ISLANDS OF CIVIC VIRTUE?
Lawyers and Civil Justice Reform

Stephen Parker[*]

> [T]he free market liberal faces the problem of how such islands of civic virtue might be secured in a world of generalised self-seeking. It is unlikely that he will be able to come up with a better answer than the one offered by professionalism.[1]

Introduction

This article is about lawyers and professional behaviour in litigation. Its basic argument is that there is a problem of civil justice which can only be adequately addressed if the nature of civil litigation is reconceptualised and the role of lawyers is clarified and adjusted. Civil litigation is, in part, a public activity which has virtuous purposes. Being a 'litigator' (ie a litigation lawyer) is an ethical activity in itself. 'Legal ethics' should be seen not simply as negative restraints on certain kinds of behaviour but also as a source of positive obligations to promote the ends of legal processes.

The opening quotation is from two American critical scholars who are better known for debunking the legal profession than supporting it. Essentially what is happening now, however, is that heirs of legal realism, like Gordon and Simon, are so sceptical about the capacity of rules and enforcement procedures to constrain self-interested behaviour that they are turning back to personal and group morality as a means of regulation. Their recent position on lawyers introduces a theme to be explored here in the context of civil justice. How, in an adversarial system seemingly based upon 'generalised selfseeking', can we secure some islands of civic virtue?

---

* Professor of Law, Griffith University. This article is a revision of a professorial lecture with the same title, delivered on 5 December 1996. The lecture attracted some public attention and is cited at various points in the 1997 Issues Papers of the Australian Law Reform Commission (ALRC), released as part of its reference into the adversarial system of litigation: see ALRC (1997b) *Rethinking the federal civil litigation system*, Issue Paper no 20, ALRC, chapter 11; ALRC (1997c) *Rethinking legal education and training*, Issue Paper no 21, ALRC, chapter 8; and ALRC (1997a) *Rethinking family law proceedings*, Issue Paper no 22, ALRC, chapter 12. I wish to thank the TC Beirne School of Law at the University of Queensland for its hospitality during a period of study leave when the lecture was prepared and the Queensland Law Society for providing a venue for its delivery. I also thank my colleagues John Dewar and Shaun McVeigh for their constructive comments.

1 RW Gordon and WH Simon (1992) 'The Redemption of Professionalism?' in RL Nelson et al (eds) *Lawyers' Ideals/Lawyers' Practices*, Cornell University Press, p 235.

The answer suggested in this article involves a revival of debates about professionalism in the practice of law. By professionalism I am referring to more than an occupational group having some specific standards and adhering to them. I mean also that the group occupies, and is conscious of occupying, an office or role which is oriented to promoting a public good. Whilst there is undoubtedly merit in the current reforms to civil procedure, outlined below, and perhaps in moves to support a competitive market in legal services, if there is a solution to the problems we face, it lies in some adjustment to professional norms and conduct. Professionalism can safeguard reforms from subversion. It can modify or restrain behaviour where the issues are too varied or complex to be covered by rules or procedures laid down in advance. It can distribute fairness where markets cannot operate.

These remarks might seem uncontroversial, even old-fashioned. It is rare to read a law reform report or an article or speech by a judge or a president of a professional body which does *not* call for some re-awakening of legal professionalism. Despite these almost ritual references, however, our current thinking about the nature of the professional and ethical litigation lawyer is unclear and perhaps a bit shallow. New perspectives may be necessary and these may well require unwelcome shifts in how lawyers see themselves.

The Civil Justice Problem

Australia and many similar societies seem to have a major problem with access to civil justice.[2] The existence of this problem is not as easy to demonstrate empirically as may be thought. There are conceptual difficulties with the notion of 'access' and with our idea of 'civil justice'.[3] Even if we can settle on a meaning for these terms, we have no objective indicator of when the stage of 'problem' is reached. After all, a system in which anyone with a cause of action could pursue it costlessly through the courts would be enormously expensive. The resulting burden on the public purse might wipe out the budget for health or social security, so that reasonable questions could be asked as to why, in a world of finite resources, justice is so much more important than health or a basic standard of living. Justice, it seems, must always be rationed to some extent.[4]

Analysing 'The Problem'

It may be, as the sociology of social problems suggests, that 'problems' of this kind are socially constructed rather than objectively identified. Similar circumstances might have long prevailed but, for one reason or another, they

2 A clear account of the perceived problem in Australia can be found in D Ipp, 'Reforms to the Adversarial Process in Civil Litigation' (1995) 69 *Aust LJ* 705, p 790.

3 See H Genn (1995) 'Access to Just Settlements: The Case of Medical Negligence' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press, p 393.

4 G Hazard, 'Rationing Justice' (1965) 8 *J L & Eco* 1.

come to be defined as 'a problem' at particular moments.[5] Three indicia that we currently have 'a problem' are as follows:

1. the political process has been mobilised to do something about it;
2. courts and judges individually are asserting that no less than a 'crisis' exists;[6] and
3. law reform bodies and ad hoc enquiries are being commissioned to look into one aspect or another of the civil justice system, or the whole thing.

Dissecting the problem is not straightforward but a consensus has arisen that its components at least include the following:

1. the high cost of litigation to the litigant, whether winner or loser;
2. the high cost of litigation to the public purse in running the courts and related institutions;
3. delay (on the principle that justice delayed is justice denied);
4. a sense that justice is by no means always done, however long the wait, taking 'justice' to mean rightful causes of action or defences being upheld through fair processes;[7] and
5. a sense that even when a rightful claim or defence is upheld, it can involve unnecessary psychological and financial warfare.[8]

---

5 See generally RP Lowry (1974) *Social Problems*, Heath, ch 4. Note Dingwall and Durkin's remark that 'there never seems to have been a Golden Age when civil justice was speedy and cheap': R Dingwall and T Durkin (1995) 'Time Management and Procedural Reform' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press, p 372. See also M Zander (1995) 'Why Lord Woolf's Reforms Should Be Rejected' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press, p 80: 'The problems are what they have always been (and probably always will be) excessive cost, excessive delay and excessive complexity'.

6 See, for example, the Chief Justice of the High Court's claim that [i]t is not an overstatement to say that the system of administering justice is in crisis': Sir Gerard Brennan (1996) 'Key Issues in Judicial Administration', paper presented to the AIJA Annual Conference, Wellington, NZ, 4 September, p 20.

7 This may be thought a limited approach to justice but if the system cannot deliver even this, then it cannot deliver a broader conception.

8 These indicia may be related, of course. In her empirical study of personal injuries actions in the United Kingdom, Hazel Genn concluded that:

> [u]nless solicitors can allay their clients' fears, most plaintiffs will substantially compromise their claim in order to avoid the experience of standing in the witness box in the High Court. This is a fact which has not escaped the attention of defendants.
>
> H Genn (1987) *Hard Bargaining*, Clarendon Press, p 98.

Less commonly observed is that the problem may be more one of the cumulative effects of small acts, many of which are unexceptionable in themselves, than of occasional egregious misconduct. To illustrate this, consider a medical analogy. Some medical experts say we have a looming problem with antibiotics. Doctors, conscientiously dispensing antibiotics in the interests of their patients' health, seem to be creating a situation where there is a risk to everyone's future health because resistant strains of bacteria may be developing. Doctors may benefit from their current practises — because satisfied patients presumably return to them — but these dispensing habits of doctors can be described as largely disinterested. It is the cumulative effect of single instances of disinterested behaviour that is causing the problem.

One possible response to bacterial resistance is to funnel more money into scientific research for *new* antibiotics, in a continuing game of being one step ahead of the bacteria. Another answer is to try somehow to adjust the prescribing practices of doctors and to educate patients into accepting the reasons for them; in other words, to make use of professional restraint which, when internalised, is basically free. One possible response to the civil justice problem is to invent new procedures and pay highly qualified people to monitor them in detail. Another answer is to target the micro decision-making that is contributing to the problem of immune strains of governments and taxpayers.

Later in this article, I argue that we can and must adjust the prescribing practices of lawyers. Somehow, we need to effect a re-positioning of lawyers within the justice system so that the cumulative effects of thousands of tiny decisions in litigation in each jurisdiction do not threaten the viability of civil justice. A choice of roles is open. The medical profession can adopt a minimal role of reducing illness or a more expansive one of promoting health. To accomplish the latter, it may need to ease off on the former. The legal profession can have a minimal role of client protection or a more expansive one of promoting justice. To accomplish the latter, it may need to ease off on the former.

