Coordination of State and Federal Judicial Systems

Jack B. Weinstein
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JACK B. WEINSTEIN*

INTRODUCTION

The coexistence of state and federal systems accords each person the benefits of dual citizenship while subjecting all individuals to two sovereignties. This dichotomy becomes particularly striking when considering the state and federal courts, two independent systems whose interplay often perplexes the citizen as well as the theorist visualizing the law as an integrated whole. This Article explores some of the problems in coordinating the state and federal judicial systems from the perspective of a federal trial judge in a large metropolitan area. Power to coordinate belongs primarily to state and federal legislators, executive agencies, and, in the case of criminal matters, to prosecuting attorneys and police personnel. Nevertheless, cognizant of their limitations, courts should take

* Chief Judge, United States District Court, Eastern District of New York; B.A., Brooklyn College, 1943; LL.B., Columbia University, 1948. This Article is adapted from the 1982 James B. M. McNally Lecture, delivered at St. John's University School of Law on April 21, 1982. The assistance of Guyora Binder, Assistant Professor of Law, State University of New York at Buffalo, is gratefully acknowledged.

1 Article III of the Constitution delineates the judicial powers of the United States. See U.S. CONST. art. III, § 2; C. WRIGHT, LAW OF FEDERAL COURTS § 8, at 19 (1976). Congress is empowered to imbue such courts as it might establish with these enumerated powers. U.S. CONST. art. III, § 1; C. WRIGHT, supra, § 11, at 29. Congress, moreover, has the power to grant to the federal courts exclusive jurisdiction in these areas. Id. § 45, at 193; see Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 HARV. L. REV. 509, 509-10 (1957). In the absence of congressional dictates, however, the jurisdiction of the federal courts is shared by the courts of the several states. C. WRIGHT, supra, § 45, at 193; see Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962); Claflin v. Houseman, 93 U.S. 130, 136-40 (1877). See generally M. WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS 269 (1949); State Courts and Federalism in the 1980's, 22 WM. & MARY L. REV. 599, 599 (1981).
whatever steps possible to ensure that the two systems properly mesh.

JUDICIAL REFORM AND STATE-FEDERAL JUDICIAL COUNCILS

In recent years, much progress has been made in streamlining the New York courts. The work of the Tweed Commission in the 1950's and subsequent constitutional and statutory amendments have increasingly rationalized the New York court structure. Chief Judges Desmond, Fuld, Breitel and Cooke, Justice McNally, the bar associations, and such lay groups as the League of Women Voters and the Committee for Modern Courts have, with many others, participated in this enterprise. Similar efforts may be noted in other states. In some instances, state reforms have been stimulated by the need to conform to higher institutional standards set forth by the Supreme Court and state appellate courts. In addition, quasi-public groups, such as the National Center for State

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4 The Supreme Court's role in enunciating criminal justice standards typifies the manner in which federal activity shapes state procedures. Decisions such as Miranda v. Arizona, 384 U.S. 436 (1966), announcing new constitutional guidelines for custodial police interrogations, require that many states modify their existing procedures. See Sheran, State Courts and Federalism in the 1980's: Comment, 22 Wm. & Mary L. Rev. 789, 791 (1981). Although state judges often have been less than receptive to federal influence, it has been suggested that such federal rulings are necessitated by the states' failure to institute timely reforms on their own. Id. at 790-91.
Courts, the Commissioners on Uniform State Laws, the Judicial Administration Division of the American Bar Association, and the American Law Institute have contributed to this restructuring.

In the federal arena, Chief Justice Charles Evans Hughes was

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* Proposed by Chief Justice Warren Burger in 1971, the National Center for State Courts was created to provide a central meeting place where state judges could exchange ideas and develop programs for the improvement of their respective court systems. Located in Williamsburg, Virginia, the center continues to play an important role in the research, proposal and implementation of policies designed to improve the administration and management of courts throughout the country. See Nat'l Center for State Courts, 1977 Annual Report 3 (1978).

* The National Conference of Commissioners on Uniform State Laws was first held in August 1892, and has since met annually to discuss proposals for uniform legislation. Nat'l Conference of Comm'rs on Unif. State Laws Handbook 403 (1980). The organization's constitution states that "[i]t is the object of the National Conference to promote uniformity in the law among the several states on subjects where uniformity is desirable and practicable." Id. at 404. When a uniform statute is deemed necessary in a particular area of law, the subject is studied by an appropriate committee, and a draft of the uniform legislation is drawn. Upon approval by the national conference, the legislation is recommended for passage by the state legislatures. Id. at 403. The national conference has contributed greatly to the coordination of state judicial systems by promulgating the Uniform Class Actions Act, the Uniform Certification of Questions of Law Act, the Uniform Rules of Criminal Procedure Act, and the Uniform Declaratory Judgments Act. Id. at 453-54.

* In an effort to improve the administration of justice in the United States, the Judicial Administration Division of the American Bar Association sponsors the National College of the State Judiciary, an institution offering judges an opportunity to improve their skills through further education and training. Founded in 1963, thousands of judges have benefited from the educational opportunities afforded by the National College. According to Chief Justice Warren Burger:

> The National College of the State Judiciary has made the single most significant contribution to the rising trend of continuing education for state judges. The College provides a major service by orienting new judges to aspects of their work. This assistance includes the study and exchange of ideas on problems concerning judicial techniques, such as the presiding function, the internal administration of a court and the preparation of jury instruction.


* Founded in 1923, the American Law Institute undertook to publish a restatement of the law to assist the legal community in dealing with the complex and uncertain state of American law. American Law Institute, The American Law Institute 50th Anniversary 15 (2d ed. 1973). According to one commentator, the role envisaged by the institute was to undertake an exhaustive study of the law of the United States in order to state that law in ideal terms, which should take account of new social needs and at the same time form a common pattern for judicial decision, to the end that the maladjustments of law to contemporary conditions and the evils of the law's diversities might thereby be alleviated.

Yntema, What Should the American Law Institute Do?, 34 Mich. L. Rev. 461, 461 (1936). The Institute, additionally, has developed proposals for facilitating the certification of questions of law between federal and state courts, and has authored various research projects such as the "Study of the Division of Jurisdiction Between State and Federal Courts." See C. McGowan, The Organization of Judicial Power in the United States 60, 69 (1969).
instrumental in urging judicial streamlining. More recently, Chief Justice Burger has been active in this effort. Administratively, procedurally, and in the scope and organization of its work, the federal court system is quite different from what it was 50 years ago when there were less than 300 federal judges. Today, they number over 800. With that numerical growth has come a commensurate change in character, as the federal court system modified itself to meet the strains of modern litigation in an increasingly complex society while confronting heightened standards of due process and equality. Among the changes have been the development of class actions; the expansion of complex multidistrict litigation practice; the extension of magistrate jurisdiction; the


11 In 1981, there were 826 circuit, district and other federal court judges, representing 5.8 percent of the total personnel in the federal system. Administrative Office of the United States Courts, 1981 Annual Report 152, table 19 (1982).

12 Class action suits, which allow representatives of a class of parties to sue or be sued, may be brought only if four requirements are satisfied. First, the class must be so large as to render joinder impracticable. Second, questions of law or fact must exist that are common to the class. Third, claims or defenses of representative parties must be typical of those of the class. Finally, the representatives must be able to protect "fairly and adequately the interests of the class." Fed. R. Civ. P. 23(a)(1)-(4). Class actions have proved useful in situations where large numbers of persons have suffered damage as a result of a single incident.

implementation of research and training programs for judges and supporting personnel; the strengthening of the United States Judicial Conference and Circuit Councils; the creation of a sophisticated computer system; the promulgation of speedy trial rules, uniform rules of evidence, criminal procedure rules, and rules of


See 28 U.S.C. § 656 (1976 & Supp. IV 1980). Acknowledging congressional intent to expand magistrates' powers, the Supreme Court has been unwilling to accept litigants' arguments that their claims were unfairly prejudiced by the performance of certain functions by magistrates. See, e.g., Mathews v. Weber, 423 U.S. 261, 268 (1976) ("[t]he [Federal Magistrates] Act grew from Congress' recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance").


The Judicial Conference of the United States, established by statute, is responsible for analyzing the conditions existing among the federal courts and suggesting improvements to aid in the administration of justice. See 28 U.S.C. § 331 (1976 & Supp. IV 1980). The Circuit Councils, consisting of judges from a particular circuit together with that circuit's chief judge, are intended to assist in the development of initiatives aimed at improving judicial administration. The councils have been criticized, however, for being ineffective. See Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. CHI. L. REV. 203, 204 (1970). The contribution of the councils in bringing about necessary reforms nonetheless may be expected to improve since extensive amendment of their authorizing statute recently has taken place. See 28 U.S.C. § 332 (1976 & Supp. IV 1980).

