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ADJUDICATIVE JUSTICE IN A DIVERSE MASS SOCIETY

Jack B. Weinstein*

INTRODUCTION

Over the years, associating with scores of law clerks and thousands of students, lawyers, and judges, I have been amazed and humbled in observing the altruistic devotion to human welfare that exudes from the hearts of so many as they enter the legal profession. Our duty of public service, particularly to the less privileged, is based on more than personal satisfaction. The protected status and virtual monopoly of lawyers as actors within the adjudicatory system comes with an implied promise to work for the public good.

In a larger sense, this obligation is founded upon the recognition that each of us stands on the shoulders of 10,000 generations. While, of course, personal achievement should be recognized, it was the fool of ancient times who is quoted in *Deuteronomy* as saying that in his heart, "[m]y power and the might of my hand hath gotten me this wealth."¹ What we have done, we have done because of all that was done by others before us.

This Article² addresses problems created by the disparity in

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¹ *Deuteronomy* 8:17.

² This Article is an expansion of the Orison S. Marden Lecture on Public Service, Association of the Bar of the City of New York, held on January 13, 2000, which is reproduced in 55 RECORD 196 (2000); see also 6 WHO WAS WHO IN AMERICA 263 (1996) (discussing Marden's public service). It is based in part upon materials for seminars on "Equality" at Columbia Law School given over the years with Judge John Dooling and Professors Arthur Murphy and Kent Greenawalt, summarized in Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651 (1981). See also Jack B. Weinstein, *Delivery of Legal Services Reviewed*, reprinted from N.Y.L.J., May 2, 1974 (evaluating the disparity between traditional notions of legal duty and the

access to the courts and other adjudicative fora between the privileged and less privileged.³ Enormous efforts have been made by the legal profession to equalize opportunities to enforce substantive rights.⁴ These efforts have fallen short of what we can and should accomplish.

I. EQUALIZING THE ADVERSARY SYSTEM

It may be argued that our adversary, adjudicative system should take each case as presented and weigh it without regard to the background of the litigants. A poor person, or one otherwise unable to deal aggressively with the judicial system, should still receive

emerging necessity for legal services responsive to modern society).

³ The problem of the poor in accessing the courts referred to in this paper remains with us as the gap between the richest and poorest grows despite our booming economy. See, e.g., Peter T. Kilborn, *Memphis Blacks Find Poverty's Grip Strong*, N.Y. TIMES, Oct. 5, 1999, at A14; Jeff Madrick, *How New is the New Economy?*, N.Y. REVIEW, Sept. 23, 1999, at 42. On the problems discussed in this paper, see generally *Proceedings of the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 FORDHAM L. REV. 1713-2791 (1999).

Those who have experience with the adjudication system will notice that this subject is reviewed primarily from the viewpoint of a federal judge. If looked at from the view of the state, the emphasis would be somewhat different. See, e.g., Report to the Chief Judge of New York State, *Funding Civil Legal Services for the Poor by the Members of the Legal Services Project* (May 1998) (explaining that problems of the poor include shelter, particularly evictions; income maintenance through food stamps; unemployment benefits; social security and SSL and veterans benefits; consumer problems, such as debt collection and wage garnishment; health issues; and family violence).

⁴ The actual speech that was the basis of this Article was divided as follows: I. A rationale for special treatment of the poor to equalize adjudication; II. Models: A. Entrepreneurial—fees and profits to lawyers; B. Pro Bono—subvention by individual lawyers and by legal aid types of lawyers working for less than they might otherwise earn; C. Mass Actions—actions in which the poor are treated in the same way as the well-to-do through devices such as matrixes; D. Administrative protections—OSHA and payments to claimants as in Social Security disability; E. Judicial Balancing—actions, such as by leaning in favor of the disadvantaged to equalize sentencing; and III. Governing Attitudes such as treating the disadvantaged with compassion and understanding.

equal adjudicatory justice—i.e., an equal opportunity to prevail. Given the inequalities embraced by our free enterprise, marketplace society, however, what happens in the courtrooms in the way of inequality is largely a reflection of what happens in the outside world.⁵ In essence, the world must equalize, and only then will the courts follow.⁶ This argument is a powerful one, and I, like so many others, am drawn to it. We lose patience with the person that we think is acting incompetently or against his or her own best interest. “Stop it. Why don’t you act more like me,” we think, but are too polite to say.

The answer, I suggest, is that we cannot ignore the effects of our work and institution. We cannot ignore the reality that by not taking account of inequalities in capacity, we are in fact operating a system of adjudication that is unequal and that is seen as unequal by those who suffer from its inequalities. Observing the adjudication system in that light, it is difficult to justify the reality that our democratic society tolerates the perpetuation of inequalities in adjudication.

⁵ See, e.g., Victor G. Savikos & David L. Silverman, *Making the Poverty Objection: Parties without Fancy Exhibits Could Claim Unfair Prejudice, but Not All Judges Would Agree*, NAT’L L.J., July 26, 1999, at C1; see also Nina Bernstein, *Widest Income Gap Is Found In New York*, N.Y. TIMES, Jan. 19, 2000, at B5; Richard W. Stevenson, *In a Time of Plenty, the Poor Are Still Poor*, N.Y. TIMES, Jan. 23, 2000, at 3. The problems of the poor have not been substantially reduced by the huge growth of prosperity for the upper classes in recent years. See, e.g., Jason DeParle, *Bold Effort Leaves Much Unchanged for the Poor*, N.Y. TIMES, Dec. 30, 1999, at 1. But see Terry Carter, *Mr. Democracy, Giving More Billions to Further Justice Than Anyone Ever*, A.B.A. J., Jan. 2000, at 57 (discussing the recent contribution of George Soros).

⁶ It has been said that, following Aristotle, there are four kinds of justice: distributive (basic and just sharing of society’s goods); corrective (recreation of just distribution where there has been an unbalancing); retributive (punishment and other reactions by government to “criminal” harm of one person by another); and commutative (correcting inequalities that result from private exchanges). See GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 80-81 (1996) (stating that “[o]ur reliance on sporting metaphors . . . provides a clue to what we regard as important” in “justice” and “fair procedure”). Transactional costs would, even in the best of Aristotelian worlds, make it impossible to fully vindicate substantive rights in adjudication. At the least, some inertia of the system properly limits perpetual litigation.

The thesis of this Article is rooted in Learned Hand's command, "Thou shalt not ration justice,"⁷ and the Bible's, nor shall "you distinguish between the rich and poor, or prevent the justice due to your poor in his suit."⁸ Despite these injunctions, we often lack the resources to provide everyone with the highest level of adjudicatory justice available to the richest and most powerful in our stratified society.⁹ All adjudicatory justice, as we know it, arguably cannot be equal in practical effect without reducing its level to all, which is an unacceptable solution. Even if that is so, the basic question still remains: how can the gap between the ideal and the real of equal adjudicatory justice be reduced?

What is the irreducible minimum standard of justice? First, the process must be appropriately designed to assure that each person's substantive rights are reasonably vindicated. Second, in each case there must be substantial assurance that the process has worked to protect substantive rights. Third, unnecessary gaps in the equality of adjudication between rich and poor must not be greater than practicalities require. How to further define and enforce those standards in varying circumstances presents a never-ending series of difficulties. Nevertheless, the task of constantly seeking to minimize or solve the shifting problems of equalizing adjudicative justice must be assumed by us, the legal profession. Delivering equal adjudicative justice is our *sine qua non*—the legal profession's reason for being.