To lay the groundwork for this argument, we need to consider briefly some of the recent activity in the area of civil justice reform.

Current Responses to the Problem

The current responses to the perceived problem of civil justice include:

1. encouragement of alternative methods of dispute resolution (ADR);

2. changes to civil procedure; and

3. greater court control over the progress of litigation: from a limited form of case-flow monitoring to full hands-on, managerial judging ('case management').

In addition, we may be seeing the judiciary responding in an organic fashion through their decisions; for example, by developing case law on class actions, abuse of process, dismissal for want of prosecution and costs penalties.[9]

Like most things, ADR has its strengths and weaknesses but its most ardent exponents do not claim that it can be a complete replacement for adjudication. To the extent that fully informed and autonomous actors prefer to use alternatives to adjudication, who would wish to stop them?'[10] The concern is that, in at least some instances, ADR is being used reluctantly as a second best precisely because litigation leading to adjudication is currently regarded as third best.

The second response, reform of civil procedure, stems partly from the need to bring processes into line with new circumstances and modern technologies.[11] Much of it, however, stems from the same motive as lies behind case management: ie to effect some change in the way that parties and their lawyers control the instigation, conduct and pace of litigation.[12] There is presently a remarkable convergence of view that the adversarial culture of lawyers or, as the Chairman of Queensland's now dismantled Litigation Reform Commission put it, the 'adversarial imperative'[13] is a major source of cost, delay and unfairness, particularly in the context of technical and labour intensive procedures and current billing practices. In England, Lord Woolf's inquiry — the latest in a long line of major inquiries into civil procedure — came to a similar conclusion.[14] In the words of Professor Ian Scott:

---

9 See, for example, the High Court of Australia's decisions in *Carnie v Esanda Finance* (1994–95) 182 CLR 398; *Williams v Spautz* (1992) 174 CLR 1; and the English Court of Appeal decision in *Shrun v Zalejska* [1996] 3 All ER 411, where a preparedness was shown to draw inferences of prejudice to the defendant from the fact of delay, even though the defendant could not produce detailed evidence of the ways in which witnesses' memories had faded.

10 This, of course, begs the question whether bargaining is ever really equal or consent truly free. See W Twining, 'Alternatives to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *MLR* 380, p 385.

11 In 1994, for example, and well ahead of some other jurisdictions, Queensland acknowledged the existence of the photocopier in its rules on disclosure of documents between parties.

12 The central idea behind the major reforms recommended by Lord Woolf in the Britain, according to his 1995 Interim Report, was to redress what he saw as the source of the problem: adversarial tactics: LJ Woolf (1995) *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Chancellor's Department. See also AAS Zuckerman (1995) 'Reform in the Shadow of Lawyers' Interests' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press, p 61. Zuckerman agrees with this argument, saying that 'the cause of complexity, delay and cost is due not to the nature of our procedural devices but, rather, to the excessive and disproportionate use and abuse of the procedural tools' (p 62).

13 GL Davies, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and Their Rationale' (1996) 5 *J Jud Admin* 201, p 203.

14 There have been about 60 inquiries into some or all aspects of civil procedure in

> Lord Woolf and others have spoken of the need to 'change the culture' of lawyering. It is said that litigators should be 'more cooperative' in seeking to settle cases and less 'adversarial' in their attitudes towards one another. It is said that a new spirit of cooperation between lawyers will assist in reducing 'interlocutory warfare' and will facilitate greater use of mediation and conciliation as means of dispute resolution.[15]

Justice David Ipp of Western Australia has observed:

> [A]dversarial excesses, such as dubious delaying tactics, claims brought for tactical reasons rather than their true merit, sham defences, and unnecessary motions are frequently to be observed.[16]

Examples of recent or proposed procedural reforms in common law systems which are designed to reduce or render less effective this adversarial mindset include:

- ◊ mediation or case appraisal as a pre-condition of instituting certain kinds of proceedings;
- ◊ mandatory mediation or case appraisal before trial;
- ◊ changes to pleading rules, in an attempt to identify more clearly the main issues in dispute and to discourage bare denials;
- ◊ changes to the discovery stage, so that documents which relate only to issues directly in dispute are to be disclosed;
- ◊ removing legal professional privilege from experts' reports;
- ◊ restricting the use of interrogatories;
- ◊ requiring witness statements to be exchanged prior to the trial, so that they will usually take the place of evidence-in-chief;
- ◊ requiring that the identity of relevant witnesses be disclosed even if the party is not proposing to call them because they do not advance, or might even harm, that party's case;
- ◊ costs penalties for rejecting a settlement offer and then failing to improve on it at trial;
- ◊ expanding the applicability of summary judgment in an attempt to weed out weak claims or defences at an early stage;
- ◊ facilitating earlier determinations of specific issues through separate hearings that might obviate the need for a full trial;
- ◊ multi-tracking and fast-tracking of certain kinds of cases; and
- ◊ allowing fee arrangements closer to contingency fees, such as cost uplifts and conditional fees.

Case management is potentially the most sweeping form of procedural change to be superimposed on these developments[17] but it is also aimed at

---

the United Kingdom since the mid-19th century.

15 IR Scott (1995) 'Caseflow Management in the Trial Court' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press, p 23.

16 Ipp (1995) p 727.

detecting and deterring certain conduct which is not specific to any particular procedural step. That conduct might be the kind Justice Ipp was referring to: the causing of deliberate delay, intentional running up of an opponent's costs as part of the psychological and financial warfare, frivolous claims or sham defences.[18]

Lessons to be Learned from Earlier Reforms

Historically, reform of civil procedure has occurred at a glacial pace. For so much to happen in such a short period is a remarkable indication of the pressing nature of our problems.

There may be independent reasons why the changes mentioned above will improve civil litigation, but as far as lawyers' conduct is concerned, there are reasons to believe that it may substantially adapt to the new situation unless other measures to do with professionalism are instituted. The so-called adversarial mindset will simply be spurred to new ingenuity.

In 1987, the Supreme Court of South Australia introduced a new set of rules on pleadings. The purposes of the change were to force the parties to address more directly the issues that were in dispute, to inhibit blanket non-admissions and to allow parties to give notice of possible defects in their opponents' pleadings so that they might correct them without any court hearing becoming necessary.

According to a Supreme Court judge at a Litigation Reform Commission Conference in 1996:

> The purposes for which the Rules were designed have not been achieved. Rather, the pleading rules have been employed tactically to oppress the opposition.... It is still commonplace that one notice will issue from each party directed to each other party seeking further particulars of that party's pleading.... Experience has shown that the new practice has dramatically increased the cost of pleadings without any consequential benefit to the parties. At trial, there are still complaints that a particular matter has not been pleaded or not been adequately pleaded and that as a consequence a party has been taken by surprise.[19]

---

17 Case management takes many forms but, as Justice Ipp notes, there are two basic models, the first involving continuous control by a judge and the second requiring the parties to report to the court at strategically chosen milestones (ibid, p 790).

18 Note the comments of the Queensland Court of Appeal judge, Justice GL Davies, that it is thought to be 'a common tactic' for a wealthy litigant to involve a poorer opponent in a great deal of preliminary skirmishing in interlocutory proceedings: Davies (1996) p 204. Note also his comment that 'a skilfully advised party can prolong the pre-trial period and the trial itself to such an extent as to cause the opponent to give up in financial exhaustion. When that occurs, and it undoubtedly does, it brings the system, and those who work in it, into disrepute': ibid, p 208.

19 Justice B Lander (1996) 'Pleadings', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March, p 3.

Pleadings in South Australia paradoxically became longer and longer and so particularised as to become almost unintelligible.

