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AGENCY FOR INTERNATIONAL DEVELOPMENT
LATIN AMERICA AND CARIBBEAN BUREAU
OFFICE OF DEMOCRATIC INITIATIVES

REGIONAL ADMINSTRATION OF JUSTICE PROJECT
FOR LATIN AMERICA AND THE CARIBBEAN

ADMINISTRATION OF JUSTICE MANAGERS CONFERENCE

Holiday Inn - Oceanside
Miami Beach, Florida

December 4-7, 1991

This resource notebook has been prepared by staff of the National Center for State Courts, pursuant to contract No. LAC-0669-C-00-1040-00 between the National Center and the Agency for International Development.

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TAB 1

Conference Schedule

NATIONAL CENTER FOR STATE COURTS

Administration of Justice Manager's Conference
Holiday Inn - Oceanside
Miami Beach, Florida
December 4 - 7, 1991

PROGRAM

TUESDAY, DECEMBER 3

7:00 - 10:00 p.m.

AOJ MANAGERS' RECEPTION
Holiday Inn - Oceanside

WEDNESDAY, December 4

8:30 - 8:45 a.m.

WELCOME & SUMMARY OF AGENDA

Mr. William Schoux,
Director, Office Of Democratic Initiatives, Latin America and Caribbean Bureau, Agency For International Development

Ms. Gail Lecce, Office Of Democratic Initiatives, Latin America and Caribbean Bureau, Agency For International Development

8:45 - 9:45 a.m.

THE HISTORY OF COURT REFORM IN THE U.S.

This brief discussion will give a cursory explanation of courts in the U.S. in an historical context. Current issues will also be discussed and supplemental materials will be introduced as a resource for more in-depth discussion of court reform.

William E. Davis, Senior Advisor
Regional Administration of Justice Project
National Center for State Courts

Barry Mahoney, Senior Staff Attorney
Institute For Court Management of the
National Center for State Courts

9:45 - 10:00 a.m.	**BREAK**
10:00 - 11:30 a.m.	SMALL GROUP WORK In small groups, participants will have the opportunity to raise issues/concerns to be discussed with Ambassador Michel during the working lunch.
11:30 - 2:00 p.m.	ODI/AOJ OVERVIEW *WORKING LUNCH* Ambassador Michel will open a discussion of AOJ and describe his vision of the program. **Ambassador James Michel** Assistant Administrator, Latin America and Caribbean Bureau, Agency For International Development
2:00 - 2:30 p.m.	ICITAP PRESENTATION **Mr. David Kriskovich**, Executive Director International Criminal Investigative Training Assistance Program.
2:30 - 4:15 p.m.	SHARING LESSONS LEARNED This session will give participants an opportunity to review the work they have done in the area of AOJ and share anecdotes with their regional counterparts. The focus will be on lessons learned from both successes and failures. **Barry Mahoney,** ICM, Facilitator

4:15 - 4:30 p.m.	**BREAK**
4:30 - 5:30 p.m.	INFORMATION FLOW: GOAL/OBJECTIVE SETTING AND THE RELEVANCE OF THE MSI INDICATORS The need to enhance the exchange of information between the Field and Washington will be discussed and a brief refresher of the differences between goals and objectives will be given. From these, a discussion of the MSI Indicators and their utility will follow. Participants will be asked to set goals and objectives using an actual case study. **Barry Mahoney,** ICM, Facilitator **William Davis,** NCSC, Facilitator

THURSDAY, December 5

8:30 - 9:15 a.m.	JOINT SESSION ON THE LEGAL REGULATORY JUDICIAL ENVIRONMENT TRADE AND INVESTMENT **Jon H. Huenemann**, Director, Office Of Brazil and Southern Cone Affairs, United States Trade Representative
9:15 - 10:00 a.m.	CONTINUATION OF JOINT SESSION ON THE LEGAL REGULATORY JUDICIAL ENVIRONMENT: THE JUDICIAL PERSPECTIVE **William Davis**, NCSC
10:00 - 10:15 a.m.	**BREAK**
10:15 - 11:30 a.m.	~~LEGAL, REGULATORY, JUDICIAL REFORM~~ ~~SMALL WORK GROUP~~

MSI INDICATORS

11:30 - 1:15 p.m.	**LUNCH**
1:15 - 1:30 p.m.	PRESENTATION OF SYNTHESIS OF SMALL GROUP SUGGESTIONS AND RECOMMENDATIONS: LEGAL REGULATORY JUDICIAL REFORM **Barry Mahoney,** ICM, Facilitator
1:30 - 2:45 p.m.	OVERVIEW ORAL/ADVERSERIAL VERSUS WRITTEN/INQUISITORIAL SYSTEMS **Dr. Alberto Binder,** Attorney - Consultant Expert, Adverserial/Inquisitorial Systems In the Americas and Other Civil Law Countries **Stephen Mayo,** Attorney - Consultant Expert, Adverserial/Inquisitorial Systems
2:45 - 3:00 p.m.	**BREAK**
3:00 - 4:00 p.m.	REVIEW OF CIVIL CODE REFORM IN THE AMERICAS **Dr. Luis Torello,** Member Supreme Court of Uruguay **Dr. Alberto Binder,** Attorney - Consultant, NCSC
4:00 - 4:10 p.m.	**BREAK**
4:10 - 5:00 p.m.	CIVIL CODE REFORM IN THE AMERICAS (CONTINUED) Question and Answer Period with Guest Speakers: **Dr. Luis Torello** and **Dr. Alberto Binder** **William Davis,** NCSC, Moderator

5:00 - 6:30 p.m.	NCSC STAFF AVAILABLE FOR INFORMAL DISCUSSIONS

FRIDAY, DECEMBER 6

8:30 - 9:30 a.m.	ODI/AOJ ASSESSMENT OVERVIEW **Gary E. Hansen,** Center For Development Information and Evaluation, Agency For International Development **Raul Sanchez,** Consultant, Ford Foundation, Development Associates, Inc. **Malcom Young,** Vice President, Development Associates, Inc.
9:30 - 10:30 a.m.	Presentation: UNITED NATIONS LATIN AMERICAN INSTITUTE FOR PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS (ILANUD) **Dra. Jacinta Balbela,** Co-Director, ILANUD
10:30 - 10:40 a.m.	OVERVIEW OF INDIVIDUAL COUNTRY BRIEFING SESSIONS **Gail Lecce,** ODI/LAC
10:40 a.m. - 12:30 p.m.	INDIVIDUAL COUNTRY BRIEFING SESSIONS As scheduled, this time is for ODI/LAC and the National Center For State Courts to meet individually with each country to discuss its programs and gather information needed to create an effective briefing system and outline the logistics of maintaining the system. Those who are not meeting will use this time to prepare their own materials.

12:30 - 2:00 p.m.	**CLOSING LUNCH (TO BE PAID BY EACH PARTICIPANT)**
2:00 - 6:00 p.m.	INDIVIDUAL COUNTRY BRIEFING SESSIONS (CONTINUED)

SATURDAY, DECEMBER 7

8:30 - 2:30 p.m.	INDIVIDUAL COUNTRY BRIEFING SESSIONS (CONTINUED)

TAB 2

Participant List

Faculty Roster

Biographical Sketches for Faculty

NATIONAL CENTER FOR STATE COURTS
Administration of Justice Managers Conference
Miami Beach, Florida
December 4-7, 1991

ATTENDEES

Argentina/Uruguay
Juliana Abella

Bolivia
Ed Kadunc
Mark Visnic

Brazil
George Paik, POL

Caribbean(RDO/C)
Dennis Darby
Drew Luten, RLA

Chile
Carl Cira

Colombia
Jim Smith, AREP

Costa Rica
Linn Hammergren, RAJO

Ecuador
Michael Jordan, GDO
Robert Kramer, DDIR

El Salvador
Debbie Kennedy
Ana Klenicki

Guatemala
Bambi Arrellano
Steve Wingert, DDIR

Honduras
Bill Bellis, POL
Emily Leonard

Jamaica
Beth Hogan

Nicaragua
Liliana Ayalde
Kenneth Schofield, DDIR

Panama
Debra McFarland

Paraguay
Mauro Sanabria

Peru
Grimaldo Guipttons
Edith Huston
James Rudolph

United States

Department of State
David Burgess

American Republic Affairs
Fay Armstrong
Roberta Jacobson

Agency for International Development

Office of Democratic Initiatives
Kim Bowser
Sharon Isralow
Gail Lecce
Bill Schoux

Center for Development Information & Evaluation
Gary Hansen

ICITAP
David Kriskovich
Executive Director

National Center for State Courts
Thomas Henderson
Director, Washington Office

United States Information Agency
Pam Lutz

Development Associates, Inc.
Raul Sanchez
Malcolm Young, Vice President

World Bank
Donald Winkler

NATIONAL CENTER FOR STATE COURTS
Administration of Justice Managers Conference
Miami Beach, Florida
December 4-7, 1991

FACULTY/FACILITATORS

Dra. Jacinta Balbela (Costa Rica)
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United Nations Latin American
Institute for the Prevention of Crime
and the Treatment of Offenders
ILANUD
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San Jose, Costa Rica
0911-506-33-74-71
or P.O. Box 10071, Route 1000
San Jose, Costa Rica
0911-506-21-38-86

Dr. Alberto Binder
Attorney Consultant
Guatemala City, Guatemala

Edward Baca (United States)
Director
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Center for Development Information and Evaluation
Room 220B, SA-18
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Rosslyn, Virginia 20523
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John Huenemann (United States)
Director
Brazil and Southern Core Affairs
United States Trade Representative
600 - 17th Street, N.W.
Washington, DC 20506
(202) 395-5190

David Kriskovich (United States)
Executive Director
International Criminal Investigative Training Assistance Program
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Washington, DC 20036
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Stephen Mayo (United States)
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(415) 381-2919
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Ambassador James Michel (United States)
Assistant Administrator
Latin America and Caribbean Bureau
Agency for International Development
U.S. Department of State
321 - 21st Street, N.W.
Washington, DC 20520

Jamie Phillips (United States)
Administrative Associate
Regional Administration of Justice Project
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Raul Sanchez (United States)
Consultant
Development Associates, Inc.
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Arlington, Virginia 22209-2009
(703) 276-0677
(703) 276-0432 (FAX)

Dr. Luis Torello (Uruguay)
Justice
Supreme Court of Uruguay
Montevideo, Uruguay

Malcolm Young (United States)
Vice President
Development Associates, Inc.
1730 N. Lynn Street
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(703) 276-0677
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EDWARD J. BACA

Edward J. Baca, formerly a Senior Court Programs Specialist with the Administrative Office of the United States Courts (USAOC) and Director of the New Mexico Administrative Office of the Courts, is Project Director of the National Center's Regional Administration of Justice Project. As a Senior Court Program Specialist with the Administrative Office of the U.S. Courts, Mr. Baca was responsible for development and maintenance of district and bankruptcy court policy guidelines, procedural manuals on juries, court reporting, interpreting, arbitration, revenue collection, training, and other support programs. He was also responsible for developing language certification examinations, maintaining interpreter regulations, developing an interpreters procedural manual, and making budget recommendations for the interpreters program. Previously, Mr. Baca served as the Director of the New Mexico Administrative Office of the Courts where was responsible for managing caseloads, staffing, automated information systems, and budgeting. Mr. Baca has also served as a courts consultant in South America. Mr. Baca has a Bachelor of Arts degree from the University of New Mexico with a double major in Business Administration and Economics.

WILLIAM H. BROUSSEAU

In addition to directing the National Center's International Program and national scope projects, Mr. Brousseau also serves as Acting Director of the National Center's Regional Administration of Justice Project. As director of the international program, Mr. Brousseau is responsible for designing, organizing, and implementing training and technical assistance activities for national judicial systems. He has conducted numerous seminars for visiting judges and serves as the National Center's liaison to governmental, private and non-private organizations which are involved in strengthening democratic institutions. Mr. Brousseau's professional experience includes several years with national associations, consulting firms, and criminal justice operating agencies. Mr. Brousseau holds a Master's degree in the administration of justice from the American University and a B.A. in political science from Loyola Marymount University.

WILLIAM E. DAVIS

Currently, William Davis serves as Senior Advisor to the National Center for State Courts Regional Administration of Justice Project. Prior to assuming this position, Mr. Davis served as Director of the Administrative Office of the Courts for California, 1987 to 1991, and Kentucky, 1975 - 1979. Mr. Davis has also served as Executive Director of a law firm with 140 attorneys, Chief Administrative Officer for the federal courts in nine western states and chairman of a national statistics task force for the United States Court of Appeals. During his tenure in the Peace Corps, Mr. Davis served as Acting Deputy Director in Chile, taught English, initiated improvement programs, developed in-country training programs and supervised other volunteers. Mr. Davis has completed numerous technical assistance assignments in Latin America. He holds a B.A. in Business Administration from Transylvania University and a J.D. in Law from the University of Kentucky.

JON HUENEMANN

Since July of 1988, Director, Brazil and Southern Cone Affairs, at the U.S. Trade Representative's Office (USTR), Executive Office of the President. Responsible for the development of U.S. trade and investment policy towards Brazil, Argentina, Chile, Uruguay, and Paraguay. Served as Coordinator of the U.S. Delegation to the Uruguay Round Ministerial Mid-Term Review in Montreal, Canada, December 5 - 9, 1988. Organizational responsibilities for delegation of 200, including senior Administration officials, Members of Congress, and senior private sector delegates. In this capacity, served as Special Assistant to the USTR. For three years prior to current position, Deputy Director, U.S. Generalized System of Preferences (GSP), USTR. Responsible for developing U.S. policy in administering this tariff preference program for developing countries. Prior to the GSP, spent two years as an International Economist at the U.S. Treasury Department in the Office of the Assistant Secretary for International Affairs. Covered numerous trade and investment issues. Prior to Treasury, spent nearly a year working for U.S. Senator Bill Bradley of New Jersey on economic policy issues, with particular emphasis on trade/investment policy. Prior to Senator Bradley, spent nearly two years at the United Nations in New York working on a project which monitored multilateral economic issues. Co-wrote a bi-monthly newsletter on economic issues. Prior to the United Nations, nearly one year at the Center for Strategic and International Studies in Washington working in the Third World Studies Department. Masters Degree in International Development and Economics from The American University. Bachelor of Arts from Stockton College in Political Science. Was awarded a Presidential Management Internship (PMI) upon receipt of Masters Degree.

Stephen A. Mayo

Mr. Mayo is presently engaged in the private practice of law, specializing in the litigation of civil and commercial matters. He teaches private trial advocacy programs for attorneys, and at Stanford and Hastings Law Schools as an adjunct faculty member for trial advocacy. He administers and manages the International Legal Exchange Project, which conducts comparative legal studies of Asian and South American legal systems and is an active member of the American Bar Association and, in particular, the Litigation and Criminal Justice Sections. He also possesses a strong interest in foreign and domestic affairs, as demonstrated by his work and his active membership in the World Affairs Council, Pan American Society, the Japan Society of Northern California, the Commonwealth Club, and Common Cause. He was recently selected by the judges of the Northern District of California to be a lawyer delegate (1990-1992) to the Ninth Circuit Judicial Conference.

JAMIE DENISE PHILLIPS

Jamie Denise Phillips is a former Program Officer with the Washington International Center, Meridian House International and now serves as the Administrative Associate for the National Center's Regional Administration of Justice Project. As a Program Officer with Meridian House International, Ms. Phillips was responsible for conducting intercultural orientations both in English and Spanish for international visitors to the United States. Ms. Phillips has developed intercultural training modules in the areas of cultural values, pluralism, intercultural communication, adjustment strategies, U.S. political process and contemporary U.S. society. In addition to these functions, she has also collaborated with community service centers in building alliances between international visitors and grassroots agencies. Ms. Phillips has had prior experience working with the International Criminal Investigative Training Assistance Program, sponsored by the U.S. Department of Justice, and was responsible for the administrative and logistical coordination of the criminal investigative training courses in Central America and the Caribbean. She has also served as a Peace Corps Volunteer in Costa Rica. Ms. Phillips holds a Master of Science in International Management and Human Resource Development from National Louis University, and a Bachelor of Art from Hampshire College, Amherst Massachusetts.

NATIONAL CENTER FOR STATE COURTS

PROJECT TEAM

EDWARD J. BACA
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(703) 281-3667
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PERSONAL

Born November 16, 1942. Married 1968. Children ages 19 and 15. Excellent health. Hobbies and interests: Tennis, karate, bicycling, home construction, and hiking.

EDUCATION

Federal Judicial Center Training, 1988-89
Institute For Court Management, 1973-1983
University of New Mexico, B.A., Double Major: Business Administration and Economics, Minor in English 1966

EXPERIENCE

August 1988 to Present
ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Washington, D.C.
SENIOR COURT PROGRAMS SPECIALIST

I am one of five Court Programs Specialists charged with the development and maintenance of district and bankruptcy court policy guidelines and procedural manuals on juries, court reporting, interpreting, arbitration, revenue collection, training, and other support programs. We provide staff support to the Judicial Improvements Committee of the Judicial Conference.

I have participated in the following Administrative Office and Federal Judicial Center training: Federal Court Automation Overview, District Court Docketing Workshop, Chief Deputy Workshop, Deputies-In-Charge Workshop, New District Court and Bankruptcy Court Clerks Orientation, District and Bankruptcy Advisory Committee Meetings, Regional Court Administrator Training, Technical Writing, Word Perfect 5.0 and LOTUS Microcomputer Usage.

My present assignment to the court interpreters program includes developing language certification examinations, maintaining interpreter regulations, developing a procedural manual, and making budget recommendations.

1987 to 1988
CITY OF SANTA FE, HUMAN SERVICES DEPARTMENT
Santa Fe, New Mexico
SENIOR CITIZENS PROGRAM DIRECTOR

I developed management reporting systems of federal and state supported service programs that provide transportation, nutrition, education, and recreation opportunities for senior citizens in ten centers within the County.

April 1988
UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, BOLIVIA, S.A.
COURTS CONSULTANT

I served on a month-long team project aimed at giving support to the democratic institutions of the Bolivian government. As the team's court expert, I interviewed the administrative staff and chief judges of the Supreme Court and three general jurisdiction courts to assess the degree of development and the extent to which improvements were necessary to make the Bolivian court system function effectively.

1973 to 1987
ADMINISTRATIVE OFFICE OF THE COURTS, STATE OF NEW MEXICO
Santa Fe, New Mexico
AGENCY DIRECTOR, DEPUTY DIRECTOR AND FISCAL OFFICER

I served one year as the State Courts Fiscal Officer in charge of the budget process and revenue collection program. The district court budgets were in the early years of state funding and were disparate in development and allocation. I initiated a uniform procedure for equitable allocation through formula factors.

As Deputy Director for six years, I organized the office professionally to implement modern methods and procedures for handling growing caseloads. I instituted a statewide

judicial personnel plan, staffing formulas, a records retention and disposition schedule, microfilm records storage, audio court recording, automated juror selection, uniform docketing and caseload reporting, and centralized data processing.

As Director for seven years, I expanded support for automation by creating a decentralized micro-computer system for the magistrate courts for revenue accounting and caseload reporting. Following a similar design, micro-computer and mini-computer systems were implemented in the five largest district courts before my departure as Director. I provided staff support to the Judicial Council, the Blue Ribbon Salary Study Committee, court reform groups, and legislative committees. I served on the Board of Directors for the Conference of State Court Administrators, and as Chairman of the Research and Technolology Committee.

1971 to 1973
LEGISLATIVE FINANCE COMMITTEE, STATE OF NEW MEXICO
Santa Fe, New Mexico
LEGISLATIVE FISCAL ANALYST

During two legislative sessions, I served as Fiscal Analyst for the Legislative Finance Committee assigned to the State Judicial System, the District Attorneys, the Highway Department, and various boards and commissions. I conducted management reviews and recommended appropriations levels for these agencies to the Committee. During this period, I worked with the Committee Chairman to create the Public Defender system, and to make District Attorneys full-time offices.

1969 to 1971
TAXATION AND REVENUE/DEPARTMENT OF MOTOR VEHICLES, STATE OF NEW MEXICO
Santa Fe, New Mexico
MANAGEMENT ANALYST

During a three year period, I worked with management and contractual consultants revamping two major departments of state government. This included personnel and accounting systems, forms and records, organizational charting, office space design and allocation, procedural manuals development, and automation.

NATIONAL CENTER FOR STATE COURTS

WILLIAM H. BROUSSEAU
Senior Staff Associate

EDUCATION

M.S.A.J. The American University, Washington, DC, Judicial Administration

B.A. Loyola Marymount University, Los Angeles, CA, Political Science

EXPERIENCE

Current Responsibilities at the National Center

Acting Director, Administration of Justice Project for Latin America and the Caribbean. Director, International and Comparative Justice Administration Program. Responsible for administering, developing, organizing, and coordinating technical assistance and educational programs for national judiciaries. Project Director, Fines, Fees, and Costs Collection Demonstration project. Director of an innovative project to enhance the collection rates of Virginia district and circuit courts. Project Director, Federal Benefits Denial project. Administers daily operations of a program designed to acquaint state court judges with federal statutory authority which allows the denial of federal benefits to individuals convicted of drug trafficking or possession. Principal Investigator, Assessment of the Comprehensive Adjudication of Drug Arrestees Program (CADA). Lead assessment investigator for a program designed to expedite drug case processing through judicial and justice agency coordination and communication.

Previous Professional Positions

1987 - Contracts Administrator, Koba Associates Inc. and The Koba Institute Inc., Washington, DC

Monitored and administered all federal, state, local, and private contracts for the corporation and The Koba Institute. Developed all contract budget proposals and assisted in preparing and negotiating corporate contracts. Maintained corporate contract filing system. Coordinated with project staff and the corporation's accounting department the appropriate documentation for all technical and budgetary matters. Reviewed and monitored contract

deliverables and timetables. Served as liaison with agency contract offices on all contract changes, modifications, and amendments. Monitored all contract expenditures and coordinated the reservation of cost recovery dollars. Prepared contract closeout documents and reviewed final contract invoices.

1986-1987 - Project Manager, Stenographic and Reporting Services, Office of the Press Secretary, The White House, Koba Associates Inc., Washington, DC

Oversaw contract compliance with management and corporate regulations, guidelines, and standards of excellence. Monitored contract due dates, deliverables and timetables. Coordinated contract changes with agency staff, including budgetary and financial matters. Reviewed project expenditures and signed staff timesheets. Ensured that all monthly reports and financial statements were submitted in a timely manner and in accordance with contract stipulations and procedures. Prepared monthly and special reports.

1985-1986 - Special Assistant to the Vice President, Koba Associates Inc., Washington, DC

Served as coordinator for all contracts managed by the Vice President. Coordinated special projects on behalf of the Vice President. Drafted reports, composed correspondence, handled marketing assignments, prepared financial analyses, developed management systems, and executed other tasks as assigned.

1985-1986 - Project Specialist, Technical Assistance/Peer Review Contract, National Institute of Justice, Koba Associates Inc., Washington, DC

Planned and coordinated meetings in Washington for project consultants. Queried manual and automated data files. Performed a wide variety of logistical tasks, including reviewing consultant reports and maintaining regular consultant contact by letter and telephone. Assisted in the creation of a computerized consultant retrieval system.

1984-1985 - Research Assistant, Criminal Justice Statistics Association, Washington, DC

Liaisoned with state chapters, associate members, and public interest groups. Developed and implemented a marketing and recruitment plan. Assisted the Executive Director with organizational development and special projects. Assisted the Program Manager in providing information and statistical reports to academicians, researchers, the media, state and federal agencies, practitioners, students, and the public. Entered data into the Comprehensive Index to Data Sources automated information retrieval system. Authored special reports and wrote articles for the Forum, a quarterly newsletter published by the association.

1983 - Consultant, JAZ Ltd., Bethesda, MD

Provided technical assistance and information to a small international trading company. Developed and implemented a marketing and sales strategy which acquainted consumers with European recreational and home products. Assisted with capital formation and product line enhancement.

1980-1982 - Criminal Justice Coordinator, National Association of Attorneys General, Washington, DC

Wrote and marketed the Criminal Justice Report, a monthly publication which covered significant litigation and recent developments in the corrections, organized crime, white collar crime, mental health, welfare fraud, and juvenile justice areas. Staffed the Corrections and Criminal Law Subcommittees and the criminal justice information clearinghouse. Handled daily requests for technical assistance and information from Attorneys General, their staffs, congressional committees, public interest groups, federal and state agencies, and the public. Planned and executed conferences, workshops, and seminars for Attorneys General and their staffs.

1978-1980 - Juvenile Justice/Corrections Specialist, National Criminal Justice Reference Service, Aspen Systems, Washington, DC

Conducted on-line computer searches for academicians, criminal justice practitioners, federal, state and local agencies, congressional committees, public interest groups, students, and the public. Wrote general information

packages and compiled selected bibliographies on special research topics in the criminal justice area. Acted as liaison with the National Institute of Juvenile Justice and Delinquency Prevention, state and local criminal justice operating agencies, research organizations and community groups.

1977-1978 - Teaching Assistant, The American University, Washington, DC

Assisted professors in composing and grading quizzes and examinations. Led class discussions which supplemented lectures. Assisted in various research assignments.

1977 - Corrections Officer, Jackson Barracks Prison, New Orleans, LA

Responsible for the security and control of inmates housed at a medium security facility. Other duties included transporting inmates from the institution to other destinations throughout the New Orleans metropolitan area, gate/tower patrol, and solitary confinement watch.

1975-1976 - Assistant to the Victim Witness Coordinator, Orleans Parish District Attorney, New Orleans, LA

Notified victims, witnesses, and police officers of case progression, trial dates, delays, judgments, and sentencing. Referred victims and witnesses to private and public agencies when warranted. Interviewed victims and witnesses in order to acquaint them with the criminal court process. Constructed and analyzed interview questionnaires.

1975 - Probation Intern, Los Angeles County Probation Department, Los Angeles, CA

Assisted in the preparation of presentencing reports. Accompanied probation officers on weekly visits to clients.

HONORS

Alpha Sigma Nu Honor Society

SELECTED PUBLICATIONS AND PRESENTATIONS

Affirmative Action in the Criminal Justice System: Selected Bibliography, National Criminal Justice Reference Service (1979).

Affirmative Action in the Criminal Justice System: General Information Package, National Criminal Justice Reference Service (1979).

Assessment of the Comprehensive Adjudication of Drug Arrestees Program, with Thomas A. Henderson, Claire B. Grimm, and Richard Semiatin, National Center for State Courts (1990).

WILLIAM E. DAVIS

PROFESSIONAL EXPERIENCE:

1991 - present	Judicial Administration/Court Management Consultant Management Consultant services to improve the administration of justice and to strengthen democratic institutions.
1987 - 1991	Administrative Office of the Courts for California, San Francisco, California Developed an annual action plan for Judicial Council, initiated Trial Court Delay training activities and education program throughout state, developed and implemented new technology for trial courts.
1986 - 1987	Executive Director, Chief Executive Officer for 140-attorney law firm with four offices in California.
1981 - 1986	Circuit Executive, Chief Administrative Officer for the federal courts in nine western states and Pacific Territories Significant Accomplishments Devised a delay reduction program to eliminate court backlog from 24 months to 10 months; developed a planning and monitoring system for management of court and support units; developed educational programs for judges and court support personnel; instituted annual plan--first judiciary in the United States to adopt this concept of managing improvement; instituted as a pilot court automation of Court of Appeals; conducted management studies on bankruptcy and district court; organized and supported annual educational conferences for 700 judges and lawyers on matters of court organization and management; chaired national task force on statistics on United States Court of Appeals which led to changes in statistical reporting system.
1979 - 1981	Personnel Officer (Volunteer religious worker) Bahai'i World Center, Haifa, Israel

Significant Accomplishments: Established a personnel system; instituted a management by objectives system; recruited multinational staff for all levels; conducted management and organizational studies on management of facilities; maintenance of historical buildings, library and archives department.

1975 - 1979 Director, Administrative Office of the Courts for Kentucky, Frankfort, Kentucky

Chief Administrative Officer for state judiciary, supervised 150 people, responsible for management of appropriated funds from Legislature ($40 million annually.)

Significant Accomplishments

Successfully managed the unification and state funding of all courts within two years; supervised drafting of legislation and represented before legislative committees all legal and organizational issues involving the judiciary (20,000 statutes involved); issues included establishing number of judgeships at this location; developed automated tracking system for all cases filed within state courts; organized first comprehensive judicial education program for the 300 judges and for non-judicial employees (2500 employees); organized and implemented the first fully state funded Pretrial Release Program in the United States (recognized as one of the ten most successful new state programs in the United States by the Council of State Governments, 1976); organized and implemented Judicial Nominating Committees for judicial vacancies; organized and implemented a Judicial Disciplinary Commission; instituted a job classification, personnel allocation, and payment system in 120 courts; implemented new record-keeping and accounting systems in 120 courts; organized and implemented a centralized purchasing system.

1973 - 1975 Staff Attorney, Administrative Office of the Courts for California, San Francisco, California

Responsibilities included the following areas of activity: Judicial Planning Committee - developed a planning manual

for California courts to target areas of improvement, reviewed all grants for federal funds for courts.

Study of Language Needs of Non-English-Speaking Persons - conducted needs analyses of language minorities in California, successfully developed legislation to authorize interpreters in courts.

Study of Alternatives to Court Reporting in California Municipal Courts

Conducted studies on the use of tape recorders in 18 municipal courts which led to their permanent installation.

1972 - 1973 Law Clerk, Buhler and Smith, Attorneys at Law, Truth or Consequences, New Mexico

Performed general law clerk duties: title searches, interrogatories, legal research, etc.

1971 - 1972 Program Director, Legal Aid Society University of Kentucky, Lexington, Kentucky

As third-year law student, directed civil legal aid program for second- and third-year law students

1968 - 1971 Regional Representative, Program Officer and Acting Deputy Director, Peace Corps Chile, Santiago, Chile

Responsible for Peace Corps program in Chile, developed in-country training programs for Peace Corps, recruited new volunteers for special programs in forestry and fisheries, supervised 35 volunteers.

1967 - 1968 Training Director, Peace Corps Training, University of Washington, Seattle, Washington

Responsible for organizing and conducting training program for 80 Peace Corps volunteers in forestry and fisheries projects for Chile.

Training Assistant, University of New Mexico, Albuquerque, New Mexico

Responsible for training Peace Corps volunteers in community development for Chile, including being sole supervisor of 52 trainees in Mexico for one month.

1964 - 1966 Volunteer, Peace Corps, Lautaro, Chile

Organized rural production cooperatives with Mapuche Indians, initiated program for planting pine and fruit trees on Indian reservation schools, organized and equipped a dental clinic, assisted in development of regional economic development program, taught English, served as volunteer fireman.

PUBLICATIONS: Language and the Justice System, 1985
Problems and Issues, Justice System Journal, Volume 10, November 3, 1985.

Court Reform in Seven States -- National Center for State Courts -- "Implementation of Court Reform in Kentucky", 1980.

Socio-Economic Profile, Bourbon County, Kentucky, Council of State Governments, Lexington, Kentucky, 1967.

AWARDS OF RECOGINITION:

Certificate of Service and Appreciation, Ninth Circuit Court of Appeals, 1986.

Certified to hold position of Circuit Executive by National Board of Certification, 1981.

Outstanding Service to Legal System, Kentucky Bar Association, 1979.

Outstanding Service to Judiciary, Kentucky Association of Judges, 1979.

Outstanding Service to Criminal Justice, Kentucky Crime Commission, 1979.

Kentucky Pretrial Release Program -- recognized by Council of State Governments as one of the ten best new state government programs for 1976, in 1976.

Drafted and assisted in passage of model statute for language-impaired in courts -- commended by National Association of the Deaf, 1978.

Volunteer fireman of the year, Lautaro, Chile, 1966.

Athlete of the year, Transylvania University, 1964.

MEMBERSHIPS: California State Bar Association

Federal Courts Committee, Vice Chairman

EDUCATION: B.A., Business Administration
Transylvania University, 1964

J.D. Law
University of Kentucky, 1972

H. CLIFTON GRANDY

EDUCATION

Georgetown University Law Center, Washington, D.C. - J.D.

Wesleyan University, Middletown, Connecticut - B.A.
Major in Government. Concentration in Spanish.
Instituto Internacional, Madrid, Spain. Semester in Spain program.

Institute for Court Management, National Center for State Courts.
Court Executive Development Program, Certificate anticipated in June, 1992.

WORK EXPERIENCE

Senior Staff Attorney, Washington Project Office, National Center for State Courts, 1110 N. Glebe Road, Suite 1090, Arlington, Virginia 22201, (703) 841-0203; 1989 - present. Project Director, Felony Drug Dispositions in Limited Jurisdiction Courts Project. Analyze existing programs to dispose of felony cases in limited jurisdiction courts and develop curriculum to train judicial officials in implementing similar programs. Project Director, Judicial Education in Child Support Enforcement Project. Develop curriculum material, provide technical assistance and training to judges, court administrators, and judicial staff on various issues in child support enforcement and in the administration of child support and paternity cases at national, regional, and in-state training conferences and workshops. Management of project budgets. Other project involvement includes drafting and reviewing contracts (FAR); responding to freedom of information requests and challenges; drafting and reviewing intergovernmental mobility agreements; legal support for the Washington Liaison; legal and empirical research, analysis, data collection, and curriculum development for the, Denial of Federal Benefits, Child Support Guidelines, Differentiated Case Management I, Regional Administration of Justice (Latin America and the Carribean), International and Comparative Justice Administration Program and Civil Discovery in State Trial Courts projects. Develop concepts for future research projects. Write concept papers and proposals.

Attorney at Law, Law Office of H. Clifton Grandy, Sole Practitioner
1988-1989; 1980-1984. Advised and represented clients in a broad spectrum of civil and minor criminal matters including wills, state election law, consumer, contracts, domestic, the return of seized property and money, employment, driving under the influence, real property, landlord/tenant, collections, and small businesses. Litigated cases; negotiated settlements with adverse parties; researched and drafted memorandum of law; drafted pleadings, contracts, agreements, advise of counsel letters, and other documents with legal effect; associated with other attorneys for litigation and research. Negotiated contracts with vendors, for space, supplies, advertisements, and support services. Developed and implemented procedures for administering office and managing cases.

Master for Domestic Relations Causes, Circuit Court for Prince George's County, MD. 1985-1989. Conducted hearings by administering oath; ruling on discovery disputes; ruling on admissibility of evidence; ruling on motions; examining witnesses; and rendering fair and prompt decisions in cases involving setting amount of child support, uncontested establishment of paternity, custody, visitation, and enforcement of domestic support orders. Issued writs of attachments and set bonds. Recommended contempt for the willful failure to pay support. Recommended the immediate detention and incarceration of delinquent obligors. Modified

prior support orders. Drafted reports making findings of fact, conclusions of law, and recommendations to judges. Cooperated with bar associations by participating in legal education programs. Supervised support staff. Developed novel recommendations such as electronic fund transfers, direct deposits, and voluntary allotments for monthly support payments; assignment of workers' compensation awards and personal injury settlements for payment toward arrearages; referrals to SSA for vocational rehabilitation or benefits; and referrals to Office for Disabilities, Human Relations Commission, and the Veterans' Administration. Translated proceedings into Spanish for Spanish speaking parties.

Attorney at Law/Associate Corporation Counsel, 1987-1988. Advised and represented clients in a broad range of civil and minor criminal matters, including traffic, wills, consumer, landlord/tenant, contracts, domestic, adoptions, employment, real property, collections, and small business. Researched and drafted legal memoranda, pleadings, and agreements. Advised and represented a municipality in a broad range of matters, including forfeiture of contraband drug-related property and currency, enforcement of administrative orders, workers' compensation, municipal infractions, personal property tax, procurement, zoning, personnel, real property, FOIA, and administrative procedures. Researched and drafted advice of counsel letters. Reviewed administrative opinions and other documents for legal sufficiency. Drafted and proposed legislation.

Executive Director, Consumer Protection Commission for Prince George's County, MD., 1983-1985. Prosecuted or otherwise represented the interests of consumers before the Maryland General Assembly, the Maryland Public Service Commission, and other state, county, and federal agencies and courts. Conducted educational programs for civic, professional, and other organizations. Supervised and administered the agency, its budget, and staff. Mediated and conciliated disputes between merchants and consumers. Drafted, recommended, and commented on legislation. Explained consumer laws and cases to news media and appeared on television and radio programs. Established and edited consumer newsletter.

Associate County Attorney, Office of Law for Prince George's County, MD., 1980-1983. Litigated a broad range of civil cases before Federal and State courts, including hospital and consumer collections, children in need, forfeiture of contraband property and currency, enforcement of zoning, building, health, animal control, and landlord/tenant administrative orders. Researched and drafted memoranda, pleadings, and advice of counsel letters on a variety of issues including personnel, human relations, FOIA, licensing, and contracts. Conducted discovery, obtained sanctions for the failure to discover. Reviewed, recommended, and drafted State and County legislation and administrative rules. Advised administrative hearing officers in parliamentary and substantive law in contested proceedings. Prosecuted cases before various County agencies, including personnel appeals board, police trial board, and the consumer protection and human relations commissions.

Legal Assistant, Office of the Maryland Attorney General, Baltimore, MD., 1979-1980. Researched and drafted legal memoranda, pleadings, legislation, opinions of the attorney general, and advice of counsel letters. Investigated and assisted principal counsel and assistant attorneys general with trial preparation. Edited and proofread handbooks, opinions, and pleadings. Assisted with discovery and trial preparation.

Law Clerk, U.S. Environmental Protection Agency, Washington, D.C., 1979. Assisted in coordinating the plain English project by working with linguistic consultants in training regulatory drafters. Edited regulations for publication in the Federal Register.

Legal Publications Specialist, Office of the Federal Register, 1975-1978. Researched the statutes and rules pertaining to the office, particularly, the Administrative Procedure, Federal Register, Government in the Sunshine, Freedom of Information, and Federal Advisory Committee acts. Drafted legal memoranda. Taught the principles of regulatory drafting.

Edited documents published in the *Federal Register* and *Code of Federal Regulations*. Researched, annotated, proofed, and edited the *Weekly Compilation of Presidential Documents* and the *Public Papers of the President*. Checked legal citations on presidential executive orders.

SELECTED LEGAL PUBLICATIONS

Authored:

Overview of the Denial of Federal Benefits Demonstration Project: State of Rhode Island, NCSC (May 1991).

"The Periodic Review and Modification of Child Support Cases", Unit 7 of *The Child Support Judicial Curriculum Guide*, Office of Child Support Enforcement and NCSC (July 1990).

"Judicial Responsibility in Expediting Child Support and Paternity Cases", Unit 9 of *The Child Support Judicial Curriculum Guide*, with Joy A. Chapper, Office of Child Support Enforcement and NCSC (October 1990).

"The Forfeiture and Return of Proceeds, Money, Real, and Personal Property, Under the Maryland Forfeiture Statute, Article 27, Section 297", Forfeiture 1989, Maryland Institute for the Continuing Education of Lawyers, Inc., (October 1989).

Report of the Symposium on the Periodic Review and Modification of Child Support Orders, NCSC (June 1989).

Attachment Before Judgement - Home Improvements. Section 303(g) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland.

Attachment on Original Process - Tort Action. (H.B. 1233, 1983 Session).

"Issue Papers", *Options for Regulatory Improvement*, Office of the Federal Register (1977).

Laws Enacted by the 1984 Session of the Maryland General Assembly Affecting Consumers, Consumer Protection Commission (1984).

"List of Executive Branch Departments, Agencies, and Functions Established, Abolished, or Continued by Act of Congress or Executive Order During 1976, Supplement to 1977 Organization of Federal Executive Departments and Agencies", Office of the Federal Register for the Senate Committee on Governmental Affairs (1977).

"Appendix E", Document Drafting Handbook, Office of the Federal Register (1978).

Edited:

The Child Support Judicial Curriculum Guide, NCSC (October 1990). "Leather Tanning and Finishing Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standard", Environmental Protection Agency, Proposed Rule (44 F.R. 38746, July 2, 1979).

Consumer Protection Card, No. 1 vols. 1 & 2 Consumer Protection Commission, (1985).

LANGUAGES

Spanish.

BARRY MAHONEY

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National Center for State Courts
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EDUCATION

Dartmouth College - A.B., 1959 (cum laude)
Harvard Law School - LL.B., 1962
Columbia University - Ph.D. (Political Science), 1976

PROFESSIONAL EXPERIENCE

September 1979 - Present: Senior Associate, Institute for Court Management of the National Center for State Courts. Currently directing education and technical assistance projects in the areas of trial management, caseflow management, and intermediate sanctions. Previous work at the Institute for Court Management includes serving as principal investigator or co-principal investigator for national scope research projects on trial court delay, the use of the fine as a criminal sanction, and the use of telephone conferences in civil litigation; also as program director and lead faculty member for conferences and workshops on delay reduction, court management information, sentencing alternatives, appellate court administration, and state court financing. Received National Center for State Courts Award of Excellence, as outstanding staff member, 1987. (On leave of absence from ICM from August 1982 to August 1983, to serve as Director of London Office, Vera Institute of Justice).

August 1982 - August 1983; August 1978 - August 1979: Director of London Office, Vera Institute of Justice. General responsibility for all of the Vera Institute's work in Great Britain, in conjunction with a consulting agreement between Vera and the British Home Office. In 1978-79, the principal project work involved design and implementation of a study of delay in British magistrates' courts. In 1982-83, the primary focus was on issues related to disclosure of prosecution evidence in criminal cases; it included development and initial evaluation of pilot projects experimenting with alternative approaches to advance disclosure in magistrates' court proceedings in London and Newcastle-upon-Tyne.

January 1978 - August 1978: Head of Denver Project Office, National Center for State Courts. Project director for two national scope projects: the Appellate Justice Project (involving research and demonstration programs aimed at alleviating problems of congestion and delay in state appellate courts) and the National Survey of Public Attitudes Toward Courts and Justice.

January 1975 - January 1978: Associate Director, National Center for State Courts. Overall responsibility for the development and management of all national scope research and technical assistance projects undertaken by the National Center. Duties included program planning, development of proposals for specific projects, negotiating with funding agencies, recruiting and managing staff personnel, supervising ongoing project work, editing written work products, and related management activities. Resigned from this position because the National Center's Headquarters moved from Denver to Williamsburg, Virginia, in January 1978.

November 1973 - December 1974: Senior Staff Attorney, National Center for State Courts. Principal Investigator (Project Director) for project on Evaluation of Policy-Related Research on Pretrial Release Programs, funded by the National Science Foundation.

June 1973 - October 1973: Consultant for U.S. Law Enforcement Assistance Administration, Ford Foundation, and National Center for State Courts.

September 1971 - June 1973: First Assistant Counsel and Acting General Counsel, New York State Division of Criminal Justice Services. General supervisory responsibility for the legal affairs of this state agency, including supervision of the work of staff attorneys, preparation of the agency's legislative program, planning and implementation of court-related programs and projects, and general policy formulation and grant administration work.

September 1968 - September 1971: Private practice of law in New York City, specializing in appellate litigation; teaching of undergraduate political science courses at Columbia University, Barnard College, and the City University of New York. (Also began and completed all course work toward Ph.D. in Political Science, with specialties in American Politics and Comparative Politics, during this period.)

January 1968 - September 1968: Staff Attorney, Vera Institute of Justice. Consulting work for New York City Criminal Justice Coordinating Council, principally in the field of juvenile delinquency.

July 1967 - January 1968: Associate, Spitzer and Feldman, New York City. General practice of law.

July 1962 - July 1967: Assistant Attorney General, New York State. Litigation in state and federal courts, mainly involving administrative, criminal, and constitutional law. Appellate experience included sole or co-authorship of briefs in United States Supreme Court cases involving legislative reapportionment, congressional re-districting, retroactivity of exclusionary rules in criminal cases, constitutionality of executive branch agency grant of immunity from prosecution, and right to privacy; also briefs and oral arguments in the U.S. Court of Appeals for the Second Circuit and in the New York State Supreme Court, Appellate Division, First and Second Departments.

PUBLICATIONS

Monograph - A Preliminary Study of the Operation of the Juvenile Term of the Family Court, New York County (New York: Vera Institute of Justice, 1968).

Committee Report (Principal Author) - "Military Surveillance of Civilian Political Activities: Report and Recommendations for Congressional Action," a report by the Civil Rights Committee of the Association of the Bar of the City of New York. Published in the Record of the Association, Vol. 28, No. 7 (October 1973).

Article - "The Administration of Justice and Court Reform," in Robert H. Connery and Gerald Benjamin (eds.), Governing New York State: The Rockefeller Years (New York: The Academy of Political Science, 1974).

Book - Alan F. Westin and Barry Mahoney, The Trial of Martin Luther King (New York: The Thomas Y. Crowell Company, 1974).

Monograph - An Evaluation of Policy-Related Research on Pretrial Release Programs (Denver: National Center for State Courts, 1975). Final Report on research project funded by National Science Foundation.

Paper - "Evaluating Pretrial Release Programs," presented at a panel session at the annual meeting of the American Political Science Association, September 1976.

Dissertation - The Politics of the Safe Streets Act, 1965 - 1973: A Case Study in Evolving Federalism and the National Legislative Process. Ph.D. dissertation, Department of Political Science, Columbia University (October 1976).

Article - Alan F. Westin and Barry Mahoney, "Martin Luther King, Jr., and the Supreme Court: On Protest and the First Amendment," in The Civil Liberties Review, Vol. 3, No. 5 (December 1976/January 1977.)

Paper - "Research Developments in the Field of Judicial Administration - The Work of the National Center for State Courts." Presented at a plenary session of the annual meeting of the Association of American Law Schools, December 1977; reprinted in 80 Federal Rules Decisions 147, 191-197 (St. Paul: West Publishing Co., 1978).

Article - Barry Mahoney, Austin Sarat, and Steven Weller, "The Public Image of Courts: Some Further Reflections on Data from a National Survey," in State Courts: A Blueprint for the Future - Proceedings of the Second National Conference on the Judiciary (Williamsburg, Va.: National Center for State Courts, 1978).

Monograph (Principal Author) - Waiting Times in Magistrates' Courts: An Exploratory Study (London and New York: Vera Institute of Justice, 1979).

Article - Barry Mahoney, Thomas W. Church, Jr., and Phillip B. Winberry "Addressing Problems of Delay in Limited Jurisdiction Courts: A Report on Research in Britain," in The Justice System Journal, Vol. 6/1 (1981).

Article - Barry Mahoney and Harvey E. Solomon, "Court Administration," published as Chapter III of the ABA Handbook on Judicial Administration, Sixth Edition (Chicago: American Bar Association, Judicial Administration Division, 1981).

Paper - "Developing a Graduate School Curriculum in Judicial Administration: Some Ideas About Ends and Means." Presented at a conference on court administration at the University of Florida, February 1981.

Project Report (Principal Author) - Final Report: Operational Audit of the Englewood, Colorado, Municipal Court (Denver: Institute for Court Management, 1981).

Project Report - Joy A. Chapper, Roger A. Hanson, Barry Mahoney, Paul Nejelski, Kathy Shuart, and Marlene Thornton, Phase I Evaluation of Telephone Conferencing to Conduct Motion Hearings in Civil Litigation (Denver: Institute for Court Management and American Bar Association Action Commission to Reduce Court Costs and Delay, February 1982). Final report on research project funded by National Science Foundation.

Working Paper - Barry Mahoney, Roger A. Hanson, and Marlene Thornton, "The Use of Fines as a Criminal Sanction in American State and Local Courts: Findings from a National Survey" (Denver: Institute for Court Management, January 1983). Working Paper prepared for Fines in Sentencing Project; available through National Criminal Justice Reference Service.

Project Report (Principal Author) - Report on Development of a Pilot Scheme for Advance Disclosure of the Prosecution Case in the Metropolitan Police District (London: Vera Institute of Justice, 1983).

Paper - "Research of the Vera Institute on Issues of Delay and Disclosure in Magistrates' Courts." Presented at the Conference on Delays in the Magistrates' Courts, Institute of Judicial Administration, University of Birmingham, May 1983.

Paper - "Disclosure in Magistrates' Courts: A Preliminary Assessment of Alternative Approaches," submitted to the British Home Office, Au 1983.

Project Report - Joy A. Chapper, Roger Hanson, Barry Mahoney, Lynae K.E. Olson, Kathy L. Shuart, and Marlene Thornton, Telephone Conferencing in Civil and Criminal Court Cases (Washington, D.C.: National Institute of Justice, 1984). Final report on research project conducted jointly by ICM and the American Bar Association Action Commission to Reduce Court Costs and Delay, funded principally by National Institute of Justice and National Science Foundation.

Project Report - Sally T. Hillsman, Joyce L. Sichel, and Barry Mahoney, Fines in Sentencing: A Study of the Use of the Fine as a Criminal Sanction (New York and Denver: Vera Institute of Justice and Institute for Court Management, 1984). Final report on research project conducted jointly by ICM and the Vera Institute of Justice, funded by the National Institute of Justice. Full report and separate Executive Summary published by National Institute of Justice, 1984.

Article - Barry Mahoney and Larry L. Sipes, "Zeroing in on Court Delay: The Powerful Tools of Time Standards and Management Information," in 1985 Court Management Journal.

Project Report - Barry Mahoney, Larry L. Sipes, and Jeanne A. Ito, Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings Form Current Research (Williamsburg: National Center for State Courts, 1985). Report prepared for the National Conference on Court Delay Reduction, Denver, Colorado, September 1985. Research funded by grants to the National Center from the Office of Justice Programs and the National Institute of Justice, U.S. Department of Justice.

Project Report - George F. Cole, Barry Mahoney, Marlene Thornton, and Roger A. Hanson, Fines as an Alternative to Incarceration: The Practices and Attitudes of Trial Court Judges. Final report on research project conducted jointly by the University of Connecticut and ICM/NCSC, funded by the National Institute of Justice (Denver: Institute for Court Management of the National Center for State Courts, 1986).

Article - "Attacking Problems of Delay in Urban Trial Courts," State Court Journal, Vol. 11, No. 3 (Summer 1987).

Executive Summary - George F. Cole, Barry Mahoney, Marlene Thornton, and Roger A. Hanson, Fines as an Alternative to Incarceration: The Practices and Attitudes of Trial Court Judges (Washington, DC: National Institute of Justice, 1987).

Research in Brief - Sally T. Hillsman, Barry Mahoney, George F. Cole, and Bernard Auchter, Fines as Criminal Sanctions (Washington, DC: National Institute of Justice, 1987).

Project Report (Principal Author) - Caseflow Management and Delay Reduction in Urban Trial Courts, (Denver: National Center for State Courts, 1987). Final Report and Executive Summary of three-year research project funded by National Institute of Justice and Bureau of Justice Assistance.

Article - George F. Cole, Barry Mahoney, Marlene Thornton, and Roger A. Hanson, "The Use of Fines By Trial Court Judges," Judicature, Vol 71, No. 6 (April-May 1988).

Article - Barry Mahoney and Marlene Thornton, "Means-Based Fining: Views of American Trial Court Judges," The Justice System Journal, Vol 13/1 (Spring 1988).

Project Report - Barry Mahoney and Daniel J. Freed, "Judges and the Use of Intermediate Sanctions as Alternatives to Incarceration," submitted to the Edna McConnell Clark Foundation, May 1988.

Article - Barry Mahoney and Dale Anne Sipes, "Toward Better Management of Criminal Litigation," Judicature, Vol 72, No. 1 (June-July 1988).

Book - Barry Mahoney et al., Changing Times in Trial Courts (Williamsburg: National Center for State Courts, 1988). Book version of final report on three-year research project on caseflow management and delay reduction, funded by National Institute of Justice and Bureau of Justice Assistance.

Article - Douglas K. Somerlot, Maureen Solomon, and Barry Mahoney, "Straightening Out Delay in Civil Litigation: How Wayne County Took Its Program from Among the Worse in the Nation to One of the Best," The Judges' Journal, Vol. 28, No. 4 (Fall 1989).

Committee Report (Principal Author) - "Privatization of Prisons and Jails," prepared for the American Bar Association Criminal Justice Section, Committee on Prison and Jail Problems, 1989.

Article - Daniel J. Freed and Barry Mahoney, "Between Prison and Probation: Using Intermediate Sanctions Effectively," The Judges' Journal, Vol. 29, No. 1 (Winter 1990).

Panel Presentation - "Managing Drug Cases in Urban Trial Courts," Midyear Meeting of the American Judicature Society, February 1990. An edited transcript of this session is published under the title "The Drugging of the Courts: How Sick is the Patient and What is the Treatment?" in Judicature, Vol. 74, No. 6 (April - May 1990).

Paper - Barry Mahoney, Candace McCoy, and Maria Gibson, "The Impact of Drug Cases on Urban Trial Courts," presented at the annual meeting of the Law and Society Association, June 1990.

Article - Barry Mahoney, V. Robert Payant, Richard Silver, and Linda K. Ridge, "Manage Trials More Effectively," The Judges Journal, Vol. 29, No. 4 (Fall 1990).

Book - William E. Hewitt, Geoff Gallas, and Barry Mahoney, Courts That Succeed: Six Profiles of Successful Courts (Williamsburg: National Center for State Courts, 1990).

Training Manual - Barry Mahoney with Carol Friesen, Ernest C. Friesen, R. Dale Lefever, Maureen Solomon, and Douglas K. Somerlot, Planning and conducting a Workshop on Reducing Delay in Felony Cases: Guidebook for Trainers (Denver: National Center for State Courts and Bureau of Justice Assistance, U.S. Department of Justice, 1991).

Article - "Improving the Administration of Justice in Limited Jurisdiction Courts," Journal of Judicial Administration, Vol. 1, No. 1 (August 1991).

PROFESSIONAL ACTIVITIES AND AFFILIATIONS

Member of Colorado and New York Bars

Association of the Bar of the City of New York

American Bar Association

- Criminal Justice Section - Chair of Committee on Corrections and Sentencing (formerly called the Committee on Prison and Jail Problems), 1991 - present; Committee Vice-Chair, 1990-91; Chair of Subcommittee on Privatization in Corrections, 1988-89; Chair of Subcommittee on Revision of ABA Standards on Sentencing, 1991.

- Judicial Administration Division - Member of Lawyers' Conference Committee on Modernizing Trial Techniques and Procedures

American Political Science Association

Law and Society Association

Colorado Judicial Institute (Member of Board of Directors, 1984-present)

Member of Board of Editors, The Justice System Journal, 1979-present

Member of Board of Trustees, Pretrial Services Resource Center, 1976-1978, 1988-present

Member of Advisory Board, Colorado Community Corrections Study, 1977-1978.

Member of the Advisory Panel for the Assessment of Alternatives for a National Computerized Criminal History System, conducted by the Office of Technology Assessment, Congress of the United States, 1979-1982.

Jamie Denise Phillips
11627 Vantage Hill Road #1A
Reston, Virginia 22090
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PROFESSIONAL EXPERIENCE

7/90 - Washington International Center
Meridian House International
1630 Crescent Place, NW
Washington, D.C. 20009

Program Officer: As an Intercultural Training Officer, my primary responsibilities include conducting intercultural orientation in English and Spanish for international visitors who have come to the United States for long and short term educational/professional experiences; developing intercultural training modules in the areas of cultural values, pluralism, intercultural communication, adjustment strategies, U.S. political process, and contemporary U.S. society; networking with other area trainers to create a quality adjunct faculty pool; working with WIC staff and management in the initiation of new projects with particular focus on Japan; collaborating with community service centers in building alliances between international visitors and grassroots agencies.

5/89 - 7/90 Miranda Associates
2000 L Street, NW
Washington, D.C. 20036

Field Representative: Working with the International Criminal Investigative Training Assistance Program (ICITAP), sponsored by the U.S. Department of Justice, my responsibilities included administrative and logistical coordination of various criminal investigative training courses in Central America and the Caribbean; supervision of Spanish language interpreters while in Central America; training and supervision of local hires in both the Caribbean and Central America; conducting simultaneous translation in Spanish for instructors as necessary; translating educational materials; acting as a liaison between law enforcement officials and the U.S. government in matters relating to ICITAP activities; writing activity reports after each course managed; serving as a resource person for regional course participants.

1/89 - 5/89 United States Peace Corps
1990 K Street, NW
Washington, D.C. 20037

Equal Opportunity Assistant: As an EO Assistant, I was hired to continue work on the Minority Volunteer Project I designed while doing my tour as a Peace Corps Volunteer in Costa Rica. While in this temporary position I conducted interviews throughout the agency in order to gather necessary information for revision of the project; researched the history of and proposed remedies for the problem; did individual counselling of minority Volunteers overseas; created two training modules aimed at addressing the needs of minority Volunteers; submitted a detailed action plan complete with needs analysis, recommendations, and implementation strategies.

1/87 - 12/88 United States Peace Corps
Costa Rica, Central America

Peace Corps Volunteer: As a PCV I assisted the local development association in community organization and motivation; created Trabajando Juntos, a groups/meetings seminar for community leaders; developed curricula and taught courses in both ESL and handicrafts for adults and children; directed fund raising for community projects including a playground and a health post; organized and administrated three (3) community youth groups; participated as a committee member in the research and evaluation of Peace Corps cross-cultural training in Costa Rica; designed and submitted an action plan for dealing with the minority Volunteer issue within Peace Corps.

EDUCATION

National Louis University
Arlington, Virginia
Master of Science in International Management and Human Resource Development, 1990
Thesis Area: Community organizational development

Hampshire College
Amherst, Massachusetts
Bachelor of Arts, 1986
Independently designed major in psychology and cross-cultural applications. Course work included psychology, education, history, and literature; Semester spent in Japan researching cultural influences on treatment methods for autistic and emotionally disturbed children; collected and helped compile data for doctoral dissertation in

psychology at the University of MA; thesis title My Mother's Legacy: an analysis of the alienation experienced by middle-class Afro-American women and the strategies used in coping.

LANGUAGES

Spanish - fluent
Japanese - basic knowledge

HONORS

Hampshire College Board of Trustees
Hampshire College Alumni Council Member
Johnson Scholar
National Intercultural Education Leadership Institute Research Associate

TAB 3 **BACKGROUND MATERIALS - The Historical Context of Court Reform in the U.S.**

ARTICLES:

"Roscoe Pound . . . The Causes of Popular Dissatisfaciton With the Administration of Justice"

"The Priority of Human Rights in Court Reform"

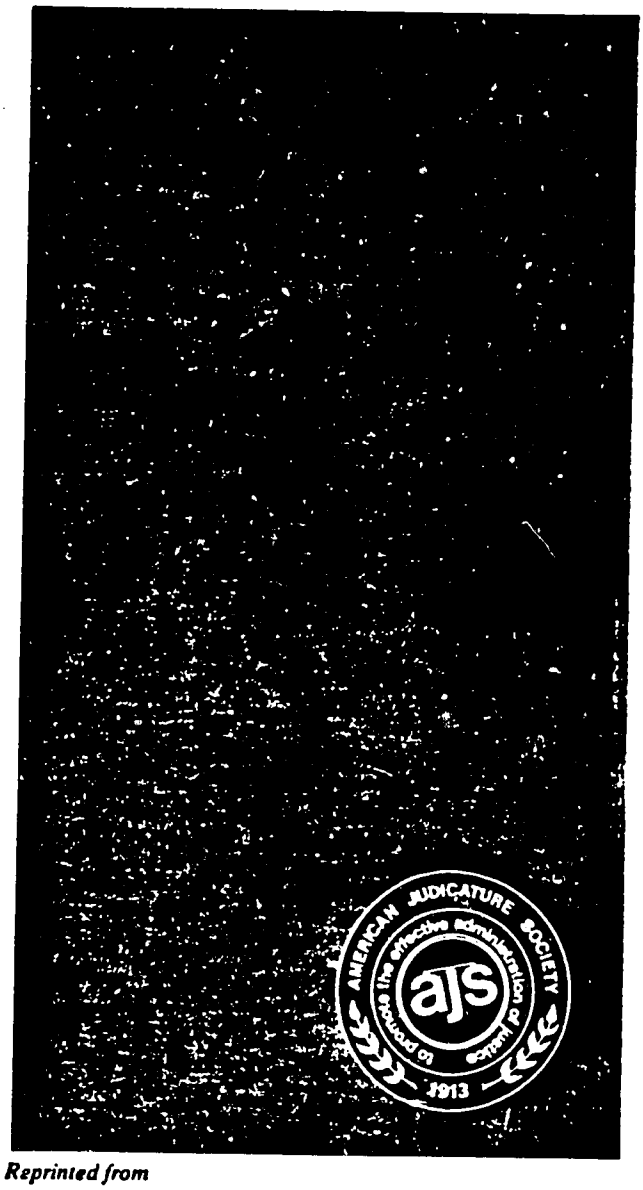
"The Implementation of Court Improvements"

"Implementation of Court Reform in Kentucky"

"The Courts and Change"

Roscoe Pound ...

The Causes of Popular Dissatisfaction With the Administration of Justice



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INTRODUCTION

Dean Roscoe Pound, perhaps the greatest evangelist for court reform of this century, gave this address, "The Causes of Popular Dissatisfaction with the Administration of Justice", to the 1906 meeting of the American Bar Association in St. Paul, Minnesota. Described by Dean John Wigmore as "the spark which kindled the white flame of progress", this speech effectively launched a court reform effort which encompassed the founding of the American Judicature Society in 1913 and continues to the present day.

Our system of courts, said Pound, is archaic in three respects: in multiplicity of courts, in preserving concurrent jurisdictions, and in the waste of judicial manpower it involves. These charges ring as uncomfortably true today as the day they were made. Although great strides have been made, the journey is not over until impartial and efficient justice for all becomes a reality.

Not unnaturally, the sensitivities of many judges and complacent lawyers in Pound's audience in 1906 were stung by his allegations. The antipathy caused by his honest but painful analysis caused an instantaneous reaction: a resolution for printing 4000 copies of his speech was defeated following lengthy laudatory defenses of the courts.

Today, let us hope, those of us who are concerned with justice in America have the common sense to accept Pound's criticisms where they are still valid in a changed society, and to work to achieve his vision of "a near future when our courts will be swift and certain agents of justice, where decisions will be acquiesced in and respected by all."

The Causes of Popular Dissatisfaction with the Administration of Justice*

Roscoe Pound

DISSATISFACTION with the administration of justice is as old as law. Not to go outside of our own legal system, discontent has an ancient and unbroken pedigree. The Anglo-Saxon laws continually direct that justice is to be done equally to rich and poor,[1] and the king exhorts that the peace be kept better than has been wont,[2] and that "men of every order readily submit...each to the law which is appropriate to him."[3] The author of the apocryphal Mirror of Justice gives a list of one hundred and fifty-five abuses in legal administration, and names it as one of the chief abuses of the degenerate times in which he lived that executions of judges for corrupt or illegal decisions had ceased.[4] Wyclif complains that "lawyers make process by subtlety and cavilations of law civil, that is much heathen men's law, and do not accept the form of the gospel, as if the gospel were not so good as pagan's law."[5] Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime

*Address delivered at annual convention of American Bar Association in 1906.

1. e.g., Secular Ordinance of Edgar, Cap. 1; Secular Ordinance of Cnut; 2; Laws of Ethelred, VI, 1; Laws of Edward, preface.
2. Laws of Athelstan, IV; Laws of Edward, 4.
3. Laws of Ethelred, V, 4.
4. Mirror, chap. 5, sec. 1.
5. See Maitland, English Law and the Renaissance, 53.

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devised."[6] James I reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges."[7] In the eighteenth century, it was complained that the bench was occupied by "legal monks, utterly ignorant of human nature and of the affairs of men."[8] In the nineteenth century the vehement criticism of the period of the reform movement needs only to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice. But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.

In spite of the violent opposition which the doctrine of judicial power over unconstitutional legislation at first encountered, the tendency to give the fullest scope to the common law doctrine of supremacy of law and to tie down administration by common law liabilities and judicial review was, until recently, very marked. Today, the contrary tendency is no less marked. Courts are distrusted, and the executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review, have become the fashion. It will be assumed, then, that there is more than the normal amount of dissatisfaction with the present-day administration of justice in America. Assuming this, the first step must be diagnosis, and diagnosis will be the sole purpose of this paper. It will attempt only to discover and to point out the causes of current popular dissatisfaction. The inquiry will be limited, moreover, to civil justice. For while the criminal law attracts more notice, and punishment seems to have greater interest for the lay mind than the civil remedies of prevention and compensation, the true interest of the modern community is in the civil administration of justice. Revenge and its modern outgrowth, punishment, belong to the past of legal history. The rules which define those invisible boundaries, within which each may act without conflict with the activities of his fellows in a busy and crowded world, upon which investor, promoter, buyer, seller, employer and employee must rely consciously or subconsciously in their every-day transactions, are conditions precedent of modern social and industrial organization.

With the scope of inquiry so limited, the causes of dissatisfaction with the administration of justice may be grouped under four main heads: (1) causes for dissatisfaction with *any* legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration.

IT NEEDS but a superficial acquaintance with literature to show that all legal systems among all peoples have given rise to the same complaints. Even the wonderful mechanism of modern German judicial administration is said to be distrusted by the people on the time-worn ground that there is one law for the rich and another for the poor.[9] It is obvious, therefore, that there must be some cause or causes inherent in all law and in all legal systems in order to produce this universal and invariable effect. These causes of dissatisfaction with any

6. Id. 42.
7. Conference between King James I and the Judges of England. 12 Rep. 63.
8. Lord Campbell, Lives of the Chief Justices (3 Ed.) IV 119.

9. Dr. V. Liszt, Professor at Berlin, delivered an address in the Rathaus in Berlin on this very subject recently, if we may credit press accounts.

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system of law I believe to be the following: (1) the necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent, and (4) popular impatience of restraint.

THE MOST important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. This is one of the penalties of uniformity. Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand. From time to time more or less reversion to justice without law becomes necessary in order to bring the public administration of justice into touch with changed moral, social or political conditions. But such periods of reversion result only in new rules or changed rules. In time the modes of exercising discretion become fixed, the course of judicial action becomes stable and uniform, and the new element, whether custom or equity or natural law becomes as rigid and mechanical as the old. This mechanical action of the law may be minimized, but it cannot be obviated. Laws are general rules; and the process of making them general involves elimination of the immaterial elements of particular controversies. If all controversies were alike or if the degree in which actual controversies approximate to the recognized types could be calculated with precision, this would not matter. The difficulty is that in practice they approximate to these types in infinite gradations. When we eliminate immaterial factors to reach a general rule, we can never entirely avoid eliminating factors which will be more or less material in some particular controversy. If to meet this inherent difficulty in administering justice according to law we introduce a judicial dispensing power, the result is uncertainty and an intolerable scope for the personal equation of the magistrate. If we turn to the other extreme and pile up exceptions and qualifications and provisos, the legal system becomes cumbrous and unworkable. Hence the law has always ended in a compromise, in a middle course between wide discretion and over-minute legislation. In reaching this middle ground, some sacrifice of flexibility of application to particular cases is inevitable. In consequence, the adjustment of the relations of man and man according to these rules will of necessity appear more or less arbitrary and more or less in conflict with the ethical notions of individuals.

In periods of absolute or generally received moral systems, the contrast between legal results and strict ethical requirements will appeal only to individuals. In periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition, this contrast is greatly intensified and appeals to large classes of society. Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellow so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply

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the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian."[10]

A CLOSELY related cause of dissatisfaction with the administration of justice according to law is to be found in the inevitable difference in rate of progress between law and public opinion. In order to preclude corruption, to exclude the personal prejudices of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete. It follows that this difficulty in the judicial administration of justice, like the preceding, may be minimized, but not obviated. In a rude age the Teutonic moots in which every free man took a hand might be possible. But these tribunals broke down under pressure of business and became ordinary courts with permanent judges. The Athenians conceived that the people themselves should decide each case. But the Athenian *dikastery*, in which controversies were submitted to blocks of several hundred citizens by way of reaching the will of the democracy, proved to register its caprice for the moment rather than its permanent will. Modern experience with juries, especially in commercial causes, does not warrant us in hoping much from any form of judicial referendum. Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration. All interference with the uniform and automatic application of these rules, when actual controversies arise, introduces an anti-legal element which becomes intolerable. But, as public opinion affects tribunals through the rules by which they decide and these rules once made, stand till abrogated or altered, any system of law will be made up of successive strata of rules and doctrines representing successive and often widely divergent periods of public opinion. In this sense, law is often in very truth a government of the living by the dead.[11] The unconscious change of judicial law making and the direct alterations of legislation and codification operate to make this government by the dead reasonably tolerable. But here again we must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first. While it is coming, and until it is so complete as to affect the law and formulate itself therein, friction must ensue. In an age of rapid moral, intellectual and economic changes, often crossing one another and producing numerous minor resultants, this friction cannot fail to be in excess.

A THIRD perennial source of popular dissatisfaction with the administration of justice according to law may be found in the popular assumption that the administration of justice is an easy task to which anyone is competent. Laws may be compared to the formulas of engineers. They sum up the experience of many courts with many cases and enable the magis-

10. Courtney Kenny, *Bonus Jurista, Malus Christa*, 19 Law Quart. Rev. 326.

11. Spencer, Principles of Sociology, II, 514.

trate to apply that experience subconsciously. So, the formula enables the engineer to make use of the accumulated experience of past builders, even though he could not work out a step in its evolution by himself. A layman is no more competent to construct or to apply the one formula than the other. Each requires special knowledge and special preparation. None the less, the notion that anyone is competent to adjudicate the intricate controversies of a modern community contributes to the unsatisfactory administration of justice in many parts of the United States. The older states have generally outgrown it. But it is felt in extravagant powers of juries, lay judges of probate and legislative[12] or judicial law making against *stare decisis*, in most of the commonwealths of the South and West. The public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice. There is no more certain protection against corruption, prejudice, class feeling or incompetence. Publicity will avail something. But the daily criticism of trained minds, the knowledge that nothing which does not conform to the principles and received doctrines of scientific jurisprudence will escape notice, does more than any other agency for the every-day purity and efficiency of our courts.

ANOTHER necessary source of dissatisfaction with judicial administration of justice is to be found in popular impatience of restraint. Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellow makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive. In an age of absolute theories, monarchical or democratic, this restiveness is acute. A conspicuous example is to be seen in the contest between the king and the common law courts in the seventeenth century. An equally conspicuous example is to be seen in the attitude of the frontiersman toward state-imposed justice. "The unthinking sons of the sage brush," says Owen Wister, "ill tolerate anything which stands for discipline, good order and obedience; and the man who lets another command him they despise. I can think of no threat more evil for our democracy, for it is a fine thing diseased and perverted, namely, the spirit of independence gone drunk."[13] This is an extreme case. But in a lesser degree the feeling that each individual, as an organ of the sovereign democracy, is above the law he helps to make, fosters everywhere a disrespect for legal methods and institutions and a spirit of resistance to them. It is "the reason of this our artificial man, the commonwealth," says Hobbes, "and his command that maketh law."[14] This man, however, is abstract. The concrete man in the street or the mob is much more obvious; and it is no wonder that individuals and even classes of individuals fail to draw the distinction.

A considerable portion of current dissatisfaction with the administration of justice must be attributed to the universal causes just considered. Conceding this, we have next to recognize that there are potent causes in operation of a character entirely different.

Under the second main head, causes lying in our peculiar legal system, I should enumerate five: (1) the individualist spirit of our common law, which agrees ill with a collectivist age; (2) the common law doctrine of

12. See an instance noted in the address of Mr. Justice Brown, Rep. Am. Bar Assn., 1899, 282.

13. Quoted in Ross, Foundations of Sociology, 388.
14. Leviathan, chap. 26.

contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon our legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American law, which gives us petty tinkering where comprehensive reform is needed, and (5) defects of form due to the circumstance that the bulk of our legal system is still case law.

THE FIRST of these, conflict between the individualist spirit of the common law and the collectivist spirit of the present age, has been treated of on another occasion.[15] What was said then need not be repeated. Suffice it to point out two examples. From the beginning, the main reliance of our common law system has been individual initiative. The main security for the peace at common law is private prosecution of offenders. The chief security for the efficiency and honesty of public officers is mandamus or injunction by a tax payer to prevent waste of the proceeds of taxation. The reliance for keeping public service companies to their duty in treating all alike at reasonable price is an action to recover damages. Moreover, the individual is supposed at common law to be able to look out for himself and to need no administrative protection. If he is injured through contributory negligence, no theory of comparative negligence comes to his relief: if he hires as an employee, he assumes the risk of the employment; if he buys goods, the rule is *caveat emptor*. In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Private suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interests, common law methods of relief have failed. The courts have not been able to do the work which the common law doctrine of supremacy of law imposed on them. A widespread feeling that the courts are inefficient has been a necessary result. But, along with this, another phase of the individualism of the common law has served to increase public irritation. At the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation. The chief concern of the common law is to secure and protect individual rights. "The public good," says Blackstone, "is in nothing more essentially interested than in the protection of every individual's private rights."[16] Such, it goes without saying, is not the popular view today. Today we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect these individuals against society for fear society will oppress us. But the common law guaranties of individual rights are established in our constitutions, state and federal. So that, while in England these common law dogmas have had to give way to modern legislation, in America they stand continually between the people, or large classes of the people, and the legislation they desire. In consequence, the courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright.

A NO LESS potent source of irritation lies in our American exaggerations of the common

15. Do We Need a Philosophy of Law? 5 Columbia Law Rev. 339; The Spirit of the Common Law, *Green Bag*, January, 1906.

16. Bl. Comm. 139.

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law contentious procedure. The sporting theory of justice, the "instinct of giving the game fair play," as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it for a fundamental legal tenet.[17] But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to "get error into the record" rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations "to affect credit," which have made the witness stand "the slaughter house of reputations."[18] It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the change to play another inning in the game of justice.[19] It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived.[20] The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them

17. Wigmore, Evidence, 127.
18. Wigmore, Evidence, 1112.

19. Holland *vs.* Chicago, B. & Q. R. R. Co., 52 Neb. 100.
20. De Graw *vs.* Elmore, 50 N. Y. 1.

are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

ANOTHER SOURCE of irritation at our American courts is political jealousy due to the strain put upon our legal system by the doctrine of the supremacy of law. By virtue of this doctrine, which has become fundamental in our polity, the law restrains, not individuals alone, but a whole people. The people so restrained would be likely in any event to be jealous of the visible agents of restraint. Even more is this true in that the subjects which our constitutional polity commits to the courts are largely matters of economics, politics and sociology upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation. This phase of the common law doctrine was felt as a grievance in the seventeenth century. "I tell you plainly," said Bacon, as attorney general, in arguing a question of prerogative to the judges, "I tell you plainly it is little better than a by-let or crooked creek to try whether the king hath power to erect this office in an assize between Brownlow and Michell."[21] King Demos must feel much the same at seeing the constitutionality of the Missouri Compromise tried in an action of trespass, at seeing the validity of the legal tender laws tried on pleas of payment in private litigation, at seeing the power of the federal government to carry on the Civil War tried judicially in admiralty, at seeing income tax overthrown in a stockholder's bill to enjoin waste of corporate assets and at seeing the important political questions in the Insular Cases disposed of in forfeiture proceedings against a few trifling imports. Nor is this the only phase of the common law doctrine of supremacy of law which produces political jealousy of the courts. Even more must the layman be struck with the spectacle of law paralyzing administration which our polity so frequently presents. The difficulties with writs of *habeas corpus* which the federal government encountered during the Civil War and the recent case of the income tax will occur to you at once. In my own state, in a few years we have seen a freight rate law suspended by decree of a court and have seen the collection of taxes from railroad companies, needed for the every-day conduct of public business, tied up by an injunction. The strain put upon judicial institutions by such litigation is obviously very great.

LACK OF general ideas and absence of any philosophy of law, which has been characteristic of our law from the beginning and has been a point of pride at least since the time of Coke,[22] contributes its mite also toward the causes of dissatisfaction with courts. For one thing, it keeps us in the thrall of a fiction. There is a strong aversion to straightforward change of any important legal doctrine. The cry is *interpret it.* But such interpretation is spurious. It is legislation. And to interpret an obnoxious rule out of existence rather than to meet it fairly and squarely by legislation is a fruitful source of confusion. Yet the bar are trained to it as an ancient common law doctrine, and it has a great hold upon the public. Hence if the law does not work well, says Bentham, with fine sarcasm, "it is never the law itself that is in the wrong; it is always some wicked interpreter of the law that has corrupted and abused it."[23] Thus another unnecessary strain is imposed upon our judicial system and courts are held responsible for what should be the work of the legislature.

21. Collectanea Juridica, 1, 173.

22. Co. Lit. Preface.

23. Fragment on Government, XVII.

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THE DEFECTS of form inherent in our system of case law have been the subject of discussion and controversy too often to require extended consideration. Suffice it to say that the want of certainty, confusion and incompleteness inherent in all case law, and the waste of labor entailed by the prodigious bulk to which ours has attained, appeal strongly to the layman. The compensating advantages of this system, as seen by the lawyer and by the scientific investigator, are not apparent to him. What he sees is another phase of the great game; a citation match between counsel, with a certainty that diligence can rake up a decision *somewhere* in support of any conceivable proposition.

Passing to the third head, causes lying in our judicial organization and procedure, we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.

Our system of courts is archaic in three respects: (1) in its multiplicity of courts, (2) in preserving concurrent jurisdictions, (3) in the waste of judicial power which it involves. The judicial organizations of the several states exhibit many differences of detail. But they agree in these three respects.

MULTIPLICITY of courts is characteristic of archaic law. In Anglo-Saxon law, one might apply to the Hundred, the Shire, the Witan, or the king in person. Until Edward I broke up private jurisdictions, there were the king's superior courts of law, the itinerant justices, the county courts, the local or communal courts and the private courts of lordships; besides which one might always apply to the king or to the Great Council for extraordinary relief. When later the royal courts had superseded all others, there were the concurrent jurisdictions of King's Bench, Common Pleas and Exchequer, all doing the same work, while appellate jurisdiction was divided by King's Bench, Exchequer Chamber and Parliament. In the Fourth Institute, Coke enumerates seventy-four courts. Of these, seventeen did the work that is now done by three, the County Courts, the Supreme Court of Judicature and the House of Lords. At the time of the reorganization by the Judicature Act of 1873, five appellate courts and eight courts of first instance were consolidated into the one Supreme Court of Judicature. It was the intention of those who devised the plan of the Judicature Act to extend the principle of unity of jurisdiction by cutting off the appellate jurisdiction of the House of Lords and by incorporating the County Courts in the newly formed Supreme Court as branches thereof.[24] The recommendation as to the County Courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. In this way the unity and simplicity of the original design were impaired. But the plan, although adopted in part only, deserves the careful study of American lawyers as a model modern judicial organization. Its chief features were (1) to set up a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate and in divorce was to be consolidated; in the other branch, the court

24. Report of Judicature Commission, 1869, p. 13.

of appeal, the whole reviewing jurisdiction was to be established. This idea of unification, although not carried out completely, has proved most effective. Indeed, its advantages are self-evident. Where the appellate tribunal and the court of first instance are branches of one court, all expense of transfer of record, or transcripts, bills of exceptions, writs of error and citations is wiped out. The records are the records of the court, of which each tribunal is but a branch. The court and each branch thereof knows its own records, and no duplication and certification is required. Again, all appellate practice, with its attendant pitfalls, and all waste of judicial time in ascertaining how or whether a case has been brought into the court of review is done away with. One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, our American reports bristle with fine points of appellate procedure. More than four percent of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Court of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Court of Appeals of Missouri show that nearly twenty percent involve points of appellate procedure. In volume 87, of fifty-three decisions of the Supreme Court and ninety-seven of the Courts of Appeals, twenty-eight are taken up in whole or in part with the mere techniques of obtaining a review. All of this is sheer waste, which a modern judicial organization would obviate.

EVEN MORE archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court. A few statistics on this point may be worthwhile. In the ten volumes of the Federal Reporter referred to, the decisions of the Circuit Court of Appeals in civil cases average seventy-six to the volume. Of these, on the average, between four and five in a volume are decided on points of federal jurisdiction. In a little more than one to each volume, judgments of Circuit Courts are reversed on points of jurisdiction. The same volumes contain on the average seventy-three decisions of Circuit Courts in civil cases to each volume. Of these, six, on the average, are upon motions to remand to the state courts, and between eight and nine are upon other points of federal jurisdiction. Moreover, twelve cases in the ten volumes were remanded on the *form* of the petition for removal. In other words, in nineteen and three-tenths percent of the reported decisions of the Circuit Courts the question was whether those courts had jurisdiction at all; and in seven percent of these that question depended on the form of the pleadings. A system that permits this and

reverses four judgments a year because the cause was brought in or removed to the wrong tribunal is out of place in a modern business community. All original jurisdiction should be concentrated. It ought to be impossible for a cause to fail because brought in the wrong place. A simple order of transfer from one docket to another in the same court ought to be enough. There should be no need of new papers, no transcripts, no bandying of cases from one court to another on orders of removal and of demand, no beginnings again with new process.

JUDICIAL POWER may be wasted in three ways: (1) By rigid districts or courts or jurisdictions, so that business may be congested in one court while judges in another are idle, (2) by consuming the time of courts with points of pure practice, when they ought to be investigating substantial controversies, and (3) by nullifying the results of judicial action by unnecessary retrials. American judicial systems are defective in all three respects. The Federal Circuit Courts and Circuit Courts of Appeals are conspicuous exceptions in the first respect, affording a model of flexible judicial organization. But in nearly all of the states, rigid districts and hard and fast lines between courts operate to delay business in one court while judges in another have ample leisure. In the second respect, waste of judicial time upon points of practice, the intricacies of federal jurisdiction and the survival of the obsolete Chinese Wall between law and equity in procedure make our federal courts no less conspicuous sinners. In the ten volumes of the Federal Reporter examined, or an average of seventy-six decisions of the Circuit Courts of Appeals in each volume, two turn upon the distinction between law and equity in procedure and not quite one judgment to each volume is reversed on this distinction. In an average of seventy-three decisions a volume by the Circuit Courts, more than three in each volume involve this same distinction, and not quite two in each volume turn upon it. But many states that are supposed to have reformed procedure scarcely make a better showing.