The problem of inequality in the adjudication system is woven into the warp and woof of our legal fabric and is revealed in a

⁷ Learned Hand, *Thou Shalt Not Ration Justice*, 9 LEGAL AID BRIEFCASE 3, at 5 (1951). Congress has for years attempted to ration justice by cutting funds for the Legal Services Corporation in order to reduce the threat of private litigation on behalf of the poor to special and governmental interests. See James S. Toedtman, *The Funding Picture*, NEWSDAY (N.Y.), Nov. 24, 1999, at A6 (explaining that the Legal Services Corp. was cut from .4 to .3 billion in fiscal 2000); see also David E. Rosenbaum, *Congress Leaves Business Lobbies Almost All Smiles*, N.Y. TIMES, Nov. 26, 1999, at A1 (discussing, *inter alia*, the attacks on lawyers' abilities to bring tort actions).

⁸ Exodus 23:6.

⁹ See, e.g., Committee on Criminal Justice Operations and Budget, *Determining a Defendant's Eligibility for Assigned Counsel Service*, 54 RECORD 493 (1999).

myriad of ways each day in our courts. An example is the question of whether interlocutory appeals should be allowed. One court of appeals denied interlocutory appeals, in certain cases, because it found that "where litigants may have unequal economic resources, the final judgment rule protects the judicial process and its participants from the delay which can prove advantageous to a well-financed litigant, and fatal to the less well endowed."¹⁰ Even so mundane a matter as who pays for the initial mailing of notice to a prospective class can involve the rich-poor issue. As Justice Douglas remarked in *Eisen v. Carlisle & Jacquelin*:

The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.¹¹

¹⁰ *Bryant v. Sylvester*, 57 F.3d 308, 312 n.4 (3d Cir. 1995).

¹¹ 417 U.S. 156, 186 n.8 (1974) (Douglas, J., dissenting). Justice Douglas wrote in a footnote to his dissent:

Judge Weinstein writing in the N.Y. Law Journal, May 2, 1972, p. 4, col. 3, said:

Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which had benefitted, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

Id.

Much of the opposition to effective class actions—despite their occasional abuses—is based on the fact that they are a great equalizer, enabling those of little political clout or financial means to band together effectively against the most powerful.

As the millennium turns, this is an appropriate time for a legal impact statement, somewhat like an environmental impact statement. We could ask—despite many improvements by New York State's great Chief Judge, Judith Kaye, and others—what courts and administrative agencies are doing for, and to, the poor and the lower middle classes. It would be an audit that would turn up reasons both for dismay and for pride. Our pragmatic system adds procedures and institutions on an "as-needed" basis. Perhaps this is the time for a global review of how a more integrated American equal adjudicative justice system should be structured without tearing down the sound aspects of the present system.

A. *Successes*

There are many grounds for pride in our successes in opening up the adjudication system to all. Among others, these include: (1) encouraging competent attorneys to prosecute claims for the poor through contingency fees payable only if there is a recovery;¹² (2) statutes encouraging Title VII discrimination suits by providing for fee shifting from defendants found liable;¹³ (3) statutory counsel

¹² See Stephen L. Pepper, *Access to What*, 2 J. INST. FOR STUD. LEGAL ETHICS 269, 270 (1999). See generally *Proceedings of the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, *supra* note 3 (discussing how legal assistance is delivered to low income individuals and considering how this might be better accomplished). But see Marcia Coyle, *Should Defendants Win Fees?*, NAT'L L.J., Dec 20, 1999, at B2 (discussing the increase in successful business defendants in environmental suits challenging the refusal by federal courts to award them attorney fees and costs); David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1945-46 (1999) (discussing such nay-sayers who describe adjudication as "the ugly bureaucratic noise that grinds daily in [] Courts").

¹³ See 42 U.S.C. § 2000e-5(k) (1994 & Supp. III 1997). This is also seen in the encouragement of suits, such as those seeking enforcement of the Americans with Disabilities Act of 1999. See Dan Christensen & Michael D. Goldhaber, *Florida Businesses Face Storm of ADA Suits*, NAT'L L.J., Jan. 10, 2000, at A4

fees payable by the government when it unreasonably opposes valid claims;¹⁴ (4) Legal Aid and service associations, such as those in New York City and Nassau and Suffolk Counties that provide legal representation to the poor;¹⁵ (5) class actions in civil rights and civil liberties matters that have brought benefits to many;¹⁶ (6) a discovery system that allows litigants to ferret out the truth;¹⁷ (7)

(explaining that representatives of landlords complain about large fees earned by lawyers who obtain minor benefits for their clients).

¹⁴ See Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1994 & Supp. IV 1998) (providing that when there are "unreasonable" suits by government, "fees and other expenses related to defending against the excessive demand" are available); *but see* Security & Exch. Comm'n v. Price Waterhouse, 41 F.3d 805, 809 (2d Cir. 1994).

¹⁵ The bar now strongly supports legal aid service institutions. This was not always the case. See *Opposition to Nassau Legal Services for the Poor at Meeting of Nassau County Lawyers Association*, Nov. 29, 1965 (Unpublished papers of Jack B. Weinstein 1964-1965). *But see* Jack B. Weinstein, *Legal Assistance to the Indigent in Nassau County*, N.Y.L.J., Dec. 8 and Dec. 9, 1965, at 3; *J. Bertram Wegman Challenges Weinstein's Statements on Validity of Nassau Plan*, N.Y. L.J., Dec. 13, 1965, at 3 (indicating that the Nassau County Bar Association would follow statutory requirements in proposing "a plan to provide counsel for those accused of a crime who could not afford to retain counsel," and not confuse this plan with "a program of general legal assistance in private, civil and administrative matters in the Office of Economic Opportunity in pursuance of its anti-poverty campaign"); Sylvia Law, *Edward Sparer, The Father of Poverty Law*, AM. LAW., Dec. 1999, at 117 (pointing out that Sparer developed the precursor of the Legal Services Corporation).

¹⁶ The desegregation cases furnish one example. See, e.g., JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 21 (1959) (inferring that a substantial African-African involvement in the legal system is an important factor in enforcing desegregation); RICHARD KLUGER, *SIMPLE JUSTICE* (1975) (discussing the NAACP Legal Defense Fund). Prisoner rights are another example. See GREENBERG, *supra*, at 334-38, 396-97; Jonathan Ringel, *Inmates Settle HIV Dispute*, NAT'L L.J., Dec. 27, 1999, at A4.

¹⁷ Several provisions of the Federal Rules of Civil Procedure allow litigants to request information from opposing parties and witnesses. See, e.g., FED. R. CIV. P. 30(a) (providing that a party may take the testimony of any person by deposition upon oral examination); *id.* R. 33(a) (providing that a party may serve upon any other party written interrogatories); *id.* R. 34(a) (providing that a party may serve any other party a request to produce documents); *id.* R. 36(a) (providing that a party may serve upon any other party a written request for the admission of the truth of certain matters). In addition, the Federal Rules of Civil

an administrative law system designed to protect consumers;¹⁸ (8) the pro bono contributions of lawyers, law firms and employees of legal services groups¹⁹ to those who seek succor in the law;²⁰

Procedure require parties to make initial disclosures without awaiting a discovery request. *id.* R. 26(a).

