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MR. CHIEF JUSTICE BURGER ON THE STATE OF THE JUDICIARY — 1981

PHILIP B. KURLAND

One of the Just Men came to Sodom, determined to save its inhabitants from sin and punishment. Night and day he walked the streets and markets protesting against greed and theft, falsehood and indifference. In the beginning, people listened and smiled ironically. Then they stopped listening: he no longer even amused them. The killers went on killing, the wise kept silent, as if there were no Just Man in their midst.

One day a child, moved by compassion for the unfortunate teacher, approached him with these words: “Poor stranger, you shout, you scream, don’t you see that it is hopeless?”

“Yes, I see,” answered the Just Man.

“Then why do you go on?”

“I’ll tell you why. In the beginning, I thought I could change man. Today, I know I cannot. If I still shout today, if I still scream, it is to prevent man from ultimately changing me.”

ELIE WIESEL, THE TESTAMENT 9 (1980)

Extrajudicial pronouncements by Supreme Court Justices on law and judicial administration are neither rare nor abundant. Such remarks by the Chief Justice are different, however, because he speaks not only as the presiding officer of the Supreme Court but also in the somewhat different role of the Chief Justice of the United States. As the former, he is but first among equals; as the latter he

* This article was delivered as the fourth Donahue Lecture, given at Suffolk University School of Law April 24, 1981
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2 See Examining Burger Message, Chicago Tribune, Feb. 23, 1981, § 5 at 3 (Professor Arthur Miller pointed out distinction between role of presiding justice of Supreme

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has no peer. No one else is charged with these duties.

Mere Justices may take to the hustings to state their judicial creed by way of defending their conduct. Such was the nature of Hugo Black's *A Constitutional Faith*,

Robert Jackson's *The Supreme Court in the American System of Government*,

and Felix Frankfurter's *John Marshall and the Judicial Function*. Sometimes Justices speak from the rostrum to explain that they did not really mean what they said in a recent opinion that aroused an outcry. Sometimes a Justice seeks to put a gloss on an opinion through a written article, thus giving him the power to reveal its meaning without the need for the acquiescence of at least four other Justices.

Some Justices, of course, have been more outspoken off the bench than others. Mr. Justice Brandeis voluntarily assumed a vow of silence on taking office, broken by him only when he joined with Chief Justice Hughes to address the Congress in opposition to Franklin Roosevelt's court-packing plan. Of the present high bench, Justice White appears to be the most taciturn, while Justice Rehnquist seems most willing to assume the role of schoolmaster to the bar.

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* See also Dennis, *Overcoming Occupational Heredity at the Supreme Court*, 66 A.B.A.J. 41, 44 (1980) (chief justice is official and symbolic leader of American judicial system).


* See L. Baker, *Back to Back* 155-59 (1967) (detailed account of letter written by Chief Justice Hughes to Senator Burton Wheeler of the Senate Judiciary committee and approved by Justices Brandeis and Van Devanter, defending Supreme Court against President Roosevelt's charge that more justices were necessary to handle work load).

There is some merit to the notion that the Justices should confine themselves to expression through their judicial opinions. One of the reasons Justices of the Supreme Court ought ordinarily to abstain from extrajudicial pronouncements is that they may take positions publicly that they must later accommodate when the same issue comes before the Court for adjudication. Thus it was that Chief Justice Burger publicly lobbied for the expansion of the role of federal magistrates and then wrote the opinion for a divided Court which upheld the statute giving federal magistrates such power against constitutional challenge.10

To reiterate, however, Chief Justices of the United States are different from Associate Justices of the Supreme Court with respect to the extrajudicial roles they choose to fashion for themselves. Certainly, some Chief Justices have regarded themselves as appointed and anointed spokesmen for the entire American bar and bench, and particularly as spokesmen for judicial reform. None, however, has taken this self-imposed obligation more seriously than Chief Justice Burger.11 At the beginning of his stewardship as Chief Justice, I ventured the prediction that the new Chief Justice was as likely to make his mark in history for his role as Lord Chancellor of the American judicial system as for his construction of landmark constitutional cases.12 Indeed, Chief Justice Burger’s work in both capacities has proved to be aggressive and revisionary.

The “passive virtues”13 have proven no more appealing to Chief

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(1974); Rehnquist, Sense and Nonsense about Judicial Ethics, 28 Record 694 (1973); Rehnquist, Civility and Freedom of Speech, 49 Ind. L.J. 1 (1973).
11 See Dennis, Overcoming Occupational Heredity at the Supreme Court, 66 A.B.A.J. 41, 44 (author notes that of Chief Justice Burger’s predecessors, only William Howard Taft in 1920’s and Charles Evans Hughes in 1930’s were active in area of judicial administration). See also Fish, William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers, 1975 Sup. Ct. Rev. 123 (during twenties and thirties, role of Chief Justice of United States as “chief judicial reformer” emerged).
14 The phrase belongs to the late Alexander M. Bickel. See, e.g., A. BICKEL, THE LEAST DANGEROUS BRANCH ch. 4 (1962) (chapter four, entitled “The Passive Virtues,” discusses choices open to Supreme Court in deciding whether to adjudicate particular
Justice Burger than they did to Chief Justice Warren when it comes to structuring the Constitution to his own model. Nor are these virtues particularly appealing to him in his role as overseer of the American judicial system. Here, however, Burger has differed from Warren. The late Chief Justice resented and rejected the American Bar Association and the Conference of Chief Justices for their criticism of the Court. The incumbent Chief Justice, however, sees these institutions as one means for bringing about reform of the judicial system, and he has worked hard and relentlessly at this task.