Each state has to a great extent its own procedure. But it is not too much to say that all of them are behind the times. We struck one great stroke in 1848 and have rested complacently or contented ourselves with patchwork amendment ever since. The leading ideas of the New York Code of Civil Procedure marked a long step forward. But the work was done too hurriedly and the plan of a rigid code, going into minute detail, was clearly wrong. A modern practice act lays down the general principles of practice and leaves details to rules of court. The New York Code Commission was appointed in 1847 and reported in 1848. If we except the Connecticut Practice Act of 1878, which shows English influence, American reform in procedure has stopped substantially where that commission left it. In England, beginning with 1826 and ending with 1874, *five* commissioners have put forth *nine* reports upon this subject.[25] As a consequence we have nothing in America to compare with the radical treatment of pleading in the English Judicature Act and the orders based thereon. We still try the *record*, not the *case*. We are still reversing judgments for nonjoinder and misjoinder. The English practice of joinder of parties against whom relief is claimed in the alternative, rendering judgment against any that the proof shows to be liable and dismissing the rest, makes an American lawyer rub his eyes. We are still reversing judgments for variance. We still reverse them because the recovery is in excess of the prayer,

25. Lord Eldon's Commission, 1826; Royal Commission, 1829, 1830, 1832; Commission on Pleading and Practice in Courts of Common Law, 1851, 1853, 1860; Chancery Commissioners, 1852, 1854, 1856; Judicature Commissioners, 1869-1874.

though substained by the evidence.[26]

But the worst feature of American procedure is the lavish granting of new trials. In the ten volumes of the Federal Reporter referred to, there are, on the average, twenty-five writs of error in civil cases to the volume. New trials are awarded on the average in eight cases a volume, or nearly twenty-nine percent. In the state courts the proportion of new trials to causes reviewed, as ascertained from investigation of the last five columns of each series of the National Reporter system, runs over forty percent. In the last three volumes of the New York Reports (180-182), covering the period from December 6, 1904, to October 24, 1905, forty-five new trials are awarded. Nor is this all. In one case in my own state[27] an action for personal injuries was tried six times, and one for breach of contract[28] was tried three times and was four times in the Supreme Court. When with this we compare the statistics of the English Court of Appeal, which does not grant to exceed twelve new trials a year, or new trials in about three percent of the cases reviewed, it is evident that our methods of trial and review are out of date.

A comparison of the volume of business disposed of by English and by American courts will illustrate the waste and delay caused by archaic judicial organization and obsolete procedure. In England there are twenty-three judges of the High Court who dispose on the average of fifty-six hundred *contested* cases, and have before them, in one form or another, some eighty thousand cases each year. In Nebraska there are twenty-eight district judges who have no original probate jurisdiction and no jurisdiction in bankruptcy or admiralty, and they had upon their dockets last year forty-three hundred and twenty cases, of which they disposed of about seventy percent. England and Wales, with a population in 1900 of 32,000,000, employs for the same civil litigation ninety-five judges, that is, thirty-seven in the Supreme Court and House of Lords and fifty-eight county judges. Nebraska, with a population in 1900 of 1,066,000, employs for the same purpose one hundred and twenty-nine. But these one hundred and twenty-nine are organized on an antiquated system and their time is frittered away on mere points of legal etiquette.

FINALLY, under the fourth and last head, causes lying in the environment of our judicial administration, we may distinguish six: (1) popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of our courts into politics; (5) the making of the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee, and (6) public ignorance of the real workings of courts due to ignorant and sensational reports in the press. Each of these deserves consideration, but a few points only may be noticed. Law is the skeleton of social order. It must be "clothed upon by the flesh and blood of morality."[29] The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious. An-

26. Brought *vs.* Cherokee Nation (C. C. A.) 129 Fed. 192.
27. Omaha St. R. Co. *vs.* Boesen, 95 N. W. 617; Cf. Mutual Life Ins. Co. *vs.* Hillmon (C. C. A.), 107 Fed 834 (tried six times).
28. Wittenberg *vs.* Molyneaux, 60 Neb. 107.

29. Sidgwick, Methods of Ethics, 6 Ed. 456.

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other strain upon our judicial system results from the crude and unorganized character of American legislation in a period when the growing point of law has shifted to legislation. When, in consequence, laws fail to produce the anticipated effects, judicial administration shares the blame. Worse than this is the effect of laws not intended to be enforced. These parodies, like the common law branding of felons, in which a piece of bacon used to be interposed between the branding iron and the criminal's skin,[30] breed disrespect for law. Putting courts into politics, and compelling judges to become politicans, in many jurisdictions has almost destroyed the traditional respect for the bench. Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game. There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel, encounters with witnesses and sensational by-incidents. In Nebraska, not many years since, the federal court enjoined the execution of an act to regulate insurance companies.[31] In press accounts of the proceeding, the conspiracy clause of the bill was copied *in extenso* under the headline "Conspiracy Charged," and it was made to appear that the ground of the injunction was a conspiracy between the state officers and some persons unknown. It cannot be expected that the public shall form any just estimate of our courts justice from such data.

REVIEWING the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of ar age of transition and are the penalty we pay fo freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the las century. Lord Kenyon, as Master of the Rolls sat in Parliament and took as active a part i political squabbles in the House of Commo as our state judges today in party conventions Dodson and Foggs and Sergeant Buzzfu wrought in an atmosphere of contentious p cedure. Bentham tells us that in 1797, out five hundred and fifty pending writs of er five hundred and forty-three were shams vexatious contrivances for delay.[33] Jarnd and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law; with active bar associations in every state to revive professional feeling and throw off the yoke of commercialism; with the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

30. Bentham, Theory of Legislation (tr. by Hildreth), 401.
31. Niagara Fire Ins. Co. *vs.* Cornell, 110 Fed. 816.

32. Lord Campbell, Lives of the Chief Justices, (3 Ed) IV, 70-73.
33. Works, VII, 214.

Address of Judge Leon A. Higginbotham, Jr., at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minnesota, April 7-9, 1991. Published in A. Leo Levin and Russell R. Wheeler (eds.), *The Pound Conference: Perspectives on Justice in the Future* (St. Paul: West Publishing Co., 1979), pp. 87-110.

The Priority of Human Rights in Court Reform

by

The Honorable A. Leon Higginbotham, Jr.*
Judge, United States District Court **

JUDGE WALSH: We now come to the distinguished District Judge from the Eastern District of Pennsylvania, Judge A. Leon Higginbotham, Jr. He is a graduate of Yale Law School. Before he became a judge, he was a member of the Federal Trade Commission and he also served as Vice-Chairman of the National Commission on the Causes and Prevention of Violence. It is with great pleasure that I present to you Judge Higginbotham. Judge Higginbotham.

We must be forever mindful that when Roscoe Pound spoke here in 1906 he was primarily concerned about assuring justice and improving its quality for all of our citizens. He was not interested in any band-aid or cosmetic process which would mask the wounds of injustice that degraded the judicial system. To use his term, he felt that one must probe the "*causes*" of the dissatisfaction and, to the extent possible, eliminate the wounds while preserving the positive strengths of our judicial body.

I have been asked to analyze the "* * * appropriate criteria for determining the kinds of disputes which should concern the courts, no doubt placing some emphasis on constitutional issues and questions of human rights." To analyze human rights in the judicial process, one must understand the history of the specific eras in which rights evolve. One must be careful not to assume that solutions proposed in 1906, even by such a thoughtful observer as Dean Pound, will be entirely adequate to meet the challenges, storms and aspirations of a nation which has reached its bicentennial birthday.

I do not believe that this stance is unfaithful to the spirit of that eminent scholar whose address is the inspiration for our own deliberations. While we have already heard and undoubt-

* While I accept total responsibility for all views expressed here, I wish to note that in many respects this paper has been jointly authored through the able assistance of my law clerk, Thomas M. Gannon, S.J., whose contribution I am pleased to acknowledge.

** Since October, 1977, Judge, United States Court of Appeals for the Third Circuit.

edly will hear many entirely appropriate suggestions about how we might avoid litigation, in his own time Pound took issue with what he called "the stock saying that litigation ought to be discouraged." As he phrased it, "in discouraging litigation we encourage wrongdoing * * * of all people in the world we ought to have been those most solicitous for the rights of the poor, no matter how petty the causes in which they are to be vindicated." [1]

Pound was bemoaning the tendency to discourage litigation rather than to create new forums for it, such as municipal courts, or small claims courts, because "with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed." [2]

Some rights, however, must be asserted through traditional litigation processes. We can learn something about this from one of Dean Pound's colleagues and contemporaries, Moorfield Storey, Boston advocate, and former American Bar Association President. In 1911, he devoted a lecture series at Yale Law School to *The Reform of Legal Procedure,* in which he bemoaned "the congestion of the docket, the fact that cases are brought faster than they can be tried, and the inevitable accumulation of work." [3] Storey's "first remedy" was legislation to remove some of the causes of litigation, and he advocated especially workmen's compensation systems. Yet Storey knew that there were some rights that had to be secured in the courts, and that is why he acted as counsel for the N.A.A.C.P., an organization he helped found,[4] in three momentous cases in the Supreme Court—cases that surely spawned more litigation. The cases were *Guinn v. U. S.*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), outlawing the "grandfather clause," *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917), invalidating a Louisville housing segregation ordinance, and *Moore v. Dempsey,* 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923), asserting the right to federal habeas corpus from a state trial conducted in the passion of racism.

[1] R. Pound, The Spirit of The Common Law (1921) at 134.

[2] R. Pound, *supra* at 132.

[3] M. Storey, The Reform of Legal Procedure (1912) at 50.

[4] Moorfield Storey was the first president of the NAACP. For its history, *see* L. Hughes, Fight for Freedom: The Story of the NAACP (Berkeley Ed. 1962).

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I

I think that Chief Justice Burger, one of the moving forces behind this meeting, was quite realistic when, in his address to the American Bar Association two months ago, he said, "It would be a mistake to create great expectations about this conference that cannot be fulfilled in the short term." But the Chief Justice also said, "we are determined that the monumental dimensions of the task and the improbability of immediate results should not keep us from undertaking the inquiry." I agree wholeheartedly. We ought to begin the inquiry, for I am no opponent of judicial reform. Early in my career on the bench, I had the privilege of assisting the then Chief Judge, now Senior Judge, Thomas Clary in moving the District Court for the Eastern District of Pennsylvania from a master calendar system to an individual calendar system, a change that has materially increased the efficiency of our court and has drastically reduced the average disposition time for cases filed there. Even now, I fear that I weary my colleagues in the Eastern District with memos suggesting ways in which we might deal more expeditiously with the business of our court. Much can be accomplished by procedural changes, systems analysis and incorporation of sophisticated management techniques.[5]

Yet in putting Roscoe Pound and the era in which he spoke in adequate perspective, we must be mindful of the possibility that too intense a focus on form can obscure our perception of matters of substance—"human rights," for instance. I know that when I speak of concern for human rights, many may respond: "But who opposes the judicial protection of human rights?" In the abstract, of course, no one does. In practice, however, it is often another story. Suppose, for example, that someone had sponsored a conference similar to this one on the 25th anniversary of Pound's address. If such a conference had been held in 1931, some of us here today would have been excluded from membership in one of the sponsoring organizations.[6] Yet such a conference in 1931 would undoubtedly have

[5] I have developed these views in "Effective Use of Modern Technology," in JUSTICE IN THE STATES: ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY (W. Swindler, Ed.) 140 (1971) and "The Trial Backlog and Computer Analysis," 44 F.R.D. 104 (1968).

Fortunately, court management personnel are coming to realize that courts need not only managerial principles but also need to know how to apply those principles in the courts' special milieu. *See, for example,* E. Friesen, E. Gallas & N. Gallas, MANAGING THE COURTS (1971), and consult the JUSTICE SYSTEM JOURNAL, published by the Fellows of the Institute for Court Management. *See also* R. Wheeler and H. Whitcomb, JUDICIAL ADMINISTRATION: TEXT AND READINGS (forthcoming, 1977).

[6] "[D]iscrimination against Negro lawyers by the American Bar Association * * * led to the formation of the colored National Bar Association. In

been composed of honorable persons who would have bristled with indignation at any suggestion that they were not concerned about human rights. We know now that 1931 was not the millenium. Neither, I submit, is 1976. There are still, and perhaps always will be, issues outstanding on the human rights agenda. We neglect them at our peril. Thus, I disagree with those who may ultimately feel that my entire analysis is only the creation of a "straw man," followed closely by its systematic destruction. That is not my intention. What I hope to do is point out some dangers on the road to reform, dangers that if ignored could cause, not progress, but retrogression. The engineer who stresses the dangers that menace a rocket's crew, even though their ship has not yet left its launch pad, is not opposed to landing on the moon. But unless those dangers are recognized, the ultimate landing may not be worth the sacrifices endured during the journey.

The quest for meaningful improvements in the way we settle disputes can be an intellectually challenging and perhaps even fascinating adventure—and a priority of the first order—especially for those of us who are required by our calling to plunge ourselves daily into the minutiae of the law. Yet our goal cannot be merely a "reform" that seeks to ease the courts' caseloads. For what does it profit us if, in making things easier for ourselves, we make things more difficult for others? What does it profit us if, in shifting our burdens to other agencies and institutions, we make impossible the burdens on those who must

1943 the American Bar Association elected a Negro, Justice James S. Watson of New York, the first to be admitted since 1912 when three Negroes, who were not known to be Negroes, were accepted. The same year the Federal Bar Association of New York, New Jersey, and Connecticut opened its membership to Negro attorneys and condemned the 'undemocratic attitude and policy' of the American Bar Association for discriminating against Negro members. In the actual practice of law so great are the limitations in the South that the majority of Negro lawyers have settled in the North." M. Davie, NEGROES IN AMERICAN SOCIETY 118 (1949).

The late Judge Raymond Pace Alexander spoke in 1941 in behalf of the necessity of a black bar association—the National Bar Association—as follows:

> Just so long as we are compelled to recognize racial attitudes in America, and the positive refusal to admit the Negro lawyer to membership in the Bar Associations of the South or even to permit them to use the libraries, just so long as the Negro lawyer is restricted in his membership in local Bar Associations in the North, and particularly, so long as the American Bar Association for all practical purposes refuses to admit Negroes to membership, then so long must there be an organization such as the National Bar Association. Certainly all of us shall welcome the day when racial animosities and class lines shall be so obliterated that separate Bar Associations, other separate professional associations as well as separate schools will be anachronisms.

Alexander, "The National Bar Association—Its Aims and Purposes," 1 Nat'l B.J. 2 (1941). *See also* Reflections, 1 BALSA REPORTS 8 (1978) (reprint of excerpts from Judge Alexander's speech). *Cf.* J. Auerbach, Unequal Justice (1975).

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deal with those agencies and institutions? What does it profit us if, in putting our own judicial houses in order, we have no room in them for those who have relied and must continue to rely on the hospitality of the courts for the vindication of their rights? What does it profit us if, by wielding a judicial and administrative scalpel, we cut our workloads down to more manageable levels and leave the people without any forum where they can secure justice? I do not contend that this will happen. Certainly, it need not. But I do say that we must be aware of the temptation to proceed as though the judicial process involved only parties, not people. If judicial reform benefits only judges, then it isn't worth pursuing. If it holds out only progress for the legal profession, then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America. It is worth pursuing only if it helps to secure those constitutional and statutory rights which, because they should be enjoyed by all our citizens, have made our democracy, despite its faults and failures, a significant model for the world.

The reformers whose contributions we prize today—Pound and Storey, for example—set their attack on inefficient courts and legal institutions within a broader vision of the needs of an America recently traumatized by industrialization, by waves of helpless immigrants and by a pervasive hostility to the rights of large classes of citizens. They realized that courts had to be reformed and new institutions of dispute settlement created in order to remedy the injustices—great and small—that pervaded American society at the turn of the century.

Our starting points must be a review of the era of the early 1900's and a careful appraisal of the quality of justice *then* available to the mass of our citizens—particularly the black, the weak, the poor, the consumer, and the laborer—that configuration of persons which, in 1906, might have been termed "powerless." We have to make those assessments so that in our quest for reform we do not unwittingly turn the clock back to the diminution of rights which persisted then. We must never forget that in part the increased judicial workloads and more complex judicial problems of the last several decades have been often the unavoidable concomitants of a long-overdue expansion of many substantive rights.

Roscoe Pound spoke here just three years after the Wright Brothers had taken their maiden flight at Kitty Hawk; he spoke at a time when the population of the country was predominantly rural; he was describing a world which knew neither the atomic bomb nor the benefits of harnessing nuclear energy. Sulfa drugs, penicillin, and antibiotics were undreamt of marvels. In reality, he spoke to a nation where the rights of the powerless were not the predominant concerns of either the legal

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process or the legal profession. There were no major governmental agencies to protect the consumer,[7] the aged, the pensioner, the investor, or the workingman.

In 1900, all expenditures of the federal government amounted to less than half a billion dollars. The Department of Justice spent 1.3 percent of that sum, less than seven million dollars. By 1975, total federal expenditures had increased seven-hundredfold, to approximately 325 billion dollars. In 1975, the Justice Department's expenditures alone exceeded two billion dollars, four times the total sum expended by every branch of the federal government in 1900. In the light of this massive expansion of government and its functions,[8] we should not be surprised that the business of the courts has increased, for they are called on to monitor the pervasive relationships between government and citizens that this expansion has created.

II

If we are to place the era of which Pound spoke in proper perspective, if we are to see its true relationship to the challenges we face today, we must analyze how the courts, and sometimes society at large, dealt with fundamental issues of human rights. As we look back to 70 years ago, and compare that time with our own, George Santayana's celebrated comment on the uses of history becomes particularly relevant: "Those who cannot remember the past are condemned to repeat it."[9] A focus on six groups of individuals will shed some light on our inquiry:

> racial minorities, women, the voter, working people, the victims of crime, and victims of court insensitivity.

I submit that over the past 70 years, the greatest legacy of our legal and judicial institutions has been their role in helping to secure the rights of these people, to see to it that they received the justice that is the due of every person in this country. I submit moreover that our greatest obligation in preparing for the next 70 years and beyond is to protect that legacy and to make its principles the basis on which we fashion new methods of dispute settlement and develop new procedures within the courts.

[7] The Interstate Commerce Commission was already functioning, of course, but its primary task seems to have been the regulation of railroad rates. The principal consumer-oriented federal agencies—the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Drug Administration come immediately to mind—did not yet exist.

[8] It should be noted that funding for the federal courts has not kept pace with the increase in expenditures for the rest of the federal government. In 1900, the cost of the courts was one-half of one percent of the over-all federal budget. In 1975, total expenditures for the federal judiciary had declined to about one-thirteenth of one percent of the entire federal budget.

[9] G. Santayana, The Life of Reason (1905) at 284.

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Race and the Legal Process

While I recognize that extraordinary progress has been made since Pound spoke, and without intending to offend anyone, it is appropriate that we focus on race relations as they existed in 1906—a time when blacks had been residents in this country for almost three centuries, though mostly as slaves.[10] Every presidential commission [11] and almost every Supreme Court opin-

[10] I have written in greater detail on the early practices in Higginbotham, "Racism and the Early American Legal Process, 1619–1896," 407 ANNALS 1 (1973); "Race, Racism and American Law," 122 *University of Pennsylvania Law Review*, 1044 (1974); "To the Scale and Standing of Men," *Journal of Negro History*, Vol. LX, No. 3. July, 1975; "The Impact of the Declaration of Independence," *The Crisis*, November, 1975. For general background *see* R. Bardolph, *The Civil Rights Record* (1970); D. A. Bell, *Race, Racism and American Law* (1973) 1975 Supp.; M. F. Berry, *Black Resistance/White Law* (1971); J. Blassingame, *Black New Orleans* (1973); J. Blassingame, *The Slave Community* (1972); S. Elkins, *Slavery* (1959); P. S. Foner, *The Voice of Black America*, Vol. I and II (1975); J. H. Franklin, *From Slavery to Freedom* (4th Ed. 1974); G. Fredrickson, *The Black Image in the White Mind* (1971); L. Green, *The Negro in Colonial New England* (1942); W. Jordan, *White Over Black* (1968); G. Myrdal, *An American Dilemma* (1944); B. Quarles, *The Negro in the Making of America* (rev.ed.1969); K. Stampp, *The Peculiar Institution* (1956); C. Woodson & C. Wesley, *The Negro in Our History* (11th ed. 1966); C. V. Woodward, *Origins of the New South* (1951); C. V. Woodward, *The Strange Career of Jim Crow* (3rd ed. 1974). For the best bibliography, *see* A. Hornsby, *The Black Almanac* 169 (1972). For an anthology, *see Civil Rights and the American Negro* (A. Blaustein & R. Zangrando eds. 1968). The United States Commission on Civil Rights in 1961 filed a series of key documents, Vols. 1 through 5, on voting, education, employment, housing, justice. A classic report which should be particularly pertinent to lawyers is the United States Commission on Civil Rights, 1965, *A Report on Equal Protection in the South*. *See particularly* pages 182–188, the separate statement of Commissioner Erwin N. Griswold. A superb analysis can be found in the ANNALS, *Blacks and the Law*, May, 1973; note particularly the article of Judge William H. Hastie, "Toward an Equalitarian Legal Order, 1930–1950," at 18.

[11] The first commission on civil rights appointed by any president was established by Harry Truman, pursuant to Executive Order 9808. In 1947, the President's Committee on Civil Rights filed a report, "To Secure These Rights," which stated:

"Our American heritage of freedom and equality has given us prestige among the nations of the world and a strong feeling of national pride at home. There is much reason for that pride. But pride is no substitute for steady and honest performance, and the record shows that at varying times in American history the gulf between ideals and practice has been wide. We have had human slavery. We have had religious persecution. We have had mob rule. We still have their ideological remnants in the unwarrantable 'pride and prejudice' of some of our people and practices. From our work as a Committee, we have learned much that has shocked us, and much that has made us feel ashamed. But we have seen nothing to shake our conviction that the civil rights of the American people—all of them—can be strengthened quickly and effectively by the normal processes of democratic, constitutional government. That strengthening, we believe, will make our daily life more and more consonant with the spirit of the American heritage of freedom. But it will require as much courage, as much imagination, as much perseverance as anything which we have ever done together. The members of this Committee reaffirm their faith in the American heritage and in its promise." *Id.* at 9–10. *See also* Report of the National Advisory Commission on Civil Disorders (Washington, D. C., U. S. Government Printing Office, 1968); National Commission on the Causes and Prevention of Violence, Final Report, "To

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ion[12] dealing with racial matters have noted the fact that in this country there has often been racial injustice for blacks.

Establish Justice, To Ensure Domestic Tranquility," xxi, 8, 10, 13-15 (1969); 1 National Commission on the Causes and Prevention of Violence, Staff Report, "Violence in America: Historical and Comparative Perspectives," 38-41 (1968). *Cf.* Milton S. Eisenhower, The President is Calling 2-4 and Ch. 23 (1974).

[12] *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 10 L.Ed. 1060 (1842); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857); *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Berea College v. Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); *Hodges v. United States*, 203 U.S. 1, 27 S.Ct. 6, 51 L.Ed. 65 (1906); *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903); *Baldwin v. Franks*, 120 U.S. 678, 7 S.Ct. 656, 32 L.Ed. 766 (1887); *United States v. Harris*, 106 U.S. 629, 1 S.Ct. 601, 27 L.Ed. 290 (1883); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876); *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563 (1876); *United States v. Powell*, 151 F. 648 (C.C.N.D. Ala.1907), *aff'd* per curiam, 212 U.S. 564, 29 S.Ct. 690, 53 L.Ed. 653 (1909). The following cases indicate the past problem of racial injustice and efforts to eliminate it:

(1) *Voting. South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (implementation of 1965 voting rights act); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935); *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Anderson v. Martin*, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1964); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *cf. Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Gray v. Sanders*, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (one man-one vote); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). *See also* Burke Marshall, Federalism and Civil Rights (1964).

(2) *Education. Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149 (1950); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950); *Cooper v. Aaron*, 358 U.S. 1, 20, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Gong Lum v. Rice*, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938); *Cumming v. County Board of Education*, 175 U.S. 528, 20 S.Ct. 197, 44 L.Ed. 262 (1899).

(3) *Housing. Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 93 S.Ct. 1090, 35 L.Ed.2d 403 (1973); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Corrigan v. Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926); *Richmond v. Deans*, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128 (1930); *Harmon v. Tyler*, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831 (1927); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

(4) *Employment. Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Steele v. Louisville & N. R. R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944).

(5) *Public Accommodations. Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

(6) *Prohibition of racial violence. Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *United States v. Johnson*, 390 U.S. 563, 88 S.Ct. 1231, 20 L.Ed.2d 132 (1968); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

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Three incidents are sufficient to highlight that human rights issue. They explain why, when the pendulum of recognition of the aspirations of black Americans began to swing in the 1950's, it had to swing as far as it did.

When in 1896 in *Plessy v. Ferguson*[13] the United States Supreme Court sanctioned a strange doctrine[14] that, among the multitude of peoples, ethnicities and groups in this country, blacks (and basically only blacks) could be isolated by the state in human affairs, Justice John Harlan dissented eloquently on the grounds that "the common government of all [should] not permit the seeds of race hate to be planted under the sanction of law."[15] But soon after that sanctioning of racist law one state was spending ten times as much for the education of each white child as it was for the education of each black child, and many were spending twice to three times as much for the education of each white child.[16]

The racial disparity and discrimination that existed in education was sanctioned by the legal process in almost every other area that today would be categorized as a human right—in housing, employment, voting, and personal relations.

The ultimate irony of the decade in which Pound spoke is perhaps best exemplified by *Berea College v. Kentucky*,[17] when the Supreme Court in 1908 upheld the validity of a 1904 Kentucky statute which prohibited a private college from teaching white and Negro pupils in the same institution. Berea College was established in the Kentucky mountains in 1854 by a small band of Christians who began their charter with the words, "God hath made of one blood all nations that dwell upon the face of the earth." After the Civil War it admitted students without racial discrimination, and by 1904 it had 174 Negro and 753 white students. It was a private institution supported by those who subscribed to its religious tenets, and it neither sought nor received any state aid or assistance. Yet the Supreme Court held that a state could prohibit any *private* institution from promoting the cause of Christ through integrated education. What a tragic ruling! A nation loudly pronounces its faith in freedom of religion, yet sanctions a state's denial of the day to day application of religious concepts if practiced in an integrated re-

[13] 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

[14] The Justices of the Supreme Court were not alone in their blindness to the realities of racism. Charles Warren's authoritative *The Supreme Court in United States History*, published in 1922, does not even mention *Plessy v. Ferguson*.

[15] 163 U.S. at 560, 16 S.Ct. 1138, 41 L.Ed. 256.

[16] D. A. Bell, *supra* at 452; Higginbotham, 122 U. of Pa.L.Rev. at 1060–61.

[17] 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908).

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ligious setting. Justice Harlan wrote another eloquent dissent in *Berea College;* tragically, Justice Holmes, for all his prescience and ability, concurred in the majority's repressive opinion.

The human rights level of this country in that decade was strikingly illustrated when a most moderate colored leader, Booker T. Washington, had an informal lunch with President Theodore Roosevelt.[18]

The Memphis Scimitar said,

> "The most damnable outrage which has ever been perpetrated by any citizen of the United States was committed yesterday by the President, when he invited a nigger to dine with him at the White House." [19]

Senator Benjamin Tillman of South Carolina said:

> "Now that Roosevelt has eaten with that nigger Washington, we shall have to kill a thousand niggers to get them back to their places." [20]

Georgia's governor was sure that "no Southerner can respect any white man who would eat with a Negro." [21]

The sequellae of judicial obliviousness and legal antagonism to the human rights of blacks is perhaps most dramatically exemplified by the response which a United States Senator, who was also a lawyer, gave to the 1944 suggestion of Dr. Studebaker, of the U. S. Office of Education, that the colleges and universities of the South should open their doors for the matriculation of Negro students. Senator Theodore Bilbo gave his "full and complete endorsement" to the Jackson (Mississippi) Daily News' editorial comment that the Washington officials should "go straight to hell." He emphasized that:

> [The editor] is right when he says that the South won't do it and that not in this generation and never in the future while Anglo-Saxon blood flows in our veins will the people of the South open the doors of their colleges and universities for Negro students. I repeat that [the editor] is right. We

[18] *See generally* G. SINKLER, THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT (1972). Even the false rumor that a black had been present at an official White House function was sufficient to drive President Cleveland to frenzy, and thus he responded: "It so happens that I have never in my official position, either when sleeping, waking, alive or dead, on my head or my heels, dined, lunched, supped, or invited to a wedding reception, any colored man, woman, or child." G. Sinkler, *supra* at 270.

[19] L. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (Meridian ed. 1967) at 206–07.

[20] *Id.* at 207.

[21] *Id.*

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> will tell our Negro-loving Yankee friends to go straight to hell.[22]

He concluded by stressing that:

> History clearly shows that the white race is the custodian of the gospel of Jesus Christ and that the white man is entrusted with the spreading of that gospel.
>
> • • • • • • • • •
>
> We people of the South must draw the color line tighter and tighter, and any white man or woman who dares to cross that color line should be promptly and forever ostracized. No compromise on this great question should be tolerated, no matter who the guilty parties are, whether in the church, in public office, or in the private walks of life. Ostracize them if they cross the color line and treat them as a Negro or as his equal should be treated. • • •
>
> • • • • • • • • •
>
> [I]t is imperative that we face squarely and frankly the conditions which confront us. We must not sit idly by, but we must ever be on guard to protect the southern ideals, customs, and traditions that we love and believe in so firmly and completely. There are some issues that we may differ upon, but on racial integrity, white supremacy, and love for the Southland we will stand together until we pass on to another world.[23]

Thus, during World War II, almost 50 years after *Plessy* and almost 40 years after Pound's address, while thousands of black soldiers were dying on battlefields throughout the world to seek victory for democracy against Hitler's Aryanism, the mold of racism was still firm at home, to such an extent that neither civil rights legislation nor anti-lynching laws could be enacted.

Other defenders of Jim Crow[24] spoke in voices less shrill than Bilbo's, but their hatred and their racism were just as intense. Instead of linking, as Bilbo did, the gospel of Jesus Christ with white supremacy, his successors used more sophisticated terms

[22] The Development of Segregationist Thought 139 (I. Newby ed. 1968) (quoting 90 Cong.Rec. A1799 (1944)).

[23] *Id.* 143–145 (quoting 90 Cong.Rec. A1801 (1944)).

[24] *See* C. V. Woodward, The Strange Career of Jim Crow (3rd rev.ed.1974) at 7:
"The origin of the term 'Jim Crow' applied to Negroes is lost in obscurity. Thomas D. Rice wrote a song and dance called 'Jim Crow' in 1832, and the term had become an adjective by 1838. The first example of 'Jim Crow Law' listed by the *Dictionary of American English* is dated 1904." Jim Crow laws sanctioned "a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons and asylums, and ultimately to funeral homes, morgues, and cemeteries." *Id.*

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like "interposition" and "nullification" and demonstrated a willingness to sit in school house doors forever to assure segregation forever.

I have cited these instances because they are a part of America's history. I recognize that some former proponents of segregation are now semi-devotees of civil rights for all. Much progress has been made, and today's challenges span all regions and sectors of our country. I do not mention this earlier era to antagonize, but rather to reemphasize that today's complexities owe their existence in significant part to the legal process of yesterday, which was often inadequate and uncommitted to assuring equal justice for all.

What I have said about blacks as an example applies with much the same force to other segments of the population which seven decades ago were powerless.

The Status of Women

Some persons question the appropriateness of courts adjudicating whether girls can play Little League baseball or whether women should be assigned police patrol work or whether females should be admitted to all-male educational institutions. They urge that these troublesome disputes be kept out of court, for "after all, men are men and women are women. God made them that way. Why should the courts get involved?" More often than not, such short-sighted concerns for judicial tranquillity and uncluttered courts fail to recognize the dehumanization which the bench, the professional bar associations, the law schools and even the legal profession as a whole sanctioned or tolerated for so long. They fail to recognize as well that while there is an essential place for non-judicial forums in resolving disputes, the cutting edge of the move to remedy the results of this dehumanization must have a sharp judicial component.

Is it without significance that when Roscoe Pound spoke, women could not be admitted to the esteemed law school whose dean he later became, and that it took almost a half century after Pound's 1906 speech for Harvard Law School to reach that stage of enlightenment where it deemed women worthy to enter the portals of the law school which produced Justices Story, Holmes, Brandeis, Frankfurter, Brennan and Blackmun? [25]

The sad fact is that in 1906 the appearance of women attorneys in the courts was almost as rare as astronauts landing on the moon. Their second-class status even in our profession was sanctioned by the courts and the entire legal process. The United

[25] Of course, law schools such as Yale, Michigan, and the University of Pennsylvania admitted women as law students decades earlier, and their alumnae have made many profound contributions to improving the legal process.

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States Supreme Court in decades past has sanctioned patent deprivations of opportunity for women. Thus Myra Bradwell was denied admission to the bar of the State of Illinois in 1872 solely because she was a woman. Except for Chief Justice Chase, all of the Justices felt that the denial of her admission to the bar did not violate her federal constitutional rights. Justice Bradley felt compelled to add a concurring opinion:

> On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most states. * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. State of Illinois, 16 Wall. 130, 83 U.S. 442, 446, 21 L. Ed. 442 (1873).

In 1906 women did not have a federal constitutional right to vote, and many were precluded even from serving on juries.

There has been progress. In 1872, the Justices of the Supreme Court considered women "naturally timid," "delicate," and "evidently unfit" for many of the occupations of civil life. In 1974, the Court categorized past deprivations of women as either "overt discrimination" or "the socialization process of a male-dominated culture." [26] If we are serious about lowering the barriers which previously confronted women, necessarily the courts' backlogs

[26] *Kahn v. Shevin*, 416 U.S. 351, 353, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

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and burdens will be steadily increased and court reform must be cognizant of this fact.

Voting: A Fundamental Right

As I have said, when Roscoe Pound spoke, women did not enjoy a federal constitutional right to vote. Not until 1920 did the Nineteenth Amendment remove that particular badge of inferiority from approximately one-half the nation's adult population.

The franchise was restricted in other ways, too. I have already discussed some of the grievances of black Americans in the early decades of this century. The deprivation of voting rights was often another. Theoretically, the Fifteenth Amendment had secured the right of suffrage to black Americans. In many parts of the country, however, they were practically disenfranchised—through literacy tests, poll taxes, grandfather clauses[27] and the like. Though there was some erosion of the obstacles to the exercise by blacks of their Fifteenth Amendment rights,[28] those obstacles remained substantially intact in many areas until the passage and enforcement of the Voting Rights Act of 1965[29] at last allowed black victims of voting discrimination some voice in the determination of their own political destiny.

Moreover, in 1906, the apportionment of several state legislatures had already taken the form that would endure, with steadily increasing imbalances in voting power, until the "one-person, one-vote" decisions of the 1960's.[30] These latter decisions, as we all know, transformed the political face of the nation,[31] but not without severe criticism by some who thought

[27] The grandfather clauses, at least, were struck down by the Supreme Court within a decade of Pound's address. *Guinn v. United States*, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915).

[28] *See, e. g., Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); and *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1924).

[29] 42 U.S.C. §§ 1973 et seq.

[30] *See, e. g., Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (Alabama); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (Tennessee).

[31] For example, the combined impact of the reapportionment decisions and the Voting Rights Act of 1965 significantly increased the number of black elected officials in seven southern states. *See* U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After (Jan. 1975), reproduced in D. Bell, *supra* (1975 Supp.) at 2:

"There is no available estimate of the number of black elected officials in the seven States before passage of the Voting Rights Act. Certainly it was a small number, well under 100 black officials. By February 1968, 156 blacks had been elected to various offices in the seven States. This total included 14 State legislators, 81 county officials, and 61 municipal officials. * * *

"More recent statistics show greater progress in electing black officials. By April 1974, the total number of black elected officials in the seven States had

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the judiciary was intervening in an area beyond its competence. Justice Frankfurter, dissenting in *Baker v. Carr, supra*, said the case was "unfit for federal judicial action," and termed the decision itself "a massive repudiation of the experience of our whole past." [32] The second Justice Harlan, dissenting in *Reynolds v. Sims, supra,* argued that it and other reapportionment decisions "give support to a current mistaken view * * * that every major social ill in this country can find its cure in some constitutional 'principle,' and that this court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements." [33] I agree with the suggestion that the Constitution is not a panacea for every social ill. The dissenters were certainly right when they warned that judicial review of state reapportionment plans would be fraught with difficulty. Nevertheless, I cannot accept their conclusion, for it leads to judicial paralysis in matters involving critical rights. Chief Justice Warren's majority opinion in *Reynolds* announced a principle that no conference on judicial reform can afford to ignore: "a denial of constitutionally protected rights demands judicial protection." [34] In spite of the problems inherent in complying with the mandate of the reapportionment decisions, it is incontestable that these decisions were responsible for a fundamentally more equitable redistribution of political power in our country, one that was long overdue. Our democracy and our people are the beneficiaries.

The Situation of Working People

Sixty years ago, Roscoe Pound was witnessing the breakdown of the common law system, a system which for its efficient functioning relied primarily on the initiative of individuals, who

increased to 903. This total included 1 Member of the United States Congress, 36 State legislators, 429 county officials, and 497 municipal officials. * * *

"In all of the covered Southern States there are now some blacks in the State legislature and in at least some counties of each State there are blacks on county governing bourds. Although the number of offices held by blacks is rather small in comparison to the total number of offices in these States, the rapid increase in the number of black elected officials is one of the most significant changes in political life in the seven States since passage of the Voting Rights Act."

[32] 369 U.S. at 266, 330, 82 S.Ct. 691, 7 L.Ed.2d 663.

[33] 377 U.S. at 624-25, 84 S.Ct. 1362, 12 L.Ed.2d 506.

[34] 377 U.S. at 566, 84 S.Ct. 1362, 12 L.Ed.2d 506.

were expected to look out for themselves and to vindicate their own rights. As Pound put it in his 1906 address:

> In our modern industrial society, this whole scheme of individual initiative is breaking down. Private prosecution has become obsolete. Mandamus and injunction have failed to prevent rings and bosses from plundering public funds. Public suits against carriers for damages have proved no preventive of discrimination and extortionate rates. The doctrine of assumption of risk becomes brutal under modern conditions of employment. An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods. At all these points, and they are points of every-day contact with the most vital public interest, common-law methods of relief have failed." [35]

The courts of that time, however, were still trying to apply common-law concepts to the social and economic problems of the "modern industrial society" that Pound saw emerging. The effort was not universally acclaimed, leading Pound to say that "[a]t the very time the courts have appeared powerless themselves to give relief, they have seemed to obstruct public efforts to get relief by legislation." In fact, he concluded, "the courts have been put in a false position of doing nothing and obstructing everything." [36]

A few familiar examples will illustrate the obstructionism that, in Pound's view, courts were compelled to indulge in because of their fidelity to obsolete common-law concepts. In *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), the Supreme Court invalidated a New York maximum hours law because it interfered with the freedom of bakers to enter into contracts with their employers. In *Adair v. United States,* 208 U.S. 161, 28 S.Ct. 277, 52 L.Ed. 436 (1908), the court held that Congress could not prohibit employers from discriminating against their workers for the union organizing activities of the latter. And in *Coppage v. Kansas,* 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), the Court ruled, again on hallowed "freedom of contract" grounds, that a state could not outlaw "yellow dog" labor contracts. To the Court's credit, it did not strike down *every* social welfare measure presented to it. In *Muller v. Oregon,*[37] it upheld a maximum hours law for women, though on grounds that some women might find offensive today.

[35] Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 40 Am.L.Rev. 729, 737, 85 F.R.D. 278, 280 (hereinafter "Address"). [*Also infra* at 837, 843. *Eds.*]

[36] Address at 737–38, 85 F.R.D. 280, 281. [*Also infra* at 837, 843–44. *Eds.*]

[37] 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).

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Lochner, Adair, and *Coppage* were not the end of the story, of course. Eventually, all were expressly overruled as the Supreme Court itself adjusted to emerging social and economic realities.[38]

I am well aware that some believe that the impotence the workingman experienced in the early decades of this century has been replaced by the omnipotence of organized labor today.

I will not join that debate; rather, I wish to emphasize that many of the gains and successes of workingmen and/or organized labor today are directly attributable to rights which have been recognized or expanded by the courts of previous generations. Thus, are we to now say that the system which has made the courts accessible to and supportive of the workingman should not now be involved in striking a balance for other groups which have not had full entry into the system?

Victims of Crime

In his 1906 address, Pound did not identify or discuss as a major problem any dissatisfaction with the criminal justice system. He apparently felt no need to focus on that system for that specific audience.[39] This conference, of course, has such a focus, a much needed one, and we will, I am sure, hear a good deal about it tomorrow, from some of the remaining speakers. But I submit that it is too narrow a focus unless it embraces the *victim* of crime as well as the person whom the system calls the perpetrator. Of course, we should be concerned about the Fourth, Fifth and Sixth Amendment rights of the criminal defendant, but we should also be concerned about the fundamental civil right of the ordinary citizen to be secure in his or her person and property. Of course, we ought to be concerned about the humaneness of our prison systems, but we ought also to be concerned about the humaneness of our urban environments and the safety of our streets. When the streets are not safe, when every citizen carries an extra burden of fear, his environment is not humane. Of course, a criminal defendant has a right to bail, but we should not allow unlimited delays in trial which prolong bail indefinitely. Of course, a defendant has a right to the effective assistance of counsel, but that should not mean

[38] *See Bunting v. Oregon*, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917), *overruling Lochner; Phelps Dodge Corp. v. N. L. R. B.*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), *overruling Adair;* and *Lincoln Fed. Labor Union v. Northwestern Iron & Met. Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949), *overruling Coppage.*

[39] Even the most casual perusal of Pound's other writings reveals his own continuing advocacy of reform of the criminal justice system as well. *See, e. g.*, Pound, "Do We Need a Philosophy of Law?," 5 Colum.L.Rev. 339, 347 (1905); R. Pound and F. Frankfurter eds., Criminal Justice in Cleveland (1922); and R. Pound, Criminal Justice in America (1930).

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that he may postpone trial indefinitely while waiting for a specific counsel of his choice. Please do not mistake my meaning. I am not suggesting that the guarantees of the Bill of Rights be suspended. But I do submit that while criminal defendants have a constitutional right to a speedy trial, society at large also has a vital stake in the prompt disposition of criminal charges against a defendant. Securing the prompt disposition of such charges must be a top priority in any reform of the judicial process. While progress is being made under statutes designed to assure defendants a "speedy and fair trial," much remains to be done. There will be problems in the transition. It will not be easy. Courts may have to assume more burdens, but it is difficult, if not impossible, to justify why individuals should be out on bail on serious crimes for months and sometimes years before final trial disposition.

In the context of this conference, the courts bear a heavy responsibility to organize themselves for the fair but expeditious processing of criminal cases. To a major extent the disposition of serious crimes is not a function which can be delegated to agencies other than the courts. Thus, in terms of our concern for human rights, we must work simultaneously on improving the processes of the criminal justice system for both the victims and the defendants and on preserving the court's capacity to deal with other fundamental human rights as well.

Victims of Court Insensitivity

There is another point which deserves to be stressed in any discussion about reform of the criminal and civil justice systems. We have to be concerned about innocent victims of the justice system itself, about those who are not part of the courthouse bureaucracy. Go into the courts in most urban communities and you will often observe either outrageous insensitivity to, or woeful systems planning for, witnesses who respond to subpoenas. It is not unheard of for a witness to appear eleven or twelve times as a case is continued again and again, either because the court cannot reach it or because some counsel is not available. In civil cases, parties sometimes wait five years for an adjudication of their rights. Court personnel sometimes treat citizens with a curtness that some of the less enlightened prison wardens would not display to the convicted felons in their custody. In this context of insensitivity to, and of non-support for, the participants in the litigation process, we have to ask whether some of the sacred rights we espouse are really designed for justice and the benefit of the parties and the public, or do these processes exist more for the basic convenience of judges and lawyers. It is not clear to me whether some of the many continuances that are granted by the courts are caused by a desire to let every per-

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son have his own counsel, or, instead, are these delays unintentional placations of the Bar which permit some lawyers, who have more clients and cases than they can now adequately handle, to increase their backlog so that the date of ultimate trial is indefinitely postponed. It is not at all clear to me whether an oligopoly is now developing within the Bar whereby the entire judicial system is designed, or at least has been modified, to accommodate the schedules of the busiest and most successful lawyers rather than to function within reasonable time frames for the prompt and fair disposition of their clients' cases.

Permit me to mention just one well-documented instance that reveals how the judicial system, and even judges, can be insensitive to the dignity of the citizens who are caught up in the legal process. A black woman was testifying in her own behalf in a habeas corpus proceeding. "The state solicitor persisted in addressing all Negro witnesses by their first names" [40] and when he addressed the petitioner as Mary, she refused to answer, insisting that the prosecutor address her as "Miss Hamilton." The trial judge directed her to answer, but again she refused. The trial judge then cited her for contempt. On appeal, the highest court in the state affirmed, because the record showed that the witness's name was "Mary Hamilton," not "Miss Mary Hamilton." Happily, the Supreme Court of the United States granted certiorari and summarily reversed the judgment of contempt. *Hamilton v. Alabama,* 376 U.S. 650, 84 S.Ct. 982, 11 L. Ed.2d 979 (1964), *rev'g* 275 Ala. 574, 156 So.2d 926 (1963). Some might say that this case exemplifies an unjustifiable waste of legal talent and judicial effort in order to determine whether the appellation "Miss" should be used in cross-examination. I disagree. At the core of this case was a person begging that a system which is supposed to dispense justice treat her with dignity and the kind of sensitivity that courts automatically accord to persons of power and prestige.[41]

III

In View of Our History, Are Courts Functioning Beyond Their Competence in the Human Rights Area, and What Are the Alternatives?

While I have stressed that we should be particularly cautious about any reforms which may cause a diminution of basic and

[40] Petitioner's Brief for Certiorari at 4, *Hamilton v. Alabama*, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964).

[41] It should be noted that significant changes have been made in the Alabama court system under the leadership of Chief Justice Howell Heflin. A recurrence of the *Hamilton* case is unlikely. *See* Peirce, "Alabama's State Courts: A Model for the Nation," *Washington Post*, May 12, 1975, at A25.

fundamental human rights, I am no opponent of good order. I have supported every judicial reform measure that promised to contribute to the orderly functioning of our courts without sacrificing the rights of our citizens. I submit, however, that order is not an absolute. It cannot be, for human affairs, and especially the affairs that come before us in the judicial process, are often inherently disorderly. In some cases, passions not only run deep, they erupt into violence.

I have in mind not just the felony dockets of local criminal courts, but also landmark human rights decisions where the Supreme Court of the United States rejected arguments that such cases were, for a variety of technical reasons, not the proper business of the federal courts.

In *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), for example, a black man who had been charged with the theft of a tire was beaten to death by the sheriff of Baker County, Georgia, and two other law enforcement officers. In *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), police officers of a Northern city had broken into the petitioners' home, routed them from bed, and forced them to stand naked in the living room while they ransacked every room in the house. In the background of *United States v. Price,* 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), was the murder of three civil rights workers, Michael Schwerner, James Chaney and Andrew Goodman. *Griffin v. Breckenridge,* 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971), involved a group of black citizens who, while driving along a highway in Mississippi, were mistaken by whites for civil rights workers. They were forced to stop, ordered out of their vehicle, and beaten with iron clubs.

Should these matters have been in the federal courts? I think so, for if the Supreme Court had not been willing to expand an overly narrow construction of the federal civil rights acts, where would these particular victims, and others like them, have gotten justice?

A basic reason for the necessity of having the courts available to vindicate the rights of our citizens is that other institutions in our society, institutions designed to either vindicate or protect those rights, have either failed to do so or have broken down completely. We should never be complacent about the accomplishments of the judicial system. I certainly am not, and I believe that one of the profound contributions this conference can make to the nation is to shatter any illusions we might entertain about living in the best of all possible judicial worlds. Nevertheless, I am convinced that the courts, when their achievements and their efficiency are compared with those of other institutions in our society, have not been abysmal failures. The

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short and simple reason for the assumption by the courts of tasks that are allegedly "beyond their competence" is the failure of supposedly competent institutions to perform those tasks effectively or with adequate protection of the rights of the clients of those institutions. I agree that in the best of all possible judicial worlds, judges should not be asked to run railroads or to function as school superintendents or to serve as chief executive officers of state prison systems. But if supposedly competent businessmen so manage a railroad that it collapses into bankruptcy, or if supposedly professional educators countenance or are powerless to deal with *de jure* segregation in the school systems they are charged to administer, or supposedly competent corrections personnel preside over a prison system that is riddled with constitutional violations, then judges have no choice but to intervene. The courts, I submit, are not reaching out for these responsibilities; they come to the courts by default. And so long as other institutions in society default on *their* responsibilities, the court will have what I consider an absolutely necessary role to play in the vindication of individual and collective rights.

It was Alexis de Tocqueville who first said that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." [42] In his 1906 address Dean Pound said much the same thing: "the subjects which our constitutional polity commits to the courts are largely matters of economics, politics, and sociology, upon which a democracy is peculiarly sensitive. Not only are these matters made into legal questions, but they are tried as incidents of private litigation." [43] We may not agree with Roscoe Pound that great matters of economics, politics, and sociology are always "tried as incidents of private litigation," but they are surely "made into legal questions." The fate of the New Deal, largely a matter of economics, remained uncertain until the decision of the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). The people's right of access, through a grand jury, to information in the control of the executive branch of government, a political issue of the utmost seriousness, was a matter of speculation until the Supreme Court enforced a subpoena on the President in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The destiny of black people in America, a matter of sociology as well as of justice, was unclear until the Supreme Court found segregated schooling inherently unequal in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and its progeny. There is, of course, no guarantee that even a definite pronounce-

[42] A. de Tocqueville, I Democracy in America (P. Bradley ed. 1945) at 290.
[43] Address at 740. [*Also infra* at 345.]

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ment by the courts will put to rest all dispute over an issue of public policy. Witness the continuing controversy over abortion.

Nevertheless, I still submit that our constitutional polity could barely function at all if the courts were not available to vindicate the rights of our citizens and thus define the limits of public and private action within that polity.

We are all familiar with the famed Footnote Four of Chief Justice Stone's opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Even though it deals with the standard to be employed in reviewing legislative enactments and even though it suggests more than it proclaims, that footnote has rightly been read as a manifesto of judicial sensitivity to the rights of those who are powerless to vindicate their rights. Since the *Carolene Products* decision, the courts have done much to redeem the promise of Footnote Four, and I suggest that we can fruitfully apply its teaching in this conference as well. We will be dealing, of course, with proposals for reform of dispute resolution and for the reform of judicial administration, not legislative enactments. Some have suggested that a "judicial impact" statement be prepared before statutes creating new legal rights are enacted, so judicial resources can be provided to protect them. I suggest, by the same token, that we prepare, at least mentally, another kind of impact statement, one that weighs the effect of the reforms that might be proposed to us on what Footnote Four termed "discrete and insular minorities," and subject those reforms that might work to the disadvantage of the poor, the weak, and the powerless to what Chief Justice Stone would call "a more searching judicial inquiry."

You may have noticed that I have not defined what I mean by the term "human rights." The omission is deliberate. I doubt that, even if I tried, I could formulate a definition of "human rights" that would adequately differentiate my perception of fundamental "human rights" from the multitude of varied interests that, at one time or another, have been called "human rights."[44] I do think we ought to be concerned about what has

[44] *See* McDougal, Lasswell and Chen, "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," 22 Am.U.L.Rev. 919 (1975). *See also* McDougal, Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies, 14 Va.J.Int'l L. 387 (1974); McDougal, Lasswell & Chen, Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry, 63 Am.J. Int'l L. 237, 264–69 (1969); Universal Declaration of Human Rights, adopted Dec. 10, 1948, G. A. Res. 217, U. N. Doc. A/810 at 71 (1948). A collection of the more important global human rights prescriptions is conveniently offered in United Nations, Human Rights: A Compilation of International Instruments of the United Nations, U. N. Doc. ST/HR/1 (1978). Other useful collections

been rightly termed a trivialization of the Constitution. For instance, some would argue, though I would not, that a high school football player has an absolute "human right" to wear long hair, regardless of his team's regulations or his coach's notion of discipline. Others would argue, though I would not, that prisoners have an absolute "human right" to snacks between meals. Cases involving these issues, I submit, seek the vindication of rights that are merely asserted, not real. Such cases, I am afraid, misuse a noble instrument, designed for a noble purpose, the protection of fundamental rights.

I should also point out that I do not include in the concept of "fundamental" human rights the interests that are at stake in automobile negligence cases, or longshoremen's suits, or medical malpractice actions. I am confident that we can develop means by which justice could be assured in these areas of tort law without the courts playing a central role and without destroying the fabric of our society. In all candor, I often wonder whether the loudest protests against no-fault auto insurance and against the removal of negligence cases from the courts stem from concern about the plight of accident victims or whether they originate in a concern about possible diminution of what are sometimes phenomenal windfalls in the form of counsel fees.

I believe that the victims of defective products, medical malpractice and automobile negligence can often receive greater protection in alternate systems of dispute resolution than they can in the courts. During my twelve years' experience on the bench, I have seen far many more specious claims and frivolous defenses in personal injury cases than I have in civil rights cases. If we are going to apply a scalpel to our dockets, let us begin with these cases, which could be handled with fairness and greater efficiency in other forums.

I believe, however, that in the universe of human rights, the constellation of rights that I have discussed today are grouped at or near the center. I refer, of course, to the right to be free from racial or sexual discrimination, the right to vote, the right to basic protection from overpowering forces of the industrial age, the right to be secure in one's person and property, and the right to be treated with courtesy and consideration by a system that purports to be one of justice, not merely of law. If my references to astronomy lead some of you to think that I am too far out, let me also say that I believe that there is a hierarchy of human rights, and that the rights I have discussed cluster at or near the top of that hierarchy. Finally, I believe

include: Basic Documents on Human Rights (I. Brownlie ed. 1971); Basic Documents on International Protection of Human Rights (L. Sohn & T. Buergenthal eds. 1973).

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that all of us can agree that the rights I have discussed are indeed fundamental "human rights."

Conclusion

As I close, I hope that I have not gone too far. I know that I have resurrected some grievances that are 70 years old, and whose roots lie even further back in American history. I know that I have spoken stridently about them, and stridency is always susceptible of misunderstanding. I did not come here intending to offend anyone, but perhaps I have. Perhaps I have spoken too stridently for 1976, perhaps too stridently in light of the genuine progress this nation has made in the past 70 years, perhaps too stridently in the overall perspective of this country's history. But the grievances that I have mentioned were, and continue to be, harsh and discordant experiences in the lives of the victims, and their harshness has been caused in part by an insensitive legal and judicial process.

As I said at the outset, I wish this conference well. I hope it is successful. But I also hope that the fruits of its success will flow not just to judges, not just to lawyers, not just to court personnel, but also to those who, in the nature of things, will seldom be attending a conference like this—the weak, the poor, the powerless—those who, whether they like it or not, are inevitably involved in the process and the system that we are privileged to preside over. By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just. We have enough victims in our society. In so many instances, they are victims of the conduct of others that violates the law. Let us not forget them. Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the courts nor anywhere else.

Report of the Task Force on Implementation of Court Improvements, prepared for the Second National Conference on the Judiciary, Williamsburg, Virginia, March 19-22, 1978. Published in Theodore J. Fetter (ed.), *State Courts: A Blueprint for the Future* (Williamsburg: National Center for State Courts, 1978)

The Implementation of Court Improvements

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A statement on implementation of judicial reform must begin on a cautionary note. Lawyers, legal scholars, political scientists, and journalists have boldly and prolifically suggested needed changes—often contradictory—in judicial institutions and processes. But they have scarcely touched the problem of the conditions and techniques that promote such changes.[1] The task force therefore necessarily relies upon episodic reports about the politics of change in various jurisdictions and, more important, upon its collective assessment of the political milieu within which judicial reform occurs. One major purpose of this report is to suggest the urgent need for systematic attention to the implementation of judicial reform.

A second caution arises from the formal structure of the collection of studies commissioned for this conference, *State Courts: A Blueprint for the Future*. It seems entirely reasonable to empanel a task force on implementation strategies. But implementation proposals are integrally related to the substantive changes which fall within the purview of others. This task force does point out, however, that the merits of substantive change are far more important in the politics of implementation than is any appraisal of the political environment or the methods which promote reform.

Without commenting specifically on the array of proposals advanced by other task forces, we are generally in agreement that schemes insulating the courts from other branches of government and from the community at large are likely to fail politically and, indeed, ought to. The concept of judicial independence is pertinent primarily to the insulation of judges from every extra curiam pressure as they try and decide cases. It may secondarily sanction judicial autonomy in matters which are part and parcel of the management of courtrooms, such as rules prescribing courtroom conduct or specifying the format of certain legal documents or setting schedules for conducting litigation or punishing those who threaten the decorum of the court. But as that short and merely suggestive list shows, many of those activities have historically been as much prescribed by other branches as by the judges.

Beyond this limited scope, the emphasis of proposals for judicial reform ought to be informed primarily by the underlying premise of American constitutionalism: checks and balances. Richard Neustadt pointed out almost two decades ago that such phrases as the "separation of powers" or, more pertinent for the present discussion, "judicial independence" tend to trap Americans. "The constitutional convention of 1787 is supposed to have created a government of 'separated powers,' " he said. "It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers."[2]

Underlying most American opinion is the Madisonian premise that constitutionalism has as a major purpose compelling government to control itself and that dividing and arranging the offices of government so that each may check the other is the most significant institutional arrangement obliging this self-limitation.[3] Proposals that suggest insulation from other branches in the structure, organization or budget of courts, the selection of judges, the definition of judicial jurisdiction, or the formulation of procedural rules ultimately run afoul of the national predisposition to spread all power among several branches to hold each more accountable and to fetter the inevitable impulse of each from time to time to act arbitrarily. Both as a matter of sound policy, consonant with American constitutionalism, and as a consideration of political strategy, those proposals which bring the judiciary into steady cooperation with other governmental institutions and which open it to continuous participation by the general citizenry are preferred by the Task Force on Implementation Strategies.

A third introductory comment concerns the nature of political calculation. The tendency in the modern behavioral sciences is to measure the regularities and patterns in political affairs. The emphasis therefore is on organized groups, on institutions, and on stable processes. A society viewed as a collection of parts is soon thought of in terms of the interests of its parts, and those interests are readily characterized as the

aggregation of power, money, prestige, or other, similar resources. Some analysis in this report follows this pattern. But the predisposition of the task force and its collective observations emphasize also two other aspects of politics.

Individual public figures loom large in judicial reform. A handful of dedicated persons, drawn from widely disparate groups and institutions, often seems to play a disproportionate role in implementing changes in judicial institutions and processes. Leadership, in short, is a critical factor in our concerns, even though this leadership is not easily assayed in political system terms.

A similar caution arises from the discussion of political interest. This report recognizes the particular "interests" that may invite support or stir opposition to changes in judicial structure, organization, procedures, or jurisdiction. But a larger and more accurate vision of politics recognizes that broad segments of the population, or at least of its politically attentive members, make decisions by balancing the aggregating self-interests previously mentioned with larger principled concerns that derive from their sense of the common welfare, their commitment to ideals they associate with republican politics, and their reverence for the rule of law in a consensual society. The task force concludes that, on balance, the self-interest of powerful individuals, institutions, and groups rarely weighs in favor of judicial reform. The implementation of change rests, therefore, on successful appeals to ideas and ideals that are larger than self-interest. President Kennedy, rebuking a cautious counselor, reminded that if politics is the art of the possible, the art of politics is to enlarge the possible. This mood illustrates our own: implementation of judicial reform does not turn on appeals to self-interest, but rather on the art of appealing to larger public commitments.

As a fourth introductory comment we acknowledge the impossibility of generalizing accurately about implementation of judicial reform in fifty states and their numerous political subdivisions. Hence, a report on implementation becomes only a crude reflection of an enormously complex reality. The purpose of such a report can be no greater than to alert interested persons to political forces and techniques that are often (perhaps usually) relevant for the implementation of change and to lay down general approaches that may shape their thinking as they ponder the particulars of implementation in their specific locales. A secondary purpose is to stimulate interest in further studies of the politics of implementation, so that a more complete literature will be available to those who take up responsibility for revising our judicial arrangements.

The enormous variety and complexity of recommended changes in judicial institutions and processes requires a fifth cautionary statement. Each recommendation has its own politics. A recent study estimates, for instance, that governors have usually been proponents of state court unification,[4] but they have been far more suspicious of changes in selection systems and overtly hostile to revisions in budget procedures that would oust them of their authority to present a comprehensive executive budget, including judicial appropriations, to the legislature.

A major divide separates the politics of proposals that touch specifically on judicial institutions and processes from those that affect the judiciary secondarily, but nonetheless importantly. Judicial structure, organization, selection, procedure, budgeting, and jurisdiction fall squarely in the first group. But no-fault insurance, no-fault divorce, and the revision of criminal codes to eliminate sanctions for drunkenness and for private sex acts between consenting adults fall clearly into the second category. Their impact on judicial caseloads and procedures, as well as on public attitudes toward the courts, is a real, although not their primary, purpose and effect.

Other proposed changes do not easily lend themselves to categorization. Higher educational standards for police, improvements in the compensation and tenure of prosecutors and public defenders, compensation for victims of crime, procedures for assisting witnesses and safeguarding their time, proposals to limit or regulate plea bargaining, and measures to reduce citizen inconvenience in jury selection pose a quandary. Some proponents identify their primary goal as improving the operation of the judicial system, but others give the heaviest weight to unique advantages related to each specific change.

A general discussion of implementation is likely to make little sense if it purports to reach all changes advanced as having either primary or substantial secondary effects on judicial institutions and processes. The task force's discussions focused primarily on implementation of "court reform" in the narrower sense, and the text of this report reflects that focus. Even that narrower focus—as the varying gubernatorial attitudes toward judicial selection, organization, and budgeting illustrate—does not fashion of implementation a garment without seams and rents.

Finally, the task force is aware of the varying meanings of implementation itself. An observer, taking it in its common sense, might well expect a discussion of how to put changes

into force once they have been adopted as policy. But for purposes of this conference, implementation has quite another meaning. The question posed to the task force was how to achieve changes in policy. The emphasis of our discussions was on the overtly political processes mentioned in later sections of this report. We do not consider the steps necessary to facilitate policy changes already adopted. That problem lies with the emerging science of judicial management and administration. The task force acknowledges the need for additional work in that area if policy changes enacted are to achieve their purposes. Moreover, successful administration of previously enacted policies enhances the confidence of relevant political leaders and groups in the ability of the judiciary to manage schemes still being debated. And the failures or successes of policies enacted in some jurisdictions will be taken as measures of their usefulness by policymakers elsewhere. The role of court administrators, a relatively new breed of professionals, is, therefore, essential to the politics and the administration of court reform.

The Techniques of Change

Change must, of course, be achieved by means appropriate to the particular goal. Virtually all judicial reform is achieved by constitutional amendment, statute, court rule, executive order, financial incentives, and persuasion or education. Political and policy considerations play a large role in the selection of techniques for change.

Constitutional Amendment

Change through constitutional amendment is required under two circumstances: first, where constitutional rules restrict the processes of change; second, where the policies to be changed are embedded in the constitution. The first circumstance occurs rarely. But examples are found where state constitutions require extraordinary majorities or procedures to change certain constitutional or statutory provisions. It is sometimes easier to obtain general agreement to modify those extraordinary rules for constitutional change than separately to muster the high levels of support necessary to adopt each of several amendments within those rules. The second circumstance is quite common. Methods of judicial selection, the jurisdiction of courts, the organization and geographic dispersion of courts are often written into constitutions, and policy changes involving these arrangements require constitutional amendment.

The methods of constitutional change vary widely among the states.[5] One feature, however, recurs in every state except Delaware: the ratification of constitutional amendments lies with the people at the polls. The required popular vote margin to ratify does, however, vary among the states, with some jurisdictions requiring extraordinary majorities at the polls. In Delaware, the legislature may amend the constitution without public approval.

Constitutional amendments may be initiated in many different ways. Seventeen states allow citizens to initiate an amendment by petition; only one of these requires legislative sanction for an initiated amendment to be submitted to the voters. The percentage of voters signing initiative petitions differs markedly from state to state. All states authorize the legislature to initiate constitutional change, but only seventeen states provide for legislative action by simple majority under usual legislative rules; the remaining thirty-three states require either an extraordinary majority or impose other special barriers.

Finally, constitutional amendments may be initiated by constitutional conventions. Forty-one states specifically provide for such conventions, while judicial interpretations have authorized them in several others. The procedures for calling conventions are complex. Six states permit the legislature to convene a convention, and one authorizes conventions to be called by popular initiative. The remaining thirty-one states adhere to a bifurcated process in which the legislature proposes a convention and the poeple decide at the polls whether to convene such a body. The states using a bifurcated procedure divide on the legislative majority necessary to propose a convention: fifteen require a simple majority, and sixteen insist on an extraordinary majority. These difficulties in initiating change by constitutional convention may be offset by the higher success rate in ratification referenda that convention-initiated proposals enjoy over amendments initiated by other means.

Advocates of judicial reform differ on whether the constitutional amendment route is desirable. It cannot be avoided, of course, where disfavored policies are embedded in the constitutional language. But where the constitutional language is permissive, an amendment is not required. Nonetheless, some proponents of reform argue that new policies ought to be written into constitutions to give them permanence or to prevent the executive and legislature from indirectly eroding them by declining to appropriate funds.

The stronger case seems, however, to be advanced by opponents of a constitutional amendment strategy. They

remind that judicial reform, like all policy change, proceeds by trial and error. After initial enactment policies must be modified in light of experience, but those adopted by constitutional amendment are cast in concrete. Moreover, reformers with a long time perspective are aware that the judicial system evolves with changing public needs, attitudes, and perceptions. Reforms that gain a consensus among the attentive public today may be quite inappropriate in the sweep of history. The difficulty of adapting the courts to contemporary needs in states where judicial arrangements were constitutionally prescribed by past generations should stand as a reminder that a present generation, however wise, ought not to impose its preferences indelibly on the future. If constitutional amendments are advanced they should, at most, state broad policies and fix responsibility for maintenance of the justice system. Particular arrangements and codes should be assigned to statute or other legal modes which do not have the permanence or dignity of constitutional mandates.

From a strategic standpoint, the efficacy of constitutional change is also debatable. In those states allowing the public to initiate amendments or conventions, resistance from legislatures can be bypassed. But a large majority of states require legislatures to initiate amendments. Lobbying legislatures on constitutional change has a somewhat easier character than seeking their approval of statutory policies; proponents of change can usually persuade a few reluctant legislators that they ought to advance proposed amendments in order to "let the people decide" or "to give the voters a voice" at the polls.

Opposition to court reform is usually strongest from lower court judges, court clerks, local officials, and those clearly involved in existing judicial arrangements, such as prosecutors, trial attorneys, and law enforcement groups. A constitutional amendment strategy gives these opponents two opportunities to block reform: they can lobby the legislature as amendments are initiated, and they can organize public opposition during the ratification process. On the other hand, proponents of change are typically able to gain the endorsement of high visibility personalities, such as the governor and chief justice, and of prestige organizations, such as civic groups and bar associations. Moreover, newspapers have generally given editorial support to court reform. Such salient endorsements may weigh more heavily in voters' minds than the opposition of local courthouse circles. But the hazard of effective local opposition suggests that a constitutional amendment strategy should be avoided where possible.

Public participation in the constitutional amendment process is much higher than in any other reform strategy. Such participation plainly accrues secondary advantages for the judicial system: a larger share of the public develops knowledge of and perhaps a sense of commitment to judicial institutions. Since constitutional change requires several separate steps, the extended time period allows wider public debate, understanding, and appreciation of the issues.

The money and organization required to initiate amendments or conventions by citizen petition are well beyond the means displayed by judicial reform forces in most states.[6] The extraordinary legislative majorities often required to initiate amendments also threaten defeat, which is unnecessary to attain reform in states with permissive constitutional provisions. Finally, those who revere constitutionalism will wonder whether the public reverence for the constitution and their sense of its permanency ought to be cheapened by calling on them to consider a larger agenda of constitutional amendments than is absolutely necessary.

On balance, both policy and strategic considerations argue against the constitutional amendment route to court reform, except where existing disfavored policies are written into the constitution and can only be revised by formal amendment. Even in the latter instance, constitutional amendments should not go beyond removing constitutional barriers to change and substituting broad enabling provisions to be implemented by the legislature or judiciary.

Statutory Change

Two techniques are available in the United States for amending or revising laws. All states, of course, permit such change by legislative action and executive approval. In addition, twenty-one states allow statutory change by popular initiative.[7] Thirteen permit laws to be written and submitted directly to the voters by popular petition; five others require that a period for legislative deliberation follow the submission of petitions.

Legislative court reform has distinct advantages. Laws can be drafted with substantially more detail than most constitutional amendments. They are flexible because revision can be obtained in subsequent sessions of the legislature as experience shows new needs or reveals problems with past enactments. The level of sophistication about judicial change is likely to be far higher in legislative bodies than among the general public, and this presages closer attention to the complexity of the judicial process.

The primary disadvantages of legislative change are politi-

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cal. Judicial change is not ordinarily a "hot" subject, and it occupies a low priority in the scramble to advance issues on the crowded legislative calendar. Moreover, legislators are often suspicious of "reforms" that diminish their prerogatives or reduce the accountability of other agencies to the legislature. State legislatures are more susceptible than any other governmental forum to the interests and pressures of local officials. Lower court judges make an impact here, as do court clerks, prosecutors, and police groups. Special weight will be given in legislative deliberations to arguments against the consolidation or unification of municipal, district, or county courts. Both local officials and legislators are vigilant to protect "home rule" and "local self-government."

Despite the serious political obstacles to judicial change that inhere in the legislative process, reform has fared well at lawmakers' hands in many states. Unless they arouse the opposition of local governments, judicial reform issues are not highly salient and they do not generate intense feelings. A small group of dedicated legislators in key positions can often persuade their colleagues to act.[8] The support of the Speaker, party leaders, the judiciary committees, and the appropriate budget committees are crucial. These legislators often are willing to lead on important, but unpopular issues. In at least some states, legislative leaders are mainly from safe districts. More important, their positions require that they develop a broader, statewide perspective than do other lawmakers. Finally, of course, they generally control the key instruments for raising the visibility of issues and advancing their merits. They can prompt the legislative council and the standing committees to propose, hear, and debate bills. They can usually authorize or persuade their colleagues to authorize special committees to study important matters. The process of change will usually be slow in legislatures, but the efforts of a small number of legislators—necessarily including or supported by leading lawmakers—can move most judicial reform issues to the legislative agenda and ultimately into law.

In general, the same strategic advantages and disadvantages that affect constitutional amendment ratification campaigns are also present in statutory initiatives. Entrenched legislative or executive opposition can be by-passed, and public awareness of the judicial system can be heightened. But despite the endorsement of prestige public figures and the media, proponents of change will usually be hard pressed to raise money and mobilize manpower successfully to circulate petitions and then win an electoral campaign. Initiative campaigns do not allow the opportunities for compromise that bring the support of additional political forces, and statutes enacted by initiative may be undermined by subsequent legislative action. In only rare cases will a statutory initiative be preferable to action through established legislative channels.

Change by Court Rule

Although the line is not bright, a distinction should be drawn between two kinds of court rules. The first variety are incidental rules which govern the internal procedure of courts. They establish schedules of proceedings, prescribe forms and documents, and, in general, regulate the conduct of litigation. A second group of court rules arise from the exercise of "inherent" or "supervisory" powers vested in state supreme courts for the regulation of the judicial branch of government. In some instances, these powers are constitutionally mandated; in others they are the children of judicial interpretation. In most states, however, such powers are delegated to the courts by law. Where legislation exists, the question often remains open whether the courts could supervise the judicial branch under independent constitutional authority. The issue has usually been avoided.

A number of influential voices have been raised in the legal community insisting that the state high courts assert an inherent, constitutional supervisory power over the judicial branch.[9] At its farthest reaches, this opinion holds that the supreme court can order into effect whatever budget is essential for the conduct of judicial business. Despite this current of opinion, the law in most states acknowledges only limited supervisory powers constitutionally vested in state supreme courts. Moreover, sweeping legislative delegations of rule-making authority are only grudgingly granted to high courts, and in some states such delegations are subject to legislative checks, either requiring lawmakers to concur in supervisory rules or permitting them to veto such rules by resolution of either house.

The Task Force on Implementation Strategies does not advance a view about the proper scope of the judiciary's constitutional supervisory power, but it is mindful that broad, unchecked delegations may run contrary to fundamental ideas about shared powers and checks and balances. Nor does the task force endorse a particular form of legislative delegation to state high courts. If judicial authority rests on legislative delegation, it is politically naive and perhaps a misapprehension of the theory of checks and balances to expect such delegations to be unlimited and unchecked.

Within these general guidelines, judicial rule-making may

be useful to achieve many changes in court procedures. It is a less likely avenue for changes in jurisdiction, court structure, staffing, budgeting arrangements, and similar questions of institutional arrangement. Here executive, legislative, and public interest is highest. Only the boldest assertions of judicial authority, supported by the strongest constitutional or legislative language, will save the courts from political backlash.

There are also strategic considerations that limit judicial rule-making to internal court procedure and to other matters only where constitutional or legislative delegations are clearly stated. Attempts to assert sweeping inherent powers in areas usually reserved to the legislature by the theory of checks and balances or by tradition invite legislative reprisals. This is likely to show itself in legislative refusals to consider other urgent matters on the court reform agenda. As a last resort, the legislature retains fiscal sanctions against the courts.

The judiciary is, moreover, in a troubling position to sustain the legality of its rules in confrontation with the legislature. Such conflicts will ultimately reach the court's own docket, and no written opinion, however well grounded or persuasive, can dispel the cloud of suspicion that hangs over such a decision or ameliorate the backlog of resentment that inevitably accompanies the judiciary's decision to sit in matters to which it is an interested party. Finally, there is the recurring question of public appreciation of the issue of judicial reform. Policy changes implemented by court rule neither involve the public nor inform it.

The advantages of judicial rule-making do not, on balance, outweigh these disadvantages. Rule-making can be swift. Although rules frequently are the product of extensive proceedings involving hearings, deliberations by special advisory committees, and consultation among the judiciary, they are likely to be more comprehensive and coherent than policy enacted in the political process. Court rules are the product, in the last analysis, of a single judge or a small group of justices in a collegial court. Despite the consultative nature of rule-making, it rarely suffers the discontinuities and major compromises that arise from the interplay of interests and the give and take that are endemic to the legislative process. Moreover, rules are easily amended as new needs arise or the imperfection of old rules becomes apparent. But the political backlash, the compromise of judicial impartiality, and the elements of judicial insulation that lurk in comprehensive policy change through judicial rule-making exact too high a price for these advantages.

Change by Executive Order

The potential for judicial policy change by executive order is more remote than innovation through judicial rule-making. First, the concept of inherent executive authority has a thin basis in American state constitutions. Second, authority, either constitutional or legislative, to issue executive orders is likely to be confined to the internal conduct of the executive department. Indeed, judicial interpretation of grants of executive authority has tended to narrow it in this way in deference to the principle of checks and balances. Moreover, legislative delegations of authority to the executive often include some provision for lawmakers' veto of gubernatorial orders. Third, executive orders involve the same limited public participation as judicial rule-making.

The advantages of swiftness, precision, coherence, comprehensiveness, and easy amendment that can be ascribed to judicial rules would only be available if executive authority to issue orders were sweeping and constitutional. The task force has not discovered such authority in the American states.

One form of executive order does, however, bear importantly on judicial change. State governors often have the authority to establish study groups and to fund them. Using this authority, governors have established special constitutional revision commissions which can recommend necessary constitutional amendments which either alter judicial structures, organization, jurisdiction, procedures, and selection or authorize the legislature to do so. In some instances chief executives have chosen to establish commissions specifically to study judicial reform.

Both kinds of commissions have numerous advantages. The members are likely to represent a broad cross section of state interests and opinion. They typically include experts, legislators, and lay people as well as representatives from all leading interests in the state. A broadly based commission is likely to engage in some compromises, but it the membership is committed to court reform, such compromises may help clear away political obstacles without surrendering reform objectives. They proceed in the open, often holding public hearings. They are likely to be most effective when they have sufficient staff and research resources to shape specific recommendations plainly adapted to their own state and are not, therefore, thrown back upon conventional wisdom. All of these factors build public understanding and support for judicial change. Morever, such study groups often form a nucleus for later lobbying and campaigning to implement their recommendations.

The strategy of executive orders establishing study commissions is plainly different from other strategies mentioned here. It looks to persuasion rather than to authoritative mandates for change. Its tempo is long-term rather than immediate. And it relies on the assumption that a diverse commission, given staff resources and a measure of independence, will make recommendations that are both wise and politically viable.

A special form of executive order bears on the governor's authority in most states to fill judicial vacancies that occur between elections, and, in fact, a majority of judges in elective systems initially reach the bench by such gubernatorial appointments.[10] By adopting clear procedures for making such appointments, the governor can consult broad segments of the public, invite a larger number of qualified persons to seek judicial office, discover potential appointees among groups underrepresented in the judiciary, and diminish public apprehension that impartial justice is shadowed by political "dealing."[11] Since most appointed judges are retained in subsequent elections,[12] executive orders governing appointments to vacant judgeships can have a substantial effect on the quality and representativeness of judges and the efficiency of courts.

Change through Financial Incentives

In recent years experimental changes in the judiciary have been prompted by financial incentives from outside sources. The leading source of financial support for judicial innovation has been the Law Enforcement Assistance Administration and its state planning agencies. Occasional grants from private foundations have also financed changes in court operations. Diversion procedures, magistrates to screen cases, public defenders' offices, data processing for work load and case calendars, research staffs and law clerks to support judges, district and state court administrators, witness assistance programs, and a host of other innovations have been tried with LEAA grants.

Some local officials, judges, lawyers, and others connected with the court system have opposed these programs, but most have welcomed the opportunity to experiment with ideas that the local tax base could not support. Where innovations have been opposed, local executives and legislatures have nonetheless sometimes adopted them to obtain the property tax relief that federal dollars provide.

In addition to improvements in specific locales and agencies, these innovations have tested new ideas which others might then consider implementing without federal money. One task force member has suggested that "outside money is often absolutely necessary to demonstrate that a change will work before it can be conscientiously advanced as a general reform for statutory enactment." Most federal grants have been made on a "declining funds" basis which requires an increasingly larger percentage of matching state and local dollars in each subsequent year. This procedure is intended to maintain innovations as federal funding is withdrawn.

Despite the opportunities for change afforded by financial incentives, this technique has serious limitations. There is far too little grant money to conduct more than a handful of experiments in any state in any year. Some jurisdictions decline to accept grants which require substantial modifications in longstanding local practices and political arrangements. Others accept funds, but do not meet the specified conditions. Program evaluation by LEAA and its state planning agencies has been primitive and sporadic, and enforcement of grant conditions, either by fund cutoffs or reimbursement actions, has been reluctantly pursued. As federal funding is phased out, some jurisdictions have returned to former practices.

The value of granted-funded innovations in stimulating change in other locales is limited. Many jurisdictions are simply unaware of relevant experiments elsewhere. And some that know of such changes decline to follow those examples because of local political opposition or because they reason that they should wait for outside funding before adopting programs that have been supported elsewhere in that way.

Major objections to LEAA grants have been raised by state judges on grounds that existing arrangements violate the principles of federalism and separation of powers. Although the constitutional principle now seems well established that financial incentives, as contrasted to regulatory legislation, do not invade the reserved powers of the states,[13] the argument is advanced as a matter of policy that heavily conditioned federal grants subordinate the independent state judiciary to agencies of the national government. The sharp edge of this contention is that LEAA grants are shaped by the Department of Justice, which has a direct interest in the decisions rendered by state courts. But there is no evidence that the Department of Justice has tried to influence the outcome of decisions by wielding the financial club of federal funds. Unless there is some danger of improper influence in specific cases, it is difficult to distinguish the budgetary relationship between LEAA and the state courts from the extensive fiscal relationship of state executive and adminis-

trative agencies to Congress and the national executive departments. Twentieth century concepts of federalism have recognized the sharing of responsibilities and the joint efforts toward common goals of the national and state governments; although extensive relationships between the federal government and the state judiciary are relatively new, they are not different from the well established and generally accepted cooperative efforts between other national and state agencies.

Objections based on the separation of powers principle arise because LEAA grants make state judges accountable to federal executive agencies and to state planning agencies, which are primarily an arm of the state executive. Some part of the argument turns on a status dispute: state judges do not want to be financially accountable to mid-level federal or state bureaucrats. Perhaps greater consideration should be given to fixing fiscal accountability for grants to the courts at high enough levels in the executive branch so that the dignity of the separate judiciary is not impaired. But the more general separation of powers objections do not seem persuasive. Both the federal and the state judiciary have long been dependent on the co-equal executive and legislative branches. The structure, organization, procedures, and jurisdiction of the courts, as well as the level of budgetary support, are often matters within executive and legislative authority. This seems entirely consistent with the American belief that each department should be reliant upon, and therefore subject to checks by, the other branches. As long as fiscal reliance on executive agencies—such as LEAA or its state planning agencies—does not impair the judiciary's independence in deciding specific lawsuits, it does not appear to violate the checks and balances concept which is the centerpiece of limited government.

On balance, innovative grants have promoted court change. They have established useful examples, and they have alerted proponents of change that some proposed programs need modification or do not succeed in practice. But such grants have produced changes in only a limited number of jurisdictions. The successful prototypes created with innovative grant funds will have their full impact only when mandated by constitutional amendment, statute, court rule, or executive order.

Change through Persuasion and Education

Discussions of judicial reform too often focus on the resistance of judges and other court personnel and officers. Little attention is paid to the judiciary's general commitment to the rule of law, sound judicial administration, and the spirit of constitutionalism. Admitting that judges may have vested interests in some aspects of the existing order, it is important to acknowledge also that they may be more acutely aware of its defects than any other body of officials. Their problem often is a lack of knowledge and resources with which to attack visible shortcomings in judicial administration.

Many changes can be accomplished by individual judges acting in their courtrooms. Others can be achieved where a single judge presides over a court or jurisdiction. Still others can be made by a majority of judges in a jurisdiction exercising their authority to make rules. Scheduling and work load regulations are obvious examples of changes that judges can make on their own authority. Procedures for plea bargaining, jury selection, witness accommodation, diversion from the courts, and appointment of counsel are other matters on which individual jurists or a body of judges in a court or jurisdiction can sometimes act.

In many instances, court reform requires persuasion and education of related justice system agencies. Prosecutors, the police, and government attorneys stand out as examples. Plea bargaining reform depends in part upon the cooperation of prosecutors and defense counsel as well as on the courtroom policies adopted by judges. Diversion of disputes from the courts may rest heavily on the police, prosecutors, social agencies, and court clerks. While we emphasize education and persuasion of judges, there is a compelling need for similar approaches to related justice system agencies.