¹⁸ See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (1994) (creating the Consumer Product Safety Commission to establish and enforce product safety standards in order to protect the interest of the public); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-395 (1994 & Supp. IV 1998) (establishing an administrative law system that regulates the development, research, production and quality of food and drug products as defined under the Act); Highway Safety Act, 23 U.S.C. §§ 401-411 (1994 & Supp. IV 1998) (granting the National Highway Safety Advisory Committee the authority to oversee a highway safety program designed to protect motorists from accidents, injury, property damage and to oversee other areas of motorist safety); Occupational Safety and Health Act, 29 U.S.C. §§ 651-658 (1994 & Supp. IV 1998) (creating an administrative law system dedicated to establishing basic workplace safety standards in order to protect individual workers from hazardous or injurious working conditions); Securities Exchange Act, 15 U.S.C. §§ 78a-78m (1994 & Supp. IV 1998) (designating the Securities Exchange Commission as a regulatory agency acting to protect investors and the general public from misrepresentation and other harmful activity in the market).

¹⁹ See, e.g., Columbia Law School, Loan Repayment Assistance Program (reducing burden of law school debt with the goal of making a career in public service financially responsible for graduates). New York is even considering allowing pro bono work to count towards attorneys' continuing legal education (CLE) requirement. See John Caher, *CLE-Pro Bono Plan Is Close to Approval*, N.Y.L.J., Feb. 9, 2000, at 1.

²⁰ In particular, I note the efforts in the halls of the Association of the Bar of the City of New York, which takes a leadership role. See, e.g., ROBERT A. KATZMAN, *THE LAW FIRM AND THE PUBLIC GOOD* (1995); Anthony Perez Cassino, *Public Service Versus Pro Bono*, N.Y.L.J., Oct. 13, 1999, at 2 ("only a fraction of the needs of the poor are being met"); William J. Dean, *Weil Gotshal & Manges Creates Pro Bono Externships*, N.Y.L.J., Sept 3, 1999, at 3 (discussing impact of several large New York corporate firms creating pro-bono programs); William J. Dean, *West Coast Programs Provide Wide Range of Services*, N.Y.L.J., Mar. 13, 2000, at 3 (discussing and describing the work of the Volunteer Legal Services Program of the Bar Association of San Francisco and Public Counsel, a public interest law firm in Southern California); William W. Horne, *Making Pro Bono Pay*, AM. LAW., July/August 1996, at S20 (noting between 1994 and 1995, a 290% increase in private attorney pro bono hours at a Florida law firm); Scott Medintz, *Public Interest's Pitch Man*, AM. LAW., July/Aug. 1996, at 48 (discussing the work of the Executive Director for the

and (9) mediation and social work services provided to avoid litigation strains.²¹

National Association for Public Interest Law in inducing persons to participate); *ProBonothon November 10, We Care Provides Matching Funds*, 47 NASSAU LAW. 1 (Oct. 1999); Deborah L. Rhode, *Pro Bono Can't Fill the Gap*, NAT'L L.J. Sept. 6, 1999, at A22 (noting that the American Bar Association has called for additional "government funding for legal service lawyers"); Jerome J. Shestack, *Pro Bono and Public Interest Law*, America Law Media, 100 Years of Pennsylvania Law 54 (2000). The tradition is long standing. See George F. Hritz & John B. Dawson, *200 Years Ago: Anti-Slavery Efforts by the New York Bar*, N.Y.L.J., July 6, 1999, at 2 (discussing the creation of the New York Society for the Manumission of Slaves pioneered by John Jay and Alexander Hamilton); *Special Report on Pro Bono*, AM. LAW. 38 (Dec. 1998).

²¹ The Federal Court for the Eastern District of New York has mediation, pro se Clerk's advice, and social worker assistance through a closely connected clinic at Brooklyn Law School. See also David E. Rovella, *The Best Defense: Rebuilding Clients' Lives to Keep Them from Coming Back*, NAT'L L.J., Jan. 31, 2000, at A1 (discussing the "holistic advocacy" approach adopted by the Bronx Defenders, an alternative to the Legal Aid Society's more traditional approach to criminal defense); Yael Schacher, *New Community Court Set to Open in Brooklyn*, N.Y.L.J., Dec. 16, 1999, at 1 (documenting the opening of a "multi-jurisdictional community court and service center" in the Red Hook section of Brooklyn, New York); *Committee on Children and the Law and the Committee on Family Court and Family Law, The Mediation Services Project*, 54 RECORD 740 (1999); Jack B. Weinstein, *When Is a Social Worker as Well as a Lawyer Needed*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 391 (1999) (documenting the practices of social workers and probation officers in the Eastern District of New York with respect to criminal, civil, and social security matters). The County of San Diego Department of the Public Defender and the courts cooperated in bringing courts and social services together to assist the homeless. See Letter from Steve Binder to Judge Jack B. Weinstein (Dec. 21, 1999) (on file with author).

This idea was echoed in a recent *New York Times* editorial:

But these rights are not self-enforcing. Making them a reality requires individuals with the skill and determination to use the law's majestic machinery by bringing cases that expose the great gulf between the high-mindedness of the Constitution and the injustices of everyday life.

Thus it was that in the 1930's the legal arm of the National Association for the Advancement of Colored People began plotting a litigation strategy to force the courts to confront head-on the evils of official racism. Propelled by Charles Houston, William Henry Hastie and Thurgood Marshall, this effort eventually led to a momentous

B. Failures

In any analysis of the failures of the adjudication system, we must examine what happens in our prisons, for their occupants are an important product of that system. Prisoners are, in a sense, the wards of the lawyers and judges who placed them in custody. In addition, problems arise because of (1) both miserly fees available for capital defense attorneys and other inadequacies in capital cases²² that have helped lead to so many miscarriages of jus-

Supreme Court decision, *Brown v. Board of Education*, that finally broke the back of official segregation. From *Brown v. Board* flowed a robust civil rights movement and, in time, a giant wave of equal rights legislation that even a Congress disproportionately influenced by old-guard Southerners could not resist.

Thus it was, too, that in 1920 a visionary non-lawyer named Roger Baldwin founded the American Civil Liberties Union, the first permanent organization dedicated to vigorous defense of the Bill of Rights, especially freedom of speech. One of the group's early actions was to recruit Clarence Darrow to defend John Scopes, a young Tennessee schoolteacher who dared defy that state's law against teaching Darwin's theory of evolution. That famous case, a legal loss but a public relations triumph, was a precursor to current fights over the teaching of creationism in public school science classes—proof of the old edict that civil liberties battles never stay won.

Inspired by the Supreme Court's new openness on civil rights, A.C.L.U. attorneys set out to extend the reach of the Bill of Rights to new groups and subject areas. This effort, since joined by other organizations and other lawyers, has helped improve prison conditions, reduce unnecessary government secrecy and achieve significant advances for women's rights, children in foster care and the mentally ill. In a similar spirit, public-interest law firms and conservation groups, given new weapons by the landmark environmental statutes of the late 1960's and early 1970's, have been instrumental in enforcing those laws, often in the face of fierce resistance by the very government agencies entrusted with carrying them out.

Editorial, *Then/Now: Reflections on the Millennium*, N.Y. TIMES, Dec. 24, 1999, at A18.