In Great Britain there is a high legal officer — almost as powerful as the Mikado's Lord High Executioner known as the Lord Chancellor. Although he is the highest judicial officer in the land, the Lord Chancellor seldom performs a judicial function. It is not that he lacks authority to do so, but rather that he has no time for judicial duties. A partial list of his duties and functions attests to the fact that he is a busy man. He is the Speaker of the House of Lords when it sits in its legislative capacity. He is usually a minister of the Government, sitting in the Cabinet, with a department to administer. He is authorized to sit as the presiding officer in the House of Lords when it sits as a judicial body, but seldom does so. Sometimes he presides over the Judicial Committee of the Privy Council. He is head of the Chancery Division of the High Court and an ex officio member of the Court of Appeals, but is seldom if ever found in either place.

The Lord Chancellor is president of the Supreme Court and as such recommends the appointments of High Court judges as well as judges of lower courts. He appoints directly other officials of the courts and is responsible for the functioning of the county court system. He recommends appointments of circuit court judges and recorders. He appoints and removes justices of the peace and stipendiary magistrates. He is also much concerned with special tribunals,

issues, and when to do so).

14 See E. Warren, The Memoirs of Earl Warren 311-12, 320-31 (1977) (asserting that although he expected enlightened appraisal by American Bar Association of Supreme Court's work during McCarthy and desegregation eras, ABA did not support the Court and, "almost never had a kind word to say for the Court.").

15 W. Gilbert and A. Sullivan, The Mikado or The Town of Titipu (1885). The character of Ko-Ko in Gilbert and Sullivan's extremely popular opera "The Mikado" became the Lord High Executioner of Titipu. Id. Described as "one of the most exalted ranks in Japan," the Lord High Executioner was superior to most other officers of state in Titipu. A. Godwin, Gilbert & Sullivan: A Critical Appreciation of the Savoy Operas 174, 253 (1969).

16 R. Jackson, The Machinery of Justice in England 570-71 (7th ed. 1977). The description of the Lord Chancellor's duties is taken from Chapter VIII of this helpfully elucidating work on a legal system that has so largely avoided systematization.
usually appointing the legally qualified chairmen and other members under the Tribunals and Inquiries Act of 1958. He also has the power of appointment to their livings of about two-thirds of the clergy of the Church of England.\textsuperscript{17}

The Lord Chancellor is also the principal instigator and overseer of civil law reform, both substantive and procedural, through the work of various committees and, since 1965, through the Law Commission, which is made up of five members appointed by the Chancellor. Finally, as Professor R.M. Jackson notes: "There are also duties [of the Lord Chancellor] in connection with the Land Registry, the office of the Public Trustee, and the care of lunatics."\textsuperscript{16}

Unlike Great Britain's Lord Chancellor, the Chief Justice of the United States cannot be said to have an executive department over which he presides. His is essentially a judicial office. His principal and most important function is to preside over the Supreme Court of the United States. He is nonetheless an official who wears several hats. For some mysterious reason — Chief Justices have not historically been known for their interest in the arts and sciences — he is Regent of the Smithsonian Institute,\textsuperscript{19} Trustee of the National Art Gallery,\textsuperscript{20} and of the Hirshorn Museum and Sculpture Garden.\textsuperscript{21} It is his responsibility to appoint the judicial member of the National Historical Publications and Record Commission.\textsuperscript{22} While he does not have an executive department to supervise, in recent years he has been given an Administrative Assistant to the Chief Justice,\textsuperscript{23} and he is charged with overseeing the assignments of federal judges outside their own courts.\textsuperscript{24}

Probably the chief instrumentalities for law reform through which the Chief Justice works are the Judicial Conference of the United States, which has over the years been accumulating substantial powers over judicial administration in the federal courts,\textsuperscript{25} and the Fed-

\begin{footnotes}
\item\textsuperscript{17} Id.
\item\textsuperscript{18} Id.
\item\textsuperscript{19} 20 U.S.C. § 42 (1970).
\item\textsuperscript{20} 20 U.S.C. § 72 (1970).
\item\textsuperscript{21} 20 U.S.C. § 76cc (1970).
\item\textsuperscript{22} 44 U.S.C. § 2501 (1981).
\item\textsuperscript{24} 28 U.S.C. §§ 291-94 (1964).
\item\textsuperscript{25} See 28 U.S.C. § 331 (1964) (delineating powers and duties of Judicial Conference of United States). This section provides that:

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.
\end{footnotes}
eral Judicial Center. Between them they provide the manpower and research capacity to address the problems of judicial administration. The Chief Justice, however, has objected to the onerous burdens placed on him by reason of his chairmanship of both the Judicial Conference and the Federal Judicial Center. At a talk delivered by him to the Seminar on Legal History at the National Archives in 1978, he bemoaned his fate thus:

Should it be expected that the chief justice, with all the duties of other justices of the Court, be called upon to be "chief executive" of the judicial branch. Congress made the chief justice chairman of the Judicial Conference with duties that absorb hundreds of hours each year. It

"The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the use of other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

"The Attorney General shall upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with peculiar reference to the cases in which the United States is a party. The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

Id.