Proponents of court change ought to ponder the gains that might be made by providing information to judges about experiments elsewhere. The National Center for State Courts has begun such information dissemination on a modest scale. Moreover, local committees or commissions established by bar associations, the National Center for State Courts, the American Judicature Society, or the judges themselves might conduct studies and make recommendations for voluntary implementation. Support for such reforms from the media, public officials, and civic groups might embolden judges and erode the inevitable opposition. These educational, research, and persuasion activities are not simply window dressing. The work load of judges often prevents them from doing the basic research and planning necessary for voluntary innovation; it certainly diminishes the time available for explaining, advocating, or implementing such changes.

Voluntary change, promoted by education and innovation, has obvious limits. It is deterred by the longstanding tradition that each judge is master in his own court; collegial deference

patterns are difficult to change. Voluntary changes, no less than mandated reforms, often require staff support, start-up funding, and other resources unavailable to judges. Many changes are beyond the authority of a single judge or a body of jurists. Judicial selection, court structure and organization, public defender arrangements, and arbitration alternatives are obvious examples. Substantive law changes which relieve caseload congestion or diminish judicial intervention in matters unsuitable for government resolution are also beyond the voluntary action of judges.

Finally, of course, voluntary action does not bring uniform change in the judicial system, but rather creates a patchwork of court practices. Lawyer and citizen confusion would be the mildest consequence; resentment at the uneven, piecemeal quality of judicial administration is a gloomier prospect. Such public reaction may, however, also have a constructive side if it stirs demands that successful voluntary improvements be broadly adopted or mandated.

Education and persuasion may be regarded as beginnings of change. They involve the public, and they call upon the loftiest aspirations of judges and other court personnel for high calibre judicial administration. They improve the judicial system in some courts and jurisdictions, and such improvements may spur wider change. Education and persuasion are relatively low cost ways to initiate implementation of court reform programs.

The Environment for Judicial Change: Public Opinion

There are no direct links between public opinion and most public policy issues. The public is usually uninformed and inattentive. Often there is no substantial opinion on a matter. The late V.O. Key, Jr. suggested that policy which did stir public interest might be greeted with conflict or with consensus of opinion.[14] Consensus, in turn, he characterized as supportive, permissive, or decisive. Supportive opinion reflects general public support that gives strength to policy and to implementing actions. Opinion is decisive when so strong, detailed, and correlated to policy that officials must anticipate public retaliation at the polls if it is not effectuated. Permissive opinion, by contrast, involves general public approval of broad ideas, but such approval is neither detailed or intense. It permits officials to act in a certain direction, but it does not compel them. Moreover, permissive opinion sets only the general objectives of policy; specific arrangements escape public notice and fall, therefore, with the discretion of officials.

Public opinion about the courts is mainly, but probably not completely, supportive. About judicial change public attitudes are apparently permissive. There is only limited reliable information about public opinion, and that is mainly about the United States Supreme Court.[15] The national opinion survey about state courts, which has been commissioned by the National Center for State Courts is a major additional contribution to knowledge about public attitudes toward the judiciary and judicial reform. (This survey is subsequently referred to as the State Courts Survey.)

Surveys consistently show that courts have low visibility. Only about half of the public can name any Supreme Court justice; and about 10 percent can identify either candidate in state and local judicial contests during the election season.[16] Public knowledge of judicial decisions seems limited to about two-fifths of survey respondents. Usually they can name a single major Supreme Court policy, and their attention is riveted on high visibility controversies, such as racial desegregation, prayers in public schools, capital punishment, abortion, or criminal defendants' rights. Twenty-six percent of respondents in the State Courts Survey reported that they were broadly familiar or simply familiar with state courts, while 74 percent said they were only somewhat familiar or wholly unfamiliar with the state judiciary. Local courts were thought familiar by 37 percent of respondents, and the federal judiciary was visible to only 12 percent of the survey sample. A second battery of questions tended to support this self-characterization by respondents. On 15 different questions about the jurisdiction, structure, and procedures of courts, 28 percent of respondents had extensive knowledge (more than 10 correct answers), 46 percent had moderate knowledge (six to ten correct answers), and 26 percent had very limited knowledge. In these circumstances, it seems improbable that citizens readily identify state judges, that they know what policies the state judiciary makes, or that they possess sufficient knowledge of the judicial system to prescribe particular reform measures.

Despite this lack of specific knowledge, the public gives at least moderate levels of support to the Supreme Court. About as many citizens rate the justices' performance "excellent" or "good" as rate it "fair" or "poor." Of special importance, however, is that those who are politically active have more confidence in the Court than does the general public.[17] The same pattern appears in response to the Court's decisions: although both groups oppose more Court decisions than they favor, the politically active segment of the popula-

tion is much less likely to find fault with judicial policies. Finally, before 1970, the Supreme Court rated lower confidence than the President or Congress in public opinion polls; but since that time, perhaps because of Watergate and its aftermath, the Court has gained somewhat greater confidence than either of the other branches.[18]

Public confidence in state courts can be measured only by a single source, the State Courts Survey. Respondents confirmed that the United States Supreme Court engenders more confidence than either the Executive Branch or Congress. Similarly, state and local courts captured greater public confidence than did state and local legislatures or executives. But all state and local departments trailed the federal departments in public confidence. And when respondents were asked to assess their confidence in fifteen public and private institutions on a five-point scale, only 23 percent voted the top two levels of confidence for state and local courts. Among the fifteen institutions, these courts ranked eleventh in confidence.

The state and local judiciary did no better among the State Courts Survey's subsample of community leaders: only 22 percent had high confidence in these courts, and they were ranked tenth among the fifteen institutions. The Survey's subsample of judges and lawyers showed very high confidence in state and local courts. Sixty-three percent of judges rated them highly, making them the second most favored institution after the United States Supreme Court. Lawyers gave state and local courts a 45 percent rating, placing them just behind the Supreme Court and the federal courts among the fifteen institutions.

Public participation in the judicial arena is much lower than in other governmental forums. Fewer people vote in judicial elections than in either gubernatorial or legislative races.[19] This gap in electoral activity is especially great in nonpartisan races, in merit retention balloting, and in judicial elections scheduled independently of contests for other branches of the state government. Each of these devices has, of course, at one time or another drawn the support of judicial reformers.

A Wisconsin study reported that only about 14 percent of respondents had been litigants, jurors, or witnesses in the previous five years.[20] The State Courts Survey found that 43 percent of respondents had at one time or another been involved with state and local courts as defendants (40 percent), plaintiffs or complaining victims (24 percent), jurors (13 percent), observers (13 percent), or witnesses (10 percent). Some studies of the Supreme Court suggest that those who know the most about its business are most likely to oppose its specific decisions. The State Courts Survey shows that those with extensive knowledge of the judicial process or with court experience have less confidence in state and local courts than do the inexperienced and they are more likely to believe efficiency in the courts is a serious problem.

The State Courts Survey shows that the general public is most likely to be aware of well-publicized problems of judicial organization, such as high lawyers' fees, inordinate court delays, and notorious weak judges. They also expect judges to "do something" about crime and about such lifestyle matters as sexual permissiveness, drug use, and pornography. Such expectations will mainly be confounded, since the roots of these problems lie beyond the reach of judicial authorities and do not lend themselves to regulation by the courts. Finally, the public is probably skeptical about the quality of the state judiciary, suspecting that "politics" too much infuses elections and appointments and that self-serving lawyer influence is too prominent in the so-called merit system.

The sum of this fragmentary evidence about public opinion and of reasonable estimates drawn from it does not predict a direct or compelling public role in court reform. Citizens may well defer to the judgment of elected officials about how to approach court reform issues. The public is unlikely to understand the complex problems that plague the courts or to hold well-formulated views on what ought to be done about them. The issues most likely to arouse public attention—such as crime, lifestyle issues, and congestion on criminal calendars—lend themselves to harsh, quick, and facilely easy solutions offered by those who wish to profit politically from court issues rather than to improve the judicial process. On the other hand, public discontent with courts creates an atmosphere in which change, formulated by political leaders, will be accepted without significant public opposition. Indeed, the State Courts Survey shows substantial majorities of respondents who are "prepared to spend tax dollars" for a variety of court improvements ranging from the recruitment of better judges to promoting nonjudicial resolutions of minor disputes.

Public discontent with the courts creates a setting in which there is general support for change. Although court efficiency ranked among the bottom group of social problems presented to respondents in the State Courts Survey, more than half of the respondents generally expressed the need for sweeping or modest court reform. Insistence on reform was strongest among those most familiar with the courts and with

direct court experience.

There is, however, little public specification of what changes ought to occur. Although the public showed interest in various reform proposals when they were presented by poll takers, there will usually be little public knowledge of or interest in specific proposals or measures considered at the seats of power. Court reform, then, occurs in an environment of permissive opinion. The public identifies a need for court reform and is generally aware of certain court problems. They are, moreover, willing to endorse a wide range of proposals put to them by others and, indeed, to spend tax money for these purposes. The initiative for change, the formulation of specific measures, and the political maneuvers which influence the success of reform proposals are, however, the activities of relatively small numbers of public officials and political activists. In all but the most exceptional circumstances, court reform implementation is an "insiders'" business, conducted in an environment of general public support for reform mixed with profound public unconcern and ignorance about its specifics.

Judicial Change: The Political Forces

Which political figures and groups become active in judicial reform depends upon the specific proposals, the jurisdiction, the political environment, and the views of strategically placed leaders. The discussion that follows is, therefore, necessarily an abstraction drawn from a meagre handful of studies of judicial reform campaigns and from the observations of members of the task force.[21]

State Executives

In general, governors have favored court reform. They have usually endorsed it during legislative deliberations or referendum and initiative campaigns. Governors have actively promoted change by appointing citizen commissions that bring together various forces in the community to deliberate on proposals for change, formulate comprehensive plans for revising judicial structures, organization, and procedures, and raise the visibility of these ideas.

The executive will, on the other hand, rarely commit substantial prestige or resources to court reform. Among the array of issues facing a governor, court reform has low visibility and little political advantage. His support therefore is likely to be nominal. Moreover, it is tempered by the natural suspicion that each branch of government feels toward the other. The courts, after all, retain authority to review the executive's decisions. On some issues, executive attitudes may veer to hostility: schemes that shift budget formulation to the judiciary and selection plans that diminish the governor's influence are, for example, likely to be disfavored.

Proposals to raise judicial salaries, to increase the number of judgeships or courts, and to install expensive court information and docket control systems may be viewed with skepticism by governors hard pressed to meet conflicting public demands for more services and lower taxes. This skepticism is often reinforced by the view that many judges maintain a leisurely work pace and are self-important in their relations with other public officials.

Court reform proponents ought to make a major effort to persuade the governor to their cause. He has visibility and usually prestige. Moreover, he possesses a large stock of political resources ranging, for example, from skilled political operatives to discretionary funds that can be used to study and promote court reform. In one state the governor wielded his powers negatively to aid court reform: he simply refused to budget additional judicial salaries or new courts until a comprehensive court reform package passed.[22] Ultimately the trial judges, who opposed reform, fell silent, hoping to loosen the governor's stranglehold on needed resources, and the necessary constitutional amendments were then approved at the polls.

State Legislatures

The response of legislators to court reform is complex and unpredictable. On the whole, legislative bodies have shown little interest in judicial change. Proponents have found it difficult to move their proposals through the committee structure and to legislative calendars, and they have found them even more difficult to enact. On the other hand, in almost every state which has experienced substantial changes in judicial organization, structure, procedures, and jurisdiction, reform efforts have been led by a handful of dedicated legislators with a zealous commitment to that cause. And legislative councils and committees have been a major forum for the development of proposals, the stoking of public interest, and the shaping of compromises which ultimately gain legislative acceptance.

One source of legislative hostility toward court revision is the separation of powers. Many judicial change proposals involve substantial diminution of legislative authority. Budgeting, staffing levels, jurisdiction, removal of judges, and regulation of the bar are illustrations of matters that have

long been within the jurisdiction of lawmakers and which court reform proponents now propose to vest wholly or mainly in the judiciary.

A quite different reason for legislative suspicion of court reform inheres in differing sociological and demographic characteristics of judges and lawmakers. In many states, judges go to the bench after a substantial career as lawyers. Further, they tend to have stability of tenure, regardless of selection system, and most serve until retirement. Legislatures in many states are changing dramatically. Especially in urban states, legislatures have witnessed a decline in the average age of members. As legislating has become a "full-time" job, younger people take it up as a profession. Persons with well-established careers in the private sector cannot afford the time or the financial sacrifice that is entailed by full-time legislative service. Moreover, fewer retired persons are serving in legislatures, perhaps because of the enormous commitment of time and energy that is now required in campaigns and legislative duties.

The membership of legislatures has shown other distinctive changes: more and more women and minority persons serve in state lawmaking bodies. On the other hand, the number of lawyer-legislators has declined sharply, and those attorneys who do sit in lawmaking bodies are frequently younger and newer members of the profession who have less commitment to or involvement with the judiciary and its traditions.

These differences between the judiciary—staffed largely by older white males—and the legislature promote suspicion. Judges are increasingly regarded as "old fogies" by legislators, while lawmakers are viewed as "inexperienced" and "disrespectful" by judges. Important attitudinal differences also mark the two branches. Young legislators are responsive to rising public demands for "accountability;" older judges are accustomed to virtually unlimited latitude in organizing their work and their courts. Legislators tend to be more liberal on the so-called "social issue" and, indeed, on many changes in substantive law as well. They are, moreover, often committed to easy access to the justice system or some comparable process that allows the public to obtain attention for felt complaints. States courts—with a few notable exceptions—have been notably conservative on lifestyle issues, and they have proceeded in the traditional manner of common law courts, committed to stability rather than change in the substantive law.

It is not clear how judicial change is affected by the declining number of lawyer-legislators. One state has only a single lawyer sitting among its lawmakers. Judiciary committees are no longer staffed exclusively by lawyers, partly because their numbers are so thin and partly because legislatures have insisted that lay members sit on those committees to counterbalance the influence of the legal profession. Both in committees and on the floor, therefore, lawyer influence in legislatures has declined. On proposals involving court structure, organization, jurisdiction, and perhaps procedure, most lawyers are likely to favor reform. The trial bar may, however, oppose changes that shift *effective* control of court scheduling, the assignment of judges, and similar matters to the courts. In matters of substantive law, such as no-fault divorce or no-fault insurance, lawyers have usually opposed change. The changing composition of the legislatures therefore both hastens and retards reform.

The Judiciary

Judges have been noticeably inactive in promoting substantive law changes that would reduce the complexity of litigation or diminish the caseload of courts. Although it has been widely accepted for half a century—since Legal Realism became popular—that judges make policy, many jurists still feel bound by public perceptions of their work. The spirit of nondiscretionary judging was well put by Justice David Brewer, who said of courts and judges that "They make no law, they establish no policy. . . ."[23] Even the great Chief Justice John Marshall, as self-conscious a policymaker as has sat in the nation's highest court, once pronounced that "judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law and can will nothing."[24] To maintain the fiction of nondiscretionary judging, those who sit in American courts may feel that they ought not become involved in discussions of policies that are or might be before the legislature.

A somewhat different constraint arises from judicial scruples. A judge who has urged revision of substantive law may feel that his integrity is soiled when he then gives interpretation to existing law or to revised statutes that accords with his previously announced view about what the law should be. Indeed, in an extreme case it might be possible to argue that a judge who helped fashion a new law or who made an extra curiam announcement about the policy that should be expressed by a particular statute ought to disqualify himself from sitting in cases involving that measure.

Finally, of course, many judges are simply hostile to substantive law changes. Existing law has, after all, been given much of its meaning by judicial interpretation. As-

saults upon the law may be taken as censure of the judges' handiwork. Judges are in the main cautious about law change because of their training and their work. State courts remain the common law bench in our judicial system, and the common law fashions new legal rules only by small increments and in the long term. Each small step is tested in practice before further steps are taken. Sweeping statutory change imposes a great burden on the courts by requiring the painful and slow process of judicial interpretation to begin anew. And it is contrary to the cautious, step-by-step law development that judges understand and usually practice. Knowledge of both substantive law and legal procedure is the primary tool of a judge's trade, and he may understandably be reluctant to render it obsolete by supporting sweeping new changes.

Changes in judicial structure, organization, jurisdiction, and procedure raise some of the same problems for judges' participation. Judges may feel that the public will perceive them as self-interested when they advocate changes that enhance judicial power. Moreover, judicial reform issues may ultimately come to the courts for adjudication. Contests about election procedures or results in judicial reform referenda may very well wind up on a court docket. How should a judge who has been an active public advocate of that reform then respond to such litigation?

Judges of the state supreme courts, and especially the chief justices, usually favor court reorganization. But almost all such proposals vest additional power in those highest courts—authority, for instance, over budgets, work load and scheduling, assignment of judges, and budget preparation. Trial court judges often recognize the merits of court reform, but their own interests typically run the other way. Justices of the peace and municipal court judges resist elimination of their offices; so do the judges of specialized courts. Judges of upper tier courts oppose a single level trial court of general jurisdiction because they do not want to lose prestige by being "lumped together" with judges in courts which formerly had only inferior jurisdiction. Most lower court judges also fear surrendering control over work loads, dockets, and assignments.

In the face of these constraints, it is not surprising that the judiciary generally has opposed or, at best, only reluctantly supported major revisions in judicial structure, organization, jurisdiction, and procedures. Nonetheless, significant leadership for such changes has often come from the chief justice and from his brethren on the highest court. Trial court judges, whatever their views, have had substantially less influence. Spread out thinly across a state, they are often not organized for effective political action. Their heavy caseloads and their insulation from much of the political process hinder their attempts to become active.

Unlike their high court colleagues, trial court judges are not daily at the seat of state government where they can engage in the informal processes of persuasion that are so important in the legislative process. Although judicial staff, as we shall presently observe, is far less politically important than the apparatus of the other branches, the supreme court has distinct advantages over lower courts in staffing. The court administrator, the budget officer, the staff of the judicial council, the court's clerk, and the law clerks can be called upon to assist the justices in their advocacy of judicial change. All of this staff is, moreover, strategically located in the state capital. Lower court staffs have neither the training, the exposure to state affairs, nor the favorable location of the supreme court's aides.

It is not useful to make too much of the state supreme court's commitment to judicial reform or to its relative advantages in meeting lower court opposition. The judiciary, including the supreme court, does not in general have a formidable array of political resources. Its most important strengths are its strong interest in judicial reform, with the concomitant commitment of energy and resources to it, and its public prestige. But in most states judges do not have close rapport with other branches of the government or with outside political groups. Their association may be somewhat closer where judges are elected, especially on a partisan ballot. But judges generally maintain a commendable distance from political affairs to assure both the fact and the appearance of independence in deciding cases. Insulation is heightened by the nature of judicial work: it occurs in the courtroom and in chambers, rather than in concert with other units of government and organized groups, which is the usual conduct in the other branches. The distance between judges and legislators is widened by generational, attitudinal, and demographic differences that we previously noted.

Judges do not have policies to bargain and compromise, as do other branches. The decision of cases is not, and ought not to be, susceptible to such maneuvering, which is the stuff and substance of policymaking elsewhere. Consequently the judiciary lacks an important political resource that is the coinage of politics. Relative to other branches, judges also lack the resource of time. Despite the activity of masters, magistrates, and law clerks, judging requires the direct involvement of judges, both in the courtroom and in chambers.

Governors and legislators, by contrast, may delegate to subordinates the largest share of daily duties in order to free themselves for advocacy, persuasion, and negotiation. Compared to other branches and to political groups, judicial staffing is sparse and politically inexperienced. The court clerk usually has substantial political experience. So do magistrates. But increasingly the court administrator is recruited from outside the state and from a background of formal studies in the subject. His political connections, experience, and instincts are not usually well developed. Law clerks are typically young, recent law school graduates; they rarely have much political skill.

Finally, the data base needed to advance judicial change is usually woefully inadequate. Longstanding traditions of local control, the fierce independence and autonomy of each judge in his own courtroom, and the sparse budget of the centralized court staff prevent the collection and analysis of data needed to show the benefits of changes in organization and procedures and the complexities created by archaic jurisdictional rules. The institutional research teams which have become common not only in other branches of government but in agencies within the executive and legislative departments are either absent or underdeveloped in the judiciary. Nor do outside organizations fill this knowledge gap. Law schools are notoriously more interested in substantive law research than in studies of court operations or structure. Independent citizen groups and the organized bar typically do not have the financial resources, the access, or the authority effectively to collect and analyze data. Hence, at a time when government decisionmaking is more and more reliant upon detailed information and well formulated policy options, the judiciary and other court-reform advocates are mainly without these important political tools.

The Bar

Lawyers' reactions to judicial reform resemble the responses of judges. The "elite" bar, composed primarily of leaders in the bar association, is likely to be sympathetic to change. Often recruited from important law firms, its members' economic interests are not affected by many substantive law changes that have a constructive impact on the judiciary, and their association with the supreme court, with law schools, and with various legal organizations awakens and re-enforces their interest in "good government" approaches to the judiciary. To the extent that these lawyers dominate the state bar association and its various local branches, the organized bar may usually be accounted a force for change.

The attitudes of the bar generally are, however, much more complex. Trial lawyers have, for instance, strongly opposed no-fault insurance. Other segments of the bar tend to reject substantive law changes that adversely affect their specialties. Most lawyers are skeptical about proposals which divert disputes from the courts or which substitute informal, perhaps lay, tribunals for traditional legal forums.[25] This posture is not a product alone of economic self-interest. Lawyers are especially committed to ideals of due process and access to courts, and they are proud of the historical success of the American legal system in resolving disputes. Few are prepared to concede that modern conditions require a sweeping renovation in these arrangements until more cautious approaches, such as more judges and courts, are tried.

Lawyer responses to proposed changes in judicial structure, organization, procedures and jurisdiction are likely to be mixed, at best. Lawyers fear that changes in structure and organization may eliminate needed local courts or may staff local courts with outside judges who are not familiar with a community's legal practices, its special environment or attitudes, and its unique needs. Outside judges do not have the same cooperative relationship with local officials, the local bar, prosecutors, the public defender, and the corporation counsel or other governmental law advisors. If changes in judicial selection diminish the influence of local bar associations, they may oppose new arrangements. Finally, of course, the opposition of trial court judges affects the attitudes of lawyers in their communities.

Such episodic evidence as exists suggests that local bar associations and individual lawyers are not active on a large scale in court change politics. The bar activists and the state bar association, which generally favor reform, tend therefore to assume importance beyond their numbers or resources. This pattern resembles that found in judges' responses to court change: the high court justices, who favor reform, are more effectively organized, strategically placed, and politically experienced than their more numerous, but less active, lower court brethren, who oppose change.

One caveat must be entered to the proposition that state bar associations generally support reform. Where the bar makes policy by polling the general membership, either at annual statewide meetings or by mail ballots, the bar activists who favor reform may be overwhelmed by the votes of other lawyers whose posture is much more cautious. On the other hand, where policy is made by the bar association executive committee or some other relatively small body of bar ac-

tivists, reform is usually endorsed. Even in this latter circumstance, however, the thrust of bar association endorsement is blunted because the general membership is disinclined to contact their legislators or engage in other efforts to promote reform.

The Media

The importance of media in court change campaigns can scarcely be overestimated. Large-audience media have tended editorially to favor court reform. This becomes especially important in referendum and initiative campaigns. Moreover, it creates incentives for legislators and governors to endorse and promote judicial change; it is a low-cost way to win notice and praise from media organizations.

Small circulation media, such as rural weekly newspapers and small-audience radio stations, may take a skeptical view about many elements of court reform. Like local officials, judges, and lawyers, they are committed to local home rule. They fear the loss of a court in the community, and they are suspicious of proposals that bring outside judges into their courthouse. Since justices of the peace and municipal court judges may serve important formal and informal dispute resolution functions in small communities, the reorganization of courts, with the elimination of these minor tribunals, is perceived, perhaps correctly, by local media as dysfunctional. Some opposition from local media is less meritorious: they join local officials who resist state budgeting of courts that deprives the community treasury of cherished fine and fee revenues generated by local judges, of which the most notorious example is revenue from "speed trap" tribunals.

Editorial policy statements are typically not repeated regularly—except perhaps as referenda or initiatives approach—and they may have little salience for an uninterested public. Citizen awareness of judicial change rests, therefore, on the extent and accuracy of news reports. Court reform is not generally a "sexy" issue, and news organizations are not inclined to give it substantial coverage. Some events must, of course, be reported. Proposals by major political figures, reports by special study commissions, and actions of the legislature command attention. But steady coverage of court reform matters pending before the legislature or of deliberations of special study commissions is optional. There is probably less media attention to these activities than their importance warrants.

A further defect in media coverage of court reform relates to accuracy and understanding. Few news reporters have the training or background to comprehend the complexities of court structure, organization, procedure, and jurisdiction. They often do not grasp the connections between substantive law and court arrangements. The purpose of reform plans or the impact of reform measures may be difficult to explain. The quality of news reporting on court reform is problematic.

Despite these difficulties, news coverage of court reform is often the key to its fate. Coverage of legislative hearings or special study commission deliberations alerts other officials that judicial change is edging onto the public agenda. It supplies information about an unfamiliar issue, and it signals that they should begin to develop an interest in it. News attention to support and opposition statements helps officials assess the "politics" of court reform.

The media, therefore, not only play a major role in shaping public opinion, especially when court reform measures are on the ballot; they give visibility to and circulate information about judicial change proposals to the relatively small community of political leaders and government officials who are mainly responsible for shaping public policy. Media, of course, play this role on all policy questions. But their role is especially important in court reform because it has exceptionally low salience unless extensively covered by news outlets and because the central participants in the issue—the judges—are far more sharply restricted in shaping public and leadership opinion than are most others involved in policy questions.

Local Officials

We have previously discussed the disposition of local officials to view court reform suspiciously. They anticipate, usually correctly, that court reform proposals eliminate some local courts, assign outside judges to the locality, reduce the availability of local judges when their work load falls off, impose centralized control over judicial work loads and schedules, and substitute the authority of the state supreme court and its administrator for the longstanding influence of the locally selected clerk and the municipal governing body. These specific objections are reinforced by rising alarm in small town and rural America about the decline in local self-government and home rule. Court reform is seen as further erosion of local control.

Local officials might see advantage in some aspects of court reform. Where courts are badly congested, work load control and the assignment of judges by the state court administrator might bring relief. Usually, however, the preferred resolution is the creation of more judgeships or of specialized courts. Many court reform packages include full state financ-

ing of the judicial branch. This lifts the cost of staffing and operating courts from the local property tax. In a handful of cases, however, localities forego more fee and fine revenue than they gain in state support. And a few local officials would prefer to budget the cost of local courts than to lose a local court or surrender influence over its conduct. Often the contrary is true. Oregon is such a case: county officials there support a transfer of court revenues to the state treasury as part of a program of state assumption of the substantially larger cost of court operations.

Local officials have not yet shown great interest in the counter-cyclical aspects of judicial reform which emphasize community solutions to justice system problems. Neighborhood dispute resolution centers and local, informal tribunals do not have the links to established local political institutions that local courts and judges do. Indeed, community justice arrangements are likely to meet the same local institutional resistance that community action poverty organizations faced. Other measures, such as probation subsidy programs to local communities, may draw public ire. Neighborhood rehabilitation centers, whatever their theoretical appeal, have rarely been greeted with conspicuous neighborliness by community residents. Hence, the aspects of reform that promise substantial community responsibility for the administration of justice will not attract wide support among local centers of political power and have very little broad-based appeal to citizens who might influence local government officials.

Countervailing influences on local officials come primarily from other political forces in the community. If the media, leading lawyers, and prominent civic organizations favor judicial change, local officials may calculate that there is little political gain in public opposition. The strongest opposition may come from local court clerks or administrators, from prosecutors, and perhaps from law enforcement groups. The former fear a loss of their own authority. The latter foresee a loss of access when outside judges sit regularly in their jurisdiction, and they fear that increased regulation by state judicial officers will disrupt the processing of criminal cases. But the signal fact about the participation of most local officials is its apparent absence. Their obvious incentives to oppose court reform are apparently offset by the low visibility of judicial reform issues and by the calculated political losses that may be incurred.

Other Organizations

It is almost impossible to generalize about the postures that other organizations will strike on court reform issues. The support of groups dedicated to court reform, such as the American Judicature Society, and of civic organizations is predictable. Among civic groups, the most active in judicial reform has been the League of Women Voters. Common Cause, citizen leagues, and similar associations also support judicial change; but in many cases it finds so low a priority on their agenda that substantial effort does not follow their endorsement.

The role of political parties is problematic. They may support reform when executive officials and legislators become identified with it. And in some states, they have promoted judicial change in response to public concern about slow, costly, and complex justice. Often, however, political parties resist change that will diminish their influence over judicial selection or other prerogatives, such as the appointments of staff, referees, magistrates, and counsel.

Economic groups such as labor unions, business associations, and agricultural alliances often endorse court reform in principle. But their attitudes toward specific proposals easily turn on the specific impact on them. Many insurance firms have come around to the no-fault indemnity principle because it promises to reduce business costs. Labor unions also favor it, but for substantially different reasons. It reflects their longstanding support for and familiarity with the principle of indemnity without fault, firmly established in workmen's compensation, and their belief that workers should not pay high legal fees to be compensated for injury.

A quite different example is labor's attitudes toward judicial selection. Their vivid memory of antistrike injunctions inspires continued commitment to direct participation in judicial selection at the polls. One business leader told the task force that litigation and the legal apparatus have come to be regarded as a form of "blackmail" by the business community; faced constantly with the threat or reality of litigation in even the smallest matters, their perceived choices have largely been reduced to unbearable out-of-court settlements or intolerable legal fees and long, complex litigation that delays the conduct of business affairs. Most court reform plans address at least some of these problems.

Potential opposition by economic groups to changes in judicial structure, organization, procedure, and jurisdiction, but not to substantive law change that improves the judicial process, has often been mitigated in the development of court reform plans. Prominent figures in various economic sectors are recruited and named to study commissions. As deliberations progress, they become more informed about and com-

mitted to court reform. Moreover, most organization leaders have a perspective which gives weight to the needs of a viable governmental system as well as to the interests of their own groups. Participation in planning allows them to ameliorate the harshest effects of court reform on their membership, and they are then able to trade off some organization interests to gain needed court revisions. Once leading figures in economic organizations have endorsed reform, others who lack their knowledge or perspective tend either to follow their cues or at least to remain neutral. As a result, economic organizations either endorse court reform or remain neutral. There are relatively few known situations, however, in which they actually made heavy commitments or resources on either side of the issues.

The Strategy of Change

It is plainly impossible to suggest a single strategy for judicial change. The specific proposals advanced, the legal framework for change, the availability of leadership, public involvement with the issues, the array of interests involved, and the aggregation of resources all condition strategy. It may be useful, however, to generalize about activity on behalf of reform that has characterized successful campaigns for change.

One common thread runs through many successful efforts to implement judicial reform: the most important political resource of its proponents is the strength, merit, and persuasiveness of their case. Our previous survey of public officials and political organizations shows that their self-interest is mainly in opposing reform. Support for change must be mustered, therefore, by effective appeals on the merits of the issues to the broader, public interest perspective of leaders and groups who are willing to forego immediate self-interest to attain policies that they perceive are important for the community at large.

Reform proposals gain wide visibility and are shaped to gain political support when formulated by a broadly based study commission. Such commissions are usually appointed by the governor or established by the legislature. Judicial creation sometimes is effective. In rare instances, a study group sponsored by private organizations may have a favorable impact. Commissions should involve not only lawyers and judges but also legislators, representatives of the executive, local officials, and prominent leaders from private groups. Open meetings and deliberations, including hearings held across the state, invite media attention.

Active sponsorship of court reforms tends to fall on a relatively small cadre of leaders. The involvement of deeply committed state legislators, sometimes but not always drawn from the leadership ranks, has been an essential element in successful court reform efforts. Active support from the chief justice is similarly necessary. Gubernatorial endorsement has usually been forthcoming; in cases where the governor has taken an active role, his participation has substantially enhanced court reform prospects. Leaders of the bar have also proven an essential part of the leadership cadre. Beyond these individuals, support from other prominent citizens and political leaders is useful. But their involvement has generally been nominal; it rarely goes beyond endorsement.

Few organizations become actively involved in court reform efforts. Notable among these are the League of Women Voters and the bar associations. In various states, political parties, civic organizations, and economic groups have occasionally given active support. Usually, however, the strategy of court reform proponents has been to gain endorsements from organizations without expecting major commitments of effort or resources. Endorsements have the effect of demoralizing opponents, depriving them of allies who might oppose a specific plank in reform proposals, and winning notice from the media. Endorsing organizations are sometimes called upon nominally to demonstrate their support by writing letters to key officials, appearing at hearings, publicizing court reform in organizational newsletters, and engaging in other low cost activities. If court reform proposals are placed on the ballot, such organizations may be called upon to advise their members how to vote and to make small campaign contributions.

Court reform campaigns tend to have a long time line. A commission's recommendations merely bring initial attention to the issue and put a package of proposals on the policy agenda. A message from the governor and from the chief justice, in states which follow that practice, are next steps. After these preliminary steps, the process slows substantially. Proposals may be introduced in the legislature, but it usually takes more than a single session merely to persuade legislative leaders to schedule more than perfunctory committee hearings. Hearings in several sessions make legislators aware of the issue and acquaint them with the merits of proposals. Court reform proponents typically modify proposals as they gain legislative comment through the hearing process.

Events sometimes shorten the time line for reform. Major breakdowns in the judicial process or public concern about a

particular issue that impinges on the judiciary speed attention to court reform proposals. But piggybacking on events has its dangerous aspect. A clear example is the rising public outrage about violent crime. Reformers are tempted to link crime prevention to judicial change, promising prompt justice for criminals. But this scarcely goes far enough to satisfy the public, which is bound to insist on more. The due process requirements of a fair trial often require substantial time, and reform proponents do violence to basic canons of decency when they raise public expectations that revision in judicial practices will bring criminals to book in short order. On the other hand, the District of Columbia Court Reorganization Act of 1970 gained momentum primarily from the belief that the courts could not process criminal offenders fast enough and that the Court of Appeals was "too liberal" in overturning criminal convictions.

The media may also shorten the time line for reform. Intensive news coverage of court congestion, uneven work loads, overlapping jurisdiction, and other inefficiencies raise the visibility of court reform. It provokes demands for change from the attentive public. And it encourages public officials to join demands for change. Media reporting and editorial endorsements of reform proposals also build pressure for prompt action. Conversely, media indifference may bury the issue of judicial change. The deliberations of commissions and legislative committees go unnoticed; endorsements are unreported, and therefore neither advance reform nor retard opposition; uninformed citizens and officials do not give court change a high priority on the policy agenda.

Those promoting court reform should, therefore, try to interest one or more top-flight reporters on influential newspapers in the issue. A reporter who becomes expert in this area and consistently writes high calibre stories about it not only forces court reform into the consciousness of political leaders and the public, he also compels others in the news media seriously to consider covering the story.

Court reform rarely involves a large public. It is an "insiders' " issue which gains close attention only from a small number of public officials, a handful of intensely committed organizations, the capitol press corps, and certain prominent public figures. Participation by a larger circle of politically active persons and groups is nominal, but important. The balance of these less active forces shapes the environment within which the active participants function and thus often determines the success of court reform efforts.

The nature of the issues stands against attempts to gain widespread public involvement through letter writing campaigns, petitions, and similar tactics. Organizing plans are thus tempered by the nature of the issues. Even when judicial reform is on the ballot, there is little likelihood of "grassroots organization" in the usual sense. Precincts or even communities cannot be systematically organized. Rather, local efforts consist of loosely coordinated activities by the bar, the League of Women Voters, and a handful of civic groups and leaders. Often a single person or a small group provides most of the energy, coaxing, and goading with minimal exertions from others.

Finally, the financing of judicial reform efforts is constrained by the low visibility of the issues. Less money has been raised to wage statewide judicial reform referenda than would ordinarily be spent in a moderately competitive congressional campaign. Individual lawyers, bar associations, and the League of Women Voters are the most likely contributors to ballot campaigns or lobbying efforts. But there is rarely a broad base of financial support from lawyers because so many are opposed to court reform. Most other organized groups decline to make major contributions because they assume lawyers will provide the necessary funding and because they want to husband their money for purposes with a higher priority on their policy agenda.

It is possible, of course, that campaigns for judicial reform—especially those requiring voter endorsement at the polls—will eventually follow the practices in candidate canvasses. In recent years New York and Arizona have witnessed expensive saturation mass media campaigns on behalf of court reform. Professional public relations firms and high budgets were part of both efforts. Such modern political techniques might come to dominate judicial reform campaigns. The requirements of such campaigns would dramatically change the politics of implementation.

One aspect of reform activity draws special attention: it is implicitly financed with public funds.[26] The promotion and endorsement activities of study commissions, legislative committees, chief justices, and governors are all publicly financed. Staff work is almost exclusively carried on by those on the public payroll. These publicly financed activities are present, of course, in any public policy deliberation. But in court reform they loom as a larger, indeed the predominant, source of financing because private spending by individuals and nongovernmental organizations is so slight. It is important, therefore, that court reform proponents obtain the commitment of enough strategically placed public officials. They are the primary source of even minimal financing for court reform efforts.

One final insight emerges from our knowledge of court reform drives in the states. Potential opposition to court reform is far stronger than its potential support. Our review of the interests and perspectives of key leaders and organizations shows the predominance of incentives and reasons for them to resist both substantive law change and the reform of court structure, organization, procedure, and jurisdiction. This imbalance in potential political activity is offset by four factors in those states where reform has been accomplished. First, reform proponents have been better organized and more active. Second, they have successfully broadened their base of support by obtaining endorsements, often purely nominal, from political leaders and major organizations. These endorsements produce little activity and few resources; they do, however, demoralize and preempt the opposition. Third, the opposition has tended to be local, disconnected, disorganized, and remote from the state capital. Finally, the opposition has rarely fully understood the implications of court reform in time to organize itself. The low visibility of the issue and the essentially "insider" way in which proposals move through the governmental process probably account for this. Each of these factors suggests important strategies for court reform proponents.

Recommendations for Implementation

Some guidelines for conducting implementation campaigns are apparent in the preceding section. The task force does not intend its recommendations to prescribe a fixed strategy for court reform. Such a strategy is impossible. Rather, the task force recommendations look to two different goals. First, how can more attention be focused on implementation strategies? Proposals for court reform have received extensive attention from scholars and commentators, while the means for implementing those proposals have been ignored. Second, how can greater sophistication about implementation strategy be promoted among reform proponents?

First, the task force recommends that major studies be undertaken of implementation in the states. Ideally, these studies would reveal the differences in implementation strategies that are dictated by the differences in substantive proposals and by the varying political conditions of different jurisdictions. These studies can be promoted by major research organizations which emphasize judicial reform, such as the National Center for State Courts and the American Judicature Society, by foundations and government agencies which sponsor research about politics, and by individual scholars whose own research on substantive reform proposals must strike them as disembodied without attention to how reform can be implemented.

Second, the task force agrees on the urgent need in each state to gather appropriate data about the judicial system, to analyze it, to conduct operational studies, and to recommend reforms pertinent to that state. But identifying the vehicle for this activity spawned widely divergent opinions. One view was that each state ought to establish an interdisciplinary institute, affiliated with a major university and preferably located in the state capital. The governing board of such an institute would include a majority of active public and private sector participants—such as judges, legislators, institutional and group leaders—rather than academic people to insure the policy-relevant nature of its studies. Another view emphasized that permanent institutions are not needed for this research and policy development function. Rather, the revitalization of judicial councils with sufficient staff and a limited life span would suffice. A third position was that operational studies ought to be conducted in the court administrator's office in each state and that the policy development activity should be conducted in national research centers, such as the National Center for State Courts, which could draw on the data banks and operational studies in the respective states. The importance of these activities is agreed on, and the apparatus to do the job needs further discussion among those who are committed to court reform.

Third, the task force recommends that national reform organizations identify and maintain a roster of successful reforms. Moreover, they should compile the studies, data, and other materials relevant to these specific cases. This information would be made available to state study commissions, legislative committees, executive and judicial officers, and other interested persons. The usefulness of the written materials, which could be circulated to various states, is obvious. But the roster of successful reforms would serve a substantially different purpose. It would inform those considering any particular problem in the justice system which other jurisdictions had already dealt with that problem. This would presumably promote extensive on-site visits to those jurisdictions for the purpose both of understanding the operation of these successful reforms and of discovering from the participants what political measures were taken to enact these experiments.

Fourth, the task force recommends that national reform organizations maintain stronger links with the widely scat-

tered activists in the states. Apart from published studies and comments, little has been done to link state reform efforts into a national effort. Activists in one state do not coordinate their efforts with activists in other states in order to take advantage of visible national or state events to educate public officials, attentive publics, and the media on court reform issues. Chief Justice Burger's vigorous efforts to achieve administrative improvements in the national courts have achieved wide publicity; but because his activities have not been coordinated with reformers in the states, the inextricable relationship between changes in the federal and state courts has not been brought home to the public. As a result, the Chief Justice's efforts have not had a major impact on state court reform efforts.

Fifth, the task force endorses the concept of "judicial impact statements" that would accompany proposed state policies. Most discussion of impact statements emphasizes only the caseload consequences and proposes such statements only for legislation. The concept of impact statements should be broadened to include consequences beyond caseloads, and impact statements should accompany major policies promulgated by executive and administrative agencies as well as by the legislature.

Sixth, the task force recommends court reform experiments by those—such as judges, prosecutors, and court clerks—who favor change and have discretion voluntarily to implement it. Not only do such experiments improve the court system, they also provide credible examples of workable reforms that reduce fear of change by others in similar positions.

Seventh, the task force recommends programs of public education about the judicial system and about proposals for reform. While we acknowledge the importance of reaching the general public, the special "insider" quality of implementation politics commends a systematic presentation of such information initially to strategically placed opinion leaders and activists. Bar associations, union leadership conferences, directors of business associations, state press associations, and similar select civic associations ought to be high priority targets for such educational programs.

Eighth, the task force recommends programs of political training for those involved in court reform drives. Many court reform activists have had little experience in politics. While all aspects of political activity should be considered, special attention should be paid to skills for working with legislators, since most improvements in the judicial system require preliminary or final legislative approval. These political action training sessions should be sponsored by a national court reform organization, which would draw upon experienced court reform advocates from within and outside the state. Training sessions would bring together judges, bar association leaders, and private sector organization activists disposed toward court reform. A useful format for these political training sessions can be found in some major American business corporations which have recently developed political action workshops or courses to introduce middle management employees to the techniques of politics.

Ninth, the task force recommends that one of the national court reform organizations, such as the National Center for State Courts, recruit teams of persons with experience in court implementation politics. Such teams would be available on request to visit states, to offer assessments of the political climate, and to recommend implementation strategies appropriate to the special local political environment.

Notes

[1]A major breakthrough in the study of the politics of court reform is Larry Berkson and Susan Carbon, *Court Unification: Its History, Politics and Implementation* (first draft, 1977, American Judicature Society). Completion of this excellent book-length study of unification campaigns in several states is expected in 1978.

[2]Richard Neustadt, *Presidential Power* (New York: John Wiley and Sons, 1960), p. 33.

[3]James Madison, *Federalist Papers No. 51*, J. Cooke, ed. (Middletown, Connecticut: Wesleyan University Press, 1961), p. 349.

[4]Berkson and Carbon, *op. cit.*, ch. 6, pp. 5-8.

[5]A state-by-state survey of methods for amending state constitutions is found in *The Book of the States, 1976-1977* (Lexington, Kentucky: Council of State Governments, 1977), pp. 162-164, 175-180.

[6]The low level of funds available in court reform campaigns is detailed in Berkson and Carbon, *op. cit.*, ch. 7, pp. 10-15.

[7]*The Book of the States, op. cit.*, p. 218.

[8]Berkson and Carbon, *op. cit.*, ch. 6 pp. 16-18. The central importance of legislators as lobbyists for court reform is often overlooked. See, for instance, Craig Harris, "Lobbying for Court Reform," in Larry C. Berkson, Steven W. Hays, and Susan J. Carbon, eds., *Managing the State Courts* (St. Paul, Minn.: West Publishing Co., 1977), pp. 81-89.

[9]Jim R. Carrigan, *Inherent Powers of the Courts* (Reno: National College of the State Judiciary, 1973).

[10]James Herdon, "Appointment as a Means of Initial Accession to Elective State Courts of Last Resort," 38 North Dakota Law Rev. Vol. 38 (January, 1962) pp. 60-92; Philip Dubois, *Judicial Elections in the United States* (Ph.D. dissertation, Department of Political Science, University of Wisconsin-Madison, 1978), ch. 4.

[11]Allan Ashman and James Alfini, *The Key to Judicial Merit Selection: The Nominating Process* (Chicago: American Judicature Society, 1974), pp. 14-17. Also President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (Washington: Government

Printing Office, 1967), pp. 65-68.

[12]Although most appointed justices subsequently win election to the bench, this pattern is much clearer in states selecting judges on a nonpartisan ballot than elsewhere. Dubois, *op. cit.*, ch. 4.

[13]*Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[14]V. O. Kay, Jr., *Public Opinion and American Democracy* (New York: Alfred A. Knopf, 1961), pp. 28-40.

[15]The leading studies are Walter Murphy and Joseph Tanenhaus, "Public Opinion and the United States Supreme Court," Law and Society Review, Vol. 11 (May, 1968), p. 357; Walter Murphy and Joseph Tanenhaus, "The Supreme Court and Its Elite Publics," a paper presented at the 1970 Meeting of the International Political Science Association; Walter Murphy, Joseph Tanenhaus, and Daniel Kastner, *Public Evaluation of Constitutional Courts: Alternative Explanations* (Beverly Hills, Calif.: Sage Professional Papers, 1973); Walter Murphy and Joseph Tanenhaus, "Patterns of Public Support: A Study of the Warren and Burger Courts," a paper presented at the 1975 Meeting of the International Political Science Association; John Kessel, "Public Perceptions of the Supreme Court," Midwest Journal of Political Science, Vol. 10 (May, 1966), pp. 167-190; Gregory C. Casey, "The Supreme Court and Myth: An Empirical Investigation," Law and Society Review, Vol. 8 (Spring 1974), pp. 387-419; David Adamany, "Public and Activists' Attitudes Toward the United States Supreme Court," a paper presented at the 1977 Meeting of the American Political Science Association.

[16]Forty-nine percent knew the name of at least one justice in a 1966 survey reported in Walter Murphy and Joseph Tanenhaus, "Constitutional Courts and Political Representation," in Michael Danielson and Walter Murphy, eds., *Modern American Democracy: Readings* (New York: Holt, Rinehart and Winston, 1969), p. 549. A 1976 survey of Wisconsin residents, conducted by the Wisconsin Survey Research Laboratory, found that only 21 percent of respondents were able to identify any Supreme Court justice; and six percent gave an incorrect answer, usually identifying a former member of the court such as Chief Justice Earl Warren or Justice William O. Douglas. On the visibility of judicial candidates, see David Adamany and Philip Dubois, "Electing State Judges," Wis. Law Rev. (1976), p. 775.

[17]Adamany, *op. cit.*, pp. 13-19.

[18]Jack Dennis, "Mass Public Support for the U.S. Supreme Court," a paper presented at the 30th Annual Conference of the American Association for Public Opinion Research, 1975, pp. 22-23, Table 10.

[19]Although judicial elections generally draw less voter participation than other races for statewide office, the difference in turnout is heavily influenced on election scheduling and ballot format. See Dubois, *op. cit.*, ch. 2.

[20]Herbert Jacob, "Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin," Wis. Law Rev. (Summer, 1966), p. 13.

[21]Other surveys of the political forces at work in judicial reform are Jeffrey W. Smith, "Interest Groups and Judicial Reform" in Berkson, Hayes and Carbon, *op. cit.*, pp. 90-96; and Berkson and Carbon, *op. cit.*, ch. 4, pp. 11-38 and ch. 6.

[22]Governor Patrick J. Lucey of Wisconsin used a wide array of gubernatorial powers on behalf of sweeping court reform. He first appointed a blue ribbon study committee and staffed it generously with LEAA funds. In subsequent sessions of the legislature he introduced constitutional amendments and legislation to create a single level trial court of general jurisdiction, to establish an intermediate appellate court, and to provide for removal of incompetent judges by supreme court action. While the battle over this package was being fought in the legislature, he declined to budget pay increases for judges or to provide additional courts, thus putting pressure on trial court judges who opposed the reform package. Two successive chief justices, key leaders in the legislature, and key civic groups, especially the League of Women Voters, joined the governor's efforts; and in 1977 the constitutional amendments were presented to the voters, who overwhelmingly ratified them. Some implementation legislation has subsequently been enacted; other proposals are still in the drafting process.

[23]Quoted in Henry Abraham, *The Judicial Process* 3d ed. (New York: Oxford University Press, 1975), p. 320.

[24]*Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 862 (1924).

[25]See, for example, J. Anthony Kline, "Curbing California's Colossal Legal Appetite," *The Los Angeles Times*, Part IV: Opinion, pp. 1, 3.

[26]This important insight has apparently been reported only by Berkson and Carbon, *op. cit.*, ch. 7, pp. 12-15.

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KENTUCKY

IMPLEMENTATION OF COURT REFORM IN KENTUCKY

William E. Davis

Laws and Institutions must change to keep pace with the progress of the human mind.

—Thomas Jefferson

Court reform has been the largest change in Kentucky's governmental history. The abolition of all lay judges and the introduction of state funding of all court operations have been accomplished in three years. Thus, much has been done in a short time, yet much remains to be done. This written report can summarize the efforts, but in no way can it truly reflect the dedication and hard work of many hundreds of people.

Omitted from this discussion is another significant reform in Kentucky—that of pretrial release. Since June 1976, commercial bail bondsmen have been outlawed and a state-operated pretrial-release system has been instituted. Purging the criminal justice system of the dross of bondsmen broke the ice for future court reform. This program, operated within the Administrative Office of the Courts (AOC), has been discussed in other literature.

This article discusses the historical background of court reform, the strategies of reform, and major aspects of reform (personnel, records, facilities, accounting). An additional section is added for evaluation of the implementation.

The author wishes to acknowledge gratefully the contributions to this article of Nancy Lancaster and Don Cetrulo. The author also wishes to dedicate this article to Leland S. King, a former employee of the Ad-

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ministrative Office of the Courts who died recently from leukemia. Mr. King was responsible for court facilities, equipment, and office space—and also for office morale. To all those who knew him, his vitality, his good humor, and his concern for others have been graphic examples of the attributes many seek to acquire. His example stirred us in the office to aspire to the best in every endeavor.

Historical Background

When Kentucky became a state in 1792, its constitution was patterned after that of Virginia. The judicial power was vested "in one supreme court, which shall be styled the Court of Appeals, and in such inferior courts as the legislature may, from time to time, ordain and establish." In addition, "a competent number of justices of the peace" were to be appointed in each county.

By the time Kentucky's fourth constitution was adopted in 1891, constitutional status had been given to a variety of courts. In addition to circuit courts (courts of general jurisdiction), recognition was given to police courts, county courts, quarterly courts, justice of the peace courts, and fiscal courts. Under the enabling legislation, the fiscal court was, and is, essentially the governing body for the county. The other courts were given overlapping inferior jurisdiction in both civil and criminal cases. There were no qualifications, other than residence, for the judges of these courts.

In a 1923 "Report on the Judiciary of Kentucky" by the Efficiency Commission studying state government, the foremost change advocated was the unification of the trial courts under the direction of the chief justice. The commission pointed out that the courts are created to administer a unified body of law and should therefore be unified in operational procedures.

Attempts to Revise the 1891 Judicial Article

Stopgap legislation was attempted through the years in an effort to cure the ills of the system, but it was finally agreed by those interested in court reform that constitutional revision was the only answer. Kentuckians had historically refused to alter their 1891 constitution; although a few minor amendments had passed, no substantial changes had been made. There was discussion of a Constitutional Convention in the early 1950's, but local officials, especially county judges, were threatened by the possibility of such a change and uniformly opposed any efforts to alter the courts.

The next notable attempt to revise the 1891 judicial article was embraced in a proposal by the 1966 Constitutional Revision Assembly. At

the regular session of the 1964 General Assembly, the Constitutional Revision Assembly had been created to draft a new constitution that would be placed on the ballot as an "amendment." This process was an alternative to calling a Constitutional Convention, since the Kentucky electorate historically had opposed the convention call procedure.

The judicial article drafted by the Constitutional Revision Assembly closely resembled the Model Article advocated by the American Judicature Society and the American Bar Association. It provided for a supreme court, a court of appeals, circuit courts, and district courts, and stated that the courts should constitute a unified judicial system for purposes of operation and administration. The article further provided for merit selection of judges, with some exceptions. All district judges were to be elected, as were circuit judges in districts with a population of less than 50,000, unless otherwise mandated by referendum in a district. All other judges were to be appointed by the governor on nomination by judicial nominating commissions. Also included in the proposed judicial article were provisions for state funding of the court system and for a retirement and removal commission. Under the article, the General Assembly was granted the authority to set jurisdiction and to approve supreme court rules governing practice and procedure.

The entire Constitutional Revision Assembly proposal became an issue in the political arena, but the judicial article was the most abused. For the first time in more than 20 years, there was a Republican primary battle for the gubernatorial nomination, while the Democratic administration was trying to maintain itself in office. The struggle to control the county power bases centered on the proposed judicial article because its approval would strip county judges, justices of the peace, and police judges of their judicial authority. Support of the article was tantamount to political suicide. The voters rejected the new constitution on election day by a four-to-one margin.

In 1968, following the defeat at the polls, the Kentucky Bar Association took the lead in yet another movement to revise the state's court system by sponsoring, in conjunction with the American Judicature Society, a statewide Citizens' Conference on Kentucky State Courts. Response to the conference was encouraging, and the resulting consensus statement was disseminated in a concerted effort to inform the public of the need to improve the courts.

When the general assembly convened in January 1972, the Kentucky Bar Association had a draft judicial article prepared for submission as a constitutional amendment. The proposal included a supreme court (court of last resort), a court of appeals (an intermediate appellate court), and circuit courts (courts of general trial jurisdiction). The proposal called for administrative unification of these courts under the chief justice. The draft contained no provisions for district courts or for

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selection of judges. The drafters left these matters up to the discretion of the General Assembly. There was apparent division of opinion among the bench and bar as to the wisdom of including the lower courts in the revision. Many felt this would lessen the chances of passing an amendment that would ensure an intermediate appellate court. Lacking the accord that would have been necessary to ensure its adoption, the bill died in committee.

Need for Judicial Improvement

Immediately after the regular session of the 1972 General Assembly, the growing need for judicial improvement resulted in the formation of several committees charged with the task of drafting a new judicial article. Governor Wendell Ford established the Governor's Judicial Advisory Commission by executive order. Other active drafting committees were the Steering Committee of the Kentucky Court of Appeals, the Judicial Article Committee of the Kentucky Bar Association, the Courts Committee of the Kentucky Crime Commission, and the Interim Committee on Elections and Constitutional Amendments of the Kentucky General Assembly.

The first full draft of the judicial article relied upon previous experience. This draft, completed by the ad hoc committee in May 1973, provided for a four-tiered system unified for the purposes of administration under the chief justice. Judges at all levels were to be lawyers appointed under a merit selection process, and the question of retention in office was to be submitted for approval or rejection by the local electorate. The proposal also included sections relating to commonwealth's attorneys, providing that they should be full-time prosecutors paid by the Commonwealth and prohibited from engaging in the private practice of law. A provision for indictment by information was also included in the first major draft, as were sections creating the judicial nominating commissions and the Judicial Retirement and Removal Commission. Other features of the proposal were the funding of the courts by the Commonwealth, the jurisdiction of trial courts to be fixed by supreme court rule, and the inclusion of a district judge in each county.

The ad hoc committee sought funding from the local crime commission for full-time support staff. An initial award of $118,511 was made in 1973, and an additional $15,000 was added in early 1974. By January 1, 1975, another $150,000 was awarded, bringing the total to $283,511.

The staff was to research, compile, and disseminate information regarding the operations and needs of the court system at that time. The

staff performed services for all the diverse committees working on court reform.

The work of the drafting committee continued with staff assistance provided by the Kentucky Citizens for Judicial Improvement, Inc. The committee also enlisted the support and advice of the knowledgeable legal minds in the Commonwealth to refine the draft. Every clause was closely examined by the committee. The sections on commonwealth's attorneys and indictment by information were removed from the judicial article because they violated other sections of the existing constitution.

With funds now available through Kentucky Citizens for Judicial Improvement, Inc., it was possible for the drafting committee to obtain an accurate picture of the thoughts of the people about the needs of the judicial system. Through the Criminal Courts Technical Assistance Project at the American University, five experts in the area of judicial improvement were appointed to lend guidance to the Kentucky project. It was determined that the expertise of these individuals could best be utilized by holding a conference during which those Kentuckians already committed to the movement could avail themselves of the particular insight, experience, and expert opinion of these consultants through panel discussions in which both the panel and invited participants were equally involved.

A public conference on the proposed Kentucky Judicial Article was held in September 1973. About 100 participants from throughout the state attended and discussed with the panel of experts the substance of the proposed judicial article and strategies for achieving executive, legislative, judicial, public, and organizational support for the proposal. The judicial article was discussed, criticized, and evaluated section by section by the participants. Comments by the out-of-state experts paved the way for Kentucky to devise a judicial article that would conform realistically to the wishes of its citizens and yet provide an improved system of justice.

A Kentucky Citizens' Conference

On November 29, 30, and December 1, 1973, a Kentucky Citizens' Conference for Judicial Improvements was held. The Citizens' Conference was sponsored jointly by the Kentucky Citizens for Judicial Improvement, Inc., the American Judicature Society, the Kentucky Bar Association, the Kentucky Circuit Judges Association, the Kentucky Judicial Conference, and the Kentucky League of Women Voters. At the invitation of Governor Wendell H. Ford and Chief Justice John S. Palmore, approximately 140 citizens convened for three days of intensive study of the Kentucky court system. At the conclusion of the conference,

a consensus statement was issued that contained recommendations to the drafting committee. The statement declared that "Kentucky needs a unified, centralized, court system under the administrative control of the highest appellate court with appropriate rule-making authority."

An ad hoc committee of the Kentucky Citizens' Conference for Judicial Improvement was formed. The membership was composed of conference participants who later became members of the Board of Kentucky Citizens for Judicial Improvement, Inc. Its responsibility was to "take steps necessary for the establishment of a permanent organization which would examine the recommendations of the Conference and adopt a plan of procedure for action and fulfillment." Inherent in that charge was a distressed feeling that the present movement might not succeed in its attempt to secure passage of a new judicial article.

One of the most valuable tools utilized by the drafting committee to complete its work was a public opinion poll. Under the auspices of the grant awarded to the Kentucky Citizens for Judicial Improvement, Inc., an agreement was entered into with John F. Kraft, Inc., a public opinion polling organization, to conduct a survey of "Adult Attitudes in Kentucky toward Kentucky's Court System and Judicial Reform." The results of the Kraft survey, completed in December 1973, indicated that 73 percent of Kentuckians preferred to have their judges trained in the law. The poll also indicated, however, that the citizens of the Commonwealth insisted on the popular election of their judges, and rejected the concept of appointment by a judicial nominating commission. Respondents to the poll favored changing the system to provide for more equitable, economical, and efficient administration of justice but were lukewarm to state funding of the system. A close study of the survey revealed a strong desire for change but some reluctance to relinquish what respondents understood to be local control of the trial courts.

Some drastic changes in the proposed judicial article were made as a result of the survey. In order to increase the chances of passage of the judicial amendment by the General Assembly and by the electorate, a decision was made by the drafting committee to provide for election of judges on a nonpartisan basis and to remove the merit selection process from the article. Some elements of merit selection were retained, however, in the provision for filling vacancies through judicial nominating commissions. The concession was not as significant as it may have appeared, because experience had shown that nearly 50 percent of Kentucky judges initially reached the bench as the result of a vacancy.

Another major change in the draft was made for logistical reasons. Provision for a district judge in each county had been included in order to preserve the tradition of local courts and also to ensure the delivery of justice by judges trained in the law. Realizing that attorneys would not be

available to stand for election in many of Kentucky's 120 counties, the drafters provided an alternative. They made the judicial districts contiguous with judicial circuits, and in multicounty districts provided for the appointment of trial commissioners in any county where no district judge resided. It was provided additionally that a trial commissioner should be an attorney if one were qualified and available.

Submission of Judicial Article

After having been disseminated by the drafting committee to all the various committees involved, the members of the bar, and interested citizens, the proposed judicial article was drafted into bill form and submitted to the Kentucky General Assembly on February 4, 1974.

The bill was reported favorably out of the Senate committee and was passed by a slim margin. It was sent to the House of Representatives and referred to the Elections and Constitutional Amendments Committee for similar action.

During this same legislative session, attempts were being made to rescind the Equal Rights Amendment (ERA), which had been ratified during the previous session. Opponents of the Equal Rights Amendment were using any method available to secure a vote for recision, and efforts were made in committee to withhold the judicial article from the floor of the House until committee approval was obtained to rescind the ERA. Supporters of the judicial article who were members of the committee agreed to report the ERA measure out of committee in return for a favorable return on the judicial amendment. The article was approved by the General Assembly for a vote by the people in November 1975.

One of the first projects undertaken by the Kentucky Citizens for Judicial Improvement was the establishment of a speaker's bureau, composed primarily of judges and members of the Kentucky Bar Association. Speaking engagements were actively solicited from every civic and service organization in the state. The speakers were provided with copies of the judicial article to distribute and also with information kits that included sample speeches for use when addressing any type of audience.

The Kentucky Bar Association appointed a Judicial Article Committee in late 1974 to work closely with the staff of the Kentucky Citizens for Judicial Improvement. Staff members were invited to participate in nine regional meetings of the bar association. The Judicial Article Committee was later expanded to provide for judicial article chairmen in each county in the Commonwealth.

Kentucky Citizens for Judicial Improvement, with joint sponsorship by the Kentucky Bar Association, conducted a series of regional seminars

in key locations across the state. Response to the seminars was positive, although attendance in some cases was very low. Serving as panelists were judges, lawyers, law professors, and members of the League of Women Voters. The publicity generated by the seminars was excellent, and the participants left with the knowledge necessary to return to their communities and to educate their neighbors.

In addition to the regional seminars, the Kentucky Citizens for Judicial Improvement provided assistance in planning and arranging similar public meetings for the League of Women Voters, the Council of Jewish Women, Kentucky Federated Women's Clubs, and local bar associations. Over 500 industries and manufacturers were contacted; this effort resulted in the dissemination of more than 25,000 brochures in paycheck envelopes to their employees.

Organizational support was supplemented by focusing on formal education programs at the secondary and undergraduate levels. Lesson plans and program materials designed to help the individual teacher prepare a comprehensive lecture on the subject of judicial reform were developed for both levels. Some type of exposure to the judicial article was achieved on every campus throughout the Commonwealth.

Voting on the Constitutional Amendment

The total vote cast on the constitutional amendment was 395,543, with 215,419 for passage and 180,124 against. The favorable votes represented 54.46 percent of the total vote on the question, landslide proportions in any election.

Of the seven congressional districts into which Kentucky is divided, the amendment carried three and lost four. The four districts in which the judicial article was defeated were the first, second, fifth, and seventh, all rural districts in the far western and far eastern sections of the state. The amendment lost by 21,959 out of 199,205 votes cast in those four districts. In contrast, the amendment carried the third, fourth, and fifth congressional districts, which contain the state's largest metropolitan areas, by a combined majority of 57,666 out of 196,338 votes cast in the three districts.

The largest majorities against the judicial article were in the fifth and seventh districts, both of which are the mountain regions in the eastern part of the state. The area is highly conservative, having an Anglo-Saxon tradition of embracing the old magisterial system of justice. Even so, there are several counties in these two districts that voted in favor of the judicial amendment because of concerted efforts by several circuit judges and by dedicated citizens who felt strongly about the necessity for improvement of the judicial system.

Only 35 of Kentucky's 120 counties approved the amendment. The urban vote was the deciding factor. In many rural counties, however, the tally was as close as 20 to 30 votes difference, a factor that had a definite bearing on the final outcome. If the amendment had been soundly defeated in the rural areas, as many expected, the margin of majority in the urban areas would not have been sufficient to effect passage.

There were isolated counties across the state that approved the judicial amendment, surrounded by counties that failed to do so. Records of the Kentucky Citizens for Judicial Improvement indicated that most of these isolated counties were ones in which regional seminars had been held or in which there had been extensive educational programs conducted for civic organizations and in the schools.

Of all the factors contributing to the success of the judicial amendment at the polls, two joint endorsements stand out as having had a major influence on the voters of Kentucky. The candidates for governor, Julian M. Carroll and Robert E. Gable, issued a joint statement several weeks before the election in which they pledged their support of the amendment and necessary implementing legislation. The United States Senators, Walter "Dee" Huddleston and Wendell Ford, also issued a joint statement of endorsement.

During September and October 1975, the John F. Kraft Company conducted a follow-up survey to determine the major issues that had developed during the two-year period of activity engendered by the Kentucky Citizens for Judicial Improvement. The poll indicated that the electorate felt as strongly about modernizing the courts as they had in 1973, and predicted that "the judicial article is a winner."

Early in October, one month prior to the election, a new committee was formed with the sole purpose of raising money to buy advertising. This was necessary, because federal guidelines prohibit the use of federal funds to lobby for the passage of a judicial amendment. This organization, Kentuckians for Court Modernization, was composed of prominent attorneys and lay persons, whose responsibility was to solicit money for the placement of advertisements urging a "Yes" vote in newspapers and on radio and television. The media blitz began during the last two weeks before the election and concentrated on the urban areas of the state.

An analysis of the success of the judicial amendment does not produce any clearcut answers as to why the referendum was approved by the voters. Local officials across the state, who were for the most part in opposition to the change, claim that the judicial amendment would not have passed without the urban vote. Some claim that the final burst of media advertising before the November election substantially affected the outcome. An examination of the statewide survey completed in

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September 1975, however, reveals that the judicial article was already a winner.

Assistance of the Press

The single most effective aid in passage of the judicial reform was the press. Numerous articles were written discussing the problems of the old system and comparing them to the proposed system. Editorial support was widespread, and statewide media coverage was given to the educational campaign. The press, more clearly than any other institution, had seen the need for substantial improvement.

The most realistic assessment of the success appears to be that education of the public to the need for judicial improvement, one-on-one contact with people, involvement of community leaders and civic organizations, and the existing chaotic situation in the court system were the most important factors in achieving change. Further, it cannot be denied that the post-Watergate era produced a desire to make changes in government that would mitigate some of the distrust generated during and after the incident.

Implementation of Reform: Strategies, Theories, and Practice

Central Staff Personnel Issues

Most court reform literature neglects the role of the staff members who prepare drafts of proposed policies and procedures for modification and approval by appropriate officials and advisory groups. This oversight is serious, because competent staff work is instrumental in the detailed articulation and implementation of court reform.

In Kentucky, the nucleus of a staff had been assembled several months before the vote on the constitutional amendment. The staff consisted mainly of lawyers and others who had diverse court-related experience. Originally funded by a discretionary grant from LEAA for planning, the staff became state funded in 1976.

Assembling an experienced group with knowledge of the problems and peculiarities of the state is critical in the development of plans and the timing of changes. A conscious effort was made to locate employees who knew the state procedures but who also had diverse experience. A former budget director for the state, a former state commissioner of personnel, a distinguished law professor, an outstanding lawyer who was the city law director in the second largest city, several young attorneys, a former statute reviser from the Legislative Research Commission, and numerous experienced state employees were assembled for the effort. Especially significant was the mix of older, seasoned employees and eager young people.

The number of staff required to carry out the responsibilities in a major reform effort is another area where there are no guidelines. The judicial article mandated abolition of all lower courts and incorporation into the court of justice of all clerks, court reporters, judges' secretaries, and court administrators within two years. Assessment of the tasks to be accomplished and the period in which action had to be taken was essential in determining the number of staff required. Since it was not possible to predict fully the workload and the time needed to conduct research and make recommendations, we reserved funds from the outset to be able to meet the unknown problems as they arose. Much reliance was placed on LEAA funds because they were tied to specific projects such as records management, court facilities, and accounting.

Recommendations were made by visiting administrative directors of the courts for North Carolina and Oklahoma, the regional director of the Southern Regional Office of the National Center for State Courts, and The American University technical assistance consultants. These recommendations proved to be quite valuable in developing the office to manage the new system.

The legislative program to implement the new article covered more than 20,000 separate statutes, which also affected each aspect of county government. The courts most affected were totally locally funded and operated. Using computer word search, the scope of the legislative program was revealed. By inquiring about the words "judge," "court," and "clerk," over 12,000 statutory references were identified. Staff were assigned by subject area and required to produce an outline of areas affected by the judicial article. The staff then reviewed the outlines and developed issue statements, with recommendations for changes on each topic.

Background references such as the ABA Standards, The American University technical assistance reports, National Center for State Courts reports, and reports by the American Judicature Society were relied upon in developing specific recommendations. Law review articles and management reports from other states provided additional guidance. These reports were presented to advisory committees for final recommendations.

A key element in this period was the dynamic relationships among the staff and the client groups (advisory committees). The intense pressure from those opposed to court reform had the effect of solidifying the staff. The identifiable outside opposition was coupled with opposition within the court system. Many judges were not pleased with the change, because historically they had enjoyed complete autonomy in managing their courts. We were constantly confornting rumors generated by certain influential judges and clerks, attempting to discredit proposals being considered. These cross-currents were ultimately quite damaging to

the opponents' best interests as will be seen in other sections dealing with personnel.

Planning

Most periodicals advocate clearly defined goals and objectives in planning, This author adopted the exactly opposite view, because the opponents clearly outweighed the proponents in volume, if not in influence. One way to balance the situation was to work regularly with the advisory committees without making major pronouncements. This approach has its problems but may be useful in a highly emotional atmosphere. Further, each staff member was involved in planning. This kind of involvement is instrumental to accomplishing goals. No special planning unit was created, because it was our intention to make those responsible for planning the change also responsible for managing that area of concern upon implementation.

The planning methodology used was to develop program goals and objectives, to link them with a specific time frame for accomplishment, and to specify the staff people responsible for each step. This plan advised the whole staff of the work anticipated and who was involved.

Weekly meetings of all staff, clerks, and secretaries were used to review progress. This review gave each staff member the benefit of each other's effort and a view of the overall progress. The nucleus of the planning staff remained in the administrative office of the courts. The continuity of experience has proven to be very valuable in the ongoing management of the courts.

Decision Making

Over 200 people reviewed the staff work in the planning stages. The final decisions were made by the advisory committees, the supreme court, or the General Assembly.

The method of presenting materials was designed to enhance the advisory committee meetings and to offer specific recommendations. Analysis of each issue was followed by a specific recommendation, allowing the committees to keep track of decision making and to maintain an active role in the process.

Much time was spent on the decision-making process. Knowing when to precipitate a major decision or a minor one required much reflection and strategy. Close coordination with the governor's chief of staff allowed for close monitoring of the progress and the problems. Differentiating the significant and minor problems became a major task as opposition intensified before the special legislative session.

Task forces working in the office met regularly to discuss problems and develop recommendations. The primary emphasis was on the legal structure of the courts. A mistake in judgment was made at this point,

because there was not a sufficient appreciation of the administrative dimension of the change. Most attention was paid to general structure but not enough to detail. Specifically, the staff did not anticipate the magnitude of the tasks of providing for items such as supplies, forms, and equipment. Problems that later became apparent could have been anticipated had the administrative staff been more involved in this area.

Number and Location of Judges

The publicity preceding the adoption of the judicial article centered on having a judge in every county. This publicity was directed at satisfying the perceived need for each county to have its own judge. The possessory nature of this interest reflected the intent of local officials to control their own judge. Local control is a meaningful issue, particularly with courts. The old maxim that most people want justice for everyone else and mercy for themselves was precisely the point in this debate. The threat of a judge from an adjoining county coming to do justice created a sense of unwelcome impartiality. Adding to this controversy was the introduction of the theme of government being taken from the people. Correcting excesses or an improvement in the quality of service emerged as less important than the emotional issue of local control.

Historically, judicial positions in Kentucky had been authorized for political reasons. Rarely was any consideration given to comparisons of workload, an oversight that resulted in too many general jurisdiction judges and a maldistribution of the work. These problems, magnified by the 56 different districts, were particularly perplexing because there had been a similar allocation of support staff throughout the court system without regard to relative need.

The advent of the district court system provided a singular opportunity to allocate judges on the basis of comparative workloads. It was also quickly apparent that the politicians had many ideas about how this distribution of judicial resources should be accomplished. The alternatives ranged from a judge or judges in each of the 120 counties to approximately 90 judges for the state.

In contemplation of the problem of determining the number of judges, the secretary for the Department of Finance was persuaded by the author to fund a weighted caseload study for judicial and nonjudicial personnel. The purpose of the study was to provide an objective analysis of the personnel needs for the whole state, in order to produce an unbiased recommendation on personnel needs and to provide a comparative base for the future.

The experience in California courts had indicated that the weighted caseload approach provided a systematic method for addressing this perplexing problem. Although total agreement with this approach was

not expected, the needs outweighed the risks. There was disagreement within the judiciary, the administrative office of the courts staff, and the clerks' ranks about the study and its usefulness, which later diminished its credibility. Most of the opposition came from people who were unfamiliar with this approach.

The major obstacle to a successful study was the availability of the caseload information necessary to make projections. Field surveys were undertaken to gather statistics from which to make predictions. It was difficult to rely on these data, since there had never been any organized effort to collect lower court caseload information. Since many aspects of the fee system were tied to numbers of cases, the case figures reported tended to be inflated. Specifically, prosecutors and clerks were remunerated on the basis of the number of indictments. These figures were translated into the number of cases, contrary to the method of counting by defendant.

Ten counties were selected for in-depth analysis on which the projection for the rest of the state would be based. An index of typical factors found in all counties was used to determine which counties would be selected for the study. The selection of the study counties was also premised upon the existence of information systems and the degree of cooperation available from the local officials. Generally, everyone, except in Jefferson County, was quite cooperative. In Jefferson County (Louisville), the probate commissioners, who had a highly lucrative business on a part-time basis, did not provide information as required. Some commissioners made more than $30,000 a year for part-time jobs.

For a period of one month the lower courts reported the time they spent on each matter before them. These reports were tabulated and then weights by case type were developed. The planning staff was cognizant of the problems with the accuracy of the statistics and evaluated each district's results independently. Where it appeared that districts of similar population had widely disparate results, adjustments were made based on personal knowledge, field visits, or consultation with local officials.

The results of the study were released to the public, the advisory committee of judges, and the legislature. Considerable debate resulted. Some people approved the results as sound, while others criticized their every aspect. Again, some judges disputed the approach and therefore attempted to discredit the results.

The total number of judges recommended by the study was 123. The supreme court evaluated the study and made a few minor adjustments but finally submitted the request for 123 judges. The governor advocated 92 positions. A legislative proposal called for 176 positions. Heated legislative hearings ensued, but the legislature finally enacted a com-

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promise by creating 113 positions to initiate the district court system in 1978.

It was closer than Kentucky had ever been to having a reasonable balance between the number of judges and the work of the courts. Since that date, one position has been added, and it appears that in 1980 more positions will be created. Additional judgeships will probably be created in those districts where two or more judges were originally recommended but were not authorized. The number of judges remains controversial in many areas. Some people continue to demand "their own" judge for each county.

A similar approach to the same problem still provides the best basis for a decision in what otherwise becomes a political donnybrook. Emotion and community pride rather than detachment and analysis tend to dominate discussion in this area. Although there is room for these factors, each must be weighed before adopting a position.

Trial Commissioners

The judicial article provided that in any county in which no district judge resided there would be a trial commissioner, whose duties would be prescribed by the supreme court. These commissioners were required to be attorneys, unless there were none qualified and available in the county. The debate centered on whether the commissioners should have the adjudicatory powers of a judge.

Some advocated that the commissioners should have full judicial powers, since that would be much cheaper than having full-time judges. It also was contended that the trial commissioners should be allowed to practice law. The supreme court thought the trial commissioners should have limited duties and not be permitted to adjudicate cases.

A unique meeting in the supreme court conference room between the members of a joint judiciary committee and the court provided the forum for the final resolution of the debate. The result was that the trial commissioners were left with limited duties and the supreme court committed itself to working closely with the General Assembly in meeting any special needs of any county. To date, there are 79 trial commissioners spread throughout the state. Trial commissioners have been allotted to counties where there is too much work for one judge or where there are unique geographical characteristics in the county. Commissioners have also been approved to provide judicial services to communities far from the county seat where requiring the public and the police to journey that distance is too burdensome.

Clerical Personnel

The weighted caseload approach was taken in determining the number of needed clerical personnel. The clerks had been fee officers and they

paid their deputies out of the fees. No personnel system existed for the clerks' offices. In fact, no one could determine precisely how many deputy clerks were working in the clerks' offices. Many surveys, field visits, and ambiguous figures provided the background for a continuing debate among the clerks, the planning staff, and the legislature. Clerks were an independent political body that was integrally involved in the local power-brokerage and patronage system.

The rationale for study in this area was the same as for judges. A factor that existed here and did not exist with district judges was resistance to change. Many clerks resented the new duties and any involvement with the state. In fact, many of the clerks tried to discredit the study by indicating they did not need so many people as the study recommended. This position was taken partly out of ignorance: the clerks did not understand the study nor did they fully appreciate the duties that would be placed upon them, and without their support a poor result was inevitable. The legislature authorized only 200 additional positions to run a system replacing one that had employed more than 1,200 people.

During the budget hearings on the number of personnel, the chairman of the Appropriations and Revenue Committee reported that the committee had consulted with a leading judicial reformer, who said this kind of study was not reliable. Since no other state had taken this approach to determine personnel needs, that would seem a reasonable position. Many other states that had undergone judicial reform, however, had "grandfathered in" many of the existing personnel; this was not being done in Kentucky. In addition, more sophisticated states had established personnel systems, which Kentucky lacked.

Seven additional sources of personnel information were relied upon in developing the statement of personnel needs. Those pieces of information: social security report of wages; state retirement system report of wages; monthly financial reports from the circuit clerks to the AOC; caseload reports; current and future circuit clerk duties; detailed job descriptions provided by circuit clerks; and the 1977 salary survey done by Associated Industries of Kentucky (which provides accurate and extensive salary comparisons by Kentucky employers). In addition, field visits to each clerk's office provided information about such matters as the location of offices and adequacy of space.

This point is worth elaborating, because personnel costs constitute almost 75 percent of the cost of the court system. Judgments made regarding these costs are crucial, for they will obviously affect how well a system can perform. Legislative knowledge on this subject was very limited, because the legislature had not been required previously to pass on this part of the court's budget. A substantial educational effort was required to acquaint the members with the operations of the court.

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When the General Assembly acted upon this erroneous advice and appropriated sufficient funds for only 200 additional jobs, it was obvious to the staff of the administrative office of the courts that this conservative funding would be clearly inadequate. Meetings with state officials, including the governor, were held to apprise them of the effects of the funding level on the operation of the courts. The governor agreed to permit the expenditure during the first three months of the new budget of all monies appropriated for the first six months. This agreement provided the minimum adequate staffing level for clerks. He further agreed to support a supplemental budget request to provide the additional necessary funding. The statutes granted the elected clerk the authority to hire and fire and gave the administrative office of the courts the authority to determine the personnel numbers and qualifications. Thus a joint effort was required to arrive at the number of personnel for each clerk's office. Since that time, the central staff have travelled frequently to each locality to discuss personnel needs with the clerks and to arrive at a joint statement of need.

Court Reporters and Recording

Court reporters historically had been independent contractors who received funds from the county. Reporters in the principal cities received higher salaries than their counterparts in the rest of the state. No examination or certification process existed for anyone taking these positions. Reporters also had substantial amounts of time to engage in private work.

The state would not authorize full-time pay for a job that required four to eight hours a week in a courtroom. Requirements that the court reporters report to the judges or court administrators were opposed by members of both parties. Further, little information was known about the reporters' work demands. Communications were inhibited by the dearth of reliable information.

Reporters were classified by the administrative office of the courts personnel and compensated according to the state pay scale. They were paid for transcripts for indigents. Inadequate funding at the outset plagued the effort. Decisions to raise or lower salaries were made on the basis of funding and correcting inequities between and among all personnel. Negotiations to create a contractual arrangement with reporters, who would then maintain their private businesses, were not successful. Planners contemplating change might well find this one of the most difficult areas to manage.

Alternatives to court reporters have successfully been explored and instituted. Several circuit courts are now using tape recorders. Judges' secretaries operate the recorders and transcribe the tapes.

In district court the decision was made early to utilize tape recorders

because the accuracy of the record could be assured with a tape recorder. This was clearly the wisest fiscal choice. The availability of competent court reporters could not be assured; therefore, plans were developed to install tape-recording devices. Competitive bidding and testing of all makes of four-channel recording devices were carried out by the administrative office of the courts. After a committee of judges and clerks selected the firm of Gyyr Odetics to provide the machinery, each machine was used by six courts for several weeks.

There was a 9 percent mechanical failure rate for the machines during the first year of operation. Most of the problems were caused by the operators; the field visit log demonstrated that more training of personnel was required.

The untranscribed tape from the district court is taken to the circuit court as the record on appeal. The circuit judge listens to those sections of the tape on which the appeal is based. Copies of the tape can be made for all parties at a nominal cost. There is no excessive delay in the process, and it is a very economical way to process appeals.

Kentucky has the largest installation of tape machines in the United States. Even with the problems noted above, the machines have performed up to expectations. The number of appeals from district court, 671 out of 600,000 cases, clearly demonstrates that this decision was the proper one from the standpoint both of cost and of accuracy.

District Court Jurisdiction

The constitutional amendment provided that the General Assembly would determine the jurisdiction of each court. The former lower courts had jurisdiction over juvenile cases, misdemeanor, traffic, probate, and civil issues up to $500.

The consensus was that the district court jurisdiction should be identical with that of the former lower courts. Some observers, however, wanted to increase the civil jurisdiction from $1,000 to $5,000. This dramatic increase would have had a significant impact on the case filings in circuit court and possibly would have overloaded the district court.

In order to provide accurate information to advisory committees and legislative bodies, the staff visited 10 sample counties and surveyed their case filings for a six-month period. After reviewing the information, the General Assembly decided to adopt the limited proposal and move the jurisdiction to $1,500. The result has been the shifting of 25 to 30 percent of the civil cases from circuit court to district court, as predicted in the survey.

Another proposal was made that would have consolidated the treatment of family issues in one court. Many conflicts had arisen because the former lower courts had jurisdiction over divorce, child

custody, adoption, and termination of parental rights. This split in jurisdiction often found members of the same family with two entirely separate support orders for different children. This legal red tape caused unnecessary perplexity, anxiety, and stress to many families.

