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The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series

WILLIAM H. REHNQUIST*

In recent years litigants have pressed the courts to resolve disputes which were formerly regulated by other social and political institutions. Mr. Justice Rehnquist stresses the crucial importance of nongovernmental institutions in our society. He discusses the need to evaluate the disruptive effect of an adversary proceeding between parties who must continue in an ongoing relationship after their dispute has been settled. The author then suggests that in order to preserve certain social institutions, limits must be placed on the use of adversary proceedings.

There are undoubtedly as many doors by which one may enter the subject of today's lectures as there are exits by which one may leave it. The subject is both so broad and so fascinating that I see little to be gained by explaining why I have chosen one particular approach over several other equally good and perhaps better entries. The very words "adversary society," without the subtitle annexed to them, suggest a part of the world which is peculiarly familiar to lawyers and judges. It suggests at the very least, if not a system of dispute resolution by means of courts, a means of dispute resolution through what Judge Friendly has called "some kind of a hearing" in his well known article bearing that title,¹ the words of which were in turn extracted from Mr. Justice White's opinion for our Court in *Goss v. Lopez*² three terms ago.

For the purpose of my remarks, I propose to avoid any extended analysis of existing bodies of constitutional law, statutory law, whether state or federal, and decisional law of the courts. The first reason for taking this approach is that it avoids the necessity on the part of the speaker of acquiring a great deal of knowledge which he does not already possess. The second reason, and I hope an equally

* Associate Justice, Supreme Court of the United States.

1. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

2. 419 U.S. 565 (1975).

good one, is that I think something can be gained from looking at the subject in a purely jurisprudential way. The adversary system and its presuppositions, therefore, will not be examined on the basis of what the Constitution of the United States requires or what rights various statutes or decisions may provide. Instead, I will try to take the measure of our adversary system as a useful tool in the maintenance of a good society or the building of a better society.

A society which can be described, even in part, as "adversary" assumes some sort of public system for dispute resolution. In this system the parties to the dispute will have an opportunity to make some sort of a pitch for their position to someone else whose job it is to resolve the dispute. The subtitle of this forum further focuses on the use of litigation to solve what are described as "social problems," thereby, at least to me, intimating a problem the dimensions of which exceed the importance of the resolution of the particular controversy to those immediately embroiled in it. We all know there has been a great deal spoken and written about the use of the courts and of the law as a vehicle for social reform,³ and there will undoubtedly be a great deal more spoken and written on the same subject. It is one that cannot fail to attract the abiding interest of anyone interested in a self-governing society such as ours. Because so much has been spoken and written on this particular aspect of the subject of today's forum, I have chosen to go at the matter from another angle.

I will first suggest that the adversary system *can* be used in a broad spectrum of situations. Some of these clearly call for such proceedings in all but the most exceptional circumstances, but in others adversary proceedings entail substantial risks as well as advantages. I will then briefly explore what it is about this latter class of situations that counsels rejection of dispute resolution through a hearing before an impartial tribunal. I will concentrate particularly on those instances in which disruption to a continuing and valuable institutional relationship is threatened by a completely adversary proceeding.

Adjudicatory review of the decisions of certain institutions, while perhaps ensuring a "better" decision in some objective sense, can only disrupt ongoing relationships within the institution and thereby hamper the ability of the institution to serve its designated societal function. While we might conclude that the harm done to these institutions is more than offset by the advantages of impartial

3. For a recent discussion of my views on this topic, see Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

review of the institution's decisions, at a minimum we must be aware of the harm we are doing to these institutions and be very certain that we are satisfied with the overall results of adversary review. Finally, after some brief philosophical musings, I hope it will become evident that while my position on this issue cannot easily be labeled "conservative" or "liberal" according to any modern day understanding of those terms, I do find myself in very good philosophical company when I express some skepticism about the desirability of adversary proceedings in a number of situations.

An adversary society which employs litigation to solve social problems, or even disputes of far less moment, necessarily assumes correlative rights and duties as between one individual and another and as between the individual and the government. Only if there are such rights and duties, which are brought into play by the existence of certain happenings, is there any litigable issue. Lawyers and judges take for granted not only the existence of an adversary system for the resolution of disputes, but assume, often with very little critical analysis, that the advantages of such a system uniformly outweigh its disadvantages. Those of us brought up in the legal tradition tend to feel that our relationships with virtually all of the people and the institutions with whom we have contact should be regulated by law. This is not to say that there is to be a preference for forbidding conduct rather than allowing it, but only that the law speaks in both situations. This essence, though volumes have been devoted to it, is probably encapsulated best in Bracton's Latin phrase inscribed on the Langdell Hall of Harvard Law School: "*Non Sub Homine sed Sub Deo et Lege*," which can be translated as, "Not under man, but under God and the law." I am suggesting that the "adversary system" with its use of litigation is not capable of being valued in gross, and that its uncritical expansion is demanded neither by Bracton's maxim nor by the general principles we associate with a government of law.

