Litigation Seeking Changes in Public Behavior and Institutions — Some Views on Participation

By Jack B. Weinstein*

Introduction

The increased role of the courts in compelling institutional change has become a substantial source of concern to scholars. Perhaps this kind of judicial intervention was inevitable. As Professor Fiss put it: "Structural reform truly acknowledges the bureaucratic character of the modern state, adapting traditional procedural forms to the new social reality, and in the years ahead promises to become a central . . . mode of constitutional adjudication."[1]

My discussion should not be taken as suggesting agreement with Professor Fiss and others that system-reform litigation will constitute a major component of federal litigation. Severe restrictions on resources available at the national, state and local levels and changing social and political attitudes suggest that this kind of case will be less important in the immediate future than it has been in the past.[2] Moreover, for the purposes of this paper, I assume — while recognizing the problems — the legitimacy of what Professor Chayes refers to as public law litigation.

All students of this subject are aware that cases seeking substantial institutional reform usually require hand-tailored practice. As Judge (formerly Professor) Benjamin Kaplan accurately

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[1] Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979). *See also* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 788 (1978).

[2] *See, e.g.*, Shabecoff, *Environmental Groups Tell of Trouble Raising Funds*, New York Times, Jan. 7, 1980, at A-15, col. 1; Rosenbaum, *Aid for Public Interest Lawyers Drops*, New York Times, Jan. 5, 1980, at 8, col. 3.

remarked at a recent private meeting, the very large cases and the very small cases (which abound in the federal courts) are not tried according to the Federal Rules of Civil Procedure.[3] Because of the numerous interests involved and the fact that these interests may be inchoate or in conflict, flexibility is particularly necessary in system-reform litigation.

My fundamental assumption is that those persons who may be affected by a court's decision should have the right to be heard before their fate is sealed. This thesis is vital to the effective functioning of the court, since it minimizes the chance of error due to the lack either of knowledge or appreciation of the variety of interests that may be affected. From the point of view of those who wish to address the court, this hypothesis serves to assure the essential element of due process — the right to be heard — and may mollify objections, thus reducing the possibilities of bitterness and enhancing the possibility that the decree will be effective.

This is a departure from the traditional two-party adversarial model where the lawyer controls his or her case. Attorneys have good reason to object to the confusion of tactics and compounding of discovery, settlement, trial and appeal problems when other lawyers and laymen enter the case. But plaintiffs' counsel should understand that, when the suit is brought, system-reform litigation entails the risk of such complexities and defendants, usually representing public institutions, should be used to the political problems attendant on managing the peoples' business.

If the plaintiff is an individual with limited funds, interested only in his own rights, there may well be reason to try to limit the case so that the courts do not become too expensive for those who need them but are not poverty stricken or wealthy. Yet, stare decisis and equal protection make it difficult to prevent the case from getting out of hand and expanding into attempts to reform an institution.

Allan Bakke may have only been interested in his case — getting into medical school.[4] But others knew that if he won stare decisis would affect many other blacks, whites and medical schools. What the two litigants might want to stipulate in order

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[3] *Cf., e.g.*, MANUAL FOR COMPLEX LITIGATION (1977); RULES OF PROCEDURE GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, reprinted in 28 U.S.C.A. at 1071-1157 (West 1976).

[4] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

to simplify the case, others who may be affected might wish to make the subject of a full record. Sometimes the stare decisis problem can be met by settling the case with the aid of counsel and the court. But then the institution may be caught on the horn of the equal protection clause: how can it treat this applicant (or prisoner, or student, or mental patient, or welfare recipient, etc.) differently? Certainly, if the case is permitted to expand beyond the scope intended by the original parties, additional burdens such as attorneys' fees and costs should be shifted and shared to the extent possible. The court may even be justified in making special interim orders granting temporary relief to the plaintiff while the broader issues are litigated.

While concepts of jurisdiction and related categories such as standing, justiciability, intervention as of right and exhaustion of administrative remedies appear to lack flexibility, sometimes they are soft around the edges and can be adjusted to achieve a sensible substantive result. Thus you will, I hope, forgive me for approaching the subject of intervention and standing by first addressing some special attributes of system-reform litigation and then considering alternative ways of bringing diverse views to the courts' attention.