The staff recommended that juvenile matters be placed in the circuit court, thereby consolidating all family issues into one court and eliminating the potential for conflicting orders. As a result of vociferous objections from the circuit judges, who simply did not want these cases, this proposal failed and the district court retained juvenile jurisdiction. Despite the decision, the issue remains a challenge for future reformers.

Since criminal misdemeanor and traffic jurisdiction had been conceded to be properly in the district court, there was no serious discussion on those subjects. Parking violations, however, were removed from the court and became the responsibility of the city government. If a violator does not pay, the city has the right to file a complaint and prosecute in district court.

There was some discussion on whether probate jurisdiction should be included in the court system. Many county judges wanted to retain these matters. Again it was argued that these cases properly belonged in the court indicated in the constitution, and they were therefore placed within the district court's jurisdiction.

A small claims division of district court was created for the consumer. This court has proven to be very popular with the general public in dealing with "minor" cases. A limit of 25 filings per year was placed in the statute, however, to prevent abuses by business interests. In summary, the General Assembly created the following jurisdictional limits in the district courts: small claims up to $500, traffic, misdemeanors, probate, juvenile, and civil cases up to $1,500.

Court Operations

Immediately before the implementation of the new court system, there was an opportunity to evaluate other major dimensions of court operations. The areas of concern included filing fees, juries, and traffic laws.

Filing Fees. The courts in Kentucky had relied upon fees for their financial support. This factor led to the development of numerous practices among attorneys, lawyers, clerks, and judges that needed close examination. The cost or fee system was tied to each item of work; pieces of routine work were often characterized as significant, thereby commanding a separate fee.

This system also fostered differences among counties. It was often said no two clerks would charge the same amount for the same work. In fact, the filing fees in the 120 counties varied from $20 to $70. Complicating the picture was the fact that the prosecutor also derived fees from each

criminal case. This archaic method of funding government services presented a picture of cumbersome, unaccountable, and confusing financing understood by only a few. Abuses were so commonplace that they were an accepted way of doing things.

The constitutional change, however, required that the courts be uniform in administration and operation. Bringing about uniformity was complicated by the demand for fiscal-impact determinations of each recommended change. Specifically, at times the executive and legislative branches were more concerned with the costs of the new system than they were with determining and resolving the differences in practices among counties or with providing improved services. This overriding concern forced the staff to analyze the change to generate funds for the state treasury. Repeated statements to the effect that courts should not be required to pay for themselves fell on a deaf audience. This problem was particularly acute because most people viewed the previous system as financially self-supporting.

A survey of other states' legislation in the area of filing fees revealed a wide disparity of approaches. The North Carolina example was useful in its simplicity and was used as an initial model. In Kentucky a flat filing fee intended to cover all expenses for civil litigation was fixed at $70 for the circuit court; additional fees for jury trials were instituted. This figure was developed after a study of average costs per case was presented to the General Assembly. In fact, the results of the study indicated the average costs in the metropolitan counties to be more than $100.

The abolition of the step costs and fee system further provided an opportunity to reevaluate the accounting system used by the clerks of court. The transition from a fee system to a simplified accounting system was a major goal of the reform.

Court reform literature often neglects the clerks of court and their problems. The AOC staff spent more time developing the administrative procedures for the clerks than for the judges, because the clerks constituted the most significant obstacle to change. Their functions increased from being only the clerk for the general jurisdiction court to being the clerk for all the municipal and county court operations. Further, they had not run for office anticipating these expanded duties that were thrust upon them. Gaining their support and cooperation was essential to successful implementation of new records-management procedures and new accounting and personnel procedures.

The local officials had developed guidelines for local fees but they were next to useless for accounting purposes. The Commonwealth of Virginia had recently completed an accounting study for its clerks. The similarity between Kentucky and Virginia was of real value in assessing

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examples to be considered. Communications with officials in Virginia disclosed their satisfaction with the system.

A grant of $90,000 was secured from LEAA. After competitive bidding, the Arthur Young Company was selected to devise a uniform accounting system. An advisory committee composed of clerks, judges, and legislators was created to guide the study. The Auditor of Public Accounts and members of the State Finance Department also served on the advisory committee. Considerable coordination with the state treasurer was required.

Upon completion of the study and field testing in October 1977, regional meetings to train clerks in the new procedures were conducted by AOC staff using problem-solving approaches as a teaching tool. Regional field auditors from the state auditor actively participated in each program and followed up the training with field visits.

A follow-up grant was approved for purchase of the necessary equipment to implement the accounting system. A considerable debate with LEAA ensued over whether automated cash registers constituted EDP equipment under LEAA guidelines. This debate delayed payment for the equipment for five months; it was finally approved only after state funding had been secured.

The accounting system has been an unquestioned success. The clerks who most opposed the change are now its principal proponents. The fiscal integrity now gives them the security to manage their affairs with more certainty. This system also has enabled the local courts to provide public information on court operations that previously was not available. Many local newspapers publish quarterly reports on the courts' fiscal operations.

Most of the impatience with the legislative process came from the absence of sound financial information. Taking a cue from this interest, the staff placed special emphasis on developing an accounting system that would immediately demonstrate the system's improvement to the public and legislature.

The legislature convened during the new system's first month of operation. The production by the staff of documented information marked the first time firm data had been presented to the public and General Assembly. Achieving dramatic results early aided in setting the stage for developing an appreciation of the new court system.

Juries. The jury legislation had not been reevaluated in many years before 1978. Under the new system the clerk served both circuit and district courts. This fact required an analysis of the jury. Historically, each judge had called his own jury; cooperation among judges was uncommon. In fact, many judges were chagrined that this analysis was done, because they relied upon the jury for reelection purposes.

Surveys of all other states' legislation were made to identify common

practices and successful ideas that have improved jury management. These surveys revealed few common patterns. The legislation was drafted with jury pooling as the central purpose. Legislative committees drafted a different version of the jury legislation, based on distrust of clerks and judges. The committees' proposal embodied a highly complicated method for jury selection, but provided no funds for implementation. This bill would have complicated the selection process with bingo-type machines.

The Judicial Council developed for the supreme court some administrative rules of jury management that explicitly contradicted the legislation. The supreme court concluded that certain aspects of jury management are matters of procedure subject to the rule-making authority of the court; therefore, rules were necessary for the orderly management of the court.

Jefferson County (which includes Louisville) initiated a jury pooling system one year before the effective date of the new bill. This system saved an average of $3,000 a month for each month of operation. It has received acclaim from public and press. Similar programs now instituted in Fayette County report an annual saving of $60,000.

Traffic Laws. In development of the internal procedures for the clerks' offices, it was quite apparent that there had to be a uniform approach to managing traffic citations. When each locality had its own police court, this was not a problem. The portent of different sizes of paper, and different methods of organizing the information coupled with the obvious need for uniformity, required the development of a uniform traffic citation.

An even more significant factor in this area was the absence of accountability in the previous system. The system could not report the number of cases, nor the amounts of money collected. "Fixing" tickets was an integral part of the local and state political process. High-ranking state officials could always arrange for a "filed away" citation. State legislators could count on this method of enhancing their political leverage.

Local judicial officers who catered to this approach similarly relied upon it in bestowing favors. In fact, when one died and his replacement appeared in the office, he would find drawers stuffed with old citations. In a few counties a local practice developed that "foreigners" (persons from outside the county) were the only ones who ever had to pay.

Legislation to bring order where none existed was introduced by the chairman of the Implementation of Judicial Reform Committee, Senator William Sullivan. In his opening remarks he characterized the legislation as a cornerstone to the reform effort, since removal of this practice would accomplish one goal of the reform—more accountability.

The legislative debate on the bill openly revealed the extent of the

legislators' involvement in ticket-fixing. Press coverage of this fact aided the bill's passage.

Another benefit of this system is the establishment of a series of prepayable offenses that considerably lessens the burden of the court and the public. By addressing this dimension of the court's business in an administrative manner, the court is not required to consume so many resources to process these cases.

Case Filing and Processing

The old lower court system had poor recordkeeping. In fact, the absence of standard recordkeeping procedures limited the ability of the staff to prepare, organize, and present to the legislative committees materials on the status of the lower courts. The effects of this recordkeeping system on the citizenry have been most recently demonstrated by the indictment and conviction of several former local court officials for concealing the dispositions of lower court cases and for misappropriating fine monies.

The large order and judgment books were abolished under the new recordkeeping procedures. The whole case record is stored in a file with a disposition card reflecting each step in the process. This system was designed both to improve the quality and to reduce the quantity of records. A committee of judges, lawyers, and clerks reviewed staff recommendations in each area. Much reliance was placed upon the federal and Colorado procedures.

Transition Rules

Rules entitled "Administrative Procedures of the Court of Justice" established transitional procedures as follows:

Rule 1 required that the circuit clerk be notified of the title and nature of each pending case that was docketed before January 2, 1978, at which point the circuit clerk gave it a new case number and assigned the case to the district court. Further, all other causes or proceedings pending in the courts of limited jurisdiction were deemed to be pending in the district or circuit court; the related papers were to be transmitted to the clerk for numbering and docketing, preference being given to those cases in which a party was held in detention on January 2, 1978.

The second rule provided in essence that the causes and proceedings pending in courts of limited jurisdiction should include only the following:

1. Civil actions in which no judgment had been entered and in which some pretrial step had been taken within six months before January 1978.

2. Probate actions in which application for the probate of a will, appointment of an executor, or appointment of an administrator had been filed but no final settlement had been accepted.
3. Juvenile actions in which a petition concerning a child had been filed but no final disposition had been made.
4. Criminal actions in which a complaint, citation, summons, or warrant had been issued but no judgment had been entered. In no case pending longer than one year on January 1978, however, were the papers to be transferred to the district court until a warrant had been served.
5. Finally, all other cases not disposed of and filed in expired courts of limited jurisdiction could be transferred to the district court by motion of any party.

Apart from the physical transfer of cases, other loose ends were treated by the transitional provisions. One such rule provided that where an expired court of limited jurisdiction had disposed of a case up to a factual determination, the district court judge could complete the disposition of the case. If the judge was not satisfied that he could perform those duties because he did not preside at the trial, he could in his discretion grant a new trial. If the judge did not grant a new trial, appeals from the judgments entered would be docketed in the circuit court and tried anew, protecting the right of the individual by granting him a trial before a judge trained in the law. (Such trials de novo had existed under the old system.)

Another rule related to the judgments of expired courts. This rule was necessary for motions for relief from judgments, and cases in which the convicted defendant defaulted on the payment of a fine according to the payment schedule. The moving party was required to file a certified copy of the relevant judgment, along with appropriate motion for action by the court, to bring that case within the jurisdiction of the court.

The General Assembly, in allotting civil jurisdiction to the district court, diminished the jurisdiction of the circuit court. At the advent of the district court, thousands of cases now within district court jurisdiction were pending in the circuit court. The supreme court determined by rule that cases currently pending in a court should be decided by the same court, thereby preventing the inundation of the district court.

A rule relating to the accounting and management of the money respecting cases in transition also was adopted. This rule provided that when a case is transferred to the district court, the portion of any cash deposit that exceeded the cost of services already rendered was to be transferred to the clerk for deposit in the state treasury. The uniform fees and costs in force on January 2 would then apply to all cases transferred

to the district court and all cases pending in circuit court on that date, and in no case would step costs continue to be assessed. In all cases filed before January 2, 1978, the difference between the amount of the cash deposit by litigants and the uniform filing fee, and the amount of step costs owed but unpaid, would be assessed and collected by the clerk.

The effect of these rules was to provide an orderly, systematic transition. They gave much useful guidance because they were widely distributed to the bar and the clerks in regional meetings and other meetings of the judiciary. Although many questions arose during this period, no serious or significant problems were encountered; the cases pending have now been disposed of and judgments entered.

As the date of January 2, 1978, neared, the lower court judges who were going out of business dismissed thousands of cases around the state as their parting gesture to the local citizenry. This act, not entirely based on goodwill for the new system, had the effect of providing the new judges with a relatively clean slate and a clean docket. It also provided them with the opportunity to initiate the new system with few carry-over cases.

Before 1978, there were no standard forms of filing procedures in the lower court or the general trial courts. The fee system, which provided an inducement for local clerks and prosecutors to multiply steps and inflate the case count in order to generate more money, meant that each jurisdiction had its own approach to these matters. There were over 500 forms in use throughout the state for all kinds of matters. Many of the forms were clearly contrary to the current law, but they continued to be used. The filing procedures had developed over a period of time with much local autonomy and relatively little uniformity.

The problems with the forms were identified primarily by a committee of judges, clerks, and lawyers; they were presented and discussed, and a series of standard forms was developed. The 500 forms were reduced to 75, including a battery of accounting forms that previously had not been used.

Much controversy arose regarding the issue of uniform forms, as the judges previously had much autonomy in this area, and pride of authorship inhibited the willingness of many courts to adopt new forms. Some of the judges felt the proposed forms were legally deficient.

Although these problems have been met and resolved, there still remains in many areas a degree of resentment of the state's intervention. This resentment is inevitable in a period of change. One year after the change this sentiment had been reduced as people had become accustomed to the new procedures.

Court Facilities

In the early months after the passage of the judicial amendment, local

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courthouses throughout the state had four attributes:

1. There was no relationship between local government and the state government, except that a circuit court was located in the courthouse. Thus, there was no mechanism for change, improvement, or management, beyond often-scarce local resources.
2. There were no design criteria or standards for court facilities. This was due in part to the lack of experience with the whole new district court level. There was also no mechanism for adopting national court design principles, except through occasional contact with the architect.
3. The physical plant in most counties was unable to accommodate a district court system in addition to the existing circuit court system.
4. Further complicating most of the early interactions between the state and local governments was the constant resistance to change and the concern over the changing role of local government created by the new amendment.

Over the next two years, the relations between state and local governments improved. The major improvements came as a result of developing mechanisms for directing resources into local court facilities.

Several philosophies and role models were examined before the Special Session of the General Assembly in 1976. The General Assembly was unable to set a clear policy with regard to court facilities. A mixed approach toward putting state resources into county property was the result of the legislation and budget document. One million dollars was provided to compensate for court space. The existing total court space was barely over one million square feet. Since it was impossible to rent that much square footage, a fair market value rent was offered only for space that had not been used for court purposes before.

The administrative problems and inequities of this approach soon became apparent. Those who had in the past provided poor facilities often got more than those who had recently constructed a new building. Further, there was little stability in such an arrangement, because of the whims of negotiations and disparities among local real estate markets. When one county found what the neighboring county had received, the demands of the former in the negotiations were related to that knowledge. Moreover, this method required a state lease, which in turn mandated that the state fire marshal inspect and approve the use of the facility. Most court facilities could not pass a fire inspection, and this failure was a major deterrent to arranging the facilities.

During the 11 months before implementation of the judicial article, the staff negotiated and arranged for space in 150 localities, fostering the construction of several new court facilities to house an entire district court.

The chief justice recognized the problems with this technique and requested the staff of the administrative office of the courts to develop alternatives. A review of the method that the federal government uses to finance local post offices provided the idea for the present legislation. The federal Office of Management and Budget aided staff in its development.

In the General Assembly Session of 1978, the relationship between the state and local governments was changed; the state began to pay its fair share of both operating and capital costs. The state kept the right of prior approval over additional capital expenditures, but all control, management, and ownership would remain with local (county or city) government. The exceptions to this pattern occurred when leasing of privately owned space was the only option available.

With the essential question answered of who was responsible for what, the legislature also approved the necessary financial means by providing about eight million dollars for facility reimbursements during the ensuing two years.

The new approach to court facilities narrowed the remaining problems to a single major issue: new construction. Although over the 47-year life expectancy of a new facility, the state's share of the cost would be returned to the county, the typical cashflow requirement of the county was usually a 20-year mortgage. This meant that new construction had to be underwritten primarily with local funds; such funds often could not be obtained in the poorer counties.

Although motivation for new construction still remains a problem, the current system appeals to most legislators and local officials as equitable and realistic. The approach of sharing the burden of costs has been a major positive step in improving state and local affairs.

The new legislation also created a Court Facilities Standards Committee, which, besides developing standards, is also empowered with review of any new capital improvement costs in which the state will be asked to participate. As this committee develops and defines its role of improving court facilities, another mechanism for change will begin to affect positively the court facilities in Kentucky.

Another problem area is the ownership of equipment being used by the courts. Several attempts to find an equitable method to compensate courts for their equipment were unsuccessful. If, however, they purchased the equipment in the three years immediately preceding the passage of the judicial article, the net court revenue act assured them they would receive credit for those purchases. The state court system is now gradually replacing all county-owned equipment and returning it to the county. This process will take several years.

Returning Monies to Local Government

A commitment by the gubernational candidates in 1975 to return money to local governments elicited the support of the Municipal League and the cities for passage of the judicial article. To fulfill that promise the General Assembly enacted the Net Court Revenue Bill, guaranteeing that each local unit of government will continue to receive its net court revenue from the state.

Arriving at a figure representing net court revenue was a difficult problem. The state Department of Finance had to ascertain the level of revenue from the courts for the three years before passage of the judicial article and had to deduct the operating costs from that figure. The average of the net figures for those three years is the amount that would be returned to the local unit of government.

In the process of implementing this legislation, it soon became apparent that the cities had a low-overhead, high-rate-of-return operation: they made money on the traffic courts, which processed cases quickly and cheaply. The counties, on the other hand, had jurisdiction over matters that did not have a comparable rate of return: juvenile, probate, felony preliminary hearings, and civil disputes are time-consuming and do not generate revenues comparable to those of traffic cases.

The result of the legislation was to return approximately $5.6 million annually to local units of government, with only 15 out of 120 counties receiving funds. The remaining counties were losing money on their courts. This fair approach to cost sharing has generally been well received.

Organizing Development: Retirement and Removal Commission, Nominating Commissions, and Judicial Council

Retirement and Removal Commission. The judicial article authorized the creation of a disciplinary commission for the judiciary. The administrative office of the courts drafted the statute in constitutional language. Before deciding on the final rules and procedures, experts were invited from California, the American Judicature Society, and Alabama to meet with the commission. The results of the two-day meeting were embodied in rule proposals to the supreme court.

The chief justice requested that the judges consider adopting or making recommendations on a code of judicial conduct, which has been discussed for several years. The decision being imminent, the judges finally acted and made several recommendations. The supreme court considered the recommendations and formally approved the ABA Code of Judicial Conduct with a few changes. The court also enacted the procedural rules.

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Staffing for the disciplinary commission was provided originally by the administrative office of the courts, but the potential conflict of interest required that the commission acquire its own staff. A director was recruited, and retired FBI agents were hired as field investigators.

No judges have been removed from office, but the commission has undertaken its duties in a cautious and quiet manner. Attempting to institutionalize a sense of accountability within the judiciary has been difficult, but the commission's perseverance and the support of the supreme court have been essential to success.

Judicial Nominating Commissions. A vacancy within the judiciary activates the Judicial Nominating Commission. The commission publicizes the vacancy in local media and receives applications. The commission may interview the applicants. Generally it meets on a date certain to discuss three nominees, whose names are sent to the governor for appointment.

The staff of the administrative office of the courts surveyed another state with similar provisions, to recommend to the supreme court procedures for the commissions. The initial approach was not to try to write numerous detailed rules but rather to explore a variety of procedures before arriving at the specifics. This approach has worked smoothly; after two and one-half years' experience the supreme court recently published the first rules.

Judicial Council. The Judicial Council existed before the judicial article, but its activities have been quite limited in scope and quantity. A new statute was enacted in 1976 to create an advisory body to the supreme court.

The council was envisioned as a sounding board for ideas and recommendations for improvements. It is both a study group and a consultant on anticipated changes. It is composed of the chairmen of the judiciary committees in the legislature, four circuit and four district judges, the chief judge of the court of appeals, three members of the bar, the president of the circuit clerks association, and the chief justice as chairman.

The council has met every two months for the last two years. During that time it has been instrumental in developing regional court administration projects, reviewing the court recordkeeping and accounting systems, recommending rule changes, and reviewing selected statutes in order to improve the courts. It provides a forum before which members of the judiciary may express their concerns about the courts. The agenda is sent to all judges two weeks before the meetings, and minutes after the meetings. There is much consultation among the judiciary on activities of the council.

Stages of Implementation

This section discusses how the foregoing changes were instituted, and with what degree of success. Education is a very significant aspect of translating the reform from paper to reality. The required changes of behavior have not occurred within certain levels of the judiciary, but have occurred in the offices of clerks and with the new judges. Realizing that the simplest, most direct method of conveying large amounts of information was to develop manuals of procedure, the staff set out early in 1977 to produce these for judges and clerks. Through this method, uniformity of practice also could be achieved.

Staff assigned to records, forms, and internal operations were responsible for working with a committee of clerks and judges in developing the circuit clerks' manual. The manual was the first effort to bring administrative uniformity to clerks' offices. Field visits a year after it was developed have demonstrated that those offices utilizing the manual are the best organized; conversely, offices not utilizing the manual are functioning poorly. The supreme court incorporated the clerks' manual by reference in the rules, thus making its use mandatory among the clerks. Enforcement of compliance with the manual has been cautious.

The accounting manual was initiated with a similar purpose. The supreme court also incorporated the accounting manual by reference in the rules of court. Compliance with accounting procedures is more closely monitored by the administrative office of the courts staff than is the circuit clerks' manual, because of the concern for fiscal integrity.

When the manuals were completed, regional seminars were conducted for all clerical personnel. These seminars used an Ardenhouse approach, with actual problems being discussed and with the manuals used as references in solving the problems.

Since there were no incumbent district judges, the materials for them were developed with the advice of some existing lower court judges, several unopposed candidates, and general jurisdiction judges who had served in the lower courts. A bench manual describing the procedures and statutes was developed by the Department of Justice's Bureau for Training at the request of the administrative office of the courts. The manual was designed with a series of checklists for the judge to use from the bench. It was intended to be particularly useful to new judges unfamiliar with their position.

In addition, one full week was devoted to a special training program for the newly elected judges before they took office. It was designed to provide a review of the law on all subject matter within their jurisdiction, court administration, judicial ethics, pretrial release, misdemeanor diversion, and juvenile services. It also provided an opportunity to develop a closer unity among the new judges than had existed in the

circuit courts, because the district court judges were all taking office simultaneously.

Evaluation Criteria

Court reform literature is littered with articles and notions about evaluations. Current articles center on the absence of comparative information about the situation before and after court reform. Unfortunately, most of the information that the social scientists wish to have is not readily available in a lower court system that keeps no formal records. In the recently published *Court Unification History: Politics and Implementation,* Larry Berkson and Susan Carbon discuss and recommend several criteria as applicable in evaluating the success of a court-reform effort. This section discusses each of their suggested criteria and their applicability to Kentucky. Although some of the suggestions cannot be readily answered owing to the absence of sound data, an attempt will be made to apply their criteria to the Kentucky reform. The following criteria are suggested.

Accountability

One of the foremost dimensions of Kentucky's court reform and court unification has been the creation of accountability in the whole system. Before the judicial article, no one person or group was responsible for the operation of the judicial branch. The passage of the judicial article and the clear vesting of responsibility in the supreme court and the chief justice have brought accountability for the operation of all the courts. This accomplishment has provided a forum for the assertion of leadership and direction by the chief justice in managing the entire judicial branch of government, consisting of more than 1,800 employees, judges, and clerks. The supreme court, in assuming its supervisory role over the entire system, further identifies itself as the agency responsible for the operation of all the trial courts. This transformation from a fragmented, locally autonomous system to a responsible and accountable statewide system has had far-ranging effects. The effects range from concern for how and where money is spent to the rate of disposition of cases and to personnel and budgetary matters. Thus, the legislature and public have made one body a point where they can make inquiries or register complaints when they feel impropriety exists.

Another significant dimension of accountability is the establishment of the Judicial Retirement and Removal Commission. This commission in the first year has disciplined judges whose behavior was not consistent with the Code of Judicial Conduct, or who did not comply with the law of the state. Its existence, although sometimes criticized by the judges, has brought accountability into the system in areas where none had

existed. Before creation of the commission, impeachment was the only means of addressing improper or illegal judicial behavior. Impeachment had only occurred once in the history of the Commonwealth, and so it was an inept tool for dealing with judges whose behavior was unacceptable.

The last areas of accountability are those of money and of case information. Uniform accounting and recordkeeping systems are major steps to resolve those issues. For the first time the courts can report to the public, the legislature, and the governor on how and what they are doing with the business that comes before them. Absence of this accountability in the past brought many of the court's actions into disrepute. In many local newspapers, the dispositions in all cases before the courts are now printed on a daily or weekly basis. This reminds the public that the courts, as public agencies, are accountable for each case that comes before them.

Flexibility

The second recommended criterion is flexibility. Under a county-funded and -operated court system, the number of judges and cases did not concern the judiciary at large; the concern was limited to one jurisdiction. The judicial article now gives the supreme court and the administrative office of the courts the flexibility to match resources with needs. This flexibility has been exercised in an unusual way in Kentucky, through the creation of administrative regions.

The regions are governed by judges elected by their peers. They are not run by court administrators but are, in fact, run by the judges. This regional concept is a highly fluid arrangement, intended to provide the flexible response required in a highly complex organization. Further, it is expected that these regions will develop into the core of an organizational structure, on which decentralization of authority and responsibility can be founded. They also increase the opportunity for the local judges to work on shared problems to benefit an area of the state.

Empirical Evidence

The third area recommended as an evaluation criterion is the use of empirical evidence to show, to justify, or to otherwise quantify the success of the reform. An example of such evidence is the number of appeals from the new district courts to the circuit court, which are taken as indicating dissatisfaction with the lower court judgment. In the new judicial system every litigant has a constitutional right to at least one appeal in every criminal or civil case. Under the old system the trial de novo method was relied upon for correcting error in the lower courts. This costly method of correcting errors has been eradicated.

In the first year of operation of the district court, there were more than 600,000 cases filed in the district courts. In only 671 cases were appeals taken to the circuit court. That only such a small number of the district court cases was appealed should be clear evidence of public satisfaction with the disposition of cases at the lower court level. This figure provides a direct contrast to the last year of the old lower courts, when there were 1,500 appeals from the lower courts to the circuit court. Although this figure may have been artificially high because of the trial de novo, the change has resulted in a savings of money to the litigants by cutting the number of appeals in half. Further, the court time of the police, the prosecutor, the witnesses, and the judge has been reduced a greater amount than that suggested by the lower number of appeals, since the appeals are on the record and not de novo trials.

The use of tape recording to make the record at the district court and of the cassette as the official record of the lower court proceedings has further expedited the appellate process and reduced the cost to the litigant as well as to the public. This appellate procedure is not common in the United States; it further distinguishes the effort that the Kentucky courts have made to reduce the cost of litigation while expediting the appellate process.

Higher Quality of Justice

Berkson and Carbon recommend, as a measure of the achievement of success, the presence of an enhanced system effectiveness and a higher quality of justice. This is a very broad category, and the author is unfamiliar with any recommended guidelines for its measurement. If the press reaction can be taken as a surrogate measurement of this criterion, local and state newspapers surveyed during the last year indicate that the response has been nearly 100 percent positive. News articles from all over the state have repeatedly praised the substantial achievements of the new court system, citing the higher quality of justice provided and the greater concern of the judges for the constitutional rights of the people appearing before them. In addition, the League of Women Voters surveyed all their local chapters and did an in-depth analysis of each of the local courts. Their preliminary report indicates that the League of Women Voters, as an impartial body, believes that the new system has greatly improved the quality of justice at the local level, and has brought dignity and decorum where none existed. If the reactions of observers are any indicator, one would have to conclude that the Kentucky court system has, to a degree, achieved the success anticipated by the reform.

Burden on Public Participants

Another recommended area for evaluation is the amount of burden

placed on the public participants. This requires a substantial amount of information that is not available. It may have been that the mere existence of countless magistrates and city police judges throughout the state presented less of a burden on the citizenry by virtue of their sheer numbers. This point may have to be conceded; but it has to be weighed (as must all others) along with the other dimensions the court system brings to bear in each case. For example, one suggested criterion is the amount of individual attention given to each case. In the old system there was no information on this amount. In fact, many of the county judges report that they gave great attention and spent lengthy periods of time attempting to consult—to mediate disputes and serve as confessors and social workers/advisors to the public. This practice may have resulted in more attention to certain cases; it is something that is hard to weigh and compare. The district judges report, however, that they too are spending lengthy periods of time with litigants in potential family disputes and other situations, attempting to resolve these problems.

This conciliation practice is peculiar to certain areas of our state, particularly eastern Kentucky where family ties and extended family relationships are a significant part of the social scene. Resolving family disputes or working with families is an integral part of every public official's life. The press of business may at times prevent the new judge from taking the time to resolve the dispute, and he is unable to bring to bear the legislative or executive functions and resources that the former county judge had available. A recent effort by the administrative office of the courts staff to measure times for disposing of cases in the district court did find they were approximately the same under the old and the new systems, with the district court taking more time in misdemeanors and civil matters.

One satisfactory measure of the burden on the public may possibly be the amount of money spent on juries. Jury pooling began in 1977 and the result of the first year was a reduction throughout the state of $100,000 in jury costs. This was achieved even while the right to a jury trial was being extended to district court, where it did not previously exist. Specifically, $2,700,000 was spent on circuit court juries in 1977 and $2,600,000 was spent on both district and circuit court juries in 1978.

Nature of Dispositions

The nature of the disposition of cases is another suggested criterion. Again, comparing the old and the present systems is virtually impossible, because we do not have adequate data on dispositions under the old system. The only comparative data available are those on uniform traffic citations kept by the state police. The nature of the traffic dispositions has changed dramatically. The state police data indicate that under the

old system approximately 64 percent of the individuals issued traffic citations were found guilty and fined for violations. In the first 12 months under the district court, approximately 85 percent of the people were found guilty and paid fines.

A fair disposition system, treating each case on its merits, clearly has been established by the district court. Some politicians have expressed chagrin and dismay at the impartiality with which the judges are disposing of cases. Dispensing favors instead of justice was an integral part of the local politician's leverage. How this issue is evaluated, therefore, depends on how it is perceived. Clearly, from a judicial perspective far more integrity has been brought to the bench. From the public view, the enforcement of the law is much more effective. If one is interested in response to individual self-interest, however, then the politicians' use of the courts for their own ends might be more popular.

Legal Representation

The quality of legal representation at the local level is another issue suggested as an evaluation criterion. The public defender's office has been under great strain since the inception of the district court system. The *Argersinger* decision has never been fully implemented at the lower court level. The people appearing before the magistrates and county judges rarely had attorneys, since the right to counsel commonly was not extended to them by the county or the county judge. Thousands of people went through the system never knowing they had the right to an attorney, never knowing they had a right to contest the charges, and only rarely receiving jury trials.

Since the inception of the district court the demand for public representation has increased fourfold. For example, in Fayette County, the second largest county in Kentucky, the Legal Aid system has had four times the number of requests to provide representation to individuals before the courts. This in itself is a manifestation of the judiciary's greater concern for the constitutional rights of the individual. Further, it suggests that the system has met the public expectation of being more fair and equal in protecting the rights of the citizens.

Comprehension of Proceedings

The extent to which litigants comprehend proceedings is also suggested as a criterion. This is a nationwide issue; it is not found only in Kentucky, nor does it relate particularly to court reform. Since the schools stopped educating children about the legal process, this problem is becoming more acute throughout the United States. Many citizens do not understand court proceedings, the judicial system, or the relationship of the judiciary to the executive branch of government. Although measurement of this criterion is very difficult, it can be suggested that

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because a record is made in every case and a copy provided the litigant at nominal cost ($2.00), he has been extended this right, or at least access to comprehension of the proceedings. The judges have been asked to make every effort to explain the proceedings.

Efficient Processing of Cases

An additional suggested area of evaluation is the efficient processing of cases. The rate at which cases are disposed of can be another measurement of the system's success. One way to evaluate this is the pressure put on prosecutors to dispose of cases expeditiously. Most prosecutors in Kentucky are part-time. Since the new court system's inception, the prosecutors have been complaining repeatedly about the time and work required to prosecute cases in district court. Further, they are complaining that the district judges, who are not permitted to practice law on the side, are demanding too much of them. The judges are requiring that they be in court to prosecute on a daily basis, which is much more often than the prosecutors have been accustomed to. This infringes upon their ability to handle their private law practice, which is still permitted in Kentucky.

It may be suggested that examining the rate at which cases are being disposed of contradicts the suggested criterion about the amount of individual attention given each case. Reconciliation between these two criteria is not easy. The absence of comparative information makes this analysis impossible. Two other criteria suggested are causes of adjournment and number of continuances. Neither of these pieces of information is collected by the administrative office of the courts, nor are they collected on a routine basis by the trial courts. They were not collected under the old system either.

Simplified Litigation

Another suggested criterion is simplified litigation. Under our old system we had multiple lower courts; under the new system we have a single lower court of limited jurisdiction and a general jurisdiction court, with exclusive jurisdiction in each. The clear delineation of jurisdiction and appeals has satisfied this criterion.

Central Administration

Central administration has been labelled as a major problem in court reform by authors Gallas and Saari. It has been a significant issue in all governmental reform since the 1930's. It is an issue about which there are many opinions, pro and con. Though it does not lend itself to quantifiable measures, there are several significant factors that can be used to avoid the pitfalls of central administration. One of the approaches is enhanced coordination among trial courts. Coordination is ac-

complished in Kentucky by regional meetings each spring and by regular meetings in the fall at the judicial colleges. This increased local cooperation among the trial courts has already shown benefits, in that successful ideas and implementation strategies at the local level have been transferred to adjoining counties.

One of the major problems at this time is inadequate local court participation in the decision-making process. This problem has arisen in part because of very tight time frames specified in setting up the system.

The supreme court, however, has authorized a change in a part of that process which is now being implemented. The court has adopted unit budgeting, the principal purpose of which is to establish an equitable, simple, and rational method of supporting requests for additional staff and equipment at the local level. This method will change the budgeting process from the previous approach, under which the budget was prepared by central staff. It should be noted that because of time constraints in the past, the budget has really been prepared centrally of necessity; the clerks and judges in the field were either not in elective office at that point or were in the process of attempting to adapt to and institute the new system. With that transition completed, an opportunity now exists for the court actively to involve more people in establishing priorities and requests for funds. While historically there may not have been much participation in this process, the trend has certainly changed toward much more open and active involvement of all concerned.

Rule-Making Practice

Another dimension suggested by Berkson and Carbon is how rule making relates to the trial courts and the extent to which it has been responsive to local needs. The major complaint from the bar is that the supreme court is too quickly promulgating rules in response to problems, rather than too slowly. In fact, many attorneys are quite distressed that the court is changing rules every two or three months. Nevertheless, it was clearly understood by the court that many things required by the judicial article should be approached by making as few rule changes as possible, by seeing how problems developed and then making necessary rule changes.

The rule-making process must also permit the local courts to initiate and develop their own local rules. This process is governed by the state only insofar as the local rules are reviewed for conformity with state rules. Thus, the local rules embody local policy and practices and establish local court procedures. Disagreements occasionally arise between the administrative office of the courts and the trial courts regarding their rules, but this process has worked smoothly. This is a further indication that successful implementation has included both local and statewide rule making.

Equitable Distribution of Resources

Equitable distribution of resources is always a problem when managing an entire system. This point is made constantly, not only in courts but in all areas of public service. It is one of the areas in which there has been notable success in Kentucky. The smallest counties, for the first time, have received from the state adequate staffing, supplies, and technical assistance. For example, the personnel of the clerk's office are compensated on a standard pay scale based on the individual's experience and qualifications. This means that those in the smallest counties are compensated for their ability, as are those in the larger counties.

The higher-caseload counties require more resources. Jefferson County (Louisville) accounts for about 21 percent of the workload of the state and receives about 22 percent of all the monies available to the system. If this example indicates that the higher-caseload counties receive adequate support, then we have also satisfied that criterion. (In fact, Jefferson County receives an even larger percentage, because at least 30 percent of the administrative office of the courts resources are allocated to that county.)

Effects on Other Agencies

Another criterion that has been suggested and should be considered is the side effects on other agencies in the implementation of the new court system. The greatest effect has been noted above; that is, the public defender's office has had an enormous increase in the demand for services as compared with that under the old system. This has led the administrative office of the courts to work with the public defender on applying for an LEAA grant to provide 25 new public defender positions in certain areas of the state. This joint effort has enhanced the cooperation between the two agencies and improved the ability of the state to respond to local needs.

The prosecutors, as noted earlier, have experienced a similar effect in the district court. They have been requested to perform more services in court than they had performed previously, and that trend is expected to continue. As long as there are part-time prosecutors and full-time judges there is an inevitable potential for conflict.

Before and After

One other recommended criterion calls for a comparison between the former and the reformed systems. This comparison, like others, is most difficult. Kentucky does have the advantage over most other jurisdictions because there were public opinion surveys prior to the judicial article. These are a readily accessible, documented source of information about public attitudes concerning the courts. Two previous public

opinion surveys (1973 and 1975) provided valuable information with regard to the public's views and expectations about courts and also identified areas for reform.

Attitude toward the change depends upon whose ox was gored. County officials who lost considerable political leverage are not pleased, although they are more tolerant toward the court reform than they were 12 months ago. The bar is pleased in some areas and not in others. Some lawyers do not like the new recordkeeping system, nor are they fond of rule making by the supreme court.

Law enforcement officials have expressed considerable praise for the reform. In their judgment the system has more integrity and has substantially reduced the political brokerage business. Also, the new system is tougher on convicted criminals and has resulted in greater use of incarceration.

The news media have been very favorably impressed, as shown by their editorials. No major newspapers have advocated a return to the old system; in fact, they have uniformly expressed affirmative support for the system.

Not everyone is pleased. The legislature drastically escalated traffic fines in 1978, as a result of the termination of an LEAA grant to support law enforcement training. The higher fines were blamed on the cost of the district court. This misrepresentation to the public no doubt left many people dissatisfied with the new system.

Conclusion

Implementation of reform has more to do with attitudes than most people realize. In the past, court reform literature has not discussed how to manage change. It was assumed that the alteration of structure by rule of statute would be adequate to produce change.

It has been learned that court reform implementation must include a substantial effort directed toward changing the attitude of system participants if one is to gain their compliance with the reform. Reform is and should be recognized as a never-ending process. Changes in the system should be continuous to maintain a flexible, dynamic judicial system. Judicial leadership must continually be seeking improvement.

Court Reform on Trial

Why Simple Solutions Fail

A TWENTIETH CENTURY FUND REPORT

Malcolm M. Feeley

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Chapter 1

THE COURTS AND CHANGE

CONSIDER this chilling composite.

A twenty-two-year-old male is arrested for burglary and assault with a deadly weapon, both felony offenses carrying maximum penalties of ten or more years. At arraignment the judge notes that the accused has a prior record and faces serious charges involving a gun. He sets bail at ten thousand dollars. Unable to afford a bondsman's fee, the accused is remanded to the county jail. Two months later the judge reduces the bond to twenty-five hundred dollars, and relatives of the accused scrape together enough money to secure his release. Three months and six court appearances later, he pleads guilty to a single count of criminal trespass, a misdemeanor, and receives a five-month sentence with two months credited for time served in pretrial custody.

Everyone involved agrees that this case constitutes a problem. The arresting officer, who strongly suspects this offender of a string of burglaries, will point to the reduced bail and light sentence as evidence that the courts do not care. The public defender who is handling the case will point out that his client, presumed to be innocent until proven guilty, spent two months in jail solely because he is poor. An attorney familiar with the

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case might privately admit that, if his colleague had reviewed the police report carefully at arraignment, he could have challenged the assault (gun) charge at the outset, possibly obtained the immediate release of his client, and probably avoided the jail sentence altogether. The defendant's family is distraught because of the financial hardship the case has brought on them. The prosecutor—the third assigned to the case—is frustrated because she could not locate one key witness and another proved unreliable. The judge is irritated because the case appeared on his calendar eight times before it was finally resolved. A social worker attached to the court is concerned because the defendant has an alcohol and drug problem that no one is doing anything about. After several trips to court, the proprietor of the burglarized store feels twice victimized—not only did he lose money during the robbery, but he has now lost money every time he left his store in order to appear in court. The one available witness, a passerby who claims to have recognized the intruder and alleges that he hit her with the barrel of a gun before he fled, is indignant at the lack of respect accorded her by the prosecutor. For his part, the defendant claims that, finding the door to the drugstore open, he entered to see if anything was wrong. In the aftermath of the case, the defendant might cynically conclude that he got off easy or that his attorney—a public defender whom he did not know, did not pay, and rarely saw—had sold him down the river.

Even if he could have heard the exchanges above the noise, a first-time observer in the courtroom would not have been able to understand what was going on. But, noting that the accused was black and that all those in a position to affect his fate were white, he might have drawn a conclusion of racial discrimination. A writer covering the courts during this period might write an article using this case as an example of the bargain-basement inducements used by the courts in order to cope

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with overcrowding, both of the courts and the jails. Sometime later, at a meeting of the county board of commissioners, a budget analyst might cite this case in a report on the fiscal implications of judicial leniency—county, not state, governments typically bear the cost of maintaining inmates sentenced to jail for periods of one year or less. Including this case in a sample that produces a statistically generated profile of burglars, a criminologist might estimate that this type of offender has probably committed a dozen or more burglaries and is likely to be rearrested within the next two years.

No one is satisfied. All of them think they have a solution: pretrial detention, release on recognizance, full enforcement, elimination of overcharging, expansion of police powers to interrogate, better attorneys, fixed sentences, improved prison financing, rehabilitation programs, more coordination, victims' rights, attacking root causes.

Some of these solutions, of course, cancel one another out. Others are beyond the reach of the courts. Many are based upon incomplete or inaccurate information.

Let us again consider the case: although the accused was charged with possession of a deadly weapon, the police were not able to produce a gun. The only *evidence* about the gun is the statement by the woman who claimed to have seen and been hit by it when she encountered the accused in the doorway to the drugstore; the druggist did not report seeing a gun, and although the accused matches the druggist's general description of the burglar, the druggist is very hesitant when making a positive identification. The police report also states that the woman did not appear to be seriously injured, that she refused offers of medical assistance, and that she "seemed intoxicated." She also failed to keep some of her appointments with the prosecutor, and a number of details changed each time she recounted the incident. And although the proprietor of the

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drugstore reported the loss of several cameras and transistor radios, in addition to cash, and the accused was quickly apprehended based on the key witness's identification, none of the items listed was ever recovered, and the money involved was not large or identifiable. Prosecutors privately acknowledge that there is an incentive for property crime victims to exaggerate losses for insurance and tax purposes.

There were various reasons for continuances: a probable cause hearing, a conflict in the defense attorney's schedule, an apparent malfunction in the computerized calendar system, a sudden resignation in the prosecutor's office, then a vacation, and an effort to locate another witness who had moved out of town.

Was the court lenient? Although the defendant had a history of prior arrests, he had only two prior convictions, both on breach of peace, and had never done time. Court records reveal that five months is above average for trespass cases. Harsh? Frustrated by the inefficacy of probation and by reports of the failures of drug and alcohol treatment programs, the judge feels he has no option other than to put the offender behind bars. But aware that violence and sexual abuse are commonplace in state prisons and impressed that the offender's family had stood beside him, the judge hopes that he will be safer in the local jail and that he will be better able to maintain ties with his family. Still, the judge, ambivalent about the sentence, expresses hope that the offender may be eligible for daytime work release after a month or so, unaware that this program has been eliminated in recent budget cuts.

Although a composite, the process just described illustrates the range of issues raised every day in courthouses across the country. As troublesome as it is, the above picture is an improvement. Twenty-five years ago, the accused would probably

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have remained in pretrial custody until conviction. He might have been subjected to sustained interrogation by the police and without benefit of counsel might have pleaded guilty to the original charges and other burglaries as well. Or had he been able to scrape together money for an attorney, the attorney might have traded on his political connections and perhaps some cash to pave the way for swift release and dismissal of charges. Not too long ago, the option of even considering alternative treatment programs would not have been available. And until a few years ago, if this incident had occurred in certain regions of the country, and if the questionable witness had been white, the prosecutor might not have challenged her credibility.

Despite frustrations, the seemingly intractable nature of the problems facing the courts, and the hydraulic quality of the courts, changes have occurred. Whether these changes constitute an improvement is, of course, a matter of judgment. And as we see, one of the problems facing the courts is that they are held accountable to a bewildering array of standards by people with quite distinct views. While I am explicit about my own point of view, the purpose of this book is more generally to examine attempts at planned change in order to illuminate the nature of courts. The terms *reform* and *innovation* are used to convey the perspectives of their proponents and not necessarily my own views.

In the past two decades, the four major innovations I examine (bail reform, pretrial diversion, sentence reform, and speedy trial rules), have been tried repeatedly in order to overcome some of the problems alluded to above. Each has been planned with an important objective in mind. Each has been replicated in a number of jurisdictions. Each is considered a serious and important enterprise. Each needs to be examined

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in detail, as does the process of change itself: What is necessary for successful change, and at what critical points can a particular innovation succeed or fail?

If we understand the structure and the functions of the courts, and if we are able to view them in historical perspective, we can see that there has been change over time. Now it is important to determine whether this change is attributable to the innovations that will be examined or whether the change has taken place in spite of or concurrent with them.

The four reform efforts that must be analyzed more fully are:

Bail Reform. Pretrial release agencies, as they are generically known, have been set up to supplement or replace traditional money bail by offering nonmonetary release on recognizance. They rely upon the "expert" opinion of disinterested third parties who collect and review information on the accused's ties to the community and make an informed recommendation to the judge about pretrial release. The Vera Institute of Justice, in New York City, is the recognized pioneer in this type of bail reform.

Pretrial Diversion. This refers to formal programs in which defendants are enrolled, thus eliminating the need for adjudication by the courts. Typically, these programs offer short-term counseling, job training, or placement services in lieu of prosecution. (The Manhattan Court Employment Project has been the model for such programs throughout the country.)

Mandatory Minimum and Determinate Sentencing. These are efforts to curb judicial discretion in the sentencing process. Although they rest on quite different philosophies, both are designed to impose constraints upon judges at sentencing. Four well-known sentence reforms are the Rockefeller Drug Laws in New York, the Bartley-Fox Gun Law in Massachusetts, the

Michigan Mandatory Minimum Firearms Sentencing Law, and the California Determinate Sentencing Act.

Speedy Trial Rules. Speedy trial rules attempt to make practical the Sixth Amendment guarantee of the right to speedy trial. While these rules take many different forms (for example, court decisions, court rules, legislation), their common purpose is to establish time limits within which charges against the accused must be readied for trial. Many speedy trial rules provide for dismissal of charges if time limits are exceeded. The Federal Speedy Trial Act of 1974 is important both in its history and its implications.

Fragmentation: The Various Meanings and Functions of Courts

The process upon which certain important reforms have been grafted has been shown at work; the structure underlying that process must also be examined.

The criminal court is a political agency, a public service institution that operates within the constraints of scarce resources and faces conflicting and competing demands from a multiplicity of publics and the organizational exigencies of its own personnel. Perhaps its most visible quality is fragmentation: it is fragmented in its organization, its operations, and its goals. This is not an aberrational feature of the court, which traditionally has been a flexible and responsive institution. In order to fully appreciate its function, its flexibility must be accepted along with its lack of efficient organization and coherence. The courts should not be seen merely as bureaucratic organizations committed to clear and well-defined purposes—they should be understood as arenas in which a range of competing and con-

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flicting interests collide and vie for attention. Fragmentation, with its accompanying dislocation and disagreements, is natural to them. The courts are run on a system of interaction whose efficiency and end product are more akin to Adam Smith's notion of unplanned, unconscious coordination in the pursuit of self-interest than to any theory of rational organization.

Courts and Games. It is instructive to look at fragmentation in the courts in terms of a multiplicity of games. Judges, prosecutors, defense attorneys, defendants, clerks, police officers, bailiffs, sheriffs, bondsmen, witnesses, and all the others whose activities take them into the courthouse pursue distinctly different interests and purposes and may understand their participation in the process in entirely different ways.

Each of these players is participating in a different game, or in several different games. The games may or may not be centered in the court and may or may not directly involve other participants in the criminal process. It is also important to understand that the courtroom is simply one of several arenas in which these games are played; actions outside the court also affect the way the criminal process is structured.

For instance, the police are engaged in a public order game, responsive to citizen complaints about domestic violence, public disturbances, and personal safety. One result: they often make arrests to keep the peace, without any intention of initiating successful prosecution. Or they overcharge to compensate for other offenses they cannot prove.

Prosecutors are involved in public order and civic virtue games. "Bad" people are vigorously pursued; when serious charges cannot be proven, lesser, more easily proven charges may be invoked, so that the bad people do not escape official sanction altogether.

Defense attorneys have their own variation of this game.

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Criminal procedure, rules of evidence, and threat of trial are not only channels within which the search for truth is conducted—they are also used instrumentally in the effort to obtain the most desirable outcome.

The *court* in this perspective becomes a convenient shorthand term for a collection of individuals who, while sharing common concerns and interests and knowing that they must work together to process criminal defendants, are also engaged in a variety of other enterprises not formally acknowledged in the law. It is the combination of the two sets of functions that gives meaning to their actions and shapes their activities. From this broader and more functional perspective, court behavior, which is often characterized as confusing, is more understandable. Indeed, it becomes normal.

THEORETICAL BASES OF FRAGMENTATION

Fragmentation in the courts is reinforced by the theory behind the American criminal justice system, which has three basic components: the adversary process, due process, and professionalism.

The Adversary Process. In his book *Courts on Trial,* Jerome Frank characterized the adversary system as embodying a "fight theory of justice."[1] He traced its origins to actual physical combat, in which participants in a dispute sought to ascertain truth by means of a duel or contest. From this ordeal by battle, there slowly emerged ordeal by words. Although the weapons of combat have changed, the underlying theory has not. It remains: truth is most likely to emerge through active combat between partisans, through attack and counterattack. The intensity of self-interest, so holds the theory, maximizes the likelihood that truth will emerge. It is, in the words of Richard Posner, as if the court were "in the position of a consumer forced to decide between the similar goods of two fiercely de-

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termined salesmen,"[2] each pointing out the benefits of his own product and the deficiencies of his competitor's.

The analogy to the competitive market is instructive. Like the theory of the free market, the theory of the adversary process rests on a belief in the capacities, initiatives, and self-interest of participants. The primary role of neutral third parties in both the legal and the economic sphere is to see that the adversaries pursuing their own distinct and clashing interests do so according to the "rules of the game."

Contrast this view with the argument that truth is best pursued and most likely to be obtained by someone who has no stake in the outcome, a disinterested inquisitor who investigates all sides of an issue and makes judgments. One might think that the judge—the disinterested party who must render a verdict—would assume this role, but he does not. The judge, in the Anglo-American tradition, does not set the charges, has no independent investigative staff, and possesses little authority to seek out witnesses. Rather, his role is to sit back and umpire the process as it unfolds before him. What the adversaries do not present, the judge does not consider.* Indeed, if they arrange to settle the dispute prior to appearing before him, in all but rare instances the judge does little more than ratify their decision. Many judges even cede their sentencing authority, content to prescribe the term proposed by the prosecutor.

In the United States, there is no ministry of justice, no criminal justice czar, no one to see that everyone works together to pursue common objectives. Rather, there are distinct of-

*Judge John Sirica was widely praised by the public for his tenacious efforts to uncover the "truth" in his handling of the lesser offenders in the Watergate scandal. But he was severely, although quietly, criticized by his judicial brethren who felt that his tactics—conditionally imposing long sentences on those lesser offenders in an effort to induce them to reveal incriminating information about the "higher-ups"—severely strained the judicial role. Judge Sirica's response to his critics was that he used as best he could what limited resources he had at his disposal. This exception is, I think, ample demonstration of my point.

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fices—police, prosecutors, defense attorneys, judges—drawn apart still further by the doctrine of the separation of powers and the theory of the adversary process. Like market theory, adversary theory relies heavily on the belief that from the clash of partisan interests, the most satisfactory results will emerge.[3]

Due Process. One of the animating features of due process is fear of authority, a concern with the potential for abuse of power by the state. It is for this reason that functions are separated, authority fragmented, and power circumscribed. Hence, even the prosecutor, who is an official of the state, is regarded in many respects as if he were a private individual, someone whose power and capabilities are roughly equivalent to those of the defense.[4] The power of the state is diminished still further by the insulation of the judiciary. Judges comprise a distinct and independent branch of government, presumably far removed from the pressures of the executive enforcement officials.

The rules of criminal procedure—due process—force the state, to borrow Herbert Packer's phrase, to run through an obstacle course before someone can be judged guilty. In order for evidence to be admissible in court, it must be obtained without violating strict rules. The accused cannot be compelled to testify against himself. Changes must be clearly specified. The accused has the opportunity to confront witnesses and offer defenses. These rules are designed to do more than accurately determine whether the accused did or did not actually engage in the crime in question; they are designed in part to restrain officials, regardless of guilt.

The detailed formalism of criminal procedure facilitates fragmentation; so also does its open-ended discretion. Despite the popular conception of courts as adhering to abstract rules at the expense of common sense, and despite the rigid formality of many stages of the legal process, criminal procedure per-

mits vast discretion at each of several critical stages. Prosecutors have virtually unlimited and unreviewable discretion in setting charges and in deciding whether or not to prosecute at all. A substantial portion of convictable cases do not go forward for no other reason than that the prosecutor feels the interests of justice are not best served by prosecution. Often, this occurs because the accused has agreed to make restitution, or to join the army, or the complaining witness decides to make an appeal on the behalf of the accused. It is but a small step from this traditional form of discretionary practice to plea bargaining, a process of dropping or reducing some charges in exchange for a plea of guilty and the assurance of likely sentence.

A cornerstone of due process is the right to trial. Despite this, there is no prohibition against waiving the right. Indeed, the primary responsibility for invoking opportunities and rights is in the hands of the accused himself. This key and critical event in the obstacle course is only optional. So, too, are other steps in the criminal process: the right to rely on counsel, the right to challenge witnesses, and the right to confront accusers. The optional nature of this process contrasts sharply with the theory of inquisitorial process of many European countries, among them France, Germany, and the Scandinavian countries. In these countries the law assigns responsibility for developing cases to an independent investigator who is to pursue his task of making a case against the accused regardless of the wishes of the accused and, often, of the victim as well. Ironically, in theory, the American adversary system rests upon the presumption of innocence and requires the state to prove guilt; yet in practice American courts rely almost entirely on the guilty plea, which eliminates the state's need to *formally* prove its case. In contrast, European inquisitorial systems—long popularly associated with the abuses of coerced confessions and the like—rely extensively on the report of an investigator

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charged with the task of marshaling *all relevant material on the case* and depend less on self-conviction through pleas of guilty.[5]

Sentencing is another critical stage at which American criminal procedure allows considerable freedom. By law and custom in the United States, sentencing authority usually rests with judges. Their freedom has been reinforced by statutes giving them wide latitude to set terms and an almost total lack of appellate review of sentence decisions.[6] This discretion has caused more than one judge to criticize American sentencing practices on the grounds that they are, in essence, "lawless."[7]

Professionalism. One reason for the courts' apparent disorganization is that they are staffed by people whose professional norms foster independence of judgment and autonomy. Professionalism presumes a sphere of competence and fosters collegiality. The norms of professionals in general and of the legal profession in particular are, in many respects, antithetical to the norms of bureaucratic organization, which promote hierarchy, supervision, and control, and eschew autonomy.

Superficially, the courts are organized in hierarchical structure, with appellate courts supervising the quality of work in lower courts. But this process of supervision is both passive and expensive, and as a consequence it is not used with great frequency. Those with the greatest stake in appeals, the accused, are typically without resources. If they claim ineffective assistance of counsel—as they very well might—they face overwhelming obstacles to voicing their claims in an appellate court. Similarly, although they are often large organizations, public defenders' and prosecutors' offices rarely closely supervise staff attorneys. Deference to professional judgment is the norm.

While the adversary process itself is often defended as a de-

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vice for self-regulation, the norms of professionalism remain as the primary constraints on and guides to conduct of courthouse officials. Yet here as elsewhere the weaknesses of professionalism as a system of regulation are widely recognized.

THREE ASPECTS OF FRAGMENTATION

Value conflicts inherent in the criminal law, multiplicity of organizations, and influence of the larger social and political environment—the three aspects of fragmentation—further influence the functioning of the courts.

Value Conflicts. In his book *The Crime of Punishment,* Dr. Karl Menninger argues that imprisonment is barbaric, that it serves no deterrent or rehabilitative value, and that it reinforces criminal tendencies.[8] He articulates a rehabilitative ideal, which substitutes treatment for punishment. In developing this thesis, Menninger expressed views shared by a great many people, including lawyers, judges, and corrections officials.

In contrast, James Q. Wilson in *Thinking About Crime* argues that the rehabilitative ideal is naïve and soft-headed.[9] Instead he offers a deterrent and incapacitative justification for punishment. This position holds that the function of imprisonment is either to serve as an example to deter others from committing crimes or to isolate from the community those who cannot abide by society's rules.

The differences in these positions are profound; in some formulations what each embraces the other categorically rejects. Such value conflicts are important because they inform the views of many who are involved in the day-to-day work of the criminal justice system. And how one views the purpose of the criminal law and the efficacy of sanctions affects decisions made at arrest, charging, sentencing, and parole.

For example, John Hogarth found that judges in the same jurisdiction sentenced similar types of offenders with similar

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backgrounds to widely varying lengths of imprisonments.[10] His investigation revealed that the reason for this was each judge's own philosophy of punishment. Studies of police arrest practices, prosecutors' charging patterns, and parole board decision making report similar findings.

Still another value conflict contributes to the fragmentation of the courts. In his classic study, *The Limits of Criminal Sanction,* Herbert Packer developed two models of the criminal process, the Crime Control Model and the Due Process Model.

The Crime Control Model emphasizes the need to repress crime by maximizing the effort to locate, apprehend, and convict offenders. This view places a premium on speed, finality, professional judgment, and efficient organization. To this end, it prefers the rapid judgments of police and prosecutors to the slow, cumbersome, and artificial process of decision making in the courtroom.

In contrast, the Due Process Model focuses on "the concept of the primacy of the individual and the complementary concept of the limitation on official power."[11] Due process erects a wall around the individual to protect him against the state's unwarranted intrusion, unreliable judgments, and harsh penalties; and at the same time it places limits on the powers of public officials, even if so doing means that the guilty may escape punishment.

These two models represent degrees in emphasis rather than opposing philosophical positions. Nevertheless, they capture the divergent goals of the various agencies and individuals who constitute the criminal justice system, as well as the goals of those who seek to reform the system.

Multiplicity of Organization. While criminal courts often have been characterized as bureaucratic, in reality they are far from it. Bureaucracy implies rational organization, hierar-

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chical control, common purpose, and central administration. None of these accurately characterizes the courts. Their fragmented organization reinforces the diversity of values and interests within them. No single coordinator, no central authority exists to resolve disagreements or to enforce compliance with goals. No set of incentives binds courthouse officials into a coherent group. Whatever one's objectives in the criminal justice process, there is some leeway and opportunity to pursue them.

Influence of Environment. Martin Levin has found clear differences in severity of sentences between courts in Minneapolis and Pittsburgh. These he explained by differences in the values and perspectives of the judges in those two cities, differences, he went on to show, that stemmed from the political cultures of the two communities.[12] Minneapolis is a middle-class "good government" city; Pittsburgh is a city of ethnic, machine politics. In Minneapolis, few of the judges are drawn from backgrounds in electoral or ward politics; in Pittsburgh, most of the judges received their appointments as rewards for party service. Differences in judicial performance are equally clear-cut. Minneapolis judges are more "legalistic," less likely to plea bargain, and harsher in sentencing; Pittsburgh judges are informal, active in encouraging and taking part in negotiations, and more lenient. Levin argues that these judges act as they do because of their backgrounds and the process by which they are recruited. Pittsburgh judges have lower-middle-class "ethnic" backgrounds and as a result have a greater capacity to empathize with defendants than do the middle-class Minneapolis judges. What Levin found in these two cities, others have found in still other cities. In New Haven, Connecticut, the political culture affects not only judges, but prosecutors and public defenders as well.[13] Studies of courts in Chicago, Baltimore, Detroit, and elsewhere reveal similar patterns.[14]

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Assessing the Courts

It is precisely the lack of agreement on fundamental goals that leads to vociferous disagreement about progress in the courts. What one person is likely to hail as progressive, another may regard as a step backward. To some, the landmark decisions of the Warren Court on criminal procedure were a step forward; to others they represent capitulation in the fight against crime. The very terms *reform* and *improvement* are subjective.

Whatever one's goals, there is a tendency to expect too much of the courts. Higher standards can lead to improvements, but exaggerated expectations can also foster disillusionment. Given the magnitude of the concern with crime in American society and the limited ability of the courts to deal with this problem, the disjuncture between expectation and reality can lead to a sense of crisis even as things improve, as well as an insistence that the courts solve problems beyond their capacities. Courts cannot solve the problem of crime or even make a significant dent in it. Thus, in a very real sense the courts—charged with handling society's failures—will always fail. What the family, the church, the workplace, and the school cannot do, neither can the courts.

This view requires a realistic appraisal of the capacities of the courts and suggests that courts be understood in historical perspective and social context. Such a view will lead us to abandon many long-standing notions. It will lead us to moderate expectations and sensitize us to the range of changes we might reasonably expect.

This point can be illustrated by examining several recurring allegations about the failings of the criminal courts: (1) plea bargaining signifies a decline in the adversary system; (2) heavy case loads are the major cause of delay and plea bargaining; (3) courts are overly lenient and undermine the deterrent ef-

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fects of the law; and (4) the low quality of court personnel contributes to the failures of the court.

Plea Bargaining. One of the major charges against plea bargaining is that it is a cooperative practice that, as a result of heavy case loads, has come to replace the combative trial, and as such compromises the integrity and effectiveness of the adversary process. This charge is false. It lacks historical perspective and fails to place plea bargaining in the proper context.

Negotiations have long been a standard feature of criminal process, and reliance on bargaining certainly predates the spurt in the crime rate of the past two decades. Negotiations in the criminal process have their origins in the Middle Ages if not before.[15] In America, plea bargaining was common in colonial New York[16] and well established shortly after the Civil War.[17] In the 1920s, guilty pleas in Cleveland accounted for 86 percent of all convictions; in Chicago, 85 percent; in Des Moines, 79 percent; in Dallas, 70 percent.[18] These high rates of guilty pleas were found not only in the crowded urban courts, but also in less crowded rural courts. In rural New York State in the early 1900s guilty pleas accounted for 91 percent of all convictions, higher even than the 88 percent rate for New York City.[19] Two recent studies of Connecticut's courts found that, while trial rates have varied, they have hovered around 10 percent for the past ninety years.[20] Other historical studies of criminal courts paint similar portraits.[21]

These findings must be interpreted with caution. The absence of a trial does not by itself indicate a plea *bargain,* an exchange of a guilty plea for a guarantee of leniency. Still, the relatively low rates of trial clearly disprove the charge that there was a more effective adversary system in the past. At least as measured by the form of disposition during this century, we are not experiencing a dramatic weakening of the adversary system.

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The trial records of courts in Connecticut, Wisconsin, New York, and London's Old Bailey from the early nineteenth to the mid-twentieth century[22] do not reveal a vastly superior system. Although there were more trials at one time, all but an occasional handful bear scant resemblance to the popular image of a vigorous duel between skilled adversaries. Often, one judge and one jury heard five or six cases or more in a single day, averaging perhaps three-quarters of an hour per case from charge to verdict to sentence. Typically, the prosecutor would summarize the charges and introduce the complaining witness, who would tell his or her story quickly. Usually, defendants who were unrepresented by counsel remained silent or stammered a sentence or two of defense. After a brief deliberation, the jury would give its verdict, and if the verdict was guilty the judge would immediately pronounce sentence. The few rules of evidence and procedure were usually honored in the breach.

Other reports on trials during the nineteenth and early twentieth centuries paint much the same picture. Stanford law professor Lawrence Friedman has sifted through turn-of-the-century trial records of American courts. In Oakland, he found that many cases were handled in a perfunctory manner. In a Leon County, Florida, court, "there were as many as 6 'trials' a day in the 1890s, complete from selection of a jury to verdict. Yet the court handled other business as well."[23] One need not point to the horrors of occasional perfunctory trials; the evidence on the mundane and routine cases is much more telling.

We see that when trials were more prevalent, they usually took less pretrial preparation and court time than the typical guilty plea does today. Indeed, one significant difference is that today those accused of serious offenses are routinely represented by counsel. And if an appearance in the courtroom

today is still little more than a brief ritual, at least both prosecutor and defense attorney are likely to have the resources to review the case, undertake some investigation, and debate and negotiate the issues prior to this appearance. Viewed in this light, plea bargaining can be seen as an expansion of adversariness, and certainly not its demise.

If the trials of the past fall something short of the battles they sometimes are envisioned to be, earlier methods of arriving at guilty pleas are even more revealing. Even in the 1950s, observers could report that unrepresented defendants accused of serious crimes were threatened by fast-talking prosecutors to plead guilty or face harsher treatment before a jury:

> The methods used by the prosecutor and the judge to obtain a plea of guilty to a lesser charge from an unrepresented defendant often amount to downright coercion performed in open court. I have heard one prosecutor tell a defendant, "Don't be a fool—if you buck us you will wait six months in jail for your trial. Now if you take a plea, you'll get six months and at the end of that time you will be a free man." Another prosecutor told an unrepresented defendant, "You had better plead guilty to petty larceny or we'll make sure you are sent up for ten years in the penitentiary."[24]

Such reports reveal not the adversarial ideal, but something that is difficult for the contemporary observer to comprehend: *arrestees unrepresented by defense counsel* were typically rushed through crowded and noisy courts and pressured to plead guilty by prosecutors—and those practices were condoned by judges. Even in those cities that had developed public defender systems before the 1963 Supreme Court decision requiring routine appointment of counsel in felony cases,[25] public defenders were available in only special circumstances, and then only after indictment, by which time the vast majority of cases had already been terminated by pleas of guilty. Seen

from this perspective, the presence of a defense attorney who is able to review the case and negotiate with the prosecutor constitutes a substantial strengthening of the adversary system.

The claim that plea bargaining signifies a decline in the adversary process is a rhetorical appeal to a mythical yesterday, a state-of-nature fallacy all too common in the analysis of social problems. If plea bargaining is an indicator of the twilight of the adversary system, when was its high noon? These observations are not offered to justify the intimidation inherent in plea bargaining, but to place this practice in context and in so doing question conventional solutions to a serious problem.

Heavy Case Loads. Between 1960 and 1970, the arrest rate jumped from 3.7 to 6.6 million, an increase that was regarded as epidemic. At the same time, there was an increased concern with the growing problems of backlog and delay. The conventional response was that more money was needed, a position that implies that these problems would diminish if enough resources were provided.

However, it has not been demonstrated that heavy case loads necessarily cause backlog and delay. Comparisons of practices between heavy and light case load courts are revealing. In both, guilty pleas predominate, and there are few salient differences in the ways cases are handled. Perhaps most significant is that judges and prosecutors in the heavier case load courts tend to put in longer hours than do their counterparts elsewhere.[26]

There are various ways case loads can affect court practices. In 1972, the number of judicial "parts" (a judge, plus clerks, stenographers, prosecutors, and so forth) in New York State was substantially increased in an effort to cope with the mounting backlogs. One official survey found that the expected reduction in delays had not materialized. Commenting on the survey, the New York Commissioner of Criminal Justice Services concluded:

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tem increased by 325 percent.[30] Expenditures for the judiciary increased at an even higher rate, 500 percent, between 1954 and 1975.* Furthermore, while there are indications that the increase in serious crime has slowed down since 1975, expenditures have continued to climb; yet problems of delay have increased. This suggests that the case load problem involves much more than sheer numbers and dollars. According to the diagnosis of former Attorney General Ramsey Clark:

> At the federal level from 1956–1958 there were never fewer than 30,000 or more than 34,000 criminal cases initiated in any year. The nature and complexity of the cases changed, but their number was fairly stable. The number of judges handling the cases, on the other hand, increased 45 percent, while the number of Assistant United States Attorneys increased only 14 percent. Simultaneously, the number of criminal cases pending—the backlog—increased by more than 100 percent. With twice as many cases pending, only a few more new cases commencing, and far more judges to handle them, it became clear that the constitutional right to speedy trials would depend on more than just additional judges. *The solution must include better techniques and*

*Criminal justice expenditures for all levels of government, federal state, and local, increased from more than $2 billion in 1954 to $3.3 billion in 1960. In 1965, total expenditures reached $4.6 billion and in 1970, $8.6 billion. As of 1975, total expenditures were over $17 billion. Looking solely at judicial expenditures, one sees a similar progression. In 1954, slightly less than $400 million was spent on the judiciary. By 1960, the figure was $597 million; by 1965, $748 million. In 1970, spending on the judiciary was just under $1.2 billion, and by 1975, had gone over $2 billion. Arrest data show comparable growth rates. From 1954 to 1960, arrests increased two and one-quarter times, from 1.7 to 3.7 million. From 1965 to 1970, these levels expanded by 30 percent, from 5 to 6.6 million, and in 1975, arrests went over 8 million for the first time. Thus, between 1954 and 1975, expenditures for the judiciary increased over fivefold, while arrest rates increased at just under fivefold.

For additional arrest and expenditure data, see U.S., Department of Commerce, *Historical Statistics of the United States. Colonial Times to 1970* (Washington, D.C.: U.S. Government Printing Office, 1976), Part 1, pp. 415–16, U.S., Department of Justice, *Sourcebook of Criminal Justice Statistics—1977* (Washington, D.C.: U.S. Government Printing Office, 1978), p. 44; U.S., Federal Bureau of Investigation, *Uniform Crime Reports—for the United States* (Washington, D.C.: U.S. Government Printing Office, 1975).

more supporting personnel, in all activities of the judiciary, civil and criminal.[31] [Emphasis added.]

The solution Clark refers to is essentially the same one offered in the reports on the New York and Washington courts discussed above: "Even if large additional sums could be found during the current difficult period, prudence would still dictate a cooperative effort to find better ways to organize felony case processing."[32] Others have argued that the solution lies in altering "local legal culture" and traditions of the local defense bar rather than adopting any specific administrative device or rule.[33]

No one denies that delay is a serious problem. The preceding discussion suggests that this problem often has not been taken seriously enough. Additional resources alone are not likely to make any difference. More effective would be improved management techniques and programs that alter incentives, informal norms, and long-standing traditions of local defense bars.

Leniency. Complaints about judicial leniency periodically lead to crusades to force judges to dispense harsher sentences. Leniency is, of course, a relative term: one person's leniency is another's harshness. Moreover, sentence reform historically has been cyclical in nature, embracing philosophies of fixed, and then discretionary, sentencing.

The leniency debate may be based upon differences in philosophy of punishment, or it may be based, as is so often the case, upon the extreme example that is reported in the media. It may also be motivated by a concern for enhancing the deterrent capacity of the criminal sanction. Still, it is possible to frame questions about leniency in a meaningful way, by contrasting sentences in the United States to those in other countries, exploring actual reasons for downgrading charges in

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American courts, and then by examining evidence on sanction severity and deterrence.

In contrast to courts in Europe, sentences handed down in this country are draconian. Sentences in the Scandinavian countries, Holland, Great Britain, and Germany are typically much shorter than those for comparable offenses in the United States.

This comparison will probably not comfort most critics of American courts who focus on the "deterioration" of cases as they wend their way through the system. The process is often described as the "sieve" or funnel effect because of the dramatic falloff at each stage. For example, one recent study of the criminal courts in New York City found that:

- 80 percent of all *reported* felonies did *not* lead to arrest.
- 43 percent of the felony cases that reached court were *dismissed.*
- 2.6 percent of all cases were disposed of by trial.
- 74 percent of the felony charge guilty pleas were to misdemeanors or *lesser offenses.*
- 50 percent of the guilty pleas led to probationary sentences involving *no jail time.*
- 41 percent of the guilty pleas led to prison sentences of *less than one year.*
- 9 percent of the guilty pleas led to sentences *over one year.*[34]

Taken at face value, such figures suggest either that the police are careless and arrest people without rhyme or reason or that the courts are incompetent or overworked. There are a number of reasons why cases are filtered out of the court system by dismissals and pleas to reduced charges, and upon inspection many of them are compelling.

The study by the Vera Institute of Justice presented some startling and revealing facts about the deterioration of criminal

cases. Was slippage, it asked, due to carelessness, uncaring prosecutors, crowded calendars, or soft judges? Or was it due to poor police work? The Vera researchers tracked a large sample of cases through the criminal justice system from arrest to sentencing. They found no evidence of widespread failures by the police, nor did they find prosecutors and judges who had caved in under the pressures of congested courts. They discovered, in fact, a group of men and women whose work yielded up roughly consistent and evenhanded decisions. Seemingly arbitrary dismissals, delays, charge reductions, and variations in length of sentences were usually explained in terms of legally relevant factors. In particular:

> The study found an obvious but often overlooked reality: criminal conduct is often the explosive spillover from ruptured personal relations among neighbors, friends and former spouses. [Felony] cases in which the victim and defendant were known to each other constituted 83% of rape arrests, 69% of assault arrests, 36% of robbery arrests, and 39% of burglary arrests. The reluctance of the complainants in these cases to pursue prosecution (often because they were reconciled with the defendants or in some cases because they feared the defendants) accounted for a larger proportion of the high rate of dismissals than any other factor. . . . Judges, prosecutors, and in some instances police officers were outspoken in their reluctance to prosecute as full-scale felonies some cases that erupted from quarrels between friends or lovers. . . . Thus where prior relationship cases survived dismissal, they generally received lighter dispositions than stronger cases.[35]

The other factor that influenced convictions and sentences was prior record. For example, 84 percent of those who had prior records and were convicted received prison sentences, as opposed to 22 percent of those without prior records.[36]

Prior relationship and prior record are the two principal determinants of how a particular felony case is handled, whether

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the case survives and, if it does, whether it results in a prison sentence. The Vera Institute's research team found it useful to distinguish between "technical" and "real" felonies, based in large part upon the presence or absence of a prior relationship between the complainant and the suspect.

A second major complaint about lenience is that the courts fail to impose severe enough sentences to deter crime. Typical of such criticism is the position of former New York City police commissioner Patrick Murphy, who has repeatedly asserted that, because of lenience, the courts must assume "the giant share of the blame [for the] disturbing rise in crime."[37] This diagnosis leads to an obvious and popular prescription—increased sentences.

Concerned with just this issue, the National Academy of Sciences convened a panel of distinguished statisticians, econometricians, and criminal justice scholars to review the available evidence on the relationship between sentence severity and the incidence of crime. The panel's report concluded that it could not definitely establish that there is any direct relationship between severity of sanction and deterrence.[38]

This conclusion seems to fly in the face of common sense until one considers that increasing sentences does not affect *likelihood* of apprehension and punishment. Of all crimes committed, only a portion are even reported to the police; of those reported, only a small fraction lead to arrests; of those arrested, only a fraction are convicted. Unless rates of reporting, apprehension, and conviction are all significantly increased, a measurable impact of the threat of an increased criminal sanction at this last stage is remote.

Problems with the deterrent effects of sanctions are compounded in still other ways. One view of punishment holds that, at a minimum, incarceration incapacitates at least one criminal offender and thereby reduces crime rates to the extent

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that this person is not committing a crime he or she would commit if free. The Academy's report questions even this seemingly obvious fact, pointing out that for some types of criminal activity incapacitation of one person may simply lead to replacement by another. For example, if there is a strong demand for drugs and a large labor market of users to tap, incarceration may have virtually no net effect. Similarly, if crimes are the results of group efforts, as much juvenile crime is, the removal of one member of a group may not affect the criminal activity of the group as a whole.[39]

The lessons are clear, if disillusioning. If we cannot assert with confidence that changes in something so significant as sentence severity will have measurable deterrent effects, we must be even more cautious in our expectations about the effects of other more modest changes in the courts. Still a great many reformers justify all types of minor changes on just such grounds, a practice that if taken seriously—as it has been—leads to unrealistic expectations and disappointment.

Personnel. In assessing the functioning of the courts, we must ask, finally: Are they staffed with unqualified, ineffective personnel?

If one takes a historical view, the answer is clearly no. The practices and the quality of personnel today are likely to be found more acceptable than ever before. A few short years ago, open appeals to friendship, party loyalty, and bribery were not at all uncommon as ways of disposing of cases in the trial courts.[40] Now such practices are limited to isolated cases in a few cities or restricted to traffic tickets. In addition, differences between publicly appointed and privately retained defense counsel are more rhetorical than real. A study comparing case outcomes and sentences of public and private defense attorneys in three cities found:

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> There was very little difference in the case outcomes received by clients of different types of lawyers, . . . [and that there] is a pervasive antipathy of unexpected magnitude toward publicly paid defense lawyers, primarily those who work for the first-line defender system, and it rapidly became evident that these antipathies were based on defendants' suspicions about the loyalties and the abilities of these lawyers.[41]

While problems with public defenders remain, few other public service institutions can match their records. Few public institutions can boast that, on average, they provide services as good as those that are available in the free market.

Conclusion

Three conclusions emerge from this examination of the criminal courts. First, the fragmentation and seeming inefficiencies of the courts are inherent in the very theory and structure of the adversary process and are not simply the result of aberration, overload, or inadequate personnel. Second, many concerns that give rise to feelings of decline and decay and a sense of crisis in the courts rest upon heightened standards and unrealistic expectations, not actual deterioration and demise. Third, a realistic assessment of the functioning of the courts reveals that, despite continuing serious problems, defendants are better served by the courts today than ever before. However slow and arbitrary criminal courts are today, they are more evenhanded and deliberative than they once were.

Part of our disillusionment is due to overexpectation. Courts are faced with a serious crime problem, but they cannot reasonably be expected to reduce crime. With but few exceptions society has not been prepared to have courts impose penalties draconian enough to make a significant difference, and courts

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have little to do with affecting likelihood of apprehension, the driving force in deterrence. Perhaps if we agreed to lock up selected groups of repeat offenders for very long periods of time, this incapacitation would reduce crime. But recently we have not, and once when the English courts did have capital punishment available in all felonies, they rarely used it.[42] Even if the controversial exclusionary rule were reversed to permit the introduction of illegally obtained evidence in court, the law's deterrent effect probably would not be measurably enhanced.[43]

Similarly, courts handle large numbers of repeat offenders, but they cannot rehabilitate. There are few agreed-upon rehabilitative techniques, and at any rate the courts do not administer them.

More realistic expectations suggest a more hopeful picture. Courts are faced with many more cases today than ten, twenty, and fifty years ago, but they are staffed by more judges, prosecutors, defense attorneys, clerks, and bailiffs than ever before. There remain problems with securing defendants' rights, responding to the needs of witnesses and victims, and dispensing evenhanded sentences, but these problems have diminished over time. There has been a demise of trials, but trials were never close to being what they are portrayed as in myth. There are serious inequities in plea bargaining and major problems with delay, but these issues must be understood in the context of expanded rights for the accused, resources for the prosecutor, and the overall professionalization of the courts.

The courts do face real problems—and problems that have not been taken seriously enough. The question is: Can proponents of planned change adequately identify these problems, diagnose them accurately, and make improvements?

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TAB 4 RESOURCE MATERIALS ON MODERN COURT MANAGEMENT

ARTICLES:

"Internal Organization and Procedures of the Courts"

"Court Administration"

"The Court Management Profession: Where Did It Come From? Where Is It Now? And Where Is It Going?"

"Wingspread Conference on Contemporary and Future Issues in the Field of Court Management"

Report of the Task Force on Internal Organization and Procedures of the Courts, prepared for the Second National Conference on the Judiciary, Williamsburg, Virginia, March 19-22, 1978. Published in Theodore J. Fetter (ed.), *State Courts: A Blueprint for the Future* (Williamsburg: National Center for State Courts, 1978)

Internal Organization and Procedures of the Courts

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The internal organization and procedures of courts cannot be narrowly viewed. Courts are complex institutions which vary in size and scope from a single judge sitting without staff to a conglomerate of judges operating in specialized divisions supported by thousands of employees. Internal organization as a concept includes everything from the relationship of the courtroom clerk and trial judge to the budgetary processes through which a state or national court system presents its needs to the various appropriating authorities. Internal procedures include those which affect the final disposition of cases and those which only support the litigative function.

The subject is difficult to analyze because the forces operating on the courts are not a part of one organization. The nature of the adversary process forces the court system to operate through multiple organizations representing the separate parts. It is inconceivable that prosecution and defense should be in the same organization or that the complaining person be represented by members of the same organization as the defending person. Yet, each of the organizations is responsible for a part of the work necessary to a judicial product.

The necessary organizational divisions are further complicated by historical divisions which are now obsolete but which have survived most attempts at reorganization. The net result is an internal organization which transcends traditional concepts of the term and includes a complex of multiple organizations within the "internal organization of the courts."

If this view is accepted the court system includes the lawyers who regularly practice within the courts, the clerks who maintain the records, the court reporters who prepare transcripts, the sheriffs' deputies who maintain security and order, probation officers, marriage counselors, adoption workers, and a myriad of others whose work directly affects court operations. Any comprehensive view of internal organization and procedures must recognize the breadth and the scope of the operation called a court.

The principal component of the operation is people. Courts are human institutions totally dependent on human judgment for their product. It follows that quality personnel are critical to effective operations. The organization and internal procedures of the court system must be adequate to ensure that the judges, lawyers, clerks, court reporters, and bailiffs are properly selected, adequately trained, and conscientiously motivated. All organizations must have within their internal procedures the method and ability to develop and maintain the competence of the workers within them. They should select, train, compensate, and supervise the workers to accomplish the purposes of the organization. Internal organization and procedures include the full scope of personnel management.

The structure of the organization is the sum total of all the necessary organizational relationships. In any organization these relationships serve complex purposes. In the courts, however, relationships of direction and control normally present in large organizations are impossible, or at the very least inhibited by necessities of the adversary process. At the local level court operations are highly dependent on local officials. At the system level the courts operate with increased organizational autonomy.

There are no simple concepts sufficient to describe the internal operating procedures or internal organization of the courts. Administration theory which places emphasis on efficiency often loses sight of justice. Management concepts aimed at achieving economic goals do not fit in a system which must sometimes sacrifice economic values for justice values.

Historically, doctrines of fairness have been formulated in terms of due process of law. A system of rules requiring notice of complaints, an opportunity to be heard, etc., has grown side by side with procedures aimed at getting the work of the court done. Sometimes the mechanics of due process have been substituted for fairness. The lawyer protecting his client's due process rights, which were once deemed sufficient to ensure fairness, often thwarts fairness today. Lawyers' interests have not always coincided with the needs

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of the justice system. Rules of procedure can become tools for avoiding justice rather than for reaching it. The struggle today to take the control of case processing out of the hands of the lawyers and place it in the courts is a reflection of this conflict and is one of the necessary developments of an effective litigative system.