The adversary system is best viewed as an expansive continuum. At one end of the continuum is the traditional common law writ of habeas corpus, which is unquestionably desirable. At the other end of the continuum is a series of specific examples which I will describe to you. It seems to me that the desirability of submitting these examples to an adversary process is subject to a great deal of doubt. Let us begin at one end of the continuum with the writ of habeas corpus, which signifies the right of one held in official custody to sue out a writ whereby the judge of some court of law will call upon the official custodian to justify to the court the reasons for detaining the prisoner. What should be required by way of explanation sufficient to satisfy the court issuing the writ is not the subject

of this discussion. Whether it should be invariably sufficient that the petitioner is held pursuant to a judgment of conviction and sentence rendered by a court of competent jurisdiction, or whether the habeas court should be authorized to further inquire into other issues of fact or law which the petitioner wishes to raise, in no way detracts from my basic thesis that the writ of habeas corpus, as understood in English common law, is undoubtedly *the* most basic example of the adversary system in action. So long as individual freedom is recognized as a matter of vital concern in society, the deprivation of that freedom by a representative of the society should be all but invariably sufficient to call into play an adversary process whereby the detention must be justified before what may be called in the familiar language of the law "a neutral magistrate."

Some may ask why the word "invariably" in the previous sentence should be qualified by the phrase "all but." But the qualification is not mine; it is that of the Founding Fathers, expressed in article I, section 9 of the Constitution of the United States in these words: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁴

Thus, jealous as they were of the writ of habeas corpus and highly as they valued individual freedom, they did not give the writ unqualified constitutional protection. Rather, when Congress appropriately provides, one who is wholly innocent of any wrongdoing but is nonetheless seized and held in the custody of the national government may not be heard even to assert or try to prove these claims under the adversary system in our courts. This is surely rather convincing evidence that in certain rare situations the Founders viewed the individual as, at least temporarily, having *no* rights which he might assert against the government. If this be true of a claim to personal liberty from wrongful seizure by the government, without any pretense of there having been a trial or judgment of conviction, then surely there must be supportable grounds for even greater reservations about the adversary system and the pitting of one individual against another or the individual against the government with a neutral magistrate as referee, in contexts less historically significant than that of governmental abridgement of personal liberty.

Two general classifications of cases outside of the traditional field of personal liberty come to mind in which courts have recognized that decisions of nongovernmental institutions which affect

4. U.S. CONST. art. I, § 9, cl. 2.

their members adversely shall not be reviewable under the normal adversary process.⁵ Those situations will be described by way of example. One such example is *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevic*,⁶ decided by our Court two terms ago. There, a dispute had arisen between two factions of the Serbian Orthodox Church in North America, each faction seeking control of the property and assets of the church. The Supreme Court of Illinois, applying to this case the law that it would have applied to disputes arising among members of other voluntary organizations, ruled in favor of the faction which had lost within the ecclesiastical court system.⁷ Our Court reversed the judgment of the Supreme Court of Illinois, saying that, because of the first amendment's protection of the free exercise of religion, no state court is free to apply its own law in such a way as to overturn the decision of an ecclesiastical court in a situation such as this.⁸ Thus, however wrong the decision of the ecclesiastical court may have been, however "arbitrary and capricious" it may have been under the standards of administrative review, this type of claim is not to be put to the test under the adversary system. The reason, according to our Court, is again to be found in the Constitution. The Constitution places a higher value on religious freedom than it does upon neutral resolution of disputes which may arise between factions within a church.

Another, and very important, example of a type of dispute which is not submitted to customary adversary resolution in courts is the claim of an individual worker under a collective bargaining contract that the employer has violated some provision of a contract and thereby harmed the worker. Since most collective bargaining agreements contain arbitration provisions, and since courts have held for a number of years that remedies under the contract must be exhausted before resorting to the courts, it may be fairly said that this type of dispute is kept out of the courts largely as a matter of voluntary consent. But this is not a satisfying or consistent explanation of the extreme reluctance of the courts to entertain litigation, not only involving disputes between individual employees and their

5. For several reasons which have seemed sufficient to me, I have omitted the entire subject of official immunity, which could very well be treated as another example, and a very important one, of a legal doctrine which permits cognizable wrongs to go unredressed because of the high social cost of redressing them.