Another example from South Australia concerns an indulgence which was introduced allowing a party to deliver at least one set of interrogatories without leave of the court. The purpose of this was to enable each side to find out more about the other's case and therefore reduce the risk of surprise at trial, but without having to involve the court. According to another Supreme Court judge:

> [T]his privilege rapidly became abused, particularly when word processors inexorably ground out almost standard form interrogatories which tended to be delivered, virtually indiscriminately, in nearly all cases.... It became a disastrous experiment, due to the unwillingness of the profession to exercise proper self discipline.[20]

In Queensland, changes have been introduced to discovery rules so that only documents relating to issues directly in dispute are to be disclosed. In addition, privilege has been removed from experts' reports. Various policies were at work behind these changes. One was to make the cost of disclosing and inspecting documents more proportionate to the amount that was in dispute, bearing in mind that discovery does not usually produce useful new documents. Another was to discourage a wealthy party from shopping around from one expert to another until a favourable report was obtained for use in the case. According to a Supreme Court judge in the state:

> It must always be borne in mind that the ingenuity of lawyers is such that one generation's reform will be another generation's abuse.... [T]here are some recidivists amongst the profession and I understand that some solicitors simply agree to disregard the new Order 35 and to proceed in the old way for documentary discovery.[21]

About removing privilege from experts' reports, she said:

> It is not unusual to encounter defendants in non-managed cases (through their counsel) who resist strenuously the idea that the defendant ought to have provided its expert reports prior to trial. They are still attached to the forensic flourish of surprise.... Unfortunately this does not prevent the expert from waiting until the start of a trial to put the report in writing.[22]

What may be emerging is a practice of experts giving their opinion to the lawyer orally, so that it is not a document to be disclosed to the other

20 Justice LT Olsson (1996) 'Discovery/Disclosure and Interrogatories', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March, p 1.

21 Justice MJ White (1996) 'Discovery/Disclosure and Interrogatories', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6-8 March, p 3. To be fair, Justice White does concede that the changes have had some efficacy.

22 Ibid, p 4.

side, and only reducing it to writing if instructed to do so because of its favourable contents.

Also in Queensland, concerns have been expressed by a Supreme Court judge that court-referred case appraisal (a form of ADR) might be used tactically by 'the cynical litigant'. Although speaking in support of case appraisal, the judge invited suggestions on:

> how to prevent the coy or cynical litigant taking advantage of this procedure so that the true case is not run, and the procedure is used in order to get a good look at the opponent's case. Such a party will get a very poor result before the appraiser, and will very easily better that result in the eventual challenge before the Court. In that situation the party who has played the game will be worse off than if no appraisal had occurred.[23]

Turning to Britain, the practice in England and Wales of requiring witness statements to be exchanged so that a party is not surprised by the oral testimony of an opponent's witness may have backfired. Enormous resources are now apparently put into the preparation of these statements in language which is highly unlikely ever to have come from the witness, in the hope that the other side will be intimidated by the strength of the case.

In 1990, an express statutory power to make 'wasted costs orders' against a lawyer was introduced in England and Wales so that a party could be compensated in costs for the unjustifiable conduct of their own, or their opponent's, lawyer. Before long, concerns grew that applications for wasted costs orders were themselves turning into a new and costly form of satellite litigation and becoming a weapon in the main warfare. In 1994, the Court of Appeal sought to confine the occasions when such orders could be made. Sir Thomas Bingham, the Master of the Rolls, noted:

> Material has been placed before the court which shows that the number and value of wasted costs orders applied for, and the costs of litigating them, have risen sharply We were told of one case where the original hearing had lasted five days; the wasted costs application had (when we were told of it) lasted seven days; it was estimated to be about half way through; at that stage one side incurred costs of over 40,000 pounds. It almost appears that a new branch of legal activity is emerging, calling to mind Dickens's searing observation in Bleak House:
>
> 'The one great principle of English law is, to make business for itself.... Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it.'[24]

Central to these reforms has been the question of lawyers' conduct, but is all this attention justified?

---

23 Justice JB Thomas (1996) 'Alternative Adjudication', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6-8 March, p 3.

24 *Ridehalgh v Horsefield* [1994] 3 All ER 848 at 855.

The Role of Autonomy

There has been no extensive empirical study in the United Kingdom or in Australia of the conduct of civil litigation and lawyers' role in it[25] and the evidence is largely anecdotal. It is, however, at least plausible to assume that the behaviour of lawyers is partly responsible for the current perception of the problem and for the patchiness of success with procedural reform. This is because a considerable degree of practical autonomy lies with a client and lawyer as to how litigation is to be conducted. There is certainly scope for self-interested or excessively partisan behaviour.

First, there is the autonomy of the client, after advice, to instruct the lawyer to take or not to take particular steps or to act with a particular intensity or urgency. In principle, this form of autonomy seems desirable for various reasons and it is recognised in even the most inquisitorial or investigative systems. An inflexible procedure which mandated each step in detail might simply add to expense by requiring a party to take a step that would cost more than it was likely to yield.[26] It is, after all, very difficult to legislate in advance for all decisions which requires a sense of proportionality. Each piece of litigation has its own efficient pace; for example, whilst injuries are stabilising or further evidence is being obtained. Forcing that pace can backfire upon the injured or loss-bearer. Each set of negotiations has times where 'the psychology' is more appropriate for settlement than others. Being forced to take an unwelcome step can spoil the moment. For these and probably other reasons, it seems desirable to leave the client with some flexibility in civil matters.

Aside from client autonomy, there is the practical autonomy of a lawyer to act without the express approval of the client or in circumstances where the client is not fully in control of the relationship, through lack of knowledge or otherwise.[27] The extent of a lawyer's autonomy may vary according to subject matter, amount at stake, procedural context or kind of client, but it is always there to some extent and its existence is often regarded

---

25 Both Zander (1995) and Genn (1995) emphasise the lack of empirical evidence behind Lord Woolf's recommendations. Genn refers to it as the 'information black hole': Genn (1995) p 390. The pilot study of Federal Court cases, described in ALRC (1997b), is apparently to be extended and may yield the first really useful data in Australia.

26 This is particularly the case with the enforcement of procedures. A client's autonomy extends in most cases to deciding to overlook the other side's breaches.

27 I am emphasising practical autonomy rather than necessarily the autonomy accorded by contract, the law of agency or professional ethics. Professional guides do often acknowledge the dependence of clients upon their lawyers; see, for example, para 5.02 of the Queensland *Solicitors Handbook* (Queensland Law Society, 1995), which requires that a practitioner should treat the client fairly and in good faith, 'bearing in mind the client's position of dependence upon the practitioner and the high degree of trust that a client is entitled to place in the practitioner'.

as a hallmark of a professional relationship as distinct from the engagement of a hired hand.[28]

While there is relatively little large-scale research in Australia or in England into the nature of the lawyer-client relationship in litigation, there was a major project in the United States commissioned by the Justice Department known as the Civil Litigation Research Project. Part of that research entailed interviews with 1,382 litigation lawyers. In his book *The Justice Broker*,[29] project participant Herbert Ritzier concentrates on the perspectives and work of lawyers engaged in what he describes as 'ordinary litigation'. He notes that whilst other workers have significant amounts of autonomy, that autonomy typically derives from employment status, eg self-employment, rather than the nature of the tasks to be completed. '[W]hat sets the [legal] professional's work situation apart from that of other workers is both the existence of autonomy of action and the basis of that autonomy.'[30]

Kritzer's conclusion was that there was little evidence in the data that clients exert systematic or meaningful controls on their lawyer, a conclusion which was supported by separate interviews with the clients themselves. This should come as little surprise because, in some accounts, a degree of autonomy and independence from the client is also a defining characteristic of a professional person.[31]

Pausing at this stage, we are now in a very puzzling situation. Clients and lawyers, or at least some of them, are said to behave in ways which defeat the purposes of procedure, add to the costs and delays of civil litigation and perhaps lead to victory for reasons unconnected with the merits. The evidence for these accusations is largely anecdotal but the existence of the autonomy described above makes them plausible. Judges, Rules Committees and governments are busily making procedural changes and, in some instances, taking over the substantial management of cases themselves, even though their reason for doing so is predicated, in part, on the capacity of 'legal culture' backed by client self-interest to subvert reform. We need reform because lawyers and clients can defeat reform. It does not sound a very hopeful strategy, if that is all there is.

We know from studies in the sociology of law concerning the impact of legal change on social behaviour that reforms which run against self-interest are likely to fail unless either the enforcement mechanism is draconian or the justification of the reform is internalised to some extent by the target population.[32] Although, as we have seen, draconian penalties may be coming

28 See, for example, JP Heinz and EO Laumann (1982) *Chicago Lawyers: The Social Structure of the Bar*, Sage, and R Nelson (1988) *Partners in Power*, University of California Press.

29 H Kritzer (1990) *The Justice Broker*, Oxford University Press.

30 Ibid, p 7.

31 RL Nelson and DM Trubek (1992) 'Arenas of Professionalism: The Professional Ideologies of Lawyers in Context' in RL Nelson et al (eds) *Lawyers' Ideals/Lawyers' Practices*, Cornell University Press, p 181.

