Trial Practice Series

ADVOCACY

The Art of Pleading a Cause

Second Edition

Richard A. Givens

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Richard A. Givens
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Preface to the Second Edition

The art of pleading causes is the challenge of finding the best way to transfer an idea from one mind to another to bring about action. This challenge arises in particular cases, in bargaining, in legislative and rule-making controversies, and in persuasion addressed to the general public.

This book is about the strategy of advocacy. It does not describe rules of law. Nor does it set forth procedures under which cases are tried, laws enacted, or candidates nominated or elected.[1] Instead, it seeks to explore the strategic options under whatever rules exist.

Advocacy is a form of conflict that seeks cooperation. Exploration of how to improve its techniques is vital to our society and to protection of each participant against overreaching by others.

The second edition of *Advocacy: The Art of Pleading a Cause* was prepared to reflect tremendous recent changes affecting advocacy, including:

1. The greatly enhanced role of other disciplines in advocacy, particularly economics, treated in a separate part and in a series of appendixes dealing with particular aspects of the law—economics interactions
2. The wide impact on advocacy in litigation of the spirit as well as the letter of new rules seeking greater expedition, narrowing of issues, and increased responsibility for the meritorious nature of factual and legal assertions
3. Increased willingness of many negotiators to seek to overcome the traditional fear of showing weakness by indicating willingness to negoti-

[1] In most instances, additional references for further research on strategic options discussed in each chapter will be found in the reference notes at the end of each chapter. In certain instances where the material is intended to be more descriptive, numbered footnotes have been used, particularly in the case of the Special Introduction on litigation, negotiation, and legislation in the 1980s, Chapters 29 and 30 concerning aspects of law and economics, and the Appendixes on that subject.

ate, thus making better bargains possible, more quickly, in more situations than previously in litigated disputes, prelitigation bargaining, legislative controversies, and business relationships

The additional references to each chapter are designed to suggest sources for further exploration of selected issues raised in the text, and are not intended to be comprehensive. Quotations from examinations and arguments have been edited to eliminate proper names other than the examiner or advocate, and in other minor respects. Topics referred to in the notes are not necessarily mentioned in the same order as in the text.

New material has also been added in areas covered by the 1980 edition, including new contemporary examples of effective cross-examination and summation techniques.

A major impetus for the 1980 edition was the tremendous value of the examples of cross-examinations contained in Francis Wellman's *The Art of Cross-Examination* (4th ed 1976), most of which dated from the nineteenth century and the first two decades of the twentieth century. During my work as an Assistant United States Attorney in the Southern District of New York from 1961 to 1971, and thereafter, I encountered numerous examples of the art of examination and other forms of advocacy which I felt were both fascinating and worth preserving. Many members of the Bar have been most generous in furnishing examples for the 1980 edition and the second edition.

In working with these examples, my conviction was reaffirmed that advocacy is at its best when it grows out of conviction, and that there is also something important to be said on each side of any important question. The classic dilemma of being in the position of arguing contrary to what one believes, therefore, rarely arises.

A second discovery which I seek to share here is that the "impossible" can frequently be achieved. In particular, I found that the best available works on cross-examination, while conveying indispensable information on technique, tended to leave the impression, as does much current folklore, that one must have a good deal of solid information before daring to cross-examine a witness at all.

During ten years at the United States Attorney's Office in the Southern District of New York, I found that this is not true. I am especially grateful to Robert M. Morgenthau, under whom I served in the Criminal Division from 1961 to 1969, and to Whitney North Seymour, Jr., under whom I served from 1969 to 1971, for a great deal of what I learned, some of which is reflected here, about both the tactics and the higher strategy of advocacy.

During my service as Chief of the Consumer Fraud Unit under both United States Attorneys, I also had the opportunity to observe the tremendous advantages of systematic programming of effort in litigation, as opposed to separate treatment of each case, and the equal or greater advantage of a shortened path for decision making to permit quick response to circumstances. Working with Postal Inspectors, it was possible to move within days against serious frauds, whereas under conventional procedures, involving referral of

cases through written administrative reports, this sometimes takes months or occasionally years.

I am also extremely grateful to my many colleagues at the United States Attorney's Office during those years for many insights and much assistance, and most especially to my wife for listening to many summations given at home before they had to be given before juries. Her non-legal analysis of what made sense often convinced me that the jury, too, would be most interested in what lay at the core of the issue, whether or not it was most prominent technically.