6. 426 U.S. 696 (1976).

7. *Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevic*, 60 Ill. 2d 477, 328 N.E.2d 268 (1975), *rev'd*, 426 U.S. 696 (1976).

8. *Serbian E. Orthodox Diocese for the United States & Canada v. Milivojevic*, 426 U.S. 696, 708-25 (1976).

employer under a collective bargaining contract, but also involving claims by employees that the collective bargaining representative failed properly to represent them in the processing of the grievance. There are rather clear implications in more than one opinion from our Court that the institution of collective bargaining and the labor union as an institution are both entities which may not be subjected to quite the same degree of adversary exploration as comparable institutions in other areas of economic life.⁹

Many years ago, I had the privilege of being a law clerk to Justice Robert H. Jackson when he was a member of our Court. Long before I came into his service, he had written the Court's opinion in *J.I. Case Co. v. NLRB*,¹⁰ wherein an employer insisted that it had no statutory obligation to bargain with a union respecting individual employment contracts which it had negotiated with its employees. Our Court upheld the finding that this action by the employer constituted an unfair labor practice and, in so doing, made the following observation:

But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. . . . The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. . . . The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result.¹¹

9. See, e.g., *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

10. 321 U.S. 332 (1944).

11. *Id.* at 338-39.

In a case decided nearly a quarter of a century later, *Vaca v. Sipes*,¹² the Court held that an individual employee could not compel the union, which was his collective bargaining representative, to take his grievance to arbitration regardless of the union's view of its merit, because if the law were otherwise "the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."¹³

In the case of the relationship between the employee, the employer and the union, the source of the law has been an act of Congress as interpreted by the Court.¹⁴ The Court found that the effect of the law was that individual rights, which would otherwise have been recognized, were on particular occasions to be sacrificed to the process of collective bargaining and the contracts which were reached through collective bargaining.¹⁵

At this point, it may be a good idea to step back for a moment and take a look at some of the policies which preserve institutional decisions against claims of individual injustice in light of the principles underlying a self-governing democracy.

There is a great tendency among us to think that in purely definitional terms "self-government" and "democracy" include or somehow subsume individual liberty and freedom. But this simply is not the case, and no one has better demonstrated it than E. H. Carr in his book, *The Soviet Impact on the Western World*:

Confusion of thought is often caused by the habit common among politicians and writers of the English-speaking world of defining democracy in formal and conventional terms as "self-government" or "government by consent." What these terms define is not democracy, but anarchy. Government of some kind is necessary in the common interest precisely because men will not govern themselves. "Government by consent" is a contradiction in terms; for the purpose of government is to compel people to do what they would not do of their own volition. In short, government is a process by which some people exercise compulsion on others. This is as true of democracy as of other forms of government; the criteria are by whom, by what means, and for what, the compulsion is exercised.¹⁶

12. 386 U.S. 171 (1967).

13. *Id.* at 191.

14. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1976).

15. See, e.g., *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

16. E. CARR, *THE SOVIET IMPACT ON THE WESTERN WORLD* 10-11 (1947); see *THE FEDERALIST* No. 51 (J. Madison).

If Carr is right, as I believe he is, and the very concept of government means the rejection, albeit by a democratic process, of certain claims to individual liberty, the same is true of the rejection of such claims by private institutions such as churches or labor unions. The refusal of the courts to review these claims as they would claims of individual rights made by members of other voluntary associations means that the law in these particular cases is attaching special weight to the institutional decision. This special weight is given perhaps because adversary litigation of the propriety of those decisions would have more disadvantageous consequences in terms of diminishing the usefulness of the institution than would the ultimate resolution by the court of the claim of individual right.

Let us turn now to another institution, the family, which is so familiar to us all that we may not even think of it as an "institution." The degree to which family decisionmaking is to be subjected to the adversary process has only recently been the subject of any substantial litigation. The family, therefore, is not an institutional decisionmaker which is protected by an established body of law in the same manner as hierarchical churches and labor unions are protected. But traditionally, parents have made decisions for minor children of tender years, and the propriety of these decisions has not been thought to be reviewable in any other forum. Except in the most extreme of cases, however misguided the parents' judgment may appear to the hypothetical "neutral magistrate," children have simply not been thought of as having rights which they might assert against such parental decisions. A prototype of the sort of decision I have in mind is the case where the child is suffering from a serious disease and a competent physician recommends, after all palliative measures have failed, that an arm or leg be amputated in order to stop the spread of the disease. Traditionally, in our society, if the parents choose to follow such a recommendation, a child of tender years, though he may be bitterly opposed to it, is not thought to have any claim cognizable by a court or agency outside of the family. The mother and father, as the head and governors of the family, have been thought of as speaking for the child in such a situation.¹⁷