32 S Vago (1981) *Law and Society*, Prentice-Hall, ch 7.

in, the Bleak House example above shows that arguments over them can become distractions from the main game. There are also problems of fairness in imposing penalties where litigants were, at the end of the day, exercising a lawful discretion. More hopeful, perhaps, is internalised justification.

The argument developed below is that we need to take a step backwards and see whether something can be done at source, as it were. Can we change the understanding that the community and profession have about the role of lawyers in the civil justice system? If we can, some procedural changes may not be necessary whilst others will have better prospects of success. This takes us to legal ethics and then onwards to the goals and purposes of civil litigation.

Re-building Professional Ethics

Let us recall the situation in need of change. Thousands of small decisions are made every day in legal offices and court waiting-rooms, by a lawyer alone or a lawyer in consultation with a client, which have cumulative effects for the civil justice system. We might only want to alter these tiny decisions by a tiny amount. The volume of litigation is such that this tiny adjustment could have enormous aggregate effects.

These thousands of tiny decisions are rarely open to subsequent scrutiny at present, if only because statistically any case is likely to be settled on terms which include costs, and there is usually no basis for later scrutiny. These tiny decisions are ones where the interests of the lawyer and the client might or might not coincide. They are decisions where the existence of an opponent does not provide an automatic check or balance either because circumstances can exist where the interests of an opposing lawyer also lie in the behaviour in question[33] or because the opponent cannot realistically know of or prove the behaviour. To describe this behaviour as consisting of individual decisions may miss part of the point. Habits and patterns emerge as a matter of everyday practice, so that we may be talking as much about litigators' reflexes.

These practices are not confined to one side or the other but when *each* side engages in comparable tactics, a process can commence which is in neither side's interests. It is a form of prisoner's dilemma, where barriers to co-operation lead to sub-optimal outcomes. Note Zuckerman's comment:

> Where lawyers can show that by investing a little extra in procedure the client would thereby obtain some advantage, they can justify to themselves recommending that the client undertake the extra expenditure. Indeed, at times the pursuit of the extra advantage can lock both opponents in a competition of investment in procedure; each trying to outdo the other by raising the procedural stakes.[34]

33 As Jolowicz has noted, rules of procedural law create choices. Even where the rule is mandatory in form, if the opponent chooses to do nothing about it, nothing will happen: JA Jolowicz, 'On the Nature and Purposes of Civil Procedural Law' (1990) 9 *Civ Just Q* 262, p 269.

34 Zuckerman (1995) p 66.

We should not be too critical of current practices.[35] So little detailed attention has been given to what amounts to good lawyering in specific contexts that a wide range of contradictory behaviour is currently justifiable by reference to professional guides or professional wisdom. But let us turn to the guidance there currently is.

The structure of legal ethics, particularly as they apply to litigation, is straightforward. Although Bar Association codes tend to have more in the way of detailed provisions on how to handle particular issues as they arise in litigation, the architecture of all guides to professional responsibility is relatively simple. There are basically two sets of duties.[36] The first, which have lexical priority, can be called duties to the administration of justice[37] and the second are duties to the client.

Duties to the administration of justice may be grouped into duties of fairness, which include the duty not to pursue hopeless cases or enter hopeless defences, and duties of candour, which include the duty not actively to mislead the court. Duties to the client include duties of loyalty, secrecy and zeal. Although duties to the administration of justice prevail in the event of any conflict with duties to the client, they can be regarded as providing minimal and indeterminate outer limits on acceptable behaviour.

One American scholar has suggested that in the United States partisan loyalty has become the starting point for interpreting the lawyer's duty to the administration of justice. Lawyers are choosing the interpretation of the limits which most favours their clients. The duties to the administration of justice are said to have become simply another set of rules which are to be manipulated as far as possible to suit the paymaster.[38] After reading hundreds of pages of witnesses' evidence to the Australian Senate's Cost of Justice Inquiry seven years ago, I came to a similar conclusion.[39] There was credible evidence of the commencement of hopeless cases, the entering of hopeless defences, discovery abuse, deliberate or reckless delay and the failure to proffer relevant material. Since then, official bodies and respected judges in Australia and England have also echoed the American experience.[40] Such a situation is not surprising because it does not require a close analysis of the case law on the duties to know that fairly low standards have been set on matters such as the probability of success required to avoid the hopelessness test or the distinction between passively withholding material and actively misleading the court.

---

35 As Zuckerman says: 'It is natural that litigants should seek to exploit procedure to their advantage. Litigants do not resort to legal proceedings for altruistic disinterested motives': ibid, p 63.

36 I am ignoring other classes of rules and principles to do with etiquette and trade practices. These may be important but are not, to me, centrally 'ethical'.

37 For various reasons, an expression preferable to 'duties to the court'.

38 See D Wilkins, 'Legal Realism for Lawyers' (1990) 104 *Harv LR* 469, p 473.

39 S Parker (1992) *Legal Ethics*, Discussion Paper No 5, Parliament of the Commonwealth of Australia, paras 4.2, 4.3.

40 See, for example, the comments of Justice Ipp: Ipp (1995) p 726.

The minimalist application of a simple architecture of lawyers' ethical duties is justified by the profession as against any more extensive or onerous design by three central arguments in the context of civil justice.

1. Civil litigation, unlike criminal proceedings, is essentially a private matter with disputants themselves calling the shots.
2. A lawyer is only one part of a self-correcting adversarial system (ie it is her or his job to be partisan).
3. This self-correcting system is the best way of protecting individual rights and therefore of doing justice.

Lawyers, in effect, see themselves as guided by a role morality, so that whilst they may depart at times from common morality,[41] they are justified in doing so because of the justifications for the wider system in which they operate. In the next section, I will argue that this conception of civil litigation is incomplete and does not justify all the behaviour I am dealing with. A broader conception of civil litigation as it operates in practice enables us to suggest that lawyers can legitimately be asked to take on more extensive roles as guardians, gatekeepers and monitors of the civil justice system, with the consequence that partisanship is diminished, although not removed. In other words, the lexical priority of duties to the administration of justice can be reasserted and made considerably more detailed.

Re-thinking Civil Litigation

Much of the literature on civil litigation focuses on the relative merits of adversarial and inquisitorial systems. The discussion tends to produce lists of differences between the two, without any real means of assessing their significance and often without acknowledging that no country adopts either system exclusively in a pure form.[42] To some extent, then, we are led up a blind alley by this debate.

Models of Civil Justice

A more illuminating approach focuses on 'models of civil justice'. How should we view civil justice?[43] What is the system there to do?

---

41 See GL Davies and SA Sheldon (1995) 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' in S Parker and C Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues*, Oxford University Press, p 131:

> The principle of moral non-accountability acts as a shield behind which lawyers can shelter in taking actions on behalf of clients which, if taken in their personal capacities, would be morally indefensible.

42 See M Damaska (1986) *The Faces of Justice and State Authority*, Yale University Press. Damaska argues that the actual mix of adversarial and inquisitorial procedures in any society may tell us more about that society's ideologies of government and structures of state authority than about how legal disputes are decided.

43 The classic application of 'models' to understand legal process was in the work

Under a *dispute resolution model*,[44] adjudication is simply a method for peacefully resolving a conflict between private parties. It sits most easily within an adversarial system[45] but is not confined to it. In this model, there is admitted to be a public interest in maintaining the system but it is the minimal one of avoiding the anti-social alternatives. In the well-known expression, the public interest lies in the courts being civilisation's substitute for vengeance.[46]

In a *policy implementation model*, however, a wider public interest is recognised. This public interest is in:

1. the effect of court decisions on the conduct of others;
2. the value of having authoritative clarifications of and adjustments to the standards by which we are to live; and
3. the repeated affirmation of the Rule of Law.[47]

The policy implementation model is not so much a clear alternative to the dispute resolution model as a larger vision which subsumes it. It is the dispute resolution model, however, that tends to monopolise the thinking of law reformers at the moment. ADR outside the courts, and the promotion of early settlement within them, dominate the debates. One reason for this, of course, is the perceived financial cost of operating the civil justice system. If people can be persuaded to resolve their disputes more cheaply, it seems as if we will all be better off. But the notion of cost is itself problematic. The policy implementation model prompts us to think about the possible *hidden* costs of an unduly narrow focus on dispute resolution.