I. Three Special Problems of System-Reform Litigation

A. Conflicts Among Groups Aligned as Plaintiffs or Defendants

Differences between counsel and clients in many of these cases, particularly in education matters, is well known; it is compounded by conflicts among groups that might seem, to those observing from the outside, to have a unity of interest.[5] There are power struggles among representative groups, personality problems, differences in interest and differences in philosophy.

Since no one can speak with assurance for certain groups, difficulties are compounded in working out a settlement. In many cases, even if there is no formal settlement, a consensus as to what is desirable, or at least what is a reasonable degree of shared pain, provides an implied agreement that supports the

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[5] Relevant examples and citations in education litigation will be found in Weinstein, *Equality, Liberty and the Public Schools: The Federal Role*, 48 U. Cin. L. Rev. 203 (1979); Weinstein, *Equality, Liberty and the Public Schools: The Role of the State Courts*, 1 Cardozo L. Rev. 343 (1979); and Weinstein, *Education of Exceptional Children*, 12 Creighton L. Rev. 987 (1979).

formal judgment and improves the probability of cooperation in enforcement. The parties who run the institution often desire a decree so that they can disclaim responsibility, but the effectiveness of the decree will depend upon acceptance of the soundness of the court's decision and a desire to make it work.

Conflicts among and within the groups involved on either side make it very difficult for an attorney. The advocate is not in a position to limit discovery, enter into stipulations and use other shortcuts since the lawyer must protect his flank against diverse concerns in "the group" whose interests are being "protected." In class actions, we know that "typical" claims and "representative" parties are somewhat fictional.[6] This situation almost precludes effective decisions by "the" client.

Some of my own cases are suggestive. In one — attacking city housing practices — the attorney for the city constantly complained that he could not consent to various suggestions made by the court and the HUD representative because other tenants' groups took an entirely different position. In a school litigation, the lawyer for the plaintiff class was in an embarrassing position because many of his "clients" preferred the status quo since it gave them control of the school they could walk to. Moreover, minority tenants preferred that newly constructed housing be available for the poor, who desperately needed it, rather than for the middle class who might change the nature of the community — possibly for the long-term benefit of children who remained in the neighborhood. A suit to integrate a newly constructed elementary school was never pressed because, I suppose, some of the clients preferred segregated neighborhood education in a new facility to integrated education in another neighborhood.

B. Inherent Differences in Capacity Because of Inequalities in Our Society

The seriousness of this conflict among the interests of those aligned as plaintiffs is compounded because the advocacy of those interests is not equal. This inequality is not only the result of the differing abilities of plaintiffs' counsel. It is, in part, attributable to differences in the ability of the variety of clients to communicate with counsel so that their special interests and needs are clearly understood and forcefully advanced.

No matter how sympathetic to the poor, lawyers tend to come

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[6] FED. R. CIV. P. 23(a).

from the middle classes and are middle class by virtue of their social, political and economic status. Clients who are members of the middle class tend to be more aggressive and better able to deal with social, governmental and legal systems and their representatives. Partly for this reason, more affluent plaintiffs tend to have their way in system-reform litigation where there is a conflict between them and poorer plaintiffs. The poor seeking the court's help must have spokespersons. Groups which are willing and able to express and pursue their interests may perform this service for the poor, but the agenda of the clients and the attorney is not always congruent.

C. Assumption by Public that the Court Has Assumed Responsibility for Institution in a Quasi-Legislative and Quasi-Executive Manner

The court's position is quasi-legislative since the remedy will often affect many more interests than those of the parties before it. Integration at the request of blacks affects whites. Who is to speak for the latter? Reverse discrimination suits by whites affect blacks. Who is to speak for the minorities? Putting emotionally disturbed children into main stream classrooms affects those students without handicaps. How are their needs to be taken into account by the judge? Using limited funds to improve the position of one group in one institution may leave less money available for other groups and other institutions. Who will present those conflicting demands?

