Rhode Island Bar Association
Providence, Rhode Island
September 24, 1973

Mr. Chief Justice, Brethren and Sistern of the Bench and Bar, and Spouses and Friends.

I am sensible of the honor of being asked to address you. I think it is the first time that anyone has given me license to speak in Rhode Island. And perhaps the last. My sponsor, the Chief Justice, laid down two prerequisites. He pointed to the heritage of Roger Williams and emphasized the point that Rhode Islanders, when they get together, like a serious subject addressed at great length. I of course have taken the Chief at his word -- but may surprise even him. For I have become privy to a most significant preliminary report of a management survey of the federal and state courts of Rhode Island. In some ways it is embarrassing, but I would be underestimating the sturdy self confidence and capacity for self criticism of your state if I attempted to soften this report. So, with a plea to keep an open mind and an even temper, I venture to read the summary.

This preliminary internal memorandum is written by the head of the management consulting team to a senior partner of the firm. It reads:

At your request, for our client, our team undertook a survey of the Rhode Island courts subject to the parameters previously outlined in the project proposal. The objective was to see whether and to what extent the courts were following the best business practices. Our general conclusion is that the judge types who try to run the operation are hopelessly naive. Neither they nor the users of the courts -- the Rhode Island lawyers -- seem to have any idea of what can be achieved by program budgeting, specialization of function, computerization, and production line techniques.

A note about our methodology. We placed great emphasis on interpersonal relations, particularly on the interface between components of the system, concentrating on input-output, cost benefit ratios to identify those points of optimal correlation, and those elements which were dysfunctional and counterproductive, making in depth analyses of asymmetries and trade-offs, to achieve cost-effective value judgments within a programmatic contextual framework.

These are our major recommendations:

1. At the trial level all courts proceed on the antiquated assumption that miscellaneous amateurs can perform as jurors. It is as if every time Ford wanted to make a new car, it would pull people off the street to put it together. A tremendously cost-effective device would be for each court to have one or two trained, professional, career jurors. It would save all the milling about; the gross national product would increase; more housework would get done; and there would be no need for large jury boxes, jury rooms, deputies. A collateral advantage would be that a trial judge would no longer need to go through a tedious set of instructions. He would merely say to the juror: "Today I'm giving you instructions numbered 1 to 12, 17, 33, and 56." If the juror has trouble agreeing with himself, the judge would simply call him back to the bench, and say, "81". It can readily be seen that appellate review of instructions to the jury would be reduced to child's play.

2. As for the appellate process in general, that is a shambles. No self-respecting drug or cosmetic firm would think of a quality control plan in which every picky tube, jar, or bottle was inspected. Random sampling, or taking one sample, from a batch satisfies the most exacting standards. Therefore, we recommend that the much-touted problem of increasing case-load be simply solved by taking, say, one out of ten appeals, or perhaps just one criminal case

per trial term. This would enable the Rhode Island Supreme Court to maintain a running quality control program, with perhaps a third of its personnel. As for federal appeals, we would restrict the sampling even more, since we seriously doubt the capacity of the First Circuit to follow any quality control program. The less it meddles, the better.

3. Appellate judges and justices are living in a pre-industrial age. One would think, to refer again to the automobile industry, that an automobile is put together by a group of workers, each with the same skills, pounding away at the same time. We therefore recommend specialization of function and assembly line techniques, utilizing standard parts.

This would mean that one judge would become an expert in stating facts. He might even develop forms for different types of litigation, filling in only names of persons, dates, etc. You see one bank robbery; you've seen them all. We suppose there still is room for an expert in the common law, but we estimate that this would be a part time job. One judge, perhaps the newest one, could concern himself with such technical mumbo jumbo as standing, mootness, jurisdiction, etc. This would free the time of the others who could divide up the Constitution, with the Chief having due process, the next senior - equal protection, another - the 1st Amendment. The fact judge would start the opinion, passing it on to the common law judge, who then would forward it for a due process check, and so on.

Apart from this assembly line technique, pre-packaging offers the greatest possibilities. Here are some examples of categories which could be placed on tape, and keypunched into an opinion.

-- Legalese. This would cover those neat words by which one knows whether he's looking at a judicial opinion or not: arguendo, haec verba, a fortiori, de minimis, strictissimi juris.

-- Footnotes. This would be an inviting buffet to satisfy the most exacting judicial gourmet. Without spending any effort, the judicial section chief in charge of that part of the opinion could not only display an acquaintance with leading Supreme Court cases but could show that he was aware of suggestions in law periodicals that the Court had completely loused up the law.

-- Judicial humor. This category would be harder to fill; there is so little raw material. But a few gems could be pulled together - e.g., in dealing with an appellant recidivist, the opinion could archly observe that appellant's argument did not carry the strength of his convictions.

-- Judicial etiquette. This category would contain several formulae for seeming to praise the trial judge while in reality saying he blew it. There would be a range of choice for the majority and a dissenter to speak of each other in varying degrees of contempt -- from "our dissenting brother misconceives our holding" (which, with our new sensitivity to male chauvinism, would be changed to "our dissenting sibling") to "what the majority today decides flies in the face of two centuries of established precedent". More of a problem would exist to find alternative ways for federal and state courts to refer to each other; at present the overworked rubric is "with great respect", which means no respect at all.

