THINKING ABOUT COURTS: TOWARD AND BEYOND A JURISPRUDENCE OF JUDICIAL COMPETENCE

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This article reviews arguments about limitations on judicial competence or capacity, focusing on the need to go beyond such arguments to understand courts and their problems. Theoretical limitations on the competence and capacity of courts are compared with the record of judicial performance. The study examines performance in three areas in which courts are most likely to be thought ineffective: (1) cases involving unrepresented defendants, such as debtors or tenants; (2) disputes among persons with intimate or ongoing relationships; (3) extended impact cases. It is shown that courts adapt to changing circumstances and perform quite well, even with these difficult types of cases. Reforms are still needed, but rather than focusing narrowly on the courts, they should be directed at a wider range of social goals, such as strengthening family and community institutions which have been diminished by increasing urbanization and industrialization.

I. INTRODUCTION

American courts are doing too much. That is the message of numerous commentaries issuing under such titles as "The Legal Explosion" (Barton, 1975), "Legal Pollution" (Ehrlich, 1976), "Hyperlexis" (Manning, 1977), "The Imperial Judiciary" (Glazer, 1975), "Runaway Courts" (Buchanan, 1979), and "Too Much Law, Too Little Justice" (Tribe, 1979). These commentaries describe a legal order and judicial system burdened by citizen demands and assailed by unprecedented efforts to use courts as a vehicle for social engineering. They regret, in part if not entirely, the expanded size and scope of law and of the judiciary. They invoke democratic theory and majoritarian values to cast doubt on the legitimacy and propriety of the law and policy making functions discharged by judges subject to little or no electoral discipline. Somehow it

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does not seem right that many of the most important social and political decisions are being made by the least accountable of public officials.

Furthermore, critics contend that there is a trade-off between the scope and effectiveness of legal control and judicial decision making; the more courts do, the less they do well. The courts do not possess the institutional competence or capacity to deal with the range of questions that come before them. Typical is the statement of Judge Simon Rifkind (1976: 5): "the courts are being asked to solve problems for which they are not institutionally equipped or not as well equipped as other available institutions." The implicit if not explicit concern of those who write about the competence or capacity of the judiciary is to limit what courts may do to those things that they can do well (Fiss, 1979). Considerations of legitimacy are also raised in a growing call for the tightening of jurisdictional limits, increased judicial restraint and a revival of private institutions that once served to perform many of the functions now exercised by courts.

Criticisms of the legitimacy and/or competence of courts are largely, though not exclusively, reserved for what are commonly recognized as civil matters. There is general agreement that adjudication of criminal liability is the proper province of courts. Many would, of course, contend that legislatures have defined with excessive liberality both the forms of conduct that courts are directed to find actionable and the range of punishments that courts are empowered to impose. We leave this and comparable debates over adjustments in substantive law to others. The argument that courts are doing too much, as we understand it, has a somewhat different connotation—namely, that in civil matters courts find their way into questions best resolved in other ways. While this theme is often commingled with arguments about caseload and delay and criticisms of substantive over-reaching in specific doctrines, the real argument goes much further than many critics recognize or acknowledge. At its extreme, it suggests that the inappropriateness for judicial decision of many matters now framed as court cases derives from the structure and organization of the courts themselves, and cannot be cured through incremental changes in the substantive law applied in particular cases.

Arguments about judicial competence or capacity direct attention to the internal operation of courts. They evaluate courts in terms of an *a priori*, axiomatic model of adjudication

(Fiss, 1979). It is our intention to review arguments about limitations on judicial capacity, to identify the ideological underpinnings of such arguments, and to suggest the need to go beyond them in order to understand courts and their current problems. Critics of court competence misunderstand the nature of judicial institutions. They underestimate the demonstrated ability of courts to evolve new mechanisms and procedures in response to implicit or explicit societal demands. They are too often content to evolve theories about judicial competence from a handful of "worst" case studies (Horowitz, 1977).

Axiomatic models against which court performance is often evaluated are either too abstract or too far removed from what courts actually do and have done throughout American history. For example, such models are generally addressed to court cases in which the parties bring a dispute before a judge to be tried, decided, and made the subject of some formal remedy. In fact, courts rarely try the cases brought to them. Thinking about competence in terms of the ability of courts to reach and enforce decisions misses perhaps their most important function: providing a framework within which parties negotiate and bargain (Sarat, 1976; Galanter, 1979). It is as important to assess the capacity of courts to facilitate "bargaining in the shadow of law" (Mnookin and Kornhauser, 1979) as it is to evaluate the effectiveness of judicial decision making. Moreover, discussions about court capacity must be placed in a cross-institutional context. The capacity of courts to act in specific areas must be judged against the capacity of legislative, administrative, or private institutions. Focusing only on courts implies that other institutions could—and would—do as well or better; yet, for any particular category of cases, this needs to be demonstrated, not assumed. Finally, discussions about judicial competence or capacity must connect with discussions about social context and social problems. Is the "imperialism" of courts a cause or a result of deteriorations in private and public life? Does the growth of law and the increasing activism of judges respond to or precipitate changes that threaten cherished American values? Commentaries on the state of the judiciary should be commentaries on the state of our politics and society. Most are not. Before investing in radical surgery on American courts, a clear sifting of the real causes of court problems is required.

This sifting begins by separating considerations of the legitimacy of courts from those of competence or capacity.

Challenges to the legitimacy of courts have been mostly rhetorical, the verbal thunderbolts of academics or politicians offended by a particular Supreme Court decision. Despite *Brown* v. *Board of Education* (1954) and its aftermath, attacks on the legitimacy of the Supreme Court have rarely animated the consciousness of the public (Black, 1960; Adamany, 1976) or motived actual changes in the responsibilities or practices of the judiciary. Generations of acquiescence work to deprive accusations of illegitimacy or usurpation of even their rhetorical force (Black, 1960). Raoul Berger notwithstanding, we have become used to a judiciary that intermittently makes law and policy (Berger, 1978; but see also Murphy, 1978).

There is certainly no evidence that the difficulty of the courts today in securing compliance with controversial decisions is primarily attributable to any widely held conviction that they are usurping powers reserved to other institutions—whatever the rhetoric of the opposition to those decisions. Implementation of particular decrees *is* sometimes difficult, but no general challenge to court power has occurred. Sporadic resistance to judicial commands has not led in recent years to retrenchment in judicial power to hear any class of cases or to grant any form of relief. South Boston residents resorted to violence when a judge desegregated their public schools; yet elsewhere "approximately 200 school districts with a combined enrollment of more than 5 million students are presently operating under court-ordered desegregation plans. . ." (Brief for the United States, *Columbus Board of Education* v. *Penick*, 1978: 87). There is historical precedent for the statutory annihilation of a court perceived to have encroached unduly on the legislative domain (Hurst, 1950: 125),[1] but post-1950 efforts to effect far more modest politically motivated curbs on our most powerful judicial bodies have failed repeatedly. The House of Representatives recently failed to muster even a simple majority in favor of a constitutional amendment that would have prevented courts from implementing school desegregation orders through assignment of pupils to schools outside their immediate neighborhoods (*New York Times*, July 25, 1979: 1). This vote came shortly after a sharply divided Supreme Court had refused to overturn sweeping decrees aimed at desegregating schools in two large urban systems.

[1] Of the historical precedent in question, let it be noted that the year was 1822 and that the victimized body, the Kentucky Supreme Court, refused to recognize its demise and required but four years to achieve formal reinstatement.

All of this does not mean that considerations of legitimacy are unimportant in assessing the role of courts. Abysmal court performance can undermine popular acceptance and generate a strong constituency for legislative backlash (Hart, 1953). We doubt that this point has been or will soon be reached. To the extent that it remains a plausible scenario, our discussion of court capacity will not lack interest for those concerned about issues of legitimacy.

However, even in an era in which "landmark" decisions with broad social implications dominate much of the debate over the role of courts, most court decisions present no arguable infringement on legislative, executive, or electoral prerogatives. "[M]ost of the time, most courts still do what they have long been accustomed to doing" (Horowitz, 1977: 64). Much of our discussion will focus on such cases, which are not ensured a happy fate in the judicial system merely because no other locus of state power wants to embrace them as its own. Intriguingly, recent survey research indicates that the public has significantly less confidence in state and local courts than in the more activist—and hence presumptively less "legitimate"—federal bench (Yankelovich *et al.*, 1978: 31).

Once one puts aside the question of legitimacy, the argument that courts are doing too much becomes an argument about judicial competence or capacity, that is, about what courts can and cannot do well. Such discussions often assume that institutions recognizable as courts share a set of relatively fixed attributes and modes of decision making, and that these attributes generate inherent limitations on the kinds of issues and problems that such institutions can reasonably be expected to manage effectively. Court capacity refers to the fit between what courts are and what they do: to the way in which the resources, expertise and procedures of courts bear on their ability to provide effective resolution of the cases they handle. Some issues and problems cannot, according to critics of the courts, be resolved through judicial procedures. Nonetheless, the "explosion" of law brings such matters into the courts. The result is a "crisis" of competence or capacity (Horowitz, 1977; Chayes, 1976).

It is our intention in this essay to explore that apparent crisis. Three aspects of current federal and state court caseloads will be given particular attention: (1) the nonparticipation of defendants in significant numbers of proceedings that adversely affect their interests; (2) the presence of cases in which questions arising out of ongoing

social relations, relations of trust and spontaneity, are translated into questions of legal rights and obligations; and (3) the emergence of so-called "public law cases" in which victory for plaintiffs assumes the guise of "complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation" (Chayes, 1976: 1284).

We describe, then, salient features of what has been termed a crisis in the courts. But at least insofar as this ostensible crisis arises from doubts about the competence or capacity of courts, we contend that it is both manageable and capable of solution without significant changes in the way courts function. Indeed, we contend that the implementation of strategies calculated to compensate for court capacity limitations is already well underway, and that the steps still to be taken can be traced and predicted with reasonable confidence. Thus, the accusation that inspired this essay is even now losing most of its persuasive force.

Changes in courts, designed within the framework of traditional judicial procedures and intended to increase the ability of courts effectively to manage particular kinds of litigation, may—even as they accomplish that purpose—have dysfunctional side effects that are inadequately understood. When problems of competence or capacity are treated as simply, or even primarily, court problems, reform strategies may alleviate those problems only to generate broader social and political dislocations. The concern for judicial competence or capacity is, in our view, both overstated and misstated. It is overstated because it has tended to ignore the ability of courts to adapt to changes in the kinds of litigation with which they must deal; it is misstated because it tends to isolate court problems from the more fundamental social and political problems of which they are at best symptoms. The difficulties of courts are, in fact, the result of changes in both private and public institutions, and in social practices. As authority in families, churches, and schools has eroded, and as new burdens have been placed on government bodies other than courts, the courts have been asked to cope with problems that have sapped the strength of alternative institutions (Nisbet, 1975). Until we can come to terms with the causes of those fundamental changes in American society and politics, the problems of the courts will not be fully alleviated. Courts are more often the victims than the villains.