The legislature handles this kind of problem through practical tools such as voting power, logrolling and consensus politics. Courts are supposed to operate by the more etherial standards of the constitution and neutral principles. But a court, like the legislature, if it is to make informed decisions, must listen to all who may be affected. This is a cumbersome process and the court is torn between seeking sufficient participation and information so that its remedy is fair to all concerned and seeking the prompt elimination of the violation which entitled an individual to judicial action in the first place. In short, in this kind of litigation, there is brought home to the court the need to protect present and future interests of diffuse heterogeneous groups with varied concerns and capacities.

The willingness of courts to assume this quasi-legislative posture may, to some extent, cause people who may be affected by the litigation to think that the court's power is unrestricted.

They fail to appreciate the court's limitations in, for example, making resources available to correct institutional deficiencies.

In many of these cases there is extensive correspondence to the court from members of the public. This mail, and petitions during the course of the litigation, seeks or opposes remedies and points out institutional deficiencies; it is very much like what I saw when I was an aide in the state legislature. Long after the case is closed, there are complaints with respect to how the institution is operating.

In one education case terminated some years ago, for example, I occasionally get letters from parents who object to the treatment of their children or from officials who seek more funds. As a result of a jail case decided many years ago, I receive letters from inmates who apparently consider me their ombudsman. I recently received a poignant letter from a teacher complaining about the problem she was having in trying to live up to the spirit of one of my recent decrees dealing with disturbed children. When I visited a state institution for the severely retarded to get an idea of how it was operating, I was met at the door by a large number of parents who wanted to accompany me on the tour and tell me about their hopes for their children.

II. Aiding the Court to Appreciate the Needs of Those Who may be Affected

I approach the matter of participation of non-parties in system-reform litigation from the least intrusive mode — letter writing — to the most intrusive — standing to bring an independent action.

A. Open Communication to the Court

Anyone who writes the court should receive an answer to indicate that, at least, the judge has read the letter. The correspondence should be filed so that the attorneys can consider it. If a member of the public wants to testify, it should be suggested that he or she get in touch with counsel. It is obviously desirable to have lawyers screen possible witnesses and others so that the litigation does not get out of hand with what the law considers irrelevancies.

The number of communications, compared to those who might be affected, is usually quite small and they are unlikely to represent a fair sample of the population which may be affected.

The fervor of these letters and their factual content will have some influence on many judges, though they probably will not have much of an impact upon the final decision.

B. Judicial Notice

In system-reform cases, the court will take judicial notice in a much more extensive way than Rule 201 of the Federal Rules of Evidence appears to permit. This is partly a matter of legislative findings, partly to provide evidential inferences, partly to permit evaluation of the impact of possible remedies, and partly because the cases are almost invariably non-jury. For example, in a case enjoining the use of IQ tests, the impact of the decree will obviously be great on persons not theoretically before the court. Publishers of these tests, psychologists in other parts of the country, and others will be affected. If new testing procedures are needed, they will have a national market and will be utilized outside of the institution before the court.

Thus, it is desirable to consider indirect impacts and broader underlying facts to the extent they are available. Typically in these cases there is a very extensive use of the secondary materials. Nevertheless, the ability of the courts to gather information has been the focus of much of the criticism of the courts as social policy makers.[7] Special problems of judicial notice, including affording parties the opportunity to object, are beyond the scope of this discussion.[8]

C. Friend-of-Court Status

Anyone who wishes to serve the thankless role of *amicus* should be permitted to do so in public interest cases. The posture is more formal than merely sending communications to the court since copies of all court papers should be mailed to the *amicus*, presenting a logistical burden. Moreover, the *amicus* will want to be heard in argument and more papers will be produced.

Responsible and competent *amici* should, I believe, be permitted to participate fully in evidentiary hearings by calling witnesses, cross-examining and introducing documents. A well-

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[7] *See generally* D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

[8] *See, e.g.*, 1 M. BERGER & J. WEINSTEIN, WEINSTEIN'S EVIDENCE §§ 200[01]-[04], 201[05]; Sperlich, *Social Science Evidence and the Courts: Reaching Beyond the Adversary Process*, 63 JUDICATURE 280 (1980).

financed *amicus* will be able to commission necessary statistical and other studies and compensate necessary expert witnesses. Such an active non-party is sometimes referred to as a "litigating amicus." The position is difficult for the lawyer since he or she has no right to appear and thus is more controllable by the trial judge than are most lawyers.

