolved by section 18 is whether the statute of limitations resumes running for class members upon class denial even if the representative appeals that denial. Section 18 may fairly be read to say that the statute does resume running, but it seems unlikely this interpretation was contemplated. With such an interpretation, the appeal of a class denial would be meaningless in most cases, because the commenced statute of limitations typically would expire during the often lengthy appeals process. Moreover, such an interpretation would be

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201 American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

202 *See* UCAA § 4.

203 *See* UCAA § 2(a).

204 American Pipe & Construction Co. v. Utah, 414 U.S. 538, 552-53 (1974).

205 *See* Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, 1975-76 TRANSFER BINDER, FED. SEC. L. REP. (CCH) ¶ 95,377 n.11 (S.D.N.Y. 1975); *see also* note 206 *infra.*

206 *Compare* Roman v. ESB, Inc., 550 F.2d 1343, 1356-57 (4th Cir. 1976) (applies to those opting-out and filing individual action) (dicta); Agostine v. Sidcon Corp., 69 F.R.D. 437, 448 n.13 (E.D. Pa. 1975); *In re* Master Key, 1976-2 TRADE CAS. (CCH) ¶ 61,080 (D. Conn. 1976); McAlpine v. Aamco Automatic Transmissions, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,359 (E.D. Mich. 1977); United Air Lines v. McDonald, 432 U.S. 385 (1977) (Powell, J., dissenting) *with* Stull v. Bayard, 424 F. Supp. 937, 942 (S.D.N.Y. 1977) (not tolled for those opting-out); Arneil v. Ramsey, 550 F.2d 774, 783 (2d Cir. 1977) (dicta); 3B MOORE'S FEDERAL PRACTICE ¶ 23.55 (1978).

contrary not only to federal practice under Rule 23, where the claims of class members are preserved through appeal,[207] but also to the policy stated in *American Pipe* of avoiding unnecessary filings by class members to preserve their rights.[208]

D. *Counterclaims*

Section 11 governs the various possible arrangements involving counterclaims of plaintiff classes and defendant classes. Most of the provisions of the section are logical and appropriate. Counterclaims by a defendant against the plaintiff class and by a defendant class against the plaintiff are properly permitted (as long as they satisfy the class prerequisites of sections 1 through 3), since they are merely the counterparts of the typical plaintiff and defendant class actions. Counterclaims by an individual defendant class member against the plaintiff are also logically permitted. After all, the plaintiff is a party and chose to sue the defendant class member. The section apparently does not allow counterclaims by individual defendant class members against individual plaintiff class members; but this seems proper because neither class member is before the court in person, the counterclaim's connection to the main action would be too tenuous, and the counterclaim would be too disruptive.

One counterclaim authorized by section 11(a) will create problems. The section allows the defendant, upon leave of court, to counterclaim against an absent plaintiff class member (*i.e.*, one included in the class but not serving as the representative). The danger with this authority is that defendants may assert counterclaims not to seek recovery, but to defeat class status by rendering the class unmanageable.[209] For this reason, as well as

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207 *See, e.g.*, Gelman v. Westinghouse Elec. Corp., 556 F.2d 699 (3d Cir. 1977); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975); Esplin v. Hirschi, 402 F.2d 94, 101 n.14 (10th Cir. 1967), *cert. denied*, 394 U.S. 928 (1968); Falk v. Dempsey-Tegeler & Co., 427 F.2d 142 (9th Cir. 1972); City of New York v. Internat'l Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

208 American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553-54 (1974).

209 *See* Roper v. Consurve, Inc., 578 F.2d 1106, 1116 (5th Cir. 1978) *cert. granted, sub nom.*, Deposit Guaranty National Bank v. Roper, 47 U.S.L.W. 3581 (U.S. Mar. 6, 1979); Neely v. United States, 546 F.2d 1059, 1069 (3d Cir. 1976); Turoff v. Union Oil Co. of Cal., 60 F.R.D. 51, 58-59 (N.D. Ohio 1973); Alpert v. United States Indus., Inc., 59 F.R.D. 491, 499 (S.D. Cal. 1973); Cotchett v. Avis Rent-A-Car System, Inc., 56 F.R.D. 549 (S.D.N.Y. 1972); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970) (antitrust counterclaim in antitrust suit).

the danger of coercing class members to opt-out,[210] several federal courts have held that absent class members are not subject to individual counterclaims.[211]

To avoid this undesirable result section 11(a) should be changed in one of three ways. First, the most extreme approach, it could simply prohibit such counterclaims altogether. Second, section 11(a) could be amended to preclude the defendant's counterclaims when the court determines that they will interfere with the maintenance of the class action.[212] Neither of these approaches would prejudice the defendant who could not thereby plead individual counterclaims, since, as section 11(f) provides, the failure to counterclaim does not bar the claim in subsequent actions. Third, section 11(a) could stipulate that no counterclaim by the defendant can yield an affirmative recovery, *viz.*, that any recovery from the counterclaim can be only as a set-off.[213] Any of these three approaches would avoid not only the problem of the defendant's abusing the counterclaims but also the due process problem of the court's entering

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210 *See* note 218 *infra*. This abuse is eliminated under the Act since § 8(a)(3) prohibits class members against whom counterclaims are asserted from opting-out. *See* notes 124 to 126 and accompanying text *supra*.

211 Absent class members are not parties for purposes of Rule 23. Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973); Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116 (D. Hawaii 1976); Hill v. A-T-O, Inc., 1975-1 TRADE CAS. (CCH) ¶ 60,235 (E.D.N.Y. 1975); Dennis v. Saks & Co., 1975-2 TRADE CAS. (CCH) ¶ 60,396 (S.D.N.Y. 1975); Serpa v. Jolly King Restaurants, Inc., 1974-2 TRADE CAS. (CCH) ¶ 75,301 (S.D. Cal. 1974); *In re* Sugar Industry, 73 F.R.D. 322 (E.D. Pa. 1976).

212 *See* Roper v. Consurve, Inc., 578 F.2d 1106, 1116 (5th Cir. 1978) *cert. granted, sub nom.*, Deposit Guaranty National Bank v. Roper, 47 U.S.L.W. 3581 (U.S. Mar. 6, 1979) (dictum) (counterclaims should not be allowed to defeat class since defendant would escape violation without liability, subclasses should be used or class members excluded); Weit v. Continental Ill. Nat'l Bank, 60 F.R.D. 5, 8 (N.D. Ill. 1973) (allowing only liquidated claims requiring minimal court involvement); Herman v. Atlantic Richfield Co., 72 F.R.D. 182 (W.D. Pa. 1976) (liquidated claims against identified class members). Because of the administrative inconveniences of litigating counterclaims in the class suit, many courts have found counterclaims to be permissive rather than mandatory and have dismissed them from the class suit without prejudice. *E.g.*, Bantolina v. Aloha Motors, Inc., 419 F. Supp. 1116 (D. Hawaii 1976); Zeltzer v. Carte Blanche Corp., 414 F. Supp. 1221 (W.D. Pa. 1976); Hermann v. Atlantic Richfield Co., 72 F.R.D. 182, 185 (W.D. Pa. 1976) (debt collection counterclaim to antitrust suit); Kolta v. Tuck Indus., Inc., 20 Fed. R. Serv. 2d 1049 (S.D.N.Y. 1975) (counterclaim based on poor job performance to title VII suit).

213 *See* Hermann v. Atlantic Richfield Co., 72 F.R.D. 182 (W.D. Pa. 1976); *In re* Sugar Indus., 73 F.R.D. 322 (E.D. Pa. 1976); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 485 (S.D.N.Y. 1973); Partain v. First Nat'l Bank, 59 F.R.D. 56, 60 (M.D. Ala. 1973).

an affirmative judgment against a person not sued in a representative capacity, not served individually, and not present in court.[214]

Section 11(c), which authorizes the court to stay the distribution of an award or execution on a judgment in favor of a class member, is a troublesome provision. By allowing the court to enforce a stay as long as a separate action or counterclaim brought by the defendant is pending against a class member in any court, the provision seems officially to countenance delay by the defendant in paying a valid judgment.[215] Of course, to get the stay the defendant must pursue his suit with "reasonable diligence"; but this does not resolve the difficulty, because it is unclear what "reasonable diligence" is and how it should be determined on a continuing basis. At the least, it seems, section 11(c) should require the defendant seeking a stay to post a bond and should require the payment of interest by the defendant if the class member prevails in a separate action.

E. *Discovery from Absent Class Members*

The major issue concerning discovery in class actions is the extent to which absent class members should be subject to discovery by the opposing party.[216] Section 10(a) of the Act follows some federal decisions in declaring that absent class

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214 *See,* Alpert v. United States Indus., Inc., 59 F.R.D. 491 (S.D. Cal. 1973); *cf.* National Council of Community Mental Health Centers, Inc. v. Mathews, 546 F.2d 1003 (D.C. Cir. 1976) (no in personam jurisdiction to award fees against class members in favor of class counsel).

215 The rationale for including § 11(c) was to avoid the possibility that a plaintiff class might recover a judgment against a defendant who had a pending suit against some class members. *See* Vestal, *Uniform Class Actions,* 63 A.B.A.J. 837, 840 (1977). Such a result is nonetheless possible whenever parties are involved in two or more suits at the same time, and there is no reason to single out class members for different disadvantageous treatment. The court always has the inherent authority to stay the judgment in proper cases. And it should be noted that § 11(c) of the fifth draft of the Act *required* the court to stay distribution or execution when another action by the defendant was pending against the class member. Certainly, the change from mandatory to permissive is laudable.

216 *Compare* Brennan v. Midwestern Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied sub nom.,* Harnman v. Midwestern Life Ins. Co., 405 U.S. 921 (1972) *with* Wainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972).

members are not "parties" for discovery purposes,[217] and therefore not subject to state discovery rules. However, the section also rejects the view, taken by several federal courts, that discovery of absent class members should be prohibited in order to prevent harassment by the defendant.[218] Instead, the section compromises by allowing discovery of absent class members only as the court permits.

Section 10(a) includes a non-exclusive list of factors for the court to consider when it rules on a motion to conduct discovery of absent class members. However, the list insufficiently emphasizes the impact of discovery on class members and the potential for abuse. The "annoyance, oppression, or undue burden or expenses" to which the class members will be subjected should be the most significant of the factors,[219] but it is mentioned in section 10(a) as merely the last of four factors, apparently of no more importance than purely procedural factors.

The list is erroneous, too, both for what it mentions and for

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217 *See* Hawkins v. Holiday Inns, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,310 (W.D. Tenn. 1977); Fischer v. Wolfinbarger, 55 F.R.D. 129 (W.D. Ky. 1971). FED.R. CIV.P. 33 to 36 apply only to "parties." *But see* Brennan v. Midwestern Life Ins. Co., 450 F.2d 999, 1004-05 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972).

218 Some courts have been opposed to imposing duties of discovery on the ground that class members would be forced to spend time and hire counsel contrary to the purpose of Rule 23, creating the danger of coercing class members into opting-out of the action. *See* Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977) (dictum), *cert. denied,* 438 U.S. 916 (1978); Fischer v. Wolfinbarger, 55 F.R.D. 129 (W.D. Ky. 1971); Hawkins v. Holiday Inns, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,310 (W.D. Tenn. 1977); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (contrary to passive status); Arizona Bakery Products Lit., 1975-2 TRADE CAS. (CCH) ¶ 60,556 (D. Ariz. 1975). *But see* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972) (interrogatories permitted); Bishop v. Jelleff Associates, 398 F. Supp. 579 (D.D.C. 1974); Denver v. American Oil Co., 53 F.R.D. 620, 628 (D. Colo. 1971).

219 *See* Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (forcing class members to spend time and hire counsel contrary to passive status); Hawkins v. Holiday Inns, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,310 (W.D. Tenn. 1977 (danger of coercing class members to opt-out); United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 (D.D.C. 1976) (discovery must not have purpose or effect of harassment); *see also* American Pipe & Construction Co. v. Utah, 414 U.S. 538, 552 (1974) ("class members are mere passive beneficiaries . . . [With no] duty to take notice of the suit or to exercise any responsibility with respect to it in order to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case"); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied,* 438 U.S. 916 (1978) (discovery permitted only where not burdensome and not available from representative) (dicta).

what it fails to mention. "[W]hether representatives of the class are seeking discovery on the subject to be covered" is a factor that should be omitted from the list. It is difficult to see the relevance of the subject matter of the representative's discovery, since the discovery interests of the adverse parties are rarely congruent. Where the defendant has exclusive possession of information on a subject, such as intent, the defendant should not be permitted to harass class members by discovery on their "knowledge" of the defendant's intent even if the subject is relevant to the claim. In such an event, parties with small claims would be forced to incur a great financial burden to respond, or be coerced out of the class so as potentially to preclude class status altogether. Conversely, the defendant may need information in the class members' possession, such as extent of injury, that the *defendant* normally would not discover from the *representative.*

A factor which is clearly relevant and which should be included in the list is the necessity that the defendant exhaust the alternative sources of information before securing it from absent class members. This factor, which is considered in federal practice,[220] is important because the same or similar information can usually be obtained by the defendant from other sources without harassing or inconveniencing absent class members.[221] Furthermore, the party seeking discovery from absent class members can already obtain the information by simply deposing the absentees, who just like any non-party witnesses are subject to deposition.[222] Of course, if the defendant uses depositions, he will have to make personal service of

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220 *See, e.g.,* Gardner v. Awards Marketing Corp., 55 F.R.D. 460 (D. Utah 1972) (must be "for essential purposes"); Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir. 1974) (defendant must show necessity); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1792 n.96 (must be "sharply limited"); United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 (D.D.C. 1976) (must show need).

