The Law:

A LITIGATION SOCIETY?

"Doomsday Drawing Near with Thunder and Lightning for Lawyers," warned a 17th-century London pamphleteer. Today's Americans may still distrust lawyers, but they nevertheless have come to rely more and more upon courts and the law. Everything from disputes between parents and children to the future of nuclear power seems eventually to come before a judge. As A. E. Dick Howard, a specialist on constitutional law, suggests, we may be well on our way to becoming a "litigation society." The courts have often served as a useful "safety valve"—they led the way in ending *de jure* racial segregation. But, of late, they have tried to resolve an increasing number of social questions that are less susceptible to judicial remedy. The real difficulty, Howard says, may be the breakdown of the old sense of community and compromise that led Americans to settle political disputes out of court—in legislatures and party conventions.

by A. E. Dick Howard

Our colonial forebears would be struck dumb by the explosion of law and litigation in 20th-century America. When John Locke drafted the Carolina colony's constitution in 1669, he included the provision, "It shall be a base and vile thing to plead for money or reward." Yet today the cost of legal services accounts for two percent of America's gross national product, more than the entire steel industry.

There are now more than 574,000 lawyers in America, twice as many as there were just 20 years ago. Law school enrollments have gone up 187 percent in the same period. Already we have one lawyer for every 400 people (compared to one doctor for every 500), or three times as many lawyers per capita as England and 20 times as many as Japan.

"We may well be on our way to being overrun by hordes of

Critics today accuse the courts of "legislating" social reform from the bench. Ironically, the Supreme Court of the early 20th century was also attacked for its activism—as it consistently overturned child-labor laws and other social legislation.

Library of Congress.

lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated," Chief Justice Warren Burger observed not long ago. In 1960, the country's federal district court judges faced about 59,000 civil cases; in 1980, the number was 185 percent higher—over 168,000. During the same two decades, the number of cases taken to the federal appellate courts jumped from 3,899 to 23,200—an increase of 495 percent. State courts have faced a similar surge of litigation. The caseload of state appellate courts has grown at an annual rate of at least 11 percent for the past two decades.

Almost every week, someone seems to discover another creative way to turn a dispute into a lawsuit. Actor Lee Marvin could hardly have expected that in parting with his live-in girlfriend, he would also be parting with the $104,000 that a California court awarded her. Yet once the "palimony" precedent was set in April 1979, lawyers across the country began "Marvinizing" similar cases, and many more former roommates found themselves reunited—in court. In April 1981, a homosexual "palimony" suit was filed against Billie Jean King, the professional tennis star. Of late, the itch to litigate has approached the absurd: In 1977, a group of irate Washington Redskins' football fans filed suit in federal court to overturn a referee's call that had given a game to the St. Louis Cardinals. *Trial* magazine

has run articles on "The Sports Spectator as Plaintiff" and "A Guide to Referees' Rights." Even clergymen have been advised to take out malpractice insurance.

We are witnessing the peculiar "legalization" of American life—the tendency to react to a problem by enacting a law or by bringing a lawsuit. To be sure, this preoccupation with the law is nothing new. Thomas Paine long ago declared that "in America the law is king." We have always been among the most litigious people on earth. But during the past decade or two, the trend toward relying on law and litigation—especially toward going to court over even minor issues—seems to have taken on epidemic proportions. What forces are at work?

The sheer growth of government activity is one factor. The federal government is involved in more aspects of our lives than ever before. Regulation has grown at a record pace. Seven new watchdog agencies were created by Congress in the last decade alone.* From 1970 to 1980, the *Federal Register*, which publishes new regulations, grew from a hefty 10,000 pages annually to almost 80,000. To get some idea of what this means, consider the University of Colorado study that found that a hamburger, from its start as part of a steer on the hoof to its arrival at the frying pan, is in theory affected by nearly 41,000 state and federal regulations.

Increased regulation spawns increased litigation. The regulatory agencies have set up additional procedures to adjudicate disputed rulings; there are now more than 1,100 administrative judges who do nothing but hear arguments on everything from water pollution to Social Security benefits. (After this procedure, of course, the plaintiff can still appeal to the federal courts.) Not surprisingly, these increasingly byzantine proceed-

*The Environmental Protection Agency, Consumer Product Safety Commission, Federal Election Commission, Occupational Safety and Health Administration, National Transportation Safety Board, Federal Energy Regulatory Commission, and the National Highway Traffic Safety Administration.

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ings have helped to make Washington, D.C., a boom town for lawyers. Since its establishment in 1972, Washington's bar association has more than tripled in size and now boasts 35,000 members. That is equivalent to five percent of the capital's total population (although many of the lawyers live in the suburbs).