I have invited the government to appear as *amicus* — the SEC in stockholder litigations, HEW in education suits and HUD in a housing case. This is one way of meeting cases such as *United States v. Mattson,*[9] and *United States v. Solomon,*[10] which hold that the United States may not bring suit to protect the constitutional rights of the mentally retarded since express statutory approval is lacking.[11] Once the case is brought by private litigants — and there is statutory and other authority for such a suit[12] — many of the expenses can be assumed by the government. We have here, as you at once recognize, a curious anomaly. The class action has expanded the capability of the private attorney general, while cases such as *Mattson* restrict the Attorney General's capacity. However, I believe the result is defensible on grounds of federalism and separation of power.

There is no reason why the court should not invite as *amici* private groups such as the NAACP Legal Defense Fund, a bar association or a law firm where the court needs help. In class actions, it may even replace inadequate counsel with a more competent lawyer.[13]

There is a substantial financing problem with respect to private litigation. To some extent, it has been reduced by permitting fees in section 1983 actions, class actions and the like, but it remains a problem partly solvable through well-financed friends of the court.

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[9] 600 F.2d 1295 (9th Cir. 1979).

[10] 419 F.Supp. 358 (D. Md. 1976), *aff'd,* 563 F.2d 1121 (4th Cir. 1977).

[11] *But cf.* Note, *Protecting the Public Interest: Nonstatutory Suits by the United States,* 89 YALE L.J. 118 (1979) (suggesting that standing should be allowed the executive unless Congress specifies otherwise).

[12] *See* Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979); 1975 Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-81 (1976); *see generally* Weinstein, *Education of Exceptional Children,* 12 CREIGHTON L. REV. 987 (1979).

[13] *See* Cullen v. New York State Civil Serv. Comm'n, 435 F.Supp. 546 (E.D.N.Y. 1977).

D. Use of Masters or Equivalent Devices

The master acts as a buffer, bridge and catalyst permitting the court to maintain its judicial role of non-involvement. This technique permits negotiations with diverse groups in a fluid, polycentric situation. Recently, for example, most of the *Franklin National Bank*[14] cases were settled in multi-district litigation pending before me. There were some two score lawyers and parties that included inside directors, outside directors, a variety of governmental agencies, classes of shareholders, directors charged with criminal violations and a trustee for a bankupt holding company. Nevertheless, since only money was involved, it was possible for the court to conduct some of the extensive and difficult negotiations because each client was "controlled" by the lawyer. The matter was quite different in the *Hart*[15] case where Professor Berger was the master and "clients" lacked discrete and, therefore, controllable interests.[16]

The master acts to solidify the interest of a group that the court can then deal with. He, she or they can also explain the court's role to the public during the litigation and build consensus and support for some solution. In effect, there is an attempt to create a new constituency.

These ad hoc institutional devices can be used for purposes of long-term daily supervision of the decree as in the *Willowbrook*[17] case where a formal standing committee (representing children, state and public) has a substantial budget. Only major disputes need to be brought to the court.

E. The Press

The media is obviously of great importance in public interest litigation. Communications by the court are not heard only by professionals who can interpret to clients. The court communi-

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[14] *See generally* In Re Franklin National Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1979); In Re Franklin National Bank Securities Litigation, 478 F. Supp. 577 (E.D.N.Y. 1979) (explaining prior history of the litigation).

[15] 383 F. Supp. 699 (E.D.N.Y. 1974), *supplemented*, 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

[16] Berger, *Away from the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978).

[17] New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F.Supp. 715 (E.D.N.Y. 1975).

cates over the heads of counsel. It speaks directly to those interested in the institution before the court, and to the public at large. The media's understanding is essential if this line of communication is to be kept functioning reasonably well.

Moreover, the newspapers, radio and television serve as a convenient, informal notice-giving device. When people hear, see or read about a case, they can take steps to make their views known to the courts.

Courts are not well equipped to deal with the press. Certainly, they cannot control it. One midwestern judge held press conferences during the period he was handling an educational litigation. This seems difficult, but he apparently carried if off well.

Most courts can take steps well within the bounds of propriety. They can write opinions that are more readable than usual. They can summarize through introductory paragraphs so that the press can obtain convenient quotations. They can notify the press when hearings or other matters of interest take place and they can see that copies of documents are conveniently available.