221 *See* Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 466 (D. Utah 1972); Wainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972); *cf.* United States v. Trucking Employers, Inc., 72 F.R.D. 101, 104 (D.D.C. 1976).

222 Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 463-64 (D. Utah 1972); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 535 (N.D. Ga. 1972); *see* Grogan v. American Brands, Inc., 70 F.R.D. 579, 584 (M.D.N.C. 1976) (dicta); Minnesota v. United States Steel Corp., 44 F.R.D. 559, 582 (D. Minn. 1968). FED. R. CIV. P. 30-32, unlike 33-36, are not limited to "parties."

the notice or subpoena on the proposed deponent;[223] he will thus have to bear both the responsibility of locating the class members and the costs of discovery. Under these circumstances, it is likely that the defendant will seek discovery only when necessity — and not mere relevance — so dictates.

Two major questions are left unresolved by the Act. First, it is not clear whether discovery on the class issues can be had of absentees prior to class certification. Section 10 may fairly be read to prohibit compulsory pre-certification discovery by its reference to "members of the class" rather than "purported" class members. Such a reading would be consistent with federal practice where compulsory pre-certification discovery is barred by *American Pipe & Construction Co. v. Utah.*[224] There, the Supreme Court held that "[n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case."[225] Further, such discovery on class issues is likely to be of little value to the defendant; individual class members simply will not have any information relevant to the class issues, such as class size, common questions, adequacy of representation, and propriety of the class action, that cannot be gained from the representative or determined from the nature of the suit itself.[226] Any possible benefit to the defendant is clearly outweighed by the unfair burden placed on absent class members with small stakes who may drop out of class membership altogether if faced with the demands of the opposing party's discovery, and who may have no stake in the suit should class status be denied or should they be outside the scope of any subsequently certified class.

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223 FED. R. CIV. P. 30(a), 45(a), (c).

224 414 U.S. 538 (1974).

225 414 U.S. 538, 552 (1974).

226 *But see* Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227-28 (S.D.N.Y. 1973); United States v. Trucking Employers, Inc., 72 F.R.D. 101, 105 (D.D.C. 1976). Class members may have some opinions on adequacy of representation that would be of interest to the court. For this reason, § 9(a)(2)(iii) of the Act authorizes the court to give notice to class members to provide them with the opportunity to signify whether they consider the representation fair and adequate. This, of course, is post-certification notice and, in any event, involves no facts discoverable under discovery rules.

The second issue unresolved by the Act is whether sanctions can or should be applied to absent class members who do not comply with court-approved discovery requests. The phrase in section 10(a) that discovery permitted by the court will be under "applicable [state] discovery rules" is not only likely to prompt divergent treatment of discovery among the states but also potentially to allow the courts to impose the ultimate sanction of dismissal of the class member's claim with prejudice depending on state rules.[227] Such a result would be highly unfortunate because it would force absentees to hire counsel to respond to the discovery and would discriminate against the less literate and lower income class members who have no immediate access to counsel. It also is inappropriate for small claims class actions where the class members may not receive any direct compensation for their damages.[228] If the information is important enough, the defendant can always use the subpoena process to take non-party depositions of the absentees.

In the same regard, the sanction of exclusion from the class without prejudice to the class member's individual claims[229] would be equally inappropriate. Such a sanction of exclusion would be equivalent to requiring class members to "opt-in" to the suit, a requirement specifically rejected by the Act's[230] provision for inclusion, not exclusion, from the class.

Given the potential for abuse and adverse effect on class members, the Act should provide the courts with alternative discovery procedures. To preclude taxing of resources, the court could limit discovery to a representative sample of the class,[231] a court-conducted informational survey,[232] and delay-

227 *See* Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972) (dismissed with prejudice where class members failed to answer discovery seeking not only identification but relating also to essential issues in asserted defenses).

228 UCAA § 15. *See* notes 273 to 295 and accompanying text *infra.*

229 *See* Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217, 227-28 (S.D.N.Y. 1973).

230 UCAA § 8. *See* Vestal, *Uniform Class Actions,* 63 A.B.A.J. 837, 838 (1977); *see* notes 113 to 135 *supra.*

231 *See* Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 700-01 (S.D.N.Y. 1975); Southern Cal. Edison Co. v. Superior Court, 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972); N.Y. CIV. PRAC. LAW § 904(c) (McKinney 1976) (notice of pendency).

232 *See In re* Antibiotics Antitrust Act., 333 F. Supp. 278, 288 (S.D.N.Y. 1971); Knight v. Board of Educ., 48 F.R.D. 108, 112-14 (E.D.N.Y. 1969).

ing discovery until liability is shown.[233] Even if the court permits pre-liability discovery, sanctions should not be impossed against class members who fail to respond to discovery pertaining to such matters as the amount or merits of the individual claim, which may be decided after decisions pertaining to questions of law and facts are made.[234] While discovery on individual claims may be relevant once liability is found, its discovery at a preliminary stage may unduly penalize those failing to receive notice, the unsophisticated, and those unable to locate papers.

Section 10(b) properly provides that the representative is to be treated like any individual party to litigation with respect to discovery, and it quite logically extends this treatment to class members who make an appearance. If a class member wishes to have the benefits of some direct control of the action relating to him, he should be subject to the corresponding responsibilities of that control.

F. *Costs*

Subsection (a) of section 14 prohibits the assessment of costs against absent plaintiff class members. While the few federal courts which have addressed the question have come to this conclusion,[235] the express prohibition is useful. Holding absent class members liable for costs to a successful defendant may intimidate class members into opting-out of the action,[236] may conflict with the "passive nature" of class membership[237] and, most importantly, may violate due process.[238]

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233 *See* Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 700 (S.D.N.Y. 1975); Bisgeiser v. Fotomat, 62 F.R.D. 118, 119-21, (N.D. Ill. 1973); Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 463 (D. Utah 1972); Kyriazi v. Western Elec. Co., 74 F.R.D. 468 (D.N.J. 1977).

234 *See, e.g.*, Robertson v. National Basketball Ass'n, 67 F.R.D. 691, 700-01 (S.D.N.Y. 1975); Unicorn Field, Inc. v. Cannon Group, Inc., 60 F.R.D. 217 (S.D.N.Y. 1973); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) (dicta); Korn v. Franchard Corp., 50 F.R.D. 57, 59-60 (S.D.N.Y. 1970); Knight v. Board of Educ., 48 F.R.D. 108, 113 (E.D.N.Y. 1969); *see generally* Note, *Class Actions and the Uniform Class Actions Act: Function and Structure,* 11 LOY. L.A. L. REV. 335, 354-56 (1978).

235 *See* Lamb v. United Security Life Co., 59 F.R.D. 44 (S.D. Iowa 1973); Love's Wood Pit Barbecue v. Bell Brand Foods, 1974-1 TRADE CAS. (CCH) ¶ 74, 905 (S.D. Cal. 1973). *But cf.* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 236 (9th Cir. 1975).

236 *See* notes 218 to 219 and accompanying text *supra.*

237 *See* notes 218 to 219 and accompanying text *supra.*

238 *Cf.* National Council of Community Mental Health Centers, Inc. v. Mathews, 546

Defendant class members are treated differently than plaintiff class members by section 14(b), which authorizes the court to apportion costs against absent class members in a defendant class action. Although there is no reported federal law on this issue, this distinction between plaintiff class members and defendant class members is proper, especially in light of the different policies behind plaintiff and defendant class actions. Plaintiff class actions are encouraged not merely because they are more efficient than a number of individual suits, but also because they provide a forum for persons who would otherwise be unable to assert their rights.[239] In contrast, defendant class actions are encouraged primarily for efficiency, to avoid a multiplicity of individual suits. Because the class members would be sued individually anyway if the suit were not brought or maintained as a defendant class action, and thus would have to pay legal fees and costs for their individual defenses, apportioning the costs of the class action costs among them simply is fair.

Equally proper is section 14(c), which provides that costs of notice are taxable in favor of the prevailing party. While several federal courts have arrived at the same conclusion,[240] the explicit authority resolves the issue more decisively. The main advantage of this subsection is that it reduces the adverse effects of the section 7 requirement that notice be given (and paid for) by plaintiffs in all class actions.[241]

F.2d 1003 (D.C. Cir. 1976) (no in personam jurisdiction to award fees against class members in favor of class counsel); Alpert v. United States Indus., Inc., 59 F.R.D. 491 (S.D. Cal. 1973) (counterclaims against class members raise due process considerations).

239 *See, e.g.*, Neely v. United States, 546 F.2d 1059, 1071 (3rd Cir. 1976); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976) (small claimant); Haynes v. Logan Furniture Mart, 503 F.2d 1161 (7th Cir. 1974) (uninformed); Ste. Marie v. Eastern R.R. Ass'n, 72 F.R.D. 443, 449 (S.D.N.Y. 1976) (employees of defendant reluctant to assert rights); *see also* notes 6 and 7 and accompanying text *supra*.

240 *See In re* Nissen Motor Corp., 552 F.2d 1058, 1103 (5th Cir. 1977); Chevalier v. Baird Savs. & Loan Ass'n, 72 F.R.D. 140, 151 (E.D. Pa. 1976); Bertozzi v. King Louie International, Inc., 420 F. Supp. 1166, 1181 n.9 (D.R.I. 1976); Partain v. First Nat'l Bank, 59 F.R.D. 56 (M.D. Ala. 1973); *cf.* Sanders v. Levy, 558 F.2d 636 (2d Cir. 1976) (en banc), *rev'd sub nom.*, Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978).

241 *See* notes 136 to 155 and accompanying text *supra*.

G. *Appeals*

Sections 4(c) and 5(d) govern appeals of the certification order. Section 4(c) of the Act provides that both an order certifying and an order refusing to certify a class are appealable. On its face, the provision permits either an appeal after a final judgment or an immediate interlocutory appeal on the issue. The former probably is superfluous, because it is settled in state practice, as in federal practice,[242] that an order regarding certification is appealable as a final order.[243] Section 4(c) is significant, however, by permitting interlocutory appeal of all class orders. Indeed, the Supreme Court's recent decisions in *Gardner v. Westinghouse Broadcasting Co.*[244] and in *Coopers & Lybrand v. Livesay,*[245] prohibiting the interlocutory appeal of class denials under Rule 23 where the denial precludes effective injunctive relief or spells the "death knell" of the action, have made section 4(c) particularly significant as a departure from federal practice of very limited interlocutory appeals of class denials.[246]

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242 28 U.S.C. § 1291 (1976).

243 McGhee v. Bank of America Nat'l Trust & Savs. Ass'n, 60 Cal. App. 3d 442, 131 Cal. Rptr. 482 (1976); Barliant v. Houghton Mifflin Co., 45 Ill. App. 3d 494, 359 N.E.2d 886 (1977); City of Hannibal v. Winchester, 360 S.W.2d 371 (Mo. Ct. App. 1962).

244 Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978). *Compare, e.g.,* Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Jenkins v. Blue Cross Mutual Hosp. Ins., Inc., 522 F.2d 1235 (7th Cir. 1975), *rev'd on other grounds,* 538 F.2d 164 (7th Cir.), *cert. denied,* 429 U.S. 986 (1976); Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Doctor v. Seaboard Coast Line R.R., 540 F.2d 699 (4th Cir. 1976) *with* Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 828 (1975); City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295 (2d Cir. 1969).

245 Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). The "death knell" doctrine holds that class denial may be appealed where the class representative's claim is sufficiently small so that the entire action will end as a practical matter upon class denial. The doctrine arises from the "collateral order" doctrine of Cohen v. Beneficial Fin. Co., 337 U.S. 541 (1949). The theory is not applicable if the representative's claim is large enough for continued individual prosecution, considering all circumstances. *See, e.g.,* Williams v. Mumford, 511 F.2d 363 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 828 (1975); Shayne v. Madison Square Garden Corp., 491 F.2d 397 (2d Cir. 1974); Falk v. Dempsey Tegelor & Co., Inc., 472 F.2d 142 (9th Cir. 1972); Gosa v. Securities Investment Co., 449 F.2d 1330 (5th Cir. 1971). Many of the circuits had approved the "death knell" theory, at least in principle. *Compare* Ott v. Speedwriting Publishing Co., 518 F.2d 1143 (6th Cir. 1975); Korn v. Franchara Corp., 443 F.2d 1301 (2d Cir. 1971) *with* Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972), *cert. denied,* 407 U.S. 925 (1972).