No less significant is the rise of the public-interest law firm. There are now at least 125 of these—most were created during the early 1970s—but their impact is far greater than their number would indicate. Their main purpose is to litigate, to petition the courts to enforce and extend laws and regulations in far-reaching cases. As Ralph Nader put it: "Our institutions [are] serving special interest groups at the expense of voiceless citizens and consumers. A primary goal of our work is to build countervailing forces on behalf of citizens."

Righting Wrongs

Public-interest firms have gone to court in a number of famous cases. Construction of the Alaska oil pipeline, for example, was delayed for four years while environmental issues were argued in the courts. When construction began in 1974, the pipeline had been significantly redesigned and rerouted to take into account many of the environmental factors that the public-interest firms had raised. In recent years, a new kind of public-interest firm has sprung up to pursue a "conservative" notion of the public interest. These firms (there are now 10 of them) go to court on a wide range of issues, from challenging environmental regulations to trying to extend corporations' "free speech" rights. (James Watt, former president of one of these firms, the Mountain States Legal Foundation, is now secretary of the U.S. Department of Interior.)

Another aspect of the law's increasing pervasiveness has been the growth of legal-aid organizations. The Supreme Court led the way for this development by ruling in *Gideon* v. *Wainwright* (1963) that in felony cases a criminal defendant must be provided with legal counsel if he cannot afford it himself. The Court's decision (since extended to misdemeanor cases) soon led to the creation of legal-aid services funded by state and local governments, bar associations, and universities. For its part, the Johnson administration established the Legal Services Program (now called the Legal Services Corporation) to provide help to the poor in civil cases, involving landlords, welfare agencies, and the like. Today, with a budget of $321 million, 6,000 Legal Services lawyers provide representation to the poor in all 50 states plus Puerto Rico, the Virgin Islands, Guam, and Micro-

nesia.* Corporations, by contrast, deducted $24 billion in legal expenses from their taxable income in 1977.

The sheer volume of new laws and litigation is only part of the story. There has also been a change in character. Litigation has become an outlet for political claims that in an earlier time would normally have been resolved by elections or by votes in legislatures. Tocqueville long ago noted that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one." The developments of the past two decades have given new meaning to his observation.

In 1963, the Warren Court declared that litigation by the National Association for the Advancement of Colored People was more than simply a technique for resolving private differences. It was "a form of political expression." Under the conditions of modern government, the Court said, "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

Sweeping Remedies

The success of blacks in seeking judicial remedies for racial discrimination quickly inspired imitation by virtually any group that failed to have its way through the normal political process. Spokesmen for voting blocs that claimed to be underrepresented, inmates of mental hospitals, and women have all dispatched lawyers to court to do battle. The United States is witnessing a "rights explosion," as more and more litigants persuade the courts to view abuses or privations as constitutional issues.

In a traditional lawsuit, a judge settles a dispute between private individuals about private rights (e.g., a quarrel over the location of a boundary line between two neighbors). But now, the courts are more willing to consider issues as matters of public or constitutional law. Today, the dispute is likely to be between a broad class of people, such as prisoners claiming cruel and unusual punishment, and some public authority (a state prison administration). The typical vehicle is the class-action suit, filed, perhaps, by a public-interest law firm.

As critics of "judicial activism" point out, the courts have also been more willing than ever before to fashion sweeping

*At this writing, the White House has asked Congress to dismantle the corporation. Apparently, the Reagan administration is unhappy with class-action lawsuits that have won court-mandated changes in state and federal policies affecting the poor, such as the level of Medicaid payments. Such suits constitute about two percent of the Legal Services case load. The administration wants to leave the provision of legal services to the states' discretion, making funding available to them through a block-grant program.

A SCARECROW OF A SUIT

Lawyers were less pervasive in the 19th century than they are today, but their activities attracted just as much concern. The law itself worked at least as slowly then as it does now, judging by this excerpt from Charles Dickens's 1863 novel, Bleak House.

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

remedies. The examples are legion: court-ordered busing, reapportionment of voting districts, affirmative action, and many more. In a famous 1976 Alabama case, *Pugh* v. *Locke*, federal judge Frank Johnson ruled that, regardless of cost, the state must build new and better prisons and that it must provide 60 square feet of living space per prisoner, three "wholesome and nutritious" meals a day, and a variety of recreational and social services.

Indeed, judges (especially those on the federal bench) often wind up managing public institutions themselves in order to carry out the reforms they have mandated. In 1974, federal district court judge Arthur Garrity ordered Boston's schools desegregated and began to supervise the process. But he has become increasingly involved in the day-to-day affairs of the school system and now participates in making decisions on such matters as the hiring and firing of teachers.

The rationale for judicial intervention is sometimes less than precise. Judge David L. Bazelon of the Washington, D.C.,

federal appeals court has said that his test for intervening is: "Does it make you sick?" Other judges have sought to curb the judicial appetite. Referring to a lawsuit challenging a local school system's restriction on the length of boys' hair, Justice Hugo Black wrote in 1971 that he could not imagine that the Constitution "imposes on the United States courts the burden of supervising the length of hair that public school students should wear."

