PANEL DISCUSSION

The following is an edited transcript (with some parts deleted and others clarified) of a panel discussion which followed the presentation of papers by Professors Neil H. Cogan and Emma C. Jones, Federal District Court Judge Jack B. Weinstein and Professor John B. Oakley, and the commentary thereupon by Professor Jack H. Friedenthal. Also included are comments and questions from the audience in attendance at the "Intervention in Public Law Litigation" symposium held at the Association of American Law Schools' annual meeting on January 4, 1980, in Phoenix, Arizona.

PROFESSOR EMMA C. JONES: There are three points I would like to re-emphasize. First is the issue that Jack [Professor Friedenthal] has identified concerning the rights of the original parties in the litigation. His concern is that the ripple effect of all litigation might be such that anyone could have sufficient interest to be permitted to intervene. This is an abstract possibility. In reality, given the expenses of litigation, intervenors seldom join litigation for frivolous reasons. This is a self-limiting feature. The questions presented arise in concrete cases.

When someone steps forward with both sufficient resources and motivation to join litigation, we must decide whether they should be denied the opportunity to provide additional assistance to the court. Speculation about abstract possibilities of widespread interest ignores the self-limiting features of intervention practice which make it a very expensive process, thereby effectively reducing the number of those who are both willing and able to use it.

The second point I would like to raise is the question of whether there can be "impairment" when a potential intervenor can also protect his interest by becoming a plaintiff in a second lawsuit. Professor Friedenthal's reading of what is necessary for practical impairment is more restrictive than the rule itself. The rule recognizes that something less than res judicata is sufficient to create the practical impairment which is necessary for intervention.

In this way, the rule permits consideration of stare decisis as well as other equally important consequences which do not rise

to the level of preclusion. For example, we cannot ignore the serious claims of those who are seeking to ensure that ongoing litigation does not jeopardize their interests in important social institutions.

The third point I would like to address is the last point Professor Friedenthal raised. I am jumping all over Jack [Professor Friedenthal] because he was the last one to speak. Moreover, I think he has raised some very interesting and provocative questions — precisely those questions that a traditionalist might raise. I think he has done an excellent job of presenting the traditional viewpoint. The third point is that nobody owns a lawsuit.

The notion that Professor Friedenthal has suggested is a proprietary view of a lawsuit. In this view, the original parties own the lawsuit. They determine the scope of the issues raised by virtue of the fact that they have paid the costs of litigation. Notwithstanding their substantial interests in the potential outcome of the case, intermeddlers should step to the side because, after all, the original parties did get to the courthouse first.

Well, I think this view reflects a misconception of this kind of litigation and Professor [Abram] Chayes has helped us to handle this kind of criticism. It is the most obvious criticism. I am not ignoring it and I do not think that anyone intends to ignore the rights of the first litigant. But the question is, on balance, does the right of the first litigant outweigh the rights of many others who are not represented but are otherwise affected? Again, I say that at the end of the 18th century the intervention procedure was created and it is a part of our jurisprudence notwithstanding Professor Friedenthal's comments to the contrary.

PROFESSOR NEIL H. COGAN: I want to respond very briefly to Jack [Professor Friedenthal]. I cannot say that we should limit public actions to those involving constitutional rights. I cannot imagine that cases like *Weber,* Title VII cases, are not public actions. Indeed, I cannot imagine a case challenging the doctrine of charitable immunity which might not also qualify as a public action. It is difficult for me to see how someone like Bakke who raises the issues that he raises can come in and say, "I just want to confine this to myself and to my individual facts and I do not want it to have ramifications beyond this lawsuit. I just want to go to medical school."

PROFESSOR D. MICHAEL RISINGER, SETON HALL UNIVERSITY: Judge Weinstein, you said there were some cases

where maybe there should have been intervenors or formal parties where there was a problem with that in terms of the authorization for intervenor status. This is one category of case. In these cases, we would really not like to have this hybrid status, but we cannot get around it, so we cheat on it by calling it litigating *amicus*.

JUDGE JACK B. WEINSTEIN: The court needs help. The litigants need help. You have a resource available. Why not use it? I do not understand why it is cheating. If I have a problem in my backyard and I cannot get black pines to grow where I want them to grow, I call in the Department of Agriculture because that is one of their responsibilities. Why can't I call in the Department of Justice when I have too many cases growing in my courtroom and I want to control them?