246 Interlocutory appeal of class denial in federal court is now permitted only if cer-

Permitting immediate appeal of refusal orders is a valuable protection of the interests of the potential class members. It encourages the class representative to appeal the order on behalf of the class rather than settle his individual claim with the defendant in return for his not appealing the order after an adjudication on the merits[247] and thus leaving the potential class without recourse as a class. It also avoids the problem that arose in the federal courts where review was virtually impossible since appeal was allowed only after final judgment and many issues were moot or settled by that time. When the purported representative loses his individual claim on the merits or his claim is mooted, he later may not have standing to appeal the class denial to protect the interests of the potential class members.[248] Permitting interlocutory appeals of refusal orders would also allow potential class members to make a more intelligent decision on whether to file an individual suit. The statute of limitations on a class member's individual claim is tolled upon the filing of the class action;[249] however, upon denial of class status, it will run again for claims pursued in-

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tified by the trial court and accepted by the appellate court. 28 U.S.C. § 1292(b) (1976). Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (dictum); Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364, 1368-69 (7th Cir. 1976) (dictum). *See* Zahn v. International Paper Co., 469 F.2d 1033, 1034 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973). Interlocutory appeal may possibly be available under FED. R. CIV. P. 54(b). Windham v. American Brands, Inc., 539 F.2d 1016, 1020 (4th Cir. 1976), *cert. denied*, 435 U.S. 968 (1978); Samuel v. University of Pittsburgh, 506 F.2d 355, 360 (3rd Cir. 1974), *rev'd on other grounds*, 538 F.2d 991 (3rd Cir. 1976).

247 *See* Williams v. Sinclair, 529 F.2d 1383, 1387 (9th Cir. 1975). However, a potential class member may intervene after final judgment solely to appeal the class denial. United Airlines v. McDonald, 432 U.S. 385 (1977).

248 *See* East Texas Motor Freight System v. Rodriguez, 431 U.S. 395 (1977) (plaintiff who lost on merits cannot represent purported class on appeal); Indianapolis Bd. of School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (mootness of representatives' claims); *Compare* Satterwhite v. City of Greenville, 528 F.2d 987 (5th Cir. 1978) *with* Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978) (loss on merits). *Compare* Van Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977); Valentino v. Howlett, 528 F.2d 975 (7th Cir. 1976) *with* Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3rd Cir. 1978); Marcera v. Chinland, 565 F.2d 253 (5th Cir. 1977) (mootness by elapse of time). *Compare* Winokur v. Bell Fed. Savs. & Loan Ass'n, 560 F.2d 271 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) *with* Roper v. Conserve, Inc., 578 F.2d 1106 (5th Cir. 1978), *cert. granted, sub nom.* Deposit Guaranty National Bank, 47 U.S.L.W. 3581 (U.S. Mar. 6, 1979) (mootness through defendant's acquiescence to representative's claim).

249 American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974); UCAA § 18.

dividually[250] but it is still tolled for the class claim through final appeal of the class denial.[251] Allowing immediate appeal of class denials would therefore inform class members at an early stage whether their action will proceed as a class action. Most important in actions for injunctive relief, interlocutory appeal of class denial will avoid significant delay in protecting absent class members' immediate and interim interests which might otherwise become moot if the plaintiff can appeal only after adjudication on the merits.[252]

Superficially, a sense of fairness recommends that an appeal of a class certification order should be treated like an appeal of a refusal order. Nonetheless, closer analysis shows that the two situations should be treated differently. First, the policy which underlies interlocutory appeals of class denial, the protection of class members, does not apply to appeals of class certification. Second, and more importantly, granting the defendant a right to appeal class certification immediately would produce serious problems of delay and fragmentation. The defendant would have, in effect, an automatic delay of the liability determination, even though the defendant is rarely prejudiced by allowing the action to proceed to judgment before an appeal of the certification order.[253] Also, granting the defendant an immediate appeal

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250 The Supreme Court's decision in *American Pipe* concerned only class members seeking intervention after class denial. This decision has been interpreted to be limited to intervention. Stull v. Bayard, 424 F. Supp. 937, 942 (S.D.N.Y. 1977); *see* 3B MOORE'S FEDERAL PRACTICE (2d Ed. 1978). But most courts have interpreted the decision as stating that the statute of limitations also is tolled for class members filing individual actions after opting-out or class denial. McAlpine v. AAMCO Automatic Transmissions, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,359 (E.D. Mich. 1977); *In re* Master Key, 1976-2 TRADE CAS. (CCH) ¶ 61,080 (D. Conn. 1976); Agostine v. Sidcon Corp., 69 F.R.D. 437, 448 n.13 (E.D. Pa. 1975). The latter view is consistent with holdings by the Supreme Court. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n.13 (1974); *cf.* United Airlines v. McDonald, 434 U.S. 385 (1977) (Powell, J., dissenting).

251 The purported representative clearly may appeal the class denial for the class members upon final judgment of the representative's individual claim. *E.g.,* Turoff v. May Co., 531 F.2d 1357 (6th Cir. 1976); King v. Kansas City S. Indus., Inc., 519 F.2d 20 (7th Cir. 1975); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1967), *cert. denied,* 394 U.S. 928 (1968). Any class member also may intervene after final judgment to appeal the class denial. United Airlines v. McDonald, 432 U.S. 385 (1977); Hooley v. Red Carpet Corp., 549 F.2d 643 (9th Cir. 1977).

252 *See* Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 221 (3rd Cir. 1977) (Gibbons, J., dissenting), *aff'd,* 437 U.S. 478 (1978).

253 *See* Lamphere v. Brown Univ., 553 F.2d 714 (1st Cir. 1977), which held that the burden of increased litigation is insufficient to permit immediate appeal of certifiction

of certification would in practice grant a simultaneous right of appeal to the plaintiff who could then make the process more fragmented and cause delay by appealing aspects of the order, such as the narrowing of the class scope, of the requested relief, or of the issues subject to class treatment. Because such matters tend not to be very important alone, any appeals by the class representative would be desirable only in special circumstances.[254] Third, an order certifying a class is only conditional,[255] not final in the same sense as a class denial. It is for these reasons that the federal courts generally have not allowed interlocutory appeals of class certifications.[256]

Yet, there may be cases in which an interlocutory appeal of the certification order would materially advance the litigation. Recognizing this, it seems that rather than permitting either all or no interlocutory appeals of an order certifying a class, the procedure of 28 U.S.C. § 1292(b), with trial court certification of controlling issues for appeal and discretionary appellate review, should be employed.[257]

Section 5(c) of the Act supplements section 4(c) by providing

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and that there is no substantive right to protect from unnecessary litigation. *But see In re* King Resources Co., 525 F.2d 211 (10th Cir. 1975); Handwerger v. Ginsberg, 519 F.2d 1339 (2d Cir. 1975).

254 *See, e.g.*, Knox v. Amalgamated Meat Cutters, 520 F.2d 1205 (5th Cir. 1975) (class certification may be appealed by the representative where the certified class is so narrow as to constitute class denial (dicta)).

255 UCAA § 5(a).

256 *E.g., In re* Cessna Aircraft, 518 F.2d 213 (8th Cir. 1975); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 424 U.S. 816 (1976); Seiffer v. Topsy's Internat'l, Inc., 520 F.2d 795 (10th Cir. 1975); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Thill Sec. Corp. v. NYSE, 469 F.2d 14 (7th Cir. 1972); Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969). *But see* Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1007 n.1 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); Herbst v. IT&T, 495 F.2d 1308 (2d Cir. 1974). Class certifications can be appealed pursuant to 28 U.S.C. § 1292(b), *e.g.*, Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1213-14 (3rd Cir. 1976); Blackie v. Barrack, 524 F.2d 891, 900 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974), or by writ of mandamus where there is a usurpation of power. Schmidt v. Fuller Brush Co., 527 F.2d 532 (8th Cir. 1975); McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083 (9th Cir. 1975).

257 *See, e.g.*, Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976). One court of appeals recently suggested that U.S.C. § 1292(b) certification for appeal by the trial court is particularly appropriate in class actions. Sperry Rand Corp. v. Larson, 554 F.2d 868, 871 n.2 (8th Cir. 1977) ("district courts ought to be more receptive to certifying critical questions for interlocutory review"). *See also* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); note 246 *supra*.

that an order amending the certification order is appealable. The problems of delay and fragmentation posed by section 4(c)'s authorization of appeals of certification orders are even more significant here, since the section 5(d) order merely amends the certification order. Therefore, a very strong showing for allowing an immediate appeal of such an order should be required. At the least, an appeal should be permitted only if the amendment significantly alters the rights of the parties or class members or the conduct of the proceedings or if the court certifies the issue for appeal, as in 28 U.S.C. § 1292(b). Such a requirement would eliminate a party's appealing an inconsequential amendment to the certification order in order to delay the proceedings. The court could also then amend the certification order whenever appropriate without fear of precipitating an appeal.

H. *Dismissal or Compromise*

Section 12(a) follows federal Rule 23(e)[258] in requiring a hearing and court approval of all dismissals[259] or settlements of class actions, both before and after certification, except for those (involuntary) dismissals based upon an adjudication of the merits.[260] A hearing and court approval are designed to prevent abuses of the class action procedure by the representative, the defendant, or both, at the expense of absentees.[261] These abuses

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258 FED. R. CIV. P. 23(e) states: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

259 Section 12 properly makes the distinction between dismissals and court orders denying class status. The former is an attempt by one or both parties to eliminate the class issues from the litigation. It is not a ruling by the court that the action is an improper class action, which is governed by §§ 1-4. The court should be alert to efforts to circumvent the notice requirements of the section by an unopposed or weakly opposed motion to deny the class rather than a motion to dismiss. *See, e.g.,* Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971); McArthur v. Southern Airways, Inc., 556 F.2d 298 (5th Cir. 1977), *vacated on other grounds,* 569 F.2d 276 (5th Cir. 1978).

260 The court should also be alert to attempts to make a voluntary dismissal appear to be an involuntary dismissal on the merits, *i.e.,* failing to respond to discovery or failing to prosecute. *See, e.g.,* Papilsky v. Berndt, 466 F.2d 251 (2d Cir. 1972), *cert. denied,* 409 U.S. 1077 (1972) (failure to respond to discovery); Webster L. Eisenloh v. Kolodner, 145 F.2d 316 (3rd Cir. 1944), *cert. denied,* 325 U.S. 867 (1945) (dictum) (failure to prosecute).

261 *See, e.g.,* Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978); Magana v. Platzer Shipyards, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); *In re* Clark Oil & Refining Corp., 422 F. Supp. 503, 507 (E.D. Wis. 1976) (dictum); Smith v. Josten's Yearbook, 78 F.R.D. 154 (D. Kan. 1978).

include the representative's using the class action to enhance his individual bargaining position, the representative and the defendant settling to avoid adjudication of absentees' claims, and the sacrifice of absentees' interests for attorney's fees. Because of this potential for abuse, Rule 23(e) in effect imposes on federal courts a duty to protect absentees' interests in settlements and dismissals,[262] and section 12(a) imposes the same duty on state courts.

Section 12(b), again like Rule 23(e) and federal practice, requires notice to class members of settlements and most dismissals. Notice is required before dismissal (other than on the merits) or settlement of certified class actions[263] and is discretionary for dismissals without prejudice to the absentees before certification.[264] Notice here serves a prophylactic function: it deters collusion; assures absentees an opportunity to contest the proposed action, to take over representation, or to file their own suits; and protects class members who abstained from filing their own suits because of the class action.[265] Thus notice of a pre-certification dismissal is appropriate where there is some possibility that collusion exists or absentees relied on the class suit.[266]

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262 *E.g.,* Patterson v. Stovall, 528 F.2d 108, 112-13 (7th Cir. 1976); Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975); Zients v. La Morte, 459 F.2d 628, 630 (2d Cir. 1972); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 680 (S.D. Tex. 1976), *aff'd,* 557 F.2d 335 (5th Cir. 1978).

263 *See* UCAA § 12(h).

264 *Compare* Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615 (E.D. Wis. 1975); Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971); Rotzenburg v. Heenah Joint School Dist., 64 F.R.D. 181, 182 (E.D. Wis. 1974) *with* Held v. Missouri Pac. R.R., 64 F.R.D. 346, 351 (S.D. Tex. 1974) (not required where class would not have been certified); Muntz v. Ohio Screw Prods., 61 F.R.D. 396, 399 (N.D. Ohio 1973); Beaver Associates v. Cannon, 59 F.R.D. 508, 510 (S.D.N.Y. 1975); *see generally* Sheldon v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978).

