JUSTICE IN THE STATES

Addresses and Papers of the National Conference on the Judiciary
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To no one will we sell, to no one will we deny or delay, right or justice.

MAGNA CARTA, ~~1229~~ 1215

PREFACE

President Nixon told this conference that we live in a time "when history is made by those who are willing to reform and rebuild our institutions—and that can only be accomplished by those who respect the law."

Those attending this conference—and they included such distinguished persons as Chief Justice Burger and the Honorable Tom C. Clark, who served as chairman of the conference, as well as state chief justices and attorneys general, legal scholars, judges and lawyers—respect the law.

And their presence at this conference indicated their concern to improve our courts, and, I believe, a willingness to rebuild and reform them.

One of the most challenging proposals at the conference was put forward by Chief Justice Burger and endorsed by President Nixon. He called for establishment of a National Center for State Courts, which would provide research and information on the problems of state courts. It would follow the pattern of the very successful Federal Judicial Center headed by former Justice Clark.

I am happy to say that the proposal for a National Center for State Courts has already become a reality, and Chief Justice Burger was at the Center's dedication to launch it on what I am sure will be an illustrious course of service. The Center was made possible—as was this conference—by funds from the Law Enforcement Assistance Administration, part of the Department of Justice and an agency which is in the forefront of efforts for court improvement.

But the establishment of the National Center for State Courts is not the end of this conference—it is only the beginning, the first item on the consensus statement of the conference. In the pages to follow, those who are concerned with improving our courts will find much food for thought—and much reason for action.

Let me borrow a little wisdom from Chief Justice Burger and remind those who search here for enlightenment and encouragement on the difficult task of court reform that even "the noblest

legal principles will be sterile and meaningless if they cannot be made to work."

And let me add another reminder, which the wise judge keeps always before him—that freedom cannot exist in the letter of the law but only in the spirit of the people.

John N. Mitchell
Attorney General
of the United States

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INTRODUCTION

by

TOM C. CLARK

Associate Justice, Supreme Court of the United States (Retired)

Chairman, National Conference on the Judiciary

"What worries many thoughtful men who believe the present time to be particularly perilous for the nation is that more and more citizens today are coming to disbelieve the promise of justice and are turning to violent dissent, advocacy of unconstitutional repression, or mindless lawlessness. They no longer believe that the system will work for them. They no longer have faith in the rule of law." [1]

This sad but true statement comes from a responsible source, the Day City Editor of the Washington Post, Leonard Downie Jr., who is the recipient of the American Bar Association Gavel Award and the Liberty Bell Award of the Federal Bar Association. The recognition was for a series of articles on the Court of General Sessions in Washington, D. C. that were published in 1966 and led to the complete reorganization of the District of Columbia courts by Congress.

This is not the first time that good men have spoken up about justice. Clarence Darrow, one who was not unacquainted with the procedures of the courts once said: "There is no such thing as justice—in or out of court." [2] At the Williamsburg Conference, the President related Learned Hand's story about Justice Holmes telling Hand that his job was not to "do justice" but "to play the game according to the rules." On one occasion, Judge Hand commented on the story,

"I have never forgotten that. I have tried to follow, though oftentimes I found that I didn't know what the rules were." [3] And William L. Prosser has now thrown in a little humor on the subject, saying that "Justice has been described as a lady who has been subject to so many miscarriages as to cast serious reflections upon her virtue." [4]

1. Downie, Justice Denied (New York, 1971), 15.
2. The New York Times—April 19, 1936, p. 24, col. 1.
3. Learned Hand, in The Spirit of Liberty (Dilliard, Ed., New York, 1960), 306–307.
4. Prosser, The Judicial Humorist (Boston, 1952) Preface p. viii.

But there are those who verily believe in justice as the great hope of man on earth. While there are those today who disbelieve its promise, down through the ages there have been those who were determined that "justice be done though the heavens fall." [5] One of these was our own Abraham Lincoln who in characteristic fashion phrased his deep feeling in two queries: "Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?" [6] And in our own time Dean Roscoe Pound held: "so venerable, so majestic is this living temple of justice, this immemorial yet ever freshly growing fabric of our common law, that the least of us is proud who may point to so much as one stone thereof and say the work of my hands is here." [7] Dean Pound, of course, realized that we suffered many injustices of justice but he had labored long and hard to eliminate them. And so had Herbert Harley, Arthur T. Vanderbilt, John J. Parker, Orie Phillips and hundreds of others. They, too, did something about it. Indeed as early as 1906 Pound observed:

> 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 to poor, and the king exhorts that the peace be kept better than has been wont, and that "men of every order readily submit * * * each to the law which is appropriate to him." The author of the apocryphal Mirror of Justices 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. 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." Starkey, in the reign of Henry VIII, says: "Everyone that can color reason maketh a stop to the best law that is beforetime devised." James I reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges." 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." In the nineteenth century the

5. Taken from the Roman aphorism: "Fiat justitia, ruat coelum".
6. First Inaugural Address.
7. 26 ABA J 800, 801 (1940.

> vehement criticism of the period of the reform movement needs to be mentioned. In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed 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.[8]

Beginning at the time of the founding in 1913 of the American Judicature Society by Herbert Lincoln Harley and somewhat later the American Law Institute [9] things began to move slowly but surely for improved court administration. And during the Presidency of Arthur T. Vanderbilt of the American Bar Association, action became more evident through the Section of Judicial Administration and Chief Judges John Parker and Orie Phillips. Later in 1952 when Vanderbilt established the Institute of Judicial Administration, the pace was quickened. The Minimum Standards of Judicial Administration were published by him a few years later, along with the initiation of the Appellate Judges Seminar at New York University; and in 1957 the Section of Judicial Administration was re-activated and the Conference of State Trial Judges created. In 1961, under the leadership of John Satterfield, President of the American Bar Association, the Joint Committee for Effective Justice was founded. From it sprang the College for State Trial Judges and later the Conference of Appellate Judges. In the meanwhile the Conference of Juvenile Court Judges, the Conference of Special Court Judges and the North American Judges Association had organized comprehensive continuing education programs for their members. The American Bar Association's distinguished Committee on Minimum Standards of Criminal Justice, under the Chairmanship of Chief Judge Edward Lumbard of the Second Federal Circuit, published its report which was adopted by the ABA in the late sixties and is now being implemented in the states. Likewise the ABA was busy in the field of professional ethics. Under the Chairmanship of Edward Wright, now President of the Association, the ABA adopted a Code of Professional Responsibility and it has been accepted *in toto* by most of the states. In 1970

8. 20 J.Amer.Jud.Soc. 178 (1936).
9. The American Law Institute, now in its 99th year, has devoted its efforts to substantive law and is pre-eminent in the field.

the ABA Special Committee on the Evaluation of Disciplinary Enforcement made its report at the annual meeting in St. Louis. It was likewise accepted and is in the process of being implemented. Finally, the National Institute for Court Management was founded by the ABA, the Institute of Judicial Administration and the American Judicature Society in 1969 and is now in its second session.

And on the federal side at least four Chief Justices of the United States—William Howard Taft, Charles Evans Hughes, Earl Warren and Warren E. Burger—have turned their attention to judicial administration during the past half century. Indeed, one of the most potent forces in the improvement of federal justice, the Judicial Conference of the United States, has grown up under these great Chiefs. It in turn has spawned the Federal Judicial Center which during the past three years has accomplished so much for the federal judicial system that there is an incessant demand for a similar Center for the States.

The sixties have been the most fruitful era for judicial improvement in our history. This historic decade experienced significant improvements in judicial administration in over a third of the states as well as the federal judiciary. The accomplishments fall into four distinct categories. First, basic court reorganization, such as unification and simplification of structure, centralization and modernization of management; the non-partisan selection, longer tenure, higher compensation and discipline and removal of state judges; the upgrading of courts of limited jurisdiction; the continuing education of judges and the training of their immediate staffs as well as those of the Clerk's offices; and, finally, the development of new techniques and procedures in adjudication. Second, the adoption of standards of criminal justice, a code of professional responsibility, tentative standards of judicial ethics and improved procedures in the enforcement of both the Code and the Standards; the creation of new criteria for sentencing and the use of sentencing councils to prevent disparity; and, finally, the development of case-aids, paraprofessional probation officers and improved techniques in parole and probation. Third, the better orientation of legal education to the needs of society and the introduction of clinical courses in the law schools and prosecutor and defender institutes, together with the use of third year law students in the courts, with supervision. Fourth, the development of a partnership between the legal profession, the courts and the public in the organization and improvement of the courts and other projects devoted to the effective administration of justice.

Thus the groundwork had been laid and the time was propitious for Linwood Holton, freshly elected Governor of Virginia and Dr. William Swindler, Professor of Law at the College of William and Mary, to utilize the annual Judicial Conference for the Commonwealth of Virginia as a springboard for the improvement of judicial administration in Virginia. A grant was obtained from the Law Enforcement Assistance Administration and, as the plans developed, the Governor became the more convinced that a national conference on effective justice at historic Williamsburg would be an even greater catalyst for the implementation of the growing national demand that the judicial system be modernized. A national committee was organized by the Governor to formulate plans for the National Conference on the Judiciary. In December 1970, as Chairman of this Committee, I extended invitations to the Chief Justice of the United States and the Chief Justices of the States, the Attorneys General and legislative leaders, as well as other officials interested in the improvement of the administration of justice. The Chief Justice of the United States accepted. The Governor extended a personal invitation to the President of the United States who did likewise. Invitations were then extended to all of the national organizations working in the field of judicial administration. A comprehensive program was organized that enlisted the support of the best talent in the area programmed, as well as various disciplines and services.

Yes, they came to Williamsburg by the hundreds, led by the President of the United States, the Chief Justice, the Attorney General, the Governor of Virginia and some forty chief judicial officers of the States and States' Attorneys General. Never were so many high executive and judicial officers gathered together in such a hallowed place on such a dedicated mission. For the first time in the history of the nation, its President threw the great weight of his high office into an organized campaign to improve the court systems of the states. To those who had long worked in those vineyards, his address was "the sweetest music this side of Heaven." The President called for a new day in court administration and pledged his wholehearted support to its attainment. And on the very next day, the Chief Justice proposed that a National Center for State Courts be organized and suggested that the Conference of Chief Justices take the lead. The President and the Attorney General applauded the proposal. As the American Bar Journal reported: "Williamsburg cradles another revolution."

In such a setting and with such participants it was but natural that a distinguished and memorable four-day conference was in the making. Well planned and executed with more precision than any conference that I have yet attended, the participants in the final session passed a resolution calling for the organization of a National Center for State Courts. Its consensus included unification of the court system of each state, criteria for the selection, tenure, compensation, retirement as well as discipline and removal of judges; more efficient use of judicial manpower, practical means for improving court dockets, calendars, procedures and techniques and, finally, the development of court improvement programs at grass root levels. Regional meetings are now being organized across the Nation to implement the findings of the National Conference.

And, in addition, I am happy to report that the suggestion of the Chief Justice of the United States that a national center be organized is bearing fruit. The Conference of Chief Justices under the leadership of its Chairman, Chief Justice Calvert, has brought into creation the National Center for State Courts which has been incorporated in the District of Columbia. The incorporators include six judges: Chief Justices Calvert, Holden and Richardson and Justices Burke, Reardon and Sharpe. The Board will be composed of twelve judges, one to be selected from three nominations from each of the following organizations: The Conference of Chief Justices, the National Conference of Appellate Judges, the National Conference of State Trial Judges, the National Conference of Metropolitan Judges, the National Conference of Special Court Judges, the North American Judges Association, the National Conference of Juvenile Judges, the American Bar Association, the American Judicature Society and the Institute of Judicial Administration. In addition the Board of Directors will select two members at large and will select the site of the Center and its staff. If nothing further came out of the National Conference on the Judiciary, it would nevertheless be historic because of the creation of this Center. Indeed, another revolution—this one in the administration of justice—had been cradled at Williamsburg.

In conclusion, let me, on behalf of the participants in the National Conference as well as thousands of others who strive to improve the judicial process—thank the President of the United States, the Chief Justice, and the Attorney General of the United States for their monumental contributions to the National Conference. In truth their participation was the sine qua non of its

success. To all Americans I say: Our President has issued a clarion call for a more effective justice. We shall not fail him. In the words of Mr. Justice Holmes:

> "To have the chance—and take it—of doing one's share in the shaping of justice, spreads over one the hush that one used to feel when one was awaiting battle. We will reach the earthworks, if we live, and if we fail we will leave our spirit in those who follow and they will not turn back * * * All is ready, bugler—blow the charge!"

PART ONE

CONFERENCE ADDRESSES

*

OPENING ADDRESS

by

RICHARD M. NIXON
President of the United States

As one who has practiced law; as one who deeply believes in the rule of law; and as one who now holds the responsibility for faithful execution of the laws of the United States, I am honored to give the opening address to this National Conference on the Judiciary.

It is fitting that you come together here in Williamsburg. Like this place, your meeting is historic. Never in the history of this Nation has there been such a gathering of distinguished men of the judicial systems of our States. I salute you all for your willingness to come to grips with the need for court reform and modernization. And I would like to salute especially the man who has been the driving force for court reform; a man whose zeal for reshaping the judicial system to the need of the times carries on the great tradition begun by Chief Justice John Marshall—the Chief Justice of the United States, Warren Burger.

I recall that when I took my bar examination in New York City a few years ago, I dwelt at some length on the wisdom of the separation of powers. My presence here today indicates in no way an erosion of that concept; as a matter of fact, I have come under precedents established by George Washington and John Adams who both spoke out for the need for judicial reform. And President Lincoln, in his first annual message to the Congress, made an observation that is strikingly current—that, in his words, "the country generally has outgrown our present judiciary system."

There is also a Lincoln story—an authentic one—that illustrates the relationship of the judicial and executive branches. When Confederate forces were advancing on Washington, President Lincoln went to observe the battle at Fort Stevens. It was his only exposure to actual gunfire during the Civil War—and he climbed up on a parapet, against the advice of the military commander, to see what was going on. When, not five feet from the President, a man was felled by a bullet, a young Union captain shouted at the President: "Get down, you fool!" Lincoln climbed down and said gratefully to the captain: "I'm glad you know how to talk to a civilian."

The name of the young man who shouted "Get down, you fool!" was Oliver Wendell Holmes, who went on to make history in the law. From that day to this, there has never been a more honest and heartfelt remark made to the head of the executive branch by a member of the judicial branch—though a lot of judges over the years must have felt the same way.

Let me address you today in more temperate words, but in the same spirit of candor.

The purpose of this conference is "to improve the process of justice." We all know how urgent the need is for that improvement at both the State and Federal level. Interminable delays in civil cases; unconscionable delays in criminal cases; inconsistent and unfair bail impositions; a steadily growing backlog of work that threatens to make the delays worse tomorrow than they are today—all this concerns everyone who wants to see justice done.

Overcrowded penal institutions; unremitting pressure on judges and prosecutors to process cases by plea bargaining, without the safeguards recently set forth by the American Bar Association; the clogging of court calendars with inappropriate or relatively unimportant matters—all this sends everyone in the system of justice home at night feeling as if they have been trying to brush back a flood with a broom.

Many hardworking, dedicated judges, lawyers, penologists and law enforcement officials are coming to this conclusion: A system of criminal justice that can guarantee neither a speedy trial nor a safe community cannot excuse its failure by pointing to an elaborate system of safeguards for the accused. Justice dictates not only that the innocent man go free, but that the guilty be punished for his crimes.

When the average citizen comes into court as a party or a witness, and he sees that court bogged down and unable to function effectively, he wonders how this was permitted to happen. Who is to blame? Members of the bench and the bar are not alone responsible for the congestion of justice.

The Nation has turned increasingly to the courts to cure deep-seated ills of our society—and the courts have responded; as a result, they have burdens unknown to the legal system a generation ago. In addition, the courts had to hear the brunt of the rise in crime—almost 150% higher in one decade, an explosion unparalleled in our history.

And now we see the courts being turned to, as they should be, to enter still more fields—from offenses against the environment

to new facets of consumer protection and a fresh concern for small claimants. We know, too, that the court system has added to its own workload by enlarging the rights of the accused, providing more counsel in order to protect basic liberties.

Our courts are overloaded for the best of reasons: because our society found the courts willing—and partially able—to assume the burden of its gravest problems. Throughout a tumultuous generation, our system of justice has helped America improve herself; there is an urgent need now for America to help the courts improve our system of justice.

But if we limit ourselves to calling for more judges, more police, more lawyers operating in the same system, we will produce more backlogs, more delays, more litigation, more jails and more criminals. "More of the same" is not the answer. What is needed now is genuine reform—the kind of change that requires imagination and daring, that demands a focus on ultimate goals.

The ultimate goal of changing the process of justice is not to put more people in jail or merely to provide a faster flow of litigation—it is to resolve conflict speedily but fairly, to reverse the trend toward crime and violence, to reinstill a respect for law in all our people.

The watchword of my own administration has been reform. As we have undertaken it in many fields, this is what we have found. "Reform" as an abstraction is something that everybody is for, but reform as a specific is something that a lot of people are against.

A good example of this can be found in the law: Everyone is for a "speedy trial" as a constitutional principle, but there is a good deal of resistance to a speedy trial in practice.

The founders of this nation wrote these words into the Bill of Rights: "the accused shall enjoy the right to a speedy and public trial." The word "speedy" was nowhere modified or watered down. We have to assume they meant exactly what they said —a speedy trial.

It is not an impossible goal. In criminal cases in Great Britain today, most accused persons are brought to trial within 60 days after arrest. Most appeals are decided within three months after they are filed.

But here in the United States, this is what we see: In case after case, the delay between arrest and trial is far too long. In New York and Philadelphia the delay is over five months; in the State of Ohio, over six months; in Chicago, an accused man waits six to nine months before his case comes up.

In case after case, the appeal process is misused—to obstruct rather than advance the cause of justice. Throughout the State systems, the average time it takes to process an appeal is estimated to be as long as 18 months. The greater the delay in commencing a trial, or retrial resulting from an appeal, the greater the likelihood that witnesses will be unavailable and other evidence difficult to preserve and present. This means the failure of the process of justice.

The law's delay creates bail problems, as well as overcrowded jails; it forces judges to accept pleas of guilty to lesser offenses just to process the caseload—to "give away the courthouse for the sake of the calendar." Without proper safeguards, this can turn a court of justice into a mill of injustice.

In his perceptive message on "The State of the Federal Judiciary," Chief Justice Burger makes the point that speedier trials would be a deterrent to crime. I am certain that this holds true in the courts of all jurisdictions.

Justice delayed is not only justice denied—it is also justice circumvented, justice mocked, and the system undermined.

What can be done to break the logjam of justice today, to ensure the right to a speedy trial—and to enhance respect for law? We have to find ways to clear the courts of the endless stream of "victimless crimes" that get in the way of serious consideration of serious crimes. There are more important matters for highly skilled judges and prosecutors than minor traffic offenses, loitering and drunkenness.

We should open our eyes—as the medical profession is doing —to the use of paraprofessionals in the law. Working under the supervision of trained attorneys, "parajudges" could deal with many of the essentially administrative matters of the law, freeing the judge to do what only he can do: to judge. The development of the new office of magistrates in the Federal System is a step in the right direction. In addition, we should take advantage of many technical advances, such as electronic information retrieval, to expedite the result in both new and traditional areas of the law.

But new efficiencies alone, important as they are, are not enough to reinstill respect in our system of justice. A courtroom must be a place where a fair balance must be struck between the rights of society and the rights of the individual.

We all know how the drama of a courtroom often lends itself to exploitation, and, whether it is deliberate or inadvertent, such exploitation is something we must all be alert to prevent. All

too often, the right of the accused to a fair trial is eroded by prejudicial publicity. We must never forget that a primary purpose underlying the defendant's right to a speedy and public trial is to prevent star-chamber proceedings, and not to put on an exciting show or to satisfy public curiosity at the expense of the defendant.

In this regard, I strongly agree with the Chief Justice's view that the filming of judicial proceedings, or the introduction of live television to the courtroom, would be a mistake. The solemn business of justice cannot be subject to the command of "lights, camera, action."

The white light of publicity can be a cruel glare, often damaging to the innocent bystander thrust into it, and doubly damaging to the innocent victims of violence. Here again a balance must be struck: The right of a free press must be weighed carefully against an individual's right to privacy.

Sometimes, however, the shoe is on the other foot: Society must be protected from the exploitation of the courts by publicity seekers. Neither the rights of society nor the rights of the individual are being protected when a court tolerates anyone's abuse of the judicial process. When a court becomes a stage, or the center ring of a circus, it ceases to be a court. The vast majority of Americans are grateful to those judges who insist on order in their courts and who will not be bullied or stampeded by those who hold in contempt all this nation's judicial system stands for.

The reasons for safeguarding the dignity of the courtroom and clearing away the underbrush that delays the process of justice go far beyond questions of taste and tradition. They go to the central issue confronting American justice today.

How can we answer the need for more, and more effective, access to the courts for the resolution of large and small controversies, and the protection of individual and community interests? The right to representation by counsel and the prompt disposition of cases—advocacy and adjudication—are fundamental rights that must be assured to all our citizens.

In a society that cherishes change; in a society that enshrines diversity in its constitution; in a system of justice that pits one adversary against another to find the truth—there will always be conflict. Taken to the street, conflict is a destructive force; taken to the courts, conflict can be a creative force.

What can be done to make certain that civil conflict is resolved in the peaceful arena of the courtroom, and criminal

charges lead to justice for both the accused and the community? The charge to all of us is clear.

We must make it possible for judges to spend more time judging, by giving them professional help for administrative tasks. We must change the criminal court system, and provide the manpower—in terms of court staffs, prosecutors, and defense counsel—to bring about speedier trials and appeals.

We must ensure the fundamental civil right of every American—the right to be secure in his home and on the streets. We must make it possible for the civil litigant to get a hearing on his case in the same year he files it.

We must make it possible for each community to train its police to carry out their duties, using the most modern methods of detection and crime prevention. We must make it possible for the convicted criminal to receive constructive training while in confinement, instead of what he receives now—an advanced course in crime.

The time has come to repudiate once and for all the idea that prisons are warehouses for human rubbish; our correctional systems must be changed to make them places that will correct and educate. And, of special concern to this conference, we must strengthen the State court systems to enable them to fulfill their historic role as the tribunals of justice nearest and most responsive to the people.

The Federal Government has been treating the process of justice as a matter of the highest priority. In the budget for the coming year, the Law Enforcement Assistance Administration will be enabled to vigorously expand its aid to State and local governments. Close to one half billion dollars a year will now go to strengthen local efforts to reform court procedures, police methods and correctional action and other related needs. In my new special revenue sharing proposal, law enforcement is an area that receives increased attention and greater funding—in a way that permits States and localities to determine their own priorities.

The District of Columbia, the only American city under direct Federal supervision, now has legislation and funding which reorganizes its court system, provides enough judges to bring accused persons to trial promptly, and protects the public against habitual offenders. We hope that this new reform legislation may serve as an example to other communities throughout the Nation.

And today I am endorsing the concept of a suggestion that I understand Chief Justice Burger will make to you tomorrow: the establishment of a National Center for State Courts.

This will make it possible for State courts to conduct research into problems of procedure, administration and training for State and local judges and their administrative personnel; it could serve as a clearinghouse for the exchange of information about State court problems and reforms. A Federal Judicial Center along these lines already exists for the Federal court system and has proven its worth; the time is overdue for State courts to have such a facility available. I will look to the conferees here in Williamsburg to assist in making recommendations as to how best to create such a center, and what will be needed for its initial funding.

The executive branch will continue to help in every way, but the primary impetus for reforming and improving the judicial process should come from within the system itself. Your presence here is evidence of your deep concern; my presence here bears witness to the concern of all the American people regardless of party, occupation, race or economic condition, for the overhaul of a system of justice that has been neglected too long.

I began my remarks by referring to an episode involving Justice Oliver Wendell Holmes. There is another remark of Holmes not very well known, that reveals an insight it would be well for us to have today.

Judge Learned Hand told of the day that he drove Justice Holmes to a Supreme Court session in a horsedrawn carriage. As he dropped the Justice off in front of the Capitol, Learned Hand said, "Well, sir, goodbye. Do justice!" Mr. Justice Holmes turned and said, most severely, "That is not my job. My job is to play the game according to the rules."

The point of that remark, and the reason that Learned Hand repeated it after he had reached the pinnacle of respect in our profession, was this: Every judge, every attorney, every policeman wants to "do justice." But the only way that can be accomplished, the only way justice can truly be done in any society, is for each member of that society to subject himself to the rule of law—neither to set himself above the law in the name of justice, nor to set himself outside the law in the name of justice.

We shall become a genuinely just society only by "playing the game according to the rules," and when the rules become outdated or are shown to be unfair, by lawfully and peaceably changing those rules.

The genius of our system, the life force of the American Way, is our ability to hold fast to the rules that we know to be right and to change the rules that we see to be wrong. In that re-

gard, we would all do well to remember our constitutional roles: for the legislatures, to set forth the rules; for the judiciary, to interpret them; for the executive, to carry them out.

The American Revolution did not end two centuries ago; it is a living process. It must constantly be reexamined and reformed. At one and the same time, it is as unchanging as the spirit of laws and as changing as the needs of our people.

We live in a time when headlines are made by those few who want to tear down our institutions, by those who say they defy the law. But we also live in a time when history is made by those who are willing to reform and rebuild our institutions—and that can only be accomplished by those who respect the law.

DEFERRED MAINTENANCE

by

WARREN E. BURGER
Chief Justice of the United States

This Conference is unique in one respect that we should recognize at the outset, for it brings together a cross-section of state and federal judges and of state and federal law enforcement authorities, and others seeking to avert an impending crisis in the courts. The only counterpart to this Conference in the past century was the Attorney General's Conference on Court Congestion and Delay convened by Attorney General Herbert Brownell more than fifteen years ago. Fifty years before Attorney General Brownell called his Conference, Roscoe Pound had warned the legal profession in the strongest terms that we were on the threshold of a crisis. Periodically we respond and experience some relief but we are soon overwhelmed by a new tide of problems.

Today the American system of criminal justice in every phase —the police function, the prosecution and defense, the courts and the correctional machinery—is suffering from a severe case of deferred maintenance. By and large, this is true at the state, local and federal levels. The failure of our machinery is now a matter of common knowledge, fully documented by innumerable studies and surveys.

As a consequence of this deferred maintenance we see

First, that the perpetrators of most criminal acts are not detected, arrested and brought to trial;

Second, those who are apprehended, arrested and charged are not tried promptly because we allow unconscionable delays that pervert both the right of the defendant and the public to a speedy trial of every criminal charge; and

Third, the convicted persons are not punished promptly after conviction because of delay in the appellate process. Finally, even after the end of litigation, those who are sentenced to confinement are not corrected or rehabilitated, and the majority of them return to commit new crimes. The primary responsibility of judges, of course, is for the operation of the judicial machinery but this does not mean we can ignore the police function or the shortcomings of the correctional systems.

At each of these three stages—the enforcement, the trial, the correction—the deferred maintenance became apparent when the machinery was forced to carry too heavy a load. This is the thing that happens to any machinery whether it is an industrial plant, an automobile or a dishwasher. It can be no comfort to us that this deferred maintenance crisis is shared by others; by cities and in housing, in the field of medical care, in environmental protection, and many other fields. All of these problems are important, but the administration of justice is the adhesive —the very glue—that keeps the parts of an organized society from flying apart. Man can tolerate many shortcomings of his existence, but history teaches us that great societies have foundered for want of an adequate system of justice, and by that I mean justice in its broadest sense.

I have said nothing of civil justice—that is, the resolution of cases between private citizens or between citizens and government. This unhappily is becoming the stepchild of the law as criminal justice once was. Most people with civil claims, including those in the middle economic echelons, who cannot afford the heavy costs of litigation and who cannot qualify for public or government-subsidized legal assistance, are forced to stand by in frustration, and often in want, while they watch the passage of time eat up the value of their case. The public has been quiet and patient, sensing on the one hand the need to improve the quality of criminal justice but also experiencing frustration at the inability to vindicate private claims and rights.

We are rapidly approaching the point where this quiet and patient segment of Americans will totally lose patience with the cumbersome system that makes people wait two, three, four or more years to dispose of an ordinary civil claim while they witness flagrant defiance of law by a growing number of lawbreakers

who jeopardize cities and towns and life and property of law-abiding people, and monopolize the courts in the process. The courts must be enabled to take care of both civil and criminal litigants without prejudice or neglect of either.

This is Why We are Here Today

The question is—what will happen as a result of our being here? What will each of us do when we return to the daily tasks we have temporarily laid aside to gather at this Conference? Let me suggest some of the problem areas and then let me venture some thoughts on what we might try to do about them.

There are many areas which we should study and consider, and indeed, that we must consider, but if we try too much at once we may fail in all our endeavors. I am thinking, for example, of substantive problems which cry out for reexamination, including the handling of personal injury claims, which especially clog the state courts; the need to ask questions about other areas of jurisdiction, such as receiverships of insolvent debtors, the adoption of children, land-title registration in some states, and possibly even such things as divorce jurisdiction and child-custody matters. We need a comprehensive re-examination of the whole basis of jurisdiction in order to eliminate whenever possible all matters which may be better administered by others so as to restore the courts to their basic function of dealing with cases and controversies.

We can see in the development of common law institutions many examples of changing jurisdiction and evolution of new remedies. I suggest no specific changes but I trust it will not be regarded as subversive to suggest the need for study and thought on these problems, remembering that subjects once committed to the courts are not the province of the other governmental bodies. The common law tradition teaches that rights and remedies are never fixed or static but a continuing process of change. For example, working men once had either no rights at all or common law rights based on negligence when they were injured in their work. The deficiencies of the common law remedies inspired lawyers to find other and better ways of dealing with the claims of injured workmen and I think no one would seriously consider turning the clock back to the old ways. A large area of regulatory activity was once imposed on courts but for the larger part of this century that has been vested in a wide array of administrative and regulatory bodies with limited judicial review.

All of us attending this Conference share and are the beneficiaries of the great common law tradition that undergirds American jurisprudence and virtually all aspects of our procedure, both state and federal. As lawyers and judges we can be proud of the great tradition of the common law and even have a pardonable pride in the improvements and developments that American lawyers and judges have added to it. We do not disparage or undermine the common law when we consider change. Indeed, change is the very essence—the very heart—of the common law concept that springs from England and has been followed in all English-speaking countries the world over.

Priorities

The challenges to our systems of justice are colossal and immediate and we must assign priorities. I would begin by giving priority to methods and machinery, to procedure and techniques, to management and administration of judicial resources even over the much-needed reexamination of substantive legal institutions that are out of date. That reexamination is important, but it is inevitably a long range undertaking and it can wait.

I have said before, but I hope it will bear repeating, that with reference to methods and procedure we may be carrying continuity and tradition too far when we see that John Adams, Hamilton or Burr, Jefferson or Marshall, reincarnated, could step into any court today and after a minimal briefing on procedure and up-dating in certain areas of law, try a case with the best of today's lawyers. Those great eighteenth century lawyers would need no more than a hurried briefing and a Brooks' Bros. suit. They would not even need a hair cut, given the styles of our day.

This is not necessarily bad, and I propose nothing specific on how we should change our methods of resolving conflicts in the courtroom, but I do know this—and so does anyone who has read legal history and read the newspapers in recent years—that John Adams, and his reincarnated colleagues at the bar, would be shocked and bewildered at some of the antics and spectacles witnessed today in the courtrooms of America. They would be as shocked and baffled as are a vast number of contemporary Americans and friends of America all over the world. They would not be able to understand why so many cases take weeks or months to try. No one could explain why the jury selection process, for example, should itself become a major piece of litigation consuming days or weeks. Few people can understand it and the public is beginning to ask some searching questions on the subject.

State-Federal Cooperation

I need not burden this well-informed audience on the subject of the tension and the strains existing between the state and federal courts in recent years. Because of the existence of those problems and the reasons underlying them I urged last August, at the ABA Convention in St. Louis, that the Chief Justice of each state take the initiative to create an informal *ad hoc* state-federal judicial council in each state. The purpose, of course, was to have these judges meet together informally to develop cooperation to reduce the tensions that have existed in recent years. I was pleasantly surprised, even astonished, at the speed with which the Chief Justices responded, for I am now informed that such Councils are in actual operation in 32 of the states. Many of these Councils have been created by formal order of the State Supreme Court. I am also informed that once the channels of communication were opened these state and federal judges found other areas of fruitful cooperation and exchange of ideas. I regard this development of such importance that I wish to express my appreciation to the Conference of State Chief Justices and to Chief Justice Calvert of Texas, its Chairman.

In urging the cooperation between the state and federal judges, and in urging the state judges to call upon the state bar associations and on the American Bar Association, I have no thought whatever that all state court systems or all judges be cast in one mold. Far from this, I have an abiding conviction that the strength of our entire system in this country and the essence of true Federalism lies in diversity among the states. It will not impair this diversity, however, to work together to develop effective post-conviction remedies for example, or common standards of judicial administration, common standards of professional conduct for lawyers, and, indeed, for judges, or the improvement in the method of selection, the tenure, and compensation of judges.

The diversity that has existed in our system and the innovativeness of state judges accounts for many of the great improvements that the federal system has adopted from the states. One of the most crucial is in the developing area of using trained court administrators or executives in the administration of the courts. The states have been a whole generation ahead of the federal system in this matter. When we sought to create the Institute for Court Management in 1969 the first step was to call on state court administrators for guidance and advice.

We should never forget that under our federal system, the basic structure of the courts of this country contemplated that state courts would deal with local matters while federal courts

would serve a limited and narrow function. I hope we will never become so bigoted as to think that state judges are any less devoted to the principles of the federal Constitution than other judges and lawyers.

Standards of Administration

I do not especially like phrases like "management of judicial resources," or "maximum utilization of judge power." They seem stilted to me as they do to most lawyers and judges. But these phrases are simple "shorthand" and if we accept them as such they become tolerable. The important thing is the concept underlying these "shorthand" terms. Every profession and every area of human activity has had to grapple with the hard realities behind the shorthand. The difference is, judges and lawyers have lagged far behind the rest. I do not suggest that justice can ever become automated or that production line processes are adaptable to courts. But we must acknowledge that the practice of the healing arts, for example, is surely a sensitive and delicate matter, perhaps as much so as the administration of justice. Yet the medical profession has responded and necessity has forced innovative changes that make it possible today for one physician or surgeon, depending on the individual, to do from three to ten or fifteen times what his counterpart could do even as recently as twenty or thirty years ago. And with this enormous increase in productivity, by and large we have in this country a better quality of medical care today than at any time in the history of mankind.

In terms of methods, machinery and equipment, the flow of papers—and we know the business of courts depends on the flow of papers—most courts have changed very little fundamentally in a hundred years or more. I know of no comprehensive surveys, but spot checks have shown that the ancient ledger type of record books, sixteen or eighteen inches wide, twenty-four or twenty-six inches high, and four inches thick are still used in a very large number of courts and these cumbersome books, hazardous to handle, still call for longhand entries concerning cases. I mention this only as one symptom of our tendency to cling to old ways. We know that banks, factories, department stores, hospitals and many government agencies have cast off anachronisms of this kind.

With relatively few exceptions, we still call jurors as in the past. We still herd them into a common room in numbers often double the real need because of obsolete concepts of arranging and managing their use. This is often complicated by the unregulated arbitrariness of a handful of judges, for example, who

demand more jurors than they can possibly use to be allocated each day for their exclusive use. There is almost a total absence of even the most primitive techniques in predicting the need for jurors just as there is a large vacuum in the standards and procedures to coordinate the steps of bringing a case and all of its components—the lawyers, witnesses, experts, jurors and court staff—to the same place at the same time.

Happily, a very distinguished committee of the American Bar Association under the chairmanship of Judge Freedman of the United States Court of Appeals of the Third Circuit is now launching a comprehensive program of bringing up to date the minimum standards of judicial administration.

Independent of what we do in the courtroom itself, we need careful study to make sure that every case which reaches the courtroom stage is there only after every possibility of settlement has been exhausted. Those parties who impose upon the judicial process and clog its functioning by carrying the cases through jury selection before making a settlement which could have been made earlier should be subject to the risk of a very substantial discretionary cost assessment at the hands of the trial judge who can evaluate these abuses of the system. Someone must remind the bar and the public of the enormous cost of a trial. Reliable estimates have been made indicating that the cost is in the neighborhood of $250 per working hour in some courts, not including plant and equipment cost—or lawyers.

Court Executive Officers

As litigation has grown and multiple-judge courts have steadily enlarged, the continued use of the old equipment and old methods has brought about a virtual breakdown in many places and a slowdown everywhere in the efficiency and functioning of courts. The judicial system and all its components have been subjected to the same stresses and strains as hospitals and other enterprises. The difference is that, thirty or forty years ago, doctors and nurses recognized the importance of system and management in order to deliver to the patients adequate medical care. This resulted, as I have pointed out on other occasions, in the development of hospital administrators and today there is no hospital of any size in this country without a trained hospital administrator who is the chief executive officer dealing with the management and efficient utilization of all of the resources of the institution. Courts and judges have, with few exceptions, not responded in this way. To some extent, imaginative and resourceful judges and court clerks have moved partially into the vacuum, but the function of a clerk and the function of a court

executive are very different, and a court clerk cannot be expected to perform both functions.

From the day I took office, twenty-one months ago, this seemed to me the most pressing need of the courts of this country, and particularly so in my area of responsibility, the federal courts. The first step I took was to lay the foundations for a facility to train executives and I requested the American Bar Association to take the leadership in accomplishing this. That Association did so with the American Judicature Society and the Institute of Judicial Administration as co-sponsors, creating the Institute for Court Management at the University of Denver Law School. That Institute has now graduated the first group of trainees with an intensive full-time course over a period of six months including actual field training in the various courts. It will train two additional classes this year. This is not a federal facility—I expect most of its output will go to state court systems.

In the meantime, the Congress has taken one of the most important steps in a generation in the administration of justice by providing for a Court Executive in each of the eleven Federal Circuits. The Court Executive will work under the direction of the Judicial Council of each Circuit. I need not say, surely, to an audience including many Chief Judges and administrative judges, that this will not only relieve Chief Judges to perform their basic judicial functions, but it will provide a person who will, in time, be able to develop new methods and new processes which busy judges could not do in the past.

The function of a Court Executive is something none of us really knows very much about. There are only a handful of court administrators or executives in this country and up to now they are all self-taught. The few who were in being were, for the most part, called upon to be members of the teaching faculty for the new Court Management Institute. The concept of Court Executive or Court Administrator will have its detractors but I predict they will not be heard for very long. The history books tell us how the Admirals reacted when General William Mitchell insisted that an airplane could sink a battleship.

This desperate need for court executive officers does not alter the fact that it will require great patience and industrious homework on the part of judges and chief judges to learn to utilize these officers for their courts.

Rulemaking Power

A great many of the infirmities in our procedures could be cured if judges had broad rulemaking power and exercised that

power. The best example of this was given a generation ago in the Federal Rules of Civil Procedure and later in the Criminal and Appellate Procedure Rules.

For the past 30 years or more state legislatures, like the Congress, have been overwhelmed by a multitude of new problems and it is increasingly difficult to get their attention on mundane subjects like rules or procedure and other internal matters of the courts. In addition, judges, by and large, have been under increasing pressure of their own daily work and have not brought these matters to the legislators.

The rulemaking process as developed in this country beginning 35 years ago is the best solution yet developed for sound procedural change. Since it is a cooperative process involving not only the legislative and judicial branches officially, but lawyers, judges and law professors, it can synthesize the best thinking at every level.

If your state does not provide for rulemaking power comparable to that vested in the Supreme Court of the United States in conjunction with Congress, I urge you to study closely the potential of this mechanism. In federal habeas corpus review of state cases it could have saved a great deal of confusion in recent years. Flexible rulemaking processes could have promptly developed post-conviction remedy procedures to blunt the impact of the imposition of federal standards on the states.

Selection, Tenure and Compensation of Judges

The combined experience of this country for nearly two hundred years now, with elective judges in most of the states holding office for limited terms and federal judges who are appointed with tenure, affords a basis for a careful reexamination of the whole method of the selection of judges. This is part of the long range problem, but it deserves some mention. The aggregate of two centuries of experience should be sufficient to afford a basis for a comprehensive reexamination of the methods of selection and the tenure of state judges. In saying this, I, of course, intend no reflection whatever on those state systems of limited terms and the many splendid judges in those states.

It may be that the fine quality of judicial work of state judges is in spite of, not because of, the method of selection.

The election of judges for limited terms is a subject on which reasonable men can reasonably have different views. Nevertheless the very nature of the judicial function calls for some comprehensive studies directed to the alternative methods developed in the last generation in some states. These alternatives tend to

preserve the virtues of popular choice of judges and at the same time develop a high degree of professionalism, offering an inducement for competent lawyers to make a career of the bench.

We know that while there are certain patterns common in the fifty states as to the selection and tenure of judges, that there is at the same time a wide disparity in the compensation. In such states as New York, California and Illinois, to mention but three of the large states, the compensation of judges of the highest courts is as much as three times the compensation of their counterparts in some other states of the Union.

As lawyers and judges we know that the function of the courts in a small state is essentially the same as the function of the courts in the larger state. The size of the state has no relationship to the nature of the function, the degree of the responsibility, and the degree of the professional competence called for. It is, therefore, an anomaly for a wide disparity to continue. At the same time I do not suggest, by any means, that there need be a rigid, uniform standard of compensation or tenure for all the states. All I suggest is that the judges in the small states are performing essentially the same function as that of their brothers in a large state, and the conditions of their service should not vary excessively. It is not a wholesome or a healthy thing for the administration of justice to have the highest court of a geographically large and economically powerful state receive two or three times as much as his counterpart a few hundred miles away.

A National Center for State Courts

As I range over this rather wide variety of subjects you are bound to take notice that in many instances I have been obliged to refer to matters of common or general knowledge or the result of spot checks, or other sources that are not wholly trustworthy. This suggests strongly the need for some facility that will accumulate and make available all information necessary for comprehensive examination of the problems of the judiciary in the fifty states. Recently a judicial conference developed an accumulation of 500 or more specific problems of courts.

Each of the points I have raised in the list of what seem to me the urgent priorities can be more readily treated and with better solutions if there is a pooling of ideas and efforts of the states.

For a long time we have talked of the need for a closer exchange and closer cooperation among the states and between the states and the federal courts on judicial problems. No state is without grave problems in the administration of justice. The problems vary chiefly in degree from those states with grave

troubles to those on the threshold of disaster in their courts. The valuable work of the National College of Trial Judges is just one example of the value of cooperative enterprise.

We now have in this country a great ferment for court improvement which has been gaining momentum slowly over a long period of time. More recently, this has taken on a new thrust and force under the leadership of the American Bar Association. The time has come, and I submit that it is here and now at this Conference, to make the initial decision and bring into being some kind of national clearinghouse or center to serve all the states and to cooperate with all the agencies seeking to improve justice at every level. The need is great, and the time is now, and I hope this Conference will consider creating a working committee to this end before you adjourn. I know that you will do many important things while you are here to the benefit of our common problems, but if you do no more than launch this much-needed service agency for the state courts, your time and attendance here would be justified.

I hope that in raising this subject of a need for a facility to serve as a clearinghouse and service agency for the states you will not think me unduly presumptuous if I make some specific suggestions for your consideration.

It seems to me obvious that the states should make the final choices and the final decisions. In offering these thoughts, I draw particularly on my experience in the twenty-one months I have been in my present office. I now see the legal profession's strongest voice, the American Bar Association, from a point of view which I never fully appreciated in my years of private practice or even in the period when I was a member of the Court of Appeals.

The American Bar Association is a force for enormous, almost unlimited, good with respect to every problem in the administration of justice. It is a force that cannot be directed or controlled by any particular group or any selfish interest because it includes approximately 150,000 lawyers and judges and law professors representing 1,700 state and local bar associations and other legal groups. Its governing body, the House of Delegates, represents 90% of all the practicing lawyers in this country. I mention these factors because the American Bar Association is essentially a grass-roots institution whose components spring from the 50 states. The facilities and power, the influence and prestige of this association are literally on the doorstep of every state capital through the State Bar Association, and that power and influence can be put to work in terms of achieving the objectives I have suggested to you.

My suggestion, therefore, is that in shaping the national organization or center to serve all the states, that you consider calling primarily on this great association and its 50 component state associations, along with other groups that specialize in judicial administration. There are additional existing structures representative of all the states and a cross section of the legal profession. I refer now to the American Judicature Society, the Institute of Judicial Administration, the Conference of State Trial Judges, the Appellate Judges Conference, the Council of State Governments, and the Conference of Chief Justices. I am confident there will be widespread interest in the formation of such a group as this but it will take time to marshall all of the large resources necessary to its accomplishment. To build soundly, you must build carefully. You must have plans and time. This is not a matter that can be adequately dealt with hastily in a few hours in a busy Conference such as you are now beginning. A Steering Committee can select five to ten representative leaders empowered to convene a larger group to perfect an organization.

The first step will be the decision to create a national center for state courts of the kind I outlined. It is desperately needed and long overdue.

In emphasizing the problems of administration, management and efficiency we must always remember that efficient administration is the tool, not the goal, of justice. Therefore it is as a means to an end that we should place high priority on changes in our methods and our machinery. The noblest legal principles will be sterile and meaningless if they cannot be made to work.

In closing, I offer the full cooperation of my own office and the facilities of the Federal Judicial Center and the Administrative Office of the United States Courts. But bearing in mind my own concepts of federalism I will participate only when you ask me to do so.

STANDARDS OF JUDICIAL CONDUCT: A PROGRESS REPORT

by

WILLIAM B. SPANN, JR.

Chairman, House of Delegates, American Bar Association

On being invited to speak, I was faced with the immediate decision of what to talk about. Those who extended the invitation to me to address you as the representative of the American Bar

Association very kindly avoided assigning to me any specific topic—quite possibly because none occurred to them on which I was qualified to speak.

I thought at first of trying to promote my favorite project of a Labor Court of Appeals, working it in to the general subject matter of the Conference on the basis of increased efficiency both in the expected expertise of such a court and in the immediate settlement of the law eliminating the long and tortuous procedure of conflict between circuits and the policy of non-acquiescence by the Labor Board. But I realized that the interest in such remarks would be confined to such Federal Circuit Court judges as may be present and to a handful of labor lawyers.

Inasmuch as I was representing the American Bar Association, I thought briefly that I might talk on the American Bar Association role in judicial reform but decided against it. This was fortunate for me since that speech was made by Chief Justice Burger this morning with far more force and authority than I could ever have given it.

On behalf of the American Bar Association, we do accept the challenge of the Chief Justice. As Chairman of the American Bar Administration Committee which meets in two weeks on March 25th, I assure you that the number one item on our agenda will be the immediate formation of a joint committee of the American Bar Association giving due and proper recognition to the other national legal organizations, such as Judicature, which have contributed and can contribute so much.

I finally decided that a progress report on the work of the American Bar's Special Committee on Standards of Judicial Conduct may not only be of general interest but could also be helpful in furthering the work of the Committee. Incidentially, on the subject of Standards for Judicial Conduct, there appears on the back cover of the current issue of JUDICATURE Lord Hale's Rules, the last of which is "To be short and sparing at meals, that I may be fitter for business." This is certainly one which, if I were a judge, I would have violated today but not being on the bench, I do not regard it as applicable.

Those of you who "did your homework" in the formidable green tome which was sent to all participants have read, if you had not before, at pages 119–125 the Interim Report of the American Bar Association Committee together with the accompanying statement, some 15,000 copies of which were released prior to the Annual Meeting of the American Bar Association in St. Louis. This report was the subject of public hearings at the St. Louis meeting. As a result of the hearings and written com-

munications to the Committee, Professor Wayne Thode, of the faculty of the Law School of the University of Utah and Reporter for the Committee, listed some 378 suggestions for the Committee's study, and other suggestions are still being received.

It must be realized at the outset that the American Bar Association has no authority to promulgate a code or Canons of Ethics for judges; indeed, it has no such authority for lawyers. Whatever may be devised by its committees and approved by its House of Delegates constitutes only guidelines, the implementation of which must come in the form of state action by judiciary or legislature with the assistance and support of state and local bar associations.

The original Canons of Judicial Ethics were the work of a committee of three justices and two lawyers chaired by Chief Justice William Howard Taft. The Canons were approved by the American Bar Association at its annual convention in Philadelphia in July, 1924. I might take pride in the fact that they were first adopted in my native state of Georgia only eleven months later in June of 1925 but someone will be sure to suggest that Georgia needed them worse than anybody else.

The Canons were slow to "catch on". By 1937 when the ABA added Canons 35 and 36, only two other states, New York and Oregon, had joined Georgia and by the end of World War II only twelve states in all had adopted the Canons.

Indeed as there were then, there may still be many who do not even realize that a separate set of Canons exists. In the Georgia primaries of 1955, a well-known Georgia lawyer opposed an incumbent on our Court of Appeals. When other members of the court actively campaigned on behalf of their colleague, the challenger wrote a letter to the entire bar criticizing the conduct of these judges under the Canons. At a convocation in honor of Senator Walter F. George, I was approached rather surreptitiously by the law clerk of one of the judges under criticism who suggested that my activity in the ABA might enable me to help him. He then stated that he had searched the Canons through and through without finding any condemnation of the judges' political activities in aid of their brother on the bench. I suggested that he perhaps was reading the Canons of Professional Ethics rather than the Canons of Judicial Ethics; to which he replied, "Oh, are there Canons of Judicial Ethics?"

But during the '50's and '60's interest increased and the pace of adoption accelerated. By 1969 when the present ABA Committee was appointed, 43 states had Codes of Judicial Ethics.*

* The seven without: Alabama, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island and South Carolina.

The present ABA Committee was created in August, 1969. As you know, it is chaired by Judge Roger J. Traynor, retired Chief Justice of the California Supreme Court. Its membership includes a Justice of the U. S. Supreme Court, a Judge of the Second Circuit Court of Appeals, a Federal District Court Judge, another former state Supreme Court Justice who is also a former Law School Dean and presently a professor of law, two state trial judges and three distinguished practicing lawyers. The Committee was directed by the ABA Board of Governors "* * * to study and report to the Board of Governors and the House of Delegates on the adequacy and effectiveness of the present Canons of Judicial Ethics, including their observance and enforcement, to make such recommendations for reformation of the Canons as it deems appropriate, and to encourage and maintain the highest level of ethical standards by the judiciary. * * *"

Since the public hearings in St. Louis, the Committee has had three 2-day meetings in New York City, the last on February 20–21, 1971, and its drafting subcommittee has met more frequently. In February, the Sixth Draft was reviewed. This April in Washington, D. C. the Committee hopes to arrive at a complete draft which can be distributed for comment during the summer; its target date for final approval by the ABA House of Delegates is August, 1972 at the Annual Meeting in San Francisco.

What then can I tell you about the present status of the Committee's deliberations? As the liaison representative from the Board of Governors of the ABA, I attended the February meeting of the Committee in New York and I have the express permission of the Chairman to indicate to you the form and direction which the Committee's work is taking.

Following the format used in the recently adopted ABA Code of Professional Responsibility, the "New" Canons of Judicial Ethics consist, in the current draft, of Seven Canons to be set in boldfaced type. These, written together without modifying standards and limitations and without commentary, take up only 15 lines. The complete text will, I estimate, take only about 20 letter-sized typewritten pages double spaced.

How is this reduction in volume being accomplished? From purely personal observation, I would answer that it results from the philosophy of the Committee which I believe is expressed by Judge Irving R. Kaufman, a member of the committee, in an article just published in the Duke Law Journal. With reference to the expression of detailed and definitive rules, Judge Kaufman states:

> "The better course, to my mind, is to continue to choose good men, provide them with a body of ethical standards to

> which they may repair and then, in all but the obvious cases where *per se* treatment is justified, trust to the character of those we have selected. * * *"

From my own observation, this is the rationale of the large majority of the Committee in formulating the Canons.

Here then are the actual Canons in the Sixth Draft as they are set out in boldfaced type:

CANON 1. A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

CANON 2. A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE FAIRLY AND DILIGENTLY [AND THIS IS HIS PRIMARY OBLIGATION].

CANON 3. A JUDGE MAY ENGAGE IN ACTIVITIES FOR THE IMPROVEMENT OF THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE.

CANON 4. A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE CONFLICT WITH HIS JUDICIAL DUTIES.

CANON 5. A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF HIS ACTIVITIES.

CANON 6. A JUDGE SHOULD PUBLICLY REPORT COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES.

CANON 7. A JUDGE SHOULD NOT ENGAGE IN POLITICAL ACTIVITY EXCEPT TO THE EXTENT NECESSARY TO OBTAIN OR RETAIN JUDICIAL OFFICE THROUGH AN ELECTIVE PROCESS.

There will follow a statement of applicability to part-time judges and retired judges and a statement as to the effective date of compliance. It should be understood that the language of these Canons is still under review, but the sense of the 7 Canons is expressed by what I have given you. There are brief explanations and comments under some of the Canons which need no mention here. Three of the boldfaced Canons have more extensive standards set forth about which a few words may be in order.

Canon 2, providing the primary obligation of the judge to perform his duty diligently and fairly, has standards under three categories. The first is Adjudicative Responsibilities and here are stated various suggestions of proper judicial conduct. This section includes a modified version of Canon 35 permitting reproduction of investitive, ceremonial or naturalization proceed-

ings, and of non-sensational proceedings for exclusive use in the curriculum of educational institutions and further permitting electronic reporting and perpetuation of testimony. The second section deals with a judge's administrative responsibilities and the third section deals with his disqualification under various circumstances. The draft contains a provision for waiver of disqualification in the case of relationship or financial interest where the relationship or financial interest is regarded by the parties as insignificant. The judge, if he considers that waiver may be in order and if he chooses to do so, may disclose to an appropriate court officer the basis of his disqualification and this court officer transmits the disqualification to all parties. If all parties and counsel agree in writing to remit the disqualification, the judge may continue in the proceeding and the judge's disclosure and the consents of the parties and counsel will be incorporated in the record of the proceedings.

Canon 3, concerning a judge's involvement in activities for the improvement of the law, the legal system and the administration of justice, speaks for itself; it authorizes the judge, among other activities, to speak, write, lecture, and teach on such subjects.

Canon 4, dealing with extra-judicial activities, contains sections dealing with civic and charitable activities, fiduciary relationships, financial activities and avocations. In other sections, it prohibits a judge from acting as an arbitrator, from practicing law, and from accepting extra-judicial governmental appointments other than the representation of his country, state or locality on ceremonial occasions and in connection with educational or cultural activities.

Canon 6 permits a judge to receive compensation and reimbursement of expenses for quasi-judicial and extra-judicial activities otherwise permitted under Canons 3 and 4 provided such compensation is reasonable and no more than a non-judge would receive, and provides for public disclosure of compensation only. The present thinking of the Committee is that expense reimbursement limited to the reasonable cost of food, lodging and travel expenses of the judge and his wife need not be reported, but any expense payment in excess of such reasonable amount would constitute compensation.

Finally, Canon 7, dealing with political activities, modifies slightly the existing Canon by permitting a judge to endorse a colleague on the bench but such endorsement may not include active campaigning or speech-making. The Committee sought a way of imposing some restriction on the party running against the incumbent judge but concluded that such a restriction must

necessarily be included in the Code of Professional Responsibility rather than in the Canons of Judicial Ethics and the Committee will make such a recommendation.

This is a brief overview of the Canons but gives you a pretty good idea of the direction in which the Committee is proceeding.

All of you here may greatly expedite the work of the Committee if you will, as soon as the Preliminary Draft is distributed this summer, give the Committee the benefit of your comments and reactions and urge others to do so. This is no "ivory tower" committee; it well realizes that the "NEW" Canons are valuable only if and to the extent that they are accepted by the bench and bar and are adopted in the various states.

And what of the chances for adoption? If acceptance of the New Code of Professional Responsibility is any measure, the prospect is very bright. That Code was finally approved in August, 1969. As of February of this year, it had been adopted in 24 states, and approved by the bar associations of 12 more states for submission to their Supreme Courts. The District of Columbia bar has also approved. It is estimated that by the end of this year all but about 6 states will have adopted the Code.

I would close with the same appeal to you on behalf of the Canons which current ABA President Ed Wright made in presenting the Code of Professional Responsibility to the ABA House for adoption in Dallas in 1969. He quoted the speech of Benjamin Franklin in his acceptance and support of the Constitution of the United States. Despite certain reservations which he entertained, Franklin said:

> "I confess that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them; for having lived long, I have experienced many instances of being obliged, by better information or fuller consideration, to change opinions I once thought right, but found to be otherwise.
>
> "Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure that it is not the best. The opinions I have had of its errors I sacrifice to the public good * * *"

It is my hope that when the time comes you will approach and review the Committee's Draft with just such an attitude, for it is my firm belief that you will find the Committee's Draft a vast improvement over the present Canons providing standards which are viable and in step with our time.

It has been a real pleasure to be with you and to participate in the working sessions of this Conference. May I hope for the

Conference that the interest and diligent efforts of its participants will help us move significantly closer to the Utopian objective which Lord Brougham so eloquently voiced over a hundred years ago in these words:

> "It was the boast of Augustus that he found Rome of brick and left it of marble.
> "But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence."

MANDATORY RETIREMENT OF JUDGES

by

ROBERT W. CALVERT
Chief Justice of Texas
President, National Conference of Chief Justices

Hearing the President and the Chief Justice of the United States speak at this Conference has been an inspiring experience. I am sorry the Chief Justice had to leave. I wanted to tell him that we have been following the Court's decisions and reading its opinions with much interest. I was particularly interested in the Court's decision last December in Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213, in which the Court divided four and four and one in holding certain hearsay testimony admissible under a Georgia statute. Some may think the majority stretched the hearsay exception beyond reason. Personally, I thought the opinions of Justices Stewart and Blackmun pregnant with logic but no more persuasive than the reasoning of a Texas trial judge in a somewhat different hearsay situation some fifteen years earlier. Some taxpayers sued the City of Texarkana to enjoin expenditure of city bond funds to build sewer lines outside the city limits. The plaintiffs' attorney had the City Secretary on cross-examination. He put this question: "Haven't you heard, sir, that it is illegal for a city to spend its funds to build utility lines outside the city limits?" The secretary answered, "Well, I've heard it was and I've heard it wasn't." The City Attorney interposed, "I object, your Honor, that's hearsay." The judge said: "Objection overruled. He heard it both ways."

I consider it a signal honor to have been invited to address the distinguished delegates to this conference. I do not regard the invitation as a personal tribute; I have done nothing to earn it. Rather, I prefer to assume that the invitation came to me as Chairman of the National Conference of State Chief Justices, and as a recognition of that organization as an integral and important segment of this nation's judicial system, a system which, though far from perfect, stands stalwartly between the tyranny of government toward its citizenry and of man toward his fellow man.

Ours is a judicial system in which the highest court in the land can place its protective arm around "shuffling" Sam Thompson in Louisville, Kentucky, and say to the police of that city, "You cannot take a man's freedom because he was irritating you by patting his foot or shuffling on a dance floor; and more than that you cannot add a fine because he protested his arrest through argument."

It is a system in which a young man, hounded from a blossoming career and even from a means of livelihood, by self-appointed and self-annointed guardians of every individual's patriotism and censors of his innermost impulses, could receive $3,500,000 in compensation from a jury, and later could describe his first day in court in these inspiring words:

> "I saw the judge, the jury, the bailiffs, the court reporter, the lawyers and the spectators, and I was overwhelmed by the realization that a single citizen who felt an injustice done him could bring all of these people together. Even if the verdict went against me, I would feel that I had won."

It is a system which through its highest court has demonstrated within the last ten days a sense of compassion for the poor and a determination that they shall not be made to suffer unnecessarily merely because of their poverty.

Those of us who serve on state courts are proud to be a part of this system. But the convening of this Conference on the Judiciary, and our presence here, is evidence that we still have problems to solve and reforms to execute, and that mere indulgence in self-praise, with eyes closed to our deficiencies, will not suffice. I ask your patience, then, as I speak briefly of one needed reform which I have not found on the conference agenda, which I have not discussed in the Selected Readings prepared by the American Judicature Society, and which has rated only passing mention in the pamphlets sent us—I speak of mandatory retirement of judges.

Parenthetically, I never think of retirement without recalling my conversation with a Texas Supreme Court staff member upon the occasion of his retirement. A few years ago the official Reporter for the Court came to see me around September 1st and said: "I thought I should come and tell you that I plan to retire on October 1st. I am 86 years old, have been with the Court for 69 years. and I don't want to stay here too long like I have seen some of these judges do!"

One of our Texas newspapers published an article, on February 15th last, commenting on the report on state judicial systems made by a Congressional Advisory Commission on Intergovernmental Relations. The article stated that, "[t]he commission recommended that compulsory retirement of state or local judges, now in effect in 22 states, be made a nationwide practice, setting retirement at age 70." The article quoted the report as stating that "[o]nce the most eminent judge is selected, there is no guarantee that he will remain competent. He will age, may become tired and can grow out-of-touch." I agree absolutely; and I can think of no sound reason for limiting the suggested reform to state and local judges. I suggest in all charity and with the utmost respect for the many able Federal judges of my acquaintance that there is no sound basis for concluding that state judges age, become tired and grow out-of-touch, but that Federal judges do not. Moreover, a totally unselfish approach to improvement of our judicial system should impel those of us who are judges to lead the movement for mandatory retirement in both branches of the system.

The Commission report, in indicating that only 22 states now require mandatory retirement of judges, does not square with the statistical summary of state court systems prepared by the Council of State Governments in 1970. The latter report shows that 40 of the 50 states have mandatory retirement requirements at ages of from 70 to 75. Some, like Arkansas, California, Minnesota, New Mexico, Tennessee and Texas achieve compulsory retirement at age 70 through denial or diminution of retirement benefits if a judge remains on the bench after that age. Let me tell you briefly of our experience in Texas.

With lawyers and judges playing leading roles, we amended our Constitution in 1965 to provide, among other things, for automatic mandatory retirement of appellate and general jurisdiction trial judges at age 75, with power in the Legislature to reduce the age to 70. With some of us in the judiciary again taking the lead, our Legislature was induced in 1967 to provide an added retirement benefit of 10% of current salary for those judges who retired at or before age 70. A grandfather clause

extended the benefit to those in office and over 70 who retired at the end of their current terms. On January 2nd of this year, just four years later, the oldest justice of the Supreme Court was 65, the oldest judge of the Court of Criminal Appeals, the court of last resort in criminal cases, was 63, only two of 42 intermediate appellate court judges were 70 or over and only three of 238 judges of courts at the District Court level were 70 or over. In sum, only 5 of 294 appellate and major trial court judges were 70 or over; and, to my personal knowledge, at least three of the five, and perhaps all five, are holding over under the grandfather clause. We have thus achieved a younger, more physically vigorous and mentally alert judiciary while providing a pool of retired judges who can be called into service with their consent at any time.

The Federal judiciary is one of the last bastions for employment of the aged. There seems to be some sort of pervading fear which makes it more or less untouchable and deters those who should speak out forthrightly. The Consensus of the National Conference on Judicial Selection and Court Administration, held in Chicago in 1959, states apologetically that "automatic retirement at age 70 is desirable." The Recommendations of the 27th American Assembly on the Courts, the Public and the Law Explosion, speaking only of state courts, concluded only that "trial judges should be subject to mandatory retirement by age 70 * * *." Why only "trial judges"?

Business and educational institutions have long since adopted mandatory retirement and limited service programs. The general facts about these programs are too well known for me to bore you with them. Just last week the new Speaker of the House of Representatives of the United States Congress confirmed his earlier statement of his determination to retire by age 70. There is no sound reason for believing that judges are a master race of people or that appellate judges are immunized against the ravages of age which may beset trial judges.

The state judicial systems have blazed the way for the Federal judiciary. There are no abler judges in the Federal judiciary than Traynor of California, Williamson of Maine, and many other state judges who have accepted retirement at age 70; and, yet, the only mandatory retirement requirement of the Federal system coming to my knowledge is the one which requires Chief Judges to step down from those administrative positions at age 70. Statistics developed at a congressional hearing last year disclosed that 10% of Federal district and court of appeals judges were over 70 years of age and eligible for retirement.

In 1966, I clipped an article from the American Bar Journal written by Honorable J. Earl Major, Senior Judge for the United States Court of Appeals for the Seventh Circuit, entitled, "Why Not Mandatory Retirement for Federal Judges?" I clipped the article because I thought much of what Judge Major said about retirement of Federal judges applied also to state judges, and at the time I was involved in a campaign for mandatory retirement of Texas state judges. But what Judge Major said in January, 1966 is just as cogent and compelling five years later. He said that "advocacy of compulsory retirement is not the high road to popularity," and I agree; and that he had "never heard a valid reason why a judge should not voluntarily retire when eligible," although he had heard many self-interest excuses.

It seems to me there are four main reasons for the reluctance of judges to retire. I would rate them in this order: The judge (1) has developed no subsidiary interests and hasn't the faintest idea what he will do to occupy his time if he retires; (2) has a secret feeling that he is the indispensable man and that no successor could possibly fill his shoes; (3) wants to keep some sort of a strangle hold on the social standing his position offers him and his wife and the favors and honors which are tendered to his position rather than to him personally; and (4) isn't wanted at home by his wife because through the years she has developed her own 8 to 5 routine program and she doesn't want it interrupted. I well remember when I first was brought face to face with the reason last mentioned. One of our Texas Supreme Court judges had obviously become senile and could no longer even remember what he had done on the previous day. Our veiled suggestions to him that he should retire did not register and went unheeded. Finally, the judge's closest friend on the court called on his wife with the suggestion that she should induce him to retire. She replied: "What, and have him here under my feet all day! Not on your life!" Considering the lack of merit in the enumerated reasons, a cynical critic would be inclined to paraphrase the statement of a famous World War II General by observing that, unless required by law, "Old judges rarely retire; they just lean more and more on their law clerks."

I repeat what I said earlier: We as judges should take the lead in seeking mandatory retirement provisions for judges, state and Federal, trial and appellate. It is not a sufficient excuse to say that a constitutional amendment would be necessary before mandatory retirement at age 70 could be required of United States Supreme Court Justices, or even of other Federal judges. If you have the slightest doubt that consent to such an

amendment would be forthcoming, just ask Congress to submit it and watch its speedy ratification by the states.

Now, I am too long experienced in government and politics to suppose that at the end of this program anyone is going to be trampled to death in the stampede of judges hurrying to seek legislative or constitutional mandate for the retirement of all judges, state and Federal, trial and appellate, at age 70; but a changing society is demanding something better than we have had, and we had better start listening with an attentive ear. We had better rap with those demanding major judicial reform and do our thing! And a very important part of our thing, in my opinion, is the capacity to realize when we should step down and entrust this great judicial system to younger men and the good judgment to do it!

CRIME, PUNISHMENT, VIOLENCE: THE CRISIS IN LAW ENFORCEMENT

by

EDWARD BENNETT WILLIAMS

Chairman, American Bar Association Committee on Crime Prevention

As we relax together tonight here in Williamsburg at dinner, our urban society is in turmoil. It's a society in revolution. Our times are like the times that Dickens described in his most famous novel, "the best of times and the worst of times." It's the worst of times because never before has our society been so challenged in preserving order while retaining its liberty. It's the best of times because to our generation of Americans more than to any other has been given the opportunity of showing to the world that liberty and order are compatible concepts even during a period of social revolution. We are faced with a series of great opportunities wearing the disguise of insoluble problems.

From every quarter we hear, and everywhere we read, that crime in America is on the rise, that we are in the vortex of a violent era, that law and order are on holiday, that crime in the streets of urban America has become its number one domestic issue.

Like all of you, I hate crime and violence of any kind. I love peace, order and law in that order. And I believe that peace is the tranquility of order and without law there can be no order.

With that as a prelude I should like to advance a few basic concepts on the subject that has arrested the attention of the nation more than anything on the domestic front. But first let's define our terms.

Crime is a broad generic term that, standing alone, means very little. A gangland murder by a member of the Mafia is a crime. So, too, is the manipulation of a stock by a Wall Street broker. Doing in an unfaithful husband by an irate, harassed housewife is a crime. So is disorderly public drunkenness by a Bowery bum. A dark park mugging by a 15-year-old delinquent is a crime. So is the misapplication of funds by a bank president.

These crimes can no more be lumped together for analysis than manic depression and chicken pox, or throat cancer and a fractured metatarsal.