II. THEORETICAL LIMITATIONS ON COURT CAPACITY: SOURCES AND MANIFESTATIONS

Courts, we are often told, can't or shouldn't hear certain types of cases because they lack the resources, expertise, procedures, or time necessary to comprehend what is really at issue, provide a wise and fair resolution, and insure that their decisions are enforced (Horowitz, 1977). In order to cope with these deficiencies adequately, it is argued that courts must often employ techniques that are inappropriate. Infused with the activism of the age, courts are reluctant to decline even those cases which they are most ill-suited to handle (Gilmore, 1977). They increasingly reach out for new means of informing themselves, reaching decisions, and insuring compliance. The necessity for such exertions is taken to indicate the inappropriateness of particular problems for judicial resolution. Contemporary criticism of courts often begins with the assumption that court structure and, therefore, court competence or capacity are relatively fixed and unchangeable, rooted in idealized conceptions of what a court in America can or should be. In order to understand the current debate about court competence or capacity, we must examine those conceptions.

Criticism of judicial competence seeks to specify the "forms and limits of adjudication" (Fuller, 1978). It often relies upon and develops abstract models or theories of adjudication (see, for example, Aubert, 1963; 1967). Fuller's conception is among the most popular. He set out to distill essential features of adjudication, pursuant to a broad-gauged investigation of the "kinds of social tasks [that] can properly be assigned to courts and other adjudicative agencies" (1978: 354). The distillation process presumed, however, a reader willing to dispense with questions about the source of the "essential" features ultimately enumerated; the critical passages commence with phrases like "[n]ow I submit that" and "[i]t may be said that . . . ." Fuller defined an essential "core" of adjudicative processes that established common limits on their scope and capacity. These limits transcended details of structure, normative context, or available remedies. As a result, his treatment of issues of competence or capacity is not rooted in any particular historical experience and may seem overly abstract and somewhat arbitrary.

It is, however, possible to build a model of court capacity on a less speculative foundation, by rooting it in historical interpretations of the requirements of due process of law.

These requirements provide the frame within which adjudication proceeds.[2] Of course "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" (*Cafeteria Workers* v. *McElroy*, 1961; see also Kadish, 1957; Pennock and Chapman, 1977). It is, however, clear that court proceedings must meet certain "rudimentary" standards to pass constitutional muster (*Goldberg* v. *Kelly*, 1970). These minimum requirements find their source both in "settled usages and modes of proceeding" inherited from our British forebears (*Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 1855), and in judicially discerned "fundamental principles of liberty and justice" (*Hurtado* v. *California*, 1884).

The strictures which are most important in discussing judicial competence or capacity can be briefly summarized: Judges in federal and state courts (1) must be impartial; (2) must afford interested parties a meaningful opportunity to be heard; and (3) must decide cases by applying legal rules to facts adduced in the course of the proceedings. These concepts may seem to have all the substantive bite of an indifferent July Fourth oration, but from them can be derived the most significant restrictions on court competence or capacity.

Impartiality

The due process requirement of an impartial judge means more than just "an absence of actual bias in the trial of cases" (*In re Murchison*, 1955). Considerations of impartiality prevent judges from deciding cases that come before them even in part as a result of their own investigations. "Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer" (*In re Murchison*, 1955: 137). Were judges to identify and initiate cases on their own, it

[2] Of course, not all bodies that might be said to adjudicate controversies are governed by the due process clauses of the Federal Constitution. The name "court" has been and is applied to numerous bodies in the United States, ranging from general jurisdiction state trial benches to student panels charged with hearing violations of honor codes in private universities. Organized religions have a long and by no means extinguished tradition of placing ecclesiastical courts at the service of adherents. Lon Fuller (1979: 353) was prepared to extend the label even to "a father attempting to assume the role of a judge in a dispute between his children over possession of a toy." (See also Sarat and Grossman, 1975; Cardozo, 1921; Shapiro, 1975.) If virtually any organ for the resolution of disputes can be and is called a court, the utility of generalizations about court capacity seems suspect. We will proceed from a less speculative foundation, and at the same time narrow our subject appropriately, by limiting analysis to governmental, third branch institutions empowered to call upon the coercive powers of the state to enforce their decrees.

would be thought widely and perhaps accurately that they had formed a premature view of the merits (Fuller, 1978; Eckhoff, 1965).[3] The federal courts have tied their institutional passivity in part to commands implicit in Article III of the Constitution, finding in its demarcation of federal judicial power a grant of jurisdiction to adjudicate only cases brought by parties with a concrete stake in the outcome.

The reactive orientation of courts is frequently seized upon as the source of important limitations on court capacity. Horowitz (1977: 44) has noted that, although many decisions have social policy implications far transcending the dispute that prompted them, courts cannot take affirmative steps to ensure that the triggering incidents are in some sense "representative" of the universe of problems that the decision will affect:

> Because courts respond only to the cases that come their way, they make general law from what may be very special situations. Courts see the tip of the iceberg as well as the bottom of the barrel. The law they make may be law for the worst case or for the best, but it is not necessarily law for the mean or modal case.

Roscoe Pound made much the same point at the turn of this century, observing that courts "tr[y] questions of the highest social import as mere private controversies between John Doe and Richard Roe. And this compels a narrow and one-sided view . . ." (Pound, 1905: 346).

In addition, courts' reactive nature reduces their ability to enforce their decisions. Courts can perceive violations only through the senses of the parties to suits (Black, 1973); where a decree is called for that is not self-executing, and where there is reason to doubt the ability of the beneficiaries to monitor compliance effectively, courts may well find themselves issuing worthless pieces of paper. Thus, we are told, judicial decision making is out of place in response to grievances that, because of their intensity or complexity, are likely to confound any single attempt at amelioration: "if [constant supervision] is

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[3] This means that courts cannot self-start. They can perform their functions only when called upon to do so by parties lacking any ties to the judge who will serve as arbiter. Thus, judges are severely limited in their ability to choose the occasions upon which their powers will be invoked. What discretion they have is wholly negative in nature; they can derail actions short of a decision on the merits by various doctrinal devices, but they cannot independently isolate and frame as a judicial proceeding any dispute, however ripe for adjudication the matter might appear.

The requirement of party initiation is buttressed by our commitment to liberal legalism and limited government (Galanter, 1977), and by what Donald Black calls our "entrepreneurial model of law" (Black, 1973: 138). Such a model "assumes that each citizen will voluntarily and rationally pursue his own interests, with the greatest good of the greatest number presumptively arising from the selfish enterprises of the atomized mass. It is the legal analogue of a market economy" (Black, 1973: 138).

what is really required, the task is more appropriate for a bureaucracy than a court, and it should be left there" (Horowitz, 1977: 293).

While courts face these difficulties as a consequence of their mandatory adherence to the due process requirement of impartiality, due process raises no barrier to removal of one of the most commonly cited limitations on court capacity: the inadequate expertise of many generalist adjudicators, allegedly made manifest by the intricate factual questions that increasingly plague the courts.

One might argue that judge-as-generalist is an aspect of judge-as-neutral-arbiter, but that contention confuses the ability of an adjudicator to evaluate complex facts with his predisposition to favor particular litigants. Judges need not be untutored to be impartial. And it is difficult today to point to any substantial category of actions outside the patent field that consistently poses technical issues beyond the evaluative capabilities of the judges involved; even the potentially worst offenders, environmental cases, have in practice created surprisingly few problems of this kind (Smith, 1974: 635; see also Currie and Goodman, 1975: 84).

Affording Parties an Opportunity to be Heard

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause," wrote Mr. Justice Jackson in 1950, "but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case" (*Mullane* v. *Central Hanover Bank & Trust Co.*, 1950). These and similar Supreme Court pronouncements lend a more than exhortatory character to Lon Fuller's description of the adjudicative process:

> The distinguishing characteristic of adjudication lies in the fact that it confers on the affected parties a particular form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in their favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression (1978: 365).

This does not mean, as some criticisms of the adversarial process would have it, that judges are compelled to leave wholly to the parties the tasks of organizing cases and presenting evidence. Indeed, "the common law tradition is strong that the judge who conducts the trial should play an active part in directing it so that, within the issues made by the parties, the true facts of claims and defenses will emerge and the appropriate law be applied to them" (James, 1965: 5).

Fleming James observed almost fifteen years ago that "the tendency of modern American procedure is away from the extreme position which would render the judge a passive umpire" (1965: 7). This view is reflected, for example, in the Federal Rules of Evidence, which invite an active judicial role in the development of complex cases by empowering courts on their own motion to select and appoint expert witnesses (Rule 706).

The "tendency" described by Professor James has become, if anything, more pronounced in recent years (Chayes, 1976; Fiss, 1979). "It is now generally accepted that the use of a more active judge can be an aid, not a hindrance, to a basically adversarial system of justice" (Cappelletti and Garth, 1978: 228-229). The parties must have an opportunity to contest evidence and comment on questions raised, but their control of the proceedings does not extend to preventing the judge from independently demanding additional enlightenment on points he deems important to the resolution of particular cases. This contrasts with the unyieldingly passive posture demanded of judges in the initiation phase of cases.

The flexibility accorded judges within the participatory framework refutes earlier noted suggestions that the unrepresentative character of parties and cases will tend to elicit decisions at odds with sound public policy considerations. Judges are equipped, within our adversary system, to reach out for the information needed to alert them to the possible impact of their decisions on individuals not before the court. They are often assisted in this endeavor by litigants' resort to procedural techniques for bringing to courts' attention the shared interests of widely dispersed groups:

> [Through class action procedures] courts are more likely to see both the significance of the claims of a plaintiff and the consequences of imposing liability upon a defendant, and thus are more likely to arrive at a substantively just conclusion. Through class action procedures, moreover, the interests of absentees . . . are given representation in the litigative process, and thus are more likely to be given their due (Note, "Developments," 1976: 1353).

Chayes has identified a number of techniques available to judges to "increase the breadth of interests represented in a suit, if that seems desirable," including refusal to proceed until new parties are brought in, notice to a sample of class members "designed to apprise the judge of significant divisions of interest among the putative class," appointment of guardians ad litem for unrepresented individuals, and obtaining the views of court-designated amici (Chayes, 1976: 1311-1312). It is difficult to see how any other institutional actor is better

equipped to become informed of the ramifications of comparable decisions.

In one respect, however, the constitutional norm of participatory decision making has implications for court capacity that cannot be dismissed so readily. Precisely because our constitutional system accords so great a priority to fair hearings as a prelude to judicial action, due process has come to mean, at least for some, intimidating process. Defendants in civil cases find themselves officially summoned to take part in a formalized debate over their alleged transgressions, conducted under oath in a large public chamber before a high-status government official. If some defendants balk at this prospect and do not appear for reasons unrelated to the merits of their cases, the court is powerless to assist them by conducting an independent investigation. Here the impartiality considerations discussed earlier once again become dominant (Fuller and Randall, 1958).

Specialists are available for hire to guide the untutored through the toils of due process, but paradoxically it is precisely those defendants least able to afford such assistance who are most likely to find daunting the prospect of personal participation in a contested proceeding. The Supreme Court has conceded that, in the civil as well as the criminal sphere, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel" (*Goldberg* v. *Kelly*, 1970). Yet no court has proved willing to compel appointment of publicly subsidized attorneys to defend indigents subjected to civil suit.

