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Better Days in Court for a New Day's Problems

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The accelerating force of social and scientific change is now an old story, kept up-to-date with country-wide daily bulletins. The relatively phlegmatic acceleration in legal concepts and procedures is also an old story but not so well known as it needs to be. Perhaps this inquiry at the Vanderbilt University Law School will quicken awareness that the repercussions of a new day have induced in the law a state of shocked stability from which it has yet to recuperate.

It is for lawyers and judges to bring it up to a strength and creativeness equal to the times. Out of the new day's commotion whirl competing interests that may spend some of their violence but none of their force by the time they reach the courtroom. A judge who must somehow compose their differences knows how deeply his decision may wound one adversary or another and how sharp a line it may cut into the future. He can no longer invoke with assurance the nearest quieting precedent. The nearest analogy may seem to him only impertinent. Tried and half-true formulas will not serve him, for all their show of stability. He must compose his own mind as he leaves antiquated compositions aside to create some fragments of legal order out of disordered masses of new data. There should be modern ways for such a task, in fairness not only to him but to those who must seek out his judgment and abide by his decisions.

Novel legal problems need not take him by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.

There is abundant evidence that those aspirations go beyond the salvage values that clutter discussion preoccupied with survival.

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A judge accustomed to working on one case at a time could have a field day free of all footnotes on an extra-curricular assignment of broad range. He could also have a field day with footnotes. He yields instead to an occupational tug against extremes. The notes to this article are illustrative only; they include outside reading that proved to be in more than one sense a congenial enlargement of the daily calendar. In deference to that exigent calendar, though at some risk of provincialism, I have relied heavily on cases from my own jurisdiction. Scholars will readily match them with others and with companion treatises.

We want more than to live past forty; we want more than to dwell in a shelter. We are also going beyond the simple homilies of the past, too often narcotic in intent and effect, which failed to riddle the problems that disturbed even a bucolic age. Man does not live by bread alone; but bread is a good current asset. At the same time we are becoming increasingly critical of persistent obsession with material things in excess of what we need or can enjoy. Man does not live by bread and automobiles alone, as they who have nobler objectives remind us.

They are glad enough to ameliorate their lot with social securities unknown to their ancestors, even at some cost to their sometimes rugged individualism. They are also ready, as such men have always been, to band together against common danger. What they ask more can be summed up in two aspirations. Pliant though they may be to the regimentations that attend their age of wonders, they have the age-old aspiration for some chance of self-fulfillment between the cradle and the grave. They envisage the dance of life as something more than a tribal dance, a way of life as something more than a folkway.

They also want enduring assurance of what men long despaired of achieving and have sometimes achieved and lost—a society whose laws operate equitably and without oppression of the individual. It is this second aspiration that can infuse a judge's response to the need for stabilizing the changes of our time.

One could make that response in many ways. One could respond by signalling where judicial decisions are already reflecting major social changes without loss to the continuity of the common law.[1] We have, for example, come much of the way from *caveat emptor* to *caveat fabricator*;[2] and there are many signs of *caveat sovereign immunity*.[3] We are taking a new look at contracts;[4] it can make a difference now if one party has read and perhaps written the contract and the other party cannot reasonably be expected to understand its legal import even if he has read it.[5] Property law keeps up in some fashion with ingenious new ways of holding and transferring property.[6]

1. See LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); WASSERSTROM, THE JUDICIAL DECISION (1961).

2. See Greenman v. Yuba Power Prods., Inc., 59 Cal. Adv. 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

3. See Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

4. See Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

5. See Casey v. Proctor, 59 Cal. Adv. 109, 378 P.2d 579, 28 Cal. Rptr. 307 (1963); Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

6. See Tanenbaum, *The ABC Technique of Financing Real Estate Acquisitions: The Tax Motivated Leasehold*, 111 U. PA. L. REV. 161 (1962); Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299 (1962).