The crime about which the nation is bestirred, the kind of crime that is accelerating at an ever-increasing tempo, is the kind of crime that is directed against private property and often attended by violence—robberies, burglaries, larcenies, muggings, yokings, thefts of all kinds. Eighty-five per cent of those crimes are being committed in the streets, homes, and small business establishments of the inner cities of urban America by youths 24 years and younger, a major percentage of whom are heroin addicted.

When the delinquent youth goes into the street to do his mischief he doesn't go out because of Miranda or Mapp or Escobedo or Mallory or Gideon. He doesn't give one fleeting moment of thought to his Constitutional rights or procedural safeguards. He goes out there on two basic premises:

1. he knows he won't be caught; but
2. if by some misfortune he is, he knows we have slow motion justice in America and that he won't have to face his day of punishment for from one to two years.

I said that when the delinquent youth goes into the urban street to do his mischief, he goes on the premise he won't get caught. We must give doleful recognition to the fact that he is 80% right.

Eighty-seven per cent of all crimes in America last year involved direct thefts of property. There were, for example, 2,000,000 burglaries of homes or business establishments. Only 18% of those were cleared on the police books. There were 1,500,000 larcenies of property worth $50 or more. Only 18% of those were cleared on the police books. There were 870,000

auto thefts. Only 18% were cleared on the police books. There were 297,000 armed robberies. Only 27% were cleared by the police.

Obviously, then, almost 80% of these crimes are irrelevant to the judicial system because they never get into it. To put those crimes and their perpetrators into the system, we must escalate dramatically the quality and quantity of the urban police forces of America. Because our cities are broke, we can accomplish that escalation only with massive federal subsidies. If the cities are worth saving, and they are, we simply must resolve to pay the price for their salvation. And the salvation of our cities will be possible only when we restore order in them, because this is the condition sine qua non of progress in all the other areas—housing, employment, education, health and welfare.

Specifically, I say that we must make law enforcement an attractive profession to our bright young college students. We must introduce the concept of officers' candidate schools for college graduates so that after a prescribed period of training, say 180 days, they can be commissioned.

We must create a West Point for law enforcement officers, an institution which qualifies interested young men and women for immediate commissions in our urban police departments.

In short we must introduce and promote the concept of lateral entry into the commissioned ranks of our big city police forces for those who are qualified by education and training.

We must reinstate law enforcement as an honorable and respected profession. We expect much from the policeman. We want him to be a constitutional lawyer, an expert in first aid, a family counsellor, a sociologist, with the patience of Job, the wisdom of Solomon, the courage of King Arthur, and the strength and agility of a professional athlete—all for $150 a week.

Law officers are professionals. Let's begin to treat them so. The real villain in this whole tragic story is the national priority that allocates 80 billion dollars to defense and less than 500 million for safety in our streets at home.

Next I submit the time has come to take a long agonizing look at our criminal courts. The criminal courts of troubled urban America are failing wretchedly. Like scarecrows put in the fields to frighten the birds of lawlessness, tattered and unmasked from neglect, frightening to no one, they have become roosting places for the crows. To the innocent, to the victims of crime, to the witnesses to crime, to the illiterate, the uneducated, and

the poor, many of our big city criminal courts are a sham and a broken promise.

Let's face up to the fact that we lawyers are the bastions of the status quo. We do things so because we have always done them so, and because we have always done them so, "so" is right. We view proposals for reform with suspicion and their advocates with derision. We stand 100% for progress and 100% against change.

But events have thrust upon us the time for change. The time has come to eliminate slow motion justice in America. Nothing is more difficult to explain about American institutions to the intelligent inquiring layman than why a man accused of robbing a fellow citizen at the point of a gun can stall the process for two years before facing the day of punishment. We worry about increasing episodes of contempt of court by political defendants. We must worry equally over whether the criminal justice system is not forfeiting its right to respect by its anachronistic delays and its failure to respond to the needs of society in the 1970s. If punishment has a valid place in the criminal process, it will be effective only if it is swiftly administered. It need not be severe, but it must be swift.

Tonight I would like to propose to this Conference 10 specific changes in the urban criminal justice system for dealing with the kinds of crime on which we are focusing—10 specific changes to eliminate slow motion justice in the big cities of the United States.

First, I submit to you that the time has come for us to recognize that the mandatory use of grand jury proceedings in these kinds of cases is an outmoded, archaic fetish of yesteryear. I can show you city after city in this country where it takes four months between the time of arrest and the institution of a criminal proceeding because the case must go through the rubber stamp processing of a grand jury. This process no longer serves a useful purpose in our criminal justice system.

Secondly, I propose for your consideration that it is time we begin to use the bail system imaginatively. I believe that money bail is meaningless in the ghettos of America. It is, to use an overworked expression, irrelevant. It is neither constructive nor productive. One example of how pre-trial release criteria can be made constructive is in their application to heroin-addicted criminal defendants. Such defendants can be required to submit to a weekly urinalysis test to determine whether they are back on the street using heroin. If they are, then we must have further conditions of bail requiring treatment or, alternatively, bail must be lifted.

Thirdly, I suggest that, at arraignment in these cases, the trial judge order liberal discovery immediately for the defendant. Such a practice will induce pleas. And none of the problems normally associated with criminal discovery are present in these kinds of cases. We are not talking about syndicate cases where the witnesses may be intimidated, coerced or injured.

Ten days after the arraignment I suggest that motions be made orally before the trial judge, and that written motions be dispensed with. We don't need written motions. Motions can be made before the trial judge. He can hear testimony, decide the motion and the case can be set no later than 60 days from the time that it is instituted.

At the trial, I suggest that we come abreast of science. One of the great reasons for delay in the whole criminal process is that now, with appeals in virtually all criminal cases of this kind, we wait 5 and 6 weeks to get the transcript from the overworked court reporter, who must work nights on cases that he or she has transcribed during the day. There is a resulting long hiatus before the appeal can be processed. I suggest that we go to the steno-computerized transcript. We know now that it is both scientifically and economically feasible for the court reporter to sit in the courtroom, hit the keys, and in another room a computer will translate electronic impulse into a printed transcript that is available for use immediately. There is no wait.

Next, I suggest that we eliminate once and for all what I regard as the shameful process that has wasted twelve weeks and more in selecting a jury for several cases that have attracted national attention. I suggest that this is the judicial counterpart of the legislative filibuster. It is time that we put an end to it. There is no case, I suggest to you, that should require more than a day of jury selection. I watched the jury picked in a case that attracted more attention than any other on the face of the globe in the 1960s—the Stephen Ward case arising out of the Lord Profumo scandals in England. It took 30 minutes. I have never taken more than a day in any case to get a jury, and I have never lost a case because I didn't have time enough for jury selection.

Next, I suggest that the trial judge should order a background report of each defendant at the time that the case gets into his court. If the verdict is "guilty," the judge will have a full report on the defendant and can impose sentence immediately after hearing from the defendant, the prosecutor and the defense

counsel. There is then no need for the present delays between verdict and sentence.

I suggest further that within ten days the record be lodged with the appellate court, that a designation of errors be made and served simultaneously on the trial judge, that the trial judge file a paper with the appellate court reciting his explanation for the controverted rulings on appeal, and that the case be set for argument within one month after sentencing.

I also suggest that briefs be required only if the appellate court wants them. But in most of these cases, the appeals can be argued without briefs. I suggest that the oral argument be limited only by consideration of relevance. So long as counsel is germane and relevant to the point, he should be allowed to develop his points. And I suggest that the appeals court can decide these cases generally in less than a month.

I suggest that appellate opinions be unsigned, short, and concise. It is really unnecessary to write essays in the kind of cases about which we are talking and on which we are focusing. I must say that I had a discomforting feeling of guilt as I drank the West Publishing Company's whiskey during the cocktail hour tonight knowing that I was going to stand up here and advocate short opinions.

I say that, if we look at the whole criminal justice system, we can de-exist some kinds of crime and get them out of the criminal justice system. I am talking about crimes without victims —drunkenness, loitering, vagrancy and the use of drugs—which, if eliminated, will permit the system again to be responsive to the needs of society.

We can eliminate slow motion justice in this country without really sacrificing any of the constitutional rights and procedural safeguards that are meaningful to the defendant. We can get, at long last, something that has been in the Bill of Rights largely unused for a long time. The defendant, the accused, has been given the right to a speedy trial. But this is the least asserted right of all the rights safeguarded in the Bill. I say that the public should take this right over by adverse possession.

Finally, we must give rueful recognition to the fact that we are on a national binge—a bender, if you will. Alcohol, amphetamines, barbiturates, hallucinogens, and finally heroin are being used as never before in history in our desperate drive to camouflage reality. It is the spiralling use of heroin in our ghettos that is directly related to the kinds of crime on which we are focusing. Hard information is difficult to come by in this area,

but it is now safe and conservative to say that we have 250,000 heroin addicts in our big cities.

It costs about $40 a day to support a heroin habit—about $14,000 a year.

That money is stolen in cash or merchandise or made from prostitution or gambling or dealing in heroin.

I can demonstrate to you that over 50% of the robberies, burglaries, and larcenies being committed in Washington and New York (where there are figures available) is being committed by heroin addicts. Those statistics will hold up for the other big cities of America.

It is folly to think that we can solve the addiction problem by controlling the flow of heroin into this country. Last year 105,000 vessels entered our seaports, 345,000 airplanes crossed our borders and 65,000,000 automobiles entered the United States; 225,000,000 people came in. There are only 1,400 men in the Bureau of Customs patrolling the ports and places of entry for narcotics. Thousands of dollars worth of heroin can be brought in a tobacco pouch. All the heroin used for a year in the United States can be brought in uncut in 2 trucks.

Furthermore, most of the addicts can't be cured. We can't exile them—and we can't jail them all. We may as well face the fact that the lesser of two social evils is to maintain them. We've got to stop them from preying on society to buy their supply at black market prices.

I submit the time has come to establish a vast network of federally funded Narcotic Treatment Centers across the country where addicts can receive multi-modality therapy, including a daily supply of methadone. This eliminates the craving for heroin and permits them to lead normal productive lives at minimal cost to society.

We must face up to an elemental fact. It is better to spend $2,000 a year on an addict supplying him with legally dispensed methadone than having him continuously prey on society with violent and clandestine thefts.

Alas, the failures of our system of criminal justice are but a microcosm of our other problems. It is no wonder that we have come to think of ourselves as a country in crisis. With the nation divided by war, inflamed by racial conflict, bedevilled by the disaffection and alienation of its children, beset by inflation, afflicted with contaminated air and polluted waters, harassed by an ever-accelerating rate of street crime, and racked with fear and foreboding, we had better recognize and declare a state of

spiritual crisis, for the alternative would be to accept irrationality, decadence, and disorder as our normal national condition.

There is a general malaise of the national spirit. As a nation we have grown fat. We cannot bring ourselves to make the personal sacrifices required to have once again a national commitment to excellence. Our preoccupation with self-centered concerns and personal pleasures has deflected us from public obligations and necessary collective endeavors. We have lost the spirit that changed a people into a citizenry and a territory into a nation.

We are living in a culture that has become singularly secular. Religion just doesn't play a vital role any longer, certainly not for our young. When religion goes, there must be something else to hold the culture together. One thing that can do it is a sense of vocation—a desire to do something and do it with excellence—it can be anything from being a paperhanger to a Supreme Court Justice. But the desire to perform well, the sense of craftsmanship and vocation, the commitment to excellence has been fading from the national scene for almost two decades.

The really great people of each generation are those who have a commitment to excellence—a commitment that transcends every other facet of their lives—the commitment to excel—to be at all times, in all places, under all circumstances, the very best that they can be at whatever they do—whether they be doctors or lawyers, or politicians, or ball players, or barbers, or bartenders, or bootblacks. They are the real champions. They are the exciting people of the world—the people worth knowing, and admiring, and loving. They are the people who have made our country great, the people who are driven by an inner spirit to greatness—not for money, nor for power, not for glory—but from a simple dedication to use whatever talents with which God has endowed them to the ultimate. It is this spirit which needs new incandescence across the land if we are to meet the crisis of revolution.

John Gardner pinpointed all this neatly for us when he wrote:

> "An excellent plumber is infinitely more admirable than an incompetent philosopher. The society which scorns excellence in plumbing because plumbing is a humble activity and tolerates shoddiness in philosophy because it is an exalted activity will have neither good plumbing nor good philosophy. Neither its pipes nor its theories will hold water."

We face a daunting challenge—but one for which we are still equal. Emerson said, "if there is any period one would desire to be born in—is it not the era of revolution when the old and the

new stand side by side and admit of being compared; when all the energies of man are searched by fear and hope; when the historic glories of the old can be compensated by the rich possibilities of the new era? This time like all times is a very good one if one but knows what to do with it."

HISTORY MADE ANEW: GUIDELINES AND CHALLENGES

by

A. Linwood Holton

Governor, Commonwealth of Virginia

[At the closing session of the National Conference on the Judiciary, Governor Holton as the primary host for the sessions spoke informally in summary of the foregoing addresses and the papers in the plenary sessions. Excerpts from his remarks follow.]

I think history is being made anew in Williamsburg. It may well be that what you have done here in March of 1971 can some day be considered as the beginning of a Judicial Renaissance in America. * * *

We have problems in all 50 states. But we have 50 laboratories * * * a great research and development laboratory in every state in the union and we can find from that basic research, which is going on every day, the answers to many problems common to us all.

That is why this conference was called. * * * We have examined the critical aspects of judicial administration; we have discussed the organization of the systems. We have probed the set-up of state trial courts. We have considered qualification for good judges and how you find them and how you appoint them. We have analyzed problems of criminal justice.

You have spoken of some ways to improve all of this court administration. Obviously, you couldn't solve all of the problems; but just as obviously it is time for the application of that Chinese proverb, that in order to begin a journey of one thousand miles, it is necessary to take the first step.

We must take it. Indeed I think we have taken it. I think this is what this conference represents—a first step. And having taken it, I don't believe that you will falter or fall along the way. * * *

History will not absolve us if we stand by apathetically while the American judiciary system continues on a course toward what really could be just plain catastrophe.

We must change course. And I think you have done so here. It was great to have you folks, distinguished folks from all over the country, here at the site in Williamsburg where so much began. And it was a real personal challenge to me to participate with you in what I consider to be a truly historic endeavor.

And with you, I look forward to seeing the dream—the dream of true justice—fairly and speedily administered equally to all.

I look forward with you to seeing that dream come true.

PART TWO

CONFERENCE PAPERS

*

GENERAL INTRODUCTION

by

WILLIAM F. SWINDLER

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A sense of crisis is the recurring theme of most discussion on the administration of justice in the United States in the third quarter of the twentieth century. In both civil and criminal law and procedure, the increasing complexity of litigation, rising crime rates, emerging areas of new law and the inexorable pressure of growing population are cited as major factors in this crisis. Under the circumstances, the fact that many warnings have been posted throughout the century—from Roscoe Pound's oft-quoted 1906 address to Chief Justice Burger's 1970 "State of the Judiciary" address—is now less important than a systematic consideration of what may be done to meet the challenge.

This was the purpose of the National Conference on the Judiciary which met at Williamsburg, Virginia March 11–14, 1971. The papers prepared and delivered at the Plenary Sessions of that Conference, and now published here, were followed in most instances with a Workshop Session in which the attendees divided into discussion groups which critically analyzed the propositions in the papers. Out of the summarized findings of these discussion groups came a Consensus Statement, separately published for the widest and most immediate distribution, and reprinted here to complete the record of the Conference itself.

In 1897 Justice Oliver Wendell Holmes wrote: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." In 1970 Chief Justice Burger observed that, aside from the Federal Rules of Civil Procedure—the only major modernizing step in the judicial process to date—"Thomas Jefferson of Virginia, Alexander Hamilton of New York and John Adams of Massachusetts would need only a quick briefing on modern pleading and the pre-trial procedures in order to step into a federal court today and do very well indeed." It has been suggested that they might do even better in many state courts, the changes from the eighteenth century being even less perceptible.

The indisposition to change in the judicial process has been increasingly manifest in the face of accelerating change on all oth-

er fronts in the quarter of a century since World War II. This is particularly so because of the fundamental impact of all-out global conflict on domestic society—the mass migration of workers and their families, the breakdown of social structures and values, the sudden vast increase in congestion and attendant pressures in urban areas, the awakening demands of minority groups and other disadvantaged sectors of society. These have accentuated the gap between the individual and the courts, a gap which has developed consistently with each major shift in the posture of American society which has not had a corresponding shift in the posture of the judicial system, responding thereto.

One of the most recent and most striking summaries of the contemporary problem is John P. Frank's American Law: The Case for Radical Reform, in which he bluntly states:

> First, that American civil practice has broken down; the legal system fails to perform the tasks that may be expected of it.
>
> Second, the collapse is now. It menaces the rights of our citizens to a determination of their disputes, and jeopardizes the capacity of commerce and industry for reasonable planning and action.
>
> Third, the curve is down; the situation is getting worse.
>
> Fourth, we have no generally accepted remedy. We do not even have a generally accepted program for discussion.
>
> Fifth, our talents are required to develop a new agenda for discussion and for action. At this moment, the greatest need of this sector of constitutional government is imagination. We must be prepared to reconstruct the institutions of the law and remodel our lawyers and our judges, even our buildings. We must be prepared to change the substantive law altogether, in every reach, cutting it down to a size our groaning court system can handle. We must be prepared most radically to change our methods.[1]

In his lectures in England on Judicial Administration: The American Experience, Professor Delmar Karlen corroborates several of Frank's charges by observing that "American courts * * * are a dumping ground for unsolved social problems like homosexuality, alcoholism, narcotics addiction and vagrancy," a fact complicated by the enormous further burden created by both civil and criminal actions stemming from automobile ac-

1. Frank, American Law: The Case for Radical Reform (New York, 1969), 182.

cident cases which cry out for removal from a judicial to an administrative tribunal.[2]

What Holmes and Pound, Burger and Frank and Karlen—and many others—have said and are saying is that we have come to a point in time when the sporadic, disparate and sometimes esoteric movements in the direction of law reform and court reform, dating from the Enlightenment of the end of the eighteenth century and pursuing an uneven course in both England and the United States throughout the nineteenth and most of the twentieth century to the present, must now be organized and systematically developed. We have come perforce to recognize that the past half-century of two world wars and a cataclysmic depression have rendered irrelevant or obsolete many of our once unquestioned precepts. If the legal and judicial structure is not to collapse, it must be modernized to serve modern needs—and serve them efficiently and effectively.

In the area of private or civil law, Professor Robert Keeton has pointed out:

> To serve its highest aims, a legal system must have the stability and predictability essential to security, order, and evenhanded justice. If it is to continue even for generations, and more clearly if it is to survive still longer, it must also have flexibility to change and ability to grow with the institutions and society it serves—the capacity, in short, to renew itself.[3]

On the criminal law side, an even more emphatic case is made by Norval Morris and Gordon Hawkins:

> * * * We must strip off the moralistic excrescences on our criminal justice system so that it may concentrate on the essential. The prime function of the criminal law is to protect our persons and our property; these purposes are now engulfed in a mass of other distracting, inefficiently performed, legislative duties. When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary tasks. This unwarranted extension is expensive, ineffective, and criminogenic.[4]

Keeton's study demonstrates the gradual modernizing of certain civil law concepts by changing judicial and legislative directions;

2. Karlen, Judicial Administration: The American Experience (Dobbs Ferry, N. Y., 1970), 61–63.

3. Keeton, Venturing to Do Justice: Reforming Private Law (Cambridge, 1969), v.

4. Morris and Hawkins, The Honest Politician's Guide to Crime Control (Chicago, 1969), 2.

the Morris-Hawkins theme is a complaint that the criminal law has remained frozen, and hence the criminal dockets have become increasingly clogged, with what Karlen calls the "unsolved social problems" of contemporary American life.

It would be well to approach the papers of the National Conference which follow in these pages with a realization that we are currently seeking to develop both a philosophy of legal and judicial reform and a practical checklist of implementation. The Williamsburg Conference of March 1971 directed attention to selected, representative problems in the area of the judiciary; it might well be followed by a complementary conference examining the rational basis for much of our substantive law as well. This is to say that improved efficiency of the courts must be accompanied by a more relevant rule of the law which the courts are to apply. Merit selection of judges, to use one example, must ultimately be accompanied by a body of substantive law which reflects modern social outlook. Good judges must be aided by modern laws.

One must begin somewhere, however, and the National Conference on the Judiciary concentrated its emphasis upon five carefully chosen areas of the judicial process which offer current and future prospects for early reform. The program of the National Conference evolved along the lines represented in the basic introductory papers on The Interrelationships in a Judicial System and the five major topics which follow. As Richard W. Velde points out in his opening paper, there is a combination of philosophy and practical implementation in the program of the Law Enforcement Assistance Administration, which underwrote the National Conference itself. The external relationships in a court system are the related components in the whole plan of orderly government in the United States: in the criminal justice area, they place the criminal courts in a continuum of crime detection, investigation, arrest, presentment and ultimate trial, followed thereafter by a correctional and rehabilitative process which manifestly has proved of limited effectiveness in the past. The ultimate effectiveness of the LEAA program depends upon seeing that all parts of the system are made more meaningful in relation to each other as well as upon seeing that each part is internally modernized and made more efficient.

Internally, as Ernest C. Friesen then points out, the judicial portion of this interrelated system or continuum must be made to operate more meaningfully. Essentially, the judicial and non-judicial or administrative jobs of the court personnel must be separated and integrated—separated into specialties of the judge and the administrator, integrated then into complementary functions of a modern court system. The clogging of judicial channels often is a result of uncoordinated specialties.

The Conference theme then turns to the organization of the judicial system within each state—whether it is a unified or an atomized and subdivided system. While the Conference was not conceived as a "selling" program, the one proposition which is consistently endorsed by all thoughtful professionals is the unified court structure, and logically if not deliberately the Conference discussion has used the unified system as its first premise. Chief Justice Edward E. Pringle reviews the gains experienced by Colorado in instituting such a system; Edward B. McConnell describes the administrative benefits attained in New Jersey by a statewide, comprehensive program of court administration; and Dean Charles W. Joiner, from the perspective of his work on the judicial article in the revised state constitution in Michigan, describes the functions of appellate courts in a unified system.

The trial courts, of various types and jurisdictions, are manifestly the operating center of any judicial process, and these are the subject of the following papers. Judge Sam Phillips McKenzie of Atlanta reviews the case for unification of trial jurisdictions compared with the traditional approach through redistricting. Judge Zita L. Weinshienk of Denver discusses the particular responsibilities of the local jurisdiction court. Justice Thomas M. Pomeroy of Pennsylvania describes the efforts required to eliminate that lingering and hard-dying phenomenon, the part-time court.

One of the obvious needs of the oncoming decade in judicial administration is the largescale adaptation of new technologies—data retrieval through electronic processing, and the like—to the needs of the courts. United States District Judge Leon Higginbotham describes the economies and expedited calendars which have been realized in the Philadelphia area in taking advantage of these new resources. On the other hand, Judge Kenneth N. Chantry of Los Angeles points out how economies and expedition may still be gained by more imaginative use of existing facilities.

The organization and the instrumentalities are concrete, material and significant elements in updating the court process; but basic to all reform programs is the quality of the judiciary itself. Thus the Conference devoted a substantial part of its discussions to this subject: Judge Laurance M. Hyde, Jr., dean of the pioneering National College of State Trial Judges, reviews the programs of the past decade which now offer basic professional ori-

entation to newly-elected or appointed members of the bench, and seminars and refresher courses to experienced jurists. Glenn R. Winters of the American Judicature Society reviews the trends—slowly moving upward—in judicial salaries and retirement plans. Justice Louis H. Burke of California discusses the development of state commissions concerned with discipline and removal, where before there has been only the anachronism of impeachment as a means of disposing of unfit or incompetent judges.

In the final analysis, as Morris and Hawkins emphasize in their current volume, the subject-matter of the courts on the criminal side has assumed a climactic dimension in our time. It was appropriate, therefore, that the National Conference should reach a climax in its own program with papers on this subject. Judge Tim Murphy of Washington, D.C. describes some of the new approaches to detention and release which have been applied in certain metropolitan courts. Justice Walter Rogosheske of Minnesota restates the relationships between judge, prosecution and defense. And in conclusion Professor Samuel Dash of the American Bar Association Section on Criminal Law reviews the emerging new concepts on correction and rehabilitation.

Obviously, the subjects were selective and representative rather than exhaustive. Yet they do cover come of the most vital issues which will have to be met in effecting a modernization of judicial process in the United States in the coming decade. It was not conceived that the National Conference would provide definitive answers, but that its primary value would be to inform and inspire to new efforts.[5]

I. THE INTERRELATIONSHIPS IN A JUDICIAL SYSTEM

Moderator: DOROTHY W. NELSON

Dean, University of Southern California Law Center

As one of my old bosses, Chief Justice Arthur Vanderbilt, once said, "It is the laymen who are probably going to bring about law reform in the last analysis." The purpose of this session is to identify, for laymen and lawyers, the basic issues with

5. To preserve as much as possible the "feeling" of the papers as originally presented, the various authors' texts have been very sparingly edited. While this has resulted in some variations in editorial style, it was felt that the "flavor" and sense of contemporaneity offset this fact.—ED.

which we will all be dealing in the workshops. This is a monumental job, because we are dealing not only with the internal issues of court jurisdiction, procedures and management, but also with the external issues comprising the social and economic pressures from the outside. We are not expected to come up with complete reforms for the court system in these four days. There will be several regional conferences which will follow this national conference during the coming years; but what we come up with will serve as the agenda for the regional conferences.

I think the response today to the President's call for court reform indicates that the members of this conference will not follow the example set by members of the bar and the judiciary in 1906, in non-response to Roscoe Pound's speech. I think Pound's message in 1906 is even considered by some to be very radical even today. The idea of a uniform court system, the idea of improved methods of selection of judges, the need for an administrative judge, the need for an executive officer in the courts, the need to reform the so-called inferior courts, the need for representation for all people who appear in the courts are all considered radical in some parts of the country. I think, however, Pound would be very proud today to have heard the talk of the President, to recognize that our Chief Justice like the Lord Chancellor in England is assuming the position of leadership of the entire United States in moving toward court reform both in the state courts and in the federal courts.

And the suggestion that was made by the President that we support some kind of resolution for a national center for state courts is something that I think will be of major importance in the Conference. I think Pound would also be proud of such men as Tom Clark. Those of you who know him as a justice perhaps don't know what an inspiration he has been to the law schools. When he was Chairman of the Federal Judicial Center he provided funds for law students to go out into federal penitentiaries and to assist convicted persons in processing post-conviction applications. He has also inspired us who were trying to expand our courses in judicial administration.

Now, with encouragement from the President, the Chief Justice and our National Chairman, Tom Clark, let us begin.

THE EXTERNAL RELATIONSHIPS

by

RICHARD W. VELDE

Associate Administrator, Law Enforcement Assistance Administration *

The external relationships of the nation's courts include the contact by the courts with the other major components of the criminal justice system. But they also include, as an end result of the work of the courts, relationships with our citizens and society as a whole.

The role of the courts in the entire criminal justice system—police, corrections, probation and parole—is of critical importance today. Never before in our history has there been such widespread concern over the complex problems of crime and criminal justice. Never before has government moved in such massive ways to both reduce crime and enhance the quality of justice.

In these efforts, the courts occupy a central position.

As representatives of states or state court systems, this is a matter that concerns you directly.

It also concerns me directly, for the Law Enforcement Assistance Administration is charged with helping to improve the criminal justice system throughout the nation. LEAA does this, in large measure, by giving each state the means to improve its own system. One important area of concern is the courts.

Efforts to improve courts rest in large part on the extent of the role played by judges themselves in those efforts. For those judges who already are taking a vigorous part in criminal justice planning and improvement programs, I urge that the high level of activity be maintained. For other judges not yet fully involved, I urge them to expand their roles. There are, of course, some obstacles.

There are the pressures of overcrowded dockets. Administrative burdens placed upon almost every judge are staggering. In addition, judicial independence is a vital element of a well-run court, and taking an active part in criminal justice planning may run directly counter to what many judges consider their proper role. But the other side of the coin is that the responsibility of

* In June 1971 there was a reorganization of the program of the Law Enforcement Assistance Administration, changing some of the lines of administrative responsibility but not essentially affecting the objectives or procedures described in this paper of March 1971.—Ed.

judges to the law and to justice and to society is not limited to activities directly related to their own court. They may serve the cause of law and justice even more effectively by serving on a criminal justice planning board or council.

Judges can make a great contribution to efforts to improve the quality of all the courts in their state and the rest of the system—police, corrections, probation and parole—as well. Some may disagree, but the state of corrections institutions and services is the direct concern of the judges who sentence men to jail or prison.

If we agree that court reform is essential, then we must ask how it can best be achieved. A key vehicle for improvement exists in the program of the Law Enforcement Assistance Administration.

The LEAA program first of all takes a comprehensive approach—that is, all components of criminal justice must be improved if the entire system is to be improved. Second, it provides financial resources on a scale that can bring a real impact—not a decade from now, but right now. Third, it vests the basic responsibility for improvement and reform where it belongs—with the states and the localities. While the federal government can urge and suggest and coax, it does not dictate.

The Judiciary must be independent, but it should not be insulated. Its effectiveness depends in part on the effectiveness of the other parts of the criminal justice system, and a spirit of cooperation and understanding may be able to solve all sorts of problems that have long plagued us.

This is why LEAA places so much emphasis on comprehensiveness in the criminal justice improvement program of each state. Courts are affected in very real ways by the operations and levels of efficiency of police and prosecutors. In addition, courts are affected by corrections agencies and probation and parole programs.

If programs for probation and community treatment are weak or non-existent, a judge may have no recourse but to sentence an offender to an institution. If the correctional institutions are poorly run, judges face agonizing decisions—especially where juveniles or first offenders are involved. Finally, because there so often is so little contact between the components, the courts may not have reliable information on the effects of their sentencing, on what has worked and on what has failed.

To achieve a successful space flight, each stage of the rocket must perform as designed; too often today, one or another compo-

nent of our criminal justice system malfunctions. The results are all too apparent as crime inflicts a terrible toll of suffering and expense.

I would like to turn now to a discussion of the LEAA program —detailing some of the things it has done in the courts area and looking ahead to what is planned for the future.

The LEAA Program—An Overview

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act and established a federal aid program to assist state and local governments to upgrade and improve all aspects of the criminal justice system. Although our enabling legislation speaks of law enforcement, that term is broadly defined to include all aspects of criminal justice: police, courts, corrections, prosecution and defense, probation and parole, organized crime, disorders, juvenile delinquency, and narcotics control.

In the intervening three fiscal years, Congress has appropriated more than three-quarters of a billion dollars for the LEAA program. If it responds to pending budget requests for the coming fiscal year, that figure will nearly double again. These and other federal funds are being added to a system expending about $6.5 billion annually.

In establishing a massive federal presence in aiding law enforcement, there was an overriding Congressional concern that state and local systems would be strengthened, not pre-empted, and that federal help would not bring with it federal domination or control or lead to the establishment of a national police force. An elaborate structure of checks and balances was devised whereby the large bulk of federal assistance would be allocated among the states according to population. Each state would be free to assess its own needs, set its own priorities, and allocate its funds to its political subdivisions pursuant to its own comprehensive plan objectives.

The LEAA program has been the cutting edge of a new concept of intergovernmental relationships—the New Federalism. The experience gained in the implementation of this program has been a significant factor in the development of the President's revenue sharing proposals, whereby even more power and authority would be transferred from Washington to the state house and city hall.

LEAA operates basically through a block grant concept, with most of the funds given to states to spend themselves according to their own priorities. Before funds are awarded, the states must submit comprehensive plans each year for review and ap-

proval by LEAA. Our enabling legislation has defined six major programs: planning, action, research, academic assistance, statistics and technical assistance. I shall briefly describe each of these activities and their relation to state judicial systems.

Planning

Congress designed the LEAA program to encourage comprehensive reform of the nation's criminal justice system, to reduce fragmentation and duplication, and to make lasting, measurable improvements. Thus, Congress declared that those states desiring federal financial assistance must first establish state criminal justice planning agencies and develop and implement comprehensive plans dealing with all aspects of the criminal justice system within their respective jurisdictions.

To encourage planning, the federal government underwrites 90 percent of the cost of establishing and operating the planning agencies. Planning funds are made available on a block grant basis, but 40 percent going into each state must be made available to units of local government so that they also can meaningfully participate in the planning activity.

All 50 states and the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands have taken advantage of this opportunity. Almost $75 million of federal and state funds have been invested to date in these planning activities and three sets of annual comprehensive plans developed and submitted to LEAA.

These plans have carefully assessed the condition of criminal justice in the several states, set ordered priorities and schedules related to existing state resources and federal assistance, and set long range goals for reform and improvement. Particular attention is being paid to the needs of high crime areas.

A new profession, that of criminal justice planner, has been established. My agency, with about 350 employees, supports the salaries of more than three times as many state employees. The states, in turn, are supporting more than 450 regional and local planning groups.

While much is yet to be learned about the nature and dynamics of criminal justice in America, the planning documents which the states have developed represent a unique resource and accomplishment.

Block Action Grants

The bulk of the LEAA program funds are in the form of action grants. Of the total available, 85 percent are distributed

among the states according to population. This automatic formula is simple and is perhaps the best means of distribution that could be devised, since, in general, the more people, the higher the incidence of crime. Thus, the populous urban states such as California, Illinois, and New York receive the bulk of the funds, whereas the rural, sparsely populated states like Alaska, Montana, and Maine receive proportionally smaller shares.

Block action grants in LEAA have grown from $25 million in fiscal 1969, to $183 million in fiscal 1970, to $340 million this year. We are asking Congress for block grants totaling $413 million in the year starting July 1. As I indicated earlier, the record of judicial involvement in action programs supported by LEAA funds shows a substantial need for improvement.

In LEAA's first year, fiscal 1969, courts received only $1.4 million, or 5.5 percent of the LEAA block grant money which went to the states.

In the second year, states allocated $12.5 million on court programs, but the percentage rose to only 6.7 percent. There was a great spread in how states responded to court needs:

—American Samoa, Guam and the Virgin Islands had no court programs, probably because of the small size of their overall block grants.

—Some 15 states allocated less than three percent of their block grant money on court programs. They included Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Kentucky, Louisiana, Massachusetts, Mississippi, Nebraska, New Jersey, Rhode Island, South Carolina, and Vermont.

—Some 12 states allocated 10 percent or more of their state block grants to the court area. They included Idaho, Illinois, Kansas, Maryland, Minnesota, Nevada, New York, North Dakota, Utah, Washington, Wisconsin and Puerto Rico. Idaho and Pennsylvania allocated 20 percent or more.

—Of the $12.5 million allocated for courts, almost two-thirds was directed at upgrading specific components of the court system, such as courts, prosecutors offices or defenders offices. The breakdown was 37 percent for court management and organization programs, 15 percent for defender services, and 12 percent for prosecutor services.

—Of the remainder, 11 percent was for training programs, eight percent for procedural reform, six percent for bail reform, four percent for code revision, three percent for alternatives to prosecution and three percent for construction. The rest went for miscellaneous programs.

As for fiscal 1971, so far we have received and analyzed 47 of the 55 state plans. These involve about $286 million of the $340 million block grant total for fiscal 1971. Of that $286 million, some $29.8 million, a little more than 10 percent, is allocated for courts programs. While that is roughly twice the percentage of two years ago, and represents a percentage half again as much as last year, it is still less than we believe the courts need and can constructively use.

I am happy to note that of those 47 state plans examined, only one, Utah, allocates less than three percent of its block grant funds for the courts.

Correspondingly, some 22 of them allocate 10 percent or more of their block grant funds. These include Alabama, Alaska, Arkansas, Delaware, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, Wyoming, American Samoa, and Puerto Rico.

I wish I could say that the action plans drawn up by the states in the court area were impressive, but I think the best that can be said is that they are steadily improving. There are exceptions, of course. Illinois has several excellent programs in the court area, and Michigan's court planning is well thought out and shows what a state can do by careful and effective application of resources.

General criticisms of state planning in court improvement are that individual programs are too often underfunded for their stated goals; the level of funding for courts compared to other areas is inadequate; there are too many studies and not enough action programs; and funds allocated for court programs are too often reprogrammed later to non-court uses. Finally, of course, there is the simple fact that in many states little can be done to improve the administration of justice without active participation and commitment on the part of the judiciary.

Those are general criticisms, however, and it is much more heartening to consider specific examples of real progress.

The Illinois 1971 Plan calls for a total court expenditure of $1,445,000 in LEAA funds, which is only 7.6 percent of the LEAA block grant, but it involves several significant programs.

One is an ambitious project to improve operation of the 102 state attorneys' offices, through a survey of all the offices of the state, and establishment of several model offices. It offers promise of increasing effectiveness and professionalism in prosecutorial services in the state, and may well provide useful information and possibly models for other states to follow. Efforts

will be made to develop minimum standards and uniform procedures as well. The project, which will involve $300,000 in LEAA funds and $740,000 in state funds, calls for establishment of several model state attorneys' offices: a district office serving five counties, a circuit office serving 13 counties, and a metropolitan office, which would be the Cook County State's Attorney's office. Finally, a model support unit to serve rural prosecutors will be developed.

The Illinois plan for 1971 also calls for a continuation of a project begun last year—the development of a statewide appellate defender service which looks toward a total statewide defense system for indigents accused of crime or delinquency. Since Illinois had no statewide defender system before, establishing a new system offers a classic opportunity to write on a clean slate, rather than, as in prosecution, attempting to build on an already established structure. The idea of a State "defender general" is one which has been implemented in few other states. Unlike the prosecutorial system, it was possible to design the defender system on a purely rational basis, with the defender units having the same geographical jurisdiction as the intermediate appellate courts which they serve. The prosecution system is working in the same direction, but with obvious obstacles. The defender project involves $495,000 of LEAA funds and $330,000 in state funds, and the establishment of a staff headquarters, four district offices in each of the other four judicial districts, and a pilot project which will serve the Cairo area and adjacent counties. The Cairo project will be trial-oriented, with assistant defenders hired to handle misdemeanor and felony cases. The Illinois defender program has been identified by the National Legal Aid and Defender Association as a model for defender services in other states.

Illinois also has a major program for judicial management and facility improvement, which involves a statewide system analysis of the courts in the state and also plans to build new courtrooms in Chicago.

Michigan is another state which used its court funds well. In contrast, it had only one large program and more than a dozen smaller ones in its 1971 plan. Its total court funding of almost $1.7 million came to more than 11 percent of its total LEAA block grant. The largest project, involving $550,000 of LEAA funds, involves a study of the specialized courts in Detroit with the objective of absorbing them into the Wayne County Judicial system. Among the other programs:

—to provide qualified management and system staff to at least 10 circuit and district courts over the next two years in order to cut time between arrest and trial to no more than 90 days.

—to codify criminal procedures.

—to expand or establish an office for prosecution of appeals statewide on behalf of the people and assist prosecutors.

—to continue a central office to coordinate activities of prosecutors and develop training programs.

—to provide legal advisors to five police agencies.

—to continue a law school prosecutor intern program, and a similar defender intern program.

—to continue an appellate defender program to handle all criminal appeals and post-conviction proceedings for indigents on a statewide basis.

—to expand the district defenders' office to provide well trained, experienced trial lawyers for indigents charged with high misdemeanors and felonies, and to establish three additional defender offices.

—to develop and implement alternatives to prosecution and sentencing of non-traffic, non-assault misdemeanant first-offenders such as alcoholics and minor sexual offenders. Last year Michigan had similar projects for felony offenders.

—to train more than 1,000 judges, prosecutors, defense counsel and court personnel in interdisciplinary projects, with emphasis on training support personnel in court management techniques.

—to develop and publish workable local and regional plans for district courts, police and prosecutors to implement in emergency conditions.

—to continue a pre-trial release program, by creating an organization to provide judges with information to assist in setting bond and other pre-trial release conditions.

For one more example of state progress, we should look at Mississippi, which last year devoted only $42,000—or two percent—of its block action grant to courts. This year, the amount has been raised to $343,000—or nearly 10 percent—and the quality of its programs is high. They include:

—Seminar courses for all of the state's judges on such subjects as court organization, administration, reforms, sentencing, and corrections.

—A prosecutor training program, with law school studies to be supplemented by work in a prosecutor's office.

—Construction, renovation, and improvement of judicial facilities.

—Hiring an assistant district attorney or investigator to assist full-time district attorneys.

In addition, the Mississippi plan indicated that future priorities will include creation of the office of administrator of courts and creation of a judicial qualifications commission.

In the words of one of our court specialists, criminal justice planners in Mississippi have rolled up their sleeves and made an impressive beginning on programs designed to solve the state's court problems.

The state's fiscal 1971 plan represents a good beginning not only in amounts of funds for courts but quality of programs as well. Projections of program spending beyond fiscal 1971 also are impressive.

For instance, in discussing multi-year action, Mississippi noted that it hopes in 1972 to increase the percentage of resources for courts substantially. This fiscal year, Mississippi plans to use 9.5 percent of its block grant—or $343,449—for courts activities. In fiscal 1972, that would climb to 17.5 percent—or $1,649,000. And court expenditures from block grants would continue to rise, with $2 million in fiscal 1973, and $3.4 million in fiscal 1974.

Among new programs planned in later years are a statewide project to provide defense services for indigents, a program to train court reporters, seminars for judges, an in-depth study of the state's judicial system, and the creation of 20 Youth Court judgeships.

The plan also noted that there must be future efforts to improve the justice of the peace system and to revise the Mississippi Code.

Discretionary Action Grants

Of the total action funds available, the law provides that 15 percent are set aside as discretionary funds to be awarded to state and local governments by the LEAA Administrators outside of the block grant formula. During the first two years of the program, over $35 million was available for this purpose. For the current fiscal year, more than $70 million is available. These funds are distributed pursuant to a discretionary grant guideline which this year has defined over 30 programs under which applications are encouraged from potential grantees. Last year, more than 450 grants were approved out of about

1,000 applications. It is anticipated that about 600 grants will be awarded this year.

The current guidelines include five areas of court programs for which discretionary grants may be awarded. They are: Court management projects, training courses for judges, training courses for prosecutors, technical assistance and coordination units for prosecutors, and law student interns in the offices of prosecutors and public defenders.

Some $4 million has been earmarked for grants in those areas —with $2 million of it scheduled to finance court management projects. The projects may include all phases of internal operations, such as procedures, scheduling, forms, staff utilization. In addition, funds may be awarded to meet areas of special need, as well as for projects which are designed to bring better coordination between the courts and other criminal justice agencies.

Discretionary grants for court programs were nonexistent in our first year. In our second year, fiscal 1970, last year, court programs accounted for only four percent of the $30 million available for all discretionary grants.

Orginially LEAA earmarked almost $2 million for discretionary grants for courts, but only $1.2 million was actually awarded. An additional grant in the special "large city" category of discretionary grants brought this up to $1.3 million. An additional $500,000 in discretionary grants for court programs was approved by LEAA's courts division, but approval came too late for awards last year and these were carried over into fiscal 1971.

As for discretionary grants for programs in the current year, fiscal 1971, a total of $70 million is available. It is impossible to estimate how much of this will eventually be actually awarded for court programs, but of the $19 million in discretionary grants awarded so far, a total of $1 million has gone for court programs. This amounts to 5.5 percent, compared to the four percent of all of last year.

I would like to cite a few programs as examples of what we are trying to do.

Fiscal 1970 discretionary grants for court programs included:

—$357,000 for the Institute of Court Management, at the Denver University Law School, and the National College of State Trial Judges, of Reno, Nevada, to conduct at least 10 court management studies of criminal courts and courts systems throughout the United States. One study will survey an entire state court system, the others will be in major metropolitan areas.

The studies will be examined to devise standards and methodology applicable to all court management analysis.

—$150,000 for the improvement of court management and operation in Illinois, including a court management survey of felony and misdemeanor courts, development of a streamlined preliminary hearing procedure for felony cases in a circuit court, and a court ombudsman program for urban municipal cases, to assist and advise citizens on sources of legal counsel and to institute litigation for those otherwise without redress.

—$143,000 to Missouri for the St. Louis Circuit Court to offer services to juveniles, including special treatment for the mildly disturbed or retarded.

—$140,000 to Arizona for the Pima County Juvenile Court Center in Tucson, to develop a model management system for juvenile court operations.

—$82,000 to support a management study in Ohio of Cuyahoga County's 15 courts by the Criminal Justice Coordinating Council of Cuyahoga County and the Cleveland Bar Association.

Fiscal 1971 discretionary grants for court programs so far approved include:

—$250,000 to reduce delay in the recorders court of the City of Detroit, Michigan. This grant provides for the design, analysis, and implementation of a new management information system for processing of misdemeanor criminal prosecutions through the court.

—$116,000 to provide the major source of funding for the judicial conference we are now attending.

—$90,000 for a three-phase project in Ohio's Franklin County Municipal and Common Pleas Court. The goal is improvement of scheduling and calendaring procedures through the use of data processing techniques.

—$75,000 for Georgia's Fulton County Juvenile Court, in Atlanta, to revise the intake forms in order to increase the information available to judges. The project will also allow projection of delinquency trends and formation of prevention programs.

—$31,000 to provide technical assistance and coordination units for six prosecuting attorneys offices in Michigan. This is a very promising project, not merely because the information used will be made available to all the prosecuting attorneys offices in the state, but because it is serving as a model or pilot for a program we hope to establish in every state. Instead of surveys or seminars, it offers centralized expertise, on a daily

basis, with technical assistance and the services of an outside management consultant. Instead of study, it offers action and real help.

Grants for Corrections

The recently enacted Amendments to the Omnibus Crime Control Act established a new program—called Part E—to accelerate correctional reform in addition to the regular funds that would be made available in the LEAA action programs. The guidelines for the new activity are just being issued and a supplemental budget for the balance of the fiscal year of some $50 million has been transmitted to Congress. For fiscal 1972, almost double that amount has been requested.

A separate comprehensive plan must be developed for those states wishing to participate in the special corrections program. Although the needs of corrections are great in all aspects, Congress has decreed that priority must be given to the development of community based programs, including probation and parole. Also, emphasis is to be given in the development of regional correctional facilities to replace the nation's crumbling and inhuman county jail system. While the needs are acute for the modernization or replacement of prisons, the costs, at least in the earliest years, are almost prohibitive. So major state institutional construction programs will be deferred in most states until subsequent years, when funding levels may be substantially increased.

If Congress responds to our supplemental request, the combination of regular action funds plus the new Part E program could well approach $175 million since it appears that the regular Part C funds devoted to correction will be close to 35 percent of the total. If the same pattern holds true for the coming fiscal year, another quarter of a billion dollars of federal funds could be added to the total current expenditures of state and local government expenditures of about $1.5 billion. These new funds and the resulting new programs, personnel and facilities will mean the start of a major upgrading of corrections not seen in the two centuries of our national existence.

Research and Its Importance

One of the greatest needs of the criminal justice system is the need to bring to bear the techniques and resources of modern science and technology on the chronic and severe problems that plague our criminal justice system. This is the mission of the National Institute of Law Enforcement and Criminal Justice, the research arm of LEAA. Although the funding level of the pro-

gram has been very modest in relation to the needs—some $7.5 million for the current fiscal year—significant research efforts are underway. In response to congressional desires, primary emphasis has been given to the development of practical police hardware and equipment, but the Institute's Center for Law and Justice also has developed an impressive portfolio of research projects for court improvement.

LEAA's research efforts aimed at court problems has been well developed almost from the beginning of the agency. In fiscal 1969 LEAA gave more than 15 research grants and contracts related to courts. The principal one was a grant of $120,000 to the Committee on the Administration of Justice in the District of Columbia, to finance a management study of local trial courts.

In fiscal 1970, the National Institute devoted 20 percent of its $7.5 million budget, or $1.5 million, to court programs. Some examples:

—$192,000 to the University of Notre Dame to finance a joint study by the law school and the engineering college on court delay. Systems engineering techniques will test the validity of mathematical models on court delays. Computers will be used to test the models under varying conditions to test the effectiveness which various improvements might have.

—$105,000 to the Case Western Reserve University Law School to make a detailed examination of pre-trial procedures in felony cases, using the Cleveland courts. High priority will be given to determine whether the due process requirements could not be equally or better served by substitute procedures which would cut down the delay and increase the effectiveness of the system, with the aim of shortening the pre-trial process in a manner consistent with fairness.

So far in fiscal 1972 two new research projects have been approved. The first is for $146,000 to the Institute for Defense Analyses in Arlington, Virginia, to examine the role of defense counsel in criminal cases, with an effort to see where defense counsel strategy and tactics delay the case, and to weigh the cost benefit factors involved.

The second research project involves a grant of $165,000 to the Institute of Judicial Administration for the first phase of a multi-year effort aimed at developing a set of nationwide standards for juvenile justice, modeled on stands for criminal justice which IJA and the ABA have developed since 1969.

Academic Assistance

Another major program of LEAA is that of academic assistance. This year, more than $21 million in loan and grant funds

are being utilized by almost 900 colleges and universities in assisting some 65,000 students to pursue college degree programs, either undergraduate or graduate, directly related to law enforcement careers.

Most of the students are in-service police officers who are taking evening or other part-time coursework.

Last year, more than 1,400 employees of courts were attending college with the assistance of LEAA funds. Since court personnel represent the smallest part of the criminal justice system, this seems to us a significant beginning, but we expect the number to grow in coming years.

With the new legislative amendments, our Office of Academic Assistance will have an expanded role in assisting in the development and support of college level training programs and short courses and also in the development of academic curricula.

We have made an important modification of our academic assistance program, although it is still too early to report on what extent it will be used. We have modified our flat prohibition on law school attendance to allow certain in-service personnel to attend law courses or study for a law degree. This was done because of the increasing demand for people with law enforcement experience and a legal education. This program is limited to police or correctional officers with at least five years of service with a state or local agency. Court personnel are presently excluded.

Statistics and Information Systems

The development of reliable statistics and information systems programs is a key to improving and reforming the nation's criminal justice system. Reform must be premised on intelligent and comprehensive planning; planning must have an accurate, timely, and comprehensive data base or it will be nothing more than wishful thinking. This is the mission of our statistics program. The National Criminal Justice Information and Statistics Service (NCJISS), is about 18 months old and has been funded at a level of about $5 million. It has two major purposes: to support the development of statistical and information system programs in the several states; and to conceive, develop, and implement major criminal justice statistical series and studies of national scope. Among other things, we are engaged in an effort to build up the state statistical programs.

Here are sketches of five important national programs, plus greater detail on a sixth.

—Last December the first full scale study on employment and expenditure of the nation's criminal justice agencies was pub-

lished and distributed, including the first information on court agencies.

—We have just released a National Jail Survey that represented a 100 percent census of the nation's 4,000 county jails. This is a comprehensive study of physical plants, programs, and inmate characteristics.

—An advance report is being issued this month of a directory of the nation's 35,000 criminal justice agencies including names, addresses, phone numbers, zip code and a new coding system of unique identifiers for each agency for computerization. It will be periodically updated.

Work on this project was done for LEAA by the Census Bureau and the result will be the first National Criminal Justice Directory ever compiled. The second part of the survey, due for completion by the end of 1971, will involve further surveys of court organization. Some results from the first phase of the survey include: of the 45,850 criminal justice agencies, 13,421 or 29 percent were found to be court agencies. (The survey did not cover towns of 1,000 or less population, or minor courts where the judge's compensation is on a fee basis.); when prosecutor and defender services are added to the courts the proportion rises to 49 percent of all criminal justice agencies; of the courts identified in the survey, 13 percent were at the state level, 47 percent at the county level, and 40 percent at the city, township or special district level.

—A fourth NCJISS program is the development of the computerized data base, the Criminal Justice Data Base. It will contain population data from the 1970 decennial census, uniform crime reports, employment and expenditure and other information.

—A fifth effort, conducted jointly by LEAA and the Census Bureau this spring will be a comprehensive Survey of Court Organization. This program is a first step in our long-range goal to develop National Court Statistics. The initial phase will cover about 8,000 court systems, including trial courts of general jurisdiction, state appellate courts and courts of limited jurisdiction. It will focus on the substructure of the system—number, type, geographic and statutory jurisdiction, and organizational alignment of courts in the system, administrative support, record-keeping practices, and distribution of workload as between civil and criminal cases. A detailed organizational directory will be prepared of the various divisions, departments and sub-units in each court system, jurisdiction at each level, distribution of workload, and location of records of court activity. We urgently

need and request your support in making this survey effort complete and successful.

Finally, a major program of NCJISS is Project SEARCH, or the System for Electronic Analysis and Retrieval of Criminal Histories. LEAA has funded development of this program at a level of more than $3 million in discretionary funds, with an additional $2 million from the participating states. The purpose of SEARCH is to develop an operational system for the computerization and interstate exchange of criminal history records by police, court and correctional agencies. The system will provide arrest and disposition data on certain categories of offenders on a real-time basis; that is, when an inquiry is addressed to the system a complete record will be reconstructed in a matter of seconds from whatever state criminal justice system that individual has been acquainted with.

Project SEARCH involves a consortium of 15 states led by California as coordinator state. The Michigan State Police has operated the central index facility for the demonstration. The 15 states in SEARCH, incidentally, account for about 75 percent of the nation's criminal transactions. The Attorney General has decided that when the system becomes operational next fall, the Federal Bureau of Investigation will operate the central index. It is anticipated that 20 to 25 states will go on line at that time and at least a half million existing records will be converted to the computerized format.

The implications of this system, when it becomes operational nationwide, are truly staggering. For the first time, the complete record of an individual will be available immediately, and this will obviously have significant meaning for courts, as it will for the entire criminal justice system.

This quick access to complete information would help a judge determine bail, decide whether or not to hold a suspect pending trial, in sentencing, in considering probation, and setting conditions for release. Even in a trial setting a prosecutor could use the system to check on the background of a surprise witness and could discredit the testimony as a result.

The operational uses aside, in the long run the most significant implications of SEARCH lie in its potential use as a tool for planning, management and research of the criminal justice system. For the first time, it will be possible to obtain timely information on the individual offender as he progresses—or doesn't progress—through each milestone in the criminal process. This will create a new statistical series on the effectiveness and efficiency of every component of our criminal justice system

which will make possible comprehensive understanding of its dynamics—including strengths and weaknesses. Already Project SEARCH has successfully developed and demonstrated the prototype of this new series.

It should be noted that when the SEARCH System becomes operational police agencies will be the primary participants in it. This is due in large part to the pioneering work of the Federal Bureau of Investigation in its National Crime Information Center, which is a nationwide computer system for the exchange of operational police information such as stolen vehicles and wanted persons. Also, the Highway Safety program of the Department of Transportation has provided $40 million in federal aid to help police automate driver's license and traffic safety records. No similar investment has been made for the automation of court or corrections record systems, but LEAA is dedicated to substantially assist the states in this regard.

Technical Assistance

The final major program of LEAA is that of technical assistance. Now entering its second year, our efforts are quite well structured in the corrections and organized crime fields, some specialized aspects of police activities such as police aviation and bomb disposal, but are generally now just getting off the ground in the police and courts area. Last year Congress appropriated about $1.2 million for technical assistance and for the current fiscal year the funding level is $4 million.

The corrections technical assistance program last year responded to over 300 requests from state and local governments. These requests were for a variety of assistance, ranging from survey teams that went into states like Mississippi and Arkansas for comprehensive field surveys of state correctional systems, to individual architects or management specialists who went to a city or county to help solve specific problems. Open-end contracts were effected with three groups—the American Corrections Association, the National Council on Crime and Delinquency and the Institute of Government at the University of Georgia —to make a wide range of specialists available on demand In addition, the Federal Bureau of Prisons and LEAA's own staff made numerous field visits. It is expected that by June 30, 1971 more than 600 additional requests will have been met.

For Courts, LEAA is now soliciting proposals for contracts to provide technical assistance for the courts. Some $200,000 is tentatively reserved by LEAA for this purpose, and we expect to make two or more contract awards before the end of the fiscal year June 30.

Ratios and Needs

I would like to turn now to a brief discussion of the LEAA effort in relation to overall spending by the nation for court programs.

Last year some $12.5 million in LEAA block grant funds were allocated for courts, some $1.5 million in LEAA research funds, and some $1.3 million in LEAA discretionary funds. Our Law Enforcement Education Program, of course, also benefited court personnel, and our National Information and Statistics Service supported development of an automated computerized system on criminal records, which when it becomes nationwide may greatly assist judges in making probation, release or sentencing decisions.

That total of LEAA spending amounts to only about six percent of that year's overall LEAA budget. On the national level, courts, prosecution and defender services accounted for 18 percent of the spending for criminal justice at the state and local level. LEAA's budgets of $268 million in fiscal 1970, of almost half a billion this year, and a request of almost $700 million for the year ahead, are respectable compared to the $6.5 billion state and local annual cost of the criminal justice system. LEAA's contribution of $15.3 million in fiscal 1970 compared to the state and local cost of operating our courts, including prosecution and public defender services—$1.2 billion—was not as high as it might have been.

A principal goal is greater participation by judges and court administrators in the criminal justice planning process. A high level of participation can help assure a greater share of LEAA funds for the courts.

If you consult the tables at the end of this paper, you can see where your own state stands in this area of funds for courts. LEAA can only do so much—the real impetus for improvement rests at the state and local levels.

Our philosophy at LEAA is and has been the one expressed by the President in his State of the Union Address, the need to solve state and local problems at the state and local level, with state and local talent doing the job. The Federal government will provide resources, because they are needed for progress to be made, but we have no desire to tell you how to run the courts of your state.

Developing National Standards and Goals

Finally, I would like to discuss the new major effort to be undertaken by LEAA in partnership with the states to develop na-

tional standards and set long-range goals for the improvement and reform of criminal justice in America.

In a recent address, Attorney General John N. Mitchell directed LEAA to begin at once to assemble working groups to review the present status of the various disciplines of criminal justice with the objective of developing national standards and setting long-range goals for the major system components. The Attorney General described the program this way:

"We have already begun to move in the right direction with the LEAA program of grants to states and localities. What is needed now is a set of national goals and standards in the operation of police forces, in the administration of courts, and in the upgrading of correction systems."

"I therefore propose that Federal, state and local governments join together in establishing such standards and goals. The Federal Government's role would be to provide financial support and technical expertise. The state and local governments would bring to such discussions their own professional experience. Working together, the three levels of government could agree upon a set of specific objectives to be achieved on a nationwide basis."

"To this end I am directing the Law Enforcement Assistance Administration to provide the financial support and to take the initiative in establishing a proper method of holding these discussions and arriving at these goals. By pooling the talents of professionals at all levels of government, we can set yardsticks to measure our progress toward a 20th Century criminal justice system."

This new undertaking will not be just another study commission writing a scholarly tome. Rather, we will develop realistic blueprints for the rational allocation of resources. As I indicated earlier, the states have embarked on similar courses individually through the vehicle of their comprehensive state plans.

The time has arrived for this experience to be brought together collectively so that the best can be gleaned and then translated into standards and goals and priorities for the benefit of the entire nation.

It may be properly asked why the work of the President's Crime Commission of a few years ago would not suffice for this purpose. There are several reasons. First, that report was the result of studies conducted largely in 1965 and 1966; and much experience has been gained in the intervening years. Second, there have been significant advances in criminal justice plan-

ning, particularly the three sets of comprehensive plans through the LEAA program. Most important, however, the recommendations of the President's Crime Commission were more or less a random set of findings with no attempt to set priorities or define goals for improvement of the system. And those are the main tasks to be done.

How is all the work to be organized? It is our intention, at a very early date, to issue a call to the states to organize a consortium, much like that for Project SEARCH. It will be headed by a coordinator state and a central secretariat would be supported by LEAA discretionary funds. Other states would chair task forces in the various disciplines. Each task force would assemble representatives from the ranks of criminal justice agencies, the academic community, and the general public. These steering committees would be supported by the services of experts and consultants as may be necessary. LEAA will make available the services of its own staff to serve the task forces.

It is hoped that the work can progress rapidly enough so that at least interim results will be available to the states in time for preparation of their fiscal 1972 comprehensive plans. Final work should be completed so that LEAA may utilize them in reviewing the 1972 state plans prior to disbursement of block action grants. This means that final reports should be available nine months to a year from now.

Unlike the National Crime Commission, which went out of existence after completing its report, this new effort will be an on-going one. To be relevant, standards and goals must keep pace with the times; they must be up-dated; they must be refined and improved as conditions change, old problems are solved, and new problems arise. A structure involving LEAA and the states will be retained for these continuing efforts. An important part of this work will be to evaluate not only the relevance of standards and goals as time goes by, but to evaluate the projects and programs which are being carried out to reach those goals.

A crucial role in this new national effort must be carried by the judiciary. I urge you, and your colleagues throughout the nation, to begin immediately to plan for creation of the national task force on the courts. And I urge you to take an active part in the work of that task force, as well as in the follow-up efforts.

The key to this, as in all of our other projects, is for the criminal justice system to work together. A new level of cooperation must be attained among police, courts and corrections, just

as through the LEAA program a new level of partnership is being reached by state, local, and federal governments.

Working together, we can bring criminal justice fully into the 20th Century, and prepare for the next.

JUDICIAL ACTIVITIES IN THE UNITED STATES BY STATE AND LOCAL JURISDICTIONS

(Dollars in thousands)

State	State and local courts			State courts			Local courts		
	Total number	Full-time equivalent employees	Total expenditure	Total number	Full-time equivalent employees	Total expenditure	Total number	Full-time equivalent employees	Total expenditure
U. S. total	13,421	79,312	$885,739	1,689	15,576	236,068	11,732	63,736	$649,671
Alabama	296	1,348	11,147	39	274	2,543	257	1,074	8,604
Alaska	57	169	3,533	57	147	3,282	0	22	251
Arizona	165	1,071	8,693	16	245	1,081	149	826	7,612
Arkansas	226	319	3,375	35	74	1,582	191	245	1,793
California	387	7,568	103,329	6	277	14,599	381	7,291	94,730
Colorado	161	1,129	11,701	23	140	1,964	138	989	9,737
Connecticut	162	1,387	18,822	162	1,377	18,678	0	10	144
Delaware	28	487	3,564	4	346	2,418	24	141	1,146
District of Columbia	4	576	-	0	-	-	4	576	-
Florida	558	2,845	38,102	24	316	6,832	534	2,529	31,270
Georgia	595	1,838	17,635	42	249	3,046	553	1,589	14,589
Hawaii	46	469	5,269	46	468	5,258	0	1	11
Idaho	170	260	3,699	9	71	2,083	161	197	1,606
Illinois	33	4,917	51,140	28	1,096	16,936	5	3,821	34,204
Indiana	385	1,497	12,829	86	213	2,480	299	1,284	10,349
Iowa	114	969	9,618	19	108	2,167	95	861	6,851
Kansas	457	820	7,618	31	157	2,201	426	663	5,417
Kentucky	440	475	8,402	50	131	6,011	390	344	2,391
Louisiana	116	1,205	11,904	33	411	4,205	83	794	7,699
Maine	64	296	3,265	48	130	1,823	16	166	1,442
Maryland	92	1,218	18,390	10	251	7,443	82	967	10,947
Massachusetts	106	1,994	28,834	1	189	6,447	105	1,805	22,387
Michigan	251	3,582	43,010	76	375	7,322	175	3,207	35,688
Minnesota	337	1,226	12,695	11	117	2,677	326	1,109	10,018
Mississippi	133	565	4,510	38	81	1,236	95	484	3,274
Missouri	479	1,484	18,024	47	293	6,062	432	1,191	11,962
Montana	86	250	2,217	19	46	647	67	204	1,570
Nebraska	225	371	3,511	22	97	1,420	203	274	2,091
Nevada	68	401	4,004	9	51	679	59	350	3,325
New Hampshire	37	193	2,280	2	57	1,160	35	136	1,120
New Jersey	576	3,639	35,372	2	594	8,653	574	3,045	26,719
New Mexico	132	359	2,977	13	147	1,383	119	212	1,594
New York	1,239	10,557	131,667	14	1,525	26,768	1,225	9,032	104,899
North Carolina	101	1,960	11,522	65	1,808	10,589	36	152	933
North Dakota	130	281	2,277	7	47	547	123	234	1,730
Ohio	526	5,130	50,567	12	394	6,537	514	4,736	44,030
Oklahoma	128	924	6,988	28	370	3,105	100	554	3,883
Oregon	201	740	8,737	21	145	2,342	180	595	6,395
Pennsylvania	564	4,820	49,654	61	802	8,065	503	4,018	41,589
Rhode Island	44	253	4,411	7	252	4,388	37	1	23
South Carolina	255	677	5,578	17	69	1,006	238	617	4,572
South Dakota	45	245	2,227	31	29	561	14	216	1,666
Tennessee	355	992	10,355	29	224	2,686	326	768	7,669
Texas	1,675	3,511	38,199	228	398	7,169	1,447	3,113	31,030
Utah	94	246	2,862	13	106	1,631	81	140	1,231
Vermont	38	176	1,850	2	116	1,850	36	0	0
Virginia	355	871	11,859	51	158	5,600	304	713	6,259
Washington	235	962	10,170	28	131	1,716	207	831	8,454
West Virginia	155	321	3,106	32	90	1,290	123	231	1,816
Wisconsin	220	1,631	17,401	27	358	5,382	193	1,293	12,019
Wyoming	75	140	1,363	8	35	491	67	105	872

SOURCE: Criminal justice agencies in the U. S.: Jan. 1970.
Expenditure and Employment Data for the Criminal Justice System: 1968-69.

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EXPENDITURE OF STATE GOVERNMENTS FOR JUDICIAL ACTIVITIES: FISCAL YEAR 1968-69

(Dollars in thousands)

State	Total expenditures	Judicial activities	
		Amount	Percent of total
U. S. total	$1,849,078	$236,068	12.8
Alabama	60,344	11,147	18.5
Alaska	15,742	3,533	22.4
Arizona	56,983	8,693	15.3
Arkansas	24,504	3,375	13.8
California	999,850	188,887	18.9
Colorado	64,237	11,701	18.2
Connecticut	97,469	18,822	19.3
Delaware	21,050	3,564	16.9
Florida	190,911	38,102	19.9
Georgia	100,283	17,635	17.6
Hawaii	28,672	5,269	18.4
Idaho	16,765	3,689	22.0
Illinois	372,148	51,140	13.7
Indiana	102,022	12,829	12.6
Iowa	61,524	9,018	14.7
Kansas	47,553	7,618	16.0
Kentucky	64,519	8,402	13.0
Louisiana	92,511	11,904	12.9
Maine	21,241	3,274	15.4
Maryland	183,214	18,390	10.0
Massachusetts	198,192	28,834	14.6
Michigan	286,205	43,010	15.0
Minnesota	90,009	12,695	14.1
Mississippi	35,717	4,510	12.6
Missouri	127,800	18,024	14.1
Montana	15,785	2,217	14.0
Nebraska	34,092	3,511	10.3
Nevada	27,221	4,004	14.7
New Hampshire	13,986	2,280	16.3
New Jersey	273,677	35,372	12.9
New Mexico	26,927	2,977	11.1
New York	1,006,391	131,667	13.1
North Carolina	107,316	11,582	10.8
North Dakota	11,174	2,304	20.6
Ohio	299,190	50,567	16.9
Oklahoma	51,131	6,988	13.7
Oregon	62,256	8,737	14.0
Pennsylvania	334,249	49,654	14.9
Rhode Island	26,964	4,411	16.4
South Carolina	44,861	5,578	12.4
South Dakota	13,128	2,227	17.0
Tennessee	77,488	10,355	13.4
Texas	251,593	38,199	15.2
Utah	20,979	2,862	13.6
Vermont	11,572	1,850	16.0
Virginia	103,589	11,859	11.5
Washington	105,523	10,170	9.6
West Virginia	25,402	3,106	12.2
Wisconsin	139,125	17,401	12.5
Wyoming	8,974	1,363	15.2

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SUMMARY TABLE OF JUDICIAL ACTIVITIES SUPPORTED BY BLOCK AND DISCRETIONARY GRANTS

Year	Block grants			Discretionary grants		
	U. S. grand total	Total for courts	Percent grand total for courts	U. S. grand total	Total for courts	Percent grand total for courts
1969	$25,054,382	$1,379,900	5.5	$4,350,000	-	-
1970	184,528,000	12,452,584	6.7	31,999,760	1,300,000	4.0
1971*	286,399,000	29,845,000	10.0	70,000,000**	1,109,356	1.6

* Figures represent only those 47 state plans for block grants so far received by LEAA.
** Figures are incomplete since all grants have not yet been approved.