The most difficult feature of the American court scene from the overall perspective is its diversity. There are fifty-six court systems within the United States. Each of the fifty states has its own structures and procedures, as does the District of Columbia, the Canal Zone, Puerto Rico, Guam, and the Virgin Islands. Superimposed on this diversity is a federal system intended under the Constitution to protect and enforce national values. In each of the fifty-six systems history rather than logic explains the relationships within the system.

The import of this diversity is that there is no general state of the art to report. Each system varies both in development of internal relationships and in court procedures. The range from centralized control to local autonomy is extreme and no two systems, even though based on a single model or similar legislative structure, operate with great similarity. The most that can be said about modern court organization is that the issues are being refined. It is becoming clear that some ways of dealing with resource allocations are better than others and that some procedures work better than others. Although the questions may be clearer, the answers are as varied as the perceptions of the people studying the process.

Shifting Patterns in Organization and Procedure

Quality and Quantity of Litigation

The workloads in the courts are changing perceptibly in quantity and character. The changes reflect an increasing number of lawyers available to litigate and a propensity for people to litigate more complex matters. Programs to open the courts to a greater number of litigants by providing government-paid lawyers for the indigent and the increased use of class actions are two of many factors contributing to this phenomenon, which is sometimes referred to as a "law explosion."

Although the class action is under some attack there is no indication that the instrument will be used less in the future. There is, of course, room for better definition of its proper limits. Ill-defined, unenforceable judgments must be avoided by judicial recognition of the procedure's proper limits. When the judgment sought cannot help the victims, other societal sanctions should be imposed. But there can be little doubt that relatively small claims founded on broadly based injuries would probably go uncompensated if the class action were not available. One must assume it will be with us for many decades and that, in the hands of imaginative lawyers, it will continue to consume large amounts of judicial time. The alternative is increased governmental regulation by newly created or expanded governmental agencies which can, in turn, increase the amount of litigation.

Even without an increase in class actions the complexity of cases will continue to increase. Litigation growing out of the complex relationships into which modern technology forces most people is necessarily more complex. Evidence of this trend can be seen in the increase in prosecutions related to conspiracies and business frauds. It was headline news that a major insurance company fraud had involved the use of computers. The resulting need to comprehend complex technologies may well shift the emphasis from jury trials to trial by referee or master. The necessity for repeated adjournments during a hearing may make use of the jury as impractical in technical cases as it has always been in complex accountings.

A predictable development, quite separate from the increasing complexity, could be a due process requirement that there be compensated counsel for the indigent in civil cases. The logic applied in criminal procedure is inescapable when applied to civil cases. If the poor cannot get justice without a lawyer in criminal cases how can they get justice without a lawyer in civil cases? The adversary process is identical and no layman can avoid procedural pitfalls without a lawyer. It can be argued that the poor are denied equal protection and due process each time they must defend against a claim or enforce one without counsel.

The consequences of this conclusion are substantial. Predictably, the lower civil courts will have adversary ejectment and collection suits where defaults are now the general rule. The lower civil courts, already inadequate in most states, will have to resort to more summary proceedings because of sheer volume.

The use of more summary proceedings may in itself constitute a major change in the next decade. A change in traditional personal injury litigation from full-scale pleading, discovery, and motion practice to an exchange of readily defined information would be expeditious and do justice. Routine divorce cases are already being carried on in less formal exchanges in some states and could be copied

elsewhere. Shortened procedures readily fulfill the needs of the system and are less costly to the litigants.

Alternatives to Judicial Process

An immediate reaction to increases in the number and complexity of cases is to suggest removing the cases from the judicial process, which is seen as slow and excessively deliberate and is thought to be buried in useless technicalities which consume time needlessly.

At least two alternatives exist within the judicial system. First, the system can be managed so that it is more expeditious and less cumbersome. Second, summary procedures can be created for less complicated causes. Where these alternatives have been tried there is some evidence that the judiciary can deal with such matters more effectively than can nonjudicial systems, which seem to copy judicial processes without learning from the experience of the judiciary.

There are, in fact, many matters consuming the time of judges which could be dealt with by lesser officials. Many routine matters, which require no legal judgment, need governmental formality and should be dealt with administratively. But the decision to proceed "administratively" does not dictate removal from the judicial branch. Since a certain number of contests will filter through to the courts in such cases the control of process may suggest setting the administrator up within the judiciary. There may be reasons to create lesser judicial officers to deal with these matters so as to keep the whole process unitary, thus avoiding workflow breakdowns which are inevitable when work is divided between two unrelated organizations.

Properly managed courts can do much better than courts now do with the nonjudgmental business which they handle. Whether this business should be removed from the courts altogether is, however, a subject separate from the internal organization and procedure of courts, the topic of this paper.

Distribution of Jurisdiction

The history of courts until recent years has recorded their proliferation rather than their consolidation. Even today specialized courts are advocated for labor disputes, and the tax court has grown to maturity. Some might argue that the creation of more and more administrative tribunals in the executive branch of government is a furtherance of this trend.

Recent wisdom has, at least within judicial circles, run to the contrary. The consolidation of trial courts into one or at most two courts of trial jurisdiction is advocated as the solution to a confusing mixture of specialized, limited jurisdiction courts. Unfortunately, however, the one and two tiered courts of modern times have tended to perpetuate the specialized courts by adopting subject matter divisions almost identical to the old historical courts. Although a rational distribution of the work is now possible under unified trial courts, the system tends to have family, traffic, criminal, juvenile, civil, equity, and other traditional divisions reminiscent of seventeenth and eighteenth century England. The basic result has been an elevation of "lesser" court judges without rationalization of the subject matter distribution of jurisdiction.

A rational distribution of judicial work would ignore subject matter labels and would consider degrees of difficulty which would put the most experienced judges on the most difficult cases and the beginners on the easier cases. Such a process would look at the case and not an arbitrary historical classification before assigning each case to a judge. The routine family case would go to a commissioner, the moderately difficult contest to a beginning judge, and the complicated case to a proven judge. This is not a suggestion that there be no subject matter specialization. Reasonable divisions of labor based on subject matter expertise on supporting staff relations will continue to be advantageous. The unified trial court makes such a distribution possible, but it has not been tried to any great extent.

Problems arise in applying traditional jurisdictional divisions to the unified trial court since status in the judiciary is associated with certain kinds of work. Traffic is low level, while personal injury trials are high level; felonies are high level and misdemeanors low; juvenile cases are important, but domestic relations less so. The traditional values tend to follow the traditional divisions and it seems demeaning to sit too long in a low status court even if the judge is doing important or challenging work.

The judges in a one-level court, being equals, must have their opportunity to do "important" work. The result often is a rotation of the judges to equalize the time in prestigious jobs without good reason. The only alternative regularly applied is a seniority system, which is equally irrational since it ignores points of difficulty and assigns cases according to the prestige of the elder judge.

In fact, work of different degrees of difficulty exists in any court. Skill is not evenly distributed through a given bench and cases should be distributed in accordance with ability. Given the present propensity of judges to want high status work, it is probable that more than one level of judge is needed. By providing a court with "assistant judges" or

"associate judges," several objectives can be accomplished. Both a training system and a rational system for distribution of cases are possible. A progressive promotion system is provided. Flexibility now barred by traditional concepts can be built into the system; for example, in complex matters teams can be set up with a senior judge directing junior associates. A unified trial court should be a tool for progress, not an excuse for promoting all judges to a universal rank. Unitary jurisdiction subject to overall management is needed but universal judges struggling for status are dysfunctional.

Unified administration of the trial courts is a desirable objective whether or not the judges are of one court. Many cases originate in one type of proceeding and conclude in another. When the workflow from initiation to disposition is under a single control, systemic breakdowns can be detected and controlled. When caseflows move across organizational lines, as from preliminary hearing to felony trial, the opportunities for breakdowns are increased by the division of administrative control in two courts.

Developments in Procedure

Trial courts are progressing slowly by trial and error into advanced, more effective procedures. Although any conclusions about long-term effectiveness must await empirical data, intuition suggests that some of the new procedures can produce beneficial results. The current ambivalent results seem to indicate that the procedures themselves may not be good or bad, but that in the hands of committed judges they can be made effective.

The omnibus hearing in criminal cases has been advocated and opposed but there seems to be an effective application of it in several jurisdictions. The theory is sound. If preliminary matters can be organized and scheduled for resolution early in a criminal case, the case will move more expeditiously to a trial or settlement. But when adopted as a universal mandatory procedure in the absence of judicial commitment to its purposes, it may be a wasteful opportunity for a lawyer to maneuver.

In civil cases pre-pretrials were designed to accomplish similar purposes and in the hands of the committed judges and lawyers they appeared to be useful. When adopted by persons who accepted them without commitment, however, they were simply another layer of costly procedure.

Sentencing councils have been adopted in many jurisdictions to assist judges in what may be their most difficult task. The results are impressive; the reasons for sentence get exposed to hard criticisms. Experience of the group tends to be better than that of any one person, and the extremes of disparity appear to be eliminated. These results are desirable and appear to be worth the cost of the additional judicial time that is necessary.

Settlement conferences have been the subject of considerable controversy over time and they are highly variable from one jurisdiction to another. In some states they are head-knocking sessions with little relation to a justice process. In others they are mediation sessions in which the parties are made more realistic by having an outside view of the case added to the partisan views of the lawyers and their clients. There is, however, little evidence that settlement conferences reduce the number of trials. But even if it leaves the trial rate unaffected, the settlement conference is probably desirable. The trial calendar becomes more solid as the cases settle earlier (i.e., not on the courthouse steps) and a settlement fairly reached by informed lawyers may well be more just than the result of a trial. Trials are subject to positive right and wrong conclusions. Settlements can take into account the broader range of potential just results.

Too much rhetoric has already been spent on jury voir dire techniques to make a brief analysis profitable here. Honesty in analysis might, however, bring the issue into focus. If lawyers and judges can reach common ground as to the purpose of the jury they might agree on a proper system of selection. Long jury voir dires aimed at giving the lawyer an opportunity to open his case or to discover favorable prejudice or to impress the jury with the lawyer's erudition and integrity are a distortion of the process and should not be permitted. The litigants are entitled to a fair cross-section of the community if it is to represent community standards and the elimination of all peremptory challenges would be the best way to accomplish this. The litigants are entitled to have a jury which does not have a preconceived notion about the facts. Challenges for cause after a simple judicial inquiry should be sufficient to accomplish this.

The growth of complex national litigation gave rise to special procedures in cases which transcend a single district. Current law in the federal system and in at least one state makes possible the consolidation of cases across district lines for discovery and other pretrial matters. These procedures are controversial largely because they are costly and time-consuming but the vast amounts of time saved on the massively complex cases probably justify the result. Their misuse, when the consolidated cases are only marginally overlapping, makes some of the current criticism valid. More judicial control of the procedure, not abandonment, seems to be required.

Modern procedure is a long way removed from the technical and manipulative procedures of years past. Although some criminal procedures are regularly used to defeat justice, most modern procedure is aimed at eliminating the gamesmanship of a lawsuit and reducing surprise and ambush in favor of a more diligent search for the truth. The demise of oratory and histrionics in modern trials may make them less dramatic, but at the same time there is probably more preparation and, consequently, a greater amount of truth obtained than in earlier times.

Current procedures are not, however, without room for improvement. The most important area for exploration and reform is in the application of sanctions. The legal profession generally is under attack for its standards of morality. The current president of the American Bar Association is organizing to rework the code of professional responsibility. Litigating lawyers have in some areas reduced their behavior to the lowest common denominator, taking the general view that they are mouthpieces for their clients with no obligation but to win. If delay will help their client they will use the rules of procedure to gain delay. If the manipulation of discovery will increase opponents' costs and force a lower settlement they will manipulate discovery. The devices of abuse are limited only by the imagination of the lawyer.

The practices are by no means universal. Many responsible practitioners and their clients are the victims of these practices. The abuses do exist and the courts need to impose available sanctions to correct the abuse. Many explanations can be made for decisions not to impose sanctions. The bad motives are usually clothed in a semblance of rectitude. Judges see themselves as the culprits. Lawyers are reticent to advocate sanctions out of feelings of comity. The alternative is, however, to continue the deterioration of professional conduct until amost all responsible litigating lawyers are driven out of the field, leaving the court arena to the irresponsible practitioners.

Closely related to the imposition of sanctions generally is a tight judicial control of proceedings sufficient to prevent sharp practices. A case controlled as to time by the court is not as subject to abuse as a case left to the whims of the lawyers. Modern caseflow management requires close judicial supervision of the case as it passes through the court. A judge who knows about the progress of a case can impose necessary sanctions without the need for lengthy inquiry. In fact, the controlled case is too much under the spotlight to permit an abuse of procedure.

The broadest opportunity for procedural reform is in the simplification of procedures in routine cases. Short forms and abbreviated processes can be designed to deal with the mass of short causes which are papered to death by the requirements of procedure aimed at general litigation. The courts should lead the way in this simplification and the redesign of procedures should work to eliminate the unnecessary steps in the complicated cases as well. Felony arraignments in their classic form are probably a waste of time. The purposes of arraignment can better be accomplished on paper where there is no dispute about the identity of the charged defendant. Appointment of counsel for the indigent and routine bail matters can be dealt with effectively by standards administratively applied so long as the slightest suggestion of a contest is placed before a judge. In civil cases, properly enforced and supervised standards for pretrial preparation can force lawyers into preparatory meetings and preliminary stipulations without the presence of a judge. Where appropriate, commissioners and magistrates can dispose of many matters now consuming judge time.

The key to reduced appearances before judges is judicial supervision of established and equitable procedures. The supervision need not be constant but it must be certain. When the consequences of failing to perform are certain, lawyers can do their work without a court appearance. Neither lawyers nor their clients profit from most appearances and the principal resistance to change comes from lawyers whose fees are based on the number of appearances rather than on the work accomplished. The cycle of fees based upon appearances—forcing more appearances to justify more fees—needs to be broken.

Applied Technology

The next twenty years will see substantial change in the operation of courts as a result of modern technology. The most visible change will be electronic displays within courthouses to keep people advised as to what matters are in what courtrooms, much like the airport terminal displays announcing plane departures and arrivals. All people affected by the system will have current information about individual courtrooms and cases.

The increasing complexity of evidence and a greater mobility of the population will dictate the use of videotaped testimony which can be pre-edited to eliminate objectionable matter. Lawyers will be able to see in advance of trial how witnesses behave under pressure. One element of surprise behavior will be reduced and the probability of settlement increased.

Electronic recording in courtrooms will become common, although court reporters will continue to be necessary since an intelligent monitoring of the proceeding will remain essential. Courts of appeal will continue to need prompt transcripts to expedite their review of cases, and although it has seemed a long time coming computers now are used to transcribe the machine notes of the court reporter. The race between computer transcripts and properly used electronic records is a close one but both will probably survive and grow.

Computer based information is not yet providing the needed support for court management, but each year there is perceivable progress. The volatility of change in the court scheduling process makes computer scheduling nearly impossible, but the less dramatic task of reporting on long-term performance lends itself well to electronic data processing.

Judicial Performance

Selection

Early in the history of judicial administration the quality of judicial performance was recognized as the critical variable. It hardly needs to be explained that the quality of the judicial process is highly dependent on the quality of the judge. But it is important to note that the quality of performance depends on several factors, i.e., the ability of the judges, their motivation to perform, their training and experience, and their integrity.

Over the years most of the concern for quality has focused on methods of selection: merit rather than politics, merit rather than friendship, merit rather than economics. It has always been assumed that excellence in selection is the key to quality performance. Selection is critical but by no means determinative in its effect. Qualified judges may become unqualified, stop working, or lose interest in their work. Judicial performance is dependent on many continuing factors.

The value of merit selection as an abstraction can hardly be denied. The most favored plan proposed by the ABA, the American Judicature Society, and others has the virtue of providing a less political screening system than is provided by governors or political parties generally. Merit selection is presumed to follow from a nonpartisan or multipartisan commission which deliberates privately and proposes several names from which a political executive must select. There is a general consensus that judges with better credentials are chosen under this scheme. At least, the governor and commission systems appear to open the recruiting to a broader base and thereby consider a greater number of qualified people.

The federal system theoretically takes the reverse approach. The President technically proposes the name to the Senate, which advises and consents in a public process. If this system were not encrusted with senatorial privilege, which often makes the appointment a senatorial proposal rather than a presidential one, it might work better.

Nonpartisan election of judges has the virtue of public exposure of proposed candidates and the practical disadvantage of being lost in the density of campaign rhetoric, most of which is irrelevant to being a judge. In nonpartisan elections no one knows who is beholden to whom or for what reasons. Campaign funds come from some place, and one can only guess as to what might be expected in return.

In an election, partisan or otherwise, what can a judicial candidate argue other than "I am intelligent, experienced and virtuous?" Certainly one should not announce a predisposition on cases which might come before the courts.

Partisan elections may have one virtue. There is, at least in theory, someone to hold responsible. It is said that the party which consistently nominates unqualified persons cannot retain power. The unhappy fact is that political parties have not demonstrated any special ability to pick good judges and that no party appears to lose support for this reason. It might well be observed that the least effective judges are most often found in the most political environments.

The initial selection of judges would probably be outside the scope of internal organization and operations if it were not that initial selection systems have a direct effect on the way judges perform in office. To argue for the election of judges is to advocate at least some degree of responsiveness to the public will. Given the American propensity to elect fence-straddlers, the judge who is most successful politically may be the least decisive, and as a consequence ineffective as a judge. The necessity to maintain public visibility at best consumes valuable time and at worst makes it difficult to assign judges as needed, since some necessary judicial assignments are undesirable because of their potential for adverse publicity.

The monitoring of judicial performance, if in fact performance can be monitored, must be a judicial function. To place it in either executive or legislative control is to place an easily abused tool in the hand of those branches. Judicial independence is important to preserve the independence of judgment necessary to fair and impartial decisions and no pressures except the existing law and the facts of the case

should be allowed to influence the judicial decision. Neither popular will nor governmental interference should affect the judge in his deliberation.

This leaves to the internal operating system of the courts the responsibilities for training, motivation, supervision, discipline, and even removal of judges. A number of states now have satisfactory discipline and removal procedures. None has adequately dealt with all of their training needs. None has developed schemes for proper motivation and supervision, and only a few have contemplated entering this area.

Training

Entry into the judiciary from whatever source should include an initial orientation over a substantial period of time. The view from the bench is different from that of law practice. Problems never encountered by most practitioners are common to the judge who takes on sentencing, child custody, and settlement problems. So long as judges are charged with the execution of the functions, they will need preparatory training.

Continuing refreshers are necessary for any professional person in a changing world but only a small fraction of America's judges attend continuing education courses. The National College of the State Judiciary and the various state colleges reach only a fraction of the thousands of judges who regularly affect thousands and thousands of lives.

Supervision

The proper autonomy of the judge in his case decision has been used to justify a hands-off, no supervision attitude within the judiciary. In fact, judges regularly adopt rules of rotation and follow seniority practices to avoid any possibility that one judge shall have supervisory authority over another. They choose not to coordinate their very complex relationships rather than surrender autonomy within their own ranks.

Courts which have chosen to select or accept a qualified presiding judge usually function more effectively. When judges meet regularly with a planned agenda and record their decisions in published minutes and rules they are better able to coordinate their activities. These practices must become the norm rather than the exception. The necessity for coordinating judicial machinery is clear to all. To think it can be accomplished without a control center in the person of a strong presiding judge is wishful thinking.

The main issue in judicial management is not whether there should be someone in charge, but rather how the person should be selected.

Advocates of strong central administration in the courts take a hard line. They see the chief justice of the system as the head of a hierarchy of judges needing selected lieutenants to carry out the decisions of the chief. To do this the lieutenants must be chosen by the chief and subject to his approval for their continuation in office. Opponents of this view believe that the presiding judge should be chosen by his colleagues, usually for a term of two to three years. They argue that a court is a company of equals who will respond to the necessity of having one of their members in charge but will not accept an arbitrary external imposition of supervisory power. As independent judges, they may choose to ignore authority they had no part in choosing. They suggest that hierarchical supervision depends upon sanctions which are usually not available in judicial systems.

Some advocates of the collegial selection of the presiding judge suggest that local participation in the decision is not an alternative but the only effective way to organize local courts. The role, as they see it, is not one of a boss with subordinates, but that of a chairman of a cooperative effort. The imposition of a boss, they believe, lowers the motivation for effective performance.

A further argument has been advanced favoring collegial election of the presiding judge. It is suggested that a supreme court as policy board for the state court system is isolated from the regular operations of the trial courts. Working as an appellate tribunal with appellate opinions to write leaves supreme court justices little time to keep informed about trial court operations. If the presiding judge is a representative of the supreme court of the chief justice the dynamics for communications are wrong. When the presiding judge is a locally selected representative of the trial court judges the point of view of the trial court is more likely to be expressed.

The advocates of a hierarchical system respond that a court system should be uniform in its administration and it therefore needs central control which cannot be accomplished by negotiating with local presiding judges. A frequent practice in electing presiding judges is to elect the one who will give the rest of the judges the least trouble. Elected presiding judges must follow rather than direct their courts.

It has been suggested by responsible observers that the better method of selecting the trial court leadership may depend on the size of the judiciary and the centrality of judical resources. If the legislature is the basic source of judicial branch funds, it is suggested that there is a greater

need for central control of the trial courts.

The issue should, of course, not be stated in terms of "either" one system "or" another. Many variations can be suggested with varying results. The appointing authority can be required to consult the local judges or bar associations. The trial court might be required to submit three names (in metropolitan areas) from which the chief justice or supreme court would be required to select. Or, more closely akin to trial court selection, the chief justice might have an approval right over the trial court selection. The dynamics would vary with the system, and the system should be selected with full awareness of the dynamics desired.

If the resolution of this issue is to be found in the experience of the several states that experience has not been adequately documented. The answer, if any, may well be dependent on whether the local judges meet regularly and attempt to coordinate their activities rather than on how the presiding judges are selected. There can be little doubt, however, that the judicial organization needs a spokesman, a representative, and a coordinator who can operate effectively within the court system. Someone must be prepared to negotiate with local officials for the court support due from them. Without regard to the necessity for judicial supervision there must be a representative of the judges who speaks with one voice for the local court. The additional need for supervision of the judicial processes suggests that the selection of a strong and experienced person as presiding judge is essential.

Motivations

Effective motivation of the workers is a necessity in all organizations. In the courts where ninety percent of the monies go for salaries it must be a prime consideration. As professionals who are conscious of their own skills and abilities, judges operate at a different level of motivation from many of the others in the system. Judges often accept their positions to attain status in the profession. They are quite often conscious of and protective of their status. Management attempts which do not take this into account are likely to fail. Procedures which place judges in a ministerial role are likely to be ignored or performed badly. Much of the trouble in judicial administration is caused by the mishandling of judicial manpower, and administrative orders which treat them as cogs in a wheel rather than as valued professionals are destined to be disregarded. It is possible to design systems of administration which constantly recognize the individual worth of the judges. To this date it has rarely been done.

Examples of conscious attempts to motivate judges can be found in several areas. A system of judicial assignments which helps a judge to perform more duties, to take on more responsible cases, and to branch into new fields is encouraging. Most professionals take on new challenges with new energy. Their minds work to master new ideas and new procedures. The reverse of this policy is to allow judges to get set in a narrow field which offers very little challenge to their minds or spirits.

Overspecialization in procedure has the same antiprofessional consequence as overspecialization in subject areas. By breaking the lawsuit down into small parts such as motions, pretrial, trial, etc., the judge is unable to see the whole and to take pride in the craftsmanship of the job. Mass production techniques are humanly destructive even in manufacturing; they are dysfunctional in an intellectual pursuit like the law. Some segments of the process may justify specialization. Settlement conferences and other similar procedures which result in completed work have their own element of satisfaction. But whatever the other benefits, highly segmented processes often lose the intellectual excitement for most judges.

Rewards for excellence are few and far between in the judiciary. No evaluation process exists to recognize competence. There is always an unhappy loser in a contested matter. Recognition can, of course, be achieved in other ways. Judges are pleased to be included on committees, to be asked to teach in training programs, and to be assigned to other districts where problems exist. Recognition is often limited to promotion to a higher court which sometimes means less interesting work that involves different abilities. Judicial "report cards" seem to reward dispositions rather than justice, since the judge who does the worst job may be responsible for a large number of dispositions. If so, he may be favorably recognized for improper practices.

Effective motivation of judges can be designed into a judicial system. Intelligent assignments including variety and challenge as requisites can be made. The substitution of judgment for seniority, the assignment of the best judges to the difficult cases, and the development of case assignment systems which recognize the need for continuity of effort in complex cases all recognize individual abilities and efforts. Properly applied, these actions will lead to better motivated judicial officers. Improperly applied, differential treatment of judges for assignments can be divisive and destructive of the cooperation needed to achieve other ends.

The subject of motivation cannot be passed without men-

tioning compensation. Although not the basic inducement to continued judicial service, the lack of adequate compensation is a real factor in the departure from the bench of some of the most competent judges. Unrealistic judicial compensation plans have the short-term effect of losing the best, and the long-term effect of discouraging the able. Inadequate compensation may well induce the attitude that less than a full work week is what the people are paying for and consequently what they get.

The minimum compensation necessary to hold good lawyers on the bench is an amount sufficient to maintain social contacts and educate the judges' children. Although that figure varies widely from community to community, most judicial salaries are below that minimum. A new theory of government salaries is needed, which accepts the fact that lawyers must be compensated at reasonable levels if government service is to be attractive.

It would be inappropriate to suggest that the problems of judicial motivation will be easily or quickly solved. It is sufficient to suggest that much can be gained by applying experience from the management of other professional organizations to the judiciary. Management education for presiding judges may well be necessary to accomplish this end.

Removal and Discipline of Judges

Nonperformance by judges results from many causes, and procedures for the discipline of judges must be as varied as the causes. The task is complicated by the need to avoid interference with the independent judgment of judges. No system should be adopted which can be misused to coerce a result contrary to the conscience of the individual judge. The values of the justice system are such that nonperformance is a lesser evil than a manipulated or pressured judicial decision.

No one has arrived at an ideal system for discipline or removal. The California model perhaps deals best with the extreme cases. Alcoholics are persuaded to leave, the mentally ill are persuaded to get help or resign, and the worst cases result in removal. If the extremes of behavior were the most difficult problems, the California model would be the solution.

Unfortunately, in the best of current systems the indecisive or lazy judge who occupies a judgeship is allowed to remain lazy and indecisive. Worst of all, the moderately incapacitated judge continues to operate within most systems, distorting the judicial processes as lawyers manipulate to avoid them and as scheduling systems are distorted to get around them. A modern court system needs an internal mechanism for privately evaluating judicial performance. When inadequate performance is discovered there is a further need for the judiciary to take direct action against the judge. By some method the judge must be induced to better behavior. Much experimentation is needed to know how to handle this problem since the present state of the art is clearly inadequate.

If one thing is certain it is that the discipline system must function within the judiciary. Although in appropriate circumstances lay personnel (from outside of government circles) may be valuable to judicial discipline commissions, exterior interference by other branches of the government creates a potential for influence in the hands of the disciplining branch that is unacceptable to the American scheme of government. This is not to suggest that judicial discipline should be the only or ultimate remedy. No reason has been suggested to eliminate the ultimate sanction of impeachment if the judicial machinery fails to act.

Court Management and Organization

Modern Organization Theory

Court organization theory is at best a reactive response by lawyers and judges to their limited concepts of management. These responses have been carefully examined by Geoffrey Gallas in a yet unpublished dissertation ("The Ethics, Politics and Administration of the American Judiciary: Toward a Substantive Perspective," University of Southern California, 1977). Dr. Gallas suggests an approach to unification of state court systems from the perspective of modern administrative and political theory. In breaking down the conventional wisdom, he notes that the principal advocates of court unification follow the organization theory which was current at the turn of the century. As an alternative, Gallas suggests a contextual approach to the allocation of the authority and other managerial functions rather than a doctrinal one. He writes that

> conditions affecting state court system structure and organization are *varied* and *contextual*. Consequently, just as it is fallacious to maintain the hierarchical, centralized management will ipso facto result in good management, an opposite assumption is also in error. It would be fatuous for anyone to maintain steadfastly that the solution to the discontinuities and inefficiencies in state court administration in Louisiana, Texas, or Indiana is decentralization. Such a strategy would be like putting Humpty Dumpty back together again by breaking him into smaller pieces (p. 170).

Dr. Gallas explains the historical development of modern organizational theory and describes the courts as victims of an arrested development which ignores the breakthroughs in organizational theory which have dominated the creation of more rational structures. Modern organizations are organized to meet contingencies with respect to their environment, resources, technology, and human dependencies. Since these vary in the context of different systems, the solutions to modern organization problems must likewise vary. Doctrine must give way to reality and be adaptive to change in the reality.

Patterns of Organization

Court systems, although they may be as diverse as the fifty-six jurisdictions they serve, fit into several basic organization and management patterns. Most, following the advocacy of Arthur Vanderbilt, have adopted concepts of strong central control and direction. The judicial council movement of the 1920s resulted in a residual pattern of central assignment of judges and information-gathering with little or no control of the system. The federal system, with its central budgetary authority, became a fiscal controller guided by a representative conference of judges. The New England states expanded the concept of central control over the general trial court to include a separate central control over the special trial courts.

There are many variations on these patterns. It is not uncommon to find that a supreme court has ample authority to direct and control the system but continues to leave large amounts of autonomy in the local courts. To state it more generally, the patterns of actual operation do not necessarily follow the patterns of authority to operate.

Several states remain with little or no central authority and with highly autonomous local operations. All of these now have some central staff and if they develop along the lines of other states will soon have substantial central activity.

These several patterns have their individual strengths and weaknesses. The basic difficulty with the Vanderbiltian model is structural ignorance. The supreme court justices have full-time jobs as appellate judges and they must take on policy and management functions in their spare time. With modern-day appellate caseloads there is very little spare time. They also suffer from their isolation. Located in the seats of government and working on appeal cases they often get a distorted view of the mass of work which flows through the system. A single case which seems monumental to them may have very little trial court impact, and the little case that seems minor may have massive administrative consequences. More important, the real administrative problems are not apparent in the factual and legal problems of individual cases. Having neither the time to deliberate on such matters nor the time to investigate them, high courts are ineffective policy boards for what has become a very complex management area. Resulting supreme court directives are often inappropriate or at best episodic responses to imperfectly perceived problems.

These observations about supreme courts and their ability to manage court systems are basically historical. It is by no means impossible to counteract the tendency of supreme courts toward isolation and administrative ignorance. Judicial planning committees, meetings of chief judges, systematic feedback drawn from training programs, and many other devices can help to bring information to the supreme court level. If staff is adequate at that level and trusted many of the historical problems can be eliminated.

Governing boards made up of a cross-section of judges can overcome the first difficulty by bringing with them some knowledge of the day-to-day operation of the system. Properly supported by their staffs the judicial councils and the judicial conferences have the advantage of up-to-date practical inputs into their deliberations. At best they are informed; at worst they tend to be deliberate and slow. They meet relatively infrequently and, like the supreme courts, are dependent on staff work for effective decisions. One pessimist suggested the choice is between being fast and wrong or too late and right. The alternatives are better than that.

Where local autonomy is the basic approach to system management, states suffer from unequal justice and the problem of parochial special interest compounded by lack of resources. Some areas have more than enough judges and resources, while others are virtually starved. Local autonomy often results in a self-perpetuating stagnation which assiduously ignores progressive measures being adopted by other courts.

The other side of the autonomy coin comes from the central ignorance of local problems. Geography, ethnics, economic conditions and other factors vary widely within all but the smallest jurisdictions. Local adaptations of procedures must be allowed. The goal should be to have a rationally centralized organization structured to force self-renewal while accommodating local differences.

Centralization basically serves three functions:

1. An economy of scale
2. Uniformity of product
3. Coordinated activity in external relations.

Both the service and advisory functions of a large organization must be developed. To be economic they need to be grouped centrally to accommodate irregular use. No organization can afford to have services used only occasionally stand by at each location until needed. Both professional and technical specialists need to be dispatched under some form of central control to be cost-effective and central or regional staffs are the only appropriate way to provide for the occasional demand.

Uniformity of rule is a readily accepted norm of the legal system. Appellate courts serve the purpose of providing for uniform application of legal doctrine throughout a jurisdiction. Administration plays an equally important role in securing uniform justice. Courts with less than adequate facilities or with weak supporting staff are less likely to do justice than adequately supplied and supported courts. Central administration of facilities and funds can allocate resources fairly and provide the same central control of administration that appellate courts serve for legal doctrine.

Coordination with external elements affecting the system requires centralized organizational patterns depending on the locale of the external activity. Statewide budgeting for a court system through the state legislative and executive branches requires a central budget control to parallel the central appropriating process. Locally supplied support personnel and facilities require parallel local management systems in the courts to deal with the local provider. Rational centralization accepts the need for coordination where the organizations interact and designs its procedures to adapt to the environment in which it must operate. Doctrinaire organizational concepts arguing for either strong centralization or decentralization will not work because court systems have a mixture of central and local constraints and needs.

Many court systems have started from an abstract theory rather than operational needs to design their organizational structures. Analysis of where particular relationships are needed and where the control points are in the workflow of the courts will dictate how the courts must organize to do their work.

The development of local management should not be thought of as an alternative to central management. Delegation of management tasks to state and local court administrators and their staff remains more an idea than an accepted practice. A few court administrators are assigned a broad authority over all of the support and administrative functions, but most judges tend to hang on to their traditional prerogatives and, in some cases, patronage. They continue to make routine staff appointments, to prescribe office procedures, and meddle in building management. As administrators become more competent and prove their competence it is hoped that they will play a broader role. This will not be accomplished by the competence of administrators alone. Judges must come to accept the fact that administrators can often do the administrative jobs better than the judges.

In many areas of the country local court management lacks continuity and direction. The leadership changes every year; only crises are managed, and courts respond to each problem as though it were unique, treating the symptoms rather than the ills. The need is for local management capabilities that understand the whole system—management which adopts routines and procedures which solve problems on a long-term basis. To do this the local courts must set goals and recognize the indicators which show they are reaching them. They must monitor their own progress and change where necessary to stay on predetermined courses. Spontaneous and spasmodic problem solving must be abandoned for a more deliberate set of policies designed to make the court work together toward its purposes. In short, the local courts must recognize and accept management.

Forming Judicial Policy

Probably the most controversial issue of modern judicial administration is the amount of sunshine which should be cast on judicial policymaking. Traditionally, appellate courts deliberate in chambers and announce only their decision in public. As supreme courts began to exercise the policy function in administering court systems, some of them also carried on these deliberations in secret. Modern sunshine legislation applicable to the executive branch of government has raised doubts about such practices. As policymaking boards administering an important aspect of American life, should judicial agencies function in secret?

Before that question can be answered, further reference should be made to the need for independent administration of the judiciary. Judicial independence as a necessity for individual judges is not in question. Judges must not be influenced in their judicial decisions by outside pressures, and there is adequate evidence to conclude that undue influence has sometimes resulted from executive branch administration of judicial affairs in the past. Thus, there seems to be little dispute today that the administration of courts should be within the court system.

The fact that courts should be independently administered, however, does not make them less accountable to the public

than are the other branches. They expend public monies, occupy public facilities, and perform an essential public function. The argument for secret policy decisionmaking must be valid, if at all, on the ground that the judiciary has a unique public responsibility. In matters of administration, as distinguished from the deciding of cases, there appears to be no ground for such a distinction.

The consequence of accepting this conclusion is to make public the deliberations of judicial policy boards, whether they are acting within the membership of the supreme court, a court of appeal, or a council of judges. The standards of judicial performance, the goals set, and the methods of reaching them are as much a matter of public interest when the judiciary is involved as when the executive or legislative branches are involved. In the long term, the better the public understands the judicial function and the costs of carrying it out the more likely it is that legislatures will appropriate the necessary funds, and the organizational structure of courts ultimately depends on the provision of adequate resources.

Court System Finance

The financing of court systems may be the most crucial modern court problem. It is the subject of a substantial analysis elsewhere in this discourse since it involves intergovernmental relationship more than internal operations.

From the point of view of court organization the resource allocation system is an integral element in securing equal justice across the system. Court resources, which are now derived in large part from county government, vary widely across the many judicial systems. Even where budgeting for the courts is centralized, the system of allocation is not always rational. Rural courts with low volume sometimes do not get adequate resources to take care of unique expenses caused by geographical considerations. Local support services are often allocated in response to effective persuasion rather than real need.

Where basic court resources are a product of county revenues it is clear that the state system will be out of balance. Wealth is not evenly distributed within jurisdiction and the state tax base is the only source adequate for equal treatment. The usual solution, which centralizes the court budget, unfortunately often ignores the fact that most support services are not in the court budget. This leaves the courts as poorly supported as before centralization and still encumbered by a divided planning and budgeting procedure. The net result may be a local court less manageable after "progress" than before.

Space and Facilities

Court architecture in the past has been left to local whims, responding more to political pressure than to judicial needs. The importance of an adequate facility for an effective justice system is readily accepted today, but its full significance has not been adequately explored. It can only be noted in passing that past facility design rules the present in many respects and, if not faced squarely, will rule judicial organization of the future.

The decision to build a courthouse in a particular place literally sets in concrete a large number of decisions which, in the present state of the art, should be left undecided. The research is not complete on how best to allocate judicial resources within a state. In fact, very little research is being conducted. The need for specialization of judges, specialized facilities, and special support personnel is undefined in many areas. Buildings and walls which last fifty years answer the questions, forcing decisions which should not be made.

Decisions, of course, must be made. Court spaces must be provided. The uncertainty of modern judicial administration theory should not be allowed to impede the development of resources. The only appeal that can be made is to avoid building limited purpose buildings. Structures should be designed and built which can be easily used for general office or meeting space if their abandonment as court facilities proves necessary. Temporary solutions should be sought for temporary problems and each special area of potential utilization of space be considered in developing the basic structure. Buildings should be flexible enough to be changed from courthouse to office building to courthouse to meet sequential needs. Modern architecture is capable of such design.

Courts serve many functions in society. They attempt to do justice, they provide a forum for dispute resolution, they record legal status, and they protect individuals from arbitrary government power. Not all of these functions need to be located at one location. The necessity in our scheme of government of maintaining the independence of these functions from executive and legislative interference is the unifying factor in their administration. The necessity for judicial independence is the basic reason for judicial administration as separate from public administration. To the extent space allocation and design control behavior, space management must be in the control of the judicial branch to make possible this independence.

Support Staff and Services

Judicial Branch

The growth of court administration will include a slow but steady enlargement of the staff personnel directly serving the judicial establishment. In some cases it will come as an almost total transfer of the persons serving the courts to the judicial branch, as has occurred in Colorado. In other instances it will occur in increments as court clerks, security personnel, and others are transferred from county clerks' and sheriffs' offices to the courts. The development of effective courts requires that they be in control of their operating personnel. The extent to which personnel should be transferred is a controversial matter, but the issues related to each group of specialists are different and must be dealt with separately.

Clerks of Court

Independent, often elected, clerks of court continue to operate in many courts within the United States. They perform recordkeeping functions for the courts, providing the staff both in and out of courtrooms for this purpose. In the courtroom they organize the flow of paper, make minutes of what occurs, and often mark and hold the exhibits. Outside the courtroom they receive and maintain the voluminous paper that is necessary to the litigation process. Since legal consequences follow the court activity they are a depository of significant records affecting the lives and fortunes of many thousands of people.

It has been argued that the clerks of court should be independent of the judges in order to provide an independent record. It is suggested that judges may have their own reasons to distort the record and that an independent clerk is a protection against abuse of judicial power. Such an argument is endless since it raises the unanswerable question: Who watches the watchers?

The cost of an independent recordkeeper, if it has merit, is too high. The recordkeeping process is an integral part of the litigation process and must be operated to support it. The separation of the recordkeeping from the deliberative process regularly causes delay and often causes unnecessary conflict. The clerks of the court must be brought into the judicial branch as a first step in bringing control to the litigation machinery.

Security and Service of Process

Service of court papers and the security of the courtrooms has traditionally been placed in the hands of the sheriff. To the extent the sheriff must perform other duties and respond to other priorities the court is out of control of its own operations. Logically there is no reason to have court papers served by persons outside of the court. It does not require law enforcement experience or training to serve papers. The service of papers is a part of the normal flow of work in a court. The papers are initiated as a part of cases and they are essential to due process. By bringing the control of service into the court another part of the complex litigation process can be synchronized with the flow of other work.

Security in the courtroom and in the courthouse has been an increasing problem in recent years. In addition to providing security for the court generally, the officers must be adept at controlling defendants without causing prejudice to them. The officers providing these services need law enforcement training as well as court training.

The control of prisoners as they are taken to and from the jail is a difficult task requiring control in one agency. To break up continuity of responsibility for prisoners creates security problems of major proportions. Unless the court takes over and runs the detention facility it is probably desirable to leave security in the hands of trained law enforcement personnel under law enforcement command.

Court Reporters

There are very few subjects in court administration which engender more heat and less light than the control of court reporters. They are both employees of the court and private subcontractors for transcripts in many communities. They are skilled artisans who play an essential role in court procedures and they are in short supply.

The review of courtroom procedures, whether on appeal or by the trial judge, depends on the competent and timely performance of court reporters. At present this performance is left to the control of the individual trial judges for whom they work. Close personal relationships often exist between the judge and his reporter, making any discipline of that performance quite difficult. Trial judges have little interest in the appeal of their cases, and consequently there is often little incentive for their reporters to provide speedy transcripts.

Without regard to issues surrounding electronic reporting court reporters need to be brought under general court control. Court procedures must not be adopted to accommodate their income production and their valuable time must be used with flexibility rather than concentrated on a particular judge.

Probation Services

Probation departments provide two basic services: the investigation of persons before sentencing and the supervision of convicted persons allowed to remain in the community. Of these two the investigations are an essential part of the judicial process and must be responsive to it. Where probation officers work directly for the courts these investigative services receive the priorities placed on them by the judges and are responsive to the needs of the judge.

The supervisory work of probation is more remote. It can be argued that the counseling, job placement, educational counseling, and other probationer contact are better carried out under executive branch supervision. Violations of probation conditions can then be brought back to the court for objective evaluation. If the accuser of the alleged violator works for the court, due process is gone. On the other side of this dispute, those favoring supervision under court control argue that the probationer is under court supervision by virtue of the probation order and that the judge needs to have the direct contact to integrate the decision with the execution. There is little empirical evidence to support either view, leaving the subject in need of substantial research.

Many new factors will be involved in any research attempted. The growth of deferred sentencing, with the demands it may put on courts and probation services, the impact of deferred prosecutions, and the increase of community based corrections generally will have consequences on the organizational structure of the courts which have not yet been given much serious consideration.

Court Administrators

The discussion of the other support personnel necessarily precedes any discussion of the court administrator. The complexity of the existing relationships among the support personnel illustrates the importance of the office.

Judges must be permitted to judge. They are drawn from the legal profession for their legal and judgmental abilities. They are entirely occupied by their duties in deciding cases before them and as a consequence have little time or propensity to take charge of the large staffs which support the judicial machinery. Court administrators provide the capacity as well as the time to manage. By providing a linkage between the demands of a law-based justice system and the management necessity of bringing space, people, and controls together, they make it possible for the judges to spend more time judging.

The existence of supporting staff, whether under direct control or provided by other agencies, makes coordination of effort necessary. Contacts with the resource providers, with the external actors, and with the internal operating staff form a coordination problem of massive proportions. The court administrator is essential if these contacts are to be managed.

Court administrators are sometimes viewed as persons to perform tasks not otherwise performed by specialists, rather than as supervisors and coordinators of the specialists. Under this view they prepare budgets, purchase equipment, arrange for space and respond to the idiosyncratic needs of the current chief judge. In smaller courts these duties may be appropriate, but they should be in addition to the general management duties associated with running the organization. In larger courts they should be performed by administrative staff under the direction of the administrator.

Court administrators are sometimes viewed as caseflow managers with the scheduling of cases as their major function. In this role they are often consumed in the detail of courtroom operations and left without time to perform any other management duties. Where the administrator is the calendar manager, court administration continues to be a loose collection of marginally coordinated specialist activities. As with other staff activities, the administrator should be responsible for the case scheduling activity but the operations should be in the hands of specialists.

Training

No one challenges the necessity for training in complex organizations. Modern equipment, complex work systems, and technical change make the training of personnel at least as important to effective operations as their selection. The need for training in the courts is increased by the requirement that persons be able to fill more than one position. Courts operate with minimum staffing. Absences force the staff to perform duties other than their own. Specialization is limited by the need to fill all of the normal complex functions with fewer staff members than are found in comparable executive branch organization.

Specialization is at the same time quite diverse. The security function is unrelated to recordkeeping and court reporting. Probation services require abilities distinct from all others. Legal assistants must have legal training and bail investigators must have investigative experience. The support services must find their basic and continuing education outside of the court service and yet must be integrated into the court service.

The ultimate solution to this diverse group of training

needs must be national programs which provide a national perspective for each of the specialties. The National Judicial College for judges, the Institute for Court Management, and masters degree programs for court administrators at the University of Southern California and the University of Denver already exist to this end. Similar national perspectives are needed in clerical, probation, and investigative support services.

Selection

Patronage personnel systems are very much alive in the courts of the United States. In many states the courts engage in the last major form of political patronage with all its dysfunctions and potential conflicts. Judicial service systems are much needed to make the support personnel as free from improper influence as judges should be. In one view the shift from patronage to judicial service provides an opportunity to avoid classic civil service problems as it is adopted. Rational personnel selection systems can be designed which avoid the rigidity of classic civil service and make possible jobs designed and filled to accommodate innovation and modern motivational skills.

Some judicial systems are, however, already burdened by archaic civil service with its limitations on lateral entry. Intake levels operate to restrict selection to modestly educated people who are often marginally qualified for advancement into responsible positions. Promotions from within are a necessary part of any organized system. Experience is often an effective teacher, but it is clearly not the only teacher, and must not be allowed to be the basic criterion for a job. Modern judicial service systems should open the doors wide to competition from persons who prepare themselves educationally before their first job in the courts, rather than relying on experience levels which lock in inadequate people to the most responsible jobs.

Integrity

Although many tasks in government can be performed by persons of ordinary qualification, most tasks in the courts require a high degree of reliability and personal integrity. The opportunities for a dishonest person to distort the system are many. The beginning clerk has records in hand which, if distorted, can adversely affect the livelihood of litigants. Probation officers literally have a person's freedom in their control. Integrity of a high order is not uniformly found in all the public; it is a special quality worth additional compensation and requires additional diligence in selection. It is often ignored as a unique quality by civil service specialists unfamiliar with the role of courts in our society.

Caseflow Management

Importance and Complexity

The basic work of any court is the orderly processing of disputes formally presented for resolution. All other work is ancillary to the process and with a few exceptions is designed to support it. The control of the flow of cases through the court system is the central focus of court administration, and is at best an art form at present far removed from scientific predictability. In its most advanced form the management of the flow of cases is a game with confusing and changing rules. In its worst form it is a free-for-all with little concern for justice.

If the principal objective of a court system is to do justice in individual cases, the caseflow management process may be the most important device toward the accomplishment of this end. The adversary system of dispute resolution is a memory-dependent system. The hearing on an issue of fact presented to judge or judge and jury is a forum for the presentation of witness recollection and the exploration of that recollection. To the extent memory survives with minimal distortion, justice can be done; the law can be applied to the fact. Since memory diminishes with time any delay in the caseflow process tends to reduce the ability to find the truth. Justice is proportionately lost.

Although the judiciary performs other functions in society its basic function is the just disposition of disputes. The manipulation of the case flow to bring about delay or to serve other purposes of the lawyers or parties makes the judicial process a sham and its agents hypocrites. Caseflow control is thus more than a mechanical device to make effective use of court resources. It is the central device by which courts perform or fail to perform their proper function.

Students of management have recently studied and acknowledged the complexity of the caseflow process. The interdependencies of professional activity alone startle the person accustomed to orderly procedures. Instead of being motivated toward coordination of effort, the principal actors are motivated to disrupt their fellow processors. The fact that each of the processors is interested in an opposing product, a decision for his client, explains rather precisely the difference between normal work flow and case flow. Impose upon this constraint a jury which is inadequately compensated for its time, clerks elected to administrative posts without re-

sponsibility to the decisionmakers, witnesses without motive to cooperate and judges acting independent of any supervision, and it is a wonder that any decisions get made.

The work flow of a dispute, in fact, originates in an office independent of the court, is recorded by an office independent of the courts, is processed by at least three different independent governmental agencies, and is dependent upon the availability of persons (witnesses) not in the process for its ultimate purpose. It is difficult to imagine a system less capable of coordinated activity.

Caseflow management is the art of pulling all of these diverse and opposed parties together. It is in its infant state of growth with only the most rudimentary resemblance to what will be its mature growth. Ten years ago the basics of caseflow management had not been discerned. Five years ago these basics were seldom applied. Today they are not widely accepted. Somewhat like other technologies, the principles must be applied across a broad base for many years and be subjected to substantial refinement.

Conflicting Theories

With the abandoning of lawyer control of the cases by consent, conflicting theories of caseflow management have developed. The assignment of cases to individual judges when they first come into the court is referred to as an individual assignment system and is a natural outgrowth of a one judge per county system; the judge has the case from filing to disposition. Short of a change of venue or other movement by challenge to the bias of the judge, the court has the case for all purposes. There is little room for judge-shopping unless the point of initial assignment, usually the clerk's office, is corrupted.

The contrasting system of case assignment is through a master calendar. Under such a system the cases are held at a central point until some judicial action is required, at which time the case is assigned to a particular judge for the judicial action and returned to the central point until further action is required. A case is often before several different judges under this system. Sometimes called the "central assignment system," it grew out of an efficiency theory of court operations which was invoked to meet the shifting availability of judicial manpower.

In their modern form both systems have worked well and both have worked badly. It is beyond the scope of this writing to discuss the pros and cons of the systems. In fact, there are few pure examples of either system and neither appears to work in its weaker forms. The individual calendaring systems are generally a response to what appears to be a lack c will to permit management of their workloads on the part c prima donna judges and the master calendar system tends t increase maneuvering room for the unscrupulous lawyers. A is made more explicit below, system design is not the onl critical variable in this comparison.

It is not surprising that caseflow principles should hav developed slowly. They are the product of a conservativ profession which resists change as a basic challenge to it principle of order. Caseflow control grew in a rural environment to meet the needs of itinerant judges who sat for fixec terms in different counties. The local clerk maintained the records, the local sheriff served the papers, and local lawyers waited for the judge to arrive. The lawyers, in cooperation with the local officials, developed the calendar system. They traded among themselves, accommodated each other's needs, and set the list of cases to be dealt with in the term of the visiting judge. They produced a lawyer's calendar with little regard for justice.

Despite the fact that most metropolitan areas of the United States had permanent court facilities and resident judges by 1900, it was not until mid-century that courts thought they might run their calendar contrary to the wishes of the lawyers. A consent continuance of the case had been the rule of administration and rarely would a lawyer refuse the request of a fellow lawyer, knowing full well that next time he might be the requester.

The work of the Joint Committee for Effective Justice in the early 1960s presaged the end of this viewpoint. By 1966 a survey of judges reported a slight majority advocating judicial control of the caseflow process. By 1970 the majority was substantial. Today the theory of lawyer control of calendars is not dead, but predictably will be in another decade.

The absence of one theory has not led automatically to the adoption of another. The battle between advocates of an individual assignment system and a master calendar system can be found at any gathering of presiding judges or court administrators. The absence of conclusive data is conspicuous as the debate wages between the ignorant of both camps.

To the extent data are available one would have to conclude that the argument between individual and master assignment system advocates is a specious exercise. Proofs exist as to the efficacy of both, which leads one to conclude that the truth must be in a different level of analysis which will explain the successes and failures on a different basis. The data now indicate that the assignment system is not a critical variable. In fact, both systems appear to work effec-

tively when governed by certain managerial approaches properly applied.

Essential Elements

Descriptions of these approaches have taken different forms, but basically they acknowledge the following:

1. Courts must take control of the case at the earliest possible time (at filing in a civil case or at issuance of a warrant or arrest in a criminal case).
2. Either by holding a hearing in individual cases or by rule governing all cases, the limits of delay in the case must be explicitly defined.
3. A judicial officer with authority must monitor the explicitly defined delay limits.
4. The court must adopt standards for acceptable (tolerable) delay.
5. Cases should always be set for a time and date certain for each step in the proceeding.
6. Expectations created by definite settings must be met with high probability.
7. Lawyer schedules must be accommodated within reasonable limit of their availability.
8. The system must have a mechanism to meet special problems so that cases are not permitted to remain undecided.

These basic observations about caseflow management can easily become rigid, with the spirit lost in the letter of the rule. The growing research and literature, however, support a flexible application of the basic rules to all kinds of caseflow systems.

Important to the operation of any caseflow system is the recognition that the individual cases presented to a modern American court for adjudication are highly diverse. All cases are not equal in subject matter or complexity. All judges are not equal in experience or ability. Subject matter labels are particularly deceiving. Some criminal cases are easily disposed of in a matter of minutes, while others can take months. Most divorce cases are disposed of without opposition, while a few involve long fights over child custody and property. The administration of case flow must take these variables into account. No system has yet been designed which can eliminate the factor of human judgment in the assignment of cases to individual judges for disposition.

Some judges good at mediating a dispute are not particularly effective in controlling a complex trial. Some judges good in business disputes are not good in personal injury cases. The allocation of judges for cases is an unexplored science and a crude art form. The future may see movement in this direction, but not without dispute. Although clearly not equal in all matters, judges are the last to acknowledge the inequalities.

In multijudge courts the differences are usually accommodated by specialization both in subject matter and procedure. Special caseflow systems are set up for the courts operating in divisions. Classic divisions include civil jury, civil non-jury, criminal, juvenile, domestic relations, and equity. Large courts sometimes organize procedurally with motions being heard in one division, trials in another, and settlement conferences in another. The possible combinations in a large court are substantial. Most courts, including some of thirty or more judges, tend to restrict themselves to criminal, civil, and juvenile. In most courts cases are assigned to judges without regard to complexity or judicial experience either on rotation or when a judge is available.

The critical need of modern court administration is to accept the fact that courts do not exist to support lawyers and judges. Their function is to resolve disputes among litigants as justly as possible, but expeditiously in any event. The caseflow system should be designed to meet the needs of the litigants. Information as to the progress of cases must be made easily available to litigants. Decisions should be made promptly and announced clearly, and no one is entitled to maneuver the system for advantage or delay.

Supporting Information

The heart of a modern, controlled caseflow management system is the information flow which supports it. The flow of cases must be controlled based upon current information as to all of the actors and the status of the cases. The complexity already noted makes this necessity difficult to achieve.

The use of computers in courts has confused the problem and to some extent increased its complexity. Fooled by the speed at which computers can process and provide stored information, courts have rushed into the computerization of caseflow information. Unfortunately, the speed of the internal workings cannot solve a problem created by constantly changing information. The problem is not one of computation or output, but one related to accurately updated inputs. The status of individuals and cases changes outside the reporting area of the court, leaving the court computer spewing forth erroneous information in minute fractions of a second.

To meet the demand of the computer for updated information the limited personnel of the system have been diverted to the never-ending task of feeding the computer. The complex coordinating process which results in a courtroom with law-

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yers, jurors, clerks, security personnel, and witnesses all in one place at one time, gathered on relatively short notice is abandoned so that the computer can be accurate. Unfortunately, the critical task of fitting it all together has been lost in an attempt to use a computer.

The presence of computer technicians in the courts has not been without benefit. The systems analysts necessary to computerization ask a lot of the right questions, such as "what is the necessary information?" and "how can the necessary information be collected and made available to the decisionmakers?" Where these questions have been asked and answered electronic equipment has been found and is in use to assist the judgment of the case-coordinating staff. In very large and complex systems electronic data processing has provided the kind of quick entry and quick retrieval which give the scheduler enough information to schedule effectively, but in most instances simple manually maintained card systems work as well.

In a modern information monitoring and operating system a combination of technologies is used. The telephone is probably the most important single device, followed closely by multicarbon forms and tub files. The system which defines standard of performance and reports progress based on these standards must come before the technology. After failures are reluctantly admitted, the next decade will record a management system based on these premises.

Pertinent Issues

Rational Centralization

The first order of business for a modern system of court organization is development of an analytical central operation. There can be little or no rational decentralization of functions until there is a central focus for the court system. Once a central focus exists the following questions can be asked.

1. What central services or expertise will be essential to the system?
2. What functions of administration should be uniform throughout the system?
3. What local functions of administration outweigh the need for uniformity?
4. How are the current supporting services organized?
5. What liaison is needed at what points to ensure workflow impediments can be eliminated?
6. How should innovative approaches to court operations be generated and implemented?
7. What kind of organizational structure will accommodate the complex relationships which are defined by the answers to the foregoing questions?

Is hierarchical central control the best model for the operation of the system as defined? Are negotiation, cooperation, and liaison as important to court operations as central direction? These issues have not been dealt with in the past and must now be faced.

Analysis of Functions and Needs

The second order of business is to identify the qualities necessary to perform the tasks within the court system. Court systems are lawyer-dominated institutions. Legal training and experience are relevant to most of their operations. The problems of court organization and administration require nonlegal as well as legal skills. The operations of a court calendar require scheduling skills. Management of large numbers of people requires personnel skills. The list of potential and necessary skills is substantial. Most court systems fail to identify tasks and skills sufficient to administer the system effectively. Again, important questions need to be asked.

1. What qualities are requisite to an effective judicial performance? Is industriousness an ingredient? Is prior experience in the courtroom essential? Is good health essential? Is a broad background in dealing with diverse kinds of people requisite? Must a judge be able to listen?
2. What qualities are needed in a presiding judge? Is legal scholarship essential? Is knowledge of state and local government important? Must the job include effective dealings with people? Is seniority on the bench relevant? Must the presiding judge have management experience?
3. What qualities are needed in a trial court administrator? Is an understanding of state and local government essential? Is an understanding of statistics and statistical techniques necessary? How much legal exposure is required to deal effectively with a legal system? What qualities, such as initiative, negotiation, and loyalty, are necessary?
4. What qualities are needed in a state court administrator? Is knowledge of the internal workings of the legislature necessary? How sophisticated must be the knowledge of statistics? Is there a need for a knowledge of government accounting? What expertise is needed in civil service practices or government union negotiations? How much knowledge of architecture and equipment is necessary?

The jobs and questions could be addressed for pages. The fact is that although tasks have been described for these

several positions there has been far too little attention paid to the qualities necessary to perform the tasks. It is time now for conjecture and testing. At some time not too far distant these questions and many others must be answered. It is important to conclude, however, that despite much rhetoric to the contrary, they have not been answered.

Optimal Selection Procedure

The third item of importance must be to design mechanisms of selection which will get the right people into the court jobs. There seem to be minimums to assure this result. These minimums are by no means universally accepted in the theory of judicial administration.

1. The system must be publicly visible to assure that selections have been based on proper criteria.
2. Judges must have adequate tenure and compensation to attract the more competent lawyers out of practice onto the bench.
3. The process of discipline and removal must be sufficiently private to make reformation possible without public confrontation, but visible at some point so as to assure fair procedures over disputed facts.
4. Training, orientation, and career development must be built into the system to avoid dead-end jobs.
5. Mobility within the system must be fostered.
6. Lateral entry into the system and into promotion lines must be possible.

Mandated Local Court Administration

Concurrent with the above priorities, local court administration must be mandated. Nonadministration of local courts must not be tolerated. The essential elements of the mandate include:

1. The stated authority of the local judges as a policy board to set and enforce standards of performance within the local court processes.
2. A regular meeting of the board of judges with a prepublished agenda and minutes of the disposition of each item.
3. The selection of a presiding judge from among the members of the board of judges for a minimum term of two years subject to reselection for an additional two years.
4. The selection of a court administrative officer responsible to the presiding judge for such matters as may be delegated to the administration.
5. A data reporting system adopted by the board of judges sufficient to provide a report as to the status of standards adopted.

Resource Development

As noted earlier, court resources do not come from a singular source. In the most centrally budgeted courts some of the persons essential to the operation are drawing on resources not subject to the control of the courts. The courts may not direct these resources, but they are dependent upon them. Police resources, for instance, determine the flow of criminal cases as much or more than judicial resources. The task of the court in resource development is to deal with the responsible people to assure the fair operation of its procedures. The funding agency must be identified for each element of the litigation process and it must be advised of court needs. It is not enough to recognize and seek money for internal operations if, in fact, a lack of resources in the police, the bar, the sheriff's office or other organization prevents the proper operation of the justice system.

The court must participate in (not direct) the administrative coordination necessary to accomplish the purposes for which the courts are operated. The planning, budgeting, and controlling process is an interactive process involving all the actors. It cannot be otherwise conceived. Isolation of the budgeting and planning process will inevitably lead to a frustration of court purposes.

Innovation and Change

Court organization must accommodate the need for innovation and change. Innovation is a hard problem in organization theory. People in charge of daily operations do not have time to take on the innovative function. People isolated from daily operations do not know enough about operations to be innovative. The glib solution is to create an innovative center made up of people rotated in and out of the center from field operations for relatively short terms. Much more is required. Travel monies must be provided and technical assistance from external sources is essential.

Innovation must be built into the structure of the court system. Complex committees served by the central staff should be used to review and advise the policy board on changes in procedure or administration. Proposed changes should always carry a prediction of result. The effect of changes should be monitored for unpredicted as well as predicted results.

Modern technologies should be the subject of special innovation programs, but never in isolation from the people they would affect. Again, interorganizational advisory boards should be included in all attempts at change. The existing order must be understood and accommodated in the

process of introducing new technology. The innovators are catalysts, not directors, of change. Ownership of change by the operating personnel is essential to success.

Ideas are not self-executing. Innovative changes must be introduced with operational involvement. The implementation requires more thought by far than the decision to change. Changes cannot be ordered: they must be programmed with each task and event and patiently monitored and reviewed over time.

The most critical innovation of modern court organization must be to develop a rational system for the allocation of cases. This involves a re-examination of the basis for the subject matter jurisdiction around which courts and divisions of courts are organized. It involves a classification of judicial capabilities and it involves the fixing authority for a rational differentiation of cases.

A preliminary analysis of court workloads will demonstrate the need for managerial differentiation of cases, as opposed to simple rotation. All judges and all cases are not fungible. The allocation of expertise to kinds and types of problems which transcend subject matter classification will bring courts into an era of rational organization. It is a long stride from the present and will require slow tentative experimentation. It may dictate the division of large courts into smaller workable units. It may suggest changes in the concept of judicial performance. It would appear to be worthy of the effort.

Last, but no means least, the essence of a modern court organization is its ability to accommodate alternative methods of dispute resolution. Cases may be taken from the courts *en masse*, and procedural redesign may result in large numbers of cases being filed that were heretofore unlitigated. The ability of the courts to adapt will be the final test of their organization. Constant monitoring of changes in workload, regular contact with the initiating agencies of government, and awareness of social change resulting in the changing patterns of litigation will provide the information for adaptation. The capacity of the court leadership to know and understand the operations of all the litigating and supporting elements will provide the basis for adaptation. An organization involved at all levels in the planning process will provide the will to adapt. Effective internal organization and procedures will be tested by the adaptability that can be demonstrated under conditions requiring change.

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Court Administration

III

Barry Mahoney and Harvey E. Solomon*

I. Introduction

The decade that has passed since publication of the previous edition of this handbook has seen a number of significant developments in the field of court administration. Perhaps the most striking change has been in the extent to which the field has become professionalized. Ten years ago there were fewer than fifty individuals in administrative positions in the courts who had had any sort of management training at all. Today, there are well over 500 individuals in senior and mid-level administrative positions serving in state and federal court systems, many of whom have had extensive postgraduate education in management. Hundreds more have had at least some type of short-term management training.

This trend has been spurred by a growing recognition on the part of the judiciary, the legal profession, and the public that effective and efficient court management is of vital importance. Two new major national organizations which were established in the early 1970s at the urging of Chief Justice Warren E. Burger contributed significantly to the developing professionalism in court administration. These organizations—the Institute for Court Management and the National Center for State Courts—have created a capacity for training, research, technical assistance, and the exchange of information and ideas that had never before existed. In addition, a number of universities, most prominently the University of Denver and the University of Southern California, inaugurated graduate programs in judicial administration during the 1970s.

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Training in court management has not been limited solely to individuals in university programs or to those holding formal titles such as "court administrator." On the contrary, clerks of court and administrative judges have become increasingly aware of their administrative responsibilities and of the need to develop management skills. Indeed, one of the significant developments of the decade has been a growing awareness that court administration involves far more than taking care of "housekeeping duties" that a chief judge would like to delegate to someone else. The administration of a court or a court system, like administration of any complex organization or system, inevitably involves policy choices, and those responsible for administration cannot help but be involved in formulation as well as implementation of policy.

Given the great diversity of American courts and court systems, it should not be surprising to find that there are widely differing views regarding what court administration means and what court administrators and others charged with administrative responsibility for the courts should do. There is, however, broad agreement that regardless of who performs specific functions there are some critical common elements in any viable system of court administration.

II. Core Functions of Court Administration

Contemporary American courts and court systems are highly complex organizations, performing a large number of functions and requiring a wide range of staff services. Those functions that are most clearly a court responsibility include caseflow management (perhaps the most critical of all functions, since handling cases is the primary business of the courts); jury management; management of records and information systems; budgeting and fiscal administration; personnel management; management of courthouse facilities and equipment; and provision of in-service training for court personnel. In addition, there is a wide range of other services—often performed by executive branch agencies and personnel—with respect to which a court may have some administrative or coordinating responsibility. These may include, for example, security services at the courthouse; pretrial release investigations; supervision of persons released on bail or other form of pretrial release; determination of eligibility for legal assistance; presentence investigations; mental health diagnoses; and adult and juvenile probation services. The range of such services is very wide and, although the court may not have direct administrative responsibility for their performance, it clearly has a stake in ensuring that they are performed effectively.

Courts differ widely in the range of services for which they have direct administrative responsibility and in how the responsibility is allocated within the courts. There is no single model for administration of these ser-

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vices. Regardless of how the administrative authority is allocated, however, there is general agreement that clear written policies and procedures—developed in consultation with other affected agencies—should be developed and reviewed regularly. And, importantly, the court itself—through its presiding judge and court administrator—should initiate and implement the formulation of policy and procedures that govern supporting services, including those that are provided by outside agencies as well as those that are provided by the court.

A. *Caseflow Management*

The primary task of the courts is to determine the matters that come before them, and to make these determinations justly, promptly, and economically. Effective management of the flow of cases through a court (or, from a broader perspective through a court system) is, or should be, the central focus of court administration. Far from being a science, caseflow mangement is perhaps best described as an art form, albeit one far more advanced today than it was a decade ago.

If a court is to give prompt and adequate consideration to its cases, it is essential that the court itself exercise active supervision over its caseflow. The possible alternatives to management by the court—leaving case scheduling to individual lawyers or, in criminal cases, to the prosecutor's office—are not only likely to result in delay in individual cases but also to produce inefficiency and disruption in the flow of all cases. Each lawyer's primary concern is with his own cases and his own scheduling problems, and lawyers as a matter of professional courtesy are inclined to accommodate each other's scheduling needs. Additionally, if the prosecutor has control over the scheduling of cases, the defense is put at an unfair tactical disadvantage. Only the court has an overview of all cases, and only the court is in a position to provide orderly and impartial direction to the movement.

The overall goal of such caseflow management by the court is not simply to move cases faster solely for the sake of speed or efficiency. Clearly, however, reasonably expeditious case processing is an important element of justice in a judicial system that is heavily dependent on the memories of witnesses. Unnecessarily long deferral of the outcome of a case is unfair to all. Both individual litigants and society at large have a stake in the prompt handling of both criminal and civil cases, following procedures that are applied in a consistent and evenhanded fashion.

Over the past decade, with the help of several significant research and demonstration projects, considerable headway has been made in establishing a set of basic principles of effective caseflow management. Many of these principles, to be sure, have long been advocated by some judges, other practitioners and researchers, but their systematic validation has come only recently. While students of the subject will differ on some of

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the nuances, there is broad agreement that these principles include the following:

1. There must be a policy-level commitment by the court (or, on a statewide basis, by the court system) to control of caseflow and speedy disposition of cases.

2. Mechanisms for consultation among judges, court administrators, lawyers, and other relevant participants in the court process should be established, under the leadership of the court, in order to help formulate policies, deal with special problems, and adjust procedures to meet changing circumstances.

3. The court must take control over the movement of cases at the earliest possible time—at the time of filing in a civil case or at the time of arrest or issuance of a warrant in a criminal case.

4. There should be explicit time standards for the maximum periods of time a case should take, both on an overall basis (inception to completion) and for the identifiable stages in the caseflow process.

5. Case record and court information systems which provide readily available information on case aging should be utilized, and should be monitored by a senior court official.

6. Clear procedures governing the caseflow process, including policies establishing tight limits on the number and length of continuances, should be established and implemented.

7. Cases should always be scheduled for a time and date certain for each step in the proceedings, including the trial.

8. The court must ensure that expectations created by definite settings are met with a high degree of probability.

9. Techniques for minimizing attorney schedule conflicts should be utilized, and lawyers' schedules should be accommodated to the extent reasonably possible, in the scheduling of cases.

10. Court system performance should be measured against the standards and goals for case processing, and provision should be made for feedback to participants and periodic revision of the caseflow management system when necessary.

The cases that come into a court system vary widely in terms of their subject matter and the degree of their complexity. Some can be disposed of in a matter of minutes, while others will require months or (in rare instances) even years. Moreover, judges differ considerably in their ability to handle different types of cases. Any viable system of caseflow management employing the above principles must take these differences into account, and must be adapted to the procedures, administrative arrangements, and other special characteristics of the jurisdiction.

In a multi-judge court, both the presiding judge and the court administrator should have key roles in a caseflow management system. Principles of collegiality will vary, but the presiding judge will ordinarily have responsibility for assigning tasks and responsibilities to judges, for monitoring performance, for imposing sanctions when necessary, and for generally ensuring that the court's case management policies are followed. The court administrator will usually have primary responsibility for communication with the many participants in the court process, for ensuring the availability of case-related information which is a vital element of any case management system, for making at least the preliminary analyses of this information on a regular basis, and for managing the court's staff resources.

B. *Records, Statistics, and Information System Management*

Courts are required—by statutes, administrative regulations, court rules, and other sources—to maintain a great many different types of records. Additionally, there is a large number of information needs that must be met by a court system even though not required by law. One of the high priority tasks of court administration, at both the systemwide level and the individual court level, is to develop efficient procedures for storing, indexing, and retrieving information from its records.

The work of a court or court system can be grouped generally into three broad categories: judicial and administrative decisionmaking (e.g., deciding cases, assigning matters for trial, managing funds paid into court); information-handling activities (e.g., making entries in official records, computing financial accounts); and monitoring and planning activities (e.g., analyzing case inventories and caseflow, preparing court budgets, auditing fine collection practices). All three categories of action and decisionmaking require relevant information in a usable form.

Those who require information from court records and information systems include judges, court administrative and clerical personnel, lawyers, police, probation officers, correction officials, litigants, representatives of the news media, and the public. The system must be able to provide large amounts of information, rapidly and economically, to this broad range of users. And, to be useful, the information must be current, based on data entered accurately and promptly in the appropriate court records that are easily accessible.

Development and implementation of an effective court information system, whether manual or automated, is a time-consuming process that requires careful planning. The system itself is constantly in need of review and revision, to ensure that it is performing its functions effectively. The key questions, with respect to any such system, involve who needs what types of information when, and for what purposes. All too often, courts

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have received minimum benefit from expensive computerization projects because of a basic oversight in planning: failure to give sufficient attention, early in the project planning process, to issues of information needs, information flow, and data recording. Because of the complexity of court operations and the large number of items of data relevant to a busy court's daily business, there are tremendous problems associated with the timely and accurate recording of information from courtrooms, clerks' offices, and other sources, for input into a computer. The result of inadequate planning is likely to be the acquisition of an expensive computer which produces incomplete, inaccurate, and untimely information, compounding rather than simplifying the problems of court management.

Over the course of the past decade, courts and court systems have made significant strides in developing useful, reliable information systems. Court information system specialists, almost nonexistent a decade ago, can now be found in many large trial courts and state court administrators' offices. The quality and timeliness of the information produced is significantly better than it was a decade ago, and is increasingly being used effectively to achieve court management objectives.

C. *Budgeting and Fiscal Management*

The capacity of a court or court system to perform its functions is determined to a large extent by the resources available to it. Adequate funding is needed to attract and retain competent judges and nonjudicial personnel; to provide supplies and equipment; to maintain court facilities; to pay juror and witness fees; and to provide a wide range of services such as those provided by physicians, psychologists, special masters, and others.

Historically, American trial courts have been financed principally by local government—by counties for trial courts of general jurisdiction and by cities and towns for limited jurisdiction courts. States have assumed the costs of appellate courts and have sometimes paid a portion of trial court costs. This is still the basic pattern in most states, but during the 1970s there has been a shift toward state assumption of trial court costs in a number of states. The ABA Standards Relating to Court Organization strongly recommend state-level financing for the entire court system on the ground that financing by local government leads to disparate levels of financial support (particularly for auxiliary services), tends to disperse responsibility for administration and policy, and may produce a widely varying quality of justice within a state. However state-level financing has been resisted by many jurisdictions, at least in part because it has usually been accompanied by increased budgetary authority in the state court administrator's office with a resultant loss of local control.

Regardless of the extent to which a court system is financed centrally, there are important planning, budgeting, and fiscal management functions which must be performed at both the state and local level. Changes

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in substantive and procedural law, for example, may create new or different tasks for the courts and may require new procedures, new organizational substructures, and new services or equipment. Population shifts, together with continued growth in the volume and complexity of court business, produce changing demands and increasing pressures on the courts, and affect their financial requirements. Technological innovations—computers, word-processing equipment, microfilm and microfiche, audio and video recording equipment, and the like—produce opportunities for dramatic long-term savings, but often require substantial capital outlays and, in any event, require careful assessment of needs if optimum use is to be made of them.

One of the significant developments of the 1970s has been the development of court planning as a subfield within court administration. A number of state court administrators now have court planners in senior positions on their staffs, charged with responsibility for making projections of future workloads; estimating needs for personnel, services, and facilities; and working with fiscal specialists to develop cost projections and budget justifications.

The budgeting process itself is both a planning exercise, requiring accurate and comprehensive information, and a political function requiring extensive consultation and persuasive presentation of the judiciary's financial needs to the executive and legislative branches of governments. At the state level, budget preparation is a key function of the state court administrator's office, and responsibility for actually presenting the court system budget is ordinarily assumed by the chief justice and the state court administrator. In states where the court system is centrally financed, the budget preparation process necessarily involves extensive consultation with judges and administrators at all levels of the court system. Even where trial courts are locally financed, the preparation of a unified court system budget—and the process of consultation and information gathering that preparation of such a budget necessarily entails—can be utilized effectively by a state court administrator's office. Such a process helps to keep open the lines of communication, makes it possible to have a comprehensive overview of court operations and finances, and is a valuable aid in day-to-day policy administration.

Planning and budgeting are also integral elements of effective court administration at the local trial court level, regardless of whether the court's source of funding is the state, local government, or some combination of the two. Trial court administrators and chief judges are likely to be more conscious of local needs and problems than are state-level officials, and they are in a better position to gather the detailed information necessary to accurately estimate future needs, formulate program plans, and estimate financial requirements. Particularly where the primary financial support of a court is provided by local government, it is essential that

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the local court have a capacity for planning and budget preparation.

The day-to-day management of fiscal affairs is also a vital element of effective court administration at both the state and local level. At both levels, it is critical that sound accounting practices be established and implemented. Funds handled by the courts—not only those provided by appropriations, but those that come into the system from fines, fees, and other sources—must be handled carefully and efficiently, both to ensure that these moneys are used as provided by law and to give the court or court system the information necessary to respond promptly to changing fiscal needs and circumstances.

D. *Space and Equipment Management*

Of all the core functions of court administration, the management of space and equipment is perhaps the one most widely regarded as being within the province of professional court administrators. Clearly, however, decisions in this area—e.g., courtroom utilization, purchasing and use of data-processing or microfilm equipment—can have dramatic effects upon the day-to-day operation of the court and upon the overall caseflow process. The close relationship between the efficient handling of these "housekeeping" tasks and effective overall court performance is increasingly being recognized, and is contributing to a reassessment of the roles and responsibilities of chief judges and court administrators. Court administrators (and their staffs) continue to exercise a broad range of responsibility in these areas, but—particularly as chief judges become more attuned to administrative goals and objectives and better trained in fundamentals of court administration—policy development and management of key housekeeping duties is becoming more of a shared responsibility.

E. *In-Service Education and Training*

Continuing training and education is desirable both for judges and for the nonjudicial personnel of a court system, in order to maintain an acceptable level of competence in the performance of vital judicial branch functions. Newly appointed trial judges, for example, need orientation to their role and training in the basic fundamentals of presiding at a trial and ruling on evidentiary matters. Experienced judges need periodic updating on developments in substantive and procedural law. Chief judges, particularly, need training in a broad range of aspects of court management. Court administrators and clerks of court, at both the senior and middle management levels, need training in policy development and implementation as well as in techniques used in a wide variety of specialized fields such as caseflow management, budgeting and planning, personnel management, information systems, and records management. One of the principal responsibilities of a court administrator, at both the state level and trial court level, is to arrange for appropriate in-service training de-

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signed to increase skills and knowledge.

During the past decade, there has been a significant increase in the range of available training programs for both judges and administrative personnel. A number of states now have their own judicial education programs, generally administered through the state court administrator's office. Additionally, training in many areas is provided through national organizations such as the Institute for Court Management, the National Judicial College, the Institute of Judicial Administration, and the Federal Judicial Center. A comprehensive training program should include both in-state training and participation in the programs offered by institutions with a national perspective and constituency.

F. *Other Functions*

Any attempt to identify and discuss the core functions of court administration will inevitably overlook some functions that—at least in some circumstances—are clearly vital to the effective administration of justice. A longer list than that presented here might logically include (but would not be limited to) the drafting and review of proposed court rules and legislation affecting court system operations; establishing job classification and salary structures; handling the hiring, performance evaluation, promotion, firing and other personnel actions affecting court personnel; investigating complaints with respect to the operation of the courts; supervising the work of court reporters; handling public information functions and relationships with the news media; and establishing and maintaining links with community organizations concerned about the work of the courts.

III. Court Administration in the 1980s: Issues and Problems

The decade of the 1970s was one of tremendous growth and ferment in the field of court administration. A new cadre of professionally trained court administrators came into being, the administrative staffs of local courts and statewide court systems increased markedly in size and range of functions performed, important developments took place in the application of modern technology to the solution of court management problems, and significant research and development efforts began to get underway.

The Federal Judicial Center, created in the 1960s to serve the federal courts, developed into full operation in the 1970s. In addition, major new national organizations such as the Institute for Court Management and the National Center for State Courts were established, creating a capacity for training, research, and technical assistance that had never before existed.

Although a great many individuals and institutions were involved in

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these developments, particular note should be made of the vital contribution of Arthur T. Vanderbilt and Warren E. Burger. It was Vanderbilt who, as president of the American Bar Association in 1937, initiated a long-term effort to establish standards of judicial administration which finally came to fruition in the 1970s with the adoption by the ABA of the Standards Relating to Court Organization, Trial Courts, and Appellate Courts. As chief justice of New Jersey from 1947 to 1957 and as the founder (in 1953) of the Institute of Judicial Administration, Vanderbilt continued his pioneering work in the field, emphasizing structural changes and the centralization of administrative authority over court system operations. Burger, who became chief justice of the United States in 1969, identified archaic and inefficient administrative practices as a serious and widespread problem for America's courts, and has spoken out consistently on behalf of efforts to improve court management. The leadership of the Chief Justice was instrumental in creating the Institute for Court Management and the National Center for State Courts, and in generally raising the level of awareness of court administration issues and concerns.

Despite the apparent progress that has been made, it is clear that court administration will face a number of serious problems and issues in the 1980s. Some of these are matters of longstanding concern while others are of relatively recent origin—arising, in some instances, out of the growth and ferment of the 1970s. Few of them will be resolved easily.

A. *Court Organization and Financing*

Issues of court organization and financing have long been a subject of debate in the United States. The debate, conducted on many different levels and in a variety of different political arenas, centers around the concept of court unification. Unification is a concept that can be interpreted in a variety of ways, but concrete proposals for creation of unified court systems in the American states generally include four basic components: (1) elimination of overlapping and conflicting jurisdictional boundaries (both in terms of subject matter and geography), and establishment of a simple, streamlined court structure; (2) creation of a centralized administrative structure, with management responsibility vested in the chief justice and state court administrator; (3) state financing of all courts in the system, using a budgetary process in which the state court administrator's office has the principal role; and (4) a judicial personnel system operated centrally by the state court administrator's office, covering all personnel working in the state court system, at every level of court.

Those who favor unification maintain that it produces a simpler, more uniform, and more efficient court system for a state, one in which lines of communication and administrative authority are clear. A unified court system is said to produce economies of scale, to allow for equitable

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distribution of resources to different areas of the state, to enable more flexible use of personnel and facilities, and to ensure more equal administration of justice throughout the state. Historically, the trend in the United States, over the past half-century, has been toward an increasing degree of unification in state court systems. The trend accelerated during the 1970s, as many state court administrator's offices developed genuine administrative capacity and as a number of states—spurred in part by the bar's interest in implementation of the ABA Standards Relating to Court Organization—undertook major restructuring of their court systems. The movement has, of course, taken place at an uneven pace; no two states have identical systems, and the extent to which unification has been achieved varies widely among the states. There are still some states where there is little or no central authority over local court operations, and others where a supreme court has broad authority to monitor and direct local court system operations but has not chosen to exercise it.

During the 1970s, even as many states moved toward greater centralization, increasing numbers of practitioners, as well as some academics, began raising questions about some of the premises of the unification movement, or at least about their broad-scale applicability to every court system. They argue, for example, that the essentially hierarchical structure which is characteristic of the unified court system model has been derived from management principles that are inappropriate for complex organizations in which professionals have key roles at the operating (trial court) level. Centralized management, they contend, tends to move the locus of control and responsibility away from the local situation, to stifle local initiative, and to result in poor morale and less flexibility in responding to unique local problems and needs.

During the 1980s, the debate over the merits of centralization may intensify, as new pressures build for state assumption of court costs. When local government units—particularly county governments, which are the traditional sources of funding for general jurisdiction trial courts in most states—face an economic squeeze affecting all of their functions, one recourse for them is to seek a state takeover of the funding of local courts. With state funding, there will almost inevitably be a greater degree of state level management and control over local court operations.