There has undoubtedly been a movement in recent years to recognize what has been loosely described as "the rights of children," but that movement has still fallen far short of overturning

17. I cheerfully acknowledge my indebtedness in this portion of the discussion to Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. Rev. 605.

the principle which I have just described. Cases such as *In re Gault*¹⁸ and *Tinker v. Des Moines School District*¹⁹ did indeed recognize that the freedom of speech and claims to fairness and judicial process guaranteed by the Constitution were not limited to adults. But in these cases and those which have followed them, the courts were confronted with claims asserted by children with the support of their parents *against* the state. The claims in those cases are thus in quite a different posture than a claim asserted by the child to have a court or agency review a parental decision to which he objects. Other more recent cases from our Court, arising in the context of a minor's right to obtain an abortion, have come closer to recognizing a right of the child at least independent of the parents, if not opposed to them.²⁰

The question remains, however, why it is that parents have been allowed to speak for their children with respect to so many decisions of vital importance in their children's lives. At least until very recently, there has been no thought that the child should have any hearing in a forum outside of the family in which to challenge the parental decision. Undoubtedly, it is largely traceable to the importance of the traditional family in our society, but I think a strong case can be made for the proposition that a legal doctrine of *laissez-faire* in this area has very defensible juridical roots.²¹ Any sort of adversary hearing which pits parent against child is bound to be disruptive, placing stresses and tensions on intra-familial relationships and weakening the family as an institution. I am no more prepared to say that the preservation of the integrity of the family as an institution is the *summum bonum* of the law than I am prepared to place a similar laurel wreath on the concept of an adversary hearing. But, I think the integrity of the family as an institution is an important and necessary factor which must be considered in deciding whether, in an increasingly adversary society, children shall have rights which may be asserted against their parents in an adversary context.

18. 387 U.S. 1 (1967).

19. 393 U.S. 503 (1969).

20. See *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). For a discussion of the cases involving constitutional claims of parents to supervise the actions of their children and cases involving successful claims of children to assert their rights in opposition to the decision of their parents, see 44 *BROOKLYN L. REV.* 63 (1977) (analyzing cases from *Meyer v. Nebraska*, 262 U.S. 390 (1923), to *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977)). I acknowledge my indebtedness to this student note for this portion of my discussion.

21. See Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 *Geo. L.J.* 887, 891-910 (1975).

I have assumed throughout these remarks that adversary litigation will indeed bring to light the truth with respect to the facts and enable the decisionmaker to decide better whatever legal questions are involved. I realize that reservations have been voiced as to the ability of the adversary system to accomplish these results.²² But my hypothesis is not that an individual's claim for redress of wrong would be better vindicated in a nonadversarial system, but that in some situations it is best not vindicated at all.

Because specific examples can shed more light on many jurisprudential discussions than can abstractions, I refer to *Sherlock v. Stillwater Clinic*,²³ a recent case decided by the Supreme Court of Minnesota. In *Stillwater Clinic*, the plaintiffs, following the birth of their seventh child, consulted a doctor in Stillwater, Minnesota, and, as the Supreme Court of Minnesota put it, "discussed with him the various medical alternatives available to them to ensure that their family would grow no larger."²⁴ The doctor recommended that the father have a vasectomy. The operation was performed in a clinic of which the doctor was a member. On the record it was at least permissible to find that the representation was made to the parents that normal sexual intercourse would not thereafter result in conception of any children.²⁵ The mother did become pregnant and delivered a healthy baby boy a little more than a year after the operation. Following this occurrence, the parents sued the doctor and the clinic for negligence and sought to recover as an item of damages the cost of educating and raising the child until the age of majority.

The majority of the Supreme Court of Minnesota, applying normal rules of damages, held that if such damages could be proved they were recoverable.²⁶ The court noted that prior to 1967 such "wrongful birth" actions had been looked upon with disfavor by the courts, and plaintiffs in such cases had generally been unsuccessful. But the court pointed out that in the intervening decade, the majority of courts confronting the issue had "allowed recovery for all damages proximately caused by the physician's negligence, includ-

22. See Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975).

23. — Minn. —, 260 N.W.2d 169 (1977).

24. *Id.* at —, 260 N.W.2d at 171.