265 *E.g.,* Pearson v. Ecological Science Corp., 522 F.2d 171 (5th Cir. 1975), *cert. denied,* 425 U.S. 912 (1976) (dictum); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); *Advisory Committee's Notes to Amended Rule 23,* 39 F.R.D. 98, 104 (1966).

266 *E.g.,* Shelton v. Pargo, Inc., 552 F.2d 1298 (4th Cir. 1978) (notice required only where court determines that collusion actually existed or if dismissal will prejudice claims of class members). In Shelton v. Pargo, Inc., on remand, the district court ordered notice when it found that the attorney for the class had agreed with the defendant not to represent any purported class members in litigation against the defendant. 81 F.R.D. 637, 641 (W.D.N.C. 1979). *See also* Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970).

Section 12(c), which governs the contents of notice of dismissals and settlements, incorporates the important elements of notice required in federal practice,[267] and supplements section 12(d), which outlines the options available to the court in ruling on the motion. Section 12(e) provides that the cost of notice under this section shall be paid by the party seeking such dismissal or as agreed in the settlement, unless the court determines otherwise after a hearing. This latter court authority is valuable to prevent prejudice to a defendant who may be deterred by notice costs from seeking dismissal for failure to prosecute class aspects of the suit. In such cases, the cost of notice should fall on the representative.

V. RELIEF

A class action procedure responsive to the interests of small claimants and those with limited means necessitates meaningful relief that is as broadly based as possible without being unfair to the parties or absentees. The Act goes a long way in making such relief available to members of a class action in the state courts. Section 15 of the Act gives the court unprecedented express flexibility in calculating and distributing class damages; it also allows the court to direct particular uses of the funds remaining after distribution to identifiable class members. Section 16 permits the court to award and control attorney's fees. And section 6 of the Act broadens the potential relief by recognizing the court's authority to issue a binding judgment in multi-state class actions.

A. *Multi-State Class Actions*

Although section 6 of the Act recognizes the viability of multi-

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267 *See In re* Four Seasons, 525 F.2d 500 (10th Cir. 1975); Rodgers v. United States Steel Corp., 70 F.R.D. 639, 644-45 (W.D. Pa. 1976); Grunin v. Internat'l House of Pancakes, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The notice should provide significant information, including a description of the proposed settlement; expenses to be deducted from gross amount; estimated range of individual recovery; the date, time, and place of the hearing; an invitation to class members to file written comments and attend the hearing; other options and effects of settlement; amount of requested attorney's fees; and opportunity for class members to object to the settlement.

state class actions in state court, it is nonetheless far narrower than is necessary or appropriate. In brief, the section permits the state court to exercise jurisdiction only over those members of a class who are subject to the court's jurisdiction under state law or whose home state permits the forum to exercise jurisdiction over them as part of a class action. As a result of this very narrow grant of jurisdiction, many worthwhile state court class actions, such as those for breach of contract, breach of warranty, and violation of state securities or antitrust laws, are likely to be precluded.

For example, in the most recent state supreme court decision on the subject, *Shutts v. Phillips Petroleum Co.*,[268] the Kansas Supreme Court upheld a class of lessors of oil properties, suing for royalties, where some of the lessors and some of the disputed properties were located outside of Kansas. If section 6 had been in effect in Kansas, however, the court would have been prohibited from including non-Kansas class members and properties in the class — to the detriment of all except (perhaps) the defendant. As it now stands, section 6 may also subject a defendant to inconsistent or varying adjudications in other state courts, since non-residents who cannot be included in the action under section 6 are free to litigate the same claim in another forum. For example, in a suit against an insurance company for interpretation of the insurance policy, or against an organization for interpretation of its by-laws, most out-of-state class members will be excluded under section 6.

Well-established legal principles do not require the limitation of multi-state classes to only those persons who would be subject to the state courts' jurisdiction. There is a significant distinction between jurisdiction over individuals (defendants) where "minimum contacts" is required,[269] and jurisdiction over persons adequately represented in a representative proceeding. In class actions, as in other representative suits, only the

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268 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978).

269 Hanson v. Denckla, 357 U.S. 232 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945). Recently, the Supreme Court held that the same standard applied for quasi in rem jurisdiction as well. Shaffer v. Heitner, 433 U.S. 186 (1977).

representative must be subject to the court's *in personam* jurisdiction in order to bind all represented parties, as long as the representation satisfies due process.[270] Indeed, numerous decisions of the United States Supreme Court and state supreme courts have recognized this broader view of jurisdiction over multi-state classes.[271] Restricting multi-state classes therefore precludes actions that are otherwise quite proper and is especially unfortunate in light of the increasingly multi-state nature of common commercial transactions, which calls for an expanded rather than restrictive multi-state approach to class actions.

Therefore section 6(a)(1) should instead provide that the state court may issue a judgment binding on any member of the class suing or being sued to the full extent of its jurisdiction. Although this provision is general it has the salutary effect of allowing each state to determine the extent of its courts'

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270 Hansberry v. Lee, 311 U.S. 32, 40-42 (1942); Appleton Electric Co. v. Advance United Expressways, 494 F.2d 126 (7th Cir. 1974); Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962); Gonzales v. Cassidy, 474 F.2d 67, 74 n.13 (5th Cir. 1973); Taylor v. Pacific Mut. Life Ins. Co., 214 N.C. 770, 778, 200 S.E. 882 (1939); RESTATEMENT OF JUDGMENTS, ¶ 26 (1942); 3B MOORE'S FEDERAL PRACTICE ¶ 23.11[5] (2d ed. 1978); L. CHAFEE, SOME PROBLEMS OF EQUITY 258 (1950); Kalven & Rosenfeld, *The Contemporary Function of the Class Suit,* 8 U. CHI. L. REV. 684, 696 n.39 (1941). There is disagreement among the states on binding nonresident class members having no minimum contacts with the forum. *See* note 274 *infra.* Recent commentators also have reached no consensus. *See* Forde, *Class Actions in Illinois: Toward a More Attractive Forum for this Essential Remedy,* 26 DE PAUL L. REV. 211 (1977); Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification,* 92 HARV. L. REV. 718 (1979); Comment, *Civil Procedure: In Personam Jurisdiction Over Non-resident Plaintiffs in Multistate Class Actions,* 17 WASHBURN L. J. 382 (1978); Note, *Toward a Policy-Based Theory of State Court Jurisdiction over Class Actions,* 56 TEX. L. REV. 1033 (1978); Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23,* 123 U. PA. L. REV. 1217 (1975); Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction,* 25 HASTINGS L. J. 1411 (1974); Comment, *Expanding the Impact of State Court Class Action Adjudication to Provide an Effective Force of Consumers,* 18 U.C.L.A. L. REV. 1002 (1971).

271 Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (members of fraternal organization); Sovereign Camp, W.W. v. Bolin, 305 U.S. 66 (1938) (members of unincorporated association); Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961) (members of ASCAP); Hartford Life Ins. Co. v. IBS, 237 U.S. 662 (1914) (beneficiaries of life insurance policies); Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal. 2d 307, 74 P.2d 761 (1973), *aff'd sub. nom.,* Neblett v. Carpenter, 305 U.S. 297 (1938) (life insurance policy holders); Taylor v. Pacific Mut. Life Ins. Co., 214 N.C. 770, 200 S.E. 882 (1939); Larson v. Pacific Mut. Life Ins. Co., 373 Ill. 614, 27 N.E.2d 458 (1940), *cert. denied,* 311 U.S. 698 (1940). *See also* cases cited in note 272 *infra.*

jurisdiction.[272] Such a provision also will avoid the tremendous problems inherent in section 6(a)(1), which would require analysis of each class member's circumstances to determine whether any basis for jurisdiction exists. Particularly where the potential class includes businesses, such as in a state antitrust law class action, the task could be herculean. In stark contrast, basing state court authority to bind non-residents on adequacy of representation requires but one determination — adequacy of representation — for the whole class.

B. *Calculation and Distribution of Monetary Relief*

Unlike section 6, section 15 is a vital and imaginative part of the Act. Among other things, in subsection (c), it authorizes the calculation of aggregate class damages and a modified fluid recovery, both of which are of great advantage in damage class actions involving small claims.

Aggregate damage calculation permits the court to award damages to the class as a whole without any determination of individual damages, thus allowing class maintenance and recovery when each class member's recovery cannot be calculated accurately or at all, but the total class damages can be determined. This is essential in a case like a transportation or

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272 *Compare* Shutts v. Phillips Petroleum Co., 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied,* 434 U.S. 1068 (1978) (withholding jurisdiction of court over class of multistate plaintiffs of gas royalty owners); Paley v. Coca-Cola Co., 389 Mich. 583, 209 N.W.2d 232 (1973) (upholding nationwide class of "Big Name Bingo" contestants); Horst v. Guy, 211 N.W.2d 723 (N.D. 1973) (class of residents and former residents of North Dakota in suit to recover veteran's benefits); Hoover v. May Dept. Stores Co., 62 Ill. App. 3d 106, 378 N.E.2d 762 (1978) (allowing jurisdiction over multistate class of department store chain's credit customers) *with* Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976), *cert. denied,* 429 U.S. 828 (1976) (limiting plaintiff class of magazine subscribers to state residents); Feldman v. Bates Manufacturing Co., Inc. 143 N.J. Super. 84, 362 A.2d 1177 (1976) (affiliating circumstances between forum state and litigation necessary before judgment could bind nonresidents); Spirek v. State Farm Mut. Auto. Ins. Co., 65 Ill. App. 3d 440, 382 N.E.2d 111 (1978) (limiting plaintiff class of all policyholders of defendant in the United States with defined medical payment claims to state residents). *See generally* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS ch. 4 (1978 Supp.). While this approach is contrary to the goal of uniformity, § 6(a)(1) as now drafted fares no better since each state will, in any event, be required to determine the extent of its own jurisdiction. At the very least, however, this suggested revision of § 6(a)(1), will permit those states which have applied the full reach of their jurisdiction against non-resident class members to do so in the future.

utility overcharge action, where no records are available to identify class members or their damages but the total overcharge can be determined readily by mathematical formulas.[273] Other areas of the law in which aggregate damages may be necessary or appropriate include employment discrimination[274] and antitrust litigation,[275] where aggregate damages are more easily calculated than individual recoveries. Sampling techniques, computer projections, and expert witnesses are useful tools in calculating damages.[276]

However the class award is calculated, whether individually or for the entire class, section 15(c) allows the court much flexibility in distributing the class award. Under section 15(c) individual class members are to be given an opportunity to make claims upon the class funds, and those who can be identified and located without expending a disproportionate share of the recovery may claim their share of the money. The distribution scheme can presumably take any reasonable form: the funds can be distributed to each member according to his injury, or if individual claims cannot be determined, the funds can be distributed in equal shares on a *pro rata* basis according to some formula.[277] Funds remaining after the distribution, because class members cannot be identified or located or because they did not claim or prove the right to money apportioned to them, are either returned to the defendant or given to one or more

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273 *See* Daar v. Yellow Cab Co., 67 Cal.2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (en banc) (1967); Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied,* 373 U.S. 913 (1963).

274 *See* Senter v. General Motors Corp., 383 F. Supp. 222 (S.D. Ohio 1974); United States v. United States Steel Corp., 520 F.2d 1043, 1055-56 (5th Cir. 1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

275 *See In re* Antibiotics Antitrust Act., 333 F. Supp. 278, 287 (S.D.N.Y. 1971); Robertson v. National Basketball Ass'n, 1976-2 TRADE CAS. (CCH) ¶ 61,029 (S.D.N.Y. 1976); *In re* Sugar Indus., 73 F.R.D. 322 (E.D. Pa. 1976); *In re* Western Liquid Asphalt, 487 F.2d 191 (9th Cir. 1973).

276 *See In re* Antibiotics Antitrust Act., 333 F. Supp. 278 (S.D.N.Y. 1971); Fischer v. Wolfinbarger, 55 F.R.D. 129 (W.D. Ky. 1971); Chmieleski v. City Products Corp., 71 F.R.D. 118, 161-63 (W.D. Mo. 1976); *In re* Arizona Bakery Prods., 1976-2 TRADE CAS. (CCH) ¶ 61,210 (D. Ariz. 1976); Rosado v. Wyman, 322 F. Supp. 1173, 1180-82 (E.D.N.Y. 1970), *aff'd,* 437 F.2d 631 (2d Cir. 1971).