The debate over centralization does not, of course, necessarily require an "either-or" resolution, in which either the central administrative office or the local trial court abdicates leadership and responsibility to the other. Indeed, the ABA Standards on Court Organization, while clearly reflecting a preference for strong centralized administration, acknowledge the importance of broad consultation in the formulation of court system policy (Section 1.30) and call for vesting significant authority for administration of day-to-day operations in local court units (Section 1.41). It is at least theoretically possible to strike an effective balance

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between strong central leadership and effective local court management under which trial court managers—chief judges, court administrators and court clerks—function as a team with the necessary degree of autonomy and discretion. One of the critical issues for court administration in the 1980s is whether—and, if so, how—this balance can in fact be struck in different states.

B. *The Roles of Courts, Judges, and Court Administrators*

During the late 1970s, there were a number of signs that both the general public and the "attentive public"—the judges, lawyers, scholars, and others who take a close interest in the work of the courts—were skeptical about the effectiveness with which courts were performing their traditional functions. A major national public opinion survey, undertaken late in 1977 showed, for example, that only 23 percent of the general public felt a high degree of confidence in the state courts. Court delay, high costs, and inequality in treatment of racial and ethnic minorities were among the problems perceived as being especially serious by the respondents. Considerable support was expressed both for the generalized concept of court improvement and for specific court improvement efforts such as attempting to get the best possible people to serve as judges, developing ways to settle minor disputes without going through formal court proceedings, and trying to make courts handle their cases faster.

The same survey results indicate that judges and practicing lawyers tend to have appreciably more positive views about the courts than do members of the public or community leaders not engaged in the practice of law. Nevertheless, judges and lawyers have also been increasingly concerned about many of the same problems that bother the general public, and have started to respond constructively. For example, bar leadership has been instrumental in the development of experimental "neighborhood justice centers" and other types of alternative dispute resolution mechanisms, and a special ABA Action Commission to Reduce Court Costs and Delay has been formed to address problems of lengthy and expensive litigation. Trial courts throughout the country have been developing case management programs that incorporate the emerging body of knowledge in this area, and are experimenting with new methods of jury management that appear to be both more efficient and less onerous for citizens called to serve as jurors.[1]

During the 1980s, it seems likely that there will be an increasing amount of such experimentation in court management—emboldened, perhaps,

1. *See* item in Chapter 2, Bibliography, Yankelovich, Skelly, and White, Inc. *The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders*, (Williamsburg, Va.: National Center for State Courts, 1978).

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by the growing awareness that such experimentation can lead to better ways of doing things. One of the critical areas for experimentation will almost certainly involve alternatives to the traditional adversary process for the handling of so-called minor disputes—disputes which, while not involving large amounts of money, are important to at least one of the disputants and are not easily resolvable by trial. Although much of the initial experimentation in this area has involved independent organizations not directly responsible to a court, most of the alternative dispute resolution programs have some type of interrelationship with the courts in their community. And, increasingly, courts themselves are considering how they should deal with the demands for better ways to deal with these types of disputes—especially those where the underlying problem involves continuing relationships such as those of neighbors, family members, landlords and tenants, and merchants and customers.

The 1980s will almost surely see a continuation of the quest to develop more effective (and less costly) means of dealing with these types of disputes, through programs employing techniques such as mediation and arbitration. To the extent that such programs are developed within the court system, the concept of a court will be expanded and the roles and functions of court managers will become ever broader than at present.

The search for more effective means of handling disputes is not confined solely to the minor dispute area. On the contrary, one of the growing areas of concern in court administration is how to handle the "big" case—the complex multi-party litigation that may require not only extensive discovery and a lengthy trial, but also an extended follow-up period during which the court has responsibility for implementation of its judgment. The management of these cases and of the actors who may be involved in them—lawyers, judges, special masters, fact-finders, mediators, and others—raises significant problems of logistics and coordination, affecting not only the individual case but the rest of the work of the court.

As the roles of courts evolve, so too will the roles of judges and court administrators. Additionally, even if there is no marked change in either the types of disputes handled by courts or the way in which they are dealt with at the trial stage, there will inevitably be further development in the managerial roles of both judges (especially chief judges) and administrators. The trend toward chief judges taking a greater interest in, and becoming better trained for, administrative duties seems likely to continue. At the same time, there is likely to be a growing awareness of the necessity for a close and mutually supportive working relationship between chief judges and court administrators. As administrative pressures increase—which seems highly likely in view of the long-term trends of the case volume and population growth—it will be important for judges and administrators to develop the capacity to work effectively as a team, each with a sound understanding of the overall objectives of the court and of

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the strengths and abilities that the other brings to a given task. There is no single model that can be identified as best in this area. One of the challenges of the 1980s will be to examine the range of different types of executive team models, and to develop an understanding of what models—in particular, what types of sharing of managerial tasks and functions—work best under differing circumstances.

C. *Judicial Accountability*

Closely related to questions concerning the roles of courts, judges, and administrators are a set of issues involving public scrutiny of the performance of courts and judges. Traditionally, the principal mechanism for evaluating the performance of judges in state courts has been the voting booth, with judges having to stand periodically for election. Some type of election procedure is still the norm in most states, with incumbent judges either running against opposing candidates or simply having their names on the ballot with the only question for the electorate being whether or not they should be retained in office.

For many years, bar associations have conducted polls of practicing lawyers, in order to solicit their opinions about the capabilities and qualifications of sitting judges who are up for reelection or retention. The results of such bar polls are typically made available to the voting public, generally through the news media. More recently, citizens' groups, the news media, and special interest groups have been observing court proceedings, conducting their own polls, and publishing information and recommendations about candidates for judicial office. Finally, perhaps in part as a reaction against the proliferation of different evaluations being made by other groups, a few state court systems—notably in Alaska, New Jersey, and Colorado—have begun to undertake their own systematic evaluation of judges' performance.

Such performance evaluations are plagued by a host of difficult problems. By what criteria should a judge's performance be evaluated? Is it possible to develop useful and valid quantitative measures to evaluate at least some aspects of performance? How should the opinions of lawyers be elicited, and on what subjects? How should the opinions of litigants, witnesses, and jurors be taken into account? To what extent should evaluation results be made public? These and other questions in this area are extraordinarily difficult to answer, but will almost surely have to be addressed by courts and the bar during the 1980s. Pressures toward the development of judicial accountability mechanisms seem likely to increase, fueled by the availability of massive amounts of computerized information about what happens in court systems and individual courtrooms. The easy availability of some types of information raises the danger that the scope of evaluation will be limited to those aspects of performance for which such quantitative information (e.g., number of

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dispositions, sentencing data) is available, ignoring subtler aspects of the job of judging for which quantifiable information cannot readily be found. If information is to be used responsibly to evaluate judicial performance, it is imperative that careful thought be given to the full range of questions and measures that may be relevant to conducting a fair evaluation. (See Chapter 5.)

Judicial discipline commissions, which now exist in virtually all states (and, in different form, in the federal system), have historically tended to focus on extreme cases—judges who are thought to have serious drinking or mental health problems that affect their behavior on the bench, or who are charged with being grossly incompetent. One of the key problems for the 1980s will be how to take the next step, to deal effectively with the occasional lazy, indecisive, or "only slightly incompetent" judge. Performance evaluation systems and judicial discipline commissions are among the mechanisms that can be used to help make individual judges (as well as the court system as a whole) more accountable for their performance. It will be important, however, no matter what type of system is developed, to ensure that it does not have the effect of manipulating or pressuring judges into making decisions that are contrary to what they believe is proper in accordance with the law.

Another aspect of the accountability problem concerns the extent to which judicial policy-making processes should be open to the public. The traditional model of appellate court decisionmaking has been one in which issues in an individual case are debated and decided in private, with only the judges present. To what extent is the same model appropriate for decisionmaking concerning administrative policy? Particularly in view of the proliferation of "sunshine" laws that open the deliberations and decisions of legislative bodies and executive branch agencies to the public, it seems likely that there will be growing pressures for public (and news media) access to the work of policy boards such as judicial planning councils or supreme courts considering matters of administrative policy.

D. *Court Costs and Delay*

Complaints about long delays and high costs of litigation have a long history. In recent years, however, considerable progress has been made in understanding the parameters of the problem and in developing workable approaches to reducing costs and delay. In particular, two major national scope studies, one conducted by the Federal Judicial Center and the other by the National Center for State Courts,[2] have produced valuable data on the range of case processing times and the factors

2. *See* Bibliography, Flanders, Steven. *Case Management and Court Management in United States District Courts. See also,* item in Chapter 9 Bibliography, Church, Thomas Jr., et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts.*

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associated with relatively fast (and relatively slow) case processing times in state and federal trial courts. Subsequent experiments with delay reduction programs employing the principles of caseflow management outlined earlier in this chapter have demonstrated that very significant reductions in case processing times can be achieved.

Despite the evidence that cases *can* be handled very expeditiously, there are still a great many courts in which both criminal and civil cases take an unordinately long time to complete. Given the high degree of public interest in this area, it is clearly one in which courts and court systems will necessarily have to devote time and attention during the 1980s. Existing techniques will have to be built upon and tailored to local conditions, but it is clear that in most courts there is substantial room for improvement in the speed and efficiency with which cases are handled. Research should continue to have an important role in this area, focusing on clearer identification of what approaches and techniques work most effectively in specific situations.

The bar, of course, has a major stake in the development of effective programs to reduce costs and delay in litigation, and can play an important role in the formulation of such programs. In recognition of this need, the ABA in 1979 formed a special Action Commission to Reduce Court Costs and Delay. The commission has a mandate to work with the courts, the bar, and other national organizations in the field, to conduct innovative action programs and related research aimed at reducing the delay and expense involved in litigation.

E. *Funding for Research and Development*

Many of the innovative court management activities of the 1970s were undertaken with the aid of outside funding, provided through grants from the federal government's Law Enforcement Assistance Administration (LEAA) and, to a lesser extent, through grants from other federal agencies and from private foundations. Although the amount of these funds was not large in absolute terms (especially by comparison to the LEAA funds allocated to police and other law enforcement programs), they were sufficient to enable a significant amount of experimentation with new ideas and fresh approaches to long-standing problems. For example, LEAA and foundation funding supported much of the work of the National Center for State Courts, the Institute for Court Management, and the National Judicial College, as well as large-scale research and demonstration programs dealing with problems of court delay, jury management, judicial statistics, court information systems, and records management. The results have been major gains in the ability of courts and court systems to manage themselves effectively.

The extent to which such funding will be available for court improvement efforts in the 1980s is at best problematic. In the fall of 1980, as this

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chapter is being written, it appears Congress is bringing the LEAA program to a halt, and it is uncertain whether any future federal support for state court needs will be forthcoming. If not, one of the major problems for courts in the 1980s will be to find new sources of funding in order to continue the innovative work of the 1970s and to build upon the gains made during the past decade.

F. *External Relations*

In many respects, the dominant theme of court administration in the 1970s was capacity building. Administrative infrastructures were developed, technologies were mastered, and research and technical assistance capabilities were nurtured. Important strides were made in providing effective internal management services for courts and court systems, most of which had never previously been managed in any meaningful sense. This capacity building effort will undoubtedly continue, but it seems likely that the 1980s will be a decade in which there is an increasing emphasis on relationships between the courts and the larger community. Indeed, if court administration is to continue to develop as a vital profession, it is essential that court managers take the perceptions and needs of the larger community into account to a greater extent than in the past when formulating administrative policies and practices.

If courts are to be viable and effective institutions, it is essential that they have at least some minimal degree of public acceptance and support. The results of the public opinion survey referred to above, while not indicating the existence of any crisis of confidence in the courts, nevertheless suggest that there is substantial room for improvement in the ways in which courts relate to other institutions and to the general public. Four areas, in particular, seem to demand attention in the 1980s.

1. *Public and User Services.* One of the common criticisms of many courts is that they appear to be organized and run primarily to suit the convenience of judges and lawyers. It is only recently that any concerted attention has been given to the problems and needs of others involved in the court process, including litigants, witnesses, victims, and jurors. Clearly, however, there are a great many ways in which the treatment of these persons—most of whom do not appear in court by choice—can be markedly upgraded. Instituting speedy case processing systems which minimize adjournments, "one day-one trial" juror systems, telephone alert systems for jurors and witnesses in lieu of long days on hard benches in dreary waiting rooms, use of videotape to take depositions, information booths and child care services at the courthouse, orientation booklets and programs for the public, availability of bilingual services and personnel where appropriate, and an emphasis on courteous treatment by court personnel are examples of ways in which court managers can act affirmatively to minimize the inconvenience, expense, and frus-

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tration that ordinary citizens frequently encounter in their contacts with courts. The types of experiences that citizens have at the local courthouse help to shape their attitudes toward the courts, and it is important that attention be given to making these experiences as positive as possible.

2. *Community Involvement in Judicial Policymaking.* Historically, the formulation of administrative policy for the courts has been almost exclusively a function of judges, clerks of court, and court administrators, with relatively little involvement by lawyers and almost none at all by nonlawyers. There are, however, some signs of change in this area, manifested by the growing involvement of citizens in judicial nominating committees and, in a few states, in judicial planning councils and disciplinary commissions. Some states have also begun conducting surveys of jurors, witnesses, victims, and the general public, in order to gather information about strengths and weaknesses in ongoing court operations. At the local level, some courts have experimented with community advisory boards which provide input on general policy and administrative matters, with structured court observer programs, and with use of citizen volunteers to assist in performing some court functions. There appears to be a general trend toward broader community participation in the governance of the courts, but difficult questions remain concerning what forms that participation should take and how it can best be structured to ensure that it does not infringe upon the judicial decision-making process.

3. *Problems and Perceptions of Minorities.* To the extent that there is dissatisfaction with the courts on the part of the public, it tends to be far greater among minorities such as blacks and Hispanics than among the population as a whole. The national survey of public attitudes toward the courts indicates, for example, that members of these minority groups view issues of court costs and equal treatment as serious problems to a much greater extent than do judges, lawyers, or members of the general public. For a society and court system dedicated to the proposition of equality before the law, these perceptions of inequality in courts are a matter of serious concern. While this problem is an immensely complicated one, some obvious initial steps that court managers and other policymakers can take to help deal with it include incorporating affirmative action plans in court employment policies, arranging for representatives of relevant community groups to participate in court advisory committees and other judicial policy-making bodies, and providing for such representation on committees involved in the selection and discipline of judges.

4. *Communications.* Improved communications are of critical importance if the public is to have a sound understanding of what courts do (and of what they do not or cannot do), and if court managers are to be able to take account of public needs and views in formulating administrative policy. For state court systems or large urban courts, the ad-

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dition of a public information officer may help deal with this problem, but an effective overall program will almost surely have to be much broader. Public education efforts, informational pamphlets and cassettes, community advisory boards, and a wide variety of other approaches are relevent here. What is perhaps most important is the development of open lines of communication between those who work in the courts on a daily basis (especially judges and court administrators) and those who have an interest in how the courts function—including lawyers, legislators, representatives of the news media, and ordinary citizens.

IV. Conclusion

Although there may be room for disagreement about the appropriate functions of court administration and about the nature of the problems to be faced in the 1980s, there can be little doubt but that the field has developed and matured enormously during the past decade. Concluding a chapter on court administration in the previous (1971) edition of this handbook, Edward B. McConnell observed that court administration was on the ascendancy and that an increased interest in and emphasis on court administration could be expected. He predicted that a demonstration by the courts of their ability to manage their own operations effectively would eventually bring about a greater degree of independence for the judicial branch of government.

These predictions have proved to be well founded, and the point about the relationship between sound court management and the independence of the judicial branch is particularly important. Surely one of the most significant contributions of court administration in the 1970s—and of the institutions and individuals active in the field—has been to develop a sense of identification, on the part of judges and administrative personnel working in the courts, with a distinct branch of government and an important common enterprise. The process of welding what had been a very loose and essentially isolated collection of individuals into a strong and cohesive set of complex judicial organizations is by no means complete, but it is well underway. Today, far more than in the past, there is a sense of common purpose and mutual interest in devising effective solutions to common problems of court administration.

As McConnell emphasized a decade ago, it is imperative that there be continued reappraisal of court operations and a never-ending search for new and imaginative solutions to both old and new problems. The capacity of the judicial branch to undertake such examinations, and to formulate viable remedies for problems of court operation, now exists to a far greater degree than it did a decade ago. The challenge for the 1980s will be to use this capacity effectively, to respond constructively to the

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myriad of old and new problems that courts will have to face in the years ahead. The goal of sound court administration—fair, efficient, and prompt resolution of disputes that come into the courts—is one that is of vital importance to American society, and the continued development of a strong, independent, and well-managed judicial branch of government is critical to its achievement.

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The Court Management Profession:

Where Did It Come From? Where Is It Now? And Where Is It Going?

Edward C. Gallas and Geoff Gallas

Three papers prepared for the Second National Conference on Court Management by leaders of the three premier American judicial administration graduate programs[1] stimulated us to construct our sense of where the court management profession came from and, given our thesis about the profession's essence and beginnings, where it is now, and where it is going. Our conclusions follow.

The Court Management Profession: Essence and Beginnings

Courts do not exist so that court managers or anyone else will have something to manage, any more than hospitals exist for their administrators, the defense establishment for its commanders, or schools for superintendents and principals. However, without effective court management, none of the ends of the American judiciary could be achieved; nor could the crucial and constitutionally protected values of judicial independence and separation of powers, crucial means to those ends, be sustained.

In fact, if not in theory, the ends of justice and liberty depend immeasurably more on effective management than on constitution, statute, or case law. Court management therefore is, and should be recognized as, a high calling. But it is not, and never could be, an end in itself. This humbling paradox is court management's essence and properly defines its history, theory, and practice.

An early example that foreshadows the importance we place on court management for a just social order, the achievement of individual justice in individual cases, the rule of law, and equal protection according to due process is found in an argument presented by Jethro to Moses. As reported in Exodus 18:13-27, the predicate for Jethro's plea for improved judicial administration through attention to "humanistic" judicial selection criteria, effective judicial education, delay reduction, shorter waiting times for litigants and witnesses, ADR and differential case management is as follows:

And Jethro said unto Moses: "What is this thing that thou doest to the people? Why sittest thou thyself alone; and all the people stand by thee from morning unto evening?"

And Moses said unto Jethro: "When they have a matter, they come unto me; and I judge between one and another, and I do make them know the statutes of God, and his laws."

And Jethro said unto Moses: "The thing that thou doest is not good. Thou will surely wear away both thyself and the people that come before thee."[2]

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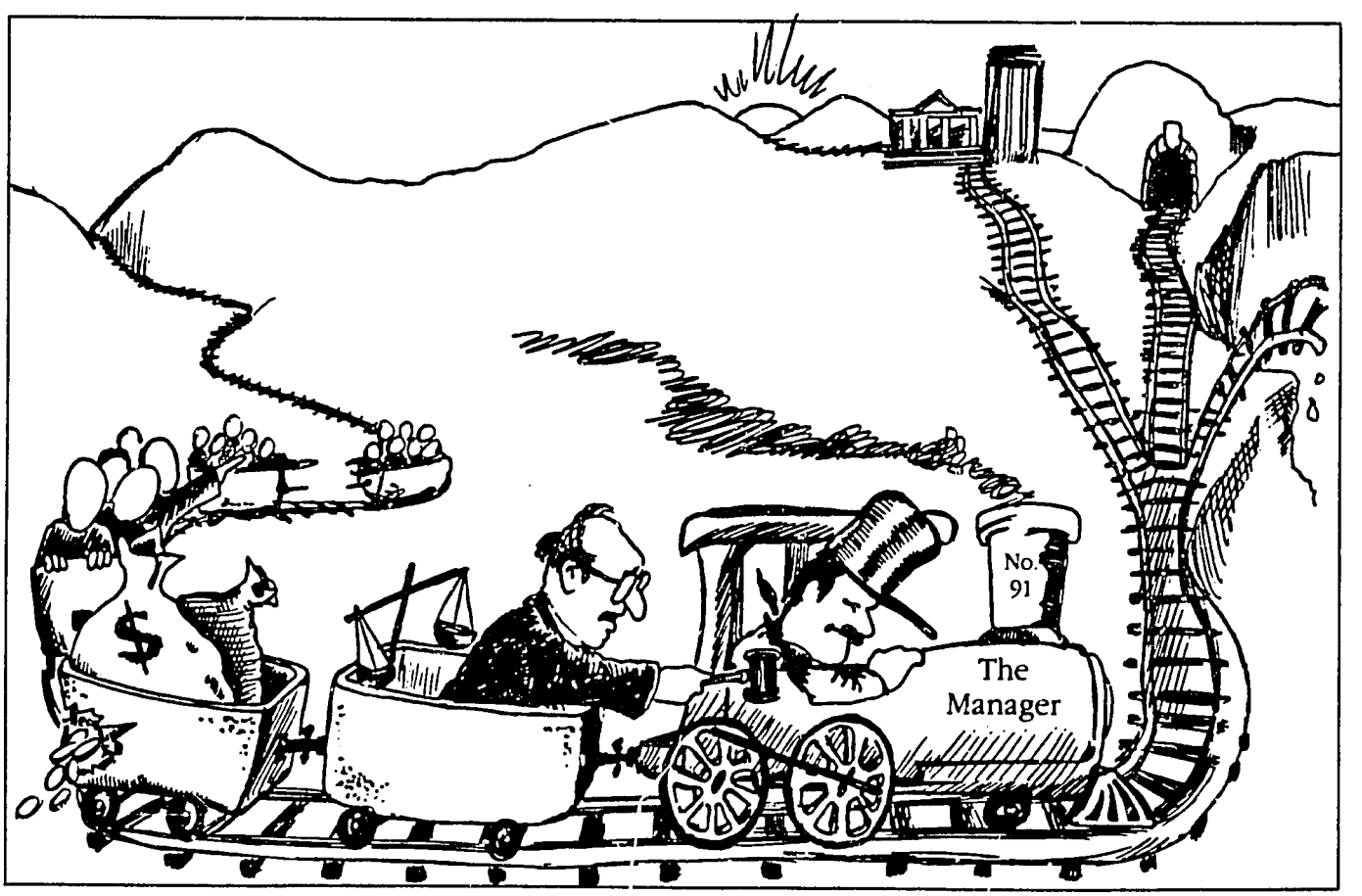
As argued by Jethro sometime ago, effective trial court management, even its most mundane aspects (and there are many), is fundamental to the health of the state. This is true here and now and was true there and then. A less expansive view of the field's origins, indeed its purposes, can be found in one of the three papers that prompted this article.

At first reading, the Phoenix conference article written by Harry Lawson and Dennis Howard was, to quote Yogi Berra, "déjà vu all over again," as it reiterated history and propositions articulated in the first published text on court management.[3] However, Howard and Lawson clearly go farther than the authors of *Managing the Courts* in developing the field's supposed historical origins, beginning at the start of this century through 1979, as well as the issue of whether court management is or is not a profession. They argue that trial courts were simple organizations in the early days, with judges riding circuit and elected clerks keeping the records. Given the absence of complexity and scale, professional court management was, therefore, not needed until recently: "there was little need for professional managers when there wasn't much to manage."[4] For us, this is not an apt description of court management's origins or its essence. Roscoe Pound in 1906 would have taken issue with that evaluation,[5] as would Plato in 350 BC[6] and Jethro in an even earlier time when he asked Moses to delegate most of his administrative and calendaring responsibilities and at least some of his judicial caseload to others.

Much is missed when court management is assumed to be nothing more than a response to increased scale and complexity. Left unaddressed, for example, will be the ends being served by court managers, the constitutional means of judicial independence and the separation of powers,[7] the need to educate court managers in these areas, including the absolute necessity for judicial oversight of court management and court managers, and the way effective state and trial court managers make it



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possible for state court systems and trial courts to achieve judicial independence.[8]

The Origins of American Court Management: An Alternative View

While discussion of the myriad, competing formulas for what makes a profession often strikes practitioners as tedious and academic, the court managers' understanding of what a professional is and whether they or others are professionals has a profound effect on how court managers understand their own and other people's jobs; the way these jobs are explained to others, including incoming chief justices and presiding judges; and, most important, how court managers go about their business.

In an early treatment of the subject, which attempted a distinction between professionals and administrators, George Strauss,[9] who helped design and teach the first Institute for Court Management education program in 1970, detailed the essentials of "profession" and its values this way:

1. Entry is restricted to those who can demonstrate proficiency in regard to specialized knowledge and skills obtainable only through training, usually academic.
2. The incumbent has autonomy to decide how his function is to be performed and freedom from lay restriction.
3. There is a feeling of commitment to his calling—identifying more with members of his profession in other organizations than with his own organization.
4. Members feel and act upon a responsibility to society for the maintenance of professional standards of work—professional self-discipline and code of ethics.

A 1973 publication of the American Academy of Political and Social Science more completely addressed the specific subject of professionalism in reference to public service by adding, among other things, commitment to organizational routines that produce equal and fair distribution of public goods and services. One of the authors, a police professional, argued that professionalism in public service is not based on academic attainment but rather on "developing (and meeting) standards of practice based on the efficient rendering of public service."[10] It would be difficult to say it better.

Lawson and Howard cover this same territory. Based on propositions and criteria articulated by Moore, Guy, Wilensky, and Caplan, they conclude that while court management is not a profession, court managers are "professionals" and "probably (members) of an emerging profession."[11] We agree.

In addressing this same subject at an Institute for Court Management graduation ceremony in 1974, our senior author, using uncharacteristic understatement, said, "Court management is not a profession; to perceive it as such is nonsense. It is a specialization, a very important specialization in the management of complex organizations . . . that requires policy, decisional and behavioral skills, all of which depends on the ability to use power and to manage conflict constructively." Given this orientation, it is difficult to trace the field's legacy as Howard and Lawson do. Besides overlooking ends and means that transcend scale and complexity, their history neglects state *trial* courts and, to an unexpected degree, the profession's managerial dimensions.

In his 1929 treatise, Willoughby defined the court management profession narrowly to comprise only chief justices as general managers and administrative judges as business directors of related court divisions.[12] Thus limited, the profession would be unable to respond effectively to enduring trial court performance standards. Some ten years later, the ABA Committee on Judicial Administration, still constrained in its view of court management, proposed that a management position be created at the state court level for a single judge with assistants to help carry out administrative "details" (duties).[13] Likewise, the 1948 ABA Model Act generally construed the nonjudge court management profession as a state-level enterprise, where the professional court manager was a state-level assistant or secretary to the "judicial head of the system" (presumably the chief justice, although a judicial council or conference was mentioned).[14]

The work described in the model act, though it included substantial state-level budgetary responsibilities (at a time when only very limited judicial-funding responsibilities were generally located at the state level), was largely clerical, statistical, and routine rather than managerial. The court executive position as we understand it and have seen it in many places, at both the state

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and trial court levels, is very different from what was prescribed in the ABA Model Act.

Overlooked in these early expositions are the state trial courts, especially those in metropolitan areas, where the truly challenging and persistent problems for the nation's judiciary are concentrated. With the possible exceptions of Connecticut (1937) and New Jersey (1947),[15] neither the responsibility for trial court funding nor the direct or even indirect supervision of trial court performance was generally located at the state level until the early 1970s.

The issues that gave rise to the still emerging court management profession and to recent developments in state-level funding and increased state oversight of trial courts were not merely changes in scale (increased caseloads) and procedural complexity. Rather, the accelerated development of the court management profession as a field of practice, with serious intent, resulted from uneven trial court performance within and across states; the chronic underfunding of trial courts by municipal and county officials; weak and even corrupt local court management; ever- worsening backlogs, times to disposition, and waiting times; and undue and inappropriate interference in trial court functions by local executive and legislative agencies and personnel, many of whom were the primary litigants in the trial courts. These were the challenges that brought about needed reforms, including "professional" state and trial court managers.

The most effective champions for needed change were courageous and frustrated trial court presiding judges. They included trial court leaders led or joined by state supreme courts, particularly courts headed by state chief justices with trial court or local political experience (for example, Arthur Vanderbilt in New Jersey); the trial court bar; an informed media; public interest groups; and enlightened elected officials—both legislative and executive, state and local. As the reform effort gained ground, trial court demands for resources increased awareness of the separation of powers clauses in most state constitutions and the resulting inherent power of the courts doctrine.[16] Both appellate and trial judges realized this required the separation of management control from agencies outside the court as well as lawyers practicing within the courts.

The trial and presiding judges who participated in, indeed spearheaded, most of the needed reform campaigns and later directed their implementation used rhetoric that emphasized

- a crisis in public trust and confidence in the trial courts' fairness, independence, and accountability;
- decreasing judicial morale;
- increasing financing problems;
- legitimate, widespread public criticism of delay; and
- increasing contention and complexity in local government/ court relationships.

In one documented case study,[17] the frustrations of "leading edge" trial judges led to a study funded by a private foundation[18] that proposed an until then largely ignored remedy—creation of a trial court executive. This recommendation was enthusiastically endorsed by the judges of the nation's largest court of general jurisdiction in 1958. Enabling legislation, the first of its kind, was introduced and adopted authorizing the appointment of an executive officer by the Los Angeles Superior Court. This provided the court with authority "to delegate any administrative powers as are now or hereafter by law . . . vested in or required by (the) court."[19]

This far-reaching and innovative grant of authority, with provision for delegation of management responsibilities, was immediately supplemented by rules of the court and given the effect of law. In delegating duties that exceed what many, if not most, trial court managers have today, the basic statute permitted, and the rules specifically delegated, control of managerial functions, including

- administrative control of all nonjudicial activities;
- establishment of court divisions as deemed advisable;
- assignment, supervision, and direction of all nonjudicial employees of the court;
- creation and implementation of a personnel system;
- preparation and administration of the court's budget;
- maintenance of all accounting, property control, and payroll records;
- representation of the court in negotiations concerning courtrooms and their maintenance;
- collection of statistical data, reports, and recommendations, including legislation concerning the judicial and nonjudicial business of the court;
- liaison with the governor, the state legislature, county board of supervisors, the county ad-

ministrative office, the county clerk, the sheriff, the state bar, local bar associations, the district attorney, and civil groups;

- service as secretary to the court and attending *all* meetings of the court and *all* committees of the courts' judges;
- service as jury commissioner; and
- preparation of an annual report, including recommendations to improve the administration of the court.

Functions not delegated to the trial court executive included authority to decide cases, make judicial assignments, and assign cases to judges. As a matter of practice, however, the assignment of cases and even judicial assignments were made by the executive officer and designated administrative staff in accord with general direction from administrative judges in the jurisdictional and geographical subdivisions of the court. The law establishing this far-reaching authority of the court to delegate its responsibilities to a "professional" manager was the first in the nation, and its implementation resulted in seven years of major reorganization, realignment of responsibilities, and confrontation with funding agencies.[20]

The success of that effort, among many other factors, encouraged other courts in California and elsewhere to delegate major trial court executive responsibilities to persons with demonstrated management skills and experience. In some cases this was done without the benefit of specific legislation.

In 1968 and 1969, Sen. Joseph Tydings, of Maryland, sponsored legislation (that was adopted by the Congress and signed into law) that required qualified managers in the federal judiciary and relieved "judges of many of their present administrative duties and freed them to apply their legal art to a more prompt disposition of the judicial business." The legislation was opposed by some who believed there were very few qualified persons to fill the new posts. In meeting these objections, Tydings gave credit to the work done in state courts at both the state (for example, in New Jersey, by Edward B. McConnell) and local levels: "While it is true that formal training programs have not existed in the past, that absence did not deter the tremendously effective work of a number of court administrators in state courts."[21] Most of the duties and responsibilities of the federal circuit executives described in the federal legislation were taken almost verbatim from the duties delegated to the executive officer of the Los Angeles Superior Court by its rules of court.

> "When you have a well-constructed state with a well-framed legal code, to put incompetent officials in charge of administering the code is a waste of good laws, and the whole business degenerates into farce."
>
> **–Plato, 350 BC**

As a footnote to the above history concerning "recent" beginnings, it is of interest to recall that as of 1958 there was only one trial court "administrator" and as late as 1965 there may have been as few as six trial courts with truly professional managers located in California, Arizona, Oregon, Washington, and Pennsylvania.[22] The six came together in Beverly Hills to charter the National Association of Trial Court Administrators (NATCA). NATCA grew to about 350 members by 1980 and, in 1985, officially merged with the National Association for Court Administration (NACA) (founded in 1968) to form the National Association for Court Management (NACM). NACM now has almost 2,000 members.

The Future

The 1985 merger of NATCA and NACA[23] holds the still-to-be-realized promise of extending the powerful ethos of court management professionalism to thousands of still unwashed *de facto* and *de jure* court managers—every elected clerk and appointed court administrator in the nation's 2,449 general jurisdiction and 14,126 limited jurisdiction courts.[24]

The gap between the number of practicing trial court managers and the number of NACM members indicates the work that remains to be done. Recent studies of the pace of litigation in 39 ur-

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ban state trial courts of general jurisdiction[25] likewise provide a sense of urgency about needed improvements in the nation's trial courts and their management. There is little reason for complacency; much, much more needs to be done in the future than was achieved in the past. The nature of these challenges should give pause to those who wish merely to consolidate past success and programs already in place.

According to our very smudged crystal ball,[26] the seven issues that most need to be addressed in the next five to ten years by the organized profession, and in daily court management practice, are

- mounting overloads in state trial courts most recently experienced as periodic, sudden, and persistent surges in drug-related cases—criminal, domestic relations, and juvenile (including dependency and neglect);
- legitimate public demands for improved judicial system accountability and performance, particularly at the trial court level;
- continued development of viable alternatives to the adversarial system and court and litigant dependence on paid advocates for finding the truth and resolving disputes;
- new forms and degrees of management oversight and involvement by the *de jure* leaders of the nation's courts, trial and appellate judges;[27]
- the impact of changing demographics (gender, race, age, and literacy) on the court's business, and when, where, and how it delivers its services and manages its human resources;
- "new" science, particularly genetics and genetic engineering, in its effects on the law, caseloads, evidence, procedure, and sentencing; and
- technology—both its downstream effects on the nature of litigation and its potential to improve court services upstream, particularly those related to expedition and timeliness and access to justice.

Some undoubtedly would view these seven challenges as more of the same, while others will find new direction in them. Either way, these issues will require, at the least, the adaptation of current court practice and procedure and, more likely, wholesale change.[28] As was true in the past, reliable responses will not come from legislation, case law, or administrative edict alone. Management, both systemic and mundane, is required. An early apologist for the court management profession, in 350 BC Plato said: "It is obvious to anyone that legislation is a tremendous task, and that when you have a well-constructed state with a well-framed legal code, to put incompetent officials in charge of administering the code is a waste of good laws, and the whole business degenerates into farce. And not only that, the state will find its laws are doing it damage and injury on a gigantic scale."[29]

Our reading from the Phoenix Second National Conference on Court Management is that one of the seven future issues listed above has the most currency today: the evolving relationship between judges and professional court managers. In particular, the field appears to face two related questions: 1) is there already or will there be a reaction by judges to the growing "professionalization" of court management, and 2) should judges report to court managers? In a paper focused on state court administrators, Cameron, Zimmerman, and Darling maintain that court managers must be legally trained and, ideally, former judges.[30] For reasons argued at length sometime ago, we do not accept these propositions.[31] The important point, however, is that many judges now believe that 1) court managers have usurped judicial authority, 2) all court managers should be lawyers, and even 3) court managers ideally will have been judges before their appointment as court managers.

This takes us to the second question: should judges report to court managers? For us the answer is clearly and decisively *no*. Moreover, the current court manager and presiding judge executive team concept is unduly narrow. Judicial involvement in state and trial court management must be expanded to include all judges and every aspect of the court's day-to-day management. Implemented properly, increased judicial involvement in trial court management will improve trial court performance, increase both the acceptance and accountability of professional trial court managers, and neutralize fears that court managers unduly usurp judicial authority. As a matter of policy, judges do not and should not report to court managers. As a matter of practice and necessity, more judges need to become more involved in day-to-day court management both as leaders of trial court committees and projects *and* as committee members and

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project team participants with court managers and their staff as committee and project leaders. This, rather than either the appointment of judges as court managers or judges reporting to nonjudge managers, is how court management theory and practice is, and should be, evolving.

We conclude with a thesis and direction from a now permanently retired manager, Billy Martin. First, the thesis: the ambiguities and uncertainties now at work in the nation's courts will continue and even increase. These challenges will be faced most competently and most reliably by court managers who understand both the essence of their high calling and their own and their profession's limitations. Competence, reliability, understanding, and humility failing, however, there is Billy Martin's wisdom: "a professional is somebody who keeps showing up and keeps coming back."

Court managers have always been around, are here now, and will always be present. As a matter of practical necessity, or ever-increasing scale and complexity, it is a job that someone always shows up to do. More important, when done right, court management clearly contributes to "Justice . . . the end of government . . . the end of civil society."[32]

In sum, it is our view that the past was OK, the present shows promise, and the future needs to be even better. Further, as was true in the past and is true today, the prime focus of our profession's effort must be the improved performance of the nation's state trial courts,[33] particularly trial courts that serve urban jurisdictions. This, and the field's service to the ends of justice and liberty, is the profession's legacy and the challenge by which it is best described and measured. **CM**

Notes

1. The papers were written for the Second National Conference on Court Management, held in conjunction with the NACM Annual Conference, September 9-14, 1990, Phoenix, Ariz. See Donald E. Fuller, "Policy Implications at the Intersection of Cutback Management, Productivity and Stress," Harry O. Lawson and Dennis Howard, "Development of the Profession of Court Management: A History with Commentary," and David Saari, "Separation of Powers, Judicial Impartiality and Judicial Independence." This article, which began as a reaction to these three papers, benefited from many conversations in both Phoenix and elsewhere. We owe special thanks to Carol Friesen for her editorial assistance.

2. As the careful reader of Exodus 18:13-27 will note, we have taken some liberties in the text.

3. See Ernest C. Friesen, Edward C. Gallas, and Nesta M. Gallas, *Managing the Courts* (New York: Bobbs Merrill, 1971), in particular chaps. 1 ("A Perspective in Court Management") and VI ("The Functions and Role of the Court Executive").

4. Lawson and Howard, "Development of the Profession of Court Management."

5. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," reprinted from the *Journal of the American Judicature Society* (Chicago: American Judicature Society, 1906). Pound clearly understood both court management's limitations and its necessity due to factors that both transcend and include scale and complexity.

6. Plato, *The Laws*, trans. T. J. Sanders (Baltimore: Penguin, 1970).

7. See Saari, "Separation of Powers," and Friesen, Gallas, and Gallas, *Managing the Courts*, particularly chaps. IV ("The Inherent Power of the Courts") and VI ("The Functions and Role of the Court Executive"). In a bicentennial essay, Russell Wheeler provides a superlative treatment of these issues (*Judicial Administration: Its Relation to Judicial Independence* [Williamsburg, Va.: National Center for State Courts, 1988]).

8. Saari, "Separation of Powers," moves from this base to advocate the appointment of "generalist" rather than "technical or specialist" managers. (Does he mean lawyers?) His final challenge to court managers and their academic chronicles, both here and abroad, deserves repetition: "Protecting judicial independence to preserve liberty by learning more about it is an intelligent first step for those who manage courts anywhere in any capacity of administration."

9. George Strauss, "Professionalism and Occupational Associations" 2 *Industrial Relations*, May 1963, pp. 8-10.

10. Nesta M. Gallas and William T. Smith, "What It Takes to Make a Professional in the Public Services," Monograph #15 American Academy of Political and Social Science (February 1973), p. 20. A powerful set of practice-oriented standards for trial courts are articulated in Commission on Trial Court Performance Standards, *Trial Court Performance Standards with Commentary* (Williamsburg, Va.: National Center for State Courts, 1990).

11. See Wilbert E. Moore, *The Professions: Roles and Rules* (New York: Russell Sage Foundation, 1970); Mary E. Guy, *Professionals in Or-*

ganizations—Debunking a Myth (New York: Praeger Publishers, 1985); Harold L. Wilensky, "The Professionalization of Everyone!" LXX *The American Journal of Sociology* 2 (September 1964); and Theodore Caplan, *The Sociology of Work* (New York: McGraw-Hill, 1954).

12. W. F. Willoughby, *Principles of Judicial Administration* (Washington, D.C.: The Brookings Institution, 1929). Willoughby and other sources discussed below are cited favorably by Lawson and Howard.

13. See American Bar Association, *The Improvement of the Administration of Justice, a Handbook Prepared by the Section of Judicial Administration*, 3rd ed. (Chicago: American Bar Association, 1952), p. 27.

14. American Bar Association, *Model Act to Provide for an Administrator of the State Courts* (National Conference of Commissions on Uniform State Laws) (Chicago: American Bar Association, 1948).

15. The history of these developments is recorded in part in Saari, "Separation of Powers"; Lawson and Howard, "Development of the Profession of Court Management," and the sources they cite; Friesen, Gallas, and Gallas, *Managing the Courts*; ABA, *Improvement of Justice*; and Arthur Vanderbilt, *The Doctrine of Separation of Powers and Its Present Day Significance* (Lincoln: University of Nebraska Press, 1953). The field's early history, however, needs and deserves much more extended treatment. With respect to funding authority, the authoritative source on early developments, as pointed out by Saari and Lawson and Howard, is Carl Baar, *Separate but Subservient* (Lexington, Mass.: Lexington Books, 1975).

16. Saari, "Separation of Powers," provides an excellent and comprehensive treatment of both substance and source material here. For background on the developments alluded to here, see also Friesen, Gallas, and Gallas, *Managing the Courts*, particularly chap. IV ("The Inherent Power of the Courts"); Vanderbilt, *Doctrine of Separation of Powers*; and James Carrigan *Inherent Powers of the Courts* (Reno, Nev.: National College of the State Judiciary, 1973).

17. See, in general, Richard Gable, "The Case of the Los Angeles Superior Court," in Edward C. Gallas and Nesta M. Gallas, eds., Symposium on Judicial Administration, XXXI *Public Administration Review* 2, March/April 1971, pp. 133-143, hereafter cited as Gable, "L.A. Superior Court"; and Friesen, Gallas, and Gallas, *Managing the Courts*, Appendix A.

18. Holbrook Foundation, "A Survey of Metropolitan Trial Courts, Los Angeles Area," 1956.

19. California Government Code, Section 69892.1.

20. See Gable, "L.A. Superior Court."

21. See Joseph Tydings, "The Courts and Congress"; Gable, "L.A. Superior Court," pp. 113-120; and Senate Report 91-262, 91st Congress, First Session. As is well known, however, there is a lingering feeling and some evidence that the promise of federal circuit positions may have, until perhaps recently, exceeded their practical effects. See John T. McDermott and Steven Flanders, *The Impact of the Circuit Executive Act* (Washington, D.C.: Federal Judicial Center, 1973).

22. For background on these developments as told by one of the six pioneers see Charles H. Starrett, Jr., "The Evolution of a Profession," 1 *The Court Manager* 2 (Summer 1986), pp. 5-6 and 14. As detailed by Lawson and Howard, the actual count, as reported by Fannie Klein, "The Position of Trial Court Administration in the States," 51 *Judicature* 9 (April 1968), p. 334, was much greater than six. As is true today, the distinction between title and function is important.

23. For information and background concerning the 1980 NACA-NATCA merger, see Bobby Branum, Gus LiCari, Gordon Griller, Terry Aragon, Sam Grice, and Donald Cullen in 13 *Court Crier: The Journal of the National Association for Court Administration* 1 (March 1984), pp. 1-2, and Donald Cullen 1 *The Court Manager* 1 (October 1985), pp. 1-2.

24. For the most current and accurate sources of information concerning the number of state trial courts, their jurisdiction, and their location by state, see *State Court Organization 1987* and *State Court Caseload Statistics: Annual Report 1989* (Williamsburg, Va.: National Center for State Courts, 1991). The *Annual Report* series is updated annually and *State Court Organization 1991* has been proposed for funding.

25. A report funded by the Bureau of Justice Assistance on the case disposition time performance of 39 urban trial courts of general jurisdiction in 1987 will soon be available in John Goerdt, Chris Lomvardias, and Geoff Gallas, *Reexamining the Pace of Litigation in Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, forthcoming). The study demonstrates that while several courts were close, none of the 39 urban courts meets the ABA Disposition Time Standards adopted in 1985 on either the criminal or civil side. See also, John Goerdt, Chris Lomvardias, Geoff Gallas, and Barry Mahoney, *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, 1989), and Barry Mahoney *et al.*, *Changing Times in Urban Trial Courts* (Williamsburg, Va.: National Center for State Courts, 1988).

26. There was comprehensive discussion of "The Future and the Courts" at an excellent conference sponsored by the American Judicature Society/State Justice Institute in San Antonio in May 1990. For a report on the issues discussed there, see *The Future and the Courts Conference: Summary* (Williamsburg, Va.: National Center for State Courts, 1990), and James A. Dator and Sharon Rogers, *The Future and The Courts Conference: Executive Summary* (Chicago, Ill.: American Judicature Society, 1990).

27. For an early warning signal to nonjudge court managers, see the text below and James Duke Cameron, Isaiah H. Zimmerman, and Mary Susan Darling, "The Chief Justice and the Court Administrator: The Evolving Relationship," in 113 *Federal Rules Decisions* 439, West Publishing Co., 1987.

28. A most perceptive writer on these realities, Leonard Sayles was a teacher and designer of the initial Institute for Court Management education program and is currently a member of the ICM advisory council. See Sayles, *Leadership: What Effective Managers Really Do . . . and How They Do It* (New York: McGraw-Hill, 1979), and "Leadership for the Nineties: Challenge and Change," in 10 *Issues and Observations* 2, Center for Creative Leadership (Spring 1990), pp. 8-10.

29. See Pound, "Causes of Popular Dissatisfaction," pp. 221-222.

30. See Cameron, Zimmerman, and Darling, "The Chief Justice and the Court Administrator."

31. See Friesen, Gallas, and Gallas, *Managing the Courts*.

32. James Madison, *Federalist* No. 51 in Roy Fairfield, ed., *The Federalist Papers* (Baltimore: The John Hopkins University Press, 1981), p. 162.

33. See Gallas and Smith, "What It Takes to Make a Professional."

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Wingspread Conference on Contemporary and Future Issues in the Field of Court Management

Sponsored by
Institute for Court Management
in cooperation with
The Johnson Foundation

Conference report by
Paul Nejelski and Russell R. Wheeler

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NOTE: The opinions and conclusions expressed in this report are those of the authors and do not necessarily represent the viewpoints of their respective organizations.

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Preface

In July, 1979, ten years after a Wingspread meeting which considered plans for the establishment of the Institute for Court Management, the Institute convened a conference to review court administration developments in the decade of the 1970s and to consider contemporary and future issues in the field. The Johnson Foundation hosted the 1979 conference, as it did the prior meeting, at Wingspread, its educational conference center in Racine, Wisconsin. Additional support for the conference, which took place July 9-11, was provided by the American Bar Endowment.

The conference keynote address was given by Robert B. McKay, Director of the Program on Justice of the Aspen Institute for Humanistic Studies. Mr. McKay's speech is set forth in Appendix A. Conference participants then spent the next day and a half in group and plenary sessions assessing the major trends and accomplishments in the field of court management during the 1970s.

On the second day of the conference, Dr. Frank P. Sherwood of the Federal Executive Institute, Charlottesville, Virginia, addressed the meeting. His remarks are contained in Appendix B. Subsequent to Dr. Sherwood's presentation, the discussion at the conference shifted to consideration of the most likely major issues to confront the judicial system and the court management field in the decade ahead. During the final portion of the conference, participants discussed the range of activities which courts and related organizations might undertake to improve the management of the judicial system.

Conference participants included court administrators, judges and others from the state and federal court systems, academics, and representatives of state legislatures and judicial education programs. They were selected on the basis of their knowledge and experience, not organizational affiliation. Appendix C contains a list of the attendees.

The report that follows is not intended to be merely a summary of the conference proceedings. Instead, Paul Nejelski and Russell Wheeler, two of the conference participants, were asked to prepare a reflective piece summarizing and commenting on the major themes that emerged from the deliberations. As their essay points out, despite the fact that the conference was not asked to fashion a prescription for a future course of action, a number of important emerging issues were explored. The conference discussions should help provide impetus for the courts and other concerned institutions and individuals to develop approaches that are responsive to the needs of the 1980s.

The report indicates that the results following the first Wingspread meeting in 1969 were impressive. We are most hopeful that this second Wingspread Conference will inaugurate another decade of solid accomplishment.

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Introduction

What follows is a retrospective and prospective commentary on the management side of the courts, drawing on the proceedings of the July 1979 Conference at Wingspread. Looking retrospectively at the 1970s, we discuss four major topics: (1) the professionalization of court administration, (2) increased judicial responsibility for active case management, (3) changes in state court organization and attitudes, and (4) the role of technology. Looking prospectively to the 1980s, we consider likely changes in: (1) the roles of courts, judges, and court administrators; and (2) how courts deal with such external entities as legislatures and the press.

A decade is, of course, an artificial construct for either retrospective or prospective analysis. While no magic distinguishes one set of ten years from another, the turn of a decade is a convenient place to stop, look, and listen. In some ways, dealing retrospectively in terms of a single decade may be too limiting. That is to say, the concern with administration, introversion, and retrenchment in the 1970s can be viewed in 1980 in contrast to the explosive 1960s, which saw the beginning of major changes in race relations, consumer movements, women's liberation, welfare rights, and policy evaluation.

Looking Back

The years from the late 1960s to the present saw considerable change — some for the better. There were changes in organization and process. New names appeared on the scene — the Institute for Court Management, the National Center for State Courts, and the Federal Judicial Center. There was dramatic growth in court administrator positions. These quantitative changes, moreover, were complemented by the decade's more sophisticated approach to how courts should be administered.

The 1970s arguably saw more freshness of thought about the administration of our justice system than had occurred in the entire 20th century. For most of the twentieth century, the administration of the courts was the province of a small company of judges, academics and lawyers bent on remolding the courts in light of "Roscoe Pound's timely pronouncements of 1906, 1913, 1927 and 1940."[1] In fact, Robert McKay spent some time in his Wingspread Conference keynote address listing numerous "articles of faith" of twentieth century judicial administration that were subject to serious challenge in the 1970s, such as merit selection, unified court structure, the adversary system, and a belief in an inverse relationship between more judges and less court delay.

There are other contrasts between the 1970s and earlier decades. A Department of Justice Council on the Role of Courts, for example, has a varied agenda to consider the diverse role courts do and should play in society. The Council is sponsored by the Office for Improvements in the Administration of Justice, itself created in 1977. Both the Council and this new Office contrast interestingly with the much narrower focus of earlier Department efforts, for example, the 1956 and 1958 Attorney General's Conferences on Court Congestion and Delay in Litigation. Also, unlike similar gatherings in previous years, the 1977 "Pound Revisited Conference" hardly confined itself to debating new tactics by which to implement the scheme urged by Pound in 1906.

We turn to the four broad developments of the 1970's seen at Wingspread as especially noteworthy.

A. The Professionalization of Court Administration

One Wingspread participant observed that the creation of the Institute for Court Management was the "starting point" of professional court administration. Another said that the field gained a "foothold" in the 1970s. These observations take nothing away from the achievements of those persons — some called court administrators, more called clerks — who prepared the courts' budgets or performed other important court administration tasks prior to 1970. Nevertheless, the differences ten years later in the court administration landscape are hard to ignore.

One difference is the increased reliance that courts put on professional court administration education and experience when choosing a court administrator. Ten years ago, the pervasive question when hiring a court manager was whether or not the applicant had a law degree.

There are also important changes in the number of court administrators. In 1969, there were state-level court administrators in about half the states. The number has since doubled. The Institute of Judicial Administration identified 48 trial court administrators in 1967; in 1977 the total number of trial court administrators was estimated at 420.[2] In the federal system, Congress authorized "circuit executives" in 1971 and ten of the eleven circuits have filled the position. Just as important perhaps, although hard to estimate, is the growth in the number of persons titled court clerk but exercising real court administration responsibilities — responsibly.

In short, the court administrator profession has become institutionalized; managers have spread throughout the system.

What difference has the enlarged corps of court administration professionals made? Full documentation and analysis must await further study.[3] Several observations, however, emerged at the Wingspread Conference.

Court administrators have provided a broad range of technical assistance. They have brought skills of implementation and development to the courts, often in relatively routine administrative areas, such as establishing and maintaining management systems for the courts' records,

[1]Gallas, "The Conventional Wisdom of State Court Administration" 2 *Justice System Journal* 40-41 (1976).

[2]See, for the earlier figure. Saari, *Modern Court Management: Trends in the Role of the Court Executive* (Washington, D.C., U.S. Government Printing Office, 1970, Appendix B); for the latter figure, Mort, "Court Administrators: Professional Associations," 1 *State Court Journal* No. 4 (Fall 1977), pp. 16-17.

[3]But see, for an example, McDermott and Flanders, *The Impact of the Circuit Executive Act* (Washington, D.C.: Federal Judicial Center, 1979).

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personnel, or finances.

They have also helped focus executive power in the courts. The example was offered at the Conference of a large metropolitan court with a frequent turnover in presiding judges — a turnover designed to continue an infusion of new ideas in court leadership positions. When courts have steady infusions of new executive leadership, their court administration components can help maintain consistency and a learning capability.

Court administrators have also maintained a focus on management options and strategy, and thus broadened the range of tools and tactics to be used by court leadership. For example, court administrators were sometimes responsible for the tactical use by the judiciary of the traditional inherent powers doctrine, a tool often overlooked by judges themselves. Observation of the old adage that a good manager "uses what works" makes available a range of devices that courts may find effective.[4]

Court administrators promoted a role for research and evaluation in the courts in the 1970s, when new (and even old) practices increasingly had to be justified to judges and to legislators. In part because evaluations were required by the suppliers of federal and foundation dollars that increasingly entered court systems in the 1970s, notions of experimentation and being able to accept failure competed with simply mandating new procedures. "Research" in the courts by 1979 became more than a pseudonym for puffing up a chief judge's favorite idea or pet project. Evaluations could and did disprove or cast doubt on many "articles of faith".

Scientific study of the courts has not solved every operational problem. To expect that would be to misunderstand scientific research. Weak findings, new problems, even contradictions abound, and there are a number of variables that can affect outcomes. Part of the growing professionalism of the court administrator, however, has been learning to accept the ambiguities created by the intrusion of scientific research as a fact of life rather than an obstacle.

Finally, court administration professionals in the 1970s helped the judicial system simply by making it realize the full extent of contributions that administrators can make. Long after other management arenas abandoned the notion, courts had still clung to the view that it was possible for one set of persons to make policy for an organization and another set to administer the policy. Policy making and policy administration were seen as separate and distinct. A briefing paper prepared for the first ICM Board meeting contained a classic statement of the traditional view. ICM's programs, it said,

> will clearly recognize the division of function between (1) establishing fundamental court policy, (2) the function of judging, both of which are for the judges and (3) the function of handling the numerous business and administrative affairs of the courts in which a trained executive officer, working under the chief judge or presiding judge, will relieve judges generally.

While there may be tactical reasons to assert a dichotomy between policy making and policy administration, most management analysts have increasingly come to recognize that the two functions cannot be dichotomized. Administering a policy inevitably creates policy decisions. Those responsible for administration cannot help but contribute to shaping policy.

The courts' public adherence to the dichotomy is understandable. It is a threatening realization that policy making and policy administering inevitably blend. Judges are threatened when they realize that they are in fact sharing administrative power they had long thought was exclusively theirs. Court administrators are threatened because they might lose their jobs if the realization upsets the judges — or others, such as legislators.

As court administration wrestles with the breakdown of the policy-administration dichotomy, it is natural to look for parallel experiences in other management areas. One that was explored at Wingspread was the appointment of city managers who might have been seen as threats to the policy makers elected to govern the city. The general consensus was that the parallel was instructive, but incomplete, because the settings are different. City managers were introduced most successfully in cities in which the electorate had immediately prior to the office's introduction, taken power from entrenched machines and given it to municipal reformers. The reformers had little interest in full-time municipal government and were willing instead to turn most of the power over to the professional city managers. Judges with a similar willingness are not prevalent — and fortunately so — tending thus to foster a situation of shared power between judge and administrator.[5]

In the late 1970s, a realization of this shared power was manifest at ICM and elsewhere in joint management education for chief judge and court administrator together. There was a growing understanding that judge and administrator inevitably will be about the same business, but with different and hopefully complementing functions and skills. The view at Wingspread was that the next step should perhaps be to include non-chief judges as well in these joint programs.

To summarize, the 1970s provided court administration a foothold in terms of numbers and responsibility in the courts. More important, it saw a breakdown in — albeit hardly the disappearance of — the notion that managers within the courts pose an inevitable threat to judges simply because they are a part of the policy-shaping process. Will the judge-administrator partnership — as opposed to hierarchy — grow in the 1980s?

B. Judicial Responsibility for Case Management

Since the days of Pound and Wigmore, there has been criticism of the idea that the judge is merely a neutral arbiter to referee the dispute when the parties were ready to try the case. Programs

[4]See Gable, "Modernizing Court Administration: The Case of the Los Angeles Superior Court", 31 *Public Administration Review* 133 (1971).

[5]See Cannon, "Forward," in R. Wheeler and R. Whitcomb, *Judicial Administration: Text and Readings* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc, 1977), pp. xi-xii.

designed explicitly to promote active judicial management of cases once filed have been with us at least since the 1950s.[6]

The change in the 1970s is the growing acceptance of the idea that a case, once filed, becomes the business of the public and that court personnel, as the public's agents, are responsible for managing the case to disposition. Less than 10% of the cases in almost any court lead to a trial, and the implications of that fact are now being recognized. Programs to train judges in case settlement techniques have increased. The federal and state court research and development arms both published studies suggesting the effectiveness of proactive case management.[7]

A cautionary note is in order: there may be an inclination to see judges increasingly embrace the concept of proactive case management and take comfort that "progress" has been achieved. Judicial administration, however, has been unduly burdened with the view that change means improvement. The 1970s' changes in attitudes toward case management responsibilities are perhaps better seen as adjustments to certain problems in the *status quo*, adjustments that will in turn give rise to further adjustments. The 1980s may see increased questioning of the relative costs and benefits of proactive case management — questioning that may increase as the view comes to dominate.

There is a link between the 1980s growing acceptance of a proactive case management responsibility and a related concept that surfaced in the 1970s: a more pervasive attack on the very concept of adversarialness as a means of finding the truth. Some well-articulated arguments appeared in the 1970s against the constraints of the "umpireal view" of the judge's responsibility in "the search for truth".[8] This disenchantment with the adversary system was noted frequently at the Wingspread Conference, in the keynote address and in subsequent conversations.

C. Court Organization

A 1977 commentator wrote that "progress" in achieving unified court systems "was painfully slow until the late sixties," and this "[d]espite a succession of studies, professional standards and model codes endorsing that stance." However, after 1968 "the 'lid came off' and the number of states with substantially unified systems more than doubled."[9]

The Wingspread Conference heard frequent reference to these organizational changes. However, the discussion also took account of the disenchantment with them and with the studies, professional standards and model codes that urged them. The conferees agreed that it was nice that substantial changes had been achieved through unification, but the issues of unification and consolidation no longer appear as important as they were even ten years ago. Indeed, the whole "standards" movement that dominated court administration from the 1930s to the 1970s is seen today in a new dynamic. Standards are viewed as a springboard, not a final resting place, and exhortation to get courts unified and consolidated is being complemented by measurement and appraisal of the effects of unification.[10] Thus, the 1970s may be recognized for increases both in court unification and in questioning the rhetoric urging unification.

D. Technology

Throughout the 1970s, it was commonly assumed that improvements in the administration of justice were necessarily linked to the use of more sophisticated technology. A frequent refrain was that "the machinery that made modern business prosper will also bring courts into the twentieth century." To be sure, there are still many courts where technological revolutions consist of electric typewriters and photocopiers and personnel to use them, but in other state and urban court systems a great deal of money has been spent and extensive computer, recording, and word processing systems established.

At the Wingspread Conference, the focus of discussion was on the lessons that courts could learn in how to digest and to accommodate the 1970s' technological change. What, for example, had to be done within the management structure of the courts to enable the courts in fact to manage the information that technology has put at their disposal? There was stress on the courts' need to choose technological support staff who understood technology and how to work with it.

In light of the truism that judging is still a cottage industry, the 1970s technological development raises the question of how to retain humanism in the judicial process in the face of videotape depositions, picture phones, and microfiche records.

Ultimately, the question remained: was technology worth the investment?

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[6]See, for an early call to action, Murrah, "Pre-Trial Procedure: A Statement of Its Essentials," 14 *Federal Rules Decisions* 417 (1954).

[7]See Flanders, *Case Management and Court Management in United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977) and T. Church, et al, *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (Williamsburg, Virginia: National Center for State Courts, 1978).

[8]Frankel, "The Search for Truth: An Umpireal View", 123 *University of Pennsylvania Law Review* 1031 (1975), and Frankel, "The Adversary Judge," 54 *Texas Law Review* 465 (1976).

[9]D. Skoler, *Organizing the Non-System*, 295 (1977).

[10]The action arm of the Law Enforcement Assistance Administration pushed hard for unification during the 1970s, but by 1979 another LEAA unit was seeking research examining the effects of unification. See U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice, "Criminal Justice Solicitation: Comparative Research on the Organization of State Court Systems" (1979).

Looking Ahead

The Wingspread Conference stressed the continuing breakdown of rigid boundaries between courts and their environment and the courts' increased openness, responsibility, and accountability to new constituencies. The problems that courts face and will face in the next decade are of almost universal application to bureaucracy, and particularly to government bureaucracy, in this latter part of the 20th century. Courts, like other institutions, are faced with an accelerating pace of change, an increasing shortage of resources, and growing constraints on leadership and authority. Most learning — in courts and elsewhere — is not change-oriented but instead reinforces the status quo.

What will be the issues of the next decade? Elegant prognostication is a risky business. It seems safest to comment on potential developments in two broad topical categories that emerged in the discussion at Wingspread: changes in the role of courts and of personnel in the courts, and changes in the courts' relationships with external agencies and persons.

A. Changes in the Courts

1. Role of Courts

Some argued at Wingspread that the courts' inability to serve all their would-be users expeditiously is caused by their popularity. By this view, courts offer so high a quality of dispute resolution that they have more business than they can handle. These Wingspread comments were similar to former federal Judge Simon Rifkind's assertion at the Pound Conference "that much of today's dissatisfaction springs not from failure but from conspicuous judicial success. The courts have been displaying a spectacular performance; it enjoys a constant "Standing Room Only' attendance."[11] There is something to be said for this view of the situation.

But some skepticism is justified as well. Courts claim great popularity for their service. In large measure, however, they have a monopoly on providing that service. This is especially true concerning courts of so-called minor or limited jurisdiction. These courts differ from the courts that receive the main credit for the courts' conspicuous success — appellate courts, and a relatively small number of major trial courts. Those courts might well legitimately claim success, at least insofar as disputants turn to them rather than, say, legislative bodies.

By contrast, minor jurisdiction courts often offer the only official, public forum available to minor disputants. They process many cases, but their business may in fact be relatively light compared to the total number of potential disputes. Is it fair to say that litigants lined up to wait for assembly-line justice in misdemeanor or small claims courts are proof of judicial success and great customer satisfaction? Would they refuse to go elsewhere if alternatives were offered?

The 1980s may see more inquiry into whether court procedures are the most effective way to resolve all disputes — at all levels. If so, there will be increased argument with the view, expressed by one participant at Wingspread, that "courts should be maintained in their purest form" and court processes, which represent "objectivity," should not be "given away." Will cost and efficiency considerations increase the appeal of no-fault programs that provide compensation to accident and trauma sufferers as a consequence of modern societal complexity? Will the 1980s see continued testing and exploration of "alternatives to courts"? Indeed, the latter phrase assumes that courts are the standard against which every other forum must be measured.

The development of non-court forums may spawn several sub-themes. First, the public need for some way to get disputes resolved without recourse to formal court procedures runs counter to court reformers' traditional wish to eliminate lower tier courts. Justices of the peace, magistrates, and others similarly styled will continue to crave the title and accoutrements of the general jurisdiction trial judge, while some sub-set of the population will increasingly demand some forum other than the general jurisdiction trial court to resolve problems that those courts seem ill-suited to resolve. According to some reports, for example, the three Neighborhood Justice Centers sponsored by the federal government have apparently provided effective mediation services to a range of disputes that the courts have neither the time nor ability to handle.[12] The next decade will see a continuation of the tension between the desire of disputants to receive "first class treatment" and the pressures on the judiciary to specialize.

Second, non-court forums will be sought not only for the too small case but also for the too big case. Certain gargantuan litigations may have bolstered appreciation of Judge Rifkind's observation that the trial, like every other "medium of communication," must "accommodate itself to an effective size."[13] Increasingly the many sides of any major change will be explored, as seen in the current debate over whether the lay jury is incapable of participating in complex economic and technical litigation.

If forums can be developed that resolve disputes within or even on the fringes of the court system, the role for the justice system manager will become larger and more ambiguous. The court manager's role even now has within its purview the great variety of social services that characterize the modern urban court — probation, juvenile matters, housing, domestic relations, and small claims procedures, for example. In the 1980s, the justice system manager may gain an even greater set of complex and diverse tasks, those involved in providing mediation and arbitration services.

The services available within the justice system may expand in another way that also will expand the role of the justice system manager. Courts in the 1970s became significantly involved in multi-

[11] Rifkind, "Are We Asking Too Much of Our Courts," A. Leo Levin and R. Wheeler (editors), in *The Pound Conference: Perspectives on Justice in the Future* (St. Paul: West Publishing Company, 1979) pp. 51,52.

[12] E.g., Ruth Marcus, "Local Justice Centers Clear the Air, but Not the Dockets," *National Law Journal*, February 25, 1980.

[13] Rifkind, *supra*, note 11 at 62-63.

party disputes in which implementation of the decree was a major, continuing responsibility of the court. Such cases will continue to bring into the courts a large assortment of non-judge actors, such as special masters, mediators, fact finders, and ombudsmen. These persons will create another opportunity and need for the services of court managers. Someone must provide them coordination and logistical support in cooperative management with the judge. There will be a need as well for analysis of the roles and performance of these new actors.

2. Changes in the Judicial Office

Although judges comprise less than ten percent of the personnel in most court systems, they are its backbone. Judging is the judiciary's reason for being. What types of issues and developments will affect the judicial office in the 1980s? Arguably, the judicial office will be affected by the continuing impact of traditional developments in the areas of selection, education, and discipline, as well as by new conditions which are seen now in only sketchy outline.

The conventional wisdom in court administration has been that the prescription for a sound judiciary was: (1) selection by "non-political" merit selection commissions, (2) secure tenure, (3) reasonable salary, (4) continuing education, and (5) fair and effective discipline and removal procedures. The 1970s saw the widespread establishment of formal institutions and procedures to those ends. Commissions for judicial selection are increasingly provided, if not by statute, by executive order. First steps were taken toward the creation of procedures for periodic review of salaries. Judicial education institutions now exist on the national and state levels. Almost all states have some type of commission as an alternative to the traditional disciplinary devices of impeachment or recall.

There may thus be a tendency in the 1980s to put these issues out of sight and out of mind. Some will take the complacent view that "another step forward" has been achieved. Others will be relieved that one more seemingly stale issue has been mercifully removed from the arena. But it would be premature to forget these issues. "Merit selection commissions" cannot necessarily be regarded as a panacea that ensures good judges. The establishment of a judicial discipline commission, for example, does not terminate the need for oversight of how judges are being — or not being — disciplined. Difficult questions will remain such as the degree of publicity to give discipline proceedings, as seen, for example, in the 1979 California Supreme Court investigation.

Perhaps even more in need of scrutiny in the 1980s are programs for judicial education. The late 1970s saw a proliferation of programs offering judges education in such subjects as economics and the free press-fair trial tension as well as the more conventional topics of case management and new legal developments spawned by recent appellate court decisions.

Sometimes the courses in the most controversial areas — such as economic regulation — are offered without charge either to the judge or the court system of which the judge is a part. While federal judges appear to have been the major objects of such courses in the 1970s, the 1980s may see an expansion to state judges of these efforts to provide adjudicators with information that some think it important they have.[14] If the 1980s see continuation of the courts' involvement in economic, political, and social regulation, they may also see expansion of efforts to provide education for judges in those areas. There is an extensive body of law on what extrajudicial facts a judge may notice in the course of litigation. This should suggest the need for some serious thinking and attention to the matter of who should be able to offer judges formal education, under what circumstances and with what disclaimers.

What other changes in the judicial role might the 1980s see? Several developments will affect the relationship of judge and court administrator and they bear mentioning here. Judges may increasingly specialize in substantive legal areas. The American judicial system usually takes pride that it is a bench of generalists, rather than specialists on the continental European model. Several at the Wingspread Conference wondered how long we can maintain the dichotomy of generalist judges in the face of an increasingly specialized bar and increasingly specialized litigation. Specialist judges are already common in many court systems; for example, there are separate juvenile, housing, bankruptcy, and probate courts. A trend toward more specialization will, in turn, provoke administrative demands for more specialized assignment systems and continuing education.

A related topic discussed at Wingspread was the sense that a major morale problem facing many of America's judges results less from overwork than from boredom. We may be developing a judicial system of many judges, grinding away at dockets filled with large numbers of routine cases moving to routine disposition. Of course, in some courts, judging has long been routine and boring — presiding over an assembly line. Nevertheless, judges have traditionally thought of themselves as dealing with legal and philosophical issues rather than as petty bureaucrats. The question is whether routinization may be affecting increasing levels and types of courts, and whether it can be ameliorated.

A judiciary affected by the bureaucratic syndrome needs creative personnel management. Large urban courts have traditionally rotated judges among various units with different cases as an antidote to boredom. But rotation is not sufficient to deal with ennui in smaller courts, many of which use individual calendars, or in most appellate courts; it is probably not sufficient even in the courts in which it is logistically possible.

More attention might be given to providing judges sabbaticals — a distinct opportunity for periodic change and recharging. Almost ten years ago, Kenneth O'Connell, then the Chief Justice of the Oregon Supreme Court, pointed out that appellate judges need occasionally to study and reflect in a fashion not possible in the daily press of judicial business. He commended the Oregon policy which permits the Supreme Court to grant

[14]Various perspectives on the propriety of such courses are suggested by the titles of articles describing them. See Guzzardi, "Judges Discover the Work of Economics," *Fortune*, May 21, 1979; Beckwith, "Judges Study Free Market Economics, At Corporate Foundation Expense," 1 *Legal Times of Washington*, February 5, 1979, (No. 36), p.1; Barbash, "Big Corporations Bankroll Seminars for U.S. Judges, *Washington Post*, January 20, 1980; Al Staple, "Free-Market Cram Course for Judges," *The Nation*, January 26, 1980, p. 78.

judges leave of up to a year for such a purpose.[15]

The rash of federal judges who have returned recently to the challenge of private practice and/or gone to executive branch service has been noted by Solicitor General Wade McCree, himself a veteran of twenty-three years of state and federal judicial duty. The job of judging, he said, may lose much of its attraction after "several times around the track," and thus it may be necessary to let judges periodically "involve themselves in activities quite different from their ordinary pursuits and then return renewed, with new perspectives . . ." And "there is general agreement, " he observes, "that the sabbatical is primarily for the benefit of the institution and not just for the teacher."[16] The new masters of law degree being offered to judges at the University of Virginia is one example of such an academic-based break in the pressures and tedium of judging.

The judiciary of the 1980s may have to deal with higher turnover. Typically judges have left the bench through death or retirement; occasionally, they have been defeated for re-election. Several developments may alter this condition. First, the boredom of the job may induce a greater receptivity to leave the bench earlier than retirement age.

Second, judges may be coming to the bench at younger ages, in part because established practitioners may find a judgeship less appealing than they have in the past, especially if they are parents of children requiring university educations. Moreover, the lawyer surplus might make younger lawyers become more aggresive in seeking judicial office either as a career or as a form of advertising for a legal career, or both. In addition, groups that have been disproportionately excluded from the practice of law and from the judiciary — blacks and women, for the main examples — will increasingly be appointed to the bench, but the pool of eligibles will be characterized by younger ages than has been typical for white male appointees.

Thus, the 1980s and beyond may see significant numbers of judges who are anxious to leave the bench after a decade of service, rather than serve to retirement. They will be able to leave the bench in anticipation of several decades of a law practice or another career enhanced by the prestige and experience of having held judicial office. This is the reverse of the common practice whereby lawyers were seasoned at the bar to assume a second and final career on the bench.

Increased judicial turnover may affect the court administrator's role in several ways. At a minimum, an increase in the turnover of judges will create additional logistical, educational and socialization tasks. It may provide an impetus for more rational personnel development plans for judges. Finally, as noted above, in courts where judicial leadership changes frequently, there is a greater need for administrative personnel to provide focus and continuity. If the judicial component in a court becomes less stable, administrators may have additional opportunities.

Another consequence of judicial boredom is that judges may turn to administration as an antidote. Peter Fish observed almost ten years ago that federal judges seek appointment to United States Judicial Conference committees because, despite "the often arduous and unpaid labor involved, . . . a committee appointment constitutes one of the few means of status differentation available within the judicial system."[17] Judges seeking judicial administration outlets for creativity, power, publicity, or a sense of well-being, could reduce the availability of court administration positions open to non-judges.

This tendency could be furthered to the degree judges are more comfortable with other judges, as opposed to non-judges, as court administrators. They will have fewer fears that the judicial branch has been invaded by outsiders. An example of this may be the bill introduced last year allowing for the appointment of active federal judges to the top administrative positions in the judiciary — the Administrative Assistant to the Chief Justice, the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center.[18]

On the other hand, increased judicial interest in systemic matters of court administration could serve to foster the partnership and cooperation between judge and administrator thereby enhancing the contribution that both can make.

3. Changes in the Court Administrator Position

Changes in the court administrator position may be of a different type and magnitude than those in the judicial office. There was a general view at the Wingspread meeting that the court administrator role, unlike the relatively traditional role of the judge, is still experiencing growth and the resultant pains of adolescence.

The impact of court administrators in the 1980s will probably be an extension of that of the 1970s. Their technical assistance will become more refined and sophisticated and thus play a greater role in smoothing the delivery of court services to litigants. Also, just as some court administrators helped focus executive power within the courts, they may in the 1980s turn increasingly to helping the courts communicate with those external to the courts, as described below. In either case, it will be important to observe whether the coordination and cooperation between judge and administrator grows or diminishes.

Increased professionalization of the court administrator position may require improved personnel and certification systems. Several at Wingspread pointed out that court administrators who consider leaving a current position are usually faced with a loss in pension rights accrued in the system. In contrast, academics can move freely between schools in different states and parts of the country. Can the profession develop alternatives to a system requiring immersion in only one jurisdiction, with the consequent risk of burn-out? Sabbaticals and other refresher experiences appropriate for judges are also appropriate for court administrators. Indeed, judicial sabbaticals may be a necessary predicate for similar programs

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[15]O'Connell, "Streamlining Appellate Procedures," 56 *Judicature* 234, 238-39 (1973).

[16]McCree, "Remarks at the Fordham-Stein Award Dinner," New York, November 8, 1979. See also Rubin, "Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency," *Notre Dame Law Review* (forthcoming).

[17]Fish, *The Politics of Federal Judicial Administration* 273 (1973).

[18]The bill, S. 1477, 96th Congress, 1st Session, would provide for the creation of an additional judgeship on the court of a judge so appointed, thus making it feasible to appoint an active judge to the positions.

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for administrators. As one Wingspread participant asked: "How many judges are going to allow their administrators a privilege they do not have themselves?"

The 1980s may also offer an opportunity for research that will illuminate the office more clearly than it has been understood heretofore. Many contemporary court administrators are first or second generation incumbents. The Wingspread conferees urged a systematic research effort to debrief court administrators as they retire or move to other positions, thus building a body of data and knowledge of their experiences. Comparisons that might be drawn to the first generation of other management professions — such as city or hospital managers — could be instructive.

Despite the gains made by professional court administrators, even at this comparatively late date, the question remains whether someone called a court administrator is really essential to the operation of the courts. At least one circuit executive position in the federal system has never been filled, and several states and major trial courts do not have someone by the title of "court administrator". Are these courts any better or worse managed than those with formally titled administrators? Before the creation of an identifiable cadre of administrators, budgets were prepared and other administrative tasks were performed by non-judicial personnel in the courts. What difference — or differences — has professionalization really made?

B. Courts and Their Environment

Organizations draw power from their environment. This may be especially true for the courts. As Hamilton said almost 200 years ago, courts have "no influence over either the strength or of the wealth of the society."[19] To protect their independence and administrative integrity, courts must be able to persuade legislators, executives, constituents, the public, and the media of the merit of their positions and thus secure the power those institutions can bring to bear on filling the courts' needs. Obviously, the major power of the courts — to decide cases — must not be brokered.

The 1980s may severely test the resources and skills of those responsible for court management. How can the courts defend themselves in an age of increasing hostility to all public authority — especially to that of the courts, an authority that is, to some necessary degree, undemocratic and secretive? How can the courts restore and maintain underlying support in the face of at least some public dissatisfaction with the courts and their administration?[20]

1. Competition for Public Resources

Justice system management in the 1980s will not only be affected by changing external demands on courts for increased services, it will be affected as well, the Wingspread Conference predicted, by changing external *denials* to the courts.

Courts have always regarded themselves as crumb catchers when the fiscal pie is divided. The age of scarcity suggested by the apparent demise of the Law Enforcement Assistance Administration will make their competition for public resources even more intense, and restrictions on the use of property taxes for public services will affect state and local courts. Efforts to improve how federal funds are channeled to state courts will persist in the 1980s and probably produce refinements, perhaps in the form of the proposed State Justice Institute. Whatever the form of federal assistance to state courts, Congressional interest in the accountability of funds appropriated will lead to some forms of control or monitoring.[21]

To what extent (if at all) should the courts pay for themselves? The costs of litigation are staggering in many instances; even so, litigants do not provide the major costs of maintaining the courthouse and courtroom. Should the taxpayers be relieved of some of this burden? If so, how? Should there be user fees which shift costs of litigation to the litigants? Would this approach bar use of the courts by many of modest economic resources?

2. Judicial/Legislative Communication

Courts have always bemoaned their problems with the legislature. Traditionally, these problems include inadequate appropriations, and unwanted legislative prescriptions of court jurisdiction, organization, or procedure. The 1970s saw several discrete steps designed to improve the courts' relationship with legislatures. Many state chief justices addressed the state legislature directly, or took a page from Chief Justice Burger and spoke to the legislature through an appropriate bar association. On the national level, the Brookings Institution has provided three annual seminars at which federal judicial and Justice Department officials could meet with members and staff of the two Congressional judiciary committees. There was little doubt among the participants at the Wingspread Conference that such steps were helpful and to be encouraged.

However, court personnel must not be lulled into undue optimism. A persistent view in the courts community is that a "new day" of judicial/legislative harmony is somehow just over the horizon and will be reached with just a bit more inter-branch communication. In fact, however, communication is but a necessary first step, part of a larger fabric of trust and shared values. Communication standing alone cannot abolish basic institutional perspectives, priorities and obligations that differentiate the judicial and legislative branches. The nature of the offices judges and legislators occupy influence their priorities and expectations. They are likely to have different views on who should draft procedural rules and what they should provide, who should

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[19] *The Federalist* No. 78 at 504 (A. Hamilton, E. Meade ed. 1937).

[20] There is disagreement about the level of public satisfaction with the courts. Data from the recent Yankelovitch national survey led the firm to conclude that there was serious dissatisfaction. Other analyses of the same data caution against "a sweeping conclusion that the public is 'dissatisfied with the courts.'" See Yankelovitch, Skelly and White, Inc. "Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders," in T. Fetter (ed.) *State Courts: A Blueprint for the Future* (Williamsburg, Virginia: National Center for State Courts 1978), 5-69 and Mahoney, Sarat, and Weller, "Courts and the Public: Some Further Reflections on Data from a National Survey," *Ibid*, 83 at 85.

[21] Meador, "Are We Heading for a Merger of Federal and State Courts?" 17 *Judges' Journal* No. 2 (Spring 1978), p.8.

have access to courts, and how public resources should be spent.

Courts have two tasks in the 1980s. First, they must maintain as much communication as is feasible with the legislature, not to preach or teach, but to try to understand and enlighten. Beyond that, communication can help build legislative confidence in the courts' ability to use legislatively delegated resources and administrative authority responsibly. It can identify areas in which courts' prerogatives — perhaps in the rule-making area — must be respected.

3. Judicial Communication with the Larger World

The same themes that characterized the Wingspread discussion of legislative/judicial communications reappeared in the discussion of court communication with others concerned about the courts. A sharp distinction was made between "taking the courts' case to the public" and recognizing communication as an organic relationship from which courts can learn as well as teach.

The consumer movement has hit the courts and will be with them at least into the 1980s. This movement carries a challenge to the unspoken assumption that courts exist for the sake of the judiciary, the lawyers, the litigants, jurors and witnesses — and in that order. One Wingspread participant characterized the public perception of the courts as that of a private game preserve in which judges, lawyers, and frequent litigants romp playfully while those who foot much of the bill watch from over the fence.

The design of a courtroom is symbolic of the broader public perception: persons interested in understanding a courtroom proceeding may soon realize that in most courtrooms they can do little more than watch an intimate conversation between working partners that is difficult to overhear.

Communication involves an opening-up process. It requires parties to be communicated to as well as to communicate. A recent review of national survey data of public perceptions of the courts concluded that "improved communications are essential if the public is to have a better understanding of what courts do (and of what they do not or cannot do) and if the judicial leadership is to have a better understanding of public needs and views as an element of judicial policy making." But, they emphasized, "improved communications is a two-way street; courts must be prepared to listen to 'outsiders' as well as to convey information about themselves."[22]

By the same token, courts can relieve pressures that put them on the defensive by taking it upon themselves in the 1980s to take into account the needs of jurors, witnesses, and litigants — and would-be litigants. Courts in the 1980s can draw power from their environment by acoommodating legitimate needs, or they can simply be the objects of power.

It is impossible to consider the courts' communication with the larger world without thinking about the courts' relations with the media. Printed and electronic journalism is in fact the main vehicle by which the public generally and specific court constituencies perceive what the courts do. Court-media relations were affected in the 1970s by major developments in First Amendment law,[23] some cases coming down only shortly before the Wingspread Conference itself.[24]

Supreme Court decisions were not the only developments in court-media relations in the 1970s. For example, Ford Foundation Media-Law seminars exposed judges, lawyers, journalists, and others to each others' perceptions and dealt with tensions in outlook that no specific Supreme Court decision could create.[25]

Discussion of court-media relations at the Wingspread Conference dealt only briefly with specific legal developments. The focus was instead on underlying tensions — what each expects of one another — and what courts can do administratively to alleviate the results of that tension. The press may seem especially hostile to the courts, but in these times almost all institutions of government are regarded with suspicion and distrust.