²² See, e.g., *McFarland v. Scott*, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of *certiorari*) (blaming the lack of minimal standards and adequate pay of appointed criminal defense lawyers for the inadequate

tice;²³ (2) parsimonious compensation of appointed counsel for federal habeas corpus petitioners;²⁴ and (3) abuses of prisoners in severely limiting court oversight, in reducing the opportunity of prisoners for education, and in sending prisoners far away so that their families cannot visit, thereby seriously compromising the essential element of rehabilitation—connection to family—after

representation of criminal defendants); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1841-66 (1994) (examining closely the paucity of resources available to, and the inexperience common among, court-appointed public defenders); Gary Spencer, *High Courts' 1998-99 Rulings Indicates Shift in Direction*, N.Y.L.J., July 20, 1999, at 1 (stating that "in a highly controversial administrative order, the Court [of Appeals] slashed compensation rates for defense counsel in capital cases by as much as 50%, rejecting warnings from bar leaders that the cut would make it difficult to attract qualified attorneys. Governor Pataki had been demanding a reduction.").

²³ See, e.g., David E. Rovella, *Unclogging Gideon's Trumpet: Mississippi Suits Are the Latest to Attack State Defense Funding*, NAT'L L.J., Jan. 10, 2000, at 1 (discussing Mississippi's lack of a state-funded public defender system and lawsuits brought by three Mississippi counties challenging this paucity); Elisabeth Semel, *The Lone Star State is Not Alone in Denying Due Process to Those Who Face Execution*, 23 CHAMPION 28, 29 (1999) (pointing out the need for organized community defender programs and the inadequacies of legislative or court created programs that provide only a token fee, cap expenses, and fail to set standards); Ann Woolner, *Invisible Bridge*, AM. LAW., Oct. 1999, at 33 (discussing a meeting of judges and lawyers on ways to protect death sentence defendants); Sara Rimer, *Florida Legislature Deals with Death*, N.Y. TIMES, Jan. 6, 2000, at A22 (stating that "[s]ince 1974, 20 death row inmates have been freed because of doubts about their guilt," and discussing a proposal to speed up Florida's appeals process for its death row inmates); Jim Yardley, *A Role Model for Executions*, N.Y. TIMES, Jan. 9, 2000, § 4, at 5 (discussing "inadequate legal aid to poor defendants" on death row); Jim Yardley, *Texas' Busy Death Chamber Helps Define Bush's Tenure*, N.Y. TIMES, Jan. 7, 2000, at 1 (stating that "critics describe the Texas system for capital crimes as the most unfair and *merciless* of the 38 states with a death penalty, saying it deprives the accused of adequate legal aid and appeals") (emphasis added).

²⁴ See, e.g., 42 U.S.C. § 1988(b) (1994) (attorney fee cap provision); Larry S. Pozner, *Life, Liberty and Low-Bid Lawyers: The Defiling of Gideon*, 23 CHAMPION 9 (July 1999); see also, e.g., *Chatin v. Coombe*, 186 F.3d 82 (2d Cir. 1999) (temporal application of cap); *The Week in Review*, NAT'L L.J., Aug. 9, 1999, at A7 (explaining that the Louisiana Supreme Court has limited law school clinics' representation of the poor).

release. The federal, state and local governments simply have not supplied the money required for legal services and compensation of attorneys to permit a balanced adjudicative system to operate fairly.²⁵

C. Ongoing Problems

The subtle problems of equalizing adjudicatory justice exist even when the courts, attorneys and staff make a forceful attempt to reduce the differences in adjudicative opportunities between the poor and the rich. Attempts to equalize adjudicative justice and to reduce differences based upon factors such as color, sex, socioeconomic status, creed and national origin have raised similar problems.

In the United States District Court for the Eastern District of New York, we have been immeasurably helped by a strong Advisory Committee of the Bar for the Eastern District of New York, under the chairmanship of Ed Weseley constantly reviewing our practices and procedures. An Eastern District foundation, headed by Professor George W. Johnson, assists financially and otherwise.²⁶ For example, its funds help to compensate experts and investigators in pro se cases. This foundation furnishes a social

²⁵ Compare Judith S. Kaye, *The State of the Judiciary* 16-18 (2000) (calling for increase in assigned counsel fees), with John Caher, *Raise in Court Fines Would Benefit Victims: Pataki Opposes Pay Raise for Assigned Counsel*, N.Y.L.J., Jan. 12, 2000, at 1, and Ruth Marcus, *Public Defender Systems Tried by Budget Problems*, WASH. POST, March 8, 1992, at A1 (detailing the vast under-funding of the New Orleans public defender system). See also Michael A. Riccardi, *Second Lawsuit Challenges Rule 18-B Fee Structure*, N.Y.L.J., Feb. 22, 2000, at 1 (discussing a suit brought in New York challenging the state's compensation of lawyers appointed to represent criminal defendants and family court litigants); Michael A. Riccardi, *Class Action Lawsuit Challenges 18-B Fee Structure*, N.Y.L.J., Jan. 25, 2000, at 1 (discussing a class action suit brought by court-appointed attorneys claiming that the fees they earn for this work is so low so as to deny their criminal defendant clients adequate representation); Joan Biskupic, *Rehnquist's Year-End Report: Chief Justice Urgently Requests Higher Pay for Court-Appointed Lawyers*, WASH. POST, Jan. 1, 2000, at A2 (noting Chief Justice Rehnquist's concern that court-appointed counsel be adequately compensated).

²⁶ Eastern District Civil Litigation Foundation, Inc.

worker operating out of Brooklyn Law School to help litigants who might do better through social or administrative agencies than through the courts.²⁷ The Eastern District Court's staff and court services, such as the pro se clerks, pre-trial services, probation, court-annexed arbitration and mediation services, and the public defender are generally sensitive to the needs of the disadvantaged and attempt to help them cope.

We need to recognize that even some in the middle class are unable to take advantage of equal opportunity to access the courts and administrative and other agencies. Combating this inability requires vigilance and action inside the adjudicative process to level the field in fact as well as in theory. In the immigration and social security fields, the administrative judge has the explicit obligation to seek out information that might assist the claimant. By contrast, the court system assumes that an impartial and passive judge presides and the adversaries seek to protect their own or their client's interests. The judge must avoid some acts designed to support the pro se or poorly represented claimant in order to equalize presentations, even though the intervention was intended to balance access to justice. Untilting the table might be viewed with the suspicion that the judge is improperly favoring the poor over the rich.²⁸

²⁷ See Weinstein, *supra* note 21, at 391.

²⁸ Institutional protections are usually more protective than any intervention by the judge. See the argument of Abe Fortas in *Gideon v. Wainwright*, 372 U.S. 335 (1963) quoted in Dan Levitt, *Rhetoric-From Socrates to Court TV*, LITIG., Fall 1999, at 42, 48-49:

This record does not indicate that the judge of the trial court . . . or that the prosecuting attorney . . . was derelict in his duty. . . . It indicates that they tried to help Gideon. . . . But to me, if the Court please, this record indicates the basic difficulty with Betts against Brady [holding that appointment of defense counsel in a state criminal case was not a federal constitutional right]. . . . And that the basic difficulty with Betts against Brady is that no man, certainly no layman, can conduct a trial in his own defense so that the trial is fair.

II. MODELS FOR EQUALIZING THE ADJUDICATION SYSTEM

A number of models attempt to equalize justice. These models vary significantly depending on the context. I will discuss several approaches and the difficulties they face.

A. *Mediation, Arbitration and Settlement*

We have tried to deal with some of the problems of commercial cases by mediation, court annexed arbitration and early settlement conferences with our magistrate judges. I am not sure how well that process works to meet a general societal problem where claims of even \$150,000 often cannot be pursued profitably because of the high transaction costs in our complex civil litigation system. The widespread private arbitration process has probably helped make protection of commercial rights more viable. Analysis of the effect of court-attached arbitration and mediation, or arbitration generally, in its effect on various classes of litigants is needed.