If judges can do nothing to assist such litigants, neither can they decline to place the imprimatur of the state on facially adequate uncontested claims. Due process requires only an *opportunity* for a hearing. Plaintiffs who do all that the law requires to acquaint their adversaries with the choice between coming forward and losing by default cannot be penalized if those adversaries pursue a course that courts can only interpret as a willing and intelligent waiver. Courts cannot self-start, but once properly activated by a determined plaintiff they generally will proceed inexorably to judgment. By declining to appear, defendants convert courts into uncritical endorsers of plaintiffs' accusations. To the extent that the passivity of such defendants reflects their inability to surmount access barriers rather than a concession that the plaintiff's self-interested view of the case is substantially correct, a clear potential for judicial error is created. The access barriers, themselves an outgrowth

of a scrupulous commitment to participatory decision making, thus may interact with the impartiality requirement to produce unjust results. This is not a brief for a paternalistic and inquisitorial system of civil justice, but rather an acknowledgment of one of the limitations on courts guided by due process norms.

"A Too Exigent Rationality"

In a recent list of "rudimentary" due process safeguards against arbitrary adjudication, the Supreme Court included the "elementary requirement" that the arbiter's decision "must rest solely on the legal rules and evidence adduced at the hearing" (*Goldberg* v. *Kelley*, 1970: 271). Courts must produce decisions that accord with known or knowable normative principles which can be derived from constitutional, statutory, or common law. And they must apply these principles in the specific context of a record compiled during a hearing at which the parties have had a full opportunity to participate, a hearing focused on facts rendered crucial by the applicable rules of decision, rather than the facts most relevant to the underlying dispute. Were courts to deviate from this practice, the parties could justifiably complain that their hearing had not been meaningful; in addition, judges' impartiality would be continually open to question (Fuller, 1978; Eckhoff, 1967: 163).

An outgrowth of this norm is the requirement of interdependence between the rights asserted by the parties and the remedy imposed by the court: "the nature of the violation determines the scope of the remedy" (*Swann* v. *Charlotte-Mecklenburg Board of Education*, 1971). Judges are constrained not only when determining which party shall prevail, but also when prescribing the form that redress will take. A judge does not have discretion to impose any imaginable solution to the grievances brought for decision. Thus, a judge faced with a wife's personal injury action against her husband would make a mockery of judicial restraint and party participation if a finding for the plaintiff were accepted as an excuse for divorcing the parties. To do so would be to destroy the logical connection between the exercise of judicial power and the dispute providing the occasion for it. It is in the name of this principle that federal district courts have, for example, been denied the power to remedy urban school segregation by transferring affected pupils to suburban districts not chargeable with intentional segregative acts (*Milliken* v. *Bradley*, 1974).

These strictures create limitations on court capacity. Lon Fuller urged that some areas of human activity will not sustain "a too exigent rationality . . . that demands an immediate and explicit reason for every step taken": "[c]ertain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument" (Fuller, 1978: 371). Two different criteria are often used to identify the "raw material" that can be expected to pose special difficulties for courts. The first, proposed initially by Fuller, is "polycentricity," an intricate concept that is, in the realm of ideas, itself polycentric. Where a violation has multiple causes and implicates the shifting and diverse interests of numerous groups, a variety of remedial alternatives may exist among which no principled choice is possible. Moreover, an incomplete understanding of the web of causation can result in a court-imposed "solution" which, because of unpredicted ripple effects, creates problems surpassing those that prompted judicial intervention. The required linkage of the scope of the remedy to the nature of the violation may promote this result by restricting the part of the web that the judge can act upon directly. Fuller and other commentators (e.g., Boyer, 1972; Sander, 1976) have urged that in such situations adjudication is markedly inferior to more informal and tentative processes, such as negotiation among the affected interests. "Compromise outcomes are often not defensible by resort to reason" (Horowitz, 1977: 22-23).

A second means of isolating cases that are unlikely to fare well in court is to look to the "relational distance" between the parties (Black, 1973; Sarat, 1976). Courts, it is argued, do not do well when resolving disputes that arise in relationships characterized by a high degree of mutual interdependence or ongoing interaction. Courts may subject such delicate matters to a very considerable degree of overkill. The object of judicial intervention in disputes is to bring them "to an end by determining whether the plaintiff or the defendant prevailed" (Rifkind, 1976: 101). Given the context of rights in which adjudication occurs, it is inevitable that judicial decisions will rather clearly state whether the claim originally asserted as the basis for the lawsuit was or was not valid. The judge is thus obligated, by virtue of his fidelity to the rule of law, to declare which party was or was not at fault. This is an unfortunate approach to adjusting tensions within relationships involving trust, spontaneity, and reciprocity. Here adjudication has the tendency to disrupt rather than to heal, forcing people to cast

their relationships in terms of rights and cognizable grievances (Macaulay, 1963; Merry, 1979). The clear declarations that attend principled decision making may be inappropriate for relationships with a long and intimate history, in which provocation and retaliation intertwine to obscure real causes.

Table 1. Limitations on Court Capacity

Nature of Limitation	Source of Limitation	Likely Manifestations of Limitation
Courts cannot *sua sponte* monitor and enforce their decrees	Requirement of judicial impartiality (which forces a reactive posture upon courts)	Ineffectuality of many decrees imposing significant long-term obligations on parties
Courts are not equipped to investigate independently the merits of uncontested but unmeritorious actions	Requirement of judicial impartiality (which prevents judges from playing devil's advocate)	Erroneous decisions in many cases involving defendants unable to secure legal representation (procedural formalities designed to ensure effective participation create access barriers, rendering default by such defendants and unreliable proxy for informed acknowledgments of liability)
Courts cannot provide ad hoc, compromise resolutions of disputes	Requirement that judicial decisions be justifiable by reference to general principles	Inability of courts to resolve polycentric controversies as effectively as institutions committed to seeking negotiated outcomes
Courts cannot process and resolve disputes without dramatizing and escalating them	Requirement of fair hearing, coupled with judicial obligation authoritatively to declare legal rights and impose legal obligations	Adjudications that unnecessarily disrupt relationships characterized by intimacy or mutual interdependence

The most important limitations on court capacity, rooted as they are in established constitutional principles of due process, are relatively fixed (see Table 1). They are built into the very fabric of the American judiciary and can be expected to survive any foreseeable procedural adjustments or resource reallocations. At least, this is what critics of judicial competence or capacity contend. The import of their arguments is that any court, whatever its expertise, compassion, and efficiency, will perform badly if confronted with certain types of demands. These arguments, summarized in Table 1, also assume that the most significant activities of courts are those in which judges *try* and *decide* cases.

In the sections that follow, we shall try to show that both of these contentions are untenable. Each misconceives the way courts operate. Due process is flexible enough, and courts have proven adaptable enough, to cope with the most difficult challenges to competence or capacity. Courts can and do respond in ingeniously adaptive ways—sometimes on their own, sometimes with outside assistance—to complex and difficult types of litigation. This is not to say that their

ingenuity is unlimited or that every issue is equally well suited for adjudication. But the crisis of judicial competence or capacity is more often found in textbooks than in courtrooms. Judges live and work with the problems that critics contend are intractable. They cope with considerable prowess and within the limits of due process. Most court cases are not even resolved by judges. Negotiating, bargaining, threatening, and settling do not cease when complaints are filed; judgments about court competence or capacity must take into account the possibly unique ability of courts to promote informal social ordering. Failure to recognize this aspect of the judicial role diminishes the utility of arguments about judicial capacity.

However cast, arguments about failures of competence or capacity tend to be political statements about the desirability of particular court decisions or aspects of legal doctrine. Such analyses of judicial capacity regularly reveal impatience with the substantive outcomes produced by courts. The political coloration of such criticism is, however, neither uniform nor predictable. While the right marshals forces against judicial activism on a wide range of social issues such as busing and abortion, the left questions the willingness and ability of courts to deal effectively with litigation against indigents, and advocates of every ideological cast assail judicial meddling in interpersonal disputes of various types. Those who question judicial competence or capacity often begin their arguments by citing perceived changes in the business of courts, changes that have ushered in new categories of controversy with which courts seem ill-equipped to cope.

III. THE RECORD OF JUDICIAL PERFORMANCE

Worried commentators are often heard warning that courts are being overwhelmed by an increased volume of cases and the introduction of new types of litigation (Rosenberg, 1972; Schaefer, 1976).[4] There is, however, some doubt about the evidence on which such assumptions are based. The significance of the rising volume of civil cases is subject to many interpretations, both as to origins and implications.

Inferences from litigation or filing rates are often misleading. Filings are a poor approximation of what actually

[4] For assessments of litigation rates and changes in types of litigation, see National Center for State Courts, 1978; Grossman and Sarat, 1974; Friedman and Percival, 1976; Lempert, 1978; McIntosh, 1978; Baum, Goldman, and Sarat, 1978; Wanner, 1974; Laurent, 1959; Dolbeare, 1967; Heydebrand, 1977; Kagan *et al.*, 1977.

happens in courts. It is necessary to distinguish between cases filed and cases actually heard: between litigation rates and trial rates. Thus, although Samuel Krislov and Keith Boyum demonstrate that during the period 1962 to 1977 the proportion of civil cases in the federal district courts terminated by trials remained relatively stable (1978: 39), Friedman and Percival (1976: 287) note that from 1890 to 1970 the percentage of cases brought to trial in two California state court systems declined significantly. This is not to say that the workload of state judges is becoming lighter. It may be that changes in case mix have brought to the courts more demanding kinds of litigation, or that cases requiring trial activity have increased in complexity if not volume.

Discussion of the rise in court business divorced from some comparative standard is relatively meaningless. Even the most commonly used per capita indices do not tell us very much. Are more people litigating or are fewer people litigating more often? Are courts taking on an increased share of a relatively fixed amount of dispute resolution business or are they merely partaking of a rising volume of such business? What worries commentators on judicial capacity is that volume will outstrip court resources. There seem to be too many cases for courts to handle most of them well or even to handle them at all. Mass justice may mean justice for few or for no one. Increased resort to courts may introduce new types of litigation that do not belong, or flood courts with repetitive, routine cases that do not require or merit the kind of custom-handling that adjudication affords. Such possibilities point up the futility of treating civil cases as fungible commodities in analyses of litigation rates.

Despite these problems, quantitative research confirms the common perception of changes in the volume and mix of litigation at both federal and state levels. Whole new categories of cases have entered the courts, and the relative importance of others has diminished (see Friedman and Percival, 1976; Kagan *et al.*, 1977). Growth seems greatest in public law cases that include the most complex type of social policy litigation, and in the least complex, repetitive categories of private lawsuits (Friedman and Percival, 1976; Krislov and Boyum, 1978). Middle-range disputes still come to court in large numbers, and they may still consume the greatest amount of judge time, but compared to public law or routine administration cases, they do not seem to be in a growth phase.

In the next three sections we will examine those categories of cases most likely to implicate the limitations on court

capacity identified in Table 1. First there are actions, typically quite routinized, against individual consumers and debtors, in which access barriers and judicial passivity have historically combined to produce high volumes of default judgments. Second, we consider cases involving relationships of intimacy or mutual dependence. Finally, we examine public law cases that combine attributes of polycentricity with judicial imposition of complex and extended remedies.