See infra note 59.

The inability of the judicial system to try cases swiftly has been a concern of both the bench and bar. See supra text accompanying notes 5-10. This concern, particularly with regard to criminal trials, also has been shared by Congress, and is reflected in the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 50(b). The current version of rule 50(b) contains a reference to the Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1976 & Supp. IV 1980). See 3 J. MOORE, MOORE'S FEDERAL PRACTICE RULES PAMPHLET 514 (1982). The purpose of the Act is "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial . . . ." H. R. REP. NO. 1508, 93d Cong., 2d Sess. 1, 9, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7401, 7402. Toward this end, the Act enunciates various time limits to be implemented on a staggered basis, see 18 U.S.C. § 3161(f), (g) (1976), the ultimate goals of which are a 30-day limit between arrest and indictment, id. § 3161(b), and a 70-day limit between the filing of the indictment and the trial, id. § 3161(e)(1) (Supp. IV 1980).

The need for uniform rules of evidence was recognized by many commentators early in this century. See 2 J. Moore, supra note 18, at 1-3. One such commentator described the
civil procedure;\textsuperscript{21} as well as the development of professional judicial administrators.\textsuperscript{22}

law of evidence in the federal courts as "not only inferior but far inferior" to that in the courts of the fifty states. Wigmore, \textit{A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Requires Further Consideration}, 22 \textit{A.B.A. J.} 811, 813 (1936). Notably, in the case of Michelson v. United States, 335 U.S. 469 (1948), the Supreme Court cited the need for uniform rules of evidence in the federal courts. \textit{See id.} at 486. In 1965, Chief Justice Warren appointed an advisory committee to formulate uniform rules, C. \textsc{Wright, supra} note 1, § 93, at 458, and on February 5, 1973, the Supreme Court presented to Congress the Federal Rules of Evidence, \textit{2 J. Moore, supra} note 18, at 6. Congress, however, then passed a statute dictating that such rules would not take effect without congressional approval. \textit{See Act of March 30, 1973, Pub. L. No. 93-12, § 2, 87 Stat. 9.} After several changes in the draft approved by the Supreme Court, the Federal Rules of Evidence were adopted by Congress, and became effective July 1, 1975. \textit{See Act of Jan. 2, 1975, Pub. L. No. 93-356, § 2(a)(1), 88 Stat. 1926; C. \textsc{Wright, supra} note 1, § 93, at 456. The Federal Rules of Evidence expressly are intended "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."} \textit{Fed. R. Evid. 102.} Many states have adopted the Federal Rules of Evidence in one form or another. \textit{See infra} note 24 and accompanying text.

\textsuperscript{21} In 1940, legislation was adopted that conferred upon the Supreme Court the authority to make rules applicable to criminal cases prior to verdict. \textit{See Act of June 29, 1940, ch. 445, § 687-89, 54 Stat. 688 (codified at 18 U.S.C. § 3771 (1976 & Supp. IV 1980)).} On December 26, 1944, the Federal Rules of Criminal Procedure were promulgated, Order of December 26, 1944, 323 U.S. 821 (1944), and became effective on March 21, 1946, \textsc{see C. \textsc{Wright, supra} note 1, § 63, at 296-97.} The Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." \textit{Fed. R. Crim. P. 2. Notably, the rules have undergone substantial amendment since their adoption. \textit{See generally 2 J. Moore, supra} note 18, at 1.}

\textsuperscript{22} Like the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure offer a uniform procedural system, serving to standardize the litigation process and minimize confusion in civil cases. They apply to "all suits of a civil nature" brought in federal courts. \textit{FED. R. Civ. P. 1.} The rules provide that "[i]t is essential to the administration of the business of every court that the judges and parties, with counsel when appropriate, be given the benefit of a just, speedy, and inexpensive determination of every action." \textit{Id.; see 2 J. Moore, Moore's \textit{Federal Practice} ¶ 1.13(1), at 284-86 (2d ed. 1982).}

\textsuperscript{23} In an address delivered to the Institute of Judicial Administration on August 12, 1969, Chief Justice Warren Burger called for the creation of "a corps of trained administrators" to alleviate some of the burdens of judicial administration which constitute a great part of a judge's workload. \textit{Burger, Court Administrators—Where Would We Find Them?}, 53 \textit{Judicature} 108, 108 (1969). Congress responded to this need by passing legislation that authorized the appointment of a circuit executive in each judicial circuit. \textit{Act of Jan. 5, 1971, Pub. L. No. 91-647, § 1(a), (f), 84 Stat. 1907 (codified at 28 U.S.C. § 332(e)-(f) (1976)).} Although the statute does not purport to provide a definitive list of responsibilities that the circuit executive must assume, many administrative duties are suggested, including administration of the personnel system and budget of the court of appeals of the circuit, maintenance of a modern accounting system, and collection, compilation, and analysis of statistical data with a view to the preparation and presentation of reports based upon such information. A commentator familiar with the duties of judicial administrators has observed that the success of an administrative system depends upon the existence of an integrated judicial system, supervised by a state's highest court. \textit{Carrigan, The Functions of State Court Ad-}
Many of these changes have tended to emphasize the separate character of the two systems. For example, in the adoption of the Federal Rules of Civil Procedure, Criminal Procedure and Evidence, the Supreme Court primarily opted for national uniformity among the federal courts, rather than federal conformity to state and local norms. As a result, many states have adopted all or most of these federal reforms, currently, at least in New York.

Conformity by federal courts to state and local procedure was statutorily mandated in 1792. See Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276, 276. The statute was described as one requiring “static conformity,” since the courts were to follow the state practice as it existed on September 29, 1789, regardless of subsequent changes made by the states. See C. Wright, supra note 1, § 61, at 289. This system of “static conformity” was later abolished, however, with the enactment of the Conformity Act of 1872, adopting a “dynamic conformity” to state rules. See Act of June 1, 1872, ch. 255, §§ 4-6, 17 Stat. 197; C. Wright, supra note 1, § 61, at 290; Clark and Moore, A New Federal Civil Procedure, 44 Yale L.J. 387, 401-11 (1935). While the Conformity Act was more flexible than its predecessor, its many exceptions resulted in uncertainties as to when and where procedures should be conformed to state law. See generally C. Wright, supra note 1, § 61, at 290-91. Many believed that procedure could be better regulated by the courts than by the legislature. See id. § 62, at 291. Accordingly, pursuant to the Enabling Act passed by Congress in 1934, Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (1976)), the Supreme Court adopted the Federal Rules of Civil Procedure, Order of Dec. 20, 1937, 302 U.S. 783 (1937). Other arguments asserted for the adoption of such rules include their favorable effect upon the interstate mobility of judges and practitioners, and the belief by the bar that uniformity will lead to a better and more predictable administration of justice. See Callahan & Ferguson, Evidence and the New Federal Rules of Civil Procedure, 45 Yale L.J. 622, 644-47 (1936); Weinstein, The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence, 69 Colum. L. Rev. 353, 358-59 (1969). But see Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 582 (1930) (uniformity may result in different decisions on the merits in the state and federal courts). On rulemaking by the courts, see generally J.B. Weinstein, Reform of Court Rule-Making Procedure (1972).

York, federal practice is noticeably different from state practice.\textsuperscript{25} A number of factors, if present, reduce this divergence. Adoption of rules of evidence based upon the federal rules limits the intersystem discrepancies and, thus, lowers the strain on lawyers operating in both sets of courts.\textsuperscript{26} In some instances, federal pract-

\textsuperscript{25} Under Rule 201(d) of the Federal Rules of Evidence, a judge is required to take judicial notice of adjudicative facts upon request of a party, where the necessary information has been furnished to him. Fed. R. Evid. 201(d); see 4 L. FRUMER \& E. BISKIND, BENDER'S NEW YORK EVIDENCE § 174.01[3], at 99 (1981). Under New York law, however, it appears to be within the court's discretion as to whether to take judicial notice of a fact. See Hunter v. New York, Ontario \& W. R.R., 116 N.Y. 615, 621, 23 N.E. 9, 10 (1889); 4 L. FRUMER \& E. BISKIND, supra, § 174.01[3], at 99. Moreover, in New York, the so-called "best evidence rule," which requires a party to present "the original instrument or explain to the court's satisfaction why he cannot do so," concerns only evidence in writing. 4 L. FRUMER \& E. BISKIND, supra, § 270, at 652. The federal rules have expanded the application of the "best evidence rule" to include recordings and photographs as well. Fed. R. Evid. 1001; 4 L. FRUMER \& E. BISKIND, supra, § 280.02, at 713-14. When the original is lost or unobtainable and secondary evidence is admissible, the federal rule recognizes no scheme of preference or "degrees" of secondary evidence. Fed. R. Evid. 1004 advisory committee note; 4 L. FRUMER \& E. BISKIND, supra, § 280.04, at 715. Apparently, however, the New York courts sometimes make such a distinction. See 4 L. FRUMER \& E. BISKIND, supra, § 280.04, at 715. Differences also exist between the Federal Rules of Evidence and those sections of the New York Civil Practice Law and Rules that pertain to evidence. For example, the federal rules contain more stringent restrictions on the impeachment of testimony by evidence showing a prior conviction of a crime. Compare Fed. R. Evid. 609(a) with N.Y. Civ. Prac. Law § 4513 (McKinney 1963). Similarly, while the New York statute requires that prior inconsistent statements sufficient to impeach a witness' testimony be in writing subscribed to by the witness or made under oath, N.Y. Civ. Prac. Law § 4514 (McKinney 1963), the federal rules allow impeachment by such statements "whether written or not," Fed. R. Evid. 613(a).