277 *See* Robertson v. National Basketball Ass'n, 1976-2 TRADE CAS. (CCH) ¶ 61,029 (S.D.N.Y. 1976); F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 662-63 (2d Cir. 1941).

states as unclaimed property. To determine this alternative distribution, the court must hold a hearing and consider a number of factors. If the court returns the funds to the defendant, conditions can be imposed on the use of those funds (*e.g.*, installation of pollution control devices could be required of an auto manufacturer in a pollution case).[278]

The imposition of conditions on the use of the reverted funds is a type of "fluid" or "cy pres" recovery, whereby funds are awarded for the benefits of the general class of persons to whom the actual class members belong, that is, the "next best" class. The fluid recovery mechanism has been employed a number of times by federal courts in distributing settlement funds.[279]

On the other hand, several other federal courts have refused to permit a fluid recovery or to use aggregate damage calculations. These courts have asserted that these two mechanisms are unfair and that they improperly alter substantive law or violate due process.[280] But these allegations, particularly as they relate to the Act, will not withstand analysis. In fact, the allegations seem to be primarily an expression of anti-class action sentiment. The allegation of improper judicial alteration of substantive law should have no bearing on the Act inasmuch as the states' adoption of the Act will constitute policy decisions by non-judicial officials approving such changes in the law. And, as for the allegation of unfairness, it seems more unfair to allow a

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278 UCAA § 15(c)(7); *see* Comment to § 15 of the Act.

279 *See* West Virginia v. Chas. Pfizer & Co., Inc., 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971) (settlement); *In re* Antibiotics Antitrust Act., 333 F. Supp. 278 (S.D.N.Y. 1971); Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 1975-1 TRADE CAS. (CCH) ¶ 60,180 (S.D.N.Y. 1975) (unclaimed funds paid to U.S. Treasury). *See also* United States v. Chicago Black Hawk Hockey Team, Inc., 1972 ECON. CONTROLS REP. (CCH) ¶ 9998(9) at 9987 (N.D. Ill. 1972) (Internal Revenue Service's requiring a future price reduction for past violation of price controls); Securities Exchange Comm'n v. Texas Gulf Sulphur, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971) (unclaimed damage fund returned to corporation to benefit only current shareholders).

280 *See* Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978) (en banc) (contrary to substantive antitrust law and Rules Enabling Act); *In re* Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971); Barnett & Sons, Inc. v. Outboard Marine Corp., 1974-2 TRADE CAS. (CCH) ¶ 75,243 (D. Del. 1974); Holland v. Goodyear Tire & Rubber Co., 1975-2 TRADE CAS. (CCH) ¶ 60,522 (N.D. Ohio 1975).

defendant who has been found liable to escape with a windfall than to permit some inaccuracy in allocating and distributing damages to injured parties.[280a] Indeed, Congress adopted this view in approving comparable procedures for certain antitrust actions.[281]

The due process allegation is more difficult to address because it has been made only in conclusory terms. It is apparently premised on some substantive right to an adjudication of individual claims even after the defendant's liability has been proved and the total harm can be determined with reasonable accuracy.[282] But here again, the unfairness of permitting the defendant to retain illegally acquired funds should outweigh any inaccuracy in damage determinations.

Section 15, however, is not an unadulterated improvement over federal practice. Subsection (b) prohibits class actions for "damages fixed by a minimum measure of recovery provided by any statute." While it is clear that this provision does not prohibit class actions for actual damages suffered, it is not clear

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280a *See In re* Sugar Indus., 73 F.R.D. 322 (E.D. Pa. 1976); Grad v. Memorex, 61 F.R.D. 88, 103 (N.D. Cal. 1973); *In re* Antibiotics Antitrust Act., 333 F. Supp. 278, 282-83 (S.D.N.Y. 1971); MULTI-DIRECT LITIGATION PANEL, MANUAL FOR COMPLEX LITIGATION ¶1.43 (1976 ed.); Moore, *The Potential Function of the Modern Class Action Suit,* 3 CLASS ACT. REP. 47 (1973); Note, *Managing the Large Class Action:* Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426 (1973); Note, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. CHI. L. REV. 448 (1972); Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 MICH. L. REV. 338 (1971). The Supreme Court has repeatedly approved the concept of approximation of damage amounts once the fact of damages is shown. *See* Bigelow v. RKO Pictures, 327 U.S. 251, 264 (1964) ("jury may make reasonable and just estimate of the damages"); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("risk of uncertainty [in damage calculations] should be thrown upon the wrongdoer instead of upon the injured party"); Zenith Radio Corp. v. Hazeltime Research, Inc., 395 U.S. 100, 114 n.9 (1969); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927).

281 *See* Hart-Scott Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15d, 15e (1976).

282 Procedural due process would not be affected since the defendant presumably will be given every opportunity to contest the aggregate calculation and the method of distribution, thereby satisfying the constitutional right to a hearing. *See* Rodino Antitrust Act, 15 U.S.C. §§ 15d, 15e (1976); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971) ("the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages"); *see also* sources cited in note 280a *supra. Cf.* Dickinson v. Burnham, 197 F.2d 973, 980-81 (2d Cir. 1952) (defendant not entitled to eighth amendment jury on each individual claim where jury permitted to contest class wide calculation).

(and the Comment does not explain) to what extent other class actions are prohibited. It appears that this section would prohibit class actions for penalties under the Uniform Consumer Credit Code,[283] and class actions for the Uniform Commercial Code's penalty for commercially unreasonable repossession or resale procedures.[284] But while it may also appear that the provision prohibits class actions under the Truth in Lending Act (TILA),[285] a good case can be made that it does not do so.

There are three reasons why it is likely that section 15(b) of the Act permits TILA class actions to be brought in state court. First, the Supremacy Clause[286] arguably precludes states from refusing to enforce TILA suits, including class actions, in state court. Second, the TILA provision for class action damages[287] does not seem to fall within the language of section 15(b). So far from fixing a minimum recovery, the class action recovery section of TILA specifically provides that "no minimum recovery shall be applicable" and instead imposes a ceiling on class recovery.[288] Third, section 15(b) does not prohibit class actions brought to obtain a "penalty,"[289] and TILA damages are generally considered to be a statutory penalty.[290]

This last reason suggests as well why section 15(b) would permit state court class actions under consumer protection or usury statutes where the statutory remedy is voiding the contract. Where a partially executed contract is declared void, the court-enforced return of the payments already made arguably constitutes not a "recovery" but a "penalty," and so the amount already paid under the contract would not constitute a "minimum measure of recovery." This is even more certain

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283 *Cf.* U.C.C.C. § 5.201; Circle v. Jim Walter Homes, Inc., 535 F.2d 583, 589 (10th Cir. 1976) (class action permitted for suit under U.C.C.C.).

284 *See* U.C.C. § 9-507 (1972).

285. 15 U.S.C. § 1640(a)(2) (1976) provides for class action enforcement of Truth in Lending violations. Congress specifically found that class actions by private consumers were critical to the statutory scheme. *See* S. REP. No. 93-278, 93d Cong., 1st Sess. 12, 14-15 (1973); S. REP. No. 92-750, 92d Cong., 2d Sess. 12 (1972).

286 U.S. CONST. art. VI.

287 15 U.S.C. § 1640(a)(2)(B) (1976).

288 *Id.*

289 *Cf.* N.Y. CIV. PRAC. LAW § 901(b) (McKinney 1976).

290 *E.g.*, Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir. 1974).

when principles of equity rather than any statute dictate the return of payments made, as when a contract is voided *ab initio*. It might also be noted that section 15(b)'s prohibition of a "minimum recovery" but not of a "penalty" permits antitrust class actions, where treble damages — usually considered a penalty[291] — are typically recoverable.

Section 15(b) was added to the final version of the Act as part of a compromise with conservative forces to insure the Act's approval.[292] The section is not without appeal; the theory behind it is that a party should not be subjected to a large class judgment for a mere technical violation of a statute.[293] However, it conflicts with the Act's policy to facilitate class actions, particularly those brought to deter wrongdoers by enforcing statutes. A better approach would focus more precisely on the substantive statute: where good sense suggests or experience shows that it would be unfair to subject a person to a class action for violating a particular statute, that very statute should be drafted or amended to prohibit the bringing of class actions under it for the statutory minimum recovery.[294] The federal courts have handled this problem by denying class certification under Rule 23(b)(3) where the statutory recovery sought is grossly disproportionate to the statutory injury.[295]

C. *Attorney's Fees*

Section 16(a) establishes the critical principle that all attorney's fees received in class actions are subject to court control. As federal courts have come to recognize,[296] court control

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291 *See, e.g.*, Blumenthal v. American Soc'y of Travel Agents, Inc., 1977-1 TRADE CAS. (CCH) ¶ 61,530 (N.Y. Super. Ct. 1977). The court did not allow a class action because the New York class action statute, N.Y. CIV. PRAC. LAW § 901 (McKinney 1976), expressly barred class suits to recover a penalty. The court further held that the representative could not waive the treble damages for the class members in order to serve certification, since that would indicate inadequate representation.

292 *See* § 15(b).

293 *See, e.g.*, Ratner v. Chemical Bank, 54 F.R.D. 412 (S.D.N.Y. 1972).

294 *See* U.C.C.C. § 5.201; 15 U.S.C. § 1640(b)(2)(B) (1976).

295 *Compare* Ratner v. Chemical Bank, 54 F.R.D. 412 (S.D.N.Y. 1972) *with* Circle v. Jim Walter Homes, Inc., 535 F.2d 583 (10th Cir. 1976). Similar authority can be found in UCAA at §§ 2(b)(2), 3(a)(7).

296 *See, e.g.*, Alpine Pharmacy v. Chas. Pfizer & Co., 481 F.2d 1045 (2d Cir. 1973);

of attorney's fees is necessary to insure that absent class members' interests are not sacrificed, as they might be where a defendant is willing to pay large attorney's fees to avoid paying a larger class award. Court control also serves the salutary purpose of safeguarding the integrity of the class action procedure, the legal profession, and the judiciary; the large lawyers' fees which have occasionally resulted in recent years have been much criticized as an abuse of the judicial system.[297]

Factors which the courts are to consider when ruling on a fee petition or settlement involving fees are listed in section 16(e) of the Act. They are derived from established federal practice[298] and, as a list, constitute an adequate guide for the courts. It would also be worthwhile for the courts to follow the federal practice of requiring an evidentiary showing of lawyers' hours and the type of work performed in that time,[299] since it is the best procedure to prevent abuse. Another federal practice which should be adopted is awarding fees to public interest attorneys based on the reasonable market value (*i.e.*, private bar) of their services. Such a measure would serve to encourage actions vindicating significant constitutional or statutory rights.[300]

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975); Pitchford v. Pepsi, Inc., 531 F.2d 92 (3rd Cir. 1976); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674 (S.D. Tex. 1976); Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973); MULTI-DISTRICT LITIGATION PANEL, MANUAL FOR COMPLEX LITIGATION ¶ 1.46 at 57-58 (1976 ed.).

297 *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719-20 (5th Cir. 1974); Oliver v. Kalamazoo Bd. of Educ., 73 F.R.D. 30, 44 (W.D. Mich. 1976).

298 The Comment to § 16 states that the factors are taken from Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973). *See also* City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974); Brandenburg v. Thompson, 494 F.2d 885 (9th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975).

299 *See, e.g.*, Dowell v. Board of Educ., 71 F.R.D. 49, 60 (W.D. Okla. 1976); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 678 (S.D. Tex. 1976); Technology Fund Inc. v. Kansas City S. Indus., Inc., 72 F.R.D. 433, 438-40 (N.D. Ill. 1976).

300 *See, e.g.*, National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975); Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976); Tillman v. Wheaten-Heaven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975); Thompson v. Madison Co. Bd. of Educ., 496 F.2d 682 (5th Cir. 1974); Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); Brandenburg v. Thompson, 494 F.2d 885 (9th Cir. 1974); Fairley v. Patterson, 443 F.2d 598 (5th Cir. 1974); Dowell v. Board of Educ., 71 F.R.D. 49 (W.D. Okla. 1970); Aspira of N.Y., Inc. v. Board of Educ., 65 F.R.D. 541 (S.D.N.Y. 1975). *But see* Souza v. Travisono, 512 F.2d 1137 (1st Cir.), *vacated on other grounds*, 423 U.S. 809 (1975); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233, 1253 (D. Kan. 1974).

Generally, a class attorney's fee may be paid either from the funds awarded to the class or by the defendant in addition to the damage award.[301] Subsection (c) of section 16 adopts the former scheme, payment out of a "common fund,"[302] but subsection (d) grants the court the important authority to charge the fees against the defendant where only equitable relief is awarded to the class and the judgment "vindicates an important public interest." This latter authority will likely encourage the filing and prosecution of class actions for equitable relief.

Subsection (b) properly applies the same principle to attorney's fees of the party opposing the class as section 14 does for costs of that party;[303] plaintiff class members are not responsible for a successful defendant's fees, but defendant class members may be responsible for a successful plaintiff's fees.