There is more talk of land use in the books than before.[7] Family law recognizes new responsibilities within the family as well as new freedoms.[8] Criminal law is beginning to take account of new insights into human behavior.[9] Wooden rules in conflicts of law are giving way as surely as wooden boundary lines.[10] Notable developments in constitutional law attest the impact of the Bill of Rights on the powers of the states and also the major changes in the relation of the national government to the states.[11] A heartening concomitant of these developments is the growing disposition in the courts to make fruitful use of scholarly research and comment.

On any legal subject there are usually experts better qualified than the judge. What he can perhaps most appropriately speak of are underdeveloped areas of the law where judges and scholars are only beginning to marshal their resources for the hard tasks ahead. I shall leave to others the large problems of international law. Within the confines of domestic law, this brief response can direct itself to a salient change in our society, the extraordinary growth of both the state and of the private groups that now have so much to say about how people shall lead their lives.[12] What enlivens the picture in a

7. See HAAR, LAND-USE PLANNING—A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND (1959); Comment, *Control of Urban Sprawl or Securing Open Space: Regulation by Condemnation or by Ordinance?*, 50 CALIF. L. REV. 483 (1962).

8. See Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598 (1952).

9. See United States v. Currens, 290 F.2d 751 (3d Cir. 1961); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); People v. Busch, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961); People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); People v. Baker, 42 Cal. 2d 550, 268 P.2d 705 (1954); People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954); MODEL PENAL CODE—PROPOSED OFFICIAL DRAFT (1962); Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 650 (1958); Hall, *The Scientific and Humane Study of Criminal Law*, 42 B.U.L. REV. 267 (1962); Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197 (1963).

10. See EHRENZWEIG, CONFLICT OF LAWS (1962); articles by Professor Currie set forth in M. Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961); R. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). See also CHEATHAM, PROBLEMS AND METHODS IN CONFLICT OF LAWS (1960), reprinted from HAGUE ACADEMY OF INTERNATIONAL LAW, 1 RECUEIL DES COURS 1960, 237; Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on Shanahan*, 35 N.Y.U.L. REV. 1126 (1960).

11. See *A Symposium on Current Constitutional Problems*, 4 VAND. L. REV. 399 (1951); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), and articles cited therein; Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961); Friedelbaum, *The Warren Court and American Federalism*, 28 U. CHI. L. REV. 53 (1960); Satterfield, *Law and Lawyers in a Changing World*, 48 A.B.A.J. 922 (1962); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

12. See BERLE, POWER WITHOUT PROPERTY—A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY (1959); BLOUGH, FREE MAN AND THE CORPORATION (1959);

country like ours is that people are in the main better placed than ever to amplify their own lives notwithstanding their increased obligations to others. For all the accounting the average citizen must do, he has more disposable income than ever, more free time, more opportunities for education, and more opportunities for self-expression in leisure as well as in work. Like the state and the private groups, he too is taller and fatter than Forefather. When he complains, it is most often from a strength and a drive to optimum living conditions, not from weakness and despair.

We can better understand his aspirations and grievances if we begin by considering the state, which is theoretically the governing institution, though it actually interacts in countless ways with powerful private groups, both to improve and to tax the lot of the citizen. We can proceed thereafter to the groups that are also interacting with one another as well as with the state. Then perhaps we can perceive the main-traveled routes of the citizen in this moving picture, and note how he seems to feel about keeping his various places in relation to both the government and private groups. It is his feelings about his status as he leads one to nine lives or more that will give us some clues to the new rules courts will have to interpolate into so-called settled law.

At least we have abundant and illuminating commentaries on the nature of the modern state, whose laws divide and multiply. Professor Arthur S. Miller gives it the evocative name of "Security State" and explains:

> By that term is meant the dual aspects of the 'Welfare State,' which this nation has become during the past two decades, and the 'Garrison State,' which this nation has in some measure approximated since the end of World War II. The Security State gets its name from the fact that the chief drives of Americans today appear to be the demands of the individual for economie and psychic security which are subsumed under the notion of the social-service or welfare principle of government, and the demands of people generally (for our purposes here, the State) for national security (self-preservation).[13]