A primary concern during the revision process was that the proposed code should conform, as much as possible, with the Federal Rules of Evidence, since "lawyers should function under the same rules of evidence regardless of whether they practice in state or federal court." Meyer and Farrell, The New York Proposed Code of Evidence: Some Background and Some Suggestions, 47 BROOKLYN L. REV. 1237, 1238 (1981). But while the original premise was to base the New York code on the Federal Rules of Evidence, the New York code differs from the federal rules in several respects, including treatment of preliminary questions, presumptions, and privileges. See generally Martin, Code of Evidence, N.Y.L.J., May 14, 1982, at 1, col. 1. While the New York legislature currently is treating the bill as a study bill, legislative action is expected to begin in the 1983 session. See id. at 2, col. 1.
tice explicitly incorporates state procedure, as in the use of state postjudgment enforcement devices\textsuperscript{27} or in the reliance upon state long-arm jurisdiction.\textsuperscript{28} Some further differences can be eliminated. The Eastern District of New York, for example, recently adopted a local rule on enforceability of judgments which is designed to bring its practices into conformity with state practice.\textsuperscript{29} Moreover, within each court system, much can be done to avoid unnecessary discrepancies. For example, the Southern and Eastern Districts of New York should have uniform local rules. Additionally, wide divergences between the practices of individual judges in both state and federal courts confuse the bar and should be reduced.

Despite the differences in the two judicial systems, it should be remembered that both courts live in the same jurisprudential milieu. Their lawyers and judges are trained together at law school, have a common legal history, and share the same social, political and economic preconceptions. Looked at from abroad, there is probably less difference between the federal district court and the New York State Supreme Court than there is among New York’s Surrogate’s, Supreme, and Family Courts. There is also a common tendency in local federal practice, infrequently memorialized, to

\textsuperscript{27} See Fed. R. Civ. P. 69(a). Rule 69(a) requires that “[t]he procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held . . . .” Id. It was believed that developing a set of uniform rules regarding supplementary proceedings would be impractical in view of the diversity of situations encountered in the various states. See 7 J. Moore, supra note 21, ¶ 69.03[2]. Moreover, the provisions in most states regarding supplementary proceedings were considered to be “fairly adequate.” Id. It should be noted, however, that any applicable federal statute controls. Fed. R. Civ. P. 69(a); see 7 J. Moore, supra note 21, ¶ 69.04[3]. There are few such applicable statutes. Id.

\textsuperscript{28} See Fed. R. Civ. P. 4(e). Rule 4(e) states:

Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may . . . be made under the circumstances and in the manner prescribed in the [state] statute or rule.

\textsuperscript{29} Section 5020 of the New York Civil Practice Law and Rules reads in pertinent part:

“Within ten years after the entry of a judgment the attorney of record or the attorney named on the docket for the judgment creditor may execute a satisfaction-piece.” N.Y. Civ. Prac. R. 5020(b) (McKinney 1981). The federal district court for the Eastern District of New York has adopted a local rule substantially similar to the rule for the New York state courts. See E.D.N.Y. R. 15. That rule provides that “[s]atisfaction of a money judgment . . . shall be entered by the clerk . . . upon the filing of a satisfaction-piece executed . . . if within ten years of the entry of the judgment or decree.” Id.
follow local state practice.\footnote{30}

Assuming that both systems continue to operate in much their present form, the question of how the state and federal judiciary can ameliorate some of the stresses attendant on this multiple operation remains to be answered. One innovation, the organization of state-federal councils,\footnote{31} blossomed after Chief Justice Burger suggested their employment as a method of reducing the tension created in part by increased federal constitutional safeguards that affected state judicial and criminal procedures.\footnote{32} The majority of

\footnote{30} The consistency of local state and federal practice has been referred to as "local legal culture." Letter from Director A. Leo Levin to Honorable Jack B. Weinstein (April 27, 1982). An example of informal inventiveness in coordinating state and federal practice may be seen in the endeavors of the Federal Probation Service, the Federal Bureau of Prisons, and the Federal Parole Commission to cooperate with state authorities on matters of probation and parole. Letter from Chief U.S. Probation Officer James F. Haran to Honorable Jack B. Weinstein (April 27, 1982) (describing the 20 year-old agency policy to conserve limited resources and avoid unnecessary duplication by sharing information and services for clients subject to both jurisdictions).

\footnote{31} The concept of the state-federal judicial council emerged from the movement in the 1960's and 1970's toward innovation and reform of the process of judicial administration. See Winkle, Toward Intersystem Harmony: State-Federal Judicial Councils, 6 JST. Sys. J. 240, 241 (1981); infra note 32. It was believed that small groups of federal and state judges could work together to alleviate tensions and to foster cooperation between the two court systems. See Winkle, supra, at 241. Although the councils are composed almost entirely of federal and state judges, \textit{id}. at 244, attorneys and other nonjudicial personnel are sometimes represented as well, \textit{id}. at 245; see infra note 33.

Since the authority of the councils is not prescribed by statute or constitution, the individual councils have flexibility in deciding their own course of action. See Winkle, \textit{supra}, at 246-47. The objectives of one such council are:

\textit{[T]o improve and expedite the administration of justice between state and federal courts . . . , to promote and harmonize the relationship between these courts and to eliminate or minimize any conflicts which may have or could develop from the operation of the dual system of courts.}

Minutes of the Meeting of the Delaware Federal-State Judicial Council, Feb. 23, 1971, reprinted in Winkle, \textit{supra}, at 246. Among the issues commonly addressed by such councils are jurisdictional matters such as habeas corpus applications and diversity litigation, and administrative issues such as calendar conflicts and jury selection. See Winkle, \textit{supra}, at 247. \textit{See generally infra} notes 38-86 and accompanying text.

states organized such councils, comprised primarily of state and federal judges. Unfortunately, most of the councils soon became dormant.

The reason for this rapid rise and fall may have been that too much was expected of these councils. After all, they had no independent power to act, but merely could advise the two judicial systems with respect to modifications of practice, training and possible legislative or rule changes. Moreover, there was, and should be, no limitation of constitutional protections simply because a judge’s feelings may be hurt when a writ of habeas corpus or a civil rights judgment is critical of judicial, executive or legislative decisions that violate a petitioner’s or plaintiff’s rights. Limiting substantive and procedural rights is not within the jurisdiction of state-federal judicial councils. Nevertheless, the councils were useful in bringing judges and other judicial personnel together to discuss mutual problems and thereby avoid unnecessary misunderstandings and conflicts. A more modest and realistic view of their function may well lead to their increased viability.

Within the Second Circuit, there has been a resurgence of these judicial councils. One in Connecticut recently has begun to meet regularly, and the council in Vermont has been active. In New York, Chief Judge Wilfred Feinberg, acting for the Second Circuit, and Chief Judge Lawrence Cooke, acting for New York, recently have agreed to set up a council of judges to discuss state-federal justice administration problems. Following the recommen-
In view of the reorganization of the New York State-Federal Council, it seems appropriate to reconsider a number of areas in which judicial initiative respecting cooperation is particularly desirable. The subject is necessarily amorphous, but, nevertheless, based upon experience in New York and elsewhere, it is suggested that the following topics may provide a fruitful partial agenda for a state-federal council.