Conclusion

In light of federal court restrictions, the Uniform Class Actions Act provides a class action procedure well-suited to facilitate damages class actions in the state courts. Although a product of compromise, the Act not only opens the legal system to those with small claims or limited means, but also expedites the handling of multi-state class actions and fosters uniformity among the states.

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301 Where no monetary recovery is involved, class counsel's fees may also be charged against class members under the "common benefit" theory. This theory applies only where the defendant owes a fiduciary duty to class members or is an organization of class members so that the award against the defendant actually comes from benefitted class members. *See* Hall v. Cole, 412 U.S. 1 (1973) (union defendant and union member class members); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (corporation defendant and shareholder class members). In practice, the "common benefit" theory would appear to be rarely available since it also strictly requires that fees must come only from the benefitted class members, not an unrelated defendant; there must be an ascertainable class benefitted; and the costs must be capable of being spread proportionately among all beneficiaries. Mills v. Electric Auto Lite Co., *supra;* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 265 n.39 (1973); D.C. Fed'n of Civic Ass'ns v. Volpe, 71 F.R.D. 206, 208 (D.D.C. 1976); Alderman v. Philadelphia Housing Auth., 71 F.R.D. 187, 190-91 (E.D. Pa. 1976).

302 *See* City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 341 F. Supp. 1077 (E.D. Pa. 1972), *aff'd,* 487 F.2d 161 (3rd Cir. 1973); National Treasury Employees Union v. Nixon, 521 F.2d 317 (D.C. Cir. 1975).

303 *See* notes 235 to 239 and accompanying text *supra.*

The provisions establishing an opt-out procedure rather than permissive joinder and authorizing flexible damage calculation and distribution are essentials for an effective class action procedure. The court's flexibility in ordering the form of notice is also helpful, although the Act's inflexible requirement of some notice in all class actions is a significant obstacle to the bringing of therapeutic class actions for declaratory or injunctive relief. The Act properly gives authority to the court to issue orders regulating the conduct of the proceeding and to supervise settlements, dismissals, and attorney's fees. Importantly, it also provides detailed guidelines on procedural matters designed to aid state courts on issues relevant to class actions, such as discovery, counterclaims, appeals, and statute of limitations. Some such provisions, as compromises, may inhibit realization of full class relief. Nonetheless, provisions such as the one authorizing attorney's fees awards are particularly valuable.

The Act is not without faults, however. Indeed, its express goal of state uniformity is seriously undermined by the expansive discretion reposed in state courts to determine criteria for class maintenance. As long as a state can narrowly interpret the Act to permit only the most traditional class actions, the variation of class action procedures among the states will be extreme and counterproductive. Suggested changes in the Act incorporated in the following appendix are designed to avoid such problems and to encourage state use of the Act's class action procedure.

APPENDIX

UNIFORM CLASS ACTIONS [ACT] [RULE]

Section 1. *Commencement of a Class Action*

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:

(1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and

(2) there is a question of law or fact common to the class.

Section 2. *Certification of Class Action*

(a) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(b) The court may certify an action as a class action, if it finds that (1) the requirements of Section 1 have been satisfied, (2) a class action should be permitted for the fair and efficient adjudication of the controversy, [and] (3) the representative parties fairly and adequately

will protect the interests of the class; *and (4) one of the requirements of Section 3(c) is satisfied.*

(c) If appropriate, the court may (1) certify an action as a class action with respect to a particular claim or issue, (2) certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary, or (3) divide a class into subclasses and treat each subclass as a class.

Section 3. *Criteria Considered*

(a) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Section 2(c), the court shall consider, and give appropriate weight to, the following and other relevant factors:

[(1) whether a joint or common interest exists among members of the class;

(2) whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class;

(3) whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

(4) whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;

(5) whether common questions of law or fact predominate over any questions affecting only individual members;]

(1)[(6)] whether other means of adjudicating the claims and defenses are impracticable or inefficient;

(2)[(7)] whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(3)[(8)] whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(4)[(9)] whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;

(5)[(10)] whether it is desirable to bring the class action in another forum;

(6)[(11)] whether management of the class action poses unusual difficulties;

(7)[(12)] whether any conflict of laws issues involved pose unusual difficulties; and

[(13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.]

(b) In determining under Section 2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(1) the attorney for the representative parties will adequately represent the interests of the class;

(2) the representative parties do not have [a] *any significant* conflict of interest in the maintenance of the class action; [and]

[(3) the representative parties have or can acquire adequate financial resources, considering Section 17, to assure that the interests of the class will not be harmed.]

(c) To be maintained as a class action, the action must satisfy one of the following requirements:

(1) that a joint or common interest exists among members of the class;

(2) that the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class;

(3) that adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantiall impair or impede their ability to protect their interests;

(4) that a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;

(5) that common questions of law or fact predominate over any questions affecting only individual members.

Section 4. *Order on Certification*

(a) The order of certification shall describe the class and state: (1) the relief sought, (2) whether the action is maintained with respect to particular claims or issues, and (3) whether subclasses have been created.

(b) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in Section 3(a).

(c) An order [certifying or] refusing to certify a class action is appealable.

(d) Refusal of certification does not terminate the action, but does preclude it from being maintained as a class action.

(e) An order certifying the action as a class action is appealable only if the court certifies that the order involves a controlling question of law the resolution of which will materially advance the litigation.

Section 5. *Amendment of Certification Order*

(a) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.

(b) If notice of certification has been given pursuant to Section 7, the court may order notice of the amendment of the certification order to be given in terms [and to any members of the class] the court directs, *to class members adversely affected by the amendment if the notice is important to protect the interests of such class members.*

(c) The reasons for the court's ruling shall be set forth in the amendment of the certification order.

(d) An order amending the certification order [is appealable. An] *or an* order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

Section 6. *Jurisdiction over Multi-State Classes*

[[(a)] A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

[(1)] a basis for jurisdiction exists or would exist in a suit against the person under the law of this State [:] [or]]

[(a)] A court of this State may issue a judgment binding on any person who is a member of the class suing or being sued

[(1)] to the full extent of its jurisdiction [; or] if

[(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.]

[(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.]

Section 7. *Notice of Action*

(a) Following certification, the court by order, after hearing, [shall] *may* direct the giving of notice to the class.

(b) The notice, based on the certification order and any amendment of the order, shall include:

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) a statement of the right of a member of the class under Section 8 to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(3) a description of possible financial consequences on the class, *if any;*

(4) a general description of any counterclaim being asserted by or against the class, including the relief sought;

(5) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(6) a statement that any member of the class may enter an appearance either personally or through counsel;

(7) an address to which inquiries may be directed; and

(8) other information the court deems appropriate.

(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining *whether notice shall be given, and if so,* the manner and form of the notice [to be given], the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice. *The form of the notice, both in language and length, shall be designed to be understandable to the average class member.*

(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100, *and to whom the court determines notice shall be given,* shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(e) For members of the class not given personal or mailed notice under subsection (d), *and to whom the court determines notice shall be given* the court shall provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

(f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted, *except that the court may*

allocate the notice costs among the parties in appropriate cases. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

(g) The court may order that steps be taken to minimize the expense of notice, *including an order requiring the party opposing the class to compile at its own expense the names and addresses of class members to the extent such information is in its possession or under its control.*

Section 8. *Exclusion*

(a) A member of a plaintiff class may elect to be excluded from the action unless (1) he is a representative party, (2) the certification order contains an affirmative finding under paragraph (1), (2) [or] (3), *or (4)* of Section 3 [(a)] *(c)* or (3) a counterclaim under Section 11 is pending against [the member or] his class or subclass.

(b) Any member of a plaintiff class entitled to be excluded under subsection (a) who files an election to be excluded, [in the manner and] in the time specified in the notice, is excluded from and not bound by the judgment in the class action.

(c) The elections shall be [docketed] [made a part of the record] in the action.

(d) A member of a defendant class may not elect to be excluded.

Section 9. *Conduct of Action*

(a) The court on motion of a party or its own motion may make or amend any appropriate order dealing with the conduct of the action including, but not limited to, the following: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given as the court directs, of (i) any step in the action, (ii) the proposed extent of the judgment, or (iii) the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action; (3) imposing conditions on the representative parties or on intervenors; (4) inviting the attorney general to participate with respect to the question of adequacy of class representation; (5) making any other order to assure that the class action proceeds only with adequate class representation; and (6) making any order to assure that the class action proceeds only with competent representation by the attorney for the class.

(b) A class member not a representative party may appear and be represented by separate counsel.

Section 10. *Discovery by or against Class Members*

(a) Discovery under [applicable discovery rules] may be used only on order of the court against a member of the *certified* class who is not a representative party or who has not appeared. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, [whether representatives of the class are seeking discovery on the subject to be covered], *the necessity that the party opposing the class secure the information from absent class members,* and whether the discovery will result in annoyance, oppression, or undue burden or expense for the member of the class.

(b) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.

Section 11. *Counterclaims*

(a) A defendant in an action brought by a class may plead as a counterclaim any claim the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim [a claim against a member of the class or] a claim the court certifies as a class action against a subclass.

(b) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under Section 7.

[(c) If a judgment for money is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a judgment for money, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable diligence.]

(c)[d] A defendant class may plead as a counterclaim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. The court shall order that notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.

(d)[e] A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for the purpose of exclusion under Section 8.

(e)[f] The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.

Section 12. *Dismissal or Compromise*

(a) Unless certification has been refused under Section 2, a class action, without the approval of the court after hearing, may not be (1) dismissed voluntarily, (2) dismissed involuntarily without an adjudication on the merits, or (3) compromised.

(b) If the court has certified the action under Section 2, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which shall specify the persons to be notified and the manner in which notice is to be given.

(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(d) On the hearing of the dismissal or compromise, the court may:

(1) as to the representative parties or a class certified under Section 2, permit dismissal with or without prejudice or approve the compromise;

(2) as to a class not certified, permit dismissal without prejudice;

(3) deny the dismissal;

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

Section 13. *Effect of Judgment on Class*

In a class action certified under Section 2 [in which notice has been given under Section 7 or 12], a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class *to whom notice was directed and* who has not filed an election of exclusion under Section 8 *and if required under Sections 7 or 12*. The judgment shall name or describe the members of the class who are bound by its terms.

Section 14. *Costs*

(a) Only the representative parties and those members of the class who have appeared individually are liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under Section 7 are taxable as costs in favor of the prevailing party.

Section 15. *Relief Afforded*

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

[(b) Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action.]

(b)[(c)] If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall give written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under Sections 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

Section 16. *Attorney's Fees*

(a) Attorney's fees for representing a class are subject to control of the court.

(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;
(4) the contingent nature of success;
(5) in cases awarding attorney's fees and litigation expenses under subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and
(6) appropriate criteria in the [state's Code of Professional Responsibility].

Section 17. *[Arrangements for Attorney's Fees and Expenses] Additional Funds for Representation*

[(a) Before a hearing under Section 2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.]

(a)[(b) [Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be] *if the court determines that costs are not being* defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.]

Section 18. *Statute of Limitations*

(a) The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of class[:] *with respect to the class member's individual claim.*

(1) upon his filing an election of exclusion;
(2) upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;

(3) except as to representative parties, upon entry of an order under Section 2 refusing to certify the action as a class action; and

(4) upon dismissal of the action without an adjudication on the merits.

(b) A class member's rights in class recovery are preserved through appeal, upon final judgment, of the class denial.

Section 19. *Uniformity of Application and Construction*

This [Act] [Rule] shall be construed and applied to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] [Rule] among states enacting it.

Section 20. *Short Title*

This [Act] [Rule] may be cited as the "Uniform Class Actions [Act] [Rule]."

Section 21. *Repeal*

The following acts and parts of acts are repealed:

Section 22. *Time of Taking Effect*

This [Act] [Rule] shall take effect

BOOK REVIEWS

CRIMINAL VIOLENCE, CRIMINAL JUSTICE. By *Charles E. Silberman.* New York: Random House, 1978. Pp. ix, 540. $15.00.

*Review by Lloyd E. Ohlin**

In writing this book, Charles Silberman has set for himself a most ambitious task. Convinced by his research that "most of what is believed about crime and about the criminal justice system is false or irrelevant," (p. ix), he sets out to do more than just correct these errors and misunderstandings. He seeks "to change the way Americans think about criminals and crime and about the operation of our system of criminal justice" (p. ix). He has no illusions that this task is easy to achieve, for it "means changing the way Americans think about race, ethnicity, poverty, and social class; about the police, juvenile and adult courts, . . . prisons and jails; and about such questions as justice, punishment and deterrence" (p. ix).