I am further grateful to four Chairmen of the Federal Trade Commission for the opportunity to serve as Regional Director of the New York Office of the Commission from 1971 to 1977. Miles W. Kirkpatrick, who appointed me, and Lewis A. Engman, Calvin B. Collier, and Michael Pertschuk all taught me more than can be expressed. Through their outstanding leadership I developed the conviction that a great deal more can be accomplished with limited resources than is usually suspected.

I am also particularly grateful for the opportunity to have worked on much state legislation under the Commission's federal-state relations program during those years. This is the source of much of the material on legislative advocacy set forth here.

During my period in private practice both at Hughes, Hubbard & Reed from 1959 to 1961 and at Botein, Hays, & Sklar since 1977, I have learned that assistance to the private sector can be just as public spirited as anything done in representing government. In particular, helping to permit actual economic activity to thread its way through the labyrinth of detailed regulation society has built up is itself a vital service, as is the enforcement of the law where private parties' interests are injured by violations.

This book was originally conceived as one dealing solely with the subject of cross-examination. However, I discovered during work on the book that the basic principles involved in cross-examination also apply to argument concerning individual cases or legislative and rulemaking issues, and to bargaining and negotiation. In each instance the alignment of the interests of the party and of the decision makers involved turned out to be the central issue. In each case the setting in which this alignment is to be sought is of vital importance to the chances of success of the effort.

I am grateful to Ellen Poler of McGraw-Hill for working with me on the basic concept, and its expansion to include these matters, to Susan Ruth Givens for diagram design and artwork, to Liz Farquhar for editorial assistance, to Megan Tallmer for reviewing the manuscript, and to the following for examples: Hon. Harold Baer, Jr., Richard Ben-Veniste, Frederick H. Block, Hon. Vincent L. Broderick, Richard Cashman, Richard Conway Casey, John P. Curley, David M. Dosen, Thomas Edwards, Ezra Friedman, Christopher Gallagher, William J. Gilbreth, John Gross, Sharon E. Grubin, Roger J. Hawke, Hugh C. Humphreys, Patricia M. Hynes, Carol H. Katz, James Kindler, Robert E. Kushner, Michael A. Lacher, James W. Lamberton, Elizabeth Lang, Anthony Liebig, Andrew J. Maloney, Maria L. Marcus, John S. Martin, Jr., Basil J. Mezines, Henry G. Miller, Peter H. Morrison, Warren Moscow, John O'Brien,

Norman Ostrow, Gerald E. Paley, Paul L. Perito, Eleanor Jackson Piel, Sybil H. Pollett, Salvatore F. Sangiorgi, Ross Sandler, Renée Schwartz, Neil T. Shayne, Shirley Adelson Siegel, Robert J. Sisk, Guy Struve, Megan Tallmer, Frank Tuerkheimer, Myer S. Tulkoff, Harry H. Voigt, H. Elliot Wales, Laura P. Worsinger and James D. Zirin.

I am grateful to my wife Janet and my daughters Susan Ruth and Jane Lucile for many hours of proofreading, criticism of the text, and suggestions for refinements of many of the ideas. Most of all, I am grateful for their love and support.

Richard A. Givens

New York, N.Y.
December 1985

Special Introduction to the Second Edition

Litigation, Legislation and Negotiation in the 1980s

Each historical period tends to include a strong dose of reaction against certain aspects of the preceding period. While the trends of any period defy simple description, an attempt at a rough definition can bring important aspects to light.

In the case of the last half of the 1980s, two major themes can be discerned:

> *Efficiency*—by contrast to the assumption frequently accepted during the preceding period that automatic productivity increases could be taken for granted[1]
>
> *Responsibility to conform to applicable rules*—by contrast to the widely held assumption of the preceding period that defiance itself could serve some useful functions in maintaining play in the joints of the system[2]

Efficiency and conformity to rules themselves frequently conflict, in addition to clashing with other goals. Where either value is asserted to be absolutely controlling, the other is usually found not to be truly applicable.[3] Both furnish raw material for arguments on differing sides of most controversies. Awareness of how these changes in attitudes can affect specific questions, even without determining particular answers to them, can be critical to effective advocacy.

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[1] *See* A. Hansen, The American Economy (1957) C. Bowles, Tomorrow Without Fear (1946).

[2] *Compare* the magisterial prose of A. Berle, The Three Faces of Power (1969) *with* S. Alinsky, Reveille for Radicals (1946).

[3] *E.g.*, INS v Chadha, 462 US 919 (1983), holding the "legislative veto" unconstitutional despite a long history of acceptance by the other branches since 1932.