JURISDICTION

Questions involving joint federal-state jurisdiction seem to be a fertile area for judicial cooperation. For example, in many federal civil cases, related actions have been brought in state court. Every effort must be made to prevent duplication of motions, discovery and trials with their concomitant unnecessary burdens on both court systems as well as on lawyers and litigants. If the individual calendar systems were utilized in state court, a judge of either system could call the other, and, using a conference call in which both lawyers could participate, decide which court would abstain. Moreover, legislation may facilitate transfers of parties or seg-

38 In New York, a federal-state judicial council was established in the early 1970's; its last known meeting, however, was in 1974. N.Y.L.J., July 1, 1982, at 1, col. 4. Recently, the council, comprised of six new members, has been reactivated by Chief Judges Feinberg and Cooke. Id. The six judges are evenly divided between state and federal courts; they hope for an “exchange of views on matters of mutual interest.” Id. Organizational meetings to discuss the number of members, their terms of office, the method of selecting a chairman, and the goals of the council have been called. See Report from Judge Hugh R. Jones to Chief Judges Feinberg and Cooke, Re Proposed State-Federal Judicial Council (Feb. 1982). The judges comprising the New York federal-state judicial council are the Honorable Sol Wachtler of the New York Court of Appeals, Honorable Vito Titone of the Appellate Division, Second Department, Honorable Martin Evans of the Supreme Court of New York County, Honorable Ellsworth Van Graafeiland and Honorable Richard Cardamone of the United States Court of Appeals for the Second Circuit, and Chief Judge Jack Weinstein of the United States District Court for the Eastern District of New York. N.Y.L.J., July 1, 1982, at 1, col. 4. See generally Wheeler & Jackson, supra note 35, at 121.


40 See infra notes 51-52 and accompanying text.
ments of the litigation from one system to the other, since abstention,\textsuperscript{41} stays,\textsuperscript{42} and conditional dismissals\textsuperscript{43} are not always sufficient. It is difficult to imagine a constitutional objection to such a rational cooperative system. Since it is acceptable to transfer a case from a federal court in Maine to one in Nebraska on the ground of convenience,\textsuperscript{44} it seems no less acceptable to transfer a case from federal court to state court for trial and final disposition if the state court consents. Under commerce clause concepts, federal legislation enabling such transfers appears valid.\textsuperscript{45}

Federal-state judicial councils also might focus upon any possible jurisdictional changes in the offing. Any sudden shift in jurisdiction, procedure or relative congestion in either system may impose a sudden and unmanageable burden on the other. Should

\textsuperscript{41} The doctrine of abstention, as enunciated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), is that federal courts will defer to state courts in cases containing unclear issues of state law whose resolution could avoid or substantially modify a federal constitutional question. \textit{Id.} at 501. One commentator has noted that this may engender unnecessary delay and that the costs of the \textit{Pullman} procedure outweigh its benefits, eliminating or at least diminishing the applicability of the doctrine. Field, \textit{The Uncertain Nature of Federal Jurisdiction}, 22 WM. & MARY L. REV. 683, 698 (1981); Field, \textit{Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine}, 122 U. PA. L. REV. 1071, 1153-63 (1974); see Anti-Injunction Act, 28 U.S.C. § 2283 (1976) (prohibiting federal injunctions against state proceedings when state action is pending).

\textsuperscript{42} In cases of concurrent jurisdiction, a stay of federal proceedings is favored by virtue of two policy considerations, namely, avoidance of waste and the impropropriety of a race to secure res judicata effect. Note, \textit{Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits}, 60 COLUM. L. REV. 684, 698 (1960); see Note, \textit{Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation}, 59 YALE L.J. 978, 979-80 (1950) (stays are customarily ordered on grounds of comity and are to be favored).

\textsuperscript{43} Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that a dismissal may be permitted by the court "upon such terms and conditions as the court deems proper." \textsc{Fed. R. Civ. P. 41(a)(2).} A court may also attach a condition to an involuntary dismissal granted under Rule 41(b) motion. See Himalayan Indus. v. Gibson Mfg. Co., 434 F.2d 403, 404-05 (9th Cir. 1970); 5 J. Moore, \textit{supra} note 21, ¶ 41.14[1] n.8.

\textsuperscript{44} Article I, section 8 of the Constitution provides: "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States . . . ." \textsc{U.S. Const. art. I, § 8, cl. 3. See generally W. Lockhart, Y. Kamisar, & J. Choper, \textit{Constitutional Law} 93-154 (1980).} This power to legislate has been broadly construed. As early as 1942, the Supreme Court indicated that any activity "though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." \textit{Wickard v. Filburn}, 317 U.S. 111, 125 (1942); see, \textit{e.g.}, \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n}, 452 U.S. 264, 276-77 (1981); \textit{Perez v. United States}, 402 U.S. 146, 153 (1971); \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241, 248, 255 (1964). It is submitted that transfer of pending litigation could have at least some interstate ramifications, and so be amenable to congressional control.
federal diversity jurisdiction be abolished, for instance, it would probably be necessary to add at least four New York Supreme Court Justices and the equivalent of one Appellate Division Justice, given the high proportion of intermediate appeals in the complex cases that would be shifted. In any event, if federal jurisdiction is reduced, state courts would require assistance in predicting the effects on state dockets. The federal judiciary should be able to analyze their caseloads and provide the necessary data with reasonable accuracy.

Finally, a number of states have adopted the uniform statute permitting certification of state law questions by the federal courts. While this is primarily a diversity jurisdiction problem, it

46 Several recent proposals have been made to abolish or substantially reduce federal jurisdiction on the basis of diversity of citizenship. See, e.g., American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 9-22 (1969); Burger, Chief Justice Burger's 1977 Report to the American Bar Association, 63 A.B.A. J. 504, 506-07 (1977). In making such recommendations, the commentators have noted that the traditional justifications offered for diversity of citizenship jurisdiction, such as the fact that out-of-state parties might encounter discriminatory treatment in state courts, are no longer warranted. See H.J. Friendly, Federal Jurisdiction: A General View 147-48 (1973); Burger, supra, at 506; Flango & Blair, The Relative Impact of Diversity Cases on State Trial Courts, 2 St. Ct. J. 20, 20 (Summer 1978).

The primary reason for transferring diversity cases to state courts is to reduce the ever-increasing federal caseload. Flango & Blair, supra, at 20. It is believed that the additional cases would be less of a burden on the state courts, since they would be spread over a wider judicial base. See Burger, supra, at 506; Flango & Blair, supra, at 21. The effect of such a distribution would, of course, vary from state to state. Flango & Blair, supra, at 23. As yet, however, no decision has been made on the subject, although Congress is studying the proposed legislation. See Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 109-14 (1982) (statement of Robert J. Sheran, Chief Justice, Supreme Court of Minnesota).

A recent study conducted by the National Center for State Courts indicates that the abolition of federal diversity jurisdiction and the resulting transfer of cases from the federal to state court system would not affect all states equally but would impose a disproportionate hardship on some states, specifically Georgia, Kansas, Massachusetts, Minnesota, Mississippi, New York, Rhode Island, South Carolina, and Wyoming. In general, however, the survey's findings indicate that while the transfer of the cases would add significantly to the burden of these state courts, which were found to be already overburdened, these cases “could be handled in most instances without major additions to state judicial resources.” Flango & Blair, supra note 46, at 24 (quoting Minnesota Chief Justice Robert J. Sheran, 1976-77 Minn. St. Ct. Rep. 12).

48 The Supreme Court, in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), held that federal courts exercising diversity jurisdiction are required to apply state substantive law rather than federal "general" common law. Id. at 78. To assist the federal courts in ascertaining the pertinent state law, some states allow the use of the certified question. "The certifying federal court sends to the state's highest court the question to be answered. The question is considered and the answer is given." Unif. Certif. Ques. Law Act, 12 U.L.A. 49-50 com-
also arises in federal question cases. A reverse procedure permitting state tribunals to call upon federal courts for advice certainly would be useful, and does not seem to be doomed by constitutional objections to advisory opinions since a real controversy would be pending in state court.

missioner's prefatory note (1975). The first state to provide for such certification was Florida. Id. at 50; see Fla. Stat. Ann. § 25.031 (West 1974). Section 1 of the Uniform Act does not mandate the highest court of the state to answer certified questions. UNIF. CERTIF. QUES. LAW ACT § 1, 12 U.L.A. 52 commissioner's comment (1975); see NLRB v. White Swan, 313 U.S. 23, 27 (1941); Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 571 (1939).

49 Federal subject matter jurisdiction is based upon a showing of either diversity of citizenship or the existence of a substantial federal question. 28 U.S.C. §§ 1331, 1332 (1976 & Supp. IV 1980). Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (Supp. IV 1980). Such cases are normally characterized as those involving substantial federal questions. See C. WRIGHT, supra note 1, § 17. Jurisdiction based on a federal question may arise over questions regarding the Constitution, a particular federal statute or regulation, or a treaty. Id.