28 U.S.C. § 620

(a) There is established within the judicial branch of the Government a Federal Judicial Center, whose purpose it shall be to further the development and adoption of improved judicial administration in the court of the United States.

(b) The Center shall have the following functions:

(1) to conduct research and study of the operations of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies;

(2) to develop and present for consideration by the Judicial Conference of the United States recommendations for improvements of the administration and management of the courts of the United States;

(3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government, including but not limited to, judges, referees, clerks of courts, probation officers, and United States Commissioner; and

(4) insofar as may be consistent with the performance of the other functions set forth in this section, to provide staff, research and planning assistance to the Judicial Conference of the United States and its committees.

Id.

See 28 U.S.C. § 601-604 (1964) (Supreme Court appoints Director and Associate Director of Administrative Office of United States Courts, which provides statistical data, fiscal and budget services, supply services, and management services for United States Courts).
made him chairman of the Federal Judicial Center, with similar time demands. These two organizations are expected to develop innovative programs and mechanisms to improve and speed up justice.

Because chief justices have somehow been able to manage up to now does not mean that this can continue to be true in the third century under the Constitution. . . . There are serious questions how long justices can work a sixty-hour week and maintain appropriate standards.28

The fact of the matter, of course, is that a Chief Justice is free to make as much or as little of his role as chief executive of the judicial branch, as he may choose. The record of some of Chief Justice Burger's predecessors in office makes that apparent. That the Chief Justice does not really regard these functions an undue burden is illustrated by the fact that he has added to them rather than reduced them. In fact, he is continuously on the road making speeches on behalf of his programs for judicial reform. His address on the "State of the Judiciary," delivered each year to the American Bar Association, is just one example. The Chief Justice seems blessed with a campaign stamina that even a candidate for the American presidency would envy. It is hard for those without personal information to the contrary to believe that this role is not at least as enjoyable for the incumbent Chief Justice as the sixty hours he claims to invest each week in hearing and deliberating on arguments and writing opinions.29

The failure of the Constitution to make adequate provision for judicial administration may be, as the Chief Justice has asserted, due to the fact "that by the time the delegates to the Constitutional Convention reached Article III they were getting weary in the hot and humid Philadelphia summer. The entire judicial article contains only 369 words . . . . Perhaps the feeling of those weary delegates was that a branch of government that would consist of only 19 judges did not call for much rhetoric or much attention."30

The Chief Justice's remarks that are the subject of this article made up the twelfth in the series of State of the Judiciary speeches.31 An examination of the first eleven speeches reveals that

29 Id.
30 Id. at 206. If this language suggests that the Constitutional Convention of 1787 took up the classes of the Constitution seriatim, its implication is in error. See 1-4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. rev. ed. 1937).
he has asked for and succeeded in obtaining enormous changes in judicial administration in this nation. A substantial sampling of these changes will demonstrate his accomplishments. Perhaps one measure of his success can be illustrated by the increase in the judicial budget from $128,000,000 in 1970 to $668,000,000 in 1980.\textsuperscript{32} Inflation accounts for only a part of this five-fold increase.\textsuperscript{33}

Throughout the period of his incumbency, the Chief Justice has decried the persistently mounting dockets and the inadequate number of federal judges to handle them. Since the Chief Justice began his efforts, the number of federal judges has doubled. There are now 667 active judges and they are supplemented by 130 judges with senior status.\textsuperscript{34} Moreover, these judges have appointed hundreds of new magistrates, and the President has appointed dozens of new bankruptcy court judges.\textsuperscript{35}

Although partially successful in decreasing direct appeals from three-judge courts,\textsuperscript{36} the Chief Justice has not been equally successful in relieving the Supreme Court of its enormous certiorari burdens. He was a strong advocate of the Freund report which, if implemented, would have provided a new court to screen petitions for certiorari so that the Supreme Court would have to pass on only about 500 of them instead of nine times that many.\textsuperscript{37} The Freund

\textsuperscript{33}See BUREAU OF LABOR STATISTICS, UNITED STATES DEP'T OF LABOR, CONSUMER PRICE INDEX, ALL URBAN CONSUMERS (Dec. 23, 1980) (inflation has averaged unprecedented rate of over 10% per year from 1969 to 1980).
\textsuperscript{34}Burger, supra note 28, at 206.
\textsuperscript{35}See 65 A.B.A.J. 639-40 (1979) (Chief Justice Burger vehemently objected to provision of Bankruptcy Act of 1978 that took appointment of bankruptcy judges away from judiciary and put it into hands of the president).
\textsuperscript{37}See Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal, 59 A.B.A.J. 721 (1973) (Chief Justice Burger appointed members of The Study Group on the Caseload of the Supreme Court and was in favor of creation of new National Court of Appeals, whereas Retired Chief Justice Warren declared that group's proposal would irreparably damage function of the Supreme Court). See also Burger, supra note 28, at 206 (enormous increase in Court's caseload has caused a corresponding increase in number of cases that are decided without oral argument and/or formal opinion).