BLOCK GRANT SUPPORT TO JUDICIAL ACTIVITIES BY STATE FOR FISCAL YEARS 1969, 1970 AND 1971*

State	1969 $(000)			1970 $(000)			1971 $(000)		
	Total block grant	Court program	Percent of block grants	Total block grant	Court program	Percent of block grants	Total block grant	Court program	Percent of block grants
U. S. total	$25,054.4	$1,300.0	5.5	$1045280	$124525	6.7	$2863990	$298450	10.0
Alabama	433.8	20.0	4.6	3,175.0	175,000	4.5	5,645.0	620.4	11.0
Alaska	100.0	-	-	500.0	11,000	2.2	380.3	69.2	18.2
Arizona	200.6	5.0	2.5	1,503.0	35,000	2.2	2,933.0	185.0	6.3
Arkansas	241.6	10.0	4.1	1,787.0	39,060	2.2	3,157.0	391.8	12.4
California	2,351.6	100.0	4.3	17,287.0	864,350	5.0	-	-	-
Colorado	242.6	24.1	9.9	1,863.0	1,800	.1	3,567.5	315.0	8.8
Connecticut	359.9	16.2	4.5	2,669.0	95,410	3.6	-	-	-
Delaware	100.0	-	-	528.0	18,624	3.5	1,000.0	135.9	13.6
Florida	737.0	-	-	5,597.0	70,500	1.1	11,166.0	770.5	6.9
Georgia	554.6	20.1	3.6	4,127.0	118,018	2.85	7,518.0	503.2	6.7
Hawaii	100.0	1.8	1.8	768.9	60,030	8.0	1,379.0	90.0	6.5
Idaho	100.0	3.5	3.5	702.9	143,281	20.3	1,286.0	69.7	5.4
Illinois	1,338.5	80.7	6.0	9,877.0	1,000,000	10.1	19,006.0	1,445.0	7.6
Indiana	613.8	69.1	11.3	4,565.0	445,000	9.1	8,609.0	917.0	10.7
Iowa	337.7	50.0	14.8	2,501.0	120,076	4.8	4,670.0	-	-
Kansas	278.5	-	-	2,065.0	246,200	11.9	3,955.0	395.5	10.0
Kentucky	391.9	11.7	3	2,906.0	55,000	1.9	5,290.0	526.0	9.9
Louisiana	448.6	-	-	3,344.0	69,725	2.1	5,966.0	573.3	9.6
Maine	119.6	-	-	970.2	75,800	7.8	1,800.0	126.0	7.0
Maryland	451.1	77.2	17.1	3,349.0	441,130	13.2	6,485.0	1,277.7	19.7
Massachusetts	665.5	33.6	5.1	4,902.0	140,000	2.9	9,424.0	109.0	11.6
Michigan	1,055.0	150.0	14.2	7,817.0	649,000	8.0	14,692.0	1,649.0	11.2
Minnesota	438.8	19.0	4.3	3,302.0	556,900	16.86	6,143.0	921.8	15.0
Mississippi	288.4	-	-	2,117.0	41,970	2.0	3,614.0	343.5	9.5
Missouri	564.5	37.5	6.7	4,155.0	347,072	8.35	7,760.0	458.5	5.9
Montana	100.0	-	-	689.7	40,000	5.8	1,279.0	47.0	3.4
Nebraska	176.2	-	-	1,310.0	30,600	2.3	-	-	-
Nevada	100.0	-	-	500.0	55,000	11.0	888.0	45.0	5.1
New Hampshire	100.0	-	-	697.4	30,000	4.2	1,331.0	110.0	8.3
New Jersey	860.3	-	-	6,372.0	101,371	1.6	11,870.0	1,613.0	13.6
New Mexico	123.2	-	-	985.0	48,500	5.9	-	-	-
New York	2,250.5	162.0	7.2	16,392.0	2,000,000	12.2	30,090.0	3,600.0	-
North Carolina	618.7	140.0	22.6	4,625.0	296,446	6.4	8,604.0	592.9	6.9
North Dakota	100.0	5.5	5.5	618.2	78,250	10.3	1,125.0	113.0	10.0
Ohio	1,284.3	18.0	1.4	9,563.0	400,000	4.2	17,645.0	1,454.0	8.2
Oklahoma	305.7	18.0	5.9	2,291.0	171,400	7.9	4,182.0	620.0	14.8
Oregon	245.5	3.6	1.5	1,806.0	123,631	6.8	-	-	-
Pennsylvania	1,427.2	120.0	8.4	10,591.0	928,760	8.8	19,532.0	2,645.4	13.5
Rhode Island	110.4	-	-	900.9	10,000	1.1	1,699.0	40.0	2.4
South Carolina	317.9	20.4	6.4	2,406.0	57,800	2.1	4,223.0	460.3	10.9
South Dakota	100.0	-	-	658.9	36,000	5.5	1,115.0	150.0	13.4
Tennessee	478.2	76.6	16.0	3,562.0	189,000	5.3	6,425.0	520.0	8.1
Texas	1,333.6	-	-	9,926.0	642,500	6.5	18,393.0	2,469.0	13.4
Utah	125.7	10.0	7.9	1,000.0	110,000	11.0	1,953.0	50.0	2.6
Vermont	100.0	-	-	500.0	13,400	2.58	807.4	89.0	11.0
Virginia	577.1	21.5	3.9	4,150.0	142,000	3.4	7,604.0	550.0	7.2
Washington	379.6	-	-	2,971.0	345,000	11.6	-	-	-
West Virginia	220.9	34.8	15.8	1,640.0	61,500	3.8	2,849.0	289.5	10.2
Wisconsin	515.2	14.0	2.7	3,795.0	430,000	11.3	7,309.0	496.0	6.8
Wyoming	100.0	-	-	500.0	22,960	4.6	750.0	130.0	17.3
District of Columbia	100.0	6.0	6.0	795.3	25,520	3.2	1,374.0	94.9	6.9
Puerto Rico	330.3	-	-	2,454.0	243,000	10.0	4,502.0	784.0	16.6
Virgin Islands	40.0	-	-	200.0			250.0	-	-
American Samoa	-	-	-	50.0			75.0	8.0	10.7
Guam	40.0	-	-	195.0			250.0	-	-

* 1971 figures are preliminary and are subject to change before approval. Evaluation of state plans for 1971 is still in process. It should also be noted that states do submit additional requests for block grants which may not have been included in present data.

1971 figures were compiled as of February 26, 1971. As of that date, 8 of 55 state planning agencies yet to submit their plans and therefore are not represented.

DISCRETIONARY GRANT SUPPORT TO JUDICIAL, POLICE AND CORRECTIONS ACTIVITIES FOR FISCAL YEAR 1970

(Dollar amounts in thousands)

State	Total discretionary grants	Court Grants		Police grants		Correction grants		Miscellaneous grants[1]	
		Amt.	Percent	Amt.	Percent	Amt.	Percent	Amt.	Percent
U. S. total	$31,999.8	$1,300*	4	12349	39	9374	29	7,109	22
Alabama	442	51	11	383	87	0	-	8	2
Alaska	367	29	8	0	-	79	22	259	70
Arizona	660	108	16	305	46	226	38	1	-
Arkansas	129	0	-	68	53	61	47	0	-
California	1,277	0	-	814	64	169	13	294	23
Colorado	471	60	13	150	32	164	35	97	20
Connecticut	634	0	-	311	49	227	36	97	15
Delaware	273	0	-	150	55	74	27	49	18
Florida	1,681	0	0	843	50	254	12	584	38
Georgia	499	31	6	191	38	173	35	104	21
Hawaii	69	0	-	0	-	0	-	69	100
Idaho	278	0	-	133	48	0	-	145	52
Illinois	808	0	-	248	31	303	38	257	31
Indiana	597	0	-	403	68	0	-	194	32
Iowa	166	0	-	134	81	24	14	8	5
Kansas	35	0	-	15	43	12	34	8	23
Kentucky	1,005	0	-	439	44	336	33	230	23
Louisiana	593	0	-	30	6	317	53	246	41
Maine	180	0	-	60	33	28	17	92	50
Maryland	611	179	29	30	5	237	39	165	27
Massachusetts	739	75	10	257	35	347	47	61	8
Michigan	1,288	49	4	505	39	531	41	203	16
Minnesota	565	0	-	282	50	263	47	20	3
Mississippi	153	0	-	153	100	0	-	0	-
Missouri	386	0	-	208	54	173	45	5	1
Montana	134	46	34	7	6	18	13	63	47
Nebraska	253	0	-	193	76	60	24	0	-
Nevada	295	0	-	165	56	35	12	95	32
New Hampshire	297	197[2]	66	2	-	16	6	84	28
New Jersey	1,356	32	3	926	68	188	14	210	15
New Mexico	116	0	-	27	23	0	-	89	77
New York	1,396	35	3	266	19	518	37	577	41
North Carolina	778	0	-	295	38	469	60	14	2
North Dakota	205	0	1	137	67	0	-	68	23
Ohio	1,579	159	10	760	48	459	29	201	13
Oklahoma	400	0	-	166	41	182	45	52	14
Oregon	380	0	-	178	47	202	53	0	-
Pennsylvania	903	0	-	285	32	461	51	157	17
Rhode Island	327	0	-	197	60	48	15	82	25
South Carolina	578	32	5	120	20	402	70	24	4
South Dakota	130	0	-	70	54	0	-	60	46
Tennessee	266	0	-	171	64	95	36	0	-
Texas	1,312	65	6	660	50	294	22	293	22
Utah	363	0	-	36	10	249	69	78	21
Vermont	250	0	-	47	19	84	34	119	47
Virginia	401	0	-	159	40	196	49	46	11
Washington	150	0	-	0	-	100	67	50	33
West Virginia	272	0	-	0	-	49	18	223	82
Wisconsin	604	0	-	83	14	67	11	454	75
Wyoming	287	0	-	0	-	77	27	210	73
District of Columbia	2,479	0	-	1,239	50	908	36	332	14
Puerto Rico	219	0	-	25	12	139	63	55	25
Virgin Islands	235	0	-	25	11	60	25	150	64
American Samoa	22	0	-	0	-	0	-	22	100
Guam	105	0	-	0	-	0	-	105	100

1 Miscellaneous grants include all discretionary funds not included in courts, police or corrections categories including small state supplement allocations and academic grant-in-aids (DF programs F-3 and G-5).

2 Figure for courts includes police and could not be broken down into separate categories.

NOTE: Fiscal year 1970 multi-state grants totaled $1,994,000. Since they could not be broken out by state, they are included only in the figure for total Discretionary Grants for FY 1970. 1,994,000 represents 6% of the total Discretionary Grants for FY 1970.

*Figure includes large city grant of $150,000 to Baltimore, Maryland.

THE INTERNAL RELATIONSHIPS

by

ERNEST C. FRIESEN, JR.
Director, Institute for Court Management,
University of Denver

The idea of court management or administration is not really a new idea except as we apply it to the judicial system. Management or administration of the business of the courts *is* a new idea.

In the next few days of this Conference we will hear many references to Roscoe Pound's 1906 speech; in it, he simply asked that we bring modern techniques, including management techniques, to the courts. Fifteen years later William Howard Taft, as Chief Justice, started asking the same thing—that we bring modern management processes to the business of administering the courts. The Wickersham Commission report, prepared in the twenties and studied throughout the thirties, asked that we do the same thing. Arthur Vanderbilt in the forties, and Earl Warren in the fifties and others in the sixties have had the same objectives.

Until recently, however, no one has clearly defined what these management techniques are. We know that what was modern in this field in 1906 isn't necessarily acceptable today. But when we speak of court administration and management, what *do* we mean? I suppose we could start by defining what a court is. Texas' definition of a court would be the judge, since each one of the district judges in that state is a court and has a number—the 235th district court, the 272nd district court, and so on.

Within this court, what are the internal relationships—since the smooth operation of these relationships is what management is all about? Within the entity we call a court are many people who are under the influence of, or in some direct or indirect way have an influence upon, the decision-making process. This definition would obviously include the clerks, bailiffs, court reporters, attorneys, jurors, perhaps even witnesses. This is true because all of these individuals have a role which has a record, and record-keeping is one of the most elemental functions of management.

At the Institute for Court Management we had one of the nation's leading experts on management study the typical organization of a court. He concluded that it was one of the most

complex institutions ever conceived by the mind of man. This man had spent nearly five years with the National Aeronautics and Space Administration as a consultant to the director. If you compare that institution—NASA—with all its ramifications and complications with a typical court system you can appreciate how complex the court system is.

There are two reasons for such a complex management concept. One is that a court has many missions, some in competition if not in conflict with others. Experts on organization define an organization as a group of people, or a collection of human resources, working toward a common objective. A court has many simultaneous objectives—civil, criminal, even non-judicial; adjudication of disputes, trying of criminal cases, supervision of probation, administration of juvenile and domestic relations issues, and more recently involvement in social controls in relation to drugs, pollution of environment and the like. Consider how many different constituencies of a court are represented. These management problems make up what we may call the program level.

The other reason for complicating the judicial scene is that courts operate within a broad governmental framework, and do not control their own resources. They are dependent, obviously, upon legislatures for definition of their authority and for funding, to a substantial degree. They are dependent for their vital routine functions upon clerks who in almost all instances are elected by a political process. They certainly are dependent for their effectiveness as instruments of justice upon lawyers, who are largely beyond their control. Even for office and courtroom space, the courts are often dependent upon agencies and individuals who are beyond their control.

Looked at in this way, the problem of court management is indeed complex. I suggest that in many instances, conventional concepts of business administration may be found inapplicable, and new concepts may have to be devised.

In theory, we should have a whole new hierarchy of court organization and control, but this is impracticable since this would require sweeping constitutional changes in some fifty-six jurisdictions in the United States. It may also be undesirable upon analysis; for what we really discover in analyzing the judicial process is that it is made up of groups of professionals or specialists—judges, lawyers, clerks, court reporters, and the like. What we are seeking is a new profession of "schedulers," who can define the specialties clearly, and then coordinate their functions efficiently and consistently.

A pair of professors of business administration at the Massachusetts Institute of Technology have written a book called The Temporary Society. They define these problems of modern management: (1) Most problems involve more than one type of expertise. (2) The specialized expertise for various individuals must be coordinated. (3) The teams may then have to be reformed as the problem changes. Every ten years, it has been said, our fund of technical knowledge doubles, so obviously our needs and ways of dealing with these needs must change periodically.

Now, applying these thoughts to the internal relationships of a court system, you can see that new concepts are demanded. Many more specialties are involved in the administration of justice in 1970 as compared with the administration of justice in 1870—but the structure and functions of the courts in many instances have not changed since about 1770. These new specialties have been added but not integrated or coordinated. They are not organized and then reorganized into teams which focus upon problems of justice as these problems change.

The physical appearance of a typical American courthouse will illustrate this "locked-in" problem of the court system itself. The pattern of courthouse design in most American counties today is the same as it has been since the 1870s. You can walk into any of these courthouses for the first time and almost automatically locate the courtroom, the clerk's office, the judge's chambers. But upon analysis you may find that a lot of steps have been wasted going to one or the other of these. They may not be located where the most efficient handling of contemporary court business would require them to be located.

In the same manner, the functions of the various professionals or specialists in the court's processes need to be redefined, relocated in the administrative plan, and systematically serviced by the management. This is the underlying theme of your discussions during the following sessions of this Conference.

II. ORGANIZATION OF A JUDICIAL SYSTEM

Moderator: HONORABLE ALFRED P. MURRAH

Senior Judge, U. S. Court of Appeals (10th), Director, Federal Judicial Center

This plenary session is very appropriately called the "organization of the judicial system," for surely that is the starting place. We can not carry out our mission unless we are organized, unless the system is organized. It was almost a decade ago, when Justice Clark called together a group of leaders in the field of judicial administration. Each of those 17 leaders represented some organization that had something to do with the improvement of the administration of justice. Out of that came the Committee for the Effective Administration of Justice. And after two or three years during which were organized the National College of State Trial Judges and the Conference of State Trial Judges, other new starts were made, all under the leadership of Justice Clark. That Committee for the Effective Administration of Justice promulgated a charter for court organization, and I'm going to take just a moment to re-read it to you.

It started out by saying that justice is effective when it is fairly administered without delay. With all litigants, indigent and otherwise and especially those charged with crime, represented by competent counsel. We realize that today. By competent judges, selected through non-political methods, based on merit, we have a good start. In sufficient numbers to carry the load, adequately compensated with fair retirement benefits—the Chief Justice spoke pointedly to that just a few moments ago. With security of tenure, subject to an expeditious method of removal for courts, we've made progress in the last decade. Operating in a modern court system, simple in structure without overlapping jurisdictions or multiple appeals. Business-like in management with non-judicial duties performed by competent administrative staff, with practical methods for equalizing the judicial workload, with an annual conference of judges for the purpose of appraising and improving judicial techniques and administration. And listen to this, under simple and effective rules of procedure, designed to encourage advanced trial preparation, eliminate the element of surprise, facilitate the ascertainment of truth, reduce the expense of litigation and expedite the administration of justice. What you have heard in the last two days is echos.

INTRODUCTION

As the people of any state of the Union approach the problems of modernizing the judicial machinery of the state, a number of questions quickly present themselves. How should the court system of the state as a whole be organized and supervised? What phases of this organization and supervision are essentially judicial and what others are essentially managerial? If, at least in the abstract, a unified court system with the chief justice of the state serving as the head of the system is the most efficient organizational form, can the system fulfill its promise if the responsibilities of the chief justice remain imperfectly defined? As for the non-judicial, administrative phases of the system, the same question applies to the statewide court administrator; if his responsibilities and authority are imperfectly defined, does the act establishing his office amount to a half-measure which also fails of achieving its promise?

Related to these questions is a third: If the highest court of the state has a chief justice who has overall responsibilities for the statewide judicial structure, and a state administrator who must work closely with the chief justice on the management affairs of the structure, how does this affect the appellate, reviewing function of the highest court itself? Put another way, what is to be inferred as to the appellate organization and function in a plan for general simplification and modernization of the entire court system? Shall there be one-level or two-level appellate processes? What should be the division of appellate jurisdiction in a system which provides for an intermediate appellate court? To what degree is a federal analogy apposite or inapposite? (W. F. S.)

THE ROLE OF THE STATE CHIEF JUSTICE

by

EDWARD E. PRINGLE
Chief Justice of Colorado

As you know, by means of both constitutional and legislative action, most of the judicial improvements which have been recommended by the authorities in the field of judicial administration have been adopted in Colorado in the past ten years. Among other things, these improvements have given the Chief Justice of Colorado broad authority in and responsibility for the administration of the state judicial system as a whole. These

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constitutional and statutory changes have also provided the requisite structure and tools for the effective exercise of administrative authority by the chief justice. Although judicial system reform and reorganization is taking place throughout the country at an accelerated pace, as yet not very many jurisdictions are this fortunate.

For this reason, I would like first to turn to what I consider to be severe impediments, where they exist, both to judicial administration, generally, and to the proper and responsible exercise of administrative authority by the chief justice, in particular.

A multiplicity of trial courts of different kinds with overlapping or fragmented jurisdiction or both is an obvious impediment to effective administration, no matter how broad the authority given a chief justice. This situation implies trials de novo, court shopping, poorly trained or qualified lower court judges, and little if any cooperation and recognition of problems among the different courts. It is very difficult when such a system, or should I say non-system, exists to achieve the proper utilization of judicial manpower, to develop procedural uniformity, and to improve administrative operations.

The ability to administer a judicial system is also severely limited if the legislature is still involved in rule making, either by legislative review or initial legislative enactment. Rule making for operation of the judiciary is and must be exclusively the province of the judicial branch of government.

Another major impediment in most jurisdictions to the administration of a state system is the lack of control over funds and personnel. Funding is usually provided primarily at the local level, and, under such circumstances, it is impossible to establish priorities and insure an adequate quality of justice throughout the system, especially in rural and economically depressed areas.

The situation with court personnel is usually even more fragmented, if that is possible. They may be appointed by someone outside of the judicial branch: prime examples include court clerks appointed by county commissioners, bailiffs appointed by the sheriff, or, as is the case in at least one state, appointment of court reporters and other key personnel by the Governor. Several jurisdictions have elected court clerks, who in turn appoint their own deputies, or this important function may be one of the many duties of the county clerk and recorder. It is also possible that judicial employees may be under an executive branch (state level) or a county personnel system over which the judiciary has little, if any, control. As that judicial seer Roscoe Pound pointed out early in the history of American judi-

cial reform, "the judiciary is the only agency of government which is habitually given no control of its clerical force. Even the pettiest agency has much more control than the average state court."

It is also very difficult to exercise proper administrative control at the state level when judges are elected. Elected judges, and understandably so, may feel responsibility only to their electorate. It is often difficult to transfer elected judges from less busy jurisdictions to other courts, no matter how broad the authority of the chief justice in this regard. The local judge feels that his responsibility is to the jurisdiction that elected him and that his absence may be criticised. An elected judge or clerk may defy or ignore an order or a request from the chief justice or supreme court on the basis that he received more votes in his jurisdiction than did the chief justice or members of the supreme court, and he could become formidable election opposition —a situation which could curb the administrative zeal of the most dedicated chief justice. The election of judges may also result in the hiring of patronage employees, again very understandable, but often employee qualifications and competence take a back seat to loyalty and the ability to help the judge get reelected.

Given all of these circumstances, or a substantial combination of them, it is impossible for the chief justice to exercise administrative authority and responsibility effectively, and even a constitutional mandate will not get the job done. In such a situation, there is little semblance of an integrated system, and it is my earnest belief that those who seek responsible and effective administration of a state court system must direct their efforts to removing or modifying as many of these impediments in their states as is politically feasible.

I have dwelt at some length on the impediments to effective administration of a state judicial system, because I think we should be realistic both in the demands made upon a chief justice for administrative responsibility and in the anticipated results, if other requisite changes are not made.

Now I will turn to what I believe to be the proper role of a chief justice in a unified state court. As I have pointed out, the chief justice, in order to carry out his responsibility, must have the proper administrative structure and tools. These include:

1.) Reorganized and unified court structure, with elimination of overlapping jurisdiction and integration of minor courts;

2.) Constitutional authority and responsibility vested in him for administration of the judicial system (including assignment

of judges) and administration of rules (both procedural and administrative), and, incidentally, that authority must include the power to designate chief or presiding judges in the various judicial districts or circuits and the power to delegate to these judges degrees of authority to administer those districts or circuits;

3.) Some form of judicial selection and tenure other than partisan elections and based on merit, and including a removal commission;

4.) Constitutional provision for state judicial administrator or administrative director responsible to and appointed by the chief justice or supreme court, with the administrator having a staff of professional assistants in several disciplines, in addition to adequate clerical support;

5.) State funding administered by the judicial branch, under the authority of the chief justice, including budget preparation and submission thereof directly to the legislature; and

6.) Separate judicial personnel system administered by judicial branch covering all court personnel—including probation, if possible, and providing for salaries, appointment, removal, etc.

When a chief justice is called upon to be the executive who is responsible for the operation of such a system, his administrative responsibility is indeed awesome. But the successful administration of something as complex as a state judicial system obviously requires the cooperative efforts of many people on many levels and cannot nor should not be a one-man autocracy, regardless of constitutional authority. It is, of course, vital to the viability of the system and its public image that someone must make the ultimate decisions and take the heat if necessary. I say to you that the people will have proper and efficient management of the court system and if the chief justice is not willing to assume this role in this time of great public concern for law and justice and of great public criticism of courts, the people or the legislature may very well place or try to place this responsibility elsewhere, perhaps with some official or somebody outside the judicial system and responsible to the executive or legislative branch of government. This can only lead to the diminution of the prized independence of the judicial branch of the government, an independence that must ever be preserved if the American constitutional scheme is to be maintained. The authority of the judiciary over its own operations has already been significantly diminished by attrition in some jurisdictions.

To carry out his administrative responsibility properly, the chief justice must spend a substantial portion of his time on ad-

ministrative matters, even though he has a competent court administrator with a qualified staff. Other members of the court as well may become involved in administrative matters for several reasons. Although the ultimate responsibility may be his, the chief justice should consult with his colleagues and also keep them informed. In Colorado, the constitution requires that administrative rules be promulgated by the Supreme Court as a whole; this is also the case with the personnel rules for the judicial employee merit system. All of the justices are also involved in the judicial nominating process, because each sits as a non-voting chairman of several district nominating commissions, while the chief justice serves in this capacity for the supreme court nominating commission.

The chief justice must spend even more time on administrative matters during the transition period required to make an integrated court system operational. At least, I hope that statement is true and that, as the system begins to take on experience, the chief justice can devote more time to his judicial function. An integrated system of necessity results in some diminution in the administrative autonomy previously enjoyed by trial judges, who have, in some instances, operated their own courts almost as feudal fiefdoms. Administration must, in my view, be decentralized as much as possible. But decentralization does not mean that each judge may administer his court at will. Trial courts must operate under delegated authority, in accordance with accepted principles which lead to the efficient and economical administration of justice. No system, no matter how well designed, will function properly without the cooperation of the trial bench. To achieve this cooperation, the chief justice and the administrative office must go out of their way to demonstrate their understanding of and sympathy for trial court problems. But once the resolution of the problem has been made, it must be executed with the firmness that leadership demands. This will require meetings with trial judges, court visits, and chief judges' conferences. Many of the individual problems of a particular district or circuit can be handled by the administrative office, but it is important that the chief justice become involved from time to time, to show his concern for proper management and to make the final decision when the problem is not resolved, and may I suggest that when administrative policy is finally determined, that policy should be promulgated in a formal administrative order signed by the chief justice and distributed to every judge in the state. Not only does this make the policy clear, but it is there for any interested citizen or legislative group to look at.

From much of my foregoing remarks, I think it is clear that there must be a close working relationship between the chief justice and the court administrator and a mutual understanding of the administrator's general scope of authority and the kinds of administrative policy matters which should be referred to or discussed with the chief justice. This relationship is absolutely necessary if the system is to function effectively, because, obviously, the chief justice is still a justice of the supreme court and is responsible for the operation of that court and for writing his share—although a smaller one—of the opinions. For this reason, he cannot and should not be involved in day-to-day administration of the system. This responsibility is delegated to the administrative office, but he should be informed on what is going on and have policy questions referred to him.

As I previously indicated, it is my belief that administration should be decentralized as much as possible within the rules, administrative orders and other guidelines promulgated by the chief justice or by the administrative office as delegated by the court. This can be accomplished more easily if the chief justice will, by administrative order, delineate the administrative authority he has so delegated to the chief judges.

In Colorado, each of the 22 judicial districts is considered as a separate administrative unit, including both trial courts, probation services, and juvenile detention in those districts where these facilities exist. Each chief judge is delegated the administrative responsibility for his district in line with fiscal, personnel, and other administrative procedures established by the supreme court. Parenthetically, the position of judicial district administrator has been created in most of the districts to provide chief judges with competent administrative assistance. For example, hiring is done at the judicial district level in conformity with standards established by personnel rules. The state court administrator's office is required to approve applicants as to qualifications, but the determination is made locally as to which qualified applicant to hire.

Decentralization has provided flexibility and has maintained some measure of local autonomy. At the same time, the broader participation in administrative matters, such as budget and personnel, resulting from decentralization has provided the meaningful involvement and cooperation at the trial court level requisite to making the system work.

A policy of decentralization should not preclude the chief justice from taking direct action when necessary to deal with important recurring administrative problems which should have

been corrected at the local level. This is a proper exercise of administrative authority, but should be used only if cooperative efforts fail. A current example is one of our courts which had a severe docket management program apparently not solvable by the court itself. The administrator's office, with the endorsement of the chief justice, has established a new docket system in this court and is monitoring it daily to make sure that it works properly.

In this connection, the chief justice must be generally familiar with the docket situation in each of the districts or circuits in his state. While it is the function of the administrative office to determine where help is needed temporarily and who is available to give this help, the chief justice must be advised, so that he may determine whether the condition is a temporary one which can be solved by temporary help, or one which requires a request to the legislature for additional judges. Moreover, it is the chief justice's responsibility to determine whether the judge available for assignment is adequate to the task. And, he must satisfy himself that the situation has not arisen because of some dereliction by the judge whose docket is involved.

The chief justice should also concern himself with judicial demeanor and behavior. Even with a judicial removal commission, the chief justice has the responsibility to deal privately, but effectively, with any judge who is not carrying his share of the load or who is remiss in his judicial duties, and whose dereliction has not reached the status where formal complaint is made to the removal commission. This practice has been followed in our state with salutary effect. In this connection, our statewide statistical reporting system now provides a monthly listing of civil cases under advisement more than 60 days and of criminal cases more than six months old which have not been tried. These lists are sent to the trial judges with a letter from the chief justice requesting that appropriate action be taken with a return letter of explanation.

This is only one, relatively minor, application of computers in the administration of justice, but it demonstrates that automation, other technical innovations, and the latest management techniques offer much in the operation of a judicial system. No one has any right to expect that a chief justice is going to be knowledgeable in these areas, but his administrative office had better be. And the chief justice should be receptive to proposals for innovation and change if the court system is to be able to cope effectively with ever increasing caseloads. Again, unless the judiciary, itself, takes the leadership in updating and improving court administration, the leadership will be provided outside the judicial branch, because the public will not continue to tolerate—nor should it—excessive delay and inefficiency in the courts.

The chief justice should always be mindful of his role as the official spokesman for the judicial system. He should make a special effort to develop a good working relationship with the press and other news media and understand deadlines and other technical problems in scheduling press conferences or issuing a news release. The importance of rapport with the news media cannot be overemphasized, especially in light of the kind of press coverage courts generally receive. The chief justice should not be remote or aloof or even appear to be so: accessibility is one of the keys to successful leadership of the system.

It is also very important that the chief justice develop a good working relationship with the legislature, so that he is able to keep legislators informed on the operation of the judicial system. He should be willing to point out the system's deficiencies as well as its accomplishments, and to explain what is planned to resolve any problems and improve operations. I would like to cite my recent address to the legislature on the state of the judiciary as an effective way of establishing rapport and setting the stage for continuing meaningful dialogue.

Legislative rapport is even more important if the judicial system is funded at the state level. I said earlier that state funding with fiscal control and budget preparation in the judicial branch is a vitally important tool in administering a unified state judicial system. It is the duty of the administrative office to prepare the budget and maintain the proper fiscal controls, but the chief justice must be familiar with the budget, the programs covered by it, and the program and staff additions to be requested. In my view, the chief justice should be prepared to present an overview of the budget to the appropriate legislative appropriation bodies and to answer questions on matters of policy, leaving the detailed presentation to the administrative office.

I have purposely not mentioned the chief justice's normal responsibilities in overseeing the appellate process and the disposition of appeals in his own court.

These are, of course, an important part of his administrative responsibilities. His court, as a part of the integrated system, must also function efficiently and economically. But, in the short time allotted to me, I cannot detail the specific methodology used in accomplishing this result, except to reemphasize that

these responsibilities cannot be slighted. Such a discussion is better left to conferences of a more specialized nature.

In conclusion, what I have said here points up that that the responsibilities of a chief justice in an integrated court system require dedication, purpose, and the willingness to accept the proposition that upon his office door is nailed the adage, "the buck stops here," and that this is the least we can expect from a chief justice if we are to achieve the aim of sound justice, exercised with reasonable speed, in an efficient and economical manner, with a minimum of technicalities, and if the independence and integrity of the judicial branch of government is to be preserved.

THE ROLE OF THE STATE ADMINISTRATOR

by

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Administrative Director of the Courts
of the State of New Jersey

In New Jersey, which has now had a state court administrator for over 22 years, some judges, many lawyers and most laymen are still only vaguely aware of what my office does, if, indeed they even know it exists! Why just last week after addressing a local Rotary Club luncheon, a neighbor of mine came up to me and expressed surprise to learn that I worked for the State. "From your title," he said, "I'd always assumed you were the tennis pro at one of the local country clubs!"

This anonymity is not altogether surprising, since the average lawyer or layman has not been particularly interested in the administration of the courts, unless and until things go wrong, and a state court administrator, by the very nature of his job, does not have occasion to deal directly either with many members of the bar or with the public, and generally is not, or at least should not be, embroiled in partisan politics or public controversy. Moreover, when the courts do get in the limelight, the judges usually see to it that the focus of attention is on them! It might also be remembered that as an institution, the office of state court administrator, although it now exists in over half the states, is still relatively new on the governmental scene.

It is difficult to know just where to begin a discussion of the role of a state court administrator, since there is no stereotype. The nature of the office varies widely from jurisdiction to jurisdiction. Where a state has assumed virtually total financial re-

sponsibility for the courts at all levels, as in Chief Justice Pringle's Colorado, the nature of the office is obviously quite different from that in the majority of states where county and municipal governments still bear the major burden of court operations. Moreover, in most jurisdictions the office is still in a state of metamorphosis.

In these circumstances, while it might be informative for some of you if I were to enumerate the duties of a state administrative office, most of you I am sure are at least generally familiar with the variety of functions which such offices do or might perform. Included are such matters as the assignment of judges; the collection and publication of judicial statistics; the handling for the state judiciary of the so-called "housekeeping" functions of budget, personnel, purchasing, court facilities, and the like; and the maintenance of liaison between the judiciary and other governmental agencies at the state level. Important, necessary and time-consuming as these common tasks may be, there are many other ways in which an administrative office, if adequately staffed, can make itself useful, if not indispensable, to the effective administration of a state court system. I shall not take the time here, however, to attempt to detail them for you.

As I previously mentioned, court administrative offices, as governmental institutions, are still in the developmental stage. Indeed this is true of the whole field of court administration, or court management as some prefer to call it. Accordingly in the time available, I would like to sketch for you what I consider to be some of the essentials for their future full development.

1. To begin with, as was pointed out by yesterday's speakers, we need to recognize that a court system, from an administrative standpoint, is an extremely complex organization that is more difficult to manage than the typical business enterprise or governmental agency. There are several reasons for this.

a. First, the key people in the courts are high level professionals—judges and lawyers—who are accustomed to working as individuals, and do not take kindly to regimentation. The judge in the black robe does not wear under it a gray flannel suit—he is not an organization minded man!

b. Second, in our governmental system we place a very high value on judicial independence, and to insure it we have surrounded judges with a variety of protections against outside influences, even administrative ones. Thus in our state, for example, while the Chief Justice is constitutionally the administrative head of all the courts, he has no authority to appoint, promote,

demote or remove any judge; in fact, the only people in the system he can hire and fire are his stenographer, his law secretary, and me! As any executive in business or government can appreciate, this severely limits the pressures that can be brought to bear to produce administratively desired results.

c. Third, many of the "dramatis personae" required for a successful judicial performance—these include practicing attorneys, jurors, witnesses and litigants—are not even public employees; and others who are so employed are not within the judicial branch of government—this is particularly true on the criminal side.

d. Fourth, the various participants in the litigation process do not all have the same goal in mind, but often are pursuing conflicting objectives.

In seeking solutions to the administrative problems of the courts, we should keep these inherent complexities in mind, since they will, to a substantial extent, restrict or determine what solutions may be effective.

Incidentally, I should point out, that the fact a situation or system appears complex does not necessarily mean that some solutions to problems may not, as was suggested yesterday, be amazingly simple. Let me illustrate: An unhappy student went to his physics professor with a problem. "Why is it," he asked, "every time I drop a piece of bread, it always lands butter-side down?" The professor was stumped, but recognizing that this was a common phenomenon which he himself had often experienced, he asked the student to come back in a week. The physics professor consulted all the authorities in his library and even discussed the matter with a colleague specializing in aero-dynamics. By the time the student came back a week later, the physics professor had the answer: "Young man," he said, "the solution to your problem is quite simple: you're buttering the bread on the wrong side!"

2. To administer effectively any organization, regardless of its size, it is necessary that some organizational pattern be established, or at least be tacitly recognized. In many jurisdictions, it seems to me, it is impossible for a state court administrator to play a significant role since there is no established organization for administrative purposes.

In some states the administrative structure is a vertical one. In New Jersey, for example, the state is divided into 12 geographical areas for administrative purposes, with a presiding judge, designated by the Chief Justice, responsible for the administration of all the courts within his geographical area. In

other states, such as Connecticut and Massachusetts, the organization is a horizontal one, with presiding judges for trial courts having statewide jurisdiction. Whatever the organizational structure, however, if a court system is to be managed in an orderly and effective fashion, it is essential that administrative responsibility be fixed and that lines of authority be established. But, as with a court structure for adjudication purposes, there are advantages in keeping the administrative structure simple and in avoiding too many levels in the management hierarchy.

3. One of the principal obstacles at the present time to the full development of the role of the court administrator, is the lack of delineation between those functions within the judicial establishment which are judicial in nature and can only be exercised by a judge, and those which are basically administrative and may properly be allocated to an administrative official, whether or not he be a judge. In my opinion it is essential that this line be drawn if courts are to make maximum use of persons with needed managerial expertise.

Unfortunately to date the determination of what is appropriately within the realm of the administrator has too often been made solely on the basis of the importance of the function, rather than on any objective analysis of the inherent nature of the task to be performed and the skills required. If the job is a big one, judges have generally reserved it for themselves; if it is a trivial or menial one, it has been wished-off on a court administrator. How often, I ask you, have you read or heard it said, that the function or role of the court administrator is to relieve the judges of administrative *details* so that they may devote their time and attention to more important matters? Where this is the judges' concept—and too often it is, or at least it has been—all that is needed is just another clerk, not a qualified administrator. I submit that if a fair analysis is made, the role of the court administrator will shape up as equal in importance to that of the judge.

One of the reasons for the subordination of the court administrator's role, I suspect, has been a latent fear on the part of both judges and lawyers that if they aren't careful the administrators will take over the system and the judges and lawyers will be relegated to a secondary status. Fear not! I assure you that as long as ultimate responsibility for the administration of the courts is vested in judges—and I think it should be—there is little danger that the administrator's role will become the dominant one; and as long as judges are the ones before whom lawyers try their cases and are the ones who have the power to fix

attorneys' fees and allowances, there is *no* possibility that court administrators will replace judges at the head tables of bar association dinners and other such legal gatherings!

4. After ascertaining what functions are non-judicial in nature, a determination should also be made as to whether such non-judicial functions can best be handled by a lawyer or a trained manager. At the state level, in my opinion, the balance is slightly in favor of the lawyer-administrator, with the assistance, as required, of various managerial specialists. At the trial level, on the other hand, I believe that an appraisal of the non-judicial duties to be performed may logically result in a preference for a non-lawyer manager.

5. To date courts generally—and our courts in New Jersey are no exception—have failed to make full use of modern business management methods and machines. Two related reasons for this are that the courts have had neither the managers nor the money necessary to modernize their operations. There is also, I suspect, a third reason: judges and lawyers have been all too reluctant to involve themselves with the management problems of the courts, but instead have been content from time to time merely to criticize their inefficiency.

Fortunately this situation is changing. Chief Justice Warren Burger's efforts, which resulted in the establishment of the Institute for Court Management, have done much to focus attention on the need for developing qualified court managers. Management consulting firms and computer manufacturers are now finding in the courts new markets, particularly on the criminal side where LEAA funds have aided in stimulating modernization.

Qualified managers, however, are needed not only at the state level, but even more urgently, at the trial court level. A state court administrator can have little permeating effect on the operation of his state's judicial system if there are not highly qualified, adequately compensated administrators in the court houses throughout his state; administrators able to deal on equal terms with county and local officials, including trial judges and trial lawyers.

By and large, I think, the courts of this country have not been mismanaged; for lack of managers they have simply been unmanaged. While we may be making some progress in reducing the shortage of mangerial personnel, we still have a long way to go to fill the court managerial gap!

6. I've previously indicated that if a state court administrator is to play an effective role, there is a need to establish an ad-

ministrative structure or organization to fix responsibility and determine lines of authority; a need to define which court functions are judicial and which are non-judicial; and a need for qualified managers at both the state and trial court levels. The fulfilling of these needs, however, will not, in my opinion, result in an effectively managed system without two additional essentials.

First, judges and court administrators vested with administrative responsibility must be willing to delegate that responsibility so as to bring about maximum participation by everyone within the system, judges and non-judges alike. This sounds simple, but in point of fact it is not only one of the most important management concepts; it is also one of the most difficult to master.

Unlike the typical business enterprise, courts do not respond well to centralized administrative authority. Many of the incentives that produce response to central executive authority in a business organization, such as increased compensation or promotion as rewards for performance, or the termination of employment as the penalty for failure, generally just do not exist in a judicial system. More subtle and less direct means must be used to encourage maximum performance by all within the system.

Sometimes, for example, in a court system administrative measures do not have the intended or expected result. Consider the case of a certain Chief Justice who, having exhausted all other means of encouraging a laggard judge to decide some cases in which decision had been long reserved, finally wrote him a letter: "Dear Judge: What would your friends and colleagues on the bench think if I were to publicly relieve you of your present assignment until all your reserved matters are decided?" Several days later the mails brought the reply: "My dear Chief Justice: After receiving your recent letter, I consulted my friends and colleagues on the bench and they all think it would be a lousy trick for you to pull!"

I believe that the greatest single incentive for outstanding judicial performance is each individual judge's desire to measure up to his own personal standards of excellence. In essence a judge's motivation to perform well is, and must be, self-motivation. If this is so, and I'm convinced that it is, then the greater the centralization of responsibility in a judicial system, the less individual responsibility and self-motivation. This accounts in large part, I think, for the apparent success of the individual calendar system in large multi-judge courts, although patently it would seem that a central assignment system in such courts should be more effective.

Court administrators, be they judges or non-judges, must find ways to call upon each individual in the system to the maximum of his abilities. To have judges on the bench, whose talents are not being fully utilized because they have not been given a fair opportunity to demonstrate their abilities, is administratively inexcusable. Continued failure to call upon a judge, or anyone else in the court system for that matter, to the limit of his capacity can only result in the gradual withering of both his abilities and his interest, with the individual and the system of which he is a part both being the ultimate losers.

The importance of delegating responsibility and authority to the lowest possible level within a system is well appreciated in the business world, but those concerned with the administration of the courts have been slow to learn this lesson. But then for some of us learning is a slow process, as illustrated by the plight of the judge with the broken arm. For years he had been accustomed to sneaking downstairs to the kitchen for a midnight snack. His dog habitually slept at the foot of the stairs; and nightly he had stepped on the dog's tail, his ears, and his paws. But this night he stepped square on its belly; the dog jumped up yelping; and the judge took a spectacular tumble, breaking his arm. "Now wouldn't you think," the judge asked in relating the incident to me, "that after all these years that damn dog would have learned something?"

The difficulty with some judges, and court administrators as well, is that once they have ostensibly delegated responsibility, they too often then insist that the subordinate to whom authority was granted do the job exactly as they would do it. Such a situation is intolerable for the subordinate; he must be left free to choose his own paths and to arrive at his own solutions. If this opportunity is afforded him, the superior will often be pleasantly surprised to find that his subordinate has found a better way.

Fear of mistakes is generally recognized as one of the biggest obstacles to effective delegation, both for the superior and the subordinate.

Yet only by full delegation of responsibility, with freedom from fear of failure, can we in the courts make full use of our human resources and avoid bureaucratic stagnation. Incidentally, Ernest Friesen, who spoke to you yesterday, has picturesquely stated the four rules for survival in a typical bureaucracy: "first, stay in with the outs; second, don't rock the boat; third, exploit the inevitable; and fourth, don't get between the dog and the lamp post!" I submit that some of us in court administration should be less afraid of getting our pants wet!

Second, to make certain that a decentralized system is working well; that those to whom responsibilities are delegated are producing the desired results, it is essential that there be objective standards of performance by which all within the system can be fairly judged and held to account; that there be a good information system to make essential data readily available to management; and that lines of communication be kept open for the free transmission of ideas—not only up, down and laterally within the organization, but also with outside interested individuals and groups.

In the courts we have been making considerable progress in the development of meaningful judicial statistics and in the free communication of ideas, but we have done little by way of arriving at acceptable objective standards by which to measure either the individual effectiveness of judges or other court personnel, or of a court system as a whole. The establishment of such standards is not an easy task in the judicial environment where, unlike in business, dollars alone are not an acceptable measure of performance, and where the real values to be sought after are so variable and so intangible. Yet, in my opinion, the task is worth pursuing, for without such standards we have no reliable way of determining which people, procedures or programs are successful and which are not.

7. There is, I think, one final factor which must be given greater consideration and which ultimately will have an important effect not only on the role and effectiveness of a state court administrator but also on the whole court system. For lack of a better term, I'll call it public relations; and by this I *don't* mean publicity.

It has often been said that courts do not exist for the benefit of judges and lawyers, but to serve litigants and the public. Sometimes, however, I wonder whether we don't, in fact, operate the courts for the convenience of these groups in the order named. I seriously believe that if judges and lawyers take a good hard look at the way the courts are run, they will have to confess that all too frequently litigants, witnesses, jurors and the public are given less consideration than they rightfully deserve. Don't misunderstand me: I don't believe that the interests of judges and lawyers should be ignored; I just think that they should be kept in proper perspective.

It is also important that we give the public a greater voice in policy decisions as to how the courts should be run. It is no longer sufficient, if it ever was, for unilaterally formulated policy to be wise, or even beneficial to those it touches. The poor,

the black and the young—and other as yet more tranquil groups —are not likely to be satisfied with the performance of their government's judicial system unless and until they have some meaningful voice in the formulation of the policies by which it operates. Our ingenuity should be able to devise ways of bringing this involvement about on our own initiative, without waiting, as so many of our establishment institutions have, until we are compelled to take action by those who are more militant than we would like.

By way of concluding my remarks on the role of a state court administrator, at the risk of boring some of you, because to date it has produced no affirmative results, I'd like to repeat a proposal for improved court administration that I made to the Third Circuit Judicial Conference last spring, shortly after several of our state trial judges had been appointed to the Federal bench.

The reserve clause, the draft, and other allegedly restrictive practices of professional baseball, football and basketball, may be of questionable legality, but I would suggest that their adaptation to the judiciary is worthy of your consideration.

Why I ask you, should state courts at great expense develop and train judges, only to have them lured away at high salaries by the Federal judiciary just when they reach their years of peak performance? Think of the advantages to be gained if we were to organize Federal and State Judicial leagues, with the courts in each bound to respect the others' rights and to refrain from poaching on the talent of the other league, except in accordance with mutually established ground-rules. Imagine, if you dare, what the results would be if Chief Justices, Chief Judges, and Presiding Judges were empowered annually to draft for their respective judicial rosters their choice of practicing attorneys—the court with the biggest backlog, of course, having first pick! What would happen if they could trade judges during the summer recess or other designated periods? I suspect that in some instances there would be offers to swap half-a-dozen run-of-the-mill judges, with an "undisclosed" amount of cash thrown in, for a single really good performer! How many faces would be missing from the bench each year, if judges who failed to keep up with their caseloads were put on waivers, given their unconditional release, or farmed out to municipal courts for further experience? The possibilities stagger the imagination! Courthouses and court trials might once again—as they were years ago—become centers of citizen entertainment. Revenue from TV rights and judicial endorsements of gavels, robes and assorted other popular products not only would relieve the over-

burdened taxpayers of upward spiralling court costs but would at the same time make possible judicial salaries comparable to those of the highest paid practicing lawyers. With the public following the daily disposition averages of their favorite judges, litigation would be processed with ever-increasing expedition and court backlogs would become a thing of the past! But what, you ask, would be the role of the court administrator in this new scheme of things? Don't worry about us! We would become the Bowie Kuhn's and the Pete Roselle's—the non-playing, $100,000 a year commissioners and general managers of the new judicial leagues!

THE FUNCTION OF THE APPELLATE SYSTEM

by

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Introduction

This paper is intended to deal mainly with the appellate portion of the process of administering justice. It is not an exhaustive survey but is designed to provide sufficient information to stimulate constructive thought about the solution of the many problems facing the administration of justice at the appellate level. Specifically, it is addressed to a) the structure of the appellate system, b) the place of an intermediate court in that system, and c) the interface between the trial system and the appellate system.

As part of this introduction it is necessary to identify at least some of the premises about the trial court system and its goals from which this discussion of the appellate system proceeds.

Trial courts, of course, have many functions and purposes, but among the most important are these:

1) They are agencies in which the government, usually the executive department, makes charges to the extent that some official action is required, against persons who have in one way or another violated law for the purpose of determining the facts and assessing the punishment. As such, the courts are an integral part of the internal peace keeping machinery of the state.

2) They are agencies in which citizens, individually and collectively, can bring a large number of problems involving other citizens and government to be redressed in one way or another. In this sense, they are an integral element of the formal grievance procedures of society.

In both instances the trial courts are a part of the power structure of the state. They help maintain peace and equilibrium within the framework of policies made by others in government. The court acts by following a process that is sharply defined and prescribed. The premises on which this process is based include the following:

The process must be fair. Fairness is tested initially by the due process provisions of the constitutions, and is refined by special additional provisions of statutes and court rules. It includes items of notice, right to call and examine and cross-examine witnesses, requirements of impartiality of tribunals, as well as equality in the application of substantive law.

The process must permit expeditious action without undue expense. Real problems are presented to courts involving real litigants, and these men and women have the right to put these problems behind them as rapidly as possible with as little economic trauma as possible.

Citizens must believe the process is effective and fair. The court is so central to the grievance procedures of individuals and to the methods of governmental peacekeeping, that public confidence in the system is and must be a major goal.

There probably would be little need for an appellate system if there were hard and fast guarantees that the trial was fair in every respect, and that it had been expeditiously and inexpensively handled. However, perfection is not possible and at time further steps are needed. These further steps result in the appellate system.

Obligations similar to those of the trial court should be placed on the appellate system. The process must be fair between the litigants in every respect. It must be carried forward expeditiously, at a minimum cost and must promote a feeling of confidence in the processes of government.

The thrust of this introduction is this: the court system and, particularly the appellate system, the subject of this paper, must be understood and evaluated from the standpoint of the public. Courts, judges and lawyers exist to serve the public and the system must be constantly monitored with this in mind.

The Appellate System.

1. Jurisdictional Base.

   a) Review of Right.

   In most jurisdictions there is review from final judgments in some courts as a matter of right. In addition, most jurisdictions have by statute listed a limited number of

interlocutory matters from which review can be taken as a matter of right. Finally, there are a limited number of interlocutory matters that are so separated from the basic cause in the case that courts have held they are appealable as a matter of right.

b) Discretionary Review.

The extraordinary writs are utilized by many courts to review, in the discretion of the reviewing court, matters that are not reviewable as a matter of right. Some courts have special rules providing for leave to appeal, in the discretion of the reviewing court. Under the leadership of the Federal Rules of Civil Procedure some courts have developed rules that permit review of a limited number of interlocutory matters within the discretion of a trial court, and in some instances we find that there is a joint exercise of discretion for review purposes, by the trial court and the appellate court.

2. Courts in the System—Division of Power.

The states can be divided today into three groups, each with a different system for the exercise of appellate power. One involves the vesting of all reviewing power in one court. A second, in one way or another, divides the appellate power between an intermediate court and a court of last resort. Still a third attempts to divide cases along substantive law lines among two or more courts of last resort.

The system of dividing up appellate power between an intermediate court and a court of last resort is the most popular system among the more populous states.

Modifications of these systems are many. Some states use commissioners to assist either the single or the several courts to act expeditiously. Some states use trial judges to augment judicial manpower at either the highest or intermediate level. In some states, either the intermediate court or the Supreme Court sit in divisions. In many states judicial assistants or law clerks are used to help judges perform their tasks. The right of review in the highest court has been restricted in states having both an intermediate court and a court of last resort. Jurisdiction is divided in many ways. Amount in controversy is important in some states. Kinds of problems are determinative in others. In only a few states is the division based on different functions performed by the courts.

In states having an intermediate appellate court, there are several patterns for the system. In some states there are

separate intermediate courts for different areas in the state. In some others there is one court hearing appeals from all parts of the state. Such a court may sit in divisions which may or may not sit in various parts of the state and may be rotating or may be permanent. Not uncommonly, three judges constitute a division.

3. Relationship to Trial Court.

There are four areas of critical interface between the trial court and the appellate court. All are important and all have an impact on the many problems facing appellate judicial administration.

a) Entry into the Appellate System.

The obligation of the appellate system is initially determined by the rules adopted for entry into that system. As indicated earlier these rules may provide entry based upon the following concepts: 1.) appeal of right from final judgments; 2) appeal of right from legislatively prescribed interlocutory matters; 3) review at the discretion of the appellate court; 4) review at the discretion of the trial court; 5) review at the discretion of a combination of trial and appellate courts.

A strict final judgment rule would provide many fewer cases in the appellate system, but also would bring cases there sometimes when it would be too late to be effective, for example, receiverships, release on attachments, etc.

A long list of interlocutory orders appealable of right may tend to keep the trial judge from acting improperly, but also it will likely provide interminable delay at the trial stage. Excessive requirements of leave to appeal may prevent necessary appeals and require duplicate work in examining appeals. The point is, that the rules of entry to the appellate system affect the problems at the appellate level as well as at the trial level.

b) Efforts to Correct Trial Errors at the Trial Level.

The motion for a new trial and the motion for judgment notwithstanding the verdict are the major tools available at the trial level to correct errors. The use of these motions provide remedies clearly affecting the appellate process. The more errors that can be corrected at the trial level, the less will be the pressure on the appellate process. The effectiveness of these remedies varies. It is not as easy for the same judge to recognize his mistakes as it is for others to do so. On the other hand, normally

the cost of preparing the record for these motions is substantially less than the cost at the appellate level.

c) Procedures for Transfer to the Appellate System.

A third area of interface between the trial and appellate courts is in the process of transferring a case to the appellate court. The problem of translating the dama of the trial to the essay of appeal is not insignificant. The specific points of contact are these: The place of filing the notice of appeal varies. Some courts require the notice to be filed with the trial court and some with the appellate court. The obligation to see that the record is prepared may vary from state to state but it often initially rests on the appealing party. The ultimate relationship between the rules of court reporting and the rules defining the record on review provides an example of the interrelationship of rules of both courts. Often both courts have power to alter timing requirements pertaining to the record. The ability to use the transcript as the record, the requirement in the rules to provide a digest of the record, or to print a given number of copies of it, all affect the timely transfer. The cost of the transcript at the trial level can inhibit review. A rule, for example, that would deal forthrightly with the record at trial making it easy to duplicate with rapidity by inexpensive help would affect the ease and speed of review. The use of video taped records at trial would also affect this interface.

d) Effect of Reversal.

Obviously the total effectiveness of the process of administering justice depends in part at least upon what happens at the conclusion of the appellate process. If error is found, what further steps are required to bring the litigation to an end? If the error is held to be harmless, litigation ends. Sometimes the court will reverse and direct that judgment be entered. In this case litigation will end. Sometimes the court will reverse and direct that a new trial be granted. Here is where the greatest waste occurs, for the litigants are, after a trial and appeal, back at the beginning of their lawsuit. This disposition not only affects the time it takes to complete litigation and its expense, but also it affects the development of confidence in the system on the part of society in general.

The need for reversals and new trials at the appellate level must be constantly monitored. Reversals for procedural matters, etc., commonly result in new trials. Inso-

far as possible this should be curtailed. I remember as a
law student that Professor Rollin Perkins held up Texas
as an example of bad judicial administration. He rightly
ridiculed decisions in Texas, that at the appellate leve
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Function of Reviewing Courts.

In addition to the management and supervisory obligations
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the administration of justice are to be solved.

Recognition of Separate Function of Reviewing Courts.

That the functions are separate and distinct is recognized today by a number of court rules and procedures followed by some appellate systems and by the structure of some systems.

1) Per Curiam Opinion.

The simplest recognition of the separate function is the per curiam opinion. The appellate court, itself, recognizes that some cases do not involve problems that are relevant for teaching others about law, resolving conflicts, providing distinctions, etc., and simply note an affirmance or reversal to do justice between the parties.

2) Leave to Appeal—Leave for En Banc Hearing.

Somewhat more sophisticated and subject to more abuse and useful only in multilevel courts or in large single level courts sitting in divisions, leave to appeal or leave for en banc hearings involve the use of the discretionary jurisdiction of the court. Properly exercised, this process should sort out the problems, discussion of which is necessary for law development, for development of important distinctions, for unifying the law throughout the jurisdiction, etc. If adequate review is had at the lower level or within a division of the same court, this process should not be used to seek out cases to do justice between the litigants. Such a use could only begin to duplicate work and clog the courts.

3) Division of Jurisdiction Between Courts.

The most complex recognition of the distinction between these functions is the appellate system that relies on separate courts to perform the separate functions. The intermediate court is assigned the function of correcting mistakes and of doing justice among the litigants. Its decisions are final with no right of review. Its opinions need not be lengthy and its jurisdiction must be easy to invoke. Procedures should be rapid. Of course, there will be larger problems presented in some of the cases and to this extent there will be times when the intermediate court may have an important law teaching and development function. On the other hand, the primary emphasis of this court should be to rapidly decide fairly the problems presented so that the litigants can return to the main stream rather than continue indefinitely in litigation.

The intermediate court can be as large as necessary and can sit in small divisions of three judges. It should be

far as possible this should be curtailed. I remember as a law student that Professor Rollin Perkins held up Texas as an example of bad judicial administration. He rightly ridiculed decisions in Texas, that at the appellate level reversed the trial court because the indictment read "causing death by stomping" instead of "causing death by stomping with feet." Some modern cases are nearly as ridiculous.

Appellate courts today must look carefully at the policy of reversals in light of the basic purposes the courts serve. As will be pointed out in the next section, there are two major policies of the appellate system: to do justice to the litigants, and to provide for the development and growth in the law. Many procedural reversals do not involve questions of fairness and justice, and unless there is a need to hold the case up as a document to teach other judges and lawyers, efforts should be made to avoid such reversals. A system in which a large number of cases are reversed is not only expensive but also soon begins to lose the confidence of its users.

Function of Reviewing Courts.

In addition to the management and supervisory obligations over the whole judicial system exercised by the highest court, a reviewing court performs two basic functions:

1) In the individual case, an appellate court corrects the mistakes made at the lower level so as to prevent miscarriages of justice between the litigants. This action also tends to provide an effective way of encouraging modesty among the trial judges which is important to creating confidence in the system.

2) In the larger sense, the appellate court, by its opinions, teaches other judges, lawyers and all citizens something about the law, what premises are acceptable, what interpretations are proper. In a sense, the litigation of some individuals has a larger public purpose, particularly at the appellate level. Private litigation provides the vehicle for development and direction of growth in the law, for unifying different interpretations, etc.

In many specific cases at the appellate level, both functions are performed. The court renders a decision that will point toward justice between litigants and, in its opinion it writes to teach, to rationalize, to interpret, to unify, or sharply distinguish. However, a clear understanding of the separate nature of these functions must be kept in mind if some of the problems now facing the administration of justice are to be solved.

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The intermediate court can be as large as necessary and can sit in small divisions of three judges. It should be

considered as one court, however, with its divisions consisting of rotating personnel so as to reduce stress and antagonisms that would probably develop between permanently constituted courts.

In this system the highest court is assigned as its primary function the obligation of law development, of resolving of conflicts among lower courts, of teaching the other courts and lawyers and public about the law. To carry out this function it needs but two kinds of appellate jurisdiction: 1) discretionary jurisdiction over decisions of the intermediate court, and 2) discretionary jurisdiction to bypass the intermediate court. Since it does not have as its major function the doing of justice between litigants, it should have no compulsory jurisdiction. It should pick and choose its cases with care to see that legislation is appropriately and constructively interpreted, that constitutional premises are fully developed and applied consistently, and that the common law breathes and grows in appropriate directions. It must assume, except of course in the cases it takes, that as between the litigants the intermediate court has corrected the mistakes of the trial court and has done justice. To undertake this latter function would subvert this system, duplicate work and clog the courts.

The federal system, except for some compulsory jurisdiction of the supreme court, and the separate nature of the various courts of appeal, is reasonably like this model. The Michigan court system even more accurately reflects this model. The work of its appellate courts is up to date and cases are heard rapidly.

The Problems.

The appellate systems in most of our states face a number of staggering problems.

1) The many efforts of litigants to use the appellate system is in some places overwhelming it.
2) The cost of the system is staggering.
3) The time required to consummate an appeal is excessive.
4) The reversals on little understood technicalities are reducing the confidence of the people in the system.

Many factors point to reasons for these problems.

1) Population, particularly at the active young adult age, has dramatically expanded.
2) Economic activity is constantly growing.

3) People are increasingly gathering together in metropolitan areas, living closer together, becoming more conscious of each other, causing more problems for the courts to solve.
4) The legislatures and congress are passing more laws. These laws create new rights and obligations. So much is the demand for new laws that the legislatures of many states meet each year instead of every two years, as was true in the past, and meet virtually all year, instead of only about three months, as was true a number of years ago.
5) The use of procedural rules to enforce newly discovered constitutional protections has been greatly expanded. Decisions involving the admission of evidence and decisions on technical procedural points have only recently become major tools in the development of constitutional protection of individuals.
6) Failure to up-date and modernize the structure of the system prevents the use of effective processes of judicial administration.
7) Failure to adopt new devices to improve and reduce the problem of paper flow contributes to the problems. Although many courts permit xeroxing, mimeographing and multilithing, the rules often indicate a grudging acceptance of these processes instead of active encouragement. Often the rules do not integrate the trial and appellate process so as to provide one economical system for the preparation of the record which is originally made at the trial and used on appeal.

Suggested Solutions.

In many instances the causes of these problems are beyond the control of judges and judicial administrators. Wisdom suggests that population growth, increased economic activity, metropolitanization, legislative diarrhea, important as they are to the problems of too many cases, too much cost, and too much time, are not easily controlled, and, probably should not be controlled solely because of increased litigation. Therefore, if help is to come to solve these problems it must come from 1) changed structure, 2) changed procedures and 3) changed attitudes. The following suggestions, dealing with structure, procedure and attitude, proceed from the premises articulated earlier—fairness, speed, economy and the need for confidence in the system.

1. Structure.

It must be recognized that the appellate system is not a system by itself, but is one part of a total system of justice

that includes many other parts. In many respects it is the lesser part of that total system. It is lesser in the sense that the major reputation of the judicial system and people's confidence in it stem mainly from the lower courts. More people touch the judicial system there. More problems are solved there. The better they are solved, the fewer will be the problems in the appellate system. The appellate part of the system, of course, is not lesser with respect to law development, coordination, interpretation and teaching. There it is major and if this is not done well the trial part of the system may be affected.

a) Recognition of Functions of Trial and Appellate Courts.

If the problems of judicial administration are to be solved the legislature, the judges, and the public must keep in mind the difference in functions of the two courts, not only in the adoption of rules of procedure and organization, but also in the selection of personnel.

The trial system must be designed to process many cases fairly and inexpensively. Judges must be selected who are sensitive to people and their problems, who will continue to be servants of the people, and who are capable of managing their own dockets expeditiously and of deciding problems with dispatch while instilling in others the feeling that justice is done. At the appellate level, however, different functions call for different processes and different kinds of judges. Judges must be capable of and willing to manage and coordinate the whole process at both the trial and appellate level. They must be able to isolate error that is prejudicial from the many errors that are non-prejudicial, and they must be able to act with wisdom in the preparation of judicial opinions that develop law, interpret legislation and the constitution, coordinate lower courts and teach lawyers, judges and the public. The different functions of the trial and appellate courts point to quite different persons as being well qualified to sit on their respective benches.

b) Recognition of Different Functions at the Appellate Level.

In many states the amount of judicial business at the appellate level has begun to exceed the capacity of the judges of a five, seven, or nine man court. Delays are interminable. What can be done? Whatever is done will be helped if the different functions of the appellate system are kept in mind: 1) correcting mistakes, and 2) law teaching, development, coordination, as well as

the ultimate obligation of judicial management. A separation of personnel along these lines should improve the system.

The use of an intermediate appellate court, if properly designed, will aid in the solution. If we assume that the trial bench is busy, that the appellate court is overloaded and that no changes are to be made in the entry requirements, more manpower will be needed to relieve the appellate court. Additional judges for the highest court are self-defeating. Use of trial judges will deplete the trial bench and will require additional help at the trial level. How then can new judges best be fed into the system?

The best method to do this is to create an intermediate court of appeals. If we assume that three judges are enough to constitute a court to examine for error and to do justice between the parties, then the minimum size of that court of appeals is three. On the other hand, there is no limit to its size, so long as that court can sit in divisions. The divisions should be rotating panels of three sitting throughout the state, hearing matters on review to determine if prejudicial mistakes have been made and writing short opinions or entering per curiam orders. Their decisions must be final. There must be no appeal of right. Only if either prior to, or after, such a decision, that court or the highest court believes that there is a matter of great moment involving law development, major legislative or constitutional interpretation, or the resolution of a divisional dispute, should the highest court take the case. Then the highest court, consisting of 5 to 7 judges, should decide these matters and write opinions as the teaching tools of the profession and society.

This difference in function must be clearly kept in mind and the highest court must insist on limiting its function. Only if it so limits its function will it be able to discharge its judicial supervisory and management function over the whole system and give direction to the appropriate law development in the jurisdiction. Such a system would permit the flexible addition of manpower as needed at the intermediate level. Of course provision must be made for the complete interchange of judges at all levels to care for emergencies.

2. Procedures.

One of the major criticisms of the appellate system is its cost, both in time and money. A significant part of that

cost is made up of lawyer time in making up the record and the expense of duplicating the record and briefs. To reduce costs, the system of trials and appeals must be considered as one system.

For example: at the trial, a court reporter makes a shorthand or stenotype record of the proceedings. Before a record on appeal can be made, a copy of that transcript must be purchased. It must often be edited or digested and twenty to forty copies printed. The printing expense and the lawyer time is very great. A simple rule requiring the court reporter to use a certain kind of paper in making his original copy would permit multiple copies to be run and used on appeal with very little additional expense in time and money, and the appellate court would be able to work from an original transcript. This is but one example of what a good systems study could do to improve the process. The appellate court needs not only to adopt new rules to reduce time and expense but it also needs to support them actively and needs to let lawyers know that it means business.

3. Attitudes.

An appellate system may be perfect in form. It may permit easy entry without undue cost to the litigants. It may have simple, inexpensive procedures to check on mistakes at the trial level. It may have a sufficient number of judges to hear and determine these matters rapidly. It may have a good system for sorting out the cases involving law development and important cases for legislative or constitutional interpretation, etc., for special treatment. It may even have a separate and highest court to consider these matters. But it also may fail unless the judges understand the intricate relationships of the several parts to the whole system of justice and the imperative need to develop their judicial roles within the framework of this system and the limited obligations assigned to them. Many of today's problems lie in a failure on the part of some judges and lawyers to understand these relationships, as well as their failure to develop attitudes to demand that judicial actions be taken within their defined roles in this process.

Stated in another way, judicial administration is a process. The process is operated by people. A failure of the operators to fully understand all aspects and relationships of that process causes problems. Some of the major points of misunderstanding are these:

1) A failure of some judges and lawyers to understand that delay, perhaps desired by one or both parties, can so

adversely affect the process of administering justice for others in terms of confidence in the system, that greater harm will be done by permitting delay than by denying it.

2) A failure of some judges and lawyers to understand that litigants are reasonable people and that they expect reasonable, not perfect, results, but that they expect results with reasonable dispatch as with other processes with which they are acquainted. Confidence in the system is lost because of delay or excessive expense caused by an imperfect effort to be perfect.

3) A failure to understand that litigants desire to have litigation ended and that one trial and one appeal should be sufficient to bring litigation to an end, and that constant review, rehearing, appeal, etc., often causes far greater harm than good.

4) A failure of some judges and lawyers to understand that litigants know the process is complicated, and that in a complicated process minor things can go wrong, but that the people in the process are honest, reasonable and capable of reacting fairly. This failure often results in reversals for errors that are not clearly prejudicial, causing interminable new trials, and often does more harm in the destruction of confidence in the system than it does good.

5) A failure of some judges and lawyers to understand that in a complicated process it is important that the participants limit their activities to their assigned role and not try to undertake the task of others simply because of power and a personal difference of opinion. Action of this sort reduces or destroys the effectiveness of that person in the performance of his role and seriously impedes the administration of justice.