COMMITTEE FOR ECONOMIC DEVELOPMENT, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY (1961); EELLS, THE MEANING OF MODERN BUSINESS (1960); GRODIN, UNION GOVERNMENT AND THE LAW (1961); HARBRECHT, PENSION FUNDS AND ECONOMIC POWER (1959); HARBRECHT & BERLE, TOWARD THE PARAPROPRIETAL SOCIETY (1960); MASON, THE CORPORATION IN MODERN SOCIETY (1960); MOORE, THE CONDUCT OF THE CORPORATION (1962); O'NEAL & DERWIN, EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES—"SQUEEZE-OUTS" IN SMALL ENTERPRISES (1961); Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930); *Freedom in the Modern American Economy: A Symposium*, 55 NW. U.L. REV. 1 (1960); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960); Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953).

13. Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620-22 (1958).

I shall not go into problems of external security, particularly complex in this era of war not yet attainted and peace not yet attained. Preoccupied though we currently are with garrison problems, it is reasonable to hope that we will not be a garrison state forever. Even in times of grave disturbance we can still keep our minds on the enduring concerns of a peaceful society.

For a generation now our country has been committed, as all modern states are, to expansive public services. However large may be the disagreement about the wisdom or quality of particular services, few now yearn for the absent ways of *laissez-faire rien.* We have learned to live very well without pervasive poverty, and we have disproved the rationalization that it builds good character if not good bones. The broadened avenues of welfare that have given concern to such pessimists as Frederick A. Hayek have not terminated in the boscage of serfdom. Indeed the evidence grows that some measure of well-being tends to move more people up than down, with a consequent net gain, to a condition that fosters not only fitness but independence of spirit. Most people are not unlike A. A. Milne's king who asked only for a little butter for his bread. When he got it, he did not fall back like a serf, but bounced out of bed. No doubt the enterprising dairymaid who went to fetch the butter, and who spoke to royalty with great independence, also owed some of her spirit to an excellent dairy supply.

There are of course diehards who still speak with alarm about the effects of a little butter upon character. Often enough, however, they prove not averse to keeping their own bread well buttered, and even to calling for a little marmalade, on the ground that otherwise they would have no incentive to work. Although the tax laws, among others, have done much to accommodate them, there are no reports that they are now marching down the road to serfdom in a trance of grateful subservience to their paternal state.

Actually what is reassuring is the amount of grumbling a service state suffers from its beneficiaries. The citizen who takes benefits for granted has also to adjust to the demands of the state and the private groups within it, but he does grumble, however innocuously, and however helpless he may feel about remedying his grievances. Nor is he without an audience. Government officials publicize how much they want to hear from him; the much-maligned mass media send out roving scribes to find out what is on his mind; the League of Women Voters invites his questions on the issues of the day; and sooner or later a law school institutes an inquiry into whatever legal problems his vexations suggest.

Nevertheless his vexations continue. He finds circuitous or be-

wildering the paths to various officialdoms empowered to exercise over his affairs what we discreetly call discretion. We can do much to modernize these paths, though we can hardly simplify them enough to make them easy traveling for the average citizen so long as government, like private enterprise, is committed to ventures on a grand scale.

In any event the achievements and failures of the social services in the modern state belong primarily to the realm of politics. It is in our best tradition that a judge keeps his distance from that realm. He has nothing to do with formulating the statutes that specify what services we shall have. He has nothing to do with formulating the statutes that fail to specify how the services will be rendered. It is not for him to determine whether the service is good or bad or to gauge popular sentiment on the matter. He is not a supervisor and he is not a pollster. He must assume a population adult enough to look after its everyday affairs, even if his peripheral vision takes in evidence to the contrary. He is not a counsellor-at-large. He cannot be all things to all men and still be a good judge.

In his job of interpreting the multifarious statutes that have been enacted in response to demands for expanded services from the state, we can expect him to be on guard against any predilection for one legislative objective or another, and likewise against any disapproving bias. He can ordinarily presume legislation to be constitutional so long as it does not move against the political processes of a free society.[14] His task is to interpret legislative language within the narrows of legislative purpose. It is not for him to pass editorial judgment on any circumstances indicating that the legislature responded to less than noble motivations in enacting what it did, even as to legislation patently responsive to special interests. The public alone can defeat its representatives when they speak only for special groups. Somnolent though the public sometimes is, courts must bank on the chance that eventually it will rouse itself to the cumulative effect of statutes instigated and passed without regard for the public interest. There is always one last sling that breaks the sleepwalker's torpor.