Efficiency

During the early phase of industrial growth in the United States, judicial and legislative decisions sought to promote increased industrial activity.[4] The trends of the middle two-thirds of the twentieth century emphasized restrictions on uses of economic power and measures to assure that benefits of industrial growth were widely distributed.[5] The engine of growth itself was largely taken for granted.

This attitude changed abruptly with the sharp impact of the "gas-line" crisis triggered by the Arab oil boycott, the dramatic OPEC oil price increases, and the combination of inflation and recession, dubbed "stagflation," experienced for the first time in the late 1970s. Concern over the available supply of natural resources has been sharpened in the 1980s by enlarged social service entitlement and national defense costs.

The prevailing view is now that increasing productivity is required, and to be achieved must be consciously promoted.[6]

The need for efficient use of resources, cost control, and more productive technologies is felt throughout the legal system. It affects both the way the law treats private conduct and the way the legal system seeks to attend to its own business.[7]

Enhancing the Efficiency of the Economy Through Fuller Use of the Open Market Where alternatives are available in a market and participants have reasonably full and equal information, it has long been recognized that the competitor with a "better mousetrap" will gain, causing others to emulate the improvement; the most efficient allocation of resources for the economy will result.[8] Of course, these conditions may not always exist. Further, the market does not deal with *externalities* such as pollution or exhaustion of nonrenewable resources which are not consumed uniquely by the buyer.

Because many regulatory measures, based on the assumption that administrators were in general wiser than the open market,[9] turned out to be counterproductive, emphasis has returned to the market as the best primary regulator of the economy.

Arguments both in particular cases and concerning legislation or rulemaking can thus have added force if they find support in the advantages of the open market. Relevant aspects include the following.

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[4] See history set forth in Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 Harv L Rev 1463 (1967).

[5] *See generally* E. Goldman, Rendezvous With Destiny (1952).

[6] *See generally* Starr & Rudman, *Parameters of Technological Growth*, 182 Sci 358 (Oct 26, 1973); David, *Science Futures: The Industrial Connection*, 203 Sci 837 (Mar 2, 1979); Hutten, *On the Importance of Productivity Change*, 69 Am Econ Rev 126 (1979); C. Freeman, Unemployment and Technological Innovation (1982).

[7] For history, *see* American Assembly, The Courts, the Public and the Law Explosion (Harry W. Jones ed 1965).

[8] *See generally* L. Sullivan, Antitrust (1977) and economic authorities cited.

[9] *See* Jaffe, *The Illusion of the Ideal Administration*, 86 Harv L Rev 1183 (1973).

First, where a legal provision deals with a subject that could better be regulated by the market, the opponents of the adoption or application of the provision may enjoy an advantage.[10]

Second, a person seeking adoption or application of a regulatory provision may make the point that it deals with a matter which the market cannot effectively control such as a safety risk of which the buyer would be unaware,[11] a major imbalance in availability of information about the subject of bargaining, or a goal concerning which the market will underinvest.[12]

Third, opponents of any change in regulations may rely on requirements for formal or cost–benefit analysis which may create difficulties for either repeal of or additions to administrative rules unless either a controlling qualitative issue or a clearly demonstrable basis for the position taken can be found.[13]

Fourth, where a legal rule furthers the functioning of the market, this may be stressed. This might apply, for example, to (a) denial of standing to competitors to challenge a license or permit *where such standing rests solely on economic harm to the competitor* and where the law is not designed to limit competition but to serve other public purposes,[14] or (b) sanctions for thefts of trade secrets, a practice which if not deterred can inhibit innovation.[15]

Fifth, where a legal provision or practice impedes the functioning of the market, this may be grounds for attack. For example:

1. A practice may give an advantage to some competitors over others for reasons other than performance;[16] this position may become vulnerable.[17] Where such a situation must be defended, it should be shown if possible that an overriding social purpose or important externality is involved

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[10] *See* New York State Bar Assn, Action Unit #5, New York State Regulatory Reform (1982); Special Committee on Consumer Affairs, *Licensing as a Consumer Protection Measure,* 28 Record of The Assn of the Bar of the City of NY 646 (1973).

[11] *E.g.,* United States v Generix Drug Corp, 460 US 453 (1983).

[12] *E.g.,* high-risk research efforts vital to the national interest, *see Cover Story,* Bus Wk, July 4, 1983, at 62; Worsinger, *New Technologies and Antitrust,*, 47 NYS BJ 651 (1975), also in 81 Case & Com 33 (1976).