Section 1332 confers original jurisdiction on the district courts in actions involving controversies between, inter alia, citizens of different states, or citizens of a state and citizens of a foreign state. See 28 U.S.C. § 1332(a)(1)-(2) (1976). Such jurisdiction is limited to disputes involving a requisite jurisdictional amount. Id. § 1332(a). One justification long offered for the existence of diversity of citizenship jurisdiction is that out-of-state parties might face prejudicial treatment in the courts of another state. See C. WRIGHT, supra note 1, § 23, at 85. Recently, however, commentators have proposed an abolition of diversity of citizenship jurisdiction. See supra note 46.

"[T]he oldest and most consistent thread in the federal law of justiciability is that federal courts do not give advisory opinions . . . ." C. WRIGHT, supra note 1, § 12, at 40. The Supreme Court has noted that "[a]s far back as Marbury v. Madison, this Court held that judicial power may be exercised only in a case properly before it—a 'case or controversy' . . . not then moot or calling for an advisory opinion." United States v. Richardson, 418 U.S. 166, 171 (1974) (citation omitted).

The jurisdiction of the federal courts is defined in article III of the United States Constitution, which limits the federal judicial power to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. Chief Justice Warren stated:

Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94-95 (1968). No justiciable controversy is presented when the parties to an action are asking for an advisory opinion. Id. at 95; see United States v. Fruehauf, 365 U.S. 146, 157 (1961); Parker v. County of Los Angeles, 338 U.S. 327, 330 (1949); Muskrat v. United States, 219 U.S. 346, 361 (1911).
Sharing Attorneys

Lawyers quite frequently find themselves scheduled to appear in federal and state courts at the same time. Generally, the federal courts, with their individual calendar systems,\footnote{There are two systems currently employed by the courts to allocate cases among various judges. The state courts primarily use a general or master calendar system, see infra note 52, while the larger federal courts generally use what is known as an individual calendar system. Under the individual calendar system, a case randomly is assigned to a judge at the time of filing. The judge to whom the assignment is made will then be responsible for the case until its final disposition. See Committee on Criminal Advocacy, The Individual Calendar System—A Needed Reform for the New York City Criminal Court, 37 Rec. A.B. Cty N.Y. 2, 5 (1982). “Individual calendar control by federal district court judges appears to be a key factor in assuring productive use of court time and the prompt trial or other disposition of criminal cases.” Id. at 7 (quoting Fooner, Where the System Breaks Down, in BLOW THE WHISTLE ON CRIME 121 (W. Seymour, Jr., ed. 1979)).} can offer firmer trial dates than state courts. Usually, therefore, state judges working under a general calendar system\footnote{The New York City Criminal Court provides an example of what is known as a general or master calendar system. Presently in New York, cases are assigned to calendar parts, such as arraignment or trial parts. When further action is required, the case is reassigned to the appropriate part. As a case shifts parts, it also changes judges, thus no single judge will oversee any given case from beginning to end. See Committee on Criminal Advocacy, supra note 51, at 2-3. This system frequently is faulted for its absence of focused responsibility, for the “cases belong to the part, not the judge . . . .” Id. at 3. “In addition, judges are constantly called upon to make snap decisions about unfamiliar cases, which [are] then passed on to new judges who are equally unfamiliar with the history of the cases.” Id. Moreover, at least one commentator has suggested that current delays in civil trials may be substantially reduced by substituting an individual calendar system for present master systems. T. CHURCH, JUSTICE DELAYED 73 (1978).} have graciously allowed lawyers to meet these fixed dates, particularly when the federal trial involves multiple parties or out-of-state attorneys. Often, however, the reverse is true. When a federal judge receives a call from a state judge, particularly in a long-delayed criminal case, asking that a lawyer be released, every effort generally will be made to do so. The difficulty with conflicting schedules thus is resolved through the concern for each other’s effectiveness that is shared by most judges and lawyers.

Respect between state and federal judges, and for the trial bar, does much to ameliorate what would otherwise be an impossible situation. Yet, the problems could be exacerbated as crowded dockets deter judges from exercising discretion to grant adjournments.\footnote{The volume of litigation pending in the courts has exploded over the past decades. See Burger, Isn’t There A Better Way?, 68 A.B.A. J. 274, 275 (1982). For example, in the period from 1940 to 1981, the number of civil case filings in the federal district courts rose} Moreover, currently proposed individual calendar systems...
for state judges, designed to increase both the quality and quantity of dispositions, arguably will increase schedule conflicts as well. In effect, hundreds of state and federal judges would be setting trials calling on the services of a limited trial bar. Working out reasonable solutions for such impasses should be a primary goal for federal-state judicial councils.

Another area in which both the federal and state systems compete for the same trial advocates is pro bono voluntarism. In the Eastern District of New York, a great deal of effort has been devoted to developing pro bono panels in civil cases. Some method from approximately 35,000 to 180,000 annually, resulting in a doubling of the yearly caseload per judge, from 190 to 350 cases. Id. at 275. Similarly, filings in the state trial courts from 1967 to 1976 increased at approximately double the rate of population growth. Id.

64 See supra notes 51-52.

65 Taking issue with the notion that individual calendar systems promote schedule conflicts, proponents of the individual calendar approach argue that under the general calendar system, schedule conflicts are already numerous, suggesting that scheduling problems are not really linked to any particular case assignment system. Committee on Criminal Advocacy, supra note 51, at 12. Moreover, supporters of the individual system suggest:

[C]ommon sense tells us that schedules conflict when the parties involved have failed to communicate with each other about their available time. Indeed, under the master calendar system, there is far less incentive to avoid schedule conflicts and adjournments since it is commonplace that the judge who agreed to an initial schedule is not the judge who is asked for an adjournment. In an individual calendar system, an attitude of date certain scheduling would prevail, providing the impetus for fewer calendar appearances and for better communication between judges and attorneys as well as the police and other witnesses.

Id.


While the Supreme Court has announced a constitutional right to counsel in criminal prosecutions, see, e.g., Argersinger v. Hamlin, 407 U.S. 25, 26 (1972); Gideon v. Wainwright, 372 U.S. 335, 340 (1963), an indigent litigant in a civil case is not usually similarly provided with legal assistance, see, e.g., Haines v. United States, 453 F.2d 233, 237-38 (3d Cir. 1971); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971); Ehrlich v. Van Epps, 428 F.2d 363, 364 (7th Cir. 1970). In a number of cases, however, courts, in their discretion, have appointed counsel for indigent civil litigants. See, e.g., Massengale v. Commissioner, 408 F.2d 1373, 1374 (4th Cir.), cert. denied, 396 U.S. 923 (1969) (income tax case); Jacox v. Jacox, 43 App. Div. 2d 716, 717, 350 N.Y.S.2d 435, 436 (2d Dep't 1974) (matrimonial action).
of sharing this valuable resource, as well as the criminal defense bars created by the Criminal Justice Act and Article 18-B of the New York County Law is therefore necessary.

**JUDICIAL ADMINISTRATION**

Another area to be considered is the possibility of reducing administrative difficulties via maximum federal-state cooperation. The federal record system is in the process of being computerized, and similar action will be undertaken by New York State. This

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A number of commentators have argued that the assignment of counsel to indigent civil litigants, though not constitutionally guaranteed, is both beneficial and necessary. See, e.g., Botein, Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?, 36 BROOKLYN L. REV. 368, 368-70 (1970); O'Brien, Why Not Appointed Counsel in Civil Cases? The Swiss Approach, 28 OHIO ST. L.J. 1, 16-17 (1967); Silverstein, Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases, 2 VAL. U.L. REV. 1, 16 (1967); Weinstein, The Poor's Right to Equal Access to the Courts, 13 CONN. L. REV. 651, 658 (1981); Weinstein, Cost-Cutting and Streamlining May Deny Justice to the Poor, N.Y.L.J., Mar. 30, 1981, at 1, col. 2. It has been proposed that the pro bono work of private practitioners be extended on a compulsory basis. Model Rules of Professional Conduct Rule 6.1 (Proposed Final Draft 1981). Rule 6.1 of the Proposed Model Rules of Professional Conduct provides:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, or by service in activities for improving the law, the legal system or the legal profession.


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57 18 U.S.C. § 3006A (1976). The Criminal Justice Act provides, inter alia, that each United States district court shall place in operation a plan for furnishing representation for indigents charged with certain designated offenses. Id. Representation under the Act includes counsel as well as investigative, expert, and other services necessary for an adequate defense. Id.; see, e.g., United States v. Henderson, 525 F.2d 247, 251 (5th Cir. 1975) (Criminal Justice Act reflects strong policy to furnish counsel and services to indigents so as to place such defendants in nearly equal position with defendant who can pay); Tyler v. Lark, 472 F.2d 1077, 1079-80 (8th Cir.) (purpose of statute is to protect indigent defendants), cert. denied, Beilenson v. Treasurer of the United States, 414 U.S. 864 (1973); United States v. Tate, 419 F.2d 131, 132-33 (6th Cir. 1969) (government compelled under statute to provide psychiatric evaluation for indigent contemplating defense of temporary insanity).

