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## PROCEDURAL REFORM AS A SURROGATE FOR SUBSTANTIVE LAW REVISION

*Jack B. Weinstein\**

I have just returned from a fascinating ten days in the Republics of Kyrgyzstan and Kazakhstan in central Asia, two of the fledgling democracies in the former Soviet Union. I travelled there with a group of lawyers from the City Bar Association to consult with the Kyrgyz and Kazakh legal communities as they engage in the exciting and sometimes overwhelming task of shaping their new legal institutions.

Having survived such local customs as imbibing fermented mare's milk, the national drink, and, as honored guest, eating selected portions of a boiled sheep's head, I can now reflect on our exchange. During this period on the steppes of central Asia I was buoyed by the thought of food served by Brooklyn Law School.

We have so many reasons to be thankful. For the Kyrgyz and Kazakhs, the prospect of initiating legal reform without many of the underlying support structures we enjoy—such as highly professionalized lawyers and academics, a tradition of judicial independence, a powerful written constitution including strong separation of powers, and mechanisms for judicial review, as well as support of the people, the press and other branches of government—is a daunting one.

The former Soviet Republics have to deal with a judiciary and bar subservient to party and the procuratura. We were asked questions such as, "But why does the legislature or prosecutor accept the court's declaration that a statute or police conduct is unconstitutional?" and "Can you really tell the prosecutor that he can't be present when the defendant talks to his counsel or that he must release a defendant during the months of investigation?" In my private talks with

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\* Senior Judge, United States District Court for the Eastern District of New York. These notes were used for remarks at the Civil Litigation Symposium Luncheon on May 7, 1993.

members of the Constitutional Court they seemed lonely and afraid. They need support from our bar and our judges. They find it hard to understand how our legal system can be adversarial and yet each element can be respectful of the others.

The Kyrgyz and Kazakhs are rich in spirit and determination. Their aspiration to develop modern legal systems should remind us to treasure and husband the enormous resources we have worked so hard to develop in bringing to fruition a rule of law in which all are equal in our courts. The simple opportunity to bring a lawsuit for harm suffered due to the fault of another—something we take for granted as a defining element of our legal system—is virtually unavailable there. Yet the republics of central Asia, despite the rural character of their lands, face many of the same modern threats of toxic and environmental harm from which we have come to expect the protection and redress afforded by our laws.

My journey has fortified my sense of caution, which I have had occasion to express in recent years, about many of the latest movements for procedural reform.<sup>1</sup> Change is not necessarily progress.

The importance of the Federal Rules of Civil Procedure in simplifying practice, making our courts more readily accessible and hastening disposition of lawsuits on the merits is now recognized by all. These procedural reforms were essential in clearing away the tangled obstacles that hampered the ability of the public to obtain speedy airing of its grievances in our courts. And easier access necessarily resulted in more equal access. Our courts became more routinely available to those without other means of recourse to defend and expand their rights.

As procedural specialists we must be careful not to elevate form over substance. We must not forget that our cherished rules function in service of substantive outcomes. The procedural reforms of the 1930s would have been only of passing interest had they not been accompanied and followed

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<sup>1</sup> See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988).

by the vast expansion of federal substantive law that resulted from the New Deal, the civil rights movement, the Great Society, Vietnam, Watergate and the environmental movement, as well as the accompanying growth and liberalization of the common law in areas such as torts and contracts.

In recent years the political pendulum has swung in the other direction, towards the "haves" and away from the "have-nots." We have witnessed a backlash against many equalizing developments in the substantive law. Many recent procedural reforms, some merely proposed and others actually adopted, may represent a *sub rosa* aspect of this substantive backlash. As guardians and keepers of the rules, proceduralists have a duty to flush out these substantive arguments from behind their procedural camouflage, exposing them to open and honest debate. The public is entitled to be aware of and participate in the law reform process. Discussions of substantive law that are cast in the arcana of procedure may become elitist and inaccessible. The public may discover too late that many of its cherished legal rights have become devalued for lack of any means to redeem them.