I am afraid that much of what needs correcting in the system of judicial administration lies in an analysis of the foregoing points. Much more attention needs to be paid to developing and understanding the system and the intricate relationship of all its parts, and in providing an opportunity for the men and women who will operate it—the judges—to learn how to make it effective. Attitudes of judges and lawyers must be redirected at making the system of justice work. Strange as it may seem, individuals are being deprived of justice today because of excessive attention to the individual's problems.

Methods of Measurement to Determine the Need for an Intermediate Court and the Number of Judges.

1) Need.

The first step is to make an analysis of the present appellate system to determine whether or not there is a need for an intermediate court. The following steps are suggested as helpful in making this analysis.

a) Examine the Supreme Court docket.

i. Determine the number of cases appealed as a matter of right.

ii. Determine the number of motions, leave to appeal, and extraordinary writs handled.

b) Examine the trends in each of these areas over a period of 10 years and project these trends for 10 years.

c) Examine the rules for entry into the system. Are there ways to improve them? If improvement is made will it add to or diminish the case load of the appellate system?

d) Examine the opinions of the court and determine if they are good. Do they do an adequate job of correcting errors, distinguishing between prejudicial and non-prejudicial error and helping in law development, etc.?

e) Examine the relationship between the Supreme Court and the rest of the judicial system to determine whether or not the court is supervising and managing the judicial system adequately.

f) Establish standards of performance in each of these various areas that would produce desired results. These standards of performance should include estimates of the amount of time needed to perform each of the judges' assigned tasks.

g) Based on the data thus acquired, including the time allocated for each task, and the standards of performance expected, determine if the judges can adequately handle all of the tasks assigned to them.

h) If not, project these figures further to determine how many additional judges at an intermediate level sitting in panels of three would be needed to handle the appellate function of correcting mistakes. This would leave to the presently constituted Supreme Court the obligation of writing opinions in cases important to law development and supervising the judicial system.

The following is a skeleton example of how such a study might determine the need for an intermediate court.

Assume that there is a supreme court of 7 judges. This is probably the best size for law development, interpretation and teaching, but too large to be efficient in dealing with the functions of correcting mistakes.

In the hypothetical jurisdiction there were in 1960, 270 and in 1970, 420 full appeals. Appeal of right and the leave to appeal granted account for these figures. This increase was evenly spread throughout this period. During this same period 360 (1960) to 460 (1970) opinions were written, including per curiam opinions. The increase was evenly spread throughout the period.

In this same time the court, in an effort to reduce its work recognized its different functions, i. e., correcting mistakes and providing for law development, and entered 100 (1960) to 220 (1970) per curiam orders. These increased evenly throughout the period.

At the same time motions, writs, and leave to appeal increased from 620 to 970. One half of these were entry matters involving leaves and writs and one half are internal operational matters. The increase was evenly spread over the ten year period.

The following assumptions seem reasonable. All judges should participate in the argument and decision of appeals with full knowledge of the records and the briefs. Oral arguments are valuable. With respect to motions and writs, it is sufficient if one judge becomes fully acquainted with the argument and record and recommends the decision to the others.

Analysis begins by consideration of the amount of time spent in oral argument in 1970. One half the cases were argued. Each argued case takes approximately one hour. Four cases are argued each day of argument. Therefore, 55 days in the year are taken up hearing cases argued. This amounts to 11 weeks of 5 days devoted to oral argument on the part of seven judges.

Conference on all matters takes one day for each four days of argument with five other days during the year assigned for conference. This is a total of 15 days or three weeks' time assigned for conference.

Judicial vacations take four weeks. The normal public holidays take up one week.

This leaves a total of 33 weeks in which to read all 420 briefs and records, digest them, make up the judge's mind on each of these matters and write opinions in one seventh of these cases. Sixty opinions, approximately one half of which in 1970 were per curiam opinions, must be written by each judge. In addition to this, each judge has responsibility to brief, digest and prepare a memorandum in one seventh of the motion matters, one half of which involve entry into the appellate system.

The major opinions which become the teaching tools of the profession and which resolve construction problems and develop law should require at least one week's time for study of the brief and record, writing and rewriting, or a total of 30 weeks. This indicates that there are but three weeks left to do the task of looking at the briefs and records in the other 360 cases and 790 discretionary matters, to do the tasks assigned relative to supervision, etc., and to study and decide the other 390 cases. It is obvious that this is impossible. No wonder the opinions are only mediocre and that the supervision is but superficial. Standards are not being met and the court is not able to perform its task adequately.

2) Number of Judges.

How many intermediate judges are needed if we make the same assumptions as were previously made and projections are figured for ten years? We find that at the present time there are 420 cases on appeal, that these have increased at the rate of 15 a year and will reach 570 at the end of a 10 year period. There are at the present time 485 entry matters. These have been increasing at the rate of 17 a year (½ of 35 per year) and will reach 655 entry matters in 10 years. The same analysis gives the same result for the other types of motions that are pending—a total of 655 at the end of the 10 year period. We assume that motions will continue to be assigned to a single judge for the preparation of a memorandum and recommendation for disposal, and that approximately one half-day of judge time will be devoted to each such motion and memorandum. In such a case, the judge days needed to handle the total motion matters will vary from 490 (1970) to 650 (1980). (One judge, ½ day each for 980 to 1,300 matters.)

We make the assumption that each court of appeals panel will hear cases in panels of three judges, and that it is mainly interested in the process of correcting mistakes rather than law development. In determining the amount of judge time essential to the decision process in the ordinary appeals, we begin with the fact that 2 judges sit on each panel who do not write opinions. Those judges, we must assume, must take some time to study the briefs and records in each case. We assign one half-day each for this purpose. This is a total of 210 (1970) to 285 (1980) days for each judge, or a total judge day for the 2 judges of 420 (1970) to 570 (1980).

The opinion writer in each of these cases necessarily will take more time but not as much as if these were to be opinions used as teaching tools. We assign 2½ days for each full opinion.

Since approximately half of the cases were per curiam cases, only one half the cases need opinions; therefore, we multiply 2½ days times 210 (1970) to 285 (1980) and find that a total of 525 days in 1970, or 710 days in 1980 will be needed by the opinion writer to prepare his opinions. This judge will need the same ½ day time to study and decide the per curiam cases or a total of 110 (1970) and 145 (1980) days of judge time. Therefore, assuming the judges are sitting as a 3 judge panel, we will need from 635 (1970) to 855 (1980) judge days for opinion writers, 420 (1970) to 570 (1980) judge days for non-opinion writers, 490 (1970) to 650 (1980) judge days for motions, leave to appeal and writs. If we assume that only ½ the cases are argued and that five cases are argued a day, each taking approximately one hour, the time allocated for argument will be a total 126 (1970) to 171 (1980) days of judge time. We assume that a conference of one day is needed for each five days of argument. This involves 25 (1970) and 34 (1980) days of judge time.

The total judge days using three judge panels needed to complete the year's work is 1,690 (1970) and 2,280 (1980).

If we make the assumption that the judge is entitled to four weeks of vacation and one week is used in connection with public holidays, there are a total of 47 weeks, or 235 days at five days a week available to each judge. This means that if we divided 235 into 1,690, we will initially need 7 judges in 1970. The need will have increased to almost 10 by 1980. Based on the stated premises, these judges sitting in rotating panels should be able to handle the business with dispatch so as to correct errors between the parties, leaving to the Supreme Court, with complete discretionary jurisdiction the obligation only of law development, resolving conflicts and managing and supervising the court system. Of course, different standards pertaining to entry rules or changes in stated premises may change the need for judges.

Conclusion.

The appellate system is an important part of the system of judicial administration. Each state should examine its own system to determine if it is fair, expeditious, inexpensive and promotes confidence in government. How good the system is will depend on how few are the variations from the following propositions.

1) The appellate system is closely coordinated with the trial system to avoid conflicts and to be supportive of each other.

2) The appellate system is inexpensive and permits easy entry, both substantively and procedurely.

3) The appellate system has adequate resources for rapidly correcting errors in individual cases, for providing guidance in law development, etc., and for supervising the total system.
4) If judicial activity is so large that a single court of 7 judges cannot handle all 3 tasks adequately, the system has as its assigned task that of correcting errors and a higher court that supervises the total system and selects cases so as to provide guidance in law development, etc.
5) The judges and lawyers understand the complexity of the system, understand the need to put the public first, understand the need to avoid reversals that are not prejudicial, understand the effect on other cases of innocent action in particular cases, understand the need to do the task assigned and to rely on equally qualified men and women to do their tasks well, understand the need to bring litigation to an end.

The public is interested in the system of justice. The time is now for a thorough examination and overhaul.

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III. ORGANIZATION OF STATE TRIAL COURTS

Moderator: EARL F. MORRIS, ESQ.

Past President, American Bar Association; Chairman of the Board, American Judicature Society

Much of our effort in the field of judicial reform has been directed toward the appellate courts, or at least to them and to courts of general jurisdiction. I think that those of us who have worked in this area over the years would find this comment in very large measure valid. It is, however, obvious to all of us that most of the grist for the judicial mill is at the level of the courts of general jurisdiction and those courts that we refer to generally as courts of limited jurisdiction—our municipal courts, our county courts, our specialized courts of various types, be they known by whatever names in our respected jurisdictions. Certainly, then, any complete study for the problem for which this conference has been convened must necessarily examine the problems of courts of general jurisdiction and the courts of limited jurisdiction. And that is the subject of this session as we turn to a consideration of the organization of courts at the state trial court level.

INTRODUCTION

The unified court system, urged by most students of American judicature, depends for its effectiveness equally upon the overall direction and management of the system from the apex—i. e., the offices of the chief justice and the state administrator—and upon the efficient interworkings of the individual trial courts in the system. The modernizing of the judicial process in these

courts involves a rethinking of the traditional division of judicial business within these courts.

The typical American state court structure has been made up of three groups of courts—the appellate group, whether of one-level or two-level; the trial group of general jurisdiction, usually with individual courts operating within fixed geographic limits; and another group of trial courts with limited, local or specialized jurisdictions. In many instances, this third group has been characterized by a patently unprofessional and unsatisfactory administration either by part-time judges, or by lay judges or by fee-paid magistrates, in too many instances all of these shortcomings being wrapped up in the same system.

Unification may take one of several forms within the peculiar needs of a specific state, but its prospect for success in achieving a more efficient and effective system of justice depends upon at least these: reasonable flexibility in jurisdiction as between different courts within the system, and full-time professional administration of justice in all courts within the system. (W. F. S.)

UNIFICATION AND REDISTRICTING

by

SAM PHILLIPS MCKENZIE

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I was asked to speak and prepare a paper summarizing the fundamental problems dealing with (1) court redistricting; that is, consolidation along geographical lines according to population density; and (2) the features of a unified court system with specialized divisions. In short, to present the two "sides of the coin" relating to judicial reorganization, taking into consideration the practical problem of effecting significant reorganization of our state trial courts. Any meaningful approach to the subject does require consideration of the problems of implementing such a plan. These considerations are intermingled throughout this dissertation.

Most approach change with reluctance; many resist it without regard to its merits. Yet, those who are objective, as well as knowledgeable, agree that most state judicial systems are antiquated and inefficient. To advocate reorganization is not to espouse "court reform" as some would suggest; rather, it is to urge modernization of our systems of justice.

Roscoe Pound expressed it much better when he said in 1906 that "our administration of justice is not decadent. It is simply behind the times." [1]

The history of the past 75 years shows that we have continued to lag further and further behind the march of events. In this point in time where all values and institutions are questioned, examined and re-examined, the problem carries with it a potential for tragedy. Those of us who are a part of the system know that in most instances it does protect man's fundamental rights. What we are seeking, then, are better methods to guarantee that those rights are protected expeditiously and efficiently. Modernization of our state judicial systems is inevitable. The only question is the manner by which it is to be accomplished.

In his thought-provoking new book on judicial administration, Delmar Karlen ends on this somber note:

> Responsible leaders of the bench, the bar and the general public are more conscious than they ever have been before of the appalling conditions in our courts. They are beginning to raise their voices in a growing chorus of protest. Perhaps this presages a full-scale, all-out attack on the fundamental causes of congestion and delay in both civil and criminal cases, in state as well as federal courts. Such an attack involves more than action by the courts alone. It involves major legislative and constitutional changes, changes in education, and in professional and public attitudes.
>
> Quaere whether there is any other alternative if the rule of law is to survive in America? Quaere further whether our civilization itself can survive if the rule of law fails? [2]

Chief Justice Burger, in the foreword to his book, makes the observation that "the picture is not pretty, but neither is the subject it depicts." [3]

Who among us can question that a simplified court organization is an essential ingredient of any system of effective justice? To this end some urge nothing more than legislative or supreme court redistricting on a periodic basis, while others urge the adoption of a unified system of courts as the best method by which to eliminate overlapping jurisdiction and needless duplication. A system which would obviate the need for special-

1. Pound, excerpts from "The Causes of Popular Dissatisfaction with the Administration of Justice" in an Address delivered at Annual Convention of American Bar Association, 1906.
2. Karlen, Judicial Administration—The American Experience, Chapter 3 (1970), p. 90.
3. Karlen, supra, p. v.

ized courts and substitute one statewide trial court with "specialized judges, dealing with their special subjects when the work of the court permits, but available for other work when the exigencies of the situation require it." [4]

If you adopt the latter approach, the question remains as to whether redistricting should be an integral part of any state plan for a unified system of courts. A unified system, with variations, would satisfy those who favor modernization through reorganization; the difficulty arises when you come to consider "whose" variations. Certainly, this determination may well depend on a particular state's judicial traditions, as well as local requirements and experience.

Perhaps we should proceed to an examination of the sides of the coin. To do this, it might be well to point out that our discussion of "redistricting" is limited to a plan which envisions the changing of district lines of courts of general jurisdiction within one state. It neither encompasses court-ordered legislative redistricting, nor a one-man, one-vote concept for the election of judges. It does recognize that although population shifts may require changes in present patterns, that politics and other practical considerations may delay, if not stalemate, change. Certainly no single factor can be used as the sole criterion for drawing district lines. What is required is a combination which balances such ingredients as caseloads, geographical differences, community attitudes, population, existing judgeships, as well as political realities.

For those who would bring about modernization of the state trial courts by a redistricting along geographical lines, the question arises as to whether the number and location of courts of general jurisdiction should be determined by political boundaries as well as population density. When district lines are drawn should each district be a geographical unit, with one judge for each district, but with each judge a judge of the whole court? What type judge should be assigned to a given area of the district? Where should the judge have his central office? How and by whom is it to be staffed? Is there, in fact, a vast difference between the problems of a judge presiding in a district or in an area within a district which encompasses one large urban area, as opposed to those facing the judge sitting in an area or district which is primarily rural? If such differences exist, does it require a different type judge to effectively deal with those problems?

4. Pound, Organization of Courts, (1940), pp. 275–77.

For instance, in my circuit (although we have a far greater caseload than some of our colleagues in rural areas of Georgia) candor requires an admission that the occasion for the exercise of judicial courage in administering criminal justice is far less for those of us sitting in Atlanta than for our colleagues in rural circuits, where everyone makes it his "business" to observe the judge's sentencing practices and few are reluctant to question the wisdom of the philosophy behind those practices. In those circuits, "law and order" is more than a cliche—it is a fact of life which the judge must live with on a day-by-day basis. The voters make it a point to try to impress upon such judges that the so-called "judicial bleeding heart" must flow more placidly and less copiously—if the judge hopes to enjoy an "extended" judicial career. Many will say that this is as it should be; yet, somehow, you continue to find some of the most enlightened and fiercely independent judges serving in our rural districts.

All of these factors, including the methods by which judges are appointed, elected and retained, must be weighed carefully in any plan for modernization by redistricting. As a matter of fact they are usually valid considerations for those contemplating the adoption of a unified state court system. Some will question whether this personal observation addresses itself to the discussion at hand, but I submit that the question of how to implement judicial reorganization may well be as important as the form it is to take.

In the great majority of the states there is an urgent present need for redistricting—if for no other reason than to insure all persons easy and prompt access to our trial courts. As I have already suggested, this may be as essential to those contemplating the adoption of a unified court system as it is to those seeking modernization by a less comprehensive approach to reorganization.

The recent history of court redistricting in such states as Iowa and Kansas indicates that though their legislators have indicated a willingness to increase judgeships in urban areas, they have insisted on maintaining the status quo in rural areas. In Kansas, for instance, the legislature felt it necessary to include a legal requirement that in a multi-judge district a candidate for judicial office must reside in the former district where the incumbent resided in order to assure that the less populated area in a new district would have a candidate from their community on the court. This history also makes one point crystal clear: it is only when the judges in the system can be convinced to actively support change, will change occur! It is the judge who

must promote the plan and answer those opposed to it. The most practical way to bring about such a change in attitudes is to have an active state-wide trial judges' association, for individual judges are and should be reluctant to enter the political arena.

There are those charged with the administration of justice who, because of present political realities, advocate redistricting while acknowledging the advantages inherent in a unified court system. Those of such persuasion insist, however, that it is not necessary that the boundaries of judicial districts be frozen if a provision is made that the chief judicial officer of the state is given the power to change district lines as change in conditions dictate. Many of the group also support a plan which would delegate to the chief justice, or a majority of the state supreme court, the power to increase the number of judgeships in certain urban areas. With such provisions the judicial workload may be so distributed as to provide for the efficient handling of changing caseloads with special needs and to allow for adjustments to new conditions. Others endorse these approaches but believe that redistricting and increasing judgeships is best handled by the legislature on a periodic basis. In any event, all agree that redistricting should be accomplished, not by constitutional amendment itself, but by a constitutional provision which permits redistricting by either the legislature, the chief judicial officer of the state, or by a majority of the state supreme court.

If the system is to be truly responsive to changing public needs and population shifts, then some provision should be made to give the chief judicial officer of the state the authority to assign judges from one district to another for a limited period of time. The suggestion has been made, but not necessarily endorsed, that a yearly shifting of judges would help accomplish the development of a cosmopolitan outlook through exposure to different parts of the state, different attorneys and different methods for doing things—thus helping prevent parochialism from narrowing a judge's point of view.

I personally feel, however, that a judge needs to have roots in the community if he is to grow in wisdom and understanding of the problems peculiar to those who come before him. This is not to say that when the need arises he should not be available for assignment or service elsewhere. Different districts will require different personnel at different times. A judicial system must be designed with this fact in mind. Judges must accept this fact for, after all, change is the law of life and legal systems, to remain viable, must accommodate, not hinder the fluctuating needs of those they serve. I would go one step further

and suggest that any plan for redistricting should provide that large or urban districts have a chief judge. "If possible he should be chosen by and responsible to (judicial) authority outside and above his court, so that he will not be subservient in the administration of the court to his associate judges." [5] I would suggest that he be appointed and removed by the chief justice to assure his line of authority. To enable the chief justice to carry out these duties it is, of course, necessary to establish an administrative office of the court to assist in the administration of the entire system.

Our increasing caseloads and the diminishing dollar require a flexible system, using such modern business techniques as data processing, and judges whose training, expertise and temperament, enables them to meet the demands of such a system. A lesser system insures only that the administration of justice will be less swift, less sure—and less effective. A strong judiciary, capable of meeting its responsibilities, but accountable for its performance, should be the goal of all who are seeking judicial reorganization—for accountability is a necessary concomitant to independence.

Now, as Justice Holmes said: "Let us talk THINGS—not words", and get on to a more detailed examination of the other side of the coin!

For those who envisage the adoption of some form of a unified judicial system as the best means for achieving modernization of our state courts, I commend for consideration The Model State Judicial Article [6] advocated over the years by the American Bar Association. The Article provides that the judicial power of the state shall be vested exclusively in one Court of Justice which shall be divided into one Supreme Court, one Court of Appeals, one Trial Court of General Jurisdiction known as the District Court and one Trial Court of Limited Jurisdiction known as the Magistrate's Court. The District Court would be composed of such members of judges as the Supreme Court should determine to be necessary, except that each district would constitute a geographic unit fixed by the Supreme Court and have at least one judge who would be eligible to sit in every district. The District or statewide Trial Court of General Jurisdiction would have such divisions of the court as might be necessary. It would be a Court of Original General Jurisdiction, with such appellate review of decisions of the lower courts and of state administrative agencies as the state Supreme Court might autho-

5. Hall, "Court Organization and Adminstration", excerpts from an Address delivered to the Citizens Conference on Alabama Courts, December, 1966.
6. 47 Jud. 8 (June 1963).

rize. In short, a blueprint for a consolidation of all courts in the state under a single organizational umbrella. The trial courts of limited jurisdiction would be organized on a city, county or district level, according to the needs of the particular judicial system. The Article recognizes as essential to any such plan a provision for merit selection and retention as well as the need for a retirement plan based on incapacity or age, with adequate pensions payable to the judges or their widows.

In recommending a system which provides for what some might term a "lower tier of courts", I am not suggesting that these courts of limited jurisdiction be manned by judges who would be less than complete judges. From a practical viewpoint I am suggesting that there may be lawyers capable of such work who could afford and be willing to work for a salary somewhat less than the salary set for judges of a statewide court of general jurisdiction. I am of the opinion that we will never improve the administration of justice if we make it impossible for the experienced, but young lawyer, to ascend the bench. A judiciary composed entirely of semi-retired lawyers who have inherited or acquired an estate and want to crown their careers with a few years of judicial service does not meet the demands of our changing world or the challenge of the '70's. This is not to say that a judge's interest in higher service or compensation is more important than society's interest in the improvement of judicial administration. What I am saying is that the best interest of everyone is served by a qualified judiciary serving on both levels —a judiciary which is viable, amenable to innovation—and anxious to improve themselves as well as the system which they serve. As Roscoe Pound said:

> No doubt opinions will differ as to the proposal to include the tribunals for the disposition of causes of lesser magnitude in a plan for unification of the judicial system, but no tribunals are more in need of precisely this treatment. The amount of money involved has a direct relation to the amount of expense to which the law may reasonably subject litigants and thus may well determine to which branch of the court a case should be assigned. But it does not necessarily determine the difficulty of the case or the amount of learning and skill and experience which should be applied to determine it. Even small causes call for a high type of judge if they are to be determined justly as well as expeditiously.[7]

7. Pound, "Principles and Outlines of a Modern Unified Court System", 23 J.Amer.Jud.Soc., 226 (1940).

It goes without saying that no system which might be adopted would work unless we have judges with the skill and learning to properly dispose of the cases that come before them. Nowhere is this more true than the courts that handle matters of so-called "lesser magnitude". No judge can be too good for the cases that come before him, for "without the right men on the bench, the finest judicial machinery is indeed worthless." [8]

In considering any plan for court unification one has to consider the recent history of the Illinois Judicial Article, its strength and weaknesses and its tendency to meet the blowing winds of change. The Article, which became effective in 1964, provided for only one statewide trial court of general jurisdiction known as the circuit court, with magistrates who were appointed by and responsible to the circuit judges in the several circuits. These judges functioned very much like county judges or judges of courts of limited jurisdiction. The practicality of the situation as it then existed caused some to say that the "one trial court only" aspect of the Illinois system was a paper distinction and in some aspects their position was worse than the judges of like courts under a system fashioned after the Model Judicial Article, since they had no tenure but served at the pleasure of the appointing judge. This deficiency was remedied by the adoption on December 15, 1970 of a new constitution with a new judicial article wherein the magistrates were given tenure and renamed associate circuit judges. Now they will be appointed by the circuit judges for terms of four years. Paradoxically, the voters of Illinois reversed the national trend when they decided to make minor changes in the judicial election system instead of establishing the merit plan. Circumstances and public opinions do dictate the forms and the fate of any plan for judicial reorganization. Recognizing this, I have chosen the pragmatic rather than the idealistic approach to the question of reorganization.

In suggesting a two-tier trial structure I have discounted any considerations of prestige (if such exists in a world so concerned with solutions to today's problems that it has little time for, or interest in, status). The judges of trial courts of limited jurisdiction with whom I am acquiainted recognize no difference, nor do they have cause to. A professional judiciary, adequately paid under a unified court system, has no need for such concern.

All who seek modernization of state trial courts must, of course, search for means by which to insure a system which is

8. I.J.A., "Survey of the Judicial System of Maryland," (1967), Chapter II, p. 28.

flexible to the end that judicial manpower is conserved and utilized. Again, for reasons of pragmatism as well as fairness, I suggest that any such plan should provide that no judge's compensation be reduced by reason of projected reorganization. A majority of the plans provide that the judge's entire compensation be paid by the state, but I submit that judicial recruitment and problems of retention may vary by reason of caseloads, population density and differing professional and business climates within the state. If this be true in certain states, then the cost of operating the court system might best be shared to some extent by state and local governments. The new Illinois charter makes provision for such supplements, as does the law in my own state. It may seem unfair to other judges within the state but in Georgia, at least, it is a matter of practical necessity. No court system can operate effectively for long unless the courts are adequately staffed and operating in quarters suitable for the task of administering justice.

With increasing numbers, the bench as well as the bar has come to the realization that a system which permits overlapping and conflicting jurisdictions is a burden which lawyers and clients should refuse to continue to support. There are enough complexities in today's world without devising systems which can result only in the denial of justice to some and an excessive cost to all.

Modernization, whatever form it takes, must also take into consideration the need to eliminate courts of coordinate jurisdictions in the same geographical units or districts. Our own history shows the waste inherent in a system which permits courts with concurrent and differing jurisdictions with resulting litigation over forms and venue rather than the merits of the case.

There have been those who have opposed a unified judicial system in the belief that it weakens the judiciary by denying to each judge that independence essential to the sound administration of justice. Experience should have established the fact that it is not necessary for each judge in each court to be completely independent in matters of administration if the judge is to be completely free in his judicial determination. A free and independent judiciary means that freedom and independence necessary for the exercise of the judicial function, free from fear of fiscal or political reprisals.

In short, all state judicial systems must be designed to see that matters needing the attention of the courts are presented as expeditiously as feasible, and at the least possible cost, consistent with the requirement that every court dispense justice equally and fairly to all.

If this requires reorganization—then SO BE IT! Chief Justice Burger, in speaking recently, said:

> * * * we must be open to consider changes to meet new problems and new conditions * * * our judicial machinery is not even adequate for the burdens now placed on it. Even if our population remained static and our society, our economy, our science and all other development stood still (and of course they will not do so) our judicial machinery will be unequal to the task * * * I advocate nothing except an openminded and mature willingness to examine our judicial machinery carefully, thoughtfully—and critically to prepare for the onslaught of events of the next 30 years.[9]

None of us look forward to having to learn new methods for doing things—but a simplified judicial structure is a necessity if we are to meet the demand for constructive change which permeates the society in which we live.

Judges seldom advocate change JUST for the sake of change; neither do we care to have change imposed on us.

Chief Justice Burger has suggested, in essence, that all things are changing and we must change with them.

DARE WE DO LESS?

LIMITED AND SPECIAL JURISDICTION

by

ZITA L. WEINSHIENK
Judge, Denver County Court

One of my colleagues on the Denver Bench likes to tell of a man who complained to his psychiatrist that he had a terrible inferiority complex. After thorough testing and evaluation, the psychiatrist finally told his patient: "You have no complex. You *are* inferior!"

In discussing the courts of limited jurisdiction, we find too often that they too are, in fact, inferior. The judges of the courts of limited jurisdiction are all too frequently given good reason to feel that that they are, in fact, inferior, or at least not as important as the trial courts of general jurisdiction. When I speak of the courts of limited jurisdiction, I am talking about all of the

9. Burger, "Agenda for Change", Judicature, Vol. 54, Number 6, p. 232, (Jan. 1971).

varied courts listed in the Conference pamphlet entitled "State Court Systems" beginning on page 2.

Perhaps this sometimes actual and sometimes imagined inferior status explains some of the critical problems—at the risk of being dramatic, I would say life or death problems—facing our courts of limited jurisdiction today. I am talking about problems that all of you are well familiar with, or at least should be: the tremendous volume of cases, the difficulties arising from mass-production justice, incompetent court personnel, poor court rooms, low judicial salaries, insufficient number of judges, incompetent judges, low public esteem. I could go on and on, but that is not my primary purpose here. These problems have been discussed at length at numerous conferences[1] and have been the subject of study by various commissions[2] and legal writers. Many of these problems are discussed at length in the Conference Workbook in the section entitled "Structure of State Trial Courts" beginning at page 51.

It is urgent that each of you recognize that these problems exist. Every member of the judiciary, including the judges at the highest level of the judicial structure, must concern himself with the problems of the courts of lowest jurisdiction, and with the solution to those problems. I would suggest to you that the success of a judicial system, or its failure, depends not on the performance and prestige of the highest courts of the state, but rather on that of the lower courts. Ninety percent of the nation's criminal cases are heard in the lower courts.[3] Add to those the thousands upon thousands of juvenile court cases, probate matters and small civil suits, and you have a picture of the vast sea of litigation in the limited or special jurisdiction courts. With an increase in population has come an increase in citizens' awareness of legal rights, which is a fine thing but devastating to the case load of the lower court judge.

There are at least three reasons for the importance of special courts in the total judicial picture. First and most obvious, there is the sheer number of defendants and litigants who ap-

1. See *inter alia* Mass Production Justice and the Constitutional Ideal, Papers Presented and Proceedings of a Conference on Problems Associated With the Misdemeanor, University of Virginia School of Law (1969); Struggle for Equal Justice, A Report on Neglect and Crisis in the Lower Courts, Judicial Research Foundation, Inc. (1969), (Excerpts at p. 106 of Conference Workbook).

2. See Task Force Report: The Courts, Report by the President's Commission on Law Enforcement and Administration of Justice, Chapter 3—The Lower Courts (1967).

3. Task Force Report, supra note 2, at p. 29.

pear in these courts. Second, the misdemeanor courts have opportunity to affect profoundly the offenders appearing before them from a crime prevention point of view. Third, public respect or disrespect for the court system flows in large measure from these courts.

No judge can be unaware of the confidence crisis faced by the judicial system at this time in our history. From one group of citizens we hear that courts are soft on criminals, that judges are too lenient. From another group we hear that our court system is obsolete and does not fairly administer justice to minorities, or the long-haired hippy type, or students. Citizen contact with the courts in the great majority of cases is in the court of limited jurisdiction, and it is here that respect for the court system must originate.

Consider the effect on a citizen charged in a traffic case in being hauled before a Justice of the Peace who holds trial in his kitchen or garage. To this day, there are still many jurisdictions in which J.P.s are compensated by keeping all or part of the court costs assessed against the guilty party. The more guilty verdicts, the richer the J.P. No wonder many people think that J.P. stands for Justice for the Prosecution.

Consider also, the defendant in a mass-production urban court who is hurried through without being given opportunity to have his full say or state his position, and who often must be hurried through because of the volume of cases that have to be handled by the pressured judge. It is interesting to note that in many jurisdictions the volume of cases in the lower courts is increasing at a much faster rate than in the courts of general jurisdiction. In my State of Colorado, the annual increase of cases in the District Court, which is the court of general jurisdiction, has been approximately 6 to 7%, whereas the annual increase in the County Court, the court of limited jurisdiction, is 10 to 12%. In Denver, the Police Department found it could streamline its handling of Driving Under the Influence cases and jumped from an average monthly filing of 90 cases up to a monthly filing of 350 to 400 cases, an increase of 400%. (This is an example where an increase in the crime statistics reflects not an increase of drivers under the influence, but rather the increased efficiency and numbers of police officers.)

Consider please, the juror who must wait and wait to start a jury trial because of the volume of other arraignments, motions and dispositions which must be handled by the judge before that judge is free to start the jury trial. Consider the public resentment against many juvenile courts which are hopelessly under-

staffed and which simply cannot do the job of rehabilitation that they are expected to do. The disrespect and disenchantment arising from one unpleasant court experience can color the individual's opinion of the entire judicial system.

A very pragmatic reason why all levels of the judiciary must take interest in the problems of the court of limited jurisdiction is in the area of crime prevention. Eighty-five to 90% of persons committing felonies have previously appeared before lower courts on minor offenses. The opportunity to prevent serious criminal offenses by effectively dealing with the petty offender at the time of his first brush with the law is obvious. And yet, the large case load, lack of probation services or pre-sentence investigations, and lack of facilities for alcoholics and addicts frustrate the most dedicated judges and court personnel.

High volume of cases in urban courts requires that cases be moved and dockets cleared, and moved they are. "The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situation and to the ideals of fairness, equality and rehabilitation professed in theory, yet frequently denied in practice." [4] Mass-production justice is no justice. Even the most minor offense is of utmost importance to the individual defendant and may profoundly affect his future conduct. Consider your emotional state were you to receive a six-month jail sentence or even a ten-day sentence.

It goes without saying that the manner in which juvenile cases are handled may initiate a life of crime or may initiate a life of good citizenship. These are tremendously important cases.

Many innovations and new procedures have been developed in recent years with varying amounts of success. Let me now go to the point of what is being done and what can be done to solve the problems of the the court of limited jurisdiction.

As recently as last year, the American Bar Association recognized the needs of the judges of these courts, and there was established under the Section of Judicial Administration the National Conference of Special Court Judges. This organization, dedicated to educating, training and disseminating information to and about judges, has in its short lifetime done a great deal to upgrade the court of special or limited jurisdiction. Two educational seminars were conducted during 1970 with great success and more are planned for 1971. Hopefully a short course for the special court judge will be offered at the National

4. Task Force Report, supra note 2, at p. 29.

College of State Trial Judges in Reno, Nevada, this coming summer. In the past, these courses for judges, so desperately needed by the special court judge, have been offered primarily to the judges of trial courts of general jurisdiction. Before the establishment of the National Conference of Special Court Judges, another organization, the North American Judges Association, had been working in the same direction. These two well-run associations of judges presently are working harmoniously toward the goals of upgrading the judges of courts of limited jurisdiction and improving the administration of justice in these courts.

Another new educational program has recently been commenced in my home city of Denver. The establishment of the National Institute for Court Management will go a long way toward filling the imperative need for trained, well-qualified, and efficient court personnel and court administrators. I predict that the future will see extensive and innovative uses of computers, data processing, and microfilm in the administration of special courts. This topic will, of course, be covered in detail by other speakers at the Conference.

Many courts of limited jurisdiction are not courts of record, and this raises problems. There can be no appeal on the record if there is no record. Trials de novo are usually available in the next higher trial court, creating a great waste of valuable judicial time. Colorado experience shows that when the trial de novo was eliminated by changing the lower courts into courts of record, appeals were cut in half. I would urge that all courts of limited jurisdiction should be courts of record, and all appeals should be appeals on that record. As a workable alternative to the expensive court reporter, court proceedings may be electronically taped efficiently and economically. Tape recording of court proceedings in the lower courts of Colorado has been utilized for over five years with very satisfactory results. The savings in avoiding the expense of so many complete second trials of the same case more than makes up for the expense of a tape recorder and transcriber.

In moving against criminal recidivism, new and exciting programs are being encouraged and extended. Probation services for misdemeanants, often involving citizen volunteers, have been shown to be extremely effective. Vista volunteers have been widely used by the courts in recent years with great success. Especially in juvenile courts, college students volunteer their time and play an important role in rehabilitating delinquents.

Cooperation between the local courts and the jails has given rise to work release and study release programs. The prisoner

serves his sentence but is released during the day to go to his job or to school. He retains his job, his family is supported and kept off of welfare, and yet he is punished—perhaps even more than the prisoners who remain at the jail.

In solving the crime problem, the special courts need the very best of diagnostic and corrective facilities. Detoxification centers for alcoholics, treatment centers for drug addicts, mental health clinics, all these are essential. The initial cost may be of concern, but in the long run such services and facilities would save the taxpayers money by reducing criminal prosecution and incarceration. The key is to prevent crime, not just punish crime.

The problems are large but the solutions are there. Your ideas, your concern, your support will provide the answers.

LINGERING PROBLEM: PART-TIME COURTS

by

THOMAS M. POMEROY

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Introduction

A unified court system has been the goal throughout most of the 20th century of those who have given serious thought to the problems of court administration. From Dean Pound to Justice Tom Clark the goal has been pressed with gathering momentum. The quarter century since the end of the last war has of course seen the greatest surge of activity in this effort, and the last dozen years, particularly from the National Conference on Judicial Selection and Court Administration in 1959 to this National Conference on the Judiciary, have been marked by great accomplishment. The tireless activity of the American Judicature Society, the A.B.A., the Institute of Judicial Administration, and numerous other organizations, including state and local bar associations, judicial conferences and several foundations, working both separately and cooperatively, have been largely responsible.

So much has been said and written as to the pressing need for improvement and the remedies to be applied that it would be presumptuous of me to try to review them, particularly before this audience of sophisticated and experienced representatives of the bench, the bar, court administration and others in the field of political science. We are all concerned to make the third coordinate branch of government, the judicial, viable, efficient, re-

sponsible and responsive in a period of expanding population, of exploding litigation, of rapid mechanization and automation, and of unprecedented social change and concurrent social unrest. The period in which Dean Pound gave his landmark address of 1906, the time in the mid-30's when the A.B.A. first announced its model judiciary article, even the years in which Justice Vanderbilt was most active in the 50's, all seem placid and calm compared with today's strident and furious rate of change, and the severity of the stresses and strains in our society and our governmental structures in the 1970's. What we need, I take it, is not preaching about the ills to be cured, but to learn from each other's experience what is being done and thought about, to the end that we may maintain and accelerate the momentum now gathered, and go forward with renewed enthusiasm, with boldness and imagination, to the never-ending tasks still awaiting us in our several jurisdictions.

Some of these tasks, as we know, are within the competence and cognizance of the judicial establishment—the bench, the bar and court administrators; a great deal of what must be done, however, requires legislative and executive action. At this point, of course, the understanding and support of public officials and of citizen groups is essential. All we can do is to be the yeast, the ferment; the bread must be made by others whom we may influence to be influential.

1. The Pennsylvania Background

With this in mind, it seemed to me that my best contribution to this session could be to tell you something of the recent Pennsylvania experience with court unification in general, and then to speak in a little more detail as to one aspect of that process as it concerns the minor judiciary, or, as the program puts it, part-time courts. I speak of Pennsylvania not to hold it up as a model, because I know full well that other states have in recent years made dramatic improvement in this field, and in many respects have done a more thorough job. I speak of Pennsylvania and not others because I know the Pennsylvania situation and do not know the others in detail. It happens, moreover, to be one of the most recent examples of a large state making a significant advance in court consolidation.

When I went on the bench in 1968, I received a letter from a friend of mine on the New Jersey Supreme Court. He wrote me a congratulatory note, and from his Vanderbiltian eminence said, "We in New Jersey have always looked upon Pennsylvania as being the finest example of colonial jurisprudence in Ameri-

ca." He might have been right a few years ago, but I told him gently in my reply that he might not have been aware of the new judiciary article in our Constitution, adopted in the spring of that year, 1968. It is this of which I will shortly speak. But first I should describe briefly our anachronistic colonial system.

Pennsylvania Courts Pre-1968 Constitution

Pennsylvania had, and still has, a 3-tier court system, in part constitutional and in part statutory: a Supreme Court, a Superior Court, and trial courts. In addition, of course, there were the justices of the peace (in some instances called aldermen or magistrates), and perhaps they could be called a 4th tier.

The trial courts were basically the courts of common pleas, which sat, and still do, in the 67 counties of the State (there are actually only 59 judicial districts, 16 of the less populated counties being paired into 2-county districts). Each district also had two criminal courts, one called the court of oyer and terminer and general jail delivery (handling all homicide and certain other serious offenses) and the other the court of quarter sessions of the peace. The same judges manned both the civil and criminal courts, but there were separate clerks, staffs, and in some places separate court rooms and other quarters. Each judicial district had a separate orphans' or probate court. In most districts the common pleas judge also sat as orphans' court judge, but in 20 districts the orphans' courts were manned by separate orphans' court judges. The same arrangement existed with respect to the juvenile courts, although only one district, Pittsburgh, was manned by a judge who was not also a common pleas judge.

The real proliferation of courts was in the two large metropolitan areas: Allegheny County (Pittsburgh) had a common pleas court, the two criminal courts, an orphans' court, a juvenile court and a county court (limited jurisdiction). In Philadelphia there was no separate juvenile court, but instead of one common pleas court, it had 10, each composed of one president judge and two associate judges!

I will not burden you with the jurisdictional hodge podge which accompanied this court structure, or non-structure. In a word, to quote an eminent student of the Pennsylvania situation, "[j]urisdiction in civil, criminal, estate and probate and family and other social matters [was] thus fragmented among a wide variety of independent courts. In many cases there [was] overlapping and concurrent jurisdiction. In some cases there [was] exclusive jurisdiction. * * * The inefficiency of this

fragmented court structure [was] appalling. * * * Each of the separate courts remain[ed] a separate domain unto itself, making impossible the efficient use of judicial and administrative personnel * * *" (S. Schulman, Toward Judicial Reform in Pennsylvania, 2, 3 (1962)).

Pennsylvania Minor Courts Pre-1968 Constitution

Underneath all of this was the minor court system. The justices of the peace (called aldermen in Pittsburgh and magistrates in Philadelphia) have been constitutional officers in Pennsylvania since colonial times. They dealt with minor civil matters up to $500 in all counties (except Philadelphia where the amount was limited to $100 by the Constitution) and a wide variety of minor criminal offenses, especially, in recent times, traffic matters. The Constitution permitted 2 justices of the peace for every city ward, township and borough in the State, or a total number of j.p.'s in excess of 5,000. The number actively commissioned was in excess of 4,000.

These persons were not learned in the law nor were they otherwise trained in their duties except for the relatively few who availed themselves of voluntary in-service training opportunities. Most of them had other occupations of all descriptions, 85% being part-time justices. A handful (7 in 1962) were lawyers; (there were no doctors or dentists). In 1962 there were 81 housewives. The largest single category was that of real estate or insurance agent. Probably a third held other public offices in their municipalities. Generally (81%) their offices and court rooms, if any, were in their homes. (There was a law against having a justice's office in a tavern or public house of entertainment! (Act of February 22, 1802, P.L. 75, 42 P.S. § 191)) Approximately 25% had not completed a high school education; 60% had no education beyond high school; 14% had completed college. As a study of minor courts in Pennsylvania made in 1962 (by the Pennsylvania Bar Association and the Institute of Public Administration of Pennsylvania State University) rather laconically notes, "Early in Pennsylvania's history these offices were held in high esteem and often filled by distinguished citizens, but their prestige has since fallen."

In addition to the elected justices of the peace and aldermen, the mayors of cities and boroughs in Pennsylvania were also authorized to exercise judicial function, although a typical borough mayor did not in fact hear cases. Each of Pennsylvania's two large cities had its own elaborate minor judiciary system, including police magistrates and traffic courts, which time forbids me

to describe in detail. Professor Schulman states that "[f]rom its earliest beginnings, the minor court system in Philadelphia, as first established in [1715], and known as the '40 shillings or two weeks court,' fell into disrepute."

The minor judiciary from the beginning has been compensated on a fee basis, statutorily prescribed. Costs of civil cases were paid by the losing litigant; they were not reported to any governmental agency, and there is no public record of them. (The only exception is in Philadelphia, where the magistrates were on a salary basis.) This, of course, was one of the most nefarious aspects of the system, and led to the old quip that "J.P." stands for "judgment for the plaintiff". "No man," as Lord Coke said in Bonham's case, "ought to be a judge of his own cause," and the fee system smacked of just that. On the criminal side, fees in summary conviction cases were paid by the guilty defendant; otherwise by the county. Costs in other criminal cases, as those where the defendant appealed or was held for court, were paid by the county. The last figures I have seen are for 1960, in which costs paid by the counties aggregated $400,000, out of a total of 95,000 cases heard (over half of which resulted in summary convictions).

It should be noted, finally, that there was virtually no control over the j.p.'s, aldermen, and magistrates, either fiscally or in terms of their performance. While their judgments could be appealed from if one had the time, money and perseverance, they operated virtually independently of any authority. The only qualification was that he or she must be politically "right", for one of the main entrenchments of the j.p. system, including the constables or arresting officers, was its close association, not to say affiliation, with one or the other political party.

It was perhaps no wonder that Schulman, in his book, charges that "The minor judiciary in Pennsylvania is the most ancient, the most politically entrenched, and the most inefficient part of our judicial system." William A. Schnader, former Attorney General of Pennsylvania and the father of our effort at constitutional revision in the critical years 1962–1968, was even more forthright: "One of the darkest blots on Pennsylvania's escutcheon is that we still permit persons without any training in the law or otherwise, without any knowledge of the basic requirements of their office, to pretend to administer justice and to have jurisdiction over the life, liberty and property of the people of this State."

Times had changed by the mid-20th century, but the justice of the peace system had not changed in Pennsylvania since William

Penn commissioned the first ones in 1682. The pattern was in large measure the same across the country, but the decades of the '50's and the '60's saw major reform in minor courts in many states. California, Ohio, Connecticut, Alaska, Hawaii, Tennessee, Virginia, Missouri, Minnesota, New Mexico, Washington, New Hampshire, Maine, Illinois, Colorado, North Carolina were among those states which had made substantial reform by 1965 before Pennsylvania made its move. Perhaps another dozen have been added to the list in the past few years.

2. The Judiciary Article of 1968

I have tried to point out in general terms the Pennsylvania picture before the adoption of our new Judiciary Article in 1968. Time will not permit a review of the proposals and counterproposals put before the constitutional convention, the pulling and hauling within the convention, a critical analysis of the emerging new article, or of the efforts to obtain its adoption by the electorate. The article fell short of what many of us wished, most importantly perhaps in the area of judicial selection (we remain one of eight states which still elect all of their judges and require them to run on a partisan political ballot) and in the failure to abolish completely the justice of the peace system in favor of a genuine district or community court; but very real progress was made, nevertheless.

Of paramount importance is the stipulation in the new article that the judicial power of the Commonwealth shall be vested "in a unified judicial system". The courts which comprise this system are the Supreme Court ("in which shall be reposed the supreme judicial power of the Commonwealth"), the Superior Court (now elevated to constitutional status), a Commonwealth Court (a new statewide court designed to handle, both at the nisi prius and intermediate appellate level, all litigation in which the Commonwealth, its political subdivisions and agencies are parties), courts of common pleas and the "minor judiciary", including both the municipal and traffic courts in Philadelphia and justices of the peace throughout the state. "All courts and justices of the peace and their jurisdiction shall be in this unified judicial system."

Thus at the trial court level there is now but one court of general original jurisdiction, the court of common pleas (one such court for each judicial district). All other courts were abolished. The jurisdiction of courts of common pleas is unlimited except as may be otherwise provided by law, and the only major exception so far made or contemplated is that which has now

vested in the new Commonwealth Court. The former separate courts are now divisions of the new unified court of common pleas. Thus in Allegheny County, for example, there is by implementing legislation a civil division, a criminal division, a family court division (which includes the former juvenile court), and an orphans' court division. The same is true in Philadelphia except that civil and criminal business is handled as subdivisions of a "trial division". The practical consolidation of the courts, in districts where there was formerly more than one, has not been without birth pains, especially in the two larger cities. Philadelphia in particular, with its 12 former courts and 56 judges, has had problems, as has Allegheny County, with its 31 judges. Each county, however, has an able president judge and a court administrator; with time the unification will be a reality, not merely a paper expression.

The Constitution made provision for one other court as part of the unified judicial system which I have not yet mentioned. The constitutional convention could not bring itself to abolish justices of the peace, but it allowed the voters in any county (i. e., judicial district) to do so on a local option basis, and to substitute a new court, called a "community court". The question of the establishment of such a court can be placed on the ballot at a primary election on petition of, roughly, 5% of the voters of the judicial district, but not more often than once in a 5 year period. Only one attempt has been made to create a community court since 1968, in Cambria County. It failed. But there is a new Community Court Act ready to be used when and if the voters of any county decide to do so. The mere existence of this device, waiting in the wings, so to speak, may keep the justices of the peace on their mettle.

In the meantime, what of the justices of the peace under the new dispensation?

1. Pre-1968 justices of the peace, aldermen and magistrates are allowed to complete their terms, but at the expiration thereof their offices are abolished.

2. There is one new justice of the peace for each "magisterial district". This is a new concept, designed to shrink the excessively large number of previous j.p.'s. The magisterial districts were drawn by the Supreme Court in accordance with an area-population density formula stipulated in the schedule to the judiciary article. Five hundred and ninety-two districts were created. This is in contrast with the 4000-plus justices of the peace under the old order. These new districts came into existence on January 1, 1970, and the j.p.'s to fill the new offices were elected in 1969. The term of office is 6 years.

3. New justices of the peace, including traffic court judges in Philadelphia, must be either members of the bar or shall "complete a course of training and instruction in the duties of their respective offices and pass an examination prior to assuming office." The schedule to the article provides for this course and examination to be devised and administered by the Department of Public Instruction so as "to insure that justices of the peace are competent to perform their duties." The state court administrator has plans to supplement this with a voluntary summer course given at one of the universities.

4. The pernicious fee system is abolished, replaced by salaries. The initial range of salaries, dependent on the population served, is from $5,000 to $14,000 per year, paid by the Commonwealth. All costs collected by a j.p. are paid to the county of his district for county use. This tends to offset the cost of office and staff, which under the new system are county responsibilities.

5. The civil and criminal procedural rules relating to venue apply to magisterial districts, and proceedings may be brought only in a district in which occurs an event which would give rise to venue in a court of record. Thus no longer can there be "shopping" to find a justice who will be favorably disposed to the plaintiff or his type of claim.

6. Justices of the peace are to be governed by rules or canons prescribed by the Supreme Court. As of January 1, 1970, the Court promulgated Rules of Conduct, Office Standards and Civil Procedure for Justices of the Peace. These rules require that his judicial business be given first priority, forbid political party office or partisan political activity, forbid the holding of any governmental job, state or federal, forbid any other practice or activity incompatible with the proper and impartial discharge of their duties, and extend the ABA canons of judicial ethics to every justice of the peace. The Supreme Court at the same time adopted a uniform set of rules of civil procedure governing actions before justices of the peace. (A large number of our rules of criminal procedure are also applicable to justices of the peace, and have been published in special form for them, along with the civil rules.)

7. As with other holders of judicial office, justices of the peace are subject to discipline, suspension, removal and compulsory retirement (at age 70).

8. By statute the new justices are required to establish an office within their districts. By Supreme Court rule the location of offices and schedule of office hours are made subject to ap-

proval of the president judge of the court of common pleas in which the district is situated.

These changes are not being accepted with complete docility by the pre-1968 justices. They have attacked as unconstitutional, as applied to them, the prohibition against political activity or governmental office-holding. The exclusive power to determine whether or not two public offices are incompatible lies with the legislature exclusively, so the challengers contend. This case is still pending in the Supreme Court. In another suit now in the United States District Court for the Eastern District of Pennsylvania a municipal court judge is challenging the Supreme Court's power to remove him from office because of pending bribery charges. This action of the Court was taken on recommendation of the Judicial Inquiry and Review Board, a disciplinary body established by the new judiciary article. A third suit was commenced 10 days ago wherein the Supreme Court has been asked to take original jurisdiction. It is brought by the Neighborhood Legal Services, an O.E.O. arm in Allegheny County, seeking to enjoin a hold-over j.p., apparently popular with landlords in eviction cases, from violating the new venue limitations. Allegedly he has been taking cases where the real estate is outside of his magisterial district. The justice asserts that since he was elected in 1965, the new venue rules don't apply to him.

Much as many of us would have preferred outright substitution of genuine courts for the justice of the peace system, the gains made were substantial. No complete profile of the new justices is yet available, nor has there yet been enough experience to gauge performance. Our assistant state court administrator who has responsibility for minor judiciary matters tells me that he has been favorably impressed by the caliber of the persons elected in 1969. He also advises me that many more than formerly are now making a full-time career out of their judicial duties. This ameliorates, at least to some degree, the continuance of part-time justices. Not many lawyers sought the new district justice jobs—perhaps not more than 10%. This seems regrettable. Nevertheless, there are now more lawyer j. p.'s than at any previous time. Further attention needs to be paid to simplifying the minor judiciary structure in Pittsburgh, where the justices of the peace and the city police magistrates appear to overlap. The whole field of subject-matter jurisdiction of the justices of the peace needs a review which it has not been given for many years.

As mentioned earlier, the justices of the peace are now an integral part of the unified judicial system with which Pennsyl-

vania is endowed by its new judiciary article. The Supreme Court has been given general supervisory and administrative authority over the components of this system, including the justices of the peace. The Court is thus in position to consolidate the gains recently made and go on to assure that the minor judiciary measure up to the standards of dignity, justice and social usefulness which are so essential at this, as at every level of the judicial process. Hopefully the Court will exercise its new powers wisely and frequently, mindful of what it said in an opinion some 32 years ago, and which is worth repeating here (the case involved magistrates' courts in Philadelphia, the name given to justices of the peace in that city):

> "The functions of the magistrates' courts come closer to the great mass of our population than any other part of our judicial machinery. The faith and respect of the citizens in the competency and integrity of these tribunals in which they appear must be maintained. These are the courts to which the ordinary citizen for relatively small but to him important problems, whether criminal or civil, resorts for the redress of his grievances. Competent and honest, the magistrate can be a protector against both unlawful invasion of private rights by public officers, and the wrongdoing of criminals and racketeers. Dishonest or incompetent, the magistrate becomes the tool of oppression and the ally of crime." Rutenberg v. Philadelphia, 329 Pa. 26, 40, 196 A. 73, 80 (1938).

IV. ADMINISTRATION OF THE COURTS

Moderators: NICHOLAS DEB. KATZENBACH, ESQ.,
Former Attorney General of the United States
and ROGER M. BLOUGH,
President-elect, Institute of Judicial Administration

The purpose of these presentations is to illustrate a few cases in which technology has aided judicial administration and court management. None of us have in my judgment begun to tap all the possibilities. As Mr. Friesen said, it is difficult enough even to understand our judicial institutions—and until we do, we cannot perceive how these techniques and technologies can be applied to them.

In the first place, you have to think out the problems of court management much more clearly and explicitly, if you wish to use the services of very rapid but also very dumb machines. What are we trying to do—what information do we need—why do we need it—when do we need it—and what purposes will it serve; these are the kinds of questions which have to be resolved more specifically than if we are dealing with pencil and paper to tell other people what we want them to do.

But the age of computers will not reach all courts of the land very soon. It is essential that we take a fresh look at what we have to work with now—how better to utilize present facilities. Hand in hand with the fascinating considerations of what electronic devices can do to serve the courts, therefore, goes the pragmatic need to consider how we can do better with what we already have. Thus these presentations are two sides of the same coin; even as a court enters the computer age, it can and will probably always have to rely on certain facilities which have long been at hand and have long been neglected.

EFFECTIVE USE OF MODERN TECHNOLOGY

by

A. Leon Higginbotham, Jr.
Judge, United States District Court for Eastern Pennsylvania

No one has spoken with greater clarity on the significance of technology and modern management than did Chief Justice Burger in his classic speech last August before the American Bar Association. For there he stated that "more money and more judges alone is not the primary solution". Some of what is wrong is due to the failure to apply the techniques of modern business to the administration or management of the purely mechanical operations of the court: modern record keeping, and systems planning for handling the movement of the cases. Some is also due to antiquated, rigid procedures which not only permit the lag but also encourage it. And I submit that during the decade of the 70's a substantial amount of the respect which citizens will have for our law and the creditability of our justice system will depend on whether we accept Chief Justice Burger's insistence that we cast aside some of our old administrative deficiencies.

While most of my comments will be related to computer utilization because of IBM's graciousness in supplying facilities for demonstration, I would like to emphasize that the technicality in

modern management principles need not involve sophisticated devices; they need not involve computers, hardware and software and projectors. Even a blackboard could be classified as a device of instructional technology. Often in the management of our courts there are some very simple devices which can greatly speed up our efficiency and need not be expensive. Let me give you one simple example before looking at computers. One court with approximately twelve judges was having a continuous problem in docketing. The docketing was always delayed, the senior employees were always complaining that they were overworked and how much easier it was in the good old days. The docket system was revised so that each deputy clerk had a specific digit to docket; he might docket all cases whose number ended in three. That would be his sole responsibility. And by that simple management device to connect the clerk with the digit, the docketing problem almost vanished, because you were able to pinpoint the person in the problem and to eliminate the delay.

But there are other problems which cannot be solved so easily. And that's where computers and automated data retrieval become so important. Whenever I discuss the problems of computers with judges I'm reminded of the experiences of Sam Jones, who visited a sophisticated urban hospital which, like our courts, was utilizing computers to aid diagnosis. The story goes that Sam went in complaining of a backache. The chief nurse said, "Sam, we're going to give you this card. You will go to various departments and they will punch holes in it. Don't bend it, don't tear it, don't fold it." So he went to the cardiologist and the cardiologist made an electrocardiogram and punched three holes in the card. He had certain surgical examinations; they spun off the various blood tests and they put seven holes in the card. And finally Sam went to the radiologist who looked at the wet x-ray films and looked at Sam and punched 12 holes in the card. And at the end of the day the nurse said, "I want you to come back here tomorrow and we will be able to tell you what's wrong. Take the card home with you, don't bend it, don't tear it." Sam could not understand how the holes in this one card could say what was wrong with his back, and when he got home he looked at the old player piano and very, very carefully put the card on the player piano and he started to pump it with great vigor. Out came the tune, "Nearer my God to Thee".

I think that while lawyers and judges are supposed to have greater intellects than Sam Jones, we can still make the same error by drawing unwarranted inferences if we envision computer technology to be akin to the piano player technique of

years ago. I need not tell you that a Univac or an IBM 360 will be no substitute for the justices of the Supreme Court. But the computer is not in lieu of any judge, but instead it is an ally that helps speed up the trial process by identifying the backlog and those bottlenecks which can be eradicated if we apply intelligent managerial techniques. There is no substitute for able judges, no substitute for adequate judge power or well-prepared lawyers, but even that trinity will not itself solve the problem of the backlog faced in major urban courts.

Now, what are some of the contributions which automated data retrieval or computer technology can relevantly offer as an aid to diminish the backlog? The first and probably the most important factor is what I call identifying the case inventory in the judicial warehouse. In short, making available to the administrative judge and his colleagues a rather precise identification of the totality of cases in the backlog with classification to their various components, noting with specificity the changes of those components during any fixed given period. As an example: in the federal courts the computer is now geared so that we can tell how many cases are airplane accidents, how many are Jones act or motor vehicles, how many are patents or trademarks, or labor suits.* In this way, just as an industrialist must know the type and quantity of goods he has on hand in a warehouse, an administrative judge can know the nature of the case inventory. Let me cite the federal courts' experience and what happened while we were not analyzing the data. We knew that our total number of cases had been increasing dramatically from 1961 to 1966. We started to analyze each component—the Jones act, FELA, and the like—using standard linear techniques. While the tort actions had increased from 3,000 to 5,000 in that period of time, we found that by charting each category we could compare the precise percentage of change. What came out of this inquiry? An alarming fact that in 1961 longshoremen cases constituted only 8 percent of our tort cases and in 1966 they constituted 23 percent and if that trend had continued for another 5 years, they would be 60 per cent of the total tort actions in our court.

Then we spun the data out differently. We compared the termination rate of maritime cases, looking particularly at longshoremen cases, and we found that during this period between '61 and '66 there had been actually less longshoremen and Jones act cases tried despite the fact there had been a 340 percent build up in that field. Now, with the knowledge of the growth of a very specific field and with a comparison of a termination

* See Appendix C.

rate, we were able to pinpoint the problem of congestion. As to specific law firms we established that certain specific lawyers were contributing to the congestion in this field. To our great surprise, we demonstrated that 95 percent of all the longshoremen cases were in the hands of two firms on the plaintiffs' side and about 80 percent of all the longshoremen cases were in the hands of about two law firms on the respondents' side. So that what we had was not a problem dealing with the bar as a whole, but dealing with a select number of cases, a select number of law firms.

In order to solve the problem of congestion, one must first know the facts and second must have a strong-willed, firm and fair administrative judge. Fortunately at the Eastern District of Pennsylvania we then had both the vigor of an able, firm and fair judge plus the necessary data. There are attached ten sample appendices to this article which are small excerpts from our former automated calendar control system. As an example, Appendices A and B give a chronological distribution of cases so that the Court could set as a priority if it desired, all cases in excess of two or three years old on the trial list and would be able to estimate the percentage of judicial work load. Appendix C is a distribution of a sample in pending case load series. Appendix D categorizes the law firm profile. Thus as an example, law firm No. 8 had 27 percent of the pending cases in the court. Law firm No. 17, Appendices E and F, had 27 percent of the pending cases. With other reports which indicated the number of cases which each lawyer had settled and whether these cases were settled at pretrial, ready pool, or after assignment or by jury verdict you could rationally estimate the case load which any specific lawyer could handle on the basis of his performance of the last year. Obviously, where one lawyer had 77 cases in his law firm and when he was terminating only a small fraction of those cases each year, he would never be able to promptly dispose of even his oldest cases.

Armed with this data, we tried to make a reasonable assessment as to how many cases any specific lawyer could handle with the available number of judges, and accordingly, Chief Judge Clary suggested to various lawyers "* * * if you will not voluntarily reassign X number of cases please be in court on Friday and if you are plaintiff's counsel, give us the name and address of your client. If you represent an insurance carrier, give the name and address of the insurance company and the claims manager in charge." With this mild persuasion of our Chief Judge, on that morning all of the cases were reassigned in accordance with the formula we had developed. But as a result of this re-

assignment, we were able within an eight-week period to terminate more longeshoreman cases by jury trials than had been terminated in the previous two-year period.

So much for the problem of inventory and attorney profile. Another very important feature of the computer is its capacity to be utilized for scheduling, so that when you have all of the lawyers on a computer and you know their schedules, through your computer you can eliminate all problems with scheduling conflicts and you can go through certain simulations which will indicate, with the number of cases which a particular lawyer has been handling, what his profile should be in the next five, four, three years and whether he is handling more cases than he possibly could try.

A third situation where the computer is so extremely important is in experimentation. In the years I've been on the court I've come across as many theories of calendar management as judges I've met, and yet I've seen very few prototypes of programs which have been constructed and have used the computer to compare. As an example, let's take the subject of pre-trial conferences. There are advocates that suggest that pre-trial conferences should be held immediately after an answer is filed. Others claim that experienced lawyers know the value of cases and it's just wasting your time to have such a conference at all or to have one promptly. Through intelligent programming a test by a computer system can be conducted where you can go through two processes, one in which there are pre-trials and one in which there are not. They can be planned to compensate for the human factors of individual differences in judges and types of cases and for lawyers, so that there is an appropriate sprinkling of cases.

A simulation is a computer representation of the functioning of a system. As an example, when NASA's planning to launch a rocket it doesn't send up the rocket, with the men in it, and then decide what they're going to do, or what the problem may be. They have the capacity to set up the prototype and then say that if you change the thrust or if you have different coefficients they can estimate what theoretical results are possible, or what are some of the theoretical problems. Now this is something that need not be done merely for space. It can be done for court performance. If you understand enough about the operation of your court and if your model is sufficiently sound you can go through a simulation by saying that if you add X number of judges on the basis of your experience in the last three years and if your criminal rate increases Y amount, what should the result be?

Another important aspect is that the computer can assist you to identify problems so that after you have once used it you may be able to eliminate the computer process. I think that our experience in the federal district court in Philadelphia verifies that fact. A total computer program for a relatively small court (10 to 20 judges) can be very costly. When Ernie Friesen was the director, the Administrative Office permitted us to experiment with the above program to identify the problems. After the experiment it became evident that the whole master calendar system was functioning inefficiently and with this impressive data we were able to convince our colleagues, and the bar generally, as to the advantages of changing over to the individual calendar system.

At the time we changed over to the individual calendar system, during the fiscal year of 1968, we had terminated a total of 3,869 civil and criminal cases. *With the same number of judges* under the individual calendar system, we terminated 5,296 cases. That is an increase in termination of approximately 1,400 cases and what would be the equivalent of an addition of four to five judges.

Finally, one of the most important aspects in the use of the computer is that I think it can make the criminal justice system work. It is commonly assumed that these components—(1) law enforcement (police, sheriffs, marshalls), (2) the judicial process, (judges, prosecutors, defense lawyers), and (3) corrections—add up to a system of criminal justice. A system implies some unity of purpose in organized interrelationships among component parts. In the typical American city and state and under some federal jurisdictions there is a well-defined criminal process, a continuum through which each accused offender may pass from the hands of the police to the jurisdiction of the court behind the walls of prison and then back on the street. But this does not add up to any system. Often what we have in our criminal "system" is a non-system of criminal justice. How can computers change this to a viable system? As an example, you can have terminals at every central police station, you can see that through your computer notices will go automatically out to the police. You can monitor to ascertain how many hours were utilized by the police for cases which were continued by the court. You can find out the moment when someone is arrested, if you have an integrated system, whether bench warrants are outstanding, whether there are prior cases involving the accused and all of this information you can get in just a few seconds.

This very elementary discussion about computer utilization has been sort of a smorgasbord of hors d'oeuvres, hopefully to whet

your appetite for later serious exploration, but I would like to assure you that the many individuals who are exploring computer utilization are not crackpots and are not on the lunatic fringe. There is demonstrable evidence in many areas of the country that it can and it does improve results.

It becomes increasingly evident that we can have a District Court which can have men of the excellence of Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Cardozo and Chief Justice Burger, and we can add seven or eight good judges, yet despite their utter substantive excellence on the law, that court can build up the worst backlog in the country because the real question is: How will you handle, through systems planning, the managerial aspects of those 80 percent of the cases which never reach trial?

Three summers ago, at my own expense, I took a course on computers and systems management. One of my classmates was Fisher Howe who is the author of a most distinguished monograph called "The Computer in Foreign Affairs". In the first chapter he makes this comment:

> "A special exhilaration is reserved for the parachutist when he experiences momentarily the defiance of gravity. A not dissimilar emotional surge comes to a man when first he confronts the computer. Nature gives only to living beings the power to think, yet a totally inanimate, ominous-looking machine accepts a statement of a thoughtful problem and seconds later produces a thoughtful, correct, super-human response."

I am confident that when added to a willingness to try new methods and reasonable experimentation, computer utilization can bring back for us some superhuman responses and results which will significantly aid in the diminution of our increasing trial backlog.

APPENDIX A

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM
CASES PENDING BY AGE

PENDING CASELOAD SERIES
PCS REPORT NUMBER 3

PAGE 1

NOV. 9, 1968

MONTHS PENDING	PENDING CASES	PERCENTAGE
76	1	.1
73	1	.1
69	9	.1
68	1	.1
67	1	.1
63	2	.1
62	1.4	.1
61	3	.1
59	2	.1
57	.5	.1
56	8	.1
55	2	.1
54	6	.1
53	5	.1
52	5	.1
51	2	.1
50	6	.1
49	7	.1
48	8	.1
47	11	.1
46	16	.1
45	18	.1
44	29	.2
43	52	.3
42	51	.3
41	79	.5
40	66	.4
39	57	.3
38	45	.3
37	83	.5
36	54	.3
35		

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — PENDING CASELOAD SERIES
CASES PENDING BY AGE — PCS REPORT NUMBER 3

PAGE 2

NOV. 9, 1968

MONTHS PENDING	PENDING CASES	PERCENTAGE
34	78	5
33	77	4
32	66	4
31	72	4
30	76	4
29	105	6
28	104	6
27	83	5
26	70	4
25	79	5
24	56	3
23	79	5
22	73	4
21	45	3
20	23	1
19	2	-1
18	1	-1
16	2	-1
12	1	-1
5	1	

1733 CASES PENDING BY DOCKET NUMBER

THE AVERAGE AGE OF ALL PENDING CASES IS CURRENTLY 32 MONTHS

APPENDIX D

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — PENDING CASELOAD SERIES
CASES PENDING BY LAW FIRM AND ATTORNEY — PCS REPORT NUMBER 4

PAGE 8

NOV. 9, 1968

LAW FIRM	ATTORNEY	CASES PENDING			
LAW FIRM 6		3			
	LAWYER #1	13			
		1			
			17	CASES PENDING	CODE 043
			1	PERCENT OF THE PENDING CASES	
LAW FIRM 7	LAWYER #1	1			
	LAWYER #2	1			
	LAWYER #3	1			
	LAWYER #4	2			
			5	CASES PENDING	CODE 044
			-1	PERCENT OF THE PENDING CASES	
LAW FIRM 8	LAWYER #1	57			
	LAWYER #2	31			
	LAWYER #3	77			
	LAWYER #4	23			
	LAWYER #5	43			
	LAWYER #6	50			
	LAWYER #7	18			
	LAWYER #8	20			
	LAWYER #9	37			
	LAWYER #10	28			
	LAWYER #11	64			
	LAWYER #12	1			
	LAWYER #13	15			
	LAWYER #14	1			
		1			
			466	CASES PENDING	CODE 046
			27	PERCENT OF THE PENDING CASES	

NOTE
NAMES OF LAWYERS AND LAW FIRMS HAVE BEEN CHANGED TO FIRM # AND LAWYER.
ACTUAL NAMES OF FIRMS & LAWYERS APPEAR ON OUTPUT USED.

