skills of cross-examination. He was criticised for failing to put matters to the complainant. He was interrupted during his address to the jury. In the event he was convicted and sentenced to imprisonment for six years. Murphy J, calling in aid the decisions of the Supreme Court of the United States in *Gideon* v. *Wainright,* 372 U.S. 335 (1963) felt that, as in the U.S., a right to counsel in all serious cases should be affirmed:

> "The right [to counsel] is an empty one if courts force accused to trial unrepresented because counsel refuse or neglect to represent the accused (because of poverty, or other reasons). . . . It is unsound to judge the strength of the evidence against [the accused] and the weakness of the defence from a trial in which he was unrepresented. How can an appellate court assess what would have happened if the accused had been represented? . . . Often courts cannot remedy denial of human rights which occur outside the judicial system, but there is no excuse for tolerating it within the system. It is useless to pretend that the rule of law operates throughout Australia when a basic human right is denied in a State Supreme Court, its denial confirmed there on appeal, and then tolerated by this court."

Speaking to a Rotary Club of Melbourne luncheon in the National Gallery, Melbourne, the ALRC Chairman, Mr Justice Kirby, pointed to the relevance of *McInnis* for Lord Devlin's thesis:

> "Without a legal representative, at least in important and difficult cases, the adversary system simply breaks down. It takes a lifetime of training and preparation to be able to present a case in the drama of a trial, with skill and persuasiveness. Some never acquire the skill. An unrepresented layman, passionately bound up in his own interest, can almost never match the talent and tactical, forensic advantage of trained counsel. Furthermore, even as between counsel, there are significant differences of eloquence and ability. Both in the criminal and civil courts, Lord Devlin urged that we should consider the cost effectiveness of the adversary trial system. In the criminal area particularly, Devlin asserted there should be less emphasis on 'winning the case' and a greater stress on 'dispassionately finding the truth of the matter'."

The ALRC is now embarked on its inquiry into evidence law in federal courts. Should our rules of evidence permit and even encourage judges to take a positive initiative to search for truth, to call witnesses themselves and to emerge from the paragon state of silence described by Slynn and Templeman? Professor Geoffrey Sawer pointed out in the *Canberra Times* (13 Feb 1980) that judges do ask questions, press issues and many take an active part in the running of the trial. According to Sawer, the tradition of judicial lockjaw dates from Lord Chancellor Bacon. A healthy antidote will be needed, if the basic ground rules of the trial system are to be altered, even marginally:

> "Unless a person on serious criminal charges is always represented, the procedures of the adversary trial break down. If one person is represented and another is not, the procedures break down. If one person is represented by a QC of the greatest skill and the other by the rawest Junior, the system has a tendency to break down. If one person is a humble citizen of little means and the other is the Government, a great corporation or a trade union, the system also has a tendency to break down. Lord Devlin put it well: 'One of the most elementary duties of a civilised state is to provide for its citizens a system of settling disputes. This obligation would be meaningless if the price to the citizen was out of all proportion to the value in dispute'. No method of human justice is perfect, but we must labour to improve our system."
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> *Do We Really Have to Kill All the Lawyers First?* 6 Feb 1980

Community Justice

> "Justice is my being allowed to do whatever I like. Injustice is whatever prevents my doing so."
>
> Samuel Johnson c1770

Oliver Wendell-Holmes Jnr once interrupted counsel with the admonition: 'This is a court of law, young man, not a court of justice'. Purists might say that courts exist to dispense 'justice according to law'. However, some modern critics feel that the strict duty of courts of law to stick to the point and decide only the specific legal issue before them, may sometimes prevent a resolution of wider, peripheral questions critical to the dispute between the parties. The court may provide the legal solution for the latest 'symptom' of a dispute. It may fail utterly to attack the underlying 'disease'.

An interesting new venture is being tried in N.S.W., with the establishment of a number of Community Justice Centres. In August 1979 the N.S.W. Attorney-General (Mr Frank Walker) announced the government's decision to introduce an experimental programme involving the funding of a number of pilot centres in metropolitan and provincial locations. The centres are modelled on agencies developed in the United States in recent years. They seek to offer an alternative means of resolving disputes amongst citizens, to supplement legal adjudication in the courts. The technique offered is community mediation.

Initially three pilot projects are to be set up at Bankstown and Redfern, populous suburbs of Sydney and in Wollongong. Funding has been approved for a two-year pilot.

Explaining the project, John Schwartzkoff, in an evaluation for the Law Foundation of N.S.W., put it thus:

> "Central to the decision [to fund a pilot scheme] was an acknowledgement that the adversary processes of legal adjudication, whether in criminal or civil matters, do not readily lend themselves to the effective resolution of conflicts between parties to some ongoing relationship. Even if the parties concerned have effective access to conventional legal remedies, the courts can only address themselves to the technical rights and wrongs of the specific issue before them."

Jane Chart, Lecturer in Law at the University of N.S.W., says:

> "By definition, the court cannot be concerned with normalising the relationship between the parties, which may be the source of future disagreements."

In the context of community justice centres as a means of mediating cases of family violence, she says:

> "It must be acknowledged that our existing social and legal arrangements for handling family violence are woefully deficient. ... The justice system has directed its attention scarcely, if at all, to ... helping the couple to come to terms with their problems. Indeed, it is questionable whether the adjudicatory mode of dealing with domestic violence cases is at all consistent with securing that objective.... The court cannot delve into the underlying conflict between the parties which may have sparked off the particular incident. It is not entitled to seek to normalise the parties' relationship."

