U. of Maine
April 28, 1976
1st draft

"Justice and Workability" - Five Years Later

I. Starting Point - the 1971 Esaai

In that article, I made the following points. I propose both to reappraise them and to probe further into the vein of workability.

To the three "tidal waves" in the law -- in administrative law ('30s and '40s), civil rights (from the '50s), and civil liberties ('60s) -- can be added a fourth in which litigation based often on the old Reconstruction statute, § 1983, sought to enforce higher standards of acceptable conduct. I gave no name to this fourth wave. If it had to have a name, its label would have to be civil rights. It differed from the earlier civil rights cases not only in not being limited to discrimination against blacks, but in the variety of plaintiffs, the diversity of issues, and its geographical ubiquity. I said that the "new breed" of cases reflected "an increasingly justice-sensitized society", whose values (realized through procedure and equal protection) underlying its "morality of duty", to use Prof. Fuller's phrase, were "leavening upward".

I suggested that this new kind of litigation added to Cardozo's quartet of forces influencing judicial decision -- logic, history, custom, and social justice -- a fifth factor, workability. I attempted to define this as "the extent to which a rule protecting a right, enforcing a duty, or setting a standard of conduct -- which is consistent with and in the interests of social justice -- can be pronounced with reasonable expectation of effective observance without impairing the essential functioning of those to whom the rule applies."

I then worked out something of a Ptolemaic system of circles surrounding the federal appellate court, beginning with that closest-- the trial court, then widening to include the remainder of the immediate judicial family, then government agencies, and finally quasi-public or even private institutions normally beyond the reach of government rule. I saw the courts unavoidably engaged in balancing benefits and burdens for individuals against those for society, identifying the conflicting interests and tailoring the judicial rule or standard so as to impose no greater burden on the institution than necessary. This counsel of restraint was immediately followed by a recognition that a certain amount of tension between the judiciary and the legislature and executive may be both necessary and desirable "[w]hen old rights are too long ignored, when new rights come into view, or when changes in technology and life expand the range of the expectable".

After this nod to the judicial role of creative catalyst, I retreated to my cautionary posture, noted the limits of courts' credit, perspective, and power, and closed by saying that the reconciliation of justice and workability lay in all parts of our polity -- legislators, taxpayers, officials and managers of people-serving institutions -- viewing themselves as part of the fabric of justice.

2. Reflections on the Essai, Five Years Later

My first thought is that of an aged novelist who rereads his first youthful work, if he has the courage. While the lapse of, say, a half century and the maturation process make understandable the novelist's discomfiture, my Essai is only five years old. But, while I acknowledge my own too limited focus, I can also say "What a five years this has been." In any

case, I am glad I called the article an Essai, an attempt. By definition it was tentative and incomplete. And so will my present reflections be. But, hopefully, more balanced and realistic.

These are, in brief, my major reflections. I stand by my unstartling assessment of non-racial civil rights litigation as a change of magnitude comparable to the three prior developments. But I was wrong to call them tidal waves, for none was a one time phenomenon. They are all here to stay. They much more resemble other such man-made inventions as the steam engine, electric light, radio, and computer.

My second reflection is one about my limited perspective. In writing about balancing conflicting interests, I concentrated solely on the burden on institutions, saying nothing about identifying individual rights or how to weigh them. In defense I can say my theme presupposed that Cardozo's four factors would influence that decision. Nevertheless my discussion is one-sided and could be read to be over-utilitarian, placing too much emphasis on the goal of minimizing institutional and governmental burden.

Finally, and most obvious to me now, is my myopia in defining workability solely in terms of declaring rights and duties. I said nothing about remedies. Yet today this is the frontier, from both the practical and theoretical points of view, of issues in the vast domain of § 1983. The course a district court should follow in enforcing its decree, how an appellate court should review, and what happens if a choice has to be made between exposing a court to criticism for being over-active and allowing individual rights to be violated, and what happens when, though it is clear that rights have been violated, there is no clear cut remedy such as a negative injunction or a make whole decree-- these are questions of the first importance and high urgency.

In bringing my earlier attempt up to date, I shall first give a profile of the current work of a federal appellate court, aiming to give some perspective on the significance, scope, achievements, and status of civil rights litigation. I shall then try to define the nature of the problems faced as courts endeavor to frame appropriate remedies.