Drawing on literature which cuts across legal scholarship, philosophy and economics, there is a way of identifying the components of a calculation, even if the calculation itself cannot practically be carried out. By identifying at least the components, we will be steered away from a purely 'dispute resolution' perspective and may have some clearer sense of the basis for repositioning lawyers.

---

of HL Packer on criminal justice: HL Packer, 'Two Models of the Criminal Process' (1964) 113 *U Pa LR* 1.

44 KE Scott uses 'the conflict resolution model' and 'the behaviour modification model' but the arguments are the same: KE Scott, 'Two Models of the Civil Process' (1975) 27 *Stan LR* 937.

45 N Armstrong (1995) 'Making Tracks' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press, p 105.

46 See AW Alschuler, 'Mediation with a Mugger: The Shortage of Adjudication Services and the Need for a Two-Tier Trial System in Civil Cases' (1986) 99 *Harv LR* 1808. See also Lord Diplock in *Bremer v South India Shipping Corporation Ltd* [1981] AC 909 at 917: 'Every civilised system of government requires that the state should make available to its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights'.

47 Jolowicz puts it slightly differently, arguing that litigation serves two ends beyond that of dispute resolution: (1) to demonstrate the effectiveness of the law; and (2) to give judges the opportunity to interpret, clarify, develop and apply the law: Jolowicz (1990) p 271.

Calculating Costs

We can begin with a simple instrumental model of substantive law which assumes there is only one goal: let us say, the pursuit of economic effi ciency.[48] Ultimately, this model implies, contract law, tort, company law and so on have the single aim of promoting efficiency and should be judged in that light. This exercise will also work if we substitute a different single criterion, such as 'justice', 'utility'[49] or 'truth', and it will work with more complex conceptions of law, but there is value in trying to move outside the language in which these debates have traditionally been couched whilst keeping things simple.

In the simple instrumental model of substantive law, the purpose of *procedural* law is, as Jeremy Bentham put it two centuries ago, rectitude of decision. The criterion by which legal procedures are to be judged is the extent to which they facilitate the correct application of the substantive law to the true facts. Being only an instrument of a separate end (like an adjective which needs a noun to serve), a civil justice system must be seen presumptively as an expense: it is the expense involved in applying the correct substantive law. It entails two kinds of costs: direct costs (DC) and error costs (EC).

Direct costs are the sum of the private costs incurred by litigants, and the public costs of providing courts, judges, and the accessories of the justice system. *Error costs* represent the extent to which the goal of the substantive law is not reached. They take various forms. They arise, for example, when a party settles for less than a case is worth, abandons a meritorious claim altogether or capitulates to an unmeritorious one. They arise also when a court makes an incorrect decision.[50]

It might seem strange to hear described as an error cost the decision of someone to settle for less than their case is-worth. This is something that, especially these days, is regarded as rational behaviour; perhaps even public-spirited.[51] But the assumption in the present exercise is that, in a perfect system, there would be complete information as to the facts and a correct application of the substantive law to those facts. All legal claims would be

48 This analysis and the discussion that follows draws on Michael Bayles' work in 'Principles for Legal Procedure' (1986) 5 *Law & Phil* 33.

49 I acknowledge that utility and economic efficiency are treated as identical in the kind of consequentialism which emanates from the Chicago School of Law and Economics; however, utility can be regarded more broadly; see RE Goodin (1995) *Utilitarianism as a Public Philosophy*, Cambridge University Press.

50 Incorrect decisions are impossible to measure accurately but, for what it is worth, Gordon Tullock put together various pieces of evidence and concluded that the error rate in US courts was about 1 in 8 cases: G Tullock (1980) *Trials on Trial*, Columbia University Press.

51 See, for example, the 1993 Report of the Independent Working Party of the English Bar and Law Society, *Civil Justice on Trial — The Case for Change*, which argued at para 1.8 that the first of ten principles of reform was that the philosophy of litigation should be primarily to encourage early settlement of disputes.

fully vindicated, through settlement (if the legal rule was clearly identifiable) or after trial (if it was not). No bogus legal claims would prevail. To the extent that the real-world system does not ensure this, therefore, we have a cost in falling short of the substantive law's goal.

Error costs are about the imperfection of the world. Because we actually live in a world of finite resources, imperfect information, set procedures, transaction costs and moral hazard, settlement at an undervalue may well be a rational strategy for a litigant but the assumption is still a valid one that an increase in settlements tends to increase error costs even if it reduces direct costs.

Acknowledging this imperfection, the goal of a practical system ought to be to reduce the sum of DC and EC, rather than necessarily the elimination of one alone. Reducing DC may increase EC; reducing EC may require higher DC. Diminishing returns will set in at some point and there will be an optimal mix of direct and error costs, which represents the lowest sum of the two. This is practical civil justice in an imperfect world.

This principle is glimpsed by law reformers in practice, although its implications are not always fully grasped. Lord Woolf in the United Kingdom, for example, was explicitly prepared to bring about a trade-off between increases in error rate and cost savings.[52] Whether or not reformers do reach the optimal mix, the important point is that this is the goal.

To the extent that error costs are reduced, we have the accurate application of substantive law in so far as we are prepared to pay for it in direct costs. To the extent that error costs are reduced, people and organisations can plan under conditions of greater security or are deterred from inefficiently harmful behaviour. Numerous examples can be given where a judicial decision about the side-effects of a drug or the dangerous positioning of a car's petrol tank can lead to socially beneficial change whereas the confidential compromise of such claims reduces the potential social value of the decision. On the other hand, a judicial finding at an inadequate trial or following inadequate interlocutory procedures may *damage* the goal of law by sending out inaccurate or unreliable messages into society. This point has been made by the Australian Plaintiff Lawyers' Association.

> The estimated annual cost to the Queensland community of injuries is $2 billion. In most cases this is from preventable injury and death. The tort system plays an important role as a deterrent against unsafe and unreasonable conduct. Every judgment sends a message to other potential wrongdoers of the consequences of unacceptable conduct.[53]

When we debate reforms to civil procedure, then, we are debating not just 'dispute resolution' but some of the fundamental questions about the purpose of law and the extent to which we are prepared to pay for its realisation.

---

52 See Dingwall and Durkin (1995) p 379.

53 P Carter, 'Reform or Deform?' (1995) 15 (April) *Proctor* 9, p 9.

The cost-benefit model of litigation traced so far, very much in the Benthamite tradition, has been challenged in the last twenty years of so, even by those who might still regard themselves as utilitarians of some kind or another. For example, some argue that there are benefits from a civil justice system which do not derive simply from the advancement of the goal of the substantive law.[54] These benefits, which are independent of outcomes, can be called 'process benefits' (PB)[55] or 'process values'.[56] They include the benefit to the litigant of:

- ◊ a peaceful rather than violent resolution;
- ◊ being able to participate in the resolution of the dispute;
- ◊ being conscious of fair treatment, in the sense of equal treatment with the other party;
- ◊ being able to understand the rationale for procedures;
- ◊ having the matter heard in a timely but not hasty fashion; and
- ◊ reasonable finality of outcome.[57]

It is possible to argue that process benefits such as these do in fact make it more likely that the goal of the legal system will be reached and so they can be brought directly into a calculation:

Minimise sum of (DC + EC - PB)

If this is so, it might be rational to increase direct or error costs if to do so would produce net gains through the enhancement of process benefits. Alternatively, process benefits can be seen as subsidiary and collateral advantages only, so that they are considerations at the margins, or tie-breakers between alternative procedures with the same net costs.

Pausing at this stage, we need to note carefully that the perspective being adopted is largely a top-down one; of the reformer or the Minister of Justice. Surely, one might say from a bottom-up perspective, the individual disputant's primary concern is with winning. Whilst most litigants obviously do not litigate just for the adrenalin rush, the research on litigant

---

54 For the purposes of this discussion, I am ignoring arguments that the substantive law itself has more than one goal and that error costs should be treated as having a sub-category of 'moral costs', which are injustices that cannot be converted into monetary values. See, however, Bayles (1986) pp 45–50.

55 It should be noted, however, that Bentham himself acknowledged that 'adjectival law' had subordinate ends in avoiding vexation, expense and delay; see Twining (1993) p 383. The recognition of process benefits may therefore not be wholly antipathetic to the Benthamite tradition.