Along with the traditional task of interpreting statutes, a court confronts the responsibility of reviewing the decisions of a growing number of administrative agencies. Time after time it must decide

14. See ROSTOW, THE SOVEREIGN PREROGATIVE (1962); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167 (1961); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUPREME COURT REV. 34.

whether agency wheels are turning within the orbit of legislative and judicial power that a statute has delegated to an agency. Often the orbit is so unconfined that a court must abandon thinking in terms of the confines of a statute and concentrate instead on whether an agency has been using its power temperately or administering to excess. The test in judicial review then becomes constitutional rather than statutory; however endowed with power an agency is, it must still conform to due process.

Scholars like Walter Gellhorn have given us illuminating insights into both statutory delegation of power to administrative agencies and judicial review of that power.[15] There is also widespread public awareness that delegation of power to agencies is growing by leaps and bounds, mainly because of what Harry Jones aptly calls "the incidence of encounter between the individual and the state power-holder,"[16] and because of a comparable incidence of encounter between private groups, such as corporations and unions, and the state power-holder.

There is no comparable public awareness of how meager is judicial review of administrative power. For the most part encounter with the state power-holder is routine. The individual usually complies placidly enough with the requirements for obtaining a library card or an automobile license or a passport;[17] a group usually complies placidly enough with various registration or reporting requirements. It is only through an encounter that brings home a seemingly arbitrary or downright unjust use of administrative power that the individual or group is likely to learn, not only how much expense attends any challenge of that power in court, but also how narrow are the paths to judicial review.

Competent observers have noted that the courts themselves are sometimes unduly deferential to what has curiously come to be known as administrative *expertise*. It is one thing if they are deferring to a technical appraisal in a specialized field. It is quite another if they are deferring to the opinion of an administrator on a matter that should be as much within the ken of judges as within his. Their very deference on such matters suggests that they are not at all clear as to

15. See DAVIS, ADMINISTRATIVE LAW TREATISE (1958); GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941); GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS (1956); Berger, *Removal of Judicial Functions from Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199 (1960); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* (pts. 1-3), 75 HARV. L. REV. 863, 1055, 1263 (1962); Jaffe, *Standing To Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

16. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154 (1958).

17. *Cf.* Kent v. Dulles, 357 U.S. 116 (1958).

what *expertise* means. One might alternatively speculate that the foreign word, indiscriminately used as it is, serves as an expedient incantation for the abdication of judicial responsibility.

Such abdication is the more regrettable in situations where judicial review could have served to uncover issues that were ignored or inadequately treated in the administrative stage. It could thus serve to good purpose even in cases that appear on the surface to involve primarily technical questions. A comprehensive technical evaluation may have expertly skimmed the surface of the problem and never touched its depths. Rendering a full accounting of the technical aspects of a problem may fall far short of taking full account of its legal aspects. A court should not then turn inferior and abdicate its responsibility for review merely because the problem it confronts calls for massive homework. It has an obligation to inquire, even under pain of studying expert reports in an unfamiliar field, into whether the administrative decision evinces a discriminating understanding of the legislative objective and an impartial and reasoned application of the statute. To refrain from exercising its own expertness in such inquiry is to make a complainant's day in court depend on the circumstance that his case is unriddled with substantial technical complications.