One reason I suspect that substance has been able to hide behind recent efforts toward procedural change is that some of the problems cited as justifications for these "reforms" are grossly exaggerated. The supposed "litigation explosion" is now treated as a matter of consensus. Former Vice-President Quayle and others have seized upon the few studies supporting this view as political tools in fomenting public dissatisfaction with lawyers and our legal institutions. These appeals contribute little or nothing to meaningful debate about procedure and only exacerbate the public's frustration. Those more dispassionate members of the bench and bar who nonetheless have joined the steady drumbeat of complaint about our "hopelessly overburdened" courts also stoke these fires and contribute to the pessimism that impedes real progress.

The serious efforts to study the problem of increased filings have revealed that the issue is far from clear.<sup>2</sup> In fact,

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<sup>2</sup> See, e.g., MARC GALANTER, THE DEBASED DEBATE ON CIVIL JUSTICE (Disputes Processing Research Program, Working Paper No. 5-6, 1992); INSTITUTE FOR CIVIL

the most recent figures from the Administrative Office indicate that the number of civil cases filed in the federal system increased modestly from almost 211,000 filings during 1991 to just over 229,000 filings in 1992.<sup>3</sup> This was the first increase since 1988 and was attributed largely to fluctuations in the numbers of student loan recovery and Social Security cases. Over 231,000 civil cases were terminated in 1992, leaving over 224,000 cases pending, excluding some 26,000 asbestos cases that were transferred to the Eastern District of Pennsylvania. These are hardly staggering numbers considering the size of both the nation and the federal judicial system. Growth does not seem to be occurring at an alarming rate.

Much of the hue and cry has been raised over tort actions. Yet, recent studies indicate that the percentage of negligently injured persons who bring lawsuits is in fact quite low and that many legal, economic and social barriers still exist to the bringing of cases.<sup>4</sup> We may be readopting a "blame-the-victim" attitude towards tort cases. And while the absolute number of cases has risen, our population and the scope of modern hazards have also grown dramatically. Much of the increase in numbers of cases can be attributed to a relatively few mass torts, such as those involving asbestos and DES, which usually involve a unitary problem affecting hundreds or thousands of people.<sup>5</sup>

The so-called "war on drugs" is another factor that has had great impact on the sense that our courts are overwhelmed. This factor is sometimes overlooked in the civil justice debate. Vast resources were expended during the 1980s in expanding the investigation and prosecution of drug offenses. The

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JUSTICE, ANNUAL REPORT 18-23 (RAND 1993) (reporting study of jury verdicts and costs of dispute resolution and concluding that the tort system is too heterogenous to make generalizations about increased costs); Roxanne Barton Conlin, *Litigation Explosion Disputed*, NAT'L L.J., July 29, 1991, at 26; Geoffrey C. Hazard, *Bush Report Not All That Controversial*, NAT'L L.J., Dec. 16, 1991, at 13.

<sup>3</sup> See ADMIN. OFFICE OF THE U.S. COURTS, COURT ADMINISTRATION BULLETIN 2 (Mar. 1993) [hereinafter COURT ADMINISTRATION BULLETIN].

<sup>4</sup> See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183-89 (1992).

<sup>5</sup> This is not to say that major changes are not required. See authorities collected in Jack B. Weinstein, *Individual Justice in Mass Litigations*, particularly Chapter X (*The Future*) recommending bureaucratic protections. JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS SOCIETY* (forthcoming 1994).

executive branch made criminal law enforcement a top priority. Congress expanded the scope of the narcotics laws and adopted severe mandatory prison sentences. The numbers of Assistant United States Attorneys grew exponentially. The Sentencing Guidelines were promulgated, creating a whole new field of intricate and arcane legal rules requiring regular application and occupying the time and energies of our district and appellate judges. Much of the nearly ten-percent increase in the number of appeals filed in the circuit courts from 1991 to 1992 probably can be attributed to the routine appellate review of sentencing decisions at the initiation of both defendants and the government.

In the Eastern District of New York well over half of our criminal cases involve drugs. The Administrative Office estimates that twenty-seven percent of criminal cases nationally involve the drug laws.<sup>6</sup> I have spent most of my time over the past year handling drug cases and most of that work has consisted of pleas and sentencing. The bulk of the cases involve low-level players in the narcotics trade who rarely go to trial. It has been many weeks since I had a trial in my courtroom. I have volunteered to assist the other judges in trying civil cases but none have needed my help. The notion that civil cases cannot get to trial in federal court because the civil calendars of our trial judges are too clogged appears, from where I sit, to be a myth.