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — PENDING CASELOAD SERIES
CASES PENDING BY NATURE OF SUIT — PCS REPORT NUMBER 2

PAGE 4

NOVEMBER 9, 1968

JURISDICTION

DIVERSITY

NATURE OF SUIT	PENDING CASES	PERCENTAGE
INSURANCE CONTRACT	25	1
NEGOT. INSTRUMENT	8	-1
PAYMENT/JUDGEMENT	0	-1
OTHER CONTRACT	62	4
RENT, LEASE, EJECT.	1	-1
REAL PROP.TORT	3	-1
AIRPLANE PERS.INJ.	12	1
ASSAULT/DEFAMATION	12	1
MARINE PERS.INJ.	430	25
MOT.VEH.PERS.INJ.	460	27
OTHER PERS. INJ.	258	15
FRAUD	1	-1
PERS.PROP.DAMAGE	6	-1

1278 DIVERSITY CASES PENDING
74 PERCENT OF THE TOTAL PENDING CASELOAD

1733 CASES PENDING BY DOCKET NUMBER

APPENDIX E

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — PENDING CASELOAD SERIES
CASES PENDING BY LAW FIRM AND ATTORNEY — PCS REPORT NUMBER 4

PAGE 12

NOV. 9, 1968

LAW FIRM	ATTORNEY	CASES PENDING
LAW FIRM 15	LAWYER #1	1
	LAWYER #2	1
	LAWYER #3	3

5 CASES PENDING — CODE 070
-1 PERCENT OF THE PENDING CASES

LAW FIRM 16	LAWYER #1	0
	LAWYER #2	6
	LAWYER #3	1
	LAWYER #4	3

10 CASES PENDING — CODE 071
1 PERCENT OF THE PENDING CASES

LAW FIRM 17	LAWYER #1	30
	LAWYER #2	3
	LAWYER #3	38
	LAWYER #4	102
	LAWYER #5	69
	LAWYER #6	6
	LAWYER #7	22
	LAWYER #8	75
	LAWYER #9	13
	LAWYER #10	1
	LAWYER #11	29
	LAWYER #12	9
	LAWYER #13	13
	LAWYER #14	8
	LAWYER #15	31

NOTE
NAMES OF LAWYERS AND LAW FIRMS HAVE BEEN CHANGED TO FIRM # AND LAWYER.
ACTUAL NAMES OF FIRMS & LAWYERS APPEAR ON OUTPUT USED.

APPENDIX F

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — PENDING CASELOAD SERIES
CASES PENDING BY LAW FIRM AND ATTORNEY — PCS REPORT NUMBER 4

PAGE 13 — NOVEMBER 9, 1968

LAW FIRM	ATTORNEY	CASES PENDING			
LAW FIRM 17	LAWYER #16	11			
	LAWYER #17	2			
	LAWYER #18	1			
			463	CASES PENDING	CODE 072
			27	PERCENT OF THE PENDING CASES	
LAW FIRM 18		2			
	LAWYER #1	6			
	LAWYER #2	5			
	LAWYER #3	10			
	LAWYER #4	6			
	LAWYER #5	14			
	LAWYER #6	8			
	LAWYER #7	7			
	LAWYER #8	18			
	LAWYER #9	8			
	LAWYER #10	51			
	LAWYER #11	3			
	LAWYER #12	1			
	LAWYER #13	1			
	LAWYER #14	1			
	LAWYER #15	1			
			142	CASES PENDING	CODE 073
			8	PERCENT OF THE PENDING CASES	
LAW FIRM 19	LAWYER #1	1			
	LAWYER #2	2			
			3	CASES PENDING	CODE 074
			-1	PERCENT OF THE PENDING CASES	

NOTE
NAMES OF LAWYERS AND LAW FIRMS HAVE BEEN CHANGED TO FIRM # AND LAWYER.
ACTUAL NAMES OF FIRMS & LAWYERS APPEAR ON OUTPUT USED.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — TERMINATED CASELOAD SERIES
CASES TERMINATED BY LAW FIRM AND ATTORNEY — TCS REPORT NUMBER 4

PAGE 76

ASSOCIATION	ATTORNEY	CALN	C	NUMBER	FILED	CLOSED	CASE STYLE	TYPE OF TERMINATION
LAW FIRM #1	LAWYER #1	0028	0	032219	101962	121967	PADDYFUT V POCOHONTAS FED QUEST	SETTLED AFTER ASSIGNMENT JONES ACT PERS.INJ.
LAW FIRM #1	LAWYER #1	0055	0	030526	111661	102367	KANSANAC V READING CC FED QUEST	SETTLEMENT-READY POOL JONES ACT PERS.INJ
LAW FIRM #1	LAWYER #1	0090	0	034494	110863	102767	RUSSO V F F TAYLOR CC DIVERSITY	SETTLED AFTER ASSIGNMENT OTHER PERS.INJ.
LAW FIRM #1	LAWYER #1	0096	0	034898	011664	041668	DALY V CALMAR STMSHP DIVERSITY	SETTLED AFTER ASSIGNMENT MARINE PERS.INJ.
LAW FIRM #1	LAWYER #1	0110	0	035076	021364	120567	GAITWOOD V SAMEIET DIVERSITY	SETTLEMENT-READY POOL MARINE PERS.INJ.
LAW FIRM #1	LAWYER #1	0111	0	035194	022764	120667	PETERSON V CALMAR STMSHP DIVERSITY	JUDGEMENT ON JURY VERDICT MARINE PERS. INJ.
LAW FIRM #1	LAWYER #1	0129	0	035035	020664	092767	THOMAS V HAMBURG AMEI DIVERSITY	SETTLEMENT-DEFFRED POOL MARINE PERS.INJ.
LAW FIRM #1	LAWYER #1	0141	0	035436	040164	101367	FERRELL V NTL BULK FED QUEST	SETTLEMENT-DEFFRED POOL JONES ACT PERS.INJ.
LAW FIRM #1	LAWYER #1	0142	0	033806	080963	111467	FIREALL V ALCOA DIVERSITY	SETTLED AFTER ASSIGNMENT MARINE PERS.INJ.
LAW FIRM #1	LAWYER #1	0146	0	035045	020764	040368	DUNN V OVE SKOV DIVERSITY	JUDGEMENT ON JURY VERDICT MARINE PERS.INJ.
LAW FIRM #1	LAWYER #1	0149	0	035444	040264	011868	MOSKEWICH V CALMAR DIVERSITY	JUDGEMENT ON JURY VERDICT MARINE PERS.INJ.

NOTE
NAMES OF LAWYERS AND LAW FIRMS HAVE BEEN CHANGED TO FIRM # AND LAWYER
ACTUAL NAMES OF FIRMS & LAWYERS APPEAR ON OUTPUT USED.

APPENDIX H

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — TERMINATED CASELOAD SERIES
CASES TERMINATED BY NATURE OF SUIT — TCS REPORT NUMBER 3

PAGE 4

JURISDICTION

DIVERSITY

NATURE OF SUIT	TERMINATED CASES
INSURANCE CONTRACT	6
NEGOT.INSTRUMENT PAYMENT/JUDGEMENT	3
SHAREHOLDER SUIT	1
OTHER CONTRACT	27
LAND CONDEMNATION	1
REAL PROP.TORT	1
AIRPLANE PERS.INJ.	3
ASSAULT/DEFAMATION	13
MARINE PERS.INJ.	335
MOT.VEH.PERS.INJ.	326
OTHER PERS.INJ.	168
FRAUD	1
PERS. PROP. DAMAGE	4

889 DIVERSITY CASES TERMINATED

1196 TOTAL CASES TERMINATED BY DOCKET NUMBER

APPENDIX I

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM — TERMINATED CASELOAD SERIES
LAW FIRM/TERMINATION CATEGORY RELATIONS — TCS REPORT NUMBER 4

PAGE 2

LAW FIRM	TERMINATION CATEGORY				
	PRE-TRIAL	SETTLED BEFORE ASSIGNMENT NOT LISTED	SETTLED BEFORE ASSIGNMENT READY LIST	READY POOL	DEFERRED
LAW FIRM #17	2	1	0	0	0
LAW FIRM #18	0	6	0	1	0
LAW FIRM #19	1	0	0	0	0
LAW FIRM #20	0	1	0	0	0
LAW FIRM #21	0	1	0	0	0
LAW FIRM #22	0	3	0	0	0
LAW FIRM #23	0	2	0	0	0
LAW FIRM #24	4	11	0	6	2
LAW FIRM #25	0	0	0	1	1
LAW FIRM #26	5	28	16	9	31
LAW FIRM #27	0	0	1	0	0
LAW FIRM #28	0	1	0	0	0
LAW FIRM #29	0	0	0	1	0
LAW FIRM #30	1	4	1	0	0
LAW FIRM #31	0	2	0	0	1

NOTE
NAMES OF LAWYERS AND LAW FIRMS HAVE BEEN CHANGED TO FIRM # AND LAWYER.
ACTUAL NAMES OF FIRMS AND LAWYERS APPEAR ON OUTPUT USED.

APPENDIX J

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
AUTOMATED CALENDAR CONTROL SYSTEM
TERMINATED CASELOAD SERIES
LAW FIRM/TERMINATION CATEGORY RELATIONS
TCS REPORT NUMBER 4

PAGE 2

LAW FIRM	SETTLED AFTER ASSIGNMENT	COURT ORDER	MISTRIAL	TERMINATION CATEGORY JURY VERDICT	OTHER	TOTAL
LAW FIRM #17	1	0	0	1	0	5
LAW FIRM #18	2	0	0	0	0	9
LAW FIRM #19	0	0	0	0	0	1
LAW FIRM #20	0	0	0	0	0	1
LAW FIRM #21	0	0	0	0	0	1
LAW FIRM #22	2	0	0	0	0	5
LAW FIRM #23	0	1	0	0	0	3
LAW FIRM #24	5	2	0	0	0	30
LAW FIRM #25	0	0	0	0	0	2
LAW FIRM #26	11	2	0	6	0	106
LAW FIRM #27	0	0	0	0	0	1
LAW FIRM #28	0	0	0	0	0	1
LAW FIRM #29	0	0	0	0	0	1
LAW FIRM #30	0	0	0	0	0	6
LAW FIRM #31	0	0	0	0	0	3

NOTE
NAMES OF LAWYERS AND LAW FIRMS HAVE BEEN CHANGED TO FIRM # AND LAWYER.
ACTUAL NAMES OF FIRMS AND LAWYERS APPEAR ON OUTPUT USED.

[A4446]

EFFECTIVE USE OF PRESENT RESOURCES

by

KENNETH N. CHANTRY
Judge, Superior Court of Los Angeles County

No claim is made that my knowledge of court management is equal or greater than the expertise you possess. All of us recognize that there are numerous court innovations and procedures concerning which we may have vigorous disagreement. But we must also acknowledge that many courts are presently using available resources which are expediting the prompt process of court cases, relieving court congestion, reducing court costs and promoting early trials.

Although some of the resources to be discussed by me require legislative action, the obtaining of change is not at all impossible, and may involve nothing more than a judicial edict.

Management in a court setting may be a more difficult task than any management problem arising from the operation of private enterprise. In most business operations—and the operation of a metropolitan court is big business—management takes place under circumstances in which most of those connected with the enterprise have a common goal.

For example, everyone concerned with my plane trip from Los Angeles to Williamsburg wanted to get the plane to its destination as smoothly, safely and expeditiously as possible.

But consider the problem of managing a trial court in which "many lawyers have no concern about the calendars of the courts" and "gaining a delay becomes a way of life." "Delay becomes a tool by which many lawyers carry on their business and the more skilful they are in this regard, the more able they are reputed to be." [1] You might say that some of the brightest minds in the country are trying to sabotage the management.[2] The topic assigned to me for discussion has been divided into the following nine parts:

1. Power To The Presiding Judge.
2. Eliminate Divided Court Management Authority.
3. Selection of Jury Outside The Court.

1. Earl Warren, Chief Justice of the United States Supreme Court, The Administration of the Courts, The Journal of the American Judicature Society, January, 1968, Volume 51, Number 6, P. 200.

2. Ralph Kleps, Administrative Director of the California Courts, Court Calendars and Judicial Administration, Williamsburg, Virginia, February, 1971.

4. Court and Government Agencies Must Cooperate.
5. State and Trial Court Administrators.
6. Computers.
7. Standardized Jury Instructions and Court Forms.
8. Concerning the Abolition of Jury Trials.
9. Re Inventory of Legal Actions.

Power to Presiding Judge

Chief judges or presiding judges should be the administrative head of the court and not mere figureheads limited to the clerical duty of assigning judges to the various departments. "It is very necessary, in a court consisting of a number of judges, or in a number of scattered local courts of the same class, that there be an administrative head. Judicial independence does not require judicial irresponsibility, and is not impaired in the least by the presence, the helpful advice, and if need be, the reproof, of such an administrative superior. Such an administrative head should never presume to interfere in the making of judicial decisions by his fellows. Much of the discourtesy, indolence, procrastination, and other annoying habits of some judges are due to the fact that the judges are isolated and become parochial." [3]

All courts, without exception, should adopt and establish work hours. During work hours, all courts should be fully staffed and open for business. The idea that judges are above work hour regulations and must be free to come and go as they please is neither conducive to court efficiency nor in consonance with good business management. Judges may consider the adoption of a work hour schedule as an affront to their professional integrity; but if you will speak with the presiding judges of the four largest state courts in the United States you will learn that their personnel problems are similar to those existing in other business enterprises. The laissez faire principle and the optimum use of judges are incompatible. At the risk of much displeasure, I will state flatly that judges need a boss.

The authority now held by a presiding judge is not sufficient for accomplishing the task for which he is responsible. "The function of the chief or presiding judge of the court may be described as the impresario of a ballet in which the ballet dancers are not hired by him, or paid by him or fired by him, but he is expected to make them dance with grace, beauty and charm."

3. G. Joseph Tauro, Chief Justice, Supreme Judicial Court of Massachusetts, The Few and the Many, The Journal of the American Judicature Society, January, 1968, Volume 51, Number 6, P. 218.

Eliminate Divided Court Management Authority

While Federal courts apparently hire and supervise practically all of the court attaches, this condition does not prevail in many state courts. In some states metropolitan courts have from three to four bosses. The court clerk is hired by the county clerk, who is appointed by the county board of supervisors or elected by the people. The court bailiff is subject to the orders of the county sheriff, who is elected by the people. Some court magistrates are appointed by the mayor of the municipality and its city council or city administrators and serve at the pleasure of the appointer. Such an anomaly does not promote the efficient administration of justice, nor does it enable the courts to operate with greater speed and efficiency in meeting today's court needs.

" 'The courts, to perform their judicial responsibilities satisfactorily, should be entrusted to regulate the expenditure of all funds made available for their operation. This responsibility should be exercised free of interference by agents of the executive branch of government, in the same manner that the executive and legislative branches administer the funds appropriated for their internal operations. * * * Within the limits set by the funds made generally available by law, courts should have full responsibility for supervising the employees upon whom they must rely to administer the business of the courts. Thus, the independent authority of courts to hire and fire their employees, to fix and adjust their salaries, and to assign them duties should not be subject to the approval or control of any non-judicial agency.'

"The implementation of these principles will depend upon whether or not a court system has an efficient organizational structure with businesslike management. The day is fast approaching when neither the general public nor the state legislatures will put up with a fragmented, autonomous court system in which every trial court carves out a separate kingdom for itself and exercises inherent powers over administrative matters as its own jealously guarded prerogative. Such a court system, if indeed it can be called a 'system', is truly a many-splintered thing." [4]

4. Robert H. Hall, Judicial Rule-Making is Alive But Ailing, American Bar Association Journal, July 1969, Volume 55, P. 637–638.

Selection of Jury Outside the Court

The selection of trial jurors prior to trial and without the presence of a judge has been used for many years in the States of New York and Pennsylvania and during the past year in Los Angeles County by stipulation of counsel. While there are some minor variances in the jury selection procedure used in these three mentioned areas, the results are substantially the same. In a court with twenty-five or thirty jury departments, the selection of the jury outside the presence of the judge materially reduces the time required for jury trials. It has been estimated that this procedure outside the court would save three or four trial days each day. With trial court costs estimated at one thousand dollars or more per day, the saving in court time and money would be very meaningful.

In California it has also been suggested that the state legislature authorize voir dire selection of jurors outside the presence of the judge or by the judge alone in all criminal trials except capital offenses.

Court and Government Agencies Must Cooperate

I have in mind the county counsel, city attorney, district attorney, public defender, probation officer, attorney general, sheriff and chief of police.

A trial court calendar cannot be effectively handled without the cooperation of these governmental divisions. The need for their assistance is accentuated during mass arrests, riots, class actions, public disasters, labor disputes, antitrust litigation, freeway condemnations, and any public interest action involving numerous plaintiffs or defendants.

To achieve rapport with these facets of government, we must recognize that they may be, and usually are understaffed and burdened with an inadequate budget. A shortage of lawyers, police officers, deputy sheriffs and clerical help may hinder or prevent them from providing necessary services to the court.

Suppose we consider just one of the numerous duties imposed on the sheriff, namely, prisoner transportation. The range of distance between courthouse and jail varies in metropolitan courts from a few city blocks to several miles. The magnitude of this task may be illustrated by telling you that in January and February of 1971 more than seventy thousand prisoners

were moved from confinement to trial courts throughout Los Angeles County. The mileage for this bussing service exceeded two hundred thousand miles.[5] Timely appearance of prisoners in court is an imperative factor in court management.

Unless the courts sincerely work in unison with these enumerated governmental agencies, efficient court management becomes a nebulous thing. Just one disgruntled district attorney can substantially damage a criminal court calendar.

In practically every state there are police, sheriff, prosecutor, public defender and judge associations. In no state is there a forum that I know of where these officials talk to each other. This is essential at both state, county and city level if court management is to derive benefit from improved communication, understanding and close working relationships.

State and Trial Court Administrators

Although some states have employed state administrative officers, this does not eliminate the need of most courts for a trial court administrator answerable to the court. In courts having seven (7) or more judges, a trial court administrator is a prerequisite to the economical and efficient administration of that court system.

It is also my belief that judges are appointed or elected to try cases and pass on legal issues. Neither the appointive official nor the people intend or contemplate that judges' time should be devoted to hiring secretaries, bailiffs, court reporters, receptionists or clerical employees. This is not the function of the judge, and time so spent subtracts from chamber and bench time. This is work that a personnel officer, executive officer or court administrator can do as well or better than the judge. It is urged, therefore, that you delegate such managerial activities to your administrative officer.

In most courts judges also serve on, or are appointed to, various court committees which further diminish availability for court business. One metropolitan court has more than 137 judges sitting on 28 court committees of which 15 committees are standing committees that meet from one to four times per month. Most of these committee functions should be assigned to the court administrator.

5. In Los Angeles County prisoners must be bussed to more than eight large courthouses separated from the jail from one to thirty-five miles and scattered over an area of four thousand square miles.

Computers

You have heard the Honorable Leon Higginbotham discuss Technology and Modern Management Principles of Judicial Administration. I also assume that you have seen the exhibit of electronic data retrieval processes applied to courtroom and court administration. The question is are you using electronic aids, modern technological developments and modern management principles in the operation of your court?

On May 12, 1971, IBM will make available its new Basic Courts System. It is a practical, powerful set of tools for the Court Administrator. It can simultaneously handle the basic recordkeeping functions of the Civil Section of the Superior Court, Criminal Section of the Superior Court, Civil Sections of the Municipal Courts, Criminal Sections of the Municipal Courts, County Jail, District Attorney, Public Defender, County Counsel, Probation Department, Jury Commissioner and County Clerk. It uses a network of terminals,—devices which resemble both television-like screens and typewriter-like keyboards,—linked by telephone lines to the County Data Processing Department's computer installation and memory files. It stores, displays, prints, and maintains calendars, case histories, name indexes and booking number indexes. The name index functions as more than a plaintiff-defendant index. It indexes case records by name of defendant, plaintiff, attorney, witness, bondsman, juror, etc. The name index can be as limited or as general as desired, depending on what the user wishes to include. The name index permits multiple indexing of court records by number, by booking number, by arrest number, or by FBI number.

It is not claimed that every court needs a computer, but every court should benefit from the convenience and information it provides. A four or five man court may find that the cost of programming and machinery may exceed the cost of doing the same task with clerks and card indexes. However, it may be predicted that by sharing computer facilities or joining with other information users, the cost of computers will soon be brought within the capacity of even the smallest courts.[6]

6. See remarks of Ernest C. Friesen, Jr., Executive Director of the Institute for Court Management, University of Denver Law Center, in The Journal of the American Judicature Society, January, 1970, Volume 53, Number 6, P. 230.

See also William B. Eldridge, Computers and Other Modern Aids for Multi-Judge Courts, The Journal of the American Judicature Society, January, 1970, Volume 53, Number 6; Roy N. Freed, Computers in Judicial Administration, The Journal of the American Judicature Society, May, 1969, Volume 52, Number 10, P. 419–429; William L. Whittaker and John T. McDermott, Computer Technology in an Appellate Court, The Journal of the American Judicature Society, August-September, 1970, Volume 54, Number 2, P. 73–78.

Standardized Jury Instructions and Court Forms

Although used by most large metropolitan courts, there are available to all courts pattern jury instructions which have been a boon to California judges and lawyers at the trial level for more than thirty years. They have diminished the causes for appeals and thus have reduced the load of the supreme court and court of appeal. The saving in time and work for the trial judge and counsel is substantial.

These instructions, known by the acronym BAJI, Book of Approved Jury Instructions, have been scrutinized and their judicial correctness determined in hundreds of appellate opinions. The instructions are designed for the average case and do not assume to cover the variations which are inevitable. However, they furnish the court and counsel a solid base upon which to structure the particular changes needed to fit the situation.

The county clerk prints, numbers and stocks loose sheet copies of all instructions, and each civil and criminal trial department has the forms available for use without charge to counsel.[7]

The usage of court forms in the various types of civil and criminal actions is common place in large multiple judge courts. These printed forms cover aspects of probate, divorce, and criminal and civil law. The simplest and shortest form available would entail a preparation cost of from two to five dollars in most law offices. Longer and more complex forms would bear a much higher law office preparation charge. These court forms save thousands of court hours and reduce materially the cost of litigation. The Los Angeles Superior Court, through the county clerk, prints more than one hundred different forms used by that court.[8] Cook County, Chicago, prints more than 800 court forms.

7. It is recommended that a charge sufficient to cover the cost of paper and printing should be made for each instruction.

8. In 1965 the Los Angeles County Superior Court reversed a long standing policy of furnishing court printed forms without charge, exclusive of jury instructions, by charging one cent for each form. This was received by lawyers without complaint. There was an immediate drop in the quantity of forms requested, although their usage in court actions did not decrease. Evidently law firms were requesting more forms than they needed and were using the free forms for other purposes, i. e., scratch paper. The one cent charge was sufficient to cover the county cost of paper and printing, which was approximately thirty-five thousand dollars per year.

Concerning the Abolition of Jury Trials

There is no logical justification for the distinction in some state laws which authorize the disposition of industrial accidents nonjury by an industrial accident tribunal but require a jury trial for vehicle accidents. If the courts and lawyers do not accept the trial of vehicle accidents without a jury, or a reduction in the size of the jury, they may find this class of litigation being removed from the court for hearing by some other agency of government.

The Report of the Special Judicial Reform Committee, February, 1971, the Superior Court, Los Angeles County recommends as alternatives to the abolition of jury trials reductions in size of civil juries; the right to try without a jury any case in which a recovery would probably be less than the amount of the court's jurisdiction (under $5,000.00); abolishment of right to jury trial in all vehicle accidents arising on public highways under the doctrine of implied consent; that jury trials should be abolished in eminent domain proceedings; reduction of the number of jurors in all felony and misdemeanor cases other than capital cases; change voir dire procedure for selection of criminal jury except capital cases; retain jury separation legislation subject to the discretion of the judge; permit court ordered bifurcation of jury trial on civil liability issue.

Re Inventory of Legal Actions

Now is the time for everyone involved in the administration of justice to take an inventory of the merchandise. Although we are not selling commodities, we are purveyors of public service, working for the people and paid by the people. Some of our procedures are antiquated and cumbersome. Many of our court functions should be eliminated or transferred to an agency of government—quasi-judicial or administrative bodies—that could perform the operation with equal competency and at less cost.

Some of the court matters that may be examined for divestment are workmen's compensation, public intoxication, off track wagering, noncontested probate matters, school teacher employment disputes, insurance company disputes, minor traffic violations such as parking, vehicle equipment and excessive weight, city leash laws, building code and license violations, and public nuisances. A legal diagnosis of these particular subjects (and there are many others) should also include the elimination of hearing by a jury or reduction in the size of the jury.

There are numerous other legal actions or procedures that are prime subjects for reform. Here are a few topics in the field of criminal law that the courts, district attorneys, attorneys and public defenders ought to jointly consider: the abolishment of preliminary hearings, special pretrial hearings and pretrial appellate review of search and seizure questions, implement the right to speedy trial, limit pretrial discovery by the prosecutor, tighten rules for continuance, abolish civil commitment procedures for mentally disordered sex offenders, create the office of state public defender, limit jurisdiction of the city prosecutor, reclassify offense of possession of marijuana and dangerous drugs.

In the area of civil law we should examine the abolition of civil jury trials or a reduction in size, particularly in automobile and eminent domain proceedings, change in voir dire procedures, permit court-ordered bifurcation of jury trials, sanctions for failure to settle, limit marital pre-dissolution hearings, limit law and motion appearances, provide for court appointed eminent domain appraisers, abolish trial de novo small claims appeal and no-fault liability.

These would constitute an agenda for discussion by the court and public agencies interested in streamlining the court and solving its problems.[9]

Conclusion

I appreciate that contentment is as rare among men as it is natural among animals and that no form of court justice has ever completely satisfied its subjects. Within the last two years the citizens of Los Angeles County and the State of California have financed three trials that cost from $250,000 to more than one million dollars each. I submit that if we do not find a more efficient and economical way to provide a citizen with his day in court, we are going to price ourselves out of justice and out of rights.

9. For comment and discussion of the above-mentioned legal subjects see the Report of the Special Judicial Reform Committee, February 1971, The Superior Court/Los Angeles County.

V. STANDARDS FOR A QUALIFIED JUDICIARY

Moderator: HERBERT BROWNELL
Former Attorney General of the United States

We're now asked to concentrate on the key man in the judicial system, and that is the Judge. The topic that has been chosen for this plenary session is, "Standards for a Qualified Judiciary." I immediately think of some of the qualities that we *don't* want in the judiciary and am reminded of the time when we had our Attorneys General conference on congestion in the courts. We were all fired up to tackle the problem of backlog in the courts and we went out of there with great zeal to find the persons who would show the energies and the stamina and the innovative spirit that would make the best kind of judges to tackle these evermore difficult problems of the courts.

At that time there came into my office a lawyer from the Middlewest accompanied by his Senator, who told me that he was anxious to become a federal judge. He was a very distinguished lawyer in one of the larger cities and after we had gotten acquainted and the Senator had sung his praises I asked him, "Sir, I'm very curious to know why you,—you're about 60 now, you've had a very tremendous law practice, fine supporting staff from your younger partners, you're the leader of the bar in your community—why is it at this stage you have decided that you would like to be a judge?" "Well," he said, "I'll tell you. I'm tired."

Well, we certainly have learned that a place on the bench is not a place for a tired man, but we are going to find out some of the positive qualities for the judiciary.

INTRODUCTION

It is a rather obvious truism that organizational efficiency at the appellate and trial court levels, and technical efficiency in terms of facilities and mechanical aids, will not bring about a true modernization of the judiciary unless the members of the bench can be selected, trained, compensated, retired with dignity and on occasion disciplined or removed for ineffectiveness by orderly processes. The most modern, streamlined and apparently efficient judicial system, in other words, is only going to be as effective as the judges who operate within it.

The establishment of the National College of State Trial Judges in 1962 was a milestone in the efforts to improve the quality of judicial administration by making possible the professional training of newly appointed or elected jurists, and the advanced training of jurists of longer tenure. In the context of the nationwide effort to modernize all state court systems, the effective record of the National College only serves to emphasize the need for insuring that all judges in all states have the opportunities for such initial training or for continuing judicial education.

Advanced professional training is one essential for a qualified judiciary; but professional economics points out that a qualified judiciary must also have a system of remuneration which is in proportion to the importance of the judge in the overall system of justice itself. Compensation for the man on the bench must be sufficient to compare favorably with the compensation of the man at the bar; and this must insure the same degree of security at retirement that the successful practitioner may expect from his professional earnings.

This need for economic security is also to be translated into an objective and humane system for retiring incumbents for age or for removing others for deficiencies in their capacity to discharge judicial duties. (W. F. S.)

"GOOD JUDGES ARE MADE * * *"

by
LAURANCE M. HYDE, JR.
Dean, National College of State Trial Judges

I approach my subject with the basic belief that the quality of our judicial system depends on one factor more than any other. That one most important factor is the caliber of the men and women who serve as our judges. Chief Justice Arthur T. Vanderbilt said, "The best organization of the courts will be ineffective if the judges who man it are lacking in necessary qualifications." If each of us here were to make a list of those necessary qualifications, the lists would probably be quite similar.

Our several lists would say that we need judges learned in the law, as well as in the mysteries of human nature. A judge must be an unusually honest man. He must be independent and believed by the community to be independent. He needs courage in much greater measure than most, for he will face the public cry for drum head justice, the blandishments of the rich and power-

ful and the very human need to be popular with the public and with the members of the bar. Our list of qualifications will include patience, humility, emotional stability, compassion, toughness, energy, endurance and good heath.

No one person will possess a full measure of all of these attributes, but all of us know judges who come very close. Some of them have reached the bench by way of each of the various judicial selection methods now in use throughout our nation. This does not mean that all of the methods are performing equally well. It only shows that some outstanding people will reach the bench under the worst systems.

The proper question is, which system produces the fewest judges who are mediocre, or worse? I know of no one who has obtained an objective answer to this question, and perhaps it is not capable of objective measurement. Therefore, our best answer will be obtained by logic. Let's see what the attributes of a good selection process should logically be.

1. It should systematically and aggressively seek the best potential judicial talent.

2. It should identify and reject aspirants who are not qualified for the bench.

3. It should operate with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office.

4. It should provide tenure of such a nature as to encourage each judge to do the best job of judging of which he is capable and to encourage good lawyers to give up their practices for the bench.

5. It should deserve and receive public respect and trust.

I believe that the plan which best fulfills these specifications is the plan devised by Professor Albert M. Kales, recommended by the American Judicature Society since 1913, and by the American Bar Association since 1937. It is generally known by the name of the state which first adopted it thirty years ago—the Missouri Plan.

I should disclose my bias. I am a product of the Missouri Plan. My father was the first appointment under that plan to the Missouri Supreme Court in 1942. I practiced law in St. Louis before Missouri Plan judges for ten years, and then served as a Missouri Plan trial judge in St. Louis for three and a half years before resigning to become Dean of the National College of State Trial Judges.

While most of you are no doubt generally familiar with the plan, let me briefly outline it to bring it into focus. It has four elements.

1. The nomination of a panel of judicial candidates by a non-partisan commission composed of conscientious, qualified laymen and lawyers.

2. The limitation on the executive to appoint judges only from the panel submitted by the commission.

3. The review of the appointment by the voters after a short probationary term of service in which the only question is whether the judge's record warrants his retention in office.

4. Periodic review of the appointment at the end of each term of office by the voters in which the only question is whether the judge's record warrants his continued retention in office.

A concrete example of how a nominating commission operates in practice has been set forth by Judge Elmo B. Hunter, now a Federal District Judge, who as presiding judge of the Kansas City Court of Appeals, acted as chairman of the commission to select trial judges for Jackson County. Judge Hunter wrote:

> Just a few months ago two of our trial judges retired because of age and illness. This created two judicial vacancies. Our judicial nominating commission issued a public statement carried by our press and other news media that the nominating commission would soon meet to consider two panels of three names each to be sent to the governor for him to select one from each panel to fill the vacancy, and that the nominating commission was open to suggestions and recommendations of names of those members of our bar best qualified to be circuit judges.

It received the names of many outstanding and highly qualified lawyers who were willing to be considered by the commission because of the nonpolitical merit type of selection involved. The commission on its own surveyed all eligible lawyers in the circuit to see if it had before it the names of all those who ought to be considered. From all sources the commission ended up with 57 names.

After several weeks of careful study by the commission, the list of eligibles was cut to 12 then to nine and finally to those six whom the members of the commission sincerely believed to be the six best qualified of all. Those six names, three on each of the two panels, were sent to the governor, who, after his own independent consideration of them, made his selection of one from each panel. His selections were

widely acclaimed by the press and the public as excellent choices from two very outstanding panels. The commission was glad to see the governor get this accolade, but its members knew that no matter which one of the three on each panel he selected, the people of Missouri would have been assured an outstanding judge.

It might be noted in passing that each of the two panels of three names submitted to the governor happened to contain the names of two Democrats and one Republican. The governor was a Democrat. He appointed a Democrat from one panel and a Republican from the other. I do not think this was deliberate. I am convinced that our plan has so proven its merit that our governor, who is oath-bound to follow the constitution, shares its spirit as well as its letter. He selected the two he thought best qualified, irrespective of political party.

This is not an isolated instance. Another rather dramatic example occurred just a few years ago when our legislature created three new judgeships for the Kansas City area to meet the increasing cases resulting principally from population growth. The judicial selection commission sent three panels of three names each to another Democratic governor. On each panel there were two Democrats and one Republican. The governor appointed two Republicans and one Democrat.

Retention in office for these judges is by noncompetitive reelection. Sixty days prior to the general election preceding the expiration of a judge's term, he may file a declaration to succeed himself, in which case his name is submitted without party designation to the voters on a separate ballot, reading "Shall Judge _____ of the _____ court be retained in office? Yes ____ No ____." If the majority of votes are negative, or if he does not file for retention, there is a vacancy which is again filled by appointment.

Let us take the five criteria for a good system of judicial selection and tenure which I have suggested, and see how the several methods compare. The methods in general, in addition to the Missouri Plan, are election on party ballots, non-partisan election, and appointment by the governor or the legislature. Appointment is often coupled with the requirement of consent by a council or legislature or other body. Note also that in states with elected judges, more than half of those serving were initially placed on the bench by appointment by the governor to fill an unexpired term. Thus, it is really a combination of an elective and appointive system.

My first criterion is that the selection method should systematically and aggressively seek the best potential judicial talent.

Party organizations and appointing authorities could do this. We all know that they usually do not. More often, party nominations and appointments are used to meet political obligations, with an eye to pleasing the various groups and factions whose support will be needed by the party in the future. Many of our governors do seek to make the best possible judicial appointments but they must deal with strong pressures to appoint on a basis other than merit. They are helped by the Missouri Plan which gives them a choice among several lawyers, each of whom is extremely well qualified.

In my view, the nonpartisan election of judges scores lowest in seeking out the best potential talent. Any one can file. No one seeks out the best ones and urges them to run, unless the Bar undertakes to do so.

The second criterion is that the method identify and reject aspirants who are not qualified for the bench. Again, the nonpartisan election scores lowest. There is no screening, no party responsibility. Anyone can file, and a popular name or one similar to that of a respected person can and has won elections. Judges running on party ballots are voted into office and turned out of office on issues having nothing to do with their abilities or with the courts. The public votes their satisfaction, or lack of it, with the local, state and national policy makers and the judiciary is swept along with the party. It makes no sense to me that the President's fiscal policy, or his foreign policy, or the governor's welfare program, or the mayor's relations with minority groups should determine whether or not the incumbent judges are retained.

There is no perfect system. Judicial temperament and mental stability and sometimes even honesty are hard to evaluate in advance. Some mistakes will no doubt occur with any screening process, but the Missouri Plan can come by far the closest to guaranteeing that no one who is wholly unqualified ever reaches the bench.

So far as I know, there has never been a judicial scandal involving a judge selected under the Missouri Plan, which in whole or in part is now in effect in some twenty odd states. While a number of the states can make the same boast, no selection system can do so.

The third criterion is that it should operate with sufficient dignity so as not to cause capable lawyers to refuse to be candidates for judicial office. Both the Missouri Plan and the other

appointive methods meet this requirement. The contested election method deprives us of a substantial percentage of capable members of the bar who for various reasons will not run for judicial office.

The Arkansas Bar Association surveyed its members in October 1964 for their opinions of the judicial system. One of the questions was, "Would you consider becoming a judge under the present elective system?" 34.9% said "yes". 65.1% said "no". I find that shocking. Something is very, very wrong when almost two thirds of the bar would not consider becoming judges. Why? This question tells us. "Would you consider becoming a judge under a system by which appointments were made by the governor from a list of nominees, limited in number, presented by a Judicial Nominating Commission composed of representatives of the public, the bar, and the judiciary?" 61.9% said "yes". 38.4% said "no". Almost the reverse of the answer to the previous question.

One final question from the Arkansas survey, "Do you feel that political influences, obligations, or considerations have entered into a judicial determination in your experience?" 78.-8% said "yes". 21.2% said "no".

This leads to my fourth criterion. The system should provide tenure of such a nature as to enable a judge to do the best job of judging of which he is capable, free of the pressures to which he is subjected if he is forced to be a politician.

In my experience as a circuit judge in St. Louis, no one ever even asked me for a judicial favor. No one ever hinted that the Senator or the Governor was a close friend of someone who had a matter pending before me. It just never happened. The system encouraged me to call them as I saw them. I hope I would have done so anyway. But there are enough pressures on a judge without adding the concern about what a decision will do to his re-election prospects.

Life tenure or the nearly tantamount tenure under the Missouri Plan is essential to judicial independence. It permits a judge to spend full time judging, not campaigning. It helps to recruit lawyers who are willing to give up a successful law practice for a judgeship with certain tenure.

My fifth and last criterion for a good selection method is that it should deserve and receive public respect and trust, so as to enhance trust in the courts themselves. Our democracy cannot survive unless the people believe that the courts will do justice. We claim we have a monopoly on justice, but we don't. People can and will take their business elsewhere if they lose trust in

the courts. "Elsewhere" means the streets. If people believe that the "fix is in", that money or power can sway the decisions of the courts, we are lost, whether or not their belief is true. We must stop forcing judges to make campaign promises. We must stop forcing judges to solicit or receive campaign funds from lawyers or from potential litigants. It doesn't really help for the judge to insulate himself from knowledge of the contributions, because the public doesn't believe it.

We made a serious mistake when in the mid-nineteenth century, we departed from our own and our English tradition and put judges into politics in the name of Jacksonian democracy. Politics are central to our democracy in selecting legislative and executive policy makers, but independence of politics is central to the judicial branch, which is not supposed to be responsive to the public will, and is not supposed to make policy, except within comparatively narrow limits, but rather which exists to decide controversies between individuals or between an individual and his government.

Part of my assignment is to discuss training for judges. While judicial education has long been a part of some civil law systems, it is new to common law judges. Traffic courts began it in 1940. The Institute of Judicial Administration pioneered in 1957 with annual two week appellate judges seminars. Following in rapid succession were the National Council of Juvenile Court Judges Institutes, the nationwide seminars of the National Conference of State Trial Judges, the National College of State Trial Judges with month long college sessions and seminars of many kinds, the California College of Trial Judges, the judicial seminars of the Alabama Department of Continuing Legal Education, the program held last summer by the North American Judges Association at the University of Alabama for judges of courts of limited jurisdiction, the National Conference of Special Court Judges, with a program of seminars for judges of limited jurisdiction, the Appellate Judges Conference, with a program of seminars for experienced appellate judges.

We have come a long way in a short period of time. The rapid growth of these programs is evidence that they were badly needed, but we are only beginning. Judges work in enormous isolation. A lot of us are court watchers when we are vacationing, but except for that, one judge rarely sees how another court is operated. A judge needs to communicate regularly and deeply with his colleagues in other parts of the country. This need continues throughout his judicial career. We are now beginning to offer these opportunities for graduates of the National College of State Trial Judges and of the Appellate Judges Seminar.

The demand still far outweighs supply but we hope to meet the demand shortly.

There are some 20,000 judges of courts of limited jurisdiction in the United States. We often say these are our most important courts because they affect the most people by far and they give most people their only contact with, and their only image of the courts. The judges of these courts usually have the least staff support, the poorest facilities, lower pay and status and the least aid from the people who are working to improve our system of justice. These judges have all the same needs, and more, for training and for continuing education as do the major trial judges and the appellate judges. The two organizations I mentioned, The National Conference of Special Court Judges, an activity of the American Bar's Section of Judicial Administration, and the North American Judges Association are striving mightily to begin to provide the programs needed. They need all the help they can get.

For appellate and major trial court judges there are still two important areas where almost nothing is available. Judges need, and know that they need, a better understanding of human nature, of behavior and how it is modified. The behavioral sciences have made rapid strides in the past ten years and we are not getting the benefit of it. We can't sentence intelligently without the best available information about behavior and its modification. We know we must demand proper correctional facilities, but we don't know what is effective and what is not. We only know that much of what is now used is ineffective.

The National College has pioneered programs in these fields, as has the National Conference of Juvenile Court Judges. These programs can be held in every state and we are ready and eager to do it. Tell us if you are interested in your state.

Finally, nearly every new judge who ascends the bench does so with little or no orientation about his tremendously important new responsibilities. He needs more help than that. He needs and can be given a short orientation course. It can be made available in states with a rapid judicial turnover or in a state with a new judge only every other year. We have designed and are attempting to fund such a course. It would be directed to local needs, would not be in depth or highly sophisticated, and could take from two to five days before the new judge hears his first case. It would help him to avoid the more obvious errors, show him some of the resources he has in local and state, public, and private agencies.

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Providing the best methods of selection, tenure and training of judges will do as much as anything we could do to improve not only the actual performance of our system of administration of justice, but also the public acceptance of that performance.

The results will be well worth the efforts.

GOOD JUDGES MUST BE COMPENSATED

by

GLENN R. WINTERS
Executive Director, American Judicature Society

The problem of maintaining a corps of well qualified judicial personnel in the nation's courts has many aspects.

1. Determination of just what qualifications are to be looked for in selecting persons to man the bench;

2. A method of selection of judges that will help to insure having such persons as judges and exclude persons who do not meet those standards;

3. Standards of judicial compensation which will make judicial office sufficiently attractive to induce lawyers with judicial qualifications to give up their law practice and accept a judicial career;

4. Security of tenure so that lawyers who have taken that step may have reasonable assurance that if they do their work well they may continue in office and not be forced to go back and rebuild a law practice;

5. An adequate retirement program so that when the proper time comes a judge may retire with dignity and without financial hardship, whether because of age or physical or mental ability;

6. A fair procedure for involuntary retirement of a judge who is no longer able to do his work and does not voluntarily retire;

7. Fair and reasonable standards of judicial ethics and codes of judicial conduct; and

8. Fair and effective means of enforcing standards of judicial conduct for the protection and benefit of both the judges and the public.

This total "spectrum" of judicial personnel standards has been divided for purposes of this program, three ways. Dean Hyde has already discussed methods of selection and tenure of well

qualified judges; Judge Burke will follow with his treatment of procedures for involuntary retirement and removal of judges for disability or misconduct. My assignment, compensation and retirement, I modestly suggest, completes the picture and ties it all into a unified whole. Adequate compensation and retirement provisions are important to selection and tenure because unless these are adequate no method of selection will succeed in bringing the best qualified judicial candidates to the bench. Adequate compensation and retirement provisions are equally crucial to fair, considerate and effective handling of the rare instance when for any reason the public interest requires that a judge be asked or compelled to step down from the bench, since very often voluntary retirement by request or involuntary retirement by order of a court or commission is by all odds the most satisfactory solution.

How much should a judge be paid?

It would be as difficult to answer that question from the platform as to answer this one: What size hat should a judge wear? In fact it would be much more difficult, because if you know the size of a man's head you know the size hat that would fit him. But many factors enter into the determination of what the size of his salary should be.

A good beginning is to observe that in our country, unlike many European and Asiatic countries, the judicial career is not separate and distinct from that of the lawyer. In our country lawyers and judges move back and forth from one to the other in both directions. This means that in effect judicial office is one of the job opportunities that are open to lawyers, along with private practice, house counsel, government attorney, and others.

More importantly, it means that in seeking lawyers for judicial posts, the judicial branch of the government is competing with other employers of lawyers, including self employment. Thus, a very important consideration in the fixing of judicial salaries has to be—what is the current market value of the legal talent which we would like to have on the bench? That last question was phrased very carefully. It might have been worded—how much salary do we have to pay to fill these jobs? Put that way, the answer is, very little. There are lawyers in every jurisdiction who could be found for almost any judicial office at a very low salary level. The reason is, of course, that in any group there are those with high potential for achievement and for earnings; along with the many who are run-of-mill; and in every group some who are barely able to survive on a minimum

basis. Even with very low salaries there are some lawyers who could not do as well anywhere else, and if you are willing to accept that type as judges, then why pay more?

The reason for paying more is that most people accept without argument the proposition that the public deserves something better than minimum legal talent in those lawyers who are hired to preside over the courts of justice, where any day any citizen's property, liberty or even life may hang in the balance.

How much then? Shall we find out how much the wealthiest lawyers are making and offer the same amount, or is it actually possible to get judicial salaries too high? As far as I know, no jurisdiction ever tried this, and perhaps that is evidence enough of a consensus that it is indeed either not necessary, not desirable or not feasible to match the biggest earnings of the top-flight members of the bar. This is probably at least in part because such an unseemly scramble of competition for judicial posts would result that it would actually harm the judicial image.

Let us imagine a scale on which 100 represents the earnings of the best paid members of the bar and zero represents the earnings of the marginal lawyers who are barely able to survive. We have already ruled out both extremes as undesirable for judicial salaries. Half-way between, at 50 on our scale, presumably is the level of compensation of the average lawyer. At 25 or 30 is the below average lawyer who is getting along but not doing very well; at 75 or 80 is the superior lawyer who for one reason or another is not making a fortune but who is doing better than most of his professional brethren. Isn't it rather clear, just from the drawing of the picture this way, that this last-described man, and not the average or below-average, is the one we want to try to get for a judge?

This is a salary range that is capable of fairly definite ascertainment. Probably every state bar association has done something about compiling statistics on lawyers' earnings. Once this figure has been identified, it is only a starting point, since many other factors enter into the determination of just what the optimum salary should be for a given job. Without undertaking an exhaustive list I suggest among others the following:

1. Cost of living. Many judges whose salaries are fixed by a statewide standard receive cost-of-living supplements because of higher expenses in the particular locality in which they live.

2. A salary differential may be offered to offset unfavorable features of the job such as uncertainty of tenure, or assignment to service in a remote or unpopular location, or a less attractive

judicial assignment. However, at the risk of dissent from the next speaker, I suggest there is not much basis for drawing a distinction on this ground between the judge of the general trial court where all cases great and small are tried, and the judge of the appellate court which looks over that trial judge's work and tells him what he did wrong. The higher the skills at the trial level, the fewer mistakes and the less there is to be done at the appellate level. Indeed there is good justification for the proposition that the most demanding and therefore in theory the most expensive judicial post should be that of presiding judge of one of our major trial courts. However, that man's administrative role probably entitles him to only a modest differential if any over the trial judges on his team who are on the firing line day after day.

3. The third factor which affects amount of salary leads directly into the second major division of my assignment—retirement compensation, since the adequacy or inadequacy of the pension plan is all-important in determining adequacy or inadequacy of the salary.

The "seven ages of man" which Shakespeare described are common to us all, and every person has the problem during his earning days of making some kind of preparation for the inevitable time when, if he is still living, he will no longer be able to earn a living. Social security attempts to do a minimal something about this for everybody, but it is not enough. The prudent and thrifty lay away savings against that day, and insurance companies provide annuities which may be purchased to assure that no matter how long one lives those savings will never be exhausted. This saving for old age is one of the current obligations of a man in middle life, as surely as the payments on his home and the education of his children, and unless he is an improvident spendthrift he must make a place for it in his budget, no matter how tight that budget may be.

This points up the fact that current salary and retirement compensation are in fact inseparable parts of a total compensation picture, and that neither one can be realistically evaluated except in relation to the other. A well designed and administered judicial retirement plan can provide for a judge's old age at lower cost than is possible if the same amount of money is paid to the judge in salary and he is left to purchase his own retirement annuity at commercial rates. (I say well designed and administered, because there have been poor retirement plans that were unsound and were probably more expensive in the long run than commercial insurance.)

Viewed in this light, two things are clear:

1. The taxpayers will get more for their money if the funds that are allocated to the judges go in part for salaries and in part for a state-operated retirement plan than as if all goes to salaries which must not only provide for the judge's retirement (and other expenses) but also pay a profit to an insurance or annuity company.

2. The only rationale for asking the judge to make his own contribution into the retirement fund is one of politics or expediency in getting the plan adopted. It is somehow easier to say, "Look, the judges are chipping in too; for every dollar the state pays into his fund the judge is putting in one of his own." That sounds good, but for the full-time judges all of those dollars come from the same source, the state (or county or city), and it is really only more bookkeeping for the state to pay a part of it into the fund direct and the rest of the money to the judge who in turn pays it into the fund. Thus, the non-contributory pension plan makes the most sense. All pension plans should make it possible, however, for the judge to make an additional voluntary contribution into the fund if he wishes, and it is now everywhere possible, I think, for him to do this in such a way that he does not pay income tax on that money until after retirement, at the lower rates which will then prevail.

Among all these words I still have not given you a concrete answer to that first question, how much should a judge be paid? In 1961 the American Judicature Society launched a nation-wide campaign in behalf of improvements in judicial salaries, and at that time as a result of a careful study of existing judicial salaries, attorneys' earnings and many factors, a determination was made and rather widely publicized that no judge of a trial court of general jurisdiction anywhere in the United States should be paid less than $15,000 a year. This was announced in connection with the Society's biennial judicial salary survey, which comes out in every odd-numbered year with latest figures as to judicial salaries and pensions in all jurisdictions. Nobody ever has challenged the thinking on which it was based except to observe that in order to remain equally appropriate it must be revised to keep up with rising prices. Thus from time to time during the intervening ten years the basic $15,000 was upped a thousand or so at a time until in the 1971 survey, released in the December 1970 issue of JUDICATURE, the suggested minimum for a general trial judge is given as $19,000. How does this compare with what is actually being paid?

The current survey shows that in only 11 of the 50 states are any general trial court judges paid less than $19,000. No state

now pays less than $15,000. The median is $22,250. In 35 jurisdictions, however, some or all general trial judges are paid less than that median, and the situation is much worse in the courts of limited jurisdiction, in some of which full time judges are living on as little as $5,000 a year.

Three minimum standards recommended in past American Judicature Society judicial compensation surveys provide a partial guide in evaluating current judicial retirement plans. They are:

1. A pension or retirement benefit of at least 50 per cent of the judge's last salary.
2. Minimum service requirement of 10 years.
3. Some provision for disability and death benefits.

Similar standards appear in the new ABA Section of Judicial Administration Handbook, distributed at this meeting.

The December survey showed 18 states at or below the 50 per cent minimum figure, with 6 states paying two thirds, 14 as much as 75 per cent and two up to 85 per cent. Fourteen states provide non-contributory pensions for some or all of the judges; others make deductions of from two to as high as 12½ per cent.

The mechanics of maintaining judicial compensation at satisfactory levels is a problem for which no satisfactory solution has yet been found. Judicial salaries are set mostly by legislatures, or local bodies of similar character like city councils or county supervisors. The money comes from taxes, and those people are under strong pressure to hold down expenditures and thus avoid tax increases. No item, such as judicial salaries, is likely to be increased on the budget committee's own motion. Increases in expenditures are made only reluctantly after a showing of necessity.

Who is to make this showing for judicial salaries? In the long run, in this cruel world, nobody tries very hard for anything that is not in his own behalf, and that is why time after time, when nobody else would do it, judges have swallowed their pride and gone down to the legislature to plead the cause of judicial salaries. This is unsatisfactory for three reasons:

1. It is a poor use of the judges' time. They should be back in the courthouse doing the work that only they can do.

2. It is a humiliating pose for them and a degradation of the judicial image. Someone else should plead this cause for them.

3. They are not particularly effective as lobbyists. They have little "clout" in the legislative chambers and it is all too easy for hard-pressed and indifferent legislators to listen with only one ear, put them off with half-hearted stalls, and push

them around. The judicial branch has neither purse nor sword, and someone's sword is needed to open the purse.

The job of carrying the ball for adequate judicial compensation really pertains primarily to the lawyers. They have the self-interest necessary to justify it in their need for well qualified judges before whom to argue their cases. A poor judge can be both frustrating and expensive to the lawyers who appear before him, and they do indeed have a substantial self interest in upgrading the quality of the bench. Also, in making it less difficult for some of their number to answer the call to judicial service.

But this is not the lawyers' interest and responsibility alone. Courts are not just for lawyers and judges, any more than schools are for teachers and principals or hospitals for doctors and nurses. Schools are mostly for the pupils, hospitals are mostly for the patients, and courts are mostly for the people—the citizens of the community who from time to time appear in them or go to them for justice.

That is why all of the aspects of judicial administration, including these of judicial personnel, and, of course, this one of judicial compensation, are a problem for the public at large, and every citizen organization and every individual citizen owes it to himself and to his community to take an interest in seeing to it that judicial salaries and retirement provisions are up to par.

This is not, let me emphasize, for the sake of doing something for those judges. Certainly, the judges are people, like the rest of us, have rent to pay and children to educate, and the laborer is worthy of his hire wherever he labors. But the rationale that will do the job is not what the judge deserves, but what it is necessary to pay to get for the public the judicial service it deserves.

I once read about a laboring man who came home in the evening and told his wife he had been working that day in a wealthy home and they had been having blintzes for dinner, and they looked so good he wanted his wife to make blintzes for him. She protested that the recipe called for a cup of cream and she had no cream. He said "use milk." She said it called for a dozen eggs and she had no eggs. "Make them without eggs," he said. The same went for several other important ingredients.

She made the blintzes and set them before him. He tasted them and then he said, "I can't see why those rich people like blintzes so well, anyway."

If we are to have the judicial service we need, we must put in all of the essential ingredients. Adequate compensation for

judges is one of them. If we skimp on it, whose fault is it if the product is not to our liking?

GOOD JUDGES MUST BE PROTECTED

by

LOUIS H. BURKE

Associate Justice, Supreme Court of California

As future historians trace the development of judicial administration in the United States, certainly one of the most significant steps that they will note was the establishment by the American Bar Association in 1961 of the Joint Committee for the Effective Administration of Justice, with Mr. Justice Tom C. Clark as its head. The function of the Joint Committee was to enlist in a crash program all of the 14 organizations working nationally in the field of judicial administration, to assess the work of each and to attempt to focus attention upon the major areas which require improvement. The important and impressive work that this committee launched is well recorded and widely in evidence, and the benefits from it will go on indefinitely.

The selection of Justice Clark as the Chairman of this National Conference on the Judiciary is recognition of the outstanding leadership which he has brought to a field in which there still remains the most urgent need for national study and attention.

In answer to the question "When is justice truly effective?" the Joint Committee in its brief statement of principles or standards stated in the paragraph devoted to judges that:

"Justice is effective when it is fairly administered and without delay by competent judges:

> Selected through non-political methods based on merit,
>
> In sufficient numbers to carry the load,
>
> Adequately compensated, with fair retirement benefits, and
>
> With security of tenure, subject to an expeditious method for removal for cause."

Those standards are just as valid and viable today as they were when written ten years ago, and although as you have noted from the speakers who preceded me, much progress has been made during the intervening decade, much more remains to be done. Dean Hyde of the National College of State Trial Judges, a former judge who resigned his post to accept the responsibility

as Dean, has spoken to you on the first standard, namely the methods of selection of judges on the basis of merit. Mr. Winters has covered the subject of adequate compensation with fair retirement benefits, and it is my privilege to discuss the subject of tenure and the discipline and removal of judges for cause.

It is conceded by substantially every student of the subject that to induce the best possible lawyers to leave private practice or public office and to accept judicial appointment they must be assured of continuing in office, of tenure, until retirement age, subject of course to good behavior. For this reason and also to assure judicial independence federal judges are given life appointments.

It is also conceded that given that tenure, independence and security, there must be workable methods for removing judges from the Bench who become physically incapacitated, evidence senility, are otherwise mentally impaired, or who are guilty of misconduct. The ancient methods of removal by legislative action, by impeachment or by recall have proven unworkable except in rare instances when a judge has given cause for great public scandal. Even then when utilized these traditional methods have resulted in a lowering of the vital and necessary public respect for our courts.

In the past fifteen years two workable plans have emerged to serve as alternative remedies, one in New York and the other in California.

In 1947 New York adopted a constitutional amendment which provided for a court on the judiciary which would be especially convened to hear charges against a judge whenever a complaint is filed by officials specifically authorized by law to do so. The California plan adopted in 1960 likewise by constitutional amendment provided for a permanent commission and staff to screen complaints from any person desiring to lodge them against any judge, to do so confidentially and to determine their merits, if any.

The Joint Committee to which I have alluded and the American Judicature Society have been most active in assisting interested organizations within the states to consider these plans and to adopt, usually by constitutional amendment, one or the other in order to fill this need. Thus far Oklahoma and Delaware have established special courts, following to a degree at least the New York plan, and some 20 states now have a common system patterned largely after the California plan. The most recent additions being in the District of Columbia and the states of Missouri and Arizona. It would appear that under Virginia's newly

adopted judicial article the General Assembly has authority to create an inquiry and review commission which I understand is intended as a California style qualifications commission. The American Judicature Society reports that 22 additional states are engaged in programs looking forward to the establishment of such special commissions or courts.

The California commission is called The Commission on Judicial Qualifications. Some have suggested that this is a misnomer since the Commission does not participate in the qualifying of judges, but only in their disqualification—their discipline or removal. The Commission consists of two judges of courts of appeal, two judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; two members of the State Bar who have practiced law in the state for ten years, appointed by its governing body; and two citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate. All terms are four years.

A California judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging him with a crime punishable as a felony under state or federal law, or (2) a recommendation to the Supreme Court by the Commission on Judicial Qualifications for his removal or retirement.

On recommendation of the Commission on Judicial Qualifications or on its own motion, the Supreme Court may suspend a judge from office without salary when he pleads guilty or is found guilty of a crime punishable as a felony under state or federal law or of any other crime that involves moral turpitude under that law. If his conviction is reversed suspension terminates, and he is paid his salary for the period of suspension. If he is suspended and his conviction becomes final the Supreme Court removes him from office.

On recommendation of the Commission on Judicial Qualifications the Supreme Court may (1) retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and (2) censure or remove a judge for action occurring not more than six years prior to the commencement of his current term that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

A judge retired by the Supreme Court is considered to have retired voluntarily. A judge removed by the Supreme Court is

ineligible for judicial office and pending further order of the court is suspended from practicing law in the state.

All complaints and papers filed with and proceedings before the Commission or before masters holding proceedings for the Commission remain confidential until, as, if and when a record is filed by the Commission in the Supreme Court, which occurs only upon rare occasions in instances where the investigation by the Commission has not resulted in the voluntary retirement or resignation of the judge.

The judge complained against is always notified of the investigation, the nature of the charge and is given reasonable opportunity to present such matters as he may choose.

Complaints which are unfounded and outside Commission jurisdiction are closed without investigation by letter to the complainant with a short explanation and normally without notification to the judge that any complaint has been lodged. About two thirds are in this category. Confidentiality protects the reputation of judges against dissemination of irresponsible accusations and shields complainants from reprisal at the hands of the judge. Of course, the Commission does not investigate dissatisfactions with rulings or sentences or in any way intrude on the decision making prerogative.

The Commission may decide after its preliminary investigation to proceed with a formal hearing in which case the hearing is non-public since as previously indicated the proceedings of the Commission are confidential. At the conclusion of a hearing the Commission can recommend to the State Supreme Court censure, removal or retirement, at which point the record is public for the first time. There is full review by the Supreme Court which has the power of official censure, removal or retirement.

A formal hearing before the Commission is rare. If there is proof of a situation serious enough to justify full proceedings the significance and gravity will often be apparent to the judge and his counsel and he may resign or retire. A reasonable disability pension plan adds to the fairness of the program and increases the likelihood of retirement without a hearing in cases of mental and physical incapacity.

Currently there are 1,094 judges in California in the various levels of courts who are under the system. During 1970 there were 181 complaints filed with the Commission; 148 cases were closed without investigation since it appeared upon their face they did not involve matters within Commission jurisdiction. In 33 instances an inquiry or investigation did take place. In 24 of such investigations there was correspondence with the judge

about the matter. Where there was a shortcoming or transgression, the action of the Commission served as a corrective influence.

In the course of 1970 the Commission made two recommendations to the State Supreme Court for public censure following a formal hearing. The Court adopted the Commission's recommendations in both instances. Briefly, both cases involved trial judges who had engaged in grossly intemperate and wholly improper remarks in connection with the sentencing of persons appearing before them, which conduct the Commission believed prejudicial to the administration of justice that brings the judicial office into disrepute and warranted public censure. The Supreme Court agreed. During 1970 two judges retired from office in the course of Commission proceedings. Similarly in 1969 on four occasions resignations or retirements were submitted while a matter was pending before the Commission. Over the years the principal factor leading to such retirements have been poor health, preventing the proper performance of judicial duties.

It should be noted that there is no red tape or formal restrictions on the making of a complaint against a judge. Any person may do so by letter.

On one previous occasion in the early years of the Commission it certified a record of proceedings involving a judge and recommended his removal from office. The Supreme Court upon its review of the proceedings concluded that the charges against the judge were not of the serious nature contemplated by the law and ordered the proceedings dismissed without the imposition of any sanctions. In brief the charges arose mainly out of disagreements between prosecutor and judge and were mostly political in nature, as I recall.

In any event the outcome of that case gave evidence that the appellate process whereby the recommendations of the Commission are subject to the review of the Supreme Court on both the law and the facts is wholly independent, as it should be, and is similar to the final review accorded litigants in ordinary court proceedings by the highest court in the state.

Last year the Illinois Supreme Court rejected an appeal by a judge from that state's Courts Commission which removed him from the trial bench. The Commission found the judge guilty of "conduct unbecoming a judge" after a week's hearing. He was the first judge to be removed from office by the five-judge Commission, which was established in 1964 and, according to the report in *Judicature* for November 1970 was the first Illinois judge ever removed as unfit to hold office. The Commission reports

indicate, that during the six years of its existence, several judges have resigned or retired during the pendency of commission investigations.

A recent case arose in Florida under the 1966 constitutional amendment setting up a Judicial Qualifications Commission. The Supreme Court of that state in a proceeding on petition to reject the recommendations, findings and conclusion of the Commission held by a 4–3 decision that the record warranted reprimand of the offending judge. The Chief Justice filed a vigorous dissent in which two assigned Circuit Judges concurred.

I was privileged to serve on the first Commission appointed under the constitutional amendment in California and was very favorably impressed with the operation of the commission. I was then on the Court of Appeal since as a member of the Supreme Court I would have been ineligible. I was particularly interested by the active participation of the two outstanding lay leaders appointed by the Governor to serve on the Commission. They entered into the work of the Commission with the same deep sense of responsibility which typified the attitude of the professional members of the Commission.

Part of the success of the Commission plan is due to good fortune or the wise judgment exercised in the appointment of the judges who have headed the Commission during the ten years of its existence. These have been men of outstanding ability and sound judgment and this is also true of the Executive Secretary of the Commission, Mr. Jack E. Frankel, who has served in this capacity since the creation of the office. Incidentally, Mr. Frankel is a participant in this Conference. He has noted in his writings concerning the operation of the Commission that lay and lawyer representation on the Commission helps maintain impartiality and independence which are its key characteristics. Judges provide the expertise. An annual report of the Commission is issued which does not identify specific cases but is informative of the program. There are several features insuring fairness to the judge, Mr. Frankel believes, especially that the program is confidential with carefully drawn rules of procedure, and is a part of the judicial process itself.

To assist the states in organizing and managing judicial qualification commissions the American Judicature Society, with its co-sponsor University of Denver College of Law, recently held its Second National Conference of Judicial Retirement and Disability Commissions in which they urged that in the initial stage

and before any formal action is taken for retirement or discipline:

> "An aura of confidentiality should surround all investigative proceedings and their findings. The objective to be gained by confidentially processing complaints against judges at least in the initial stages is the protection of those most involved, who are (1) the judge himself, (2) the judicial system as a whole and (3) the complainants who initiated the proceedings, sometimes at great risk to themselves professionally and otherwise."

I concur most heartily in these conclusions of the conference. It is essential that of all human beings in our society the judge must remain the most incorruptible because it is he who is, in the last analysis, the final protector of our rights to life, liberty and property under law. In this country and despite all that is said of a lessening of confidence in our judicial system—the public generally holds judges in high esteem and this view is so deeply ingrained that when in fact a scandal does involve a judge it becomes a matter of national attention and concern. In order that this image of the thousands of fine judges in the country may not be unjustifiably tarnished by failings of a few, great care must be exercised that complaints against judges do not receive publicity until and unless upon screening by an independent and qualified commission they are shown to have merit. Even then it is better that the action of such a commission result in the relinquishment of office by such a judge, than to have the fine reputation of the thousands of able men and women, to whom judicial office has been entrusted, tarnished by the shortcomings of a single judge.

By the establishment of such a program for the discipline, removal or retirement of those judges who fail to measure up to the high standards of competence and integrity that the public is entitled to demand and expect, the independence of the judiciary is fully protected and at the same time the public is assured of the continued service of capable, efficient and conscientious judges.

VI. CRIMINAL JUSTICE: THE BASIC AND SPECIAL PROBLEM

Moderator: J. EDWARD LUMBARD
Chief Judge, United States Court of Appeals
(Second Circuit)

If you heard President Nixon and Chief Justice Burger, there's no need to preface what we say here with any words about the importance in improving the administration of criminal justice. And how grave the public concern is that the system is not operating as it should.

Back in 1964 the American Bar Association, aware of this condition, at the suggestion of the Institute of Judicial Administration and through the efforts of Wally Craig and Lewis Powell, the presidents of the Association, set up the project for the formulation of minimum standards of criminal justice, including the important areas in the law from the police function right through sentencing and probation. Now, I shall not labor you with the details of how that project has worked because most of you have already heard it. There have been about 100 judges of state and federal courts, prosecutors, members of the bar, members of the academic community, who have participated in this program in the fashioning of the 15 sets of standards which have been issued by the ABA and sent to all of you who have been members of the Sections of Criminal Law and Judicial Administration. Keep that project in mind as these papers, based on that project, are given.

INTRODUCTION

Although many people have labored long in the cause of judicial modernization throughout the twentieth century, the massive problem of crime in the United States in the decade of the sixties brought the whole matter to a crisis stage in American public opinion. Court congestion on the civil side is perhaps of equally massive dimensions, but it simply lacks the color of national emergency which is so manifest in the area of criminal justice.

Professionals and laymen alike now tend to break down the problems of criminal justice into three broad categories: First, the balancing of individual rights and public interests in the pre-trial stage of prosecution; second, the restatement of the roles of judge, prosecutor and defense counsel in the trial itself;

and third, the manifest need for finding a better, more effective process of correction and rehabilitation of convicted persons.

The voluminous literature on the general subject, the underlying basic goals of an agency such as the Law Enforcement Assistance Administration and its constituent agencies both at the federal and state levels, and the pervasive consciousness of changing standards and frames of reference in national life, all ultimately focus upon criminal justice and its wholesale revitalization as the key to an effective judicial process in the United States in the closing decades of the twentieth century. (W. F. S.)

CHANGING CONCEPTS OF BAIL AND DETENTION

by

TIM C. MURPHY

Judge, Superior Court of the District of Columbia

I am pleased to have this opportunity to give you some of my views on bail and bail reform. The problems related to the pretrial release of criminal defendants are, I think, among the most neglected problems of our criminal justice system.[1] To be sure, considerable efforts towards modernization of our approach to bail have been undertaken recently in a number of jurisdictions, including the District of Columbia. But these efforts go back only five or, at most, 10 years. Traditionally those of us involved with the courts and criminal justice have simply ignored deficiencies in our pretrial release practices.[2] And, even today, bail problems have unfortunately not received, in most states, the attention they deserve.