Of course, some measure of responsibility for the certiorari burden belongs to the Court itself. See Kurland, Jurisdiction of the United States Supreme Court: Time
The Chief Justice was again partially successful in seeking divisions of the Fifth and Ninth Circuits. Because of the huge geographic areas covered by the Fifth Circuit and the Ninth Circuit, and the dramatic increase in the number of appeals in these areas, Chief Justice Burger urged Congress to consider dividing each into three parts. The Fifth Circuit has now been sundered in half, but the Ninth remains intact, largely because of the opposition to placing part of California in one circuit and part in another.

Chief Justice Burger's reiterated protest against retention of diversity jurisdiction has fallen on deaf ears. Some twenty to twenty-five percent of the federal court's business falls into this jurisdictional category, in which the federal courts are expected to apply not federal but state law. Since federal courts sit only in larger cities, and juries in larger cities are likely to give larger awards, there is a strong contingent of plaintiff's lawyers in support of retaining diversity jurisdiction. Since trial in local state courts is

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for a Change?, 59 CORNELL L. REV. 616, 619-23 (1974) (whether Supreme Court's work is too burdensome may well be matter of differing attitudes of Justices; some former and present justices say Court is completely capable of handling its workload, others do not). The Court is so erratic and quixotic in its grants of certiorari, however, that in most cases counsel cannot honestly tell a client that it is totally hopeless to seek such review.

38 See G. GUNTER, CONSTITUTIONAL LAW, CASES AND MATERIALS 74-76 (10th ed. 1980) (bill to implement National Court of Appeals provoked much criticism in 1976 congressional committee hearings; as of 1978, no further congressional action forthcoming on Freund Committee's recommendations).

39 See Burger, Chief Justice Burger's 1977 Report to the American Bar Association, 63 A.B.A.J. 504, 508 (1977) ("...the Fifth Circuit, which extends from Key West, Florida, around the gulf to the western boundary of Texas.").

40 See id. at 507 ("The Ninth Circuit is roughly a mammoth triangle extending from the Mexican border north beyond the Arctic Circle, west beyond Hawaii to Guam, and back to the Mexican border.").

41 See id. at 508 (in California alone, number of appeals increased by 650 per cent from 1962 to 1977).

42 See id. at 507-08.

43 28 U.S.C. 5TH CIR. R. 1 (1981). "This Court shall contain two Administrative units: Unit A to be composed of the states of Louisiana, Mississippi, and Texas, and the Canal Zone, with headquarters in New Orleans; Unit B to be composed of the states of Alabama, Florida, and Georgia, with headquarters in Atlanta." Id.

44 See Burger, supra note 39, at 507 (prospect of splitting California into two or more circuits "has disturbed some people almost as much as the dilemma posed in the biblical account involving Solomon's dividing the baby when two women claimed motherhood.")

45 Burger, supra note 39, at 506; Burger, supra note 36, at 362.

46 See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (federal Courts to apply state law to all cases except those governed by Federal Constitution or acts of Congress).
thought to be prejudicial to large nonresident corporate defendants, there is also a strong contingent of defendant’s lawyers opposed to abolition of diversity jurisdiction. The battle against diversity jurisdiction has been carried on for more than 50 years\(^4\) and will probably last another fifty before it is abandoned, if ever.

The Chief Justice has successfully advanced his distaste for the civil jury through judicial opinions reducing the constitutional requirements from twelve jury members to six, and from unanimous decisions to pluralities.\(^5\) In his campaigns for reform, the Chief Justice has also been concerned with a more efficient use of jurors’ time and here computerized court services seemed to have availed.\(^6\)

The Chief Justice has argued for judicial impact statements from Congress which would evaluate the amount of new judicial business that each new law might generate in the courts.\(^7\) Such evaluations would serve as a constraint on Congress and a demonstration of the need for still more judges and facilities. This suggestion has not had much effect, possibly because, as the Chief Justice seems to recognize,\(^8\) the increase in number of new claims is at least as much the consequence of new rights created by the judiciary as new rights created by Congress.

Probably the most controversial — at least within the bar — of the Chief Justice’s complaints about the administration of Justice in his proposition that “the majority of lawyers who appear in court are so poorly trained that they are not properly performing their jobs.”\(^9\) His answer to this problem is twofold, first to increase the amount of clinical education in law school; second to restrict the federal trial bar to those with prior trial experience. In rejecting what he regards as the sophistical argument that law schools are not intended to train for courtroom practice, the Chief Justice has said:


\(^5\) See Colgrove v. Battin, 413 U.S. 149, 160 (1973) (court held that in civil cases, jury of six was enough to satisfy seventh Amendment); Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (upon consideration of history and functions of unanimous jury verdicts, Court held that Constitution does not mandate unanimity).

\(^6\) See Burger, supra note 36, at 358 (combined efforts of judiciary and bar over past decade have resulted in “more effective utilization of jurors”).