It nevertheless remains true that the broader the statutory delegation of administrative power, the broader is administrative discretion and the narrower is the scope of judicial review. There is then all the more reason why a court should have as much to say as ever about the constraints of due process upon agency procedures.[18] The greater the power of an agency to affect people's lives, the more constrained it should be by rules of due process commensurate with that power. A court free of popular or private pressures is well situated to articulate such rules with relevance to a novel context. It can state the constraints of due process in terms responsive to the new facts of administrative life. It must do so as insurance that any individual or group denied a fair day in an agency will have a fair day in court. As Harry Jones perceptively observes, only in this way can we reconcile the formidable impingement of the welfare state upon the individual with the rule of law. In his view:

> The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements: *first,* that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful 'day in court'; *second,* that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the

18. See Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961).

> influence of personal gain and partisan or popular bias; and *third,* that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation.[19]

He makes clear that a fair day in an administrative agency need not parallel in every formality a fair day in court. Nevertheless he rightly emphasizes that the basic requirements of proper notice and opportunity to be heard mean not only that a claimant will be able to state his case but that someone in real authority will study his case "in good faith and high seriousness before the decision comes down."[20] He also rightly insists on a "reasoned" decision rather than one purportedly "on principle," but actually "an undiscriminating and unjust application of general policy to a concrete situation within its letter but not within its spirit."[21]

One is moved to add that these are basic concerns of a court in the review of decisions of administrative agencies. A person has not had a fair hearing if the one in authority, given discretion to adjudge the case in the ample terms of a general policy, has exercised his discretionary power not with the realistic appropriateness that is the very justification of such power, but with such harsh inappropriateness as to mock the meaning of discretion. A court reviewing an alleged abuse of discretion, and finding a prima facie case of arbitrariness, must be alert to ascertain whether or not there emerges from the record some reasonable explanation for the administrative decision. We cannot take it for granted that because an authority is, he thinks. The thought process, or the absence thereof, of the one in authority has more than once been the key to determining the issue of due process in administrative proceedings.[22]

Even if courts actively exercise their reviewing power, there still remains for others the problem of making the administrative agencies operate efficiently and with real commitment to the legislative objectives they are created to serve. We are indebted to such scholars as Walter Gellhorn and Kenneth Davis for their constructive proposals to insure administrative operations commensurate with capacity.

They have suggested the interesting possibility of "Ombudsmen in America,"[23] comparable to those who serve in Scandinavian countries

19. Jones, *supra* note 16, at 145.
20. *Id.* n.4.
21. *Id.* n.5.
22. See California Motor Transp. v. Public Util. Comm'n, 59 Cal. Adv. 283, 379 P.2d 324, 28 Cal. Rptr. 868 (1963).
23. Davis, *Ombudsmen in America: Officers to Criticize Administrative Action,* 109 U. PA. L. REV. 1057 (1961); Gellhorn, *Administrative Procedure Reform: Hardy Perennial,* 48 A.B.A.J. 243 (1962); see also SENATE COMMITTEE ON THE JUDICIARY, 86TH CONG., 2D SESS.; J. M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 86 (Comm. Print 1960).

and in Finland, to improve as well as to investigate administrative procedures. They note how much such men could do to foster clear standards for the implementation of vaguely defined administrative powers. Unlike courts, which can hear only isolated controversies, Ombudsmen would have freedom to investigate complaints even of ponderous or apathetic administration, to recommend changes as well as to criticize, and to publicize recommendations as well as criticisms. Briefly, they would be as concerned with the fevers brought on by the frustrations of cumbersome routine or the slow poison of listless routine as with outright injustice.

Now and again it fortuitously proves of benefit to the individual that the government agencies which crowd in upon his life also crowd in on private groups usually better situated than he is to complain about official proceedings. To the extent that such groups vindicate legal rights akin to his own, they make him the incidental beneficiary of their resources for effective complaint. Moreover, their superior power keeps alive, on his behalf as well as their own, a healthy critical spirit regarding official Establishments. Any servant of the public will usually think twice before daring an attempt at tyranny when he knows that his public encompasses private groups of significant strength.

The influence of such groups is not always so beneficent. As they continue to grow stronger their leaders tend to develop a force of their own that is more than the sum of the strength of those they purport to speak for. They come to speak with the multiplex voice of authority and then to equate their authority with a divinity homely enough to appear consonant with the democratic way of life even when most antipathetic to it.