More importantly, however, we can manage the growing burden on our courts. Curtailing court access should be our last, not our first resort in dealing with these problems. Claims of discovery abuse, for example, are exaggerated. Increasing utilization of magistrate judges and special masters to assist in managing cases, supervising discovery and in settlement has greatly expanded our ability to handle our workload. I do not believe discovery abuse is a problem in our district. Abuses by large law firms are being checked by our magistrate judges and the corporations that will no longer pay inflated legal bills for unnecessary discovery.

Yet, change after change in procedure has been designed to reduce access to the courts on the ground of abuse:

- Venue over defendant corporations in diversity suits has

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<sup>6</sup> COURT ADMINISTRATION BULLETIN, *supra* note 3, at 3.

been reduced.

- Minimum amounts in diversity cases have been increased.
- Proposals to abolish diversity or further limit it are being reactivated.
- Class actions have been discouraged by rules against aggregating sums in dispute to meet minimum diversity requirements and by appellate decisions.
- More detailed pleadings have been required and, now, proposed detailed disclosure at the time the action begins will place additional burdens on plaintiffs, some defendants and the courts.
- Summary judgment—usually against plaintiffs—has been expanded.
- Discovery as a part of the pleading will discourage bringing suits.
- Use of discovery by plaintiffs after a suit is commenced has been discouraged.
- Rule 11 and other sanctions, primarily against plaintiffs, have deterred suits—particularly those involving civil rights.
- Proposals to limit use of experts have been strongly urged on almost baseless claims of widespread abuse.
- Increased fee proposals to make litigants “pay their way” are common.

This tendency to discourage civil litigation demonstrates that there is always the danger that the rulemaking process can be activated to make access to the courts more difficult. Were there a conservative Chief Justice, he or she could control appointments to the rulemaking committees to staff them with conservative procedural door-closers. Congress would arguably not have sufficient interest or time to protect adequately the procedural rights of claimants as a counterbalance to the Supreme Court and the various federal rulemaking committees.

Alternative Dispute Resolution (“ADR”) has been useful and has great promise. We should proceed cautiously, however, in replacing our courts with alternative fora. ADR is a supplement to traditional adjudication, not a substitute. We should remember that our goal in developing adjuncts to our courts is to improve the functioning of the courts themselves,

which are public facilities. The primary disadvantage of much ADR is that one must purchase access to the system. A situation in which the wealthy are able to gain speedy resolution of their disputes while the disadvantaged must wait in line for limited public resources would be regrettable. Moreover, major areas of law may be unresolved if the courts do not decide initial cases. Illustrative is the settlement of almost all claims against lawyers in connection with alleged bank fraud; we still do not know what the law requires a lawyer to do in reporting a client's possible overreaching to government agencies.

Moreover, the public has some right, I believe, to an open airing of disputes in full view. Taxpayers would have a legitimate gripe about funding a court system that diverted commercial cases of potentially great public interest to alternative fora hidden from the public's view. Litigant satisfaction is also important to public support and the legitimacy of our courts. Studies by RAND and others have indicated that an airing of grievances before a judge in open court has a cathartic effect and contributes greatly to the sense of having received a fair hearing.<sup>7</sup> This has been my experience informally with DES plaintiffs and in other cases.<sup>8</sup>

We have had some success in the Eastern District utilizing ADR techniques in a limited, supplementary fashion. We provide a pamphlet to litigants explaining dispute resolution facilities available in the district. These procedures include: a court-annexed arbitration system under which a panel of lawyers is available to hear cases parties wish to submit to arbitration; an early neutral evaluation program that provides a lawyer knowledgeable in the field to meet with the parties early in the case to evaluate the merits; court-annexed mediation providing a knowledgeable mediator to help the parties arrive at settlement; consent to jury or court trial before a magistrate judge; settlement conferences conducted by a judge or magistrate judge; and appointment of special

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<sup>7</sup> See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 39-41 (1990); Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 98-99 (1989); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18 L. & SOC'Y REV. 51, 67-68 (1984).

<sup>8</sup> See WEINSTEIN, *supra* note 5, ch. V (*Ethics of Judges*).



masters to assist in case management, discovery and settlement.