\(^7\) Burger, supra note 39, at 505.

\(^8\) Burger, supra note 28, at 207 (need to examine powers exercised by judiciary as important as need to examine growth of judicial branch).

“Some of the law professors say very proudly, ‘We are not trying to make tradesmen. We are trying to teach people to think.’ But a great thinker may not be of very much use to one in the courtroom trying to present a case.”[83] Whether the capacity to think is a detriment to a good trial lawyer or not, clinical education programs began long before the Burger crusade and have now burgeoned within our schools.[84] Additionally, the federal courts are establishing experience requirements as a condition for admission to the trial bar through experimental districts, of which the Northern District of Illinois is one. One of the difficulties here is that the existing members of the bar are “grandfathered” in. A second is that training under a bar that is, by the Chief Justice’s estimate, made up of fifty percent defectives will suffice to qualify a new bar member. Accordingly, if the situation is as bad as the Chief Justice has said, it is not likely to improve on this score in the immediate future.

For those who complained that trials suffered more from the incapacities of the bench than of the bar, we are told: “It is no answer to call the kettle black and point to inadequate judges.”[85] Apparently it is permissible for the kettle to call the pot black, but not the other way around. The fact is, however, that the mean talent of the bench is never likely to rise above the mean talent of the bar so long as the bench derives its members from the bar and so long as judges are chosen, not on demonstrations of ability, but because of political services, ethnic origins, or gender. Incidentally, those reformers who think that appointed judges are necessarily better than elected judges have yet to make out their case. A judicial nominee, whether he is nominated for selection by the executive or the electorate, is still likely to be chosen for the wrong rather than the right reasons.[86] When Senator Hruska made a plea on the Senate floor on behalf of

[83] Burger keeps heat on lawyers, supra note 52, at 26. But see O. Holmes, Collected Legal Papers 29-30 (1920) (Oliver Wendell Holmes, Jr. thought that, “the law is the calling of thinkers.”); McGowan, The University Law School and Practical Education, 65 A.B.A.J. 374 (1979) (author advocates that educators balance traditional legal education and practical instruction, taking care not to sacrifice any of fundamentals that only law school can provide).


[86] See Griswold, Report of the Dean of the Law School to the President of the University (1964), quoted in, Washington Post, Sept. 18, 1964. See also Brownell, Too Many Judges Are Political Hacks, SATURDAY EVENING POST, April 18, 1964, at 10 (current judicial selection methods reward mediocre and discourage talented applicants; whether elected or nominated, judges are often selected by political leaders for reasons of patronage).
mediocre candidates for the Supreme Court because mediocrity also deserves representation, he need not have bothered or worried. At least some mediocrity is guaranteed by the processes in action. The Chief Justice, however, thinks this problem may be solved by in-service training and judicial nominating commissions.\(^5\)

By the time of his twelfth State of the Judiciary message, the Chief Justice should have experienced some satisfaction with respect to his efforts toward improvement of judicial administration. In addition to the specific improvements in the federal judicial system already mentioned, he had seen the creation of various instrumentalities likely to aid in the future improvement of both the state and federal levels of the American judicial system, such as the National Center for State Courts and the National Institute of Justice.\(^6\) Indeed, the time has come when judges are so busy attending courses and conferences that one must wonder where they find the time to preside over the evergrowing backlog of lawsuits.

It is not quite clear why the Chief Justice's 1981 State of the Judiciary message exploded on the public like a bombshell. Essentially, its themes had been iterated and reiterated in his earlier reports. In his first such message in 1970, he considered a huge territory of the criminal process as within his ken for recommended improvements in the machinery of justice.

The system of criminal justice must be viewed as a process embracing every phase from crime prevention through the corrective system. We can no longer limit our responsibility to providing defense services for the judicial process, yet continue to be miserly with the needs of corrective institutions and probation and parole services.\(^6\)

The Chief Justice's consistent principal complaint about the criminal process was that there was inordinate delay in bringing a case to final judgment, and he blamed that delay largely on the assertion by defendants of their constitutional rights through state-provided lawyers.\(^6\) Accordingly, Chief Justice Burger asserted that, "[t]he most

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5 See Burger, supra note 39, at 508 (establishing bona fide judicial screening commissions will result in higher number of nominees ranked "exceptionally well-qualified" by American Bar Association); Burger, The State of the Judiciary - 1975, 61 A.B.A.J. 439, 441 (1975) (suggesting that judges, as well as lawyers, should participate in continuing education, and noting growth in judicial seminars in past two decades).

6 See Burger, Annual Report to the American Bar Association by the Chief Justice of the United States, 67 A.B.A.J. 290, 290 (noting that responses of members of American Bar Association were major factor in bringing about creation of National Center for State Courts).