Moreover, as the decision-makers in the unofficial Establishments, they crowd in on the individual as does the state. Within their own groups their word becomes law, and against any arbitrary power they may exercise the individual is likely to stand very much alone. It is noticeable how passively he has come to acquiesce in a multitude of unofficial decisions that affect his life. It is also understandable. A person without an effective voice at the council tables is not in a position to do anything but acquiesce if a corporation decision dilutes his equity as a shareholder or affects his franchise as a dealer, or if a union decision constrains his opportunities as a wage earner. He usually has little recourse against the subtle pressures that can be brought against him by those in control of all that is loosely described as the internal affairs of a corporation or union. The route from the closed sessions of such a private group to the distant open courtroom is arduous and often impassable.

Even the exceptional man, well able to set forth his disagreement with the decision-makers of his groups, usually learns that his is a voice crying in the togetherness. Worse still, unheeded though it may be, it risks being vilified as the tantrum of a troublemaker. The ordinary law-abiding soul with valid questions to ask is likely to keep them to himself for fear of being labeled with a scarlet "T." It is bad enough to be a helpless man, but worse still to be a marked one.

Moreover, he may be no less daunted about expressing disagreement privately, given still serious risks. The exclusionary rule that militates against state invasions of privacy has been given virtually no application against unofficial invasions instigated by groups as freely as by individuals.[24] Unless people take care to censor themselves, such invasions afford opportunities for wholesale vilification that few would have time or energy or resources to challenge in court.

Even a member of the public without any close relation to decision-making groups may suffer the consequences of their decisions. He finds it small comfort that a powerful union and a powerful corporation may counter each other forcefully if in the end they join to make a decision at his expense. The decisions of other influential groups may insinuate themselves into his life directly or indirectly. The consumer as well as the member producer or distributor may suffer the effects of what a trade association decides. On occasion the public may be adversely affected by less than noble decisions of professional associations. Even charitable foundations, as they grow in resources and power, make decisions whose repercussions bear watching, particularly because their influence, together with that of government and industry, plays a large part in determining how far research is to be applied rather than pure, and to what ends.[25] We must also reckon with the many influential voluntary associations that purport to speak on behalf of all their members, as we remain mindful of how seldom a dissident comes forth to state his disagreement publicly.

The evidence mounts that the leaders in these private groups now exercise power in some measure comparable to that of public officers; yet their decisions are ordinarily not open to comparable public criticism unless they have immediate and substantial impact upon the public, and even then criticism is likely to prove ineffectual in the absence of legal remedies. Insofar as the decision-makers of a group

24. See Burdean v. McDowell, 256 U.S. 465 (1921); Sackler v. Sackler, 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (1962); MAGUIRE, EVIDENCE OF GUILT—RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 209-17 (1959); Note, 48 CORNELL L.Q. 345 (1963).

25. See Friedmann, *supra* note 12, at 160-63; Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Bigness*, 55 NW. U.L. REV. 4, 16 (1960).

affect mainly the interests of some one or more of its members they are likely to escape public notice altogether, even if what they decide has long range public repercussions. There is as yet little general concern for due process outside the realm of state action. The public has yet to understand how freighted with public interest may be the injury to an individual denied a fair hearing in the sessions of a private group regarding interests perhaps as important to him as any he would assert against the state. For all our vigilance against official tyranny we have yet to take full account of how majestic the decision-makers of some private groups have become, how arbitrary their procedures can sometimes be, and how inadequate internal or external controls may be to insure some private equivalent of due process.

There is nevertheless a lively interest among scholars in possible remedies;[26] they may be harbingers of public sentiment more articulate than the occasional wishful statement that there ought to be a law. There is inquiry into the possibilities of extending the public utility concept to various private groups in their relations with the public. There is also inquiry into the possibilities of extending the reach of the due process clause to such activities as bear primarily on individuals, within or without the group, through an expanded connotation of state action. Given the new affairs of state and the new states of affairs, the line between public and private activity is becoming increasingly blurred. Already we have substantial articulation of the responsibilities of a state that undertakes activities characteristically associated with private enterprise. We can expect more articulation of the responsibilities of private groups that operate in a sovereign manner.