We argue that there are, indeed, substantial issues of court competence or capacity raised by each type of case. But at the same time we note that promising techniques for coping with such problems, either generated by courts or devised by legislatures, have evolved. The record demonstrates, at least to our satisfaction, that courts have the ability to adjust without threatening the minimum requisites of due process.

Disputes Involving Unrepresented Defendants: Debtors and Tenants in Court

Due process of law requires that individuals have an opportunity to take part in adjudicative proceedings that place their liberty or property at risk. Yet it is not difficult to identify sizable categories of disputes on the dockets of American courts which may involve as defendants individuals without the ability to take part in a contested court proceeding, personally or by proxy.

Consider first the overcommitted individual debtor, a figure of considerable dramatic and literary interest, whose once distinctively pathetic lot is now shared by most adult American citizens. Never one lightly to tolerate profligacy, Senator Proxmire noted with concern in 1974:

> One out of every two families has some form of consumer installment debt. The heaviest users of commercial credit are families with children, heads of the household under 45 years old, and annual incomes between $10,000 and $15,000. Two out of every three families with these characteristics are in debt.
>
> In 1949, consumers used 8 percent of their take-home income to meet payments for their installment debt. By 1973, the percentage of take-home income used to repay installment debt has more than doubled to 17 percent. . . . Many families use 30 percent, 40 percent or more of their income to repay consumer debt (Caplovitz, 1974: ix).

Disregarding mortgages, charge accounts, and bills for professional services, net installment consumer debt rose from $2.5 billion in 1945 to $100 billion in 1970 (Caplovitz: 1). According to the *New York Times*, the latter figure had doubled by 1975, and at the end of 1978, outstanding personal debt reached $339 billion (July 29, 1979, section 3: 1). Not only the sheer magnitude of individual debt, but also the nature of the

transactions creating it, have bred irreconcilable creditor-debtor differences. David Caplovitz (1974: 9) observed at the outset of a study of debtors in court:

> [T]he phenomenon we are studying—the breakdown in credit transactions that result in lawsuits—is . . . very much a product of the anonymity of consumer transactions in urban America. It is this lack of knowledge of each other by the parties to these transactions that contributes to mistrust, misinterpretations of the reasons for the default, and the employment of harsh bureaucratic procedures to collect debts.

Assuming the accuracy of this account, the only obstacle that might have prevented a flood of lawsuits was the high cost of litigation relative to the amounts typically at stake in debt collection endeavors. However, most states long ago removed this impediment, albeit inadvertently, by creating limited jurisdiction courts designed to afford inexpensive and speedy access to redress for individuals with small monetary claims. By 1975, all but eight states had made "special statutory provision for the adjudication of smaller civil cases using an informal procedure" (Ruhnka and Weller, 1978: 2). In theory, small claims courts were courts for the "ordinary person"; in theory, their informal procedures promoted access to justice for consumers, tenants, and others supposedly disadvantaged through market transactions.

In fact, many small claims courts were quickly recognized by creditors as the happy equivalent of state-subsidized debt collection agencies. The result: high volumes of debt actions in the state courts most conveniently available to creditors, typically resulting in default judgments for plaintiffs. "In major cities, 75 percent of all contract claims filed in courts of limited jurisdiction may end in default judgments" (Rubenstein, 1976: 66). Yngvesson and Hennessey (1975: 235) drew from a review of fourteen empirical studies of small claims courts a common theme: "all of the studies point to the high number of business plaintiffs, the high number of non-business 'individual' defendants (frequently identified as low-income consumers), and a high default rate." More than 90 percent of proceedings against consumer-debtors surveyed by Caplovitz (1974: 221) in Chicago, New York, and Detroit courts ended in default judgments. (See also Kosmin, 1976: 940-941; Cappelletti and Garth, 1978: 249, n.228.)

Another type of litigation in which the opportunity to participate in judicial proceedings is regularly forfeited arises from the uneasy relations of landlords and tenants. Justice Douglas observed in 1972 that trials prior to evictions were "likely to be held in the presence of only the judge and the

landlord and the landlord's attorney,"[5] and a recent empirical investigation of Detroit eviction proceedings bears him out:

> During the year studied, 22.3 percent of the cases started were voluntarily dismissed by landlords before the return day of the summons and 57.6 percent resulted in default judgments for landlords; only the remaining 20.1 percent were contested (Mosier and Soble, 1973: 26).

While the number of defendants appearing in court may have exceeded *de minimus* levels, most of those who showed up were unable to make their presence felt. More than two-thirds raised no cognizable defenses, often—argue the authors—due to ignorance of the fact that nonpayment of rent could be excused if the landlord were in breach of statutory obligations to keep leased premises in good repair. All told, combining defaults with abortive defense presentations and dismissals of cases on landlords' motions, "in 93 percent of the cases started . . . the landlord's action went entirely unchallenged," despite adjustments in the law that had been designed to improve the legal position of tenants facing eviction proceedings (Mosier and Soble, 1973: 41-42).

There is ample cause to suspect that many defaults in both debt collection and landlord-tenant cases do not reflect an unassailable case for the plaintiff. The empirical literature affords repeated indications that substantial percentages of defaulters concede defeat despite fair prospects for success in a contested hearing.[6] For example, looking to federal statutes and regulations alone, it will be the rare debtor who cannot find some comfort in "the Consumer Product Safety Act, the Consumer Credit Protection Act, 'Truth-in-Lending,' FTC regulations governing door-to-door sales, and the Magnuson-Moss Warranty Act"; yet a National Center for State Courts survey of small claims judges found that few respondents had ever heard so much as a reference to any of these protections for consumers (Ruhnka and Weller, 1978: 27). To some extent this is a function of the reluctance of lawyers to take cases involving consumers or tenants (Macaulay, 1979); to some extent it results from the ignorance of both individuals and lawyers of the full range of available defenses.

That the passivity of defendants derives in part from factors unrelated to the merits of their cases should surprise no one (see Johnson, 1978). Unintimidating tribunals, structured to promote informally negotiated outcomes based on mutual

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[5] *Lindsey* v. *Normet*, 1972 (Douglas, J., dissenting in part).

[6] See, e.g., Mosier and Soble (1973); Yngvesson and Hennessey (1975: 243); Rubenstein (1976: 73-74).

consent, are not those to which creditors and landlords are likely to turn. "Conversation pits" and forums of mediation, to the extent available at all, require personal involvement in each case by both sides and do not afford coercive remedies. Courts will be preferable, if access can be had at reasonable costs, and courts confront defendants with the various daunting features discussed above. Even the supposedly informal small claims courts do not and cannot spare defendants the prospect of defending their conduct in a public debate with a more skilled adversary, before a high-status arbiter (Note, 1969). Yet debtors and tenants are unlikely to retain counsel when sued,[7] and, given the cost of legal assistance in relation to the sums at stake, they cannot be expected to do so (Note, 1974). The very nature of the causes of action involved guarantees that defendants will be drawn largely from the ranks of the financially embarrassed. Thus, Caplovitz (1974: 300) concludes that "default debtors are overwhelmingly persons of marginal if not poverty-level incomes, persons of low occupational status, and persons disproportionately recruited from minority groups—black and Spanish-speaking citizens."

The result is a clear and massive challenge to court capacity. As Rubenstein (1976: 71) puts it:

> [T]he creditor or landlord seeking to deprive the consumer or tenant of his property has the opportunity to use the state's enforcement apparatus without any expectation that the action will be contested. He can proceed unimpeded by the weakness of his claims or any of his own violations of law. The system that supposedly operates as a procedural "safeguard" thus inherently operates to the landlord's or creditor's advantage, not only in assuring him success in a particular dispute, but also in permitting him to ignore the substantive protections legislatures have provided consumers and tenants.

Courts cannot render just decisions when they are presented with but one side of the factual situation out of which litigation arises, or when they are not fully advised of the range of applicable law. Both considerations lead to a concern that courts may render substantively erroneous decisions when the defendant is not present, decisions different from those that would be reached after a full adversarial hearing. Furthermore, given the ease with which they can obtain default judgments, creditors and landlords have little reason to undertake negotiations calculated to obviate the necessity of going to trial. Thus, the potential for error at the hearing stage is

[7] See Mosier and Soble (1973: 42-44): "Very few tenants had an attorney. Those who did not were unlikely to raise any defense. . . . In contrast, tenants with attorneys seldom were without a defense and raised the new [statutory] defense more than twice as often as unrepresented tenants." See also Caplovitz (1974: 214): "In all four cities [surveyed], only one in every five debtors enlisted the aid of an attorney."

supplemented by limits on the effectiveness of adjudication in promoting bargaining between the parties.

Judges and legislatures have not been oblivious to these problems. Reform strategies can be grouped in four categories, none mutually exclusive, which taken together will go far to ameliorate the difficulties posed by the relevant court capacity limitations.

The norm of judicial impartiality, and its derivative canons, do not compel courts to validate all creditors' and landlords' claims for relief automatically whenever their adversaries fail to appear. Judges in the analogous context of an *ex parte* search warrant or wiretap application are certainly not expected to rubber-stamp the papers they are handed, and small claims tribunals plagued with high default rates are increasingly finding that "[t]he procedure with the best safeguards for defendants is to treat a default situation like a contested trial and require the plaintiff to prove both the liability of the defendant and that the damages claimed are accurate or reasonable" (Ruhnka and Weller, 1978: 133). Requiring plaintiffs to make a *prima facie* showing of entitlement to relief, while relatively modest in impact given the ease with which sophisticated litigants can comply, is a distinct improvement on the practice (still sometimes followed) of entering "a default judgment on the plaintiff's claim without requiring supporting documentation of either liability or damages" (Ruhnka and Weller, 1978: 135).

Cappelletti and Garth (1978: 251) identify as "a central task of small claims reformers" the mobilization of consumers "to litigate effectively those cases in which they do dispute the existence of a debt." Numerous efforts are underway to overcome defendants' reluctance to enter small claims courts, through "procedure[s] aimed at making the court more intelligible to the layman defendant and positively suggesting to him how to defend" (Cappelletti and Garth, 1978: 251, n. 238). The Harlem Small Claims Court employs paralegal personnel who mail defendants information on how to contest actions brought against them (Kosmin, 1976: 962). Courts of limited jurisdiction increasingly require plaintiffs to serve upon their adversaries simply phrased and informative notices of the filing of actions, which refer defendants to legal aid offices or court personnel equipped to answer questions and dispel confusion (see, e.g., Mosier and Soble, 1973: 67).

A trend is developing to exclude from small claims courts the sorts of plaintiffs seen as primarily responsible for

converting these courts into collection bureaus (Ruhnka and Weller, 1978: 4). A recent nationwide survey found that "seventeen states presently bar assignees or collection agencies from suing in small claims court," while six limit the number of claims individual litigants may file within specified periods (Runhka and Weller, 1978: 3). New York has gone so far as to withhold access from all corporations and insurers. In the Chicago Small Claims Court, which excludes corporations, partnerships, and associations, less than 20 percent of 1972-1974 dispositions constituted default judgments for the plaintiff (Eovaldi and Meyer, 1978: 976). Creditors prevented from using small claims courts to process large numbers of actions can still resort to conventional civil suits, but the increased attendant cost may rule out this tactic for many debts that could have been converted economically into small claims court default judgments.