Much of the increased load on our courts can be attributed to mass tort cases, a burden caused by the failure of legislators to come to grips with what are really problems of national substantive policymaking. In the absence of congressional action, courts and lawyers have had to fashion ad hoc responses to these problems. On the whole, the legal community should be commended for its devoted efforts to come to grips with mass cases. Our experience of the last fifteen or so years in the area of mass torts illustrates that we do have the capacity to handle new challenges facing our courts and that cutting down on the numbers of cases is neither a necessary nor a rational response to these problems. Our legal system is capable, as it always has been, of the growth and adaptation necessary to deal with change.

In continuing to address the challenge of mass cases, honesty is our best policy. Rather than attempting to sweep under the rug the difficult problems these cases present for the courts by desperately searching for any means to cut down on the volume of cases, we should debate openly how best to handle the unique aspects of mass cases.

That debate should include open discussion of the ethical problems mass cases present for lawyers and judges, a matter about which I have spoken in a recent address at Northwestern University.<sup>9</sup> For example, lawyers often do not communicate properly with what are sometimes thousands of clients, their fees are disproportionately higher when based on a contingency and thousands of cases will certainly result in huge fees, requiring recovery as a basis for settlement.<sup>10</sup> We generally have avoided these difficult ethical questions, making exceptions to our ordinary rules without stating so openly, in the hopes that the problems will go away. But mass cases are here to stay and so are the ethical dilemmas they carry with them. I am hopeful that in mass cases, as in other areas, genuine discussion of real problems of substantive and procedural law will replace the unhelpful and distracting focus

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<sup>9</sup> Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

<sup>10</sup> See WEINSTEIN, *supra* note 5, ch. III (*Ethics of Lawyers*).

on numbers of cases and the calls to clear our courts of problems we would prefer not to address.

A companion to the complaint that we are inundated with lawsuits and suffer from litigation disease is the claim, advanced by Peter Huber and others, that "junk science" is routinely allowed into our courtrooms causing juries to reward otherwise unworthy plaintiffs.<sup>11</sup> The solution proposed to this alleged problem is constriction of the legal rules that govern admissibility of scientific evidence, a proposal recently rejected by the Supreme Court.<sup>12</sup>

As scientific understanding grows more sophisticated and the cases before us become ever more scientifically complex, judges struggle to keep pace with developments. This problem, however, is not a new one. Judges and jurors are not scientists and we have always had to determine how to adapt science to the law's particular methods of factual development. Our goal has been, and should remain, to foster full and clear presentation and development of facts in the courtroom. The Federal Rules of Evidence take a broad approach to the admission of expert evidence and place faith in the courts' and jury's ability to discriminate between the valuable and the purely speculative.

The answer to concerns about science in the courtroom should be to provide jurors with more information, not less. Jurors are capable, under control of the court, of evaluating an expert's credibility if they are provided with the relevant information about the expert's work and the underlying field. Erecting artificial barriers, such as "general acceptance within the field," peer review standards and the like only imposes the rules of the scientific community—with all of its own shortcomings and biases—on our courts.<sup>13</sup>

Leaving aside the context of the largely false debate over

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<sup>11</sup> See, e.g., Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993); Jeff L. Lewin, *Calabresi's Revenge? Junk Science in the Work of Peter Huber*, 21 HOFSTRA L. REV. 183, 186 (1992) (book review) (criticizing work of Huber).

<sup>12</sup> See *Daubert v. Merrell Row Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993); WEINSTEIN, *supra* note 5, ch. VII (*Ethics of Scientists*); Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should not be Amended*, 138 F.R.D. 631 (1991).

<sup>13</sup> WEINSTEIN, *supra* note 5, ch. VII (*Ethics of Scientists*).

our supposed "litigation explosion," many of the recent procedural reforms appear to me to be surrogates for direct curtailment of substantive rights. This is because virtually all of them share a common characteristic: they limit court access and have a disproportionate impact on those without the independent means to gain a fair hearing of their grievances.