For example, there is a class of disputes among neighbors and within families that the States have attempted to resolve through mediation.²⁹ We must adjudicate these cases of the disaffected, of which my court has seen a few, by trying to address them with a resident social worker, pro se clerks, and pretrial and probation officers. Too much interjection through "mediation" by the State, as in China and Cuba, may be counter-productive from a democratic point of view. A certain amount of community and personal disarray and litigiousness may be an irreducible concomitant of a democratically robust social system. Even mediation without a lawyer has its dangers. To that effect, the Eastern District has

²⁹ In New York, for example, there is the Community Dispute Resolution Center, providing financial support to non-profit community organizations in all 62 counties of the State without resort to formal court structures. *See* Community Dispute Resolution Act, ch. 847, N.Y. JUD. LAW § 849a-g (McKinney 1981); *see also* Report of the Chief Administrative Judge of the Courts for January 1, 1994 to December 31, 1994, at 12 (1995).

before it a proposal by Peter Wooden to ask that members of our pro bono panel advise pro se parties in mediation.³⁰

B. Social Security Claims

Social security disability cases represent a good example of an effective administrative system handling a huge docket while protecting the rights of the poor. The process is, nevertheless, frustrating to judges who review some of the decisions of administrative law judges. This is because many of those decisions are predicated upon esoteric medical evaluations, making it difficult to winnow out the shirkers and others who should not be receiving government pensions. As a whole, however, the social security and, particularly, the disability pension process reflect one of the great successes of our legal system. The option of an appeal to the court³¹ adds necessary protections against unfairness without excessive burdens. Nevertheless, the system has been manipulated by government to cut costs by unlawfully depriving large classes of deserving claimants of their benefits. A particularly egregious example was the treatment of thousands of mentally ill some years ago.³²

This disability review problem is difficult to deal with on the basis of equality because it results from differences in social and medical backgrounds of the claimants. Not only are the "well-to-

³⁰ See Peter Woodin, *Memorandum to the Board of Directors, Eastern District Civil Litigation Fund*, Nov. 16, 1999; see also Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 379-381 (1999) (noting that in divorce cases dealing with child custody and visitation issues, many courts have developed different approaches to institutionalizing mediation by either establishing and funding court-annexed mediation programs, staffed by court employees, or by educating divorcing parents through brochures or video tapes and then directing those parents to private mediators).

³¹ 42 U.S.C. § 405(g) (1994).

³² See *City of New York v. Heckler*, 578 F. Supp. 1109, 1115 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd sub. nom. Bowen v. City of New York*, 476 U.S. 467 (1986); Jack B. Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 902 (1984); see also LINDA G. MILLS, A PENCHANT FOR PREJUDICE 137-39 (1999).

do” persons more capable of dealing with the system and obtaining counsel, they also often will have had a long-term family physician supervising specialists. Low income people, by contrast, are often served—when they get medical treatment at all—in clinics, where they are sent from one doctor to another, making a sensible integrated presentation to the administrative law judge almost impossible, even though the administrative judge is charged with seeking out medical records. The disadvantaged often have little cogent written medical history available. Sometimes, in social security cases, in addition to appointing counsel from a pro bono panel on a remand, courts will authorize payment for a physician from funds of the Eastern District Foundation.³³

Differences between effective adjudication for the more and less affluent may be affected by the new developing medical delivery systems, where the middle class also often will lack a single family doctor and full specialists and testing. But, it is a dubious boon to equality when disparities of injustice between rich and poor are balanced by a reduction of the opportunity for the relatively affluent to access the justice system, rather than by an increase in effective representation for the poor. Levelling should go up, not down.

How much we can and should add to a compulsory process of litigating disputes about the new breed of Health Management Organizations’ (“HMO”) denials of service and Medicare and Medicaid payments is not clear. Because many of those aggrieved by HMO decisions are articulate middle-class people capable of making their voices heard, the legislatures are beginning to provide effective remedies for all.³⁴ These are, for many millions, among

³³ See *supra* text accompanying note 26 (explaining that the Eastern District Civil Litigation Foundation provides services to poor people).

³⁴ See, e.g., Patients Bill of Rights of 1999, S. 1256, 106th Cong. (1999) (providing, *inter alia*, HMO members the ability to challenge an HMO’s denial of coverage); see also Rene H. Reixach, Jr., *Medicaid and Medicare Fair Hearings Are Vital First Step in Reversing Adverse Decisions on Patient Care*, N.Y. ST. B. ASS’N J., Feb. 2000, at 8 (explaining the crucial role of the fair hearing process under Medicare, specifically its administrative, authoritative and judicial implications for Medicare recipients). “

the most critical of their grievances over what they consider to be a denial of substantive rights.

I am dubious about how fairly the out-of-court adjudications of medical reimbursements are conducted. Some years ago when I forced a change in the "gobbledegook" notices to claimants of a right to appeal,³⁵ I received the impression that many aggrieved claimants did not understand and could not protect their rights. Yet, individual appeals to the courts in millions of such cases might overwhelm us unless an effective administrative or mediation screening system were developed.

C. *Mass Torts and Other Delicts*

It is in mass torts that we most often see the need to temper the individual's right to full civil adjudication using the entire panoply of the Federal Rules of Civil Procedure.³⁶ In cases involving small claims by many, class actions are the most effective way of litigating even though individual suits, if they were affordable, might best protect the substantive interests of the plaintiffs and the defendants.

In addition, civil and criminal litigations may be melded in some cases in order to best protect individual plaintiffs while conserving resources. This model, based on the French system, provides the equivalent of a class action through restitution supervised by the United States Attorney.³⁷ This combination was

³⁵ See *David v. Heckler*, 591 F. Supp. 1033, 1035-1045 (E.D.N.Y. 1984) (holding that the existing mechanism for notifying Medicare patients of a denial of coverage was a system rife with "bureaucratic gobbledegook, jargon, double talk, a form of officialise, federalese and insurancese, and doublespeak"); see also Benjamin Weiser, *Judge Orders Fast Review of Claims for Benefits*, N.Y. TIMES, Feb. 5, 2000, at A11 ("Nearly eight years after the Social Security Administration agreed to review the cases of thousands of New Yorkers who were wrongfully denied disability benefits during the Reagan Administration, a federal judge in Manhattan has criticized the agency for moving too slowly, saying people are dying before their claims can be processed.").

³⁶ See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 125 (1995).

³⁷ See *United States v. Ferranti*, 928 F. Supp. 206, 223 (E.D.N.Y. 1996), *aff'd sub nom. United States v. Tocco*, 135 F.3d 116 (2d Cir.), *cert. denied*, 118

successfully accomplished in one jointly conducted criminal proceeding and class action based on frauds committed on a large group of Chinese immigrants.³⁸

The administrative model provides another alternative for dealing with mass torts. Preliminary studies of this model, such as the study provided by the National Childhood Vaccine Injury Act of 1986,³⁹ however, suggest that it may be quicker and fairer than expensive court adjudication with high transactional costs. In non-criminal securities cases, the Securities and Exchange Commission's fines and administratively ordered restitution would seem to be a more reasonable way to deal with securities delicts if the Commission had the personnel to police more fully.

Perhaps consumer protection agencies charged with the safety of automobiles, pharmaceuticals, and other consumer products should deal with damages arising from the inadequacy of some of these products. This is because an administrative decision declaring general liability for defects may be possible. Individual suits or administrative proceedings for later determination of liability to individual claimants may be developed.⁴⁰ Fines may be used in place of massive punitive damages and held by the government for distribution to claimants.