The last few years have seen substantial increases in public funding for civil legal assistance to the indigent. The Legal Services Corporation, primary provider of such services, secured federal appropriations for the 1977, 1978, and 1979 fiscal years totaling $125 million, $203 million, and $270 million (Legal Services Corporation, 1979: 3). The Corporation, by its own estimates, is currently in a position to provide "minimum access to legal services" for 26 million of the nation's 29 million poor. Some 30 percent of the 1.4 million matters handled by corporation personnel in 1978 involved consumer and housing law (Legal Services Corporation, 1979: 2). While this by no means constitutes a complete response to meeting the legal needs of debtors and tenants, and falls far short of analogous programs in such nations as England, France, and Sweden (Cappelletti and Garth, 1978: 200-201), inability to pay for assistance in contesting creditors' and landlords' claims is no longer an insurmountable barrier to securing representation.

By encouraging participation, scrutinizing uncontested petitions, restricting access to creditors, and taking advantage of the availability of publicly compensated attorneys, courts are increasingly equipped to overcome the handicaps so vigorously exposed in the literature reviewed at the beginning of this section. Cumulatively, these developments should significantly reduce the frequency with which default judgments ride roughshod over unasserted defenses and, therefore, increase the competence or capacity of courts to make accurate determinations and fair decisions. But there are indications that, as reforms have been instituted, they have engendered

some troublesome side effects which hinder resolution of the social problems that give rise to the court problems described above.

The implications of eliminating courts as an inexpensive mechanism for routine collection of debts and eviction of tenants are not entirely benign, even from the perspective of debtors and tenants as a class. For example, the availability and cost of credit to high-risk individuals will almost certainly be adversely affected (Wallace, 1976: 481). Wallace suggests that these individuals may find themselves forced to turn in consequence to "an underworld loan shark market which employ[s] genuinely abusive, self-help remedies" (Wallace, 1976: 474). On the landlord-tenant side, there is some empirical evidence that increased availability of free legal counsel adds significantly to the costs of eviction, which is likely to be reflected in a reduction of housing supply or an increase in rents (Note, 1973). Absent government intervention to alleviate these presumably unintended side effects of court reform, debtors and tenants collectively may well find themselves questioning measures supposedly enacted for their benefit. It is far from clear that such individuals would trade a reduction in the likelihood of court-mediated injustice for new burdens of the type described.

Predicting the economic consequences of changes in courts' processing of creditors' and landlords' suits is a complex undertaking, necessarily simplified in this overview. Our hope, both now and later in the essay, is merely to flag some of the wide-ranging implications of efforts to eliminate the more serious manifestations of court capacity limitations. We intend no suggestion that the particular efforts reviewed above should be aborted; few would contend that courts should go on blindly dealing out default decrees at bargain rates because, by doing so, they contain the cost of credit and housing. But failure to do more than simply improve and reform the courts, here and elsewhere, will often only displace or recast problems, not eliminate them.

Cases Arising Out of Intimate or Ongoing Relationships

The recent literature on courts contains numerous discussions of the relative utility and wisdom of judicial involvement in disputes arising in the context of what have been called "multiplex relationships" (Nader and Singer, 1976; Felstiner, 1974; Danzig, 1973; Mentschikoff, 1961; Cratsley, 1978; Sander, 1976). Courts, it is argued, are best equipped to deal

with disputes involving questions of financial compensation for grievances that (1) find their *primary* locus in a breach of legal duty, and (2) can be ended effectively by a judgment identifying the party at fault and fixing damages. Courts require people to frame social problems as problems of legal rights and to seek an authoritative determination of blame. Both of these elements complicate the problem of providing a satisfactory legal resolution of disputes arising out of intimate or ongoing relationships.

What we will term "related-party" cases possess either or both of two characteristics, one pertaining to the past and one to the future. Litigation may arise between people whose involvement with each other is longstanding and complex, the clearest example being relationships within the family. Actions like those described above, although presumably few in number, stand out because they represent a legalization of matters most often thought beyond the proper reach of the law. What is characteristic of cases arising in this context is that the dispute referenced in the lawsuit may be only remotely related to, or at best an aspect of, the real dispute or trouble in the relationship. The complexity of intimate relations is, in effect, denied when, in framing a lawsuit, particular incidents are singled out to create a cause of action. Furthermore, in most relations of intimacy the actual cause of trouble is difficult to uncover; identifying who is primarily responsible for disrupting a relationship of long duration is often all but impossible. In dealing with such cases, courts, it is argued, have difficulty finding out and resolving what is really at issue. Judicial proceedings lift matters out of context; judges are ill-equipped and ill-trained to discern underlying causes. They are also constrained by legal form.

In addition, where there is a need for parties involved in a dispute to continue their relationship, some critics suggest that adjudication is inappropriate. The argument here is geared not so much to the complexities of the past as to the necessities of the future (Macaulay, 1963; Merry, 1979; Bonn, 1972; Fuller, 1963). Thus, many commercial contracts include a provision for submitting disputes to binding arbitration as a way of avoiding the cost, time, and disruption attendant upon litigation. Some suggest that the same relations of necessity that obtain in commercial transactions between, for example, producers and suppliers may also typify the relations of landlords and tenants or prison inmates and prison officials. Consequently, they use as illustrations of the limits of adjudication cases arising out of

such relationships (Sembower, 1969; Keating, 1975; Cratsley, 1978; Lippman, 1972).

The literature on related-party cases points to the inadequacy of adjudication as a fact-finding technique. It highlights the costliness of courts and their inability to penetrate to "social facts." Further, the "fight" theory of participation is arguably inappropriate where victory may impede reconciliation. What is involved in these arguments is a critique of judicial competence and an indication of the limits of legality as a device for ordering society.

Concern for the competence or capacity of courts to resolve related-party cases cannot be matched against any reliable empirical picture of how many of these cases are actually on the dockets of American courts. Since such disputes can arise out of a wide range of specific transactions, there is no way to extrapolate the frequency of related-party cases from the volumes of actions in particular legal categories.

Few empirical studies reveal even the number of related-party cases coming to particular courts. In Sarat's (1976) study of the Manhattan Small Claims Court, approximately 40 percent of the cases surveyed involved parties who had known each other for at least one year or who had an expectation of continuing interaction. A Vera Institute (1977) investigation of felony dispositions in New York City found that in 56 percent of the violent crimes and 35 percent of the property crimes examined, the victim had reported a prior relationship with the defendant. Whether these findings transcend the courts involved is, of course, questionable.

Prior relationships are a necessary part of divorce and other family law cases. Here gross quantitative data are available but, as the Friedman and Percival findings (1976: 280) attest, case counts are a poor proxy for the frequency of court involvement in the resolution of disputes. Other types of actions in which prior relationships may often be found arise in the fields of probate, landlord-tenant, and commercial law. Again, information on the number of contested cases involving mutually interdependent parties is relatively scarce.

Given the paucity of empirical information, the record of courts in dealing with related-party cases is most commonly assessed by resort to an anecdotal parade of horribles. A California man responds to the cancellation of a date by suing the culprit for $38,000 in compensatory and punitive damages (Antioch Law School Newsletter, February 5, 1979: 2). A Colorado youth demands $350,000 from his mother and father,

whose "parental malpractice" allegedly has condemned him to a lifetime of "impaired mental health" (*Washington Post*, January 10, 1979: B1). An irate woman seeks Dear Abby's advice on whether she should sue her neighbor, who has insisted on naming the family dog after the prospective petitioner's husband. An Oregon wife prefers rape charges against her spouse. And no one, of course, will soon forget Michelle Marvin.

This sort of thing makes for effective newspaper editorials; the reader is left to assume that he has been vouchsafed only a representative sprinkling of a vast universe of litigation. Never mind that the suits of the California man and the Colorado youth were summarily dismissed, or that Abby counseled an out-of-court adjustment, or that the Oregon husband was acquitted and subsequently, albeit temporarily, moved back in with his accuser. (Michelle Marvin won a victory of sorts, to which we will return shortly.) The ambiguity of the record does not generally inhibit the sounding of tocsins: "To bring law into this shadowy grotto is to invite even more discord than Adam and Eve bequeathed men and women" (*Washington Star*, December 29, 1978).

Yet the courts have long been entering the "shadowy grotto" of related-party matters for purposes of entering divorce decrees, and the record of their involvement is at once more extensive and instructive than that reviewed above. On the face of it, a divorce invites all the evils of dispute escalation and mutual antagonism that the court-capacity model predicts for related-party cases. Although in nearly all jurisdictions the decision to grant a divorce no longer hinges on proof of gross marital misconduct,[8] the judge typically must make an express finding that the marriage has "broken down irretrievably" or that the spouses are "incompatible." Concern was expressed at the time these "no fault" grounds were coming into vogue that they would invite "an examination of marital intimacies unparalleled under traditional divorce laws," exacerbating "the intrusive state role that has characterized previous divorce systems" (Cornell Note, 1972: 600). Moreover, as of 1977 only eleven states had explicitly rendered marital misconduct irrelevant to division of family property and allocation of support payments (Freed and Foster, 1977: 305). Finally, there is a clear trend toward abandonment of the inflexible presumptions that once expedited resolution of custody

[8] Only Illinois, Pennsylvania, and South Dakota retain exclusively "fault"-oriented grounds for divorce.

disputes (Freed and Foster, 1977: 311-312). With courts divorcing more than one million couples annually in recent years (HEW Monthly Vital Statistics Report, Annual Summary for the United States, 1977: 20), one would expect to find numerous reports of the unfortunate consequences of judicial intervention. Since "many provisions in divorce settlements, among them alimony, child support, and visitation, require cooperation over an extended interval" (Project, 1976: 149), the last thing the parties need is the disruptive "overkill" of a court proceeding.

However, the potential for disaster seemingly inherent in such proceedings has for the most part not been realized. Consider a typical divorce action in an equally typical "no fault" jurisdiction which, to take advantage of the best available data, we shall call Connecticut.[9] The plaintiff commences the proceedings by filing a complaint in court and giving the defendant notice of the commencement of the action. After 90 days, the case is scheduled for a hearing before an impartial judge whose training and experience encompass all matters normally tried in a state court of general jurisdiction. A hearing is held, at which the plaintiff or his representative offers proofs and reasoned argument in support of the contentions that the marriage should be dissolved and that certain dispositions should be made of property and custodial matters. This is accomplished by informing the judge that the marriage has broken down irretrievably, and by handing him a piece of paper, sometimes typewritten, incorporating the details of an agreement earlier reached by husband and wife regarding custody arrangements and division of the marital estate. Often, of course, the couple is childless and has no marital estate to divide, so this step can be dispensed with. The defendant is present throughout only as an interested spectator unless, which is more likely, he or she is not on hand at all. The court then enters a judgment incorporating all the plaintiff's requests for relief. The entire process takes, on the average, about four minutes.[10]

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[9] The description of a prototype Connecticut action is taken from a recent *Yale Law Journal* empirical study (Project, 1976: 123-129).