PROFESSOR RISINGER: If I may, if those are the kinds of cases where they should have been full parties, I would label them as cheating. But there is another kind of case I think you identified where you did not think they should be full parties and you wanted them in somewhere. I would characterize that structurally as a process of calling in a court's expert witness.

You are calling upon an agency of the government and the function it seems to be performing in that litigation — where you really did not want another full party to come forward — to provide expert information for the purpose of deciding some adjudicative fact or to provide the background for deciding a legislative fact. It seems to me that they could better be characterized as courts' experts. If we did it that way, it would put the control of that process in the court. More specifically, it seems to me it would line the functions up better than if you call them sort of half-parties and then have them coming in and thinking as half-parties that they have only half-way a say in what they get to do.

JUDGE WEINSTEIN: I think that is a fruitful analysis, but characterizing them as experts is not really quite accurate because what you are asking for is the U.S. Attorney's Office to send an attorney who works in this field to serve as a pipeline for the court leading to a whole series of experts. The attorney is not an expert, but he can give the court access to a lot of expertise. This is not quite the same as an expert witness, although that model provides a useful analogy.

PROFESSOR JOHN E. KENNEDY, SOUTHERN METH-

ODIST UNIVERSITY: I just wanted to raise a technical point in this last discussion about not confining intervention exclusively to Rule 24. I wish to raise the technical point that many of the cases are class actions and, therefore, Rule 23(d) would govern over Rule 24, thereby giving a larger amount of discretion to the trial judge. This would include the implication that is drawn from Rule 23(d) cases where, in response to notice, people have a right to appear.

Different commentators have analyzed that by allowing the court to structure a limited participation which is then read back into Rule 23(d) to authorize the type of process that Judge Weinstein has been elaborating. Thus, it is not a cheat, but rather is authorized within the developments of the types of public actions that have been maintained under Rule 23 rather than Rule 24.

PROFESSOR JACK H. FRIEDENTHAL: I was just going to say that I think we stayed away from the class model because it does raise different considerations, but it does provide a very good analogy. Of course, the right to intervene on appeal has been subject to quite a bit of writing, especially with reference to challenges to settlements under Rule 23(e). In Rule 23 we have a useful model for outsiders who are affected (although they may in fact have representation up to a certain point) to come in and say at this point that my interests are not represented because the settlement is unfair or unjust. We are not completely in new territory here. I think it is a good analogy.

PROFESSOR JAMES M. KLEBBA, LOYOLA UNIVERSITY OF NEW ORLEANS: This question that Professor Kennedy brought up is one that was in the back of my mind. The whole question is the relationship of class action to what we call public interest litigation. The type of public interest litigation described by Professor Chayes and by Professor Cogan does not necessarily mean a class action. You can have a Bakke who says, "I am just one individual; I do not purport to represent all white students similarly situated. I just purport to represent myself; I do not purport to represent a class. I am not asking for money damages; I am asking for injunctive relief."

To what extent should the court treat differently a Bakke who comes in and says he merely represents himself from the way it would treat one who purports to represent a class? And, furthermore, to what extent should a judge require a class action to be brought? I do not see that there is any mechanism for doing this

under the present rules should a judge receive a *Bakke*-type case in the future. How can the judge say: "I will not take this individually, you must bring this as a class action"? In effect, perhaps this achieves the same result as allowing a large number of people to intervene.

PROFESSOR JONES: Professor Kennedy's observations about the connection between the class action and intervention are useful. I think the class action is a good model. In fact, one of the things that concerns me most about this category of cases is that they are not being pursued as class actions and, thus, they do not have the protection of class actions such as the procedure for testing the adequacy of representation by subclassing or by providing explicitly for the court to invite intervention by sending out notice.

When one considers the full panoply of procedural protections for outsiders available in group actions under Rule 23, but unavailable under Rule 24, it may be helpful to look to the class action model for implication of powers that might be available in cases which have been initiated as nominally individual actions, but which clearly have a class-like effect. The question which might arise at some point in the future is whether a court might force an Allan Bakke — who only seeks individual relief — to bring a class action.

PROFESSOR JOHN B. OAKLEY: I have a vague recollection that I have seen a case in which a judge required an action to be brought as a class action. The problem under Rule 23, of course, is that even if you could cajole a party into making it a class action, all Rule 23 gives you the right to do — if you do not like the adequacy of representation — is to dismiss the class part. It does not let you dismiss the individual action. So it really is not, in its present form, a panacea. The point is well taken that the concerns of public law litigation argue for some of the virtues of class action; it is nice to hear of those virtues particularly when we hear the vices so frequently.