It would not be judicious of a judge to rush in where scholars are treading warily, and where there are not yet enough cases to serve

26. See Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Alfange, *"Under Color of Law:" Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962); Barnett, *What is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 ORE. L. REV. 227 (1945); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Henkin, *Shelly v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368 (1963); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 985 (1963).

as aids to navigation.[27] It is for him not to predict but to await what cases may materialize to challenge the supposition that there is no right without a clearly visible remedy. However unexpected may be their disorderly appearance from a recessed area, they are likely to afford some timely clues to the group context from which they emerge, enough perhaps to construct a hypothesis as to how right the asserted right looks in context. If it then appears worthy of a remedy, it will compel inquiry into whether there are adequate unofficial remedies available that would render official intervention unnecessary. If not, a court must resolve the problem of devising an official remedy befitting the right and also befitting the easy ways appropriate to unofficialdom.

It is the perennial responsibility of a court to worry its way through just such a seeming dilemma to a solution that enables one competing interest to adjust to another without undue sacrifice, or that even sacrifices one interest if it is demonstrably unworthy of legal protection. There is no great quarrel with a solution that proceeds from realistic reasoning if it is reasonably clearly set forth. There can be serious quarrel, however, even with a decision that appears just on its face, if it floats in language so inadequate or ambiguous as to afford no clear insight into the nature of the competing interests, no clear vision of their relation to the contemporary environment, and hence no reliable clues for the determination of cases involving kindred competing interests in dissimilar fact contexts.

Nevertheless one can hardly expect that a court can or should invariably afford crystal-clear guidance as to the availability of remedies for injuries proceeding from the everyday public operations of private groups or from their more limited activities in a private or semi-private environment. Even though it may seem reasonably clear to a court that legal concepts seem destined to expand as both official and unofficial activities expand and dovetail, it still has no way of divining a concept's optimum tolerance for expansion at a

27. See Martin v. Walton, 368 U.S. 25 (1961); Local 473, Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Lathrop v. Donohue, 367 U.S. 820 (1961); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); King v. Grand Lodge of the Int'l Ass'n of Machinists, 215 F. Supp. 351 (D.C.N.D. 1963); Rosner v. Eden Township Hosp. Dist., 58 Cal. 2d 592, 375 P.2d 431, 25 Cal. Rptr. 551 (1962); Marshall v. International Longshoremen's Union, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962); Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962); Black v. Cutter Labs., 43 Cal. 2d 788, 278 P.2d 905 (1955), *cert. denied*, 351 U.S. 292 (1956); De Mille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Bernstein v. Alameda–Contra Costa Med. Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (Dist. Ct. App. 1956); Note, 10 U.C.L.A.L. REV. 390 (1963); Tobriner, *Social Responsibility of Law and Lawyers*, The Recorder (San Francisco), Jan. 30, Jan. 31, Feb. 1, Feb. 4, 1963, p. 1, cols. 1 & 2.

given moment in a given situation. The cases themselves are not likely to arrive in well-arranged clusters to present the interlocking aspects of growth situations in the law. A court that must hence guard its language against inappropriate application does not always achieve a very happy medium between expansive and wizened language, let alone the most felicitous statement for the instant case and its close kin. The critics who perceive how a court could have rendered a decision on all fours with the future as well as on time are well situated to spell out how. On the shuttles of *how,* they can reconnoiter in all directions with the leisure and freedom denied to a court preoccupied with the record before it.