To assist him in undertaking this mission, the author secured financial support from the Ford Foundation, the help of able field research assistants, and extensive advice and counsel from a most distinguished advisory commission of scholars and criminal justice experts chaired by Judge Shirley M. Hufstedler of the U.S. Court of Appeals. In fact, his lengthy acknowledgment of help from established contributors, together with the comprehensive bibliography and detailed citations, testifies to the diligence and thoroughness of his six-year search for understanding and solutions.

The sheer scope of this effort and its objectives inevitably invites comparison with the work of prior national crime commissions and special study groups that sought to cover in whole or part the same range of problems. Indeed, Silberman's survey and analysis may be usefully approached as condensed and updated offspring of the three major national crime commissions

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which preceded it: the President's Commission on Law Enforcement and Administration of Justice (1965-1967), the National Commission on the Causes and Prevention of Violence (1968-1969), and the National Advisory Commission on Criminal Justice Standards and Goals (1971-1974).

Like Silberman, these commissions were concerned with the sources of criminal violence in American life, the exploding citizen fear of victimization by street crimes and burglaries, and the apparent ineffectiveness of the system of criminal justice in response to these concerns. The Commissions, of course, had much larger budget and staffs and produced voluminous task force reports and collected papers to back up their general reports and detailed recommendations. But they all covered the same general subject areas. To a remarkable degree they adopted similar ideological and philosophical perspectives on the street crime problem as well as highly consistent findings and recommendations.

In light of these intensive studies of street crime and criminal justice in the United States by teams of highly qualified scholars and experts, one might well question what a much more limited, privately financed study could contribute by traversing the same ground. Yet the publication of this book has been eagerly awaited in expectation of fresh insights and proposals for action despite the fact that Silberman began his research in 1972 when the third crime commission was still at work. Such hopes can be partly explained by the considerable reputation the author gained as a perceptive analyst of social problems through earlier studies of race relations (*Crisis in Black and White,* 1964) and education (*Crisis in the Classroom*). Commission studies inevitably result in reports and recommendations which lack the coherence and relevant ordering of priorities which may flow from the attempt of a single individual to assimilate and make sense of a vast array of issues, facts, and theories. The enormous time constraints and coordination responsibilities imposed on key staff members of presidential commissions also allow little opportunity for careful contemplation of basic assumptions or construction of conceptual frameworks that integrate and order problems and solutions, facts and interpretations. Given enough time and help, an experienced an-

alyst might succeed in clarifying the central issues and strategic leverage points for new policies, though this is rarely done well.

The publication of *Criminal Violence, Criminal Justice* also follows a period of sustained challenge to the liberal reform doctrines advanced by the crime commissions and retrenchment of conservative definitions and solutions to crime. In the correctional field, policies of rehabilitation are being supplanted by demands for more immediate community protection through incapacitation of adjudicated offenders. Charges of judicial permissiveness and leniency in decisions on sentencing have led to numerous proposals to replace indeterminate sentence policies by legislative enactment of fixed sentence categories, mandatory minimums or maximums, or presumptive sentences with some allowance for mitigating or aggravating circumstances. In some states definite sentence schemes are already in operation and parole board discretion is severely limited or abolished. Prison and jail populations have also risen steadily throughout this decade. In short, the field of criminal justice and crime control is involved in an emotional ideological debate about its basic assumptions and central strategies. Would Silberman's new book be able to sort out fact from fiction amid these charges and countercharges among criminal justice professional advocates or distinguish reason from fantasy in proposed solutions? Could he do this and also at the same time change the way Americans in general think about crime and criminal justice?

This dual test may well reflect unrealistic expectations for any single treatise on crime and criminal justice today. It is my impression that scholars and professional policy makers in the field of criminal justice will thus be disappointed by the book, despite their agreement with most of Silberman's analysis. The book provides a clear statement on the nature and sources of criminal violence that effectively restates and validates the analyses conducted by the crime commissions and reflected in current sociological studies and texts. Silberman finds the roots of violent crime in the conditions of poverty, inequality, and racial discrimination; in the long run, his solution calls for the elimination of these conditions. In the short run, he points to more limited measures as possible ways to alleviate the pressures from these root causes, *e.g.*, enhancement of police

service functions as part of crime prevention and control, or investment on the community level to construct social networks of assistance and support for neighbors in trouble.

The sense of disappointment, however, does not arise so much from this analysis of violent crime and its roots in the first third of the book. To the contrary, that section marshals an impressive array of statistical data, ethnographic studies, popular stereotypes and myths about crime, autobiographical accounts by criminals, and personal observations, interviews, and anecdotes. Silberman's discussion provides insight, probing questions, and fresh perspectives that scholars, professionals, and the general public should find informative and convincing. The discussion of fear of crime is provocative and the chapter on race and crime adds a new dimension to earlier treatment of these issues. Silberman not only ponders the significance of the well-explored fact that blacks account for a disproportionate share of arrests than whites, but also shows that arrest and prison incarceration rates for blacks are three and four times as high as those for Hispanic peoples in such disparate locations as New York City, San Antonio, San Diego, and other areas where both minorities coexist and experience similar problems of poverty and discrimination. This leads Silberman into an enlightening discussion of the sources of violence in the black experience in America, drawing on a reservoir of understanding gained in his earlier discussion of race relations in *Crisis in Black and White* (1964).

The problem arises more clearly in the following sections of the book which deal with policies, resources, and solutions involved in the response of the criminal justice system to crime. Following a general chapter on issues of punishment and deterrence, Silberman deals successively with the police, courts and prosecution, juvenile justice, corrections, and community crime prevention. The author is dubious that greater punishment than our system now provides can expect to achieve much more than it already does in pursuit of deterrent effects on crime. He believes police are likely to have more effect on crime by increasing service functions and rewarding such work than by incremental increases in police response time efficiency or variations in patroling practices. Similarly, prosecutors, judges, and

court staff doing a reasonably good job of sorting out the serious offenders are likely to be hindered rather than helped by the present wave of sentencing reform. Current prison and jail systems offer little hope for altering criminal tendencies or protecting the public except over the short-term and at the cost of making inmates more criminal. Silberman also supports the view that over-preoccupation with the authority problems of status offenders has seriously diverted the juvenile justice system from its appropriate function. In short, he infuses his analysis with a deep sense of pessimism about the limited effect which even major changes in these systems are likely to have on the crime problem.

Silberman's assessment of these matters appears to reflect accurately the current state of research findings. However, his analysis does not directly confront the current conservative policy thrust to increase the degree of short-term community protection at the long-term expense of a wide variety of offenders and probably the community itself. Silberman too quickly dismisses the law-and-order proposals currently in vogue without advancing the debate on its merits. Furthermore, he offers no suggestion other than making the present system work somewhat better until the longer-term attack on the basic social causes begins to register effects.

This may be good advice and may accurately reflect all we can do. Lowering our expectations of what the criminal justice system can accomplish apart from large scale societal changes would probably be a wise accommodation to the reality of crime and its control. But this counsel does not address the need to deal more effectively with the present state of fear about crime and its devastating impact on the quality of life. Despite increased costs of confinement, harsher measures designed to increase the deterrent effect of criminal justice practices appeal because they appear to deter so much more quickly and economically than other proposals. It may be that community development programs advocated by Silberman will reduce crime more certainly in the long run. I thing they will. But such proposals do not effectively counter or address the advantages and disadvantages of the more punitive policies now being advanced. Silberman clearly has little faith in the utility of these

punitive policies. However, his position on these matters is not developed to pose a counter strategy for the time it may take to implement the social changes he properly views as essential to a basic solution to high rates of criminal violence in the United States. The sense of disappointment, therefore, is likely to be felt primarily by those readers who are inclined to oppose punitive prescriptions but are uncertain of both the factual or theoretical grounds for opposition and the short-term viable alternatives.

Some of this same sense of disappointment may also be experienced by the general reader interested in solutions to criminal violence. The injunction to undertake long-term social reform measures or to support local community action projects may not seem responsive enough to the desire for some more direct targets for action. Silberman's lucid and persuasive writing will be more effective in giving the reader a realistic awareness of the nature of crime in our society than will various crime commission reports. The life style descriptions of "robbers, hustlers and other dudes," in chapter 3 will shatter many myths about crime and the effectiveness of the justice and enforcement response. However, the lack of ready alternative programs is still likely to induce apathy rather than mobilization of citizen involvement.

It is difficult to identify precisely my sense of disappointment in this book. I have rarely read a book with which I have been more in agreement with the author's philosophy and findings. It may therefore well be that expectations of a definitive response to the dominant law-and-order rhetoric of the day are inappropriate. Silberman's decision to address the deeper, longer-range issues of criminal violence in our society may be the most constructive contribution which can now be made. Further public debate, education, and reflection about these problems may be required before better policies can be developed. But until that time, this exposure to the realities of crime and criminal justice will not resolve the major law-and-order policy issues that confront us today.

THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS. By *Raymond T. Nimmer.* Chicago: American Bar Foundation, 1978. Pp. xiv, 195, notes. $10.00, cloth; $5.00, paper.

*Review by Judge John C. Cratsley**

A knowledgeable court administrator recently wrote me that "while the past ten years have seen a great many studies of courts, few of them represent serious academic or critical works. Many are technical management studies, attempting to apply modern business management techniques to particular courts. Others are anecdotal or 'how to' pieces by practitioners."

Fortunately, *The Nature of System Change* by Raymond Nimmer is an addition to those "few" studies of serious academic value. With painstaking and sometimes redundant care, Nimmer reviews the complexities of the criminal justice system, the inadequacies of past efforts at reforming it, and the challenges of creating a usable model for planning and evaluating future efforts at system change. He begins, quite logically, where the court administrator began, by listing the shortcomings of prior work on the topic. According to Nimmer, previous works have been statistical "impact research," "evaluation research," and social science models. These books have emphasized specific reform proposals at the expense of an in-depth look at the strategies for modifying that behavior. Against these works, Nimmer sets up his own analytical framework in order to evaluate the courts in terms of the reform process and systemic behavioral change rather than in terms of substantive reform proposals.

Measured by his own standards, Nimmer's book accomplishes a great deal. It develops an interesting look at the operational workings of the judicial process and how the judicial process reacts to and interacts with reform. At the same time, however, the book outlines defining frameworks, relationships, and

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hierarchies of values that are ultimately as confining, and as subjective, as those of its predecessors.

At the outset, Professor Nimmer gives the reader a comprehensive look at both the substantive goals and the tactics of reform as well as the thinking behind those reforms. The role of legislatures, appellate courts, and bureaucrats, in addition to some sound speculation about their working philosophies when formulating reforms, are thoughtfully presented. Against that background, Nimmer imposes his richer "stimulus-response analysis" as a means of assessing "impact relationships" in the criminal justice system. To assess motivations and interactions within the court system, Nimmer asks us (and helps us) to define who the actors are in the criminal justice system, what interests they have, and why they behave as they do. Stated his way,

> A simple model treats each participant as an independent actor whose actions are influenced by three variables: (1) the options perceived as available to the individual, (2) the tangible incentives attached to each option, and (3) the subjective value associated with the various incentives (p. 29).

According to Nimmer, this type of behavior analysis is best done when one can separately evaluate the role of statutes and case law, agency policies, and informal norms of the motivations and expectations of the participants.

Having woven this elaborate fabric of judicial participants, interactions, and resultant behavior, Nimmer then suggests a helpful — if over-simplified — dual classification for reforms — optional and mandatory. Optional reforms are those which are triggered by the choice of one participant in the criminal justice system. An example is the establishment of a court diversion program to offer selected defendants an alternative to confinement or punishment. Mandatory reforms, on the other hand, automatically apply to all cases and must be followed, unless avoided or subverted, by all affected parties. One example which Nimmer examines is the stipulation of maximum and minimum sentencing norms for certain crimes.

With these preliminary foundations laid, Professor Nimmer then devotes a healthy one-half of his book to an elaborate case study and empirical analysis of reforms directed at judicial

delay. After a definitional chapter, he evaluates two types of mandatory administrative reform — plea bargaining conferences and court calendar practices (*i.e.*, individual versus master calendar) — followed by one type of optional legislative reform — speedy trial statutes. His description of these important reforms proceeds along recognizable lines: the reasons (stimuli) for the changes, the behavior (responses) of the various participants in reaction to them, and the explanation for that behavior (impact analysis) in terms of the priorities of the participants and how their priorities were affected by the required or optional new approaches. He highlights the massive reforms undertaken in this area as a springboard to preliminary generalizations about the mechanisms and motivations of judicial reform.