[10] See Project (1976: 129): "Cases in which no financial awards were made usually required less than three minutes, while cases featuring such awards typically lasted about 5½ minutes. . . . In these limited intervals little transpired beyond a brief review of the facts set forth in the complaint and the cause of the marital breakdown. If there was a support or property award, plaintiffs were sometimes queried by the judge as to whether they were satisfied with it."

Everything tends to go smoothly, of course, only because the court usually has no dispute resolution role whatever to play. The lesson is not that judges can deftly resolve domestic controversies, but that the very threat of their being called upon to do so can expedite negotiated settlements:

> The parties gain substantial advantages when they can reach an agreement concerning the distributional consequences of divorce. They can minimize the transaction costs involved in adjudication. They can avoid its risks and uncertainties, and negotiate an agreement that may better reflect their individual preferences. (Mnookin and Kornhauser, 1979: 974)

This analysis serves to point up an error that afflicts many discussions of court performance: the assumption that courts' success or failure can be gauged by exclusive reference to the contested cases they try and decide. How well a court "handles" a particular class of cases must be tested not only by the quality of justice dispensed at trial, but also by the fairness of the settlements courts induce by compelling what Mnookin and Kornhauser have called "bargaining in the shadow of the law" (1979). Just knowing that a court is waiting in the wings, prepared perhaps to make trouble for everyone, can serve to moderate extreme positions and dampen tensions that threaten an ongoing relationship (Bonn, 1972; Eisenberg, 1976). By focusing on how badly a court would do if such a case came to trial, it is easy to overlook these positive emanations from the constraints on court capacity.

Outside the divorce field—where the state's monopoly on legal freedom to remarry assures that most cases will proceed to judgment—it is noteworthy that related-party cases fail to reach trial in disproportionate numbers. The high "drop out" rate for this category of actions indicates that going to court is often used only as a strategy to promote negotiation. Filing a lawsuit is not necessarily a full-scale declaration of war; it may be simply

> [A] tactic in [an] ongoing relationship. It is likely to be used by the weaker party to reestablish an equilibrium in the relationship. As a tactic, . . . going to court uses the judicial process as a threat; it engages the court as an unwitting ally. . . . Having mobilized the court as an ally, the "victim" may be in a position to continue the relationship. The dispute which brought the parties to court has not been resolved, but the relationship can continue at its new conflict level (Jacob, 1978: 19).

These considerations militate against efforts to remove court jurisdiction over related-party disputes, however dismally courts may deal with the relative handful of cases that actually conclude with contested hearings. By the same token, it makes no sense to force the forms of adjudication upon parties able independently to reach a mutually satisfactory adjustment of

their differences; on this ground, American divorce procedures are increasingly, and properly, assailed.[11]

The settlement-inducing capabilities of courts can be enhanced by promoting mediation as a device for helping parties work out their differences short of trial (Danzig and Lowy, 1975; Griffiths, 1970; McGillis and Mullen, 1977). Advocates of mediation as a technique for resolving related-party disputes persuasively argue that, in contrast to adjudication, mediation provides for fuller and more flexible participation by disputants. Unconstrained by legal form, mediation relies on the consent of the parties (Shapiro, 1975) and therefore is more likely to produce an outcome acceptable to both sides. Mediation allows those involved to engage in "guided conversation," to exchange impressions of contested events (Fuller, 1971), and to gain an appreciation of the perspective, if not the position, of others. As Frank Sander (1976: 120) puts it, when disputes arise between parties who are involved in long-term relationships:

> [T]here is more potential for having the parties, at least initially, seek to work out their own solution, for such a solution is likely to be far more acceptable (and hence durable). Thus negotiation, or, if necessary, mediation appears to be a preferable approach in the first instance. Another advantage of such an approach is that it facilitates a

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[11] Divorces are unique among related-party cases, in that a day in court is imposed on the parties whether or not either of them desires it. Since, as noted earlier, most couples are able to work out settlements without judicial assistance, divorce hearings predictably have atrophied into adjudication by rote. The consequences, for courts, are not terribly burdensome. Uncontested divorce actions have not overwhelmed institutional processing capabilities; a recent survey of 21 state trial court systems found that, in marked contrast to conditions prevailing for other civil case types, domestic relations dockets had been kept relatively current (National Center for State Courts, 1978: 137). Cumulatively, however, the flood of standardized forms and repetitive hearings absorbs appreciable judicial time that might better be invested in more demanding pursuits. More important, mandatory divorce adjudications impose burdensome costs on the exercise of a fundamental right enjoyed in theory by every citizen (see Project, 1976: 147-166).

Militating against diverting uncontested divorces from courts are ceremonial considerations and the paternalistic hope that courts will sometimes intervene *sua sponte* to save the parties, or one of them, from a bad bargain. The likelihood that either function will be performed well is reduced by internal efficiency-related pressures generated in over-burdened courts by masses of urgent cases susceptible to routinized processing. Heydebrand (1977: 761) notes the contribution of such business to "the introduction of bureaucratic procedures and rules, administrative strategies, and new technologies . . . for the purpose of raising the productivity of labor (including that of judges) and the cost-effectiveness of court services." Judges subject to such demands have every incentive in uncontested divorce actions to content themselves with perfunctory endorsements of the decrees proffered by plaintiffs. Recognizing this, Mnookin and Kornhauser have argued (1979: 993) that:

> A better system would define, within a broad range, the norms that should govern divorce agreements and use those norms to identify for intensive scrutiny those cases falling outside what is ordinarily thought reasonable. Cases settled within the normal range would require no [judicial] review at all.

probing of conflicts in the underlying relationship, rather than simply dealing with each surface symptom as an isolated event.

Advocates of mediation often suggest that removal or diversion of related-party cases from the courts will help rebuild bonds of trust necessary to the restoration of community in America ("Community Courts," 1975). Mediation permits, even invites, widespread participation by affected individuals, and allows the participants to probe more deeply into the issues in dispute. As related parties talk out their grievances, they may come to realize that they have more in common than simply a single dispute or even a series of disputes, and that their social bonds are worth preserving. Mediation in related-party cases can prove a therapeutic process (Wexler, 1972; Snyder, 1978; Felstiner and Williams, 1979). Locating mediation "in the community," it is argued, contributes not only to the health of particular relationships but also to the health of whole neighborhoods (Danzig, 1973), whose accelerating disintegration may be manifested in part by a movement of related-party cases into courts. Merely substituting one publicly sponsored dispute resolution forum for another, however, hardly seems likely to reawaken a moribund spirit of community: the patient may be rendered more comfortable, but his disease is no closer to a cure.

Furthermore, the efficacy of mediation might well diminish if the courts did not remain at least a brooding presence in the background. Those who, like Learned Hand, fear litigation more than anything save illness or death, are likely to give greater heed to the gentle voice of the mediator if the threat of adjudication is very much present. An occasional decision of the *Marvin* v. *Marvin* variety can serve a useful function, not because the court performs admirably, but because the prospect of a comparably expensive and humiliating experience might spur negotiations where otherwise brute economic or physical force would rule unchecked. Those who clamor for courts to refrain altogether from such adjudications often fail to take adequate account of this possibility.

On balance, courts have not suffered unduly from the inability to deal effectively with related-party disputes. The unpredictability, expense, and anguish of contested proceedings have not been eliminated, but they serve to limit filings and trials by generating strong settlement pressures. That the frequency of these cases may be increasing—of which no one can be sure—is more likely a function of the erosion of private sector alternatives to judicial decision than of any

lessening in the deterrent effect of the relevant court capacity limitations.

However, a failure to appreciate the positive repercussions of occasional, albeit inept, judicial intervention has led to a clamor for courts to stay out of related-party disputes altogether, especially those implicating intimate relationships. Many would second Justice Rehnquist's recommendation (1978: 18) that "a legal doctrine of laissez-faire" be applied to intrafamily disputes; many would extend such a doctrine much further. No jurisdictional limitations will be needed to achieve this, if judges come to internalize the perspective of their critics. Certainly no judge needs much inducement to find, and lock into precedent, excuses for not performing the painful and thankless task of occasionally presiding over such cases. Yet, in the public sector, there is no one else equipped to threaten authoritative and binding resolution of such disputes, and thus to spur negotiation and compromise. Given the private sector's inability to produce figures with comparable stature in their communities, it may be that no replacements will appear for an abdicating judiciary.

There is no reason to think that the presence of courts as fora of last resort has acted to discourage the development of effective alternative dispute resolution mechanisms; given their highly tentative approach to related-party cases, and generally heartfelt willingness to hold up or forego decision where a settlement may be in prospect, judges can hardly be said to have displaced dispute resolution "competitors." As a result, it seems unlikely that alternatives to courts will suddenly blossom if only the prospect of judicial intervention can be removed. Indeed, the reverse could be true. Private sector dispute resolution mechanisms may actually be beneficiaries of the mutual incentive for trauma avoidance that court capacity limitations afford related-party disputants. Here as in the debtor-creditor context, the elimination of some manifestations of poor court performance could simply trigger new problems of equal or greater societal significance.

In sum, the court capacity model is of little use in determining what the role of courts should be in related-party cases. There is a widespread failure on the part of critics of court performance to recognize the important social function discharged by occasional judicial involvement, however maladroit; this leads to recommendations that adjudication cease altogether, without any recognition of the infrequency of judicial fiascos or the salutary impact of those that occur. The

court capacity model correctly predicts that judges will have trouble with related-party disputes; yet substantial social costs attend any effort to excuse the judiciary from such ordeals. Here as elsewhere, the problems of courts are relatively trifling manifestations of social problems, which cannot constructively be addressed by manipulating jurisdictional boundaries.

Extended Impact Cases

The most controversial of all issues related to competence and capacity are those which arise when courts find it necessary, in fashioning a remedy for a proven violation of individual rights, to intervene in the ongoing operations of state-run institutions. It is widely recognized that in the last decade courts "have . . . been involved to an unprecedented extent in designing and implementing changes in the operations of complex social institutions" (Project, 1978: 788-789). In order to do so they have had to resolve disputes which are quintessentially polycentric and to enforce decrees requiring long-term judicial supervision. If, as most critics assume, courts are best fitted to resolve bipolar controversies through a zero-sum decision involving the imposition of a one-shot obligation on the loser, then so-called "extended impact" cases are far removed from the ideal.

The paradigmatic extended impact decree is issued by a federal judge in the context of a lawsuit brought by clients of a state institution, typically a school, mental hospital, or prison. While this by no means exhausts the catalogue of targets (Horowitz, 1977: 4-5), it demarcates the sphere of greatest controversy. Here extended impact decrees have responded for the most part to constitutional, not statutory, concerns, precluding the judges involved from casting their orders as mere reflections of a legislature's will. Plaintiffs often allege that legislatures and executive agencies have, either through neglect or conscious policy, allowed custodial institutions to deteriorate below constitutional standards. Often the cause is under-financing. Sometimes it is the failure to take action to correct a cognizable denial of rights as, for example, in many of the school desegregation cases. Not only do such allegations invite judicial performance of what seem to be legislative or executive functions, but they often lead to federal court intervention in state affairs. As a result, extended impact cases seem to compromise values of federalism. The institutions subjected to compulsion are complex in structure, goals, and needs (Note, 1977; 432-433), creating formidable barriers to

effective intervention and inevitably requiring a level of specificity in decrees that many perceive as presumptuous and intrusive (Glazer, 1975). Finally, to implement such decrees effectively, judges may have to become directly involved in a political process of anticipation and reaction in which they try to restructure the behavioral systems of complex organizations. Such involvement may threaten judicial independence and impartiality (Fiss, 1979).