In my remarks today, I plan to cover several different areas of concern. I am going to talk first about some of the background and deficiencies of the traditional surety bond-oriented pretrial release system. Second, I will discuss some of the efforts which have been made at reforming this system. Here I want to concentrate particularly on the benefits—as well as the

1. The President's Commission on Law Enforcement and Administration of Justice, for example, devoted only two pages in its landmark 340-page report to pretrial release. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 131–133 (1967).

2. Two of the key studies which focused attention on bail problems for the first time were published only in 1964 and 1965. *See*, D. Freed and P. Wald, Bail in the United States and R. Goldfarb, Ransom: A Critique of the American Bail System (1965).

problems—of the federal Bail Reform Act of 1966.[3] Those of us sitting on the new Superior Court of the District of Columbia, which was formerly the D. C. Court of General Sessions, have had extensive experience with this landmark legislation; more extensive, I would say, than anyone elsewhere in the country.[4] Although prior to the reorganization of the District courts last month our trial jurisdiction was somewhat limited,[5] judges on our court have for some years served as committing magistrates for almost all persons arrested in the District of Columbia. This has involved considering release under the Bail Reform Act for many hundred defendants each month since the Act became operational. Hopefully I can pass on today some of the insights which we have gained in working under the Act.[6] Finally, I want to give you a few of my views about future problems and prospects for bail reform.

I

Historically, most of the characteristics of our present bail system can be traced back to developments taking place during the formative years of the English common law in the 11th and 12th centuries. During this period it was actually uncommon to hold criminal defendants in jail pending trial. The reasons for this seeming leniency had little to do, as Pollack and Maitland point out, with "any love of an abstract liberty."[7] Rather, they had to do with practical problems of confinement caused by the development of a national system of justice. Owing to the small number of circuit riding royal judges, many months, even years, might elapse between sessions of court in some areas. Pending the appearance of a member of the judiciary, local sheriffs were responsible for the custody of prisoners; a task which often proved difficult. Despite the impression which all of us must have gotten from seeing Errol Flynn and Douglas Fairbanks films when we were young, medieval dungeons seem not to have been particularly secure places. Escapes were common. Maintaining prison facilities was also a costly and troublesome business. In such circumstances, most sheriffs were more than happy to relinquish a defendant provisionally into the custody of

3. P.L. 89–519; 80 Stat. 329 (1966).

4. Approximately 40 percent of release decisions under the Act have been made by judges in the District of Columbia.

5. *See*, Williams, District of Columbia Court Reorganization, 1970, 59 Geo.L.J. 477.

6. Much of the experience is related in reports prepared in 1968 and 1969 by the Judicial Council of the District of Columbia Circuit Committed to Study the Operation of the Bail Reform Act in the District of Columbia.

7. 2 Pollock and Maitland, History of the English Law, 584–590 (3rd ed. 1899).

some third party, usually a friend or relative of the defendant, on a promise from that party to assure the defendant's appearance for trial.[8]

Although this use of sureties to keep track of defendants was principally an invention of necessity, it did have a conceptual antecedent in the older Anglo-Saxon institution of "hostageship." [9] As the name implies, the institution involved the giving of hostages to secure fulfillment of promises or conditions. If there was a default on a promise, those to whom the promise had been given could make it good out of the hostage. There is some difference of opinion among scholars as to whether this was done by inflicting punishment on the hostage or simply by levying on the hostage's property.

Actual bodily seizure of sureties was apparently not a common feature of the pretrial release system which developed at common law. But in the early days of the system, it was common for the property of a surety to be seized if a defendant absconded. Later, however, the familiar practice of money bonds evolved to replace this somewhat harsh expedient.[10]

The early development of the suretyship system was, of course, quite ad hoc. Sheriffs held considerable and largely unchecked discretion as to whether to admit persons to bail. Numerous abuses necessarily resulted.[11] In 1275, the Statute of Westminster I [12] formalized the system and attacked some of these abuses. Bail procedures were made a matter of specific law and crimes bailable on the presentation of sufficient security, as well as those not, were specified. Subsequently the system was further refined by the gradual transfer of authority for setting bail from the sheriffs to judges and magistrates.[13]

The pattern of pretrial release codified by Westminster I remained, by and large, the basic pattern for English bail practice until fairly well into the 19th Century.[14] In this country, the underlying theory of the Statute continues to be at the heart of pretrial release practices in most jurisdictions. Today's bondsman is an extension of the common law surety. Imposition of a risk of financial loss on defendants released prior to trial (or on

8. Goldfarb, *supra* note 2, at 21–27.

9. *Id.*, at 22.

10. In actual practice, it was common for sureties to serve as their own jailers, *id.*, at 24.

11. *Id.*, at 26.

12. 3 Edw. 1, c. 12 (1275).

13. Foote, "The Coming Constitutional Crisis in Bail," 113 U.Pa.L. Rev. 959, 969 (1965).

14. The patchwork of practices growing up around Westminster I were overhauled in 7 Geo. 4, c. 64 and 11 and 12 Vict., c. 42, s. 23. *See*, 4 Holdsworth, A History of English Law 238 (1945).

their sureties) is still considered necessary to prevent defendants from fleeing.

Most of us here today are perfectly familiar with the operation of the traditional system.[15] A defendant, upon arrest, is brought before a committing magistrate. With little or, more often, no knowledge of the defendant's background or record, the magistrate sets a monetary bail figure as security to "assure" his appearance at trial. Often the figure is based—as it was under Westminster I—on a fixed scale or rule of thumb: $500 for petit larceny, $1,000 for assault, $3,000 for housebreaking, $5,000 for robbery and so on. In the absence of such a scale, the recommendation of the prosecuting attorney is often controlling. Unless the defendant has the good fortune to have ready access to $1,000 or $5,000—and most do not—he must resort to the services of a commercial bondsman. In return for a fixed, non-returnable fee or premium—perhaps 8% on the first $1,000 and 5% on each additional $1,000—the bondsman will post the figure set by the magistrate.[16] The bondsman may also, at least in some jurisdictions, demand that the defendant put up collateral in addition to the premium. If a defendant, his family or friends are unable to meet the bondsman's premium and any additional collateral which the bondsman may seek—or if they are unable to find a bondsman willing to go bond—then the defendant remains in jail.

The problems with this system are fairly obvious.

First, the system's near exclusive reliance on monetary incentives to ensure that defendants return to court inevitably discriminates against the poor. When bail is set at more than $500, premiums become more than many defendants can afford. A 1963 study by the D. C. Bar Association's Junior Bar Section indicated that 17 percent of all defendants failed to make bail at $500. Forty percent were jailed at $1,000 and at $2,500 bail, 78 percent stayed in jail.[17] Although comparable figures for other jurisdictions vary somewhat, they tend to follow the same pattern. Another survey showed that 75 percent of all felony defendants in Cook County, Illinois, and 30 percent of those in Jefferson County, Kentucky (Louisville) were unable to make bail. The same survey showed that substantial portions of those arrested in rural areas—Brown County, Kansas; Rutland County,

15. For a brief description of bail practices in the District of Columbia prior to the Bail Reform Act, *see*, D. C. Bail Project, Bail Reform in the Nation's Capital, 4–14 (1966).

16. Premium rates of 10 percent are not uncommon and rates as high as 20 percent have been reported. Freed and Wald, *supra* note 23–24 (1964).

17. Bail System of the District of Columbia 2 (1963).

Vermont; and so on—also remained in jail because they could not afford bail.[18] Just a few weeks ago, Attorney General Mitchell pointed out that 56% of all inmates currently held in city and county jails are being held pending trial.[19]

Defendants who remain locked up because they cannot afford a bondsman's premium may or may not be guilty and might or might not be good risks to return to court if they were released. Their single common characteristic is their inability to raise the necessary $50 or $100 or how many ever dollars it would take to secure their release. At the same time, more relatively well-to-do individuals—even if they are plainly going to be convicted when they come to trial and may be poor risks to stay within the jurisdiction—can obtain bond without difficulty. Petty criminals and first offenders may remain in jail, while members of an organized crime syndicate are unlikely to remain in the lock-up even overnight.

The realities of the bail system go even further. Substantial monetary, emotional and physical costs may be imposed on those who cannot make bail. The already economically disadvantaged defendant who spends two or three months in the city or county jail awaiting trial is likely to have his economic position further eroded by this prolonged incarceration. He loses his present earning capacity and often his job. His family, if he has one, may well suffer. If he does not have a family and his dwelling place remains unattended while he is in jail, it is likely to be burglarized, or he will be evicted and his possessions placed on the street to be quickly stolen. If he has a car or other items purchased on credit, they most certainly will be repossessed. Most jails are hardly pleasant—or even adequate—places to incarcerate large numbers of persons for long periods of time. They typically lack work and recreation facilities. And because of overcrowding and other difficulties, detainees are usually mixed together indiscriminately. Convicted offenders will be put in cells with those awaiting trial. Juveniles may sometimes be locked up with hardened criminals. Homosexual assault, as well as exposure to narcotics, is a constant possibility. And, as we are all too well aware, young and inexperienced offenders who might have otherwise had some chance of rehabilitation are likely to be taught sophisticated criminal techniques by more experienced cellmates. A stretch in the average city jail, one observer notes, is the "equivalent to giving a young man an M.A. in crime."[20]

18. *See*, Silverstein, "Bail in the State Courts: A Field Study and Report", 50 Minn.L.Rev. 621, 626–7, 630–1 (1965).

19. Cited in 117 Cong.Rec. S1656 (daily ed. Feb. 22, 1971) (remarks of Senator Ervin).

Detention of those awaiting trial and unable to make bond also imposes some significant costs on the public generally. Jail facilities cost a good deal of money. Recent figures show that the per capita daily cost of holding a man in the District of Columbia Jail is $13.38. The daily cost of detaining a female defendant at the District's Women's Detention Center runs to $26.-66.[21] And these figures do not reflect such incidental costs as those of transporting defendants to and from these institutions and of providing detention facilities in our courthouses. The President's Commission on Law Enforcement and Criminal Justice, in 1965, estimated that the total nationwide costs of pretrial detention were in excess of $100 million.[22] With inflation and so forth, I would suppose that this figure is considerably higher today. And, of course, these are only the direct costs to society.

Unnecessary pretrial detention also has numerous indirect costs. Society may have to bear increased welfare costs for the dependents of those who remain in jail and may well lose tax and other revenues because otherwise productive citizens must spend several months in jail. This is not to mention the burden of additional losses to crime that may be imposed because novice criminals have become experts during their tenure in the local lock-up.

I think we can also legitimately question the central role which the traditional system accords professional bondsmen. Although many individual bondsmen have provided conscientious and dedicated service to our courts, the ABA's standards relating to pretrial release are not at all on unsound ground in recommending the prohibition of compensated sureties.[23] It does not seem to me correct that extrajudicial personnel should, in effect, determine who stays in jail and who does not. Although I do not often agree with Judge Wright of the District of Columbia Circuit, there is considerable merit in his comment in the *Pannel* case on professional bondsmen: [24]

> Certainly the professional bondsman system as used in the District is odious at best. The effect of such a system

20. N.Y.Times, April 4, 1963, p. 37, col. 5.

21. *See*, Appendix II.

22. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967).

23. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release 61–65 (1968).

24. Pannell v. United States, 115 U.S. App.D.C. 379, 320 F.2d 698, 699 (1963) (concurring opinion).

> is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.

Even in jurisdictions where money bail decisions are made on an individualized basis, it is possible for a bondsman to effectively negative a committing magistrate's bail determination. A defendant may as well have been released on personal recognizance when a bondsman accepts credit in lieu of a cash premium. Conversely, the magistrate's bail determination may be frustrated if the bondsman demands full collateral when the magistrate assumed that the defendant would be able to obtain release on putting up only a premium.

Among the other difficulties with reliance on bondsmen is the possibility that the system may be particularly susceptible to corruption or breakdown. The ABA report on pretrial release standards notes that:

> The bail bond business is subject to a variety of allegations of corruption. The charges range from alleged tie-ins with police and court officials, involving kickbacks for steering defendants to particular bondsmen, to collusion and corruption aimed at setting aside forfeitures on bonds where the defendants have failed to appear.[25]

There have also been instances of bondsmen collectively refusing to write bonds because they felt that judges were too vigorously enforcing bond forfeitures.[26] Other problems with bondsmen relate to the occasional use of extra-legal methods to assure the appearance of bond-jumpers.[27]

All of these deficiencies might be tolerated if the traditional approach was a genuinely effective method of achieving the key goal of a pretrial release system: assuring that the criminally accused return to court. It is true, to be sure, that most persons making money bond do appear for trial. But recent studies cast some doubt on the assumption that the reason for their return is the monetary incentive supposedly afforded defendants by the bail system. The very useful 1962 study of District of Columbia

25. ABA Project on Minimum Standards for Criminal Justice, *supra* note 23, at 62.

26. *Ibid.*

27. *See*, Note, Bailbondsmen and the Fugitive Accused—The Need for Formal Removal Procedures, 73 Yale L.J. 1098 (1964).

bail practices conducted by the Junior Bar Association reached the following conclusion:

> The Committee doubts that fear of incurring a forfeiture of a bond is in many cases the principal reason which impels an accused to appear in court. He has already paid the premium and will get back nothing if he appears. Furthermore, if he absconds, the bondsman suffers the forfeiture and has only a right of indemnity against the defendant. Stronger incentives for appearance would seem to be the fear of being caught and charged with a violation of the terms of release * * * and the defendant's unwillingness to sever ties with the community where he lives, such as employment, family, and other social relationships.[28]

As I will discuss shortly, this conclusion seems to have been borne out by the results of the Manhattan Bail Project and other similar endeavors which found that the number of persons who violate the terms of release on personal recognizance was smaller than the number of those jumping ordinary bail.[29]

Nor, for that matter, does the traditional bail system protect society against the commission of new crimes by those awaiting trial. By keeping in jail until they are tried a substantial portion of those arrested poor, the system does incidentally preclude the commission of such new crimes by the poor. But there is nothing inherent in the system which prevents recidivists who can afford bail from being released and committing multiple crimes while on bail.[30] Ronald Goldfarb, in his book Ransom—A Critique of the American Bail System, recounts what is probably an all-time classic case of recidivism.[31] The gentleman in question had previously served time on a felony conviction when he was arrested on a burglary charge. Released on $7,500 bail, he immediately committed a second burglary. Again he was released on bail. Subsequently, as Goldfarb recounts it,

> he was rearrested twice, once in possession of arms and burglary tools, once in the act of yet another burglary, released again on somewhat higher bail, $15,000, rearrested the same afternoon in the midst of yet another burglary. Bail was set once more, at $5,000. He was rearrested three more times, released each time. When he went to trial, he had been arrested nine times and freed each time.

Perhaps this story verges a bit on the incredible, particularly since the defendant involved seems to have been such an inept

28. D. C. Junior Bar Association, *supra* note 17, at 8.

29. Goldfarb, *supra* note 2, at 160.

30. *See* text at note 37, *infra*.

31. Goldfarb, *supra* note 2, at 4.

criminal, but it is not all that far removed from experiences that many of us here today have had with recidivism by persons released on bail. The blunt truth is that any defendant with organized crime or credit bondsman connections can make all but the most astronomical bonds and usually does. Our present money bond system can effectively preventively detain the poor but not the more affluent.

II

I do not think that it is unfair to say that the deficiencies in the surety bond-oriented system which I have outlined have been perfectly obvious for many, many years. The comments I have made really add little to the findings of Beeley's classic study of the bail system in Chicago—which was done in 1927.[32] Nor have I talked about anything that shouldn't have been driven home to those of us involved in the administration of criminal justice by a 1954 study of bail in Philadelphia.[33] But, despite the findings of these and other studies, there is great reluctance to move away from the traditional system. Perhaps we cannot bring outselves to discard the notion that any other approach would be even worse.

In any event, it is of no particular credit to the legal profession that it took a New York chemist named Louis Schweitzer to convince some of us of what we should have known all along: that release on personal recognizance could work.[34]

Schweitzer became interested in the bail problem after a 1961 visit to the Brooklyn House of Detention. Not surprisingly, he was shocked by conditions in the facility, which was anything but a model jail. His initial reaction seems to have been to establish a fund to pay the bail of people who were worthwhile risks but who could not afford the premiums charged by professional bondsmen. He quickly abandoned this notion, because, as Goldfarb notes, he realized that this approach would only support "what he had concluded to be the basic erroneous flaw in the bail system, that reliance upon money is a valid criterion for pretrial release." [35] Instead, he created the Vera Foundation to conduct research into the problems of pretrial release.

Most recent efforts at bail reform can be dated by reference to Vera's first undertaking: the Manhattan Bail Project. The aim

32. Beeley, The Bail System in Chicago (1927).

33. Foote, "Compelling Appearances in Court: Administration of Bail in Chicago," 102 U.Pa.L.Rev. 1031 (1954).

34. *See*, Ervin, "The Legislative Role in Bail", 35 G.W.L.Rev. 429 (1967).

35. Goldfarb, *supra* note 2, at 151–2.

of the project was to test the hypothesis that indigent defendants could be freed on personal recognizance pending trial without a significant increase in the rate of flight to avoid prosecution. As we all know, the project proved to be tremendously successful.

The pattern of the experiment has since been duplicated in numerous pretrial release projects. Essentially the experiment consisted of interviews with newly arrested individuals designed to evaluate their character and roots in the community. The interviews focused on several factors subject to independent verification:

1. Had the defendant lived at his present or recent residence for six or more months?
2. Was he currently employed and, if so, had he been so employed for six or more months?
3. Did he have relatives in New York City with whom he was in contact?
4. Did he have a record?
5. Had he been a resident of New York City for ten years or more?

A judgment based on verification of the defendant's answers to these questions could then be formed as to whether he would be likely to flee the jurisdiction if released on his own recognizance. This recommendation was then passed on to the appropriate judicial officials.[36]

During its first three years, the Manhattan Bail Project interviewed over 10,000 defendants. By the end of the first year, release was being recommended for about 65 percent of those interviewed. Over the three year period, 3,500 persons were actually released on personal recognizance on the project's recommendation. Of these, 98.5 percent reported for trial when they were supposed to. As I have mentioned, the appearance record of bailed defendants during this period was considerably worse. Almost three times as many defendants who were on bail during this period failed to appear.[37]

Spurred by the initial results of the Manhattan Bail Project—as well as by studies conducted by the Justice Department's

36. Ares, Rankin D. Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole, 38 N.Y.U.L.Rev. 67, 71–74 (1963).

37. Goldfarb, *supra* note 2, at 156–7. The return statistic is probably somewhat artificially high because of the Bail Project's selectivity in choosing interview candidates.

Committee on Poverty and the Administration of Justice [38] and the Junior Bar Section of the District of Columbia Bar [39] — numerous bail reform projects began to develop in the mid-1960's. Experimental projects patterned after the Manhattan Project were soon underway in Chicago, Des Moines, Denver, Albuquerque, Los Angeles, San Francisco, Syracuse, St. Louis, Charlestown and other cities.[40] The National Conference on Bail and Criminal Justice, held in Washington, D. C. in 1964 under the auspices of the Justice Department and Vera, also served to focus attention on bail reform and clarify some of the thinking that had been prompted by the Manhattan Bail Project.[41]

From the point of view of future developments, one of the most important experiments to develop in the wake of the Manhattan Bail Project was the D. C. Bail Project. This effort was sponsored by the Judicial Conference of the District of Columbia Circuit and was administered by the Georgetown University Law Center.[42]

The method of operation of the D. C. Bail Project tracked very closely that of the earlier New York program. The overall statistics for the program during its two and one half years of operation [43] also closely resembled those of the New York program. The Bail Project interviewed 5144 defendants and recommended release on personal recognizance for 2528 or 49 percent. Eighty-five percent of those recommended for release or 2166 persons were in fact released by the courts. All but 65 of this group—three percent—returned for required court appearances.[44]

More importantly, detailed analysis of these statistics provided some highly useful findings.[45] They established, for example, a definite correlation between residential mobility and failure to appear. Eighteen percent of all releasees had resided at their current address less than 6 months, but of those who failed to appear, 30 percent had moved within the six-month period pre-

38. *See*, Attorney General's Committee on Poverty and the Administration of Justice, Report: Poverty and the Administration of Criminal Justice (Allen Report) (1963).

39. *Supra*, note 1.

40. Goldfarb, *supra* 2, at 166. For a general survey of alternatives to the traditional system, *see*, *id.*, at 150–212.

41. *See*, National Conference on Bail and Criminal Justice, Proceedings and Report (1965).

42. *See*, McCarthy and Wahl, "The District of Columbia Bail Project: An Illustration of Experimentation and a Brief for Change," 53 Geo. L.J. 675 (1965).

43. The agency went out of operation after passage of the Bail Reform Act.

44. D. C. Bail Project, *supra* note 15, at 31.

45. *Id.*, at 33–83.

ceding their arrest. Similarly, a correlation between employment and appearance at trial was established. A comparison of those who failed to appear with the total released population showed a significantly higher percentage of unemployment among those failing to return. Another useful finding was that, while 37 percent of all releasees were both married and living alone, 45 percent of those who failed to appear were in this category. The study did fail to show a strong positive correlation between family ties and appearance, but this was probably due to the high percentage of juveniles included within the released population.

The significance of these detailed figures, of course, was that they tended to lend credence to the project's release criteria (which generally paralleled those of the Manhattan Project, but which were somewhat more detailed). One other interesting point which was illustrated by the project—one that I don't think has been widely commented upon—was the irrationality of the traditional assumption that the character of the crime with which a defendant was charged was a good indicator of his reliability to return for trial. The results of the project showed that felons—who have always been considered poor risks to return and who have accordingly received higher bonds than misdemeanants—were in fact more likely to return for trial. Thirty-seven percent of those released were felony defendants, but only 29 percent of those who did not appear were accused felons.[46] I have said somewhat facetiously that I would rather release a man who murdered his wife on personal bond than a person charged with driving after suspension. My experience has shown that serious offenders appear far more frequently than minor offenders. The question of danger to the community in the interim is another question.

III

The Bail Reform Act of 1966 [47] was a direct outgrowth of the success shown by the Manhattan, District of Columbia and other experimental bail projects.[48] Taken together these projects offered fairly conclusive evidence to support Mr. Schweitzer's original feeling that pretrial release need not be tied to monetary incentives.

The Bail Reform Act wrote this principle into law for the federal courts and for the local courts in the District of Columbia.

46. *Id.*, at 33.

47. P.L. 89-519, 80 Stat. 329 (1966).

48. The genesis of the Act is described in Ervin, *supra* note 34. Also *see*, Wald and Freed, "The Bail Reform Act of 1966: A Practitioner's Primer, 52 ABA Journal 940 (Oct. 1966).

Essentially the Act establishes a presumption of eligibility for release on recognizance. The key provision of the Act provides that any person charged with a non-capital offense shall, at his appearance before a judicial officer, be ordered released pending trial "on his personal recognizance" or on personal bond unless the committing magistrate determines that such release "will not reasonably assure the appearance of the person as required."

If the magistrate determines that a defendant may not return if he is released on personal recognizance, the Act authorizes him to impose one or more of five additional conditions. These conditions also tend to deemphasize the importance of monetary incentives as a method of assuring the appearance of defendants. The first of the five conditions which the Act authorizes is the placing of the defendant in the supervisory custody of a designated—and willing—individual or organization. The second type of condition which may be imposed is restriction of the defendant's travel, place of abode or association during the period of release. Only if these devices will not be sufficient is the magistrate to resort to the use of financial incentives. The preferred form of monetary condition is the 10 percent cash bond. Under this approach—which was pioneered in the United States in the state of Illinois—an appearance bond in a specified amount is set and the defendant may meet the bond by paying 10 percent of the amount into the registry of the court. This amount is returnable to the defendant after his appearance for trial. The Act authorizes the court to require a surety bond, as a second type of monetary condition. A final provision in the Act also authorizes the court to "impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours."

In making release decisions under the Act, magistrates may take into account any "available information." This information need not conform to rules of evidence. The Act, relying heavily on the experience of the various experimental bail projects, state several factors which shall be given consideration. These factors are: "the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

The Act as originally enacted attempted to firm up the personal recognizance approach by imposing penalties for wilful

non-appearance. A felony defendant who wilfully failed to return to court could be fined up to $5,000 or imprisoned for not more than 5 years, or both. A misdemeanor defendant might be fined "not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both." The Act required that defendants be warned by the judge of these penalties at the time of their release and further, the judge was required to advise that a warrant would be issued immediately if a violation occurred.

If an accused individual cannot meet the conditions of release —perhaps because he cannot raise sufficient funds to pay a 10 percent cash bond into the registry of the court or because he cannot find a bondsman willing to go surety bond for him—and thus remains incarcerated, he is entitled to a review of detention after twenty-four hours to determine whether the conditions should be amended. The Court of Appeals has interpreted the statute to require that this review be conducted by the judicial officer who originally set the conditions,[49] a requirement which sometimes causes some difficulty.

Frequently, we have the situation in the District of Columbia where a man has been brought before a Superior Court judge immediately on arrest and has had conditions which he could not meet set by that judge. Subsequently he is indicted and taken before a different Superior Court judge—or perhaps a U. S. District Court judge—for trial. It is somewhat awkward and time-consuming for the trial judge to return the case for review to the judge originally setting the defendant's conditions. In any event, unless the original conditions are amended, and the defendant released, the Act requires the reviewing officer to set forth in writing the reasons for requiring the condition imposed. This requirement is, I think, a salutary one. By requiring us to think about what we are doing, it has the effect of curbing any tendency we might have to depart from the pattern of the Act.

The Bail Reform Act has now been in operation for somewhat over four years. As I will discuss in a moment, experience has turned up numerous difficulties in the operation of the Act. Whatever these difficulties, however, I think that overall the Act must be termed a success. Today in the District of Columbia we have a much more sensible and humane approach to pretrial release than we did before the adoption of the Act. Personal bond programs do work and must be established in every jurisdiction in the United States.

49. Grimes v. United States, 129 U.S. App.D.C. 308, 394 F.2d 933 (1967). Also *see*, Salley v. United States, 134 U.S.App.D.C. 90, 413 F.2d 364 (1968).

I think that statistics speak for the general success of the Act. The report of the D. C. Bail Agency on its operations during calendar year 1970 [50] shows that it processed 18,994 cases during the year. Some 14,456 of these cases reached the point of a release determination under the Bail Act (the remainder of the cases were handled under the Police Citation Program). Personal recognizance alone or in combination with non-financial conditions was given in 8206 or 57 percent of the cases dealt with under the Act. A substantial portion of these 8206 persons would, of course, have remained in jail awaiting trial under the old monetary bond-oriented system. The report shows that only 229 of those released on personal recognizance ultimately failed to appear for trial. This figure is lower than the actual number of no-shows, but it is accurate at least to the extent that it indicates that most individuals released under the Act without the imposition of financial conditions do come back to court.

IV

The weaknesses of the Bail Reform Act which came to light during its first years of operation in the District of Columbia fell into three broad areas: administration, enforcement of penalties and sanctions, and preventive detention.

Administration:

The difficulties in the first of these areas—administration—were not difficulties caused by any inherent weaknesses in the personal recognizance approach to pretrial release. Rather, the difficulties can be traced to several other problems. Most of these problems were focused on in the report of the Judicial Council Committee to Study the Operations of the Bail Reform Act in the District of Columbia.[51]

One of the problems was the failure of Congress to provide the D. C. Bail Agency with all of the tools necessary to successfully administer the Bail Reform Act. At the time it adopted the bail reform legislation, Congress also enacted the District of Columbia Bail Agency Act.[52] The thrust of this Act was simply to establish the Bail Agency to perform on an on-going basis the functions which the D. C. Bail Project had performed experimentally. Unfortunately, the legislation did not give the Agency the comprehensive authority necessary to take over all of the Bail Project activities. The Bail Project had, in addition to screening newly arrested individuals, been notifying releasees of

50. Report of the D. C. Bail Agency for the Period January 1, 1970–December 31, 1970.

51. *See*, note 6, *supra*.

52. P.L. 89-519, 80 Stat. 327 (1966).

upcoming court appearances and supervising their release. The Bail Agency Act gave the Bail Agency only a screening function with no authority or funds to provide notice or to supervise those released on the basis of its recommendations. Notice and supervision are critical responsibilities; without authority in these areas a high rate of success cannot be achieved. The Bail Agency tried with limited success to meet the legislative oversight by undertaking notice and supervisory activities on an *ad hoc* basis, but the failure to provide adequate machinery to make the system work had a marked impact on the administration of the Bail Act in the early years. This deficiency was corrected by provisions in last year's District of Columbia Court Reform Act which formally extended the Bail Agency's mandate to include notice and supervision.[53]

A second problem was a shortage of manpower and cash. Screening 19,000 cases and attempting to provide *ad hoc* supervision to 8,200 releasees during the course of a year is a substantial task and the D. C. Bail Agency simply did not have the resources to do everything it could have been doing. This was particularly so since its post-release efforts were always gratuitous and necessarily drew off interviewing resources. Hopefully, part of this problem was alleviated with the passage, last year, of legislation lifting the statutory $130,000 ceiling which had originally been placed on Bail Agency expenditures.[54]

Some of the early administrative problems were also the result of the simple novelty of the procedure with which we were working. As always happens, a good deal of trial and error was necessary to sort out the best ways of deciding on and enforcing pretrial release conditions. With experience, the Bail Agency has been able to develop imaginative new approaches to problems. This has particularly been the case during the tenure of the present Agency director, Bruce Beaudin. Mr. Beaudin has made available some of the materials his agency uses and will work with any jurisdiction that wishes to call on him for assistance.

Several examples of the substantive nature of the administrative problems which we have had under the Act should give you some ideas about what has to be done to make a system favoring release on personal recognizance really work.

One of our key problems has been to secure adequate information on which to make release determinations. Because of the manpower limitation which I have mentioned, Bail Agency practice has been to conduct a single investigation which serves as

53. P.L. 91-358, 84 Stat. 639 (1970).

54. P.L. 91-358, 84 Stat. 639 (1970).

the basis for both the initial release decision and the 24-hour review. If the agency were able to conduct follow-up investigations at periodic intervals it might well turn up additional information or information on changed circumstances which could serve as the basis for a revised release recommendation.[55] Unless a Bail Agency is staffed and equipped to provide the maximum amount of data to the Court, there will always be a substantial number of individuals initially detained who would have been eligible for release if a follow-up had taken place.

Ideally there should be a regular procedure for automatic review of bail conditions at a fixed time—probably 72 hours—after the initial setting of conditions in those cases where the defendant remains lockedup. This review would not replace the right presently granted by the Act to seek a review of conditions after 24 hours. Rather, it would be designed to give the court an opportunity to take a second—and less hasty—look at all of its release determinations which do not in fact result in release. At this automatic review, the court could have the benefit of observations from both defense counsel and the prosecuting attorney—who are inevitably operating in the dark at the time of the original determination. It could also have the benefit of any additional information which the Bail Agency could bring to light on detained defendants.

Development of an automatic review procedure seems to me particularly pressing since our experience in the District of Columbia has shown that many attorneys do not take advantage of the 24-hour review provision of the Act. A study done for the Justice Department in 1967 showed that bond review motions were filed in only 19 percent of the cases studied.[56] My observations from the bench suggests that the rate of bond review motions continues to be rather low.[57] Because of the time pressures under which original conditions are usually set, it seems to me that defense attorneys could appropriately be much more active in this area.[58] An automatic review provision would assure that an incarcerated defendant would have a review of his case.

55. *See* text at note 56, *infra*.

56. *See* Reynolds and Fitch, *infra* note 75.
Also *see*, Washington Pretrial Justice Program, American Friends Service Committee, Report on the Pretrial Justice Survey (Dec. 1970).

57. In a recent series of felony arraignments which I conducted, eleven defendants were being held in jail under money bonds which they could not meet. Bond review motions had been filed in only three of these cases.

58. A continuing duty to file bond review motions where appropriate is imposed by Shackleford v. United States, 127 U.S.App.D.C. 285, 383 F.2d 212 (1967).

Manpower problems have thus far precluded development of an automatic review procedure for the D. C. Superior Court. Not only has the Bail Agency not been able to gear up for this type of procedure, but also we have not had sufficient manpower to effectively implement it. For the procedure to work effectively it would be necessary for the judge sitting as committing magistrate to sit for one week to hear new cases and then take a week off to review his determinations made the preceding week. We simply have not had the resources for this sort of luxury. However, in view of the failure of counsel to seek review, in spite of the numbers that would be released if review on verified information took place—a trial court must assume this responsibility and build automatic review into the system.

Another administrative problem has related to the Bail Agency's duty to notify defendants of upcoming court hearings and to assure their attendance at these hearings. We have had chronic problems of inadequate notice to defendants. It is a frequent occurrence for a defendant to receive an inaccurate notice or no notice at all and for the Bail Agency to be unable to locate both those who fail to appear because they did not get notice or because they simply decided not to return to court. It is these difficulties, I might note, which lead me to question the Bail Agency's figure of only 229 no-shows for 1970. I suspect that the figure represents not the number who initially failed to return, but instead the number of those who never returned at all. My suspicion on this point seems to be borne out by the fact that the U. S. Marshal's Office presently has 850 bench warrants outstanding for missing defendants.

Obviously, the source of the notice problem was the failure of the Bail Agency Act to specifically authorize the Agency to provide notice to defendants. With the expansion of the Agency's mandate to include notice hopefully many of our problems in this area will be solved.

To assure that a personal recognizance system functions properly, a bail agency should be sufficiently staffed to develop a foolproof notice system. The system should insure that *no* person ever fails to come to court because of a confusion of dates or inadequate notice. A system of personal interviews after the initial court appearance plus personal service of subpoenas on all high risk cases or in any case where the trial is more than 60 days from arraignment would be beneficial. Every released person should be given an I.D. card with his photo on it and a passbook that requires endorsement every time he appears. All released persons should be listed on an area-wide computer net-

work with conditions listed, so police officers could check for possible violations.

Additionally, more effective methods have to be developed to find those individuals who do not—for one reason or another—show up for court appearances. One of the few virtues of the old monetary bond system was that bondsmen worked very hard at finding missing defendants. If a defendant failed to show up on the day of trial, a threat of bond forfeiture would send the bondsman scurrying to find him. In most instances the defendant would be found in bed, at work, in a nearby bar or in some other hideaway and would be returned to court within a few hours so that his case could be disposed of. In our haste to eliminate bondsmen, we initially failed to assure that this valuable fiction would continue to be performed. We threw out the baby with the bath water. The Bail Agency has not had the kind of resources necessary to perform in this way. Today, when a defendant fails to arrive, the Bail Agency will attempt to reach him by phone. When this attempt fails, as it usually does, the only thing which the court can do is continue the case, excuse all the witnesses and issue a bench warrant. If the defendant does not shortly appear, the bench warrant goes to the U.S. Marshal's Office. This office, which like the Bail Agency is understaffed, usually has a tremendous backlog of unserved warrants. The marshals are continually far behind on their civil process, that is, their landlord-tenant, small claims and civil litigation, and they just do not have the time to spend exhaustively searching for bail violators. Thus, the filing of a bench warrant has the impractical effect of putting it in a closed file. What we need is some sort of device which can perform the function of finding lost defendants as effectively as the bondsmen did in the days before the Bail Reform Act. A well run system needs a warrant squad that works closely with the Bail Agency and the Court, notifying laggards and immediately arresting no-shows.

Fortunately, most defendants do eventually appear, often because they hear through one channel or another that a bench warrant has been issued for their arrest. But this cannot compensate for the fact that their failure to appear promptly has disrupted the court's docket and slowed the orderly processing of cases and placed another burden on the innocent victim witness.

Another significant problem has been our inability to supervise adequately non-financial release conditions. The Act mandates the imposition of such conditions as restrictions on travel, place of abode and so forth with the thought that these conditions will keep released defendants out of trouble and hopefully bring them back to court. Except for the condition that releas-

ees check periodically with the Bail Agency, the agency simply has been unable to keep track of violations. During the second half of 1970, the Bail Agency reported a total of 1123 violations of release conditions. I am sure that the actual number of violations was far greater than this.

Again the problem has been partly the gaps in the Bail Agency Act and the Agency's shortage of manpower. I can require that a defendant—as a condition of his release—stay away from the 14th and T Street area, which is the hard narcotics area in Washington, but the Bail Agency does not have the ability to check daily on the defendant's activities to see that he does not violate the conditions. I am not sure exactly how we can more effectively enforce conditions. One possible approach, however, would be to set up regional bail agency offices in the more remote sections of the city and require defendants to check in with these offices daily. If necessary, we could provide defendants with bus scrip so that they would have no excuse for failing to check in. This, tied in with a computer listing and spot checks, should bring about the desired result.

Before leaving the area of administration, I should make some mention of the costs of administering a personal recognizance oriented system. Recent figures provided by the D. C. Bail Agency indicate that a full range of release services—screening, notification and supervision—can be provided for an average cost of $20 per defendant. This figure is based on the Bail Agency's projected budget and caseload for calendar 1971. The Agency expects to handle 26,000 cases this year at an estimated cost of $520,000.[59] The cost of providing only screening services, again on the basis of Bail Agency figures, is about $8.90 per defendant. These costs can be fruitfully compared with the costs of maintaining an individual in jail which I cited earlier. Assuming that a defendant can be brought to trial within the ideal trial period of 60 days after arrest, the costs of keeping him in jail at $13.38 a day will be in excess of $800.

Enforcement:

The Vera Foundation's Manhattan Bail Project, at the very beginning of the movement for bail reform, found that it was simply not community ties which brought those released on personal recognizance back to court. Another important factor was the fear of punishment for failing to return.[60] Strong deterrents for flight from prosecution are a necessary part of a sensible effort at bail reform.

59. *See* Appendix I.

60. Goldfarb, *supra* note 2, at 152.

Our experience on this score in the District of Columbia has not been a particularly happy one. Federal law does provide a substantial penalty for failure to appear. A felony defendant who does not return to court may be fined not more than $5,000 and imprisoned for not less than five years.[61] Unfortunately our experience proved this law to be ineffective. A necessary element of failure to appear under the statute was that the failure be wilful. In practice it was almost impossible to prove wilfulness.[62] If a defendant comes in to court an hour or two late—after his case has been removed from the calendar and rescheduled and the witnesses have been sent home—claiming that he overslept, how can the government prove that his failure to appear on time was wilful?

The inability to adequately assess penalties for non-appearance proved to be a serious impediment to the efficient operations of our courts. Unlike a defendant who is being held in jail, a defendant free on personal recognizance has no incentive to seek a speedy trial. Indeed, it may be to his interest, if he is likely to be convicted, to attempt to delay his trial—and thus retain his freedom—as long as possible. A person who shoplifts in small stores, breaks into cars or smashes store windows may even have a substantial chance of having the charges against him dropped if he can drag his case out long enough. This fact was not lost on more experienced and knowledgeable defendants and we found our calendar being continually disrupted by released defendants coming in late and resorting to other dilatory tactics.

The new Court Reform Act provides what seems to me an effective solution to this problem.[63] While retaining the same penalties for non-appearance, the Act deems that failure to appear for a scheduled court appearance will be deemed prima facie wilful. This change in the law should allow us to punish experienced criminals, e. g., addicts, prostitutes and boosters, who use non-appearance as a delaying tactic. Properly administered, however, I do not think the provision should be detrimental to the rights of individuals who are legitimately late to court or who are not provided with adequate notice of upcoming court appearances.

Preventive Detention:

It goes without saying that the most difficult—and controversial—problem with the Bail Reform Act had to do with the commission of new crimes by those released from custody pending trial.

61. 18 U.S.C. § 3150 (1967).

62. *See* United States v. Moss, Crim. No. 23091 (D.C.Cir. Dec. 2, 1970); 438 F.2d 147.

63. P.L. 91-358, 84 Stat. 473 (1970).

Although there had been some discussion of preventive detention prior to 1966,[64] the Act did not include any authority for flat denial of release to those thought to be likely to commit new offenses. Nor did the Act explicitly authorize committing officials to take danger to the community into consideration in shaping release conditions.

Actually it was not surprising that these things were omitted from the Act. Traditional American practice has been to accord the criminal accused a "right" to bail in non-capital cases. At the federal level, the Judiciary Act of 1789 provided that "upon all arrests in criminal cases, bail *shall* be admitted, except where the punishment may be death." In capital cases, bail was discretionary, "depending upon the nature and circumstances of the offense, and of the evidence and usages of law." [65] Some writers have urged that this provision simply implemented a constitutional requirement imposed by the 8th Amendment.[66] There has been considerable debate over this point, however. Strong arguments have been made on behalf of the view that there is no constitutional right to bail.[67] Because this is an issue presently in litigation before the Superior Court—and because others here today will be discussing this point—I do not intend to enter into the dispute. In any event, regardless of the constitutional status of the right to bail, it is true that from the time of the Judiciary Act on, federal law did require the availability of bail. In Stack v. Boyle, Justice Vinson noted: "From the passage of the Judiciary Act * * * to the present Federal Rules of Criminal Procedure, Rule 46(a) (1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail." [68] At the state level, similar requirements have also been traditionally imposed, either in state statutes or, more often in state constitutions.[69]

Two things should be said about this traditional "right" to bail. First, the rule imposed by the Judiciary Act is deceivingly liberal. At the time of its adoption, it was much more restrictive than we accept today. In 1789, the capital offense excep-

64. Goldfarb, *supra* note 2, at 127-149.

65. 1 Stat. 73, 91 (1789).

66. *See*, Foote, *supra* note 13.

67. *See*, e. g., Hruska, "Preventive Detention: The Constitution and the Congress", 3 Creighton L.Rev. 36 (1969) and Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention, 55 Va.L.Rev. 1223 (1969).

68. 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951).

69. Goldfarb, *supra* note 2, at 2.

tion—a provision which is also uniformly found in state law—created a substantial category of cases not subject to the right to bail. Federal offenses then punishable by death included not only treason, but also such crimes as piracy and robbery on the high seas and on internal waterways, forgery and counterfeiting.[70] Under state law, most serious felonies were capital crimes.[71] And this continued to be the case during most of our history. Even as late as 1958, capital punishment could be imposed in 44 states for murder, 21 for rape, four for arson and in three for burglary.[72] It is only in fairly recent times that the right to bail in non-capital cases has come to mean the right to bail in virtually all cases.

The other important point about the traditional "right" to bail is that, in fact, the "right" was something of a sham. As I discussed earlier,[73] the great majority of those for whom bail was set were unable to secure their release pending trial. Either they would be too poor to put up the necessary security or they would be unable to find a bondsman willing to go bond for them. The poor and those considered by bondsmen to be bad risks have always been preventively detained whatever their "right" to bail.

The Bail Reform Act dramatically exposed the realities of the former system, insofar as the District of Columbia was concerned, at least. For the first time, pretrial release became available for the majority of those arrested in the District. Under the old monetary bond system, as I have suggested earlier, affluent dangerous individuals occasionally obtained release pending trial. But as often as not, these individuals tended not to be the sort of criminals who actually commit the kind of street crime which scares the public so badly. Rather, they tended to be gangsters and other more sophisticated types. This picture changed with the Bail Act. Among those now being released one found a number of holdup artists and other street criminals who, upon release, promptly committed new crimes.

Paradoxically, the focus of the Act on the probability of return criterion may have even promoted the release of those most likely to commit new crimes. A narcotic addict is generally a fairly good bet to return for trial or, at the very least, to be found quickly if he does not. An addict with a substantial habit

70. *See*, The Crimes Act of 1790, 1 Stat. 112.

71. For a compilation of crimes treated as capital prior to 1800, *see* Mitchell, *supra* note 67.

72. Mitchell, *supra* note 67, at 1227–30.

73. *See* text at note 17, *supra*.

cannot afford to leave his source of supply and is thus unlikely to flee. But returning an addict to the street guarantees that new crimes will occur. A man with a $50-a-day habit has to raise $300 to $500 a week to support his habit. If his chief source of income is theft, as it commonly is, he will have to steal goods worth several times this amount to keep going. I have heard it said that it requires a television set a day to support a substantial habit. These are people who, because of what we all have to concede is an illness, have to steal.

I think that it is difficult to dispute that the sharp rise in crime which was experienced in the District of Columbia during the late 1960's was in some measure due to recidivism by those free from custody while awaiting trial. Sitting on the General Sessions, now the Superior Court, bench, I have encountered numerous cases of young men brought in on petit larceny charges who, when I released them on personal recognizance or into the custody of their families, I knew to a moral certainty would commit additional crimes before they came to trial. It was apparently not uncommon for some of these individuals to go on crime sprees while on bail because they knew that they would be convicted on their original charge.

The problem of recidivism by those awaiting trial is well-documented in a number of studies and case histories contained in the 1970 hearings of the Senate Judiciary Subcommittee on Constitutional Rights.[74] One of these studies was done by the U. S. Attorney's Office in the District of Columbia.[75] This study gathered data on persons indicted for robbery during 1968 and measured the rearrest rate for these persons. It found that about 70 percent of those indicted were rearrested on one charge or another. Even allowing for the fact that some of these new arrests would not result in conviction, this is a substantial rate. Other studies showed somewhat lower rates of recidivism, but I think they all generally point in the same direction.[76]

On the basis of statistics such as these, as well as my own observations from the bench, I have come to believe that the omission of some form of preventive detention authority from the Bail Act was a crucial omission. As the majority of the Judicial Council Committee to Study the Operation of the Bail Reform Act pointed out: "A proper balance between the rights and in-

74. Senate Judiciary Committee, Subcommittee on Constitutional Rights, Hearings on Preventive Detention, 91st, 2d. Sess. (1970).

75. Reynolds and Fitch, The Bail Reform Act and Pretrial Detention (1967).

76. *See, e. g.*, Senate Judiciary Committee, *supra* note 74, at 1020.

terests of the individual and those of society requires such a [provision.]" [77]

Historically preventive detention is not an unrecognized principle or a novel method of protecting the interests of society. Even taking the guarantee of a right of bail made by the Judiciary Act at face value, we have to remember that the Act did provide for discretionary pretrial detention in capital cases. Presumably this provision was prompted, at least in part, by the view that individuals charged with capital offenses might pose an especial danger to the community.

Preventive detention is also used today in most other democratic countries. The only countries not having formal pretrial detention mechanisms have been—besides the United States—the Philippines and Liberia. The United Kingdom, a country which cannot be faulted on the general fairness of its criminal justice system, has had a preventive detention law for a century. Last year, about 42,000 persons were detained under this law.

Aside from its importance to society, I think that preventive detention may also be necessary to assure the rights of criminal defendants who are not dangerous and who ought to be released pending their trials. The failure of the Bail Reform Act to make provision for the detention of dangerous individuals created pressures on the general framework of the Act. An unreasonable law has the ultimate effect of forcing those who administer it to ignore it, calloused of the consequences, or else to make extreme rationalizations in circumventing it: this applies to judges. You cannot expect judges to follow the letter of a law that requires them to turn many dangerous criminals loose day after day.

Despite my view that preventive detention is an essential element of any pretrial release program, however, I must confess that my support for preventive detention is not particularly enthusiastic. Preventive detention is at best a stop-gap measure. It will not provide any lasting solution for our crime problems. Nor should it be used as a substitute for speedy trial or the badly needed modernization or improvement of our judicial machinery.

Over the long term, the problems of recidivism by individuals awaiting trial have to be solved, not by preventive detention, but by fundamental reforms in our criminal justice system. One of the reasons that recidivism has been such a problem in the District of Columbia and elsewhere is that an individual released pending trial may spend months on the street before the courts

77. *Supra* note 6, at 32 (1969).

can get around to hearing his case. Prior to the recent reorganization of the District of Columbia court system, the median time that an individual held in the D. C. Jail spent awaiting trial in General Sessions was 4½ months. Those awaiting trial in U. S. District Court spent 7½ months in jail.[78] Since those who cannot make bond and are held in jail are given priority in the setting of trial dates and also because individuals who are released have no incentive to seek speedy trials and tend to engage in dilatory tactics, comparable figures covering releasees would show that the periods elapsing between their arrests and trials were considerably longer. In six or ten months on the street a man can commit a good deal of crime.

Senator Ervin has recently proposed legislation which would require that criminal trials in the District of Columbia be held within 60 days. I generally support this legislation. And, even without such legislation, those of us on the Superior Court are working to reduce as much as possible the period between arrest and trial. Efforts in this direction are much more important ultimately than preventive detention. One study of recidivism has indicated that the average time between pretrial release and arrest on other charges for recidivists is on the order of eight or nine weeks.[79] If all trials could be held in 60 days or less many crimes by releasees could thus be prevented. Besides their value in curbing recidivism, speedy trials have a good deal of independent value. A well-run system of justice should provide prompt determinations of guilt and innocence for all persons arrested.

Another important alternative to preventive detention would be a civil commitment procedure for narcotics addicts. As I have suggested, many of the releasees who commit crime while awaiting trial are addicts who have to steal to support their habits. If the government were able to take action to promptly hospitalize for treatment individuals determined to be addicted to hard narcotics, the problem of recidivism by addicts would be sharply curbed. And, like speedy trials, civil commitment of addicts has great value independent of its usefulness in removing from the streets individuals certain to commit crimes. Addiction is a disease. Attempting to deal with it through the criminal process is no more fruitful than attempting to deal with drunkenness—or for that matter the common cold—through the criminal courts. Criminal sanctions do not deter those who have become addicted to drugs from continuing their addiction.

78. *See* Appendix II.

79. Report of the D. C. Bail Agency for the period Jan. 1–Dec. 31, 1970, at 5.

At best, the criminal process provides a *sub rosa* method—through treatment programs such as the Narcotic Addict Rehabilitation Act—for attempting to cure addicts. A sensible approach to the tremendous problem of addiction which we have in all of our big cities demands that we begin recognizing addiction for what it is—an illness—and begin treating it as such.[80]

Still another alternative to the use of preventive detention is the creative use of release conditions. Adequate supervision of release conditions is, as I have noted, somewhat difficult. But if a bail agency has developed to the point at which it can effectively keep track of a releasee's activities, efforts should be made at imposing conditions designed to steer defendants away from the temptation to commit new crimes.

Preventive detention ought to be only a last resort. It ought to be available only in those cases where a speedy trial, civil commitment, creative use of conditions and other devices will be of no avail in preventing the commission of new crimes. It ought not be a "cheap" solution to the crime problem.

Further, a preventive detention statute should be narrowly and carefully drawn. Opponents of preventive detention have pointed up a number of legitimate concerns about the procedure.[81] Leaving aside their constitutional arguments, I think that they are on firm ground in suggesting, for example, that predictability is a problem in preventive detention. Although determining whether or not an individual is dangerous is not too different from the sort of decision a judge has to make in sentencing a convicted defendant, it is a difficult decision and, I think, one which will have to be approached cautiously. Another legitimate concern relates to the ability of detained defendants to adequately defend themselves. A number of studies have shown that defendants who remain in jail pending trial are more often convicted than those who do not. Commentators have suggested, probably with some accuracy, that this may be due in part to the inability of an incarcerated defendant to see that his case is adequately prepared. In cases of preventive detention it thus seems to me necessary to assure that attorneys representing the detained individual are extremely diligent in representing their clients. I think it is also necessary that safeguards be built into preventive detention so as not to encroach upon a defendant's presumption of innocence.

80. *See, e. g.* Watson v. United States, 439 F.2d 442 (D.C.Cir., July 15, 1970), United States v. Ashton, D.C., 317 F.Supp. 860 (1970).

81. *See, e. g.*, Dershewitz, On Preventive Detention, New York Review of Books (March 13, 1969).

The preventive detention provisions which were included in the D. C. Court Reform Act go a long way, I think, towards providing the kind of safeguards necessary for a preventive detention law. The Act permits safety to the community to be considered in non-financial conditions of release. A select group of individuals charged with dangerous or violent crimes may be detained. The accused is entitled to a hearing in which the government must show and the court find a substantial probability that the accused committed the crime he was arrested for. It also must show by clear and convincing evidence that the accused fits into the defined categories and that no combination of conditions will insure the safety of the community. The court's reasons must be in writing and subject to a speedy appeal.

The details of the procedures are set forth in the Act. While I favor a very limited preventive detention policy, I am not prepared to say at this time whether this Act is constitutional or ever should be a model. I leave that to others. I do suggest this is a congressionally approved way to do it.

V

The Future:

The need for the 70's in pretrial detention is the need to implement the philosophy of the 1968 American Bar Association Standards relating to "Pretrial release."[82] What I have said here today is simply an urgent cry to do something about implementation of these Standards and some suggestions about how to avoid some pitfalls. A non-financial pretrial release system can, does, and will work. A pretrial release program needs only a valid interview technique, the machinery for supervision and notice, plus sanctions for failure to appear or for violations of conditions. These concepts, tailored to the individual needs and resources of your state will produce a viable system.

I have left to others on the panel the citical roles of counsel and the trial court in the area of pretrial release. All participants in the release decision must actively support both the letter and spirit of non-financial pretrial release to make it work. If this is done, our system will work more humanely, economically, and certainly more in accord with our basic American principle of justice.

82. ABA Project on Minimum Standards for Criminal Justice, *supra* note 23.

APPENDIX I

DISTRICT OF COLUMBIA BAIL AGENCY
601 INDIANA AVE., N.W.
WASHINGTON, D. C. 20004
SECOND FLOOR

EXECUTIVE COMMITTEE
HONORABLE ROGER ROBB
HONORABLE JOHN L. SMITH JR.
HONORABLE AUSTIN L. FICKLING
HONORABLE TIM MURPHY
DAVID J. McCARTHY, JR.

BRUCE D. BEAUDIN
DIRECTOR
629-4311

March 1, 1971

MEMORANDUM

TO: The Honorable Tim C. Murphy

FROM: Bruce D. Beaudin

Dear Tim:

If you need anything in addition to these figures, the back copies of our annual reports should suffice for all the figures that we have available.

A. Screening--Notification Type of Agency.

In fiscal year 1970, the Agency handled 18,994 cases. Its over all budget was $168,500.00. The only service performed by the Agency within this cost ratio were the initial screening (interviewing, verifying and providing the committing magistrate with reports at the time of presentment) and a limited notification (mailing notices of continued Court dates to all defendants released). To provide this service alone, and I feel that any program must encompass both the initial reporting and the follow-up notification letter, the program costs about $8.90 per defendant screened.

B. Screening--Notification--Supervision Type of Agency.

At the suggestion of the Hart Committee, and with the ammendments to the Bail Reform Act effective February 1, 1971, the additional responsibilities of supervising release conditions and providing certain pre-trial services have been implemented. We estimate that we will service about 26,000 cases in calendar year 1971 at an estimated cost of $520,100.00. At an average cost of $20.00 per defendant, other costs of the system should be prevented or lowered. Detaining suspects in jail, the issuance and service of bench warrants, and other related costs should diminish significantly. Most important, however, close supervision of release conditions should contribute significantly to a reduction of crimes committed by those on pre-trial release.

APPENDIX II

GOVERNMENT OF THE DISTRICT OF COLUMBIA

DEPARTMENT OF CORRECTIONS
Suite 1114
614 H Street, N.W.
Washington, D.C. 20001

1315

Office of The Director

March 2, 1971

Honorable Tim Murphy
D. C. Superior Court
Fifth & E Streets, N. W.
Washington, D. C. 20001

Dear Judge Murphy:

This is to confirm information supplied to your Clerk yesterday on jail costs.

The question was: "What is the per capita cost of prisoners in detention awaiting trial?"

Male prisoners held in the D. C. Jail cost the District $13.38 per day, per man; which produces an annual cost of $4,904 per man.

Female prisoners held in the Women's Detention Center cost $26.66 per day or $9,731 per year.

These costs are based on the total direct operating costs of these respective institutions bearing their pro-rated costs of Department administration. The costs do not include the costs of depreciation of the capital investment.

Costs stated also do not include the costs of escort and supervision of these detention prisoners by the U. S. Marshal.

It may benefit your calculations to know that we have, at this time, 1172 male prisoners awaiting trial or sentence in the D. C. Jail; and about 90 females in the Women's Detention Center. In both cases, this total population multiplied by the daily cost and remultiplied by either: 1) 210 days for felony cases in the U. S. District Court [which is the average time between jail admission and sentencing]; or 2) 120 days for misdemeanant cases [average time between jail admission and sentencing].

Our total detention population of 1,262 is approximately 35% misdemeanant suspects and 65% felon suspects.

Sincerely,

Kenneth L. Hardy
Director

cc: Chief Judge Greene
Dr. Stuart Adams

A TRILOGY: TRIAL, PROSECUTION, DEFENSE

by

WALTER F. ROGOSHESKE
Associate Justice, Minnesota Supreme Court

The Report of the American Bar Association Standards on the Prosecution Function and the Defense Function is of such great importance that it is tempting to say of it that it is the most significant of the reports issued in the project. Its potential is clear to anyone who has seen, over the years, how much confusion, uncertainty, and doubt exists about the proper function of the prosecutor and defense counsel. This confusion, uncertainty, and doubt exists not only in the minds of the public, as represented in some fictional accounts of lawyers on television or in occasional misconceived newspaper editorials, but also too often in the attitudes that lawyers themselves bring to the practice of criminal law. The task of the Advisory Committee in preparing its report on this subject was thus to bring clarity to a field in which there has not been clarity. That task was somewhat different from that of the other committees, since in this area there was not a large body of established case law, statute, or even of well considered proposals in the form of recommendations or law review articles. Instead, the main source of the Advisory Committee's information had to be in the experience of practitioners, active in the trial of cases and familiar with the work of the criminal courts.

Recognizing this, Chief Justice Burger, then Judge of the United States Court of Appeals for the District of Columbia, and first chairman of the Advisory Committee, organized hearings to which experienced lawyers, prosecutors, defense counsel, and judges who earlier in their careers had such experience, were in-

vited to speak to an agenda of questions and issues prepared in advance by the staff and committee members. Then, as throughout the preparation of the report, the committee and its staff were greatly concerned that it attain a completeness and a relevance to the actual problems of day-to-day practice in the criminal law that could not be guaranteed by reference to the existing literature on the subject. Time and again the question was put, "Have we omitted anything important? Have we left out anything that you have found to be a difficult question of proper conduct in your practice? Are we giving too much attention to issues of theoretical concern but not of practical importance?"

There was constant concern also that the standards evolved make sense to the practitioner in the field. To achieve this, the advisory committee drew not only on its own personal experience—which was vast in prosecution, defense, as well as in participation in the role of judge in criminal cases—but was at pains to present its drafts for consideration by lawyers throughout the country, including the major organizations in the field, the National District Attorneys Association, and the National Association of Defense Lawyers in Criminal Cases. The standards thus evolved represent what remains from a strenuous process of examination and re-examination, which though it sometimes tried the patience of the committee, guaranteed that nothing remained in the report which was the result of hasty consideration. The result is a document which can serve each of the main objectives that the committee had in preparing the report: as a guide to the lawyer and the judge in the handling of a criminal case; as a standard for the evaluation of the conduct of prosecutors and defense counsel; and as a handbook for the education of lawyers and law students, and indeed, of the public, in the proper role and function of the prosecutor and defense counsel.

The report rests on several fundamental principles. It recognizes the basic adversary character of our system of justice, but it also recognizes that the prosecutor is an administrator of justice. It recognizes that in many respects the ethical duties of prosecutor and defense counsel are alike; that while their roles differ each is equally bound by canons and traditions of propriety, but also that there are certain areas in which there are special standards which apply to the particular role of prosecutor or defense counsel. It recognizes that the majority of criminal cases are and will continue to be disposed of not by a formal trial but through plea discussions between prosecutor and defense counsel; but it seeks to give greater clarity, dignity, and intelli-

gibility to this process. Above all, it stands on the proposition that the court in a criminal case is like a three-legged stool, resting on the support of a judge, a prosecutor, and a defense lawyer. If any one of the legs cannot carry its load, the stool will fall out of balance and the system of criminal justice will fail to achieve its purposes.

With this in mind, the Report on the Prosecution Function begins with a section of general standards. These seek to establish the framework in which the prosecutor's function is exercised. They recognize that the prosecutor is an executive officer, both an administrator of justice and an advocate, and that his office is one which requires the exercise of sound discretion. The traditional position of the bar is reaffirmed: the duty of the prosecutor is to seek justice, not merely to convict.

An important problem treated at the outset of the standards is their relationship to the Code of Professional Responsibility. The standards follow the Code in seeking to make a distinction between guidelines, the enforcement of which must rest in the conscience of each lawyer, and rules, to be used in formal disciplinary proceedings. The latter, comparable to the disciplinary rules of the Code of Professional Responsibility, are identified in these standards by the term "unprofessional conduct." The consistency of these standards with the Code is shown through citations in the commentary and also in a table of parallel provisions.

It was important to make clear the relationship of these standards to the law on prosecutorial misconduct as a ground for reversal of criminal conviction and the cases in which a challenge is made to the effectiveness of defense counsel. The report clearly states that these standards are not intended to be per se criteria for such cases, but that their relevance in such judicial evaluations may depend upon circumstances which are not treated in the standards.

Other general standards call attention to the importance of the prosecutor avoiding the appearance or reality of a conflict of interest, of his observance of the standards on fair trial and free press, and of his duty to seek improvement in the substantive and procedural law when inadequacies or injustices come to his attention.

The second part of the prosecution standards deals with the organization of the prosecution function. There is no parallel to this section in the Defense Function Report, because the matter has previously been treated in a separate report entitled "Providing Defense Services."

This portion of the standards has as its keynote the establishment of prosecution offices on a level of professional competence and organization which will allow them to discharge their functions efficiently and to have the confidence of both the bar and public. They accept the tradition of vesting authority and responsibility for prosecution in a lawyer, provided with adequate staff and facilities, selected by a method considered desirable in the particular jurisdiction, to serve in a district, county, or city. Although the standards recognize that in some areas it may be necessary to have part-time prosecutors, they take the position that it is desirable that, wherever possible, the unit of prosecution be designed on the basis of population, case load, and other relevant factors at a size which will warrant at least one full-time prosecutor. They seek to improve efficiency and encourage uniformity within the jurisdiction and cooperation among local prosecutors through the establishment of a state council of prosecutors, by providing for consultation with the Attorney General in cases where questions of law of statewide interest or concern arise which may create important precedents, and by calling upon state governments to consider the need for establishing a central pool of supporting resources and manpower, available to local prosecutors. In pursuit of the goal of high standards of professional skill, the standards suggest that, wherever feasible, the offices of chief prosecutor and of the staff attorneys be full-time occupations, that professional competence be the only basis for selection for prosecutorial office, and that staff should be selected on the basis of competence without regard to political considerations. They recommend that prosecutors be compensated at a rate commensurate with the high responsibilities of their office and comparable to the compensation of lawyers with similar obligations and responsibilities in a private sector of the bar.

A novel suggestion in the standards is that each prosecutor maintain a handbook containing his policies which guide the exercise of prosecutorial discretion and the procedures of his office, in order to have greater continuity and uniformity in the administration of the office by different staff personnel over time. An example of the kind of material which might be included in such a handbook is provided in an appendix to the prosecution report, consisting of an organizational chart and table of contents taken from the manual of the office of the District Attorney of the County of Los Angeles. The standards also suggest the need for regularly organized training programs and for financial support so that prosecutors may participate in programs of continuing education.

Two important areas of the prosecutor's function are his relations with the police and his relations with the courts and the bar. The standards recognize the responsibility of the prosecutor to advise the police concerning their functions and duties in criminal matters and recommend that he cooperate with police in providing staff assistance to aid in their training. In his relationship with judges, the prosecutor is advised to strive to preserve the appearance as well as the reality of a correct relationship, and the standards state that it is unprofessional conduct for a prosecutor to engage in unauthorized ex parte discussions with or submission of material to a judge relating to a particular case which is or may come before him. In view of the great public concern with delay in the courts, it is significant to note that the standards provide that a prosecutor should not intentionally use procedural devices for delay for which there is no legitimate basis, and that the prosecution function in each jurisdiction should be so organized and supported with staff and facilities as to enable it to dispose of all criminal charges promptly.

The remainder of the prosecution standards follow the chronology of criminal procedure. Part Three deals with investigation for the prosecutor's essential decisions. This portion of the standards begins by stating that, although the prosecutor ordinarily relies on the police as an investigative agency, the ultimate responsibility rests with him personally for the investigation of suspected illegal activity which is not adequately being dealt with by other agencies. The standards make it unprofessional conduct for a prosecutor to obtain interviews by using a letter or other communication which appears to be a subpoena if he is not authorized by law to do so.

The standards state that it is unprofessional conduct for a prosecutor knowingly to use illegal means to obtain evidence. On a subject which has long been of concern to defense counsel, the standards take the position that a prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. Both of these standards have their parallel in the defense standards, as does the provision which states that a prosecutor is not obligated to caution a prospective witness concerning possible self incrimination but permits him to do so if that seems appropriate. Prosecutors are cautioned against seeking to dictate the formation of expert opinion, where they employ an expert. Payment of an excessive fee to influence the expert's testimony is denominated "unprofessional conduct."

Some of the most important sections of this portion of the report are those that deal with the exercise of the prosecutor's discretion in bringing of charges. The standards take the position

that the decision to institute criminal proceedings should be initially and primarily the prosecutor's responsibility. That is, there should be restrictions on the ability of either the police or private persons to institute criminal proceedings that the prosecutor does not believe should be instituted. The standards recommend that the prosecutor establish standards and procedures for evaluating citizen complaints. In those jurisdictions which permit a citizen to complain directly to a judicial officer or to the grand jury, it is recommended that the law be changed if necessary to require that the complaint be presented for prior approval to the prosecutor and that the prosecutor's action or recommendation be communicated to the judicial officer or grand jury. The intent here is to make the professional prosecutor a screening agency in the administration of criminal justice and to bolster that activity in the many jurisdictions where it already is the practice.

In his relations with the grand jury, the prosecutor is advised to act as legal advisor, explain the law and express his opinion on the legal significance of the evidence, but to give deference to the status of the grand jury as an independent body. He is enjoined against making statements or arguments to influence grand jury action which would be impermissible before a petit jury. The report recognizes that exposure is the chief sanction against violations of these recommendations, and suggests that the prosecutor's communications and presentations to the grand jury should be on the record. The standards also provide that the prosecutor should present to the grand jury only evidence which would in his belief be admissible at trial. The standard does recognize, however, that there may be appropriate cases in which the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial.

Consistent with the fundamental duty of the prosecutor to seek justice, the standards take the position that the prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt and that a prosecutor should recommend that the grand jury not indict if he believes the evidence presented does not warrant an indictment under governing law. Similar standards apply to the prosecutor in deciding whether to exercise his discretion to charge by information, in those jurisdictions which permit informations. Because of the general desirability of moving matters out of the criminal process if they can better be handled by other social agencies, the standards suggest that the prosecutor explore the availability of non-criminal disposition, especially in the case of a first offender. To

make this possible, it is suggested that prosecutors be familiar with the resources of social agencies which can assist in the evaluation of cases for diversion from the criminal process.

Experienced prosecutors have, over the years, developed for themselves the criteria by which they exercise their discretion. To the novice, the law student, and the public, these criteria have too often remained a mystery which sometimes fosters the impression of impropriety in the exercise of discretion in the charging decision. The maintenance of a handbook in the prosecutor's office, containing its guidelines and procedures, suggested earlier in the report, should go a long way to help lift this cloud. In more general terms, though necessarily lacking the detail that can be provided in each locality according to its experience and its particular pattern of criminal cases, the standards seek to sketch the criteria which prosecutors should use in exercising their discretion in the decision whether to charge.

First and foremost, of course, is a determination of whether there is evidence which would support a conviction. The standards make clear that the prosecutor is not obliged to present all charges which the evidence might support. In view of the particular circumstances of the case and consistent with the public interest, the prosecutor may decline to prosecute for one or all of the crimes on which complaint has been made. Although no complete list of the factors which might lead him to make such a decision is possible, the standard suggests that within the range of considerations which are proper are such matters as the prosecutor's own reasonable doubt that the accused is in fact guilty, the extent of harm caused by the offense, the disproportion of the authorized punishment to the particular offense or offender, the motivation of the complainant in bringing charges, the reluctance of the victim to testify, cooperation of the accused in the apprehension or conviction of others, and the availability and likelihood of prosecution by another jurisdiction. The standards provide that the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions. Nor should the fact that in his jurisdiction juries have tended to acquit persons accused of a particular kind of criminal act in question deter him from prosecution, in cases which involve a serious threat to the community. On the subject of over-charging, which all have found difficult to define, the standards take the position that the prosecutor should not bring charges greater in number or degree than he can reasonably support with evidence at trial.