However, the heart of Professor Nimmer's book, and his real contribution to scholarship on the formulation and implementation of judicial reform, comes in the finale. In his last chapter he develops the insightful notion of "incentive manipulation." According to Nimmer, "system impact occurs only if a reform supplies incentives sufficient to overcome existing motivation" (p. 177); there must be behavioral incentives generated by the reform which have a direct impact on the operation of the system in flux. While much of his perceptive and well-organized writing can be summarized as the presentation of a traditional "systems model" with operational inputs and outputs,[1] the concept he develops here is entirely new. One may well disagree with his ratings of various motivations, but no one can dispute the wisdom of isolating and ranking the reasons participants accept or reject change in a system as complex and systematically stable as courts. Indeed by drawing hierarchies of motivation, Nimmer facilitates the predication and direction of reform within the system. He points to various incentives such as a desire to minimize time in court or to obey intra-agency policies as "significance" factors motivating reform in the courts and the judicial system generally.

Even more innovative, but particularly difficult for judges

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1 C. SHELDON, THE AMERICAN JUDICIAL PROCESS: MODELS AND APPROACHES 164-199 (1974).

and court administrators to grasp and use, is Professor Nimmer's final "analytical format" designed to examine the impact and motivational stimuli behind reform within the judicial system. His format is an elaborate, over-arching chart which can, if all the relevant data are available for reliable predictions, lead to sound judgments about the outcomes of particular reforms — *i.e.,* no behavior change, compliant change, or evasive or resistant change. In this chart, Nimmer attempts to provide a framework for projecting reform by diagraming the likely interactions of ideal reform planning with the actual problems and personnel within the system. And Nimmer, like others interested in the role of theory and the development of explanatory models useful to thoughtful practitioners,[2] defends his efforts nobly:

> Ignoring the search for theory is short-sighted and counter productive, even if the goal of research is to facilitate more effective response to problems. Even a cursory review of the literature shows that reform measures reportedly fail to achieve their objectives. Closer review of the literature reveals similarities at every stage of the reform enterprise, whatever the substantive goals. This leads to the observation that successful reform for any specific goal will be facilitated by an understanding of the general phenomenology of reform (p. 194).

As should be evident, I welcome Professor Nimmer's contribution and his diligent efforts to apply his work to the everyday needs of the judicial system for modernization. And while it is not my purpose to criticize so exhaustive and delicately balanced an effort (*i.e.,* a counter-thought for every generalization), I would only suggest that several other developments on the judicial scene are relevant yet unfortunately ignored by the calculus of his theory. First, there are emerging leadership roles not mentioned in his work such as full-time chief and regional administrative judges whose motivations for reform are far different from those of the typical trial judge emphasized by Nimmer's studies. Second, there are emerging notions of the trial judge's role resulting from merit selection plans, contested

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2 G. BELLOW AND B. MOULTON, THE LAWYERING PROCESS INTRODUCTION at xxiii-xxiv (1978).

judicial elections, and rising public interest in courts that are not so *status quo*-oriented and accommodating as Nimmer describes most judges. These attitudes often include a far more aggressive stance on managing case flow, denying continuances usually given the bar in the past and becoming involved in plea bargaining and civil settlements.[3] Third, there are emerging institutions for judicial discipline prompting trial judges to be far more open, on the record, and grounded in rules than ever before. The reality of censure or removal for not following a mandatory reform, or subverting a participant's efforts to use an optional reform, is increasingly present and must be considered in any type of impact analysis.

My point, if not already clear, is that given the broad conceptual scope of his work Professor Nimmer may well have missed some of the externally imposed and internally derived trends currently disrupting the judicial actors he describes as harmoniously atuned. If, for example, the fear of public censure or removal by a judicial conduct commission motivates judges to follow a reform it is worthy of treatment in Nimmer's book. Similarly, internally generated motives by which contemporary judges seize upon narrow public interest goals (*e.g.*, prompt completion of litigation or public understanding of their courthouse experience) to the exclusion of all others are ignored by the analytical format of his book. To his credit, however, Nimmer has crafted an understandable model which appears to have the inherent flexibility to adjust to these new incentives and motives as they become explicit.

Professor Nimmer has, in short, given us a valuable new perspective on the age-old problem of institutional reform. Like any dynamic system, the inputs and actors were changing as he wrote. Only time can show whether his vision is expansive enough to encompass those changes in the judicial process.

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3 A recent magazine article on judges and delay notes this development. It quotes Harvard Law Professor Arthur Miller as saying: "There has been a slow but important change in attitude by the bench, from judges as 'passive umpires' to judges getting involved actively from the beginning." TIME, Jan. 8, 1979, at 63.

RECENT PUBLICATIONS

LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976. By *Robert Stevens*. Chapel Hill: University of North Carolina Press, 1978. Pp. 627, appendices, bibliography, index. $30.00.

Law and Politics: The House of Lords as a Judicial Body is an exhaustive treatment of the judicial work of the highest court in the English legal system. By examining the work of the House through the professional lives of the Law Lords, Robert Stevens elucidates changes that individuals bring to the law. Working all the while within relatively broad conceptual categories, Stevens begins by focusing on the rise of utilitarianism and its impact on the House of Lords and the judicial system in the 19th century. According to Stevens, English judges, drawn increasingly from the professional and mercantile classes as the nineteenth century progressed, were staunch formalists and loathe to disturb the decisions and mandates of Parliament. Their resulting declaratory theory of the law stifled judicial creativity for decades and underscored the sorry absence of a tradition of professional law teaching and serious legal criticism. By 1932, the *Report of the Committee on Ministers' Powers* carried the Rule of Law "to the outer limit" and blessed the courts' eternal separation from anything resembling decisions based on policy (p. 194).

That such a separation occurred is not surprising. In spite of its shaky intellectual foundation, the dichotomy was accepted because the "social structure of England provided a unity of interest among the legal profession, the Civil Service, and the bulk of successful politicians" (p. 194). After the Second World War the general tide of modernization began to rearrange the social structure. Its effects were seen in the law when in the 1960's a new group of Law Lords turned away from substantive formalism towards a Realist view of the law and a more creative function for the final appeals court.

Stevens thus fleshes out the broad outline of his study by extensive consideration of the substantive law involved, including the position of virtually every Law Lord on what appears to be

every significant case that came before the House. The trends revealed are not startling and on the whole coincide with the changes in society. Perhaps the clearest example is the law of taxation. Except during the Second World War, when the emergency presumably dictated results, the House read successive Finance Acts as penal legislation and seemed to relish frustrating the Commissioners of Inland Revenue. In the 1960s, however, the trend of general modernization seems to have produced both a strict anti-tax avoidance provision in the 1960 Finance Act and a willingness on the part of the House to enforce it.

In short, Stevens does a thorough and totally convincing job of illustrating recent changes in judicial style and the emergence of the final appeals court as a self-conscious developer of the law. By emphasizing this historical emergence, Stevens leaves to other studies what he himself calls the unprobed "psychological and sociological bases of these changes" (p. 589). Given his look at changes in the law and the judges' way of determining the law, those bases are more than ever important to an understanding of the contemporary British judicial system.

FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816. By *Mary K. Bonsteel Tachau.* Princeton: Princeton University Press, 1978. Pp. 199, appendices, bibliography, index. $16.50.

Examining the entire caseload of the federal courts in Kentucky from 1789 to 1816, Mary K. B. Tachau provides the first indepth institutional history of the lower federal courts in the early days of the Republic. Her findings require major revision of the legal history of this period and raise numerous questions to be tackled by other scholars.

The central discovery, the surprising number of federal cases and proceedings, underlies her primary argument that the federal courts were "accessible, visible, and deeply involved in the concerns of the population" (p. 12). Indeed, Ms. Tachau postulates that the courts acted more directly upon Ken-

tuckians than did any other branch of the federal government. She finds that in a period when the Supreme Court handed down 457 decisions, the federal courts in Kentucky acted on 2,290 causes.

The work surveys both criminal proceedings, where the most controversial matters were efforts to enforce the unpopular internal revenue laws, and civil cases, which were primarily actions for case, covenant, and debt. Her research combines a thorough familiarity with the court records with extensive use of private manuscripts and local newspapers. Through the focus upon Henry Innes, the state's leading judge for the entire period, the book enlivens institutional history with those important personal idiosyncracies, particularly personal and political dislikes, which profoundly affected legal developments in frontier Kentucky.

Ms. Tachau's discovery of a strong reliance upon traditional English common law forms and English cases undercuts the recent view that early American courts exhibited a bitter hostility to all things English. More importantly, her emphasis upon the importance of local political and practical concerns in shaping judicial proceedings offers a welcome antidote to recent studies which separate doctrinal development from its local social and political context. At the same time, her view of the role of local partisanship conflicts with the broader economic development model articulated by Morton Horwitz and the general ideological interpretation developed by followers of Bernard Bailyn.

Although the work examines court employees and federal officers, it does not give enough attention to the state of the local bar. Neither does it compare the workings of the federal judiciary with those of the state courts. Thus we are unable to learn whether there were major differences and, if so, what they were. These omissions do not seriously weaken the work, however, and may safely be left to later inquiries.

Through her examination of one state, Ms. Tachau has offered a striking reinterpretation of American legal development. Other scholars must now take up the challenge of discovering whether Kentucky is exemplary or unique.

THE SUPREME COURT REVIEW 1978. Edited by *Philip B. Kurland & Gerhard Casper.* Chicago: The University of Chicago Press, 1979. Pp. 409. $30.00.

The latest edition of the annual Supreme Court Review from the University of Chicago continues the pattern of excellence we have come to expect from that series. Consisting of diverse essays by distinguished lawyers, historians, and social scientists, each volume presents informed analyses of past and present opinions and addresses important public law issues which have come under Court consideration.

Two insightful articles on administrative law highlight this edition. Daniel Polsby examines the Supreme Court's opinion in *F.C.C. v. National Citizens Committee for Broadcasting (NCCB),* while Antonin Scalia considers the relationship of the Administrative Procedure Act, the D.C. Circuit, and the Supreme Court, as expressed in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.* Administrative law practitioners and scholars will find these essays welcome guides through some of the maze of current judicial review of agency action.

Examining the important role of the D.C. Circuit in developing administrative law, Professor Scalia argues that the D.C. Circuit has progressively eviscerated the APA by replacing the rudimentary procedural mandates of the Act with a more elaborate, evolving, court-made scheme sometimes described as an ever-growing common law. At the same time the Circuit has de facto made its positions unreviewable through ambiguous and alternate holdings. According to Scalia, the *Vermont Yankee* case brings into question both the ability of the Supreme Court to establish coherent principles of law in this area and the willingness of the D.C. Circuit to be guided by the Supreme Court.

Professor Polsby likewise underscores the expansive role the D.C. Circuit has staked out for itself through the extension of judicial power over substantive rulemaking competence of an agency. He analyzes the Supreme Court's general thrust in *NCCB* and finds in it the seeds of the view that the court "can

seldom, if ever, defensibly upset the agency's decisions on how the First Amendment relates to communications policy" (p. 5) and that the judicial role in all substantive policymaking by agencies should be small.

Other essays include a revisionist interpretation of the Waite Court by historian Michael Les Benedict, an essay outlining a theory of double jeopardy by Peter Westen and Richard Drubel, theologian Martin Marty's perceptive analysis of two Supreme Court decisions concerned with religion and the First Amendment, and a consideration of the institutional press and its First Amendment privileges by Margaret A. Blanchard.

GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT. By *Raoul Berger*. Cambridge, Ma.: Harvard University Press, 1977. Pp. 418, appendices, bibliography, indices. $15.00.

Through a close examination of legislative debates and contemporary commentary, Professor Berger outlines the background of the drafting of the Fourteenth Amendment and argues that the intention of the framers was to provide a limited response to the needs of blacks newly released from slavery. He attacks the recent academic and judicial attitude of indifference toward the "original intention" of the drafters of the Amendment, contending that the Court may not "assume a power not granted in order to correct an evil that the people were, and remain, unready to cure" (p. 409).

Emphasizing the pervasive racism that shaped American society in the Reconstruction period, Berger draws upon an impressive range of sources to document his contention that the framers' goals were narrow and their techniques restricted. According to Berger, the substantive rights to be protected were identified by the privileges or immunities clause — fundamental rights described by Blackstone, such as personal security and freedom to move about and to own property, and articulated in the Civil Rights Act of 1866. The equal protection clause was similarly limited in scope: to secure those rights against

discriminatory state legislation, so that there could no longer be one law for whites and another for blacks. Finally, the judicial machinery to secure the rights was to be supplied by non-discriminatory due process of the several states.

At the same time, Berger argues, the drafters expressed no intention to encroach on state control of suffrage and segregation. He asserts, for example, that Negro suffrage was extensively debated and deliberately excluded from the Amendment's reach. Consequently, Berger criticizes the Warren Court's reapportionment and desegregation decisions for exceeding constitutional bases.

Berger's research is meticulous, his argument persuasive. Both the text and the notes reflect a thorough familiarity with the scholarly debates on the subject, and opposing arguments are dealt with point by point. The real debate with Berger must come not on the basis of his analysis of the genesis of the Amendment, but on his contention that the Court and society must continue to be bound by that original limited scope.

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