But the judiciary is expanding its reach into ever more aspects of our daily lives, forcing elected officials and state institutions to undertake reforms it thinks are necessary. Harvard's Nathan Glazer has warned against the emergence of an "imperial judiciary." How far the trend will go depends heavily on judges themselves. As Justice Harlan F. Stone once observed, "While unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

Judicial activism is often associated with the Supreme Court under Chief Justice Earl Warren from 1953 to 1969. "In that time," wrote the *New York Times*'s Anthony Lewis, "the Supreme Court . . . brought about more social change than most Congresses and most Presidents." Many observers thought that the Burger Court—with four of its justices appointed by President Nixon—would veer away from such activism. The Burger Court has indeed taken a "hands-off" attitude toward some issues, such as school dress codes and "gay" rights.

A History of Activism

More striking, however, is the new ground that the Burger Court has occupied. It declared a woman's constitutional right to have an abortion in its *Roe* and *Doe* decisions (1973), invalidated all then-existing state capital punishment laws with *Furman* v. *Georgia* (1972), and opened the doors to a flood of sex discrimination cases. In other fields, it extended the Warren Court's principles. With regard to school busing, for example, the Burger Court approved the first big city busing plan and made it easier for plaintiffs to show *de jure* segregation. All in all, the Court is today more of a center for the resolution of social issues than it has ever been before.

Judicial activism is not an invention of the modern Supreme Court; judges in the early decades of this century used the due process clause to protect business from social and economic welfare legislation, overturning such measures as minimum

wage and child-labor laws and some New Deal legislation as well. In his famous dissent from the Court's *Lochner* decision (1905), Justice Oliver Wendell Holmes, Jr. objected that in striking down New York State's law limiting working hours for bakers, the Court was imposing its own social and economic views. "The Fourteenth Amendment," he wrote, "does not enact Mr. Herbert Spencer's *Social Statics*."

New Ideas

Traditionally, the courts considered all governmental actions valid unless proved otherwise. With its decision in *Brown* v. *Board of Education* (1954), the Warren Court embarked on the development of a judicial rationale that allowed it to view certain kinds of governmental actions as presumptively suspicious. This meant that courts could overrule government actions much more easily. Far from repudiating this approach, the Burger Court has made generous use of it in carving out a zone of "personal autonomy" rights in abortion and contraception cases. Now, government has to prove a "compelling state interest" to avoid having its laws in these matters overturned by the courts.

Reinforcing the trend toward greater judicial intervention are changing ideas about the nature and function of law. In earlier times, law and morality were one. Law, it was believed, was rooted in a society's common ethos—its religion, its customs, its folkways. Under a regime of "natural" law, judges did not "make" law, they "discovered" it. Thus, the creative role of judges was, at least in theory, significantly limited.

The insights of positivism and of legal realism—two powerful forces in American thinking about law—have shattered the old unity between law and morality. In positivist theory, law comes from deliberate human decisions, with certain ends in mind, and is not simply the reflection of society's values. Between 1811 and 1817, Jeremy Bentham, the English philosopher and reformer, campaigned to have the United States adopt a unified code of laws and discard the common law, which had slowly evolved under the old English system. A single code drawn up by a purposeful legislature, he believed, would do more to reveal the intent and thrust of law. Legal realism, another influential movement, emphasizes the role of the judge in interpreting and extending the law.* The late Justice William O. Douglas, in his willingness to reinterpret constitutional law in

*In the United States, several legal scholars were responsible for advancing legal realism. Jerome Frank's *Law and the Modern Mind* (1930) and Karl Llewellyn's *Bramble Bush* (1951) were particularly influential works.

light of contemporary values, was strongly influenced by this movement. Both notions embody a view of the law as purposeful and result-oriented.

When the law is no longer viewed as the reflection of some immutable verity, the courtroom becomes a place to seek simple tactical advantage, not necessarily justice. One can go to court on the slightest pretext. If one has the resources—deep pockets and skilled counsel—delay may be as good as a final decision. More than one litigant has filed motion after motion, hoping simply to wear the other side down. Of such calculation is much litigation made.

The Decline of Community

The growing number of lawyers and lawsuits, the displays of judicial activism, and the "judicialization" of an ever widening variety of issues are trends that reflect, in turn, fundamental shifts in American attitudes toward authority and in our sense of community. Beginning in the 1960s, opinion polls have marked a continuing decline in public confidence in the leadership of virtually every major public and private institution. The Catholic Church's teachings on birth control, for example, are ignored by the majority of American Catholics. College students today would scoff at the notion that their college should serve as a kind of substitute parent, as it did only 20 years ago. In every sphere of life—family, school, church, politics—there is more confrontation and less accommodation than ever before. Consensus on basic values seems, in the modern world, increasingly elusive.