58 Article 18-B of the New York County Law provides in part:

The board of supervisors of each county and the governing body of the city in which the county is wholly contained shall place in operation... a plan for providing counsel to persons charged with a crime... who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense.


59 See generally Nihan & Wheeler, Using Technology to Improve the Administration...
should permit swift interchange of all criminal and civil information. It would be helpful if, for example, a judge, state or federal, could quickly ascertain the number of cases of a specific type brought by a particular plaintiff, or in which a certain attorney is serving as counsel, or the length of an average sentence for a given crime. Storing such information in computerized data banks would greatly facilitate access to it and would enable a prompt search of all federal and state records.

Bar membership and discipline provide another area of state-federal interface. Separate requirements for admission to state and federal bars are unnecessary since admission to the bar is essentially a state matter.\(^6\) A full and appropriate bar examination is given by the state, and law school courses should be designed to enable students to act effectively in both systems. In addition, discipline is, for the most part, a state matter. In virtually no instance will a lawyer be excluded from the federal court and not the state system. Since the state has a comprehensive admission and disciplinary system, it is common practice to issue an order to show cause why a lawyer should not be disciplined by the federal court when he or she was disciplined by the state and, except in a few cases where the state decision is being challenged, to order the same discipline concurrently. If a lawyer acts improperly in the federal court, absent a contempt citation or other sanction under the federal rules,\(^61\) any delict should be handled by the state. Rather than strike an attorney from the federal rolls, the problem should be brought to the attention of the state authorities, leaving to them the primary disciplinary function.

Recent federal attempts to design a wholly new federal admissions and disciplinary system, it is submitted, have been misguided...
Judicial activity for its own sake is particularly undesirable in light of the scarcity of judicial resources within both systems. Duplication of state efforts should be avoided as much as possible.

Another administrative factor deserving attention is jury selection. The time lost in New York state criminal trials because of the virtually unrestrained use of voir dire by lawyers is well known. The trial bar strongly has resisted the federal system of questioning by the judge using inquiries suggested by counsel. Here, as in other areas, the federal and state trial judges can learn techniques from each other, modifying them as differences in practice require. For example, some federal judges are currently using magistrates or law clerks to supervise the jury voir dire while the

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62 In 1975, a recommendation was made by the Judicial Council of the Second Circuit that the Second Circuit district courts adopt rules designed to increase the difficulty of admissions to the federal bar and to improve disciplinary procedure. See Advisory Committee on Proposed Rules for Admission to Practice, Final Report, 67 F.R.D. 161, 161, 191 (1975). Some of the proposed rules included an increase in required law school courses and an evaluation before a screening committee on admissions. See id. at 167-72. It has been suggested that such a policy amounts to an unjustified interference with the law school curriculum and is based on an unreasonable assumption that attorneys in the state courts are less qualified than those in the federal courts. Weinstein, Proper and Improper Interactions Between Bench and Law School: Law Student Practice, Law Student Clerkships, and Rules For Admission to the Federal Bar, 50 St. John's L. Rev. 441, 451, 457 (1976).

63 The National Center for State Courts defines voir dire as “the process by which prospective jurors are examined to determine their suitability to serve on the case at hand. Its purpose is to uncover prejudices and reveal biases, in the hope that all jurors will be fair and impartial in judging the defendant.” Nat'l Center for State Courts, Facets of the Jury System 22 (1976).

64 See Costantino, Abolish Lawyers' Voir Dire of Juries, 8 Litigation 5, 6 (Spring 1982). Judge Costantino of the Eastern District of New York stated:

The state courts consume far more time in voir dire than their federal counterparts. For example, jury selection now consumes one-third of New York City court time. . . . During the recent state trial of Jean S. Harris, who was convicted of murdering Dr. Herman Tarnower, the author of The Scarsdale Diet, the lawyers questioned 550 possible jurors over three weeks. During those same three weeks in the U.S. District Court in Brooklyn, I selected three juries and tried a racketeering case, a narcotics case, and a longshoreman case. I managed to select a jury acceptable to both the government and the defense in one of the “Abscam” trials in three hours. . . .

When lawyers rather than judges select juries it is a time-consuming and expensive procedure.

Id.

65 Federal Rule of Civil Procedure 47(a) and Rule of Criminal Procedure 24(a) guide voir dire examination in federal court. Under these rules, the trial judge is granted broad discretion. For example, under both the civil and criminal rules, the trial court may examine the panel or permit the parties or their attorneys to conduct the examination. Costantino, supra note 64, at 5.
judge handles other cases. Some state judges have allowed the lawyers to select civil juries without a judge being present. These ideas merit further joint evaluation, and participation in each other's training programs could prove useful. 66

It is also apparent that the two systems do not cooperate in distributing the burden of jury service. Some federal jurors complain that they are called to serve in federal court shortly after having served in state court, and vice versa. It would be more equitable for each system to give credit for recent service in the other. 67 Further, it appears that the federal juror panels in the Eastern District, being drawn from voting rolls alone, may not be as representative of the population as they are under the state system, which uses other sources in addition to voter lists. Perhaps one data base from which to draw both federal and state jurors could be utilized, thereby saving money and minimizing juror inconvenience. Legislation may be required to achieve this result. 68

Another facet to be considered is the utilization of expert witnesses. New York State has expert medical witness panels. 69 Yet, use of these state panels by federal judges sometimes is denied by the clerk in charge. It seems unreasonable to go to the expense of creating duplicate panels. Similarly, the increased courtroom use of statistics augurs the eventual establishment of groups of statistical

66 The Federal Court's Circuit Conference in the fall of 1982 will be discussing jury selection and use. State judges should be welcomed and, in fact, Presiding Justice Milton Mollen of the First Department has been invited by the United States District Court for the Eastern District of New York.

67 See Winkle, supra note 31, at 248.


The federal selection plan also provides for a random selection from either the voter registration lists or the lists of actual voters. See 28 U.S.C. § 1883 (1976). Such a system has been criticized as being less than representative of the total population. See J. Van Dyke, Jury Selection Procedures 24 (1977). The federal courts, however, repeatedly have upheld the validity of this procedure. See United States v. Huber, 457 F. Supp. 1221, 1231-32 (S.D.N.Y. 1978); United States v. Gaona, 445 F. Supp. 1237, 1240 (W.D. Tex. 1978).

experts to aid the courts.\textsuperscript{70} Both state and federal courts should share in this resource if it is created.

There is one administrative issue that causes actual and potential problems but is, most likely, not susceptible of resolution by state-federal judicial councils. There are differences in the pay, ancillary benefits and duties of equivalent personnel in the state and federal systems that may cause intersystem friction. For example, federal probation service was at one time less attractive, and possibly is now more attractive, than state service. Federal and state reporters’ compensation differs.\textsuperscript{71} Although these factors may result in employee dissatisfaction or cause a shift in employment from one system to the other, negotiating wages and other terms of employment is so complicated already that perhaps this thicket should be left unexplored by state-federal judicial councils.

\textbf{Criminal Justice}

The final topic to be examined is the arena of criminal justice. A number of the problems besetting the courts in this area may be alleviated, to some extent, by increased state-federal cooperation.

There is growing pressure in this country to incarcerate increasing numbers of felons for lengthier periods of time. Presently, there are over 350,000 prison inmates in the United States.\textsuperscript{72} In

\textsuperscript{70} Several commentators have noted the increased use of statistics in the courts. See Brilmayer & Kornhauser, Review: Quantitative Methods and Legal Decisions, 46 U. Chi. L. Rev. 116, 116-17 (1978); Cohn, On the Use of Statistics in Employment Discrimination Cases, 55 Ind. L.J. 493, 493 (1980); Curtis & Wilson, The Use of Statistics and Statisticians in the Litigation Process, 20 Jurimetrics J. 109, 110 (1979). Some commentators attribute this to “larger numbers of technical disputes involving problems such as air and water quality, the safety and economics of nuclear generators, the deregulation of natural gas, and the presence of carcinogenic agents in the workplace and in the kitchen.” Brilmayer & Kornhauser, supra, at 117.

\textsuperscript{71} As of July 12, 1982, court reporters in the federal system were receiving salaries ranging from $30,121 to $33,133. State court reporters’ salaries range from $26,763 to 35,980. See Memorandum from Robert C. Heinemann, Chief Deputy Clerk of the Office of Court Administration to the Honorable Jack B. Weinstein, Chief Judge, United States District Court, Eastern District of New York (July 12, 1982). There are, however, differences in fees earned from transcripts and in the demands made by federal and state judges, making comparisons difficult.