Some lawyers do not feel competent to deal with the 'underlying conflict'. Others do not care about it. In the attempt to solve ongoing conflicts and to avoid the label of criminality and punishment that may compound the problem, Neighborhood Justice Centers have been set up in the United States. The Centers use mediators to probe misunderstandings and common ground between the parties. The mediator has no power to compel a settlement, nor to enforce it. Cases are referred to the Center by the courts, for mediation and report. Specifically, Centers operate out of store-front premises, often in areas of racial conflict. They use mediation panels of two or three volunteer citizens, generally residents of the local community. Often, law students are used to help with mediation.

Orthodox lawyers may look askance at the suggestion of courts referring cases to 'a group of amateurs', however well-meaning. But typical cases which have proved susceptible to this form of mediation in the United States include:

- Disputes between neighbours over a dividing fence
- Long-standing disputes about rowdy parties
- Disputes between friends or relatives which result in violence or property damage
- Harrassment or acts of retaliation for real or imagined wrongs

A background paper on the CJC system suggests:

> "A more fruitful approach than a determination of guilt or innocence may be to grapple not with the isolated complaint but with the underlying personal interactions which have produced it. The mediator actively assists the parties to come to their own resolution of the dispute and does so by appealing to their own self-interests."

Citizen dispute settlement projects are springing up all over the United States and the Judiciary Committee of the U.S. Senate has commenced an inquiry into federal funding for the schemes (*Hearings,* 96th Congress, Serial 96-7). Opening the inquiry, Senator Edward Kennedy, Chairman of the Committee, said:

> "No system merits the description [of equal justice] if access is the privilege of a few and not the right of all. That principle is the foundation of our legal system, but the reality is that more than two-thirds of the American people lack easy access to the courts. The guarantee of justice has too frequently been nothing more than a hollow promise.... In the past few years many individuals and groups have begun to rethink the basic principles for effectively delivering justice. They have realised that litigation is neither the only method nor always the best method of resolving a dispute."

Senator Kennedy went on to outline the 'excellent and innovative programmes' which had begun. To 'continue and encourage' the experimentation, he introduced into the Senate the Dispute Resolution Bill 1979. If passed, this measure will provide technical assistance, a central clearing house for information and grants of funds.

Although only in its infancy in Australia, the move for conciliation services is now well advanced in the United States. R.F. Greenwald described the movement in 'Dispute Resolutions Through Mediation', 64 *ABA Journal,* 1250 (1978). Judges are increasingly calling on mediators as a third party neutral assistant. Problems have arisen, particularly with the parties in dispute, concerning the identity of the mediators and their 'terms of reference'. But when the procedure works, it may have a better chance of achieving lasting success, where the parties have to continue to live in contact, than courtroom resolution:

> "Many times parties are in litigation because there was never an opportunity for honest, in depth, good faith communication. Often the conflict is essentially the consequence of conceptual differences, misunderstandings or simple ignorance. Fact and fancy can all too easily combine to feed dissent and increase divisiveness. Parties seeking a voluntary settlement have obvious advantages over those who are cast in adversary positions of litigants for whom antagonisms typically grow stronger. It is in improving this climate that the legal profession can contribute significantly."

Commenting on the N.S.W. experiment, the *Sydney Morning Herald* (15 March 1980) in an editorial says:

> "The system and those running it will be on trial.... A good deal (some may say too much) will depend on the quality of the multi-lingual mediators who are expected to be appointed in June. The location and atmosphere of the Centres will also be important. Looking for shopfront premises [and avoiding] mystery or formality ... is sensible ..."

No-one can suggest that Community Justice Centres will ever replace the courts. The leadership in the planning phase of the N.S.W. scheme has been given by Mr Kevin Anderson SM, an experienced magistrate who took an important part in N.S.W. bail law reform. The encouragement of the State Attorney-General, the support of the courts, a modest flow of funds and a dash of good luck may result in success for this interesting, novel experiment. It is reported that other States are watching the scheme closely. It is expected that it will be in full swing by mid year. Jane Chart again:

> "Whilst the use of mediation is clearly not going to be a panacea ... the technique offers considerably greater promise for those tragically caught up in family violence than conventional adjudication. Moreover, the Centres may well, in the long term, assist in developing more positive attitudes on the part of members of the community towards each other and towards justice system personnel such as police ... insofar as mediation encourages people to take responsibility for reaching their own settlements and reduces community feelings of disenchantment with the system."

If the Centres work well, it will not be surprising to see them spread elsewhere. Indeed they may even suggest the greater use of conciliation and mediation in the court trial system itself. Readers of *Reform* will remember an interesting proposal of the Sri Lanka Law Commission that every civil court case should automatically be referred to a court official to explore, in a skilled and determined way, the possibilities of reconciliation. The N.S.W. experiment may show whether this idea has any life in it for Australian conditions.

Standing and Class Actions

> "Those who are well assured of their own standing are least apt to trespass on that of others."
>
> Washington Irving, *The Country Church,* 1819

Under the direction of Commissioner Bruce Debelle, the ALRC is continuing its work