3. Civil rights cases in perspective - 1975.

In my 1971 article I listed 12 civil rights cases involving public housing, welfare, schools and universities, prisons, and mental institutions as the subject matter. Since then our civil rights catalogue has broadened. In alphabetical order our cases have dealt with abortion advocates (mothers and doctors), age discrimination victims, aliens excluded from professions, blacks, church-state antagonists, a contraceptive promoter, citizens alleging conspiracies in hiring, firing, zoning, contracting; developers, drivers, employees, free speechers prosecuted for mistreating the flag, license plates and/or pamphleteering; homosexuals, lienors, mortgagors, nude bathers, patients, police candidates, prayer promoters, pornographers, prisoners, squatters, students, tenants, teachers, trailer homeowners, welfare recipients and women who wanted to play basketball or be admitted to bars. With the exception of the developers, and possibly the doctors, these plaintiffs might be called Carolene Products footnote people -- having in common their limited influence upon the political process.

To list the types of cases as I have done, however, is misleading and can convey the erroneous impression that federal courts do nothing but wrestle with the 14th Amendment. This impression also feeds the fire of the sentiment that courts have become too intrusive and that jurisdiction should be curtailed in a wholesale manner.

The case profile of our court in calendar year 1975 is instructive. Our 167 published opinions were distributed as follows:

	No.	%
Interpretation or application of federal statutes	45	27%

Issues of federal procedure and jurisdiction	14	8%
Federal criminal appeals	29	17%
Reviews of federal agencies	27	16%
Habeas corpus - state court convictions	13	7.5%
Diversity cases	13	7.5%
Civil rights cases	26	15%
	167	98%

Several comments can be made about this profile. In the first place the work of this federal appellate court is largely (70%) federal. New legislation such as that dealing with the environment, food and drugs, occupational safety, freedom of information, and electronic surveillance offers much grist for our mill. The continuing vigor of administrative law growth and the vitality of civil liberties issues, despite some retrenchment, account for the rest. A second deduction is that the area of possible conflict with state law is small, only 15% (habeas and diversity) and the occasion of actual conflict is, in the habeas field, rare. Of the 13 habeas appeals in 1975, from four states and Puerto Rico, I am not sure that there was even one granting of the writ. And there were perhaps twice that number of habeas cases where we denied permission to appeal for lack of a substantial federal question. In civil diversity cases, where we face a novel and significant state law issue, we certify the question to the state court.

Coming to civil rights cases, we observe that the percentage of 15 is significant but not overwhelming. The picture is understated because a fair proportion of these cases do not follow the regular appellate process but start with three judge courts of one circuit judge and two district judges and are appealed directly to the Supreme Court. I estimate that in 1975 there were about 15 of these. But, since Goosby v. Osser, I must convene these courts even though the claim is not impressive, if we cannot say that it is utterly frivolous. While some of these cases raise most difficult issues, I would say that, if they are added to our own civil rights cases, the total percentage would still not greatly exceed 20 percent. This, however, is a substantial portion. Is it too much? Too much burden? Too much interference? I suppose the answer depends on one's point of view.

I confess to not being alarmed. We have occasional excesses of pro se or lawyer's zeal in bringing groundless suits on the theory that attaching the magic number 1983 will convert a state domestic relations case into a civil rights suit. But on the whole, even considering those appeals which we finally find without merit, I find them as worthy of our time as deciding whether a patent is or is not obvious, whether a ship was or was not seaworthy, whether an employee was discharged because of anti-union animus, or whether a judge improperly gave a conspiracy instruction. And quite occasionally the appeal involves a matter of individual rights which is of top importance in any calculus.

Moreover, the courts may have open doors but there are several ticket takers inside, all of which exact their due before a civil rights plaintiff establishes his right to be heard on the merits. He must establish his standing, allege a protectible interest, establish jurisdiction [§10000, §1331] avoid the twin dangers of prematurity and mootness, justify a class and his right to represent it, show "state action" and an official who has shed his immunity, give precedence to any pending state prosecution, be able to show why abstention is not appropriate and show why or why not a three judge court is required. The case law on all these issues has mushroomed even as have civil rights cases themselves -- a sort of built-in counterrevolution.