25. At trial, the father testified that the physician neither advised him to undergo further tests nor to continue using contraceptives. The semen test, however, had revealed the presence of live sperm cells which indicated that the father was not yet sterile. The parents, relying on the erroneous belief that the operation had been successful, resumed normal sexual relations without contraceptives. *Id.*

26. *Id.* at — & n.6, 260 N.W.2d at 174 & n.6 (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* §§ 41-42 (4th ed. 1971)).

ing the cost of rearing the child during his minority. These courts have ordinarily required that damages be reduced by any benefits conferred by the child through an application of the 'benefit rule.'"²⁷ The court opined:

Pretermittin moral and theological considerations, we are not persuaded that public policy considerations can properly be used to deny recovery to parents of an unplanned, healthy child of all damages proximately caused by a negligently performed sterilization operation. Analytically, such an action is indistinguishable from an ordinary medical negligence action where a plaintiff alleges that a physician has breached a duty of care owed to him with resulting injurious consequences.²⁸

The court went on to say:

Most troublesome is the matter of allowing recovery for the costs of rearing a normal, healthy child. Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents, no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the cost as a matter of law.²⁹

Two justices of the Supreme Court of Minnesota took no part in the decision, and the Chief Justice and Justice Peterson dissented. The dissenting opinion concludes with this language:

In so far as the majority decision permits parents to recover damages by proving their healthy child a net burden to them, it is contrary to public policy, in my judgment. We should not permit the courts to be used for this purpose. I would direct the trial court to enter judgment for the defendant.³⁰

There is no doubt from reading the opinion of Justice Rogsheske for the majority of the court that he, too, was troubled by the case. The majority opinion concludes with this paragraph:

The result we reach today is at best a mortal attempt to do justice in an imperfect world. In this endeavor we are not unmindful of the deep and oftentimes painful ethical problems that cases of this nature will continue to pose for both courts and

27. *Id.* at ____, 260 N.W.2d at 174.

28. *Id.*

29. *Id.* at ____, 260 N.W.2d at 175.

30. *Id.* at ____, 260 N.W.2d at 177 (Sheran, C.J., dissenting).

litigants. It is therefore our hope that future parents and attorneys would give serious reflection to the silent interests of the child and, in particular, the parent-child relationships that must be sustained long after legal controversies have been laid to rest.³¹

I would be hard pressed to find any case which more clearly than this one embodies the adversary system of justice carried to its ultimate conclusion, with all of the advantages and disadvantages that flow therefrom. The Supreme Court of Minnesota, in its opinion, referred to an earlier case disallowing recovery for this type of damages, which had described the child conceived after sterilization as an "emotional bastard" by reason of his learning that his birth was attributable to a doctor's negligence and not his parents' desires.³² If we reflect for a moment and remember that here at least we are not talking about what is required by the Constitution of United States, the Constitution of Minnesota, Minnesota statutes or Minnesota decisional law, it seems to me that the result in this case must inevitably give considerable pause to even the most vigorous advocate of the adversary system as well as the advocate of free access to the courts for redress of individual wrongs. What is the effect of such a lawsuit going to be upon the relationship between these parents and this child from the time of his birth through the subsequent seventeen or eighteen years which he will, in the normal course of events, spend with his parents?

But equally troubling is the fact that this decision was apparently made without careful acknowledgement and weighing of the values being undercut by the introduction of adversary proceedings into the family setting. The dissenting judges did no more than assert that they thought this decision "against public policy." The majority opinion articulated to a greater degree the detrimental impact that this sort of lawsuit might have on parent-child relationships. The author of the majority opinion thought, however, that this was basically a question for the attorneys and litigants to resolve, and if they chose to invoke the judicial process the court should proceed to entertain the suit.

Let me turn to one final example of the redress of grievances through the adversary system of justice. A lead article in the *Michigan Law Review* contains this language:

Through the repeated efforts of a woman legislator, Indiana has abolished actions for seduction of females over twenty-one years

31. *Id.* at ____, 260 N.W.2d at 176-77 (footnote omitted).

32. *Id.* at ____, 260 N.W.2d at 173 (citing *Shaheen v. Knight*, 6 Lyc. 19, 23, 111 Pa. D.&C.2d 41, 45 (1957)).

of age, for breach of promise to marry, and for criminal conversation and alienation of affections. Almost immediately New York, and shortly thereafter Illinois, passed similar legislation, and at least ten other states are now considering analogous proposals.³³

Lest you think that the developments referred to in this article are the result of the women's liberation movement, I must reveal to you that the article appeared in May, 1935. The author, Nathan P. Feinsinger, then an Associate Professor of Law at the University of Wisconsin, described a movement for legislative change which I can remember reading about in the Sunday pictorial supplements of the Milwaukee newspapers when I was growing up in Wisconsin. "Heart balm" suits had been historically recognized by the courts for many years. Included within this colloquial term were actions for breach of promise to marry, seduction and alienation of affections. Professor Feinsinger's article, after discussing the arguments pro and con, made these observations about the motivation for statutory abolition of such claims for damages:

The surface explanation of this unusual legislative receptivity is a reaction against the prevalence of blackmail peculiar to these actions, the incongruity of applying the damage remedy to injured feelings, and the perversion of that remedy by courts and juries to express their emotional sympathy and moral indignation. . . . While the importance of the affectional relations of husband and wife may still justify their legal protection, the social cost of such protection by means of an action for damages may exceed its worth.³⁴

Near the end of the article, after discussing arguments in favor of abolishing such actions, the author states that because such actions are peculiarly susceptible to abuse, they were singled out from other actions to redress intentional injuries to feelings. He then comments: "Three legislatures have presumably weighed these results against the sacrifice of meritorious claims and have abolished the actions by large majorities."³⁵

It seems to me that a common thread runs through the remarks I have made. Each of the examples I have mentioned involved situations in which courts either have, or arguably should have, refused to have an adversary hearing on the merits of a claim because of some overriding public policy which outweighed the virtues of an adversary hearing. The policies militating against recognition of the

33. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 979 (1935).

34. *Id.* (footnote omitted).

35. *Id.* at 1009.

right to a hearing on a particular claim may, of course, be quite different. And in trying to analyze them, it is easy to confuse substantive law with rules of pleading and procedure. Perhaps a specialist in the latter disciplines would simply state that all of my examples amount to complaints which merely fail, or which I think should fail, to state a claim for which relief may be granted. Obviously, therefore, no hearing, trial or any sort of adversary fact-finding process is required under the Federal Rules of Civil Procedure or cognate state rules of pleading and practice. But I think there is more significance to these examples than this somewhat tautological conclusion.

Many states abolished "heart balm" suits a generation ago because, as Professor Feinsinger observed, the benefits accruing from the recognition of meritorious claims were outweighed by the abuses resulting from allowing adversary trials of all such claims which alleged the necessary substantive elements of a claim for relief. The suspension of the writ of habeas corpus subordinates the very important right of an individual to demand judicial inquiry into the cause for his confinement by the government to the needs of the government in time of invasion or rebellion. The refusal of courts to inquire into whether religious denominations have properly applied ecclesiastical law is found in the first amendment's prohibition against governmental interference with the free exercise of religion. The extraordinary reluctance of courts to interfere with institutional decisionmaking in the area of collective bargaining and the strong arguments which can be made for a similar judicial reluctance in the case of the family, while having their source in differing kinds of law, seem to me to have this common thread: in each case, the litigation of an individual's claimed deprivation of a right would bring parties who must remain in a continuing relationship into the adversarial atmosphere of a courtroom. To those of us trained as lawyers and judges, the natural response is: "What other atmosphere would you expect in a courtroom than an adversarial one?" But I think the judgment of those lawmaking bodies which have been slow to allow the litigation of claims of individual deprivation in these situations has been that the very crystalization of the parties' differences in the adversary process may threaten the future of the institutional relationship.

Very likely few, if any, law students who have taken a course in evidence since Wigmore's great treatise on that subject was written have not been exposed to the author's observation that cross-examination "is beyond any doubt the greatest legal engine ever

invented for the discovery of the truth.”³⁶ But I think anyone who has been exposed to cross-examination in practice can see why Dale Carnegie never listed it among the numerous methods which he recommended for winning friends and influencing people. Generalizations in this area are indeed risky, but surely the adversary process, with all of its attendant judicial panoply, best serves its purpose when any continuing relationship between the contending parties is at an end. During an adversary hearing, the question before the court is simply whose rights have been infringed and what damage has been caused by the infraction. To pit children against their parents in these same surroundings, in order to determine whether an operation recommended by a physician should or should not be authorized by a court, may make for a better informed decision as to the propriety of the operation,³⁷ but may leave the family unit in a shambles.

If I am at least partly correct thus far, perhaps this analysis suggests that the use of adversary-type litigation to solve social problems may have more to commend itself in some situations than others. Examples at the polar extremes may be helpful in expanding this thesis. In *Gilligan v. Morgan*,³⁸ our Court reviewed a decision by the United States Court of Appeals for the Sixth Circuit in which the original plaintiffs had been students at Kent State University in May 1970 at the time when four students were killed by members of the Ohio National Guard. The original defendants included the Governor of Ohio at the time the suit was filed and the Commander of the Ohio National Guard. Injunctive and declaratory relief, but not damages, were sought.