The quiet hum of such shuttles is a welcome sound to a court in the tumult of the not altogether bright new day. Its own perspectives grow larger as the scholars report on theirs. It can make good use of their reconnoiters, immersed as it is in litigation that continues to increase despite the growth of preventive counseling and private settlements. Quite apart from the tasks of interpreting countless statutes and of reviewing countless administrative decisions, a court must keep pace with the cases involving the common law, no mean responsibility in traditional areas, to say nothing of the ones that are opening up. It would be a savage waste not to marshal all the available resources of scholarship for law and justice that transcend hack law and a semblance of order.[28]

In the interest of coherence as well as efficiency, it is for the courts to consign to oblivion what has proved over the years to be chaff. Now that space and time are at a premium for the storage and study of even superlative matter, it is folly to clutter and confuse work papers with materials that are either obsolete or repetitious or ridden with inept or fallacious analysis that cannot survive the light of reason. Less than ever can we assume that all the good enough thoughts and ways of yesterday are adequate today, however superbly undated some remain. What is indelibly dated as of yesterday may now be a light-year's distance from problems that reach deep into tomorrow. There is no place in the living law for period pieces or parrot paragraphs or ill-conceived figments of what has passed as legal imagination.

Important as it is for judges to clear the desks for a new day's problems, it is still more important that they restate their judicial responsibilities lest the new day become a Walpurgis Night. Their modern responsibilities are less than is commonly believed and more

28. See Traynor, *Badlands in an Appellate Judge's Realm of Reason,* 7 UTAH L. REV. 157, 169-70 (1960).

than is commonly imagined.[29] It is commonly believed, though the legal profession knows better, that the decisions of a day in court are reflex arcs of the wisdom of the ages, just as it is commonly believed that the ages have been wise. In this vision judges have a ceaseless responsibility at the switchboard of time to make all possible connections between incoming calls and outgoing ancestors. They are pictured as having such skill and luck at their busy posts that rarely do they have to report that the number they have called is no longer in service or that the line is dead.

If judicial responsibility is actually not so incessantly tedious, it does demand insight together with exactitude of a high order. The judge's task of developing law, at once stable and creative, is hard enough when he is constrained to write on an untidy slate; it may be harder still when he has to write on a clean one. He can only hope that the legislature is working out on its large blackboards some comprehensive solutions for the large problems that cannot be solved properly on a case-to-case basis. Even then he can expect consequent problems of statutory interpretation as novel as those emerging everywhere in the common law.

For all the great expansion of statutory law, indeed, in part because of it, a judge has key responsibility for the well-being of the law. If he tends it badly or merely passively, it can develop weaknesses or disorders or, worse still, frightening powers, no matter how well put together it is. If he tends it well it will thrive, even if it is of clumsy structure. So long as it thrives it gives both evidence and assurance of a society healthy enough to manage its anxieties and to resolve its conflicts in open and orderly ways.

One might add a postscript that well-tended courtrooms connote more than open doors and seemingly orderly procedures. Open doors have an ironic appearance to those who must wait years to enter them. Purportedly orderly procedures that involve superfluous capers and needless intricacies seem tinged with madness to those who must comply with them in the name of the law. Even those willing to endure the inexcusable delays and complications that too often con-

29. See AUERBACH, GARRISON, HURST & MERMIN, THE LEGAL PROCESS (1961); LLEWELLYN, THE COMMON LAW TRADITION (1960); Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961); Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821 (1961); Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218 (1961); McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837 (1955); Sentell, *The Opinions of Hughes and Sutherland and the Rights of the Individual*, 15 VAND. L. REV. 559 (1962); Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175 (1962); Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962), and articles cited therein.

dition access to a courtroom may be discouraged or deterred by the attendant costs.

We do not lack first-rate proposals for court organization and administration and procedures that would befit a new day. Neither do we lack well-conceived plans for the selection and retention of judges that would attract able and independent men to the bench. Nevertheless, the few states that have undertaken substantial reforms are far outnumbered by those that have not. It is high time to inquire why there has been such a woeful lack of will in the legal profession throughout the country to have done with ways so antiquated as chronically to impede the just operation of the laws. It is a fair speculation that if bar associations were to unite wholeheartedly with judicial institutes and law school groups to follow up the splendid statements of Law Days with sustained efforts to achieve needed reforms, we would have them.

Meanwhile, well-tempered judges will do the best they can, whatever their working conditions, to stabilize the explosive forces of the day. They know that they can do little enough to bring on the millenium, but they will do everything within their power of reasoning to make each day in court lead constructively to the next one and to set an example approaching what a civilized day could be.