With regard to the first appearance before a judicial officer and the preliminary hearing, the standards provide that the prosecutor should cooperate in obtaining counsel for the accused, and should not encourage an uncounseled accused to waive preliminary hearing. Nor should the prosecutor seek a continuance solely for the purpose of mooting the preliminary hearing. The standard on disclosure of evidence by the prosecutor to the defense, consistent with the Code of Professional Responsibility, states that it is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence known to him supporting the innocence of the defendant. In addition to this provision, set at the level of unprofessional conduct, and therefore the kind of rule which may be enforced by disciplinary sanctions, the standards provide as a guideline to the prosecutor that he should disclose to the defense evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment, at the earliest feasible opportunity. As this provision demonstrates, here, as elsewhere in the standards, a narrow, carefully defined type of conduct has been prohibited as unprofessional, and a broader, related category has been defined in which the prosecutor must use his own conscience in following the standard.

The next section of the report deals with the subject of plea discussions, a subject long shrouded in mystery. The report on "Pleas of Guilty," earlier issued in this project by the Advisory Committee on the Trial, sought to clarify the legitimacy of plea discussions. The report on the Prosecution Function supports that concept with the recommendation that the prosecutor make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea. Where the defendant is represented by counsel, of course, it is unprofessional conduct for the prosecutor to engage in plea discussions directly with the accused, except with counsel's approval. The standards apply the same high standard of honesty and fairness in plea discussions as applies at trial to both the prosecutor and defense counsel. In both cases, it is made unprofessional conduct for the lawyer knowingly to make false statements or representations in the course of plea discussions. The prosecutor is enjoined against implying a greater power to influence the disposition of a case than he possesses. Although it is unprofessional for a prosecutor to make a promise or commitment concerning the sentence, he may properly advise the defense what position he will take concerning disposition. Since the prosecutor's general obligation is to fulfill the commitments he has made, if he finds he is unable to fulfill an understanding pre-

viously agreed upon, he should give notice promptly to the defendant and cooperate in the withdrawal of the plea or any other steps necessary to restore the defendant to the position he was in before the understanding was reached or the plea made. If the prosecutor is aware that the accused persists in denying guilt or the factual basis for the plea, he may not properly participate in the disposition by a guilty plea without disclosure of the circumstances to the court. An important provision in the effort to make the exercise of the prosecutor's discretion more visible and intelligible to the defendant, lawyers, and the public is that whenever felony charges are dismissed by way of nolle prosequi or its equivalent the reasons for the action should be on the record.

Part Five of the report deals with the criminal trial. The standards take the position that, contrary to what has been the practice in some jurisdictions, control over the trial calendar should be vested in the court rather than the prosecutor.

Courtroom decorum is a subject of great concern as a result of events of recent years. In a section of the prosecution report which has its identical parallel in the defense report, the prosecutor is told that he should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum. When court is in session he should address the court, not opposing counsel, on all matters relating to the case. The standards provide that it is unprofessional conduct for a prosecutor or defense counsel to engage in behavior or tactics purposefully calculated to irritate or annoy the court or opposing counsel. Although both prosecutor and defense counsel should comply promptly with all orders and directives of the court, each has a duty to have the record reflect adverse rulings and a right to make respectful requests for reconsideration. Lawyers are urged to take leadership in developing, with the cooperation of the courts and the bar, a code of decorum and professional etiquette for courtroom conduct.

Another section deals with the selection of jurors. Since some prosecutors make it a practice to do background investigation of members of the jury panel, the prosecutor is urged to restrict himself to investigatory methods which will not harass or unduly embarrass potential jurors or invade their privacy. Whenever possible, he should restrict his investigation to records and other sources of information already in existence, rather than making additional investigation which may appear to the juror as a form of pressure upon him. Both prosecutors and defense counsel are urged to use the opportunity to question jurors on voir dire, in those jurisdictions where lawyers are permitted to

personally question jurors, solely to obtain information for the intelligent exercise of challenges. In his relations with the jury once it has been empanelled, the prosecutor should avoid the reality or appearance of any improper communications. After verdict, he should not make comments or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgment in future jury service.

The sections dealing with the prosecutor's handling of the trial itself, which have their parallel in the defense report, begin with the proposition that the prosecutor should confine his remarks in opening statement to evidence he intends to offer which he believes in good faith will be available and admissible and to a brief statement of the issues in the case. The standards make it unprofessional conduct to allude to evidence unless there is a good faith and reasonable basis for believing that it will be tendered and admitted in evidence, knowingly to offer false evidence, to permit any tangible evidence which would tend to prejudice fair consideration to be displayed until such time as a good faith tender of the evidence is made, to tender evidence which would tend to prejudice fair consideration unless there is a reasonable basis for its admission, or knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer it, ask legally objectionable questions, or make other impermissible comments or arguments.

It should be noted that here, as throughout these standards, conduct of this nature which is labeled unprofessional, and thus is subject to disciplinary sanction, is defined with regard to the knowledge or purpose of the prosecutor or defense counsel who engages in it. It is only the knowing violation of the prohibitions I have just mentioned which would constitute a violation.

In examining witnesses, the prosecutor is instructed to be fair, objective, and have regard for the dignity and legitimate privacy of the witness. Although the lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination, it may limit its scope or nature. A prosecutor should not call a witness in order to force that witness to claim a privilege in the presence of the jury and thereby impress the jury with the claim of privilege. Here, as in a number of other instances in the report, the standards call attention to the fact that some instances of this conduct may be unprofessional conduct because of provisions in the Code of Professional Responsibility.

In his argument to the jury the prosecutor may argue all reasonable inferences from evidence in the record. However, it is unprofessional conduct intentionally to misstate the evidence or mislead the jury as to the inferences it may draw; and it is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. The general objective of this portion of the standards is summarized in the provision that the prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence. The prosecutor is also enjoined against referring to matters outside the record, at trial or on appeal. The standards also call upon him not to make public comments critical of the verdict, whether rendered by judge or jury.

At sentencing, another context in which the prosecutor may exercise his discretion, the central theme of the prosecutor as an administrator of justice is again repeated: he should not make the severity of sentences the index of his effectiveness, but should seek to assure that a fair and informed judgment is made; and he should seek to avoid unfair sentence disparities. Ordinarily the prosecutor should refrain from making any specific recommendation as to the appropriate sentence, unless his recommendation is requested by the court or, as a result of plea discussions, he has agreed to make a recommendation. The main method by which the prosecutor can assist the court in sentencing is by disclosing any information in his files relevant to the sentence and assisting in remedying any incompleteness or inaccuracies in the pre-sentence report. The standards recommend that the prosecutor disclose to the defense and to the court, at or prior to the sentencing, all information in his files which is relevant to the sentencing issue.

This sketch of the contents of the prosecution standards is an indication of the ways in which these standards seek to reaffirm and even elevate the professionalism of the American prosecutor. Of necessity, this brief outline has omitted many of the qualifications and details of the standards. They are also elaborated in the commentary which accompanies them, which in addition to demonstrating their origin in research and experience, often gives examples of their application to particular problems.

The Standards on the Function of Defense Counsel, as has been mentioned, parallel the prosecution standards in so many respects, that they can be summarized more briefly. They begin by recognizing that the defense counsel is part of that tripartite entity consisting of the judge (and jury, where appropriate),

counsel for the prosecution, and counsel for the accused, which comprise a properly constituted court in a criminal case. As the basic duty of the prosecutor is to seek justice, the basic duty of the lawyer for the accused to the administration of justice is to serve as his counselor and advocate, with all the courage, devotion, learning and ability, consistent with the law, that he can bring. The standards reject the notion that the defense lawyer is obligated to execute all directives of the accused, regardless of their content. He is a professional representative of the accused, not his alter ego.

These very general propositions are given greater concreteness in the sections on general standards. The defense standards follow the prosecution standards in making it unprofessional conduct intentionally to misrepresent matters of fact or law to the court, intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance, or to accept employment for the purpose of delaying trial.

The subject of delay, of course, is one on which there is intense public concern. Defense counsel, as was the prosecutor in the prosecution report, is enjoined to avoid unnecessary delay in the disposition of cases. The standards also provide that he should not intentionally use procedural devices for delay for which there is no legitimate basis. Delay is often a function of overload. The prosecution standards seek to cope with this by recommending an adequate provision of personnel and facilities to prosecutors' offices. A similar approach is taken with respect to the staff and facilities of defender offices in the earlier report on "Providing Defense Services." With respect to privately retained defense counsel, the Defense Function report states that a lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for a speedy trial and the limits of his capacity to give each client effective representation.

Defense counsel, as was true in the earlier report on the prosecution, is urged to avoid personal publicity connected with a case before, during, and after trial, and to comply with the ABA standards on Fair Trial and Free Press.

One of the great needs of the administration of criminal justice is the widest possible participation in the defense of criminal cases by experienced trial lawyers. In view of this need, the standards provide that lawyers active in general trial practice should qualify themselves for participation in criminal cases. This can be done both by formal training and through experience as associate counsel to lawyers familiar with work of the crim-

inal courts. Once qualified, the lawyer should stand ready to undertake the defense of an accused without regard to public hostility toward the accused or the lawyer's personal distaste for the offense charged or the person of the defendant. If lawyers defending criminal cases are to have the public respect needed to carry out their functions with a high degree of professionalism, it is important that the bar not demean the trial of criminal cases as an occupation. The standards thus provide that qualified trial lawyers should not assert or announce a general unwillingness to appear in criminal cases and law firms should encourage partners and associates to appear in such cases.

The Advisory Committee grappled with the problem faced by many lawyers in seeking to cope with difficult ethical problems that arise during the course of their representation. It recognized that while the publication of this report and the establishment of the Code of Professional Responsibility go far to remove the uncertainty that many lawyers have suffered in seeking to discharge their functions on a high ethical plane, no general standards can ever deal with all of the fact situations which may confront a particular prosecutor or defense counsel. There is a need for somebody to whom the prosecutor or defense lawyer can turn for confidential advice when faced with a difficult problem in the discharge of his functions. The lawyer who works in a large prosecution office or a large law firm may find that opportunity with his colleagues, but for many prosecutors and defense lawyers there is no one to whom they can turn in such circumstances. Therefore, the report recommends that in every jurisdiction a special advisory body of lawyers be selected, on the basis of experience, integrity and standing at the trial bar, to serve as an advisory council on problems of professional conduct in criminal cases. This council should be organized so that it can provide assistance immediately to lawyers who need to consult it for advice. The communication between a lawyer and such a council should have the same privilege for protection of the client's confidences as exists between lawyer and client.

The introductory provisions of this report end with the reiteration of the basic theme of the role and function of defense counsel. Whether privately engaged, judicially appointed, or serving as part of a legal aide or defender system, the duties of a lawyer to his client are to represent his legitimate interests; and considerations of personal and professional advantage should not influence his advice or performance.

The next section of the report deals with Access to Counsel. It begins by providing that every jurisdiction should guarantee by statute or rule of court the right of an accused person to

prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose. Since for most people, access to a lawyer can be meaningful only if they know to whom they should turn, the report recommends that every jurisdiction have a referral service for criminal cases, maintaining a list of lawyers willing and qualified to undertake the defense of a criminal case, and so organized that it can provide prompt service at all times. On the other hand, it is important to avoid improper referrals. The standards make it unprofessional conduct for a lawyer to accept referrals by agreement or as a regular practice from law enforcement personnel, bondsmen, or court personnel. It is suggested that regulations and licensing requirements governing these non-lawyers should prohibit them from making any referrals. Instead, they should be required to direct the accused to the referral service or to the local bar association if no referral service exists.

The nature of the lawyer-client relationship is the subject of several standards. At the outset, the lawyer should seek to establish a relationship of trust and confidence with the accused. He should explain the necessity of full disclosure of the facts for an effective defense and should explain the obligation of confidentiality which makes privileged the accused's disclosure to him. The report recognizes that confidentiality is sometimes hindered by the lack of adequate facilities in jails, prisons, courthouses, and other places where accused persons must confer with counsel. To ensure essential privacy, the report recommends that adequate facilities be available for private discussions. Similarly, the personnel of jails, prisons, and custodial institutions should be prohibited by law or regulations from interfering with any communication or correspondence between a client and his lawyer relating to legal action arising out of the charges or incarceration or from examining any such correspondence.

In the initial interview, the lawyer should not seek to influence the direction of the client's disclosure to him but should probe for all legally relevant information. It is unprofessional conduct for the lawyer to suggest to the client that the client's lack of candor would afford the lawyer greater reign to take action favorable to the client.

On the subject of fees, after suggesting the same general criteria for the calculation of fees that appear in the Code of Professional Responsibility, the standards emphasize some problems that may be particularly acute in criminal cases. It is noted that it is unprofessional conduct for a lawyer to imply that the

compensation is for anything other than professional services rendered by him or by others for him; that it is unprofessional to charge an illegal or clearly excessive fee; that it is unprofessional to divide a fee with a non-lawyer, except in the special circumstances noted in the Code of Professional Responsibility; and that it is unprofessional in a criminal case to enter into an arrangement for a contingent fee. It is also made unprofessional conduct for the lawyer, prior to the conclusion of all aspects of the matter, to enter into any agreement or understanding with a client by which the lawyer acquires an interest in publication rights with respect to the subject matter of his employment.

The sections on Conflict of Interest begin with a general proposition, found also in the Code of Professional Responsibility, that at the earliest feasible opportunity defense counsel should disclose to the defendant any interest in the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him. The standards then explore some problems that are peculiar to criminal cases. They point out that the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants have given an informed consent to such multiple representation. Another concern which has been especially great in criminal cases arises in situations in which one person pays the fee for the representation of another. The standard alerts the defense counsel to the danger of a conflict of interest in this situation, notes that it is unprofessional conduct to accept compensation from someone other than the accused except with the accused's consent, and takes the position that it is unprofessional conduct to allow the other person to direct or regulate the lawyer's professional judgment in rendering legal services to the accused.

In furtherance of the lawyer's basic duty as defense counsel to protect his client's rights under the law, the defense lawyer is urged to take prompt action to inform the accused of his rights and to take all necessary action to vindicate such rights, considering all procedural steps which in good faith may be taken. This would include the full range of pre-trial motions, insofar as they are applicable to the case. The standards take the position, however, that a lawyer should not act as surety on a bail bond for the accused.

The lawyer's duty to act within the law is spelled out in more detail in a section on advice and service on anticipated unlawful conduct. The standard restates the traditional position that it is

a lawyer's duty to advise his client to comply with the law, though he may advise concerning its meaning, scope, and validity. Counselling or assisting a client in engaging in illegal conduct is recognized to be unprofessional conduct by the lawyer. The section spells out in detail the nature of lawyer's obligations with respect to the confidentiality of statements made by the client which reveal an intention to commit a crime. The defense lawyer may reveal the expressed intention of his client to commit a crime and the information necessary to prevent the crime from occurring, but he must reveal that information if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts; and the lawyer believes such action on his part is necessary to prevent it.

Other general duties which the lawyer has to his client are to keep the client informed of the progress of the case and of the preparation for it. The report also emphasizes that the duties of a lawyer to the accused are the same whether the lawyer is privately retained, appointed by the court, or serving in a legal aide or defender system.

The section of the report dealing with investigation and preparation by defense counsel begins by noting that it is the lawyer's duty to promptly investigate the circumstances of the case and to explore all avenues leading to relevant facts. The duty to investigate exists regardless of the accused's admissions or statements of facts constituting guilt. Even if the defendant has made such admissions of the lawyer, the lawyer should verify the facts by his own investigation as best he can.

The standard for defense counsel is identical to that for the prosecution in providing that it is unprofessional conduct for a lawyer knowingly to use illegal means to obtain evidence or to employ, instruct, or encourage others to do so. The standards on relations with prospective witnesses, relations with expert witnesses, and compliance with discovery procedure, also follow the prosecution standards as outlined earlier.

One very important respect in which the defense counsel finds himself in a position different from that of the prosecutor is that the defense counsel is acting for an individual client. One of the most difficult questions faced by defense counsel is the proper allocation of control of the case and direction of the litigation between the client and the lawyer. The standards seek to clarify this question. They suggest that, after properly informing himself on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the

case, including his estimate of the probable outcome. The standards take the position that it is unprofessional conduct for a lawyer intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his plea. The crucial section of this part of the report spells out that certain decisions relating to the conduct of the case are ultimately for the accused, and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are on what plea to enter, whether to waive a jury trial, and whether to testify in his own behalf. Other decisions, such as the decision on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. Because of the number of cases in which after trial there has been question about how these decisions were made, the lawyer is advised that if a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached. The record, of course, should be made in a manner which protects the confidentiality of the lawyer-client relation.

An important section deals with the question of the lawyer's participation in a plea of guilty where the accused denies his guilt. The standard takes the position that if the accused discloses to the lawyer facts which negate guilt and these facts are supported by the lawyer's independent investigation, but the accused persists in entering a plea of guilty, because he believes the risk of conviction is great and that he will suffer harsher penalty if convicted after trial, the lawyer may not properly participate in presenting the guilty plea, without disclosing these circumstances to the court.

The whole matter of disposition without trial is treated in detail in the standards, just as it is in the prosecution standards. The defense lawyer, like the prosecutor, is urged to explore the possibility of a diversion of the case from the criminal process through the use of other community agencies. When the lawyer's best judgment, under controlling law and on the basis of his investigation of the facts, is that a conviction is probable, he should advise the accused accordingly and seek his consent to engage in plea discussions with the prosecutor. Defense counsel should keep the accused advised of developments in plea discussions at all times, and all proposals made by the prosecutor should be communicated promptly to the accused. It is unpro-

fessional conduct for a lawyer knowingly to make false statements concerning the evidence in the course of plea discussions or to seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of any other client.

The sections of the Defense Report dealing with courtroom decorum, selection of jurors, and relations with the jury during trial and after, are identical to those applying to the prosecution, as are the standards on opening statement, presentation of evidence, and examination of witnesses.

A special problem of the defense, treated in a separate standard, is the defendant's own testimony. As we noted earlier, the decision to testify in his own behalf is one of those decisions that rests in the hands of the accused. The problem with which this section deals arises when the defendant has admitted to his lawyer facts which establish guilt; and the lawyer's independent investigation substantiates the accused's admissions, but the defendant nevertheless insists on taking the stand to testify. The standard takes the position that if this situation arises before trial, the lawyer must withdraw from the case if that is feasible. If withdrawal is not feasible or is not permitted by the court, or if the situation arises during the trial, it is unprofessional conduct for the lawyer to lend his aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel. This record should be made in some appropriate manner without revealing the fact to the court. The lawyer must then confine his examination of the defendant to identifying the witness as the accused and permit him to make his statement to the trier or triers of fact. The lawyer may not examine him in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief, and he may not recite or rely upon the false testimony in his closing argument. Although this situation, no doubt, arises rarely, it has posed grave difficulty to lawyers who have faced it, and it was thought best to treat it in this detail.

The Defense Report contains standards on argument to the jury similar to those in the Prosecution Report. It is unprofessional conduct, for example, for a lawyer to express his personal belief in his client's innocence or his personal belief in the truth or falsity of any testimony or evidence, or to attribute the crime to another person unless such an inference is warranted by the evidence. Because there has been some doubt in the past about the scope of the responsibility of trial counsel for post-trial mo-

tions, the standards make clear that the trial lawyer's responsibility includes presenting appropriate motions, after verdict and before sentence, to protect the defendant's rights.

Defense counsel has an important role in sentencing which too often in the past has been neglected. The standards suggest that the lawyer for the accused should be familiar with the sentencing alternatives available to the court and should try to learn its practices in exercising its sentencing discretion. Defense counsel should explain to his client the consequences of the various dispositions available to the court. In relation to the court, defense counsel's responsibility is to present any ground which will assist in reaching a proper disposition favorable to the accused. This may require that defense counsel be prepared to verify the information contained in a pre-sentence report and to supplement or challenge it if necessary. If there is no pre-sentence report or if it is not disclosed, he should submit all favorable information relevant to sentencing. In an appropriate case defense counsel should be prepared to suggest to the court a program of rehabilitation based on his exploration of employment, educational and other opportunities available in the community.

On appeal, the lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. The decision whether to appeal must be the defendant's own choice. Trial counsel should conduct the appeal unless new counsel is substituted by the defendant or the appropriate court. On appeal, counsel should not seek to withdraw from a case solely on the basis of his own determination that the appeal lacks merit.

With respect to post-conviction remedies, the standards take the position that appellate counsel should determine whether there is any ground for relief under such remedies and explain to the defendant the advantages and disadvantages of taking such action. Appellate counsel, however, is not obligated to represent the defendant in a post-conviction proceeding unless he has agreed to do so previously.

The final section of the Defense Report deals with challenges to the effectiveness of counsel. It provides that a lawyer who is satisfied, after investigation, that another lawyer who served in an earlier phase of the case did not provide effective assistance should not hestitate to seek relief for the defendant on that ground. On the other hand, if the lawyer's investigation satisfies him that the lawyer whose effective assistance is under challenge acted properly, he should so advise his client, and he may decline to proceed further. The lawyer whose conduct of a

criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation, even though this involves revealing matters which were given in confidence.

These standards, for the prosecution and for the defense, are the first effort on the part of the American Bar Association to define in detail true professionalism in the performance of these functions. Their implementation is a burden and a responsibility that rests upon each of us. Many of these standards must, to be effective, have their application in the hands of judges who insist that the lawyers trying cases before them meet these standards. More generally, there is a need to make members of the bar aware of the fact that these standards have been adopted and bring them to the attention of young lawyers and law students. The task of initial formulation of a set of standards for prosecutors and defense counsel is complete. The task of making those standards a working reality is a never-ending one to which we must dedicate ourselves.

CHALLENGE: SENTENCING, CORRECTION, REHABILITATION

by

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The joining of the topics of sentencing and post-conviction remedies for the purpose of discussion at this conference can be justified on the simple basis that at this stage of the criminal process this is the order in which the system sequentially works. However, it may also reflect the real concern of many judges that the sentencing function leads to post-conviction proceedings almost as a matter of course. My primary focus on both topics will be based on the treatment of these procedures by the American Bar Association's Standards for Criminal Justice approved by the House of Delegates of the American Bar Association.

Sentencing

I am sure most judges will agree that the sentencing of a convicted defendant is the most troublesome, unpleasant and frustrating judicial responsibility. The professional training of a judge is the same as that of all lawyers, and there is nothing in

that training which especially equips or prepares him for the sentencing function. In recent times, there has been increased opportunities for trial judges to obtain helpful training in this field through the programs of the National College of Trial Judges and the numerous sentencing institutes which have been sponsored by judicial conferences and individual courts. Nevertheless, in all candor, the grave responsibility of sentencing of offenders is dependent for the most part on guess work.

Since as many as 13 states leave the sentencing decision to the jury for some or all noncapital crimes, the ABA Standards prefer the judgment—or guess work, if you will—of professionally trained judges, and specifically recommend that the authority to determine the sentence should be vested in the trial judge and not in the jury. Standard 1.1, ABA Standards Relating to Sentencing Alternatives and Procedures.

At the very beginning of the consideration of the sentencing function, I believe it is important to emphasize the obvious—that a criminal sentence does not simply involve a commitment to a correctional institution, but includes, as well, the release of an offender on probation. The ABA has prepared a separate set of standards relating to probation which has been approved by the House of Delegates. The Probation Standards as well as the Standards Relating to Sentencing Alternatives and Procedures point to a basic preliminary step that must be taken before any sentence should be imposed. Of course, I am referring to the presentence investigation.

We are all too aware of the fact that the proper preparation and use of presentence investigations vary from court to court and from judge to judge. Yet if we are going to do anything beyond give lip service to the avowed goal of rehabilitation in the American criminal justice system, it is absolutely essential that a fair presentence investigation be made by competent personnel and that the judge use the information supplied by such an investigation in a sentence determination. There is really no disagreement on the part of anybody experienced in the criminal justice field that our heavy caseloads in the trial courts substantially involve recidivists who have gone through our "revolving door" of criminal justice, once, twice, or many times before. Of course this does not mean that a carefully thought out sentence based on a well prepared presentence investigation is a guarantee against recidivism; but it is an essential beginning step.

Obviously, when one talks about the sentencing of offenders based on professionally prepared presentence investigations, one has to recognize at once that the judge is not acting with optimum alternatives. On the contrary, he too often is at the mercy of what the community has provided for him by way of resources. These can be termed, on a nationwide basis, as outrageously inadequate. Thus, too often, the judge's choice must be made among the lesser of evils.

I can think of no more dramatic statement underscoring the problems faced by the sentencing judge than that made by the highest judicial officer in the land, Chief Justice Warren E. Burger, when he flatly announced to the American Bar Association at its annual meeting in Dallas, Texas, in 1968, that "our correctional system has failed." The Chief Justice called for the legal profession to join with the various disciplines in the behavioral sciences to place top priority in developing workable programs for rehabilitating offenders. The American Bar Association has responded with the creation of a prestigious special committee on corrections.

Although the crucial flaw in our criminal justice system, dramatically identified by the Chief Justice, cannot be quickly remedied, sentencing judges still must, today or tomorrow, improvise sentencing programs with the assistance of competent probation officers which meet the needs of the offender and the community.

It is in this context that I emphasize the ABA's position regarding the sentence of probation. Standard 1.3 of the Standards Relating to Probation recommends that probation should in fact be the sentence unless the sentencing court finds that (a) confinement is necessary to protect the public from further criminal activity by the offender; (b) the offender is in need of correctional treatment which can most effectively be provided if he is confined, or (c) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.

Standard 1.2 of the ABA Probation Standards stresses the desirability of a sentence of probation as follows:

> "Probation is a desirable disposition in appropriate cases because:
>
> (i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violation of law;
>
> (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;
>
> (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;

(iv) it greatly reduces the financial costs to the public treasury of an effective correctional system;

(v) it minimizes the impact of the conviction upon innocent dependents of the offender."

As stated earlier, the sentencing judge cannot intelligently make a determination of sentence, whether it be probation or commitment to a custodial institution, without a careful presentence investigation. Standard 2.3 of the ABA Standards Relating to Probation sets forth detailed guidelines concerning the content, scope and length of the presentence report. I urge your serious consideration of these guidelines.

In order to permit defense counsel and his client to have a fair opportunity to participate in the sentencing decision, the ABA Standards Relating to Sentencing Alternatives and Procedures recommend in Standard 4.4 that "the substance of all derogatory information which adversely affects his [the defendant's] interests and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf." The Standards provide for procedures to be followed in extraordinary cases where the court determines that information should be withheld from the defendant or his counsel.

In recent years an experiment has been undertaken in the Office of the Public Defender Service in Washington, D.C. which allows defense counsel to carry out his professional responsibilities to his client at the sentencing stage of the trial. Originally begun as a pilot project of the Institute of Criminal Law and Procedure of Georgetown University Law Center and later sponsored as a demonstration project by the Office of Economic Opportunity, this program has now been adopted as a regular program of the Public Defender Service by the District of Columbia and is supported by the appropriations Congress makes available to the Public Defender Service in the District of Columbia.

In brief, the program provides for a separate rehabilitative staff, supervised by a social worker, which develops presentence information about the defendant for use by the defense counsel at the time of sentence. Since this staff works closely with the defendant and defendant's family and associates from the very beginning of the criminal proceedings, it can frequently have access to information that would not be available to the probation officer. An added feature of this program is that the rehabilitative staff does not limit its functions to preparing a presentence report, but actively engages in working with available resources in the community to develop a rehabilitation plan (such as a job,

a training program, or social services for the family) which can be recommended to the court, should the court be disposed to impose a sentence of probation. If the defendant is not in custody pending and during his trial, the rehabilitation plan developed is immediately implemented, so that the court can receive a report at the time of sentence of the progress the defendant has made on the plan.

This program carries out specific recommendations made by the President's Commission on Law Enforcement and Administration of Justice with regard to the role of the defense lawyer at the time of sentence. It also implements the ABA Standards Relating to Providing Defense Services and the Standards Relating to the Defense Function, both of which standards have been approved by the House of Delegates of the ABA. Standard 1.5 of the Standards Relating to Providing Defense Services recommends that defender agencies be provided supporting services for this type of program. In the ABA Standards Relating to the Defense Function, Standard 8.1(b) dealing with the defense lawyer's role at the sentencing stage, recommends the following:

"Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused. If a presentence report or summary is made available to the defense lawyer, he should seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary. If there is no presentence report or if it is not disclosed, he should submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case be prepared to suggest a program of rehabilitation based on his exploration of employment, educational and other opportunities made available by community services."

It is significant to note that Chief Justice Warren E. Burger was the chairman of the advisory committee which drafted these standards relating to the Prosecution Function and the Defense Function through most of the life of this committee prior to his appointment as Chief Justice of the United States.

The Offender Rehabilitation Project of the Public Defender Service of the District of Columbia has been evaluated by the Institute of Criminal Law of Georgetown University Law Center under a grant from the National Institute of Justice of the Law Enforcement Assistance Administration. The full report of this evaluation is being reproduced by the Law Enforcement Assistance Administration for the purpose of widescale dissemination among criminal justice agencies. The evaluation made a limited

finding (based on a short period of follow-up) that the increased use of sentences of probation by judges relying on rehabilitation plans submitted by the project did contribute to a reduction in recidivism. The project also resulted in substantial savings in operating costs of custodial institutions in the District of Columbia.

Admittedly, there is little empirical data comparing the impact on rehabilitation of offenders of sentences to custodial institutions with sentences of probation. But there is general agreement on the part of criminal justice experts that community rehabilitation is more likely to succeed in ending criminal careers than incarceration of offenders in custodial institutions. However, the success of probation depends upon the qualifications and training of probation officers and the kind of supervision probation officers provide over probationers. The ABA Standards Relating to Probation offer specific guidelines on these crucial matters which should be reviewed by courts and correctional departments for the purpose of implementation.

Standard 6.5 of the Probation Standards recommends that the core staff of any probation department be made up of professionally educated and trained personnel, who have had graduate study in either social work, corrections, counseling, law, criminology, psychology, sociology, or related fields. In addition to study, probation officers require prior field work experience in recognized community or correctional agencies dealing with offenders or disadvantaged persons, or the equivalent of such experience.

The Probation Standards also recommend that it is desirable that the probation staff include individuals who may lack such professional qualifications but have backgrounds similar to those of the probationers themselves. There are a number of programs in the country today experimenting with the use of ex-offenders. Difficulties, of course, arise from time to time, when ex-offenders are employed in any rehabilitation program. But the advantages of using ex-offenders in rehabilitation programs far outweigh the risks involved. In addition, the Standards recommend that in appropriate cases citizen volunteers should be used to assist the probation officers.

The Standards highlight that continuing education and training of probation officers both in universities and through in-service training programs developed and carried out by a probation department itself are essential to maintain the qualifications and competence of individual probation officers in the difficult tasks related to supervising probationers.

In order to maintain the most effective supervision program, Standard 6.2 of the Probation Standards outlines recommendations regarding caseloads, relationships between probation officers and probationers, reporting practices, maintenance of records, and the need for satisfactory working conditions for probation officers with regard to office space, clerical assistance and conference facilities. The Probation Standards are also realistic in recognizing that recommendations calling for highly qualified and trained probation officers are dependent on the community decision to pay the kind of adequate salaries necessary to attract professional men and women of the quality we need to make probation work.

Apart from the specific subject of probation, the basic ABA guidelines helpful to judges at the time of sentencing are the Standards Relating to Sentencing Alternatives and Procedures. Some of these standards are not immediately directed at what judges can do, but are pointed to the need for legislative changes in the substantive criminal law which would provide a rational scheme for sentencing and which would allow judges a wider range of alternatives. Among these Standards dealing with substantive law, is the basic one recommending against a mandatory sentence of incarceration in a custodial institution. The Standards recognize limited exceptions to this principle, but only for the most serious offenses such as murder or treason. Although the Sentencing Standards recommend that "a sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary," the Standards acknowledge that prison sentences are often necessary and appropriate with regard to specific offenders.

With regard to sentences involving total confinement, the ABA Standards emphasize that "many sentences authorized by statute in this country, are, in comparison to other countries, and in terms of the needs of the public, excessively long for the vast majority of cases." Standard 2.5(b). Judges are reminded that maximum statutory prison sentences are undoubtedly the product of concern for protection against the most exceptional cases, most notably the particularly dangerous offender and the professional criminal. The Standards suggest that it would be more desirable for the penal code to differentiate explicitly between most offenders and such exceptional cases, by providing lower and more realistic sentences for the former and authorizing a special term for the latter.

In the exceptional cases where the Standards recognize that a legislature might want to provide for a special term, the Stand-

ards would place the outside limit for extreme cases at 25 years. The Standards also would place the matter of sentencing a particular offender to a normal term or to a special term in the discretion of the court, and that the court should exercise that discretion in favor of imposing a special term "only if application of the specified statutory criteria supports the conclusion and the defendant fits within the exceptional case, and if the court also concludes that commitment for such a special term is necessary in order to protect the public from further criminal conduct by the defendant." Standard 3.1, ABA Standards Relating to Sentencing Alternatives and Procedures.

Similarly, the Standards recommend that legislation dealing with habitual offenders should be revised, where necessary, to apply the same principles as outlined for the imposition of a special term maximum sentence and also to provide the following qualifications: (a) any increased term which can be imposed because of prior criminality should be related in severity to the sentence otherwise provided for the new offense; (b) the offender has previously been convicted of two felonies committed on different occasions and the present offense is a third felony committed on an occasion different from the first two; (c) less than five years have elapsed between the commission of the present offense and either the commission of the last prior felony or the offender's release, on parole, or otherwise, from a prison sentence or other commitment imposed as a result of a prior felony conviction, and (d) the offender was more than [21] years old at the time of the commission of the new offense. Standard 3.3, ABA Standards Relating to Sentencing Alternatives and Procedures.

Concerning the imposition of a minimum sentence, the ABA Standards Relating to Sentencing Alternatives and Procedures recommend the following in 3.2(c):

> "Minimum sentences are rarely appropriate, and should in all cases be reasonably short. Authority to impose a minimum term should be circumscribed by the following statutory limitations:
>
> (i) The legislature should specify for each of the categories of offenses designated pursuant to section 2.1(a) the highest minimum period of imprisonment which can be imposed;
>
> (ii) Minimum sentences as long as ten or fifteen years should be strictly confined to life sentences. Longer minimum sentences should not be authorized;

> (iii) In order to preserve the principle of indeterminancy, the court should not be authorized to impose a minimum sentence which exceeds one-third of the maximum sentence actually imposed;
>
> (iv) The court should not be authorized to impose a minimum sentence until a presentence report (sections 4.1–4.5), supplemented by a report of the examination of the defendant's mental, emotional and physical condition (section 4.6), has been obtained and considered;
>
> (v) The court should be directed to consider prior to the imposition of a minimum term whether making a non-binding recommendation to the parole authorities respecting when the offender should first be considered for parole will satisfy the factors which seem to call for a minimum term. Such a recommendation should be required to respect the limitations provided in subsections (ii) and (iii);
>
> (vi) Imposition of a minimum sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a minimum sentence only after a finding that confinement for a minimum term is necessary in order to protect the public from further criminal conduct by the defendant;
>
> (vii) As provided in section 6.2, the court should be authorized to reduce an imposed minimum sentence to time served upon motion of the corrections authorities made at any time."

Where an offender is convicted of multiple offenses, the ABA Standards prefer an appropriate concurrent sentence rather than the imposition of consecutive sentences. Standard 3.4(b) of the ABA Standards Relating to Sentencing Alternatives and Procedures states that "consecutive sentences are rarely appropriate," and recommends that consecutive sentences should be circumscribed by specific statutory limitations which would provide a reasonable maximum aggregate of consecutive terms. In addition, the Standards recommend that the court should not be authorized to impose a consecutive sentence until a presentence report, supplemented by a report of the examination of the defendant's mental, emotional and physical condition has been obtained and considered. Under the ABA Standards, consecutive sentences are not to be inferred by the court's silence on this issue, but require the court's affirmative designation, only after a finding that confinement for such a term is necessary in order to protect the public from further criminal conduct by the defendant.

The commentary to the Standards dealing with special term sentences, habitual offender sentences and consecutive sentences, all make clear that the draftsmen of the Standards were acting on the philosophy that lengthy prison sentences are, as a rule, counterproductive for the rehabilitation of offenders and lead more often to further serious criminal activity on the part of the offender when he is ultimately released. Put more dramatically, offenders incarcerated for such lengthy terms have been considered "time bombs" who, when freed (as they ultimately must be), will explode more violently to the danger of society because of our failure, in appropriate cases, to construct more realistic rehabilitative programs.

Concerning such programs, aside from probation, Standard 2.4 provides special guidelines to the courts concerning the use of "partial confinement" as an innovative effort to provide a program for rehabilitation. This Standard specifically states that "attention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other, and will permit the development of an individualized treatment program for each offender." Such partial confinement sentences would include work-release programs, confinement to certain special facilities designed to provide educational or other rehabilitative services, and other types of flexible arrangements which can be developed on behalf of a specific offender with the assistance of the probation officer or defense counsel.

Part V of the Standards Relating to Sentencing Alternatives and Procedures sets forth a number of helpful guidelines to sentencing judges regarding the procedures to be followed by judges at the time of sentence. The Standards prefer that in the absence of compelling reasons, the trial judge should impose the sentence. The Standards recommend that the sentencing proceeding take place as soon as practicable after the determination of guilt and the examination of any presentence reports, and that it should include full opportunity for the submission by the parties on the facts relevant to the sentence and arguments by defense counsel and the right of allocution by the defendant if he desires it. Basically this part of the Standards recommends to the sentencing judge the necessity to make a complete record of all of the considerations that went into the determination of sentence, including an explanation by the sentencing judge to the defendant of the sentence imposed and the reasons for the sentence. A verbatim record of the entire sentence proceedings

is recommended so that no issue can remain in doubt on appeal or in collateral proceedings which later may be filed.

The Standards approve appropriate open court proceedings within a reasonable time for the reduction or modification of a sentence based on new factors bearing on the sentence. However, the Standards would permit no increase of a term of imprisonment once it has been imposed.

Recognizing that the entire field of sentencing is complex and difficult for all judges, and that a need exists for the development of sentencing criteria in order to promote more uniformity in the sentencing of like offenders, the Standards recommend the creation of sentencing councils, the holding of sentencing institutes, other training programs, and the regular visitation by judges of facilities used by them in the sentencing of offenders.

It bears repeating at this point that the preference stated in the ABA Standards for sentences of probation and for partial confinement for the purpose of rehabilitating the offender relies heavily on the allocation of our community resources. Probation or partial confinement for a drug addict can be an exercise in futility in the absence of a community drug addict treatment and rehabilitation facility. Stabilizing an offender in the community through dignified and financially rewarding work cannot take place without the necessary employment counseling, job training, and the willingness of employers to give an offender a job. Judges may well hesitate to release mentally disordered offenders where there is no qualified out-patient facility available to provide an appropriate therapeutic program. More need not be said to illustrate the point.

Post-Conviction Remedies

In this discussion I will not be dealing with the usual appellate procedures of a criminal case, but rather with procedures dealing with collateral attack on the conviction such as habeas corpus proceedings. In the federal criminal procedure as well as in the procedures in many states, where at one time different forms of writs, depending upon the nature of the collateral attack being made, were required, today the system has been modernized to permit the court to deal with the challenge to a conviction through a single form of petition. Judges need not be told that in the past ten years post-conviction remedy proceedings have become a major part of judicial business. To a large extent this great volume of post-conviction remedy proceedings is a consequence of the decisions of the Supreme Court of the

United States relating to the Fourth, Fifth, and Sixth Amendments to the Constitution and their application to criminal defendants in state prosecutions.

We should frankly recognize that this response to Supreme Court decisions is supportive of the strength of our system of criminal justice rather than a symptom of weakness. Despite any disagreements one may have with the merits of any individual opinion, there is ample basis to conclude that the recent pressure on the courts by collateral attack petitions is the product of years of neglect in our state criminal justice systems. There have been sufficient studies to establish what has been well known by anybody familiar with the criminal justice system, that most of those who are prosecuted for crime in our state criminal courts are the poor, minority dwellers of the slum sections of our cities. For years many of them have been subjected to arrest, search, and interrogation by procedures that are now generally conceded by most law enforcement officials to fall below constitutional standards. More seriously, many poor defendants have been tried in the past with inadequate legal representation or with no representation at all. Putting aside the numerous frivolous claims, should we really wonder at the ground swell of petitions challenging the validity of many past convictions on the basis that they are violative of constitutional standards enunciated by the Supreme Court aimed at providing more equal justice under law?

It would be reassuring to think that once the past mistakes have been corrected there will be little need to concern ourselves with a heavy caseload of post-conviction remedy proceedings. However, judges and prosecutors well know that police, prosecutorial and court actions that occur today are under constant scrutiny by those convicted or their counsel in order to find a basis beyond the appellate stage to raise a collateral challenge to the conviction, whether the challenge has merit or not. Nothing, perhaps, has caused more public dismay than what seems to be our inability to bring finality to a criminal case.

The ABA Standards for Criminal Justice seek to provide a basis for achieving this finality by recommending Standards for post-conviction remedies. The purpose of these Standards and the general content of their recommendations are concisely set forth in the introduction of the Standards approved by the House of Delegates of the ABA. What follows is the pertinent verbatim part of this introduction beginning at page three.

A general principle underlying these Standards is that once an issue of fact or law has been finally determined, that adjudica-

tion ought to be final and binding. (Sections 6.1[a]). If this principle of finality is to be effective, it is essential that adequate records of prior proceedings be prepared and preserved. The main burden of these minimum Standards is to outline a system of post-conviction relief to deal with questions that have not been finally adjudicated in the proceedings leading to conviction and sentence. The Advisory Committee believes that it is preferable in pursuit of justice, and administratively most efficient, to develop a system that will treat post-conviction applications on their underlying merits rather than to create an elaborate overlay of procedural rules to attempt to dispose of them. In pursuit of that purpose, these Standards provide that:

(1) There should be a single, unitary post-conviction remedy so that applicants and courts need not be concerned with whether the proper form of relief has been sought. (Section 1.1).

(2) The scope of the remedy should be broad enough to encompass all grounds for attacking the validity of a conviction or sentence in a criminal case, including violation of the United States Constitution or state constitution, lack of jurisdiction over the person or subject matter, unlawful sentence, new evidence of material facts or new developments in legal Standards applicable to prior convictions (Section 2.1).

(3) The post-conviction remedy, unlike habeas corpus, should be available even though the applicant is not presently serving the sentence he seeks to challenge. (Section 2.3).

(4) No fixed period of limitations should be established, although courts should have discretion to refuse to consider state claims where the applicants have no demonstrable present need for relief. (Section 2.4).

(5) Measures should be taken to improve in-prison counselling so that persons incarcerated will have a better understanding of what is, and what is not, a basis for post-conviction relief. (Section 3.1).

(6) Efforts to effect final disposition of applications on the sufficiency of allegations should be restricted in favor of inquiries more likely to disclose the validity of claims. (Sections 4.2 and 4.3). At the same time, significant improvement in pleadings can be obtained through the development and use of standardized application forms or questionnaires. (Section 3.2).

(7) Discovery devices, specially adapted to the needs of post-conviction relief, should be available to bring to the surface the evidentiary bases for post-conviction claims. Controlled discovery will enable courts to avoid unnecessary and time-consuming

plenary hearings. Where such evidentiary hearings are required, the products of discovery will facilitate definition of and resolution of material factual questions. (Section 4.5).

(8) The pre-hearing conferences should be liberally utilized both to explore the possibility of summary dispositions without hearing and to narrow and focus such hearings as are needed. Such conferences can be held without the necessity of the applicant being present, a considerable saving in convenience and expense, not to say avoidance of risk. (Sections 4.5 and 4.6).

(9) Beyond the limited threshold inquiry appropriate for the pleadings, counsel should be provided for applicants who are unrepresented and without funds to pay for their own lawyers. If private attorneys are assigned to represent indigent applicants, they should be adequately compensated from public funds. (Section 4.4).

(10) Full and accurate records of proceedings, particularly plenary hearings, should be carefully compiled and retained, so that the evidentiary basis for findings of disputed fact will be available. Ordinary rules of evidence should be followed. (Section 4.6[c]).

(11) Dispositive orders should indicate explicitly the grounds for decision. Findings of fact should be carefully prepared to keep separate the trier's determinations of relevant historical events from legal characterization of those events. (Section 4.6[c]).

(12) Appellate review should be available as of right at the instance of either party. (Section 5.1). An opinion indicating the basis for decision on appeal ought to be filed in every case. (Section 5.3).

To prevent applicants from taking undue advantage of the unrestricted remedy afforded, pervading the Standards is the sanction for abuse of process, whereby a court may refuse to entertain an application on its merits. Thus, a defendant who deliberately and inexcusably fails to raise a known defense during the prosecution proceedings may be precluded from doing so at the post-conviction stage. (Section 6.1[c]). Similarly, an applicant who files seriatim more than one application for relief cannot be permitted intentionally to fragment his claims. (Section 6.2[b]). A related abuse is possible where an applicant wilfully withholds presentation of his application for relief until, by virtue of change in circumstances, it is no longer possible to mount a renewed prosecution against him. (Section 2.4[b]).

Another broad principle influencing these Standards is that post-conviction review ought to be considered as much as possi-

ble a part of the overall criminal process, not a separate and civil remedy. This is stated in section 1.2. The interrelationships between the post-conviction stage and the prosecution stage are governed by several Standards: the finality rule of section 6.1(a), the provision saving for use in re-prosecution of successful applicants those parts of prior proceedings not vitiated by the post-conviction judgment (section 6.2[c]), and the limitations on sentence that may be imposed on re-prosecution (section 6.3).

Administratively, the standards propose to vest original jurisdiction and venue in the same courts authorized to try criminal cases. (Section 14.). Ordinarily, therefore, a post-conviction application will be entertained in the court that entered the judgment of conviction. A liberal policy of change of venue is recommended in the interest of justice and for convenience of litigation. The standards do not exclude the original trial court judge from presiding in the post-conviction proceeding. There are advantages and disadvantages of the same judge presiding, as indicated in section 1.4(c). In some cases, the course of litigation will prevent the same judge from presiding. If the systematic preference is toward employing the same trial judge, a liberal policy of reassignment is recommended.

It is important to note that in these Standards every effort has been made to provide for the expeditious handling of post-conviction remedy procedures. Preliminary judicial screening of *pro se* applications can bring about the dismissal of cases of unmistakably frivolous allegations. In all other situations where petitioners have acted on their own, the Standards recommend the appointment of counsel so that the pleadings can be properly presented and the issues narrowed. Provision is made for summary disposition without plenary hearing, utilizing discovery techniques where there is no factual issue or where the case is submitted on an agreed statement of facts. Special guidelines are provided to protect against the abuse of post-conviction remedy procedures where the defendant has contrived to avoid raising significant issues at earlier proceedings or where he has waited to file his post-conviction remedy petition until he has assured himself that events have occurred which will prevent a further prosecution should he prevail on his petition. In addition, the Standards require the petitioner to bring all his complaints in one petition rather than stringing them out over a series of petitions. The failure to include an appropriate issue that he is aware of at the time he files his petition will preclude him from raising the issue in a subsequent petition. Of course the petitioner is not precluded from raising an issue in a

subsequent petition which was not available to him or reasonably known to him to exist at the time of his earlier petition.

It is believed that the recommendations dealing with the provision of counsel will go a long way in easing the burden on the court to review these collateral attacks on convictions. However another program is being demonstrated throughout the country which has already given indication that it can make a major contribution in reducing the number of petitions for post-conviction remedies filed on the courts and to assure the finality of judgments of conviction which have been properly obtained in accordance with law. This program involves the periodic visiting by lawyers to prisons for the purpose of holding interviews with prisoners who believe they may have a basis for complaining about their conviction. In some cases this program is sponsored by a public defender's office which assigns a lawyer on a regular basis to visit the prisons in the jurisdiction of the defender's office. These visits are announced in advance to the prisoners and appointments are made by those prisoners who wish to talk to the lawyer.

Often these programs are supplemented by the use of law students who receive valuable clinical education under the sponsorship of a practicing lawyer in a defender's office.

The Council for Legal Education for Professional Responsibility has recently made a number of small grants to law schools to sponsor this type of clinical program involving prison visiting under the supervision of a clinical law professor. Recently the Young Lawyers' Section of the American Bar Association has announced a major program of prison visiting where in addition to reviewing cases of prisoners who believe they are imprisoned on an illegal conviction, the young lawyers will also review complaints by prisoners raising internal prison grievance matters.

Reports from the various types of programs mentioned above indicate that periodic visits by lawyers to prisons for the purpose of reviewing prisoners' complaints and providing legal advice to prisoners concerning these complaints has substantially cut down the number of petitions collaterally attacking convictions. This has not been because the visiting lawyers have discouraged meritorious claims, but because these lawyers have won the confidence of the prisoners and have often been able to persuade a prisoner who believed he had a valid complaint, based usually on what another prisoner told him, that, in fact, he did not have a complaint which would hold up in court. That lawyers have been available at the prison to talk to prisoners who may have been serving their time with all kinds of imag-

ined injustices rankling in their breasts has served a remarkably useful, professional, and perhaps rehabilitative function.

On the other hand, in those cases where the visiting lawyer or law student, acting under the supervision of a lawyer, determines that the petitioner's case raises an issue which is not frivolous, but which is worthy of being presented to a court in a post-conviction remedy petition, the lawyer or student is better able to frame the petition to permit it to be more effectively and efficiently reviewed and disposed of by the court receiving the petition. This has saved the courts substantial time and has permitted the petitions presented to be resolved on concrete issues properly and professionally raised by lawyers on behalf of the petitioner.

This program should be an integral part of every public defender office and should have tied in with it the participation of local law schools. In a recent opinion of the Court of Appeals for the District of Columbia Circuit, Judge Harold Leventhal stressed the value of such programs and urged the participation of law schools in them (United States v. Simpson, 436 F.2d 162 [D.C. Cir. Oct. 1, 1970]).

Perhaps the better remedy for the lack of finality in criminal cases, highlighted by post-conviction remedy proceedings, is the competent investigation, preparation, and trial of the criminal case in the first place. Should all the Standards of the American Bar Association on criminal justice be implemented we would accomplish to a great extent our goal of finality. The Standards emphasize throughout the need for competent and professional performance of the police, the prosecutor, the defense lawyer and the judge. Further, the Standards stress the necessity of the making of an accurate in-court record of all proceedings which could later be the basis of a collateral attack. Perhaps the most significant Standards in this regard are those dealing with the function of the prosecutor and the function of the defense lawyer. A fair prosecution in which a defendant is competently and professionally represented by a defense lawyer will provide no basis, except in extraordinary cases, for a meritorious post-conviction petition.

Of course, a number of cases still will slip through that will require the careful attention of a judge on a post-conviction remedy petition, but these will be inconsequential in number compared to those which now face our courts. Furthermore, no Standards or procedures can prevent the frivolous appeal or post-conviction petitions, but it is believed that these can be handled summarily, either through competent counsel persuading

his client that he has no case to pursue, or through the court's expeditious disposition on the basis of the case presented by the petition.

It bears restatement: If a case is tried correctly the first time, before a fair and careful trial judge and by two competent adversaries who are fully aware of their professional responsibilities as prosecutor and defense counsel, there will be no need to relitigate the matter. Perhaps a word should be said about convictions obtained on pleas of guilty. A number of petitions for post-conviction remedies have been based on convictions following pleas of guilty. Again the ABA Standards deal extensively with this problem and recommend procedures for pleas of guilty which should prevent collateral attack in the future. Here again the Pleas of Guilty Standards emphasize the presence of counsel and the making of a complete record before the judge receiving the plea. Pleas of guilty frequently involve the matter of pretrial negotiations between the prosecutor and the defense lawyer. Pleas of Guilty Standards recommend that these negotiations be made a matter of record, and that the defendant acknowledge his understanding of the plea agreement prior to his entering the plea. In addition, the ABA Standards recommend that the court inquire concerning the factual basis of the plea and the defendant's voluntary action in making the plea. In addition, the Standards recommend that the court inform the defendant of the sentencing alternatives and the consequences of the defendant's plea, including a special term sentence that may be appropriate because of the defendant's prior criminal record and the nature of the present case, the existence of multiple offenses, or the fact that the defendant is a habitual offender. A careful record of a guilty plea proceeding of this kind may not prevent a later petition collaterally attacking the conviction, but it should not take the court long to dispose of it.

With regard to sentences involving pleas of guilty, the Standards Relating to Sentencing Alternatives and Procedures permit the trial court to allow sentencing concessions for a plea of guilty, but strongly urge the corollary principle: that a defendant has a right to plead not guilty and require the state to prove him guilty beyond a reasonable doubt. Under such circumstances, the Standards make it clear that the trial judge should not penalize the defendant who has chosen to go to trial and has been found guilty.

In this discussion, I've talked about two major areas in the criminal justice process, sentencing and post-conviction remedy proceedings. However, I again stress that the ABA Standards

for Criminal Justice are a comprehensive set of Standards beginning with the police function and covering every phase of the criminal case up to and including post-conviction remedy procedures. The Standards are interrelated and are aimed at providing an effective, speedy and fair disposition of criminal cases with the finality that is necessary to regain the confidence of the public in our American system of criminal justice.

*

Resolutions

Adopted by the National Conference
on the Judiciary
Williamsburg, Virginia
March 11–14, 1971

*

Resolution on a National Center for State Courts

WHEREAS, the President of the United States has stressed the need for the establishment of a national center for state courts to serve and assist such courts and to perform services for them similar to those performed by the Federal Judicial Center for the federal courts and has invited the conferees of the National Conference on the Judiciary to suggest ways and means of expediting the formation of such a center; and

WHEREAS, the Chief Justice of the United States has urged the state judiciary to establish such a national center for state courts and has requested this Conference to form a committee to implement the formation of such a center, and, to that end has offered his full support; and

WHEREAS, it is the consensus of this assemblage that such a center could serve and assist the state courts in improving the administration of justice nationally and could also assist the following organizations presently functioning in the field of judicial administration, to coordinate programs designed to achieve that purpose, such as:

American Bar Association
American Judicature Society
Institute of Judicial Administration
Conference of Chief Justices
National Council on Crime & Delinquency
National College of State Trial Judges.
National Conference of Metropolitan Court Judges
North American Judges Association
American Academy for Judicial Education
National Conference of Special Court Judges
National Conference of State Trial Judges
Appellate Judges' Conference
Section of Judicial Administration, ABA
Institute for Court Management
The several conferences of court administrators
National Conference of Juvenile Court Judges

NOW, THEREFORE, be it hereby resolved that this National Conference on the Judiciary endorses the formation of a national center for state courts and requests the Executive Council of the Conference of Chief Justices to carry this resolution into effect within a period not to exceed 90 days.

Other Resolutions

WHEREAS, the President of the United States and the Chief Justice of the United States have graced this Conference with their presence and have delivered notable addresses in aid of the progress of judicial administration; and

WHEREAS, the Conference stands indebted to these two national leaders for their interest and help;

NOW, THEREFORE, be it hereby resolved that this National Conference on the Judiciary extends its appreciation to President Nixon and Chief Justice Burger, and expresses to them its gratitude for their participation and assistance.

WHEREAS, the National Conference on the Judiciary, meeting in historic Williamsburg, Virginia, has been the beneficiary of the warmest hospitality from the officials of the Commonwealth who have welcomed the members of the Conference; and

WHEREAS, the National Conference stands indebted to the Commonwealth of Virginia for this warm welcome through its leaders and wishes to state its gratitude in appropriate fashion;

NOW, THEREFORE, be it hereby resolved that this National Conference on the Judiciary extends its heartiest thanks to his Excellency, the Governor, as well as to his gracious wife, and as well, also, to Justice Lawrence I'Anson, of the Supreme Court of Appeals of the Commonwealth, all of whom the Conference deem entitled to call upon any of the fifty states for reciprocal hospitality at any time.

WHEREAS, the National Conference has noted the excellent appearance and fine work of the Virginia State Troopers, under the direction of Sergeant Corvello, and is most appreciative of their friendly and courteous assistance;

NOW, THEREFORE, be it hereby resolved that this National Conference on the Judiciary thanks the men of the Virginia State Police who aided in making this meeting so memorable.

WHEREAS, the participation of the Law Enforcement Assistance Administration in the preparation for the National Conference on the Judiciary has been noteworthy, and its cooperation has played an important role in the good work of the Conference;

NOW, THEREFORE, be it hereby resolved that this National Conference on the Judiciary is of opinion that it stands indebted to the Administration for its massive and productive cooperation, and so notes in this Resolution of appreciation.

WHEREAS, the success of the National Conference on the Judiciary was directly dependent on the massive task of preparation performed by a devoted staff; and

WHEREAS, the exceedingly large amount of work which went into that preparation has been evident on every side;

NOW, THEREFORE, be it hereby resolved that this National Conference note in this fashion its sense of obligation to Messrs. Earl Childress, Ed Wood, Dr. William Swindler, Robert L. Masden, Stanley Lowe, and Judge Sharp, and Miss Alice O'Donnell, whose collaboration will allow us all to return home with pleasant memories of a productive and worthwhile meeting.

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CONSENSUS STATEMENT OF THE NATIONAL CONFERENCE ON THE JUDICIARY

General

A national judicial center for state courts, as proposed by the Chief Justice of the United States and endorsed by the President of the United States, is needed and should be established.

Civil and criminal matters which can be better handled outside of the judicial system should be eliminated from the jurisdiction of the courts.

The courts should make greater and more effective use of parajudicial personnel.

Court Structure and Administration

State courts should be organized into a unified judicial system financed by and acting under the authority of the state government, not units of local government.

They should be under the supervisory control of the supreme court of the state, whose chief justice should be the chief executive officer of the unified court system. He should be chosen by a method and for a term of office that will insure strong and effective judicial administration, and he should be expected to devote a significant portion of his time to administrative duties.

He should be assisted by a statewide court administrator, charged with responsibility for developing and operating a modern system of court management, including up-to-date budgeting techniques, personnel practices, and procedures for gathering, processing, storing and retrieving information.

The supreme court should possess power to promulgate rules of procedure and also rules of administration. It should possess power to delegate administrative duties to local judges and local court administrators, subject to broad state-wide standards established by the supreme court itself.

Judges of the unified court system should be available for tem-

porary assignment anywhere in the state, so that judicial manpower can be provided whenever and wherever needed.

The state legislature should recognize the fact that adequate funds are essential to provide the services that courts are required by statute and constitutional provision to perform; that they are further necessary to insure that judicial determinations are made on the merits, unaffected by extraneous considerations; and further necessary to protect the judicial branch of government against encroachment by the other coordinate branches of government.

Funding by the state legislature should be adequate to provide uniformly throughout the state the manpower, facilities and supporting services that are necessary to provide speedy and certain justice to all who come before the courts.

In addition to providing funds for judges, the legislature should recognize that funds are needed to provide the services of non-judicial personnel, including clerks, jury commissioners, probation and parole officers, reporters, prosecutors and lawyers representing indigents.

A state-wide personnel system based on merit for the recruitment appointment, training, promotion, tenure and removal of persons other than judges employed within the judicial system should be developed.

There should be only one level of trial court, divided into districts of manageable size. It should possess general jurisdiction, but be organized into specialized departments for the handling of particular kinds of litigation. Separate specialized courts should be abolished.

Only one appeal as of right should be allowed. It should lie only from a final decision of the trial court and should not be a trial de novo, but an appeal based on the record, which should be kept in all cases, utilizing modern recording devices.

If the appellate caseload is too great for a single court to adequately perform its tasks of correcting errors, developing law and supervising the courts below, serious consideration should be given to creating an intermediate appellate court.

After appeal to such a court, further review in the highest court should be allowed only if the reviewing court, in its discretion, deems the question presented to be of such nature as to lead to important constitutional or statutory interpretations, or to the resolution of a disagreement between the lower courts, or to the development of the common law.

Appellate processes should be re-examined to make certain that appeals are fair, speedy and inexpensive and that they merit the confidence of the public.

The Judiciary

Judges should be full-time officials, professionally trained in the law and aware of its traditional values, but, at the same time, sensitive to new intellectual and social developments, not isolated and insulated from the problems of the times. They should hold themselves apart from special interests and resist political or intellectual bias.

Judges should not be elected but appointed under a non-political merit system of selection. Laymen should participate in the nominating process, and care should be taken to give due consideration to the qualifications of minority group candidates, i. e., through the use of judicial nominating commissions.

Judges should be retained in office during good behavior until the age of retirement, but subject to removal for misconduct, physical or mental disability or incompetence by a fair, non-political process in which laymen and professionals participate. Every state should establish a commission to effect such a process.

They should be compensated on a scale which conforms with the dignity of the office rather than the size of the state, and which takes into account, by means of periodic reviews, such factors as the current existing costs of living and the compensation received by other law-trained people, including that received by judges in the federal system. Differences in compensation between different levels of the judiciary should be held to a minimum.

Judges and their dependents should be protected by non-contributory plans providing adequate pensions during retirement or disability and adequate death benefits, which pensions and benefits should recognize rises in the cost of living.

Judges should not be required to be lobbyists in their own behalf. Their just claims should be espoused by a group representing informed community opinion.

Judges should conduct themselves with dignity and accord the same respect to those who come before them as they expect to receive themselves. It is their responsibility to attempt to equalize all parties before the court regardless of the industry or skill of their lawyers, particularly when one of the parties is not represented by counsel.

Criminal Justice

Justice requires not only that the innocent go free but that the guilty be subjected to effective correctional and rehabilitative treatment.

Our present system of criminal justice is suffering from a severe case of deferred maintenance. It fails to guarantee either speedy trials or safe communities.

The foregoing statements, paraphrasing some of the thoughts expressed by the President and the Chief Justice of the United States, indicate an urgent need for a fundamental re-examination of our judicial system with a view to making it better able to accomplish the goals of criminal justice.

Such re-examination will be aided by the Standards of Criminal Justice promulgated by the American Bar Association. Each state should thoughtfully consider them with a view to adopting them in principal by legislation or rule of court. These carefully prepared standards illuminate many of the concepts hereafter mentioned.

Money bail should be replaced to a very large extent by the practice of releasing on their own recognizance as many persons as can reasonably be expected—in view

of their roots in the community —to appear for trial. Except in the case of a serious crime committed by an adult, a summons or citation should be used in lieu of arrest.

Preventive detention should be used only if there is danger that the accused will engage in violence or will not appear at the time of trial and only if trial can be guaranteed without delay.

Judges, not prosecutors, should control criminal dockets.

Judges, as well as lawyers, should conduct voir dire examinations of prospective jurors.

Prosecutors should be full-time officials, adequately compensated. They should receive special training which will enable them to exercise more wisely the broad discretion they possess in screening cases and accepting pleas.

Private defense counsel should be precluded from accepting retainers in more cases than they can properly handle.

Defense counsel for indigents should be adequately compensated.

Omnibus hearings should be used to screen cases which do not justify trial and to streamline those in which trial is necessary.

Plea bargaining, when the accused is properly represented and when adequate safeguards such as those recommended in the Standards of Criminal Justice are provided, is practical and proper where the court is assured through its own inquiry that the ultimate plea is a just one.

A speedy trial is as essential from the public's point of view as from the defendant's. If a speedy trial cannot be provided, the prosecution should be required to show cause why case should not be dismissed.

Sentencing should be done not by juries, but by judges. Although sentences should be carefully tailored to individual situations and based upon adequate pre-sentence reports, judges should, preferably through attendance at sentencing institutes, attempt to avoid disparate sentences as far as possible.

In most cases, probation under proper supervision is a better alternative than imprisonment.

Where imprisonment must be used it should be in a properly constructed, staffed and equipped institution, and should be directed toward rehabilitation of the defendant.

Frivolous appeals and frivolous post-conviction proceedings should be eliminated particularly appeals and proceedings which do no more than repeat arguments previously presented and rejected.

Annotated Bibliography

Compiled and Annotated
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I. COURTS

A. Court Systems

Selected items on appellate courts and trial courts of general, special or minor jurisdiction—their structure, jurisdiction, operation, inter-relationship. Not included are writings detailing state special legislative or other reports regarding proposed reforms or approaches used to cope with delays —i. e. no fault concepts, comparative negligence, arbitration, mandatory pretrial, and others. A selected number of state court surveys are included in I B.

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case always available; judge maintains this is impractical and suggests that concentration of trial bar and lack of trial ability are true causes of delay.

B. Selected Court Surveys

In spite of sharp limitations of time and budget, decision was made to include a sampling of court surveys. Only those which examine in depth the entire spectrum of a state's judicial system or review closely the work of a particular court were selected. The decision was difficult to make and inconsistencies are evident. Traffic court surveys conducted by the ABA Traffic Court Program and/or the Northwestern U. Traffic Institute are too numerous to list. Often these present full information on the entire court structure, e.g. Rep. on S. C. Traffic Courts, 1968, 300 p. Omitted also are the constitutional convention committee and commission studies, many of which include searching documents on the judicial system —with recommendations. Only a few governmental and official legislative reports have been listed. State and local court administrators' reports present valuable data on the structure, personnel and work of the courts as do judicial council and judicial conference reports and studies. For obvious reasons, these reports are not included here.

ARKANSAS

Arkansas Judicial Dept. Courts in Arkansas trying traffic cases; a survey of 1968 activities . . . [Little Rock] 1969. In cooperation with U. S. Dept. of Transportation. 177 p.

Arkansas Judiciary Commission. Report to 1965 Assembly [of a survey of the judicial system with statistical information regarding caseloads of the various courts . . . specifically outlining a proposed districting of judicial and chancery districts . . .] Little Rock, 1965. 2 v.

CALIFORNIA

San Francisco Council. Bay Area Social Planning Council. The San Francisco juvenile court: three phase report and recommendations of the study committee. San Francisco, 1968, 1969. various paging.

DELAWARE

Institute of Judicial Administration. The criminal courts of Delaware. May 1969. N Y, 1969. 230 p.

DISTRICT OF COLUMBIA

(The many studies and reports made by the *D. C. Committee on the Administration of Justice*, S. M. Kandell, Exec. Dir.; *Court Management Study*, D. J. Saari, Director; *National Advisory Committee*, E. G. Gallas, Director, are too numerous to list. The reports published by the U. S. Senate Committee on the District of Columbia include verbatim many of the reports). Consult—U. S. Senate Committee on the D. C., Court Management study, Part One: I. Report . . . to the Judicial Council of the D. C.; II. A program for improved management in the D. C. Wash., D.C., U.S. GPO, May, 1970. 179 p. Part Two: Reports . . . to the D. C. courts and related agencies . . . Wash., D.C., U.S. GPO. May 1970. 578 p. See symposium: The modernization of justice in the D. C., the Court Reform and Criminal Procedure Act of 1970. 20 Am U L Rev 1 (Special symposium issue Dec. 1970—Mar. 1971).

IDAHO

Idaho Legislative Council. Court modernization in Idaho; report to the Idaho legislature. Nov. 1966 [Boise, 1966] 253 p.

ILLINOIS (Chicago)

National Council on Crime and Delinquency. The Cook County Family (Juvenile) Court. Chicago, 1963. 219 p.

INDIANA

Barnes, A. J. and others. An analysis of the Indiana trial court system. [for the Indiana Judicial Study Commission]. Bloomington, Bureau of Business Research, Indiana U., 1968. 90 p. For further analysis of Indiana judicial system, see Indiana Judicial Study Commission biennial reports, 1966 and 1968. Indianapolis, 1967, 1969.

IOWA

Institute of Judicial Administration. The Supreme Court of Iowa; a study of its procedures and administration. N. Y., 1971. 93 p.

Iowa Legislative Court Study Commission. Report: Letter of transmittal. 1. Court structure; 2. Court administration; 3. Court re-districting; submitted to the 61st Gen. Assembly of Iowa, Jan. 4, 1965. [Des Moines, 1965] various paging.

KANSAS

Fenton, W. B. District courts in Kansas. Lawrence, U. of Kan., Governmental Research Center, 1964. [iv], 85 p.