4. In terms of the vexing problem of federal-state court relations, we have two suggestions: that the courts follow the example of either small business or big business. If they choose the former, then they would compete in the market place. The consumer -- the litigant -- would go into both courts; he then could choose the result he liked best. Of course a plaintiff might prefer a state result, and the defendant a federal one, but our society is built on diversity. The other approach has even more promise, to act like big business. This would mean that the

state and federal courts would get together in advance and agree on their decisions. This would immensely improve the uniformity of law and make for a stable market.

5. Ultimately, of course, we foresee an even more efficient system, when the computer can handle the whole business.

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Well, Mr. Chief Justice, that is one set of proposals. While undoubtedly the product of a disoriented mind, it has in common with many other such reports the objective of trying to apply to what it is popular to call the justice delivery system management techniques which work in other systems of delivery of goods and services. We judges and lawyers spend our lives working on individual cases, where the product is hand-crafted, and meticulously fitted. When so much else is systematized and mass produced, we truly are a remnant of a pre-industrial age.

But the pressures of population, urbanization, institutionalization, and an increasing sensitivity to the value of individual rights have coalesced to make this decade one of unprecedented ferment over changes in the structure and operation of our court system. A partial catalogue reveals their scope. Some are relatively minor institutional or procedural changes, such as the decriminalization of some crimes, shifts in federal and state jurisdiction, resort to parajudicial personnel for help in screening cases, the use of magistrates in petty cases, the creation of the profession of court executives, omnibus pre-trial hearings in criminal cases, the limitation of oral argument, summary disposition without opinion, limitations on publication of opinions, vigorous time limits for the prosecution of criminal cases, resort to computerized case management techniques and videotaped depositions, and the creation of more judgeships. Other proposals are more fundamental: the adoption of the six-man jury; provision for majority verdicts; abolition of the grand jury; creation of intermediate appellate courts and of specialized courts; abolition of appeal as of right to the highest court of a state; the reduction of formal legal education to two years and far-reaching curriculum changes; the establishment of ombudsman-like institutions to investigate and process prisoner complaints; a community arbitration service outside the court system for small claims; and the creation of new institutions to direct the course of institutional reform -the Federal Judicial Center, the National Center for State Courts, and the proposed National Institute of Justice. Finally, there are two proposals which go to the basic structure of the federal court system: the reorganization of federal circuits; and the creation of a new National Court of Appeals.

The circuits have remained unchanged since federal courts of appeal were created in 1891 to help relieve the pressure on the Supreme Court. Now Congress has directed that a Commission undertake a study of the circuits and propose changes in geographic allocation, in numbers, and even in the manner of their operation. Their growth has varied so widely that the distortion in pattern is enormous, ranging from the far-flung Fifth and Ninth Circuits with twelve and fifteen active judges to our own tiny First, with three active judges.

Next Monday I go to New York to appear before that Commission, which plans to file its report on redesign of the circuits in December. Our circuit presently contains Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico. The Second Circuit, with nine authorized active circuit judges, contains New York, Vermont, and Connecticut. In an effort to make the circuits more uniform and manageable, with none too large and none too small, several proposals affecting this part of the country have been made. One is to enlarge the First Circuit by adding Connecticut; another would add Vermont and the northern and western districts of New York; a third is to add Connecticut and New Jersey.

It may be that something like this is inevitable. But we on the First Circuit would regret

the necessity. We can appreciate that a circuit of fifteen or twenty judges, all of whom must sit on en banc hearings (under present procedures), presents serious problems of management, communication, and waste of judicial time. It does boggle the mind to realize that the Fifth Circuit stretches from Key West to El Paso and the Ninth Circuit from Phoenix to Barrow, Alaska, and Mana on the island of Kauai. But while a circuit may be too large, we cannot see that our circuit is too small. We have been privileged to work as a small community of judges, with a minimum of bureaucracy, where one or two phone calls can resolve a problem with an opinion. Because the judges sit together on almost every case, there is a rapport which encourages mutual criticism and all but eliminates any pride of authorship. Through no special virtue of our own, and solely because of informality and size, we are truly a collegial court, as is the Supreme Court of Rhode Island. Largely because of this we are able, year after year, to dispose of appeals within four months, while the federal national average is nearly seven months, and seldom hold any case under submission for more than three months.

Perhaps the nation can no longer afford the luxury of a small circuit. Perhaps the solution of increasing the number of circuits from eleven to fifteen or so would unacceptably increase the burden on the Supreme Court. I am not at all sure that differences on important issues among the circuits account for a substantial part of the Court's work. But both the prospect of enlargement of this circuit and the possibility of a mini Supreme Court to perform the screening process raise the dilemma of reconciling quanity with quality. The processes of justice, as Paul Freund has said, are "at the opposite pole from the 'processing' of cases in a high-speed, high-volume enterprise." But all of the forces of demand leading to mass production of goods and services bring their pressure to bear on justice. What is finite and limited is the supply of judges. And they cannot, like Henry Ford, convert to mass production, automation, or, let us hope, to synthetics. Nor can we deal with justice as we do when we face a scarcity of goods, and ration it.

The next few years will be years of testing our deepest wisdom. We reshape our institutions at our peril, for institutional changes are much less easy to repeal than substantive or procedural laws. Perhaps we have no other choice for a people's confidence in the justice system erodes when existing institutions do not work well. To this process of institutional reform the bar should dedicate its best efforts. No group of technicians, scholars, or legislators can quite duplicate the experience and intuition of those who inhabit the courts. If the quality of justice is not to be sacrificed to the demand for increased quantity and speed, the bar as the court's best amicus curiae must involve itself to the end that each institutional change not be adopted without the most probing and reflective deliberation.