The press can assist by assigning special reporters who have kept in touch with the whole litigation. I believe the law schools can cooperate by interpreting important litigations to interested reporters somewhat in the manner they do when United States Supreme Court opinions are handed down.

Particularly in this kind of case, television and radio reports from the courtroom should be available to the public. Since so many individuals may be affected, why should they not see the proceedings? This knowledge will, I believe, enhance acceptability of the decree.[18]

F. Back Door Communication with the Judge

The judge is a member of the establishment. Particularly in smaller communities, he or she sometimes remains involved by reason of past and present positions. Directly through conferences in chambers and telephone calls, or indirectly through remarks that he or she makes to be transmitted and picked up by friends in power, the judge could influence the decisions outside the courthouse which will make the court's resolutions easier to accept and implement. That underground line of communication

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[18] *See* Weinstein & Zimmerman, *Let The People Observe Their Courts,* 61 JUDICATURE 156 (1977).

could be reversed to influence the court. How often this latter technique is used I do not know. Such dangerous ex parte attempts to influence the court should, I believe, be avoided.

In a more benign way, however, doors will be opened to masters by longtime acquaintances of the court. Officials and the court may share a mutual respect through prior contacts that will reduce some hostility. In general, the court's role is a lonely one and this kind of indirect influence will not, and should not, have any appreciable effect.[19]

G. Intervention

Intervention of right in system-reform litigation should, I think, be allowed wherever Rule 24(a) of the Federal Rules of Civil Procedure can be interpreted to permit it if there is a possibility that "an applicant's interest is [not] adequately represented by existing parties." The litigation becomes more complex, but the diversity of the interests becomes clearer.[20] The common question of law or fact criterion in Rule 24(b) will obviously permit permissive intervention in most cases.

Since the litigation is already pending, there is less reason to be as finicky about standing than there would be if the intervenor was commencing the suit.[21] Recall that Rule 24(b) has a clause permitting intervention by a governmental agency where a party "relies for ground of claim or defense upon any statute or administrative code."

Query: Could a governmental agency intervene in cases such as *Mattson* or *Solomon*?[22] If yes, is this a circumvention by rule of limitations on standing implied from a statute? Perhaps so,

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[19] *Cf.* Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 95 (1979).

[20] *See* Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979).

[21] *See* Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979) (not necessary to decide if *Solomon* should be followed to restrict standing of United States to bring suit since government became a party by intervention under Rule 24(b)(2)). *See generally* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726-28 (1968); Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 U.C.L.A. L. REV. 244 (1977); *cf.* Brown v. Board of Educ., 84 F.R.D. 383 (D. Kan. 1979) (recurring problem of intervention in the most famous public law litigation).

[22] Discussed in connection with friend-of-court status, notes 9-10 and accompanying text, *supra*.

but I feel more comfortable in many of these cases with the government's expertise and often dispassionate view available and the theoretical problem seems a minor barrier to a sensible result.

H. Standing

This brings us finally to the problem directly before us — standing to bring a suit. To paraphrase Justice Stewart, standing may be undefinable, but, at least at the extremes, we know it when we see it.[23] Of course, many cases are not obvious. My colleague, Judge Dooling, says standing depends on the imagination of the judge. Certainly the skill of the advocate is a main ingredient in categorizing a plaintiff as a bona fide claimant aggrieved by illegal conduct rather than an officious intermeddler.

1. Private Persons

The Association of the Bar of the City of New York's committees on Federal Legislation and on the Federal Courts' Report on Citizens' Standing to Sue in Federal Court summarized the constitutional and prudential limitations in suits against the government. The report explained that meeting the "case or controversy" standard of article III of the constitution generally requires (i) that plaintiff has personally suffered "some actual or threatened injury," (ii) which is the "result of the putatively illegal conduct of the defendant."