Wetmore, R. Y. Justice of the peace in Kansas. Lawrence, U. of Kan., Governmental Research Center, 1960. 76 p.

MAINE

Institute of Judicial Administration. A district court for Maine; report to the Legislative Research Committee of Maine on the desirability of integrating activities of municipal courts and trial justices . . . N Y, 1961. 54 p.

Institute of Judicial Administration. The probate courts of Maine. Jan., 1969. N Y, 1969. 48 p.

Institute of Judicial Administration. The Supreme Judicial Court and the Superior Court of the State of Maine. Jan. 1971. N Y, 1971. 73 p. App. Feb. 1971.

Maine. University. Bureau of Public Administration. Report of a preliminary analysis of the feasibility of a probate district court system for Maine. May 10, 1967. Orono, 1967. 40 p. (Project report 67-1).

MARYLAND

Institute of Judicial Administration. Survey of the judicial system of Maryland. N. Y., 1967. 98 p.

Prince George's County. People's Court. Report and recommendations based upon an administrative study and systems analysis of the People's Court of Prince George's County, Maryland, for the Hon. Wm. H. McGrath, Chief Judge; staff report, Personnel Dept., Prince George's County, Md. 1968. various paging.

MASSACHUSETTS

Boston Lawyers' Committee for Civil Rights under Law. The quality of justice in the lower courts of metropolitan Boston; a report by the Lawyers' Committee . . . by S. R. Bing and S. S. Rosenfeld, to the Governor's Committee on Law Enforcement and the Administration of Justice. Boston, 1970. 149 p.

Mitre Corp. Mass. superior court management and administrative information system study by M. P. Galin and J. Mazzetti, for Hon. G. Joseph Tauro, Chief Justice, Superior Court. Boston, 1970. 148 p.

MICHIGAN

Virtue, M. B. Survey of metropolitan courts [in Michigan]; final report . . . prepared for the U of Mich Law School and the Section of Judicial Administration of the ABA. Ann Arbor, U of Mich Press [c1962] 523 p. (Mich. legal studies).

MISSISSIPPI

Mississippi Judiciary Commission. Report . . . 1970. Jackson, 1970. 182 p.

NEW HAMPSHIRE

New Hampshire. Administrative Committee on Municipal Courts. The municipal courts of New Hampshire; a survey of local justice in the Granite State by the Administrative Committee on Municipal Courts. July 1, 1961. Concord, 1961. 66 p.

NEW MEXICO

Institute of Judicial Administration. Expediting appeals; a study of the Supreme Court of New Mexico. N Y, 1963. 21 p.

NEW YORK

Economic Development Council of New York City. Organization study of the N Y C Criminal Court. N Y, 1970. 23 p.

Management Services Associates, Inc. Report concerning the management survey of the courts in Nassau County. N Y, 1964. various pagings.

New York City Rand Institute. The flow of arrested adult defendants through the Manhattan Criminal Court in 1968 and 1969, by John B. Jennings. Jan. 1971. N Y, 1971. 131 p.

New York City Rand Institute. The flow of defendants through the NYC Criminal Court in 1967, by John B. Jennings. Sept. 1970. N Y, 1970. 29 p.

New York (State) Judicial Conference. Classification survey: unified court system—New York City. Revised staff report to Thomas F. McCoy. Mar. 12, 1965. N Y, 1965. 2 pts in 1 v.

New York (State) Supreme Court. Appellate Div. A study of the family court of the State of New York within the City of New York, and related agencies and recom-

mendations concerning their administration. N Y, Offices of the Directors of Administration of the Courts [N Y State Supreme Court, Appellate Div.] First and Second Jud'l Dept., 1969. 131 p.

NORTH CAROLINA

North Carolina. Courts Commission. Reports to the General Assembly 1965, 1967, 1969 and 1971. Raleigh, No. Car. 4 v. "Design for modern efficient court organization was completed December 1970." (Attention is called to the many useful reports on the North Carolina courts made by Institute of Government at the University of North Carolina, preceding the constitutional reform)

OHIO

Ohio. Legislative Service Commission. Ohio Court system: its organization and capacity. Columbus, Ohio. 95 p. (Staff research rep. no. 47).

National Council on Crime and Delinquency. Court surveys for children and families; a survey of the Cuyahoga County, Ohio, Juvenile Court. N Y, 1968. various paging.

Order in the courts; a report on time span for disposition of litigation in six northeastern Ohio counties, submitted to Knight Foundation, Mar. 31, 1970. Akron, 1970. 203 p. (Prof. James G. France, Project Director)

OKLAHOMA

Whinery. Policy, legislation and organization of municipal courts in Oklahoma. Repr. from 18 Okla. L Rev (No. 1, Feb. 1965). 67 p.

PENNSYLVANIA

Allegheny (County). Court of Common Pleas. A personnel and administrative study for the Allegheny County Court of Common Pleas. [by the Pa. Economy League, Inc.] Pittsburgh, 1969. 2 v.

Institute of Judicial Administration. A report to the Allegheny County Bar Association on the court of common pleas, the county court, the criminal courts of Allegheny County. N Y, 1960. 60 p.

Levin, A. L. and Woolley, E. A., Dispatch and delay; a field study of judicial administration in Pennsylvania. Phila., Inst. of Legal Research, the Law School, U of Pa, 1961. 426 p.

Little, Arthur D., Inc. Congestion and delay in the court; preliminary report to the Greater Philadelphia Movement. N Y, Arthur D. Little, Inc., 1961. 30 p.

Pennsylvania Bar Association. Committee on Minor Judiciary. Minor courts in Pa., a study of the justices of the peace and aldermen, conducted by the Committee on Minor Judiciary of the Pa. Bar Assn. with the cooperation of the Instit. of Public Administration, the Pa. State U. . . . University Park, 1962. 94 p.

Pennsylvania. Dept. of Justice. Report of the Attorney General on the investigation of the magisterial system. Harrisburg, 1965. 515 p.

RHODE ISLAND

Institute of Judicial Administration. The Rhode Island courts. N Y, 1967. various pagings.

SOUTH CAROLINA

South Carolina. Committee to Make a Study of the South Carolina Constitution of 1895. Final report, June, 1969. Columbia, 1969. 147 p.

TENNESSEE

Overton, E. E., The judicial system and its administration in Tennessee; potentialities for reorganization and improvement—a comparative study. Knoxville, U of Tenn., Government Industry-Law Center, 1964. 88 p.

Sheridan, R. G. Urban justice: municipal courts in Tennessee. Knoxville, U. of Tenn., Bureau of Public Administration, 1964. 101 p.

Tennessee. Law Revision Commission. The judicial system of Tennessee; a background survey. Interim report, Mar. 1, 1966. Nashville, 1966. 75 p.

UNITED STATES

Auerbach Corp. Systems analysis of District Court clerk's office functions, submitted to Federal Judicial Center . . . Sept. 19, 1968. Phila., Auerbach Corp., 1968. 36 p.

Federal Judicial Center. Summary of a management and systems survey of the U. S. Courts; an overview study of five courts of appeal and five district courts. Washington, D. C., 1969. 55 p.

Klein, F. J., Survey of the U. S. District Court, W/D of Pa., for the Administrative Office of the U. S. Courts. Washington, 1960. 124 p.

Mitre Corp. Study of the federal judicial court system. Washington, D. C., 1968. 79 p.

Shafroth, W. Survey of the U. S. Court of Appeals. Washington, D. C., Administrative Office of the U. S. Courts, 1967. 110 p.; also in 42 FRD 243 (1967).

UTAH

Report to the Judiciary Committee of the Legislative Council of the State of Utah; study of the judicial system of the State of Utah conducted by the College of Law of the U of Utah . . . Salt Lake City, 1966. various paging.

VERMONT

Vermont. Legislative Council. Study of the judicial branch; Committee report on Proposal no. 5. [relating to judicial districts and establishment of a statewide district court]. Dec. 29, 1966. Montpelier, 1966. 37 p.

VIRGINIA

Virginia Court System Study Commission

The court system of Virginia; a report for the Virginia Court System Study Commission by the Virginia Court System Research Project. Tent. draft, Nov. 1969. Williamsburg, 1969. various paging. (Wm. F. Swindler, Project Dir.)

The court system of Virginia, 1969 report; a report for the Virginia Court System Study Commission prepared by the Virginia Court System Research Project. Virginia Consortium on Law Enforcement and Crime Prevention. Williamsburg, 1969. various paging.

Virginia's court structure; Report of the Virginia Court System Study Commission to the Governor and the General Assembly. Portsmouth, 1970. 23 p. (Chmn.: Hon. Lawrence W. I'Anson).

Virginia. Judicial Council. Report [on means of obtaining help for the Supreme Court of Appeals because of heavy dockets]. Richmond, 1969. 8 p. (Chmn.: Hon. Lawrence W. I'Anson).

WISCONSIN

Wisconsin. University. Institute of Governmental Affairs. Law enforcement and juvenile justice in Wisconsin. Madison, 1965. 93 p.

II. COURT ADMINISTRATION

Selected items dealing with the nature of court administration, administrative officers, state and trial; educational programs for court administrators; supervisory administrative powers of the Supreme Court and the administrative judge, financing of courts; courtroom facilities; not included are annual reports of state and trial court administrators and judicial councils and conferences. For selected court surveys, see I B.

AMERICAN Judicature Society. An analysis of courtroom design criteria. June 1967. Chicago, 1967. 34 p. illus. (Its rep. no. 10).

Analysis of needs of participants in trial to see, hear, perform tasks. Diagrams and floor plans.

AMERICAN Judicature Society. Court administrators, their functions, qualifications and salaries. July 1966. Chicago, 1967. 45 p. (Its rep. no. 17) Biblio. p. 45.

Includes excerpts from legislation.

AMERICAN Judicature Society. Court facilities checklist. Nov. 1968. Chicago, 1968. 12 leaves. (Its rep. no. 24).

This and the other reports on court buildings and courtrooms, also reprints from *Judicature*, available as Court House Packet from American Judicature Society.

AMERICAN Judicature Society. The quality of state judicial statistics. June 1969. Chicago, 1969. 13 p. (Its rep. no. 27). Bibliographies: p. 9-13. Table of state reports of judicial statistics. p. 6-8.

Report of survey attempting to identify factors making for good statistical collection and reporting.

BLAINE, Computer-based information systems can help urban court problems. 54 Judicature 149 (1970).

An IBM staff specialist lists purposes for which computers can be programmed in aid of courts.

BLAKE and POLANSKY. Computer streamlines caseload at Philadelphia Common Pleas Court. 53 Judicature 205 (1969).

The story of IBM computer in the civil and criminal divisions of the Common Pleas Court of Philadelphia told by the court administrator and the deputy court administrator; "backlog analyzed."

BOYLE, Judicial aspects of trial court administration: the quest for effective justice. 36 Bklyn L Rev 342 (1970).

Chief Judge, Circuit Court of Cook County, gives good coverage of his stewardship as administrative judge of the largest trial court in the country, where judges select other judges; liberal education on how to structure and administer a new statewide single trial court.

BROWNELL, A development program for court administration. 54 Judicature 99 (1970).

Details of how the Institute for Court Management was organized and its training program developed, told by the Chairman of its Board.

BURGER, Court administrators—where would we find them? 53 Judicature 108 (1969).

How poor court administration slows work of courts; gives specifics on how to set up training program for court executive and specialists.

CHARTRAND, Systems technology and judicial administration. 52 Judicature 194 (1968).

Information Sciences Specialist, Library of Congress reports on application of ADP devices and programs; shows potential for state and local use of ADP in courts; lists states where courts have installed some form of automative data processing.

CLARK, The Federal Judicial Center. 53 Judicature 99 (1969)

The then Director recounts the scientific research by the Center respecting calendaring which resulted in preference for individual calendaring; describes its investigation on use of data processing in particular courts; its weighted caseload study; its education and training programs.

COMPUTERS and other modern aids for multi-judge courts. 53 Judicature 229 (1969).

Remarks of W. B. Eldridge on Federal Judicial Center computer programs; Eldridge Adams on future of automation; Ernest C. Friesen on pitfalls to avoid in computerizing.

COMUS, Use of computers and other automated processes by the courts. Geneva, World Association of Judges and World Peace Through Law Center (1967) 41 p.

Bibliographical data.

DANAHER, Computer in court. 75 Case and Comment 26 (Jan/Feb 1970); reprinted 3 Law and Computer Technology 128 (1970).

Specific applications in Cook County Circuit Court: traffic ticket disposition, cash bond disposition, cases pending index, law division docket information.

DAVIDSON and DAVIDSON. Computerized court calendaring. 54 ABAJ 1097 (1968).

Describes computerized system that can be used to calendar cases in as many as 50 courts in the several counties of a metropolitan area; San Francisco Bay area project described.

ELLENBOGEN, Automation in the courts. 50 ABAJ 655 (1964).

Pittsburgh Common Pleas Court judge describes modern data processing procedures and equipment in use to provide necessary information for calendaring.

ERNST and ERNST. Report on the study and recommendations for record keeping and operating procedures in the offices of the clerks; California courts of appeal. Jud'l Coun. of State of Calif. May 1970. 97 p.

Pertinent practices in other states, recommendations and long-range planning.

FRIESEN, E., GALLAS, E. and GALLAS, E., Managing the courts. Indianapolis, Bobbs-Merrill, 1971.

GALLAS, Planning function of court administrator, 50 Judicature 268 (1967).

Conflicts which a court administrator must face and how to avoid or cope.

GREEN, Trials of an architect. 50 Judicature 232 (1967).

Architect who designed Marin County Hall of Justice recounts problems and determinations made.

HALLORAN, Judicial data centers. 52 Judicature 156 (1968).

Management analyst, Administrative Office of the U. S. Courts, indicates how use of computers aids in traffic courts, for jury management, court records, calendaring,

and many other areas; advocates county-wide or multi-county-wide Judicial Data Center and describes services available from such center. See App. E of The Task Force Report, The Courts, U. S. President's Commission on Law Enforcement and the Administration of Justice, at 163, for Mr. Halloran's report re: modernized court administration.

HARBINGER, Courtroom-in-the round. 54 Judicature 68 (1970).

A modern, untraditional courtroom, described with diagrams by special assistant to Bernard Segal, then ABA president.

HIGGINBOTHAM and FREED, Trial backlog and computer analysis. 44 FRD 104 (1968).

Federal district court judge and lawyer explain how automated data retrieval has been used in E.D.Pa., effect on the court and lawyers.

INSTITUTE of Judicial Administration. Administrative and supervisory powers granted to chief justices of courts of last resort. [New York] 1967, 1970. Unpaged, unpublished, available on request.

State-by-state constitutional and statutory provisions.

INSTITUTE of Judicial Administration. Calendar status study 1952-1970. New York, IJA.

Annual published report giving delay in auto personal injury jury cases from inception of case to trial, and from notice of readiness to trial in 100 metropolitan trial courts of general jurisdiction.

INSTITUTE of Judicial Administration. State and local financing of the courts. (Tent. report, Apr. 1969) New York, IJA. 57 p. + 50 p. tables and appendices.

Illustrates distribution of cost between state and local government, demonstrates small percentage of budget for judiciary. Tables give specifics; appendices report cases involving litigation between judges and local boards on budgetary issues, and includes legal memoranda and briefs.

JOHNEN, Data processing in the Circuit Court of Cook County. 53 Judicature 291 (1969).

Court's legal system analyst gives description of the processing used in traffic, civil, criminal and juvenile divisions.

KANDELL, Methodology of the D. C. Court Management Study. 54 Judicature 245 (1970).

KLEIN, Position of trial court administrator in the states. 50 Judicature 278 (1967).

A survey of qualifications, duties, salary, method of selection of these officers; where employed.

KLEPS, Computers and court management. 53 Judicature 322 (1969).

Administrative director of California courts illustrates specific cases where computers have been put to use: in traffic matters, for jury lists, and other areas; updates to 1969 the 1967 survey of use of computers in California courts reported in 1967 Calif. Jud'l Coun. Rep. at 173; warns against human factors which may make computer calculations unworkable.

LAWSON, H. Judicial system finance and administration. Report of Joint Budget Committee prepared by the judicial administrator for the 46th Colorado General Assembly. Denver, Jan. 1967. 140 p.

An examination of how the state can assume virtually all judicial system costs. Colorado now has a state-financed judicial budget.

MCCONNELL, E. B., a blueprint for the New Jersey judicial system. Newark, Jud'l Conf. of N. J., May 23, 1969. 46 p. (available from Am. Jud Soc'y).

Included because this distinguished nationally-known court administrator, in enumerating and speaking to N. J.'s pressing judicial problems, is treading ground familiar to all courts: court personnel, court facilities, court calendars, court financing, court managing; professional personnel needed and the many changing functions of the courts are critically examined; urges speedy action.

MONAGHAN, A new courtroom arrangement, 47 J Am Jud Soc 209 (1964).

Assisted by U. S. District Judge Boldt, news reporter narrates advantages of *renovated* federal courtroom, S. D. Washington; photos.

NAVARRO and TAYLOR. Application of systems analysis to aid in efficient administration of justice. 51 Judicature 47 (1967).

Senior staff members of Institute for Defense Analyses summarize findings on problems of delay in courts based on systems analyses; see full report in Task Force Report on Science and Technology for the President's Commission on Law Enforcement and the Administration of Justice (1967).

PHILLIPS, S. W., Calendaring in U. S. Court of Appeals, Richmond, Va., U.S.C.A. (4th Cir) 1970. 60 p.

Tabulaiton, with constructive comment, by clerk of U.S.C.A. 4th cir. of calendaring practies in courts of appeals.

PROUT, Computerizing, the friend of the court. 48 Mich S B J 12 (Feb 1969)

How automation was established in Oakland County, to process 15,000 divorce cases as to support payments and to make periodic requested reports on disbursements, delinquency status and tax statements for alimony payors.

REYNOLDS, Alaska's ten years of electronic reporting. 70 ABAJ 1080 (1970).

Supreme Court rule adopted in 1959 made electronic recording exclusive method of preserving record of proceedings in all courts. Experience demonstrates it is superior to traditional court reporter and is more economical and dependable.

ROBERTS. Towards a modern public record system. 39 Penn B A Q 406 (1968).

Penn. Supreme Court justice explains legislation and procedures taken to establish a county records retention program, including early court records.

SAARI, Court management and the administration of justice. 6 Trial 41 (Feb/Mar 1970).

Describes tasks of court management; how to organize and re-organize departments of court; predicts growth of court executive office in trial courts and increasing court surveys and analyses.

SAARI, Management and the courts: perplexing nexus. In symposium, The modernization of justice in the District of Columbia. 20 Am U L Rev 601 (Special symposium issue, Part I, Dec. 1970—Mr. 1971).

Enumerates with comment elements of a management model for a court system and their application in authoritarian, as compared to a participatory, court system.

SAARI, Open doors to justice—an overview of financing justice in America. 50 Judicature 296 (1967).

Then a trial court administrator, author reviews untenable position of the judiciary in the budget picture, suggests changes.

SOBEL, Lawyers, judges and architects—a task force on courtroom facilities. 53 Judicature 30 (1969).

Chairman of Amer. Instit. of Architects' Committee on Courtroom Design and Facilities describes combined study with A B A Committee headed by Judge Fort; aims, study of judicial functions; final report in process.

SULLIVAN, Court record by video tape experiment—a success. 50 Chi B. Rec 336 (1969); 41 N Y S B J 695 (1969).

Analysis by Chicago circuit court judge of successful use of video tape recording in court proceedings; weighs video tape versus reporter, court decorum, publicity and cost.

SUTRO, Can the courts find improvement through science? 45 FRD 77 (1968).

Federal judge lauds creation of Federal Judicial Center; describes its scientific research projects and plans.

TORPY, A training program for court administrators. 53 Judicature 210 (1969).

Assistant to the dean of Denver College of Law gives data on combined program of College of Law and Business Administration to train court administrators.

TYDINGS, Temporary judicial assignments; an invaluable tool for effective judicial administration. 3 U. Richmond L Rev 264 (1969).

UHLENHOPP, Better management of the judicial system. 5 Trial Judges J. 3 (Jan. 1966).

Internal management calls for a chief judge of each trial court or circuit; chief judge of trial court should not be elected or chosen for seniority or rotation; should be appointed by the chief justice because of particular administrative ability.

U. S. Administrative Office of the U. S. Courts. A factual study of the Office of the Clerk of the U. S. District Court for the District of N. J. Washington, D. C. various pagings.

U. S. Administrative Office of the U. S. Courts. Guide to the administrative organization of the U. S. courts. [rev. ed. 1966] [Washington, D. C., 1966] Looseleaf.

U. S. Dept. of Commerce. National Bureau of Standards. Compilation and use of criminal court data in relation to pretrial release of defendants. Pilot study, Washington, D. C. U.S. G P O, Aug. 1970. 236 p. (N B S Technical Note 535).

Analyzes data presently collected in a number of states when allowing defendants pretrial release; recommendations to facilitate accumulation of accurate information readily exchangeable through the jurisdiction of the criminal justice system.

U. S. District Court. California (Central Dist.) Study of the Clerk's Office, prepared by Burton H. Marcus and others. Los Angeles, Research Instit. for Business and Economics, U of So Calif, 1967. 122 p.

U. S. District Court. Illinois (Northern District). Management survey, Clerk's Office. Washington, D. C., 1960. 80 p.

U. S. General Services Administration. Paperwork management survey, Office of Clerk of Court [U. S. District Court] Eastern District of Louisiana, Sept. 1967. Ft. Worth, General Services Administration, Region 7, 1967. various pagings.

Vanderbilt, The application of sound business principles to judicial administration. In improving the administration of justice—two decades of development. 26 U Cin L Rev 155 (1957) at 201.

A classic. Supreme Court provides rule to enable Chief Justice to appoint local administrative judge whose role and duties are described; duties of Chief Justice as administrative head of the courts; weekly work reports; responsibility of local judicial administrators to improve efficiency of the courts. Many details of work of the N. J. Administrative Office of the Courts.

Van der Ryn, An analysis of courtroom design criteria, 52 Judicature 150 (1968).

Associate professor of architecture at Berkeley reports findings on relationship between courtroom function and courtroom design; illustrations and charts.

Wagner, Jury selection by computer. 2 Law and Computer Technology 6 (Oct. 1969).

Former court administrator describes use of punch cards and card sorting machines for jury selection in the courts in Union County, N. J.

Waugh, Court administration. 6 Trial Judges J 28 (July 1967).

Urges centralized administration with Chief Justice as head.

Whittaker and McDermott. Computer technology in an appellate court. 54 Judicature 13 (1970).

USCA (10th Cir) clerk (administrative counsel to judicial panel on multi-district litigation, also aerospace engineer) describes project to determine feasibility of using computer techniques to increase efficiency in calendar control; programming is detailed; conclusion is that use of time computer for trial and appellate courts accomplishes substantial improvement.

III. JUDGES

Selected items regarding qualifications, selection, tenure, compensation, retirement and removal; conduct, ethics, continuing judicial education; contempt powers of trial judge in face of disruption.

AINSWORTH, Judicial ethics—the federal judiciary takes an historic step forward. 54 Judicature 104 (1970).

USCA 5th Cir judge summarizes developments re federal judges' judicial ethics canons since the Fortas resignation.

AMERICAN Bar Association. Special Committee on Standards of Judicial Conduct. Interim report. June 1970. Chicago, 1970. 11 p. Hon. Roger Traynor, Chmn.

Proposed standards.

AMERICAN College of Trial Lawyers. Disruption of the judicial process. Report and recommendations. New York, IJA, 1970. 23 p.

Lawyers' obligations; judge's obligations, his contempt powers; proposed sanctions against lawyers, litigants and spectators.

AMERICAN Judicature Society. Canons of judicial ethics. June 1969. Chicago, 1969. 24 p. Bibliography: p. 18-20.

Adoption of ABA canons, with variations therefrom, in the states. Includes text of ABA canons.

AMERICAN Judicature Society. Comparative chart—number and tenure of major trial and appellate judges. May 1968. Chicago, 1968. 2 p. (Its report no. 9)

AMERICAN Judicature Society. The extent of adoption of the non-partisan appointive-elective plan for the selection of judges. June 1969. Chicago, 1969. 4 p. (Its report no. 18)

Summary chart; citations.

AMERICAN Judicature Society. Judicial discipline and removal. August 1969. Chicago, 1969. 51 p. (Its report no. 5). Bibliography: p. 5-12.

Summary chart; separate charts, state-by-state; impeachment, address, recall, commission plan and involuntary retirement commissions.

AMERICAN Judicature Society. The judicial rule-making power in state court systems. June 1970. Chicago, 1970. 21 p. (Its report no. 13). Bibliography: p. 14-21.

State-by-state: body charged with procedural rule-making citations.

AMERICAN Judicature Society. Judicial salary and retirement plans in the U. S. 54 Judicature 184 (1970).

Introduction by Hon. Elmo Hunter, Pres. Entire issue is devoted to current statutory provisions regarding salaries and retirement plans of judges in all the states; rank order is charted; judicial salaries in selected courts of limited jurisdiction included.

AMERICAN Judicature Society. Judicial selection and tenure. August 1970. Chicago, 1970. 41 p. (Its report no. 7). Bibliography: p. 31-41.

Methods used in each state with citation. Merit plan chart: p. 3-7.

AMERICAN Judicature Society. Ratio of state and lawyer populations to number of trial court judges. Feb. 1966. Chicago, 1967. 4 p. (Its report no. 15).

AMERICAN Judicature Society. Temporary judges and quasi-judicial personnel in compulsory proceedings. June 1969. Chicago, 1969. 8 p. (Its rep. no. 26). Bibliography: p. 8.

Statutory citations for judges pro tem, compulsory reference; sample statutes.

AMERICAN Judicature Society. Texts of provisions for merit plans of judicial selection. June 1968. Chicago, 1968. 85 p. (Its rep. no. 3). Table: structure and function of nominating commissioners, p. 74-83.

BRAITHWAITE, Judicial misconduct and the evolution of Illinois Courts Commission 1964-1970. 1969 U of Ill Law Forum 442.

Recent judicial misconduct in Illinois detailed; course of action taken by Illinois Supreme Court; new rules and standards for judicial ethics.

BRAITHWAITE, W., Removal and retirement of judges in Missouri; a field study. ABA Foundation, research rep. no. 5.

Chicago, 1969. 57 p. Reprinted from 1968 Wash U L Q (no. 3).

Describes cases of judicial misconduct, demonstrating lack of procedural regularity in treating with the problems; system is ineffective and costly; points to California Commission on Judicial Qualifications.

Burger, School for judges. 33 FRD 139 (1963).

Institute of Judicial Administration's appellate judges seminars, first continuing education for appellate judges; evaluation by member of seminars' faculty (now Chief Justice).

California. Judicial Council. Weighted caseloads [in Courts of Appeal]. 1967 Ann. Rep. 184.

Formula for precise measure of workloads of the Courts of Appeal gives recognition to fact that various types of cases appealed require varying amounts of judicial time.

California. Judicial Council. Weighted caseloads [in Superior Courts] 1969 Ann. Rep. 140.

Formula to determine workload of California judges (trial court of general jurisdiction), giving specific weight to cases according to judicial time spent on them.

Chase, Federal judges; the appointing process. 51 Minn L Rev 185 (1966).

Political scientist reviews factors involved in appointing federal judges; pressures and balance of power; impact of Senatorial Judiciary Committee, White House staff, ABA, FBI, Atty. General, and others.

Dahl, R. C. and Bolden, C. E., The American judge—a bibliography. Vienna, Va. Coiner Publications, 1968. 330 p.

Judges—American and foreign—qualifications, selection, removal, compensation, duties, performance, independence, criticism; biographies. Helpful, albeit not annotated.

Dobbs, Contempt of court: a survey. 56 Corn L Rev 183 (1971).

Law professor's 101 p. study on acts constituting contempt, mode of trial, jury trial, persons subject, sanctions. Generously footnoted to articles and cases.

Fairbanks, American Academy of Judicial Education. 54 Judicature 226 (1970).

Description of first (two week) session of school for judges of courts of limited jurisdiction, held at Univ. of Alabama, August 1970.

Fairbanks, Educating judges for courts of the poor. 6 Trial 43 (Apr/May 1970).

Chief judge, Peoples Court, Md. reviews judicial education programs; gives details of North American Judges Association's plans and establishment of American Academy of Judicial Education to provide schooling for lower court judges on a national basis.

Frankel, Judicial ethics and discipline for the 1970's. 54 Judicature 18 (1970).

Description of California's Commission; factors bearing on effectiveness.

Flaum and Thompson. The case of the disruptive defendant: *Illinois* v. *Allen*. 61 J Crim L 327 (1970).

Analysis of case and Supreme Court's holding; discusses former cases in point to prove "long recognized and respected precedent did exist."

Freund, Contempt of court. 1 Human Rights 4 (Aug. 1970).

Types of contempt, role of judges and limitation on their powers.

Friesen. The judicial seminar: foundation of judicial education. 46 J Am Jud Soc'y 22 (1962).

Enlightening report on seminars for trial judges under Project Effective Justice.

Goodell. Judicial participation in charitable activities. 25 Rec (Assn Bar City of N Y) 648 (1970).

N. Y. Civil Court judge reviews Canon 25 and the entire question as to whether it is appropriate for judges to participate in charitable activities; if so, the extent.

Grossman, J. B. Lawyers and judges: the ABA and the politics of judicial selection. New York, Wiley, 1965. 228 p.

Historical recital of selection of federal judges and role of ABA.

GUTMAN. An experiment in judicial education. 52 Judicature 366 (1969).

Unique all-year continuing program of the N Y Academy for the Judiciary described by its Dean.

HUGHES, In defense of disruption. 30 Antioch Rev. 171 (1970).

Law professor indicates flaws in judicial system which may warrant refusal on part of some to cooperate; makes specific suggestions to alleviate "real moral indignation . . . which is a reaction to real inequities and iniquities."

HUNTER. The judicial nominating commission. 52 Judicature 370 (1969).

A Missourian, now U. S. District Court judge and President of Am. Jud. Soc'y, experienced in work of judicial nominating commissions gives words of advice and caution to Nebraska Judicial Nominating Commissioners.

HUNTER, Twenty-five years under the merit selection plan. 39 Fla B J 22 (1965).

Details Missouri story and Missouri plan which has found favor in eyes of laymen and lawyers.

ILLINOIS. Supreme Court. Report and recommendations of the Illinois Supreme Court Committee on Judicial Ethics. Dec. 4, 1969. [Champaign, 1969] 16 leaves. John E. Cribbet, Chmn.

See Standards adopted Jan. 30, 1970.

ILLINOIS. Supreme Court. Standards of judicial conduct and rules for the regulation of judicial conduct. Rules 61-68, adopted 1-30-70.

Rules prohibit specific activities. Financial statements required.

INSTITUTE of Judicial Administration. N. Y. Academy of the Judiciary. Report of the Dean, 1968-1970. New York, IJA, 1968-1970. 3 v. Daniel Gutman, Dean.

Pilot project gave all new NYC judges orientation and continuing seminars throughout the year.

INSTITUTE of Judicial Administration. Judicial education in the United States: a survey. New York, 1965. 276 p.

Education and experience of American judges; results of survey; comparative data on selection and education. Specific seminars and programs described.

JONES. The trial judge; role analysis and profile. In the courts, the public and the law explosion. (Jones ed. 1966) at 124.

Importance of trial courts in adjudication; strains and demands; who is qualified.

KALVEN, Confrontation comes to the courtroom. 1 Human Rights 10 (Aug. 1970).

Some thoughts on political aspects of Chicago conspiracy trial; present judicial system is not geared for political debate; compares Scopes trial during which court became forum for discussion.

KARLEN, Judicial education. 52 ABAJ 1049 (1966).

Reviews growth of movement, national and local, suggests future programs.

LAMB, The judge's role in a changing society. 53 Judicature 140 (1969).

Law school dean presents changing concepts which give judges new role and responsibilities: "to adjust the law to mankind's new aspirations", problems of waste, pollution, housing, new causes of action—and survival.

LEFLAR, The appellate judges seminars at New York University. 9 J Legal Ed 359 (1957).

How innovated, structured and administered; curriculum, participants, faculty.

LEFLAR. The appellate judges seminar. 21 Ark L Rev and B Assn J 190 (1967).

Ten years later. Curriculum, methods, readings, participants, evaluation.

MUELLER and GRIFFITHS. Judicial fitness; a comparative study. 52 Judicature 199 (1968) and 232 (1969).

Originally a memorandum to the U. S. Senate 1966, this report of the Director of the Comparative Criminal Law Project, NYU School of Law, and his research assistant, is enlightening as to education of judges in civil law countries and how they are retired or removed; evaluates these judges' performance; authors prefer continental education and method of judicial selection.

MURPHY, National Conference of Special Court Judges. 9 Trial Judges J 21 (Jan. 1970).

Judge describes organization to further training and education. See also, National Conference created for judges of special courts. 53 Judicature 170 (1969).

NATIONAL Conference of State Trial Judges. The state trial judges' book. 2d ed. Published under the sponsorship of the Nat'l Conf. of State Trial Judges. St. Paul, West, 1969. 407 p.

Guide for new judges: behavior, conduct of trial, calendar control, many aspects of judicial duties.

NATIONAL Council of Juvenile Court judges. Ventures in judicial education [by Jean R. Block]. Chicago, 1967. 168 p.

Pilot project and its specific techniques described. List project publications.

O'CONNELL. Continuing legal education for the judiciary. 16 J Legal Ed 405 (1964).

One IJA appellate judges seminar alumnus describes benefits, suggests authorized sabbaticals to give judges time for study and self-improvement. Oregon only state which permits this by statute.

RUNKLE. The judicial nominating commission. 54 Judicature 114 (1970).

Chairman of Oklahoma's Commission describes its operation from inception in 1967.

SHELDON. The uniqueness of state legal systems: Nevada, Utah, and Vermont. 53 Judicature 333 (1969).

Interesting because political science professor recounts results of survey of judges of these states which studied judicial behavior patterns and impact on their decisions; questionnaire and responses.

SOBELOFF. Striving for impartiality in the federal courts. 24 Fed B J 286 (1964).

Former chief judge of USCA (4th Cir) comments on legislative proposals regarding judicial ethics; gives history of conflicts of interest in the judiciary, and various types of conduct and activities which a judge should abjure.

SYMPOSIUM. Judicial conflicts of interest. 18 Am. J. of Comp. L. 689 (1970).

How treated in Brazil, Britain, France, W. Germany, Japan, in Marxian socialist states; conflict of interest in U. S. Supreme Court justices (by John P. Frank).

SYMPOSIUM. Non-judicial activities of judges. Intro., W. M. Kennedy; The propriety of the participation by a judge in non-judicial, money-making activities, J. Ritchie; The public activities of a judge, J. E. Cribbet, Questions on judicial rules of conduct and their implications, P. C. Neal; symposium questions and answers 51 Chi B Rec 92 (1969).

U. S. JUDICIAL Conference. Resolutions [governing outside activities and income of judges, adopted at special meeting June 10, 1969] in Report of the Proceedings of the Jud'l Conf. of the U. S., March 13-14, June 10, 1969, Wash. D. C., 1969. at p. 42-43.

Mandates, among other things, public disclosure of income as of May 1970. Amended at Oct. 31-Nov. 1, 1969 meeting, further amended at March 31, 1970 meeting as reported in Rep. of Conf. Proceedings, March 1970.

U. S. JUDICIAL CONFERENCE. Time study of the workload of U. S. District Court judges. 1960 Ann. Rep. of Jud'l Conf. at 127.

Determines relative amount of time spent by district court judges on different types of cases, on and off the bench. Similar study which includes time record of outside professional activities (Oct. 11, 1969 through Feb. 28, 1970) now in process.

VOORHEES, State of the profession in judicial selection. 53 Judicature 146 (1969).

Brief account of Conf. on Jud'l Selection in Dallas, Aug. 10, 1969; publications helpful to judiciary committees; suggestions for achieving merit selection; need for applying merit selection in federal judiciary.

WATSON, DOWNING and SPIEGEL. Bar politics: judicial selection and the representation of social interests. 24 Mo B J 27 (1968).

Bar association politics divide lawyers into groups representing different socio-economic interests, and bar's

selection of representative on Missouri Jud'l Nominating Commission is political rather than meritorious.

WATSON, R. and DOWNING, R. G. Politics of the bench and bar; judicial selection under the Missouri non-partisan court plan. New York, Riley, 1969. 393 p.

Does the Plan provide better judges? Opinions of lawyers, judges; comparison of elected and selected judges. See also lawyer-political scientist's (Watson's) comments in "Judging the Judges" 53 Judicature 283 (1970).

WINTERS, Selection of judges—an historical introduction. 44 Tex L Rev 1081 (1966).

Special issue on the judiciary.

WINTERS, G. and SUNIWALL, S. A., eds. Selected readings on administration of justice and its improvement. Chicago, Am Jud Soc 1966. 168 p.

Covers readings in judicial selection, tenure, removal, court organization and administration; reform efforts successful and otherwise.

WINTERS and LOWE, eds. Judicial retirement and disability commissions and procedures. Chicago, 1969. 1 v. looseleaf.

State-by-state report.

WISCONSIN. Supreme Court. Report . . . from the Cttee on Implementation of the Judicial Code. Madison, 1969. various paging.

New Canons of Judicial Ethics adopted by this court.

COMMENT. *Illinois* v. *Allen*, 397 US 337 (1970), 39 U Cin L Rev 350 (1970).

An accused who persists in disorderly, disruptive and disrespectful conduct may be held, after due warning, to have waived his right to be present in the courtroom; contempt powers of trial judge discussed. See also *Mayberry* v. *Pennsylvania*, 39 U. S. Law Week 4133 (Jan. 20, 1971) in which the U. S. Supreme Court recommends contempt procedures to be employed by trial judge in face of disruption.

NOTE, Potential limitations upon the tenure of federal trial judges—some implication of the Chandler case. 20 Sw L J 667 (1966).

Constitutional issues arising from action of 10th Cir Jud'l Council in virtually removing Chief Judge Chandler of District Court.

NOTE, Remedies for judicial misconduct and disability; removal and discipline of judges. 41 NYU L Rev 149 (1966).

Law review editors thoroughly examine, with comment, existing constitutional and legislative provisions; research funded by IJA.

IV. ADMINISTRATION OF CRIMINAL JUSTICE

Includes selected items regarding bail and detention, prosecution and defense, sentencing, rehabilitation and corrective services, appellate review and post-conviction remedies. Because of national emphasis on the administration of criminal justice, lists of pertinent presidential commission reports and published serial studies of national organizations are included.

AMERICAN BAR ASSOCIATION. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE. [Originally called Project on Minimum Standards for Criminal Justice]. N. Y., Institute of Judicial Administration, Secretariat. J. Edward Lumbard, Chairman.

ADVISORY COMMITTEE ON THE CRIMINAL TRIAL. Walter V. Schaefer, Chmn., Wayne R. LaFave, Rep.

Standards relating to joinder and severance. Tent. draft, Nov. 1967, 68 p. amendments Sept. 1968, 5 p. app'd Aug. 1968.

Standards relating to pleas of guilty. Tent. draft, Feb. 1967, 78 p. Prop'd rev., Dec. 1967. 5 p. (Reprinted as Supp., Mar. 1968). App'd Feb, 1968.

Standards relating to speedy trial. Tent. draft, May 1967. 56 p. App'd Feb. 1968.

Standards relating to trial by jury. Tent. draft, May 1968. 180 p. Amendments, Supp. Sept. 1968. 5 p. App'd Aug. 1968.

ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS. Paul C. Reardon, Chmn., David L. Shapiro, Rep.

Standards relating to fair trial and free press. Tent. draft, Dec. 1966. 265 p. Rev. of tent. draft, July 1967, 36 p. Prop'd final draft, Dec. 1967, 36 p. App'd draft, Mar. 1968. 36 p.

ADVISORY COMMITTEE ON JUDGE'S FUNCTION. Frank J. Murray, Chmn., Thomas J. O'Toole, Rep.

In process.

ADVISORY COMMITTEE ON THE POLICE FUNCTION. Richard B. Austin, Chmn., G. Robert Blakey, Rep.

Standards relating to electronic surveillance. Tent. draft, June 1968. 250 p. Prop'd final draft, Feb. 1971, 27 p. App'd Feb. 8, 1971.

Standards relating to the police function. In process.

ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS. Alfred P. Murrah, Chmn.

Standards relating to discovery and procedure before trial. Daniel G. Gibbens, Rep. Tent. draft, May 1969. 167 p. Supp. Oct. 1970, 8 p. App'd Aug. 1970.

Standards relating to pretrial release. Charles E. Ares, Rep. Tent. draft, Mar. 1968, 88p. Amendments, Supp. Sept. 1968, 5 p. App'd Aug. 1968.

ADVISORY COMMITTEE ON THE PROSECUTION AND DEFENSE FUNCTION. Warren E. Burger, Chmn., 1964/69, Roger F. Rogosheske, thereafter; Lester J. Mazor, Rep.

Standards relating to the prosecution function and the defense function. Tent. draft, Mar. 1970. 327 p. Supp. ——. App'd Feb. 1971.

Standards relating to providing defense services. Tent. draft, June 1967, 85 p. App'd Feb. 1968.

ADVISORY COMMITTEE ON SENTENCING AND REVIEW. Simon E. Sobeloff. Chmn.

Standards relating to appellate review of sentences. Peter W. Low, Rep., Tent. draft, Apr. 1967. 160 p. Amendments Dec. 1967, 5 p., Amendments, Supp., Mar. 1968, 5 p. App'd Feb. 1968.

Standards relating to criminal appeals. Curtis B. Reitz, Rep. Tent. draft, Mar. 1969. 109 p. Amendments, supp. Oct. 1970. 7 p. App'd Aug. 1970.

Standards relating to post-conviction remedies. Curtis R. Reitz, Rep. Tent. draft, Jan. 1967. 123 p. App'd Feb. 1968.

Standards relating to probation. Herbert S. Miller, Rep. Tent. draft, Feb. 1970. 110 p. App'd Aug. 1970.

Standards relating to sentencing alternatives and procedures. Peter W. Low, Rep. Tent. draft., Dec. 1967. 345 p. Amendments, Sept. 1968. 9 p. App'd Aug. 1968.

AMERICAN BAR FOUNDATION. ADMINISTRATION OF CRIMINAL JUSTICE SERIES. Boston, Little, Brown. Frank J. Remington, Editor.

Dawson, Robert O., Sentencing: the decision as to type, length, and condition of sentence. 1969. 428 p.

LaFave, Wayne R., Arrest: the decision to take a suspect into custody. 1965. 540 p.

Newman, Donald J., Conviction: the determination of guilt or innocence without trial. 1966. 259 p.

Miller, Frank W., Prosecution: the decision to charge a suspect with a crime. 1969. 366 p.

Tiffany, Lawrence P., Detection of crime: stopping and questioning, search and seizure, encouragement and entrapment, Donald M. McIntyre, Jr., and Daniel L. Rotenberg. 1967. 236 p.

American Judicature Society. Sentencing patterns and problems; an annotated bibliography. Chicago, 1969. 53 p. (Its rep. no. 28) July 1969.

American Law Institute. Model code of pre-arraignment procedure.

Tentative draft no. 1. Mar. 1, 1966. 250 p. Study draft no. 1. Apr. 25, 1968. 169 p. Tentative draft no. 2. Apr. 15, 1969. 169 p. Tentative draft no. 3. Apr. 24, 1970. 115 p.

Ares, Rankin and Sturz. The Manhattan bail project. 38 N Y U L Rev 67 (1963).

Use of release on recognizance; hypothesis is that more persons can successfully be released if verified information is available at bail determination.

Association of the Bar of the City of New York. Bail or jail. 19 Rec 11 (1964).

Report of Committee on the Criminal Court of the City of New York. Short range and long range reforms. Perversion of bail practices by underworld.

Bailey, Correctional outcome: an evaluation of 100 reports. 57 J Crim L C & P S 153 (1966).

An appraisal based on correctional outcome studies published between 1940 and 1960.

Barrett, E., Criminal justice, the problem of mass production in the courts, the public and the law explosion, 85 (H. Jones, ed. 1966).

Recommends civil penalties be substituted wherever possible to handle offenses which call more for correction than punishment.

Benjamin, Freedman & Lynton, Pros and cons: new roles for nonprofessionals in corrections. Washington, U. S., Dept. of H.E.W. (1966).

Manpower problems in corrections, use of nonprofessionals to upgrade.

Biddle, Legislative study of the effectiveness of criminal penalties. 15 Crim & Delin 354 (1969).

California study reveals that certainty of arrest and imprisonment are of greater deterrence than long imprisonment.

Bonfield and Anderson, Continuances in Cook County criminal courts. 35 U Chi L Rev 259 (1968).

35-page analysis of use, abuse and cost of continuances in criminal cases.

Bryan, For a swifter criminal appeal—to protect the public as well as the accused. 25 Wash & Lee L Rev 175 (1968).

Second Circuit judge lists causes of delay and suggests specifically what can be done to remedy. Screen frivolous cases, dispense with briefs, call for concurrent briefs, waive printing.

Burger, Counsel for the prosecution and the defense—their role under minimum standards. 8 Am Crim L Q 2 (1969).

Burger, Exclusive interview with Chief Justice Warren E. Burger. U. S. News and World Rep. 32 (Dec. 14, 1970).

Chief Justice answers questions on judges, the courts and their criminal procedures, the penal system; gives specific ideas on improving.

Burger, New Chief Justice's philosophy of law in America. 41 N Y S B J 44 (1969).

Included because this address delivered by the then Judge Burger categorically defines his criticism of our system of criminal justice; it is suggested these ideas "weighed heavily" in his selection as Chief Justice.

Clark, R., Crime in America; some observations on its nature, causes, prevention and control. N. Y., Simon & Schuster, 1970. 346 p.

Analysis with recommendations regarding American approach to problems of crime and the entire criminal justice system.

Cohen, Speedy trial for convicts: a re-examination of the demand rule. 3 Val U L Rev 197 (Spr 1969).

Historical retrospect of "speedy trial" and what constitutes waiver; run-down of pertinent cases defining "speedy trial."

CRIMINAL justice in extremis; administration of justice during April 1968 Chicago disorder. 31 Chi L Rev 455 (1969) American Bar Foundation 1970.

Specifics indicating problems and failures of judicial system at such time.

DISCRETION of the prosecutor in criminal procedure—a symposium. 18 J Comp L 483 (1970).

Discretion of prosecutor in Canada, France, West Germany, Japan and the U. S. U. S. article by W. LaFave.

DASH, MEDALIE and RHODEN, Demonstrating rehabilitative planning as a defense strategy. 54 Cornell L Rev 408 (1969).

Final report of demonstration project conducted by Institute of Criminal Law and Procedure of Georgetown U Law Center. Rehabilitation services must be brought to bear as soon as possible after arrest. Finds community-based rehabilitation programs are necessary.

DISTRICT of Columbia Bar Association. Junior Bar Section. Bail system of the District of Columbia (1963) 105 p.

Demonstrates, among other things, persistence of discrimination against the poor. Numerous tables and charts.

DISTRICT of Columbia. Judicial Council. Report of the Committee to Study the Operation of the Bail Reform Act. Washington, D. C. (1968) 57 p.

Survey of operations under new 1966 Act. Suggests legislative and other action required to improve.

FOELHERTZ, H. The nature, impact and prosecution of white-collar crime. U. S. Dept. of Justice, Law Enforcement Assistance Administration. May 1970. 77 p.

An intensive investigation and report on type of crime and criminals which receives "scant national attention."

ERVIN, Legislative role in bail reform. 35 Geo Wash L Rev 429 (1967).

Senator traces origins of congressional interest, Bail Reform Bill of 1966 and issues of preventive detention.

FEDERAL Sentencing Institutes (only those whose proceedings were published are included)

Pilot Institute, Boulder, Colo., July 1959 26 FRD 231

Second circuit, New York City, Nov. 1966 41 FRD 467

Third circuit, Lewisburg, Pa., Nov. 1964 37 FRD 111

Fourth, Fifth circuits, Atlanta, Ga., Oct. 1967. 45 FRD 149

Fifth circuit, New Orleans, La., May 1961 30 FRD 185

Sixth, Seventh, Eighth circuits, Highland Park, Ill., Oct. 1961 30 FRD 401

Eighth, Tenth circuits, Denver, Colo. July 1966. 42 FRD 175

Ninth circuit, Pebble Beach, Calif., July 1960 27 FRD 287

Ninth circuit, Wash. state: McNeil Is. & Tacoma, Sept. 1965. 39 FRD 523

Ninth circuit, Lompoc., Calif., Oct. 1964 37 FRD 111

FOOTE, The coming constitutional crisis in bail. 113 U Pa L Rev 959, 1125 (1965).

Conviction rate for jailed defendants materially exceeds that of bailed defendants; of defendants charged with grand larceny 43% bailed defendants convicted; 72% jailed defendants convicted.

FOOTE, C., Studies on bail. Phila., U Pa Law School (1966) 288 p.

Collection of reports and symposia.

FREED, D. J. and WALD, P., Bail in the United States. Prepared as a working paper for the National Conference on Bail and Criminal Justice. Wash., D. C. 1964. 116 p.

Research papers on bail surveys all over the country; role of bondsman; costs of detention; alternatives to bail system.

FREEDMAN, Professional responsibility for the prosecuting attorney. 3 Crim L Bull 544; 55 Geo L J 1030 (1967) BRAUN, Ethics in criminal cases: a response, at p. 1048.

Prosecutor's ethical problems, pointing up fine lines between strategy and unethical activity; defense lawyer's ethics.

FRIZER v. MCMANN (U.S.C.A., 2d Cir. Docket #34039, decided Jan. 5, 1971).

Case precipitated an unusual examination of reasons for delay in criminal trials in New York. Chief Judge Lumbard reviews federal cases and reports dealing with "speedy trial" in criminal cases.

GENTILE, Fair bargains and accurate pleas. 49 B U L Rev 514 (1969).

37 page discussion of ABA standards, constitutional cases.

GLASER, D., The effectiveness of a prison and parole system. Indianapolis, Bobbs-Merrill (2d ed. abridged 1969) 345 p.

Based on report of research project, conducted at request of U. S. Bureau of Prisons, originally published in 1964, includes new developments; full documented examination of federal prison and parole system.

GOLDFARB, R., Ransom; a critique of the American bail system. N. Y., Harper and Row, 1965. 264 p.

Includes pretrial detention in other countries; why preventive detention may be needed.

GRAHAM, F. P., The self-inflicted wound. N. Y., Macmillan, 1970. 377 p.

Analysis of U. S. Supreme Court's holdings, particularly in criminal cases. "Whether the court's decisions . . . merited . . . public rejection . . . what the rulings actually did and why they were made is the subject matter of the book."

HOLMAN, Multiple post-trial litigation in criminal cases. 19 De Paul L Rev 490 (1970).

Present criminal post-trial litigation is repetitious and wasteful—Oregon associate Supreme Court justice proposes that appeal and other post-trial litigation go directly to federal court.

HRUSKA, Appellate review of sentence. 8 Am Crim L Q 10 (1969).

HRUSKA, Preventive detention; the Constitution and Congress. 3 Creighton L Rev 36 (1969).

Senator presents historical and statistical study; analysis of proposed federal preventive detention legislation; recommends changes; appends proposals.

JACOB and SHARMA, Justice after trial: prisoners' need for legal services in the criminal-correctional process. 18 Kan L Rev 493 (1970).

135-page report on when, where and how needed, present practices and programs, suggestions for law school

programs; recommendations include call for statewide appellate and post-conviction defender's office, also a similar federal institution; helpful, detailed, constructive.

KARLEN, D., Anglo-American criminal justice. Oxford U Press, 1967. 233 p.

Contrasts administration of criminal justice in England and the U. S.; two systems compared from police action, to courts, to trials, to prison systems; indicates needed reforms in U. S. A.

KEVE, P. W., Imaginative programming in probation and parole. Minneapolis, U. of Minnesota Press, 1967. 293 p.

KIRSHEN, Appellate court implementation of the standards for the administration of criminal justice. 8 Am Crim L Q 105 (1970).

Impact of standards of the courts; in two years, almost 100 cases have cited standards; legislatures and administrative bodies are being guided by standards.

LAFAVE, Alternatives to the present bail system, 1965 U Ill L F 8.

Describes failure of police to use citations instead of arrest due to lack of legislative attention as well as to notion that arrest itself has punitive function.

LAFAVE, Detention for investigation by the police; an analysis of current practices. 1962 Wash U L Q 331.

Discusses permissible detention by police.

LAY, Post-conviction remedies and the overburdened judiciary: solution ahead. 3 Creighton L Rev 5 (1969).

Omnibus pretrial hearing, post trial motions, appellate remand and other innovative procedures, discussed by U. S. Court of Appeals judge.

MELTSNER, Pre-trial detention, bail pending appeal, and jail time credit: the constitutional problems and some suggested remedies. 3 Crim L Bull 618 (1967).

Helpful and practical suggestions; pertinent cases analyzed.

MITCHELL, Bail reform and the constitutionality of preventive detention, 55 Va L Rev 1223 (1969).

U. S. Atty General reviews bail statutes in all of the states. Advocates preventive detention with procedural safeguards.

MOLLEUR, R. R., Bail reform in the nation's capital, final report of the D. C. bail project. Washington, D. C., Georgetown Law Center, 1966. 105 p.

Detailed account of federal bail reforms; includes statistical charts and tables indicating various findings.

MURRAH, Dangerous offender under the Model Sentencing Act. 32 Fed Prob 3 (June 1968).

Model Sentencing Act defines dangerous offender and suggests procedures.

NATIONAL Conference of Commissioners on Uniform State Laws. Uniform Mandatory Disposition of Detainers Act 1958. Handbook at 262.

This Act adopted in 7 states as of 1969 and the Interstate Agreement on Detainers ratified in 19 states as of 1967.

NATIONAL Conference on Bail and Criminal Justice. Bail and summons: 1965; Institute on the operation of pretrial release projects. Oct. 14-15, 1965. Washington, D. C., U. S. Dept. of Justice. 1965. 262 p.

Panel discussions on legal and constitutional questions raised by various pretrial release projects. Includes proceedings of London Conference on "Bail and Remands in Custody." Nov. 27, 1965.

NATIONAL Conference on Bail and Criminal Justice. Proceedings of May 27-29, 1964, and interim report, May 1964-April 1965. Washington, D. C., 1965. 388 p.

Co-sponsored by U. S. Dept. of Justice and Vera Foundation.

NATIONAL Conference on the Extension of Legal Services to the Poor, Oct. 1964. Status of bail reform in the U. S. A report to the executive board of the National Conference on Bail and Criminal Justice. Washington, D. C. 1964. 48 p.

NATIONAL Council on Crime and Delinquency (formerly National Probation and Parole Association).

Model acts; guides for judges:

Standard juvenile court act, 1949, 1959, 71 p.
Standard probation and parole act, 1955. 45 p.
Guides for sentencing, 1957. 99 p.
Standard family court act, 1959. 64 p.

Standards for selection of probation and parole personnel, 1960. 6 p.

Procedure and evidence in juvenile court—a guidebook for judges, 1962. 84 p.

Annulment of a conviction of crime [model act] 1962. 8 p.

Guides for parole selection, 1963. 96 p.

Guides for juvenile court judges, 1957, 1963. 142 p.

Model sentencing act, 1963. 35 p.

Guides for juvenile court judges on news media, 1965. 16 p.

Standard act for state correctional services, 1966. 33 p.

Guides to the judge in medical orders affecting children. 1968. 12 p.

Guides to the judge in sentencing in racketeering cases, 1968. 8 p.

Model rules for juvenile courts, 1969. 91 p.

Model rules of court on police action from arrest to arraignment, 1969. 39 p.

NELSON, Community based correctional treatment: rationale and problems. 374 Annals 82 (1967).

Makes a case for community treatment; various projects described.

NEWMAN, C. L., ed. Sourcebook on probation, parole and pardons. 3d ed. (1968) Springfield, Ill. C. Thomas. 345 p.

NEW YORK (State) Judicial Conference. The case of the dangerous defendant: A study and a proposal, in 14th Ann Rep N Y Jud Conf 124 (1969)

85-page report, historical and comparative survey of pretrial release; problems of preventive detention; proposals; 12 page bibliography.

OAKS, D. H. and LEHMAN, W. A criminal justice system and the indigent. U of Chi Press 1968. 203 p.

A study of Chicago and Cook County; system described, present aid for indigent in trial and appellate processes; recommendations.

ORFIELD, L. B., Criminal procedure from arrest to appeal. N Y U Press, 1947. (National Conference of Judicial Councils. Judicial Administration Series).

A classic; traces history, sketches law as it is, proposes standards for reform.

PAULSEN, Pre-trial release in the United States. 66 Colum L Rev 109 (1966).

Paper prepared for Anglo-American Legal Conference on Criminal Law held at Ditchley Park, England; discusses aspects of American system.

PORTMAN, Defense lawyer's new role in the sentencing process. 34 Fed Prob 3 (Mr 1970).

Discusses recent Supreme Court decisions which have extended role of defense lawyer beyond the trial.

POLSTEIN, How to "settle" a criminal case. 8 Prac Law 35 (Jan 1962).

Function of counsel for guilty defendant; timing and tactics respecting prosecutor and judge; lawyer's function after guilty plea.

PREVENTIVE detention [proceedings of Conference on Preventive Detention, Oct. 28-30, 1969. Chicago Urban Research Corp., c1971 381 p.

Well-known legal, professorial and government experts debate entire spectrum of bail and preventive detention. Legislative hearings and testimony appended.

RANKIN, The effect of pretrial detention. 39 N Y U L Rev 61 (1964).

There is a strong relationship between detention and unfavorable disposition.

RECTOR, Sentencing reform and litigation. 53 Judicature 58 (1969).

Model Sentencing Act offers controls to correct disparity in sentencing. Nevertheless, this continues to be a problem; legal profession's interest in incarcerated persons is lacking; cites to recent cases in aid of persons illegally or unfairly confined; significant developments in penal reforms and improvement in correctional law and institutions.

ROCHE, The position for confidentiality of the presentence investigation report. 29 Albany L Rev 206 (1965).

Nature of report, arguments against disclosure, defendant should not have access.

RUBIN, Developments in correctional law. 15 Crime & Delin 283 (1969).

Run-down on recent laws and cases.

RUBIN, Disparity and equality of sentences—a constitutional challenge. 40 F R D 55 (1966).

Discussion of cases and sentencing statutes.

SCHINDLER, Interjurisdictional conflict and the right to a speedy trial. 35 U Cin L Rev 179 (1966).

Prejudice to sentenced accused in delaying prosecution and trial in another jurisdiction; illustrative cases.

SCHREIBER, Indeterminate therapeutic incarceration of dangerous criminals: perspectives and problems. 56 Va L Rev 602 (1970).

Definitions of dangerous criminal, constitutional problems, suggested approaches.

SILVERSTEIN, Bail in the state courts—a field study and report. 50 Minn L Rev 621 (1966).

Bail practice and procedures throughout the country by ABF research attorney.

SILVERSTEIN, Defense of the poor in criminal cases in state courts. Chicago, American Bar Foundation, 1965. 3 v.

Examination in depth: Vol. 1, National report; Vol. 2, Ala—Miss; Vol. 3, Mo—Wyo.

SUBIN, H. I., Criminal justice in a metropolitan court; the processing of serious criminal cases in the D. C. Court of General Sessions, Washington, D. C., U. S. Dept. of Justice, Office of Criminal Justice, 1966. 209 p.

Stresses assembly line justice.

SWINDLER, W. F. (Director). State post-conviction remedies and federal habeas corpus. *Documentary Supplement.* Williamsburg, Marshall-Wythe School of Law (1970) 86 p. Reprinted from 12 W & M L Rev 147 (1970).

Study undertaken for the Federal Judicial Center by law review editorial staff, objective being to summarize present state post-conviction processes and impact on adjudication in federal courts; also statutory revision in states. See Tent. Drafts No. 1, Nov. 1969; No. 2, May 1970 for state-by-state reports. *Documentary Supplement* presents comments of authorities who reviewed the tentative drafts; includes chart of state statutory references.

SYMPOSIUM: The modernization of justice in the District of Columbia, the Court Reform and Criminal Procedure

Act of 1970. *Part One*: 20 AM U L Rev 1 (Special symposium issue Dec. 1970—Mar. 1971)

Included because in 600 pages of this issue numerous areas of criminal justice administrative and procedural reform are discussed. *Part Two* is in process. This symposium is of national interest both because of court structural and administration innovations and, more importantly, because preventive detention provisions may forerunner of similar legislation in states.

TAPPAN, P. Crime, justice and correction. McGraw, 1960. 800 p.

A classic.

THOMAS, D. A., Appellate review of sentences and the development of sentencing policy; the English experience. 20 Ala L Rev 193 (1968).

An in-depth review; case for appellate review of sentences.

THOMAS, D. A., Current developments in sentencing—the Criminal Justice Act in practice. 1969 Crim L Rev 235 (1969).

Suspended sentences; future trends in England.

THOMAS, D. A., Establishing a factual basis for sentencing. 1970 Crim L Rev 80 (Feb. 1970).

THOMAS, P. Exploration of plea bargaining. 1969 Crim L Rev 69 (1969).

American and British experiences compared.

TOMPKINS, D., Bail in the United States; a bibliography. Berkeley, Calif. Inst. of Govt. Studies. U. of Calif. 1964. 49 p.

TREBACH, A. S., The rationing of justice; constitutional rights and the criminal process. New Brunswick, N. J. Rutgers U Press, 1964. 350 p.

Unfavorable observations of criminal justice in New Jersey courts. Shortcomings characteristic of all metropolitan criminal courts.

TYDINGS, Ensuring rational sentences—the case for appellate review. 53 Judicature 68 (1969).

Shocking disparity in sentencing; favors appellate review of sentencing, preferably by council of judges.

UNDERWOOD, Let's put plea discussions—and agreements—on record. 1 Loyola U L J (Chicago) 1 (1970)

U. S. ATTORNEY General's Committee on Poverty and the Administration of Federal Criminal Justice. Washington, D. C. 1963. 154 p. Francis A. Allen, Chmn.

Four Federal district courts' survey reveals among many things that only when bail is set low do a substantial number of defendants gain pretrial release.

U. S. COURT of Appeals. 2d Circuit. Rules regarding prompt disposition of criminal cases. Jan. 5, 1971. 10 p.

New rules effective July 5, 1971; mandate, among other things, 90 days detention limit and trial within 6 months or charges quashed.

U. S. NATIONAL Advisory Commission on Civil Disorders. Report. O. Kerner, Chmn. Washington, D. C., U S G P O 1968. 425 p.

Report on racial disorders summer of 1967; inadequacy of administration of criminal justice under emergency conditions; suggests measures to improve criminal justice particularly at lower court level; every aspect, including detention facilities, studied.

U. S. NATIONAL Commission on the Causes and Prevention of Violence. Milton S. Eisenhower, Chmn. Washington, D. C., U S G P O, 1969.

Task Force Reports

Assassination and political violence. — p.
Crimes of violence; staff report. . . . 3 v.
Firearms and violence in American life. 268 p.
Law and order reconsidered. 606 p.
Mass media and violence. 614 p.
Politics of protest. 276 p.
Violence in America: historical and comparative perspectives. 2 v. 795 p.

Investigative reports

Miami report; the report of the Miami Study Committee on Civil Disturbances in Miami, Fla. during the week of August 5, 1968. 30 p.

Rights in concord: the response to the counter-inaugural protest activities in Washington, D. C. Jan. 18-20, 1969. 120 p.

Rights in conflict; the violent confrontation of demonstrators and police in the parks and streets of Chicago during the week of the Democratic National Convention of 1968; a report submitted by Daniel Walker to the National Commission on the Causes and Prevention of Violence. [Chicago, Walker]. [Not published by the Nat'l Commission, published by D. Walker, Chmn.] various paging.

Shoot-out in Cleveland: black militants and the police. 100 p.

Shut it down! a college in crisis: San Francisco State College; Oct. 1968-Apr. 1969. 172 p.

* * *

Progress report . . . to President L. B. Johnson. 52 p.

To establish justice, to insure domestic tranquility; final report of the Commission. 1969. 338 p.

U. S. President's Commission on Law Enforcement and Administration of Justice. The challenge of crime in a free society. Washington, D. C., U S G P O, 1967. 340 p.

Final report based on Task Force reports and consultants' papers, all published in 1967.

Task Force Reports.

Crime and its impact—an assessment. 220 p.
The courts. 178 p.
Corrections 222 p.
Drunkenness. 131 p.
Juvenile delinquency and youth crime. 428 p.
Narcotics and drug abuse. 158 p.
Organized crime. 126 p.
The police. 239 p.
Science and technology. . . . [Prepared by the Institute for Defense Analyses] 228 p.

U. S. President's Task Force on Prisoner Rehabilitation. The criminal offender—what should be done? U S, G P O, April 1970. 24 p.

Description of job training, regional institutions and programs including those in juvenile detention homes; endorses community based programs.

Vera Institute of Justice. The problem of overcrowding in the detention institutions of New York City. An analysis of cause and recommendations for alleviation. A report

to the Mayor's Criminal Justice Coordinating Council. N. Y., Coordinating Council, 1969. 73 p.

Wald, Pretrial detention and ultimate freedom; a statistical study. 39 N Y U L Rev 631 (1964).

Staff member of National Conference on Bail and Criminal Justice reports on impact of jail confinement on trial and sentencing.

Wald and Freed, Bail Reform Act of 1966: a practitioner's primer. 52 A B A J 940 (1966).

Changes explained, provisions of new act outlined; defense counsel's role in securing defendant's pretrial release.

Williams, Crime, punishment, violence and dissent: A crisis of authority. 45 Calif S B J 817 (1970).

Distinguished trial lawyer addresses himself to archaic criminal justice system and procedural delays; compares British system of criminal appeals.

Younger, Prosecution problems. 53 A B A J 695 (1967).

Obstacles prosecuting attorneys meet; the exclusionary rule, outdated criminal code provisions, police restrictions which stymie prosecutors, overworking "due process", disruption due to defendant's right to represent himself, imbalance against prosecution, restriction of right of prosecution appeal.

Comment, Frivolous appeals and the minimum standards project; solution or surrender. 24 U Miami L Rev. 95 (1969).

Critique of A B A Standards Relating to Criminal Appeals (Tent. draft 1969); shortcomings, proposals.

Note, Bail and preventive detention during riots: a proposal. 35 Bklyn L Rev 417 (1969).

Note, Bail bondsman and the fugitive accused—the need for formal removal procedures. 73 Yale L J 1098 (1964).

A run-down of laws giving bondsmen right to recapture fugitive without complying with extradition safeguards.

Note, Costs of preventive detention, 79 Yale L J 926 (1970).

Many additional burdens on state and defendant described.

NOTE, Guilty plea bargaining: compromises by prosecutors to secure guilty pleas. 112 U Pa L Rev 865 (1964).

In defense of charge reduction by prosecutor without concurrence of the trial judge; discusses cases dealing with withdrawal of pleas; sets standards for acceptable plea bargaining to make it visible, subject to control; includes study of practices of 83 prosecutors in most populous counties of 31 states; role of defense lawyer.

NOTE, Juvenile's right to bail in Oregon. 47 Ore L Rev 194 (1968).

Included because right of juvenile to bail rarely discussed in law review articles.

NOTE, The presentence report: an empirical study of its use in the federal criminal process. 58 Georgetown L J 451 (1970).

An in-depth historical study by two 3d year law school student editors. (Frank E. Gillick, Jr. and Robert E Scott) of federal probation system.

NOTE, Preventive detention before trial. 79 Harv. L. Rev. 1489 (1966).

Extensive discussion: limited provisions, carefully hedged with adequate procedural safeguards, would survive constitutional attack.

NOTE, Procedural due process at judicial sentencing for felony. 8 Harv L Rev 821 (1968).

Background, sentencing under due process clause, plea bargaining, right to be personally present, right to allocution, right to counsel, presentence report, mitigating evidence, justifiable sentencing standards.

NOTE, Right to bail and the pre-"trial" detention of juveniles accused of crime. 18 Van L Rev 2096 (1965).

NOTE, Unconstitutionality of plea bargaining. 83 Harv L Rev 1387 (1970).

Discusses ABA standards, recent cases, present practices, desirable reforms.

APPENDIX

Organizations and Participants in the National Conference on the Judiciary

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