56 See RS Summers, 'Evaluating and Improving Legal Processes — A Plea for "Process Values"' (1974) 60 *Cornell LR* 1.

57 This list is drawn from Bayles (1986) pp 53–6. It is not difficult to re-cast many of the items as facets of procedural legality under the Rule of Law.

satisfaction with outcomes is interesting. It reveals a high regard attached to fair processes regardless of outcome.[58]

To the sceptic, it may not seem as if we have come very far but we have at least identified some components of a calculation, a set of variables, which assist us in making public policy choices. This has taken us further than debates over whether one approach is more 'just' than another, particularly if we accept that the administration of justice must be rationed. But the exercise breaks down, as utilitarian calculations tend to do at the macro level, because we are unable to attach precise values to all the components. We might be able to establish direct costs (ie the public and private costs of litigation) but we cannot easily identify and quantify error costs[59] or process benefits.

The Justice Market?

Assume, however, that this is a useful way of looking at the issue and the problem is the insuperable one of calculation. The temptation is to take a step sideways and ask whether a *market* might lead us to the optimal civil justice system with these features. In other words, even if the hand on the calculator cannot help us, perhaps the invisible hand of the market will take us to the optimal mix of error costs and direct costs.

In principle, and assuming various conditions are satisfied, public welfare economics suggests that the civil justice system should be analysed as a market. The service should be priced so that the marginal benefit from using it equals the marginal cost of providing it. We would then have Pareto efficiency at the point where no further change is possible without making someone worse off. From this perspective, there is no justification for subsidising the service. Nor is there justification in regulating the use of the service because the market will arrive, unaided, at the most efficient price and quality of service. If this were put into practice, one can imagine a system where, as a case proceeded to each new stage, a court fee for that step would be set that represented the full marginal cost of providing a judge and related facilities. As the case reached the final stage of a trial, the high marginal cost of providing the trial would be in prospect. At that stage, the parties would make settlement decisions in the light of the costs that would otherwise be passed on to one or both of them.

In practice, however, and without even taking into account equity considerations, there can be no competitive and complete market in civil justice and, hence, there are arguments in favour of intervention.[60] Although

---

58 See, for example, EA Lind et al (1989) *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences*, Rand Institute for Civil Justice, and TR Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Soc R* 103.

59 Because we lack the information about the terms on which disputes are settled and the legitimate claims that are not even proceeded with and we cannot put a starting figure on the value of having the substantive law fully enforced.

60 See, generally, I McEwin (1992) *Access to Legal Services: The Role of Market*

court fees are rising in Australia and overseas, they still do not come close to the total costs of judicial salaries, the provision of court staff and the opportunity costs of the buildings and equipment. The reasons for the market failure that justifies subsidisation and intervention have already been touched upon but can be spelt out more clearly now.

1. Litigation produces public goods with positive externalities by producing rules which benefit *subsequent* decision-takers and negotiators. If litigants had to bear the full marginal cost of producing these rules, they would factor that costs into their decisions. Leaving aside issues of equity, this would tend to lead to an under-production of such public goods and an increase in error costs (because meritorious claims would settle at an under-value). This view is strengthened the more that one adopts the position that the common law system of legal reasoning and stare decisis tends to promote overall utility by enabling judges to search continually for the most efficient allocation of liability under prevailing circumstances.
2. Litigation also produces public goods by producing policies and symbols that cannot easily be stated as rules. For example, one of the concerns about family violence being dealt with through mediation is that opportunities are lost for systematic denunciation in a public way of the wrongfulness of the conduct.[61] One could not, however, expect the survivors of violence to pay the full marginal cost of public denunciation in the courts.
3. Litigation produces public goods by reaffirming the value of rule of law processes as compared with strategies of vengeance and vendetta. Alschuler's graphic article entitled 'Mediation with a Mugger' shows how inadequate treatment of wrongdoing can produce vigilante reactions.[62] Collectively, we must pay to avoid being caught in the cross-fire of private retribution.

Even within welfare economics, therefore, there is a prima facie case for intervention and regulation. The traditional form has been subsidisation of the courts from public resources, so that parties pay nothing like the marginal cost of the service. In adversarial systems, however, financial subsidies for the service have gone hand in hand with procedural rules which can only be described as laissez-faire. Unless one party invokes the assistance of the court, no direct public costs will be incurred in monitoring

---

Forces, Parliament of the Commonwealth of Australia.

61 There are, of course, other more pressing objections to it, in particular, the strong likelihood that the target of violence will lack the bargaining power to insist upon a fair outcome; see H Astor (1995) 'The Weight of Silence: Talking About Violence in Family Mediation' in M Thornton (ed) *Public and Private: Feminist Legal Debates*, Oxford University Press.

62 Alschuler (1986) p 53.

interlocutory behaviour. Civil litigation has traditionally been 'in the hands of the parties'. Curiously, however, we now face an interventionist spiral in which a demand-led subsidised system seems to require the investment of public resources, in the form of direct management by the courts, to protect its purposes and to preserve some balance between the parties.[63] And, of course, we hit political and budgetary difficulties in a world of rationing.

One of the unfashionable aspects of this article is a questioning of the hyperlexis thesis; ie the argument that we have too much litigation. David Luban and others have challenged the belief that the United States is a litigious society and have shown that the rate of court filings is what one might expect by reference to the gross domestic product of that country, perhaps even less.[64] By this token, Australia may be more litigious than the United States, but that is not in itself a criticism. We cannot know whether we have 'too much' litigation because we lack a calculus with which to compute the benefits, but we *can* make statements that the average instance of litigation costs too much.

It may be that case management is the final road we must go down in an attempt to find a suitable regulatory method within a basically adversarial system. Once that has failed, we might actually have to imitate market solutions even though we are aware of the imperfections. There is, however, a decentralised system that involves gatekeepers and monitors who are much closer to the decision-making: lawyers themselves.

Conclusions

This article began with a quotation suggesting that professionalism might provide an island of civic virtue in a world of generalised self-seeking. Much of what followed may have come across as critical of lawyers and so this may seem a surprising thesis. Lawyers have been portrayed more on the generalised self-seeking side of the line than on the civic virtue side. After retracing my steps, however, I will make some suggestions that rest on a degree of unfashionable faith in the legal profession to deliver real change.

The argument is that reformers are plausibly on the right track when they place some of the responsibility for our civil justice problems upon lawyers and their clients. The autonomy possessed by lawyers and their clients in the pursuit or defence of civil claims makes it at least arguable that patterns of self-interested choices emerge and these have damaging cumulative effects. In the same way that we are all potentially patients or the loved ones of patients and might need an antibiotic to defeat a bacterium, we are all potentially litigants or the beneficiaries of litigation and need an effective and fair civil justice system.

---

63 Armstrong (1995) p 107, notes that court management is 'rooted in part in the rationale that lawyers are an obstacle to efficient litigation management'.

64 D Luban (1995) 'Speculating on Justice: The Ethics and Jurisprudence of Contingency Fees' in S Parker and C Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues*, Oxford University Press, p 99.

Reforming the rules of procedure and having courts manage cases through the system is an uncertain and indirect approach on its own.[65] It is uncertain because reformers themselves are guided by a pessimistic view about the capacity of lawyers to subvert reforms. It is indirect because there is no open debate about what is good and acceptable practice.

Our understanding of professionalism in civil justice has drifted, partly because legal ethics are understood in too general a way and they bite in too few instances. For professionalism to be revitalised, we need to reconsider the purposes of civil justice — and in particular to see it as involving more than mere dispute resolution — so that we can draw on some powerful justifications for guiding professional conduct in one way or another. When the civil justice system is seen as having important public purposes, of a kind which make the operation of a free market in civil justice unattainable, we can move away from the idea that litigation is only self-seeking activity in a private sphere with lawyers there merely to oil the wheels. The public purposes of litigation between private litigants justify a regime which promotes lawyers as islands of civic virtue. The request is not an unreasonable one because the profession earns at least part of its living from an activity which is subsidised, and for good reasons.

This analysis of the purposes of litigation suggests a particular goal to which a revitalised professionalism should be directed: namely, reducing to the lowest point the sum of error costs and direct costs. It is emphatically not merely the reduction of direct costs (whether private legal fees or public court budgets) by bulldozing settlements through. Nor is it the elimination of error costs, by taking everything through to an exhaustive trial. It is the search for the optimal mix.

Before making some concrete suggestions as to how legal ethics can be revitalised with this goal in sight, let me deal with two possible objections; what might be called the adversarial system objection and the libertarian objection.