6 In his 1970 address to the ABA the Chief Justice asserted:

We should not be surprised at delay when more and more defendants demand
simple and obvious remedy is . . . to try criminal cases within sixty
days after indictment and then see what happens. I predict it would
sharply reduce the crime rate . . . .”81 He did not consider, however,
that the burgeoning of these constitutional defenses was a product
of the Supreme Court.82 Moreover, the Chief Justice subsequently
took umbrage at the Congressional enactment of a speedy trial law
for the federal courts, requiring the disposition of a case within sixty
days, just as he had suggested. The delay rule, he contended, should
have been left to judicial rule-making rather than legislative
fiat.83

In the same 1970 speech, Chief Justice Burger further proposed
that,

“. . . the most experienced defense lawyers know that the defendant’s
best interests may be served in most cases by disposing of the case on a
guilty plea without trial.”84

Although it may be that the best interests of society could be found
in such guilty pleas, it is difficult to understand how a guilty plea
can be in the best interest of a defendant, unless it results in a bar-
gain for a suspended sentence or probation. It is exactly the release
of defendants on bail or otherwise, however, that the Chief Justice
has persistently found to be a primary evil in the administration of
criminal justice.85

Despite the fact that most of the substance of the 1981 talk could
be found in his earlier reports, the address was treated as a startling
revelation. Even before its delivery, the Chief Justice himself desig-

PERFECT JUSTICE part III, chapters 11-19, and part IV, ch. 20 (1974) (tendency of
courts to supersede legislatures and create new laws on routine basis has seriously
impaired judiciary’s capacity to perform its intended functions).
82 Burger, supra note 36, at 362. Chief Justice Burger stated that, “In 1974 the
Congress enacted a Speedy Trial Act. The continued growth of cases filed, the delay
in providing new judgeships, and the confining strictures of that act have made it
difficult for judges to meet the rigid time requirements of the law.” Burger, supra
note 36, at 362.
83 Burger, supra note 59, at 931.
84 See Burger, supra note 58, at 299 (noting significant increase in “bail crime” in
recent years); Burger, supra note 36, at 360-62 (Burger notes that it is increasingly
frequent that at time persons are arrested and charged with serious crimes, they have
been released pending trial on other charges).
nated the talk as a "blockbuster." The *New York Times*, however, appropriately summed it up thus in a lead editorial:

Chief Justice Burger obviously struck home with his free-swinging speech on crime and punishment in America. Never in a dozen years on the high bench has he provoked such strong response, mostly favorable, and from far beyond his familiar audience of the American Bar Association. It did not matter that he had said it all before . . . . It is not the Burger message that has changed. The country has.

. . . There exists an entire generation of citizens who dread the city streets and in their fear feel deprived of elementary rights. There is growing sympathy, therefore, for Mr. Burger's awesome question: "Is a society redeemed if it provides massive safeguards for accused persons" but fails to afford "elementary protection for its decent, law-abiding citizens?" Rightly or not, more citizens than ever think that defendants' rights are well cared for, whereas their own are not.

Some of Mr. Burger's remedies, notably the curtailing of bail and certain rights of appeal, raise serious constitutional problems. But there is no disagreement, in principle, about the main things he would do. The main obstacle to swifter justice is only money — but lots of money.

The *New York Times*, as is so often the case, had it wrong. Money may be able to buy lots of things, maybe even health and happiness, but the elimination of violence in the streets is not so easily procured. It doesn't take a long memory to recall the first great war on crime, during which the Law Enforcement Assistance Administration of the United States Department of Justice lavished billions of dollars on state and local governments and on expensive research. Nevertheless, the crime rate has accelerated faster than the rate of monetary inflation.

If the Chief Justice's 1981 talk lacks novelty, it does not lack merit, any more than did the 1970 address. Its reforms are, for the most part, devoutly to be wished. He frames the problem in an unnecessarily controversial manner, however, as a choice between constitutional rights and law enforcement. He then wisely challenges only one constitutional concept, the right to bail, or perhaps two, if he should be read to want to restrain the right to habeas corpus.

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Unless he is asking for unlimited preventive detention or a total denial of post-conviction review, both of these reforms are within the purview of the Supreme Court's adjudication control.

In fact, there is no evidence, to my knowledge, that the constitutional rights created by the Court are in any way responsible for the upsurge of violence in the streets that is so disturbing to us all. Surely, it must be conceded that more of us are deprived of our lives, our liberties, and our property by the actions of criminals than were ever threatened by government action. Adding government denial of due process of law to that which takes place in our streets every day, however, will not help. Nor will the Chief Justice's suggestion that constitutional rights be balanced against effective crime control solve the problem. Criminals do not plan their street violence in reliance on the Miranda rule or the right to habeas corpus or the expectation of light bail. They may be relying on the myriad and almost certain continuances before trial that a court will afford them. There is no constitutional right to such continuances, however. They are an exercise of discretion by the trial judiciary, toward whom the Chief Justice has shown no ire.

Chief Justice Burger's suggestions for the cure of crime in the streets are, essentially, deterrence and rehabilitation. He expects to bring about deterrence of other crimes by preventive detention prior to trial, speedy trial, fast and limited appellate review, and judgments subject only to limited collateral attack. Rehabilitation would be the function of an enlightened prison system. Clearly, these are worthy goals, but they are premised on unproved and unlikely theses. Those in jails before trial and in prisons thereafter will themselves be deterred from committing violence on the citizenry at large, if not on their fellow prisoners, while they are incarcerated. We are very short, however, on evidence that swift retribution as to some will in fact deter others from street violence. Crimes of street violence are acts of opportunity and mindlessness. Deterrence can be effective only if the crime is calculated in terms of risk and cost. Few street criminals properly fall within Holmes's concept of the "bad man." Street crime is not likely to be committed in the pres-

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* It may be of some interest to note that a British Law Lord, on his retirement from the bench - British judges do not make speeches on political subjects while they are in service - recently warned the British people that they were in danger of losing their liberties to the Government for lack of what he termed a "statute of liberty" that would afford judicial protection against government incursion. de Jongh, *Judge's Warning for Britain on the Perils of 1984*, The Observer, Feb. 15, 1981, at 10.