There are two additional points that can be made. Both are grounds for some optimism or pessimism about workability. The first is the fact that doctrine is accumulating. The lineaments

of procedural due process have been fairly sharply outlined for cases involving discharge from employment, prisoners' discipline, seizure of property. State action, standing, mootness, immunity, equitable deference to states have been addressed many times by courts of appeals and several times by the Supreme Court. Equal protection analysis, imperfect though it is, is at least fairly stable. I confess that I am not happy with some of the precedents or approaches in both due process and equal protection. Particularly in what might be called the substantive due process area do I find difficulty. I do not know how to reconcile a holding that a mother has a near absolute right to have an abortion in her first trimester with the recent holding that a person has no constitutionally protectible interest in his reputation. It somehow does not seem enough to say: privacy, yes; non-publicity, no. Nevertheless, the problems we deal with in 1976 are not the same as those I wrote about in 1971.

A second basis for optimism, and for me even more important that the growth of doctrine, is the resilience of subsystems. By this I mean the demonstrated capacity of government agencies and such institutions as prisons, universities, police departments, civil service systems, and welfare agencies to develop procedures assuring more fairness. Sometimes this has been done by court order. Sometimes, as in the case of the Rhode Island prison code, by negotiation under the aegis of the court. The Maine prison code was so developed back in 1971. And sometimes outside the context of any litigation. Occasionally, perhaps more than occasionally, institutions have gone beyond what any court has required. In Drown v. Portsmouth, I wrote an opinion for our court which required a school board to state its reasons for discharging even non-tenured teachers. In our view this requirement imposed but little burden on the board and could be of significant help to the teacher. The requirement was discarded in an aside in Roth (Sinderman?), along with the full due process array, once the Court found no protectible interest. Interestingly, however, many governmental departments of cities within the First Circuit continue to give reasons.

4. The Frontier of Remedies

While I have argued that civil rights cases, although an important part of the federal caseload, do not threaten to engulf it, and that some issues have been settled, by courts or by the actions taken by responsible subsystems, this is only Chapter One. Chapter Two presents quite a different order of problem.

The difference can be seen when we review the types of civil rights cases I listed in 1971. Tenants were seeking injunctive relief against their landlords, welfare mothers wanted freedom to demonstrate at welfare offices, teachers and students wanted to enjoin their ouster for discussing a magazine article or wearing long hair, a prisoner slated for solitary wanted due process. Almost all of the cases involved a suit by a few people against a specific institution in which an injunction was sought preventing the institution from taking adverse action or requiring it to observe procedural due process.

The thrust of the cases in the past five years has changed in several respects. With plaintiffs representing large classes of people, the target of the suit has broadened from a single institution to many institutions, a substantial segment of society. A judge's decree, if for plaintiffs even in part, has a scope and effect as broad as important legislative acts. This is true of cases of sex, age, and race discrimination. While some of the suits are brought under federal legislation, § 1983 is usually an alternative ground. Many of the suits no longer seek a mere negative injunction but seek affirmative action -- to reinstate (which means to bump), to adopt quotas for hiring, to desegregate schools. Moreover, this takes place at a time when the economy is down, jobs are scarce, and every job given means one taken away. Not only are blue collar workers

affected but, under Fuentes and Sniadach, all extenders of credit. And officialdom, which gained little sympathy when all that was asked was an injunction, is now increasingly sued for compensatory and penal damages. States which have fought attacks on their laws and agencies have not only lost cases but have been required to pay counsel fees to the legal service organizations they have helped support.

In a word, while formerly only a few officials and institutions had to change their conduct, now almost everybody's ox is being gored. The suits, once restricted to the South, have spread horizontally and vertically. No longer do plaintiffs seek merely higher standards of institutional conduct, but the closing of the institution. The burden is no longer confined to the managers of the institution but is felt by all taxpayers if massive new investment is the only alternative to a closing. And when a court tries to bring about the desegregation of a big city's school system, the entire city is deeply affected.