[13] *Compare* Motor Vehicle Mfrs Assn v State Farm Mut Ins Co, 103 S Ct 2856 (1983)(airbag) *with* Burroughs-Wellcome Co v Schweiker, 649 F2d 221 (4th Cir 1981)(qualitative considerations); *see* Wildavsky, *The Political Economy of Efficiency: Cost-Benefit Analysis, Systems Analysis, and Program Budgeting,* Pub Admin Rev 26 (Dec 1966); Thomas, *Overregulating the Regulators,* NY Times, June 3, 1981, op-ed page.

[14] *See* R. Givens, Antitrust: An Economic Approach §19.03 (1983).

[15] *See* FMC Corp v Taiwan Tainan Giant Indus Co, 730 F2d 61 (2d Cir 1984); Rohm & Haas Co v Adco Chem Co, 689 F2d 424 (3d Cir 1982); Goldberg v Medtronic, Inc, 686 F2d 1219 (7th Cir 1982); Trade Secrets Handbook (1983).

[16] For a statement of the concept that competition should be on the merits, see the prevailing opinion in Jefferson Parish Hosp v Hyde, 104 S Ct 1551 (1984).

[17] *See* United States v Generix Drug Corp, 460 US 453 (1983) *with* Burroughs-Wellcome Co v Schweiker, 649 F2d 221 (4th Cir 1981).

2. Allowing evidence of subsequent product improvements in some instances in support of an assertion of liability may deter incentives for product improvement in aid of safety[18]

Sixth, local regulations unduly burdening commerce without a significant showing of local need may become more vulnerable under the interstate commerce clause.[19]

Seventh, "one-stop" regulatory approvals rather than processing through multiple layers, or regulation of the same conduct by differing agencies and units within agencies, may begin to be favored.[20]

Finally, promotion of an open marketplace may be sought by means which can themselves be counterproductive. This may occur if the robust competition sought to be generated itself becomes subject to attack as anticompetitive.[21] Some go so far as to assert that practically all the ills of a marketplace are self-balancing and will cure themselves best with no intervention other than protection against violence, enforcement of contracts, and the like.[22] Others assert that a modern economy is not inherently self-balancing, since large units or coalitions of smaller units use bargaining power to interfere with the market by means entirely apart from political intervention.[23]

The possibility of counterproductive effects of measures adopted to promote open markets is one example of a classic dilemma:

1. In order to reach goal A, means B may be adopted
2. B normally will both promote goal A and have at least some side effects adverse to goal A
3. To establish B, means C is adopted, which promotes B but may interfere with A
4. It may be logical, looking exclusively at how to obtain C, that D be implemented. D may promote C, but be almost completely contrary to A

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[18] *See* Givens, *Product Improvement—Evidence of Liability?*, NY LJ (July 18, 1983), at 1.

[19] *See* Raymond Motor Transp, Inc v Rice, 434 US 429 (1978); *compare also* Hunt v Washington Apple Advertising Commn, 432 US 333, 350 (1977).

[20] *See* R. Givens, Legal Strategies for Industrial Innovation chs 1, 12 (Shepard's/McGraw-Hill 1982).

[21] *Compare* Berkey Photo, Inc v Eastman Kodak Co, 603 F2d 263 (2d Cir 1979), *cert denied*, 444 US 1093 (1982) *with* United States v Aluminum Co of Am, 148 F2d 416, 427 (2d Cir 1945); *see* Bock, *The Innovator as Antitrust Target*, Conf Bd Bull No 74 (1980); Gribbon, *Does the Law of Monopolization Inhibit Innovative Behavior?*, 49 ABA Antitrust LJ 925 (1980); Jentes, *Assessing Efforts to Challenge Aggressive Competition as an Attempt to Monopolize*, 49 ABA Antitrust LJ 937 (1980); Note, *Aggressive Innovation and Antitrust Liability*, 53 S Cal L Rev 1469 (1980).

[22] *See* Miller, Interview, in *Report from Official Washington*, 53 ABA Antitrust LJ, Issue 1, pt I, at 3, 13 & n 27 (Mar 1984).

[23] *See generally* L. Sullivan, Antitrust (1977).

Each step considered separately may be entirely logical. Each, however, may drift further away from the original goal.

In the legal system this is particularly common because enforcement of legal rules generates its own momentum—the desire to see to it that rules created by the legal system are observed (an independent primary value in the 1980s).