I will not bore you with a rehash of the now familiar Rule 11 debate. I believe that it has become clear that routine imposition of sanctions as a matter of rule-based mandate is inconsistent with both the liberal access policy of the Federal Rules and the overall American system of rewarding risk-taking in the bringing of lawsuits. Sanctions have a disproportionate impact on the poor and those without well-settled legal expectations. A policy deliberately designed to chill the bringing of lawsuits is unnecessary and is destructive to our commitment to open courts. It potentially hampers development of the law and, perhaps more significantly, infuses our court proceedings with a spirit of meanness and intolerance as parties seek to litigate ancillary questions of lawyers' conduct having little to do with the merits of the cases.

Imposition of more stringent pleading requirements for various categories of cases has a similar effect and is a direct retreat from the goal of the Federal Rules to allow easy entry to the courthouse, permitting subsequent factual development to discover the merits and value of the case.<sup>14</sup> The same can be said of efforts to "reform" discovery in response to the supposed responsibility of "abusive" discovery practice for delays in the system.<sup>15</sup> The recent proposed amendment to Rule 26 to

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<sup>14</sup> The Supreme Court recently reversed a Fifth Circuit decision imposing a heightened pleading standard in a civil rights case alleging municipal liability. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1161 (1993).

<sup>15</sup> See Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 4-5 (1992) (criticizing proposed amendment to Rule 26, requiring mandatory disclosure before discovery practice, as likely to result in inefficiency, delay and conflict with attorneys' ethical obligations). Compare George F. Hritz, *Plan Will Increase Cost, Delay Outcomes*, N.Y. L.J., Apr. 13, 1993, at 2 (criticizing experimental mandatory disclosure rules in the Eastern District of New York) with Charles P. Sifton, *Experiment a Bold and Thoughtful Step*, N.Y. L.J., Apr. 13, 1993, at 3 (defending experiment of the District Court for the Eastern District of New York).

mandate pre-discovery disclosure would disadvantage certain types of plaintiffs since the disclosure requirements would be determined with reference to the initial pleadings.<sup>16</sup> This approach is in direct contravention of a system originally premised upon liberal pleading followed by broad discovery to develop the case. Such measures cannot help but result in less information for plaintiffs who commence litigation with limited resources and hinder speedy arrival at just settlements.<sup>17</sup>

The Supreme Court decisions imposing greater burdens upon plaintiffs seeking to survive summary judgment will work together with discovery restrictions to make full development of the merits of cases more difficult.<sup>18</sup> The Court's curtailment of the standing doctrine also has limited the ability of citizens to obtain private enforcement of laws controlling the behavior of the government and other entities.<sup>19</sup>

The emerging trend toward variation in local rules and practice, in part as a result of the Biden Bill,<sup>20</sup> threatens to result in a disuniform and complex system with many of the accessibility problems that predated the reforms of the 1930s.<sup>21</sup> These measures threaten the enormous resource we have fashioned—a uniform national practice with national specialists capable of enforcing rights across the nation. Dividing and conquering this system should be discouraged. With the inevitable and unending growth in the volume and complexity of the substantive law, our courts are intimidating enough to the average citizen without our adding to the problem by erecting additional procedural hurdles. The Federal Rules were intended to minimize the barriers to court access.

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<sup>16</sup> See Bell, *supra* note 15, at 36 n.137 (quoting letter of Judge Ralph K. Winter stating that little disclosure would be required in product liability cases since these plaintiffs usually plead sparsely).

<sup>17</sup> See Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 143 (1993) (explaining how proposed amendment to Rule 26 to impose mandatory disclosure in advance of discovery practice is likely to disadvantage plaintiffs in personal injury and public interest litigation).

<sup>18</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>19</sup> See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

<sup>20</sup> See Robert L. Haig & Warren N. Stone, *Does All This Litigation "Reform" Really Benefit the Client?*, 67 ST. JOHN'S L. REV. (forthcoming 1993) (examining implementation of Civil Justice Reform Act).