* See O. HOLMES, COLLECTED LEGAL PAPERS 169-74 (1920) (essentially, Holmes posits that "bad man" does not plan actions in light of ethical or moral considerations, but rather upon consideration of material and/or legal consequences of
ence of a policeman, but constant police surveillance of the entire population as a form of deterrence has a certainty that the legal judicial process does not provide. Such a program is an unaffordable, and probably undesirable, alternative to our present system, however, and the threat of imprisonment itself does not effect deterrence if the criminal's living conditions out of prison are not much different than in prison. However threatening jail or prison may be to the white- and blue-collar classes, it is not nearly so much a threat to those of society's substratum engaging in violent street crime.

It is not intended here to suggest that improvement in the conditions of our jails and prisons is not badly needed. Even if the threat of prison does not deter, and rehabilitation within the prisons is a chimera, a civilized nation such as we purport to be owes humane treatment to those whom it incarcerates. The brutalization of prisoners is equally a brutalization of the society which imprisons them. Conscience dictates the abandonment of the kind of prisoner warehousing we indulge in our contemporary systems. If, at the same time, we make attempts at what the Chief Justice calls rehabilitation, so much the better. There is, however, a fundamental deficiency in the premise of the Chief Justice's program of deterrence through speedy conviction, and rehabilitation through prison training. Although from time to time he acknowledges it, he nevertheless seems to continue to assume that the judicial process can afford appropriate answers to our society's fundamental problems. Social engineering through the judicial process, however, has never proved successful. Judicial action has never cured any of our basic societal evils. The courts are tools of society, not its master. They are essentially dispute-settling mechanisms, not efficient policy makers or policy effecters. The legislature, not the judiciary, is the body responsible for policy making, although it may use the courts to implement or enforce the policy. The executive, not the judiciary, is charged with the execution of the laws, although it, too, may use the courts in carrying out its function.

The notion that we should seek relief for any societal ill through litigation has, unfortunately, bemused this country. Litigation and the courts, however, cannot carry this burden. As Attorney General Levi said at the law reform conferences in memory of Roscoe Pound's early call to the bench and bar for the improvement of the machinery of justice: "... the problems we face as a society are

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71 See Burger, supra note 58, at 292 ("Nothing will bring about swift changes in the terror that stalks our streets and endangers our homes... ").
often not susceptible of judicial resolution. To rely on the courts alone, or even primarily, for its solution to our problems may itself be to countenance our eventual default, as a people, in our commitment to the establishment and preservation of equal justice for all."  

Concentration on judicial processes as the method for cure of society's deficiencies is likely to foreclose the use of more appropriate avenues for investigation and experiment. We need, particularly in the area of violent crime, discoveries of preventatives rather than cures. By the time a felon is arrested, the damage has already occurred.

Abolition of poverty, the Chief Justice tells us, is not the answer, and if it were it is too remote and unrealistic a possibility. In support of his proposition, he notes that the crime rate is higher in wealthy Sweden than in the impoverished nations of Spain and Portugal. Chief Justice Burger cannot deny, however, that the poor commit the bulk of violent crime in the streets. Admittedly, perpetrators of crime do not act in order to put bread and milk in the mouths of their families. In this society, government has afforded better means of feeding even the impoverished. Nevertheless, street crime tends to be the vocation of those who have no other vocation. The syndrome that joins violent crime and poverty exists. We cannot ignore its importance as the Chief Justice would do.

In his 1981 speech, the Chief Justice said: "We must not be misled by cliches and slogans that if we but abolish poverty, crime will also disappear." Nor, this author would suggest, should we be misled that the Chief Justice's formula of "swift arrest, prompt trial, certain penalty, and — at some point — finality of judgment," will result in the disappearance of crime. He does not claim it will. We need not abandon one effort to indulge the other. Poverty is not an excuse for crime. This does not mean it is not a contributing factor, however. Perhaps the Chief Justice is telling us only that we must abandon the notion that criminals are the victims and that society is the perpetrator of crime, but it is hard to believe that there is no causal relation between poverty and crime.