Thus, a countervailing tendency has begun to gain ground, favoring interpretation of legal rules through evaluation of the facts of cases based on their estimated overall impact on underlying goals.[24] The price paid for this is sometimes a decrease in predictability and simplicity of adjudication. Whether uncertainty or rigidity is more harmful may depend on how often close questions arise, and on what happens if the uncertainty is great.

One approach to this dilemma is *purpose interpretation* of rules based on what they seek to achieve (as best this can be discerned) when necessary to apply broad or ambiguous terms.[25]

While efficiency is accorded greater importance in the last half of the 1980s than in the previous half-century, commitments to other values can and do outweigh it and prevail in numerous instances.

Frequently, there is also a conflict between openness to new options within a large organization, which may lead to more efficient procedures, and short-run efficiency sought by emphasis on "team playing" and avoiding duplicative efforts to solve a problem[26] or internal dissension.[27]

Moreover, efficiency will not necessarily be furthered by positions advocated in its name. Assumptions may be made without discussion that circumstances required for success of an approach exist, and that adverse side effects or other elements in the situation can be neglected.

A person on the receiving end of an efficiency argument may be able to rebut it by challenging these assumptions. Statistical, mathematical, computerized, or analytical deductive methods may sometimes be undermined by laying bare the assumptions underlying them, and, at times, the limitations or even the total absence of required data.[28] Sometimes assumptions are chosen which

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[24] *See, e.g.,* Broadcast Music, Inc v CBS, 441 US 1 (1979); Continental TV, Inc v GTE Sylvania Inc, 433 US 36 (1977).

[25] *See* United States v Classic, 313 US 299, 317-18 (1941).

[26] On the values of duplication, *see* J. Jacobs, The Economy of Cities (1969).

[27] *See* G. Westerlund & S. Sjostrand, Organizational Myths (1979); D. Weinstein, Bureaucratic Opposition (1978); E. Gibney, Miracle by Design: The Real Reasons Behind Japan's Economic Success (1982); R. Kanter, The Change Masters: Innovation for Productivity in the American Corporation (1983); D. Ewing, The Human Side of Planning (1969).

[28] *See, e.g.,* Simon, *Rational Decision Making in Business Organizations,* 69 Am Econ Rev 493 (1971); Zarnovitz, *Econometric Models . . . Though the Stuff of Nobel Prizes, They Ultimately Depend on Questionable Data,* NY Times, Oct 26, 1980, at 20E; Routh, *The Mist in Economics,* NY Times, Nov 8, 1977, at 33; Staley, *Nonquantification in Economics,* 217 Sci 1204 (Sept 24, 1982); Gardner, *Mathematical Games,* 245 Sci Am 18 (Dec 1981); J. Blatt, Dynamic Economic Systems ch 16 (1983). "In the final analysis, a simulation model depends very heavily on the judgments and assumptions that are made by those who construct the model." Joskow, *Economic Modeling in Litigation,* National Economic Research Associates Fifth Annual Antitrust Seminar 4 (July 8, 1983).

make sophisticated methods seem fruitful, regardless of whether the assumptions are well-founded.[29]

Enhancing the Efficiency of the Legal System Expense, delay, and obfuscation sometimes imposed by the procedures of the legal system have been highlighted by comparisons to other ways of dealing with disputes.[30] Complaints that our procedural mechanisms have become counterproductive[31] have contributed to efforts to promote settlements through improved negotiation techniques.[32] They have likewise led to greater attention to alternate dispute settlement mechanisms,[33] allowing the workload of the courts to become a factor in some instances in defining what constitutes a legal violation,[34] and new rules and attitudes seeking to deter abuses of legal processes by the legal profession and others.[35]

Negotiations supervised by courts or other third parties may, unless astutely handled, become merely a phase of the combat. "Poisoned offers" and other ploys may be used merely to impress the third party rather than to promote agreement.[36] Compulsory alternate dispute mechanisms may screen out cases that in fact have merit and should be heard.[37] If the decisions are not final, these mechanisms may wear down the financially weaker party, a result not likely to show up in statistics showing the "success" of a program.

New rules may themselves add to the complexity of the system as a whole, creating new issues for further litigation.[38] This additional complexity and any risks of imposition of monetary penalties will work to the advantage of better funded disputants who can afford to utilize procedures at the apex of an already complex system. A better funded party can also better afford to take the risk of absorbing penalties, if any are imposed. A better funded party can also meet

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[29] *See* P. House & J. McLeod, Large-Scale Models for Policy Evaluation §5.3 (1977).