The *adversarial system objection* is that the civil justice system is based on the idea that the necessary facts are more likely to be found, and the preferable legal principles more likely to be identified, when opposing parties battle things out on the basis of certain minimal ground rules. To seek to dampen partisan behaviour, in the way I have suggested, is to undermine the adversarial system.

There may be merit in this view under certain conditions. The difficulties are that the conditions are often not satisfied and the clarity of the ground rules needs consideration, particularly in civil litigation. The conditions are often not satisfied because the cost and complexity of the battle deter or hamper many of the battlers so that most disputes never become subjected to the dialectical heat envisaged.

In turn, the lack of clarity as to the ground rules can paradoxically notch up the cost and complexity of the ground rules. Recent theories of

65 I have not dealt with persuasive arguments that the independence of the judiciary can be eroded in case management contexts; but see Alschuler (1986) and J Resnik, 'Managerial Judges' (1982) 96 *Harv LR* 374.

rule-following have acknowledged a role for 'conventions' about the meaning to be given to rules and the conditions for their correct application.[66] In other words, to be regarded as a competent user of rules, one needs to be more than literate and logical; one needs to have some sense of which uses and arguments the relevant community of rule-users regards as acceptable. Such conventions control indeterminacy and the undiscerning use of the rules. It seems that the 'adversarial excesses' complained about by judges and others recently may actually have been a collapse in conventions by the legal profession as to what are acceptable applications of the ground rules. Even if, therefore, the adversarial system of justice is more than weakly justified in ethical theory,[67] its best hope lies in a rebuilding of conventions about the proper conditions for its operation. My call for a rebuilding of professionalism in civil litigation can be read as a call for the reconstruction of litigation conventions appropriate to modern circumstances.

The *libertarian objection* is that laws exist primarily for the preservation of the rights and liberties of the individual. The rule of law requires, *inter alia*, that these laws are clear and promulgated, and are applied by an independent judiciary. Individuals have the right to use a lawyer and, in the absence of an unambiguous legal rule to the contrary, they and their lawyers may choose their own methods of protecting their position. To the extent that restrictions are imposed on what a lawyer can do which are not contained in any unambiguous legal rule, there is an unwarranted infringement of liberty. Furthermore, to the extent that lawyers are under pressure to restrain their clients in this way, their independence is imperilled. From there, it is said, we have a chain reaction which can lead to the growth of state power and the erosion of the separation of powers between the judiciary and the other two branches of government.[68] In short, all this talk of professional self-restraint for fear of suffering a worse form of intervention is the thin end of a wedge which leads to the crumbling of the rule of law in a liberal society.

Such arguments have arisen particularly in the United States in connection with penalties on lawyers for running cases which have some, but very little, prospects of success and debates about 'ethical independence' of lawyers from their clients' interests.[69] They have surfaced in Australia more

66 With Peter Drahos, I have looked at some of these arguments, both at a theoretical level and in the context of certain areas of law; see P Drahos and S Parker, 'Critical Contract Law in Australia' (1990b) 3 *J Contract Law* 30; 'Closer to a Critical Theory of Family Law?' (1990a) 4 *Aust J Family Law* 159; 'The Indeterminacy Paradox in Law' (1991) 21 *Univ WALR* 305; and 'Rule Following, Rule Scepticism and Indeterminacy in Law: A Conventional Account' (1992) 5 *Ratio Juris* 109.

67 Using Luban's argument that it is only weakly justified in civil litigation in that it is insufficiently worse than the alternative to warrant the change; see D Luban (1988) *Lawyers and Justice*, Princeton University Press, ch 5.

68 See Wilkins (1990) for a clear account of the independence arguments that arise in debates about regulating the legal profession.

69 As to the former, see S Levinson, 'Frivolous Cases: Do Lawyers Really Know Anything At All?' (1986) 24 *Osgoode Hall LJ* 353, and S Parker (1992) ch 4. As

in connection with proposals to lessen the degree of self-regulation by the legal profession.[70]

My response to this objection is two-fold. First, the imbalances of power that are commonly found in litigation, particularly when an individual litigant is pitched against a corporation with a deeper pocket, are such that a more positive conception of liberty should be built into the civil justice system, particularly with the decline in legal aid. Positive liberty (or 'freedom to') is typically contrasted with negative liberty (or 'freedom from').[71] Our present rules and ethics protect negative liberty in litigation, but fail to promote positive liberty. We presently fail to correct adequately for disparities of resources between litigants or marked differences in risk aversion between parties. The libertarian objection to the approach suggested here may still come down to one of political philosophy but I do not concede that my approach is any the less concerned with liberty. Secondly, even the most libertarian liberal concedes a role for the state where there is a collective interest that cannot be protected by private means. By focusing on the public nature of litigation, as I have done, one can justify a degree of intervention which is less easily sustained by a dispute resolution model.

Although the concern of this article has been to argue the case for a more expansive approach to legal ethics which re-positions lawyers more squarely as guardians of the system, I have tried to argue the practical and principled case for this rather than come up with a blueprint for change. It is appropriate, however, that I suggest some next steps.

The first step is a major debate about how we can align procedural rules with ethical principles so that they work together in the promotion of the goal of producing the lowest sum of error costs and direct costs. This involves seeing procedural rules as providing necessary bright lines for conduct which can only operate in the manner intended if they are shored up by professional conventions about how to choose between lawful alternatives and how to decide the proportionate course of action. Although there is some valuable work now being done on ethics in criminal litigation,[72] I know of no Australian work that shows the interrelationship between procedure and professionalism in civil litigation.

Who should participate in this debate? Rules Committees, law reform bodies, Department of Justice officials, representatives of the legal profession and representatives of court users[73] need to open a dialogue about standards

---

to the latter, see Luban (1988) and W Simon, 'Ethical Discretion in Lawyering' (1988) 101 *Harv LR* 1083.

70 See J Disney et al (1986) *Lawyers*, 2nd edn, Law Book, p 222.

71 The distinction was developed by Isaiah Berlin in I Berlin (1969) *Four Essays on Liberty*, Oxford University Press. For a discussion, see S Bottomley and S Parker (1997) *Law in Context*, 2nd edn, Federation Press, ch 2.

72 See J Hunter and K Cronin (1995) *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary*, Butterworths.

73 There is a danger that regular court-users will feature in these talks more than occasional users — in the words of Galanter, the repeat-players rather than the

in litigation. Other bodies, such as the Australian Institute of Judicial Administration and the Judicial Conference of Australia, will also be able to offer the perspectives of court administrators and the judiciary respectively. The various codes and model rules of conduct will provide something to work from but the emphasis should be specifically on civil litigation and the focus as much on 'do's' as on 'don'ts'. Whenever the discussion becomes dominated by claims about the rights and liberties of individual litigants, firm reminders will be needed that the civil justice system is publicly subsidised because of its public purposes and that collectively we are facing major problems because of the unintended aggregate effects of individual actions. It may even be necessary to differentiate certain kinds of litigation; for example, so that personal injury litigation or debt collection are governed by particular protocols.

Secondly, we need to debate how litigation is to be regulated. There seems no practical alternative to a multi-door enforcement policy because of the different interests and positions of those involved.[74] On some matters, clients may be expected to complain or to sue. In others, professional bodies might be expected to take an initiative. In others, a judge with knowledge of the case may decide that some action is necessary, even though no one else has the incentive or resources to do so. None of these points is novel, although there is not always clarity about the enforcement system in litigation and the respective roles of the participants.

There are, however, some more creative regulatory steps that can be considered. For example, although the fact that lawyers increasingly work together in larger and larger entities has caused something of a problem for legal ethics in matters such as conflict of interests, the organisational phenomenon of the large law firm can also be turned to ethical advantage. These entities are sufficiently large to enable them to develop in-house procedures, standards and mechanisms for monitoring compliance with them. They are basically already required to do this if they want Quality Certification. There is no reason why litigation standards should not be agreed with the courts on analogous lines so that, for so long as the standards appear to be complied with, lawyers from those firms can benefit from more streamlined procedures. Naturally, issues about judicial independence and impartiality may become involved at some stage but these debates are already occurring in the context of certain kinds of case management. The core idea is that instead of courts managing cases, the responsibility can be franchised to law firms who meet certain standards.