<sup>21</sup> See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

Make no mistake about the substantive effect of these changes in the procedural rules. Much of the expansion of federal substantive law in the post-World War II period has occurred in the area of civil rights. Our courts were opened to claims sounding in bias based upon race, age, sexual orientation, crippling diseases and disabilities. New procedural restrictions are adopted in the bland name of supposedly neutral concerns about docket clearing, frivolous cases and the like. But the effect is to cut back on the opportunity for those who may have suffered discrimination to get an airing of their claims and the redress to which they may be entitled under the substantive law.<sup>22</sup>

A similar dynamic has operated in the area of habeas corpus, where frustration about supposed abuse of the federal system has been used to justify strict new procedural rules that result in the arbitrary elimination of many substantively meritorious claims from the courts.<sup>23</sup> Those who may have been wrongly imprisoned suffer because the judicial system has determined that it cannot manage the volume of its work. Surely we can be more humble in addressing our problems than to pronounce arrogantly that the federal courts no longer have the patience for plaintiffs who draft poorly, or cannot be bothered with the repetitive claims of some prisoners or do not have time any longer for diversity suits.

Perhaps most troubling has been the recent trend of funding cutbacks. Once again procedure masks substance. Just as the supposedly neutral and widely accepted problem of budget deficits now crowds out meaningful discussion of social policy in our legislatures, lack of funding and shifting funding priorities in the judiciary have become indirect means of controlling what types of cases come before our courts. Shortages in funds are convenient excuses for the throwing up

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<sup>22</sup> According to Rule 48 of the 1991 amended Federal Rules of Civil Procedure, alternates will deliberate and vote with regular jurors. A deliberating jury including alternates creates an increased barrier to a decision for the plaintiff because a unanimous verdict must be reached by a greater number of people. For another example of civil procedure's impact on practical balances between plaintiffs and defendants, Cf. Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961).

<sup>23</sup> See *Herrera v. Collins*, 113 S. Ct. 853 (1993); *Coleman v. Thompson*, 111 S. Ct. 2546 (1991).

of hands, and are means of avoiding responsibility for what would be unpopular decisions were they made out in the open. If our courts truly are overburdened—and I believe that they are not—it is only because we have not been given the resources to do our jobs.

Funding shortages are a particular problem in state courts. Failure to grant salary adjustments and provide even minimum electronic help has driven good judges out of the system and discouraged others from entering it. But the problem is also apparent at the federal level. In March 1993 we were told by the Administrative Office that we would not be permitted to compensate civil jurors for their services after May 12. Given the general requirement that jurors be paid, I consider this probably an unconstitutional deprivation of the right to jury trial. The justification given is that money is short and that of course the criminal cases must go forward at all costs. But it is the policies of the executive branch in vastly increasing narcotics prosecutions that have caused such a great increase in criminal cases. A situation has been created whereby the courts have been “accidentally” and “regrettably” closed off to certain types of litigants. Some question how accidental this result is, just as some question whether the current enormous budget deficits were not a deliberate means of precluding substantive discussion of government funding of social programs.

My journey two years ago to Russia and Latvia on behalf of the Lawyers' Committee for Human Rights, and my recent trip to central Asia on behalf of the City Bar Association remind me of the importance of the basics. I was asked to make a presentation in central Asia on the elements of an independent judiciary, a matter of great concern to local leaders who must build one from scratch and who have the experience of having dealt with Soviet judges beholden to party leaders in Moscow. My remarks focused on such elemental matters as separation of powers, judicial review, life tenure, salary guarantees and justiciability doctrines. I departed with high hopes for these new nations as they seek to emulate a system that has served us so well. And I returned home with a reinvigorated appreciation for the wealth of our own legal system.

Perhaps the most striking aspect of the experience was the

impression it left of a changed world. The relative ease with which our group was able to travel across the globe, the lively exchange of ideas we were able to have with a formerly remote and isolated people and the dizzying pace of technological and political progress in central Asia, Russia and the Baltic states were all remarkable. It is difficult not to be enchanted by the changes that are swirling about us.

Rapid change also has been accompanied in some regions by terrible violence. The rule of law has been essential to the maintenance of our own social compact. Breakdown of order in countries such as the former Yugoslavia, Armenia, Iraq, the Sudan, Peru and others stems in large part from a failure to develop and maintain political and legal cultures founded upon the rule of law.

It is our great challenge to deal with changes in a manner that permits us to move forward without losing hold of the basic elements that make our legal system so successful. I want to thank the Brooklyn Law School and the *Brooklyn Law Review* for bringing this group together. Without such exchanges, we could not succeed in our mission of making the rule of law available for all—rich and poor, powerful and humble, or, as President Franklin Roosevelt put it, the “haves” and “have-nots.”