[30] *See* F. Gibney, Miracle by Design: The Real Reasons Behind Japan's Economic Success (1982).

[31] *See* Bok, *A Flawed System*, 55 NYS BJ 8 (Oct 1983), also in 38 Record of the Assn of the Bar of the City of NY 12 (Jan/Feb 1983); Harvard Mag 38 (May/June 1983); 79 ABA J 1220-30 (Sept 1983); Fiske, *President of Harvard Brands Legal System Costly and Complex*, NY Times, Apr 22, 1983, at Al, B4.

[32] *See* **ch 21.**

[33] *See* Parker & Radoff, *The Mini-Hearing*, 38 Bus L 35 (Nov 1982); Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 Loy LA L Rev 493 (1978).

[34] *See* Colligan v Activities Club, 442 F2d 686, 692-93 (2d Cir), *cert denied*, 404 US 1004 (1971).

[35] *See especially* Fed R Civ P 11, as amended in 1983; *see also The Backlash Grows Against Frivolous Suits*, Bus Wk, May 28, 1984, at 67.

[36] *See generally* **ch 22.**

[37] On limitations, *see, e.g.*, Special Committee on Consumer Affairs, *Recommendations Regarding Use of Mandatory Arbitration Clauses in Consumer Contracts*, 31 Record of The Assn of the Bar of the City of NY 356 (1976), leading to enactment of NY L 1984, ch 946, NY Gen Bus Law §399-c (limiting precommitment of consumers to arbitrate disputes at time sales contract is entered into).

[38] *See* Thomas, *Overregulating the Regulators*, NY Times, June 3, 1981, op-ed page; De Long, *Repealing Rules*, 8 ABA Admin L News #2 (Winter 1973).

the initial cost needed to litigate in an expansive manner and thus build up big legal fees that it can seek to charge to the other party should the latter's case be labeled frivolous.[39]

Under these circumstances, a need to give a *Miranda*-type warning to a *non*-affluent party might chill legitimate as well as frivolous litigation, as, for instance if a client were told, "If the court decides your case is frivolous, which I think it shouldn't, although prediction is never certain, you might have to pay the expenses of the other side which could run into hundreds of thousands of dollars." If this penalty could be imposed on attorneys taking unpopular positions, the independence of the Bar could suffer.[40]

Where federal intervention in state and local affairs is involved, a triple convergence of concepts may occur:

1. Efficiency in the system through reduction of workload and of overlapping jurisdiction
2. Tidiness of structure through adherence to concepts of proper distribution of work that appear to follow from adherence to propriety of procedures[41]
3. Renewed emphasis on the importance of federalism

These factors tending to favor deference to state and local decisions and procedures can be overcome by specifically articulated national commitments believed to require intervention in one form or another,[42] or by indications that state or local procedures may not, in fact, meet due process standards.[43] Any presumption of regularity that official procedures are proper may be dangerous where facts are to the contrary.[44]

An area where current intervention may not be justified under these approaches is that of dismissals of state and local employees in violation of self-imposed procedural requirements of a public agency or institution. The very act of setting up procedural protections is sometimes converted into the

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[39] *See* City Bar Panel's Report: *Rule 68 Drastic Remedy*, NY LJ, Apr 2, 1984, at 1; Federal Bar Council, Second Circuit Digest #79 (Mar 1984).

[40] *See* Fales, "Introduction" in *Will the ABA Draft Model Rules of Professional Conduct Change the Concept of the Lawyer's Role?*, Assn of the Bar of the City of New York 1981 and references cited.

[41] *See* General Inv Co v Lake Shore & MS Ry, 260 US 261 (1922).

[42] *See* Transportation Union v LIRR, 455 US 678 (1982); City of Rome v United States, 446 US 156 (1980).

[43] For an instance where this appeared to be so, and yet the triple convergence still prevailed by a narrow margin, *see* Rosewell v LaSalle Natl Bank, 450 US 512 (1981)(plurality, concurring and dissenting opinions) interpreting the Tax Injunction Act, 28 USC §1341. *Compare* Gibson v Berryhill, 411 US 564 (1973)(right to an impartial tribunal) *with* Armstrong v Manzo, 380 US 545 (1965)(notice and opportunity to be heard); United Transp Union v State Bar of Mich, 401 US 576 (1971)(access to the judicial process).