In addition to the poverty-crime syndrome, there are others. Indeed, the Chief Justice comments on the drug-crime syndrome. In the 1981 talk, he said:

To speak of crime in America, and not mention drugs and

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72 The Direction of the Administration of Justice, 62 A.B.A.J. 727, 728.
73 Burger, supra note 58, at 292.
74 Burger, supra note 58, at 292.
75 Burger, supra note 58, at 292.
76 Burger, supra note 58, at 292.
drug-related crime would be an oversight of large dimension. The destruction of lives by drugs is more frightening than all the homicides we suffer. The victims are not just the young who become addicts. Their families and, in turn, their victims and all of society suffer over a lifetime. I am not wise enough to venture a solution. Until we effectively seal our many thousands of miles of borders, which would require five or ten times the present border guard personnel and vastly enlarge the internal drug enforcement staffs, there is little else we can do. Our Fourth and Fifth Amendments and statutes give the same broad protection to drug pushers as they give to you and me, and judges are oath-bound to apply those commands.\textsuperscript{77}

The drug-violence syndrome is particularly vicious and clear. It is not the Fourth and Fifth Amendments that prevent the effective exclusion of drugs from foreign and interstate commerce. The drug industry seems to have too much support within our population, and there is not enough effective effort by our local, state, and federal police forces to inhibit it. A society without access to drugs would surely be a far less violent society than the one which we endure.

Of a third violent crime syndrome, the intimate relationship between violent crime and handguns, the Chief Justice appears to say nothing.\textsuperscript{78} Our need for gun control is evident. Those who oppose gun control laws often do so on the ground that enforcement will not be successful. Such a response, however, begs the question. Whether or not gun control legislation can be enforced is dependent on the willingness of the police to perform their duties and of the prosecutors and judges to do theirs. A society without handguns, like a society without drugs, would surely be a less violent-prone society than that which we now endure.

There is one other syndrome at which we tend to blink because we cannot face it. The greatest number of violent crimes is most clearly connected with the inhabitants of this country’s ghettos and barrios, and most of the crime is inflicted by their inhabitants on their inhabitants. Whether this is merely a spin-off of the poverty-crime syndrome, or a symptom of frustration at the failure to attain full membership in American society, or for some other reason, we do neither the majority nor the minorities any favor by ignoring the fact in the hope or expectation that it will go away.

\textsuperscript{77} Burger, supra note 58, at 292.

\textsuperscript{78} But see Burger, supra note 58, at 293 (Burger deprecates large investment in handguns for self-defense and notes that war on crime will not be won by “self-appointed armed citizen police patrols. At age 200, this country has outgrown the idea of private law and vigilantes.”).
There is, of course, the possibility that the violence in our society is not curable. The Chief Justice suggested in his 1981 talk:

Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability, and respect for others' rights. This was recently commented on by a distinguished world statesman, Charles Malik, former president of the U.N. General Assembly. Speaking to a conference on education, he said: "I search in vain for any reference to the fact that character, personal integrity, spiritual depth, the highest moral standards, the wonderful living values of the great tradition, have anything to do with the business of the university or with the world of learning."  

Perhaps what Dr. Malik said is not irrelevant to what gives most Americans such deep concern in terms of behavior in America today. Universities and schools provide a convenient scapegoat, and one particularly to the taste of the Chief Justice. The typical street criminal, however, does not have any university training and precious little education from grammar or high school. The schools cannot inculcate values in those who are not there or are there involuntarily with closed eyes, ears, and minds. Nevertheless, it may still be true that we have violence in our society because our society, including our school and university graduates, has come to admire or at least tolerate violence, rather than to condemn it.

Violence, the antithesis of civility, is endemic in our society, just as it was in the primitive societies from which we evolved and to which we are returning. We deplore it only when it threatens us individually. Most of our cultural activities, however, extol violence rather than condemn it. The news media exploit it. Television concentrates on it, not for purposes of enhancing moral values, but for the titillation that physical suffering imposed by some on others brings to the voyeurs in most of us. Our theatre, our cinema, our sports, our music, our literature celebrate it. As a recent critic wrote of some of our most highly rated literature: "Whatever the critical establishment may make of the relative merits of our most important poets and novelists, there is at least general agreement that we are living in an age of apocalyptic imagination and that those fictions which touch us most intimately are the images of the disintegration of the Western culture and society which goes on, every day, around us."  

I have come, however, not to bury Caesar, but to praise him. The 1981 State of the Judiciary Message was a declaration of the second

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77 Burger, supra note 58, at 291.
great war on crime. The first such war, which was epitomized by the Omnibus Crime Control and Safe Streets Act of 1968, imposed an ignominious defeat on us. We can hope that the second will fare better. The general response to the Chief Justice’s speech was heartening. The initial reaction by law enforcement agencies was swift and promising. Appointment of committees and promises of action, without more, however, will not reach the Chief Justice’s objectives. Time tends to reduce exuberance for reform. Whether the Chief Justice’s speech marks a beginning or an end will depend on the persistent support afforded the attainment of his goals by “we, the people.” The governance of this nation can be in our hands. That is where the Constitution placed it, if we can but dedicate ourselves to meaningful effort, “to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” In the absence of this effort, we should have to join in Matthew Arnold’s lament in Dover Beach:

... for the world, which seems
To lie before us like a land of dreams,
So various, so beautiful, so new,
Hath really neither joy, nor love, nor light,
Nor certitude, nor peace, nor help for pain;
And we are here as on a darkling plain
Swept with confused alarms of struggle and flight,
Where ignorant armies clash by night.

* U.S. Const. Preamble.
* Id.
* M. Arnold, Dover Beach (1851).