The decline of a sense of community carries with it a more atomistic attitude toward public policy—more emphasis on legal formalities and procedure, less place for the informal, nonlegal resolution of issues. In such a climate, adversarial relations replace trust, and the sense of community is further diminished. Yale's former president, Kingman Brewster, once said that a university is "a community of goodwill and of loyalty more than it is a regime of laws." Today, that phrase sounds more hopeful than descriptive. Few university activities—from admissions to student discipline, from faculty hiring to the operation of student newspapers—do not now give rise to legal issues. Caution, not collegiality, is the watchword on today's university campus.

Our increasing reliance on law and litigation to resolve conflicts has far-reaching implications. The more we litigate and the more judges intervene in our affairs, the more our shared

values and elective political processes are undermined. As Justice Felix Frankfurter wrote in warning of the "inherently oligarchical powers" of judicial review, "Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people."

Courts that make rules for universities, prisons, welfare agencies, or other bodies take on the functions of legislatures. But courts are afflicted with a kind of tunnel vision. A judge is not in a position—nor does he have the warrant—to balance competing political and economic interests as legislators are accustomed to doing. Yet he can order heavy expenditures of public funds to carry out his decisions, and that means either that taxpayers will pay more or that other public projects will get less.

Similarly, in our rush to regulate and litigate, we are eroding the informal processes and traditions of compromise so vital to the functioning of our society. We are both setting up rigid rules and inviting controversy on the smallest matters. An army unit that has to go "by the book" all the time soon becomes demoralized; so, eventually, will a society.

What steps can be taken to de-emphasize the role of law in America? In public policy, deregulation of some industries, such as trucking and airlines, is one avenue. In other areas, simpler and fewer regulations might get the job done as effectively with less need for litigation and confrontation. Some states have experimented with laws designed to cut down on the need for lawsuits. Massachusetts and New York, for instance, have enacted no-fault insurance statutes (which guarantee damage payments no matter who is at fault) in an attempt to reduce the number of automobile negligence cases.

The courts themselves can be improved; year after year, Chief Justice Burger has called for court reform. In a speech this year, he said that the growing burden of litigation could be met

Courtesy of the Detroit News.

by more judges, the adoption of better office and support systems by the courts, improved procedures. "The most important single ingredient," he said, is "the service of dedicated judges and supporting personnel in the courts." Former Attorney General Griffin Bell has urged more vigorous enforcement of an existing rule that requires an attorney's affidavit that there is "good ground" for any filing in a federal legal proceeding and that it is "not interposed for delay."

The signs that we must get to work on these reforms are all around us. In California, desperate litigants have invoked a long-forgotten "rent-a-judge" law to by-pass the state's clogged court system. The law provides that the parties to a suit can hire their own judge (usually a retired jurist, but the law doesn't require a law degree).

Many suggested remedies require closer scrutiny. For example, some reformers have called for the creation of intermediate appellate courts to ease the congestion. But creating more courts is like building more highways: It simply encourages traffic. And other proposals may have little real prospect of success. For one thing, almost every move to "de-legalize" runs squarely into the opposition of a well-organized group that benefits from leaving things as they are. Opponents of no-fault insurance, led by lawyers loath to abolish jury trials in auto accident cases, say that they have a political constituency "that exceeds even that of the AFL-CIO."

A Little Pruning

Much can, and should, be done by judges, lawyers, and politicians to slow the pace of the legalizing of America. At the same time, we should not be blind to the gains that have been made precisely because of increased recourse to the courts. It is hard to imagine that a nation dedicated to principles of justice would want to go back to the days when minorities were largely shut out of the legal system or when, because of poverty, a deserving citizen could not have his fair day in court. The courts can also serve as a useful "safety valve" if a minority's fundamental rights are consistently ignored by the majority in the political process. It is unlikely that we would want to confer untrammeled discretionary power on police, prosecutors, and bureaucrats, and it is surely no abuse of the law to curb air and water pollution.

But it is clear that we have gone too far in many cases. Some selective pruning is in order. A little less than 200 years ago, Alexander Hamilton sought to reassure an America worried

about the powers given the federal government in the new Constitution. He wrote in *The Federalist* that the judiciary would be "the weakest of the three departments of power." The judiciary, he said, "has no influence over the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment." We have come a long way from that concept of judicial power.

A judiciary that single-handedly undertakes the systematic reform of a democratic society exceeds its appointed task. In America, resolving problems informally through consensus or in the elective process ought still to be the ideal; judicial intervention ought to be the exception, not the norm. We cannot go back to a simpler time. But we can begin working to restore the primacy of compromise in building a better society—an undertaking that cannot succeed on the basis of laws and court judgments alone.