Beyond these constitutional requirements, the Court has identified at least three tests sometimes referred to as prudential:

(A) the injury claimed cannot be a "generalized grievance" shared equally by the citizenry at large;[24]

(B) a litigant cannot sue upon the legal rights or interests of a third party; and

(C) the interest of the plaintiff must be arguably within the "zone of interests" to be protected or regulated by the statutory or constitutional provision upon which the claim rests.[25]

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[23] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

[24] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978); Gladstone Realtors v. Village of Bellwood, 99 S. Ct. 1601, 1608 (1979). *See also* Comment, *Standing to Sue in the Federal Courts: Congressional Power To Reduce Judicial Barriers to Justiciability*, 2 WESTERN NEW ENGLAND L. REV. 71 (1979).

[25] The Committee on Federal Legislation and the Committee on the Federal Courts, *Citizens' Standing to Sue in Federal Court*, 34 THE RECORD, 585,

The City Bar Association's committees concluded that, should Congress decide that corrective legislation for the doctrine of standing is appropriate, such legislation (in preference to bills such as S. 680, then pending in Congress[26]) should read:

> Any person shall have standing, to the fullest extent allowed under Article III of the United States Constitution, to bring an action against the United States or any officer or agency thereof or against any State or local governmental entity or officer or agency thereof or against the District of Columbia or any officer or agency thereof, based in whole or in part upon an act or omission alleged to be in violation of the laws or Constitution of the United States.[27]

The committees' report is a fine study of the standing problem and I agree with this conclusion. As far as possible, the federal courts should be open to the aggrieved people who pay for them — residents of this country — to the fullest extent permitted by the Constitution. As Professor Davis notes, "one who is *in fact* adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable."[28] But what does "in fact" mean? Certainly it suggests a person concerned because he or she is affected. How much and how personally the plaintiff must be affected remains necessarily a matter of judgment.

Strict application of the case or controversy limitation can encompass much of what has been referred to as prudential limits. In order to have a case or controversy, there needs to be a potentially wounded plaintiff or one who will personally gain from the

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594 (1979) (footnotes omitted) [hereinafter cited as *Report on Citizens' Standing*].

[26] The Judicial Conference also opposes enactment of S. 680 in its present form. The Conference Report suggests that the complete elimination of prudential limitations raises serious problems. The Conference voted to inform Congress, *inter alia*, that it:

> 4. Believes that prudential standing rules should not be treated in an "omnibus" approach such as S. 680, but individual problems should be resolved by amendments to individual statutes or by incorporating standing provisions in the enactment of new substantive statutes; and
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> 5. Believes that complete elimination of prudential rules could require courts to decide questions which could be more appropriately decided in a constitutional democracy by the national legislature.

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 71 (Sept. 1979).

[27] *Report on Citizens' Standing*, *supra* note 25, at 17.

[28] 3 K. DAVIS, ADMINISTRATIVE LAW § 22.18, at 291 (1958) (emphasis added).

suit. How much harm and how much potential gain depends upon attitudes, not mathematics. The proposed City Bar committees' legislation would only suggest to the courts that Congress — a body with constitutional interpretive power — expected the courts to view standing with, to use Judge Dooling's word, "imagination."[29] The Supreme Court may, in any event, be liberalizing its conception of constitutional and prudential standing once again so that the need for legislation has been reduced.[30]

It should be borne in mind, however, that article III's "case or controversy" requirement and its component notion of standing has an important role in ensuring that those who may be affected by a legal decision will have an opportunity to be heard. As Professor Brilmayer notes in her perceptive article on the issue,[31] among the "interrelated policies" of article III are "the unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented; and the importance of placing control over political processes in the hands of the people most closely involved."[32]

Thus, a relaxed view of standing to permit people believing themselves harmed to challenge institutions or policies may, paradoxically, effectively close the courts in the future to those even more aggrieved because of the doctrine of stare decisis.

In a real war, wooden guns have limited utility. Likewise, mere expansion of jurisdiction without providing lawyers and courts with the resources to effectively handle the cases is futile. For example, in the area of handicapped students, Congress has provided extensive jurisdiction for suits brought by individuals. While the class action and public interest lawyers are available,

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[29] The related but distinct question of whether a private right of action exists is beyond the scope of this paper. *See, e.g.*, Gannett Co., Inc. v. DePasquale, 99 S. Ct. 2898 (1979) (sixth amendment right to open trial belongs to defendant, not public); *cf.* Cort v. Ash, 422 U.S. 66 (1975). *Gannett* will probably be limited in its scope in future litigation. *See generally* Winer, *Press Case Stirs Rabble of Rulings*, Nat'l L.J., Jan. 14, 1980, at 1, col. 4.