Public suspicion of and hostility toward government generally and the "imperial judiciary" in particular does not seem likely to ease in the next years. The Wingspread conferees did not doubt the value of programs developed by bar associations and others to respond to unfair criticism of judges, but they noted that this involves only one aspect of the total dynamic.

There was recognition at the Wingspread Conference that courts, in the next decade, may simply have to endure criticism and hostility more intense than has been the traditional norm. Courts are in a poorer position than other agencies of government to favor the press with assistance. Judicial decisions — including First Amendment cases — are not properly subject to any bargaining with those outside the courts. Moreover, courts must necessarily operate with some greater degree of non-communication than other agencies. Canons of judicial ethics tolerate little advance notice of decisions or little extrajudicial commentary about decisions once reached.

Much can and has been done to explain the procedures for reaching decisions. For instance, several federal courts of appeals have not only published their internal operating procedures but have also undertaken to formulate these policies with the help of committees that include lawyers and other outsiders.

Courts could also do more to improve how their decisions are communicated. The distinction between the substance of a judicial decision and how it is communicated is a delicate but identifiable distinction. The court's decision and any opinion justifying the decision are not subject to administrative constraint or even guidance.

The form of how those matters are communicated can benefit from administrative guidance. Timing the daily announcement of decisions to accommodate journalists' deadlines is one example of an effort to facilitiate the communication of judicial policy administratively, without affecting the substance of the decision.

There was at the Wingspread Conference a probing exchange into how far *beyond* mere mechanical adjustments court administrative personnel might go in efforts to improve the com-

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[22]Mahoney, Sarat, and Weller, supra note 20 at 91.
[23]E.g., *New York Times v. United States*, 403 U.S. 713 (1971)
[24]*Herbert v. Lando*, 441 U.S. 153 (1979; *Garnett v. DePasquale*, 443 U.S. 368 (1979).
[25]See Simons and Califano, *The Media and the Law* (Washington, D.C.: Praeger, 1976).

munication of courts. At one point, a participant suggested that the language of judicial decisions — and the confusion with which multi-judge appellate courts sometimes speak — heighten public antagonism or distrust of courts and that court administrative personnel might play a role in attending to the volatile language or confusing communication in judicial decisions. This suggestion provoked the response that, if court administrators seek to affect the actual substance of judicial decisions, it would be inappropriate and no doubt meet with hostility on the part of the judiciary.

Still, the fact remains: managers tend to bring a cybernetic view to an organization's operations. They appreciate the effect of a system's output on the support it receives. If public attitudes toward the judicial function and the independence of judges suffers because of the manner in which judicial action is communicated, there is an instinctive urge to improve the communication. In judicial decisions, however, form and substance intertwine. Managerial direction of judicial communication will probably not be able to separate them.

4. Judicial Accountability

A final aspect of the relationship of the courts to their environment is the growing concern with judicial accountability by those in and out of the courts. The increased use of statistical systems and concern for the judicial role in case management will help fuel public and legislative interest in the performance of the judiciary — both collectively and individually.

If procedures to subject judges to periodic retention decisions are to be more than a formality, the relevant decision makers — whether they be the electorate, the governor, the legislature, or some combination — will need objective and relatively sophisticated information about the judges in a form which can be readily understood. A number of states — including Colorado and New Jersey — are already working to develop criteria and reporting systems.

Ironically, this trend toward greater accountability comes at a time when the power of the judiciary is increasingly diffused. Like other governmental units, the courts are sufficiently specialized and interdependent that no one is fully in charge. While there has been a trend toward centralizing administrative authority at the state level, there also is an emphasis on collegiality of decision making, epitomized by the judicial planning councils.

Some at Wingspread argued that decision making in judicial administration policy was following the general trend in public administration of horizontal communication or consultation rather than hierarchial, "top down" orders. Others felt that the power of and respect for the judiciary had diminished over the last decade.

Summary

This effort to anticipate what the 1980s may hold for court administration may do little more than illustrate the truth of the biblical admonition that "there is nothing new under the sun." In large measure, there are only new ways of looking at old problems. Looking at old problems from new perspectives is instructive when one considers the old battle cry to "reform the courts." The questioning in the 1970s of many traditional court reform objectives reflected a realization that a "reform" is, by strict definition, nothing more than a "reconfiguration". And a reconfiguration is not necessarily an improvement.

A bona fide improvement requires several things. It requires, first, some reflective thinking on what is good, what is bad, and why. Certifying a change as "an improvement" also requires some assurance — through measurement — that the objectives sought have indeed been achieved. That, in turn, implies some specification of objectives and development of a capacity to measure the extent to which objectives are achieved.

What is improvement for one set of participants in the judicial process may not be an improvement for others. This truth becomes more apparent as the courts become more open. Changes in the courts affect, inevitably, judges, lawyers and clients (plaintiff and defense), the public, and that 90% of the court's employees who are not judges.

The 1980s may give the court administration community an opportunity to reconsider the field's basic, unspoken faith that there can in fact be progress in how we administer justice and manage the courts. For much of the century, judicial administration has seen its task as solving a finite set of problems. The underlying assumption has been that the problems were indeed solvable once and for all. Entry into the judicial Valhalla would take time; getting there was not a sport for those Arthur T. Vanderbilt called "the shortwinded".

With plodding, though, the problem of poorly organized courts would be solved by merit selection. The problem of poor procedural rules would be solved by giving the courts the rule-making power. The implicit assumption underlying this problem-solving endeavor seems to have been that all of the courts' problems could eventually be solved. Court reform was the process of solving them, and progress was the product of the effort.

The last ten years have produced a more modest agenda. No one denies that many injustices can be remedied, that the condition of some citizens can be improved, and some procedures can be found that work better than those they replaced — at least for a while. The possibility of achieving temporary improvements, however, makes it all the more essential to remember that some problems are less susceptible to solution than they are simply to accommodation and adjustment. A nation that can enable a human being to walk on the surface of the moon is not, simply by that fact, capable of meeting every objective it sets for itself.

At the start of the 1970s, it could be observed that the country had trained more people to walk on the moon than to administer courts — and the observation certainly served important rhetorical purposes. It is worth reflecting, however, on whether the swelling in the ranks of court administrators, vastly outnumbering the moon walkers, has necessarily brought about all the improvements in the administration of justice that were implied when the observation was made.

Court management problems may be part of circumstances ingrained in the larger political fabric of the community. Consequently, the motivation of judges and how they view their job may have more

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to do with the local political scene than court reform exhortations.[26] For example, the influence on the Chicago courts of former Mayor Richard Daley is so pervasive that court reform pronouncements can have only limited impact.

Then, too, the growing skepticism in the field may be a sign of a healthy maturity. Systematic study of the courts and innovation has only come on a large scale in the last decade. Other fields of social experimentation, such as public welfare and education, have seen earlier optimism chilled by the realization that solutions to basic problems cannot always be found through good intentions and public dollars.

In summary, it may be advisable in the 1980s to regard changes — such as the increase in court administration positions — less a sign of inevitable progress, but rather as a necessary means to meet the needs of the day. Our agenda at any particular time may not be "unfinished business," but rather the "business at hand." New conditions and new needs may require some form of court administration in addition to — or other than — the court administrator.

Problems in the administration of justice, in one form or another, may always be with us. Today's solutions seem to beget new problems. If we manage to curtail drastically the existence of delay in court and costs in litigation, we may swell the ranks of litigants, thus encouraging a new wave of delay and costs. And, since the problems will be with us, perhaps the more healthy approach to take toward them is one of guarded receptivity. As one participant observed at Wingspread: "What makes court administration fun is problems. If we solved them all, it would be boring."

Efforts to predict future trends have a tendency to take themselves too seriously. The assumptions of the late 1960s about what the 1970s would bring were only partly validated. The increase in court management personnel and technology was borne out. But few predicted then the growing maturity of the field, as seen in its tendency to question the principles and premises of "improved judicial administration" that had been the staples of court improvement efforts over the century.

Also, efforts at prediction tend to highlight dramatic departures and developments, which, even if realized, are not likely to dominate real life as they dominate the prognosticator's imagination. Thus, while it is likely that the 1980s will see greater court system interest in responsive communication and public accountability, it would be risky to assume that such an interest will loom over the courts, affecting their every action.

From the vantage point of, say, the year 2050, courts and their administration in the 1980s will surely look more similar than dissimilar to the courts of the 1970s. And, from the vantage point of 70 years, it may be almost impossible to measure the extent to which the courts, on a daily, undramatic, continuing basis were able to provide litigants and society fair and expeditious resolution of daily, undramatic controversies.

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[26]Levin, "Delay in Five Criminal Courts," 4 *Journal of Legal Studies* 83 (1975).

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Appendix A.

Keynote Address by Robert B. McKay

COURT MANAGEMENT: PAST, PRESENT AND FUTURE

The United States seems to have lost its sense of direction. Our leaders wallow in indecision. We citizens are full of self-doubt. Goals and purposes elude us.

The self-proclaimed experts disagree on national policies and priorities; they do not understand any better than you and I what prescription will put the nation on a sound energy policy or deal effectively with unemployment, inflation, the Middle East or apparently anything else.

Remarkably, all these matters will appear in the courts in various guises. But is the judicial branch better able to resolve these issues than the legislative and executive branches, which have tried and failed?

Public confidence in our leadership, in our institutions, in ourselves, is at a low ebb. Regrettably, but not surprisingly, the courts have not escaped this syndrome. A national survey of public attitudes, conducted by Yankelovich, Skelly and White, Inc., in preparation for the 1978 Williamsburg II Conference, showed that public confidence in state courts was only 23 per cent, a bare 4 percentage points above confidence in prisons.

Even more alarming is the survey's conclusion that those who have had experience with the courts, and might therefore be thought to know them best, in fact trust them least. Coupled with this was the discouraging fact that large segments of the public misunderstand the courts. Many stated their belief that it is the function of courts to prevent crime. Most do not understand the relationship between state and federal courts. And many, perhaps most, accept a presumption of guilt for those charged with crime, rejecting or not comprehending the presumption of innocence.

Other developments are equally disturbing. California's Proposition 13, and its popular counterparts elsewhere, can only have an adverse impact on court systems already precariously financed. The investigation of the California Supreme Court, both in its televised and its secret phases, bodes ill for respect for courts everywhere. And the criminal justice system — or "nonsystem" as Daniel Skoler has described it — is widely considered to be a failure.

All of which brings to mind Murphy's Law: "If anything can go wrong, it will." And don't forget the corollary, Mrs. Murphy's Law: "Murph's an optimist."

Believe it or not, I too am an optimist. Without retreating at all from the problems that lie ahead, I propose to discuss what seem to me to be the frontline issues and to call attention to current and prospective developments that I find encouraging.

This is an auspicious time for a Conference on Contemporary and Future Issues in the Field of Court Management. For ten years Chief Justice Burger has been calling for the development of a cadre of court managers. The Institute for Court Management has responded to that call, and its graduates now populate nearly all courts in the land. Within the same decade the National Center for State Courts, the Federal Judicial Center and the National College of the Judiciary have all come into healthy existence.

This is also a time of transition. Much progress has been made toward a better understanding of the wonders that can be accomplished by court management. But the most important tasks still lie ahead. If once it seemed that all problems would be solved by the application of managerial skills, we now understand that the unwrapping of each layer of difficulties reveals a new layer of problems yet to be solved.

I am complimented to be here with this distinguished group of court administrators and managers, but you — and I — must recognize my limitations. I am not a judge, court manager, or even an active litigator. The best that can be said for me in this connection is that I am a court watcher. I have had at least peripheral involvement with a number of the national and local organizations and agencies concerned with judicial administration. These various contacts provide the opportunity, and you have given me the forum, to try to think in a more organized way about the issues of court management.

Where We Have Come From

When Roscoe Pound spoke, almost three quarters of a century ago, about "The Causes of Popular Dissatisfaction with the Administration of Justice," the notion that courts might be subject to planning and management had scarcely been considered. (Now it is at least considered, but, as you know better than I, not always fully accepted.)

Following the Pound speech there was a slow start on what has become a fast track. Within the first ten years after the 1906 speech judges and others met in New Jersey and Wisconsin to discuss ways to modernize the courts in those states. Significant developments followed in each decade of the sixty years to the present.

1919: The Massachusetts Legislature established a commission to consider change. The report called for a permanent body to collect data, make studies and suggest modifications in court administration. This led to the first functioning judicial councils in Massachusetts, Ohio and Oregon.

1929: By 1929 the American Judicature Society had been established; and it worked with the ABA to create the National Conference of Judicial Councils as the umbrella for the 18 state Judicial Councils then in existence. Roscoe Pound was the Director of the National Conference, and Arthur T. Vanderbilt was the first chairman.

1939: The first volume in the important Judicial Council series was published, and the Administrative Office of the United States Courts was established.

1949: Arthur T. Vanderbilt published the influential *Minimum Standards of Judicial Administration*. About the same time he established the Institute of Judicial Administration at New York University.

1969-1979: In this, the decade of greatest development, a number of significant organizations were created, including the Institute for Court Management, the National Center for State Courts, the Federal Judicial Center, and the National College of the Judiciary. A new and powerful entity was created by Congress to assist in research and funding, the Law Enforcement Assistance Administration. The Department of Justice established a modest but potent new division, the Office for Improvements in the Administration of Justice. Writing on judicial administration proliferated so extensively that there was a need for bibliographic assistance, splendidly fulfilled in Fannie Klein's *Bibliography of Judicial Administration*, already in its second edition.

The increasing awareness of the need for court management is a welcome development, but does not by itself resolve all problems of the courts. Learned Hand would be likely to repeat in 1979 what he first said in 1921: "As a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."

Where Are We Now? What Do We Expect of Our Courts?

James Madison said it best in *Federalist Paper No. 51:*

> "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."

What *do* we expect of our courts, including the judges, administrators and other support personnel? At the minimum we expect, and we have the right to demand, impartiality, independence and fairness in proceeding and result. The reasons for insisting upon these qualities may be obvious, but the attainment of this level of perfection is by no means easy. We ask judges to cast aside all the biases, predilections and vulnerabilities which are

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part of human nature and to act in a manner of fairness and impartiality that is never easy. Evidentiary rules, judicial codes of ethics, and court managers have as a principal purpose the assisting in the accomplishment of this onerous task. Similarly, judicial independence is sought to be advanced by merit selection, careful protection against discipline or removal in response to popular passion and screening from rewards or penalties dependent on decision. Even judicial independence can be carried too far. We are told, for example, of the two judges on the same court who met in the corridor after a considerable separation. The younger judge greeted his senior thus: "How are you today, judge?" To which the crusty rejoinder was: "None of your damn business. And I wouldn't tell you that much if I hadn't know you for 30 years." In the same vein of overblown independence, it is said that when Chief Justice Hughes asked a messenger to tell Justice McReynolds that the other Justices were waiting for his arrival to begin the conference, his reply was "Tell the Chief Justice I don't work for him."

Beyond the more abstract qualities of impartiality, independence and fairness we are entitled to expect, more pragmatically, that courts will cope with what Chief Judge Irving Kaufman calls the "twin devils" of delay and cost. That is, the judicial process must be expeditious and inexpensive without loss of its sense of humanity and compassion.

The devils of delay and cost are not easily routed. When we seem to be losing ground, I like to think of this story which I first heard from Ed McConnell, who reports that it appeared originally in the *Jerusalem Post*.

> Ten years ago I loaned Billitzer 20 pounds. He promised to return it within a week. When he didn't, I phoned him and he asked for a week's grace. After a week I went to see him and demanded my money back. He promised to pay it by the following Monday. He didn't. So on Thursday I consulted a lawyer and he sent Billitzer notice that due legal steps would be taken if he didn't pay within 72 hours. No reply came within a period of two months, after which my lawyer said there was nothing he could do as Billitzer refused to pay.
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> I placed my case in the hands of a better lawyer. We sued Billitzer. The hearing was all set to go five months later, but Billitzer didn't show up because of illness. The hearing was therefore adjourned to a date for the next year. It didn't take place then either, because by this time Billitzer had gone abroad. I waited 18 months and as he hadn't come back, I went to another quite well-known lawyer. He tried to activate the proceedings, but the judge refused to conduct the case in the defendant's absence.
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> We appealed to a higher court. It rejected the case in accordance with the requirement that a court of that level does not handle claims involving less than 50 pounds. So we waited a year for Billitzer to come back from abroad, and when he did I sent him another 30 pounds to raise the debt to 50. Now the higher court did accept our case and ordered the lower court to conduct the hearing in the defendant's absence. However, since the defendant wasn't *in absentia*, having as mentioned meanwhile returned from abroad, the hearing was adjourned pending clarification.
>
> I then tried an even better known lawyer and we petitioned the Supreme Court for a decree *nisi* calling upon the Minister of Justice to show cause why I shouldn't have my money back from Billitzer. The Minister of Justice said I should apply to the courts. Therefore we renewed the proceedings, but they were adjourned because Billitzer asked for an adjournment.
>
> I then went to the biggest lawyer in Israel and told him my story. He listened attentively and then suggested I go to Billitzer and beat him up! So I went to Billitzer and beat him up! He gave me my 50 pounds in cash right away!
>
> It sometimes pays to consult a really good lawyer.

The good news is that court management has progressed substantially. I have already noted some of the leading organizations active in the promotion of good management. Nearly every state now has a court administrator, and the compensation is at least improving as a sign of the growing respect in which the position is held. Standards of Court Organization have been approved, surely a sign of maturity of the endeavor; and there are even proposals for adoption of a code of ethics for court administrators.

The significant gain is that court management has progressed beyond routine housekeeping for the courts to the more significant tasks of budgeting, hiring, firing and supervision of personnel, planning for use of space and equipment, and even docket control. Developments in the state which I know best demonstrate the richness of the possibilities. Judge Richard Bartlett, the first statewide administrator of the courts of the State of New York, worked with judges, legislators, civic groups, the public and the media to bring about significant change despite the obstacle of a fragmented judicial system lacking centralized control. Similarly, Robert Lipscher, the first Circuit Executive for the Second Circuit, instituted major changes to help the courts in that busy circuit keep up with the mounting business thrust upon them. In both instances their successors continue the same tradition. Finally, in this selective roster of virtue I am very favorably impressed with the work of the Office for Improvements in the Administration of Justice under the guidance of its first two directors, Assistant Attorneys General Daniel Meador and Maurice Rosenberg.

Court managers, still young in the history of their new profession, have not been reluctant to replicate themselves. Training programs at the Institute for Court Management and elsewhere have provided a substantial cadre of the new breed of sophisticated managers, who know courts, understand judicial administration and are not reluctant to use the new technology of computers, word processors and LEXIS, to name only a few of the new techniques that make possible further improvement in the administration of justice.

But What Have We Learned?

It is customary to approach the topic of judicial administration in reasonable confidence that there are certain enduring truths. It might at first seem discouraging, therefore, to find that every one of the basic postulates is undergoing reexamination. But is not this willingness to rethink premises a healthy sign of maturity?

Consider with me some of those "fundamental" propositions and challenges that must be reviewed for their impact on judicial administration.

1. *Separation of Powers.* Montesquieu was surely right in emphasizing the importance of keeping distinct the powers of the legislative, executive and judicial branches; but the lines are now blurred, never more so than in recent decades when it is openly acknowledged that judges legislate and we see courts increasingly in the executive garb or administrators with oversight and management responsibility for schools, prisons, mental institutions and even supervising development of criteria for hiring personnel and admitting students to educational institutions.

Perhaps more important than the blurring of the lines that once separated is the uncertainty about the role and the power of the courts. There are those who assert with Alexander Hamilton that the judiciary is the weakest branch. Certainly that is true in terms of support. Only about 10 cents of every 100 dollars of federal tax expenditures goes to the federal courts, and in the states the courts get only about one per cent of all state expenditures. Pay scales for judges and court managers compare unfavorably with private enterprise and sometimes even with comparable positions in the legislative and executive branches.

On the other hand, some believe that the judicial branch is the most powerful. They cite the potency of the power of judicial review and point to the undeniable present reality of DeTocqueville's assertion more than a century ago that all important issues in American society ultimately reach the courts. Moreover, however little confidence the public reposes in the courts (as in all institutions), there remains an overwhelming willingness — even insistence — on bringing matters to the courts for resolution. The reasons are not mysterious: (a) access to the courts remains relatively easy, particularly as compared with effective access to the other branches of govern-

ment; (b) the courts act relatively quickly, as Maurice Rosenberg has observed, with a "blur of speed" when compared with legislative process; (c) the courts provide a relatively definite answer, again particularly in contrast to legislative bodies; and (d) the courts are perceived to be relatively impartial in their decisional process and generally fair in result.

Despite these incontrovertible strengths, the judicial branch has mostly struck out with the legislative branch. In general, courts and their judicial representatives have not been effective lobbyists in their own cause, often believing that role inappropriate or even demeaning. As a result courts generally lack control over their own budgets despite much brave talk (but little action) about inherent power. Courts have little control over the choice of colleagues, whether the system is elective or appointive. And courts have little control over legislation that affects the courts. Chief Justice Burger, for example, has urged Congress to adopt judicial impact statements before enacting measures that will affect the federal courts; but his voice has been little heard on this eminently sensible approach.

2. *The Adversary System.* The distinguishing characteristic of the Anglo-American legal system, often thought to be its crowning achievement, is the adversary system, where opposing parties through counsel contend vigorously in the search for truth before an impartial fact-finder. But we now ask, what is truth? And the system limits the search for truth with all manner of impediments: exclusionary rules of evidence, privileges that permit or encourage silence, prohibitions against unreasonable search and seizure and the like. Indeed, we might ask with Macaulay whether "the fairest decision will emerge when two men argue, as unfairly as possible, on opposite sides."

The ABA Commission on Evaluation of Professional Standards (the Kutak Commission) observes that the adversary system, unconfined by rule, offers an opportunity for the more powerful adversary to impose unfair advantage on the less powerful. Proposals to make the balance less skewed are complained against as attempts to destroy the sacred adversary system.

3. *Merit Selection of Judges.* No one opposes merit selection, all deplore partisan influence. But disagreement continues as to how best to assure merit selection, by appointment, by election, or by some combination such as the Missouri Plan. Even in the pages of *Judicature*, the prime advocate of merit selection by appointment, doubts are allowed to creep in.

4. *Unified Court System.* If any one star seemed fixed in the constellation of judicial administration, it would until recently have been the unified court system with centralized control, with three essential characteristics: (a) uniform court structure, preferably three tiers from a court of general jurisdiction through intermediate appellate review to a final review in selected cases in the high court of the jurisdiction; (b) centralized budget control; and (3) management control at the center. But there are defections from the perceived truth of the last generation. Some believe that specialized courts must be preserved, even in derogation of the idea of a single trial court of general jurisdiction. Others suggest that statewide control at the top may be too rigid. All options remain open.

5. *Uniform Procedure for All Cases.* It is a symbol of equal access to the courts that the process should not vary from the least important case (and litigant) to the most significant. But that principle of equality does not necessarily work to the advantage of individuals involved in minor litigation, as is the apparent intent. The rules of procedure have become so complex (not without reason) that the litigator of minor causes is discouraged from entry into the system. Unless useful alternatives are available, many worthy causes are resolved out of court or not at all. In short, some litigants are more equal than others. Complex litigation swallows court time, which becomes accordingly less available to others. Procedures designed for complex cases may be burdensome to litigants who need simple, quick and inexpensive procedures. Courts are increasingly preoccupied with what Abram Chayes has taught us to call extended-impact cases, because they reach in consequence far beyond the formal litigants in courts. Shirley Hufstedler has caught the nuances of the problem in saying:

> We expect courts to encompass every reach of the law, and we expect law to encircle us in our earthly sphere and to travel with us to the alien vastness of outer space. We want courts to sustain personal liberty, to end our racial tensions, to outlaw war, and to sweep the contaminants from the globe. We ask courts to shield us from public wrong and private temptation, to penalize us for our transgressions and to restrain those who would transgress against us, to adjust our private differences, to resuscitate our moribund business, to protect us prenatally, to marry us, and, if not to bury us, at least to see to it that our funeral expenses are paid. These services, and many more, are supposed to be quickly performed in temples of justice by a small priestly caste with the help of a few devoted retainers and an occasional vestal virgin. We are surprised and dismayed because the system is faltering.

6. *Individual Calendaring Systems.* It is a primary tenet of effective judicial administration that a single judge should be assigned to a case and remain responsible for its disposition through all stages. But questions are now raised whether exceptions should not be made in recognition of widely differing case complexity and the need for specialization in some instances.

7. *Settlement in Preference to Trial.* No one disputes the desirability of reducing the number of cases submitted for trial. More than half of all civil cases are settled, and a substantially larger proportion of criminal cases are disposed of by plea bargaining. But it is argued that the price is too high, on both the civil and criminal side. If parties are coerced into settlement or into an induced guilty plea, the system is not serving its primary obligation to dispense justice. Yet it is not easy to draw a line between efficiencies that serve the interests of the parties and those that are unduly coercive.

8. *Need for More Judges and Reduced Caseloads.* It is easy and attractive to argue that the courts need more support in numbers of personnel as well as in financing. But the question is increasingly raised whether more judges and more administrators will reduce or will compound the problem. The issue is how best to deal with mounting case loads without reducing the justice system to a bureaucracy like all other bureaucracies.

9. *Judicial Independence.* All subscribe to the demand for judicial independence. But the not irrational fear of some is that the glory of judicial independence can become the nightmare of judicial arrogance. The question is whether juridical independence can be properly channeled to assist in the administration and in the delivery of justice.

What is My Message to Court Managers?

Whenever we begin to think we know all the answers — if only somebody would ask the right questions — I suggest we should think about the case of the lawyer and his gardener. Here is the story.

Lawyer purchased a disassembled lawnmower with directions he found too complex to understand, so he put it aside in his garage. Imagine his astonishment when he returned home a few days later to find that his illiterate gardener had assembled the mower and was using it for its intended purpose. Lawyer to gardener: "How is it that you, who cannot read or write, can assemble this complicated piece of machinery when the instructions are beyond my capacity?" Gardener to lawyer: "Those of us who cannot read have to think."

Thinking won't solve all problems. At least I (perhaps like the lawyer in the story) have thought about these issues, and I don't yet have answers. Perhaps you do. Your calling is a high one, and your opportunity to serve the public is very real. Your role is not unlike that of the judge whose obligation Learned Hand described in these words:

> [A] judge is more than a moderator, he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.

We speak admiringly of reform, but do not confuse reform with mere change. Recall the homely admonition that "If it ain't broke, don't fix it." Or the somewhat more

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sophisticated expression of alarm by a legislator: "Reform? Reform! As if things aren't bad enough already."

Since I am not expected to provide answers, I consider myself privileged to ask questions. For example:

1. What should be the proper relationship of a court manager to the chief judge, to the court as a whole, to each individual judge? This is perhaps the most sensitive of all questions because judges may regard a strong administrator as a threat to judicial independence.

2. What belongs in court? Although the ultimate answers to this provocative question lie with the legislature and with the court itself, court managers must be aware of the implications of the various possible answers and alert to make appropriate response.

3. What research is needed, and how should it be accomplished, in order to provide answers to the questions of conventional wisdom previously raised in this discussion?

4. What initial training and continuing education is appropriate for judges and support personnel? Who should provide it, and at whose expense?

5. What can be done to improve — or salvage — the criminal justice system? This short question cries out for a more effective answer than in the past.

6. How is it possible to improve relations with the community, including better use of lay personnel?

7. How is it possible to make effective use of the new technology without threat to judicial independence or interference with the humanity appropriate to the disposition of individual cases?

8. What is the best use of social science and hard science data? How can modern knowledge be effectively utilized without undue interference with judicial independence?

9. Lawyers and judges sometimes stray from the straight and narrow ethical path. Who will bell the cat of unethical conduct, and what should be the procedures for discipline?

Conclusion

These are only some of the questions. Others will occur to you — or I shall be surprised and dismayed if that is not the case.

We live in a complex world that is not going to become suddenly simple. If court managers had not already developed techniques for dealing with the current flood of litigation, the courts would already have drowned in that mounting sea. But the issues have not been solved; they have at most been diverted for a time.

The great issues of our time press our courts for answers. Whether they are handled expeditiously and thoughtfully is not solely the responsibility of the judges. Clearly they cannot do it alone. You are essential to the success of the enterprise.

Your task is enviably difficult, for you serve many constituencies, sometimes with interests that may seem to conflict with others, whether chief judge, other judges, support personnel, jurors, witnesses, lawyers, media, legislators, investigators, probation, parole, corrections, prosecution, defense, legal services or the public.

Nothing less is at stake than the quality of justice and public respect for the system of justice.

Robert B. McKay

Since 1975, Mr. McKay has been Director of the Program on Justice, Society and the Individual of the Aspen Institute for Humanistic Studies. Previously, he served as a Professor of Law at New York University School of Law and was Dean of the Law School from 1967 to 1975. Mr. McKay has also taught at the Emory University Law School and has served as an attorney with the Department of Justice.

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Appendix B

Remarks by Frank P. Sherwood

EXECUTIVE LEADERSHIP AND THE PROCESS OF CHANGE

The title for these remarks is not one that will win any awards for originality.

On the other hand, there is a certain solace in familiarity. In our interdependent society problems do not seem to differ much from one human institution to another. Thus, anxieties about top leadership performance tend to be broadly pervasive; and those anxieties are further exacerbated by testing leadership performance in terms of an organization's capacity to adapt and change.

It is likely that a similar topic is being addressed in many locales and institutional settings at this very moment. Change the functional concern from courts to health or police or housing but the message will be roughly the same. Where are the leaders who can meet the awesome responsibilities imposed on them by modern organizations and the society in which they must function?

Clearly, the practice of leadership is tougher today. The reasons are abundant, but I want to mention three which appear to have particular salience.

First, the criteria for measuring an organization's performance have changed largely because of the accelerated rate of change in the environment. The social pace is now so rapid that organizations committed to doing the same old thing with more fine tuning at a minimum are destined for less relevant roles in the larger system. Put another way, the variables with which a leader must contend are no longer predominantly *inside* the organization but outside. The tracking and strategizing problems are rendered infinitely more difficult.

Second, the constraints on the leader are infinitely greater. Partly this is a result of a growing understanding that we all share in the leadership process; and hence no single person can be fully in control or fully responsible for a collective effort. But the rise of the Accountable Society, in which many specific demands are made on organizations and their leaders, has made it a virtual myth that any goal can be pursued in a coherent, single-minded fashion. As a result, the rewards for leadership have inevitably lessened. It's not much fun to be the object of often polarized, competing demands.

Third, the society doesn't do much to support leaders in dealing with such perplexities. Generally speaking our populist orientations triumph over any conscious effort to deal with the leadership problem. Hence our ideaology forces us to assume an immaculate transition from the follower role to one of hierarchical leadership. An abstract generalization, like charisma ("it") is about as far as many of us want to go in specifying what we mean by leadership competences.

I am also tempted to say that our technology is so minimal as to suggest our problem is much more than concern for leaders. True, there is much we do not know; but my experience, particularly at the Federal Executive Institute, inclines me to the belief that we know more than we use. As a result we tend toward the most conventional, low-risk strategies; and the problems of the past are simply built more deeply into the system. That is often a problem of professional development in which the product is more trained incapacity, to use the familiar term of Thorstein Veblen.

In any case, the job of leadership is tough at any level. The further one proceeds up the hierarchy with accompanying increases in formal responsibility, the broader and more complex the problems and similarly the constraints. For me, incidentally, the word executive simply serves as a qualifier of the more generic term of leadership. It

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suggests that a person has reached such a status and a relevance in the organization as to influence its behavior and directions in very substantial degree. Typically, that status is provided by official title; but Peter Drucker in particular has pointed out that influence processes in specialized modern organizations often include more individual performers as well. Detecting the executive leaders in an organization involves more than looking simply at the formal organization chart.

With a shifting cast of characters and roles, the organization has an increasing need for collaboration among executives who are essentially peers. Those peer interactions, incidentally, occur not only within the organization but within a broader society of organizations. In *The Future Executive*, Harlan Cleveland labels this process as *horizontal administration* as distinguished from vertical administration. The difference is highly signficant to Cleveland's argument about competences of future executives. In the world of vertical administration, executive lived in reasonably structured, unambiguous, authority-oriented worlds. The important things happened inside the organization; and the person at the top of the hierarchy was clearly in charge.

Horizontal administration posits a world of dramatic contrast. Most of all, no one has the legitmacy to give an absolute order; there is no objective rationality with the continuing task to mix apples and oranges; ambiguity is chronic; organizational boundaries never seem to conform to the scale of the problems being encountered; and executive life seems to comprise an endless stream of negotiations. To live in this kind of world, as Cleveland points out, an executive must have endless energy, relish compexity, and have an unrelenting appetite for ambiguity.

In what degree do we find issues of horizontal administration in the courts?

It is instructive that the Institute of Court Management, founded at least in part to sponsor the development of a profession of court managers, has developed new programs that have emphasized a collective leadership responsibility. There is a four-day program entitled, "Strengthening the Executive Component in the Court," which brings together teams of Presiding Judges and Court Administrators to develop greater skills in working collaboratively on common problems. According to the Institute's literature, the fourth of these programs was held in May, 1979 in Denver.

Very likely, the launching of this training program in horizontal administration was stimulated in part at least by feedback data obtained by the Institute garnered from its graduates in 1977. In the 1977 *Annual Report* Executive Director Harvey E. Solomon wrote:

> . . . Two key factors [in the survey data] were revealed as common throughout. First, those projects which were the most successful, from the planning stage to final implementation had the total support of the judiciary. The principal ingredient essential to the court administrator's successful efforts was a "willing," "committed," or "progressive" presiding judge or judiciary.
>
> A second factor was the administrator's ability and willingness to utilize a participatory management style. Those who appear to have achieved the greatest success in meeting their goals are those who have accepted their roles as catalytic agents and facilitators, often working by indirection to serve, encourage and influence those who are the decision makers or have the experience or political power to bring about the desired results.

Thus these Institute findings seem to support a conclusion that the courts are no different than other modern, complex organizations. They are sufficiently specialized and interdependent that no one is fully in charge. Organizational effectiveness will be determined in large part by the capacity of the executive actors to build commitments and competences in collaborative behaviors.

The contrast in the Institute's approach to these questions and earlier orientations in administration as a whole are striking and worth noting. In respect to hospitals, for example, the conventional formulation was that the MDs were substantive specialists. They obviously had to do their thing. However, the setting within which they operated and the resources available to them were essentially determined by a core of administrators who were expert on processes and mechanisms. Reform efforts led to the development of a group of administrative technicians who became the hierarchical leaders of many of our hospitals; and we substituted one set of problems for another set. I remember my surprise about a decade ago with doctoral research findings from a large public hospital. It showed that the doctors and the nurses were far more cost conscious than were the administrative types. On reflection, the findings made sense. Those performing the actual medical services could see the direct results of resource expenditures; for the administrators end products were only an abstraction.

It would seem to me that the judges are in a position much like the physicians. The condition of the institution in which they seek to perform services is much too important to leave to an administrator. And Drucker's broadened view of the executive role seems particularly relevant. Each judge, no matter how specialized or narrow may be his view of his tasks, is in fact a part of the executive structure. It is within this reality that one finds particular encouragement in the Institute's efforts to expand the collaborative skills of key actors in the courts.

In this context it is of great importance to look beyond the institution of the courts in assessing the omnipresence of *horizontal administration* and hence the imperative of collaboration. Transactions occur in a broad arena of action, and the quality of those transactions has much to do with the status and character of a particular organization within that system. In effect the resources available to the courts and the degree to which society provides rules and mechanisms that support their function are essentially products of the ways in which they are valued in the larger environment. The more they are prized, the more favorable the treatment is likely to be. Most importantly, such societal valuing is changeable. It is a highly consequential executive responsibility to lead the institution toward behaviors that will be valued.

In this respect the courts face some critical problems. A major study of police chiefs about four years ago revealed the disturbing information that the courts were their biggest problem. In my own work with police chiefs I have found verification of this finding, a continuing litany of complaints about the courts. One highly successful chief had developed a highly elaborate strategy of attack on the courts, as he believed such reform was the most effective means by which he could improve the performance of his police department. The police have tremendous influence in local communities. While there is perhaps an inevitable conflict between the police and the courts, it takes very little reflection to suggest how detrimental such feelings are to the institutional interests of the courts.

Such inter-organizational questions may seem somewhat removed from processes of executive collaboration within the courts, but they are not. Organizations do not have a fixed amount of power. They acquire power from their environment. The more they are valued, the more power they are likely to have. If the elements of the executive structure within an organization see themselves in a competitive, zero-sum contest for power, the likely result is lessened capacity to influence the larger environment in favorable ways. Thus the capacity to collaborate, really to *live* horizontal administration, is not just a matter of concern to internal functioning.

While the point may be apparent, horizontal administration is a consequence of the necessity for rapid organizational change and adaptation. As systems become more contingent and problematic, single individuals have neither the legitimacy nor the capacity to process the many and variant demands on the organization. The fewer the ground rules and the less the importance of precedents, the broader the range of possible behaviors in a given situation.

Now, I want to make two basic points in respect to this context.

One, learning is the essential condition of change. It is in the process of asking basic questions about what is happening and what needs to happen that disconfirmation occurs. And it is in the recognition that things are not quite as we want them, i.e.

disconfirmation, that we become ripe for change. No one can mandate change. There is no such thing as resistance to change, which assumes that some actors need not engage in their own learning and consequent disconfirmation. Such a process of learning must go on in the organization as a whole; thus, we ought to think a great deal more about organization learning than we do.

It is also critical that we recognize that learning in itself does not support change. Indeed, it is generally hypothesized that most learning activity in which we currently engage has the goal of socialization. That is, it emphasizes to us the way in which we are supposed to think and behave. Hence, protestations of learning do not in themselves imply a concern for heightening the organization's capacity to change.

Even when change is the orientation of the learning, it is typically within rather stringent boundaries. That is, much learning is seen in Model I terms, to use the terminology of Donald Schon and Chris Argyris. To the extent that people are prepared to seek change through learning, they are open only to inputs that fine tune already established approaches. The norms/goals themselves are not subject to disconfirmation; and Model I therefore does not challenge basic assumptions of the individual or the organization. It is learning whose consequences for change can be anticipated.

Model I learning is low risk. That undoubtedly is why it is so widespread; organizations, even more than individuals, seek to minimize risks.

Yet the problems are not so neatly bonded. Choices about what a court does may be far more consequential for societal performance than a new management technique, even when it comes from a business school. And choices that are right for today may be very wrong for tomorrow.

It has often been said that executives must be developed for a future that no one can predict. The same might be said for organizations. Thus the need is for predispositions toward, and skills in, applying Model II learning. Model II places no limits on inquiry, and it particularly emphasizes that assumptions and purposes are important objects of questioning. It asks the individual or the organization to run the risk of discovering that the most cherished norms and practices no longer have the old salience, if indeed they ever did.

The distinction between Model I and Model II learning may seem far too subtle to have particular consequence for the change process in organizations. Yet, if learning is the pre-condition to adaptation and change, there is nothing more destructive than limiting the scope of learning. Bear in mind that most learning does not contribute to change; it reinforces the status quo. When we seek to minimize risk in the remainder of our learning efforts, the chances of becoming fully effective in a changing milieu are thereby minimized.

In my judgment there is relatively little Model II learning at the individual level and almost none at the organizational.

My second point involves executives more directly in the change process. The proposition is straight-forward: only changing-learning people can provide the leadership necessary for changing-learning organizations. Put another way, the executives are the ones who absolutely need to be Model II learners in an organization. Yet the tendency is to talk about how others must learn and change, rather than concentrating on one's self. Indeed, it could be legitimately argued that the higher one rises in an organization, the less the incentive to engage in Model II learning. The Army, for example, has a tremendous learning apparatus; but there is very little indication of Model II orientations. Even at its premier institution, the War College, the boundaries for appropriate learning seem well settled, with Model I the clearly dominant mode. Recently the Army launched a major program in Organization Development, and again the question is whether the system is sufficiently Model II to permit the infusion of the democratic and humanistic values of OD.

Model II learning is interactive and collaborative. It cannot be undertaken in isolation. Frequently, the values and assumptions that ought to be tested are not even at a level of consciousness. In other cases, emotions get in the way to such an extent that the real nature of the issue or problem cannot even be framed. My own experience at the Federal Executive Institute in Executive Coaching has convinced me that Model II learning is possible only in association with others and in a climate of openness, trust, and caring.

Further, Model II learning involves very high personal risk for many individuals. It focuses on the person, and it raises the most basic issues of identity and self. In administration in particular, it almost inevitably surfaces questions of relationships with others. Many people, through education and experience, have followed highly independent, individualistic tracks. They are often unprepared to confront the realities of the leadership process, which involves working through others. I would think judges, with their backgrounds in the specialized discipline of law, might have these problems.

the executive to deal more effectively with future learning needs and to support the learning of others, thereby facilitating a greater coping capability within the organization. Remember that executives must deal with problems for which no routines or programs have been developed. The issue involves the capacity of the executives to summon resources and to use them fully in dealing with the new and the unique.

In conclusion, I have tried to make the point that the old forms of specialization and vertical administration no longer meet current needs. And the more professionalized the organization, the more important is it to think in terms of horizontal administration. If horizontal administration is an imperative in specialized and professionalized systems, effective learning at both the individual and organizational levels becomes a companion requirement. Yet, as I have noted, most learning is highly bounded. It is rarely directed toward the more fundamental issues of change. Most of all, it is the executives who must reform their approaches to learning. They are the ones who must become Model II learners and thus lay the base for the kind of collaboration essential to horizontal administration.

Frank P. Sherwood

Dr. Sherwood is currently a professor at both the Federal Executive Institute, Charlottesville, Virginia, and the School of Public Administration, University of Southern California, where he teaches at the School's Public Affairs Center in Washington, D.C. Previously, Dr. Sherwood was: Director, Washington Public Affairs Center, University of Southern California, 1973-76; Director, Federal Executive Institute, Charlottesville, Virginia, 1968-73; and Director, School of Public Administration, University of Southern California, 1967-68. Dr. Sherwood joined the School of Public Administration faculty in 1951.

Dr. Sherwood is widely recognized as an author and leading scholar in the field of public administration. He is a member of the National Academy of Public Administration, and, in 1973-74 served as National President of the American Society for Public Administration. He has consulted widely in this country and overseas.

Dr. Sherwood was educated in the San Diego, California public schools. He received a Bachelor of Arts degree from Dartmouth College and a Ph.D. in Political Science from the University of Southern California. During World War II, he served in the United States Army.

Appendix C

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TAB 5 RESOURCE MATERIALS ON COURT DELAY REDUCTION

ARTICLES:

"Zeroing in On Court Delay: The Powerful Tools of Time Standards and Management Information"

"Why the Court Measures Delay from Commencement"

"Alternatives to Court and Trial"

Court Management Journal 1985

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Howard Schwartz 4

Zeroing in on court delay: The powerful tools of time standards and management information
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Zeroing in on court delay

The powerful tools of time standards and management information

Barry Mahoney & Larry Sipes

Diagnosing the illness of court delay has been facilitated by the development of two largely similar sets of case processing time standards adopted by the Conference of State Court Administrators and the American Bar Association's National Conference of State Trial Judges[1] (see page 32). Both sets of standards provide indicators of the health of a court, and there is a remarkable degree of similarity in the measures they use. For example, both suggest that there is (or should be) cause for concern over a court's health if all or most civil cases are not terminated within one year of commencement. Felony cases that exceed six months in duration are another serious symptom of ill health.

While these standards certainly are not prescriptive or mandatory, they do furnish a measure for identifying courts that are healthy in terms of the pace of litigation. Standards adopted by a state supreme court or other superintending agency within the judicial branch can, of course, serve the same function. With the aid of such standards, initial diagnosis of court delay problems can be self-administered in any court by comparing case processing times in the court with those recommended in the standards.

Regrettably, many judges and administrators (let alone lawyers) do not have reliable information about the pace of litigation in their courts. Lacking such information, they are unable to assess whether the court is ill with delays, much less determine the extent of the illness or formulate effective remedies. When asked if the court suffers from delay, judges and administrators too often resort to a traditional response: They place a hand on the court's forehead and announce that the temperature feels fine—even though a thermometer would register a serious fever.

In a world awash with information, the lack of data about how quickly or slowly cases are progressing through our courts is particularly puzzling. But this lack of information is a fact. In 1976, when the National Center for State Courts began its research into the causes of pretrial delay in state trial courts, one of the threshold tasks was to assess the then existing pace of litigation on a comparative basis. Using a rather broad set of criteria, more than 50 urban trial courts were identified across the nation as prospective candidates for more extensive examination. Upon inquiry, the project staff was startled and sobered to learn that not one of the courts could report with any presentable documentation the average or median time required from commencement to termination in either civil or criminal cases. When the group of courts to be studied was narrowed to 21, it was necessary to deploy researchers and data gatherers in every site to obtain an accurate and documented measurement of the pace of litigation. While this effort was also desirable in order to ensure comparability of the resulting data, the important fact for present purposes is that not one of these courts regularly measured or reported

the overall pace of litigation from commencement to termination.

That initial research led to publication in 1978 of *Justice Delayed: The Pace of Litigation in Urban Trial Courts*,[2] which furnished, for the first time, a comparative picture of the pace of litigation in representative urban trial courts nationwide. This was followed by a period of experimentation with delay reduction techniques in eight general jurisdiction trial courts, the results of which were reported in *Managing to Reduce Delay*.[3] Again, wherever experimental programs were begun or monitored, it was necessary to first obtain baseline data on the pace of litigation and thereafter create an information system for monitoring caseflow and measuring the program's impact on delays. The requisite information simply was not available on an ongoing basis in any of the participating courts. Other researchers have encountered the same problem.[4]

As part of its delay reduction initiative, announced in 1984, the National Center has begun to update its research on case processing times in urban trial courts. Using staff who were involved in the earlier research and experimentation, along with staff from its Institute for Court Management, the National Center currently is examining the pace of litigation and efforts to reduce delay in recent years in 18 large general jurisdiction trial courts.[5] Thirteen of these courts were among the 21 included in the original *Justice Delayed* study; three others were studied by the American Judicature Society in 1979-81.

While the research is still in its early stages, it is already clear that there is a great deal more consciousness of delay as an issue than existed eight years ago. Judges, court administrators, and (in some places) practicing lawyers are much more aware of case processing times. With respect to information, the most encouraging change during the intervening years is the newly developed ability of some courts to furnish computer-generated data from which a profile of the pace of litigation can be constructed. Additionally, in some states the state court administrator's office is involved to some extent in collecting, analyzing, and disseminating information on case processing times. (See Howard Schwartz, "Monitoring Delay Reduction Efforts," in this issue.) In the majority of the courts, however, it has again proven necessary to gather data from individual case records in order to construct the desired profile. Even in the courts with automated databases, it is rare to find that the pace of litigation is regularly reported and tracked over a long period of time.

From our preliminary research, it appears that the problem with respect to information for case management and delay reduction is twofold: In many courts, the requisite information is not collected, and court managers thus have no readily available picture of the pace of litigation or of particular problem areas. In other courts, the information is available (or is easily obtained), but is not used for diagnostic and remedial purposes by the judges and administrators primarily responsible for managing the court. Information by itself does not solve problems or even necessarily pinpoint them. It is critical for court managers to use the information to (1) identify problem areas; and (2) consult with others involved in the process to develop effective solutions.

An extended discussion of management information systems and their use in reducing delay and managing a court's caseflow is beyond the scope of this article. We can, however, outline basic questions that must be asked and indicate key items of information that will be needed in order to identify delay problems, develop a core strategy for reducing delays, and thereafter manage caseflow on an ongoing basis.

Baseline Data

Before embarking on a delay reduction program, it is essential to get a picture of the current situation in the court. If you don't know where you are to start with, you won't know what the key issues are and you won't know—a year or two later—whether you've made progress in dealing with the delay problem. Three questions are critically important in developing a sense of the current situation.

What is the existing pace of litigation in the court? While this question is often answered impressionistically, it is not difficult to answer empirically through a time-lapse study. In the *Justice Delayed* study, random samples of approximately 500 civil cases and 500 criminal cases terminated in 1976 were drawn at each court; data from records in these cases provided the basis for analyzing the pace of litigation in the 21 courts covered in that research. Similar sampling procedures have been used in other courts and are being followed in the National Center's current 18-court research. The methodology is now well developed and, when followed by an individual court, is neither expensive nor especially time-consuming. The first (and sometimes most difficult) step is to obtain a list of all of the cases terminated during the selected 12-month period. From that list, a random sample can be drawn. For example, if the court had 4,000 felony case dispositions in 1984 and the desired sample size is 500, every eighth case on the list of terminated cases would be selected for inclusion in the sample.[6] The National Center's research staff has developed standard data collection forms designed to capture information about major events in a case and about characteristics that are relevant to the pace with which cases move through the court.

Some modifications to these standard forms may be desirable in order to take into account the unique nomenclature and procedures in a particular court, but the basic elements are fairly obvious. They include, at a minimum, the date the case was filed, the date of disposition, the type of case, and the manner of disposition. Additional information (e.g., number of plaintiffs and defendants, date a certificate of readiness or similar document was filed, first scheduled trial date, total number of trial settings, date the trial [if any] actually started, and number of court days spent in trial) helps to construct a more detailed portrait of the pace of litigation in a court and to identify particular problem areas.

Similar forms can be used to gain an

overview of criminal case processing. Minimum data for a study of felony cases would include the date of the defendant's arrest, date the indictment or information was filed, date of arraignment on the indictment or information, date of disposition, manner of disposition (plea, verdict, dismissal, diversion, etc.), and date of sentence. Again, other data might be extremely useful, e.g., date the lower court complaint was filed, number of co-defendants, date of probable cause hearing, highest charge in indictment or information, date of plea conference or pretrial conference, date of trial (if any), custody status, highest charge at disposition, and type of counsel. However, even very limited data can be valuable in ascertaining the broad outlines of case processing patterns and in identifying problem areas.

Analyzing the data need not be complicated. The kind of information needed to gain an initial overview of the pace of litigation can be tabulated by hand if necessary, but is certainly aided by using a computer. If a court does not have a person on its own staff who can do the analysis, assistance can be obtained from a variety of sources. These include professors at local universities, analysts on the staff of the state court administrator's office, and staff members at the National Center and other court improvement organizations. Simple, readily available software programs make it easy to analyze the data to determine the range of case processing times for different types of cases, to show the range of times for different stages in a case, and to examine a broad range of possible relationships between case characteristics and case processing times. To take just one common example, the analysis might reveal that there is often a period of several weeks from the time an indictment is filed until the time a defendant is arraigned on the indictment. This is something that could be done routinely in a matter of days, and the remedy is simple. More often, the analysis will suggest the existence of a number of interrelated problems and may point to a need for broad consultation in developing system changes.

In analyzing data from a time-lapse study, it is especially important to use several different measures. Median times are commonly used and are perhaps the single most useful indicator of case processing times in a court, but they are clearly insufficient as a *sole* measure. Because reliance on a single measure such as the median or the mean can present a distorted picture of a court's pace of litigation, researchers have used a number of other indicators. These commonly include the 75th percentile case, the 90th percentile case (both of which highlight the time required for the older cases disposed of by the court), and the percentage of cases taking longer than a fixed period of time (e.g., longer than six months from arrest to disposition in a felony charge case or longer than a year in tort cases).

It is likely that many [cases] are simply adrift in the system

The information provided by a time-lapse study can be used by the court to compare its case processing times with those of other courts; to identify particular problem areas, e.g., certain kinds of cases that move particularly slowly or stages of the process that seem to take much more time than is really necessary; to provide a starting point for establishing time standards and goals of the court (by contrasting the current situation with what seems desirable); and to provide a baseline against which to measure the success of whatever delay reduction program may be developed.

What is the size, age, and status of the pending caseload? This is an inventory question, aimed at giving the manager an overview of the situation in the court at a specific point in time. Like the time-lapse study data, it provides a "snapshot" of the court's operations. It will show how many cases are at particular stages of the process and how long they have been in the court and in that particular stage. Inventory information, when analyzed together with information on filing and disposition rates (see below) allows a manager to gauge the quantitative dimensions of the problem and to ascertain how many cases must be dealt with over a period of time (such as a year) in order to reduce the pending caseload to a level at which all pending and incoming cases can be handled within an acceptable period of time. The pending caseload inventory will also indicate where the bulk of the cases are; will show whether there is a build-up of cases at early points in the process (thus warning of problems yet to come); and, perhaps most importantly, will identify cases that have been in the court (or in particular stages of the court process) for abnormally long periods of time. These older cases should be objects of close attention during the early stages of any delay reduction program. While it may be that some cases contain elements that prevent moving them rapidly to trial or other disposition, it is likely that many are simply adrift in the system with neither the lawyers nor the court having devoted the attention required to produce a timely disposition.

What is the rate at which the court has taken in and disposed of cases in the past? Virtually every court has aggregate data on filings and dispositions, and an examination of these figures over a period of several years can provide useful information on trends and (when combined with information on judges, courtrooms, and other key resources) on the court's existing level of productivity. On a year-to-year basis, most courts tend to show a total

number of dispositions that is not greatly different from the number of filings. In courts that have a serious delay problem, however, a five-to-ten year comparison of filings and dispositions is likely to show the annual number of filings consistently greater than the number of dispositions. The result has been the build-up, over a number of years, of a serious backlog—a large number of pending cases that cannot be dealt with in an acceptable period of time.

Researchers in the *Justice Delayed* project found that analysis of a court's pending caseload in relation to its total dispositions per year was helpful in diagnosing problems of delay. The larger the number of pending cases in relation to yearly dispositions, the lengthier the processing time in both civil and criminal cases.[7] The backlog problem is clearly one that must be addressed at the outset of a delay reduction program. Effective elimination of the backlog of cases already in the system is just as important for the success of a delay reduction program as the development of effective means of dealing with new cases. In the short run—until the backlog of old cases is cleared away and substantially all cases are being handled within time standards adopted by the jurisdiction—this necessarily means that a court committed to delay reduction must dispose of appreciably more cases than it takes in. Goals must be set, and strategies devised, with this reality in mind.

Using Time Standards and Baseline Data to Help Formulate a Delay Reduction Strategy

A time-lapse study, pending case inventory, and aggregate data on filings and dispositions over the past several years provide basic raw materials for developing a delay reduction program. Data from the time-lapse study will enable the court to assess its situation in relation to national time standards and, in some states, to standards established for the state. (It should be noted here that a key measure would be the percentage of cases taking longer than the appropriate standard.) The resulting diagnosis, if favorable, should be reassuring to the court and to other interested parties, such as the practicing bar, funding bodies, state-level judicial leaders, and the public. For those courts in which the diagnosis is troublesome—where there is a significant gap between the standards and the court's performance as reflected in the time-lapse data—the time-lapse data will indicate the extent of the difference between a broadly accepted goal and the current reality in the court, and will help identify specific points in the process where an unacceptable amount of time is being expended. Information on the court's current pace of litigation can also be helpful to the court in establishing goals for itself, taking into account the appropriate time standards.

There is no single "model" of delay reduction strategies and techniques that will work successfully

The pending case inventory and aggregate data on filing and terminations will also be useful in setting goals and in formulating a delay reduction plan. In particular, they (together with the standards) will be valuable for addressing the following strategic questions:

- What are the maximum time periods that most cases should require to move from inception to disposition and through specific stages of the process in *this* court?
- How many cases will it be necessary to dispose of, over the next year or two, to reduce the pending caseload to a manageable level, taking into account the anticipated number of new filings?
- What particular problems in the existing process should be primary targets of the delay reduction program? (These might include, for example, identifiable categories of "old" cases, procedures that are counter-productive, resource needs that can be met, and so forth.)
- Who should be involved in the planning and implementation process?
- How will the court's managers (and others involved in the process) know what aspects of a newly developed delay reduction program are working well and which need revision? That is, what kind of information is needed to monitor the program's effectiveness?

Research conducted over the past several years indicates there is no single "model" of delay reduction strategies and techniques that will work successfully in every jurisdiction. Indeed, successful trial court delay reduction programs have taken widely varying approaches to such issues as the type of calendaring system, extent of emphasis on reducing the "old case" backlog, degree of involvement of the practicing bar, and nature and extent of the participation of state-level leaders. Despite this diversity, however, successful programs share some important common themes:

- The court—led by the chief judge and other key participants in the litigation process—has made a firm commitment to controlling caseflow and improving the pace of litigation.
- Standards specifying the amount of time appropriate for completion of a typical case (and sometimes for stages of the case) have been adopted, with allowance for exceptional cases.

If basic information . . . is not effectively collected, analyzed, disseminated and used to identify and address problems, a delay reduction program is likely to founder

- The practicing bar and other affected public officials have been consulted in the development of the plan and have been provided with information about the plan's implementation.
- Particular attention has been paid to the "local legal culture"—the set of established attitudes, expectations, and practices that support an existing pace of litigation and that must be changed in order to significantly reduce delay.
- Information has been collected and used effectively at the outset to ascertain the dimensions of the problem, to help identify key caseflow issues, and to monitor progress toward achieving the standards that have been established.[8]

Ongoing Monitoring

The types of statistical information needed for ongoing monitoring of a delay reduction program are to a large extent the same as the baseline information needed to identify problems and to develop strategies. Thus, it will be useful to sample terminated cases for a time-lapse study at periodic intervals (e.g., every six or twelve months) to see what changes take place in case processing times. In this connection, one caveat is important: It is possible that a time-lapse study conducted within six to twelve months after the introduction of a delay reduction program may actually show *lengthier* times for terminated cases than the baseline study. For example, if a delay reduction program successfully targets older pending cases, the median time from filing to disposition and the time required for the 90th percentile case may very well be higher in the first year or so. If the program is successful over time, however, subsequent time-lapse analyses will show progressively faster case processing times for terminated cases.

Periodic inventories of the age and status of the pending caseload are especially important for monitoring delay reduction efforts and for ongoing caseflow management. At a minimum, such an inventory should be taken at least once a year (e.g., January 1), and it is preferable to take one monthly. For courts with automated systems, this is easy. For courts operating entirely on a manual system, a monthly inventory is more complicated but certainly feasible even in a large court. Analysis of the pending case inventory should involve a comparison of the current information with previous reports and should focus on a few key questions:

- Is the total number of pending cases decreasing, and at what rate? A steady decline in the total number of pending cases is essential in a court that has a serious backlog, which is true of virtually all courts with severe delay problems.
- Is the number and percentage of cases over a fixed period of time decreasing? For example, assume that a jurisdiction has adopted a standard of six months as the maximum time from arrest to disposition of a felony case. It would be important to know the number and identity of pending cases already exceeding that standard *and* of cases that have been pending more than four months and are thus nearing the outside limits.

Finally, information on filings and dispositions is essential for monitoring trends and spotting potential problems. This information can be easily collected and analyzed each month. As with other types of data, however, analysis of individual monthly reports in isolation is of little help to managers. The information must be put into context and sorted into types of cases filed and terminated, with indications of the age and type of termination, and compared with previous monthly reports. Again, the focus should be on a limited number of questions:

- What are the trends? Are dispositions exceeding filings? Does there appear to be any unexpected upsurge in filings that will require a response by the court? Although there will probably be some seasonal fluctuations, the overall trend should show a consistent excess of terminations over filings in order to begin reducing the backlog.
- What is the age at termination for particular types of cases and types of terminations? Do particular categories of cases seem to be taking longer than necessary?

Collecting the requisite information[9] and addressing questions such as those outlined here will provide a start toward monitoring a delay reduction program, but other actions are also necessary if the information is to be used effectively. In particular, court managers must communicate with the judges and others involved in the program. This means more than simply distributing monthly or quarterly statistical reports. Such reports can be useful, but their utility will be greatly enhanced if accompanied by a short memo that summarizes trends, ac-

complishments, and current or potential problems, and that suggests possible remedies for the problems.

The senior managers in the court—the court administrator, the chief judge, and any senior administrators or administrative judges involved in overseeing the delay reduction program and continuing operations of the court—all have key roles in monitoring and evaluating the reduction effort. Information is a critical ingredient, along with leadership and commitment to the goals of the program. If basic information about the court's caseload is not effectively collected, analyzed, disseminated, and used to identify and address problems, a delay reduction program is likely to founder.

Conclusion

Every step along the way to remedying delay is marked by the need for information. The system producing that information need not be computerized, or even complicated, but it must exist.

The discussion of information needs and uses in this article is far from comprehensive,[10] but should provide some general guidelines that will be useful to court managers and others interested in doing something about problems of trial court delay. For a long time, American trial courts functioned with very little attention to these problems and with little consideration of what sort of information would be useful in dealing with the problems. Today, however, court delay is widely recognized as an issue of public concern, and strategies and techniques for reducing it have been developed. The information required to define the problem, to formulate delay reduction plans appropriate for a particular court, and to act on those plans is available or easily accessible in every court. Collecting, analyzing, and using the information effectively is not a matter of technology but of human will. If the commitment and leadership exist, the information can be obtained and used to great effect in diagnosing and remedying problems of delay in American trial courts.

notes

1. Conference of State Court Administrators, "National Time Standards for Processing Cases" (adopted July 1983); American Bar Association, "Court Delay Reduction Standards," replacing Sections 2.50 through 2.56 of the [1976] ABA Standards Relating to Trial Courts, proposed by the National Conference of State Trial Judges and approved by the House of Delegates at the ABA's 1984 annual meeting. For discussion and comparison of the two sets of standards, *see* J. Denis Moran, "Stating the Case for Timely Justice," 8 *State Court Journal* 23-25 (Fall 1984); Frederic G. Melcher, "Setting Time Standards," 23 *The Judges' Journal* 48 (1984).

2. National Center for State Courts (1978).

3. National Center for State Courts (1980).

4. *See, e.g.*, David W. Neubauer et al., *Managing the Pace of Justice: An Evaluation of LEAA's Court Delay-Reduction Programs* (Washington, D.C.: National Institute of Justice, 1981).

5. The research is funded principally by grants from the National Institute of Justice and the Bureau of Justice Assistance, Office of Justice Assistance, Research, and Statistics, U.S. Department of Justice.

6. An alternative approach involves examining a group of recently completed cases instead of sampling a full year's dispositions. For example, the 500 most recently terminated cases could be studied. This would give a more current picture, but does not protect against possible seasonal variations in the court's operations. Another alternative involves examining a sample of cases filed during some prior period. The main difficulty with this approach is that the sample is likely to include pending cases, and at the point of initial analysis it will not be possible to know how long these cases will take to reach disposition.

7. *Justice Delayed*, *supra* note 2, pp. 25-30.

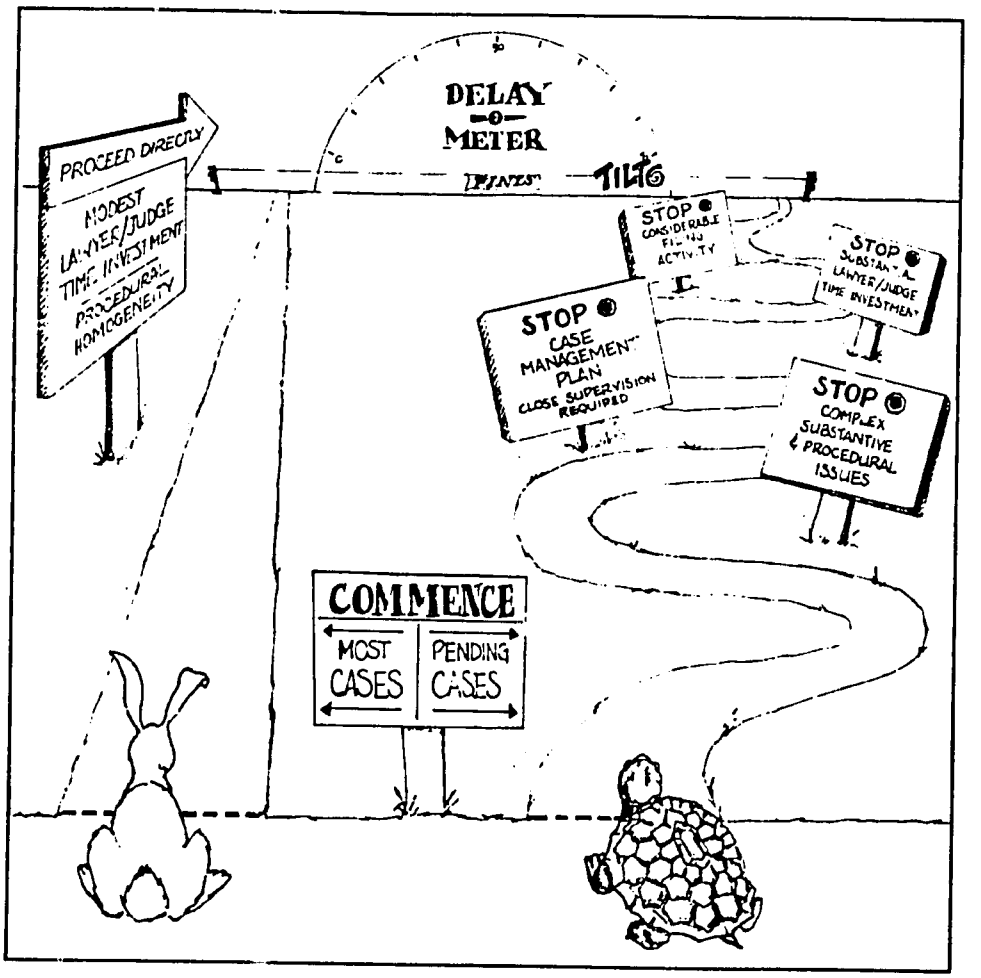
8. *See generally* Larry L. Sipes, "The Journey Toward Delay Reduction: A Traveller's Report," 6 *State Court Journal* 5 (Spring 1982); Ernest C. Friesen et al., "Justice in Felony Courts: A Prescription to Control Delay," 2 *Whittier Law Review* 7 (1979); Neubauer et al., *supra* note 4; *Managing to Reduce Delay*, *supra* note 3.

9. An example of a one-page monthly report form that summarizes much of the critical information—data on filings and terminations; size and age of pending caseload; and age of cases at disposition, by type of disposition—is shown on page ++. The form can be easily adapted for use by any court in monitoring a delay reduction program, with appropriate changes in categories and nomenclature.

10. There are a number of sources in which more detailed discussion of information needs and methodological issues may be found. *See, e.g.*, Mary Lee Luskin, *Describing and Analyzing Case Processing Time in Criminal Cases* (Washington, D.C.: National Institute of Justice, 1981); David W. Neubauer, "Improving the Analysis and Presentation of Data on Case Processing Time," 74 *Journal of Criminal Law and Criminology* 1589-1667 (1983); Philip X. Murray, "Nine Steps to an Information Systems," 23 *The Judges' Journal* 18 (1984); *Managing to Reduce Delay*, *supra* note 3, pp. 165-68.

Why the Court Measures Delay from Commencement

Noel Fidel



The Maricopa County Superior Court's civil "fast-track" program has been a model to courts considering various calendar management approaches to combatting delay. After a one-year experiment beginning in 1979 involving four volunteer judges, Phoenix expanded the project in 1983 to include all judges hearing civil cases.

EDITOR'S NOTE: *The author is presiding judge of the civil division of the Maricopa County Superior Court (Phoenix, Arizona). Judge Fidel wrote the article in response to suggestions by local lawyers that the schedule for pretrial preparation of a case be changed to start the "clock" from the date of a defendant's answer rather than from the date a plaintiff's complaint is filed.*

The program's success[1] lies mainly with the following components:

- court acceptance of responsibility to manage cases and to ensure timely dispositions
- use of an individual calendar
- a significant master-calendar feature for last-minute calendar adjustments
- expeditiously completed discovery
- increasing use of compulsory arbitration (now for all cases up to $15,000)
- certificate of readiness not filed until discovery is completed
- strict continuance policy
- stringent rules on time to trial and continuances
- limited "oversetting" of cases for trial
- close working relations between bench and bar
- hardworking, dedicated, and cooperative judges
- use of lawyers as *pro tempore* judges

In discussions of the program, lawyers suggest from time to time that the court should monitor delay from the date of answer, not the date a complaint is filed. While the court is committed to work with the bar to refine and improve life on the civil fast track, we have been unreceptive to this suggestion. Calculation from the date a suit is filed is an essential element of a delay reduction system. The court holds firmly to this view. That does not mean, however, that the court should hesitate to state its reasons. Nor should the court ignore the bar concerns that underlie suggestions to start the Rule V[2] countdown at the date of answer.

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ABA Standard 2.50

Section 2.50, the first of the ABA Standards Relating to Court Delay Reduction (1984), states the following general principle:

> From the commencement of litigation to its resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation. A strong judicial commitment is essential to reducing delay and, once achieved, maintaining a current docket.

While the ABA Standards have no formal standing in the policy of our court, Section 2.50 provides a concise statement of the operative philosophy of civil delay reduction in Maricopa County.

Stale claims

The most common criticism of courts, the legal profession, and our system of justice is that we take too long. Claims grow stale, witnesses are lost, memories fade with delay. Witnesses, jurors, and members of the public measure the pace of delivery of justice from the time a claim arises to disposition. Parties often do the same. Time elapsed from the arising of a case until its filing is not subject to judicial control but to legislative control through statutes of limitations. Once a case is filed, however, the public looks appropriately to the court to answer for its pace.

The judiciary complements legislative limitations policy by case management from the time of commencement. The period of limitations represents a legislative judgment of a reasonable time for potential litigants to learn their rights, hire counsel, investigate their claims, and explore alternatives to litigation, including settlement. Once a litigant chooses to invoke the judicial forum by filing a complaint, the court owes a duty not solely to the parties but to witnesses, jurors, and the public to press the case toward a reasonably expeditious end.

Pace management by judges helps case management by lawyers

ER 1.3 of the Code of Professional Responsibility provides, "A lawyer shall act with reasonable diligence in representing a client." ER 3.2 provides, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The comment to ER 1.3 provides in part, "A lawyer's workload should be controlled so that each matter can be handled adequately." These provisions are reinforced by judicial control of the pace of litigation from the date a case is filed. Mention of these rules may evoke discomfort from lawyers who enjoy—or who would like to enjoy—more work than they can handle. The rules are important, however, and the court can ill accept the rationale that ethical constraints of our profession are economically impractical.

The court and bar now struggle under Rule V to develop new patterns and habits of civil practice. Judicial management of pace from commencement and judicial intolerance of unreasonable delay from commencement should have such salutary effects on case management by attorneys as the discouragement of case warehousing, encouragement of greater selectivity in case screening and acceptance, encouragement of greater pre-filing settlement efforts, expansion of opportunities for young attorneys in civil litigation, and encouragement of training of associates in litigation skills through NITA programs and their like.[3]

Measure of delay from the date of answer is impractical and inappropriate

All cases have a common starting point—the filing of a complaint (Rule 3, ARCP).[4] Answers are filed and issue is joined at widely varying times. While the complaint always signifies commencement, the first answer may not signify joinder of issue. Determining when issue has been fully joined requires a judgment call that would be difficult and unreasonably time-consuming for court administrative staff to try to make. Because the timing of answers and joinder of issue vary from case to case, the complaint is the logical trigger for comparative measure of delay.

The filing of first answer, by contrast, is not offered as a logical constant point from which to measure. It is proposed rather as a kind of cushion, an expandable post-commencement comfort zone wherein the court would give shelter from the statute of limitations, relinquish control of pace to lawyers, and ask no justification for delay. Though unreasonable and unnecessary delay can occur between commencement and joinder of issue, as at other stages of litigation, the court is asked in effect to look the other way. Section 2.50 of the ABA standards would be locally rewritten as follows:

> From joinder of issue in litigation to resolution, whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery, and court events is unacceptable and should be eliminated. However, from commencement to joinder of issue, the court will be indifferent to delay and tolerate whatever elapsed time the attorneys deem appropriate, whether such time is reasonably necessary or not.

Such a standard is unacceptable to the public and the court and should be unacceptable to the bar.

The court need not abandon measure of delay from commencement in order to meet the bar's concern

The eleven-month presumptive standard of Uniform Rule V[5] comfortably fits as many as ninety percent of the civil cases brought to court; judges, however, must bear in mind that ten percent of our cases cannot be fairly developed within that time.

The ABA Standards recognize that exceptions to presumptive time limits must be made. The ABA comment to Section 2.51 on case management states in part:

> Most cases on a court docket involve a modest investment of lawyer and judge time and can be managed presumptively because of their procedural homogeneity.

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> Every court has pending cases, however, with complex substantive and procedural issues which generate considerable filing activity and consume substantial amounts of judge and lawyer time.
>
> These complex cases often require special handling by the court. Once such a complex case is identified from its pleadings, a case management plan must be tailored by a judge to apply a close and continuous supervision over its procedural progress and development. . . .

Chief Justice Joseph R. Quinn of Colorado states in "The Bottom Line," *State Court Journal*, Fall 1985:

> . . .[T]he linchpin of any effective delay reduction program is control. The degree of control, however, must not be such as to transform the role of judicial adjudication into that of bureaucratic claims management. Case processing as an end in itself leads to concomitant loss of citizens' confidence in objective and impartial dispute resolution. Judges must remain accountable for both the quality and the quantity of their actions.
>
> Control in its broadest sense simply means that the trial judge must assume the responsibility for the early judicial management of the case from the filing of the complaint to the notice of appeal. Control also means that we must recognize that *we do not have the luxury*, indeed we never had the luxury, *of treating all cases alike*. (Emphasis added)

Our court has taken to heart the bar criticism that, in the newness of Rule V, we have erred toward treating all cases alike. We have taken to heart the criticism that we have occasionally been inadequately receptive to valid arguments for expanding the Rule V limits for protracted or unusual cases.

We hope, however, that the bar takes to heart a corollary criticism: Too many lawyers content themselves with untimely and perfunctory applications or stipulations for extension of time. Too many lawyers, incredulous that the court would press the pace despite a stipulation for delay, think good cause is a lawyer's say-so. Too many lawyers decline to inform the court of facts which, if the court only knew them, would constitute good cause for expanded time. Too many lawyers forsake the discipline of early application and procrastinate to the brink of dismissal or beyond.

Keeping this point in mind—that both the bar and the court can do a better job of showing and weighing good cause—consider the examples most often cited in support of a shift to calculation of delay from the date of answer.

The first example is the case with a statute of limitations problem. Claimants are sometimes late in seeking counsel. Some cases must be filed on the verge of expiration of the period of limitations without adequate time for investigation or exploration of settlement. A variety of delay factors may result. The attorney might feel the need under Rule 11(a), ARCP, to investigate before service in order to prune inappropriate allegations and inappropriately named parties. (See *Boone v. Superior Court*, 145 Ariz 235, 700 P2d 1335 (1985).) The defendant's trail may be cold and service unachieved despite diligent investigation. The plaintiff's lawyer and the insurance claims adjuster might reasonably agree to a *brief* period for exchange of information and settlement discussion before issue is joined and litigation costs begin to mount.[6]

Such factors, individually or in combination, preclude achievement of trial readiness within eleven months from commencement in a small percentage of the court's cases. Yet the court can accommodate the specialized needs of such cases without abandoning the uniform practice of monitoring delay from litigation's start. The court should be *more* concerned, not less concerned, with the orderly progress of cases filed in the last days of the period of limitations. Orderly progress, however, for reasons discussed in the preceding paragraph, may require a slight enlargement of Rule V time. The good cause standard of Rule V was specifically intended to provide the court the flexibility to make such case-by-case enlargements. The lawyer's burden is to make the good-cause showing full and timely.

The second most common example to support a shift to calculation of delay from the date of answer is the unusually complex case, the case requiring protracted discovery and multiple motions. "Such a case," states the bar, "does not meet Rule V's eleven month presumption." Granted. It was never meant to. Such a case, however, should be identified to the court at an early stage by counsel, preferably by request for Rule 16 pretrial conference. Thus the court and counsel together can tailor a reasonable schedule for the staging of discovery, the exchange of witnesses and exhibits, the filing and disposition of pretrial motions, and the designation of a trial date. Though the eleven-month presumption is exceeded, full, yet reasonably expeditious, development toward trial readiness is assured.

Conclusion

Measurement from the time of filing is an indispensable tool for a court committed to delay reduction. Presumptive time limits for achievement of trial readiness are likewise an essential case management tool for the court. Such limits, calculated from the date of filing, are realistically achievable and place a healthy pressure toward completion on most of the court's cases. The good-cause standard represents a flexible safety valve for the expanded yet expeditious management of the remainder. The target of civil delay reduction is the malign neglect of the back burner. The courts can attack that target without forsaking the flexibility to enlarge time where justification is shown. Counsel can do a better job of showing good cause. The court can do a better job of seeing it. But the court must continue to gauge delay and its own effectiveness in delay reduction from the date that cases are filed.

NOTES

1. As a statistical measure, the average number of trial-ready cases per judge at the end of 1979 was 357. At the end of 1984, it was slightly over 100 cases per judge. At the same time, filing of new civil cases increased from 21,000 in 1979 to 28,300. However, the number of cases more than 18 months old in the same period decreased from approximately 4,000 to 2,600.

2. Rule V, Uniform Rules of Practice of the Superior Court of Arizona, provides for placement on the Inactive Calendar nine months from commencement if a pleading called a "Motion to Set and Certificate of Readiness" (for trial) has not been filed. Dismissal without prejudice for lack of prosecution follows two months from placement on the Inactive Calendar unless, in the intervening period, a Mo-

tion to Set and Certificate of Readiness is filed, judgment is entered, or an extension has been granted upon showing of good cause.

3. At seminars conducted by the National Institute for Trial Advocacy (NITA), participants perform repeatedly as trial counsel in simulated courtroom setting, watch their performances on videotape, and receive extensive critiques by experienced trial lawyers and judges.

4. The Arizona Rules of Civil Procedure closely follow the Federal Rules of Civil Procedure. Arizona's Rule 3 and Federal Rule 3 are identical. Arizona's Rule 11(a), mentioned *infra* is identical to Federal Rule 11. Arizona's Rule 16, mentioned *infra*, is substantially similar to Federal Rule 16.

5. Nine months until placement on the inactive calendar and two months thereafter before dismissal.

6. Plaintiff's lawyers should not give open extensions of time to answer. Limited extensions of reasonable and fixed duration may be given where warranted. An open extension, however, is virtually prima facie evidence of non-diligence.

The State of the Art

XIV

ALTERNATIVES TO COURT AND TRIAL E

Paul Nejelski* and Larry Ray†

This chapter begins by noting the extent to which alternatives to court and to trial have always existed in this country. Two types of programs which seek to resolve more traditional forms of commercial and tort litigation are discussed: court-annexed arbitration and court-related adjudication. The chapter focuses on a discussion of the growing mediation movement, which tends to deal with the resolution of interpersonal disputes—often between persons with continuing relationships.

* * *

Americans have traditionally sought alternatives to courts or, where the court framework has been retained, to trial by a jury and a law-trained judge:

- From colonial times, voluntary arbitration has been available for the resolution of disputes, usually of a commercial nature.
- The lay judge and relatively informal proceedings before quasi-judicial officers such as justices of the peace have had a long history in the United States.
- The creation of specialized jurisdictions such as the juvenile court, pioneered in Chicago in 1899, or the more recent creation of small claims courts have sought to develop alternatives which deemphasized the adversary process, the jury, rules of evidence and other elements normally associated with the common law trial.

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- The enormous growth in this century of administrative agencies in such areas as disability payments and pensions, or occupational and driver's licenses has resulted in many citizens having their disputes with government adjudicated—at least initially—outside of a court.
- The founding of housing courts with combined investigative, mediation and adjudication functions is an important contemporary manifestation of these trends.

There have been several reasons for these repeated attempts to create mechanisms for the resolution of disputes other than the normal trial or outside of court altogether. Some have been historical, such as the dislike of the colonists for courts controlled by the king and his governor. The continuing desire to keep the size of the judiciary at manageable proportions has been another reason. Then, too, the need to have the decision of a specialist has been important, e.g., commercial arbitration or juvenile court. Perhaps the greatest reason for the creation of alternatives has been the attempt to reduce the excessive delay and cost which have normally attended the trial of cases.

In sum, our society has always supported both court trials and alternatives. Each form of dispute resolution has benefited from the competition—in terms of cases actually resolved, as well as the development of new mechanisms and theories.

Indeed, rather than being viewed as adversaries, it would be more realistic to see the resolution of disputes in and out of court as a continuum with considerable and necessary overlapping rather than as a sharp either/or distinction. For example, a small claims court in San Jose, California, might benefit from a program of volunteer lawyers mediating disputes, or prisoner complaints about the conditions of confinement filed in U.S. district court might be more quickly resolved by mediation. On the other hand, a community based program such as the Atlanta Neighborhood Justice Center receives many of its cases from court; and, after mediation, these cases may be referred back to the trial court for review and even serve as the basis of the court's judgment.

This chapter reflects the recent focus of attention on alternatives for the resolution of *civil* disputes. However, it is important to note the relevance of many of these programs and the issues from which they arise to criminal cases as well. Indeed, some of the most important work in the late 1960s and the early 1970s concerned diversion from the criminal courts by prosecutors or juvenile courts, especially at intake.

Perhaps the most celebrated program was the Manhattan Court Employment Project sponsored by the Vera Institute of Justice in New York City. The Court Employment Project began in 1968 and attempted to take persons out of the criminal justice system before trial by finding them a job, having the trial postponed and finally having the charges dismissed if the accused appeared to be making progress toward rehabilitation.

Alternatives to Trial

Two of the most popular methods of resolving civil cases before trial have been (1) requiring that the case be submitted to arbitration, and (2) having the case adjudicated by someone other than a full-time judge. Both of these approaches have been used with typical tort or commercial cases which have been filed in court.

Court-annexed Arbitration

Compulsory nonbinding arbitration of civil court cases has been utilized in Philadelphia for more than twenty-five years. New York and Ohio have had arbitration since 1970; Michigan and Arizona, since 1971. California adopted a system in 1976. In addition, arbitration procedures for particular kinds of cases, such as medical malpractice and uninsured motorist disputes, have been utilized in several states. No state has chosen to discontinue arbitration after trying it out.

The state systems generally involve referral of money damage cases to volunteer lawyer arbitrators. The maximum value of claims that may be referred varies from $3,000 to $10,000. The arbitrators are paid fees ranging from $30 per case in Ohio to $150 in California. They hear the evidence under relaxed rules of admissibility. There is generally a trial *de novo* available in the trial court. Court trials have been held in from 5 to no more than 15 percent of all cases arbitrated. Financial disincentives placed upon such a demand have withstood constitutional challenge. *See Application of Smith*, 112 A.2d 625 *appeal dismissed sub nom. Smith v. Wissler* 350 U.S. 858 (1955).