Whilst one cannot prescribe in advance the outcome of the regulatory debate, the goals are to produce a coherent and clear regulatory system that provides for not only escalating responses, so that each subsequent default triggers a more serious sanction, but also proportionate responses, so that

---

one-shotters — but it is possible to identify bodies that at least have regular contact with occasional litigants, particularly bodies who represent plaintiff lawyers and debt counsellors; see M Galanter, 'Why the "Haves" Come Out Ahead: Speculation on the Limits of Social Change' (1974) 9 *Law & Soc R* 95.

74 For an important discussion of this, see Wilkins (1990) p 851.

the sanctioner is not inhibited in reacting by the fear of overkill. The system should be devised not specifically with single instances of major default in mind of a kind which are demonstrably abuses of process or perversions of the course of justice, but rather possible patterns of unacceptable self-seeking.

If the various bodies mentioned can work together to produce an integrated set of procedures, standards and ethics, which have as their aim the reduction of the sum of direct costs and error costs and perhaps also the promotion of independent process benefits, the tide can be turned in the civil justice crisis.

Finally, law schools have a responsibility to build into their curricula components which require students to study and debate at least some of the ethical and professional issues which arise in legal practice. By this is meant more than the 'professional responsibility' material required to be covered by the Uniform Admission Rules. Students should be given the space to focus upon the importance of professionalism in the attainment of law's goals. It is ironic that there currently seems to be more interest within the legal academy in medical ethics than in legal ethics. Practising lawyers and academics have at least one thing in common: they have both suffered recently at the hands of resistant strains of government.

References

Books and Articles

Australian Law Reform Commission (1997a) *Rethinking family law proceedings*, Issue Paper no 22, Australian Law Reform Commission.

Australian Law Reform Commission (1997b) *Rethinking the federal civil litigation system*, Issue Paper no 20, Australian Law Reform Commission.

Australian Law Reform Commission (1997c) *Rethinking legal education and training*, Issue Paper no 21, Australian Law Reform Commission.

Alschuler, AW, 'Mediation with a Mugger: The Shortage of Adjudication Services and the Need for a Two-Tier Trial System in Civil Cases' (1986) 99 *Harv LR* 1808.

Armstrong, N (1995) 'Making Tracks' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press.

Astor, H (1995) 'The Weight of Silence: Talking About Violence in Family Mediation' in M Thornton (ed) *Public and Private: Feminist Legal Debates*, Oxford University Press.

Bayles, M, 'Principles for Legal Procedure' (1986) 5 *Law & Phil* 33.

Berlin, I (1969) *Four Essays on Liberty*, Oxford University Press.

Bottomley, S and S Parker (1997) *Law in Context*, 2nd edn, Federation Press.

Brennan, Sir Gerard (1996) 'Key Issues in Judicial Administration', paper presented to the AIJA Annual Conference, Wellington, NZ, 4 September.

Carter, P, 'Reform or Deform?' (1995) 15 (April) *Proctor* 9.

Damaska, M (1986) *The Faces of Justice and State Authority*, Yale University Press.

Davies, GL, 'A Blueprint for Reform: Some Proposals of the Litigation Reform Commission and Their Rationale' (1996) 5 *J Jud Admin* 201.

Davies, GL and SA Sheldon (1995) 'Some Proposed Changes in Civil Procedure: Their Practical Benefits and Ethical Rationale' in S Parker and C Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues*, Oxford University Press.

Dingwall, R and T Durkin (1995) 'Time Management and Procedural Reform' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press.

Disney, J et al (1986) *Lawyers*, 2nd edn, Law Book.

Drahos, P and S Parker, 'Critical Contract Law in Australia' (1990a) 3 *J Contract Law* 30.

Drahos, P and S Parker, 'Closer to a Critical Theory of Family Law?' (1990b) 4 *Aust J Family Law* 159.

Drahos, P and S Parker, 'The Indeterminacy Paradox in Law' (1991) 21 *Univ WALR* 305.

Drahos, P and S Parker, 'Rule Following, Rule Scepticism and Indeterminacy in Law: A Conventional Account' (1992) 5 *Ratio Juris* 109.

Galanter, M, 'Why the "Haves" Come Out Ahead: Speculation on the Limits of Social Change' (1974) 9 *Law & Soc R* 95.

Genn, H (1987) *Hard Bargaining*, Clarendon Press.

Genn, H (1995) 'Access to Just Settlements: The Case of Medical Negligence' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press.

Goodin, RE (1995) *Utilitarianism as a Public Philosophy*, Cambridge University Press.

Gordon, RW and WH Simon (1992) 'The Redemption of Professionalism?' in RL Nelson et al (eds), *Lawyers' Ideals/Lawyers' Practices*, Cornell University Press.

Hazard, G, 'Rationing Justice' (1965) 8 *J L & Eco* 1.

Heinz, JP and EO Laumann (1982) *Chicago Lawyers: The Social Structure of the Bar*, Sage.

Hunter, J and K Cronin (1995) *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary*, Butterworths.

Independent Working Party of the English Bar and Law Society (1993) *Civil Justice on Trial — The Case for Change*, English Bar and Law Society.

Ipp, D, 'Reforms to the Adversarial Process in Civil Litigation' (1995) 69 *Aust LJ* 705.

Jolowicz, JA, 'On the Nature and Purposes of Civil Procedural Law' (1990) 9 *Civ Just Q* 262.

Kritzer, H (1990) *The Justice Broker*, Oxford University Press.

Lander, Justice B (1996) 'Pleadings', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March.

Levinson, S, 'Frivolous Cases: Do Lawyers Really Know Anything At All?' (1986) 24 *Osgoode Hall LJ* 353.

Lind, EA et al (1989) *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration and Judicial Settlement Conferences*, Rand Institute for Civil Justice.

Lowry, RP (1974) *Social Problems*, Heath.

Luban, D (1988) *Lawyers and Justice*, Princeton University Press, ch 5.

Luban, D (1995) 'Speculating on Justice: The Ethics and Jurisprudence of Contingency Fees' in S Parker and C Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues*, Oxford University Press.

McEwin, I (1992) *Access to Legal Services: The Role of Market Forces*, Parliament of the Commonwealth of Australia.

Nelson, R (1988) *Partners in Power*, University of California Press.

Nelson, RL and DM Trubek (1992) 'Arenas of Professionalism: The Professional Ideologies of Lawyers in Context' in RL Nelson et al (eds), *Lawyers' Ideals/Lawyers' Practices*, Cornell University Press.

Olsson, Justice LT (1996) 'Discovery/Disclosure and Interrogatories', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March.

Packer, HL, 'Two Models of the Criminal Process' (1964) 113 *U Pa LR* 1.

Parker, S (1992) *Legal Ethics*, Discussion Paper No 5, Parliament of the Commonwealth of Australia.

Queensland Law Society (1995) *Solicitors Handbook*, Queensland Law Society.

Resnik, J, 'Managerial Judges' (1982) 96 *Harv LR* 374.

Scott, IR (1995) 'Caseflow Management in the Trial Court' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press.

Scott, KE, 'Two Models of the Civil Process' (1975) 27 *Stan LR* 937.

Simon, W, 'Ethical Discretion in Lawyering' (1988) 101 *Harv LR* 1083.

Summers, RS, 'Evaluating and Improving Legal Processes — A Plea for "Process Values"' (1974) 60 *Cornell LR* 1.

Thomas, Justice JB (1996) 'Alternative Adjudication', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March.

Tullock, G (1980) *Trials on Trial*, Columbia University Press.

Twining, W, 'Alternatives to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' (1993) 56 *MLR* 380.

Tyler, TR, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Soc R* 103.

Vago, S (1981) *Law and Society*, Prentice-Hall.

White, Justice MJ (1996) 'Discovery/Disclosure and Interrogatories', paper presented at Litigation Reform Commission Conference on 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March.

Wilkins, D, 'Legal Realism for Lawyers' (1990) 104 *Harv LR* 469.

Woolf, Lord J (1995) *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, Lord Chancellor's Department.

Zander, M (1995) 'Why Lord Woolf's Reforms Should Be Rejected' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press.

Zuckerman, AAS (1995) 'Reform in the Shadow of Lawyers' Interests' in AAS Zuckerman and R Cranston (eds) *Reform of Civil Procedure*, Clarendon Press.

Cases

Bremer v South India Shipping Corporation Ltd [1981] AC 909.
Carnie v Esanda Finance (1994–95) 182 CLR 398.
Ridehalgh v Horsefield [1994] 3 All ER 848.
Shrun v Zalejska [1996] 3 All ER 411.
Williams v Spautz (1992) 174 CLR 1.