PROFESSOR COGAN: I view some of the stronger forms of public action as having greater effect than a traditional class action. Often in class actions we have a defined group of persons. In fact, there are cases which hold that if you cannot define the group of persons who are affected by this action, you cannot bring it as a class action. Well, I am not sure how to get out of that. I think that there are actions which perhaps cannot be brought as class actions which have broader effects. For these

actions, we have to have some of the same types of protections that the class action provides. I am not sure that due process is the only thing we are concerned about, but some other democratic notions that are also at play.

I wanted to respond to one other point. I am not at all sure that we can legitimately have these kind of actions in court. Nevertheless, I do think, to be positive, that we have to deal with them for a while at least until we see what we can do. We have to explore what it is that we have. We have to understand what the concerns are and see if we can develop the process. If it works out that we cannot deal with it, then we (or I) will be a traditionalist like Jack [Professor Friedenthal] and trudge back to the agencies and the legislature.

JUDGE WEINSTEIN: I would like to respond to something that I think is a serious concern raised by comments Professor Friedenthal made about the individual. He just wants to come in fast, get a cheap remedy and get out before anybody even knows he is there. He does not want to make a "federal case" out of it. These are problems with which we ought to be concerned. We are limited in our ability to deal with them because of stare decisis, the Constitution and word of mouth.

Take a prisoner case, for example. We get a letter from a prisoner claiming prison officials are opening his mail. So you know what has to be done. Immediately you have to order them to stop opening his mail, assuming he has that right. You must do it quickly. You do not want to wait and get this whole panoply of public system reform law involved. It is very hard to do it without getting involved in all of the prisoners' complaints.

One way of doing it, of course, is to bring in the defendant and say: "Look, let us stipulate this case out of the way so you do not have any stare decisis effect and we just take care of this case which is a clear case," and you settle it. That is one way of handling that kind of case. Maybe that is the way the *Bakke* case should have been handled at the trial level. I don't know.

PROFESSOR FRIEDENTHAL: It certainly was halfway handled that way. The university's past discrimination was stipulated out.

JUDGE WEINSTEIN: But then you get into the problem of stare decisis and word of mouth in the institution itself, in the prison itself. Everybody knows that it is very difficult to limit cases involving prisoners' rights. The case really gets out of hand

and I do not know of any device for forcing limitations given the equal protection clause and the concept that everybody ought to be treated the same way. Those problems of constitutional equal protection get in the way of really sensibly controlling this kind of litigation. If you did not have to treat everybody equally . . .

PROFESSOR FRIEDENTHAL: The darned Constitution always gets in the way, doesn't it?

JUDGE WEINSTEIN: . . . we would have no trouble handling your problem.

PROFESSOR FRIEDENTHAL: But you can do it in one way. You can make sure that the interests are truly sincere by making the cost sharing that I suggested.

PROFESSOR OAKLEY: But, then, what about the poor litigant?

Well, our talk has turned to equality which is the subject of the [Annual Meeting's] plenary session this afternoon. It does suggest one observation to be made. Judge Weinstein, in detailing sources of information for the public law judge, ranked next only to intervention and extensive standing for private parties the "back door" experience of the judge involved. He said there was a malign side to that in terms of the judge sort of pulling strings behind the scenes and a benign side by which the judge brings to the bench in a public law case the judge's personal experiences. I think that argues very strongly for a more representative judiciary as we continue to enter an era of public law litigation.

JUDGE WEINSTEIN: That will not help. No. I am in favor of minorities being on the bench, but obviously it is not going to help because you can only get one judge. Unless you have all the judges voting together, what good does it do to have different people represented? Either you get the minority judge, or you get the right-wing judge, or you get the left-wing judge, or you get the male or the female. Generally, there is one judge per case. So although it may help on the appellate level, it does not, in my opinion, solve this problem that you are talking about. A court is not a legislature.

PROFESSOR OAKLEY: No, but if the judge is part of the establishment and if you change the establishment it would have some partial effect.

In any case, it was Jack Friedenthal who said there was a correlation between public law litigation and obscenity. As is true with traditionalists, I think he got it backwards. After all, obscenity is something private that gets made public, and public

law litigation, we have said today, is something public that is too private. In any case, I agree with Jack that it is a matter not of kind but of "the decree" and, on that, we will close the proceedings.