\textsuperscript{72} The Bureau of Justice Statistics reported a prison population of 369,009 in this country in 1981. Court News Roundup, 21 Judges’ J. 1, 1 (1982). This constituted a record increase of 12.1 percent in the total number of inmates in state and federal institutions. \textit{Id.} These figures included an increase of 16 percent in the number of federal prisoners, thus ending a 3-year decline in the federal prison population. \textit{Id.} at 46. The figures also indicate wide variations among the states in the percentage of change. The percentage ranged from a low of -0.9 percent for Michigan, the only state to show a decline in prison population over
fact, we now imprison a larger percentage of our population than any other western nation.\textsuperscript{73} The states are not building prisons rapidly enough to handle these increasing numbers.\textsuperscript{74} In case after case, the federal courts have intervened to reduce overcrowding in state jails and prisons,\textsuperscript{75} which, in turn, has a direct impact upon

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\textsuperscript{73} The American Institute of Criminal Justice has reported that our national rate of incarceration of 250 people per 100,000 is surpassed only by two industrialized nations, namely, South Africa (400 per 100,000) and the Soviet Union (391 per 100,000). Rawls, \textit{Crisis and Cutbacks Stir Fresh Concerns on Nation's Prisons}, N.Y. Times, Jan. 5, 1982, at A1, col. 1, B10, col. 1. A comparison of the incarceration rates in other western nations showed that the rate in Canada is less than one-half, in Britain less than one-third, and in West Germany less than one-quarter of the rate in the United States. \textit{Id.} at B10, col. 2.

\textsuperscript{74} In June, 1981, it was reported that federal and state prisons were then holding a total of 320,000 inmates. This figure exceeded the stated total prison capacity by almost 100,000. \textit{Bulging Prisons Bracing for New Disorders}, U.S. News & World Rep., June 8, 1981, at 31. In that same article it was reported that at least 70 new state facilities were then under construction and 100 more were in the planning stage. \textit{Id.}

Obviously one major factor preventing the construction of new facilities is their cost. The cost of construction has been estimated to be from $30,000 to $100,000 per bed. Pear, \textit{Reagan Panel Asks Aid to State Jails and Sterling Laws}, N.Y. Times, Aug. 18, 1981, at A1, A14, col. 1 ($70,000 for maximum security, $30,000 to $50,000 for medium security); \textit{Id.}, Apr. 23, 1982, at A26, col. 4 (letter to the Editor from Robert Gangi, Executive Director, Correctional Association of New York) ($90,000 to $100,000 estimate per bed). It has been suggested that the federal government provide financial assistance to the states for the purpose of constructing new facilities. The United States Attorney General's Task Force on Violent Crime recommended in its final report that the federal government make some $2 billion available to the states for construction of prison facilities. U.S. Dep't of Justice, Attorney General's Task Force on Violent Crime 10, 19-20 (1981) [hereinafter cited as \textit{Final Rep.}].

One of President Reagan's top advisers, Edwin Meese III, has conceded, however, that the federal government cannot afford to follow this recommendation. Rawls, \textit{supra} note 73, at B10, col. 1.

In contrast to the Attorney General's task force, the American Bar Association's task force on crime is reported to have concluded that building new prisons will not help reduce violent crime. Lauter, \textit{ABA Crime Unit Backs Pretrial Jail}, Nat'l L.J., Jan. 11, 1982, at 7, col. 1. "The ABA group said that building new prisons should be a low priority in most states, which should concentrate more on finding alternative ways of handling non-violent offenders." \textit{Id.} at 7, col. 4. It has also been suggested that the basic problem is not money but rather the unwillingness of the people to accept prisons in their neighborhoods. McQuiston, \textit{Why Jail Crowding is So Hard to Cure}, N.Y. Times, May 2, 1982, § 21, at 1. For a general discussion of the problem of prison overcrowding, see Lieber, \textit{The American Prison: A Tinderbox}, N.Y. Times, March 8, 1981, § 6 (Magazine), at 26.

\textsuperscript{75} At the end of 1980, a total of 28 states and the District of Columbia were ordered by federal courts to reduce the overcrowding in their correctional facilities. Bureau of Justice Statistics, Prisoners in 1980, at 1 (1981). By the end of 1981, there were 31 states under such orders, and 37 states in litigation concerning prison conditions. Court News Roundup, \textit{supra} note 72, at 1. This judicial intervention persists despite the holding of the Supreme Court that the housing of two prisoners in a single cell in an Ohio correctional facility did not constitute cruel and unusual punishment for purposes of the eighth and fourteenth
state court bail, sentencing and parole practices. The solution to this problem does not lie with state and federal judges alone. State judges and parole boards are caught between the federal judiciary's mandates to reduce overcrowding and the state legislators' failure to allocate funds. Federal army bases, old civil and conservation corps camps, and other facilities could be made available to meet the states' needs in this area, particularly when juvenile offenders are involved.\(^7\)

When prisoners are convicted in both state and federal court, joint sentencing problems may arise. The federal judge who sentences after a state sentence is imposed can recommend to the United States Attorney General that the sentence be served in the state system, if he wishes the sentences to run concurrently.\(^7\) He

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\(^7\) In its final report, the Attorney General's Task Force on Violent Crime made the following recommendation:

The Attorney General should work with the appropriate governmental authorities to make available, as needed and where feasible, abandoned military bases for use by states and localities as correctional facilities on an interim and emergency basis only. Further, the Attorney General should work with the appropriate governmental authorities to make available, as needed and where feasible, federal property for use by states and localities as sites for correctional facilities.

FINAL REP., supra note 74, at 10 (footnote omitted). A recent Gallup Poll indicates that 76 percent of the American people favored the Reagan administration's proposal to permit states to use abandoned military bases to house their prisoners. N.Y. Times, Apr. 5, 1982, at A18, col. 3. The State of New Jersey already has arranged to lease the former stockade at Fort Dix from the federal government. N.Y. Times, Mar. 25, 1982, at B10, col. 3. The new facility will accommodate a total of 500 prisoners presently housed in overcrowded county jails. N.Y. Times, May 14, 1982, at B2, col. 5.

\(^7\) Two sections of Title 18 of the United States Code have been interpreted as precluding a federal judge from ordering that a federal sentence be served concurrently with a state sentence. See 18 U.S.C. §§ 3568, 4082 (1976). The relevant part of section 4082(a) provides:

A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

18 U.S.C. § 4082(a) (1976). This statute clearly gives the United States Attorney General, and not the federal judge, authority to determine where a particular sentence will be served. It has also been interpreted as indirectly denying the federal judge power to order that a federal sentence be served concurrently with a previously imposed state sentence. See United States v. McIntyre, 271 F. Supp. 991, 999 (S.D.N.Y. 1967), aff'd, 396 F.2d 859 (2d Cir. 1968), cert. denied, 393 U.S. 1054 (1969). The McIntyre court stated:

It is fundamental law that under 18 U.S.C. § 4082 the Court has no power to order a Federal sentence to run concurrently with a prior State sentence since this in effect would be a designation of the place of confinement, a matter exclusively
cannot, however, extend the prisoner’s time in the state penitentiary, nor can he designate service of both sentences in his own system. A state judge may take a prior federal sentence into account in sentencing on a state charge, but he cannot recommend service of the state sentence in a federal institution. Counsel in the two cases are often different, and the defendant may not be fully and fairly treated in either. Joint sentencing by state and federal judges, perhaps after consultation with one another, sometimes would be more satisfactory. Coordination of correctional and parole decisions obviously would aid in this regard.

Another area that would profit from judicial cooperation would be probation services. When both state and federal authorities have jurisdiction over the same prisoner, the probation and parole authorities of each are called upon to perform similar tasks. The two systems should share probation reports in order to

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within the province of the Attorney General. The sentencing Court is only authorized to recommend a place of detention which the Attorney General is free to accept or reject. And while the Attorney General, in practice, generally follows the recommendation of the Court, he is under no duty to do so. Thus . . . a grant of concurrency (arising from the designation of place of sentence) is a matter of grace rather than a matter of right. It arises from the combination of the sentencing judge's recommendation and the Attorney General's adherence to that judge's suggestion.

271 F. Supp. at 999-1000 (citations omitted); accord United States v. Janiec, 505 F.2d 983, 987 (3d Cir. 1974) (“[a]lthough the Attorney General may ‘designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise,’ 18 U.S.C. § 4082(b), a federal court has no authority to designate ‘a place of confinement’”), cert. denied, 420 U.S. 948 (1975); Joslin v. Moseley, 420 F.2d 1204, 1206 (10th Cir. 1969).