[44] *See* Jaffe, *The Illusion of the Ideal Administration*, 86 Harv L Rev 1183 (1973).

source of property rights protected from infringement without due process by the Fourteenth Amendment.[45] This, if carried to its logical limits, would convert every breach of contract by a state or local instrumentality into a federal constitutional violation.[46] Although the necessity for arbitrary line-drawing does not, in and of itself, doom a legal principle,[47] there is no national commitment of any kind favoring intervention in this sort of dispute based on the Civil War Amendments. Neither invidious discrimination[48] nor the need to protect access to means of redress are involved, nor are any specific constitutional provisions implicated beyond the general requirements of due process.[49]

One line of development leading to elimination of this class of cases holds that the mere existence of state remedies for any procedural or other violation itself satisfies due process requirements.[50] Of course, this approach may be dangerous and perhaps find its limitations where underlying federal rights are at stake.

There are also frequent collisions between the effectiveness of the legal system and adherence to propositions articulated within the system as a goal apart from their practical effects. According to Sir Frederick Pollock in a letter to Justice Holmes, "Laws exist not for the scientific satisfaction of the legal mind, but for the convenience of the lay people who sue and are sued."[51]

Collisions arise, for example, from imposing liability for legal fees on judges sued for violation of federal requirements, thus perhaps intimidating them and impairing their ability to function for all citizens, merely because Congress did not write in an exception for such cases in providing for attorneys' fees in civil

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[45] *See* Cleveland Bd of Educ v Loudermill, 53 USLW 4306 (US Mar 19, 1985)("property" right of state employee created by contract cannot be taken without due process). Bishop v Wood, 426 US 341 (1976); *compare* Corso v Creighton Univ, 731 F2d 529 (8th Cir 1984) *with* Mabey v Reagan, 537 F2d 1036, 1042 (9th Cir 1998); Jacobson v Hannifin, 627 F2d 177 (9th Cir 1980); *see Developments in the Law—Public Employment*, 97 Harv L Rev 1611, 1780-800 (1984); Comment, *Protecting State Procedural Rights in Federal Court*, 30 Stan L Rev 1019 (1978).

[46] Compare, under the Robinson-Patman Act, 15 USC §13: "Nothing in the act is intended to federalize ordinary breach of contract actions." Republic Packaging Corp v Haveg Indus, 406 F Supp 379, 381 (ND Ill 1976).

[47] *See* discussion in Monsanto Co v Spray-Rite Serv Corp, 104 S Ct 1464 (1984).

[48] *See* Jones v Alfred H. Mayer Co, 392 US 409 (1968); Strauder v West Va, 100 US 303 (1879); Yick Wo v Hopkins, 118 US 356 (1886); *see also* Truax v Raich, 239 US 33 (1915); Missouri *ex rel* Gaines v Canada, 305 US 337 (1938); Black, *The Lawfulness of the Segregation Decisions*, 69 Yale LJ 421 (1960).

[49] *See* First Natl Bank v Bellotti, 435 US 765 (1978); Landmark Communications, Inc v Virginia, 435 US 829 (1978); Nebraska Press Assn v Stuart, 427 US 539 (1976)(freedom of expression); Wesberry v Sanders, 376 US 1 (1964) (voting rights); cases cited, Bates v Arizona, 433 US 350, 376 n 32 (1977)(access to the judicial process).

[50] For application of this concept in the context of the kind of case discussed above, *see* Cohen v City of Philadelphia, 736 F2d 81 (3d Cir 1984).

[51] 1 Holmes-Pollock Letters 8 (Howe ed 1961).

rights suits generally[52]—despite the frequent application of common sense to statutory interpretation in other circumstances.[53]

They may also arise from exalting the notion that each case must be decided by the proper tribunal under all circumstances regardless of the practical impact of any mistake.[54]

Many steps to improve the efficiency of the legal system as a whole even without legislative changes are possible, but experts in each field do not always favor steps that might seem at first to reduce their own role.[55] For example, in the criminal field, so important to the safety of the citizen, the many unnecessary complexities make trials on a large scale impracticable and thus lead to the evils of mass plea bargaining.[56]

Responsibility to Obey Rules

Adhering to Governing Documents Federal law and most state and local law in the United States is based on documents—beginning with the constitution or charter of the unit involved, and continuing through statutes, regulations, rulings, contractual provisions, and similar sources. The trend in this direction is accelerating as efforts are made to put into codified form previously uncodified areas such as rules of evidence.[57]

Words are always subject to differing interpretations, which means that a deciding officer can choose among differing approaches that may lead to differing results.[58] Indeed, when the will is there, any provision can be read to mean almost anything, including the exact opposite of what it seems to mean on the surface or what it may have been intended to mean.[59]

Some judges and commentators, tapping the reservoir of power inherent in this uncertainty, came to decide that the creative power of the courts was an asset to be exploited to the fullest.[60]

This permitted subjective views to be released relatively unhindered by concern with the text to be interpreted. It also led to a counterreaction based

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[52] Pulliam v Allen, 52 USLW 4525 (US May, 14, 1984).