These latest civil rights cases differ enough in degree from the earlier ones to be labeled a third generation -- a genus characterized by the scope and complexity of the remedy. In addition to affecting the vast middle class, and wide ranges of institutions, including state taxes and the warp and woof of city life, the issues of remedy present other unique problems for courts. Earlier due process and equal protection cases were at least informed by legal principles. The decrees could simply require a described procedure or call for the cessation of certain practices. Today, in considering whether to close a prison, a mental institution, or a school, a district court has no external spirit level by which to identify constitutional inadequacy. If it finds inadequacy, it must somehow, again without the help of precedent, identify the steps necessary to achieve adequacy. It then must enter the realm of the pragmatic and, calling on the affected institutions, experts, and citizens' groups, devise a plan which over time and in stages enables the defects to be remedied. And it must exercise sensitive oversight during the difficult time of implementation, sometimes with the help of consultants, committees, special masters, and even court appointed administrators and receivers. The court is in a lonely position, for it is dealing with more than a subsystem which has the power to put its own house in order; the subsystem needs the resources of the city or the state as a whole.

The reviewing court also has its problems, although by no means so exhausting and demanding of time, creative intellect, diplomacy, and stamina. The ordinary guides for review of substantial evidence and well established legal principle are usually of far less importance than the standard of abuse of discretion. An appellate court, seeking to conduct a meaningful review, will look to see if the trial court has given a full opportunity for all parties to be heard; it will read the transcript to see if the court's findings are supported; it will be interested in seeing if the court has considered all alternatives; it will be alert to any error of law. But, these steps taken, it then must accord a wide range of discretion to the judge on the firing line. If the appellate court exposes the alternatives and articulates its reasoning, I suspect that over time a body of guidance, wisdom and prudence approaching principle will be built as indeed the Chancellor's foot was eventually contained within generally expectable limits.

The problems faced by both trial and appellate courts, difficult enough even when all the parties are in court and cooperating, reach a crisis stage when the objective sought by the court brings it into confrontation with large segments of society or with a legislature unwilling to raise tax dollars and appropriate funds. A trial court may have been painstakingly fair in taking evidence, have made the only possible findings, drawn the obvious legal conclusions, conducted the most patient, wide-ranging and informed search for the least burdensome alternative solutions, and finally tailored an order evidencing great sensitivity and realism. Yet if society, or

its major instruments, balks. What then?

There are many who would say that the courts have gone too far, that they are "taking over" government, that they are operating in a sphere for which they are unequipped. Obviously resort to far-reaching court-designed remedies for violation of constitutional rights is not comfortable for those affected, and certainly not for the courts themselves. But what is the alternative? Almost never expressed, it is to subordinate the vindication of individual rights to the will of the majority. That, after all, is the democratic approach. But the dilemma built into the Constitution, and now -- as it does once in a while -- surfacing dramatically, is that the majority will is not all powerful at all times. Particularly in a time of economic hardship, we may not be able to say with the confidence of five years ago that our society is "increasingly justice-sensitized".

I do not take an apocalyptic view of the current confrontations -- even though they are beyond anything that the Legal Process School may have contemplated. I tend to suspect that with the advent of huge government, a higher degree of tension among the three branches and between the two systems of government, state and national, is something we must learn to live with, being as civilized about it as we can be. I suspect that Thayer's old teaching that judicial intrusions based on judges' views of the Constitution dull the sensitivity and initiative of legislators is not a fact of life today. The demands on the Congress and on state legislators are so diverse that individuals and disadvantaged groups, the Carolene Products people, may not be able to claim attention in the normal course. Our system has provided that a forum be available for them where their hearing cannot be cut short, their bill buried, or tabled, where some sort of decision is a matter of right. If the decision is hard for society in the large to live with, the Congress usually can find ways, using its own resources and competence, to fine tune the instrument, and make it more fair and workable.

The perspective given by reflecting on the past gives some basis for optimism. Desegregation in the South and even in some northern cities has been substantially achieved. The hopeless political thicket specter predicted by Justice Frankfurter as the result of the Court getting involved in voter representation has not proved unworkable. Federal habeas corpus is no longer the chief weapon of a state prisoner; his state post-conviction remedy is usually a real one. Government departments and agencies, and institutions, federal, state, and private, are today observing a standard of conduct substantially less arbitrary than then or even five years ago. And in matters of institutional reform state courts are now getting into the act; the Maine Court has its first prison reform case.

This is by no means an answer to the legal, political, and moral issues of remedy posed by the third generation of civil rights cases. These issues have broadened and deepened the problem of justice and workability. But this frontier of remedies, like all frontiers, is by definition still largely unexplored.