This same conclusion, that a federal judge does not have the power to order concurrency between a federal and state sentence, also has been reached on the basis of section 3568. That section provides:

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence . . . . No sentence shall prescribe any other method of computing the term.

18 U.S.C. § 3568 (1976). In United States v. Allen, 588 F.2d 183 (5th Cir. 1979), the court held, on the basis of this statute, that the district court had not been empowered to order that the federal sentence be served concurrently with one previously imposed by the state. Id. at 185.


In general, a judge may place an offender on some form of probation in lieu of imposition of incarceration. See generally Sentencing, Parole and Probation, 70 GEO. L.J. 721, 763-70 (1981). A crucial factor in such a decision is the input received from probation services. See R. Henningsen, Probation and Parole 32 (1981). Aside from supervising the terms of probation, a major role of probation services is the preparation of the presentence report. The United States Probation Service, established in 1930, is a good example of a probation service. The service provides a comprehensive range of services to the federal courts throughout the United States.
avoid duplication of research, since the investigative efforts of probation services in preparing background reports are costly and intrusive. There is no need to investigate and describe the same defendant twice. At the moment, the federal probation system in the Eastern District probably has more high quality resources available than the state system, and there is no reason why the state could not make greater use of the federal reports. Certainly, courts and probation services could frame their orders so that each probation system could operate as agent for the other in supervision, training and charging probation violations. The Eastern District Chief Probation Officer has indicated that cooperation with state probation services already is quite advanced.

A final area of federal-state interplay in the criminal justice system is federal civil review of state criminal prosecutions. State criminal defendants frequently bring collateral attacks on their criminal arrests or convictions before exhausting their state remedies. When such attacks are leveled, there is the danger that a federal court will grant discovery in a civil rights suit which would interfere with the state's pending criminal prosecution. These issues are among the most sensitive in the criminal law area. Bear investigation report. See id. at 11. The presentence report contains background information on the offender, such as his prior record or financial condition, which is designed to enable the judge to tailor the sentence to the defendant. See id. at 32.

Two state-federal judicial councils (Virginia and Maryland) apparently have adopted programs providing for the exchange of presentence reports between state and federal probation officers.

It must be borne in mind that interference by a federal court with proceedings in a state court is violative of the federal abstention doctrine. See Younger v. Harris, 401 U.S. 37, 43 (1971). In Younger, the Court stated: "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." Id. This same policy of noninterference with state proceedings is the basis of the exhaustion doctrine in the area of federal habeas corpus. See infra note 85 and accompanying text. The Supreme Court has emphasized:

As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.


See Note, Habeas Petitions with Exhausted and Unexhausted Claims: Speedy Release, Comity and Judicial Efficiency, 57 B.U.L. Rsv. 864, 871-72 (1977); see also Hopkins,
in mind that, in the recent case of Rose v. Lundy, the Supreme Court, in its desire to reduce the repetition of habeas corpus attacks upon state convictions, perhaps went too far by adopting a total exhaustion rule. Petitioners now are required to exhaust all state claims in a petition before those already exhausted can be considered by the federal court. In many cases, rather than sending the prisoner back to the state to exhaust a plainly nonmeritorious claim, it might save the time of both court systems if the federal court were to resolve all issues at once. Justice Hopkins has suggested the establishment of a data bank which would keep the records of the prisoner's various petitions available to assist both state and federal judges in dealing with collateral attacks upon convictions. He concluded that "the possibility of tension be-

Federal Habeas Corpus: Easing the Tension Between State and Federal Courts, 44 St. John's L. Rev. 660, 665 n.34 (1970) ("an appeal is where one court is asked to show its contempt for another").

Id. at 1199. The case of Rose v. Lundy involved a mixed petition for habeas corpus, that is, a petition containing at least one claim as to which the applicant's state remedies had been exhausted and at least one as to which they had not. The exhaustion rule requires that each claim be exhausted before it can be considered by a federal court. See 28 U.S.C. § 2254(b) (1976). At the time Rose v. Lundy was decided, there existed a conflict among the circuits as to whether the exhausted claims presented in a mixed petition should be considered. The majority of circuits had held that the exhausted claims should be addressed. E.g., Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Hewett v. North Carolina, 415 F.2d 1316, 1320 (4th Cir. 1969). Two circuits, however, had adopted the more demanding total exhaustion rule, requiring that the court dismiss all claims presented in a mixed petition. See Galtieri v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978) (en banc); Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976). Adopting the more stringent total exhaustion rule, the Rose v. Lundy Court held: "[B]ecause a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, . . . a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." 102 S. Ct. at 1205 (footnote omitted). Notwithstanding the holding in Rose v. Lundy, the precise degree of exhaustion necessary remains to be seen. In his concurring opinion, Justice Blackmun noted that the two circuits that already had adopted the total exhaustion rule did allow exceptions. Id. at 1209 n.7 (Blackmun, J., concurring). Similarly, Justice Brennan observed, in an opinion rendered 1 month after Rose v. Lundy, that the Court was already ignoring its own total exhaustion rule. Engle v. Isaac, 102 S. Ct. 1558, 1578 (1982) (Brennan, J., dissenting). Justice Brennan remarked that "[i]n scarcely a month, the bloom is off the Rose." Id. (Brennan, J., dissenting).

Hopkins, supra note 83, at 671. The Attorney General's Task Force on Violent Crime recently came to a conclusion similar to that of Justice Hopkins in a report written some 10 years after the Hopkins article. The report states:

Criminal history information is vital to optimum performance of the criminal justice system. The police need adequate, accurate information for the prevention and investigation of criminal activity and for the apprehension of criminal offenders; prosecutors and the judiciary need such information for bringing offenders to justice; courts need additional information to determine appropriate sentences;
between the two systems can be lessened by opening the channels of communication.”

Undoubtedly, other areas of tension exist. Most can be resolved, however, through common courtesy and consideration of the needs of other judges, lawyers and litigants. As to these matters, the state-federal judicial council may prove particularly useful in exposing points of friction and providing methods for greasing the gears of our judicial systems. A great deal can be accomplished on a personal level as federal and state judges invite each other to their conferences and establish closer social and professional relationships.

CONCLUSION

The American system of justice should be considered, whenever possible, as an integrated whole designed to meet the needs of all the American people. In both the criminal and civil spheres, states must, and should, continue to handle the overwhelming bulk of cases. Nevertheless, various methods for effectively utilizing joint resources can be developed. This may require partial elimination of the distinction which currently exists between federal and state courts, and may raise constitutional, legislative, and practical difficulties. Such methods, however, are well worth investigation with a view toward creating a cooperative federal-state system of justice.

The primary responsibility for better coordination rests with the legislature since it can provide a more rational division of jurisdiction and substantive law. The executive branch, moreover, particularly prosecutors and police, must cooperate in allocating prosecutorial roles in order to prevent a breakdown of both federal and state systems of criminal justice. Judges, however, can encourage this process through their influence as members of the legal community. Occasional decisions that slightly modify the law so as to eliminate sources of friction between state and federal law officers also may be helpful. In the main, however, the judiciary has the minor role of adhering to rules of etiquette that permit

and correctional agencies need it to select proper correctional programs. Final Rep., supra note 74, at 67. The task force did not actually recommend the creation of a national data base, however, because alternative systems for making such information available are already being tested. Id. at 69.

87 Hopkins, supra note 83, at 674.
members of the two judicial establishments to cooperate with a minimum of annoyance and interference and a maximum sense of pleasure in jointly serving the bar and public.

As Professor Winkle observes:

The state-federal judicial council experiment is instructive for courts and federalism. It suggests in part that the intergovernmental process best achieves goals, at least modest ones, through cooperation, not competition. Separatism, isolation, and noncommunication undermine interjudicial harmony. Within a framework of interdependence, there is a distinct need to understand and to accommodate the federal and state interests whenever possible. . . . [A] complete view of judicial federalism cannot be confined to statutory rules and judicial decrees alone. The interplay of individual actors is a necessary dimension of that relationship.88

Joint training sessions, invitations to each other's conferences and the State-Federal Judicial Council can assist in improving the ability of state and federal judges to provide the public with more effective justice. At the same time, it must be emphasized that "Our Federalism" and a sensitivity to intrusion on state courts' interest in enforcing state laws, should not impede the prompt vindication of federal constitutional rights by simple and economical procedures.

88 Winkle, supra note 31, at 252.
89 Charles Alan Wright defines "Our Federalism" as the doctrine "which teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts." C. Wright, supra note 1, § 52A, at 229. Justice Black referred to "Our Federalism" as:

[T]he concept . . . represent[ing] . . . a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. Younger v. Harris, 401 U.S. 37, 44-45 (1971).