In repetitive stress injury litigation in the Eastern District of New York, some improvements in worker protection were obtained through deterrence attendant on the tort litigation.⁴¹ Yet, poor

S. Ct. 1582 (1998); *United States v. Cheung*, 952 F. Supp. 148, 150 (E.D.N.Y. 1997); *United States v. Concepcion*, 795 F. Supp. 1262, 1268 (E.D.N.Y. 1992).

³⁸ See *Cheung*, 952 F. Supp. at 148; see also Jonathan Lippman, *New Approach Put to the Test*, N.Y.L.J., Jan. 26, 2000, at 1 (discussing possibility of fusing criminal, family, and housing proceedings).

³⁹ Pub. L. 99-660, 100 Stat. 3755 (codified throughout 42 U.S.C. § 300a(a) (1994)).

⁴⁰ See, e.g., Jeffrey S. Bromme, *An Examination of the Refund Remedy Under the CPSA and the FHSA*, 28 PROD. SAFETY & LIAB. REP., Jan. 10, 2000, at 25 (describing the refund remedy process involved when a company recalls a dangerous consumer product pursuant to the Consumer Product Safety Act, 15 U.S.C. § 2064(d) (1994)).

⁴¹ See *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 374 (2d Cir. 1993), *reh'g granted*, 35 F.3d 637 (2d Cir. 1994); Robert Pear, *After Long Delay, U.S. Plans to Issue Ergonomic Rules, Effort to Limit Injuries*, N.Y. TIMES,

workers across the country gained more through the regulations of OSHA. If the government were serious about funding administrative agencies for enforcement, there would be a greater chance for equality in the adjudicatory system. The appellate courts have not been sufficiently responsive to the needs of claimants and defendants when they restrict class action suits and settlements in cases such as those involving asbestos or HIV-tainted blood.⁴² Where massive wrongs have taken place, one-on-one litigations lead to huge transactional costs, delays, and the denial of rights.

Obviously, there is a balance to be drawn between unjust coercion of defendants on the one hand, and denial of effective rights on the other. But, I am not sure that in insisting on the highest standards of control by the litigant in individual cases, we do not underserve society and the majority of claimants. Since World War II, we have persisted in trying to create substantive and procedural rules available equally to all within our country, rich and poor, powerful and powerless. In tort lawsuits, attempts to make the law available to those harmed by massive delicts, while protecting industry and technological change, seems to be in the process of being compromised by legislative caps, disentitlements, and the discouragement of settlements.

There is an increasing aversion on the part of appellate courts to aggregation of cases through class actions and other means.⁴³ In many instances this has led to frustration on the part of both plaintiffs and defendants, who, together, seek by class action settlements to avoid large scale human distress, huge transactional costs, delays, the multiplication of suits across many jurisdictions, and difficulties in planning industrial and commercial activity

Nov. 22, 1999, at A1; Robert Pear, *Business and Labor Differ in Ergonomic Proposals*, N.Y. TIMES, Nov. 23, 1999, at A20.

⁴² See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing a Fifth Circuit affirmation of a certification of a mandatory settlement class in an asbestos suit); *In re Rhone-Poulenc Rorace, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (reversing the federal district court's class certification of a group of hemophiliacs infected by the AIDS virus).

⁴³ See *supra* note 42 and accompanying text (showing the Court's aversion to certifying class actions for purposes of adjudicating torts suffered by those exposed to asbestos and HIV-infection).

because of a cloud of overhanging litigation. Given the sensible control of cases and fees by judges, abuses may be minimized and the advantages of consolidation may outweigh the disadvantages.

We have the judicial tools to provide some degree of individual justice in mass litigations.⁴⁴ Certainly, we must be particularly vigilant of, and sensitive to, the ethical issues of representation and due process, where many people's complaints are considered in one case. For example, I would not criticize the Third Circuit Court of Appeals' refusal—approved by the Supreme Court—to countenance one massive settlement in the asbestos litigation.⁴⁵ That case raised difficult problems of ethics and adequate representation of future claimants and other subclasses. In other cases, however, an aversion to class actions has led to unjustified decertifications or dismissals. Ethics and due process may be given appropriate weight when courts handle mass disaster settlements effectively.⁴⁶ I have tried, and helped settle, many mass tort cases—Agent Orange, asbestos, DES, breast implants and others.⁴⁷ Based on these experiences, I have concluded that class action settlements are not subversive of due process. They can serve all the people of the Nation well.

The most difficult intellectual and political problems raised by class action cases relate to federalism. The question that arises is whether it is possible to integrate the work of federal and state courts when a litigation, such as asbestos or tobacco, spreads through hundreds of courts and dozens of jurisdictions. We may ask whether one state or federal court should control a national or

⁴⁴ See, e.g., *Judges, Not Legislators, Hold Key to Reform of Class Actions*, *Rand Reports*, 68 U.S.L.W. 2279, at 2279 (Nov. 16, 1999) (promoting the view that judges, through settlement approval and fee awards, control the outcome of class actions, and the effect on class members and society using these tools effectively will create positive change in class action litigation).

⁴⁵ See *Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 618 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997).

⁴⁶ See, e.g., *Ortiz*, 527 U.S. at 815 (Breyer, J., dissenting).

⁴⁷ See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 746 (E.D.N.Y. 1984), *aff'd*, 818 F. 2d 145 (2d Cir. 1987); *In re DES Cases*, 789 F. Supp. 552, 558 (E.D.N.Y. 1992); *In re Breast Implant Cases*, 942 F. Supp. 958, 959 (E.D.N.Y. 1996); *In re Joint Eastern and Southern District Asbestos Litig.*, 129 B.R. 710 (S.D.N.Y. 1991), *rev'd*, 982 F.2d 721 (2d Cir. 1992).

world-wide dispute by settlement, class action or another technique with respect to these varied and widespread laws, claims and defenses.

In many instances it would be better if the legislature dealt with these matters. A modified bankruptcy procedure could provide a useful model if an effective voting procedure by informed litigants could be developed. Our economy operates on a national and international scale. The law of the simple automobile fender-bender requires modification if it is to accomplish effective justice for all parts of our society in global cases arising in our modern technological, economic, and social worlds. There are festering sores on the public and private psyches left by disasters, such as DES, thalidomide, Agent Orange, asbestos, and HIV-tainted blood that the law cannot ignore.

Increasingly, in our integrated global electronic communication society, we find the poor of the world using our almost unique procedures for class actions and our court system to meet world-wide tort and other problems of the oppressed from other lands. Already, we have entertained actions against foreign tyrants from the Philippines⁴⁸ to Paraguay⁴⁹ by slave laborers and by those cheated and abused during, and following, the Nazis' regime against banks and large corporations.⁵⁰ Expanded views of personal jurisdiction may now be utilized by the courts to expand litigations. Ultimately, treaties may be required to control such litigation.⁵¹

What is particularly important is to try to assuage the fear and concern of plaintiffs. In the Agent Orange cases, I traveled the nation to hear the stories of fearful veterans and their wives, who

⁴⁸ See, e.g., *In re Estate of Marcos*, 910 F. Supp 1460, 1469 (D. Haw. 1995), *aff'd*, 103 F.3d 767 (9th Cir. 1996).

⁴⁹ See, e.g., *Filartiga v. Pona-Irala*, 630 F.2d 876, 889 (2d Cir. 1980).