Our Court ultimately held that the Sixth Circuit was wrong in directing the district court to decide whether the practices of the Ohio National Guard had led to the use of more force than was necessary to suppress civilian disorders. Putting to one side all of the complex constitutional and prudential principles which are bound to attend such a case, I think it can be said with reasonable assurance that then Governor Gilligan of Ohio, who had not been in office at the time of the Kent State shootings, had no continuing relationship with the student plaintiffs which would be jeopardized by a hearing on the merits of their claims. I think the same may be said for the Commander of the Ohio National Guard. Whatever other claims might be made against courts deciding this sort of a

36. 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (Chadbourn rev. ed. 1974).

37. But see Damaška, *supra* note 22.

38. 413 U.S. 1 (1973), *rev'g sub nom.* *Morgan v. Rhodes*, 456 F.2d 608 (6th Cir. 1972).

controversy, therefore, the claim that its very litigation would endanger the functioning of an existing societal institution could not be made.

But can the same be said of the *Stillwater Clinic* case?³⁹ Or, if you prefer, envision this hypothetical situation: An elementary school child has been diagnosed to have a malignant type of cancer which requires amputation of the child's leg in order to prevent the disease from spreading to the rest of the body and from ultimately proving fatal. The trauma to the family relationships which will result from the mere existence of this situation, without the least bit of judicial intervention, can hardly be overstated. But let us suppose that, notwithstanding the fact that the parents are following the recommendation of competent medical specialists in consenting to such an operation, the courts of a particular jurisdiction should decide that before the operation may be performed, the child must be furnished independent advice of counsel, and if the latter shall recommend it, a court hearing shall be held as to whether the operation should be performed. It may well be that the ultimate decision reached by the court as to whether the operation should be performed will be no worse than that of the parents, and perhaps it may be better. But can anyone seriously question that the very airing of this dispute in an adversary forum will further traumatize the relationships not only between the parents and the child, but very likely between one parent and the other?

One, of course, might ultimately conclude that the advantages of an adjudicatory hearing in this setting outweigh any harm done to the institutions. But, at a minimum, I think we must be aware of the societal interests being sacrificed in pursuit of providing an adversary forum for the vindication of what we perceive to be meritorious claims of individual right. I think we ought to judge each situation carefully to make sure that the game is always worth the candle.

I think it worth noting at this point that what I have suggested does not relate directly to the concern expressed by others that the judicial system is being overloaded.⁴⁰ Thus, not surprisingly, the solutions directed toward solving that problem, such as the proposal that Congress file a Judicial Impact Statement with every piece of

39. See *Sherlock v. Stillwater Clinic*, ____ Minn. ____, 260 N.W.2d 169 (1977) and text accompanying notes 23-32 *supra*.

40. The recent Cecil Sims Lecture Series focused on the current pressure on the judiciary which has been caused by a large caseload. For a collection of the presentations at that symposium, see *Discussion: Crisis in the Courts*, 31 VAND. L. REV. 1 (1978).

legislation,⁴¹ while perhaps meritorious, will do little to alleviate the concerns on which I am focusing. A Judicial Impact Statement will help determine if the courts can adequately deal with the increased case load resulting from certain legislation, but it will do nothing to increase our sensitivity to the potentially deleterious impact such legislation might have on existing institutions and the values embodied therein. Such a result could be obtained only if courts and legislatures were to consciously weigh in the balance the damage to socially desirable institutional relationships that could be caused by the creation or recognition of every new cause of action.

As I conclude, let me freely admit that there is an element of authoritarianism in the views that I have advanced this morning. The subordination of a hypothetically provable claim of individual wrong to the greater good of a private institutional arrangement does not sit well with those of us nurtured in the libertarian tradition of western civilization, with those of us who have at least figuratively sat at the feet of Bacon, John Locke, Adam Smith and Thomas Jefferson. But both the legal and the economic worlds in which those men lived have long since passed us by, and the atomistic individualism which may have undergirded some of their thought was never the doctrinal centerpiece of even the world in which they did live. Government, we have been told by more than one wise man, is the process by which liberty is reconciled with authority; and just as surely as we must strive to maintain a maximum amount of individual liberty, we must realize that authority, too, has its claim in a constitutional republic such as ours. Indeed, the very idea of law is ultimately based on the authority of the state to enforce that law, as events throughout our Nation's history have on more than one occasion demonstrated. Authority in this sense of the word is not only the indispensable condition of all government, including self-government, but it is the ultimate guardian against a state of anarchy in which only the strong would be free.