State mental institutions have found themselves subject to decrees that are "frequently written in great detail, covering specific requirements on a wide range of issues, such as privacy in bathrooms, provision of staff on various work shifts, the use of seclusion, the nature of educational and recreational programs, standards for recordkeeping, and procedures for patient reviews" (Note, 1977: 430-431). Prison administrators confront exacting demands regarding "food handling, hospital operations, recreational facilities, inmate employment and education, sanitation, laundry, painting, lighting, plumbing, and renovation . . ." (Horowitz, 1977: 4). Schools have been directed to abolish academic tracking, establish "in-service training for faculty and staff for multi-ethnic studies and human relations," reform curricula to reflect ethnic diversity of incoming students, and reevaluate grading, reporting, and testing programs (Graglia, 1976: 223).

Extended impact cases are not an insignificant aberration, and their effect often extends far beyond the operation of the institutions in question. We have already noted that some 200 school districts are currently operating under court order. The Law Enforcement Assistance Administration estimates that 24 states are currently obligated by judicial decrees to reduce prison overcrowding (*New York Times*, June 11, 1979: A16). Joy (1979: 6) reports that "eleven major jurisdictions have existing federal court orders to upgrade all their prisons." And, of course, extended impact decrees do not invariably bear the signatures of federal judges; in Los Angeles it was the state courts that imposed a major desegregation program (*New York Times*, May 17, 1979).

Courts are not complete newcomers to the task of reordering complex institutions. Chayes (1976: 1303, n.92) points out that "from 1870 to 1933, federal judges, acting through equitable receivers, reorganized over 1,000 railroads." And Eisenberg and Yeazell (1980) have recently noted the continuity between extended impact cases and the management of trusts, estates, and bankrupt businesses.

Nevertheless, the recent spate of extended impact decrees has provoked vehement criticism. Courts, it is argued, do not have sufficient expertise to undertake tasks like reforming and upgrading schools, prisons, or mental hospitals. Judges typically lack intimate familiarity with the way those institutions operate; the vehicle of a single lawsuit, no matter how comprehensive its scope, is no substitute for training or experience. Nor are courts equipped with the administrative machinery to supervise implementation of their orders. Furthermore, critics suggest that the law is a rather blunt instrument for reforming complex institutions. Judges have available to them a limited range of sanctions and, therefore, have difficulty deterring or halting noncompliance with their decrees (Scheingold, 1974: 123). Finally, because they cannot fashion relief transcending in scope the violations proved, courts are deemed inferior to other bodies which they displace in extended impact cases:

> [A court] can order the creation only of legally permissible conditions, and not of optimal ones. By contrast, a legislature may freely pass broad legislation to serve nonspecific ends, and an administrative agency may serve the public interest by interpreting its jurisdictional mandate to fill perceived lacunae in broad statutory schemes (Project, 1978: 927).

Successful solutions to polycentric problems require a series of negotiated, incremental adjustments. Imposing the Procrustean frame of a "principled" solution on such subject matter is likely to constitute an exercise in futility at best and at worst to exacerbate already complicated problems. Yet the mere fact that litigation ends in a detailed order says nothing about the provenance of that order. In extended impact cases, as with related-party actions, the court can serve simply to stimulate use of alternative decision-making processes that are better suited to the nature of the case than an adversarial trial. Extended impact litigation does not displace negotiation and compromise but is frequently an essential precondition to it. Without filing lawsuits, many institutional clients would never get to the bargaining table; our pluralistic society is not, for example, noted for the political clout it confers upon convicted felons and retarded children. Granting that rearrangement of conditions invading the rights of these groups should proceed by negotiations involving all affected parties, there remains the necessity of triggering such negotiations and ensuring that normally submerged interests are accorded the weight to which the law entitles them. Courts can often do this, simply by threatening a judgment inferior to an alternative arrangement the parties can work out on their own. "The court's role . . . is

to make sure that issues are addressed and choices made, not to make those choices itself" (Diver, 1979: 92). We would expect to find as a result that most extended impact decrees were the product not of judicial fiat but of negotiated settlements. The threat of a remedy fashioned by a judge on his own generally acts to bring the parties together to work out a mutually agreeable course of remedial action. The argument that judges do not have the training or experience to devise appropriate solutions ignores the fact that "a large number of the institutional cases end in consent orders, and in most others agreement among the parties significantly reduces the scope of the dispute" (Diver, 1979: 78).

Nonetheless, there will inevitably be cases in which the judge must take an active role in prodding negotiations and crafting decrees. Here questions of expertise become critical: "Are judges sufficiently skilled in the art of political bargaining? Can they devote the amount of time necessary to supervise extended negotiations? Do they have access to necessary information?" (Diver, 1979: 94). Yet even where they must work without the cooperation of the parties, judges are not compelled to rely exclusively on their personal capabilities and those of their staffs:

> The reference of remedial issues to an expert special master is often useful in resolving remedy formulation problems. . . . [M]asters . . . are commonly chosen for their expertise in specialized disciplines or public administration (Project, 1978: 805-806).

By appointing masters on a temporary basis to deal with individual cases, courts avoid the development of the cumbersome permanent bureaucracies which some commentators have seen as an inevitable concomitant of extended impact litigation (e.g., Moynihan, 1978).[12] This device also compensates for judges' lack of familiarity with organizational routines and procedures in defendant institutions, helping to ensure that remedial regimes are crafted with such subtleties in mind. Judicial reliance on imported specialists at the remedy stage of complex litigation has a long history, beginning with the advent of court-supervised railroad reorganizations in the late nineteenth century (Hurst, 1950:179). It violates none of the requisites of

[12] Revealing, in this regard, is the stability of the judge/support staff ratio in the federal court system between 1960 and 1978. Unpublished tabulations by the U.S. Department of Justice reveal that the 1978 figure of 9.3 staff positions per federal judgeship constituted an increase of only 6 percent over its 1960 counterpart. Probation officers and public defenders were not deemed "support staff" for purposes of these computations.

due process of law from which competence or capacity limitations are derived.

Little is known about the frequency with which masters are employed in extended impact cases; federal district courts do not keep systematic records. The use of masters in such cases is somewhat hampered by the requirement in Rule 53 of the Federal Rules of Civil Procedure that "a reference [to a master] shall be made only upon a showing that some exceptional condition requires it." It is not clear whether the rule applies to masters who are appointed after a finding of violation but before entry or implementation of a decree; Rule 53 can be construed to address only appointments of masters to make tentative findings of fact in advance of liability determinations (Nathan, 1979: 427). The courts are not in agreement, and the Rule would benefit from clarification, given the growing incidence of cases in which the question is likely to arise. But whether they appoint a master or use their "broad general powers to seek outside expert aid" and "appoin[t] informal consultants or experts to assist in remedy development" (Project, 1978: 808), judges are not helpless in the face of processes that might overtax their personal expertise, or impinge on scarce resources of time.

Our argument, in brief, is that the court pleadings which initiate an extended impact case will normally work to facilitate the very approach polycentric controversies appear to demand: a process of negotiation, with a knowledgeable mediator potentially available if needed. Limitations on the competence or capacity of courts to design solutions unilaterally become largely irrelevant where this occurs. Given the diverse interests affected and the complexity of the issues, negotiations will frequently be lengthy, fractious, and cumbersome, but these difficulties can hardly be charged to courts. Moreover, in overseeing such a process, a court has one significant advantage over a legislature or executive agency; it will feel less keenly the popular pressures for a "quick fix" that might lead its competitors to force an accommodation on the disputants prematurely.

Implicit in the preceding discussion were the assumptions that courts can credibly threaten defendants with directives more burdensome than those attending a negotiated settlement, and that such settlements when reached can themselves be enforced effectively. It is not immediately apparent that either assumption is justified. The plaintiffs will often be in no position to monitor compliance or identify

sources of violations. Moreover, the sanctions typically imposed by courts on contemnors in other contexts—fines and imprisonment—seem unsuitable responses to institutional recalcitrants. Courts are understandably reluctant to imprison public officials or to demand that legislators appropriate funds to pay substantial civil contempt fines.

Neither category of problem is, however, insurmountable. Courts can build a monitoring capability into the structure of their decrees by requiring compliance reports, scheduling periodic hearings on the progress of implementation, and—if a master participated in the formulation of the decree—retaining his services during the implementation phase. Alternatively, a court can appoint a monitor "to report on the defendant's compliance with the decree and on the achievement of the decree's goals" (Project, 1978: 828); Rule 53 limitations on the judicial appointment power can be avoided if the monitor restricts himself to that function (Project, 1978: 828; Nathan, 1979).

Such supervision, regardless of its quality, is of little use if no sanctions are available when violations appear. But courts are not limited to a choice between massive retaliation and acquiescence:

> [A] judge does have other methods at his disposal, such as awarding attorney's fees, excluding a named defendant from some aspect of remedial planning, closing an institution, removing an officer, or appointing a receiver. . . (Diver, 1979: 99-100).

By the same token, judges are in a position to reward good performance, first by incrementally lessening the intrusiveness of monitoring measures and ultimately by relinquishing jurisdiction. Also, courts have reduced the impact of their orders on state treasuries by directing institutional defendants into the frequently open embrace of federal grant administrators (Lipman, 1974: 720; Harris and Spiller, 1976: 22).

Courts are, then, in a position to perform better in the extended impact area than the court capacity model would suggest. We should not expect, and are not getting, utopian results, but to have waited for the action of legislatures or executives equipped to give more complete redress would have been to overlook the consequences of official neglect on individual rights. Once violations of law are proven, the courts must choose between traditional remedies, which provide little more than symbolic victories for plaintiffs, and meaningful redress through "intrusive" intervention. Given widespread violations of individual rights, the former course would represent an abdication of responsibility on the part of the

judiciary and would diminish the reach and significance of constitutional protections (Baude, 1977). Reasonable people can differ as to the desirability of such doctrinal retrenchments, but few would want them to stem from misplaced doubts about courts' institutional capabilities. In the context of extended impact cases, the court capacity theme is rendered doubly mischievous by the dearth of evidence that legislatures or administrative agencies are willing or able to take on the remedial responsibilities for which courts are allegedly ill-suited. Critics of judicial competence are effectively demanding the rejection, by default, of constitutional grievances arising from the operation of complex state institutions (see Dworkin, 1977; Fiss, 1979 and "Decency and Fairness," 1971).