⁵⁰ See, e.g., *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173 (S.D.N.Y. 2000); *Weissshaus v. Union Bank of Switzerland*, No. 96 Civ. 4849 (E.D.N.Y.).

⁵¹ See *Simon v. Phillip Morris, Inc.*, 86 F. Supp. 2d 95 (E.D.N.Y. 2000); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Satellites*, 37 WILLAMETTE L. REV. (forthcoming 2000) (speech to AALS section on conflicts of law, Jan. 8, 2000).

were terrorized by visions of genetic damage that had no scientific basis. Just listening and, then, providing a national network of person-to-person assistance helped. In the DES non-class action cases, massive settlements with a set of matrixes, the help of a special master, and informal conferences in chambers between the shaken women and the trial judge after settlement acted as a useful catharsis that money alone would not provide. So, too, in the breast implant cases settled by the thousands in the federal district courts of the Eastern District of New York, a sympathetic special master meeting with the women was useful as a balm and an explanation of what was happening.⁵² In the trials themselves, the court could not show sympathy or act less than impartially towards each side.⁵³

In many of these mass tort matters the media and lawyers stir up unnecessary fears of the credulous. The courts, using science and some sympathy, with the aid of counsel and special masters, may provide the appropriate reassurance. So, too, may defendants and their counsel provide reassurance through apology and guarantees of help when it proves necessary.

D. Discrimination Cases

The federal district court for the Eastern District of New York has had an enormous influx of civil rights, sex, race, age and disability discrimination claims. Unlike the Social Security Administration and the machinery it has employed, the Equal Employment Opportunity Commission ("EEOC") sometimes has not sufficiently addressed the administrative tasks of screening and providing out-of-court resolutions for many of its disputes.⁵⁴ Too

⁵² See, e.g., Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50, 50 (1999) (stating that "[m]ore face-to-face contact among clients, lawyers and judges will improve satisfaction with the court system").

⁵³ See *Deuteronomy* 16:19 (providing that "[y]ou shall not pervert judgment, you shall not respect someone's presence"). Rashi's gloss on the phrase is that the court must treat everyone equally and "[i]f a judge shows more respect to one litigant the other feels at a disadvantage."

⁵⁴ See, e.g., Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC.

many controversies are thrown raw and undigested into the courts where they linger and become more intractable. In the context of discrimination cases, Congress has provided for legal fees for the prevailing plaintiff,⁵⁵ making cases with any merit attractive to lawyers. Consequently, many cases are well tried, but they are expensive.

Many discrimination cases are brought pro se. The fact that there is no lawyer often suggests that these cases are not worth trying. But, frequently there is enough merit to the allegations to prevent summary judgment, especially when the plaintiffs feel wronged. This subset of cases needs reconsideration if we are to screen out those disputes driven by psychological, rather than legal problems. Often the claim was sparked by an imperious management style, rather than discrimination. We may ask whether an apology or mediation will help before the case has become frozen in vindictiveness. Both sides are frustrated by a failure to obtain a reasonable early resolution, and so are we in the court.

E. Habeas Corpus and Prisoner Abuse Cases

A similar kind of difficulty with cases of little or no merit is presented by many prisoner habeas corpus and civil rights actions charging abuse by the police or others. Barrier after barrier is placed before the pro se litigant in his cell in prison.⁵⁶ The prisoner is considered less than human and entitled to be abused to some point.

PROBS. 331, 340 (1999) (discussing the EEOC's failure to effectively inspect discrimination complaints, develop compliance plans and monitor such plans).

⁵⁵ See 42 U.S.C. § 1988 (1994) (providing that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs").

⁵⁶ See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 382 (1998) (noting the barriers caused by the Prison Litigation Reform Act of 1996 that require an individual to prove that conditions, such as overcrowding, violate his constitutional rights before the federal courts may order changes); *Prison Litigation Reform Act's Cap on Legal Fees*, 68 U.S.L.W. 3128 (Aug. 24, 1999).

For habeas corpus proceedings and other cases, the amount the appointed attorney is paid is so small as to induce, in some instances, inadequate attention by the lawyer.⁵⁷ In many of the prisoner civil rights cases, as in the discrimination cases, I am reluctant to appoint an attorney because the costs of full blown discovery seem unwarranted. In one case, a well-respected attorney caused the defendant to spend \$100,000 in discovery costs, which the defense counsel wanted to collect on the ground that the suit was frivolous. I denied the motion, but it made me somewhat leery of full-fledged adjudications in every case started pro se in the federal courts. Rule 11 sanctions are futile.

Is there some systemic way of dealing with the problem? A "sitting brief," where an experienced trial counsel would sit alongside the pro se litigant during the trial, might help. The attorney would advise the litigant at trial. But, many lawyers would be uncomfortable with such a role when discovery and trial preparation were inadequate. These cases sharply etch the dilemma of the advantaged and the disadvantaged seeking equal justice. Retaining counsel with your own money arguably does provide some assurance of the adequacy of the claim or defense.

F. Sentencing

There is a superb group of legal aid attorneys attached to the Eastern District of New York. Yet, they, and many private attorneys, fail to do an adequate job on sentencing. In deciding on rehabilitation, for example, the rich child given every advantage of psychiatric and other expertise can usually make a better case for rehabilitation than the poor person who will be thrown back into the same environment, beset by the same pressures that led to the original crime.⁵⁸

⁵⁷ See, e.g., David Rohde, *Critical Shortage of Lawyers for Poor Seen*, N.Y. TIMES, Dec. 12, 1999, at 59 (chronicling how the low fees resulting in adequate attention cause the criminal and family court cases of the indigent to languish).

⁵⁸ The drug courts, fought for by Chief Judge Kaye and others, can do a much better job in directing defendants to early drug treatment rather than to jail, while they still can be saved. See, e.g., Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence: As Demonstrated by Drug Courts, Judges Can*

Should the defendant be granted a year free of restraint before sentence, with psychiatric assistance, job training and other services to demonstrate rehabilitation? More and more I want to turn to this technique. It seems entirely appropriate to authorize the use of government funds for specialists, such as social workers, doctors or tutors to help “treat” the poorest of defendants during a year’s wait before sentencing. Assistance with schooling or a job is often required. The defendant can be released on closely supervised bail in contemplation of a possible strict probation term or dismissal instead of prison.⁵⁹

The calculus of equalization, taking into account differences in past opportunities and the rigidities of the guidelines—sometimes racist in their impact, as in the diverse sentencing treatment of crack and cocaine—is difficult to assess and deal with. Yet, I think we can do better in providing minimum assurances that poor people are not unnecessarily sent to prison.

G. Empathy, the Most Powerful Solvent

Trial judges, as front-line representatives of the law, the human face of the law, cannot blink away the baleful effects in our criminal and civil litigations of sharp and growing socioeconomic differences. Looking out from the cave of the courts to perceive dimly the enormous diversity of life that is only opaquely revealed in the courtroom, many judges are dismayed at the social inequalities that we must seek to deal with in our system of adjudicative justice. The challenge to the judge becomes how we can most effectively minimize the inequalities while providing an acceptable minimum standard for all the people in all kinds of situations. This challenge remains.

The most powerful weapon we have is empathy. The leavening influence of regard for our fellow human beings and concern for

Improve the Psychological Well Being of People Subject to the Legal Process and, in Turn, Make Their Own Jobs More Rewarding, 82 JUDICATURE 9, 11-12 (1998) (explaining how the drug courts’ therapeutic approach promotes a respect for the law and for the humanity of the criminal defendant).