[30] *See* Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) (residents near nuclear power plant have standing to challenge act governing claims from nuclear plant accidents) and Gladstone Realtors v. Village of Bellwood, 99 S. Ct. 1601 (1979) (allowing municipality and residents to sue real estate brokers under Fair Housing Act of 1968 for steering).

[31] Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

[32] *Id.* at 302.

much more needs to be done in providing lawyers to potential litigants in such cases. Hardly a week goes by without my feeling this lack. Pro se litigation involving the jails or disability contentions under the social security laws cannot be handled effectively without counsel, yet lawyers for plaintiffs in such cases are the exception rather than the rule.

2. Government

Congress ought, I think, to explicitly provide new jurisdictional bases giving standing to the United States to enforce individual rights. But this is primarily a legislative problem. It has granted the Department of Justice extensive powers to commence litigation in many instances.[33] As I have already noted, Congress must, if it is serious, also provide personnel to the executive branch and increase judicial resources to handle new classes of cases.

I. Procedural Aids

It follows from what I have said that the attempts to limit class actions, to limit discovery and to otherwise inhibit private litigants in public institution reform cases are undesirable. Moreover, I have substantial questions about attempts by the federal government through the Department of Justice to control class actions in areas such as those involving consumers. The recently proposed legislation on certain aspects of class actions represents an interesting and thoughtful contribution towards the solution of a difficult problem. However, I am generally skeptical of the provisions in the Department of Justice's proposed former S. 3475, now H.R. 5103 — which would give the Department control over much of this litigation[34] — because I doubt that sufficient resources will be made available to the Department to execute the law properly.

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[33] *See, e.g.*, Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 788, 871 n. 4 (1978); N.Y. Times, Jan. 3, 1980, at A-18, col. 1(legislation suggested permitting Department of Justice to sue state officials when their penal and mental institutions become inhumane; safeguards for states including right to advance notice and settlement procedures).

[34] *See also Reform of Class Action Litigation Procedures: Hearings Before the Subcommittee on Judicial Machinery of the Commission on the Judiciary*, 95th Cong., 2d Sess. (Nov. 29 and 30, 1978); Bernstein, *Legislative Revision of Class Action Procedures*, N.Y.L.J., Dec. 26, 1979, at 1, col. 1.

CONCLUSION

Widespread access to the courts for people as well as ideas is desirable. Generally, all those who may be affected by judicial decisions which are quasi-legislative in character should have some channel of communication with the court. Based on my own experience, I doubt that liberality in reviewing correspondence, taking judicial notice, granting friend-of-court status, use of masters or their equivalent, considering the needs of the press, or freely granting intervention, will produce costs in terms of complexity that outweigh the advantage of access to the courts by those who may be affected by the judicial decisions.

Mr. Justice Holmes appears to have taken a contrary view in *Bi-Metallic Co. v. Colorado*,[35] when he noted, in an administrative law context, "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its application."[36] My experience, however, in handling at least a score of cases that might be characterized as public litigations is that granting an opportunity to be heard in such cases at the district court level is entirely practicable. The number of those who will want to appear in court is generally quite small in proportion to those who might be affected. Moreover, most people are quite sensible — they understand the burdens on court time and will accede to reasonable requests to limit participation.

The conclusion of the fine Special Project of the Columbia Law Review, *The Remedial Process in Institutional Reform Litigation*,[37] seems sound. Where the courts are required to become involved in institutional reform, they should "avoid" an authoritarian, closed posture. The federal courts "should nourish remedial approaches characterized by the greatest feasible amount of general participation, fact finding, and negotiation."[38] Given their awesome responsibilities when asked to force institutions to change, courts should want to hear from as many different voices as will speak. Considering the serious burdens individuals may bear because of any decree, they have the right to know that someone who is neutral and concerned has listened to their cry and hesitated, reflecting on their views, before deciding a part of their fate.

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[35] 239 U.S. 441 (1915).
[36] *Id.* at 445.
[37] 78 COLUM. L. REV. 784 (1978).
[38] *Id.* at 929.