An experiment in the federal system starting in 1978 has used compulsory arbitration for substantially larger cases—in the Eastern District of Pennsylvania and in Connecticut up to $50,000; and in the Northern District of California, $100,000. An evaluation by the Federal Judicial Center published in 1981 suggests improvement by earlier termination of cases—both through settlement and arbitration award. However, in a large number of cases, attorneys requested court trials; but the experiment had not run long enough to determine whether the number of court trials actually held would exceed the rate experienced in similar state programs.

Court-related Adjudication

Existing court rules and procedures often allow individuals other than full-time sitting judges to adjudicate pending litigation. Given the pressures of increasing caseloads, the desire of litigants to select their own

"judge," and continuing efforts to reduce litigation cost and delay—the next few years may witness an increase in nonjudicial adjudicators.

In the past, most of the models for nonjudicial adjudication have been designed and used for smaller matters, e.g., special masters in juvenile or matrimonial cases. In recent years, some courts have turned to an increased use of nonjudges during the adjudicative process to alleviate the burdens imposed by big case litigation.

Operating within the framework of the judicial system, these procedures may provide specialized attention and services. In addition, many offer the litigants an extraordinary degree of flexibility and control over the manner in which a case is presented for decision—selecting the individual before whom a case will be heard, scheduling outside of normal business hours at locations convenient to the parties, and hearings closed to the public. Operation within the judicial system also offers the safeguards provided by the substantive statutory or common law of the jurisdiction and its rules of procedure and evidence.

These procedures can be utilized to perform four distinct types of functions: (1) settlement, (2) case management and pretrial supervision, (3) fact finding, and (4) adjudication. Illustrations range from a more frequent utilization of the long-established system of masters to highly specialized procedures and devices for particular types of cases:

1. *Court-appointed Masters or Referees.* This procedure exists in Rule 53 of the Federal Rules of Civil Procedure and in differing forms in many states. Although its utilization is typically not encouraged, referrals at the parties' option can offer expertise and expedition, particularly where there is discretion in the appointment of the special master. For example, in at least one jurisdiction retired judges serve as state referees for life, providing a pool of specialized experience which can be drawn upon for particular cases.

2. *Referencing Out.* An expanded form of referencing out is permitted under a long-standing but until recently unused California statute. Under its provisions, upon agreement of the parties, any or all issues of fact or law may be referred to an individual of their choice. In effect, a private trial funded by the parties is possible.

3. *Parajudicial Officers.* In the federal system, magistrates can be called upon to conduct, hear, and determine a variety of pretrial matters. Their use can provide continuity in the pretrial handling of a big case, offering detailed attention and supervision, freeing judges for other matters.

4. *Temporary Judges.* In some states, particularly in the west, lawyers in a community may be appointed to serve as judges for short periods. While generally used to clear up general backlogs, experienced attorneys could conceivably be enlisted to assist in the resolution of particular cases.

5. *Settlement Facilitators.* The expertise offered by nonjudges can be particularly useful in assisting the parties to reach a settlement. A procedure based on this view is in operation in one jurisdiction where a retired judge is serving as a "consultant" in a voluntary program involving medical malpractice cases. Cases eligible for the program are those in which liability is admitted and only damages are contested. The consultant hears the evidence in a summary fashion and gives an estimate of damages to the parties. This estimate is used by them in further private negotiations.

6. *Preliminary Neutral Observer.* Even where there is no attempt to settle a dispute or offer a prediction as to outcome, a presentation before a neutral observer can facilitate settlement by providing the parties with an opportunity to assess the relative strengths and weaknesses of the opposing sides. One example is from California, where parties in a case pending in federal court devised a plan whereby abbreviated presentations were made to two executives, one from each party, and a neutral adviser selected by them. While the plan called for the adviser to give an assessment of the case if no settlement occurred within an allotted period after the "mini-trial," this proved unnecessary when the parties reached a settlement within the interim period.

Court-related adjudication is not without its problems. For example, to the extent that the adjudicators are part-time and remain in the active practice of law, serious questions about conflict of interest, bias and favoritism arise. However, to the extent that it combines (1) the flexibility of the justice mediation center described in the next section with (2) the rule of law, court procedures and decisions by law-trained personnel, court-related adjudication may provide an "alternative" within or at least closely related to the court system.

Alternatives to Court

The preceding programs on court-annexed arbitration and persons adjudicating cases in court who are not judges are closely related to traditional court procedures. They usually involve money damages and involve lawyers both in prosecution and deciding cases.

In contrast, the justice mediation programs (also known as citizens' dispute centers, community boards, neighborhood justice centers, night prosecutor's mediation programs) do not rely as heavily on the formalities of the traditional legal system. Mediation is stressed, rather than an adversarial model. Complaints involving persons with continuing relationships such as family members, neighbors and friends dominate the case types.

In this setting, there may be little need for lawyers, consequently reducing the disputants' costs and making the proceedings less adversarial.

Generally, lawyers are happy not to be a part of cases which carry heavy emotional freight and little or no fee. In fact, one important finding concerning justice mediation programs is that most of their economic claims are too small to be handled by lawyers.

One problem with the limitations in jurisdiction of most of our courts is that it is often difficult for a judge to deal with the variety of problems presented in a single situation. The social problems confronting disputants often have both civil and criminal aspects. A justice mediation program may be more likely to consider the whole problem than a court.

The programs stress mediation, conciliation, or fact finding and not an adversary process. Their purpose is to arrive at a jointly acceptable solution and not find out who hit whom first. The people involved may have to deal with each other in the future, and an amicable resolution of their problems will facilitate future cooperation. The proceedings are private and at more convenient times than courts usually meet. The mediators often can give more time to a dispute than a hard-pressed judge. The environment may be more informal and less intimidating.

Another advantage of these centers is simply that they are new. There is an excitement about a different approach which releases new energy, taps new people, and involves new groups in an old problem.

The current generation of alternatives to courts has many antecedents. In the 1950s the juvenile court, often a source of innovation, developed some of the first community dispute resolution centers—for example, the New Jersey Juvenile Conference Committees. The prosecutor's office in Philadelphia—building on a tradition of court-annexed arbitration—in the late 1960s pioneered the use of arbitration to resolve relatively minor disputes instead of referring them to formal adjudication.

The theory behind justice mediation centers has been developed by such academics as Richard Danzig, Earl Johnson, Laura Nader and Frank Sander. Sander's 1976 paper for the Pound Conference Revisited provided a well publicized model for thinking about these problems.

When Griffin Bell, the former chairman of the Pound Conference Follow-up Task Force, became attorney general in 1977, he started a program including the creation of centers in Atlanta, Kansas City and Los Angeles.

The American Bar Association gave the movement an additional boost by holding an important conference at Columbia University in May 1977, which reviewed a variety of dispute resolution techniques and helped legitimize and publicize alternatives to courts.

The ABA Special Committee on Resolution of Minor Disputes in 1981 identified 141 dispute resolution programs. Their diversity is seen in differing sponsorship, approaches or strategies taken, types of cases, and the dispute resolvers themselves.

Sponsors of the programs include courts, mayors' offices, bar associations, prosecutors' offices, private foundations, private citizens, and consumer groups. The approaches vary from referral by a social service agency or the court itself to self-referral or walk-ins. The types of cases heard cover a wide variety of both criminal and civil matters. Mediation hearings may occur in a church, community center or a laundry room, as well as city council chambers or the prosecutor's office.

Highlights of the ABA Special Committee's survey of 141 programs summarize this diversity:

- POPULATION: 34 percent of the programs are located in cities of less than 100,000; 34 percent, in cities between 100,000 and 500,000; and 32 percent, in cities of more than 500,000.
- DURATION: 36 percent of the programs have been in existence for less than two years; 51 percent, between two and six years; and 12 percent, more than six years.
- ANNUAL BUDGET: 29 percent of the programs have annual budgets of less than $25,000; 43 percent, between $25,000 and $100,000; and 28 percent, more than $100,000.
- FUNDING SOURCE: 6 percent of the programs are funded by either the courts or the district attorney; 36 percent, by local government; 28 percent, by federal government; 24 percent, by private sources; and 6 percent, by fees.
- CASELOAD: 51 percent of the programs handle fewer than 500 cases annually; 35 percent, between 500 and 3,000 cases annually; and 14 percent, more than 3,000 cases annually.
- MEDIATORS: 37 percent of the programs use lay citizens as mediators; 11 percent, attorneys; 12 percent, academicians or students; 33 percent, social service professionals; and 7 percent, court clerks.
- REFERRAL SOURCES: 23 percent of the programs rely on the courts, judges and clerks for the majority of their case referrals; 23 percent, the district attorney, prosecutor and state attorney; 19 percent, police and law enforcement; 12 percent, community agencies; 18 percent, walk-ins and self-referrals; and 6 percent, government and bar associations and private attorneys.

Underlying this diversity, all justice mediation centers appear to have one central goal: to help citizens resolve their disputes effectively, expeditiously, and with compassion. For a more detailed analysis, the mediation centers may be divided into two categories: those annexed to the legal system and those more closely tied to the community.

Mediation Centers Annexed to the Legal System

Judges, city government leaders, and district and private attorneys have long realized the value of mediation in resolving interpersonal prob-

lems, as when disputing parties are called into private offices in a last-ditch effort to avoid the court proceedings. But the diversion movement's quest for relieving court dockets led to the creation of the first prosecutor-sponsored mediation program in Columbus, Ohio, late in 1971.

The Columbus Night Prosecutor's Mediation Program has served as the model for more than thirty other similar programs throughout the nation, including those in Memphis, South Bend, Miami, Los Angeles and Lexington, Kentucky. It began as a volunteer program using law professors. After two years of Law Enforcement Assistance Administration funding, the program won Exemplary Award status from LEAA. Ten years later, the program is funded totally out of the prosecutor's budget and handles one-third (18,000) of all citizens' criminal complaints brought to the local legal system.

The Columbus Program contains two components: interpersonal mediation hearings, which comprise 50 percent of the caseload, and administrative hearings, which include bad check cases, health code violations, motor vehicle regulations and utility cases.

Currently using more than sixty law, social work, and psychology students as mediators and counselors, the Columbus program conducts informal hearings during evenings and weekends. Each day, approximately seventy citizens arrive at the prosecutor's office to file what they believe to be a criminal complaint. Many of these complaints are against family members, neighbors, and (former) friends. Approximately 50 percent of the complaints are scheduled for a voluntary informal mediation session one week later. On the hearing date, both a mediator and a counselor are assigned to the parties. The hearings average forty minutes.

Building on this model, both Florida and Kentucky have created statewide mediation programs sponsored by the court. Presently, the state of Florida has more than seventeen court-annexed mediation programs focusing on both adult and juvenile problems. Through Kentucky's state Pretrial Release Commission, four programs using lay citizens as mediators aid in relieving the local court dockets.

Recently, both the Houston and Boston bar associations have sponsored mediation programs using volunteer attorneys as mediators. The Houston Neighborhood Justice Center is located in a renovated warehouse in a neighborhood from which they expect most of their referrals. The Boston program is located in an office building downtown.

One of the primary purposes for the legal system annexed mediation centers is to relieve the system of many of the interpersonal complaints. Program staff are convinced that the quality and the duration of the agreements reached are better and longer lasting than those which may have been obtained through the system. Time is saved for both the participants as well as the legal system, since most mediation centers schedule hearings within a week.

Justice Centers in the Community

Unlike the legal system annexed mediation centers, which emphasize court caseload reduction and cost savings, community justice centers stress the empowerment of neighborhoods and community building. The major goal of the community justice centers is to create or reestablish an informal dispute resolution process operated by citizens in order to deal with conflicts within the neighborhood.

The mediators are often of the same racial or ethnic background as the disputants. Their occupations include retired persons, social workers, homemakers, law students, and lawyer volunteers. This diversity of mediators is important and necessary to community-based justice because they are peers from the disputants' community, and this gives them greater immediate rapport and credibility. Their jurisdiction generally is not compartmentalized.

The Community Board Program in San Francisco is often viewed as the prototype of a community justice center. The program develops neighborhood forums with the capacity to reduce and to resolve individual and community conflicts. When a case is referred to the program, a neighborhood staff member visits everyone involved with the problem. The staff member answers questions and explains how the program works. Disputants are encouraged to meet with a community board panel. Participation is voluntary and the hearing is informal and open to the neighborhood.

Community justice centers attempt to serve identifiable neighborhoods. Most of these centers, such as those located in Concordville and Lansdowne, Pennsylvania; Cambridge, Massachusetts; and Venice, California, have experienced a major problem in obtaining referrals. Since the centers are not formally or even informally linked with any part of either the legal or social service systems, the source of referrals is usually the disputants themselves. Program publicity through brochures, posters and speaking engagements plays a vital role in stimulating referrals.

Evaluations of the Centers

Assessing the impact of the justice centers on both the parties' dispute and the legal system has been the subject of seven evaluations of thirteen programs.* The evaluations vary substantially in their methodology, but the following statements may be made based on evaluation findings:

- The rate of both parties appearing for mediation is higher for court/prosecutor-related programs than for community-based centers: (60–70 percent compared with 35–45 percent);

*See Appendix.

- Once the disputants arrive at the justice centers, the chance of the hearing resulting in an agreement is extremely high (70–90 percent);
- Most of the agreements reached during the hearings contain behavioral provisions, e.g., to stay away from each other or to end the relationship;
- Generally the disputants view the mediation process as fair and effective;
- The majority of the disputants believe that they had a fair opportunity to tell their side of the story;
- Most cases are totally processed within one month, including follow-up, which compares favorably with court processing time.

Two areas of uncertainty remain because of problems in collecting and analyzing the data. Little impact on court caseloads has been measured. Most evaluations have been unable to show cost savings to the funding sources (e.g., lower cost to society per case), although the cost to the disputants has often been less.

Issues Presented by Alternatives

While there are many advantages to justice mediation centers and other alternatives such as court annexed arbitration, there are also problems. The future of the movement to some extent will depend upon answers to the following questions:

Are Alternatives Cost-effective?

It is difficult to resolve this question in favor of these innovations. If they are found to be cheaper, those who use them most may feel that they are receiving second-class justice. If, however, they are more expensive, there will be a tendency for the legislators and other decision makers to continue the court's role on the grounds that they are providing the same service less expensively.

Can We Afford Two Justice Systems?

The impact of public and government concern over expenditures makes this a difficult time to build on some of the innovations that have gone before. In 1980, the Congress passed the Dispute Resolution Act to provide technical assistance and money for innovative programs—but no funds were provided in the first year. To the extent that the programs deal heavily in prevention and not in easily measurable referrals from agencies or courts, it may be difficult to prove their effectiveness. Questions have been raised about whether clients of community justice projects should pay a user fee and whether states should subsidize it to some extent. In some places, these new programs are being subjected to zero-based budget review in their first year.

Are Justice Mediation Centers Being Oversold?

There is a tendency to claim more for the centers than they can deliver in certain circumstances or to sell them for the wrong reasons. A project may not reduce court workload, especially if it is not attached to the court or to the prosecutor's office. Often cases handled by these programs either never go to court or, if they are in court, receive summary treatment.

Are the Centers Coercive?

What are their referral policies? What are people told as they are moved into these alternatives? What do they understand? For example, do the centers on occasion take advantage of persons referred by the court and force resolutions on those who would not voluntarily have accepted the terms imposed?

Should Centers' Agreements Be Enforceable in Court?

Some argue that unless the treaties negotiated in the mediation centers are enforceable in court, there will be a great deal of wasted time and effort. Others claim that these treaties should be enforceable only in a separate court action.

Can Unequal Parties Mediate?

Mediation may be good for members of the same family, although situations involving children versus their parents obviously present a problem. Mediation may not be appropriate because of unequal bargaining power where a large corporation and an employee are in contest.

Should the Established Law Be Followed?

On the positive side, mediation strives to do justice, not unlike a court of equity. However, the law can be the protection of the weak and minorities. To what extent do people want justice and to what extent, law enforcement?

Will These Programs Eventually Succumb to Over-professionalization?

Will certification be required to be a mediator? To what extent can and should the community be able to participate without such credentials as graduate degrees?

Will These Projects Be Viewed as "Second-class Justice"?

Will they be only for certain types of people or will a broad spectrum of citizens participate? Are they designed more to free the courts to hear

the powerful and affluent commercial and business interests than to provide better disposition of small claims?

Are We Increasing Government Control?

A final, important consideration is whether or not society, through these community programs, is unnecessarily widening the net of social or governmental intervention.

The Role of Judges and Lawyers

While it would be a mistake for judges and lawyers to demand or accept the total responsibility for control of alternatives to trial and court, it is important that they play some role because, for all their warts and blemishes, courts and lawyers have a special background and responsibility for the administration of justice.

Even in court cases, lawyers and judges in the justice system share their domain with others, such as the press, the legislature, the jurors, and lay observers. Obviously, there is a need to share even more on the side of the continuum outside of the courts: to work with mediators, arbitrators, the executive branch, clergy, experts in conflict resolution, academics and students. These are broad policy questions not necessarily suitable for narrow technical solutions.

The following roles may be appropriate for the courts and lawyers in developing community justice programs:

1. Help set guidelines for the types of cases and procedures appropriate for the programs.
2. Monitor performance based on a variety of relevant criteria.
3. Participate in important decisions about the creation or continuance of these experiments. (The Atlanta Neighborhood Justice Center has been an excellent model of judicial involvement without domination.)
4. Learn from these experiments. Inside court systems, judges and lawyers can help set up some of the innovations pioneered in the out-of-court area. For example, the Maine courts have successfully experimented with third-party mediation in small claims courts, matrimonial disputes and other areas.

Indeed, the court may do as well or better than its alternatives. The history of the last two decades suggests that at least in the areas of bail, pretrial release and diversion of criminal cases from the justice system, the courts may perform better than special, supplemental agencies.

Malcolm Feeley, a political science professor at the University of Wisconsin, has written the following warning:

> Neighborhood justice centers and community courts are currently gaining great favor in this country. They try to substitute informality, understanding, and the perspective of local community opinion for the formal rigid procedures of the courts. But their proponents fail to realize that lower courts do not operate according to rigid formalities; they operate with flexibility and the concern for substantive justice. Thus these new centers may end up doing in a time-consuming and cumbersome manner what the lower courts do more quickly and more effectively. (M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage, 1979) at pp. 239–240)

The problem of providing justice for all citizen disputes is, by definition, without a complete and permanent solution. We can only provide partial or interim answers. All of the alternatives mentioned in this chapter, but especially justice mediation centers, offer judges and lawyers a unique opportunity to share their expertise with others in our society and jointly to develop better programs for the resolution of disputes in our society.

TAB 6 EVOLUTION OF THE JUDICIARY IN THE U.S.

ARTICLES:

"Judicial Selection, Compensation, Discipline and Mandatory Retirement"

"Judicial Education and Training"

"Use of Judicial Councils and Judicial Conferences"

Judicial Selection, Compensation, Discipline and Mandatory Retirement

IV

Larry Berkson*

The quality of the judiciary in large measure determines the quality of justice dispensed in state court systems. For this reason nearly every proposal to improve the administration of justice during this century has suggested ways to improve the quality of the bench. Some reformers have focused on changing the methods of selection to accomplish this goal while others have emphasized the need to provide adequate compensation systems to attract the most competent individuals to the bench. Still others have emphasized the need to establish adequate discipline and removal mechanisms through which corrupt and incompetent judges can be removed from office.

Judicial Selection

Throughout America's history there has been considerable controversy about how judges should be chosen. During the colonial era judges were selected by the king. His intolerably wide powers over them were vehemently resented and were condemned in the Declaration of Independence. Following the Revolution, the states continued to select judges by appointive processes, but ones which prevented the chief executive from controlling the judiciary. Eight of the original thirteen states vested the appointment power in one or both houses of the legislature. Two allowed appointment by the governor and his council and three vested appointment authority in the governor subject to consent of the council (Escovitz).

By the 1830s the appointive system came under attack. The general population was resentful that property owners controlled the judiciary (Niles). There was a common desire to terminate the privileges of the upper class, making the influence of Jacksonian Democracy with its notions of popular sovereignty pervasive.

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The Rise of Judicial Elections

In 1832 Mississippi became the first state in which all judges were popularly elected. During the next decade there was little opposition against those who advocated this system of selection. Adoption of popular elections by New York in 1846 signaled the beginning of a rapidly growing trend to employ this method as a viable alternative to the appointment of judges. By the time of the Civil War, twenty-four of thirty-four states had established an elected judiciary with seven states adopting an electoral system in 1850 alone. Thereafter each of the new states admitted to the Union adopted popular election of some or all of its judges until the admission of Alaska in 1959.

Within a short while however, it became apparent that this new system had not produced the promised panacea, and the need for reform again became apparent. One of the main objections voiced during this period was that judges were almost invariably selected by political machines and as a result were controlled by them. Judges were often perceived as corrupt and incompetent. The notion of a judiciary uncontrolled by special interests had not been realized. As early as 1853, for example, delegates to the Massachusetts Constitutional Convention viewed the popular election of judges in New York as a failure and refused to adopt that system in their own state. One delegate claimed that the electoral system had "fallen hopelessly into the great cistern" and quoted an article in the *Evening Post* stating that judges had become enmeshed in "the political mill" (Niles, at 528).

It was in this context that the concept of nonpartisan elections emerged. The idea of judicial candidates appearing on a ballot without party label was used as early as 1873 in Cook County, Illinois. Surprisingly, it was the judges themselves who decided to run on a nonpartisan ballot rather than doing so pursuant to a legislative mandate or some other authority. The nonpartisan ballot system gained its widest acceptance at the turn of the century, primarily from Ohio and Michigan to the Pacific Coast. By 1927, twelve states employed such a system (Aumann).

However, criticism of nonpartisan elections arose almost immediately. As early as 1908 members of the South Dakota Bar Association indicated dissatisfaction with this method in their state. By 1927, Iowa, Kansas, and Pennsylvania had tried and abandoned it. The major objection was that there was still no real public choice. New candidates for judgeships were regularly selected by party leaders and thrust upon an unknowledgeable electorate which, unguided by party labels, was not able to make reasoned choices.

The Rise of Commission Plans

While others attacked nonpartisan elections, a number of well-known scholars, judges and concerned citizens began assailing all elective systems as failures. One of the most outspoken critics was Roscoe Pound who, in 1906, delivered a now classic address on the "Causes of Popular Dissatisfaction with the Administration of Justice" to the American Bar Association. He claimed that "putting courts into politics, and compelling judges to become politicians in many jurisdictions...[had] almost destroyed the traditional respect for the bench" (Pound, 1937, at 186). Several years later in a speech before the Cincinnati Bar Association, William Howard Taft claimed that it was "disgraceful" to see men campaigning for positions on the state supreme court, asking for votes on the ground that their decisions would have a particular class flavor. To him, this was "so shocking, and so out of keeping with the fixedness of moral principles" that it ought to be "condemned" (Taft, at 423).

Reformers advocated eliminating the worst features of partisan politics from the selection process. The pool of candidates was to be expanded to include persons other than friends of politicians. Inappropriate partisan political considerations such as an individual's party affiliation, prior party service, or friendship with an appointing executive were to be minimized so that the most distinguished members of the bar, regardless of party, could be elevated to the bench (Kales, ch. 17).

In 1913 the American Judicature Society was founded. Its first director of research, Albert M. Kales, developed a plan which he believed would maximize the benefits while minimizing the weaknesses of both the appointment and election processes. It called for an elected chief justice to fill judicial vacancies. As a "slight but reasonable control" upon the appointing power of the chief justice, Kales proposed that a judicial council be given the power to suggest a list of qualified candidates for each division of the court. The chief justice would be required to select appointees from the list for every other vacancy. This council was the forerunner of the present day judicial nominating commission.

Two years after Kales presented his plan, Herbert Harley, founder and first secretary of the Society, proposed mandatory appointment from the council's list in all instances rather than just every other one. In 1926, Harold Laski, a political scientist, proposed a slightly different plan. Unlike earlier proposals which called for the chief justice to appoint from lists prepared by a council composed entirely of judges, he suggested that the governor make appointments with the aid of an advisory committee composed of a judge of the supreme court, the attorney general and the president of the state bar association (Laski). Two years later Harley accepted the idea that the governor should make the appointments and proposed that the lists be complied by use of a bar plebiscite (Harley). From this time forward, almost nothing is heard about judicial appointment by an elected chief justice, and more and more is heard about bar participation.

In 1931, a publication of the Grand Jury Association in New York sug-

gested that nominating commissions include lay citizens. This was the first proposal encouraging nonattorney participation in the process (Winters, 1973, at 36).

Various proposals for a nominating commission plan were introduced in state legislatures throughout the 1930s. The American Bar Association endorsed a proposal in 1937 and in 1940 Missouri became the first state to put one into effect. Today it is variously known as the Kales, Missouri, merit or commission plan. Almost none of the state plans in use is identical. There are, however, certain features common to nearly all of them. These elements have become the conventional wisdom of how a commission should be structured and how it should operate. Most are permanent and nonpartisan, and are composed of lawyers and nonlawyers (appointed by a variety of public and private officials) who actively recruit and screen prospective candidates. The commission then forwards a list of three to five qualified individuals to the governor, who in turn is required to make an appointment from the list. Usually the judge serves a one-year probationary period after which he must run unopposed for election. The sole question submitted to the electorate at that time is: "Shall Judge _____ be retained in office?" A majority vote in favor of retention is required before a judge may serve a full term.

Arguments for the Commission Plan

Three categories of arguments are raised to support the commission plan. The first focuses on the weaknesses of partisan and nonpartisan elections. It is claimed that they do not allow citizens to rationally choose judges. Elections of judges, they argue, are premised on a dubious assumption: that the public is attentive and well informed about the candidates. Proponents of the commission system argue that few individuals understand the intricacies of court procedure or the role and functions of the judiciary. Even fewer are aware of the credentials and qualifications of relatively unknown candidates. The result is that candidates are often elected on the basis of name identification, personality, and demeanor rather than on the basis of ability to perform effectively in the courtroom.

Moreover, in most states which theoretically utilize popular elections, a large number of judges are initially appointed by the governor to fill vacancies occasioned by death or retirement of incumbents. Where contests do take place, they are generally issueless, and invariably lead to low voter turnout. Additionally judges serve long periods of tenure and thus are elected relatively infrequently. Most incumbents succeed themselves with little difficulty, often running unopposed.

Proponents also argue that elections often discourage the candidacy of exceptionally well-qualified individuals. Many attorneys, they claim, have a philosophical distaste for politics and political campaigning, and thus refrain from seeking office. Others are hesitant to leave successful law practices to campaign for relatively low-paying positions from which they may be removed at the next general election.

Elections are also criticized for compromising the independence of the judiciary. Popular elections are designed to provide accountability and responsiveness on the part of incumbents to the electorate. However, it is argued that judicial officers, unlike other elected officials, should not be governed by the transient whims of the public which is likely to vote an unpopular, although competent, judge out of office for rendering correct but controversial decisions.

Perhaps more important is the fact that judges who must campaign, solicit votes, and seek monetary contributions, may be asked for favors once they take office. Thus, they may come under extreme pressure involving questionable, if not illegal, activities. Finally, it is noted that elections require sitting judges to abandon their duties in order to campaign for reelection. In such circumstances, judicial business suffers, resulting in negative consequences for the entire judicial system.

The second category of arguments supporting adoption of commission plans focuses on the national trend toward adopting such proposals. Proponents note that despite opposition, most often from well-entrenched politicians, versions of the commission plan have been adopted in thirty-one states and the District of Columbia for some or all of the judicial offices in those jurisdictions. Twenty-eight of these thirty-one jurisdictions adopted or extended a previous commission plan during the 1970s. Selection by commission has also been implemented at the federal level. In 1977 President Carter created the U.S. Circuit Judge Nominating Commission, composed of thirteen panels, to aid him in selecting all federal circuit judges. Since 1975, forty-eight U.S. senators in thirty states have established voluntary advisory commissions to aid them in selecting federal district judges.

The third category of arguments raised on behalf of commission plans is that, where employed, they have been praised as successful. No state has adopted this method and returned to an elective system. Nor has a judge selected under such a system been removed by a judicial performance commission. It is also argued that commissions have raised the quality of the bench. For example, it is noted that in Missouri, where the commission system has been studied most rigorously, the average age of judges has risen from the 40s to the 50s, thus bringing more mature attorneys to the bench. Moveover, appellate judges appointed under this system have had considerably more judicial experience than their predecessors. Proponents also note studies showing general agreement among the Missouri Bar that the plan has resulted in placing "better" judges on the bench. In particular, it has tended to prevent the appointment of highly incompetent persons to the state's judiciary.

Arguments against the Commission Plan

A number of objections are raised against commission plans. Perhaps the most frequent one is that they are philosophically repugnant to a democracy because they deprive citizens of the franchise. The right to elect public officials, it is argued, is one of the hallmarks of freedom. It safeguards our democratic system and ensures the survival of democracy.

A second argument made against the adoption of commission plans is that they do not take politics out of the selection process. Critics claim that the governor often tries to pack the commission with his supporters and usually chooses a member of his party for the judgeship from among the recommended candidates.

Third, it is argued that members of the nominating commissions will not represent the community and thus the candidates will not be drawn from all segments of society. Prospective nominees, it is claimed, will be selected from large law firms, a group which is relatively unknowledgeable in criminal law matters and traditionally lacks courtroom experience. Moreover, appropriate numbers of minorities and women will not be appointed under this plan.

Fourth, it is argued that retention elections are a dismal failure. Rarely are appointed incumbents defeated. For example, in Missouri between 1941 and 1964 only one judge failed to win retention. Thus, the commission plan in effect results in life-tenured judgeships.

Finally, it is believed that elections serve to educate the public, while the commission system does not. Under the electoral method the issues are discussed by the opposing candidates and the office seeker has an opportunity to make known the weaknesses of the incumbent's record.

Judicial Selection Today

Today an almost endless combination of schemes is used to select state judges. Almost no two states are alike and many do not employ the same method for choosing judges at all levels of their judiciary. As stated earlier, thirty-one states and the District of Columbia use commission plans to aid the governor (or president) in selecting some or all of their judicial officers.

In three states, Maine, New Hampshire and New Jersey, the governor appoints judges without using a nominating commission (subject to senatorial confirmation in Maine and New Jersey and a five-member council in New Hampshire) and in two states, Hawaii and Illinois, judges appoint some of their colleagues. In Connecticut, Rhode Island, South Carolina and Virginia, the legislature appoints or elects most, if not all, of the judges.

Partisan elections are held to select most or all judges in thirteen states and some judges in eight states. Nonpartisan elections are held to select most or all judges in seventeen states and some judges in five states (Berkson, Beller and Grimaldi).

Judicial Compensation

Providing adequate compensation for judges has long been a concern of the public. The colonists expressed displeasure in the Declaration of Independence that the "amount and payment" of judicial salaries was dependent upon the king's discretion. Their experience taught them that if judicial independence was to be preserved, salaries had to be firmly established and not subject to control by political officials during a judge's term of office. This belief was reflected in both the federal and state constitutions which prohibited reduction of judicial compensation during a judge's tenure in office.

As the new nation emerged, concern arose about how to attract and retain the most highly qualified personnel. One method was to provide competitive compensation. It was recognized that adequate remuneration was not simply a favor to judges, but a necessary investment to insure a superior judiciary.

During the nation's first century, the terms compensation and salary were nearly synonymous. However, by 1900 compensation began to include more than salary. The idea of retirement and disability pensions had come into being. As the twentieth century progressed, death benefits, longer periods of vacation, health benefits and expense allowances were also proposed as ways to compensate judicial officers.

Salaries

Historically, state legislatures have provided inadequate judicial salaries. Often judges have gone for years without pay increases. As a result there has been considerable tension between the two branches of government, causing the resignation of some highly competent jurists (Chapin). For example, in 1954 Chief Justice Carl V. Weygandt took the unprecedented action of submitting his resignation because judicial salaries in Ohio had not been increased in twenty-seven years (Judicial Salaries, 1954).

Another source of irritation regarding pay raises in the early 1900s was that many state constitutions prohibited increasing judicial salaries for sitting judges during their terms of office. It was argued that this prohibition adversely affected the older, more experienced judges who had to complete their current terms before qualifying for an approved increase. At the same time, newly elected judges were unfairly benefited by immediately receiving the current authorized rate (Skoler and Janewicz). A successful campaign was waged by reformers against this restriction and by 1962, the constitutions of only 13 states still included it. Today, even though generally condemned, seven states (Alabama, Kentucky, Mississippi, Nevada, Oklahoma, Tennessee, Washington) still prohibit salary increases for some or all of their judges during their terms of office.

One of the most controversial topics involves the dollar amount which judges should be paid. Some claim that salaries should depend on the region of the country, the standards of the local community, the amount of work to be done, the level of the court in the judicial hierarchy, and the length of time a judge has served on the bench. Others argue that salaries throughout a state's judiciary should be substantially the same. Today most proposals call for fairly uniform salaries. The American Bar Association Standards, for example, recommend that there should be no salary differential between judges of equivalent rank and only a modest differential between judges of different court levels (ABA Standards).

Until recently, salaries were determined in an arbitrary manner. Legislators, who generally keep their own salaries low in deference to the electors, have increased judicial salaries at irregular intervals, usually only after considerable pressure has been applied by the legal community. This practice has been attacked for the past several decades and today it is generally recommended that salary figures should be comparable to senior executive department officials other than the governor (ABA Standards).

Compensation review commissions have been created in twenty-two states to provide advice on appropriate levels of compensation for members of the judiciary (Roberts). Most exclude public officers or employees. All but one have been created since 1967. Twenty provide advice on appropriate salary levels for other governmental officials but those in Alabama and New Mexico focus exclusively on the salaries of judges.

In recent years, because of the declining value of the dollar, the idea of providing automatic cost-of-living raises for judges has gained support. California adopted such a plan in 1968 basing it on the California Consumer Price Index. However, the state repealed this legislation in 1980 and now judges receive the same percentage increases as other state employees subject to a five percent limitation. In 1974 Tennessee adopted a plan tied to the U.S. Consumer Price Index which is effective until at least 1982. In 1975 Wisconsin adopted a similar plan but it was repealed in 1977. In Maryland judges receive the same salary increments as other state employees.

Retirement Pensions

Another product of the twentieth century is the idea of providing judicial retirement pensions. Massachusetts established a plan in 1885, but it was not until after Maryland enacted legislation in 1904 that other states adopted them with great frequency. By 1928, fourteen states had established judicial retirement pensions (Shartel, 1928). By 1943 the number had increased to twenty-three and by 1960, every state provided such a plan (Winters, 1961).

Proponents argue that attractive pension plans are essential to providing a highly qualified judiciary. They note that not only are these plans important in attracting and retaining qualified personnel, but that they are necessary for at least two other reasons. First, it is claimed that judicial retirement plans are the best solution to the problem of the elderly judge who remains on the bench too long. Before the advent of judicial retirement plans, it was not unheard of to find judges serving on the bench beyond eighty years of age because they could not "afford" to retire. If a judge can elect to retire with generous pension benefits he may be more easily persuaded to relinquish his position in favor of a younger, more vigorous individual.

Second, it is pointed out that competent but retired judges provide an auxiliary staff which can be drawn upon periodically to deal with case load emergencies. This practice allows the aging judge to continue his work at a reduced pace while still serving the needs of the state.

In 1962, concern over the quality of benefits included in retirement pensions lead the American Bar Association to recommend that judges who have served ten years or more, or their widows, should receive not less than fifty percent of the salary received at the time of their retirement or death (Holt). In 1974 the ABA revised its recommendation after finding that many states had "grossly inadequate" pension systems. It suggested that a pension system should provide at least three-quarters salary upon retirement at age seventy with ten or more years of judicial service (ABA Standards). Although numerous states have altered their plans since that time, many states still do not come within the guidelines.

Today nine states (Maine, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, Rhode Island, Utah, Wyoming) provide all the revenue for the judicial retirement funds (Pyne). The rest require judges to bear a portion of the financial responsibility by contributing from one to ten percent of their salaries to the fund. The current trend is toward greater contributions by the judges. Between 1974–1980, fifteen states (Alabama, Alaska, Arizona, Idaho, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Nebraska, New York, Ohio, Oklahoma, South Dakota, Texas) increased the percentage of the judges' contributions while only two (Michigan, Utah) decreased it (Pyne).

Another recent change in retirement benefits is the addition of cost-of-living increments (Pyne). The first plan was adopted in 1963 when Nevada created one for its trial court judges. Since then, seventeen states (Alabama, Colorado, Connecticut, Florida, Idaho, Louisiana, Maryland, Massachusetts, New York, North Carolina, Ohio, South Carolina, Tennessee, Utah, Vermont, Virginia, Michigan) and the District of Columbia have adopted plans which provide for annual cost-of-living increases in retirement benefits based on changes in the Consumer Price Index (Pyne). One of the most recent, Connecticut, has restricted coverage to probate judges. Additionally, Hawaii, Illinois and South Dakota have fixed annual cost-of-living increases included in their retirement benefits (Pyne).

Disability Pensions

American judges did not begin receiving disability pensions until well after plans had been established in other nations (Shartel, 1928). Like retirement pensions, they are a product of the twentieth century. By 1928 only eight states made provision for the disabled judge. However, plans were adopted with increasing rapidity after that date and by 1961 all but four states had provisions for disability retirement (Winters, 1961). Today only Wyoming does not provide these benefits.

The age and service requirements vary from state to state. In some there is no minimum term of service required before a judge is eligible. In others the requirement may be a dozen years or more. Some states limit the amount of benefit to a fixed percentage of a judge's salary. Coverage generally ranges from twenty-five percent to seventy-five percent.

Death Benefits

Death benefits are also of relatively recent origin. By 1961 there were still numerous jurisdictions which did not provide spouses or dependents with income when a judge died (Winters, 1961). Today only Wyoming does not provide these benefits.

Again, states vary considerably in eligibility requirements and benefits (Pyne). Some require minimum terms of service while others do not. A few states require that a spouse must have been married to the judge for a certain length of time (usually one year) before being eligible to receive compensation. Some provide for only nominal support of the spouse while others are quite generous. Most provide that dependent children are eligible to receive benfits if the judge is not survived by a spouse. Many states discontinue benefits for the spouse if he or she remarries.

Other Compensation

Vacations and official court holidays have historically been a part of the judicial compensation package. Some states have been generous while others have not. In 1970, for example, seventeen states allowed each judge discretion in determining the length of his vacation (Judicial Salaries, 1970). Others established a maximum of one month, and Oklahoma allowed only two weeks. That same year Arkansas allowed only two official court holidays while New Jersey and Tennessee allowed eighteen.

In recent decades the importance of other fringe benefits has also been recognized. Medical insurance and hospitalization benefits are now regarded as an absolute necessity although the plans vary considerably (McConnell). In some states judges pay entire premiums while in others, premiums are shared by the judge and government. Many states require that the judge pay that portion of the premium required for coverage of his family.

Appellate and trial court judges are generally reimbursed for actual travel expenses incurred on court business. Only recently, however, has the compensation package come to include reimbursement of expenses which enable judges to participate in a wide range of professional activities. The American Bar Association considers this an important element in insuring a high quality judiciary. In 1974 the Association expressed its concern that many states do not provide reimbursement of expenses for attending programs of continuing education, conferences, councils on judicial administration, and meetings of the bench and the bar (ABA Standards). Although the situation has improved, reimbursement for these activities is still severely restricted in many jurisdictions.

Judicial Discipline

The tension between judicial accountability and judicial independence was well known to the founding fathers. During the late eighteenth and early nineteenth centuries, those believing in an extremely independent judiciary were generally more influencial than those favoring greater accountability. They believed that independence could be achieved by appointing judges for life with limited mechanisms for their removal. Thus, eight of the thirteen original states based the term of office on good behavior (Escovitz).

Traditional Methods of Holding Judges Accountable

Impeachment was the only method of discipline and removal specifically provided in the early state constitutions. This widely adopted method of holding American judges accountable begins in the lower house of the legislature, which investigates and votes on charges against the accused. The upper house then acts as a court. If the judge is found guilty, usually by a two-thirds vote, he is removed from office. Forty-six states now provide for this procedure (Hays).

Two other methods were developed during the early years of American history. Unlike impeachment, neither provided the accused with the procedural protections that accompany a trial. One, resolution, is simply removal by a concurrent vote of both houses of the legislature (usually a two-thirds vote is required). The other, legislative address, directs the governor to remove the offending judge. It normally requires a majority vote in both houses. Twenty-eight states provide for one or both of these procedures (Hays).

During the Populist Revolution of the 1830s–1850s, the notion of greater accountability gained support. It was believed that accountability could be achieved by the election of judges for short terms rather than appointment for life. As noted earlier, every state joining the union after 1846

until the admission of Alaska in 1959 provided for elected judges, usually for short terms of office.

By the turn of the century it was perceived that the elective system made judges accountable to political machines and party politicians rather than to the people. The Progressives were disenchanted with this practice and worked to achieve a new method of holding judges accountable, the recall. This device is analogous to the initiative and referendum. If a specified number or percentage of the voters in a given jurisdiction sign a petition requesting that a judge be recalled, a special election is held to determine whether the judge will remain in office. Judicial recall was first adopted in Los Angeles in 1903. Oregon followed in 1908 and California in 1911. Eventually at least nine states adopted recall for judges. Today seven states provide for the removal of judges in this fashion (Hays).

Weaknesses of the Traditional Methods

By the post-World War II era there was still genuine concern about the lack of accountability of state judges. It was perceived that the traditional methods of discipline and removal had failed (Berkson and Tesitor). Several arguments were offered to support this proposition. First, it was claimed that the gounds for impeachment were too narrow. While judges could be removed for illegal conduct, it was unclear whether they could be removed for senility, insanity, physical disability, alcoholism or laziness.

Second, opponents of the traditional methods argued that the sanctions were inadequate. The only penalty was removal and thus minor offenses could not be punished.

Third, it was argued that the traditional procedures were cumbersome. Legislatures were ill-equipped to investigate, collect evidence, and screen complaints, and senates were generally too large to act as judicial bodies. Moreover, senators were often not trained in the law. Additionally, legislatures simply did not have enough time to handle these problems with all of their other pressing business.

Fourth, claims were made that the traditional methods were subject to political manipulation. It was noted that votes to impeach or remove judges usually divided along party lines.

Fifth, it was claimed that many almost insurmountable obstacles prevented the removal of errant judges. For example, a two-thirds vote was required in cases of impeachment and concurrent resolution and a great deal of time and expense was involved in obtaining the required number of signatures on petitions in recall elections.

Finally, it was noted that the traditional procedures are rarely used. Between 1928 and 1948, for example, only three judges were impeached in the United States, and all three were acquitted. Recall is very rare; resolution and address are even less common.

Post-World War II Developments

Because of these considerations post-World War II reformers sought a new mechanism to hold judges more strictly accountable for their actions. In 1947 New York established the first Court on the Judiciary. This special six-judge court was to be convened to hear cases of judicial misconduct or disability. However, it lacked investigative capacity and had no confidential screening mechanism. Removal was the only sanction.

California was the first state to adopt a plan to overcome the weaknesses of the New York system. In 1960 it created by constitutional amendment the Commission of Judicial Qualifications (now the Commission on Judicial Performance). This permanent agency, with a full-time executive director and staff, receives complaints against judges, conducts investigations, convenes formal hearings and makes disciplinary recommendations to the state supreme court.

Today forty-one states and the District of Columbia have unitary commissions which possess both investigative and adjudicative functions (Tesitor). Nine states have established two-tiered systems which separate the functions (Alabama, Arkansas, Delaware, Illinois, New Jersey, Ohio, Oklahoma, West Virginia, Wisconsin). In these states the commission receives and investigates complaints and if there is probable cause that grounds exist for disciplinary action or removal, it presents the charges to a separate board or court for adjudication. In New Jersey the commission presents its charges to the state supreme court.

All of the judicial conduct organizations in existence today have been created since 1960: twenty-four by constitutional amendment, twenty by statute, and seven by court rule.

Commission Composition

Most commissions are composed of seven to nine members. Almost all have a combination of lay persons, judges and attorneys. Iowa, New Mexico, North Dakota and Wisconsin have a majority of lay persons, and lay citizens constitute the largest group in Florida, Illinois, Minnesota and Rhode Island. There are no lay persons on the commissions in Delaware, Ohio, South Carolina or Utah. Legislators have membership in Rhode Island and Utah. Generally the governor selects public members, the supreme court selects judges and the state bar association selects the attorney members. Some states allow legislative officials to select members.

Grounds for Discipline

The grounds for discipline and removal vary from state to state. Although some have been challenged as vague and overbroad, most have been upheld in numerous jurisdictions. The most common ground, found in forty-five jurisdictions, is physical or mental disability. Forty-three

jurisdictions provide that a judge may be disciplined or removed for willful or persistent failure to perform judicial duties, thirty-four for willful misconduct in office, thirty-four for habitual intemperance, twenty-seven for conduct that brings the judicial office into disrepute and twenty for commission of an offense involving moral turpitude. Other grounds provided for less frequently include violation of the code of judicial conduct, incompetence, conviction of a felony, disbarment, engagement in partisan politics, corruption in office and failure to execute the business of the courts in a timely manner.

Sanctions

With the exception of automatic removal for a felony conviction, the sanctions for misconduct are determined on a case by case basis. Four commissions, those in the District of Columbia, Kentucky, Nevada and New York, actually impose sanctions including removal subject to supreme court review. The remainder recommend sanctions to a special court or to the supreme court. Forty-three jurisdictions provide that judges may be removed from office. Forced retirement is a sanction in forty-one jurisdictions, public reprimand or censure in thirty-nine, suspension in twenty-five, and private admonishment, reprimand or censure in eighteen. A few states include assessment of costs and fines among their sanctions. Only Maine, Massachusetts and Wisconsin do not list specific sanctions in their governing provisions.

Confidentiality

One of the most difficult problems facing these commissions is the subject of confidentiality. In five states and the District of Columbia, it ceases when the commission or special court orders discipline or removal. Confidentiality ceases in six states when the state's highest court, after reviewing the commission's recommendations, orders public discipline. In Maine, Nebraska and South Dakota all commission proceedings are confidential, but the confidentiality of subsequent action is not specified. In twenty-two states confidentiality ends when the commission makes a recommendation for discipline to the state's highest court and in thirteen jurisdictions it ceases when formal charges are filed against the judge prior to the hearing.

Commission Activity

The commissions are becoming increasingly active. For example, a twelve- month study during 1977–78, reporting the responses from thirty-eight jurisdictions, found that twenty-one judges in twelve states, as well as twenty-two in New York, voluntarily resigned before formal hearings were held. Fourteen judges in seven states plus eight in New York voluntarily resigned after formal hearings began. Commissions made disciplinary

recommendations involving thirty-eight judges in seventeen states, plus fifty-one in New York, to supreme courts or filed charges with a special disciplinary court.

Mandatory Retirement

The compulsory retirement of judges is not new in this country (Shartel, 1930). As early as 1856 the Connecticut Constitution was amended to require that judges leave the bench when they reached age seventy. By 1936 constitutions in five other states had similar provisions and by 1961, twenty-two states had constitutional or statutory provisions for compulsory retirement (Winters, 1961).

Opponents argued that mandatory retirement requires many able and productive judges to leave the bench while they are still able to make substantial contributions to the judicial system. They point to such great judges as Holmes and Brandeis whose productivity extended well beyond most mandatory limits. To them a more sensible way to handle the problem is to rely on judicial performance commissions to determine when a judge is no longer competent to serve.

Proponents, on the other hand, argue that mandatory retirement is necessary to insure that the judicial system is composed of judges with the highest mental and physical qualifications. They favor this approach in order to escape the difficulty of passing judgment in individual cases. A compulsory retirement age makes the process of elimination simple and impersonal. Proponents realize that there will be some loss of competent personnel but argue that this must be weighed against the advantages of easily ridding the bench of incompetent judges. To mitigate the sometimes harsh ramifications of compulsory retirement, proponents advocate establishing a pool of supernumerary judges who may be called into service when caseloads become delayed or emergencies arise.

In recent years most of the commissions and advisory groups investigating this subject have recommended that states adopt mandatory retirement provisions. The American Bar Association has been very explicit and has declared that retirement should be at age seventy (ABA Standards). In its standards the Association states that this guideline should be linked to a provision for recalling retired judges into active service. It recommends that the term of such an appointee be not more than one year, but with an option to renew.

Today, thirty-three states, the District of Columbia, and Puerto Rico have mandatory retirement provisions (Pyne). In twenty-three states, the District of Columbia and Puerto Rico, judges must retire at age seventy. In North Carolina and Utah, trial judges must retire at age seventy and appellate judges at age seventy-two. In four states all judges must now retire at age seventy-two and in a like number of states the mandatory age is

seventy-five. Only Indiana does not allow judges to be recalled to serve part-time or temporarily after mandatory retirement.

In Alabama, Arizona, Maine and Montana, judges are allowed to continue in office after the prescribed retirement age but, if they do, they forfeit their retirement pensions. Judges in California receive substantially reduced benefits if they do not retire by age seventy.

Recently there have been challenges to mandatory retirement provisions in Illinois, Missouri, and Pennsylvania. In each instance, judges have attacked the statutes as being violative of the federal constitution. Courts in Illinois (*Trafelet v. Thompson*, 594 F.2d 623 (1979) and Missouri (*O'Neil v. Baine*, 568 S.W.2d 761 (1978)) held that the statutes did not violate the due process or equal protection clauses of the Fourteenth Amendment. Recently, the Third Circuit Court of Appeals overturned a decision of the District Court for the Eastern District of Pennsylvania (*Malmed v. Thornburgh*, 48 U.S.L.W. 2262) which had held that a mandatory retirement statute violates the Fourteenth Amendment.

Judicial Education and Training

VI

Ernst John Watts*

I. Early History

The late Justice Tom C. Clark of the Supreme Court of the United States created the National Conference of State Trial Judges in 1957 when he was chairman of the Section of Judicial Administration. So successful were the seminars for state judges of general jurisdiction sponsored by the conference that in 1961, the American Bar Association joined with the American Judicature Society and the Institute of Judicial Administration in organizing the Joint Committee for the Effective Administration of Justice headed by Justice Clark as chairman and Albert E. Jenner, Jr., of Chicago as vice-chairman. The Joint Committee's seminars met with such approval over a three-year period and fulfilled such a vast educational need among the nation's judiciary that the National College of State Trial Judges was created in 1963, again under the leadership of Justice Clark, with funding provided by the W. K. Kellogg Foundation. The original purpose of educating judges was "to improve the administration of justice," and this has remained the goal of the Judicial College since its inception. In 1964 the first session was held in Boulder, Colorado, with Ernest C. Friesen, Jr., as dean. In 1965, a second four-week session was conducted with Judge Frank J. Murray of Massachusetts serving as dean. Judge Murray, who served for many years on the faculty, became chairman of the board of directors when Justice Clark retired, and continued until 1980. In September of 1965, with a ten-year grant from the Max C. Fleischmann Foundation, the Judicial College was moved to its permanent academic home on the University of Nevada-Reno campus. At this time Judge Laurance M. Hyde, Jr., of Missouri became dean and served through 1973. Judge Ernst John Watts, Wisconsin, took over the leadership of the College when he was appointed dean in 1974. Judge Watts first attended

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the College as a participant in 1965, returned in 1968 as a faculty adviser and in 1969 became a member of the faculty.

II. The National Judicial College

The growth of the National College of State Trial Judges has been exceptional. The College became a separate, nonprofit Nevada corporation affiliated with the American Bar Association on January 1, 1978, and adopted the name "The National Judicial College." Since the first month-long session attended by eighty-three judges in 1964, the College has continued upward expansion, both in the number of participants and types of courses offered. Graduate and specialty courses were introduced in the early 1970s. In 1974, the concept of judicial education and training as a career process was instituted. The acceptance of career education by judges is seen in the ever-increasing enrollments in College sessions.

Three semesters—spring, summer and fall—were established in course scheduling to better accommodate the convenience of the judiciary and improve their calendaring efficiency. The concept provides that a judge attend a general session early in his career to facilitate the transition from lawyer to judge. A judge should then return (on a state-administered basis) for intensive graduate and specialty sessions on traditional subjects such as criminal law, sentencing and evidence; or for instruction in developments of such specialized litigation areas as professional malpractice, equitable remedies, alcohol and drugs, probate, family and traffic court proceedings.

An important innovation instituted by the College in 1975 was the scheduling of consecutive one-week courses, which assure that maximum benefit is derived from each dollar available for career judicial education. Savings in travel expense and lower tuition enable judges to participate in more sessions, thus expanding their ability to contribute to the efficient administration of justice in this country.

As of 1981, the largest attendance for a single year was reached in 1979 as 1,537 judges attended a total of forty resident sessions. The Judicial College has issued 11,768 Certificates of Completion for resident sessions in the seventeen-year history through 1980. In the first ten years of the College, 3,183 certificates were issued. In the six years, 1974–1979, the number of judges attending increased dramatically, with the College issuing 7,152 certificates. Participants represented the following judicial categories: state judges from general and special jurisdictions; nonlawyers; District of Columbia judges; military judges; judges from commonwealths, possessions and territories; foreign judges; Indian Tribal Court judges; federal judges; appellate judges; court personnel; and administrative law judges.

The growth in the institution can be attributed to many things; however, it is felt that a permanent academic facility with classrooms, auditorium and administrative office, along with the law library, containing approximately 50,000 volumes, contributed to the growth. Both of these were made possible by grant funds from the Max C. Fleischmann Foundation. With the classroom space available on a year-round basis, the next step was to provide living accommodations for judges and their families at a reasonable rate. Again, it was the Fleischmann Foundation that provided the funds through a grant to the University of Nevada-Reno to purchase the College Inn. This seven-story facility serves as an adult education center for the university, the Judicial College and the Juvenile College.

In addition, funding and funders of the Judicial College have increased. From the initial two foundations (Kellogg and Fleischmann), twenty-eight private foundations and corporations, along with many individuals, will provide funds in 1980.

Resident sessions, ranging in duration from one to four weeks, commence on Sunday afternoon and conclude on the final Friday at 11 A.M. Participants attend a minimum of thirty-two hours per week which are divided, depending on the goals of the course, into classroom presentations (lectures, panels, demonstrations, workshops, etc.) and group discussion periods, during which the judges meet in small groups of eight to ten to discuss the issues presented in class or problems previously assigned to them. The faculty is composed of experienced judges, professors, attorneys and experts in related fields who volunteer their services toward the improvement of their own profession and the administration of justice. This contribution of time, if paid at the current rate allowed by LEAA, amounts to a half-million dollars a year. When the sixteen-year contribution was calculated, it came to more than $5 million.

Throughout all its educational endeavors, the College is guided by four principal objectives. First, imparting of knowledge. This means providing judges with the latest trends in the law, the current significant cases in criminal and civil areas of likely judicial concern, statutory developments of widespread impact (e.g., the federal rules of evidence)—in short, an updating of a previous legal education. Second, improving skills and techniques to be applied in and out of the courtroom, and upgrading the actual performance level in the art of judicial craftsmanship so that litigation can flow smoothly and expeditiously with reduced delay and congestion. Third, establishing values or standards in the performance of judicial functions by making available to the judge the most up-to-date thinking of what standards of judicial conduct and procedure are to be applied in resolving difficult and complex legal and social issues as, for example, the ABA Standards for Judicial Administration, the ABA Revised Standards for Criminal Justice and the IJA–ABA Standards for Juvenile Justice. And fourth, sensitizing judges to an understanding of the importance of their responsibilities and impact on society, as well as an awareness of their place in the scheme of democratic government.

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Since 1965, the College has conducted more than 300 extension programs for states and regions in association with state supreme courts, judicial organizations and law schools, with 18,337 participants attending. In addition to conducting extension programs, The National Judicial College continues its support and assistance not only to individual judges, but also to related organizations and state programs.

Special and innovative programs with other disciplines related to the judicial processes are conducted. Since their inception in 1975, twelve programs have been conducted at the College with such groups as news media personnel and bar leaders. In 1979, twenty-two representatives from nineteen nations of the United Nations met to prepare for world discussion the topic "Juvenile Justice: Before and after the Onset of Delinquency." It was the third time the United Nations and the National Judicial College have cosponsored programs. A National Seminar on Small Claims Courts to consider minor dispute resolution methods was conducted for judges from forty-six states in May of 1980 in cosponsorship with the National Conference of Special Courts Judges of the Judicial Administration Division.

The fourth category of substantial College involvement relates to other judicial and legal programs with such organizations as: civic clubs, the Association of Trial Lawyers of America, the National American Indian Court Judges Association, and the Western Pacific Mililtary Law Seminar. Since 1975, the College has supported forty-eight such programs, attended by 3,601 participants.

III. Other National Judicial Education

Other national judicial education is available. At the appellate level, the Institute of Judicial Administration commenced its summer training sessions in 1956 at New York University. These seminars have been attended by over 900 appellate judges since its inception. They were the catalytic agent for other programs for appellate judges, which include the Appellate Judges' Seminar Series sponsored by the Appellate Judges Conference of the American Bar Association. This series, now in its twelfth year, provides continuing judicial education for the nation's appellate judiciary designed to stimulate repeated attendance. The Appellate Judges Conference established in the summer of 1980 an LL.M. program for appellate judges at the University of Virginia Law School. There is also the Legal Writing Program for Appellate Court Judges given by the American Academy at Boulder, Colorado, now in its fifth year.

Specialized judge training is provided by the National College of Juvenile Justice, which is the training arm of the National Council of Juvenile and Family Court Judges, located at the University of Nevada-Reno.

Also, the National College of Probate Judges holds annual conferences and offers an annual one-week course in joint sponsorship with the National Judicial College.

The Institute for Court Management, headquartered in Denver, Colorado, was created in 1970 to develop and present professional training for administrators and judge-administrators. Its mission is to upgrade the capabilities of those employed by the courts.

Training for the Federal Judiciary is provided by The Federal Judicial Center. Training for nonlawyer judges is provided in those states where they exist. (See chapter 14 D. Nonlawyer justices of the peace are also compelled to undergo training upon appointment or election, see chapter 14 C.)

IV. State Judicial Education

When The National Judicial College moved to the University of Nevada, it assumed the responsibility for state and regional seminars. It has always been the College policy to encourage state judicial conferences to take over their own in-state judicial education and training programs. This policy has met with success, and as the movement for judicial education matured, in addition to state judicial education organizations accepting this responsibility, individual state judicial colleges were organized and began to undertake the basic orientation of judges within their states. The largest and oldest is the California Center for Judicial Education and Research located at Berkeley, California. This program is an outgrowth of the Conference of California Judges which presented its first session in 1967. The center offers a basic two-week course and in 1980 introduced a graduate curriculum. Another early leader in judicial education was Wisconsin, led by Judge Watts until he became dean at the Judicial College in 1974. Wisconsin offers well-planned, comprehensive basic courses for new judges. Other state judicial colleges, which are institutionalized as operating entities, are found in Indiana, New Jersey, Ohio, Alabama and Florida; and Michigan has the equivalent of a judicial college.

Most of these judicial colleges are primarily concerned with educating new judges, although some are enlarging their curricula to meet the needs of experienced judges. All utilize judges as instructors, supplemented by authorities from other fields. The subject matter dealt with is necessarily closely related to state procedures and practices, but the topics covered have expanded substantially in recent years. A complete picture of state judicial colleges, which offer an extraordinary variety of subjects and utilize innovative educational methods, would require space beyond that allowed for this presentation. Moreover, the types of organizations and their relationship to the judiciary hierarchy differ considerably; some are

directly connected to the supreme courts of the states and others are within the court administrator's offices.

Even states without judicial colleges, such as Washington, North and South Dakota, New York, Maryland, Georgia and others, have employed training offices for their court systems and offer seminars periodically for their state judges.

State judicial educators have joined in a national organization called the National Association of State Judicial Educators, which meets annually to exchange information on skills, techniques and methods of conducting courses and seminars, determining needs assessments, use of visual aids and other technology, and trends and developments in judicial education.

V. Unresolved Problems In Judicial Education

The relationship between national and state judicial education has yet to be institutionalized. Though there has been discussion among chief justices and other judges, judicial educators, court administrators and state colleges, a coordinated effort is needed to bring about the most effective career judicial education for the judges of this nation.

To have the greatest impact, judges must have both state and national judicial education. State rules, procedures and law can only be taught at the state level. However, it is only through national programs that a judge can gain a broader perspective of commonly encountered problems.

Not all states have this outlook, as a few refuse to commit even a small percentage of their funding to national judicial education. Furthermore, in most states, judges are compelled to use their personal vacation time to attend national programs, and some states have decreed that their judges may only leave the state for short periods, such as five days. Such limitations definitely limit access by judges to the invaluable resources and deeper challenges provided by participation in national judicial education programs.

Leadership is required, and in more recent times, it has been forthcoming in several states by providing motivation, initiative, time and support to cultivate the climate required to maintain a viable, progressive judiciary.

The concept of state-administered judicial education is still not an actuality. This would involve judges attending a progression of courses, beginning with state orientation training, followed by periodic attendance at the national programs to acquire specialized skills and become aware of new trends and developments. In a few states, attempts have been made to approach the realization of administered judicial education, but much remains to be done before most of the states are able to claim that they adhere to the principle. In some states, notably Minnesota, Iowa and Wisconsin, by supreme court rule, mandatory judicial

education, consisting of a stated number of hours each year, was instituted in the mid-seventies. Recently, other states such as South Carolina and New Hampshire have ordered their judges to attend continuing judicial education and training programs. The requirements differ in terms of the number of hours that must be taken. If a state does mandate judicial education, the programs in which judges enroll should be viewed as part of an orderly progression of courses associated with administered judicial education, so that judges are not merely attending random courses to complete their credit requirements, but are truly working toward career development within the judicial profession.

Consistent, adequate financial support, both state and federal, is lacking. Unlike other countries, particularly Japan and continental countries, where a definite commitment to judicial training exists, the United States has never adopted a policy of providing the necessary funding for training for the third branch of government. An elite, trained judiciary as exists in many countries is not recommended, but the independent American judiciary should be provided with the resources necessary for self-improvement in the obligations of its office.

Until a similar commitment is achieved here, our judiciary is unable to become the beneficiary of career education. Eventually, if adequate funding for career education and training were established, true degree granting could become a reality. This has long been an aspiration of The National Judicial College.

VI. Conclusion

Education is the course to follow to increase professionalism. However, this requires change, not simply for the sake of change, but change that adds to the quality of life, to professionalism and to justice. Career education for judges on an organized and institutionalized basis, state and national, has yet to reach its full potential. Great growth has taken place since Justice Clark's initial inspiration, but continuance of the growth of career judicial education depends on the states providing the judiciary with motivation, initiative, time and support in the coming years.

The improvement of the administration of justice through the performance of judicial personnel will be directly related to the support given to career judicial education and training.

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Use of Judicial Councils and Judicial Conferences

VII

Robert B. McKay*

The concept of justice is as old as the written word. Plato, Aristotle, the various authors of the Bible and Shakespeare were all deeply concerned with notions of right and wrong and the attainment of justice.

The concept of the administration of justice is, at least in a formal sense, much more recent; but surely the ends of justice have always required some means of implementation, which we now call judicial administration. Concededly, however, it was not until relatively modern times that courts, lawyers and the public acknowledged that the fair and efficient delivery of justice requires planning and management. Judicial administration, as a recognized discipline, based on specialized training in its own technology, is almost entirely a product of the twentieth century. Yet even today, despite the general acceptance of the central importance to the judicial function of planning and management, there is considerable divergence of opinion as to the best means of achieving optimal results. The fifty state court systems and the federal judiciary have experimented with a number of different techniques, rejecting some, modifying others and inventing still different models; and the variety of current answers remains substantial. It is the purpose of this chapter to review the history and utility of those aspects of judicial administration that relied in some substantial part on judicial councils and judicial conferences.

The first thing that must be said is that there is no agreed-upon vocabulary. "Judicial council" and "judicial conference" are often used interchangeably to refer to at least three generically different structures (and there are further variations within each class). One kind of council (or conference) is a body that includes judges, lawyers, and sometimes legis-

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lators, media representatives and lay members of the public. Most of the early state judicial councils were originally so constituted. Another kind of council (or conference) is a body consisting of all the judges of the particular court (ordinarily appellate). The principal current example is the judicial council of each United States court of appeals, consisting of all the active judges of the circuit. The third variation is a body composed of selected representatives of the relevant judicial system. The prime example is the Judicial Conference of the United States, which consists of the Chief Justice of the United States (as chairman), the chief judge and one district judge from each of the circuits and the chief judge of the specialized courts.

Whatever the particular arrangement, the purpose must be in each instance to find the best arrangement for the development of policy through planning and to determine the most effective means of implementation in cooperation with the relevant legislative body. The central point is that all these judicial councils, whatever the specific format, are judge-centered. The original impetus for the state judicial councils came during a time in the early decades of the twentieth century when the judges themselves made nearly all the crucial decisions about court management. It was not until near the middle of the twentieth century that court management, under the direction of trained specialists who are not judges, emerged to its present dominant position. In light of this development, it is not surprising that most states have abandoned or downgraded their judicial councils in favor of increased reliance on nonjudicial, professional court administrators,[1] although in many states judges continue to meet for the discussion of common problems, often with lawyers and other individuals interested in the administration of justice. In a few states, as will be noted later, judicial councils continue to be active and effective. Meanwhile, the federal judiciary has gradually strengthened its judicial councils at the circuit level and the Judicial Conference of the United States (while at the same time vastly stepping up the infrastructure of professional administrators in support of the judicial policy planning function). The following comments will trace in broad outline the course of those developments and their implications for the future of judicial administration.[2]

1. The role of the professional court manager is discussed in Chapter 3 of this volume, Court Administration.

2. In this summary statement I have relied substantially on the following principal sources: R. Fries and S. Trost, The Status of Judicial Councils in Our Bicentennial Year (1976, IJA Study); R. Wheeler and H. Whitcomb, Judicial Administration: Text and Readings (1977); Wheeler and Jackson, *Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions*, 2 Just. Sys. J. 121 (1976); Winters, *The Judicial Council Movement*, 59 Jud. 303 (1976).

The Origins of the Judicial Council Movement

Three quarters of a century ago Roscoe Pound identified for his American Bar Association audience "The Causes of Popular Dissatisfaction with the Administration of Justice." At that time the notion that courts might be improved through planning and management had scarcely been considered, and the American Bar Association delegates were not moved to immediate action by Pound's analysis of archaic court procedure and organization. For others, however, the speech defined a mission of judicial reform, and within ten years results were visible: judges and others met in New Jersey and Wisconsin to discuss ways to modernize the court system. The American Judicature Society, which was to become a major proponent of state judicial councils, was established in 1913. In 1919 a Massachusetts statute created a commission to investigate the judicial system and to recommend changes. The resulting statute in 1924 created a judicial council:

> for the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and results produced by that system. . .

and directed the council to report

> upon the work of the various branches of the judicial system [and to] submit for the consideration of the justices of the various courts such suggestions . . . as it may deem advisable.[3]

Even before the Massachusetts legislation became effective, Ohio and Oregon adopted similar provisions, and the Massachusetts statute became the working model for a number of other states. By 1929 there were eighteen state judicial councils, from New England to Texas and from California to Virginia. Representatives of nine councils met in Memphis in 1929 to create the National Conference of Judicial Councils. Arthur T. Vanderbilt became the first chairman, and Roscoe Pound the director.

The purposes of the National Conference were to support and coordinate the work of the state judicial councils, which were in general isolated within their states, and to promote the establishment of additional councils. The Conference was initially successful in both objectives. By 1940 councils were functioning in thirty states, and twenty sent delegates to the national meeting in Washington.

Although 1940 may have marked the peak of enthusiasm for the councils, the number of councils continued to grow. Eight councils were created in the 1940s, nine in the 1950s, three in the 1960s and four in the 1970s. In many of the states, however, this development was more facade than substance. In 1941 no more than twelve could be considered "healthy"

3. Mass. Gen. Laws, § 221, 134A (1924).

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in terms of legislative appropriations and council activity. In that year only New York and California had appropriations in excess of $10,000 a year ($60,000 and $53,000 respectively), and the median appropriation was less than $3,000. With that kind of money it is not surprising that the importance of the councils diminished (or never gained much momentum). After 1940 a number of the judicial councils established prior to that date were either disbanded altogether or declined into a genteel state of desuetude. By 1976, when the Institute of Judicial Administration survey of judicial councils was undertaken, thirty-eight responded to the inquiry; but clearly most of them existed more on paper than at the center of policy planning.

Meanwhile, for a number of years the National Conference of Judicial Councils, although ultimately unsuccessful in its aim to extend the number and influence of the councils, made a notable contribution in the publication of a number of useful volumes that paved the way to the acceptance of judicial administration as an important adjunct of the search for justice. The Judicial Council Series, the brainchild of Arthur T. Vanderbilt, were the following: Lester B. Orfield, *Criminal Appeals in America* (1939); Roscoe Pound, *Organization of Courts* (1940); Roscoe Pound, *Appellate Procedure in Civil Cases* (1941); George Warren, *Traffic Courts* (1942); Evan Haynes, *The Selection and Tenure of Judges* (1944); Lester B. Orfield, *Criminal Procedure from Arrest to Appeal* (1947); Arthur T. Vanderbilt, *Minimum Standards of Judicial Administration* (1949); Robert Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1952); Delmar Karlen, *Appellate Courts in the United States and England* (1963).[4]

The most significant of these volumes was Vanderbilt's *Minimum Standards of Judicial Administration* which, like Pound's speech two generations earlier, set the basic standards of judicial administration to upgrade justice in the courts consistent with the needs of the day. The *Minimum Standards* volume has set a pattern for court reform in every state.

The National Conference of Judicial Councils also published a useful directory of member councils in 1937 and in 1953. In each year between 1939 and 1942 the Conference published Handbooks that included reports of the activities of the Conference and the individual state councils. Each Handbook also presented substantive articles, such as a model act for the establishment of judicial councils, a guide to the Federal Rules of Civil Procedure and an article by the Director of the Administrative Office of the United States Courts on the feasibility of similar offices in the states.

4. The new generation of books on judicial administration, which has clearly benefited from the earlier series, includes such worthy successors as R. ALDISERT, THE JUDICIAL PROCESS: READINGS, MATERIALS AND CASES (1976) and D. NELSON, CASES ON JUDICIAL ADMINISTRATION AND THE ADMINISTRATION OF JUSTICE (1974).

Largely inactive in recent years, the National Conference of Judicial Councils continues its annual luncheon, held in Washington most years since 1940 in conjunction with the annual meeting of the American Law Institute. Always well represented by Justices of the Supreme Court of the United States (and ordinarily held in the conference rooms of the Supreme Court), the luncheon originated as a tribute to activists in the judicial council movement. In more recent years it has served to honor notables of the bench and bar generally.

State Judicial Councils

Some believe that the state judicial council movement was a failure, but that judgment fails to take sufficient account of the very real contributions of the councils. The fact is that they performed a valuable, perhaps indispensable, role in the transition from courts without significant administrative support to a time when judges and judicial administration experts have learned to work together in useful collaboration. The significance of this function was well stated by Justice Harlan Stone, regretfully declining an invitation to the 1940 luncheon:

> Most judicial reforms fail, or are disappointing, because they are not based on adequate study of the conditions in which they are expected to operate or because they are adopted without adequate comparison with the experiences with similar attempts, or finally because they lack the support of the moral force of the community. I know no better system to overcome these difficulties than that of local councils, capable of making local studies and gaining the moral support of the Bar and public in their communities, and organized into a national conference for the comparative study of local experience.

In addition, by providing a measure of citizen participation (in most cases), councils served to ameliorate "popular dissatisfaction with the administration of justice." The usefulness of citizen participation in the process was noted by Chief Justice Burger when still a judge of the United States Court of Appeals for the District of Columbia Circuit:

> I do not believe judges alone can make the improvements in the judicial process which are demanded by the new burdens placed on the courts in the past 30 years or more. Judges generally, and perhaps life tenured judges in particular, like all human beings with security, tend to like things as they are.[5]

The advent of judicial councils was accompanied by much fanfare and great expectations. The American Judicature Society proclaimed the

5. W. Burger, Dormant Powers of the Circuit Judicial Council 6-7, (June 16-17, 1958), speech to the Attorney General's Conference on Court Congestion and Delay, Washington, D.C., (original draft in I.J.A. library). Although he spoke here of United States Circuit Judicial Conferences, the point is equally applicable to state judicial councils, which pointed the way to collaboration between judges and others on matters of judicial administration.

coming of "the judicial council era" in 1925; Roscoe Pound told the National Conference fourteen years later that "the future of the law in the United States may be in your hands." Friends of the judicial council movement acknowledge that these claims were exaggerations. But the observation of less sympathetic observers that the movement was a failure also overstates their case. Moreover, a few of the judicial councils continue to be effective in performing their originally intended functions. The California Judicial Council, created in 1926 by constitutional amendment, is the governing body for the entire state judicial system, with power to promulgate rules of court procedure and administrative regulations. Through its network of eleven advisory committees, the council formulates recommendations to the legislature. It is composed of twenty-one members: fifteen judges, four lawyers and two legislators. It is staffed by an administrative director and a substantial support staff.[6]

The creators of judicial councils were not primarily concerned with the preeminence of judicial councils. Their motive was to achieve basic changes in the judicial system in the United States. It may not be very important that the ambitious goals of the councils were never fully achieved. The newer institutions that have replaced the councils as the prime instruments of judicial administration inherited the traditions of the councils that in large part they replaced. The point can be made by looking at the career of the councils' staunchest champion, Arthur T. Vanderbilt. During his tenure as Chairman of the National Conference on Judicial Councils, he was also President of the American Bar Association, in which capacity he encouraged the American Bar Association Section on Judicial Administration to take an active role in court reform. Later, as Chief Justice of the New Jersey Supreme Court, he introduced the first unitary court system (as advocated four decades earlier by Roscoe Pound), and gave significant authority to one of the nation's first state court administrators. Finally, while Chief Justice of New Jersey, Vanderbilt established the Institute of Judicial Administration, which has been a leading force in the establishment of unitary court systems, the office of court administrators, minimum standards for criminal justice, juvenile justice standards and an ongoing program of judicial education.

Considering the integration of judicial councils into the broader movement for court reform, the growth of organizations that fulfilled the functions originally envisioned for councils must be taken as a measure of the judicial council movement's success. All states now have a judicial council, a judicial conference or some parallel body, commonly charged with the obligation to study the organization, rules and methods of practice and procedure in the state, including recommendations for improvement. Although there is no uniform structure for such bodies, the very differences in form and function testify to the vitality of the demand for more effective judicial administration in the United States. Far from failing, the councils have provided continuity to efforts for court reform in many instances and transition to other vehicles of court administration in other cases.[7]

6. R. Kleps, *State Court Modernization in the 1970s: Forces for Reform in California*, 55 JUD. 292 (1972). For another example of a council that continues to be active, see 53 Kansas Judicial Council Bulletin (1979).

Federal Judicial Councils and Conferences

Meanwhile, as state judicial councils experienced their various ups and downs—and maybes—the experience in the federal judicial system was quite different, even if not reverse of the state court experience. Similar influences, during similar times, affected the administration of justice in the federal judiciary. As Carl Baar has observed:

> The most important change in the judicial branch of the federal government during the past half century has been the creation of a number of administrative structures linked to, but not part of, the federal courts. The Judicial Conference of the United States (and its standing committees), the Administrative Office of the United States Courts, and the Federal Judicial Center develop, make, and implement policies which can affect not only the operations but also the outcome of cases brought before the federal courts. . . .
>
> While the judicial administrative structures in many states and localities are often dominated by professional administrators with no experience as judges (or, often, as lawyers), the Judicial Conference of the United States consists entirely of judges. Each of its standing committees is chaired by a judge and is made up almost entirely of judges. As a result, federal judges have maintained their influence over the judicial branch even though the number of legal tasks allocated to administrative structures has increased. However, a number of changes have taken place. The style of judicial branch operations has been altered. Partnership arrangements have been cultivated with other branches of government, deemphasizing the isolation of the judiciary, and advisory committees have replaced judicial proceedings as forums for considering and creating rules of procedure. The notion of the court-system as an organization has changed: Bureaucratic coordination has become more important, supplanting professionalism as a basis for court system operation. And these developments have had consequences for the distribution of power within the judicial branch: Influence over judicial administrative policy making is increasingly centralized under the chief justice of the United States, and the Supreme Court's influence over the federal court system is declining.[8]

It was not always so. The federal courts, which now have a substantial array of management support services at every level, in the early years of

7. National Center for State Courts—National Court Statistics Project, *State Court Organizations, 1980*, Washington, D.C., U.S. Department of Justice, Bureau of Justice Statistics, 1981.

8. Baar, *Federal Judicial Administration: Political Strategies and Organizational Change*, in R. WHEELER AND H. WHITCOMB, JUDICIAL ADMINISTRATION: TEXT AND READINGS 97-98 (1977).

the century were largely devoid of any administrative assistance beyond the most mechanical. The Pound call for reform was no less necessary in the federal judiciary than in the states. In 1922, due largely to the efforts of Chief Justice Taft, a federal statute was enacted providing for an annual conference of the senior circuit judges to be called and presided over by the Chief Justice of the United States. This conference—formerly the Judicial Conference of Administrative Judges, now the Judicial Conference of the United States—was to make a survey of the business of the federal courts and to determine what courts might be in need of more judges, and which courts might be able to assign some judges temporarily to other courts. The act also prescribed the procedure for the temporary assignment of judges from one district to another. The statute gave to the Judicial Conference general power to "submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business." Under this provision, the Conference has made recommendations to the courts in regard to pretrial conferences and selection of jurors; matters of administration, such as the qualifications of probation officers and the appointment of United States magistrates; and matters of legislation affecting the courts, including diversity jurisdiction, judicial impact statements and methods for improving the competence of trial advocates in the federal courts.

The Administrative Office Act of 1939 (28 U.S.C. §§ 331-33) provided for judicial conferences in the several circuits once a year and for a judicial council in each circuit. Each circuit judicial conference consists of all the circuit and district judges of the circuit plus representatives of the bar selected in a manner determined by the court of appeals of each circuit. In all the circuits the judges hold at least one executive session at which matters relating to the internal affairs of the courts are discussed.

More significantly for the administration of justice, the 1939 Act imposed the burden of supervising individual federal courts on the judicial councils of each circuit. The statute gives these councils the authority "to make all necessary orders for the effective and expeditious administration of the business of the courts" within their circuits, and the district courts are directed to comply with their orders. Thus, the authority of the circuit judicial councils is mandatory in contrast to that of the circuit judicial conferences, which is only admonitory. In 1980 the circuit judicial councils were given increased authority over, and responsibility for, the discipline of judges within the circuit. Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (P.L. No. 96-458), any person may file a written complaint that a federal circuit, district, bankruptcy judge, or magistrate acted in a prejudicial manner or is physically or otherwise incapacitated. Such complaints will be filed with the clerk of the court of appeals for the judicial circuit in which the judge serves, with copies sent to the chief judge of the circuit and to the

person involved. If the complaint is not dismissed under articles specified in the statute, the chief judge of the circuit will review it or may appoint a special review committee consisting of district and circuit judges to investigate the complaints. The Act also expands the membership of the judicial councils to include district as well as circuit judges. This review committee will have the authority to make written findings and recommend appropriate action to the circuit council. The circuit council may also conduct an additional investigation and take any appropriate steps, including public or private reprimand, temporary suspension of case assignments, a request for voluntary retirement, or certification of disability under the existing statute, Title 28 Section 372(B). In serious cases the matter may be referred to the Judicial Conference for review. In any instance in which the Conference believes that impeachable conduct may be involved, it is authorized to forward materials to the House of Representatives for consideration and appropriate action under Article I of the Constitution.

The Judicial Conference of the United States is quite different in the reach of its authority than the circuit conferences. Within the judicial branch, it has authority over the assignment of judges across circuits, the distribution of magistrates and bankruptcy judges, the utilization of jurors in federal courts and many other matters. While some matters can only be decided by Congress, the Conference is a potent voice on all matters affecting the judicial branch, including matters of financing the courts and legislation affecting the judicial system. One significant action of the Judicial Conference of the United States was its push for the establishment of the Federal Judicial Center, which came into existence in 1967, recommendations of the Conference having formed the background for the initial proposal by the President to the Congress that the Center be established. The effectiveness of the Center in the improvement of judicial administration is demonstrated by its conduct of and stimulation of significant research into the operation of the federal courts; in the development of recommendations to the Judicial Conference; and in the conduct of training programs for personnel of the judicial branch of the government.

During the 1970s several other organizations have been established, each with the avowed purpose of improving the administration of justice. The National Center for State Courts, which solicits membership on the part of each state court system, has in less than ten years established itself as a major resource for fact finding, collation of data and survey of recommendations for state court activity. The Institute for Court Management has studied the problems of judicial administration in a series of reports and through its publication, *The Justice System Journal*. Even more important has been its principal activity, the training of court administrators, a cadre now operating in every state and numbering more

than 500. At the same time, the Institute of Judicial Administration has continued to offer its Appellate Judges Seminars each year, and at least half a dozen other organizations provide continuing judicial education to selected groups of judges. (For details, see Chapter 6, Judicial Education.) Meanwhile, the National Judicial College has provided initial training or continuing judicial education for thousands of state judges, while the Federal Judicial Center has provided similar services to the smaller number of judges in the federal judiciary. The American Judicature Society (no longer an avowed defender of the judicial councils on the original model), has continued to advocate various modifications of the judicial system for the promotion of greater justice and efficiency in the courts.

The American Bar Association has become much more active in the field of judicial administration. Its Judicial Administration Division supported the establishment of the Conference of Chief Justices and the National Judicial College. The Division now includes no fewer than seven conferences and committees involved with the administration of justice: Appellate Judges' Conference, Conference of Administrative Law Judges, National Conference of Federal Trial Judges, National Conference of Special Court Judges, National Conference of State Trial Judges, Lawyers Conference and Committee on Traffic Court Program.

A final development of special interest in a federal judicial system, and once more an outgrowth of the original judicial council movement, is the creation since 1970 of state-federal judicial councils in more than forty states. Their useful purpose is to stimulate cooperation between state and federal judges on scheduling court terms, coordinating jury calls and other common problems.[9]

Conclusion

Chief Justice Vanderbilt has been proved right when he said that judicial administration is no sport for the short-winded. The path to judicial administration reform has been more tortuous and difficult than was contemplated in the original flush of enthusiasm for judicial councils. If that original promise of reform has not been fulfilled in precisely the way once contemplated, at least we should be grateful that the judicial councils showed the way to the next (and probably still not final) path to improvement in the administration of justice in the United States.

9. W. Burger, End-of-the-Year Statement, 1980 at 1 (released December 29, 1980).