⁵⁹ See, e.g., *United States v. Blake*, No. CR 98-979, 2000 WL 286685 (E.D.N.Y. Mar. 15, 2000).

their welfare does more than any practice, procedure, rule or statute to ensure equality in the courts and our administrative agencies. *Nisi prius*, as well as other judges, can become hardened by too much exposure to tragedy. Few of us find the time or interest to volunteer and help people in our deprived communities and, thus, get to know how they live. We must try to bridge the gap between them and us. We must try to open communication between the heart of the law and the hearts of those who seek justice from us. This goal requires not only that we act justly on a moral plane, but also that we make our reasoning understandable and, so far as practicable, acceptable to every level of society.

Leading appellate judges have described the appellate functions as performed almost entirely through research and cogitation. Such a description is not useful for trial lawyers and district judges who observe and deal with real people who are sometimes irrational, but always unique, interesting and important. Often what they want most is a hearing to demonstrate that we understand their fears and their sense of mortality. The need for sensitivity to people is just as true for lawyers in their offices as it is for judges in their courtrooms.

One of the reasons for avoiding excessive sentences is that the empathy required of lawyers—and of citizens in a democracy—is stunted when parents are away in prison. “[W]ithout regular comforting, physical contact and sensory stimulation from birth, the biological capacity for sociality—the precondition for empathy and conscience—cannot develop . . . and [e]mpathy requires the nurturing required by early social relationships.”⁶⁰ Breaking up

⁶⁰ Phillips Stevens, Jr. and William Damon, *Molding Morality*, SCI. AM., Dec. 1999, at 14. Peter Berkowitz has similarly recognized the important role the family plays in socialization:

It is in the family that the child first develops the capacity for love and trust . . . [and s]ubsequently, the rich array of voluntary or secondary associations that flourish in a well-ordered society foster the ‘cooperative virtues,’ which include ‘justice and fairness, fidelity and trust, integrity and impartiality’ . . . [and f]inally, through fulfilling the offices of citizenship, individuals develop an allegiance to the principles of justice such that they learn to treat fellow citizens as the free and equal beings they are.

families by sending fathers and mothers to prison for unnecessarily long terms sows the seeds of problems for the next generation,⁶¹ particularly when, as is sometimes the case, the ex-prisoner becomes a “monster.”⁶²

CONCLUSION: CHALLENGES FOR THE NEW CENTURY

At the beginning of this new century, enormous demographic and socioeconomic changes are taking place. These changes will further strain the American resources of fraternity that have carried us through so many crises. Accessibility to the courts and other adjudicatory institutions on roughly equal terms is essential to equality before the law. If we cannot provide this foundation of protection through the courts, many of the rest of our promises of liberty and justice for all remain a mockery for the poor and the oppressed. Equal access to the judicial process is a sign of a just society. While we have made enormous strides towards that goal, it is still a glaring truth that equality is, in the real world, often a figment of the jurisprudential imagination.

Achieving full and precise equality, even in the courts, is incredibly difficult in a society where there is so much social and economic inequality. There must be more aid to Legal Services and pro bono enterprises to begin a semblance of a balance of legal resources available to rich and poor. So, too, is insistence on adequately-funded government-supported legal services for the poor—without artificial government imposed limitations. The Association of the Bar of the City of New York and others, as well as so many individual lawyers, have struggled mightily to provide pro bono help and to fund Legal Services and Legal Aid against

PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM 25 (1999) (quoting JOHN RAWLS, A THEORY OF JUSTICE 462-72 (1971)).

⁶¹ But see Malcolm Gladwell, *Baby Steps: Do Our First Three Years of Life Determine How We'll Turn Out?*, NEW YORKER, Jan. 10, 2000, at 80 (concluding that even children deprived in early years can catch up with adequate later help—at least in many cases).

⁶² See, e.g., Michael Berryhill, *Prisoner's Dilemma, Did the Texas Penal System Kill James Byrd?*, NEW REPUBLIC, Dec. 27, 1999, at 18 (discussing the influence of prison on the brutal dragging death of James Byrd).

those who would protect their privileges by denying the rights of others. We must continue to try to accomplish the attainable, even if nearly impossible: procedural and substantive fairness and the integration of mercy and justice for the people,⁶³ all the people we lawyers and judges are charged with protecting under the Rule of Law.⁶⁴ That is the glorious public service to which we are called.

As we enter a new Millennium, we can look back 2000 years with profit when the contemporaries Hillel (60 B.C.E. to 20 C.E.) and Jesus (5 B.C.E. to 30 C.E.) laid down the central rule that should still inform our work: "Do unto others as you would have them do unto you."⁶⁵ Lawyers cannot long keep the ethical level

⁶³ See Jeffrie Murphy, *Mercy and Legal Justice*, 4 SOC. PHIL. & POL'Y 1 (1987), in THE RESPONSIBLE JUDGE, READINGS IN JUDICIAL ETHICS 148 (John T. Noonan, Jr. and Kenneth I. Winston eds., 1993).

⁶⁴ See Judge Fuld's remarks on his departure from the Court of Appeals, N.Y.L.J., Dec. 29, 1973, at 1:

The courts must insure that the ideal of equal protection under law shall be more than a hallowed phrase; that the disadvantaged shall not be denied their rights because of lack of adequate representation; and that the aid and protection of the courts shall ever be available on equal terms to one and all, to the poor, the weak and the unpopular as well as to the rich, the strong and the popular, to the nonconformist as well as to the conformist, and to the bigot as well as to the victim of prejudice. In short, in adjusting the machinery of the court system to achieve greater efficiency of operation, the courts must see to it that the quality of adjudication is not sacrificed to speed of disposition.

See also Berkowitz, *supra* note 60, at 23 (discussing communitarian view that "a well-ordered society and a good life depend upon the exercise of virtue, the practice of citizenship, and participation in a common political life").

⁶⁵ See, e.g., JAMES H. CHARLESWORTH & LOREN L. JOHNS, HILLEL AND JESUS: COMPANIONS OF TWO MAJOR RELIGIOUS LEADERS 19-20 (1997) (explaining that both prophets summarized the Torah which is a part of universal human learning). The Rule assumes some kind of normality and kindness towards self. See, e.g., Jason DeParle, *Early Sex Abuse Hinders Many Women on Welfare*, N.Y. TIMES, Nov. 28, 1999, at 1 (establishing a link between sex abuse and welfare, since victims of abuse tend to be addicts, suffer from disabilities, depression, or other social, physical and emotional obstacles).

Professor George P. Fletcher in his essay, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1615-17 (1999), makes an interesting argument based on language in *Genesis 2:18-23*. While religious sentiment certainly now permeates our American Society and was

required by equal adjudicative justice appreciably higher than that reflected in our social ethos revealed in substantive rights for the poor; and the social-ethical level cannot long be kept artificially higher than most individual's view of what is good and just in treatment of the less fortunate. In a larger sense, then, if we would satisfy our adjudicate duties, we must also satisfy our social and individual obligations to the poor as members of the whole community.

In our complex, tripartite free-enterprise welfare-philanthropic system, no single formula can serve the poor in all their different guises and roles. The lawyer's role to improve the lives and protections of all of us is central.

present at the creation of our Constitution, our courts are secular and must depend on the more secular (though religiously influenced). "All . . . are Created Equal" in the Declaration of Independence, and elsewhere in our history. *Id.* In view of the divisiveness of religions and the tendency of adherents to want to dominate or proselytize others, the First Amendment rather than the story of creation seems a better guarantor of equality in our civil society.