[53] For an excellent example, *see* Tedla v Ellman, 280 NY 124, 19 NE2d 987, also in 10 NYS2d (1939).

[54] *See* Leroy v Great United Corp, 443 US 173 (1979); *but see* Davis v Department of Labor, 317 US 249 (1942).

[55] Compare the initial hostile reaction to requirements that consumer contracts be written in plain language, discussed in Practising Law Institute, Drafting Documents in Plain Language (1979, 1981).

[56] Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv L Rev 1037 (1984).

[57] *Compare* Cary, *Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for a Moratorium and Reappraisal*, 60 Colum L Rev 259 (1960) *with* Llewellyn, *Meet Negotiable Instruments*, 44 Colum L Rev 298 (1944).

[58] "The life of doctrinal formulations is in their applications." Powell, *More Ado About Gross Receipts Taxes*, 60 Harv L Rev 710 (1947).

[59] *See* A. Bullock, Hitler: A Study in Tyranny ch 5 (1953)(making "illegality legal" through twisting stated rules).

[60] *See* A. Berle, The Three Faces of Power (1969).

on the perception that legislative power had in effect been taken over by some judges.[61] This counterreaction stresses that words in documents to be interpreted must be given close attention, and read first of all to mean what they say. Resort should be had to other sources of guidance only in the event of ambiguity. If the result of reading a governing document in this manner is not always the most workable, the solution is often said to be revision of the document, not its judicial amendment.[62]

Sometimes, however, the history of a subject contradicts a view claimed to flow from the text or from language contained in prior rulings, and history may prevail.[63]

Text-bound interpretation may hold hidden dangers of subjectivity masked as adherence to text, when in fact the text may not supply an unambiguous answers.[64] Desire to appear faithful to plain meaning may lead to wooden interpretation when the text might well be read to avoid an unworkable result.[65]

In some instances the meaning of a provision is fairly clear, and the return to what it says is refreshing. In other instances, professed devotion to following the text may sidestep the real task of interpreting it in the context of a new situation not clearly dealt with by the words themselves.[66]

The purpose of a provision as gleaned from its text, any relevant materials such as legislative reports, and the history behind its adoption, may provide guidance as to how to apply the words involved to achieve its objectives. Such purpose interpretation may avoid the perils of either unbridled subjectivity or deceptive exactitude in purporting to follow the text when the text may admit many interpretations.[67]

When the pendulum swings again, perhaps it may stop short of the former avowedly arrogant position that courts should do whatever they please simply because words are always unclear in any event.[68]

Nature of the Party Involved During the period preceding the 1980s, there was often great emphasis on the size of an alleged violator of a legal rule: unless the offender had committed a major violation or was a major figure in an illegal

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[61] *Compare* Powell, *Carolene Products Revisited,* 82 Colum L Rev 1987 (1982); Wellington, *The Nature of Judicial Review,* 36 Record of The Assn of the Bar of the City of NY 360 (1981) *with* Mitchell v Robert De Mario Jewelry, Inc, 361 US 288 (1960); Notes, 82 Yale LJ 258 (1972), 95 Harv L Rev 892 (1982).

[62] *See* INS v Chadha, 462 US 919 (1983).

[63] *See* Marsh v Chambers, US (1983)(upholding prayer in legislative proceedings).

[64] *See* United States v Butler, 297 US 1, 62-63 (1936)(a statute is to be placed "alongside" the Constitution to see if "the latter squares with the former").

[65] *See* Tedla v Ellman, 280 NY 124, 19 NE2d 987 (1939) for a decision refusing to take this route.

[66] *See* Jones, *Statutory Doubts and Legislative Intention,* 40 Colum L Rev 957 (1940).

[67] *See* United States v Classic, 313 US 299, 317-18 (1941); United States v Trenton Potteries Co, 273 US 392 (1927); Standard Oil Co v United States, 221 US 1, 58-60 (1911).

[68] For a balanced approach, *see* Curtis, *A Better Theory of Legal Interpretation, in* Jurisprudence in Action (NYCBA 1953).