But there are subtler hues in the background of this subject than stark authority on one side and rampant liberty on the other. Friedrich Hayek's *The Road to Serfdom*,⁴² published a generation ago, is the philosophical embodiment of nineteenth century English liberalism.⁴³ Hayek would greatly doubt that there were very many justifications for allowing the state to deny claims of individual rights because of possible threat to institutions within the state

41. See Burger, *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 A.B.A.J. 504, 505-06 (1977).

42. F. HAYEK, *THE ROAD TO SERFDOM* (1944).

43. See *Introduction* in *ROADS TO FREEDOM* at xii-xiv (E. Streissler ed. 1969).

which would result from the litigation of those rights. In *The Road to Serfdom*, he castigates Auguste Comte, whom he describes as "that nineteenth century totalitarian,"⁴⁴ for describing claims of individual rights as against the state as "the perennial Western Malady, the revolt of the individual against the species."⁴⁵

If I had to choose between Hayek and Comte as philosophical godfathers, I would certainly choose the former. But the libertarians of our day, who regard any restraint on individual freedom, or at least any restraint of which they do not approve, as requiring an extraordinarily high degree of justification, have not captured the entire essence of a constitutional democracy. There are times when the claims of the individual should be subordinated to those of the "species," even if the species is not government itself but a private institution which serves a useful purpose.

Those who make our laws, and in a democracy that means just about all of us directly or indirectly, serve us poorly if they do not recognize that the world in which we live is an intricate web of relationships between people, private institutions and government at its various levels. Many agencies of government and many private institutions have existed for longer than any living person. While this should not confer upon them by prescription a power to ride roughshod over the claims of individuals, it should make courts and legislatures chary of submitting to de novo review by a neutral magistrate resolutions of an individual's claim by such an institution. I think the philosopher who saw this most clearly was Edmund Burke, who, though a Whig and a champion of the American colonists in their dispute with the mother country, was undeniably a conservative at heart. He abhorred the idea, espoused in turn by Hobbes, Locke and Paine, that the relationship between individual citizens and their government was essentially that of master and servant to be governed by the law of agency.⁴⁶ While he approved of many institutions and ideas which are totally anachronistic in our time, he did demolish, for me at least, the idea that society is based on nothing more than an implied contract between the citizens and their current government. Society for him included not only citizen and government, but institutions as well; it was bequeathed by our forefathers to us in trust for generations yet unborn. And though he never said so in so many words, I think he would have doubted the

44. See HAYEK, *supra* note 42, at 16.

45. *Id.*

46. There are, of course, significant distinctions between the political philosophies of Thomas Hobbes, John Locke and Thomas Paine, which do not seem to me to be essential to the point which I address here.

wisdom of subjecting to the adversary process every dispute that might arise out of this complicated network of relationships. Perhaps I can do no better than close my remarks with a quotation from his familiar *Reflections on the Revolution in France*:

Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure—but the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primæval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact sanctioned by the inviolable oath which holds all physical and all moral natures, each in their appointed place.⁴⁷

47. E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 93-94 (E. Rhys 1910). Burke criticized the notion of a social contract, which was drafted without a careful consideration of a variety of traditional institutions, as follows:

The third head of right, asserted by the pulpit of the Old Jewry, namely, the "right to form a government for ourselves," has, at least, as little countenance from anything done at the Revolution, either in precedent or principle, as the two first of their claims. The Revolution was made to preserve our *ancient* indisputable laws and liberties, and that *ancient* constitution of government which is our only security for law and liberty. If you are desirous of knowing the spirit of our constitution, and the policy which predominated in that great period which has secured it to this hour, pray look for both in our histories, in our records, in our acts of parliament, and journals of parliament, and not in the sermons of the Old Jewry, and the after-dinner toasts of the Revolution Society. In the former you will find other ideas and another language. Such a claim is as ill-suited to our temper and wishes as it is unsupported by any appearance of authority. The very idea of the fabrication of a new government is enough to fill us with disgust and horror. We wished at the period of the Revolution, and do now wish, to derive all we possess as an *inheritance from our forefathers*. Upon that body and stock of inheritance we have taken care not to inoculate any scion alien to the nature of the original plant. All the reformatations we have hitherto made have proceeded upon the principle of reverence to antiquity; and I hope, nay I am persuaded, that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example.

Id. at 29 (emphasis in original).

The reverence for traditional institutions espoused by Burke does not preclude a forward-looking or progressive view of government. Such reverence merely provides that change will be tempered by experience. Burke posited that reformers who abandoned the inheritance of institutions bequeathed by their forefathers threatened the long-term success of reforms they hoped to institute. He leveled this charge at his opponents: "People will not look forward to posterity, who never look backward to their ancestors." *Id.* at 31.