Of course, judicial intervention is no guarantee of success; full compliance is often difficult to obtain. Nevertheless, "while judicial solutions may never be fully implemented, at least they may succeed in eliminating extreme abuses, or perhaps more optimistically, in setting a model and a tone for eventual internal reform . . ." (Harvard Center for Criminal Justice, 1972: 228). Furthermore, extended impact decrees may prompt officials to correct conditions that violate important rights before any litigation is initiated. Indeed, a recent survey of California prison administrators found unanimous agreement that "some changes in correctional procedures, regulations, and facilities have come about specifically because administrators have anticipated what courts might do and have acted accordingly" (Project, 1972: 535). The 200 school districts forced by court order to desegregate are matched by an equal number that have voluntarily submitted desegregation plans to the Department of Health, Education and Welfare (Brief for the United States, *Columbus Board of Education* v. *Penick*, 1979: 87).

Various objections can be raised to the prospect of a judiciary ready and able to entertain extended impact litigation. Professor Thayer (1974: 106-107) urged that judicial intervention "is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors." But the extended impact cases we have discussed are concentrated in areas where there is simply no way to "fight the question out in the ordinary way," since the victims of the

"legislative mistakes" have no effective access to the political process. Moreover, the very fact that courts are limited in the relief they can provide assures that much will be left for legislatures to do after judges have acted. That was the pattern in the civil rights field, where court decisions helped mobilize political action whose legislative consequences far transcended anything that judges were equipped to compel (Scheingold, 1974: 100), and it seems also to characterize the evolution of public policy toward custodial institutions.

Yet, in this area as in the others we have discussed, the capacity of the judiciary to provide effective remedies is not an unmixed blessing. Extended impact cases have the potential for distorting resource allocation in the public sector. "The judge cannot frame his issue in terms of more health care versus less prison reform, although (depending on whether and how executives and legislators respond to his decision) this may be the exact result of a decision that purports to make choices in one of these areas or the other" (Horowitz, 1977: 38). Thus, Cox (1976: 827-828) reports that New York State complied with a judicial order to upgrade a mental hospital "by transferring to the hospital all the funds appropriated for the prevention and relief of alcoholism." Louisiana dutifully reduced overcrowding in one jail "by transferring inmates to correctional facilities where conditions were no better and sometimes worse than those in the [jail] had been" (Harris and Spiller, 1976: 796). Assuming, *arguendo*, that institutional litigation tends to focus on sectors that are "under-funded" in some meaningful sense, nothing guarantees that the remedy will not strip other equally impoverished and deserving programs of resources. Since extended impact decrees—and legislative initiatives adopted in an effort to forestall them—have often resulted in substantial capital construction, the resources at issue are sufficient in magnitude to give this objection some force. Joy has suggested, for example, that it is largely courts that are responsible for the currently ongoing construction of some 600 custodial facilities "costing more than 3.5 billion dollars" (1979: 6).

To keep these arguments in proper perspective, it is useful to recall the long history of wide-ranging interference in state budgetary decision making by another species of nonelected official: administrators charged with overseeing federal grant programs. By 1975, more than 26 percent of *total* state expenditures had their source in federal funds subject to federal conditions (U.S. Bureau of Census, 1976: 5-6), creating

an enormous and frequently exercised source of leverage. There are indications that the economic "distortions" attributable to extended impact decrees pale beside the adjustments forced on states by these administrators and their forebears (see Derthick, 1970; Advisory Commission on Intergovernmental Relations, 1955; Key, 1937). Nonetheless, lesser convulsions are not rendered unimportant by the existence of greater ones, and the problems implicit in Dworkin's (1977: 146) eloquent defense of an activist judiciary cannot be gainsaid: "The nerve of a claim of right . . . is that an individual is entitled to protection against the majority even at the cost of the general interest."

IV. CONCLUSION: COURT PERFORMANCE AS A SOCIAL AND POLITICAL PROBLEM

No doubt we live in an age of judicial activism in significant areas of our social and political life. It is possible to view this development as an indication of a shift in the fundamental bases of the legal order (Nonet and Selznick, 1978), a full realization of our heritage of liberal-legalism (Unger, 1976), or the product of misguided understandings of that heritage (Graglia, 1976). However viewed, the scope and substance of present judicial activities gives rise to the concern that courts are doing too much and doing it badly.

Challenges to these activities often appear as a discussion of problems of judicial competence or capacity. Such discussions, as we have already argued, begin with a fixed idea of what courts are, what procedures are most appropriate for them to follow, and what resources and expertise they have—or don't have. Thus, the discussion of judicial competence or capacity contains, at one and the same time, a description and evaluation of courts and a prescription for reform.

The discussion is, we believe, substantially incorrect on all three counts. First, its description is wedded to a conception of courts that is static and often too abstract. Courts can take any form or adopt any procedure so long as they do not violate relatively flexible due process requirements. The structures and procedures of courts have, in fact, frequently changed to accommodate new types of cases. The full history of American courts, which has yet to be written, would be a history of dynamic adaptation—not of rigid institutional adherence to any ideal of "courtness." Questions about judicial capacity will inevitably arise as new issues are brought to courts, and new issues will always find a way there. Ours is a heritage of

creativity in law and of regular, if not uniform, expansions in our concepts of rights. Necessarily, it is also a heritage of an evolving judicial role (Friedman, 1974). One should expect institutional adaptation on the part of courts to lag somewhat behind changes in their business, but not to lag so far behind that questions of competence or capacity reach the point of genuine crisis.

Even accepting, *arguendo*, the existence of some inherent limitations on the efficacy of the adjudicative process, it remains our conviction that the court capacity model does not provide a useful vehicle for evaluating and predicting court performance. The model does not advance either of two inquiries that are crucial to a determination of what courts "do well." Those inquiries address, respectively, the outcomes of negotiations elicited by the prospect of contested hearings, and the consequences of adjustments in individual and institutional behavior that are motivated by a desire to avoid such negotiations altogether.

The three types of litigation reviewed in this essay capture the range of concern about judicial capacity and reveal the extent to which critics have misunderstood the strengths and weaknesses of courts. There is ample evidence of effective institutional adaptation, seemingly in the face of insuperable odds, in courts' handling of debtor-tenant defaults, related-party disputes, and extended impact cases. But that seemingly significant conclusion is of little use in deciding whether courts should go on performing all or part of their existing functions in those areas. Court capacity to adjudicate a particular class of disputes, however universally recognized, is neither a necessary nor a sufficient condition for welcoming their involvement.

Arguments about judicial competence or capacity would focus reform energies on the courts themselves; the political battle for reform is a battle to enact, or to convince courts to accept, various jurisdictional limitations. In our view, these reform strategies are too narrow. They are too rigidly focused on the courts themselves. Removing or limiting jurisdiction typically is neither necessary to solve court problems nor adequate to redress what really troubles critics of judicial capacity, namely, the movement to courts of matters perceived, on a variety of grounds, to be inappropriate subjects for adjudication.

Challenges to judicial competence or capacity arise from the response of the courts to changing social and political

conditions (Miller, 1979). If courts should not deal with debtor/tenant defaults, related-party disputes, or extended impact cases, then it remains to identify the reasons why such cases find their way to court so persistently and to try to alter the conditions responsible. The so-called crisis of the courts is but one indication of a crisis in the social and political order. Those who write about problems of judicial capacity as if they were themselves of great or lasting significance distract us from the far more important disruptions that are only manifested in court problems.

It seems to us that the role of American courts, or perhaps more accurately, the scope of their activities, varies inversely with the strength and vitality of alternative private and public institutions (Black, 1976). Judicial processes are residual by design—that is, they are available and were intended to cope with those areas of social life susceptible to neither the norms of private life nor the rigors of democratic processes. Today, however, the role of courts has expanded far beyond what could justifiably be called residual.

On the one hand, courts become involved in regulating the activities or resolving the disputes of people joined through relationships of trust, affiliation, or functional interdependence when those bonds weaken. Conflicts between relatives, friends, and neighbors belong to the province of family or community. As both family and community lose their significance, as both lose their ability to impose order and develop normative consensus, disputes that once would never have been expressed in terms of breaches of legal duty are increasingly cast in precisely those terms. A crisis of authority, revealed in the diminished stability and vitality of family and community, is responsible, at least in part, for an influx of new cases to the courts (Herlihy, 1971). Regulation by public processes, especially litigation, replaces regulation by parents, teachers, and clergy and the order provided by shared norms.

This weakening of private life is caused by the increasing urbanization and industrialization of advanced capitalist development (Nisbet, 1975; Lasch, 1977 and 1979). Such development fosters complexity and rationality in social structure, both of which, in turn, weaken primary, affective social bonds. The decline of the private sector invites the intervention of the state, intervention designed to secure the stability necessary for social order and continued economic development (Heilbroner, 1965; Wolfe, 1978). But state intervention further diminishes private initiative and, as a

result, exacerbates rather than ameliorates the problems to which it is addressed. Such intervention takes the form of transfer payments, welfare programs and large-scale regulation of conditions of production, exchange, and consumption. The politics of electoral accountability further widen the scope of state involvement as politicians trade programs for votes (Mayhew, 1974). We now seem to be approaching the limits of effective intervention. The bloated state increasingly resorts to "subterfuge" (Calabresi and Bobbitt, 1978; Habermas, 1975) to conceal its own inadequacies. Problems linger unsolved because the state has neither the will nor the ability to find and implement solutions; instead, decision-making routines and rituals emerge to maintain the appearance of a state-controlled or at least state-managed social order.

The decline of primary social institutions may appear to invite a totalitarian state, but its ultimate consequence is to threaten the capacity of the government to govern at all (Crozier *et al.*, 1975; Rose and Peters, 1978). This is a problem now generally acknowledged throughout the political spectrum. It may be that constitutional government cannot adequately or effectively operate in the absence of strong, viable private institutions (Hayek, 1960) and much as the phenomenon of related-party cases reveals a weakened private sector, extended impact litigation may expose a diminished public capacity. The state, operating within a constitutional framework, finds it difficult to live up to its expanding commitments; the first evidence of that inability is the way it treats the weak, disabled or stigmatized. The constitutional state creates or recognizes new rights—rights which reinforce its claims to legitimacy—while it loses or relinquishes its own ability to guarantee those rights (Friedman, 1971).

The result is legalization and judicialization on a massive scale. People call upon the courts to compel the state to fulfill its commitments; the state turns to the courts to enforce its regulations. The scale of that legalization and judicialization varies directly with the ambitions and impotence of legislatures and administrative agencies. What all of this means for courts is that they are invited to fill, or are drawn into, a vacuum of effective authority in the society at large; they are asked to do work, and expected to do it well, that cannot be done elsewhere. Unless we can come to terms with the forces that thrust the courts into this role, there will be no reckoning with the problems that provoke criticisms of judicial competence or capacity.

Certainly the courts can be improved. Problems of access, efficiency, and, yes, even capacity can be usefully addressed. We detect, however, in much court rhetoric both impatience and limited vision. Expectations for court reform are often too high. Court reform efforts all too often simply displace court problems. Improving judicial machinery, necessary as it is, treats symptoms; the upsurge of interest in judicial competence or capacity often distracts and misleads by artificially narrowing the field of maneuver. It is, we think, time to recognize the full dimensions of the problems of American courts and to attack their causes.

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